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STATE RESPONSIBILITY FOR MODERN SLAVERY: UNCOVERING AND BRIDGING THE GAP

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Abstract:

International law prohibits slavery and slavery-like practices under treaties that have been in force for more than a century. Yet, contemporary forms of slavery are one of the prevailing challenges for the international community, with 40.3 million people in modern slavery on any given day in 2016. The State has been largely overlooked as a perpetrator or accomplice in the global movement to eradicate modern slavery. The hand of the State can however be found in contemporary cases of modern slavery. This article identifies five scenarios of state involvement in modern slavery and aims to uncover and bridge the responsibility gap.

Keywords:

Public International Law, State responsibility, slavery, forced labour, child labour, human trafficking, diplomatic immunity, international obligations, recommendations.

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INTRODUCTION

The State – an abstract entity¹ and legal fiction² - has been largely overlooked as a perpetrator or accomplice in the global movement to eradicate modern slavery. Yet the hand of the State can be found in contemporary cases of modern slavery. The United States has apparently granted export credit to a national company³ participating in the construction of the Bisha mine in Eritrea, a project for which a Canadian mining company, Nevsun Resources Limited, is said to be complicit in the forced labour and torture allegedly inflicted on Eritrean nationals working on the construction of the mine.⁴ In the United Kingdom, the apparently private exploitation of domestic servants by wealthy households starts to implicate the State when the perpetrator is a diplomatic agent representing his State overseas.⁵

International law prohibits slavery and slavery-like practices under treaties that have been in force for more than a century. The International Court of Justice recognized the peremptory nature of the prohibition of slavery and the slave trade nearly half-century ago.⁶ Yet, contemporary forms of slavery are one of the prevailing challenges for the international community, with 40.3 million people in modern slavery on any given day in 2016.⁷

The policy term ‘modern slavery’ is used to refer to contemporary forms of slavery, including slavery, servitude, human trafficking, forced labour and child labour. For the purposes of this article, modern slavery covers: a) slavery, servitude and institutions and practices similar to slavery, as defined by the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; b) human trafficking, as defined by the Palermo Protocol; c) forced labour, as defined in the International Labour Organisation (ILO) Protocol on Forced Labour; and d) child labour, as defined in the ILO 1999 Convention on Worst Forms of Child Labour and in accordance with the UN Convention on the Rights of the Child.⁸

Aware of the gravity of this situation, States committed to eradicate modern slavery as part of the 2030 Sustainable Development Agenda (Sustainable Development Goal ‘SDG’ Target 8.7)⁹. As most modern slavery offences are committed by non-state actors (‘NSAs’)¹⁰ such as transnational criminal networks involved in human trafficking and corporations exploiting workers in their supply chains, States’ efforts have focused on preventing, protecting

¹ *Nazi Conspiracy and Aggression*, Judgement of the Nuremberg International Military Tribunal, 1 October 1946, Trial, Vol. I.

² J Vidmar, ‘The Concept of the State and its Right of Existence’ (2015) 4 Cambridge International Law Journal 547.

³ E Garcia, ‘US has provided \$315m in financing to supplier of mines accused of slave labor’ *The Guardian* (22 February 2017).

⁴ *Nevsun Resources Ltd. v Gize Yebeyo Araya et al.*, Supreme Court of Canada, pending.

⁵ *Reyes v Al-Malki* [2017] UKSC.

⁶ Vienna Conference, Yearbook, 1966, vol. II, at 247; *Barcelona Traction case*, Light and Power Co, Ltd. (*Belgium v Spain*), ICJ Reports 1971, 5 February 1971, 32.

⁷ ILO, Walk Free Foundation, *Global Estimate of Modern Slavery* (September 2017). The estimation excluding forced marriage amounts to 24.9 million people.

⁸ Certain forms of forced labour are exempt from the prohibition of the ILO Convention (prison labour, emergency assistance, military assistance and communal duties). The scope of this article does not include forced marriage or prison labour.

⁹ Sustainable Development Target 8.7: ‘Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms’.

¹⁰ For the purposes of this article, ‘non-state actors’ are ‘all actors who are not the State’ (ILA Committee on non-state actors, Rio Report (2008), at 2). As more recent work of the ILA Committee highlights, there is no consensus on the definition and some definitions exclude individuals and illegal groups (Johannesburg Report (2016), at 4).

and prosecuting with due diligence the offences committed by NSAs.¹¹ While acknowledging that this focus on positive obligations is necessary, this article identifies a gap in the international response to modern slavery: it overlooks the responsibility of States themselves for involvement in modern slavery.¹²

State involvement in the commission of modern slavery occurs through State policy or through the actions or omissions of a State organ or official or of private entities exercising public functions. If that involvement amounts to a breach of a State's international obligations, the law of State responsibility provides mechanisms to hold it accountable. This article challenges the current focus on NSAs and aims at uncovering and bridging the existing responsibility gap.

The article proceeds in three parts. Part 1 analyses existing evidence and identifies five factual scenarios of State involvement in modern slavery that could give rise to State responsibility. Part 2 addresses the main challenges of this approach, including plausible deniability by States and implications for victims, and examines how the international law of State responsibility applies to modern slavery, unpacking its potential for advancing efforts to eradicate it. Part 3 presents legal policy recommendations that have been developed in consultation with representatives of States, international organisations and civil society, practitioners and academics specialising in international law and modern slavery.

I. STATE INVOLVEMENT IN MODERN SLAVERY: THE ILLUSION OF ABOLITION?

State involvement in modern slavery remains a small portion of the overall number of cases.¹³ However, there are credible reports of pervasive State involvement in the commission of modern slavery offences. That reality must be confronted in order to advance towards the elimination of slavery in all its forms and avoid 'the illusion of abolition' created by the longstanding prohibition of slavery in international instruments.¹⁴

The analysis of evidence indicates that certain practices and policies of some States could amount to a breach of the prohibition of slavery, forced labour and human trafficking¹⁵ and constitute an internationally wrongful act entailing international responsibility under the 2001 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'). The conduct of state organs (including individuals or entities)¹⁶ may also involve the state in a modern slavery situation. Even non-state entities exercising public powers could implicate the state if they engage in an activity tainted by modern slavery.

¹¹ This is the focus of the Anti-Slavery acts in the UK, Australia and California, as well as of the 2017 French law on the Duty of Vigilance. On the due diligence standard, see also UNCHR, 'Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences' (2017) UN Doc A/HRC/36/43, at 5.

¹² Research developed for the project [anonymised].

¹³ Of the 24.9 million victims of forced labour in 2016, 16 million were in the private sector, another 4.8 million were in forced sexual exploitation, and 4.1 million were in forced labour imposed by State authorities (Global Estimates of Modern Slavery (n 8), at 10).

¹⁴ BK Freamon, *Possessed by the Right Hand: The Problem of Slavery in Islamic Law and Muslim Cultures* (Brill 2019), chapter 9: 'The Illusion of Abolition', 439-463.

¹⁵ 1926 Slavery Convention, 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and 1930 ILO Convention concerning Forced or Compulsory Labour.

¹⁶ Art 4 ARSIWA includes organs (entities or individuals) of the central, regional or local government, exercising whatever functions (legislative, executive or judicial organs) (J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press 2002), at 41, para 7).

Employment agencies or export credit agencies, some of which are private or semi-public entities, are examples.

Based on the analysis of reports from international organisations, relevant case law and studies by experts working on the frontline, we have identified five scenarios identifying varying levels of state involvement in modern slavery. They range from the most direct involvement (scenario 1) to the more indirect forms of assistance (scenario 5).

A. Scenario 1: Modern Slavery as State Policy

There is evidence of human trafficking and forced labour cases arising from state policy. Forced labour has been used to achieve production quotas in state-managed industries, or to generate funds for the state. Confiscation of passports and the use of threats and violence are common in these contexts. Other states may be aware or even complicit as destinations for the trafficked workers or through trade agreements.

Uzbekistan¹⁷ and Turkmenistan¹⁸ have both been accused of using forced labour in the state-controlled cotton harvesting industry. Those states allegedly force national ministry employees (such as medical professionals and teachers), as well as students, to participate in cotton picking under quota systems and menace of penalty. Working conditions are harsh, pay is poor and sometimes withheld, and there are reports of punishments if quotas are not met.

The Democratic People's Republic of Korea ('DPRK') government is alleged to engage in human trafficking of its own nationals for forced labour.¹⁹ It is said to conclude bilateral contracts with foreign governments for trafficking DPRK nationals to work overseas in the fishing, construction or textile industries. Those trafficked workers are allegedly subject to extreme working conditions under significant coercive control, have their passports confiscated and their wages paid directly to the North Korean regime.²⁰ Some of the reported receiving countries are Russia, China, Mongolia, Kuwait, the United Arab Emirates ('UAE'), Qatar, Angola or Poland.²¹

B. Scenario 2: Participation of State Organs or Officials in Modern Slavery

There is evidence of the active participation or cooperation of public officials in the smuggling and exploitation of migrants by private companies, or in the deployment of forced labour at the local and national level. Those practices usually involve physical abuse, withholding of wages and confiscation of passports. The state may not even be aware, but the action could still be attributable to it.

Evidence on the involvement of public officials in modern slavery cases is abundant. In Myanmar, where the 2008 Constitution prohibited forced labour leaving behind the era of its systematic use as state practice,²² certain state authorities have informally resisted pressure

¹⁷ ILO, 'Child Labour in Cotton' (2016) 12; ILO, 'Third-party monitoring of measures against child labour and forced labour during the 2015 cotton harvest in Uzbekistan' (2018), at 13, para 41.

¹⁸ UNCHR, 'Concluding Observations on the second periodic report of Turkmenistan' (2017) UN Doc CCPR/C/TKM/CO/2, paras 26-27. The same concern was shared by the ILO Committee of Experts (ILO, 'Individual Case (CAS) – Discussion: 2016' (2016)).

¹⁹ US Department of State, 'Trafficking in Persons Report' (2015).

²⁰ R Breuker, 'North Korean Forced Labour in the EU, the Polish Case: How the supply of a captive DPRK workforce fits our demand for cheap labour' (2016) Leiden Asia Center; R Breuker, IBLH Van Gardingen, *People for Profits: North Korean Forced Labour on a Global Scale* (Leiden Asia Center, 2018).

