

Office of the Special Representative and Co-ordinator  
for Combating Trafficking in Human Beings



# MODEL GUIDELINES

**ON GOVERNMENT MEASURES  
TO PREVENT TRAFFICKING  
FOR LABOUR EXPLOITATION IN  
SUPPLY CHAINS**



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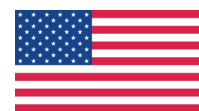
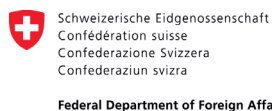
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# **MODEL** **GUIDELINES** **ON GOVERNMENT MEASURES** **TO PREVENT TRAFFICKING** **FOR LABOUR EXPLOITATION IN** **SUPPLY CHAINS**

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# Foreword

The aim of these model guidelines is to provide a practical tool to assist OSCE participating States and Partners for Co-operation to implement concrete measures to prevent trafficking in human beings in supply chains. It highlights how States can implement legislation and policies that promote transparency to ensure that public supply chains are free from trafficked labour; and promote the fair and ethical recruitment of workers.

Trafficking in human beings (THB) can tragically be found in the production of goods that we purchase and in the delivery of the services we consume. Governments and businesses have a responsibility to do their part to prevent trafficking in human beings. Increasingly public procurement, labour and other authorities are recognizing the need for the inclusion of social conditions to prevent exploitative and forced labour in contracts for goods or services, and to prevent fraudulent recruitment.

Over the past decade, the Organization for Security and Co-operation in Europe (OSCE), and my Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (OSR/CTHB) have undertaken efforts to improve the understanding of trafficking in human beings for labour exploitation, and the measures required to address and prevent it. The OSCE has adopted several Ministerial Decisions on trafficking in human beings that call on participating States to develop targeted prevention policies. These include leveraging public procurement and ensuring transparency in supply chains; promoting co-operation among governments, businesses, civil society and international organizations; and, ensuring that we at the OSCE are doing what is necessary to prevent trafficking in human beings from entering our organizational supply chains.

Governments turn to my Office to provide assistance to them in implementing the OSCE's anti-trafficking commitments, including through programmatic work. During 2016-2017, my Office implemented the project *Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures*.

In September 2016, with the generous financial support of Austria, Germany, the Netherlands, Switzerland and the United States the OSR/CTHB launched the project in Berlin, along with the first workshop. A series of events were organized under the project in Astana, Geneva, London, Stockholm and Vienna, also in co-operation with the CBSS, the ILO, the Swedish MFA and the UK Home Office, to raise awareness, build capacity, and exchange practices on preventing trafficking in human beings for labour exploitation in supply chains. Over 350 trafficking in human beings and public procurement experts from 50 OSCE participating States and two Partners for Co-operation, as well as international experts, shared their experiences, identified challenges and promising practices, and discussed trends and opportunities. These model guidelines are an outcome of these events. With the inputs gleaned from these various meetings with stakeholders throughout the OSCE region and beyond, and research on promising practices, this document summarizes and makes recommendations on how THB can be prevented. It also contains a related model law and clauses for participating States as well as suggested strategies and considerations on implementation.

I am grateful to all the participants of the workshops who generously gave their time and expertise, and for those who contributed to the writing and peer reviews of this document, especially our core experts and partners, including CBSS and the ILO. It is hoped that this document will serve as a guide to participating States, Partners for Co-operation and other practitioners on enacting and implementing concrete measures to better prevent trafficking in human beings in the first place. Finally, I will continue to raise the political profile of the issues, including through country visits. I and my Office stand ready to work further with participating States and Partners for Co-operation, as well as with other partners to enhance the capacity needed to implement these model guidelines, including through technical assistance, capacity building, knowledge building, as well as events and projects.



**Ambassador Madina Jarbussynova,  
OSCE Special Representative and Co-ordinator  
for Combating Trafficking in Human Beings**



# Acronyms

<b>BHRE</b>	Business, Human Rights and the Environment Research Group	<b>MOU</b>	Memorandum of Understanding
<b>CBSS</b>	Council of the Baltic Sea States	<b>MSA</b>	Modern Slavery Act
<b>CDDH</b>	Council of Europe Steering Committee for Human Rights	<b>NAP</b>	National Action Plans
<b>CIPS</b>	Chartered Institute of Procurement and Supply	<b>NCP</b>	National Contact Point
<b>CoE</b>	Council of Europe	<b>NGO</b>	Non-governmental organization
<b>CETS</b>	Council of Europe Treaty Series	<b>OECD</b>	The Organisation for Economic Co-operation and Development
<b>CBP</b>	Customs and Border Protection	<b>OSCE</b>	The Organization for Security and Co-operation in Europe
<b>CTSCA</b>	California Transparency in Supply Chains Act	<b>OSCE PA</b>	Organization for Security and Co-operation in Europe Parliamentary Assembly
<b>DIHR</b>	Danish Institute for Human Rights	<b>OSR/CTHB</b>	Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings
<b>ECHR</b>	European Court of Human Rights	<b>RLI</b>	Responsible Labor Initiative
<b>EU</b>	European Union	<b>SMEs</b>	Small and medium-sized businesses
<b>ETI</b>	Ethical Trading Initiative	<b>SOMO</b>	The Centre for Research on Multinational Corporations
<b>FAR</b>	US Federal Acquisition Regulation	<b>SPP</b>	Sustainable public procurement
<b>FRA</b>	European Union Fundamental Rights Agency	<b>THB/LE</b>	Trafficking in human beings / trafficking for labour exploitation
<b>GDP</b>	Gross Domestic Product	<b>TVPRA</b>	Trafficking Victims Protection Reauthorization Act
<b>GLAA</b>	Gangmasters and Labour Abuse Authority	<b>UK</b>	United Kingdom
<b>GPA</b>	World Trade Organization's Government Procurement Agreement	<b>UN</b>	United Nations
<b>GRETA</b>	Council of Europe's Group of Experts on Action against Trafficking in Human Beings	<b>UNCAC</b>	United Nations Convention against Corruption
<b>HEUNI</b>	European Institute for Crime Prevention and Control, affiliated with the United Nations	<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>ICAR</b>	International Corporate Accountability Roundtable	<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>ICCR</b>	Interfaith Center on Corporate Responsibility	<b>UNEP</b>	United Nations Environment Programme
<b>IFC</b>	International Finance Corporation	<b>UNGP</b>	United Nations Guiding Principles
<b>IHRB</b>	The Institute for Human Rights and Business	<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>ILO</b>	International Labour Organization	<b>UNTOC</b>	United Nations Convention on Transnational Organized Crime
<b>IOM</b>	International Organization for Migration	<b>U.S.</b>	United States of America
<b>IRIS</b>	International Recruitment Integrity System		
<b>LE</b>	Labour Exploitation		
<b>MEAT</b>	Most Economically Advantageous Tender		
<b>MNE</b>	Multinational Enterprises		
<b>MNE Guidelines</b>	Guidelines for Multinational Enterprises		

# Glossary

**Corporate social responsibility (CSR):** a programme or method in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal processes and in their interaction with other actors.<sup>1</sup> A company's verifiable commitment to operating in an economically, socially and environmentally sustainable manner, that is transparent and increasingly satisfying to its stakeholders.<sup>2</sup>

**Forced or compulsory labour:** "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."<sup>3</sup>

**Labour exploitation:** while the term "labour exploitation" has not been defined in international law, the term "trafficking for labour exploitation" is understood to both refer to the trafficking in human beings for purposes referred to as forced labour or services, slavery or practices similar to slavery, and servitude, as well as other forms of economic exploitation that may be indicators of or lead to such practices<sup>4</sup>. Furthermore, the European Fundamental Rights Agency has defined the term "severe labour exploitation" as "all forms of exploitation that are criminal under the legislation of the Member State in which the exploitation occurs"<sup>5</sup>. Note that the term "labour exploitation" is also sometimes used to refer to a wider range of violations of labour standards or laws that do not rise to the level of crimes or trafficking in human beings, such as wage theft and certain types of hazardous working conditions and unethical recruitment practices.

**Public procurement:** the public sector's purchasing of the goods and services it needs to carry out its functions. It comprises three main phases: procurement planning, the procurement process, and implementation and management.<sup>6</sup>

**Supply chain:** "[...] the network of organizations that cooperate to transform raw materials into finished goods and services for consumers" and, "[...] flows of materials that are processed, transported, and otherwise transformed by a series of organizations into higher value products".<sup>7</sup>

**Global supply chains:** the cross-border organization of the activities required to produce goods and services, and bring them to consumers through various phases of development, production and delivery. This definition includes foreign direct investment (FDI) by multinational enterprises (MNEs) in wholly owned subsidiaries or in joint ventures in which the MNE has direct responsibility for the employment relationship. It also includes the model of international sourcing where the engagement of lead firms is defined by the terms and conditions of contractual or sometimes tacit arrangements with their suppliers and subcontracted firms for specific goods, inputs and services.<sup>8</sup>

**Value Chain:** "A business's value chain encompasses the activities that convert inputs into outputs by adding value. It includes entities with which the business has a direct or indirect business relationship and which either a) supply products or services that contribute to the business's own products or services [conventionally known as a 'supply chain'], or b) receive products or services from the business [conventionally known as a production chain]".<sup>9</sup>

**Sustainable public procurement (SPP):** a process by which public organizations meet their needs for goods, services,

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1 (ILO Governing Body GB. 295/MNE/2/1, 295th Session, Geneva, March 2006)

2 (OSCE, Situation Analysis on Corporate Social Responsibility in Albania: Current Practices and Challenges of Extractive Industries, Albania: OSCE, 2013)

3 The ILO's Forced Labour Convention, 1930 (No. 29), states in Article 2, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"

4 EU-ILO. "Operational indicators of trafficking in human beings." ILO. March 2009. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_105023.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf)

5 "Severe labour exploitation: workers moving within or into the European Union ." FRA. March 2016. Accessed February 06, 2018. <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union>.

6 Public Procurement and Human Rights, A Survey of Twenty Jurisdictions, July 2016, International Learning Lab on Public Procurement and Human Rights; and the Swedish National Agency for Public Procurement

7 (OECD, *Supply Chains and the OECD Guidelines for Multinational Enterprises: BSR Discussion Paper on Responsible Supply Chain Management*, (France: OECD, 2010))

8 "ILC.105/IV Decent Work in Global Supply Chains." ILO. 2016. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_468097.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf).

9 "Children's rights and business principles." UNICEF. Accessed February 06, 2018. <https://www.unicef.org/csr/47.htm>

works and utilities in a way that achieves value for money on a whole life cycle basis in terms of generating benefits not only to the organization, but also to society and the economy, whilst significantly reducing negative impacts on the environment.

Sustainable Procurement should consider the environmental, social and economic consequences of: design; non-renewable material use; manufacture and production methods; logistics; service delivery; use; operation; maintenance; reuse; recycling options; disposal; and suppliers' capabilities to address these consequences throughout the supply chain".<sup>10</sup>

### **Trafficking in human beings (also "trafficking in persons", "human trafficking" or THB):**

(a) "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age".<sup>11</sup>

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<sup>10</sup> (UNEP, The Sustainable Public Procurement Programme of the 10-Year Framework of Programmes (10YFP SPP Programme): Principles of Sustainable Public Procurement, 2015).

<sup>11</sup> The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000 (the "Palermo Protocol")



# Executive Summary

## a. Background

Trafficking in human beings is a human rights abuse and a lucrative crime that can be found in the production of goods, and in the delivery of services we consume. Today's globalized economy is characterized by complex supply chains, with goods, materials and labour sourced from all around the world. It can be difficult for buyers and consumers to be sure that the goods or services they purchase or procure were not produced by trafficked labour. Therefore, addressing this issue of trafficking in human beings in supply chains is an area of urgent concern.

A recent report by the International Trade Union Confederation (ITUC) indicates that just 50 companies with a combined revenue of 3.4 trillion USD may have a hidden workforce of 116 million people in their global supply chains. That is, according to the report, "The global supply chains of 50 companies employ only six percent of people in a direct employment relationship, yet rely on a hidden workforce of 94 percent".<sup>12</sup> Thus, while the economic power of these companies is staggering, the potential for labour abuse in the hidden workforce is also very high. The ILO estimates that at least some USD 150 billion of profits are made by forced labour, two thirds (USD 99 billion) by commercial sexual exploitation, while another USD 51 billion resulted from forced economic exploitation, including domestic work, agriculture and other economic activities.<sup>13</sup>

There has been a clear realization that business organizations as well as governments have responsibilities in the area of human rights. The significant development of the global movement against trafficking in human beings, forced labour and modern slavery has provided a further impetus for addressing the worst forms of exploitation in business supply chains. These risks may also be present in the goods and services that businesses provide to public authorities. Public procurement authorities are thus also recognizing the need for inclusion of social conditions, in line with societal expectations, in contracts with vendors for goods and services. Such measures expand a traditional "value for money" approach and recognize that companies that supply goods and services to public authorities, utilizing taxpayer funds, should be expected to uphold human rights related values in their operations. However, as is summarized in this paper, attaching such societal expectations to public procurement processes is complex and varies by jurisdiction across OSCE participating States.

Over the past decade, the Organization for Security and Co-operation in Europe, and its Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings has taken an important lead in improving understanding of trafficking in human beings for labour exploitation, and of the measures required to prevent and combat it more effectively. The OSCE has adopted several Ministerial Decisions focused on these aspects of trafficking in human beings, which include the 2013 *Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later*, and its commitments pertaining to procurement for participating States as well as for the OSCE Executive Structures. Governments turn to the OSR/CTHB to provide assistance to them in implementing the Organization's anti-trafficking

"Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking in Persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"

*\*United Nations Office on Drugs and Crime (UNODC)*

12 "New ITUC report exposes hidden workforce of 116 million in global supply chains of fifty companies." International Trade Union Confederation (ITUC) . January 18, 2016. Accessed February 06, 2018. <https://www.ituc-csi.org/new-ituc-report-exposes-hidden>.

13 "Profits and Poverty: The Economics of Forced Labour." ILO. May 20, 2014. Accessed February 06, 2018. [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_243391/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm)

political commitments. The Office has undertaken a number of projects as one of the ways to provide that assistance.

The OSR/CTHB developed a targeted project aimed at providing participating States with practical tools to enact concrete measures to prevent trafficking in human beings in supply chains, as well as build their capacity to implement these measures. Over 2016-2017 the OSCE implemented the project, *Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures*, under which it has convened conferences, consultations and workshops with multiple stakeholders to raise awareness, build capacity, exchange practices, and to develop this guidance for participating States, business leaders and other advocates with the goal of preventing trafficking in human beings for labour exploitation in supply chains.

Taking the input gleaned through these various activities and additional research, this document summarizes how trafficking of human beings for labour exploitation (THB/LE) can be prevented through fair and ethical labour recruitment, public procurement reform and increased transparency in supply chains. It contains related model laws and clauses for OSCE participating States and provides recommendations on strategies to implement such measures. The guidance aims to assist OSCE participating States and Partners for Co-operation in developing and implementing appropriate legal and policy frameworks to address THB/LE in supply chains through government measures, with a focus on public procurement and transparency practices. The model guidelines presented contain a model law, including model clauses that cover public procurement, ethical labour recruitment, monitoring and evaluation, enforcement and supply chain transparency that are and can be used by OSCE participating States. Additional related resources can also be found in the Annex.

## b. Outline & Findings

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This document elaborates guidance for States in order to meet initial challenges to:

- address THB and labour exploitation in supply chains in public procurement policies;
- enhance transparency in supply chains;
- protect workers' rights and promote fair and ethical labour recruitment.

For each area of focus, the document summarizes common policy concerns and provides operational guidance for addressing issues at national levels and offers the following specific guidance and presents guidelines to achieve these goals.

- **Planning Public Procurement Policies, Specific Guidelines (Chapter 3b):** At each of the following steps, the document explains how States can intervene and promote human rights in supply chains:
  - planning;
  - the procurement phase;
  - implementation and follow-up.
- **Enhanced Transparency in Supply Chains (Chapter 3c):** Details expectations of businesses and incentives for companies that States can employ:
  - oblige business enterprises to adopt a THB/LE preventive policy;
  - specifications for content and publication criteria of a company's THB/LE preventive policy;
  - consideration of mechanisms to monitor adherence and incentivize compliance through rewards;
  - imposition of sanctions for non-compliance and oblige remedy for victims;
  - integration of disclosed information into decision-making related to the purchase of goods.

- **Fair and Ethical Recruitment & Labour Market Protection (Chapter 3d):** Identifies examples of emerging practices and offers guidance:
  - overall labour recruitment approaches should be guided by internationally accepted human rights and labour standards, including but not limited to the ILO's core conventions that include freedom of association and collective bargaining, non-discrimination in occupation and employment, elimination of child labour, forced labour.<sup>14</sup>;
  - labour administration and inspection should be strengthened through innovative mechanisms to protect workers' rights;
  - fair and ethical recruitment should be promoted through regulation and monitoring of private and third party employment agencies, contractors and subcontractors;
  - illicit recruitment practices should be identified and curbed, particularly in cases where workers may be charged fees or make other payments to secure employment.

The document concludes by outlining implementation strategies for the guidelines provided, including monitoring and effective regulations as key tactics that states can employ. The suggested strategies and considerations identify a number of recommended activities and measures that can be initiated at the national level.

## **c. Audience & Implementation**

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The primary audience of this document are the governments of the OSCE participating States and Partners for Co-operation, including policy makers, such as national anti-trafficking co-ordinators and equivalent structures, lawmakers and public procurement officials and authorities, as well as labour inspectors, judges, prosecutors, customs officers, and border officers. The secondary target audience includes other partners and stakeholders in the OSCE region such as International Organizations, NGOs, think tanks, academia and research institutions, the private sector, trade unions, social workers, teachers, medical staff, and other service-providers, journalists, human rights activists and those responsible for procurement in any organization. We hope that the guidance offered in this document will prove useful to governments and other stakeholders as they supplement and strengthen effective measures to help eliminate forced labour and the trafficking of human beings in areas of their jurisdictional control.

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<sup>14</sup> "About the Declaration." ILO. Accessed February 06, 2018. <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>



# Introduction

The information and model guidelines presented in this document seek to assist OSCE participating States and Partners for Co-operation in developing and implementing appropriate legal and policy frameworks to address trafficking of human beings for labour exploitation in government and corporate supply chains, including the relevant OSCE CTHB commitments. The overall goal is to promote harmonization of regulatory practices across jurisdictions as related laws and policies are being developed in additional countries. This may also lessen the burden on businesses that have to comply with different laws in different countries, and encourage further compliance. The report emphasizes government measures concerned with public procurement, promoting transparency in supply chains and the responsible, fair and ethical recruitment of workers.

Over the past decade, the OSCE and its Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings has taken an important lead in raising awareness of the labour dimensions of trafficking in human beings, and of the measures required to prevent and combat it more effectively. This has been part of broad-based international efforts to address the problems, together with partner organizations, such as the Council of Europe (CoE), the Council of the Baltic Sea States (CBSS), the International Centre for Migration Policy Development (ICMPD), the International Labour Organization (ILO), International Organization for Migration (IOM), and the United Nations Office on Drugs and Crime (UNODC), which are all part of the *Alliance* against Trafficking in Human Beings.

The development of these model guidelines is part of an overall effort conducted by the OSR/CTHB over several years to promote the prevention of trafficking in human beings for labour exploitation. The OSCE has adopted strong commitments and recommended actions on combating trafficking for labour exploitation, including in supply chains (see section b. below for more information). In 2010 the OSR/CTHB published “Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude”, that further details specific forms of labour exploitation. In November 2014, the OSR/CTHB also published the 7<sup>th</sup> Occasional Paper “Ending Exploitation: Ensuring that Businesses Do Not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector.” The paper was launched at the 14th High-level *Alliance* against Trafficking in Persons conference “Ethical issues in Preventing and Combating Human Trafficking”.

This OSCE project has built upon these activities and has made strategic linkages – from research to policy to practice – including a series of capacity building workshops; a compilation of a compendium of relevant materials on available promising practices on the subject; and the model guidelines themselves which include a suggested strategy and considerations to encourage their adoption and implementation at the national level.

The *Alliance* against Trafficking in Persons is a broad international forum that includes national stakeholders, international, non-governmental and inter-governmental organizations as well as trade unions and academics in joining forces to combat trafficking in human beings. As a platform for advocacy and co-operation, it was launched in 2004 to improve synergy in responding to this heinous crime which violates human rights and undermines the rule of law, human security and good governance throughout the region.

It helps to develop effective joint strategies, combines individual efforts, and provides all 57 OSCE participating States and 11 Mediterranean and Asian Partners for Co-operation with innovative and co-ordinated approaches to strengthen the prevention of trafficking in human beings, the fight against it and the protection of its victims.

\* Please see link to *Alliance* against Trafficking in Persons for more information and the full list of partners

\*\* <http://www.osce.org/secretariat/107221>

## a. Purpose

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In a 2016 publication, “Global Report on Trafficking in Persons”, the United Nations Office on Drugs and Crime finds that “Countries in Western and Southern Europe detected victims of 137 different citizenships”.<sup>15</sup> Affluent areas – such as Western and Southern Europe, North America and the Middle East – detect victims from a large number of countries around the world. These findings lead the UNODC to conclude that “No country is immune to trafficking in persons.”

The subject is complex, and one on which a limited number of OSCE States have so far adopted specific measures. It is nevertheless a subject of considerable importance – not least in view of the significant proportion of public procurement in overall Gross Domestic Product (GDP) in many countries, and also a subject on which some OSCE States have requested more specific guidance.

In recent years, States have given more attention to the labour dimensions of trafficking in human beings. These include: the means to identify it; prevent its occurrence; legislate against abusive practices; establish remedies including grievance procedures and compensatory mechanisms; and, punish offenders through appropriate forms of justice. There is, however, a growing realization that action and guidance is now required on different aspects of the public procurement process. Therefore, the OSCE has developed these model guidelines, which include:

1. overall guidance concerning the means to ensure that human rights and social considerations in general, and the concerns of trafficking in human beings in particular, are integrated into laws, regulations and policies concerning responsible, fair and ethical labour recruitment, public procurement and transparency in supply chains;
2. operational guidance to assist States in taking the relevant steps throughout the cycle of the public procurement process, encouraging business transparency and promoting fair and ethical recruitment, respecting the diverse circumstances of different OSCE participating States.

## b. International & National Level Contexts

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These initiatives by the OSR/CTHB are in the context of other measures and commitments, within the framework of both the OSCE itself and other international organizations and fora. Obligations of States to prevent, investigate and punish THB are defined in various international instruments. States implement these obligations by passing policy regimes that companies and other entities in their jurisdictions have to abide by.<sup>16</sup>

A core instrument is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, otherwise known as the “Palermo Protocol” (UNTOC).<sup>17</sup> Article 9 of the Protocol requires States to establish comprehensive policies and programmes to prevent THB. Prevention also means that States have an obligation to discourage the demand that fosters all forms of exploitation (Article 9, para. 5). The following sets of States’ measures are examples of those that have an effect on discouraging demand: public procurement policies, specifying the obligations of companies including laws that oblige companies to disclose reports about their anti-trafficking policy, and regulating recruitment.<sup>18</sup>

Furthermore, the UNTOC obliges States to establish the liability of legal persons for participation in “serious crimes involving an organized criminal group” (Article 10 para. 1) and for crimes related to THB as established under the

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15 “2016 Global Report on Trafficking in Persons.” UNODC. December 2016. Accessed February 06, 2018. [http://www.unodc.org/documents/data-and-analysis/glotip/2016\\_Global\\_Report\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf).

16 UN General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, A/70/260 (3 August 2015), para. 40.

17 “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.” OHCHR. 2000. Accessed February 06, 2018. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>.

18 CoE, Emerging Good Practice by State Authorities, the Business Community and Civil Society in the Area of Reducing Demand for Human Trafficking for the Purpose of Labour Exploitation, M. Dottridge (June 2016), pp. 3 and 10.

“Palermo Protocol”.<sup>19</sup> The Convention suggests criminal, civil or administrative liability (Article 10 para. 2). At the regional level, the Council of Europe Convention on Action against Trafficking in Human Beings establishes corporate liability for THB (Article 22 CoE Convention against THB)<sup>20</sup>.

