



Closing the loopholes - How legislators can build on the UK Modern Slavery Act



ITUC CSI IGB

International Trade Union Confederation

Foreword

In the global economy, forced labour in the private sector generates an estimated \$150 billion each year. In all countries, unscrupulous employers and recruiters are increasingly exploiting gaps in international labour law and migration law and enforcement.

Companies with a business model built on modern slavery and governments who facilitate exploitation of people through outdated laws have been put on notice.

We all have a responsibility to the women forced to mine for minerals in Eastern DRC for our smart phones, migrants on Thai fishing boats fishing for seafood, low-wage workers in Malaysia making our TVs and washing machines, and the Gulf States relying on a workforce enslaved by the kafala system to staff international hotel chains, department stores and construction companies.

Trust in business to take responsibility for workers in their supply chains is low. The 2015 ITUC Frontlines Poll found more than half of the people in G7 countries of the US, Germany, France, Netherlands and the UK said they didn't trust major corporations to look after the interest of workers.

It will take international and national legislation to get us to a world without modern-day slavery and labour exploitation.

Mandated due diligence must hold companies to account for treatment of workers in their supply chains. In the 2016 ITUC Frontlines Poll in nine countries, 82 per cent of people agree that a company is ultimately responsible for and should be held accountable for the actions of their subcontractors.

The UK Modern Slavery Act was a major development in national legislation to hold businesses to account by requiring companies to publicly state each year the action they have taken to ensure their business and supply chains are slavery free. In September 2016, the first UK company was ordered to pay compensation to victims of modern slavery.

In recent months, many other governments are looking to adopt legislation to combat modern-day slavery and are looking to the UK Modern Slavery Act as a model. The trade union movement support fully governments who wish to tackle this problem; however, we would urge them to build upon the UK Modern Slavery Act in order to address some of its limitations, rather than adopt it as is, and make a major contribution to ending of forced labour.

Sharan Burrow
General Secretary,
International Trade Union Confederation

Introduction

In 2015, the UK Modern Slavery Act¹ (MSA) entered into force, signaling another important effort to establish legal tools to combat the scourge of forced labour – not only in its territory but also in the supply chains of UK-based enterprises.

The law was supported by a broad coalition, including business, labour and NGOs, though many had urged the government to show greater ambition with regard to many aspects of the legislation.

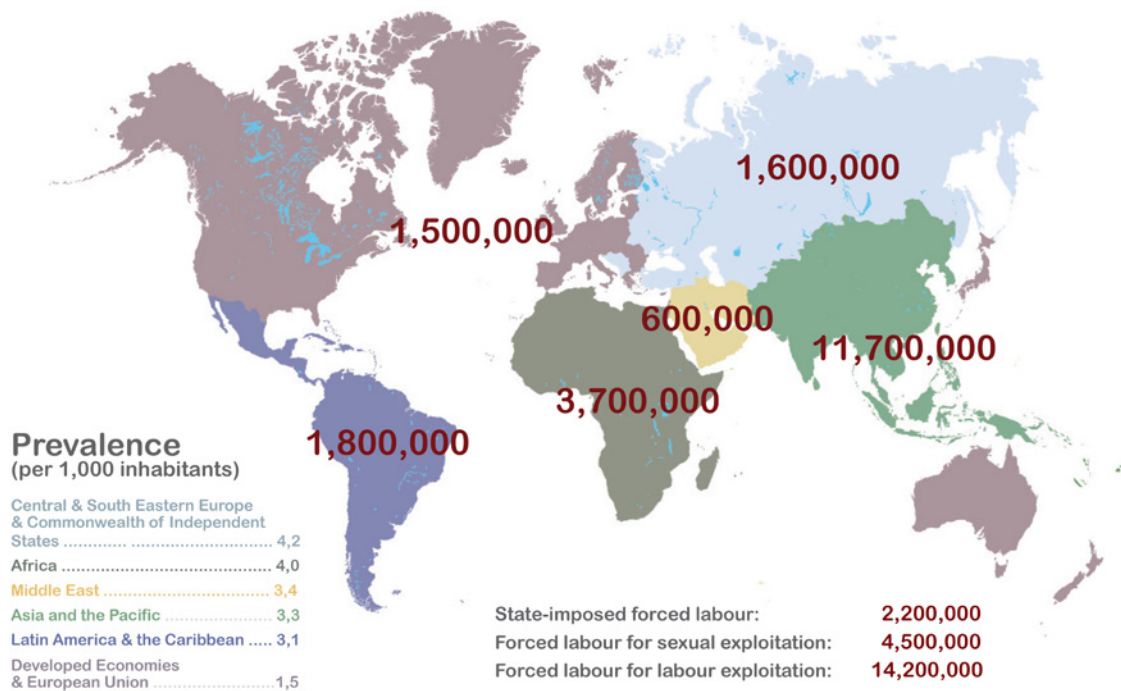
Part one of this briefing provides a legal review of the Act and has identified its limitations in relation to:

- Supply Chain Transparency
- Extraterritoriality
- Due Diligence and Civil Remedies for Supply Chain Violations

and proposes a series of recommendations for legislators to consider when reviewing the Act or using it as a model in their own countries.

Part two identifies additional legal tools to combat modern-day slavery.

Regional figures Persons in forced labour



¹ Available online at http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf

Part One: Recommendations to increase the impact of the Modern Slavery Act

1. Supply Chain Transparency

Perhaps the most discussed provision of the MSA is Section 54 on Supply Chain Transparency.

Section 54 asks companies to publish an annual “slavery and human trafficking statement”², which would disclose the steps the company has taken during that year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business. The statement must be approved by the board or its equivalent. Where a company has a website, it must publish the statement on its website. The UK Government set a threshold so that the law applies to any company with an annual turnover of £36 million. As a result, the Act applies to an estimated 12,000 UK companies.

“In the UK 77 per cent of the public agree that all companies should make information publicly available to their customers about all the contractors and subcontractors they source from” 2016 ITUC Frontline Poll

The Government argues that the Act will create a “race to the top” among businesses to disclose information about their supply chain policies which will lead to changes in their corporate behaviour. However, corporations are unlikely to provide comprehensive and accurate information about adverse impacts – especially if it could lead to legal liability. Indeed, the UK NGOs CORE and Business and Human Rights Resource Centre found that most initial annual statements are little more than PR and do not disclose information as recommended by the law and the non-binding guidance. Indeed, the Government gave businesses significant flexibility as to what to disclose.³

The ITUC has identified the following concerns with Section 54:

- The law applies to commercial organisations, which are defined as corporations or partnership. They must carry on a business or part of a business in the UK. While this will cover a substantial number of businesses, it appears that the wholly owned subsidiaries of UK corporations are outside the scope of the law. So long as the goods or services are not coming into the UK, they are exempt from this requirement. Thus, a subsidiary of a UK company providing, e.g., construction services in Qatar would not have to report under the MSA.

Recommendation: Any new legislation should eliminate this loophole.

² Section 54(5) provides that a company’s statement “may include” the following: (a) the organisation’s structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; (f) the training about slavery and human trafficking available to its staff.

³ See Lindsay Fortado, Lacklustre Compliance on anti-slavery law, Financial Times, March 6, 2016, available at <https://www.ft.com/content/d8147d76-e22d-11e5-9217-6ae3733a2cd1>

- The UK Government set an annual turnover of £36 million to be covered. Of course, we understand that micro and small enterprises should probably not be within the scope of the reporting requirements.

Recommendation: Any new legislation should set an appropriate initial threshold amount, in consultation with the social partners, so as to ensure broad coverage while excluding those businesses not likely to be engaged in international trade and investment. Adjustments to broaden the scope of coverage over time should be a simple regulatory process.