²¹ CH Shin, MH Go, *Beyond the UN COI Report on Human Rights in DPRK* (The Asan Institute for Policy Studies, 2014), at 21.

²² ILO, 'Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No 29)' (1998).

from the International Labour Organization to reform forced labour practices²³ and continue imposing it ‘not as part of an official policy, but in violation of it’.²⁴ In March 2018, there were allegations of the *tatmadaw* forcing villagers, especially in Rakhine state, to engage in portering, act as guides and human shields, tend military-owned fields and maintain military infrastructure.²⁵

In Thailand, modern slavery conditions have been reported in the fishing industry where, despite recent changes in the domestic legislation, enforcement continues to be an issue²⁶ partly due to the involvement of public officials in the smuggling of migrants from Myanmar or Cambodia, their recruitment process and the facilitation of exploitation by fishing companies, frequently subjecting them to forced labour, physical abuse, withholding of wages and confiscation of Seafarer Identification Documents.²⁷

Another common example is the complicity of border guards or immigration officials who facilitate human trafficking. It has been reported that in certain land borders labour recruiters bribe immigration officials to allow labour trafficking victims to leave the country and in some cases, as on both sides of the Indo-Bangladesh border, law enforcement agencies procure tokens to traffickers, allowing them to cross the border back and forth unhindered.²⁸

Eritrean officials are alleged to be involved in human trafficking. The UN monitoring Group reporting on the UN Security Council’s sanctions against Eritrea collected evidence showing that sums extorted from victims of human trafficking were paid to agents of the Eritrean government who were allegedly trafficking people to Sudan, Egypt and Israel.²⁹ In China, in the last decade the black kiln scandal unveiled the involvement of local officials in the trafficking of persons to the kilns, where they were held in conditions that could amount to slavery.³⁰ Coercion by local governmental schools for students to accept forced internships has also been reported.³¹

C. Scenario 3: Diplomatic Involvement in Domestic Servitude

Migrant domestic workers employed in diplomatic households constitute one of the groups most vulnerable to modern slavery.³² They may be subject to exploitation, have their passport confiscated and be subject to physical, psychological and sexual abuse by public officials with

²³ K MacLean, ‘Lawfare and impunity in Burma since the 2000 ban on forced labour (2012) 36 Asian Studies Review.

²⁴ R Horsey, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime* (Routledge 2011), at 185.

²⁵ UN, ‘Fact-finding Mission on Myanmar: concrete and overwhelming information points to international crimes’, 12 March 2018.

²⁶ ILO, EU, ‘Ship to Shore Rights: Baseline research findings on fishers and seafood workers in Thailand’ (2018).

²⁷ ILO, ‘Report of the Committee set up to examine the representation alleging non-observance by Thailand of the Forced Labour Convention, 1930 (No 29), made under Article 24 of the ILO Constitution by the International Trade Union Confederation (ITUC) and the International Transport Workers’ Federation (ITF)’ (2017), at 14-15. See also scenario 4, for the involvement of employment agencies in this type of recruitment.

²⁸ IBA, ‘Human Trafficking and Public Corruption. A Report by the IBA’s Presidential Task Force Against Human Trafficking’ (2016), at 25-26.

²⁹ ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Eritrea’, UN Doc S/2013/440 (2013), Annex, paras 137-144, ‘Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002 (2011)’, UN Doc S/2012/545 (2012), paras 77-86.

³⁰ I Franceschini, *Cronache dalle fornaci cinesi (Chronicles from the Chinese Kilns)* (Cafoscarina 2009).

³¹ SACOM, ‘Apple Watch 3 – Exploit Student Workers Further an Investigative Report on Apple Watch’s Exclusive Manufacturer’ (2018).

³² J Ewins, ‘Independent Review of the Overseas Domestic Workers Visa, Final Report’ (2015), paras 8-29, at 41-42; *Reyes and Al-Malki and (1) Secretary of State for Foreign and Commonwealth Affairs (2) Kalayaan*, case for Kalayaan, Supreme Court of the United Kingdom on Appeal from the Court of Appeal (Civil), UKSC/2016/0023, at 10, para 36; *Reyes v Al-Malki* [2017] UKSC (n 5), Lord Wilson’s opinion, para 59.

diplomatic status.³³ And their avenues of legal redress are severely restricted by the bar of diplomatic immunity.³⁴

Finding a way out of those abuses is a challenge for victims, exacerbated in many cases by the domestic legal system of receiving states, which may restrict the right to change employer or residence rights. Visas of overseas domestic workers in diplomatic households are typically tied to the employer's diplomatic status and are only valid so long as they remain employed by the diplomatic agent.³⁵ In addition, many countries do not allow private domestic workers to change employer before the termination of the contract, a restriction that has been used in some cases as a tool to pressure the worker and increase his/her vulnerability.³⁶

The *kafala* system in certain Gulf states may require the employer's permission for the worker to leave their job and even the country, leaving domestic workers outside the protection of labour law and allowing their 'sponsors' to evade social security and medical costs.³⁷ Certain promising practices in some of these Gulf states show their acknowledgement of a need for change. Kuwait and the UAE introduced a unified standard domestic worker's contract (2006, 2007) and Oman introduced in 2011 a pilot contract for the employment of house maids. However, implementation remains a challenge and the scope of some of those reforms does not include domestic workers.³⁸ An example of this is a new law that will allow the majority of migrant workers to leave Qatar without permission from their employers but does not cover migrant *domestic* workers.³⁹

The situation of victims is even more precarious in accessing justice due to the extensive scope of diplomatic immunity.⁴⁰ While diplomatic involvement in this form of modern slavery has become increasingly visible through court proceedings and thanks to the work of organisations protecting the victims in States such as the United Kingdom, the United States or Australia, when the victims manage to escape and bring a claim against a diplomat, diplomatic immunity from jurisdiction may restrict the possibilities of redress.

D. Scenario 4: State-backed Labour Brokerage Practices Facilitating Human Trafficking Recruitment agencies act as intermediaries matching workers in one country to jobs in another. This growth in the use of these agencies started with the facilitation of migration from Asian countries to the Gulf, and has now become a globalized feature of labour markets.⁴¹ Some of the methods employed by these agencies are abusive and increase workers' vulnerability to human trafficking and forced labour.⁴² Certain practices, such as collection of excessive and

³³ UNCHR, 'Report of the UN Special Rapporteur on Contemporary Forms of Slavery, including its causes and consequences' (2010) UN Doc A/HRC/15/20, para 23.

³⁴ UNCHR, 'Report of the UN Special Rapporteur on Contemporary Forms of Slavery, including its causes and consequences' (2018) UN Doc A/HRC/39/52, para 37.

³⁵ OSCE, 'How to Prevent Human Trafficking for Domestic Servitude in Diplomatic Households and Protect Private Domestic Workers' (Office of the Special Representative and Co-ordinator for Combatting Trafficking in Human Beings 2014), at 14.

³⁶ *Ibid*, at 36.

³⁷ R Bajracharya, B Sijapati, 'The Kafala System and Its Implications for Nepali Domestic Workers' (2012) CESLAM Policy Brief.

³⁸ *Ibid*, at 4.

³⁹ P Webb, R Garcandia, 'Slavery in Domestic Work: The Potential for State Responsibility?' (17 September 2018) EJIL: Talk!, Blog of the European Journal of International Law.

⁴⁰ UN Doc A/HRC/39/52 (n 34), para 37.

⁴¹ ILO, 'Fair migration. Setting an ILO agenda' (2015) Report of the Director General, at 15, para 85; B Farbenblum, 'Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin' (2017) 7 Asian Journal of International Law 1.

⁴² IOM, 'IOM, IOE join forces to combat unethical recruitment of migrant workers' (2014); ILO, 'Profits and Poverty: The Economics of Forced Labour' (2014); Verité, 'Corruption and Labour Trafficking in Global Supply Chains' (2013); Verité, Freedom Fund, 'An Exploratory Study on the Role of Corruption in International Labour

sometimes extortionate recruitment fees,⁴³ are legal but may lead to debt bondage and other forms of modern slavery.⁴⁴ Other practices, such as deliberate misinformation and deception concerning the nature and pay and conditions of the work that is on offer,⁴⁵ threats, intimidation, retention of identity documents and physical or sexual violence,⁴⁶ are ‘abusive and fraudulent’⁴⁷ and may in certain cases amount to modern slavery offences. Access to means of redress in face of unscrupulous intermediaries is very limited once migrant workers arrive at their destinations and problems become apparent.⁴⁸

Following initiatives of the ILO, IOM and the International Organisation of Employers (IOE) to promote fair and ethical recruitment of migrant workers,⁴⁹ States are adopting measures to combat abusive labour recruitment and to promote fair recruitment practices globally and across specific migration corridors in North Africa, the Middle East and South Asia.⁵⁰ Yet, the problem persists in many countries where those practices used by employment agencies, which are regulated, licensed or owned by the State, put migrants at risk of trafficking and forced labour. In addition, certain State policies (such as visa and deportation policies, language requirements, job portability) can also increase vulnerability of migrant workers to modern slavery.

In the Philippines, despite former governments’ efforts to establish a comprehensive system of regulation and licensing of employment agencies,⁵¹ deceptive and abusive recruitment practices persist in certain areas and enforcement remains weak.⁵² In the Thai seafood industry, most workers are hired through irregular channels, such as informal referrals, or as walk-in applicants, without going through the legal immigration and labour procedures.⁵³ Most workers access Thailand through an intermediary who facilitates their transport and entry to the country for a fee. Some also paid intermediaries who link them with employers. Inhumane conditions during transport are usually reported, using overcrowded vehicles where people were ‘piled’, sleeping or sitting on top of each other.⁵⁴

Corruption is one of the main challenges in this scenario. The bribery of public officials by labour brokers to ensure that they turn a blind eye has been reported as a common practice

Migration’ (2016); Verité, ‘The Cost of a Job: Systematic Forced Labor in Asia and What Companies Can Do to Eliminate It’ (2015).

⁴³ ILO, Fair migration (n 41); UNODC, ‘The Role of Recruitment Fees and Abusive and Fraudulent Recruitment Practices of Recruitment Agencies in Trafficking in Persons’ (2015).