Furthermore, by linking obligations based on international instruments related to THB with the States’ obligation to protect, as defined in the UN Guiding Principles on Business and Human Rights, the UN Special Rapporteur on trafficking in persons has endorsed benchmarks and indicators for ensuring trafficking-free supply chains. These guidelines should help businesses exercise due diligence in their supply chains in order to detect and prevent trafficking cases.<sup>21</sup> In June 2013, the Human Rights Council adopted a resolution that calls upon States and businesses to strengthen legislation and initiatives in order to combat trafficking for the purpose of labour exploitation, including in supply chains.<sup>22</sup> As outlined by the UN Special Rapporteur, States should have general rules in place requiring companies to respect human rights. Furthermore, States should: revise their procurement policies; tackle and further strengthen disclosure requirements for companies mandating them to report on their anti-trafficking policies; and, establish a system of recruitment agency licensing to regulate and discourage worker-paid recruitment fees.<sup>23</sup>

The ILO has a specific mandate for international labour standards and the protection of workers. It has developed a standards-based approach to help member states address child and forced labour and trafficking in human beings, and the unacceptable forms of work increasingly referred to as severe labour exploitation. The four principles contained in its 1998 Declaration on Fundamental Principles and Rights at Work (covering, respectively, freedom of association and collective bargaining, non-discrimination at the workplace and the elimination of forced labour and child labour) have been widely accepted by pertinent international organizations and financial institutions, and national governments, as a benchmark for the integration of social standards and labour rights in procurement policies and contracts.

Beyond these core instruments, the ILO has a number of other important Conventions that can serve to guide labour protection in public procurement including Convention num. 94 (1949) on labour clauses in public contracts that received 63 ratifications. In 2014 the ILO adopted a Protocol (P029) and a Recommendation (No. 203) supplementing and updating the Forced Labour Convention num. 29 (1930). Amongst other regulations, the Protocol “requires governments to take measures to better protect workers, in particular migrant labourers, from fraudulent and abusive recruitment practices and emphasizes the role of employers and workers in the fight against forced labour”. The Recommendation provides additional orientation for Members to develop national policies and plans of action, particularly in consultation with employers and workers’ organizations. It also instructs Members to undertake efforts to ensure that labour inspection services are strengthened in this regard.

The ILO determines 11 indicators of Forced Labor to help front-line “law enforcement, labour inspectors, trade union offices, NGO workers and others” to identify persons who may be victims:

1. Abuse of vulnerability
2. Deception
3. Restriction of movement
4. Isolation
5. Physical and sexual violence
6. Intimidation and threats
7. Retention of identity documents
8. Withholding of wages
9. Debt bondage
10. Abusive working and living conditions
11. Excessive overtime

\* *ILO Indicators of Forced Labour, Special Action Programme to combat Forced Labour*

The ILO has also embarked on its Fair Recruitment Initiative, encompassing both cross-border and national recruitment,<sup>24</sup> which compiles and promotes examples of good practices that have successfully addressed unethical recruitment mechanisms.<sup>25</sup> The ILO Fair Recruitment guidelines are treaty-based obligations stemming from international conventions

19 Gallagher Anne, Skrivankova, Klara, “Human Rights and Trafficking in Persons – 15th Informal ASEM Seminar on Human Rights” (2015), p. 62.

20 Council of Europe Treaty Series (CETS) No. 197, adopted 16 May 2005, entered into force 1 February 2008 (thereinafter CoE Convention against THB).

21 Human Rights Council, ‘Report of the Special Rapporteur on trafficking in persons, especially women and children – Expert consultation on human trafficking and global supply chains’, A/HRC/23/48/Add. 4 (4 March 2013).

22 Human Rights Council, ‘Trafficking in persons, especially women and children: efforts to combat human trafficking in supply chains of businesses’, A/HRC/RES/23/5 (19 June 2013).

23 UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/70/260 (3 August 2015), para. 40.

24 “ILO adopts new Protocol to tackle modern forms of forced labour.” ILO. June 11, 2014. Accessed February 06, 2018. [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_246549/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_246549/lang--en/index.htm).

25 “Fair Recruitment Initiative: Fostering fair recruitment practices, preventing human trafficking and reducing the costs of labour migration.” ILO. November 2017. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_320405.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_320405.pdf).



to provide guidance to governments, worker's and employer's organizations, labour brokers and companies. The ILO is currently working on a definition that will provide guidance on the legitimacy and limits of "fees" that are charged to workers. The U.S. government is also working on a definition of "recruitment fees" to clarify its use in the Federal Acquisition Regulation, "Ending Trafficking in Persons".

In addition, in 2015, the global community adopted the 2030 Sustainable Development Goals (SDG), a series of seventeen goals and 169 targets to guide inclusive global development, including three targets which address trafficking in human beings, Targets 5.2, 8.7 and 16.2. Target 8.7 calls for the elimination of child labour by 2025 and forced labour by 2030. The Target 8.7 leaders, Alliance 8.7, have committed to "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".<sup>26</sup> Subsequently, Alliance 8.7 has formed the "Supply Chain Action Group" chaired by the ILO, of relevant stakeholders that began a series of workshops in 2017 to establish a five-year work plan and deliverables.

In 2017 the UN Security Council unanimously adopted Resolution 2388 (2017) reiterating its condemnation of trafficking in persons. The Resolution also "calls upon United Nations system organizations to enhance transparency in their procurement and supply chains and step up their efforts to strengthen protections against trafficking in persons in all United Nations procurement and to that effect request major suppliers to establish and implement anti-human trafficking policies...".<sup>27</sup>

The OSCE itself, while adopting strong commitments on all aspects of trafficking for labour exploitation has highlighted in particular the importance of measures to prevent trafficking in human beings in government procurement of goods and services. The 2011 Vilnius Ministerial Declaration on Combating All Forms of Trafficking in Human Beings, while encouraging the dissemination and implementation of the UN Guiding Principles on Business and Human Rights, encourages governments to consider incorporating similar standards in government procurement of goods and services. The 2013 *Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later* included ground-breaking provisions related to procurement for participating States as well as for OSCE structures. It was the first such commitment made by a multilateral organization, and reflects governments' commitments around policies and other similar standards for the public procurement of goods and services. In July 2015, the OSCE Parliamentary Assembly adopted its Resolution on Responsibility to Combat Human Trafficking in Government Contracts for Goods and Services. Among other measures, this Resolution calls on participating States to "require by law and regulation that all government contracts for goods and services go only to businesses that have a plan in place to ensure that their subcontractors and employees do not participate in activities that contribute to or that constitute human trafficking".<sup>28</sup> More recently, in December 2017, the OSCE Ministerial Council adopted a Ministerial Decision on Strengthening Efforts to Prevent Trafficking in Human Beings that calls on participating States to develop targeted prevention policies; promote co-operation among governments, civil society and international organizations; develop harmonized procedures across States; and, to continue to use the OSCE as a platform for judicial and law enforcement co-operation.

Within this context of high level initiatives that are setting standards and goals, raising awareness and expectations, this report aims to assist participating OSCE States to translate principles into clear laws, policies and practices.

## c. Methodology

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The model guidelines were developed based on desk research and inputs, including concrete cases, lessons learned, and recommendations, from experts from OSCE participating States in the course of discussions during the series of workshops held under the project, the *Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures*.

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26 Accessible at <https://www.alliance87.org/>

27 "Security Council Reiterates its Condemnation of Trafficking in Persons, Unanimously Adopting Resolution 2388 (2017)." UN. November 21, 2017. Accessed February 06, 2018. <https://www.un.org/press/en/2017/sc13081.doc.htm>.

28 OSCE Parliamentary Assembly, *Resolution on Responsibility to Combat Human Trafficking in Government Contracts for Goods and Services*, (Helsinki: OSCE PA, 2015), para. 15.

# Background

## a. Current Challenges & Issues

In 2017 in Hamburg Germany, the leaders of the world's twenty major global economies (the G20) released the G20 Leader's Declaration after many months of discussion and negotiation regarding issues affecting the global economy. High on the list is "addressing sustainable supply chains, internationally active companies, and adherence to the fundamental labour, social and environmental standards".<sup>29</sup> As concluded by the 105<sup>th</sup> session of the International Labour Conference in Geneva in 2016, global supply chains are complex, diverse and fragmented. Facilitated by technological developments and increased access to markets and labour, supply chains are spread across international borders. Multiple sectors benefit from global production, including: textile, clothing, retail, footwear, extractive, automotive, food and agriculture, seafood, fisheries, electronics, construction, tourism and hospitality, horticulture, transport and others. While the benefits are incontrovertible, this complexity also has bred some negative aspects:

*"Failures at all levels within global supply chains have contributed to decent work deficits in the areas of occupational safety and health, working time, and which impact on the employment relationship and the protections it can offer. Such failures have also contributed to the undermining of labour rights, particularly freedom of association and collective bargaining. Informality, non-standard forms of employment and use of intermediaries are common. A company at the top of a supply chain may operate ethically with its direct workforce but not recognize, or take an interest in the conditions of the workers involved in the production of commodities and components produced in a number of countries, which feed into the final product that is retails. The presence of child labour and forced labour in some global supply chains is acute in the lower segments of the chain. Migrant workers and homeworkers are found in many global supply chains and may face various forms of discrimination and limited or no legal protection".<sup>30</sup>*

A 2015 report details three most serious forms of labour exploitation tied to the globalization of production, including servitude and forced or compulsory labour.<sup>31</sup> However, while there has been a growing body of thematic and country-specific research on the subject of trafficking in human beings for labour exploitation, it has often been a challenge for States to identify specific cases of such exploitation, and to determine the appropriate response.

Another 2015 report finds that the various types of labour exploitation form a continuum of severity of abuses spanning from slavery to less serious mistreatment.<sup>32</sup> These widespread and systemic practices of alleged abuse in employment relationships and in global supply chains are attracting more attention from human rights and labour advocates, businesses and governments. However, abusive labour practices, though widely identified as being at the root of severe exploitation are very often not explicitly prohibited in national laws and regulations or such prohibitions are not adequately enforced.

The challenges inherent in global production and supply chain complexity are exacerbated by weak rule of law and governance issues caused by corruption. That is, the inability of States to hold accountable corrupt and exploitative

29 "Priorities of the 2017 G20 Summit." [www.bundesregierung.de](http://www.bundesregierung.de). December 1, 2016. Accessed February 06, 2018. [https://www.bundesregierung.de/Content/DE/\\_Anlagen/G7\\_G20/2016-g20-praesidentschaftspapier-en.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesregierung.de/Content/DE/_Anlagen/G7_G20/2016-g20-praesidentschaftspapier-en.pdf?__blob=publicationFile&v=2).

30 International Labour Conference, Provisional Record, 105th. Session, Geneva, May-June 2016. Reports of the Committee on Decent Work and Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference.

31 FRA, "Severe labour exploitation: workers moving within or into the European Union: States' obligations and victims' rights", (Vienna, FRA, 2015); See also: Skrivankova, Klara. "Between decent work and forced labour: examining the continuum of exploitation." JRF. November 13, 2017. Accessed February 06, 2018. <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation>.

32 FRA, "Severe labour exploitation: workers moving within or into the European Union: States' obligations and victims' rights", (Vienna, FRA, 2015); See also: Skrivankova, Klara. "Between decent work and forced labour: examining the continuum of exploitation." JRF. November 13, 2017. Accessed February 06, 2018. <https://www.jrf.org.uk/report/between-decent-work-and-forced-labour-examining-continuum-exploitation>.

labour agents, production facility owners and managers who violate local labour laws, or government officials who collude with such actors. Such corruption stalls good efforts and can counter the implementation of progressive policies. The OSCE thus passed a Ministerial Council decision (MC. DEC/4/16), “Strengthening Good Governance and Promoting Connectivity” that reaffirms its commitments to good governance and highlights the “...determination to fight trafficking in human beings in all its forms, and [recognizes] the role that transparency and accountability in public procurement processes can play in preventing and combating human trafficking and labour exploitation.”<sup>33</sup> The Ministerial Council recognizes corruption as a challenge, and encourages participating States to work with the private sector to implement internationally recognized labour standards and acknowledges the key role that global trade and good supply chain policies and practices can play in eliminating THB/LE.

## 1. Risks in Public Procurement

Public procurement is described as “purchasing by government from private sector contractors, usually on the basis of competitive bidding, of goods and services that government needs”.<sup>34</sup>

The exact proportion of public procurement in a country’s GDP can be difficult to assess. An information brief by trade specialists from the European Union<sup>35</sup> observes generally that public procurement is a major component of public spending, with a sizeable impact on total demand of any domestic economy<sup>36</sup>. Public procurement covers a wide range of industries, goods and services and spending is vast.<sup>37</sup> According to a 2013 EU report “government procurement expenditures” account to almost 14 percent of GDP in the EU and 10 percent in the U.S. Furthermore, according to the report, “the total public procurement spending (including state-owned enterprises) accounted for 2.4 trillion Euros, corresponding to 19 percent of EU GDP in 2011.”<sup>38</sup>

Governments may buy products or services whose production or delivery is associated with human rights abuses. A 2016 publication by the International Learning Lab on Public Procurement and Human Rights finds that “...over recent years governments have been increasingly implicated in human rights abuses spanning sectors including electronics and ICT, apparel, healthcare, infrastructure and agriculture via their supply chains.”<sup>39</sup>

Depending on the sector, such as apparel, electronics or food processing, all of which affect public procurement, different human rights abuses might be more likely to occur than others. Child labour, violations of labour rights, excessive working hours or THB/LE can all take place in these sectors.<sup>40</sup> While there are no estimates of

Verité also provides an overview of the risk of THB/LE in federal and corporate supply chains related to over 40 different commodities, including coffee, cotton and rubber. Verité summarizes the key risk factors for human trafficking in global supply chains:

- Hazardous/undesirable work;
- Vulnerable, low-skilled, easily replaced workforce;
- Migrant workforce;
- Presence of labour contractors, recruiters, agents or other middlemen in labour supply chains;
- Long, complex and/or non-transparent product supply chains;
- Substantial sourcing or subcontracting in high risk countries.

[www.responsiblesourcingtool.org](http://www.responsiblesourcingtool.org)

33 “Decision No.4/16 - Decision on Strengthening Good Governance and Promoting Connectivity.” OSCE. December 09, 2016. Accessed February 06, 2018. <http://www.osce.org/cio/289316>.

34 McCrudden, Christopher, *Buying social justice – Equality, Government Procurement, & Legal Change* (2007, Oxford: OUP), p. 3.

35 Cernat, Lucien, Kutlina-Dimitrova, Zornitsa, “International Public Procurement: From Scant Facts to Hard Data”, *Chief Economist Note*, Issue 1, April 2015, (EU Trade, 2015).

36 Public procurement represents approximately one third of total government expenditures in OECD countries. In 2013, government procurement expenditures amounted to an average of almost 14% of GDP in the European Union, and to over ten % of GDP in the United States. But the authors observe that actual public procurement spending is higher, as national accounts aggregates do not include procurement spending of public utilities providers. In the European Union, total public procurement spending, including state-owned enterprises, accounted for 2.4 trillion Euros or almost 19% of GDP in 2011. In the Russian Federation, according to OECD figures, government procurement is over 12% of GDP and almost 30% of total government expenditures.

37 OECD, “Size of Public Procurement”, *Government at a Glance 2015*, (Paris: OECD Publishing, 2015).

38 Cernat, Lucian, and Zornitsa Kutlina-Dimitrova. “International Public Procurement: From Scant Facts to Hard Data.” European Commission. April 2015. Accessed February 02, 2018. [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153347.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153347.pdf).

39 “Public Procurement and Human Rights: A Survey of Twenty Jurisdictions – Learning Lab.” International Learning Lab. July 19, 2016. Accessed February 06, 2018. <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/>.

40 For an overview of human rights abuses in the agriculture and seafood sector see Stumberg, Robert, Ramasastry, Anita, Roggensack, Meg, *Turning a Blind Eye – Respecting Human Rights in Government Purchasing*, (ICAR, 2014), pp. 15-16.

profits generated from forced labour exploitation, there are approximations by sectors and types of economic activity, including sexual exploitation.<sup>41</sup> At the global level, in 2014 the ILO estimated that overall profits from the exploitation of forced labour generated traffickers at least U.S.\$150 billion.<sup>42</sup> Estimated annual profits are highest in developed economies and the EU followed by the Asia-Pacific region.<sup>43</sup>

At the national level, the NGO Verité has provided estimates of the risk of trafficking in human beings in U.S. federal supply chains.<sup>44</sup> To prepare for the implementation of a 2012 U.S. Executive Order, “Strengthening Protections Against Trafficking In Persons In Federal Contracts”, Verité was contracted by the U.S. Government to investigate and map out both sector-specific risk factors, and those associated with specific federal supply chains. The sectors with significant federal procurement and significant risk of trafficking in human beings were identified as: agriculture; construction; electronics and electrical products manufacturing; extractives/mining and basic metals production; fishing and aquaculture; forestry; healthcare; hospitality; housekeeping/facilities operation; textile and apparel manufacturing; and transportation and warehousing.

Finally, and running parallel with these developments, ILO reports detect a significant and growing international movement to apply labour standards to public contracting as well as to private contracting in public-private partnerships.<sup>45</sup> These fall under a variety of names such as “sustainable public procurement (SPP)” or “social considerations in public contracts”. Some invoke the ILO’s fundamental principles and rights at work,<sup>46</sup> others give more concrete and practical guidelines, but none referred to or were in line with Convention No. 94 concerning Labour Clauses in Public Contracts.<sup>47</sup>

## 2. Risks in Labour Recruitment

In addition to ILO findings, the UNODC and various NGOs including the Institute for Human Rights and Business (IHRB) and the Issara Institute have also identified concerns over non-standard forms of employment and their implications for adequate labour protection in supply chains. As observed in the ILO’s recent survey of supply chains, suppliers may respond to external pressures and unpredictable production schedules through the use of non-standard forms of employment to ensure that demand is met.<sup>48</sup> Such forms of employment have grown in many global supply chains. Demand is often met and flexibility increased through various means, including greater use of part-time, temporary, casual, and zero-hour contracts.<sup>49</sup> The use of non-standard forms of employment presents significant regulatory challenges: employers may choose not to comply with protective labour legislation owing to the precarious nature of their orders and the labour inspectorate may face difficulty in enforcing the application of work outsourced to home workers, informal labour contractors or in the challenging specificities of rural work.

In this ILO report, furthermore, serious concerns are expressed with regard to migrant workers, who are often found in non-standard forms of employment:

*“The increasing cross-border flows of workers have also resulted in a greater risk of forced labour and trafficking in persons. While most companies proactively avoid illegal employment practices, there is a risk that they may become associated with forced labour through business links to suppliers (including suppliers of labour) and contractors who may conceal unlawful practices.”*

41 The profits from forced sexual exploitation are estimated to amount to US\$99 billion per year. Victims of forced labour exploitation, including domestic work, agriculture and other economic activities, generate an estimated US\$51 billion in profits per year. Out of these the profits from forced labour in agriculture, including forestry and fishing, are estimated to be US\$9 billion per year. Profits from other economic activities are estimated at US\$34 billion per year, encompassing construction, manufacturing, mining and utilities.

42 ILO, *Profits and Poverty: the Economics of Forced Labour*, (Geneva: ILO, 2014).

43 Ibid p. 21

44 Verité, *Strengthening Protections against Trafficking in Persons in Federal and Corporate Supply Chains*, (Verité, January 2015).

45 “Labour Clauses in Public Contracts: Integrating the Social Dimension into Procurement Policies and Practices.” ILO. 2008. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_091400.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_091400.pdf).

46 In 1998 the ILO adopted its Declaration on Fundamental Principles and Rights at Work. At a time when there had been intensive debates over the inclusion of a social clause in international trade agreements, the ILO was under pressure to identify from its large range of Conventions those core labour standards to which particular importance should be attached as fundamental human rights instruments. The 1998 ILO Declaration, drawing on relevant Conventions on the subjects, covers the four concerns of: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

47 2014 Interagency Roundtable on CSR. “Sustainable public procurement as a tool for promoting responsible business.” ILO. November 19, 2014. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_323469.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_323469.pdf).

48 ILO, *Decent Work in Global Supply Chains*, (Geneva: ILO, 2016 (as above)), paras. 66-74.

49 The term “zero-hour” contracts refers to contractual situations in which the worker must be available at any time, but only remunerated for the work hours that are actually performed.



A key concern identified is the charging of recruitment fees by labour agencies and brokers to workers for job placement. Fees may include costs of travel, visas and administrative costs, and other unspecified charges. Such fees can be substantial and compel workers desperate for economic opportunity to take out loans at high interest rates to pay brokers just to get a job. According to the IHRB, “large recruitment fees can leave workers in situations of debt bondage, a form of forced labour in which a person’s labour is demanded as means of repaying a loan, trapping the individual into working for little or no pay until the debt is repaid”.<sup>50</sup> Thus, the first principle established by the “Dhaka Principles for Migration with Dignity” established to respect the human rights of migrant workers during overseas employment is “No fees are charged to migrant workers” and that the “Employer should bear the full costs of recruitment and placement”.<sup>51</sup>

Furthermore, in a 2017 report on labour recruitment, The Interfaith Center on Corporate Responsibility details the exploitation that migrant workers face in global supply chains:

*“Poverty, displacement, job scarcity and wage disparity all create financial burdens for workers at the bottom of global supply chains that may drive them across borders seeking jobs. The ILO estimates that over 150 million workers left their home countries in 2013 in search of a job, and that number is increasing every year. Unethical recruiters often charge workers the equivalent of thousands of dollars in fees to secure employment. These fees could cover a range of services from work placement to orientation, transportation to the country, daily transportation to the worksite, housing and other services. Migrant workers in fear of being deported, without access to adequate grievance mechanisms in their host countries, are prime targets for exploitation as forced laborers. This exploitation takes a number of forms including debt bondage, collateral, illegal deductions from wages and confiscated or restricted access to travel documents like passports, permits and visas that limit workers’ freedom of movement.”<sup>52</sup>*

Other research and experiences of NGOs like the Issara Institute in Thailand document the vulnerabilities and exploitation of migrant workers to fill labour shortages in a variety of industries including construction, agriculture, seafood and manufacturing.<sup>53</sup> Some of these migrant workers are trafficked across borders to job locations, others are recruited while in country by labour brokers who take advantage of poverty, cultural, social and economic barriers and immigration status. Many of these workers end up employed in production facilities tied to the supply chains of global companies.

### 3. Risks Regarding Transparency in Supply Chains

Any company, especially large multinationals, can be at risk, notably when they or their suppliers rely on multiple layers of contractors and vendors. Some industrial sectors may be at particular risk of trafficking in human beings and forced labour, for example agriculture, seafood, construction, or hotels and hospitality services. In recent years there has been extensive documentation of severe labour exploitation in multiple industries. For example, as of 2016, the U. S. Department of Labor estimates that 139 goods from 75 countries could be made by forced or child labour.<sup>54</sup> While there has been a marked increase in the knowledge base concerning the incidence of trafficking for labour exploitation in business supply chains, significant limitations still remain, including obtaining visibility in the lower segments of supply chains and getting more accurate prevalence estimates at the global, national and industry-specific levels.

However, there are a few positive trends as well. First, there has been a clear realization that businesses as well as governments have responsibilities in the area of human rights. At the international level, this realization has been most clearly reflected in the UN Guiding Principles on Human Rights since their adoption in 2011, and in the various mechanisms established to secure the practical application of these standards at all levels. There has also been a marked growth in the tendency by major companies to refer to the protection of labour standards in their codes of conduct, as part of their voluntary efforts to promote socially responsible business practices. Major companies are now more willing to acknowledge the risk of trafficking in human beings and forced labour in their extended supply chains, and to take steps to remediate any problems once detected.

50 “Recruitment Fees (IHRB Briefing).” IHRB. May 2016. Accessed February 06, 2018. [https://www.ihrb.org/uploads/briefings/2016-05%2C\\_IHRB\\_Briefing%2C\\_Recruitment\\_Fees.pdf](https://www.ihrb.org/uploads/briefings/2016-05%2C_IHRB_Briefing%2C_Recruitment_Fees.pdf).

51 “Dhaka principles: for migration with dignity.” IHRB. Accessed February 06, 2018. <https://www.ihrb.org/dhaka-principles/hYMYT/OaMRf/>.

52 “Best practice guidance on ethical recruitment of migrant workers.” Interfaith Center on Corporate Responsibility. April 2017. Accessed February 06, 2018. [http://www.iccr.org/sites/default/files/iccrsbestpracticeguidanceethicalrecruitment05.09.17\\_final.pdf](http://www.iccr.org/sites/default/files/iccrsbestpracticeguidanceethicalrecruitment05.09.17_final.pdf).