- The law provides for no mandatory disclosures. The types of information listed in subsection 5 are permissive, not mandatory. Further, the guidelines which accompany the MSA are also not binding. While peer-pressure may result in firms not issuing superficial statements, it would not violate the MSA if they did so. Further, the law does not even refer to information about companies' remediation processes where negative impacts have taken place and the company has caused or contributed to them.

Recommendation: At a minimum, any new legislation should require the disclosure of the information which is now merely permissive in the MSA. The UK NGO CORE, in its report, "Beyond Compliance: Effective Reporting under the Modern Slavery Act," provides useful guidance as to what companies should disclose in each of the 5 areas listed at Section 54(5) of the MSA.⁴ This detail is probably best enacted through implementing regulation.

- The MSA does not establish a central repository to which these statements must be uploaded. For governments, investors and civil society to know which companies are taking effective action, the reports need to be in one place on a single website, and easily comparable between companies. Otherwise, one would have to go website by website to collect and compare information. This is all the

more difficult, as it is not disclosed specifically which entities are covered by the MSA. At present, the only repositories in the UK are voluntary initiatives supported by business or NGOs and labour.

Recommendation: Any new legislation should provide for a central repository to which all covered entities must upload their statements.

- There is a lack of penalties for businesses which fail to comply with the MSA supply chain provisions. Companies that ignore the requirement will technically be breaking the law, but they do so without risk of any consequence. Further, those that fail to report are most likely the ones most likely to have forced labour in their supply chains.

Recommendation: Any new legislation should provide a sanction in the following circumstances:

- Failure to issue the statement or issuance of an incomplete statement;
- Issuance of a misleading or fraudulent statement;
- Failure to have an appropriate policy on forced labour and human trafficking;

2. Extraterritoriality

A major shortcoming in the MSA is the lack of an extraterritoriality offence. For example, if a British person or company were to hold a person in slavery or exact forced labour from that person abroad, they can do so with impunity (unless it were to violate the criminal laws in that state). This is despite the fact that the UK already recognises that some crimes committed by British citizens should be punished no matter where the act to place, such as torture or child sexual slavery. In contrast, under the Trafficking Victims Protection Act, 18 USC 1596, the US has explicit extraterritorial jurisdiction to pursue criminal sanctions against US citizens or non-citizens present in the US, regardless where the crime (forced labour, trafficking) was committed.

⁴ CORE's guidance on disclosure is found at pp 21-22 of their report, available online at http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf

Recommendation: Any new legislation should provide that any natural or juridical persons of a state who commit the act of slavery, servitude and forced or compulsory labour and human trafficking should be held to account in the courts of that state, regardless where these crimes were committed.

3. Due Diligence and Civil Remedies for Supply Chain Violations

Article 54(5)(c) merely suggests that the statement include information about a company's due diligence processes but does not require a company to have a due diligence policy or to carry out effective human rights due diligence along the lines indicated by the UN Guiding Principles on Business and Human Rights and related guidance. Legislation can and should go beyond transparency to mandate that companies conduct human rights due diligence in their supply chains regarding forced labour/human trafficking.

Further, legislation should provide for a civil cause of action for victims of forced labour/human trafficking that occurs in a company's supply chains. Legislation could provide companies a defence to liability evidence that have in fact carried out due diligence to identify risks of forced labour and human trafficking in their supply chains, put in place systems to prevent such violations from happening and provided an effective remedy when it occurred. The MSA currently creates no such legal requirements.

Recommendation: Any new legislation should mandate that a company undertake human rights due diligence in their supply chains, at least with regard to forced labour/trafficking and provide a civil remedy in the company's home jurisdiction for victims of forced labour/trafficking.

CONSTRUCTION SUPPLY CHAIN - QATAR

Trapped by the Kafala System of Modern-Day Slavery

.....
"Our employer refuses to pay gratuity payments after two years of employment, which is illegal even according to Qatari law. But none of us can file a complaint with the Labour Court, since it is impossible to support oneself financial during the process,"
Construction worker Qatar



SEAFOOD SUPPLY CHAIN - PHILIPPINES

What's the catch for workers?