⁴⁴ The UN Guiding Principles on Business and Human Rights and the work of the ILO in this area provide a solid basis for improvements.

⁴⁵ ILO, Fair migration (n 41).

⁴⁶ B Andrees et al., ‘Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities’ (2015), at 10-11.

⁴⁷ Term established in the ILO Private Employment Agencies Convention, 1997 (No 181).

⁴⁸ ILO, Fair migration (n 41).

⁴⁹ The ILO launched its Fair Recruitment Initiative and IOM and the IOE launched an international initiative to promote ethical recruitment of migrant workers through a voluntary certification process.

⁵⁰ ILO Integrated Programme on Fair Recruitment (FAIR) and Global Action to Improve the Recruitment Framework of Labour Migration (REFRAME).

⁵¹ Key national legislation was adopted under the governments of Fidel Ramos in 1995 (Migrant Workers and Overseas Filipinos Act, Republic Act No 8042), and Gloria Arroyo in 2007 (Philippine Overseas Employment Administration Act, Republic Act No 9422) and in 2009 (Amendment Act, Republic Act No 10022).

⁵² ILO, ‘Fair share? International recruitment in the Philippines’ (2017).

⁵³ Verité, ‘A Verité Assessment of Recruitment Practices and Migrant Labor Conditions in Nestlé’s Thai Shrimp Supply Chain. An Examination of Forced Labor and other Human Rights Risks Endemic to the Thai Seafood Sector’ (2015), at 14.

⁵⁴ Ibid.

in countries such as Nepal.⁵⁵ Beyond petty corruption, negotiation and implementation of some government-to-government memoranda of understanding (MoUs) has been reported as arbitrary and corrupt.⁵⁶ In some cases, restrictions placed by countries of origin on the type of work that migrants can do abroad lead to MoUs for manufacturing or construction, and not for fishers and domestic workers,⁵⁷ increasing the risk of trafficking in the non-regulated industries.⁵⁸ In addition, corruption may be entrenched in the execution of those agreements and the complex MoU process may discourage migrants to use regular avenues for migration. In the Myanmar to Malaysia migration corridor, for example, ‘under-the-table’ payments beyond ‘several thousand’ per worker are allegedly required at the Ministry of Labour offices to secure approval of the foreign employer and exit visas for selected workers.⁵⁹

E. Scenario 5: States Funding Modern Slavery Through Export Credit Agencies

States could be funding projects tainted by modern slavery through the loans, insurance and guarantees executed by national export credit agencies (‘ECAs’). Many of these agencies, which facilitate exports or investments of private companies in foreign countries assuming the high costs associated to those operations,⁶⁰ do not have mechanisms in place to assess the human rights and social impact of those projects. Only very few States ‘explicitly consider human rights criteria in their export credit’.⁶¹

Companies receiving this kind of support from their home institutions may engage in investments or economic activity tainted by slavery, forced labour, child labour or human trafficking. In these circumstances, the State may incur international responsibility for breaching its obligations under international law. An example of the need for human rights monitoring is the credit provided by EXIM, the Export-Import Bank of the United States, to a US company providing equipment to the Bisha Mine,⁶² in the construction of which the Eritrean National Service Programme allegedly deployed forced labour.

An interesting development, although not on modern slavery but in relation to social and human rights impact more generally, is the withdrawal of the British ECA in 2006, and then of the Austrian, German and Swiss ECAs in 2009, from the Ilisu Dam project in Turkey. The withdrawal was precipitated by serious social, cultural and environmental risks such as displacement of those living in the area and potential destruction of an ancient town considered part of the region’s cultural heritage. It was the first project to have export credit guarantees from European governments withdrawn after the guarantees had been agreed.⁶³

⁵⁵ In Nepal, the exchange of information and interaction between labour brokers and the Department of Foreign Employment had generated by 2010 an estimated 194.7 billion USD of bribery or corruption payments (S Manandhar, J Adhikari, ‘Study of Issues on the Recruitment of Migrant Labour in Nepal, submitted to the World Bank Country Office’ (2010)).

⁵⁶ Verité, Freedom Fund (n 42).

⁵⁷ ILO, ‘Review of the effectiveness of the MOUs in managing labour migration between Thailand and neighbouring countries’ (2016).

⁵⁸ Ibid, at 24.

⁵⁹ Verité, Freedom Fund (n 42), at 16.

⁶⁰ That cost corresponds to the political and commercial risks, currency exposure, cross-cultural risk and financial risk of certain projects (M Sant’Anna, ‘Enabling Risky Business: Human Rights and the Role of Officially Supported Trade Finance and Investment Guarantees’ (2013) *International Institute for Sustainable Development*; A Klasen, ‘The Role of Export Credit Agencies in Global Trade’ (2011) 2 *Global Policy* 2).

⁶¹ UNCHR, ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’, Report of the Special Representative of the Secretary general on the issue of human rights and transnational corporations and other business enterprises (2007) UN Doc A/HRC/4/035, para 17.

⁶² *Araya v Nevsun Resources Ltd.* case, 2017 British Columbia Court of Appeal 401.

⁶³ See ECAWatch report <<https://www.eca-watch.org/dodgy-deals/ilisu-dam>>.

On the supranational level, the European Ombudsman determined in July 2018 that the European Commission had wrongly decided not to carry out a human rights impact assessment before agreeing to the 2015 Sector Understanding on Export Credits for coal-fired electricity generation projects, negotiated in the context of the OECD Arrangement on Officially Supported Export Credits. The Ombudsman cited maladministration on the part of the Commission for having taken this decision in the absence of a thorough analysis of whether it was likely there would be any significant economic, social or environmental impact, including on human rights.⁶⁴

II. INTERNATIONAL LAW OF STATE RESPONSIBILITY: A FOCUS ON MODERN SLAVERY

International law imposes obligations of a diverse nature on States in the area of modern slavery. The breach of those obligations can give rise to the liability of the State by virtue of the principles of State responsibility codified by ARSIWA.⁶⁵ As Boon has indicated, the problem of slavery was well known to the drafters of the Articles on State Responsibility, and it is frequently invoked in the commentaries, including as an example of a *jus cogens* and an *erga omnes* obligation.⁶⁶

A. *Challenges of Uncovering and Bridging the Gap in Accountability for Modern Slavery*
Looking at the involvement of the State in modern slavery through the lens of ARSIWA, there are three main challenges for unpacking the potential of the law of State responsibility to tackle modern slavery more effectively.

First, there is the plausible deniability of States. States may point to the prohibition of slavery in their legislation (or even their constitution) as sufficient evidence that they are not involved in such practices. Former UN Special Rapporteur on Contemporary Forms of Slavery Gulnara Sahinian reported in 2014 after a country visit to Mauritania that some officials denied the existence of slavery stating that because Mauritania had legally abolished and criminalized slavery,⁶⁷ it therefore no longer existed as an institution. These officials spoke of ‘the remnants of slavery or vestiges of slavery which exist as a result of poverty’,⁶⁸ denying any role for the State.

States may also characterize their own involvement in modern slavery as benevolent sponsorship,⁶⁹ military service,⁷⁰ community work or just isolated cases of corrupt officials.⁷¹ Attempts to cover modern slavery as lawful practices or to blame a ‘rogue’ public official are

⁶⁴ Recommendation of the European Ombudsman in case 150/2017/JN on the European Commission's failure to carry out a human rights impact assessment before approving the inclusion of a Sector Understanding on Export Credits for Coal-fired Electricity Generation Projects as Annex VI to the OECD Arrangement on Officially Supported Export Credits, 17 July 2018.

⁶⁵ There is a consensus that the ARSIWA accurately reflect customary international law on State responsibility, as confirmed by the ICJ (*Genocide Convention (Bosnia v Serbia)* case, ICJ Reports, 2007, 43, 209).

⁶⁶ K E Boon, ‘Modern Slavery and State Responsibility’ (11 February 2019) *Opinio Juris*. See J Crawford (n 16) on the peremptory (n 416, 641) and *erga omnes* (n. 640) nature of the prohibition of slavery.

⁶⁷ Slavery was criminalized in Mauritania in 2007.

⁶⁸ UNCHR, ‘Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, Mission to Mauritania’ (2010) UN Doc A/HRC/15/20/Add.2, para 33.

⁶⁹ Established decades ago in Gulf States as a sign of hospitality to foreigners, in current times *kafala* has become a door to abuse (n 37).

⁷⁰ In Eritrea, forced labour of military conscripts was identified by the UN Commission of Inquiry as a common practice (UNCHR, ‘Report of the Commission of Inquiry on Human Rights in Eritrea’ (2015) UN Doc A/HRC/29/42, paras 63-65).

⁷¹ The dismissal of the Uzbek Deputy Prime Minister in October 2018 over a scandal involving the public humiliation of a group of farmers is an illustrative example of sanctions to officials for a practice conducted at a State level (n 92).

common and constitute an obstacle to advancing the efforts against modern slavery. A State may not want to acknowledge publicly its limited capacity to enforce anti-slavery legislation or its insufficient mechanisms to control corrupt officials. In other cases, a recent history of chattel-slavery may lead to understanding certain patronising slavery-like practices as beneficial and may drive public institutions, including the executive, the judiciary and police officers to turn a blind eye to those practices, failing to tackle them effectively. These attitudes and approaches, which could be considered ‘epistemic vices’ using Cassam’s terminology,⁷² must be confronted as they constitute an obstacle to tackling the problem and could ultimately give rise to State responsibility.