53 Marshall, Phil. “Slavery free recruitment systems: A landscape analysis of fee-free recruitment initiatives.” Issara Institute. September 2016. Accessed February 06, 2018. [https://media.wix.com/ugd/5bf36e\\_47b2c5880148494c88101734aba21d45.pdf](https://media.wix.com/ugd/5bf36e_47b2c5880148494c88101734aba21d45.pdf).

54 “List of Goods Produced by Child Labor or Forced Labor.” United States Department of Labor. 2016. Accessed February 06, 2018. <https://www.dol.gov/ilab/reports/child-labor/list-of-goods/>.



Responsible companies have been calling on governments to create a ‘level playing field’ through transparency in supply chains legislation, and have found it to be influential in improving their human rights due diligence. For example, member companies of the Ethical Trading Initiative (ETI), and the British Retail Consortium in the United Kingdom wrote to the Prime Minister calling for passage of transparency legislation. One year after the law was enacted, a study conducted by ETI & Hult Business School found that 50 percent more senior executives in companies were engaged in managing risks of modern slavery, human trafficking and child labour.<sup>55</sup> However, it is important to note that some NGOs have expressed concern that companies can often satisfy transparency requirements by declaring minimal efforts. As summarized in this document, such disclosures must be comprehensive and accompanied by oversight and monitoring for them to be meaningful.

In addition, institutional investors are also putting pressure on public companies to address human rights. For example, the Interfaith Center on Corporate Responsibility launched the Investor Alliance for Human Rights to “Build a collective action platform that allows for quick mobilization of a broad group of investors to advocate on urgent business and human rights issues. Alliance members will address both critical public policy challenges, and emergent human rights risks arising from corporate operations and supply chains.”<sup>56</sup>

Companies employ various methods of conducting due diligence, including investigating entities in their supply chains. Audits that verify supplier labour and environmental practices, technologies that capture “worker voice” and collaborations across industries that include sharing of supplier data have all shown promise, but also limitations. Transparency thus means that companies should disclose what efforts they are taking to illuminate labour exploitation risks in their supply chains to inform States, investors and consumers.

## **b. Mandates, Obligations & Disclosures**

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Obligations of States to prevent, investigate and punish THB are defined in various international instruments. States then pass on these international obligations concerning THB towards companies by implementing national laws and policies.<sup>57</sup> The core instrument on trafficking in human beings is the Palermo Protocol that defines the obligation to prevent human trafficking in Article 9, by requiring States to establish comprehensive policies and programmes. Prevention means that States have an obligation to discourage practices that inadvertently foster all forms of exploitation (Article 9, para. 5). Public procurement policies also specify the obligations of government contractors, including requirements to disclose efforts they take to address trafficking in their supply chains and monitor labour recruitment.<sup>58</sup>

### **1. Human Rights Obligations of States & Companies**

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The human rights obligations of States are also defined in the International Covenant on Civil and Political Rights, and are often described as the three-part obligation to respect, protect and fulfill human rights:

- the obligation to respect means that States must not interfere with or curtail the enjoyment of human rights;<sup>59</sup>
- the obligation to protect requires States to protect individuals and groups against human rights abuses caused by private entities towards other private persons, and have to take reasonable measures to prevent these acts.<sup>60</sup>

These obligations, however, have to be applied through the implementation of policy regimes and enforcement mechanisms. An opportunity thus exists for public authorities to ensure that businesses providing goods and services by contract to

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55 “Corporate leadership on modern slavery.” Ethical Trading Initiative. October 28, 2016. Accessed February 06, 2018. <https://www.ethicaltrade.org/resources/corporate-leadership-modern-slavery>.

56 “ICCR launches new Alliance to amplify global investor influence on human rights.” Interfaith Center on Corporate Responsibility. October 18, 2017. Accessed February 06, 2018. <http://www.iccr.org/iccr-launches-new-alliance-amplify-global-investor-influence-human-rights>.

57 UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children, A/70/260* (3 August 2015), para. 40.

58 “Ending Exploitation. Ensuring that Businesses do not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector.” OSCE. November 03, 2014. Accessed February 06, 2018. <http://www.osce.org/secretariat/126305>.

59 “International Human Rights Law.” OHCHR. Accessed February 06, 2018. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

60 de Schutter, Olivier, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010), p. 365-366.

governments are upholding their obligations to human rights in their supply chains. For example, the Council of Europe (CoE) recommends that its Member States evaluate measures businesses take and impose consequences should they fail to respect human rights.<sup>61</sup> For example, the CoE recommends that States:

*“...apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, [...] when member States [...] conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts”.*<sup>62</sup>

This obligation of CoE States to adopt protective or preventive measures in order to protect human rights, is identified by the European Court for Human Rights (ECHR) as a “positive obligation”. The State also has this obligation to protect, by enacting specific laws when a private person or entity, such as a company, abuses rights of other individuals.<sup>63</sup> In the *Rantsev v. Cyprus and Russia* decision, the ECHR defined the obligation to act – the positive obligation – as an obligation to have laws in place that define THB as a criminal offence, to protect the rights of trafficked persons and to prevent THB.<sup>64</sup> The positive obligation includes the obligation of States to implement “adequate measures regulating businesses often used as a cover for human trafficking”.<sup>65</sup> The ECHR has also held States responsible for abuses conducted by businesses.<sup>66</sup> For example in 2017, the ECHR ruled in the case of *Chowdury and Others vs. Greece* that the State “failed in its obligations” to prevent human trafficking, protect victims and investigate those responsible”. The case was of 42 Bangladeshi men who had been denied payments for their work at a Strawberry farm in Southern Greece.<sup>67</sup>

States’ obligations to protect persons from harmful acts of companies is further defined in the legally non-binding “Protect, Respect and Remedy” Framework on business and human rights developed by Professor John Ruggie, Former Special Representative of the UN Secretary General.<sup>68</sup> The Guiding Principles on Business and Human Rights (UNGP) he developed specify:<sup>69</sup>

- the States’ duty to protect against human rights abuses;
- the responsibility of companies to respect human rights;
- the requirements of States and companies to ensure access to remedies for persons who were harmed by business-related human rights abuses and lists judicial and non-judicial remedies.

The State has to avoid abuse by enacting effective policies, legislation or regulations concerning business conduct. Other relevant Guiding Principles include UNGP 4 which focuses on state owned businesses, or those that receive substantial support and services from State agencies; UNGP 5 that focuses on privatized service delivery, which may be a high-risk area for THB, including in health care; and UNGP 8, which covers policy coherence and assistance to businesses with relevant information, training and support. Part of this obligation to avoid abuse is encapsulated in UNGP 6: “States should promote respect for human rights by business enterprises with which they conduct commercial transactions”.<sup>70</sup> The UNGPs emphasize the importance of public procurement and possible use of contract clauses to meet the ambitions of the principles.

The Guiding Principles also assert the responsibility of companies to respect human rights. To this effect companies should, according to UNGP 17, carry out human rights due diligence that proactively assesses the impact on rights their operations will have. Human rights due diligence by companies should also show how the business will address any adverse issues uncovered. States then have to ensure that companies fulfill this responsibility. There are different

61 CoE Steering Committee for Human Rights (CDDH), Explanatory Memorandum to Recommendation CM/REC (2016) 3 of the Committee of Ministers to Member States on human rights and business, (CM/2016) 18-addfinal, para. 39.

62 CoE Committee of Ministers, Recommendation CM/REC (2016) 3 of the Committee of Ministers to Member States on human rights and business, adopted on 2 March 2016, para. 22.

63 Methven O’Brien, Claire, “Essential services, public procurement and human rights in Europe”, *University of Groningen Faculty of Law Research Paper Series 22/2015*, January 2015, p. 5.

64 *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 10 May 2010).

65 *Rantsev v Cyprus and Russia*, App no 25965/04 (ECtHR, 10 May 2010), para. 284.

66 Methven O’Brien, Claire, “Essential services, public procurement and human rights in Europe”, *University of Groningen Faculty of Law Research Paper Series 22/2015*, January 2015, p. 5.

67 “Chowdury and Others v. Greece.” UNODC. 2017. Accessed February 06, 2018. [https://www.unodc.org/cld/case-law-doc/traffickingpersons/crimetype/\\_irb/2017/chowdury\\_and\\_others\\_v.\\_greece.html?lng=en&tmpl=sherloc](https://www.unodc.org/cld/case-law-doc/traffickingpersons/crimetype/_irb/2017/chowdury_and_others_v._greece.html?lng=en&tmpl=sherloc).

68 “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008).

69 Report of the Special Representative of the Secretary-General on the issue of human rights and Transnational corporations and Other Business Enterprises, John Ruggie, “Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31 (2011), hereinafter UN Guiding Principles (UNGP).

70 *Ibid.* p. 8.

approaches on how to ensure that companies carry out this human rights due diligence, for example States can:

- create legal liability for companies (e. g. criminal, civil liability or administrative penalties) when they violate human rights;
- establish incentives or benefits for companies that demonstrate proactive due diligence practices;
- encourage human rights due diligence by enhanced transparency and disclosure mechanisms (e. g. obliging companies to disclose reports about their anti-trafficking policies and efforts taken).<sup>71</sup>

Although the UN Guiding Principles are legally non-binding, they have received a high level of support internationally and instruments by other international organisations are aligned with the UN Guiding Principles. For example, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (developed in 1976) set out recommendations from governments to business on corporate responsibility and are the landmark instrument on responsible business conduct worldwide. The latest revision of the Guidelines in 2011 led to the inclusion of a separate chapter on human rights aligned with the UN Guiding Principles, and extended responsibility also across business relationships and supply chains.

In addition, the Guidelines are accompanied by a unique non-judicial grievance mechanism – the National Contact Points (NCPs). Governments that have adhered to the Guidelines are required to set up an NCP in their country to promote the Guidelines and to deal with cases of alleged violations of the Guidelines, including human trafficking in global supply chains. As of January 2018, 48 countries have adhered to the OECD Guidelines, out of which 32 are OSCE participating States and 8 are Partners for Co-operation.

Another important part of the implementation of the OECD Guidelines is work carried out to provide guidance to companies on how to apply the recommendations of the Guidelines in practice, through supply chains, in **specific sectors**. So far, OECD guidance exists for the **minerals, extractives, agriculture, garment and footwear**<sup>72</sup> and **financial sector** (institutional investors). This work, which is carried out in multi-stakeholder settings, involves the development of the guidance and, once adopted, support for its implementation, including annual events, which gather governments, companies and stakeholders.<sup>73</sup> The OECD is currently developing a general, cross-sector due diligence guidance for responsible business conduct, which should be finalised mid 2018.

<http://mneguidelines.oecd.org/>

## 2. Corporate Liability & Disclosure

The UN Convention on Transnational Organized Crime also obliges States to establish civil, administrative or criminal liability (Article 10 para. 2) of legal persons for participation in “serious crimes involving an organized criminal group” (Article 10 para. 1), and for crimes related to THB as established under the Palermo Protocol.<sup>74</sup> At the regional level, the Council of Europe Convention on Action against Trafficking in Human Beings establishes corporate liability for THB (Article 22 CoE Convention against THB).<sup>75</sup> However, in practice these provisions are applied rather rarely: only in a few CoE Member States have cases related to corporate criminal liability concerning THB been identified by GRETA, the Convention’s monitoring body.<sup>76</sup>

By linking obligations based on international instruments related to THB with the States’ obligation to protect, as defined in the Guiding Principles on Business and Human Rights, the UN Special Rapporteur on trafficking in persons has endorsed benchmarks and indicators for ensuring trafficking-free supply chains. These guidelines should help businesses exercise due diligence in their supply chains in order to detect and prevent incidents of human trafficking and thus live up to international obligations and principles.<sup>77</sup>

In June 2013, the Human Rights Council adopted a resolution that calls upon States and businesses to strengthen legislation

71 De Schutter, Olivier et al., *Human Rights Due Diligence: The Role of States* (2012), p. 60.

72 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; OECD Due Diligence Guidance For Meaningful Stakeholder Engagement in the Extractive Sector, OECD-FAO Guidance For Responsible Agricultural Supply Chains and the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector.

73 “OECD Guidelines for Multinational Enterprises.” OECD. Accessed February 06, 2018. <https://mneguidelines.oecd.org/sectors/>.

74 Gallagher Anne, Skrivankova, Klara, “Human Rights and Trafficking in Persons – 15th Informal ASEM Seminar on Human Rights” (2015), p. 62.

75 Council of Europe Treaty Series (CETS) No. 197, adopted 16 May 2005, entered into force 1 February 2008 (thereinafter CoE Convention against THB).

76 CoE – Group of Experts on Action Against Trafficking in Human Beings, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, GRETA (2013) 14, (Strasbourg: GRETA, 2013), para. 208; CoE – Group of Experts on Action Against Trafficking in Human Beings, Report concerning the implementation of the CoE Convention against THB by Cyprus, GRETA (2015) 20, (Strasbourg: GRETA, 2015), para. 135; CoE – Group of Experts on Action Against Trafficking in Human Beings, Report submitted by the Romanian Authorities on measures to comply with the Committee of the Parties Recommendation, GRETA (2014) 9, (GRETA, 2014), p. 26; CoE – Group of Experts on Action Against Trafficking in Human Beings, Report concerning the implementation of the CoE Convention against Action against Trafficking in Human Beings by Slovenia, GRETA (2013) 20, (GRETA, 2013), para. 156.

77 Human Rights Council, ‘Report of the Special Rapporteur on trafficking in persons, especially women and children – Expert consultation on human trafficking and global supply chains’, A/HRC/23/48/Add. 4 (4 March 2013).

and initiatives in order to combat THB/LE.<sup>78</sup> The Rapporteur recommended the following measures for States to employ:

- have general rules in place requiring companies to respect human rights;
- revise their own public procurement policies to cover THB issues;
- implement or further strengthen disclosure requirements for companies mandating them to report on their anti-trafficking policies and practices;
- establish a system of recruitment agency licensing in order to avoid high recruitment fees burdening workers.<sup>79</sup>

In a limited number of cases, governments have adopted specific legislation, placing legal obligations on companies to disclose anti-trafficking actions. For example, the Transparency in Supply Chains provision of the United Kingdom's 2015 Modern Slavery Act, requires all companies above a certain threshold to report on the measures taken to address these forms of abuse in their supply chains.<sup>80</sup> The French "*Devoir de Vigilance*" or "On the Duty of Care of Parent and Ordering Companies" establishes a reporting and monitoring obligation for multinational companies.<sup>81</sup> Similarly in February 2017 the Dutch Parliament introduced a bill that requires companies to conduct due diligence to ascertain the prevalence of child labour in their supply chains.<sup>82</sup> A Federal Committee also recommended that the Australian Parliament adopt a Modern Slavery Act that "requires large companies to eliminate forced labour and trafficking in Australia".<sup>83</sup> The Parliament of Australia inquiry into establishing a Modern Slavery Act is considering provisions on public procurement as well.<sup>84</sup>

In the area of public procurement, the United States Federal Acquisition Regulation (FAR) has for several years required that a clause prohibiting trafficking in persons be added to all U.S. government contracts. The FAR was updated in 2015, pursuant to former U.S. President Barack Obama's Executive Order (EO) 13627<sup>85</sup> that specifies a series of prohibited practices, and requires contracts above a certain threshold performed outside the United States to develop compliance and certification plans.<sup>86</sup> In addition, EO 13126, "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor" was issued in 1999 to ensure that U.S. federal agencies do not procure goods made by forced or indentured child labour.

Another U.S. example is the evolution of the U.S. Smoot-Hawley Tariff Act that since 1930 has banned goods produced with forced labour from entering the United States. However, the act contained an exception that allowed goods to be imported where "U.S. demand exceeded domestic production." That exception was removed from the Act in 2016, thus enhancing the ability of U.S. Customs and Border Protection (CBP) to prevent products made with forced labour from being imported into the United States.

The adoption and introduction of these laws and orders represent an increasing trend of States expecting companies operating in their jurisdictions to exercise vigilance about THB/LE in their supply chains. It is within this context of guiding principles, disclosure laws and certain State mandates that this report outlines specific guidance and guidelines to implement the goal of eliminating forced and exploited labour from supply chains.

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78 Human Rights Council, 'Trafficking in persons, especially women and children: efforts to combat human trafficking in supply chains of businesses', A/HRC/RES/23/5 (19 June 2013).

79 UN General Assembly, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/70/260 (3 August 2015), para. 40.

80 The UK legislation was itself strongly influenced by the *California Transparency in Supply Chains Act* (SB 657), adopted by the US state of California in September 2010, and entering into force in January 2012. The Act requires companies operating in California, doing business with a value of over US\$ 100 million per year, to disclose information about their efforts to ensure that their supply chains are free from slavery and human trafficking, and to provide training to their own staff on this subject.

81 International Bar Association. Accessed February 06, 2018. <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=1324a0d4-268f-40d1%E2%80%91ad30%E2%80%91f863ba212d39>.

82 Altschuller, Sarah A., and Amy K. Lehr. "Proposed Dutch Legislation on Child Labor Due Diligence: What You Need to Know." *Corporate Social Responsibility and the Law*. August 24, 107. Accessed February 06, 2018. <http://www.csrinthelaw.com/2017/08/24/proposed-dutch-legislation-on-child-labor-due-diligence-what-you-need-to-know/>.

83 Guilbert, Kieran. "Australia urged to follow UK's lead in adopting tough anti-slavery law." *Reuters*. December 07, 2017. Accessed February 06, 2018. <https://www.reuters.com/article/us-australia-slavery-lawmaking/australia-urged-to-follow-uks-lead-in-adopting-tough-anti-slavery-laws-idUSKBN1E121H>.

84 "Inquiry into establishing a Modern Slavery Act in Australia." *Parliament of Australia*. 2017. Accessed February 06, 2018. <https://www.aph.gov.au/modernslavery>.

85 "Federal Acquisition Regulation; Ending Trafficking in Persons." *Federal Register: The Daily Journal of the United States Government*. 2015. Accessed February 06, 2018. <https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>.

86 Importantly, the Executive Order and implementing regulation specified a series of trafficking-related activities in which Federal contractors, contractor employees, subcontractors and subcontractor employees were prohibited from engaging. These included: using misleading or fraudulent recruitment practices during the recruitment of employees; charging employees recruitment fees; destroying, concealing, confiscating, or otherwise denying access by an employee to an employee's identity documents, such as passports or drivers; licenses; and (for portions of contracts or subcontracts performed outside the United States), failing to pay transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a US government contract or subcontract. Contracts over \$500,000 performed outside the U.S. also require a compliance plan commensurate with the size and complexity of the contract, to include clearly delineated components, including housing, recruitment and wage plans, and mechanisms for workers to report violations; as well as an annual certification from the contractor indicating, among other things, compliance with the rule and that a compliance plan has been implemented.

# Guidance & Guidelines

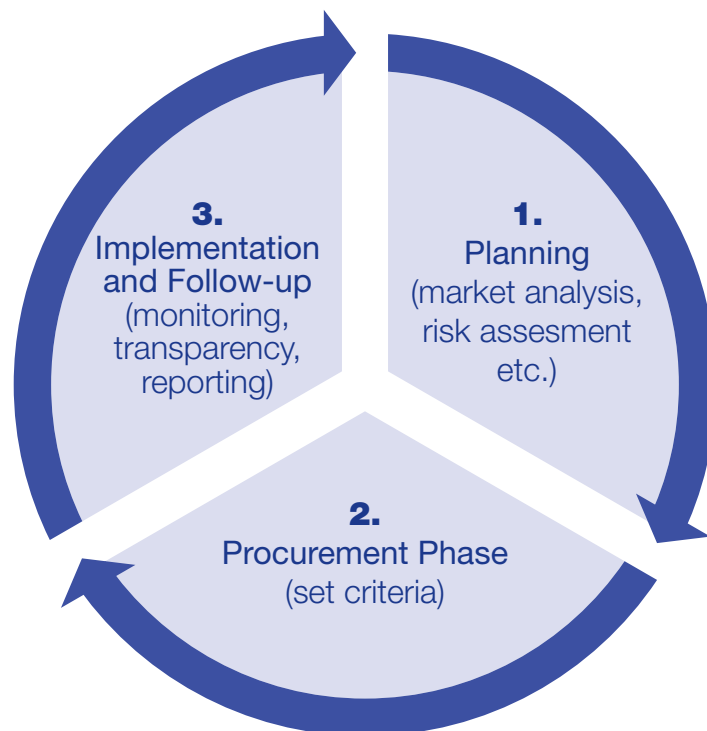
## a. Steps Involved in Public Procurement

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There are many steps involved in public procurement, summarized in these three broad categories:

### 1. The Planning Phase

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Source: Swedish National Agency for Public Procurement

This phase includes identifying the needs, determining types of procurement process and identifying any related human rights risks. When a new request to procure a product or service is received, the related category in question is analyzed to define its strategic significance. The strategic significance is defined based on several parameters including any negative social and environmental impact, the population affected, importance to the region's activities, delivery aspects, value of the contract, the length of the contract, and the complexity of the goods or services. Compliance monitoring and follow-up is often a challenge that requires time, competence and resources. Therefore, it is important to foresee this phase of the process at the early stages of procurement.



## 2. The Procurement Phase

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Based on data gleaned from the planning phase, the tender dossiers can be prepared. In accordance with the legal framework, procurement is carried out starting with the invitation to bid, followed by tender qualification, evaluation of tenders, negotiation where applicable, and the award of contracts. To ensure contractors' responsibility to respect human rights, the social criteria, including human rights criteria, can be set as qualification of suppliers, technical specifications, award criteria or special contract terms. Once the tenders have been evaluated, the procuring agency decides which tenderer(s) will be awarded contract(s).

## 3. Implementation and Follow-up

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The purpose of implementation and follow-up is to monitor the fulfilment of the contract to ensure that the supplier complies with established requirements. The contractor must report on how they fulfill sustainability criteria which requires full transparency. Reporting requirements will vary for each contract, where low risk contracts may not have any reporting requirements. The contracting body will assess the supplier's ability to ensure compliance with set criteria, for example compliance with basic human rights, and take further action if needed to address outstanding issues.

## b. Public Procurement Policies, Specific Guidelines

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### 1. Recommendation 1: Take Action During Planning & Conduct Risk Assessments

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At the planning stage of procurement, it is important for public authorities to identify product or service categories that are most likely to be prone to human rights abuses, in particular to THB/LE. Risk assessments can help evaluate to which extent the supply chains of goods or products are known to public authorities as vulnerable and thus requiring of greater scrutiny through deeper diligence. Based on this risk assessment further steps in the procurement process can be integrated and adapted. When procuring at-risk products, such as coffee or information technology, or services such as construction, a risk assessment can identify where there is a need for specific measures to tackle labour exploitation in the supply chain.

It is then important for public authorities to work with their suppliers in high risk areas to build the collective capacity to map out, investigate and mitigate identified risks. That is, instead of simply denying suspect companies the ability to bid on projects, honestly acknowledging challenges, developing corrective actions, and sharing information can lead to collaboration to drive improvements with sub-contractors and vendors operating in such high-risk areas.

There are tools developed by and for public authorities to better plan for THB risks. The Norwegian Agency for Public Management, Difi, has created a publicly available list of high-

#### Case Studies:

##### **Ethical criteria as part of the selection process – Example from Norway**

The South Eastern Regional Health Authority of Norway included ethical criteria as part of the selection process in 2013. Bidders have to be able to disclose their supply chain including all suppliers that contribute to the production of the product and their location. Additionally, bidders have to show that they have an adequate system of monitoring, by, for instance, audits of subcontractors and suppliers in the supply chain

\* *Health Care Without Harm, Sustainable Public Procurement in European Healthcare*, (2014), p. 8-9.

##### **Social Clauses in the Technical Specifications— Example from Spain**

In 2009, the city of San Sebastian included social clauses in the technical specifications of a tender for clothing and footwear. The social clauses encompassed compliance with ILO standards and verification. Unless bidders were able to prove compliance, they would be

risk products for procurement professionals to consult.<sup>87</sup> The Responsible Sourcing Tool developed by the U.S. State Department also identifies risk categories.<sup>88</sup> The “Sweat & Toil: Child Labor, Forced Labor, and Human Trafficking Around the World” mobile app developed by the U.S. Department of Labor contains easily accessible information on child and forced labour data for each country.<sup>89</sup> The LinkUP database is another tool, which is used by cities and counties in the U.S. to officially publish their suppliers/supply chains when purchasing textiles for public organizations.<sup>90</sup> “Protecting Human Rights in the Supply Chain: A Guide for Public Procurement Practitioners” is a publication by the University of Greenwich, that can also help evaluate risk points in particular to THB/LE in supply chains. Another resource is the Responsible Business Conduct Module on the Sustainable Facilities Tool that provides information on pre- and post-award best practices.<sup>91</sup>

excluded from the process. Bidders have to provide a declaration in which they guarantee that the production throughout the supply chain adheres to the standards of ILO core conventions. In addition, they have to disclose subcontractors and suppliers.