.....
"Tuna exporting giant Citra Mina is one of the Philippines biggest seafood suppliers. The company makes billions of dollars in sales to the European, Asian and North American markets, while workers endure a grim reality of precarious work and labour standards violations,"
Citra Mina Worker Unions



Part Two: Additional Legal Tools to Combat Modern-Day Slavery

1. Trade

With the Trade Facilitation and Trade Enforcement Act of 2015, the United States modernised a 1930s law to prohibit the entry of goods into its territory which were produced by forced or compulsory labour. See, Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307).

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

“Forced labor”, as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term “forced labor or/and indentured labor” includes forced or indentured child labor.

Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s). In the original version, a petitioner had to demonstrate that the forced-labour-made goods were harming domestic production of the same good. This has been eliminated with the 2015 amendment – transforming the law from a trade law to an important human rights tool. Of note, similar language encouraging the non-importation of forced-labour-made goods was included in the Labour Chapter of the (now stalled) Trans-Pacific Partnership.⁵

2. ILO Protocol to the Forced Labour Convention

In June 2014, the International Labour Conference adopted a Protocol to the ILO Forced Labour Convention No. 29 (1930), which required states to take additional measures to prevent and combat the trafficking for forced labour of migrant workers.⁶ With regard to forced labour, the protocol calls on members to “take effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour.” Governments are also directed to adopt a national action plan to prevent forced labour in consultation with the social partners.

⁵ See Article 19.6 of Chapter 19 of the TPP, which provides, “Each Party recognises the goal of eliminating all forms of forced or compulsory labour, including forced or compulsory child labour. Taking into consideration that the Parties have assumed obligations in this regard under Article 19.3 (Labour Rights), each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.”

⁶ The text of the protocol is available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO:12100:P12100_INSTRUMENT_ID:3174672:NO

The Protocol has already been ratified by 10 countries and more are expected in 2017. Governments should ratify the protocol as a part of any comprehensive strategy to combat forced labour and human trafficking, and implement the protocol in domestic law and policy.

Conclusion

Hostis humani generis – “enemies of all mankind” under international law

There is a broad-based global consensus that the exaction of forced labour, or human trafficking to exact

forced labour, is a serious human-rights crime. Indeed, slave traders, the antecedents to today’s human traffickers, were deemed *hostis humani generis*, or “enemies of all mankind” under international law. This long-standing legal doctrine held that slavers were beyond legal protection and provided that any state could act against them for their crime. No one should benefit from this crime, whether directly or from forced labour exacted by a third party in the global supply chain.

BEEF SUPPLY CHAIN PARAGUAY

Indigenous forced labour persists in Chaco

.....
“Child labour, forced labour and debt servitude are still part of everyday life for the indigenous communities living in the Paraguayan Chaco. Some cattle ranchers work all their lives without receiving any pay, just food and the right to stay on the property for as long as their boss deems fit,”
Nandeva Leader, Equal Times Special Report, The Chaco Region Paraguay



ELECTRONIC SUPPLY CHAIN – MALAYSIA

Verite: One third of workers are in forced labour

.....
“When you go to the recruitment agent, they promise a certain salary and assure you that you will be able to pay back your loan and earn money, but when you get here you find it’s impossible to pay the money back, even if you stay here for two years,”
Nepali migrant worker



TOMATOES SUPPLY CHAIN ITALY

No supermarket can boast supply chains untainted by abusive practices

.....
“From Spain, to South Korea, Italy the US and the UK, agricultural workers face abuse, coercion and under-payment. Illegal and forced labour is the norm in agriculture rather than the exception,”

Dr Neil Howard, European University Institute



Publisher responsible in law:
Sharan Burrow, General Secretary

ITUC
5 Bld du Roi Albert II, Bte 1, 1210-Brussels, Belgium
Tel: +32 2 224 0211 Fax : +32 2 201 5815
Email: press@ituc-csi.org Web: www.ituc-csi.org

D/2017/11.962/11