Second, most efforts against slavery are focused on the rights of victims, and the law of State responsibility may not seem to be the most immediate and effective avenue for securing redress for victims. But the potential of State responsibility as a tool is not limited to its mere invocation or the adoption of countermeasures, although those remain important aspects. It can also contribute to raising awareness of State obligations and the need to uphold those obligations in order to avoid the potential consequences of a breach. In this regard, as Jägers has noted, ‘the law of State responsibility offers an interesting, yet underutilized tool for addressing human rights violations’.⁷³ Human rights courts are starting to apply certain principles of the international law of state responsibility to modern slavery cases, holding states to account. Landmark cases in this regard are the *Hacienda Brasil Verde* case before the Inter-American Court of Human Rights, the *Mani* case before the ECOWAS Court, and the *Siliadin* and *Rantsev* cases before the ECHR.⁷⁴

Third, the state responsibility approach may have unintended consequences for victims and for the dynamics of modern slavery. Protection of victims must be a priority in the design of any accountability strategy. Equally relevant is the impact that accountability mechanisms could have in the trends and dynamics of modern slavery. As some states have not ratified all the existing conventions and treaties relevant to modern slavery, holding a state party accountable could leave a space open for non-states parties to engage in modern slavery, indirectly aggravating the problem. An interesting case in this regard is the increasing presence of Chinese companies in the Eritrean mining sector, which is plagued by allegations of forced labour.⁷⁵ In 2012, Australian based Chalice Gold Mines sold its 60 per cent stake of the Koka gold mine to a Chinese company,⁷⁶ and in 2019 the Chinese Sichuan Road & Bridge Company will start producing copper, zinc, gold and silver at another mine in Eritrea. Both investments have been funded via a preferential loan from the Chinese government.⁷⁷

⁷² For Cassam, an epistemic vice is ‘a blameworthy or otherwise reprehensible character trait, attitude or way of thinking that systematically obstructs the gaining, keeping or sharing of knowledge’ (Q Cassam, *Vices of the Mind. From the Intellectual to the Political* (Oxford University Press 2019)).

⁷³ N Jägers, *Corporate Human Rights Obligations: In Search for Accountability* (Intersentia 2002), 175.

⁷⁴ *Trabajadores de la Hacienda Brasil Verde v Brasil*, Judgment of the Interamerican Court of Human Rights, of 22 August 2017 (case on ‘slave labour’ practices in an agricultural complex in northern Brazil); *Hadijatou Mani Koraou v The Republic of Niger*, Judgment of the ECOWAS Court No ECW/CCJ/JUD/06/08 of 27 October 2008 (case on the obligations of domestic authorities in Niger to prosecute and punish slavery suffered by Hadijatou Mani); *Siliadin v France*, ECHR Judgment of 26 July 2005 (case on a foreign minor subject to servitude in France and the protection provided by criminal domestic legislation); *Rantsev v Cyprus and Russia*, ECHR Judgment of 7 January 2010 (case on trafficking in human beings and the protection of the victim by Cyprus and Russia).

⁷⁵ Eritrea Focus, ‘Mining and Repression in Eritrea: Corporate Complicity in Human Rights Abuses’ (2018) Eritrea Focus to the All-Party Parliamentary Group on Eritrea, at 34.

⁷⁶ ‘Chinese and Turkish companies show interest in Eritrea’, *The Economist*, 9 July 2013.

⁷⁷ Bloomberg, ‘Chinese Miner to Start Copper Output in Eritrea by Next Year’, 23 August 2018.

In response to this argument, which has also been raised in relation to extraterritorial human rights obligations in the context of foreign investment,⁷⁸ two considerations must be taken into account. First, the *jus cogens* nature of the prohibition of slavery and slave trade allows for the invocation of international responsibility of a state which has not ratified the relevant treaties. Second, as in all areas of international law, state consent remains at the core of international obligations of states and, the lack of an equally binding obligation for all sovereign states should not undermine the validity of the obligations that some states have accepted. The fact that one state may not have ratified a convention should not prevent international law from holding other states to account of its respective international obligations. Those potential unintended collateral effects must encourage the design of transparent monitoring systems that provide assurances to states and businesses and allow them to operate respecting human rights.

B. Which Violations of International Obligations Could Give Rise to State Responsibility for Modern Slavery?

According to Article 2 of ARSIWA, there is an internationally wrongful act of a state when the conduct consisting of an act or omission a) constitutes a breach of an international obligation of the state; and b) is attributable to the state under international law.

1. International obligations

Under Article 12 ARSIWA, ‘there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character’. These obligations may arise by a treaty or under customary international law,⁷⁹ ‘whatever the nature of the obligation it has failed to respect’.⁸⁰ The international legal framework creates two types of obligations for States related to modern slavery: the so-called ‘positive obligations’, which include preventing, protecting and punishing modern slavery offences and the obligation not to commit or facilitate those offences.

a) Positive obligations: preventing, protecting and punishing slavery

The 1926 and 1956 Slavery Conventions oblige States to abolish slavery and to criminalize slavery and institutions and practices similar to slavery, such as debt bondage, serfdom, forced marriage or child exploitation.⁸¹ States’ obligations in relation to human trafficking, forced labour and child labour are contained in ILO and UN Conventions and human rights treaties.⁸² In addition, international human rights law obliges States to prevent, protect and punish slavery offences committed by NSAs,⁸³ in provisions protecting the rights of individuals not to be

⁷⁸ A Hankings-Evans, ‘Power and Justice in International Investment Law: China’s Rise and Its Extraterritorial Human Rights Obligations vis-à-vis the African Host State Population’ (2016) 4 African East-Asian Affairs; D Kucera, ‘The effects of core workers’ rights on labour costs and foreign direct investment: Evaluating the “conventional wisdom”’ (2001), International Institute for Labour Studies Discussion Paper DP/130/2001.

⁷⁹ J. Crawford (n 16), at 126, para 3.

⁸⁰ *Gabčíkovo-Nagymaros* case, ICJ Reports 1997, 7, at 38, para 47.

⁸¹ Slavery Convention (1926, 45 States Parties) and Supplementary Convention (1956, 124 States Parties).

⁸² Some of those instruments are the UN Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children (2003, 173 States Parties); the ILO Convention on Forced Labour (1929, 178 States Parties); the ILO Protocol on Forced Labour (2016, 22 States Parties); the Convention against Torture (1984, 163 States Parties) and the Convention of Human Rights of Migrant Workers (1990, 51 States Parties).

⁸³ UNCHR, ‘Report of the UN Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences’ (2017) UN Doc A/HRC/36/43, para 13. On positive obligations, see A T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010); V Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press 2017); J. Allain, *Slavery in International Law. Of Human Exploitation and Trafficking* (Brill 2012).

subject to slavery or servitude,⁸⁴ not to be subject to inhumane or degrading treatment⁸⁵ or the right to just and favourable conditions of work.⁸⁶ States are also obliged to cooperate with each other and with the United Nations to give effect to the 1956 Supplementary Convention.

b) The prohibition on the commission of slavery

Those obligations to prevent and punish *necessarily imply* the prohibition of the commission of slavery, forced labour and human trafficking by the State, following the reasoning of the International Court of Justice on the prohibition on genocide.⁸⁷ In the *Bosnia Genocide* case, the ICJ emphasized that, although Article 1 of the Genocide Convention does not expressly require States to refrain from themselves committing genocide, speaking only of prevention, ‘it would be paradoxical if the parties had an obligation to prevent acts of genocide under Article 1 but were not forbidden to commit such acts through their own organs, or persons over whom they had effective control, where such conduct may be attributable to them’.⁸⁸ The Court stated clearly that ‘the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide’.⁸⁹ The reasoning of the Court on the prohibition of genocide can apply by analogy to slavery, forced labour, human trafficking and child labour.

2. Attribution of the breach to the State

If the obligation to respect the prohibition of slavery or the positive obligations mentioned in section a) are breached and such breach is attributable to the State, the violation will constitute an internationally wrongful act. The rules for attribution for the five factual scenarios described above are detailed in chapter II of ARSIWA.

a) Conduct of State organs or officials

Most of the breaches of obligations that may occur under the five factual scenarios would be attributable to the State under Article 4 of ARSIWA, as they are committed by State organs or officials. Under Article 4 of ARSIWA, ‘the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions’ notwithstanding the position and character (national, regional or local) of that organ in the internal organization of the State. According to this provision, decisions by State organs or officials committing or facilitating modern slavery, as well as failing to prevent, protect and punish modern slavery, could give rise to State responsibility.

In many slavery-related cases where conduct occurred with the complicity or involvement of a State, it is a State organ who engages in the conduct. For example, in the Uzbek cotton harvesting industry in which forced labour is allegedly deployed, numerous major government organizations, including national enterprises, utility companies, banks, factories, law enforcement, and government agencies, require their employees to pick cotton or pay for replacement pickers. Further, the 1998 Report of the ILO Commission of Inquiry into Issues of Forced Labour in Myanmar found ‘abundant evidence’ of the ‘pervasive use of forced labour imposed on the civilian population throughout Myanmar by *the authorities and the military*’.⁹⁰

⁸⁴ Art 4 Universal Declaration of Human Rights and Art 8 International Covenant on Civil and Political Rights (ICCPR).

⁸⁵ Art 7 ICCPR.

⁸⁶ Art 7 International Covenant on Economic, Social and Cultural Rights.

⁸⁷ *Application of the Genocide Convention*, ICJ Reports 2007, paras. 166-179.

⁸⁸ *Ibid*, para 166.

⁸⁹ *Ibid*, para 166. See also Gowlland-Debas, ‘The ICJ and the Challenges of Human Rights Law’, in M Adenas and E Bjorge (Eds.), *A Farewell to Fragmentation. Reassertion and Convergence in International Law* (Cambridge University Press 2015) 109, at 132.

⁹⁰ ILO (n 22), para 528.

As regards employment agencies and ECAs (scenarios 4 and 5 discussed above), their legal nature varies from public or quasi-public to private entities. ECAs act under a mandate from their government and employment agencies under a regulation or licence issued by the government. If the ECA or employment agency is a public entity, its acts or omissions are attributable to the State under Article 4 of ARSIWA.⁹¹ If it is a semi-public or private entity, its acts or omissions may still be attributable to the State under Articles 5 or 8 ARSIWA (see sub-section ii).