The LANDMARK Project, *Good Practice in Socially Responsible Public Procurement – Approaches to Verification from across Europe*, (The LANDMARK consortium, 2012), p. 17.

#### **Requesting a “Social Concept” from Bidders—Example from Germany**

A tender for IT hardware for several federal States in Northern Germany also include a ‘social concept’ that bidders had to submit. This concept should explain how bidders ensure the implementation of the ILO core conventions in its supply chain. In general, the tender awarded price and quality. 10% of the quality award criteria are allocated to a social concept. The concept itself had to fulfill plausibility criteria and measures for verification, which could include external audits. In relation to plausibility, bidders were requested to disclose subcontractors and suppliers.

\*The LANDMARK Project, *Good Practice in Socially Responsible Public Procurement – Approaches to Verification from across Europe*, (The LANDMARK consortium, 2012), p. 9-11.

## Recommendation 1: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **conduct assessments to identify goods and services that pose THB/LE risks;**
- ▶ **prioritize which goods and services require immediate focus;**
- ▶ **collaborate with suppliers to develop specific prevention and mitigations plans;**
- ▶ **provide THB/LE training resources to all procurement, programme and related personnel who are involved in public sourcing;**
- ▶ **facilitate collaboration between officials responsible for procurement and anti-trafficking policies and create positions that link the two.**

Violation of internationally recognized human rights can also be one aspect of exclusion criteria for a tenderer for a public contract.

87 “Information about High-Risk Products.” Difi. January 27, 2017. Accessed February 06, 2018. <https://www.anskaffelser.no/english/socially-responsible-public-procurement/information-about-high-risk-products>.

88 For more information see: <https://www.responsiblesourcingtool.org/>.

89 “Sweat & Toil: Child Labor, Forced Labor, and Human Trafficking Around the World.” United States Department of Labor. 2016. Accessed February 06, 2018. <https://www.dol.gov/dol/apps/ilab.htm>.

90 For more information, see: <http://buysweatfree.org/linkup>

91 For more information, see: <https://sftool.gov/plan/545/responsible-business-conduct>

## 2. Recommendation 2: Set Standards During Award that Manage and Mitigate the Risks of THB/LE from Public Supply Chains

Public authorities can leverage their purchasing power with their suppliers and hold them to ethically responsible standards.<sup>92</sup> The stage of the tender process in which criteria for awarding contracts are set is an opportunity to ensure the observance of human rights standards. When deliberating a contract, social and ethical requirements, including requirements to implement human rights, can also be criteria for consideration in addition to price and quality. Including these criteria at the award stage can have a stronger impact than defining specific contract performance clauses after the contract has been awarded. Hence, there are examples in which public authorities started with including criteria as contract performance clauses and then, as a next step, implemented them at the selection process.<sup>93</sup> However, importantly, it is noted that the ability of jurisdictions to align such criteria with procurement policies varies. European Union procurement directives, for example, require evaluation criteria to be linked to the subject-matter of the contract, which may not be perceived to have a direct link to social expectations. Public authorities that are at the initial stages of integrating anti-THB/LE measures in procurement processes can start with including criteria as contract performance clauses, and eventually in the selection process itself.

In the EU, selection based on the ‘Most Economically Advantageous Tender’ (MEAT) is possible for specific tenders. This allows for the best quality-price ratio and points can also be awarded for sustainability and human rights aspects.<sup>94</sup> The EU does not permit merit points in this process – it is part of the requirement for merit points, which are assessed at the award stage, to be linked to the subject-matter of the contract. UNCITRAL, on the other hand, does permit this de-linkage. Since 2013 all tender contracts of the Dutch national government beyond a certain threshold have to include social conditions, and award decisions are based on price, quality and sustainability. Thus, by scoring more points for sustainability, the bidder has an increased chance of winning the contract. In Austria, as of 2016, the national public procurement legislation applies the principle of “best supplier” rather than “cheapest supplier” in the construction sector for contracts above 1 million EUR. In Germany, the City Council of the City of Munich instilled socially responsible public procurement processes in 2002 to ensure the exclusion of goods produced by children under exploitative conditions. Thus, cities and States can adopt procurement measures that adhere to ILO conventions or those outlined in the Ethical Trading Initiative’s Base Code.<sup>95</sup>

The award criteria can also be used to evaluate a bidder’s capacity to manage for human rights in its production activities.

### Case Study:

The City of Malmö (Sweden) decided to use public procurement to improve working conditions. As a first step, Malmö conducted a risk analysis in 2010 and established different categories in relation to working conditions: high, medium and low risk purchases. Malmö identified three product groups as being high-risk groups: electronic equipment, furniture and office materials. These groups are prone to abuse of workers’ rights. This assessment formed the basis for further steps such as implementing a Code of Conduct to be signed by suppliers of those goods.

-The LANDMARK Project, *Good Practice in Socially Responsible Public Procurement – Approaches to Verification from across Europe*, (The LANDMARK consortium, 2012), p. 7.

The Ethical Trading Initiative Base Code derives from ILO core conventions as an internationally recognized code of labour practices, reflecting minimum standards. Principles, that companies and governments can follow include: the free choice of employment; freedom of association; safe and hygienic working conditions; prohibition on child labour, inhumane treatment, excessive work hours and discrimination; and, living wages.

\* [https://s3-eu-west-1.amazonaws.com/www.ethicaltrade.org/files/shared\\_resources/eti\\_base\\_code\\_english.pdf?ppXz9ivoyynr1uTTto5e.Z5n.ZHaQvQfN](https://s3-eu-west-1.amazonaws.com/www.ethicaltrade.org/files/shared_resources/eti_base_code_english.pdf?ppXz9ivoyynr1uTTto5e.Z5n.ZHaQvQfN)

92 International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 18 and HEUNI (European Institute for Crime Prevention and Control), Guidelines to prevent abusive recruitment, exploitative employment and trafficking of migrant workers in the Baltic Sea region, L. Sorrentino, A. Jokinen (Helsinki 2014), p. 39.

93 See for instance the example in the Norwegian health care sector: Health Care Without Harm, *Sustainable Public Procurement in European Healthcare*, (2014), p. 8-9.

94 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods”, *The International Journal of Human Rights* 19 (3), April 2015, p. 349 and SOMO, “A review of Dutch policy for socially responsible public procurement”, *SOMO Paper* (March 2014), p. 5.

95 “ETI Base Code.” Ethical Trading Initiative. Accessed February 06, 2018. <https://www.ethicaltrade.org/eti-base-code>.

It is important to consider the supplier's capability, referred to as the "responsibility determination" to do so before awarding a contract to ensure they have an adequate record of upholding business integrity ethics. The United States, for example, employs a post-source selection, but pre-award "Determination of Responsibility" where procurement officials make an affirmative determination on responsibility of the contractor's resources, qualifications, business ethics, and other areas, prior to signing the contract.<sup>96</sup>

In recent years, the responsibility determination has been significantly strengthened through the creation of a database that includes information on criminal convictions and civil and administrative judgments, and executive actions to ensure that violations of various labour laws are considered in determining if a contractor is a responsible provider of goods and services. Hence, bidders that show that they have an effective anti-THB/LE process in place can be awarded with additional points.<sup>97</sup> Bidders that are committed to protect labour rights in the supply chain and include this in their due diligence process can have an advantage.<sup>98</sup>

Thus, while criteria for choosing a winning bidder is normally solely price based, further social criteria can also be included that prioritizes the value of eliminating THB/LE.

Because more than one company procures from a single supplier, it is important to recognize the limitations of their leverage and influence with suppliers. As such, companies can manage risk and share the responsibilities for improvements and remediation through collaborative mechanisms, such as becoming members of multi-stakeholder initiatives, such as the Ethical Trading Initiative<sup>99</sup>, Fairwear Foundation<sup>100</sup> and Fair Labor Association.<sup>101</sup>

It is recognized that integrating related requirements in the above stages of the procurement process can add additional time and resource requirements. The goal of eliminating THB/LE, however, can be considered with other procurement objectives. It is thus imperative to have executive level buy-in from companies bidding for contracts and the political will of participating States, and their procurement authorities, to meet the goals outlined.

### Case Study:

Under the U.S. Federal Acquisition Regulation (FAR), public authorities have to include a clause in all contracts that includes the obligation of suppliers to take actions to help prevent trafficking in human beings in federal contracts ([International Learning Lab on Public Procurement and Human Rights, Public Procurement and Human Rights: A Survey of Twenty Jurisdictions, \(2016\), p. 43](#)).

"Government solicitations and contracts shall—

(a) Prohibit contractors, contractor employees, sub-contractors, subcontractor employees, and their agents from—

(1) Engaging in severe forms of trafficking in persons during the period of performance of the contract; [...]  
--US Federal Acquisition Regulation (FAR), Subpart 22.17—Combating Trafficking in Persons, 22.1703 Policy

## Recommendation 2: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **require contractors to take measures to prevent and address THB/LE from occurring in their supply chain by having a policy in place that aims to mitigate human rights risks;**
- ▶ **define award criteria that require the implementation of human rights standards in the supply chain:<sup>102</sup>**

96 "Subpart 9.1—Responsible Prospective Contractors." Federal Acquisition Register. Accessed February 06, 2018. [https://www.acquisition.gov/far/current/html/Subpart%209\\_1.html](https://www.acquisition.gov/far/current/html/Subpart%209_1.html).

97 As for instance the EU Directive 2014/24, Article 58 and Annex XII, Part II (d) allows.

98 Swedwatch, "Healthier Procurement – Improvements to working conditions for surgical instrument manufacture in Pakistan", Report 73 (19 March 2015,) (Viveka Risberg, 2015), p. 45.

99 For more information, see: <https://www.ethicaltrade.org/>

100 For more information, see: <https://www.fairwear.org/>

101 For more information, see: <http://www.fairlabor.org/>

102 Standards include: The UN Universal Declaration on Human Rights, the eight ILO Core conventions, Article 32 on the UN Convention on the Rights of the Child, All work-related health and safety legislation and labour laws in the country of production; and the UN Convention Against Corruption



- ▶ **work with bidders to acknowledge THB/LE challenges and determine due diligence and mitigation strategies and plans;**
- ▶ **reward companies that have demonstrated respect for human and labour rights through contracting incentives.**
  
- ▶ **establish an “ineligibility list” of companies that are not fulfilling anti-THB criteria that is monitored and updated annually, or in accordance with procurement cycles:**
  - ▶ **define that bidders who were convicted for THB/LE and child labour are not eligible;**
  - ▶ **formalize due process provisions for ineligible vendors to prove that they have improved practices and can be considered for delisting.**
  
- ▶ **include an adequate weighting among the award criteria of social, ethical, and anti-THB requirements:**
  - ▶ **score vendors engaging in proactive anti-THB/LE practices higher than those who are not, for example as having policies in place, utilizing certification and audit schemes and conducting due diligence.**

### 3. Recommendation 3: Assess Supplier Capacity to Meet Standards

Conditions of contract performance should be included in the original tender documents so that potential bidders understand the expectations set for them.<sup>103</sup> However, the stage of the procurement process in which conditions are maintained on how the contract with suppliers has to be performed, can also be crucial for integrating human rights considerations. In this phase, the contract has been awarded to a supplier and further specifications can be developed concerning labour standards.<sup>104</sup> While aspiring to meet the UN human rights standards and the ILO labour conventions, at the minimum they should adhere to national anti-THB/LE laws. Given that THB/LE can be difficult to identify, contract clauses can clarify and prohibit the activities known to lead to trafficking in human beings, which may be easier to spot, such as charging workers recruitment fees, confiscating or destroying workers’ identity documents, or using misleading or fraudulent recruitment tactics.

There are several examples of how THB/LE provisions can be included at the contract performance stage. For example, since 2010, twenty-one county councils in Sweden co-operate in order to procure sustainable materials and services for health and dental care, and public transportation. Many of the products they procure are produced in countries where there are risks of human rights abuses. To address these issues, they use a common code of conduct as well as human rights contract performance clauses for all purchases from eight high-risk categories, that mainly cover the commodities identified to be at risk. The county councils require suppliers to agree to actively work to produce the goods for them under

#### Case Study: Enhancing Audits in Sweden

Swedish county councils conducted a two-year and ongoing review of the human rights due diligence of its IT-supplier and its subcontractor. Reports of exploitative working conditions in factories that supply the subcontractor sparked off a process of enhanced monitoring of the implementation of human rights due diligence. Part of the process was an audit of two supplier factories that supply products under the contract. Importantly, a representative of the Swedish public authority also participated in the external audit. During the audit conducted by an external company, it was observed that workers might have been coached by the management. Interviews in private with the workers were not possible, additionally, no interviews off-site or at the dormitories were allowed. The Swedish public authority changed its compliance conditions as a consequence and requested the supplier to improve the quality of social audits. Social audits also have to include the possibility of interviewing workers in confidentiality. Furthermore, the Swedish public authority ensured its right to conduct its own independent audits.

\* *Electronics Watch, Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation*, (Electronics Watch, 2016), p. 12-16

103 SOMO, Fact Sheet “Social Responsible Public Procurement of Garments and Textiles – Focus on the role of European governments and organisations in the public and semi-public sectors”, (2014), p. 5.

104 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Promoting responsible electronics supply chains through public procurement”, BHRE Research Series (Policy Paper no. 1, January 2015), (Business, Human Rights and the Environment Research Group, 2015), p. 8 and Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods”, *The International Journal of Human Rights* 19 (3), April 2015, p. 351-352.



conditions that comply with the following human rights standards: The UN Universal Declaration on Human Rights, the eight ILO core conventions, Article 32 on the UN Convention on the Rights of the Child, all work-related health and safety legislation and labour laws in the country of production; and the UN Convention Against Corruption.<sup>105</sup> Thus, public authorities can share knowledge about which contractors comply with these expectations and collaborate on best practices to working with suppliers.

## Recommendation 3: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **implement contract clauses that clearly state anti-THB/LE performance expectations;**
- ▶ **implement and enforce THB/LE clauses with all subcontractors and supply chain vendors:**
  - ▶ **clarify and prohibit for suppliers those activities that may lead to trafficking in human beings;**
  - ▶ **delineate procedures for contractors to follow that require immediate investigation, remediation and corrective action of issues uncovered and the issuance of preventative policies.**
- ▶ **authorities across participating States may work with those suppliers who have proven effective at addressing THB/LE to further strengthen their capacity to sustain efforts.**

## 4. Recommendation 4: Agree on Process for Suppliers to Meet Standards and Drive Continuous Improvements through Human Rights Due Diligence

The UNGPs advise that companies should avoid causing or contributing to adverse human rights impacts through their own activities and should seek to prevent or mitigate adverse human rights impacts that are linked to their business relationships.<sup>106</sup> For example, a company that sells apparel should be diligent about its sewing and production facilities as well as the harvesting and processing of raw materials. At the minimum, a company should map its supply chain and provide information on locations of production facilities, suppliers used and whether any of its facilities utilize migrant workers, who are known to be especially vulnerable to THB/LE. Mapping enables better due diligence, which includes an assessment of actual and potential human rights impacts, integration of findings and monitoring of mitigation efforts should violations be found. Thus, a public authority can include that the supplier has to exercise due diligence across their entire production chain as a requirement of contract maintenance. This leads to a responsibility, derived from the contract performance conditions, to take necessary steps to identify and monitor the entirety of its supply chain for THB/LE.<sup>107</sup> Where public procurement legislation may not explicitly have a provision that expects suppliers to implement human rights due diligence, legal or policy frameworks may have a reference to social criteria in the supply chain that can form an entry point to define specific criteria concerning THB/LE.<sup>108</sup>

### Nike Manufacturing Map:

The apparel company, Nike contracts with factories around the world to produce its products. Nike requires these suppliers to submit production facility data, including demographic information about workers employed. The company verifies the data during its audits and publishes an interactive map on its website that allows for its customers and investors to access the information.

<http://manufacturingmap.nikeinc.com/>

Public authorities should also have the ability to monitor suppliers for the human rights due diligence methods they employ. During contract performance, public authorities need tools to monitor to what extent the contract performance

<sup>105</sup> Health Care Without Harm, *Sustainable Public Procurement in European Healthcare*, (2014), p. 8-9.

<sup>106</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

<sup>107</sup> Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, "Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods", *The International Journal of Human Rights* 19 (3), April 2015, p. 357-358.

<sup>108</sup> International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 42.

clauses are put into practice. Switzerland requests from suppliers that they contractually oblige their subcontractors and vendors to adhere to the ILO core conventions.<sup>109</sup> Such clauses concerning monitoring can be defined as contract performance clauses in the framework of human rights due diligence in the supply chain. Monitoring, however, is a challenging task for public authorities. A survey in twenty different States showed that systematic and comprehensive monitoring of the suppliers' performance with regard to human rights due diligence could not be identified. Even when social clauses are included in the contract, cases where the observance of these clauses is monitored are rare.<sup>110</sup> For example, monitoring implementation of social clauses for products in the Information Communications Technology (ICT) sector in the whole supply chain is assessed in Switzerland as very challenging and therefore difficult to execute.

Suppliers who do demonstrate monitoring systems can benefit from a competitive advantage for further public procurement opportunities.<sup>111</sup> Ensuring monitoring of the supply chain can be the financial responsibility of suppliers, or borne by contracting authorities. In the city of Malmö example referred to on page 27-28, inspections of suppliers of higher risk sectors were paid for and conducted by contractors of public authorities.<sup>112</sup> States may also assume costs of monitoring, as in Sweden where various public authorities shared the related expenses. Sweden has also established a "procurement hub" that provides co-ordinated audit services where local public authorities can pay for a membership and then mandate third-party audits through the facility.<sup>113</sup>

Methodologies and proof of compliance may vary by suppliers. Businesses and their suppliers often use in-house or third-party audits to verify conditions. However, recent studies show that audits have certain weaknesses, including not adequately uncovering issues of labour abuses<sup>114</sup> in supply chains.<sup>115</sup> Third-party, often nonprofit, monitoring groups can augment audits, and have the expertise to identify human rights and labour risks. Organizations such as the Coalition of Immokolee Workers<sup>116</sup>, Ulula<sup>117</sup>, Labor Voices<sup>118</sup>, Labor Link<sup>119</sup>, the Fair Labor Association<sup>120</sup>, the Ethical Trading Initiative<sup>121</sup>, GeoPoll<sup>122</sup>, and Electronics Watch<sup>123</sup> also incorporate "worker-driven" monitoring that includes incorporating worker feedback through technology or other means.<sup>124</sup> OSCE participating States can find ways to partner with and support these organizations.

## Recommendation 4: Operational Guidance

**It is recommended that OSCE participating States:**

- ▶ **implement systems that allow for comprehensive monitoring of the supplier's performance with regard to human rights due diligence:**
  - ▶ **recommend that suppliers conduct third party audits, in partnership with civil society and labour union actors that survey workers directly, to independently verify labour conditions in production facilities in their supply chains;**
  - ▶ **develop or increase expertise for independent monitoring by training relevant officers.**

109 Eidgenössisches Finanzdepartement EFD, *Nachhaltige Beschaffung des Bundes: Stand der Umsetzung, Bericht zu Massnahme 3.4 des Masterplans Cleantech*, (EFD, 2014), p. 8-9.

110 International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 53.

111 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, "Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods", *The International Journal of Human Rights* 19 (3), April 2015, p. 360.

112 The LANDMARK Project, *Good Practice in Socially Responsible Public Procurement – Approaches to Verification from across Europe*, (The LANDMARK consortium, 2012), p. 8.

113 International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 46.

114 Finnwatch report highlights such problems with audits, including an example of suspected human trafficking in a juice factory, see p. 44: [http://finnwatch.org/images/pdf/PerspectivesOnVSS\\_forweb.pdf](http://finnwatch.org/images/pdf/PerspectivesOnVSS_forweb.pdf)

115 LeBaron, Genevieve, Lister, Jane, "Ethical Audits and the Supply Chain of Global Corporations", *SPERI Global Political Economy Brief* No. 1, (SPERI, 2016).

116 For more information, see: <http://www.ciw-online.org/>

117 For more information, see: <http://ulula.com/>

118 For more information, see: <https://www.laborvoices.com/>

119 For more information, see: <https://www.mylaborlink.org/>

120 For more information, see: <http://www.fairlabor.org/>

121 For more information, see: <https://www.ethicaltrade.org/>

122 For more information, see: <https://research.geopoll.com/>

123 For more information, see: <http://electronicswatch.org/en>

124 See the approach of Electronics watch at: [http://electronicswatch.org/en/worker-driven-monitoring\\_2460012](http://electronicswatch.org/en/worker-driven-monitoring_2460012).

- ▶ **include a contract performance clause that obliges suppliers to exercise ongoing due diligence concerning THB/LE in the supply chain. Criteria should include:**
  - ▶ **due diligence concerning all tiers of subcontracting;**
  - ▶ **allowance of third party independent monitoring of companies in the supply chain;**
  - ▶ **allow the contracting public authority to conduct or participate in independent audits that penetrate all levels of risk in a supply chain.**

## 5. Recommendation 5: Establish Enforcement Mechanisms and Remedial Actions

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Suppliers who do not fulfill contract requirements can face a range of penalties. Enforcement actions must be clearly defined in the legally binding contract clause put in place prior to start of the contract term, and then need to be monitored.<sup>125</sup>

In case of a breach of contract in relation to human rights due diligence, different options can be taken. For example, in the case of the city of Malmö (Sweden), the public authority works with the supplier that fails to fulfill criteria, aiming to improve performance, rather than terminating the contract.<sup>126</sup> Applying sanctions, such as terminating a contract, might have unintended consequences such as workers in the supply chain losing their jobs.<sup>127</sup> Hence, further negotiations or dialogues can be a form of improving standards. The U.S., for example, has the option to exclude contractors and/or suppliers from obtaining contracts, either through suspension or debarment, as a last resort after other less severe options have been considered and determined to be ineffective.

In order to encourage contractors to come into compliance, remedies might be viewed on a continuum with lesser penalties considered before more severe ones are imposed to avoid unintended harmful consequences for workers who may be left without jobs. Penalties can include withholding payments, suspension, and termination of contract or, excluding the supplier from participating in other public tenders for a certain period of time.<sup>128</sup> Other forms of contractual sanctions include the imposition of a fee or daily fines for missing deadlines for corrective actions, as for instance applied in Norway.<sup>129</sup> Termination of contracts should be a last resort when other avenues have been exhausted.

Public authorities can request suppliers to have a monitoring and evaluation process of their supply chains in place. This process should also incorporate a complaint mechanism in case there are human rights abuses including THB/LE at worksites. Vendors must institute meaningful systems that work and public authorities should develop a functioning model and standards for them to follow. Through these complaint mechanisms, workers can report abuses and begin a process to access remedy and compensation if necessitated.<sup>130</sup>

The UN Guiding Principles define a grievance mechanism as “routinized, State or non-State based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy be sought”.<sup>131</sup> Thus, the company should ensure that complaint mechanisms are in place that allow for violations to be reported and a transparent process exists that provide for remedies and compensation for victims.

There are a number of ways by which companies can help improve access to remedy. This includes the provision of formal, overarching grievance procedures for supply chain workers, as well as working with suppliers to build local grievance handling capacity. In addition, a number of multi-stakeholder initiatives and certification or standard bodies require the existence of workplace-level grievance mechanisms in their codes or other governance documents, while others provide a recourse option to workers or their representatives for where grievance resolution at local level has failed or is impossible. Given the centrality of decent work to the Sustainable Development Goals, it may be useful for NGOs and trades unions to consider forming strategic partnerships to advance this goal.

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125 Electronics Watch, *Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation*, (Electronics Watch, 2016), p. 16.

126 The LANDMARK Project, *Good Practice in Socially Responsible Public Procurement – Approaches to Verification from across Europe*, (The LANDMARK consortium, 2012), p. 8.

127 Stumberg, Robert, Ramasastry, Anita, Roggensack, Meg, *Turning a Blind Eye – Respecting Human Rights in Government Purchasing*, (ICAR, 2014), p. 40.

128 International Learning Lab on Public Procurement and Human Rights, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 48.

129 Direktoratet for forvaltning og IKT (difl)/Norway, *SRPP Contract Performance Clauses* (Revised: September 2012, copy with author).