In certain cases, the State may claim that its official was disobeying instructions by committing modern slavery. In Uzbekistan, Deputy Prime Minister Zoyir Mirzayev was dismissed in October 2018 over a scandal involving the public humiliation of a group of farmers conscripted to pick cotton.⁹² Article 7 of ARSIWA makes clear, in line with international jurisprudence and general principles of international law, that *ultra vires* acts of State organs, persons or entities acting in their official capacity are attributable to the State.⁹³ This is the case ‘even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question’.⁹⁴ Otherwise, ‘one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received’.⁹⁵

Evidence gathering under this provision poses challenges in discerning the line between an act in an official capacity and an act. The Mixed Commission in the *Mossé* case noted that even if an official was acting outside the statutory limits of the competence of their service, it would still be necessary to consider ‘whether in the international order the State should be acknowledged [as] responsible for acts performed by officials within the apparent limits of their functions, in accordance with a line of conduct which was not entirely contrary to the instructions received’.⁹⁶

For the purposes of Article 4, in case the internal law of a State does not classify - exhaustively or at all - which entities are considered ‘organs’, the powers of an entity and its relationship to other bodies under internal law will be relevant. In addition, in some systems the status and functions of an entity are determined by a combination of law and practice,⁹⁷ creating a de facto organ.⁹⁸ This rule of attribution was explained by the ICJ in the *Bosnia v Serbia* case, in which the Court referred to ‘persons or entities which are not formally recognized as official organs under internal law, but which must nevertheless be equated with State organs because they are in a relationship of “complete dependence” on the State’⁹⁹. Referring to the *Nicaragua* judgment, the ICJ observed that ‘according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international

⁹¹ J Lee, ‘State Responsibility and Government-Affiliated Entities in International Economic Law’ (2015) 49 *Journal of World Trade* 1.

⁹² BBC News, Uzbek deputy PM sacked in ditch row, 29 October 2018.

⁹³ See Art 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949. See also *Caire* case before the French-Mexican Claims Commission (5 RIAA, 516 (1929)) and *Velásquez Rodríguez* case before the Inter-American Court of Human Rights (IACHR, Series C, N. 4 (1989), para 170).

⁹⁴ J Crawford (n 16), at 45, para 2.

⁹⁵ *Ibid*, para 3.

⁹⁶ 13 RIAA, 494 (1953).

⁹⁷ J. Crawford (n 16), p. 98.

⁹⁸ D Momtaz, ‘Attribution of conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority’, in J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility, Oxford Commentaries on International Law* (Oxford University Press 2010), at 243.

⁹⁹ *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, pp. 43, 205, para 406.

responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious’.¹⁰⁰ Attribution on this basis would only be on an exceptional basis, ‘for it requires proof of a particularly great degree of State control over them’.¹⁰¹

b) Conduct of other persons or entities exercising public functions

The involvement in modern slavery of certain semi-public or private entities may be attributable to the State under Article 5. This encompasses certain ECAs or employment agencies (Scenarios 4 and 5), private security firms empowered to act as prison guards, or private or State-owned airlines exercising immigration controls (Scenario 2).¹⁰² This type of attribution is potentially on the rise, with a wide range of public functions being increasingly outsourced to private actors.¹⁰³

Under Article 5 of ARSIWA, the conduct of a person or entity which is not an organ of the State shall be attributable to the State if this person or entity is empowered by the law of that State to exercise elements of the governmental authority, and if it is acting in that capacity.¹⁰⁴ The variety of entities to which a State can possibly delegate some of its functions include public corporations, semi-public entities, public agencies and even private companies.¹⁰⁵

In the *Nevsun* case,¹⁰⁶ forced labour and torture were allegedly inflicted on military conscripts in the construction of the Bisha mine, owned by the Canadian company (60 per cent) and the Eritrean government (40 per cent). The construction was managed by a South African company which subcontracted two Eritrean companies (Segen and Mereb)¹⁰⁷ under the framework of the Eritrean National Service Programme¹⁰⁸. Those are the two companies allegedly deploying forced labour. Although it was not the State that directly subcontracted the companies and it is not clear whether the works done by the companies can be considered as ‘elements of governmental authority’, the allegations of the connection of the companies with the Eritrean State and the claimants’ Statement that this programme provides labour to various companies owned by senior military officials provide elements of a situation to which Articles 5 or 8 ARSIWA may apply.¹⁰⁹

¹⁰⁰ *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, pp. 43, 205, para 392.

¹⁰¹ *Ibid*, para 393.

¹⁰² IBA (n 28), at 25 - 26.

¹⁰³ Privatisation of public functions is increasingly common in areas such as security and border control. See O Bures, H Carrapico, ‘Private security beyond private military and security companies: exploring diversity within private-public collaborations and its consequences for security governance’ (2017) 67 *Crime, Law and Social Change: An Interdisciplinary Journal* 3; L A Dickinson, *Outsourcing war and peace: preserving public values in a world of privatized foreign affairs* (Yale University Press 2011).

¹⁰⁴ Art 5 ARSIWA.

¹⁰⁵ See J Crawford (n 16), at 100.

¹⁰⁶ *Nevsun Resources Ltd. v Gize Yebeyo Araya et al.* (n 4).

¹⁰⁷ *Araya v Nevsun Resources Ltd.* Case (n 62), paras 33-38.

¹⁰⁸ The Eritrean National Service Programme is a government program of military and national service administered by the Eritrean Ministry of Defence.

¹⁰⁹ On 19 January 2018, *Nevsun Resources Ltd.* appealed the decision of the British Columbia Court of Appeal to the Canada Supreme Court.

If the empowerment element of Article 5 is not found to be applicable on the facts, another possible basis for attribution would be Article 8 of ARSIWA, although there is no consensus on its customary nature. It must be shown that the conduct of persons or groups of persons acting (i) on the instructions of a State, or (ii) under the direction or control of that State shall be attributable to it.¹¹⁰ The first possibility, attribution on the basis of instructions, is widely accepted. It covers cases in which State organs supplement their action by recruiting, commissioning or instigating private persons or groups to act as ‘auxiliaries’ while remaining outside the official structure of the State.¹¹¹ The second possibility, attribution on the basis of ‘direction’ or ‘control’,¹¹² involves domination and actual direction of an operation, not simply the exercise of oversight, influence or concern.¹¹³

International case law provides guidance, with the ICJ confirming the ‘effective control’ test in the *Bosnia Genocide* case.¹¹⁴ As the Court indicated, in order to establish a factual basis for a person or entity to be responsible on grounds of direction or control, it must be shown that the ‘effective control’ was exercised ‘in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or group of persons having committed the violations’.¹¹⁵ It must be proved that the State provided the direction or exercised control ‘over the action during which the wrong was committed’.¹¹⁶ However, the level of control required for attribution remains unclear, making necessary a flexible and fact-dependent view of what falls within a State’s control. The application of the effective control standard to certain questions, such as terrorism or the right to use of force in self-defence against non-state actors has been problematic, leading commentators and some tribunals to advocate for lower control thresholds.¹¹⁷ Various techniques have emerged to overcome those challenges and to adapt control thresholds, locating responsibility within omissions, the duty to prevent, or under the due diligence rule and articulating principles of shared responsibility.¹¹⁸

c) Aid or assistance to another State

A state may also be responsible for aiding or assisting other States in the commission of an internationally unlawful act under Article 16 of ARSIWA. There are three elements:¹¹⁹

- the State must be aware of the circumstances making the conduct of the aided or assisted State internationally wrongful;
- the aid or assistance is provided with the view to facilitating the commission of the internationally wrongful act, or is facilitating it; and

¹¹⁰ Art 8 ASRIWA.

¹¹¹ See J Crawford (16), at 110.

¹¹² Their translation has raised some issues. In French, for example, ‘direction’ may imply complete power, unlike in English.

¹¹³ See J Crawford (n 16), at 154, para 7.

¹¹⁴ In the *Nicaragua* case, the ICJ considered ‘effective control’ as a requirement for attribution. Although in the *Tadic* case the ICTY adopted a more flexible approach and applied what has been known as the ‘overall control test’, the issue in this case was not of State responsibility but of individual criminal responsibility. In 2007, the International Court of Justice confirmed its position on effective control *Genocide Convention (Bosnia v Serbia)* case, stating that the overall control test was not appropriate for State responsibility (ICJ Reports, 2007, 43, 209-210).

¹¹⁵ *Ibid*, at 205, para 400.

¹¹⁶ *Ibid*, para 406.

¹¹⁷ K E Boon, ‘Are control tests fit for the future? The slippage problem in attribution doctrines’ (2014) 15 *Melbourne Journal of International Law*.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*, at 149, para 3.

- the act would be internationally wrongful if committed by the State.¹²⁰

The acting state remains primarily responsible,¹²¹ but the aiding or assisting State will be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.¹²²

Although the customary nature of this provision remains controversial, this rule could be particularly relevant in cases of human trafficking, an area where there is evidence of corruption and collusion between State officials and traffickers,¹²³ as well as in some of the cases that fall under scenario 1 where, under certain circumstances, cases of assistance or aid of a State to another could emerge. Reception by UAE authorities of workers trafficked by the DPRK government could amount to aid or assistance if the requirements of ARSIWA are met. In the *Campaign Against the Arms Trade* case,¹²⁴ Article 16 ARSIWA was tested in the English courts in the context of weapons sales to Saudi Arabia with onward use for unlawful acts in Yemen. The intervenor representing Amnesty International, Human Rights Watch and Rights Watch UK, argued that the Defendant, the UK Secretary of State for International Trade, had failed to consider the UK's international obligations reflected in Article 16 ARSIWA. According to the intervenor, the sale and supply of weapons and military support from one State to another is a paradigm example of a situation where Article 16 may be engaged; the central question in interpreting and applying Article 16 is whether the assisting State has the requisite 'knowledge of the circumstances' of the internationally wrongful act.¹²⁵ He stated that there is strong academic support for the proposition that 'knowledge' encompasses not just 'near-certainty' or 'something approaching practical certainty', but also 'wilful blindness'.¹²⁶

In order to explore this argument, the Court would have had to first establish whether Saudi Arabia had committed an internationally wrongful act.¹²⁷ As this was beyond its functions, the claim was rejected.¹²⁸ However, the test proposed by the intervenor suggests an approach that could contribute to a more systematic application of Article 16 ARSIWA to situations such as the reception by UAE authorities of workers trafficked by the DPRK government. The test would mean that knowledge or certainty of the trafficking would not be necessary for UAE to be responsible for aiding or assisting the DPRK in the trafficking. Turning a blind eye or 'wilful blindness' would suffice.¹²⁹

C. What is the Potential of the Law of State Responsibility to Tackle Modern Slavery More Effectively?

The ARSIWA, many provisions of which reflect customary international law, provide an applicable set of secondary rules to apply when primary obligations regarding slavery are not respected.

As mentioned above, it may be said that such legal framework is not beneficial for victims because it does not envisage an *individual* right of action, and individuals can only

¹²⁰ This third requirement is in line with Arts 34 and 35 of the Vienna Convention on the Law of Treaties, as a State cannot do by another what it cannot do by itself.

¹²¹ Domestic courts may dismiss its responsibility based on immunity.

¹²² See Crawford (n 16), at 148, para 1.

¹²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 26 February 2018, at 11, para 34.

¹²⁴ *Campaign Against the Arms Trade*, UK High Court of Justice, Queen's Bench Division, Administrative Court, Judgment of 10 July 2017, [2017] EWHC 1726 (QB).

¹²⁵ Written Submissions on Behalf of Amnesty International, Human Rights Watch and Rights Watch UK.

¹²⁶ Ibid.

¹²⁷ Art 16 ARSIWA.

¹²⁸ Judgment, 10 July 2017.

¹²⁹ See n 125.

obtain redress if a State decides to exercise diplomatic protection. While other mechanisms will allow for direct action by individuals,¹³⁰ the potential of ARSIWA to overcome the gap identified in this article will ultimately benefit potential and actual victims by reducing their vulnerability, providing them a way out and adequate protection, and having a deterrent effect in perpetrators.¹³¹ And beyond the scenario of invoking the responsibility of a State for modern slavery, the application of ARSIWA to State involvement in modern slavery can enhance the fight against slavery in two ways: first, by encouraging States to uphold in practice what they have agreed to in international treaties; second, providing a valuable tool for States to put pressure on other states to change exploitative behaviour.

1. Calling States to uphold their existing obligations in practice

The analysis of evidence and of State obligations on modern slavery through the lens of ARSIWA, and consultation with modern slavery experts, indicate four avenues for maximising compliance with existing international legal obligations.

The first avenue is to use existing international mechanisms to tackle modern slavery. States are bound by a complex framework of interconnected international obligations, including UN Conventions, ILO Conventions and international and regional human rights instruments which provide mechanisms to protect victims and to ensure redress and accountability, although some of those mechanisms are rarely used in the fight against slavery and in general in the protection of human rights. A good example is Article 24(c) of the Council of Europe Convention on Action Against Trafficking, which considers the involvement of public officials in the performance of their duty as an aggravating circumstance in the determination of the penalty for offences established in accordance with the Convention.¹³²

The second avenue is tackling corruption and enhancing monitoring over state-backed entities to avoid State responsibility. It is critical that States strengthen controls to identify corrupt officials and networks and prosecute corrupt officials. Otherwise, they may be responsible for failing to investigate and prosecute with due diligence. Corruption and lack of transparency has also been identified as a problem in government to government memoranda of understanding for migration of workers.¹³³

More generally, enhanced monitoring mechanisms and human rights due diligence are identified as desirable developments in the regulation of ECAs and employment agencies, since a lack of monitoring could lead some States to unknowingly sponsor or support slavery-tainted projects or practices.¹³⁴ According to the UN Guiding Principles on Business and Human Rights, ‘States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence’.¹³⁵ In 2012 the OECD adopted its Common Approaches for Officially Supported

¹³⁰ Individual complaint procedures are available under the UN human rights treaty system under the Optional Protocols to the ICCPR, the ICESCR, the UNCRC and under the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, among other treaties (United Nations OHCHR, Individual Complaint Procedures under the United Nations Human Rights Treaties, Fact Sheet No 7/Rev.2, 2013). The ECHR, the Inter-American Court of Human Rights and the ECOWAS Court also envisage direct individual action.

¹³¹ See section B.1 above.

¹³² The Convention entered into force in 2008, and 47 States have ratified it.

¹³³ Verité, Freedom Fund (n 42).

¹³⁴ R McCorquodale, P Simons, ‘Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 Mod. L. Rev. 598.

Export Credits and Environmental and Social Due Diligence ('the OECD Common Approaches'),¹³⁶ amended in 2016 to explicitly include as potential social impacts of projects human trafficking, forced labour and child labour.¹³⁷

In line with the OECD Common Approaches, States are increasingly regulating ECAs' obligation to assess the social impact of the projects they fund and some States and ECAs are actively looking for support to ensure the correct functioning of those assessments.¹³⁸ Nevertheless, those examples are still rare and there are circumstances in which impact assessments do not guarantee modern slavery-free investments and exports.¹³⁹ In harmony with the UN Guiding Principles on Business and Human Rights and the OECD Common Approaches on ECAs, such enhanced monitoring would allow States to have more control over the activities in which they become involved.

The third avenue is preventing vulnerability and ensuring a way out for victims. Regional human rights courts are holding States accountable for failing to prevent modern slavery and protect victims (their 'positive obligations').¹⁴⁰ States must uphold their policies and strategies to their obligation to prevent modern slavery, which includes any policies or decisions that may affect migrant women.¹⁴¹ A wider implementation of practices on prevention and protection of victims which have been successful in a selection of countries¹⁴² would be desirable, accompanied by other measures such as enhanced labour inspections. In addition, visa and sponsorship regimes for overseas domestic workers have been identified as two policy areas with potential to ensure a way out for victims.¹⁴³ Fair recruitment and the prohibition of recruitment fees and abusive recruitment practices is also of importance.

The fourth avenue is ensuring that State or diplomatic immunity does not prevent victims from obtaining redress. A recent landmark case in this regard is *Reyes v Al-Malki*¹⁴⁴, in which the UK Supreme Court considered the implications of human trafficking for the scope of diplomatic immunity.¹⁴⁵ Although in this case the diplomat was not entitled to immunity as he was no longer in post,¹⁴⁶ the Court referred in *obiter dictum* to the situation in which the diplomat would have been still in post, particularly to the applicability of the commercial exception to diplomatic immunity under Article 31(1)(c) of the Vienna Convention on Diplomatic Relations. According to Lord Wilson, it can rationally be argued that 'the relevant

¹⁴⁰ See n 74.

¹⁴¹ According to a recent report of the UN Special Rapporteur on Contemporary Forms of Slavery, 11.5 million domestic workers are international migrants, which represent 17.2 per cent of all domestic workers and 7.7 per cent of all migrant workers worldwide. The domestic work sector accounted for 24 per cent of forced labour exploitation in 2017 (UN Doc A/HRC/39/52 (n 34), para 43).

¹⁴² ILO 201 Recommendation on Decent Work for Domestic Workers, OSCE Handbook (OSCE, 'How to Prevent Human Trafficking for Domestic Servitude in Diplomatic Households and Protect Private Domestic Workers', (Office of the Special Representative and Co-ordinator for Combatting Trafficking in Human Beings 2014), US TIP Office and DLA Piper Model Contract of Employment.

¹⁴³ Ewins (n 32); UN Doc A/HRC/39/52 (n 34).

¹⁴⁴ *Reyes v Al-Malki* [2017] UKSC (n 5).

¹⁴⁵ P Webb, 'Introductory Note to *Reyes v Al-Malki* and Another (UK SUP CT)' (2018) 57 International Legal Matters, The American Society of International Law, at 1.

¹⁴⁶ This case was settled in similar terms to previous cases, such as the *Swarna* and *Baoanan* cases in the US (*Swarna v Al Awadi* case (SDNY, June 2006); *Baoanan v Baja* case (SDNY, June 2008), on the ground of Art 39(2) of the Vienna Convention on Diplomatic Relations.

“activity” is not just the so-called employment but the trafficking; that the employer of the migrant is an integral part of the chain, who knowingly effects the “receipt” of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards; that the employer’s exploitation of the migrant has no parallel in the purchaser’s treatment of the stolen goods; and that, in addition to the physical and emotional cruelty inherent in it, the employer’s conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly or at all’.¹⁴⁷ This potentially opens up an avenue to considering the trafficking and exploitation of the domestic worker to fall within the ‘commercial or professional activity exception’ to diplomatic immunity (Article 31(1)(c) of the Vienna Convention on Diplomatic Relations).¹⁴⁸

In addition to exploring the interpretation of exceptions to diplomatic immunity, as suggested *obiter dictum* by three judges of the UK Supreme Court in the *Reyes v Al Malki* case,¹⁴⁹ other measures could contribute to ensuring redress to victims. The sending State can play a key role by cooperating in the investigation and prosecution before the Courts of the receiving State and considering waiving the immunity from jurisdiction of public officials when there are credible allegations of their involvement in modern slavery.

The general practice of sending States appears to be cooperation with the investigation or at least allowing the cases to proceed without objection.¹⁵⁰ In the *Soborun* case in the US, for example, a critical matter was resolved quietly and diplomatically with the cooperation of the sending State, Mauritius, which agreed to a waiver from immunity requested by the US.¹⁵¹ Unfortunately, not all sending States cooperate, as the *Khobragade* case shows, but this seems to be an exception to the rule. In that case, India denied the waiver of immunity requested by the US State Department and obstructed the proceedings by transferring its consular agent to India’s Mission to the UN to ensure and expand her immunity.¹⁵²

2. *Providing a tool for accountability*

The application of ARSIWA to State involvement in modern slavery also provides a valuable tool for States to put pressure on other States involved in modern slavery and ultimately to invoke their responsibility for internationally wrongful acts. These avenues correspond to the traditional use of the international law of State responsibility, which enables the international community to use sanctions, countermeasures (Article 49 ARSIWA) and the invocation of State responsibility as last resort mechanisms ensuring accountability for modern slavery.

a) Who may invoke State responsibility and in which fora?

¹⁴⁷ *Reyes v Al-Malki* [2017] UKSC (n 5), para 62.

¹⁴⁸ While two of the judges (Sumption and Neuberger) interpreted this exception in a restrictive way, the other three (Wilson, Hale and Clarke) argued for a broader interpretation of the exception by defining the relevant activity ‘not just [as] the so-called employment but the trafficking’; an approach that understands that ‘the employer of the migrant is an integral part of the chain, who knowingly effects the “receipt” of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards’; and considers that ‘in addition to the physical and emotional cruelty inherent in it, the employer’s conduct contains a substantial commercial element of obtaining domestic assistance without paying for it properly or at all’ (Ibid, para 62)..