130 Stumberg, Robert, Ramasastry, Anita, Roggensack, Meg, *Turning a Blind Eye – Respecting Human Rights in Government Purchasing*, (ICAR, 2014), p. 54 and CORE Coalition and partners, *Beyond Compliance: Effective Reporting Under the Modern Slavery Act: A civil society guide for commercial organisations on the transparency in supply chains clause*, (CORE, 2016).

131 “Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework.” OHCHR. 2011. Accessed February 06, 2018. [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

However, the State is primarily responsible for remedy of labour rights abuses through its formal and informal judicial mechanisms (such as labour courts or oversight and mediation by labour inspectors). Grievances should primarily be dealt with in the workplace between employers and workers, and a mature industrial relations system involving independent, free and representative trade unions negotiating directly with employers on behalf of workers is optimal. The employer should be held responsible for handling grievances and ensuring remedy using a single system that is aligned with international laws and best practices.

There are diverse operational models of grievance mechanisms. The main responsibility for dealing with grievances of supply chain workers lies with the direct employer – which will be the supplier, or sometimes a contractor to that supplier – and typically, local or workplace-level grievance channels will be the most effective and accessible way for workers to seek redress. Therefore, the most robust and appropriate model for providing remedy in any workplace will typically be a mature system of industrial relations with a single code of conduct that reflects all the fundamental International Labour Organization conventions. That involves a trade union recognition agreement and management system, which forms a part of an operational grievance mechanism capable of addressing individual grievances, disciplinary issues and collective disputes, and which acknowledges the primacy of the employment relationship. Such approaches offer the prospect of a sustainable model of ethical business. Labour rights NGOs have also successfully contributed to worker organizations to claim their rights in places where traditional trade unions are absent or, in the instance of child labour, where traditional trade union approaches have been deemed inappropriate.

There are a range of potential routes that a grievance may be received in a supply chain setting, including official grievance mechanism contact points, but also ethical trade or human rights teams, corporate affairs, customer hotlines, worker hotlines, stakeholder engagement teams and direct relations with trade unions. It is important to ensure that implementation is based on clear policies detailing how complaints received via different channels are subsequently dealt with, including clearly assigned responsibilities, internal reporting and escalation channels. A key area for improvement of current and future approaches relates to putting in place systems to assess the actual impacts and outcomes of complaints procedures.<sup>132</sup>

Should workers of a subcontractor of a supplier be exploited and not paid for their work, the supplier has to make sure that procedures are in place which allow the worker to obtain remedy, that is all due compensation for unpaid work and the repayment of recruitment fees or fair wages owed. In case of reports about THB/LE in the supply chain of the supplier, the public authority needs to define what the supplier is required to do, and law enforcement should be notified of any suspected criminal offence. The public authority should define as contract performance clause how the supplier has to act when human rights issues in the supply chain are identified through audits or other third party due diligence.<sup>133</sup>

## Recommendation 5: Operational Guidance

**It is recommended that OSCE participating States:**

- ▶ **develop an understanding that the aim of contract enforcement is to improve or maintain good working conditions in the supply chain;**
- ▶ **define the obligation of the supplier to act to remediate cases of THB/LE that are uncovered and to implement measures to avoid further abuse of human rights:**
  - ▶ **in case of reports of THB/LE in the supply chain, develop a strategy with the supplier on how to address the situation, to avoid future cases of THB/LE and how to ensure access to remedy for the exploited persons;**
  - ▶ **encourage contractors to partner with worker organizations and local NGOs to implement remedies and address exploitative conditions.**
- ▶ **establish an on-going dialogue with the contractor to monitor contract compliance;**
- ▶ **define all forms of sanctions that could be imposed upon a non-compliant contractor, that include contract termination only if all other reasonable actions to satisfy compliance have been exhausted.**

<sup>132</sup> "Grievance mechanisms & remedy." Ethical Trading Initiative. Accessed February 06, 2018. <https://www.ethicaltrade.org/issues/grievance-mechanisms-remedy>.

<sup>133</sup> Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, "Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods", *The International Journal of Human Rights* 19 (3), April 2015, p. 361.

## c. Enhanced Transparency in Supply Chains

The UN Guiding principles stipulate that all companies have a responsibility to respect human rights. This means that companies should avoid infringing on the human rights of others and should address any negative impacts their operations have.<sup>134</sup> According to Former Special Representative of the UN Secretary-General on Business and Human Rights Ruggie, “doing no harm is not merely a passive responsibility for firms but may entail positive steps”.<sup>135</sup> Thus, companies should establish human rights policies that will be the ‘precursor to a company’s human rights due diligence towards meeting its responsibility to respect human rights’, including in relation to THB/LE.<sup>136</sup> As detailed earlier in this report, countries including Australia, France, Brazil, the Netherlands, the UK, and the U.S. State of California, have or are in the process of passing trafficking in human beings due diligence transparency legislation (“transparency legislation”) that puts the onus on companies to implement and disclose their anti-THB/LE policies and practices.

This section details how OSCE participating States can promote transparency in commercial supply chains to enable scrutiny of a company’s performance to prevent THB/LE and to encourage the production of goods responsibly. Research has shown that in relation to THB/LE there is a general lack of transparency throughout the supply chain and that persistent violations of labour rights occur. Given the research findings, OSCE participating States should consider requiring businesses, especially those operating in high risk sectors, to exercise and disclose due diligence on how they avoid adverse human rights impacts.

The assumption underlying transparency regulation is that an information gap exists between those who purchase goods (consumers/public sector) and those who sell goods (businesses).<sup>137</sup> The information gap relates to the circumstances under which the goods are produced, i. e. whether labour standards are respected within business operations and their supply chains to the extent that THB/LE is avoided or dealt with. This increased labour supply chain transparency would allow public authorities, consumers, potential workers, subcontractors and investors to integrate the disclosed information in their decision-making. Further, it can help companies by raising awareness of the issue to those that have not yet engaged in anti-trafficking activities and assist them in accepting the risks inherent in their supply chains. In addition, it can help to level the playing field for those companies already engaged in anti-THB/LE, by giving them a competitive advantage over those that have not taken steps to address the issue. Transparency also enables a company to utilize its leverage with suppliers to prevent exploitative practices and incentivize good behavior.

Discussions during the OSCE OSR/CTHB project workshops identified an information gap related to worker awareness of the downstream brands that purchase from supply chains they are embedded in. This information gap has critical implications for worker voice and empowerment to resist THB/LE. For example, participants in the 2016 “Second Workshop on the Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures”, organized by the OSCE in London highlighted the critical need for the “Incorporation of Worker’s Voice”. In addition to providing workers with information about which company may be the retailer of the goods they are producing, the “establishment of anonymous hotlines, and independent grievance mechanisms” are critical to ensuring multiple channels of communication with and to workers.<sup>138</sup> Attendees of the 2016 OSCE “Prevention of Trafficking for Labour Exploitation in Supply Chains” conference in Berlin also recognized the importance of the “voice and participation” of workers, adding that “workers, and their organizations involvement and leadership in eradication efforts are

### Case Study: Public List of Companies is St. Petersburg, Russian Federation

The Labour Inspectorate in St. Petersburg publishes on its website a list of companies that: a) are licensed, b) against whom no serious complaints have been received from workers, c) have been accused of non-payment or late payment of wages, and d) have been accused of mistreating workers. The Labour Inspectorate also sends out text messages to registered migrants informing them of the possibility to complain and seek assistance if their rights are violated. It also arranges meetings with representatives of these communities, to inform them of their labour rights and grievance mechanisms.

[\\*http://www.cbss.org/wp-content/uploads/2012/11/ADSTRINGO-Guidelines.pdf](http://www.cbss.org/wp-content/uploads/2012/11/ADSTRINGO-Guidelines.pdf)

<sup>134</sup> “Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008).

<sup>135</sup> Ibid.

<sup>136</sup> OHCHR, *A Guide For Business: How to Develop a Human Rights Policy*, (The Global Impact, 2011, p. 4.

<sup>137</sup> Fung, Archon, Graham, Mary and Weil, David, *Full Disclosure: The Perils and Promise of Transparency* (Cambridge University Press: 2008), p. 40.

<sup>138</sup> Second Workshop on the Prevention of Trafficking in Human Beings in Supply Chains through Government Practices and Measures, London, 29-20 November 2016.



essential, as they know where the risks are, and will act willingly as monitors and whistle-blowers if they have the confidence that there will be enforcement and progress”.<sup>139</sup>

Many voluntary initiatives have encouraged companies to establish a human rights policy, such as the United Nations Global Compact and the Extractive Industries Transparency Initiative. The United Nations Global Compact is a public-private partnership that is set up for the same purpose. The UK Modern Slavery Act (MSA) and the California Transparency in Supply Chains Act (CTSCA) are examples of State-initiated legislation that require certain companies to publish what, if anything, they have done to ensure that THB/LE is not taking place throughout their supply chains. However, even stating that the company has not taken steps is considered to be sufficient under the California law.

OSCE participating States could take the current disclosure laws a step further and implement an *obligation* to have a THB/LE preventive policy in place, at least for companies that meet a certain revenue threshold and that operate in certain high risk areas. Binding legal requirements are the most effective way to provide clarity on what companies are required to disclose, and to create a level playing field in the industry. That is, if all companies in an industry have the same disclosure requirements, they will all operate under the same rules, and proactive practices will become the norm and be scaled. Moreover, at the 2017 UN Forum on Business and Human Rights, both employer and labour groups called publicly for greater coordination and harmonization of transparency legislation to ensure a level playing field and more consistent requirements across jurisdictions.<sup>140</sup> Effectiveness in this context means that imposing mandatory corporate due diligence transparency policies concerning THB/LE will contribute to uncovering and addressing THB/LE industry-wide, and will allow consumers, investors and public authorities to make informed decisions about purchasing goods, procurement and investment.

## 1. Recommendation 1: Create Policy Obligations and Agree to Definitions

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OSCE participating States are encouraged to publish a list of companies that are subject to the transparency regulation, derived from companies with a minimum threshold of turnover. Since a minimum turnover sets the threshold for companies' subject to the transparency regulation, the tax authority should provide input for the list. OSCE participating States may further consider providing, alongside the list, a database public registry where already published reports of the companies enlisted can be uploaded and consulted.

Suggested language is included in the model law in the annex of this report and is based on the assumption that only companies with a minimum determined turnover will be required to annually prepare a statement outlining the THB/LE preventive policy. Where a company passes the threshold to require a statement it is likely that its sub-contractors, who are more likely to be under the threshold will have to demonstrate what they have done to satisfy their client. Therefore, where this occurs, a contractual clause could be that all subcontractors agree that evidence of their due diligence, and contract compliance, be published as part of the company's statement.

### Recommendation 1: Operational Guidance

**It is recommended that OSCE participating States:**

- ▶ **apply transparency regulations to companies over a certain threshold;**
- ▶ **adopt legislation that will require companies to have a THB/LE preventive policy in place:**
  - ▶ **legislation should include definitions of topics covered.**

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<sup>139</sup> Conference Report, OSCE Prevention of Trafficking for Labour Exploitation in Supply Chains, Berlin, 7-8 December, 2016.

<sup>140</sup> The summary report of the 2017 UN Forum on Business and Human Rights has not been published as of the printing of this document. Information about attendees, concept notes and the programme can be found here: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2017ForumBHR.aspx>

## 2. Recommendation 2: Define the Content and Scope of the Disclosed Information and Needed Remedial Actions in Legislation

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Apart from the size of the company it is important to indicate to what extent business action abroad is part of the reporting obligation. Existing transparency policies either apply to the company's own business operations exclusively or to also those of its subsidiaries. In order to ensure that the reporting is conducted comprehensively, it is advised that companies show what they are doing to prevent THB/LE including with their subsidiaries abroad. However, since small- or medium-sized businesses may also be impacted by THB/LE, it is important to also include them in some form of transparency legislation. This should at least apply to companies in sectors that are most likely prone to THB/LE in the supply chain. Extensive reporting requirements may create an undue burden to small- and medium-sized businesses (SMEs), thus States can encourage large businesses to work with SMEs in their supply chain to build their capacity to implement and report on such policies.

The THB/LE transparency legislation regulating businesses that participating States adopt should specify the exact information that needs to be disclosed. At a minimum, the THB/LE preventive statement should indicate:

- the structure of the company's business operation and supply chain;
- steps the company takes to prevent THB/LE from taking place within the entirety of its operations;
- what efforts it takes to understand and mitigate relevant risks, hold its suppliers accountable, and remediate any issues found;
- what in-house or third-party due diligence processes it employs to investigate and determine the THB/LE;
- steps taken to assess and manage identified THB/LE risks;
- remedial actions should any suspected THB/LE conditions be found, and efforts to verify the effectiveness of such remedy.

Capacity assessment and building is critical for relevant government officials to enable them to assess the quality of THB/LE disclosures. Governments should also, at a minimum, provide guidance and training for companies to assess, manage and remediate risks of THB/LE, as presented in Recommendation 5 of the previous section.

OSCE participating States are advised to urge companies to develop such mechanisms, or participate in an existing and effective operational-level grievance mechanism, which allows for remedies for persons whose rights were harmed by suppliers or their subcontractors. For example, the European Action for Compensation for Trafficked Persons (COMP. ACT), a project of La Strada International and Anti-Slavery International, aims to assist with the implementation of compensation measures for trafficked persons and mainstream the provision of remedy.<sup>141</sup>

Remedy whereby a claimant can access both justice and compensation for rights violations, is a critical part of any grievance process, as has been documented in the 2017 UN Forum on Business and Human Rights titled, "Realizing Access to Effective Remedy".<sup>142</sup> Company-based complaint mechanisms are "accessible directly to individuals and communities who may be adversely impacted by a business enterprise". These mechanisms are administered by companies themselves.<sup>143</sup> However, it is essential that staff of a company understand the difference between a grievance and an allegation of forced labour, and do not inappropriately investigate an allegation of forced labour as a grievance which may undermine the ability of the appropriate authorities to investigate any forced labour offences effectively, and potentially place the appointed grievance manager and the worker at risk from the exploiters.

The conditions of contract termination or the imposition of sanctions should be stated explicitly in the original contract, with provisions to follow due process. In case of violations down the supply chain, companies should indicate how the revealed harm will affect their future business relationships with the responsible supplier, vendor or SME. It may decide to terminate business relationships altogether, or it may enter into dialogue with the supplier in question to ensure that the THB/LE will be avoided in the future. From the overall objective of preventing THB/LE in business supply chains, the latter option can be considered the most preferable response in case of less severe violations of THB/LE and when the company thinks that by raising awareness (e. g. by improving standards or providing training) THB/LE can be avoided in the future, while still preserving economic opportunities for workers.<sup>144</sup> States can thus encourage companies to enter into dialogue with their suppliers once

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141 "Project COMPACT European Action for Compensation for Trafficked Persons." Compact. Accessed February 6, 2018. <http://www.compactproject.org/?main=home>.

142 Concept Note "2017 UN Forum: Focus, aims and context" United Nations Forum on Business and Human Rights, 27-29 November, 2017. Accessed February 6, 2018. <http://www.ohchr.org/Documents/Issues/Business/ForumSession6/ConceptNote.pdf>

143 UNGP 29, Commentary.

144 Lake, Quintin, Macalister, Jamy Berman, Cindy, Gitsham, Matthew and Nadine Page, *Corporate approaches to addressing modern slavery in supply chains: A snapshot of current practice* (Ethical Trading Initiative, 2015), p. 23.

minor human rights abuses relevant to THB/LE have been revealed rather than to terminate the business contract, in order to ensure that THB/LE will effectively be addressed and avoided by the company in the future.

## Recommendation 2: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **conduct assessments to determine which industries and sectors are particularly at risk, prior to developing transparency regulations;**
  - ▶ **mandate compliance by SMEs operating in those high-risk areas.**
- ▶ **mandate the adoption and enforcement of a THB/LE policy that is applicable to the entirety of its supply chain;**
- ▶ **specify which information needs to be disclosed;**
- ▶ **ensure that the policy includes what actions will be taken for remediation if issues are found. Specify that THB/LE Policies should:**
  - ▶ **disclose information about grievance mechanisms implemented;**
  - ▶ **indicate how violations will be addressed, including about future business relationships with offending suppliers, vendors and SMEs in the company's supply chain;**
  - ▶ **specify the type and frequency of audits used and who in the company is responsible for all related compliance and enforcement actions.**
- ▶ **oblige subject companies to disclose policies and efforts annually;**
- ▶ **indicate clearly in legislation how the THB/LE preventive statement should be published in order to ensure that it is widely accessible.**

## 3. Recommendation 3: Monitor Compliance

Monitoring by States of corporate disclosure statements is essential to meet the legislation's purpose. States should monitor and verify that companies are disclosing accurate information regarding steps taken to eradicate THB/LE in their supply chains, ensuring that companies are actually carrying out the actions they report. OSCE participating States may develop a registry that companies can upload their THB/LE statements to, in addition to posting them on their own company websites.

Ensuring that disclosed information is meeting the requirements and intent of the transparency legislation, may require further institutional capacity for the implementing authority. The OSCE OSR/CTHB could provide such capacity building and training assistance to participating States, at their request.

## Recommendation 3: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **establish a database where companies upload their THB/LE statements;**
- ▶ **develop tools, with the support of the OSCE, to evaluate whether the THB/LE preventive statement meets the requirements set forward in the transparency legislation;**
- ▶ **train implementing authority staff to oversee reporting requirements.**

## 4. Recommendation 4: Incentivize Adherence and Take Enforcement Actions for Non-compliance, against Systemic Violators and where No Remedy

When there are no legal consequences attached to non-compliance, THB/LE might continue. Thus, incentives to comply and enforcement of non-compliance actions are key.<sup>145</sup> Therefore, the monetary and non-monetary costs of non-compliance should be specified in order to achieve desired results. Disclosure naturally implies an informal enforcement mechanism: inadequate disclosure or non-disclosure may lead to reputational damage for companies since they will be negatively perceived by consumers and investors which can impact revenue.<sup>146</sup> For example, Section 1502 of the US Dodd-Frank financial reform regulations specifically addresses companies that file reports to the U.S. Securities and Exchange Commission and use certain minerals from the Democratic Republic of Congo (DRC). As the trade in minerals potentially fuels conflict in the DRC, the law requires companies to disclose their use of minerals they extract from particular conflict-torn regions. Under this rule, companies have to disclose what actions they are taking to ensure that the minerals they source from a high-risk region are “conflict free”. Though advocates cite that the rule has improved conditions, the law does not subject companies to any strict liability, and is primarily a disclosure mechanism.<sup>147</sup>

Another example is Brazil's “dirty list” that names and shames companies that have found to have slave labour in their supply chain. Government investigations, NGO audits and media reports have identified THB/LE issues, that are then connected to large retailers and brands. Making the list may subject a company to face punitive measures, and as the Guardian reports, “Companies stay on the list for two years, during which time they have to prove they are making concerted efforts to clean up their supply chains and pay a series of fines and unpaid labour taxes. While on it, they can't obtain credit from government and private banks and are boycotted by those who have signed up to the pact.”<sup>148</sup> While recent political turmoil has challenged the implementation of this pact, the provisions are still being applied.

Similarly OSCE participating States should consider placing those companies that do not comply with transparency legislation on a blacklist. Blacklisting can cause reputational damage for companies and States can add further financial consequences, such as those employed in Brazil.<sup>149</sup> An additional route OSCE participating States may take is rewarding companies that comply with the transparency regulation and are actively taking action to prevent THB/LE. These companies may be included on ‘good performance’ lists who would then be viewed favorably when they bid on public procurement opportunities.

Whichever route a participating State takes, it is important to clearly define roles and responsibilities for enforcement and develop capacity and training to ensure that their implementing authority is capable to do so, in co-ordination with all relevant agencies engaged in combatting THB/LE.

### Case Study: Brazil

“Lista Suja” established in 2004 in Brazil

The “Dirty List” is a registry of names of employers exploiting workers in “slavery” conditions. After complaints have been investigated by inspectors, cases are dealt with through an administrative process at the Ministry of Labour and Employment. The list is made public through the websites of the Ministry itself and collaborating NGO Reporter Brazil, and updated every six months. Once included on the register, an employer is monitored for two years. If the offence does not occur again, all fines, unpaid wages and social security compensation have been paid, the employers' name may be removed from the list. Although the decree does not provide for specific penalties, some major public and private financial institutions have decided to refuse credit and other banking benefits to companies on the list.

145 Prokopets, Alexandra, “Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010”, *37 Hastings International and Comparative Law Review* 351 (2014), p. 362.

146 Ibid. p. 365.

147 Kim, Yong H., and Gerald F. Davis. “80% of Companies Don't Know If Their Products Contain Conflict Minerals.” *Harvard Business Review*. January 04, 2017. Accessed February 6, 2018. <https://hbr.org/2017/01/80-of-companies-dont-know-if-their-products-contain-conflict-minerals>.

148 “Brazil's ‘dirty list’ names and shames companies involved in slave labour.” *The Guardian*. July 24, 2013. Accessed February 6, 2018. <https://www.theguardian.com/sustainable-business/brazil-dirty-list-names-shames-slave-labour>.

149 See as example for blacklisting companies Brazil's Dirty List, chapter 2.3.2.

## Recommendation 4: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **create and clearly communicate sanctions for companies that do not comply with disclosure laws and incentives for compliance;**
- ▶ **should violations of policies occur, allow for companies to take good faith corrective actions before imposing sanctions;**
- ▶ **clearly define roles and responsibilities for enforcement;**
- ▶ **develop capacity building and training to support enforcement efforts.**

## 5. Recommendation 5: Measure Progress and Analyze Quality of Reporting and Disclosures

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OSCE authorities may consider grading companies' compliance, based on whether disclosure statements meet specified criteria and should include that determination on a publicly available database. States may also wish to include disclosures on related issues to THB/LE, such as past compliance or violations of core labour laws in such databases. This will better enable consumers to determine which companies are complying with the obligation to disclose and the actions they are taking. OSCE participating states may also support NGOs and civil society organizations that compile disclosure statements filed by companies complying with transparency laws. For example, the Modern Slavery Registry is a website maintained by the Business & Human Rights Resource Center of company reports filed under the UK Modern Slavery Act.<sup>150</sup> A central registry also facilitates further analysis and monitoring of corporate conduct by sector and industry, as is done by the NGO Know the Chain, that benchmarks company performance based upon their disclosure statements.<sup>151</sup> Such analysis is useful for investors, consumers and governments to better understand industry-wide approaches to anti-human trafficking efforts.

## Recommendation 5: Operational Guidance

It is recommended that OSCE participating States:

- ▶ **publicly release, and if possible compile in a registry company disclosure statements so that they are widely accessible to the consuming public, investors, workers, and other stakeholders;**
- ▶ **conduct analyses, or support NGOs that analyze, corporate disclosures to ensure better public and private supply chain decision making.**

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<sup>150</sup> For more information, see: <http://www.modernslaveryregistry.org/>

<sup>151</sup> For more information, see: <https://knowthechain.org/>



## d. Fair and Ethical Recruitment & Labour Market Protection

Much attention has been given to illicit and unethical labour recruitment practices. In 2017 alone, ICRR,<sup>152</sup> the Institute for Human Rights and Business and Equidem,<sup>153</sup> the NYU Stern School of Business<sup>154</sup> and the ILO<sup>155</sup> all released reports on different challenges in the recruitment industry adding to past studies by academic, worker-led, advocacy, tripartite and other institutions that have greatly contributed to the understanding of risks and solutions in this space.

Migration for work and recruitment of workers across and within borders is a complex and multilayered process that is plagued with corruption and exploitation. In 2013, the International Labour Organization estimated that 150 million workers migrated within and outside their country borders for economic opportunity. Many do so through recruiters and agents who exploit their vulnerabilities and economic desperation: migrant workers often pay unscrupulous third-parties exorbitant fees to access jobs; fall victim to false promises; or, are compelled to work in unsafe work environments with little or inadequate pay. Stories of such exploitation have been documented in numerous past surveys and studies focusing on workers primarily migrating from the Global South in search of economic opportunity in various industries within their region, or across the Middle East, Europe and North America.

Fueling this migration is the lack of economic opportunity in one country, and the shortage of labour in another. Global businesses in the manufacturing, construction, fishing, agriculture, textile, garment, footwear, hospitality, extractives and other sectors rely upon migrant workers to fulfil these labour shortages. These companies are often far removed from production level facilities, and despite good intentions, may have limited visibility in the local hiring practices of their myriad suppliers. The reliance on labour brokers, agents and middlemen by lower rung suppliers, further clouds visibility into on the ground hiring practices and the experiences of workers. Corrupt government entities that issue visas or look the other way when laws are broken further facilitate practices that can lead to THB/LE. While the recruitment process is complex, layered and geographically varied, it generally involves multiple stakeholders, who each have a role in the multiple steps it takes to get a migrant worker to a job site.