¹⁴⁹ *Reyes v Al-Malki* [2017] UKSC (n 5), Lord Wilson, para 67.

¹⁵⁰ M Vandenberg, S Bessell, ‘Diplomatic Immunity and the Abuse of Domestic Workers: Criminal and Civil Remedies in the United States’ (2016) 26 *Duke Journal of Comparative and International Law*, at 604.

¹⁵¹ In this case, Mauritius’s ambassador to the US pled guilty to charges that he had failed to pay his domestic worker minimum wage or overtime while he was serving as his country’s permanent representative to the UN (Plea Agreement, *United States v Soborun*, No 2, 2:12-mj-03121 (DNJ Sept 7, 2012)).

¹⁵² The Deputy Consul General of India had allegedly forced her domestic worker to work long hours for a low wage and under an illegal employment contract (M Vandenberg, S Bessell (n 150), at 605).

The responsibility of a State involved in modern slavery may be invoked by an injured State, that is, the State to which the breached obligation is due.¹⁵³ The State of nationality of the victims is entitled to invoke responsibility through diplomatic protection, a mechanism which can also protect non-nationals, such as refugees or stateless persons, although it has no obligation to do so.¹⁵⁴

An injured State is not however the only sovereign actor able to invoke the responsibility of another State for breaching its international obligations. Some modern slavery obligations are included in treaties ratified by a group of States and are therefore owed to that group (obligations *erga omnes partes*).¹⁵⁵ As a consequence, any State Party to those treaties would be able to invoke the responsibility of the breaching State. Furthermore, protection from slavery is an obligation owed to the whole international community (obligation *erga omnes*) as confirmed by the ICJ in the *Barcelona Traction* case,¹⁵⁶ and therefore any State could invoke a breach of that obligation. The forum is determined by the applicable primary treaty, with this section of the ARSIWA acting as the secondary norm establishing the framework for such invocation. Article 8 of the 1926 Slavery Convention establishes that any dispute shall be settled by direct negotiation and otherwise be referred to the PCIJ. Under Article 10 of the 1956 Supplementary Convention, negotiation and referral to the ICJ are the dispute settlement mechanisms established, unless the parties concerned agree on another mode of settlement. Article 15 of the Palermo Protocol also relies on negotiation, arbitration and referral to the ICJ. The connection of the ILO Conventions¹⁵⁷ with the ICJ is limited to those cases in which a complaint results in a report of a Commission of Inquiry: under Article 29 of the ILO Constitution, the governments concerned may propose to refer the complaint to the International Court of Justice.¹⁵⁸

State responsibility has traditionally been invoked in inter-state litigation. Beyond that traditional approach, its use in fora alternative to litigation is not only possible under ARSIWA but also increasingly explored in practice. In addition to the promising trend recently initiated by human rights courts,¹⁵⁹ investment arbitration is the area where ARSIWA are most heavily cited.¹⁶⁰ The potential of the international law of State responsibility in negotiation, mediation or conciliation are worth exploring. Under Article 8 of the 1956 Supplementary Convention, States have the obligation to cooperate with each other and with the United Nations to give effect to the Convention. The existence of that obligation, and the international responsibility

¹⁵³ Art 42 ASRIWA.

¹⁵⁴ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment, ICJ Reports 1970, p. 3. See also Seventh report on diplomatic protection, by Mr. John Dugard, Special Rapporteur, UN Doc A/CN.4/567, 7 March 2006.

¹⁵⁵ J Allain, 'Slavery and its Obligations Erga Omnes' (2019) *Australian Yearbook of International Law*.

¹⁵⁶ ICJ Reports 1970, 3, at 32, para 34. Allain calls to read this pronouncement in context and reminds of the absence of cases of slavery where an obligation owed to the international community as a whole was invoked. Instead, he states that it is the *erga omnes* nature of the obligations derived from the protection from slavery what is at the basis of the *jus cogens* prohibition of slavery (See Allain (n 83), at 110, referring to J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Collected Courses of The Hague Academy*, at 410).

¹⁵⁷ The key conventions in this area are Convention 29 (forced labour) and Convention 182 (worst forms of child labour).

¹⁵⁸ Art 29, ILO Constitution.

¹⁵⁹ See n 74.

¹⁶⁰ J Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 *ICSID Review 1*; UN, 'Report of the Secretary General, Responsibility of States for internationally wrongful acts. Compilation of decisions of international courts, tribunals and other bodies' (2017) UN Doc A/71/80/Add.1.

that could derive from its violation, suggests that State responsibility could play an important role in encouraging effective settlement of disputes through methods alternative to international litigation.

b) What can ARSIWA forms of reparation offer in the fight against slavery?

One of the reasons for unpacking the potential of State responsibility in the fight against slavery are the advantages offered by the forms of reparations envisaged under ARSIWA. If a State commits or facilitates a modern slavery offence, it must repair the damage caused. The obligation of reparation is towards a State, although the beneficiary of the obligation may be an individual, as the ultimate holder of certain rights.¹⁶¹ In addition, the responsible State may be asked to offer assurances of non-repetition¹⁶² and it must cooperate with others to bring the situation to an end.

The set of alternatives that ARSIWA provides to ensure that the responsible State makes full reparation for the injuries caused¹⁶³ is a valuable tool for modern slavery cases. The first step is to re-establish the *status quo ante* prior to the concurrence of the wrongful act, which can be particularly relevant if the involvement of the State in modern slavery has occurred through the adoption of legislation allowing the State to commit labour exploitation, or if a decision of a domestic court constitutes the internationally wrongful act.¹⁶⁴ If restitution is not possible, both material and non-material damage may be the subject of a claim of compensation,¹⁶⁵ the quantification of which has been dealt with by human rights bodies.¹⁶⁶ Alternatively, when a damage is not financially assessable,¹⁶⁷ satisfaction may take the form of an acknowledgment of the breach, an expression of regret, a formal apology or other appropriate modalities. An example of satisfaction relevant in the context of modern slavery is disciplinary or penal action taken by the responsible State against the individuals whose conduct caused the internationally wrongful act.¹⁶⁸

Ex-gratia payments, such as the one made by the Tanzanian government to compensate a victim of slavery in the *Mazengo v Mzengi* case,¹⁶⁹ are welcomed as a form of redress to those victims.¹⁷⁰ Those payments are usually accompanied by a disclaimer and would not, in principle, trigger State responsibility. But if no disclaimer is made, in addition to compensating victims those payments could serve for holding States accountable for modern slavery under Article 11. Such an approach should be explored with caution to avoid any chilling effect on such payments, which provide a measure of redress to the victims even if on a without prejudice basis.

The obligation to cooperate to bring the breach to an end is applicable in this context given the peremptory nature of the prohibition of slavery and slave trade¹⁷¹ as well as of the

¹⁶¹ This is the case for treaties concerning the protection of human rights. In addition, the *LaGrand* case is an example of how this can also be the case outside the human rights framework (*LaGrand* ICJ judgment, 27 June 2001).

¹⁶² Art 30 ARSIWA.

¹⁶³ Art 31 ARSIWA, PCIJ, 1927, *Series A*, N. 9, at 21.

¹⁶⁴ See *Germany v Italy case, Jurisdictional Immunities of the State*, ICJ, 3 February 2012.

¹⁶⁵ See *Lusitania* case, RIAA, vol. VII, 32 (1923).

¹⁶⁶ See J Crawford (n 16), at 224, para 19.

¹⁶⁷ *Ibid*, at 231, para 4.

¹⁶⁸ *Count Bernadotte* case.

¹⁶⁹ *Mazengo v. Mzengi*, N 07-cv-756, DDC filed on 25 April 2007.

¹⁷⁰ L Wexler, J K Robbennolt, 'Designing Amends for Lawful Civilian Casualties' (2016) 42 *The Yale Journal of International Law* 1.

¹⁷¹ See n 6.

prohibition against torture,¹⁷² though there is not yet a consensus on the peremptory nature of the prohibitions of forced labour and human trafficking.¹⁷³ In case of breaching a peremptory norm, the responsible State is under the duty to cooperate to bring to an end those serious breaches, be it within an institutional framework or in the form of non-institutionalized cooperation. The ICJ emphasized this obligation to cooperate in its Advisory Opinion on the *Chagos Archipelago*, stating that ‘the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius’.¹⁷⁴ It is also under a double duty of abstention, not to recognize as lawful situations created by such serious breach, and not to render aid or assistance in maintaining that situation.¹⁷⁵

III. LEGAL POLICY RECOMMENDATIONS

Given the patterns identified in the five factual scenarios and the analysis of those patterns through the lens of the ARSIWA, the following legal policy recommendations would help bridge the gap in accountability for State involvement in modern slavery. Although this is an academic article, we include these recommendations because we believe the practice of legal scholarship involves the exploration of alternative arrangements, which is an ‘intellectual task [that] is active and interventionist and engages the fundamental responsibility of the jurist and the citizen’.¹⁷⁶

A. *Using Existing International Mechanisms to Tackle Modern Slavery*

States are encouraged to:

- i. Co-operate with each other and with the United Nations to give effect to the 1956 Supplementary Convention. This includes communicating to the Secretary-General of the United Nations any measures adopted to implement the Convention. Under Article 8.3, the Secretary-General shall communicate that information to the other Parties and to the ECOSOC as part of the documentation for any discussion which the Council might undertake with a view to making further recommendations for the abolition of slavery, the slave trade or the institutions and practices which are the subject of the Convention.
- ii. Use the ILO mechanisms in place, particularly the complaint mechanism against member States. Non-ILO members are encouraged to accept the obligations of the ILO

¹⁷² See UK Court of Appeal in the *Al-Adsani v Government of Kuwait* case, (1996), ILR, vol. 107, at 536 and 540-541.

¹⁷³ The peremptory character of forced labour was recognized by the 1998 Report of the ILO Commission of Inquiry into Issues of Forced Labour in Myanmar (ILO (n 22), para 528), which stated that forced or compulsory labour constitute peremptory norms and confirmed by the US Court of Appeals for the Ninth Circuit in the *Doe* case (*Doe v Unocal*, 14208). Some authors have however expressed reservations to this recognition. According to Allain there is no evidence that indicates that forced or compulsory labour has reached the normative level of a *jus cogens* norm. Instead, he states that forced or compulsory labour may attain the threshold of a peremptory norm, but only when the labour compelled is slavery (See J Allain (n 82), 246-254). Concerning the peremptory nature of the prohibition of human trafficking, it is to note that, although ‘legal conceptions of slavery have expanded to embrace practices that go beyond chattel slavery, it is difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and *jus cogens* norm prohibiting slavery and the slave trade’ (See Gallagher (n 82), at 252).

¹⁷⁴ Advisory Opinion on the *Legal Consequences of the Separation of the Archipelago from Mauritius in 1965*, ICJ Reports 2019, para 182.

¹⁷⁵ Art 41 ASRIWA.

¹⁷⁶ W Michael Reisman et al, *International Law in Contemporary Perspective* (2nd edn, Foundation Press 2004) 7.

Constitution and Conventions. Those member States that have not done so yet, are encouraged to consider ratifying the ILO Conventions.

- iii. Use existing human rights mechanisms to tackle modern slavery, by addressing structural situations and policies (e.g. economic migration) that may create the circumstances for unlawful behaviours amounting to modern slavery. The Palermo Protocol, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women or the Convention on the Rights of the Child provide mechanisms for inter-state dispute or complaints mechanisms that could be used for those purposes.¹⁷⁷

B. Tackling Corruption and Enhancing Monitoring over State-backed Entities to Avoid State Responsibility

States are encouraged to:

- i. Strengthen controls to identify corrupt officials and networks and to set effective penalties for corruption in line with the UN Convention against Corruption and to instruct public officials on modern slavery and its consequences as part of routine training.
- ii. Increase transparency and monitoring mechanisms in the way government-to-government Memoranda of Understanding (MoUs) for migration of workers are negotiated and implemented.
- iii. Implement enhanced monitoring and human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights and the OECD Common Approaches, particularly concerning Export Credit Agencies.

C. Preventing Vulnerability and Ensuring a Way Out for Victims

States are encouraged to:

- i. Revise visa requirements for overseas domestic workers to provide them a safe way out of potentially abusive situations by guaranteeing their right to change employer and by allowing them to apply for annual extensions. States with a *kafala* system are encouraged to revise it to protect potential victims of modern slavery, enabling them to change employer and leave the country without permission of their employer. All workers should enjoy equal protection under domestic labour law.
- ii. Perform human rights impact assessments on any legislation on borders and passport controls, in order to reduce vulnerability of victims of trafficking to practices such as confiscation of identity documents.
- iii. Prohibit recruitment fees in their domestic law and enhance controls and inspections to ensure that employment agencies do not tolerate or use abusive practices; ensure that their legal and judicial system guarantees migrant workers' rights, in particular the right to remedy, and that extraterritorial jurisdiction is used to end impunity of companies operating abroad; follow the ILO General principles and operational guidelines for fair recruitment (2016).
- iv. Follow ILO 201 Recommendation on Decent Work for Domestic Workers and promising practices in prevention and protection of victims (OSCE Handbook, US TIP Office and DLA Piper Model Contract of Employment¹⁷⁸).

D. Ensuring that Immunity does not Prevent Victims from Obtaining Redress

States are encouraged to:

¹⁷⁷ Also relevant is Art 24.c of the Council of Europe anti-trafficking convention, which considers the involvement of public officials as an aggravating circumstance. The Global Compact for Migration adopted on 10 December 2018 contains several provisions on modern slavery.

¹⁷⁸ <https://www.state.gov/j/tip/c73528.htm>

- i. Waive the immunity from jurisdiction of public officials when there are credible allegations of their involvement in modern slavery, in the territory of the State or in a foreign country. States could require diplomatic missions give a prospective waiver of immunity for employment-related disputes when there is a reasonable basis to believe that gross violations of human rights of domestic servants could have been committed. The vast majority of States will not be content to provide a blanket waiver, so, in order to be workable, the waiver should be limited to cases where there are: (i) reasonable grounds for believing that (ii) gross human rights violations have been committed (iii) against a domestic servant. This would capture the most serious cases and provide a best practice model for other jurisdictions to follow, leading to the accumulation of State practice.¹⁷⁹ Once waiver is provided, States should cooperate with foreign courts' investigations of such allegations by disclosing documents and making personnel available for interviews.
- ii. Revise employment laws so that overseas domestic workers in diplomatic households are employed by the foreign State. This would allow victims to sue the State instead of the diplomat and to benefit from the employment exception to State immunity.¹⁸⁰ To avoid that service of process becomes a barrier to redress, States may agree to permit channels of transmission other than those provided for in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, such as direct communication between respective authorities.

Domestic courts are encouraged to:

- i. Develop the idea in the UK Supreme Court *Reyes v Al-Malki* [2017] UKSC 61 to interpret the commercial exception to diplomatic immunity in Article 31(1)(c) Vienna Convention on Diplomatic Relations to cover exploitation of domestic workers. This would allow those courts of receiving States to prosecute diplomats in post involved in the exploitation of domestic workers and hold them to account.
- ii. Consider the application of exceptions to State immunity from jurisdiction when there are credible allegations of the involvement of a public official or body in modern slavery. Examples of these exceptions are the commercial activity or territorial tort exceptions to State immunity.

E. Putting Pressure on other States through Sanctions

States and international organizations such as the UN or the EU are encouraged to:

- i. Consider imposing economic, commercial or other types of sanctions within their respective legal frameworks to put pressure on States if there is a sufficiently solid factual basis to believe that they are committing modern slavery offences. The decision on the adoption of those sanctions should take into consideration any potential collateral effects.
- ii. Consider adopting legislation allowing for targeted sanctions or visa bans on individuals who have committed human rights violations in other States.

F. Invoking State Responsibility and Countermeasures

States are encouraged to:

¹⁷⁹ P Webb, 'The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?' (2016) 27 EJIL 3, 764-5.

¹⁸⁰ The *Benkharbouche* case in the UK is an example of a situation in which the State itself was sued (*Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janah (Respondent)*, 2017 UKSC 62, 18 October 2017).

- i. Invoke the responsibility of another State for failing to investigate and prosecute with due diligence non-state actors committing modern slavery offences, as well as corrupt officials that may facilitate the commission of modern slavery offences (Article 4 ARSIWA).
- ii. State responsibility may be invoked through diplomatic protection by the State whose nationals are victims of modern slavery (Article 42 ARSIWA), or by other States based on *erga omnes* or *erga omnes partes* obligations (Article 48 ARSIWA).
- iii. Invoke the international responsibility of other States, if they commit an internationally wrongful act by engaging in modern slavery (Articles 42 or 48 ARSIWA).
- iv. If the wrongful act constitutes a serious breach of an obligation, States have a positive duty to cooperate in order to bring to an end such breach. They also have the obligations not to recognize the situation created by the internationally wrongful act and not to render aid or assistance in maintaining that situation (Article 41 ARSIWA).
- v. Invoke the international responsibility of a State for aiding or assisting another State in the commission of an internationally wrongful act (Article 16 ARSIWA)
- vi. Consider adopting countermeasures (Article 49 ARSIWA) against another State, if the latter commits an internationally wrongful act by engaging in modern slavery. Examples of possible countermeasures include asset freezes, import restrictions or travel bans.

IV. CONCLUDING REMARKS

Behind the classic image of the ‘modern slave’ as a construction worker exploited by a private company or a vulnerable female migrant working 24/7 in a family home may lurk the State: the export credit agency funding the construction project or the diplomat bringing his domestic servant to his overseas posting. The focus to date on the role of NSAs in modern slavery is important, but it also creates a gap in accountability. This article, and the research project on which it is based, seeks to make the role of the State visible – to uncover the gap. There are at least five scenarios in which evidence of State involvement in modern slavery could give rise to State responsibility. Beyond this, and a potential project for future research, is the possibility of modern slavery in public procurement, development aid¹⁸¹ and in conflict situations.¹⁸²

The law of State responsibility provides a framework for bridging the accountability gap. As the legal policy recommendations presented in this article show, there are many existing mechanisms for State responsibility. Many widely-ratified conventions already require States to prevent and punish forms of slavery. A State may incur responsibility if it does not adequately prevent and punish certain private misconduct subject to a due diligence standard.

¹⁸¹ A recent example illustrating the risks in development aid concerns legal proceedings launched against the EU in April 2019 by Eritreans in exile, accusing the EU of financing a scheme in Eritrea that uses forced labour (<http://www.pressclub.be/wp-content/uploads/2019/04/Letter-of-Summons-EU-Emergency-Trust-Fund-for-Africa-1.pdf>).

¹⁸² The inclusion of obligations for the State in the Australian Modern Slavery Act (2018) and recent developments in the UK concerning section 54 of the Slavery Act indicate interesting upcoming developments concerning public procurement. Under Art 15 of the Australian Slavery Act, ‘the Minister must prepare a modern slavery statement for the Commonwealth, for a reporting period, covering all non-corporate Commonwealth entities within the meaning of the Public Governance, Performance and Accountability Act 2013’. In the UK, the independent review of the Modern Slavery Act called for extending section 54 of the Modern Slavery Act to the public sector. It also emphasized that the ‘Government should further strengthen its public procurement processes to make sure that non-compliant companies in scope of section 54 are not eligible for public contracts’ and that ‘the Crown Commercial Service should keep a database of public contractors and details of compliance checks and due diligence on all relevant aspects of corporate governance carried out by public authorities’, a database that should be easily accessible to public authorities for use during the procurement Purposes (Independent Review of the Modern Slavery Act 2015: second interim report, 22 January 2019, section 2.5).

And the obligations to prevent and punish necessarily imply an obligation not to commit or facilitate modern slavery.

We do not envisage our recommendations triggering a wave of inter-state litigation. That remains an infrequent and difficult form of ensuring State responsibility. There are many measures that States can take beyond the courtroom, such as exercising vigilance in visa processing, enforcing minimum wage rules and border inspections, stamping out corruption, and monitoring compliance with laws on living and working conditions, particularly for migrant workers.

The development of strategies to tackle tomorrow's slavery requires a comprehensive understanding of its drivers and risk factors. An important element of that exercise is uncovering and bridging the existing gap in accountability for State involvement in modern slavery.