The issues that migrant workers face are only exacerbated by global supply and demand, as the International Organization for Migration (IOM) summarizes, “On the one hand the labour force in the developing world is predicted to expand significantly and at a faster rate than employment will be created; while on the other hand the demand for migrant labour in the developed world is likely to increase as a result of demographic trends. This has contributed to an unprecedented number of employers seeking workers, globally, to fill labour gaps in all sectors and skill levels.”

International Organization for Migration, Ethical Recruitment of Migrants, Background Paper

*Workers may experience rights violations across multiple facets on this migration journey. An ILO paper has identified a “non-exhaustive list” of eight types of abusive and fraudulent recruitment practices, a combination of which could amount to the crime of trafficking in persons if the end result of the recruitment process is exploitation.<sup>156</sup> These are, respectively:*

1. *charging fees to workers;*
2. *threats and intimidation, including verbal and psychological abuse;*
3. *deception with regard to contracts, working and living conditions as well as failure to disclose relevant information;*
4. *restriction on the freedom of movement;*
5. *retention of identity documents with the aim to control job seekers;*
6. *physical and sexual violence;*
7. *recruitment of children below working age;*
8. *recruitment of workers into hazardous and unsafe work.*

*Of these eight points, it is the first regarding fee-charging that is now receiving much attention from industry bodies, law and policymakers and anti-trafficking activists. Increasingly major companies are accepting the principle of no fee-charging to workers, and in some cases, have even insisted on the return of fees to workers.*

152 ICRR, “Best Practice Guidance on Ethical Recruitment of Migrant Workers” (ICRR, 2017) Accessed February 6, 2018. <http://www.iccr.org/best-practice-guidance-ethical-recruitment-migrant-workers-0>

153 Institute for Human Rights and Business, “Responsible Recruitment: Remediating Worker-Paid Recruitment Fees” November 2017. Accessed February 6, 2018. <https://www.ihrb.org/focus-areas/migrant-workers/remediating-worker-paid-recruitment-fees>

154 Segall, David and Labowitz, Sarah, “Making Workers Pay, Recruitment of the Migrant Labor Force in the Gulf Construction Industry” (NYU Stern Center for Business and Human Rights, 2017) Accessed February 6, 2018. <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58ec1e9ed1758e3915cb4c5b/1491869348464/FINALFINAL%E2%80%91MakingWorkersPay-Report-Digital.pdf>

155 “Fair Recruitment.” ILO. Accessed February 6, 2018. <http://www.ilo.org/global/topics/fair-recruitment/lang--en/index.htm>

156 Andrees, Beate, Nasri, Alix and Swiniarski, Peter, “Regulating labour recruitment to prevent human trafficking and to foster safe migration: Models, challenges and opportunities”, *ILO Working Paper*, (ILO, 2015).

A number of guidance documents and statements of principle have already been put forward by others that promote responsible or fair and ethical recruitment practices. For example, HEUNI and the ADSTRINGO project of the Permanent International Secretariat of the Council of the Baltic Sea States (CBSS) provides “Guidelines to prevent abusive recruitment, exploitative employment and trafficking of migrant workers in the Baltic Sea region”.<sup>157</sup> In addition, in 2016, the ILO also published general principles and operational guidelines for responsible recruitment.<sup>158</sup>

This section seeks to identify some of the main policy concerns and broad principles, in the areas of labour market protection and fair and ethical recruitment; to identify examples of emerging practice in the respective areas; and, to provide some operational guidance for addressing these concerns at the national level. In the latter area, this can also provide some basis for identifying possible support by the OSCE for national implementation plans.

Procurement policies and directives at international levels, including the policy frameworks and safeguard instruments of international financial institutions, now make specific reference to the ILO’s core labour standards on forced and child labour, discrimination and equality of opportunity, and freedom of association. While these are positive steps, States need to understand the value of other international labour standards for guiding their national laws and policies in difficult areas. Standards of particular relevance in the area of responsible recruitment include those that cover, at a minimum:

- private employment agencies;
- labour inspection;
- the protection of wages;
- labour clauses in public contracts;
- domestic workers;
- migrant workers.

Good practice at the international level has included consultations between such institutions as the World Bank, the International Finance Corporation (IFC) and the ILO, to build consensus for integrating social dimensions into procurement policies and practices. A note prepared by the ILO for the World Bank states, “...especially the question of labour standards applicable in the execution of public contracts, continues to be disregarded or marginalized in the global debate on public procurement systems”.<sup>159</sup> The ILO observed, however, that “beyond the fundamental standards, other basic conditions of work, in the areas of occupational safety and health, working time, wages etc., have been increasingly recognized as valuable, due to the growing acceptance of the importance of decent work in development.”

For example, such standards are included in the IFC’s performance standards, the equator principles, OECD Guidelines on Multinationals, Social Accountability International’s SA-8000, and other international instruments. Such broader approaches to labour standards in procurement have also been taken by industry-wide bodies, such as the Chartered Institute of Procurement and Supply (CIPS).<sup>160</sup>

Labour recruitment across borders, however, is very context-dependent, as has been demonstrated by States that already monitor and regulate the flow of citizens and non-citizens for purposes of employment.

### Case Study: Belgium

The Social Inspectorate in Belgium has a legal mandate to investigate trafficking in human beings and plays a frontline role to detect and investigate related crimes. It has a presence in the field and extensive investigative powers that include 220 “general” and 35 “specialized” inspectors. The Inspectorate also coordinates investigations between key partners including prosecutors, police and victim services at the local and national levels.

<http://accountabilityhub.org/country/belgium/>

### Case Study: Finland

Occupational Safety and Health Inspectorates of the Regional State Administrative Agencies have appointed 17 labour inspectors, with the particular task of monitoring the sectors that employ migrant workers. They carry out inspections particularly in the restaurant, cleaning, construction and agricultural sectors, focusing on companies that employ migrant workers. These inspections, which can be carried out without prior notice, are based on tips received from the public and other authorities, and have been instrumental in uncovering several cases of exploitation and trafficking for forced labour. In 2012, the Ministry of Social Affairs developed guidelines for the labour inspectorates to identify victims of trafficking in human beings including to refer potential victims to the official assistance system for victims of trafficking.

157 Sorrentino, Liliana, and Anniina Jokinen. “Guidelines to prevent abusive recruitment, exploitative employment and trafficking of migrant workers in the Baltic Sea region.” Heuni. 2014. Accessed February 06, 2018. [http://www.heuni.fi/material/attachments/heuni/reports/RiNj47uIB/Guidelines\\_report\\_English.pdf](http://www.heuni.fi/material/attachments/heuni/reports/RiNj47uIB/Guidelines_report_English.pdf).

158 “General Principles and Operational Guidelines for Fair Recruitment.” ILO. 2016. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/genericdocument/wcms\\_536263.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_536263.pdf).

159 International Labour Office, *International Labour Standards in Procurement: Integrating the Social Dimension into Procurement Policies and Practices*, (2008).

160 CIPS Knowledge, *Ethical Purchasing Practices*, (2013).

# 1. Recommendation 1: Bolster Labour Administration & Inspection

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The application of labour standards requires rigorous monitoring through an adequately resourced and staffed system of national labour administration and inspection. The ILO's Labour Inspection Convention num. 81 (1947) defines the functions of labour inspection systems as:

- enforcing legal provisions in conditions of work and the protection of workers;
- providing technical advice to employers and workers;
- alerting the competent authority to abuses not specifically covered by existing legal provisions.

This means that labour inspectorates can perform the three roles of prevention, advisement and enforcement. The Convention also calls for co-operation and collaboration between labour inspectors and other concerned public and private institutions, including organizations of employers and workers.

It is widely recognized that labour inspectors need to be more involved in action against trafficking for labour exploitation. However – as the ILO has observed in a Handbook for Labour Inspectors on Forced Labour and Human Trafficking – the key role of labour inspectors has so far been overlooked.<sup>161</sup> The OSCE has also published guides and handbooks and conducted capacity building exercises for labour inspectors in the area of trafficking in human beings.<sup>162</sup> Because these are serious criminal offences, States have tended to assume that THB/LE is best dealt with through criminal law enforcement and procedures, rather than through labour law, administration and justice. Labour inspectors often lack a clear mandate in this regard and the scope of their focus may not cover sectors in which forced labour practices tend to occur, such as agriculture and informal industries, including domestic work. Often labour inspection processes are reactive rather than proactive and thus a careful assessment needs to be made about whether more proactive approaches, such as the licensing of recruitment agencies are warranted.

Once a clear mandate is established through policy, labour inspectors can play an important role in prevention, dispute resolution and labour law enforcement, and through the application of civil penalties on offenders. Labour inspectors are also well equipped to observe indicators of THB/LE. However, they should immediately submit any suspicions of criminal violations over to law enforcement, and should take care to adhere to those inspection actions they are authorized to do so through local laws. That is, a labour inspector should conduct an inspection under their authority, but if they unexpectedly uncover criminal activity they should immediately follow all established protocols to refer the matter to the police, or to the specialist section of the inspectorate, if the inspectorate has the authority to investigate a criminal offence of forced labour or trafficking in human beings.

Labour inspectors can also apply a wide range of tools of labour justice in a discretionary and flexible manner, within their mandates, seeking to resolve conflicts, and imposing sanctions such as fines and, in the worst cases, closure of businesses.

The 2014 Protocol to the Forced Labour Convention num. 29 (1930) draws particular attention to the role of labour inspectorates in preventing forced labour and trafficking. The measures include:<sup>163</sup>

- the coverage and enforcement of legislation relevant to the prevention of forced and compulsory labour, including labour law as appropriate, applied to all workers and all sectors of the economy;
- strengthening labour inspection services and other services responsible for the implementation of this legislation;
- providing the necessary resources and training to the labour inspection services and other competent

To help implement these legally binding obligations, the International Organization for Migration (IOM) supports IRIS, the International Recruitment Integrity System that is a “voluntary multi-stakeholder certifications system for labour recruiters developed to support ethical recruitment of migrant workers.” IRIS is a management system that companies and government bodies can use that embeds transparency and due diligence within the recruitment process.

<https://iris.iom.int/what-iris>

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<sup>161</sup> ILO, Special Action Programme to Combat Forced Labour, *Forced Labour and Human Trafficking: Handbook for Labour Inspectors*, B. Andrees (Geneva: International Labour Office, 2008).

<sup>162</sup> OSCE, *Trafficking in Human Beings for the Purpose of Labour Exploitation*, a Reference Paper for Bosnia and Herzegovina, July 2011

<sup>163</sup> Protocol to Convention 29, adopted by the ILO Conference at its 103rd. Session, 11 June 2014.

authorities and organizations concerned to allow them to increase their co-operation and to take effective measures for prevention, law enforcement and protection of victims of forced or compulsory labour;

- strengthening efforts to identify victims, including by developing indicators of forced or compulsory labour for use by labour inspectors, forced or compulsory labour;
- strengthening international co-operation between and among members and with relevant international organizations<sup>164</sup>.

The challenge of addressing THB/LE in supply chains has required innovative approaches in developed and developing countries alike. One approach – as described in the guidance prepared for the Baltic States region – has trained and deployed a section of the labour inspectorate specifically to address the conditions of migrant workers in at-risk industries.<sup>165</sup>

As the ILO observed in its law and practice report, guiding the discussions for the 2014 Protocol to the Forced Labour Convention, “A complementary, coordinated and mutually-supportive approach is required between labour and criminal justice systems”.<sup>166</sup> The ILO has observed that “None of the existing international or regional trafficking treaties explicitly recognizes the role of labour institutions in action against trafficking, and, in practice, labour administrations are rarely represented on national anti-trafficking coordination bodies”.<sup>167</sup> There have been national examples where labour institutions have taken a significant or even leading role in such task forces and other co-ordination mechanisms. In other cases, they have tended to be sidelined.

Not many States have as yet adopted laws and regulations, or taken other measures, to articulate the role of labour inspection in monitoring the labour and social provisions of suppliers that provide goods and services to public authorities. This can be an important area of work, given the renewal of attention to the social dimensions of sustainable public procurement. An effective role for labour inspection would among other things require cross-border co-operation between labour inspectorates.

## Recommendation 1: Operational Guidance

**It is recommended that OSCE participating States:**

- ▶ **ensure that labour administration is fully involved in national policies and structures to address trafficking in human beings in supply chains:**
  - ▶ **involve labour administration and inspectorates from the outset in the drafting and preparation of national policies and plans of action against trafficking in human beings, thus ensuring that labour dimensions are fully reflected.**
- ▶ **ensure that Labour Ministries and administration are included in task forces on the subject, whether at international, regional or national levels;**
- ▶ **conduct unannounced inspections and use interpreters and cultural mediators to allow discussions with migrant workers who do not speak the local language:**
  - ▶ **investigations can be bolstered by the use of mobile and other technology to survey workers independently to directly gauge their experiences;**
  - ▶ **ensure that labour inspectorates co-ordinate closely with law enforcement and stay within their mandates.**

164 “General Principles and Operational Guidelines for Fair Recruitment.” ILO. 2016. Accessed February 06, 2018. [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/genericdocument/wcms\\_536263.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_536263.pdf).

165 HEUNI (European Institute for Crime Prevention and Control), Op. cit., *Guidelines to prevent abusive recruitment, exploitative employment and trafficking of migrant workers in the Baltic Sea region*, L. Sorrentino, A. Jokinen (Helsinki 2014), p. 34.

166 ILO, *Report (IV) I: Strengthening action the end forced labour*, (Geneva: ILO, International Labour Conference 103rd. Session 2014).

167 Ibid. para. 214.

## 2. Recommendation 2: Monitor & Regulate Recruitment Agencies and Address Violations

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The labour recruitment and employment industry has seen exponential growth in recent years. It ranges from companies with multi-billion dollar revenues at the top end of the market that are active worldwide to labour brokers or sub-agents in small villages and towns of developing countries. The former can be expected to operate within the law, though larger companies may rely on local labour agents to identify and recruit workers. Many local labour agencies or brokers may be unregistered and operating informally, yet part of an overall recruitment workflow that governments and large companies benefit from. Many also provide workers to governments under officially recognized temporary worker schemes in which there may be restrictions on the workers' freedom of movement. In addition, governments also approve visa applications for individual and groups of workers to facilitate international recruitment and labour migration.

As the ILO has observed in a recent review of statutory regulation, there are three basic approaches to regulating recruitment agencies that include:<sup>168</sup>

- **prohibition:** while general government monopolies on recruitment are now rare, private labour recruiters and employment agencies may be prohibited from handling certain categories of workers, such as foreign migrant workers;
- **registration:** private labour recruiters and employment agencies are registered and subject to controls in the same way as any other business;
- **licensing:** private agencies must request a license, that can be renewed or withdrawn that is granted when certain conditions are met. Licensing implies that the government establishes special administrative procedures to inspect agencies on a regular basis, measure compliance, and impose sanctions in the event of non-compliance.

Policy and guidance documents have generally given priority to the need for strong and clear government measures in this area. For example, the guidance for the Baltic Sea States recommends that States should introduce legislation to regulate the activities of private employment agencies and of informal labour providers through the introduction of a system of licensing or registration.<sup>169</sup> For example, the “Labour Hire Licensing” scheme implemented in Australia requires the use of registered labour agencies and imposes civil penalties for non-compliance. The measure is backed by labour inspections.<sup>170</sup>

It is imperative that States hold illicit labour recruiters, agents and brokers accountable through both civil penalties and criminal prosecution. Sanctions have also been included in criminal and anti-trafficking laws against abusive and fraudulent recruitment practices. In the United States, the Trafficking Victims Protection Reauthorization Act (TVPPRA) of 2008 created a new criminal statute (18 USC 1351) prohibiting fraud in foreign labour contracting. In addition, USC 1595 creates a civil cause of action for victims to bring against companies who violate the covered provisions. USC 1595 is currently being used by individuals who have filed a lawsuit against companies they allege facilitated their trafficking.<sup>171</sup>

In response to reports of serious abuses by labour providers, some States have created new structures with a combination of licensing responsibilities and a role in law enforcement. This is the case of the Gangmasters and Labour Abuse Authority (GLAA) in the United Kingdom that was first established following the adoption of a Gangmasters (Licensing) Act of 2004, which created an offence of acting as a gangmaster without the authority of a licence. The Gangmasters Licensing Authority (GLA) was set up the following year, to protect workers in the sectors of agriculture, shellfish gathering, food processing and packaging. Its main task has been to license the labour providers, and to monitor compliance with its licensing standards, though it also has the power to bring prosecutions where a Gangmaster operates without a licence, or a business uses workers supplied by an unlicensed gangmaster.

Operating in close co-operation with other government agencies, the GLAA has in effect been the leading body in

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168 Andrees, Beate, Nasri, Alix and Swiniarski, Peter, “Regulating labour recruitment to prevent human trafficking and to foster safe migration: Models, challenges and opportunities”, *ILO Working Paper*, (ILO, 2015).

169 HEUNI (European Institute for Crime Prevention and Control), *Guidelines to prevent abusive recruitment, exploitative employment and trafficking of migrant workers in the Baltic Sea region*, L. Sorrentino, A. Jokinen (Helsinki 2014), pp. 21-22.

170 “Inquiry into the Labour Hire Industry and Insecure Work.” Victoria State Government. December 13, 2017. Accessed February 6, 2018. <https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry>.

171 Malo, Sebastian. “U.S. lawsuit against seafood importers makes claims of human trafficking.” Thomson Reuters. June 17, 2016. Accessed February 6, 2018. <https://www.reuters.com/article/us-usa-trafficking-lawsuit/u-s-lawsuit-against-seafood-importers-makes-claims-of-human-trafficking-idUSKCN0Z22WI>.



tackling labour exploitation in the country. The 2016 Immigration Act has recently given the renamed GLAA stronger police style powers to tackle labour exploitation across the economy, introducing the capacity to search and seize evidence and investigate modern slavery where it relates to labour abuse and other labour market offences, including national minimum wage offences.

Finally, important advice on due diligence for labour providers can be given by government ministries in addition to those responsible for labour and employment concerns or criminal law enforcement. For example, in the UK, advice on these matters has been provided by the Revenue and Customs agency, most recently updated in early 2016.<sup>172</sup> The advice includes: key questions about labour providers, the business, the business finances and the workers provided; advice on dealing with labour provider businesses; important information about employment intermediaries; and special rules for the construction industry. The GLAA also established a Construction Protocol in 2017 that establishes a “voluntary information sharing agreement or Protocol” to provide guidance and transparency on how it will communicate and work with “all parties involved in the supply and use of labour into the UK construction sector.” The guidance applies to labour and service providers as well as construction companies and construction supply providers.<sup>173</sup>

States have different options for statutory regulation, monitoring and enforcement. The choice of options needs to be based on an assessment of national conditions. Where there is evidence of significant abuse by labour providers, contracts and subcontractors, the licensing option is to be preferred. Regulations then need to be drafted in close consultation with employers including national associations of labour providers (where they exist) and workers’ organizations. While providing a ‘level playing field’ for businesses in general, including by minimizing the respective administrative burdens and checks, it is crucial to balance this approach with the need and obligation of a State to protect the people from any crime, including from trafficking in human beings. Importantly, States need to ensure that the trafficking in human beings risks for all businesses involved in internal or transnational migration processes are duly assessed. In addition to recruitment agencies, some other businesses perform similar intermediary functions while traditionally being excluded from the licensing practices, namely model, dating and marriage, artistic, crewing, household staffing (e. g. au pair) and other agencies. Thus, all-encompassing and multi-agency analysis of the businesses operating in at-risk sectors would be beneficial. Further development and implementation of the policies would also require multi-agency co-operation, transparency and flexibility at all levels.

Legislative and policy initiatives should be developed in consultation with businesses and workers’ organizations and should comply with the ILO’s Private Employment Agencies Convention, No. 181, as well as other relevant standards, and take into account the particular vulnerability of migrant workers to abuse, while striving to put in place measures and initiatives to build their resilience.<sup>174</sup>

In complement to national and regional level action by States, industry groups are also implementing voluntary measures to promote responsible, fair and ethical recruitment, for example:

The Responsible Business Alliance (formerly the EICC) has launched the Responsible Labor Initiative (RLI), that is a “multi-industry, multi-stakeholder initiative focused on ensuring that the rights of workers vulnerable to forced labor in global supply chains are consistently respected and promoted”. The initiative is open to any company that supports the principles of the RLI that aims to implement due diligence to prevent forced and trafficked labour in their supply chain. The aim is for the collective influence of recruiters, suppliers, multi-national companies and stakeholders to drive improvements transforming markets and reducing the risks of trafficking in human being for forced labour throughout global supply chains.

<http://www.responsiblebusiness.org/initiatives/rli/>

The Leadership Group for Responsible Recruitment is a “collaboration between leading companies and expert organisations to drive positive change in the way that migrant workers are recruited”. Its objectives include advocating for the protection of migrant workers, increasing the supply of ethically sourced labour, creating demand for responsible recruitment and the positive benefits of ethical practices and developing tools to help companies implement the Employer Pays Principle. Co-ordinated by the Institute for Human Rights and Business and the IOM, the group helps to create the demand among companies for fair and ethical recruitment and advocates for improvements.

<https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment>

172 HM Revenue and Customs, *Use of Labour Providers: Advice on due diligence*, United Kingdom, (30 January 2014, updated 1 February 2016).

173 “Construction Protocol.” Gangmasters & Labour Abuse Authority. October 2017. Accessed February 06, 2018. <http://www.gla.gov.uk/media/3297/construction-protocol-v05.pdf>.

174 Reference is made to the European Directive 2008/104/EC on Temporary Agency Work.

## Recommendation 2: Operational Guidance

It is recommended that OSCE participating States:

- ▶ conduct all-encompassing analysis of businesses involved in/facilitating internal or transnational migration processes or operating in at-risk sectors to assess threats of trafficking in human beings stemming from their operations. Multi-agency approach of such analysis should involve both anti-trafficking and migration experts, including law enforcement and NGOs, as well as respective business and employment regulating authorities, trade unions and employers' organizations;
- ▶ ensure that national laws and policies compel companies, particularly those operating in at-risk sectors and countries, to monitor entities in their supply chains that provide them with labour. Regulations should:
  - ▶ assign clear institutional responsibility;
  - ▶ ensure transparency and clarity of requirements for compliance;
  - ▶ clearly delineate remedial actions to be taken should violations be found.
- ▶ consider involvement of the States' foreign ministries and embassies abroad for establishing bi-lateral procedures to exchange information on the labour migration patterns, intermediaries and employers involved, and to safeguard prompt migration protection measures as needed;
- ▶ employ a mix of criminal, labour and financial sanctions, depending on the circumstances, to ensure compliance by labour recruiters with applicable laws and regulations:
  - ▶ wherever possible, the inspections of businesses involved in/facilitating internal or transnational migration processes or operating in at-risk sectors should involve the representative of the anti-trafficking stakeholders, e. g. the office of the National Co-ordinator or specialized police units;
  - ▶ wherever possible, criminal and civil measures resulting from inspections, should be accompanied by incentives for good business practices that promote the use of fair and ethical recruitment practices.
- ▶ strengthen the exchange of information and promote transnational co-operation to investigate cases of labour exploitation which took place with the involvement of intermediaries facilitating employment abroad;
- ▶ create policies, and enforcement mechanisms, to ensure that all fees and costs associated with labour recruitment and placement are paid by the employer, and not charged to the employee;
- ▶ ensure that anti-corruption initiatives pay particular attention to collusion between illicit labour recruiters and government entities involved in labour migration;
- ▶ leverage technology applications to increase transparency and awareness about the labour migration and inspection process, and related procedures;
- ▶ ensure availability of easily accessible information on licensed companies, the recruitment businesses whose licenses were withdrawn or suspended, and other relevant data to the general public;
- ▶ raise awareness among the general public, with a special focus on at-risk groups, on the necessity to exclusively use the services of licensed recruitment agencies and other intermediaries.

# Suggested Strategies and Considerations for Adopting and Implementing the Recommendations Outlined in the Guidelines

The OSCE has developed these Model Guidelines as a practical tool for participating States and Partners for Co-operation to develop their own measures and practices. Discussions over the course of project events confirmed that States recognize that governments have a decisive role in setting up standards so that irresponsible businesses are obliged to play by the same rules that responsible business play by, thus leveling the playing field for all and ensuring fair competition based on respect for human rights. Furthermore, States acknowledge that adherence to internationally accepted labour and social standards is key, and that it is best to prevent THB and provide effective remedies, rather than to only react to the problem after its occurrence.

Thus, these guidelines are designed to build on the momentum that has developed around preventing forced labour and labour exploitation along globalized supply chains, and to promote the implementation of relevant international obligations and commitments at the national level, as well as to harmonize practices across jurisdictions.

The goal set out in these guidelines is to present guidance and recommendations to assist States in adopting and/or strengthening the actual implementation of relevant government measures. Another objective is to explore how adopting consistent measures and practices across the region could set clear minimum standards for private sector conduct. Harmonizing approaches will lessen the burden on businesses to adapt to diverse laws across countries, while more and more States are enacting laws and policies to ensure ethical sourcing and transparency throughout their supply chains.

While there is no magic wand, or “one size fits all” approach, different promising practices and models have been presented in this paper. It is important that governments and the private sector admit that the problem can happen in any country, industry and supply chain – that no business or purchaser, including governments, is exempt from the risk of forced labour and trafficking in human beings. Governments can and do play a crucial role in preventing trafficking in human beings in supply chains, including leading by example, addressing key challenges, encouraging initiatives and collaborating with the private sector, worker organizations, civil society, international organizations, trade unions, and other actors.

Government measures to prevent exploitation in supply chains, including those for public procurement, should be grounded in the broader principles of labour market protection, particularly meeting applicable relevant international labour standards. They also need to recognize the important roles of labour administration and labour inspectorates. Some of the examples and guidance provided in earlier sections involve contractual conditions and legislation which require businesses and contractors to monitor and remediate labour practices in supply chains down to the lowest tier in the countries from which they source goods and raw materials.

When businesses are expected to assume responsibilities of this kind in their global supply chains, there are obvious questions concerning monitoring and enforcement of labour laws. Furthermore, when social or labour clauses are included in procurement contracts, there are questions concerning the kind of labour standards that need to be included. These complex issues are now receiving considerable attention from policy makers, civil society, business analysts and academics. There are ongoing debates concerning the extent to which labour market regulations are necessary to prevent the risk of trafficking in human beings among the more vulnerable workers, including migrants.

This project identifies and proposes a menu of options and steps to adopt and implement the guidance and recommendations at the national level. A plan for encouraging implementation needs to consider the actions that can be undertaken by OSCE participating States, including:

- activities to further increase the knowledge base on this complex subject, and the means to share and disseminate learnings, in order to adopt and implement laws and policies at the national level;
- capacity building needs and approaches, identifying the right mix of participants for workshops and training programmes;
- engaging with implementing agency stakeholders within participating States and achieving institutional “buy-in” in the value of adopting and effectively implementing measures based on the guidelines and recommendations presented here;
- resource implications and the timing of the various activities;
- monitoring and evaluation of the implementation of adopted policies and measures, including with a view to assess their applicability in THB cases as they arise;
- avenues to raise the profile of this work and exchange practices at the national and international levels.

This section is thus organized as follows:

- **context of recommendations (Subsection a)**, for the successful implementation of an implementation plan;
- **recommendations (Subsection b)** on the implementation of public procurement policies to prevent THB/LE in supply chains and promote fair and ethical labour recruitment for action at the national level;
- **recommendations (Subsection c)** for the implementation of transparency regulations to prevent THB/LE in supply chain;
- **recommendations (Subsection d)** on the timing and the organization of priorities, resource implications, activities to develop a plan for implementation of the recommendations.

## **a. Context of Recommendations**

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### **Context 1: Tailoring the guidance to national realities**

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These Model Guidelines are based on knowledge from existing practices and government measures in a number of OSCE participating States and beyond. Successful guidance is best when grounded in a sound understanding of the relevant international obligations and commitments and the concrete practices within diverse national contexts. It is important to continue to broaden both the knowledge base and the discussions going forward which may include participatory national workshops. Such workshops should be guided by the knowledge accumulated thus far, additional research to identify the legal and policy contexts, implementation gaps and realities in practice in specific economic sectors, THB cases, as well as trends at the national and transnational levels.

### **Context 2: Technical review and feedback from experts and procurement agency stakeholders**

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Procurement law is a specialized field, and a wide range of government agencies with officials and technical experts from different professional backgrounds are involved in the negotiation, drafting, monitoring, implementation and enforcement of public contracts. These also vary across regions. Often government contractors have little awareness of trafficking in human beings issues, so it is important to engage with them as early as possible to explain relevance, and the opportunity they have to impact change. These Model Guidelines can be used as a guide with which to further engage these important stakeholders and incorporate their feedback and expertise in developing implementation plans at the national level. The OSCE already laid the foundation for involving multiple stakeholders by bringing together public procurement and CTHB officials over the course of this project, and through the creation of a network of the workshop participants.

## **Context 3: Effective implementation requires institutional support**

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In order for the recommended guidelines and policies to be successfully adopted, senior leadership and technical experts in relevant implementing agencies should be actively engaged as key stakeholders in the process.

### **b. Recommendations on the Implementation of Public Procurement Policies to Prevent THB/LE in Supply Chains and Promote Fair and Ethical Labour Recruitment for Regional Action at the OSCE and National Levels.**

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As has been discussed in this paper, governments should lead by example, ensuring that goods and services purchased by State authorities are not made by trafficked persons. Leveraging public procurement to prevent and combat THB sends a strong message to the private sector that the government will not do business with companies involved in committing human rights abuses.

The following are concrete recommendations for the implementation of relevant public procurement policies of States. They are grounded in the philosophy of collaborative action among key and affected stakeholders and the sharing of challenges, opportunities, accumulated knowledge, and best practices.

#### **1. Establish a working group at the national level in OSCE participating States**

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Co-operation among relevant authorities within OSCE participating States is strongly recommended to promote the effective and co-ordinated application of the recommended policies and guidance. Different areas of technical expertise and authority are housed in various implementing agencies and organizations within the participating States – these agencies need a mechanism to engage in dialogue, coordinate and provide feedback on policy development and course-correction once implementation is underway. The working group can also map existing methods or contract clauses used across jurisdictions. For example, knowledge and best practices on how to monitor working conditions in supply chains can be exchanged, and the working group can help achieve institutional buy-in from implementing agency stakeholders by providing a forum for dialogue and feedback. These working groups may also consider inviting civil society organizations and trade unions to contribute expertise, knowledge and research to help guide participating States. The OSCE Field Operations, wherever they are present, can be also invited to support these efforts. Such working groups could also consider linking up with counterparts in other participating States to exchange experiences, and consider to conduct study visits.

#### **2. Implement trainings and workshops with staff of relevant public authorities in participating States**

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Workshops at the national level can be integral to raising further capacity and awareness about how public procurement can play a crucial role in preventing THB/LE in supply chains. Workshops can be also used to exchange experiences with initiatives promoting labour rights in supply chains in procurement procedures. Such workshops can be venues to hear and learn from the experiences of public procurement authorities, knowledge that can be incorporated at a strategic level.



### 3. Start a dialogue between relevant authorities of OSCE participating States and (potential) suppliers

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It is important for public authorities to engage in dialogue with existing and potential suppliers to discuss challenges and strategies around due diligence, supply chain monitoring and fair and ethical labour recruitment. Such conversations can happen within participating jurisdictions and in bilateral or multilateral workshops, where standards for supply chain monitoring and THB/LE prevention can be discussed.

### 4. Integrate Public Procurement in the National Action Plans on Business and Human Rights and further tools developed in the framework of Corporate Social Responsibility

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It is important to engage with and to leverage existing reform efforts underway such as National Action Plans (NAP) on Business and Human Rights and the OECD National Contact Points. The United Kingdom, the Netherlands, Norway, Italy, the United States, Germany and Finland have already included public procurement related measures in their NAPs on Business and Human Rights.<sup>175</sup> For example, as a result of their NAP process, a public procurement law was passed in Norway under which public authorities have procedures for promoting basic human rights in public procurement when there are risks of rights violations.

#### Case Study: National Action Plan in Denmark

The Danish National Action Plan on the Implementation of the Guiding Principles on Business and Human Rights shows implemented measures such as a practical tool for authorities to determine when and how to apply the UNGPs in public procurement procedures. Furthermore, the government aims at increasing the use and better enforcement of labour clauses in public contracts in order to avoid 'underpaid foreign labour'.

NAPs are frequently used in relation to prevent THB and in the area of business and human rights. Such National Action Plans with defined goals and measures to be implemented by public authorities in co-operation with other relevant actors, such as NGOs, are a widespread policy tool that can incentivize and measure progress in certain policy areas. The NAP process should be closely co-ordinated with the creation of the national level working groups recommended above, and take into account the technical guidance and feedback from implementing agency stakeholders in any related workshops.

## c. Recommendations for the Implementation of Transparency Regulations to Prevent THB/LE in Supply Chains.

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Businesses have to be engaged in the policy making process and consulted on new legislative initiatives in the field of combating THB in supply chains. There is a need to balance incentives with obligations for business compliance with regulations about ethical production and sourcing.

To implement the transparency regulations outlined in this guide, the following steps are recommended. First, a Transparency Working Group with a clear mandate could be set up to drive the implementation of transparency regulations at the national level. Since an overarching goal is to harmonize approaches and practices across jurisdictions and lessen the burden on businesses to adapt to diverse laws across countries, the working group could study how to adapt the guidance and recommendations, so as not to reinvent the wheel, while more and more States are enacting laws and policies to ensure ethical sourcing and transparency in supply chains.

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<sup>175</sup> "National Action Plans on Business and Human Rights (Public Procurement)." Danish Institute for Human Rights (DIHR). Accessed February 06, 2018. <https://globalnaps.org/issue/public-procurement/>.

Working group members can exchange ideas, best practices and challenges that are grounded in their national context and collectively agree to and elevate those practices that can be then disseminated to relevant authorities. The Working Group can collect promising practices, lessons learned and share identified challenges in relation to the implementation of the reporting obligations for companies covered by the guidance and the proposed regulations. The OSR/CTHB has compiled a Compendium of Resources of relevant laws and policies to assist governments and institutions to learn from existing practices, which can be updated online with new policies and practices as they emerge. The working group could also involve other relevant and interested international organizations and stakeholders.

The Transparency Working Group could develop a user-friendly format for a Transparency Database at the national level. The database includes the companies that are subjected to the transparency legislation and it should be designed such that companies can upload their own THB/LE Preventive policy to meet their reporting requirements. The Transparency Working Group may also recommend how the database could be used by other actors to make the disclosed information more accessible to consumers. The Working Group can also establish the primary indicators needed to evaluate affected company's compliance with transparency policies, and other tools to ensure effective monitoring of government measures, to assess their impact, and suggest revisions as needed.

Finally, a common approach among States could be built between working groups and thus impact companies operating throughout the OSCE region. Through workshops with relevant national officials, the Working Group can transmit its guidance at the operational level, respecting national contexts.

## **d. Proposal for Recommendations on the Timing and the Organization of Priorities, Resource Implications, and Ways to Raise the Profile of the Model Guidance and Implementation Plan.**

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It is recommended that States implement the recommendations occur over an eighteen-month to two-year period. The following activities are thus recommended:

The Model Guidelines provide a set of advice and resources that can be used and shared by participating States and partner organizations in the areas outlined in this Guidance. In some cases, countries have already started on their journey, but could still learn from and share with others on the implementation gaps and challenges they have experienced in consulting with and bringing companies and other key stakeholders on board. In other cases, exchange on good labour market inspection and enforcement practices can help countries build their expertise by sharing with others.

### **The following timeline of activities is proposed:**

#### **Phase 1 (Months 1-6): Lay the Groundwork at the National Level**

- The determination of specific activities depends on the resources made available. The participating States should determine the budget required to implement the co-ordination and activities outlined in this guide and approach partners for assistance (and funding, if needed) to implement activities, including setting up a Working Group.
- The Working Group could commence with a country study that includes a review of the status of laws around public procurement, supply chain transparency, human rights, forced labour and anti-trafficking.
- Participating States may consider conducting mapping exercises, including analysis of the regulations, tools, and resources their relevant structures already utilized or not utilized, to prevent and address THB/LE in their government's supply chains, and to regulate businesses in their jurisdictions. These analyses can serve as national level baselines to monitor progress and impact over time.
- Participating States should also conduct brief risk assessments of where their supply chains are vulnerable to THB/LE, and develop risk management matrices.
- Identify the national specialists in public procurement, law and management from the range of States who will participate in the Working Group process.

## **Phase 2 (Months 7-12): Conduct the Consultations and Analyses**

- Early in Phase 2, the Working Group should begin to meet and develop their analyses and recommendations.
- The Working Group should invite various stakeholders including NGOs, labour / trade unions and other civil society members to provide research, guidance and expertise about particular THB/LE regulations and challenges that can inform their work.
- Begin conversations at the national level with businesses, both large and small, which may be impacted by the proposed regulations. These can be a series of consultations to seek feedback and inputs that can be incorporated into the analyses conducted by the Working Group.
- Continued active engagement with implementing agency stakeholders within OSCE participating States, to ensure they are organically included in the policy development process, have the ability to provide early and continuous feedback, and develop institutional ownership of, and investment in, the success of the new policies and guidelines.

## **Phase 3: (Months 13-18): Release Findings and Recommendations to Participating States and Provide Technical Assistance for Implementation**

- Hold a series of national level workshops and events to promulgate the findings and recommendations. These events will provide technical advice to the participating States about how to implement the regulations within their national context.
- Ensure dialogue between participating States at the national, bilateral and multilateral levels, in order to foster a collaborative environment of implementation, and utilizing learning from other States to help address similar challenges.
- States should implement goals, monitoring plans and benchmarks within their national contexts for implementing and monitoring the effects of regulations.

# Annex:

## Model Law & Clauses

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### 1. Public Procurement: Criteria for Awarding Contract<sup>176</sup>

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#### I. Preamble

#### II. Key Definitions

#### III. Provisions

##### A. Prohibitions

##### B. Obligations

##### C. Foreign Nationals

##### D. Contractor Co-operation

##### E. Compliance Plans

##### F. Foreign Worker Rights

###### 1. Document Retention

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### I. Preamble:

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Concerned that millions of men, women and children around the world are victims of human trafficking or trafficking in persons, defined in [Reference to the relevant national law definition] and in the Palermo Protocol<sup>177</sup>. [State] has zero tolerance for the criminal activity of any employee or contractor personnel engaging in human trafficking. Furthermore, [State] has accepted obligations under [list UN and relevant ILO Conventions] and [list U.N. Conventions].

Stressing that further measures must be taken to prevent human trafficking in line with national laws and international conventions and commitments.

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<sup>176</sup> Model law language and provisions derived from multiple sources including: UNCITRAL Model Law on Public Procurement; UNODC Model Law against Trafficking in Persons; S. 2234 – End Trafficking in Government Contracting Act of 2012 (U.S.); U.S. EO 13627; (U.S.) H. R. 4310 National Defense Authorization Act of 2013; and, public comments to H. R. 4310 submitted by the Alliance to End Slavery & Trafficking and Human Rights First

<sup>177</sup> Human Trafficking as defined in the Palermo Protocol: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under eighteen years of age.

Reaffirming our obligation as States to criminalize trafficking in persons activity, bring human traffickers to justice, prioritize the investigation and prosecution of related offenses, invest in prevention efforts, and provide assistance to victims.

Considering that trafficking in human beings is a national and transnational crime where criminals work across borders, co-operation among States is required to effectively address this crime.

Concerned that men, women, and children, particularly those in marginalized groups, can all be victimized by human traffickers and that workers around the world report that illicit labour recruiters use fraudulent and misleading practices<sup>178</sup> to lure them to jobs.

Acknowledging that these illicit recruiters employ various tactics to deceive and exploit workers, profiting off of their economic necessity and other vulnerabilities. In addition to confiscating identity documents, misleading workers about actual working conditions and pay, or utilizing force or making threats of force, illicit recruiters often charge workers fees to access job opportunities.

Considering that once workers arrive at their job sites, often having gone in to debt to pay the recruiter fees, they are trapped in a system of debt bondage with little access to recourse.

Stressing that these tactics are facilitated by corruption and contribute to conditions that could make workers susceptible to human trafficking.

Recognizing that workers may not have access to information about job opportunities themselves, are desperate for economic opportunity, and may lack access to remedies when they experience exploitation.

Recalling that, the International Labour Organization finds that, "Recruitment should respond to established labour market needs, and not serve as a means to displace or diminish an existing workforce, to lower labour standards, wages, or working conditions, or to otherwise undermine decent work."<sup>178</sup>

Recognizing that as a procurer of goods and services the [State] has a responsibility to ensure that taxpayer resources are not contributing to labour exploitation and human trafficking. This Act provides additional tools and authorities to the Implementing Authority and other contracting personnel to ensure that government contractors are taking the steps necessary to fully comply with laws that aim to eliminate human trafficking from government supply chains.

Reaffirming that this legislation aims to protect vulnerable individuals at risk of human trafficking in the supply chains of contractors who provide goods and services to [State].

Stressing that these safeguards have been modeled on successful similar measures instilled by other national governments and in the private sector. The policy framework outlined in this Act will safeguard against human trafficking tainted goods and services entering the government supply chain, while upholding economy and efficiency in Government procurement systems.

Reiterating that these safeguards will help government procurers, contractors and subcontractors avoid disruptions and legal liability caused by the impact of trafficked labour's presence in supply chains.

## II. Key definitions

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**Recruitment Fees:** Charging employees or potential employees placement or recruitment fees, or anything of value, in exchange for access to a job.

**Supplier:** A company or contractor that provides goods or services to another entity.

**Contractor:** A recipient of a contract at any tier under a grant, contract, or co-operative agreement.

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<sup>178</sup> For more information, see: "General Principles and Operational Guidelines for Fair Recruitment." [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/genericdocument/wcms\\_536263.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_536263.pdf)



**Human Trafficking, Trafficking in Persons** [used interchangeably]: Defined in the Palermo Protocol and in applicable local laws. Conduct which constitutes an offence under any of the following:

- [indicate national legislation of the State wherein THB is criminalized];
- [indicate national legislation of the State wherein LE is criminalized].<sup>179</sup>

**Labour Agent, Labour Recruiter** [used interchangeably]: A company or individual providing workers to a contractor or supplier.

**Implementing Authority:** The central or local level government entity charged with implementing the provisions of this Act.

### III. Provisions:<sup>180</sup>

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**A. Prohibitions.** Contractors and subcontractors of [State] are prohibited from engaging in any of the following types of activities:

1. Using fraudulent and misleading recruitment practices during the recruitment of employees, including:
  - a. Making material misrepresentations regarding the key terms and conditions of employment, including wages, benefits, location of work, living conditions and housing (if employer provided or arranged), costs to be charged to the employee and hazardous nature of work;
  - b. Charging employees recruitment fees;
  - c. Utilizing any tactics that constitute human trafficking as defined by [national human trafficking law] and the Palermo Protocol;
  - d. Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses.
2. Foreign Nationals. If contractors & subcontractors are performing work outside of the [State], they must not engage in the following practices:
  - a. Fail to pay return transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a [State] contract or subcontract;
  - b. [Exception for where payment of transportation cost back to home country of recruited worker is covered by existing MOU or codified understanding between sending and receiving States];
  - c. [Exception for recruited workers who are legally permitted to remain in the country of employment, and voluntarily choose to do so];
  - d. [Exception for a recruited worker who is a victim of human trafficking, or a witness to human trafficking, and is seeking services and redress];
  - e. Other activities that the [implementing authority] identifies as promoting or contributing to trafficking in persons.

**B. Obligations.** Contractors and suppliers and their subcontractors and suppliers are obligated to comply with the ILO Core Conventions, with standards to prevent human trafficking and [the applicable national law on human trafficking] and at minimum the fundamental provisions:<sup>181</sup>

1. The UN's Universal Declaration of Human Rights;
2. The ILO's eight Fundamental Conventions on forced labour, child labour, discrimination and freedom of association, as well as the right to organize (nos. 29, 87, 98, 100, 105, 111, 138 and 182);
3. UN Convention on the Rights of the Child, Article 32;
4. The worker protection and the working environment legislation that applies in the country where all or parts of the [product/service] is/are produced;

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<sup>179</sup> The model provision indicates national legislation rather than international legislation since it may differ per State what may constitute THB. For EU Member States for example, trafficking may also include forced criminality and forced begging as forms of trafficking, while non-EU Member States that are party to the Palermo Protocol, are not committed to criminalize these forms of exploitation as THB.

<sup>180</sup> Also derived from The LANDMARK Project, *Verifying Social Responsibility in Supply Chains – A Practical and Legal Guide for Public Procurers*, (The LANDMARK consortium, 2012), p. 67 and SOMO, "A review of Dutch policy for socially responsible public procurement", *SOMO Paper* (March 2014).

<sup>181</sup> Derived from Special Contract Terms for Sustainable Supply Chains, Sweden

5. The employment law, including regulations regarding pay conditions, and the social insurance cover that applies in the country where all or parts of the [product/service] is/are produced;
6. The environmental protection legislation that applies in the country where all or parts of the [product/service] is/are produced; and
7. UN Convention against Corruption.

**C. The contractor** must stipulate that all of its subcontractors and suppliers in its supply chain pass these requirements on to their own subcontractors and suppliers, down to the final tier of production of goods and/or the sourcing of raw materials.

**D. Contractor Co-operation.** Contractors and subcontractors [by contract clause] must co-operate fully and provide reasonable access to Implementing Authority, or agents deemed by the Implementing Authority including but not limited to auditors, NGO representatives, law enforcement and labour inspectors to conduct audits, independent investigations, or other actions to ensure compliance with this order, [local human trafficking law] and any other applicable law or regulation that prohibits human trafficking.

**E. Compliance Plans.** In addition to other factors considered by the contract Implementing Authority, contract award will also be contingent upon a contractor [of contracts over a certain amount] submitting a satisfactory compliance plan, as detailed in this Act prior to award. Contractors are also required to maintain a compliance plan during the performance of the contract or subcontract that is appropriate for the nature of activities performed. The compliance plan must include:

- a. A recognition of the related risks that exist in the contractor's supply chain;
- b. Details on due diligence and auditing activities taken to monitor its supply chain for those risks;
- c. Activities around investigating suspected human trafficking activities;
- d. Remediation plans and grievance mechanisms instilled for employees to report, without fear of retaliation, any activity that would justify termination under this Act and related human trafficking legislation;
- e. Policies that ensure that employees of contractor and subcontractors do not engage in trafficking in persons or related activities and actions that will be taken against employees for violation of such policies;
- f. Training and awareness raising initiatives initiated with employees and subcontractors for the fulfilment of this Act;
- g. A recruitment and wage plan that only permits the use of recruitment companies with employees trained on responsible labour recruitment and anti-trafficking in human being practices, prohibits charging recruitment fees to employees, and ensures that wages meet applicable host country legal requirements;
- h. The methods employed to provide accurate wage information to employees upon recruitment. If applicable contractor may explain why any wage variance exists between what was promised, and what was given;
- i. A housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host country housing and safety standards. If applicable, contractor may explain why any housing variance exists between what was promised, and what was given;
- j. Procedures to prevent subcontractors at any tier from engaging in trafficking in persons.

**F. Foreign Worker Rights.** Contractor compliance plans must stipulate and provide information on how the contractor will adhere to the following provisions to guarantee that the rights of foreign recruited workers are upheld:

**1. Document Retention.** Foreign workers must:

- a. Be provided employment contracts that clearly specify the rights and responsibilities of workers with regards to wages, benefits, hours of work, including regular hours and overtime requirements, days off and annual leave, location of work, living conditions, housing arrangements, work related hazards, and disciplinary and other procedures that can lead to terminations, appeal procedures and grievance mechanisms;
- b. Be provided with a signed copy of their original work contract, in a language they understand, at least five days prior to deployment. The contractor must explain the terms and conditions of the contract in the a language the worker understands, should literacy barriers exist and have a means to verify that the terms are clearly understood and fully agreed to by the workers;
- c. Have the freedom and ability to retain personal identity documents, including passports, work permits and other documents;
- d. Be provided with locked, secure storage space for personal documents at accommodation and worksite that they have unrestricted access to at all times of the day. If documents need be retained by the contractor for legal reasons, they must be returned immediately upon request without preconditions. All preconditions to such access is strictly prohibited.

**2. Return Transportation.** The contractor must:<sup>182</sup>

- a. Provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a [Government] contract or subcontract, for portions of contracts and subcontracts performed outside the [Country]; or
- b. Provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a national [of implementing country] and who was brought into the [country] for the purpose of working on a [Government] contract or subcontract, if the payment of such costs is required under existing temporary worker programs
  - i. The requirements of paragraph (a) and (b) of this section do not apply to an employee who is –
    - A. Legally permitted to remain in the country of employment and who chooses to do so;
    - B. A victim of trafficking in persons [as defined in this act] who is seeking victim services or legal redress in the country of employment, or for a witness in an enforcement action related to trafficking in persons. The contractor shall provide the return transportation or pay the cost of return transportation in a way that does not obstruct the victim services, legal redress, or witness activity. For example, the contractor shall also offer return transportation to a witness at a time that supports the witness' need to testify.

**3. Grievance Mechanisms.** Foreign workers must:

- a. Be made aware of and have unrestricted access to an independent grievance channel;
- b. Be protected from retaliation should they file grievances;
- c. Have access to a grievance process that thoroughly and without bias investigates grievances filed with privacy and immediacy;
- d. Have access to clear remediation processes and procedures, including criminal and civil actions depending on the nature of the grievance filed;
- e. The contractor should actively engage with civil society and organized labour experts who can support the implementation of grievance mechanisms and remedial actions.

**3. Contracts with Subcontractors, Labour Agents and Brokers.** The Contractor must provide and maintain:

- a. Written work agreements between contractor and its subcontractors, suppliers, labour agents and brokers;
- b. Formal contracts with any subcontracted entity that stipulates the contractor can perform regular due diligence on the entity and its partners involved in the hiring and placement of workers;
- c. Contracts that clearly specify fees paid for services rendered by the subcontracting entity.

**4. Labour Agent Screening.** The contractor must:

- a. Obtain sufficient information and evidence to indicate that a labour agent or recruiter will comply with all applicable legal requirements and contractor's standards for fair and ethical recruitments as outlined in this Act;
- b. Establish and provide performance requirements and criteria that a subcontractor, labour agent or recruiter can follow to be in compliance with the provisions of this Act;
- c. Develop operational procedures to ensure that performance requirements are being met;
- d. Provide subcontractors, labour agents and recruiters with guidance on implementing performance requirements stipulated by the contractor.

**G. Certification.** The contractor shall certify, prior to receiving an award and annually thereafter during the term of the contract or subcontract, that:

- 1. It has a compliance plan as outlined in Sections E and F of this Act in place to prevent human trafficking-related activities;
- 2. To the best of its knowledge and belief, neither it nor any of its subcontractors has engaged in any such activities; or, if abuses have been found, the contractor or subcontractor has taken the appropriate remedial, referral and preventative actions;
- 3. Requirements of this section (Section G) shall not apply to contracts or subcontracts for commercially available off-the-shelf items.

**H. Submission to Implementing Authority.** The compliance plan outlined in Sections E and F of this Act will be

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182 "Federal Acquisition Regulation; Ending Trafficking in Person." Federal Register, The Daily Journal of the United States Government. March 2, 2015. Accessed February 6, 2018. <https://www.federalregister.gov/documents/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>.

submitted to the implementing Authority prior to the start of the contract and upon request, and initiated no later than the start of the contract period. Contractor will provide annual updates to the implementing Authority, with data on any actions taken against subcontractors or employees deemed to be in violation of this Act, and remedial actions taken for any victims identified (if applicable).

**I. Violations.** If the implementing Authority determines that a contractor is in violation of this or related acts, it shall:

1. Determine the severity of noncompliance activity;
2. Provide the contractor the opportunity to explain [or challenge] the determination;
3. Implement measures and provide guidance to bring the contractor and subcontractors into compliance;
4. Initiate suspension or debarment actions against the contractor, including removing the contractor from “preferred supplier” or equivalent lists;
5. Hold contractors and subcontractors criminally liable for acts that violate [State] human trafficking laws even if the work performed on a [State] government contract is performed outside of [State].

**J. Training and Capacity Building.** The Implementing Authority shall:

1. On an annual basis compile and publish lists of goods and services that are at high risk of being made or provided by trafficked persons;
2. Create a list of contractors in compliance with the provisions of this Act, and a list of those found to be not in compliance with the provisions of this Act:
  - a. Clearly specify the criteria that the Implementing Authority used to place a contractor on either list;
  - b. Create a transparent process for contractors to explain or challenge the findings, affording them due process and an opportunity to come into compliance;
  - c. Make the list available to other public authorities implementing this Act.
3. Provide guidance to public agencies throughout the [State] to develop appropriate internal procedures and controls for awarding and administering contracts to improve procurement actions taken to prevent trafficking in persons;
4. Provide training to [State] employees on implementation of this Act and related acts on the policies, responsibilities, regulations and procedures to monitor contractors to implement this Act;
5. Provide training to [State] employees on procedures available to verify contractor actions, investigate, manage and mitigate contractor and subcontractor trafficking violations;
6. Provide training and tools to [State] and municipal employees charged with implementing this Act to conduct due diligence, including but not limited to through audits, technology enabled research, NGO investigations and organized labour actions on contractor compliance with the provisions in this Act.

## 2. Monitoring & Implementation, Model Clause<sup>183</sup>

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### I. Definitions:

**Supplier:** A company or contractor that provides goods or services to another entity.

**Contractor:** A recipient of a contract at any tier under a grant, contract, or cooperative agreement.

**Human Trafficking, Trafficking in Persons** [used interchangeably]: Defined in the Palermo Protocol and in applicable local laws. Conduct which constitutes an offence under any of the following:

- [indicate national legislation of the State wherein THB is criminalized];
- [indicate national legislation of the State wherein LE is criminalized].<sup>184</sup>

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<sup>183</sup> Based on Direktoratet for forvaltning og IKT (difi)/Norway, *SRPP Contract Performance Clauses* (Revised: September 2012, copy with author); UK Modern Slavery Act 2015 (s. 54); UK Home Office, *Transparency in Supply Chains etc. – A practical guide* (UK Home Office, 2015), p. 33; Hunter, Philip, Kepes, Quinn, *Human Trafficking & Global Supply Chains: A Background Paper*, Annex 3 (Ankara: 2012); CORE Coalition and partners, *Beyond Compliance: Effective Reporting Under the Modern Slavery Act: A civil society guide for commercial organisations on the transparency in supply chains clause*, (CORE, 2016).

<sup>184</sup> The model provision indicates national legislation rather than international legislation since it may differ per State what may constitute THB. For EU Member States for example, trafficking may also include forced criminality and forced begging as forms of trafficking, while non-EU Member States that are party to the Palermo Protocol, are not committed to criminalize these forms of exploitation as THB.

**Labour Agent, Labour Recruiter** [used interchangeably]: A company or individual providing workers to a Contractor or Supplier.

**Implementing Authority:** The central or local level government entity charged with implementing the provisions of this Act.

**Human Rights Due Diligence:** Conducting investigations and research into the practices of suppliers and contractors to determine worker treatment and working conditions at the facility level, including but not limited to through audits, utilizing computer aided research, technology tools that communicate directly with workers, and NGO and labour union reports.

## II. Provisions:

- A.** Due to documented human rights abuses, in particular related to human trafficking, for the production of [type of product], contract clauses concerning production that prevents human trafficking in the supply chain, will be part of this contract. Thus [name of Implementing Authority] obliges that a Supplier:
- a.** Respect ILO Fundamental Principles and Rights at Work;
  - b.** Respect national laws regulating labour rights and working environment of the production country in its supply chain and during the manufacturing process of the products linked to this contract.
- B.** [Name of Implementing Authority] obliges its suppliers to safeguard and enforce within the supply chain, the rights set forth in the ILO Fundamental Principles and Rights at Work and the ILO Core Conventions and standards to prevent human trafficking. [Name of Implementing Authority] obliges the supplier:
- 1.** To enforce the Convention on the Rights of the Child, the ILO Minimum Age Convention (C. 138), the Prohibition and Immediate Elimination of the Worst Forms of Child Labour Convention (C. 182);
  - 2.** To prohibit any use of forced, bonded or indentured labour or involuntary prison labour, and embrace employment practices consistent with ILO Conventions pertaining to forced labour: Forced Labour Convention, (C. 29) and Abolition of Forced Labour Convention, (C. 105)<sup>185</sup>;
  - 3.** To recognize and respect the rights of employees to freely associate, organize and bargain collectively in accordance with the laws of the countries in which they are employed, as well as core ILO conventions: Freedom of Association and Protection of the Right to Organise Convention (C 87) and Right to Organise and Collective Bargaining Convention (C. 98).
- C.** In order to implement the provisions outlined in this Act, [Name of Implementing Authority] obliges suppliers to disclose what systems are in place to conduct human rights due diligence, specifically for human trafficking in its supply chain. [Name of Implementing Authority] obliges the supplier to:
- 1.** Have a corporate policy, clause in contracts and conditions or codes of conduct applicable to the supply chain in place, that declares that workers shall not be subject to any form of forced, compulsory, bonded, indentured, or prison labour. All work must be voluntary and workers shall have the freedom to terminate their employment at any time without penalty, given notice of reasonable length;
  - 2.** Regularly report on actions the supplier undertakes to enforce the provisions provided in this Act with its subcontractors and suppliers;
  - 3.** Disclose information concerning the make-up and complexity of the supply chain including information on subcontractors and factory locations. Implementing authority will grant exceptions, within reason, to respect privacy and proprietary concerns regarding business operations;
  - 4.** Have monitoring and evaluation measures in place, including by third party, independent auditors;
  - 5.** Ensure that all the companies in the supply chain allow access by independent monitoring organizations, third parties and civil society stakeholders. In addition to monitoring conducted by the supplier. [Name of Implementing Authority] has the right to conduct independent audits of the supplier operations to ensure compliance with this Act;
  - 6.** Ensure the opportunity of independent monitoring includes the ability of an auditor or monitoring entity to engage with workers privately and confidentially in their native language and quickly and effectively respond to worker grievances through a transparent and impartial mechanism.

<sup>185</sup> "P029 - Protocol of 2014 to the Forced Labour Convention, 1930." ILO. June 11, 2014. Accessed February 06, 2018. [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB%3A12100%3A0%3A%3ANO%3A%3AP12100\\_ILO\\_CODE%3AP029](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB%3A12100%3A0%3A%3ANO%3A%3AP12100_ILO_CODE%3AP029).



### 3. Enforcement & Remedies, Model Clause<sup>186</sup>

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- A.** [Name of Implementing Authority] obliges its suppliers to:
1. Report on status and progress of the implementation of human rights due diligence in their supply chains;
  2. In case of the identification of human rights violations, in particular human trafficking, in the supply chains of the supplier, the supplier is obliged to report on remediation measures it took, including victim assistance provided and any reports it made to law enforcement of related criminal acts;
  3. Report on the steps taken to prevent further violations of rights and standards throughout the company's supply chains;
  4. Report on ongoing remedy measures implemented in place for the persons harmed by the human rights abuses, in particular by human trafficking;
  5. Submit reports on an annual basis to the Implementing Authority;
  6. Implementing Authority shall either maintain a public database to make these disclosure statements publicly available, or submit disclosures to a central entity within the national government who will maintain such a public database.
- B.** If the supplier fails to meet the obligations in terms of deadlines or corrective actions, sanctions, in the form of daily fines, will be imposed [Fines can be a numeric amount consistent with national practices or a percentage of contract amount].
- C.** In case supplier reports to the Implementing Authority on provisions provided in this Act do not indicate relevant steps to improve the standards in the supply chain, [Name of Implementing Authority] may cancel the contract after [x] days.

### 4. Transparency in Supply Chains, Model Clause

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**Company:** [local definition of corporation]

**Supplier:** A company or contractor that provides goods or services to another entity.

**Contractor:** A recipient of a contract at any tier under a grant, contract, or cooperative agreement.

**Human Trafficking, Trafficking in Persons** [used interchangeably]: Defined in the Palermo Protocol and in applicable local laws. Conduct which constitutes an offence under any of the following:

- [indicate national legislation of the State wherein THB is criminalized];
- [indicate national legislation of the State wherein LE is criminalized] or where civil penalties are in place for prohibited LE related conduct.<sup>187</sup>

**Labour Agent, Labour Recruiter** [used interchangeably]: A company or individual providing workers to a contractor or supplier.

**Implementing Authority:** The central or local level government entity charged with implementing the provisions of this Act.

**Human Rights Due Diligence:** Conducting investigations and research into the practices of suppliers and contractors to determine worker treatment and working conditions at the facility level, including but not limited to through audits, utilizing computer aided research, technology tools that communicate directly with workers, and NGO and labour union reports.

**Provisions:**

- A.** A company that provides goods and services in any sector in [State] and reaches a total turnover of [indicate

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<sup>186</sup> Based on Direktoratet for forvaltning og IKT (difi)/Norway, *SRPP Contract Performance Clauses* (Revised: September 2012, copy with author); The LANDMARK Project, *Verifying Social Responsibility in Supply Chains – A Practical and Legal Guide for Public Procurers*, (The LANDMARK consortium, 2012), p. 67.

<sup>187</sup> The model provision indicates national legislation rather than international legislation since it may differ per State what may constitute THB. For EU Member States for example, trafficking may also include forced criminality and forced begging as forms of trafficking, while non-EU Member States that are party to the Palermo Protocol, are not committed to criminalize these forms of exploitation as THB.

amount] will annually prepare a human trafficking prevention statement that outlines its human trafficking prevention policy. The statement must be certified by the company's executive leadership including the CEO/ President and Chair of the Board;

- B.** This Act applies to companies that provide goods and services in [State] and have a total turnover of more than [indicate amount];
- C.** The human trafficking prevention statement consists of:
  - 1.** An explicit commitment to avoid and address human trafficking in any part of its own business operations and in any of its business supply chains;
  - 2.** Actions taken in the previous financial year to prevent human trafficking from taking place in any part of its own business operations and in any of its business supply chain;
  - 3.** Actions taken to remediate any human trafficking incidents that it found to take place, including any reports it made to law enforcement;
  - 4.** Companies with a total turnover of less than [indicate amount] may also issue a statement that no action has been taken at all;
  - 5.** Any major violations of labour law reported or adjudicated in the company's operations and [insert tiers of subcontracting] over the five years previous to the release of the statement.
- D.** The total turnover is to be determined in accordance with regulations made by [Name of Implementing Authority];
- E.** Failure to Comply: If a company fails to produce such statement the [Implementing Authority] may impose monetary penalties [in the amount of] per each day that the statement is not posted in compliance with this law.

#### **Content and publication of the human trafficking policy---companies subject to the transparency regulations need to be defined, Model Clause**

- The [Name of Implementing Authority] must produce a list of companies required to publish a human trafficking prevention statement as outlined in this Act. The Implementing Authority must:
  - 1.** Annually publish a list of companies that are required under this Act to publish a human trafficking prevention statement;
  - 2.** The provision will apply to companies in any part of a group structure in all sectors above a certain minimal annual turnover specified in the statute with operations in [State];
  - 3.** "Turnover" means the amount derived from the provision of goods and services falling within the ordinary activities of the company or subsidiary undertaking, after deduction of:
    - a.** trade discounts;
    - b.** value added [or equivalent in participating State] tax;
    - c.** any other taxes based on the amounts so derived.
  - 4.** Turnover is calculated as turnover of that company and of any of its subsidiaries, including those operating wholly outside the [State].

#### **Content and publication of the human trafficking policy – frequency of disclosure and the form of communication, Model Clause**

- The Implementing Authority must establish communication requirements of the human trafficking prevention statement. Companies subject to this Act shall:
  - 1.** Update their human trafficking preventive statement annually;
  - 2.** Publish the human trafficking preventive statement in a prominent location on their website;
  - 3.** Include a direct link to the human trafficking prevention statement on its websites homepage;
  - 4.** Upload the human trafficking preventive statement in the database provided by the implementing authority [in case a national level database/repository of disclosures is established:].
- The statement should be reviewed and approved at the highest levels in the company, and should include a signature from the CEO or Chairman of the Board, or a company officer reporting directly to the CEO
- Failure to comply with the communication requirements under subsections A and B will be considered non-compliance of the reporting obligation under the current legislation and subject to the daily fines specified by the implementing authority.

# Other Tools and Resources

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## 1. UNCITRAL Model Law

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A central international standard concerning public procurement is the UNCITRAL Model Law on Public Procurement, adopted in 2011.<sup>188</sup> The Model Law seeks to harmonize international standards on public procurement, and to enhance outcomes in public procurement at the national level. It implements the requirements of the United Nations Convention against Corruption on public procurement. Public procurement is assessed as one of the governmental activities that is most vulnerable to corruption. There are estimates showing that 20-30% of project value gets lost through corruption in publicly funded projects. It also takes into account the WTO Agreement on Government Procurement (GPA).<sup>189</sup> The Model Law and GPA both have the aim of encouraging cross-border participation in public procurement procedures, and reducing discriminatory trade rules. Within certain constraints, they also allow some support for SMEs and domestic industry, but generally require that foreign goods or services should not be treated less favourably than domestic products.<sup>190</sup>

The Model Law aims at achieving two overarching goals: the value for money and the avoidance of abuse in public procurement.<sup>191</sup> “Value for money” implies, as described in the context of the EU, an obligation of public authorities to safeguard taxpayers’ interests by procuring in the most cost-effective way.<sup>192</sup> The latter is particularly closely linked to efforts to reduce corruption in public procurement. Public procurement is assessed as one of the governmental activities that is most vulnerable to corruption. There are estimates showing that 20-30% of project value gets lost through corruption in publicly funded projects.<sup>193</sup>

The UNCITRAL Model Law allows to take into account “social factors”, such as employment conditions, and “ethical factors”, such as human rights, labour exploitation and child labour. Including these factors under the term “sustainable procurement” is possible by way of the qualification criteria for suppliers and contractors (Article 9 Model Law). “Sustainable procurement” is thereby described as an “umbrella term for [the] pursuit of social, economic and environmental policies through procurement”.<sup>194</sup>

The guide to the UNCITRAL Model Law refers to human rights as an “ethical factor” under the umbrella of sustainable public procurement. As noted above, the concept of taking human rights-related factors in public procurement into account is not entirely new. The concept has been used, for instance, to support anti-discrimination efforts.<sup>195</sup> By applying sustainable public procurement (SPP), public authorities should consider environmental, social and economic consequences of the procurement process in order to act sustainably<sup>196</sup>, hence human rights-related factors as social consequences should be considered to the same extent as environmental factors. In the past, SPP focused on environmental issues and many ‘green’ procurement and policies have been developed. Over time, social matters receive increased attention in SPP.<sup>197</sup> However, although a reference to social factors can be found in relation to SPP, tackling human rights issues among the broader area of social factors needs specific attention. The promotion of human rights, in particular related to THB/LE in supply chains, has only recently been explored.<sup>198</sup>

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188 Adopted by the UN Commission on International Trade Law on 1 July 2011, A/66/67, annex I.

189 Plurilateral Agreement on Government Procurement of the World Trade Organization, entered into force on 1 January 1996.

190 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods”, *The International Journal of Human Rights* 19 (3), April 2015, p. 347.

191 UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, (Vienna: UNCITRAL, 2014), p. 3.

192 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible public Procurement of Electronic Goods”, *The International Journal of Human Rights* 19 (3), April 2015, p. 347.

193 OECD, *Corruption in Public Procurement*, 2016, p. 5.

194 UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, (Vienna: UNCITRAL, 2014), p. 4.

195 McCrudden, Christopher, “Using public procurement to achieve social outcomes”, *Natural Resources Forum* 28, (Malden, MA: United Nations, Published by Blackwell Publishing, 2004), pp. 260-263.

196 See for instance the definition of SPP used by UN Environmental Program (UNEP): UNEP, *Sustainability of Supply Chains and Sustainable Public Procurement – a Pre Study*, (UNEP, 2014), p. 31.

197 International Learning Lab on Public Procurement and Human Rights, C Methven O’Brien et al), *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, (2016), p. 17.

198 Martin-Ortega, Olga, Outhwaite, Opi, Rook, William, “Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods”, *The International Journal of Human Rights* 19 (3), April 2015, p. 345.

## 2. UN Guiding Principles on Business and Human Rights<sup>199</sup>

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### General principles

These Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization. Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights. These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

Full text and guidance of the U. N. Guiding Principles on Business and Human Rights can be found here:

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

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<sup>199</sup> "Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework." OHCHR. 2011. Accessed February 06, 2018. [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

### 3. Directive 2014/24/EU of The European Parliament and of The Council On Public Procurement And Repealing Directive 2004/18/Ec<sup>200</sup>

#### Public contracts — setting out clear ground rules [Summary]

The directive sets out rules on the use of public contracts for the provision of works, supplies or services by companies or individuals and the exemptions which can be applied.

#### SUMMARY

The legislation specifies that when national authorities use [public procurement](#) to invite tenders to provide works, supplies or services, they must treat all applicants equally and not discriminate between them. They must also be transparent in their dealings.

#### Thresholds

The rules applicable to public contracts must be followed when the sums involved are above the following ceilings:

- €5,225,000 for public works (from 1.1.2016);
- €135,000 for central government contracts (from 1.1.2016);
- €209,000 for local and regional government contracts (from 1.1.2016);
- €750,000 for social and other specific service contracts.

The [European Commission](#) assesses these thresholds every 2 years to determine whether they should be changed in accordance with the EU's international obligations.

#### Criteria

The contract is awarded to the most economically advantageous tender to be identified in particular on the basis of the best price–quality ratio. This criterion takes into account such factors as the overall cost effectiveness, quality, environmental and social aspects, trading and delivery conditions.

#### Innovation and small companies

The legislation introduces a new procedure to promote the development of innovative products, services or works. To facilitate the participation of small companies, the new rules encourage public authorities to divide up large contracts into individual lots.

#### Safeguards

EU countries have to ensure that economic operators and their subcontractors comply with all applicable European and national environmental, social and labour requirements, collective agreements and any relevant international obligations. The legislation tightens up provisions on abnormally low offers notably to prevent workers' rights being abused.

#### Exemptions

Nothing in the legislation requires EU governments to contract out services they wish to provide themselves. Nor does it affect national social security legislation.

The water, energy, transport and postal services sectors are excluded from the directive. Instead, they are regulated by [Directive 2014/25/EU](#).

In addition, some sectors such as electronic communications, research and development and defence and security can be excluded under certain conditions.

#### ACT

Directive [2014/24/EU](#) of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, of 28.3.2014, pp. 65–242)

#### RELATED ACTS

Directive [2014/25/EU](#) of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, of 28.3.2014, pp. 243–374).

Directive [2014/23/EU](#) of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, pp. 1–64).

Full text of the EU Directive can be found here:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

200 "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance." EUR-Lex . 2014. Accessed February 06, 2018. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>.



## 4. ILO P029 – Protocol of 2014 to the Forced Labour Convention, 1930

### **Article 1**

1. In giving effect to its obligations under the Convention to suppress forced or compulsory labour, each Member shall 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.

2. Each Member shall develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers' and workers' organizations, which shall involve systematic action by the competent authorities and, as appropriate, in coordination with employers' and workers' organizations, as well as with other groups concerned.

3. The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.

### **Article 2**

The measures to be taken for the prevention of forced or compulsory labour shall include:

(a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;

(b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices;

(c) undertaking efforts to ensure that:

(i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and

(ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;

(d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process;

(e) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and

(f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

### **Article 3**

Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

### **Article 4**

1. Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.

2. Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

### **Article 5**

Members shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour.

### **Article 6**

The measures taken to apply the provisions of this Protocol and of the Convention shall be determined by national

laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned.

#### **Article 7**

The transitional provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24 of the Convention shall be deleted.

#### **Article 8**

1. A Member may ratify this Protocol at the same time as or at any time after its ratification of the Convention, by communicating its formal ratification to the Director-General of the International Labour Office for registration.
2. The Protocol shall come into force twelve months after the date on which ratifications of two Members have been registered by the Director-General. Thereafter, this Protocol shall come into force for a Member twelve months after the date on which its ratification is registered and the Convention shall be binding on the Member concerned with the addition of Articles 1 to 7 of this Protocol.

#### **Article 9**

1. A Member which has ratified this Protocol may denounce it whenever the Convention is open to denunciation in accordance with its Article 30, by an act communicated to the Director-General of the International Labour Office for registration.
2. Denunciation of the Convention in accordance with its Articles 30 or 32 shall ipso jure involve the denunciation of this Protocol.
3. Any denunciation in accordance with paragraphs 1 or 2 of this Article shall not take effect until one year after the date on which it is registered.

#### **Article 10**

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications, declarations and denunciations communicated by the Members of the Organization.
2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Protocol shall come into force.

#### **Article 11**

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with article 102 of the Charter of the United Nations, full particulars of all ratifications, declarations and denunciations registered by the Director-General.

#### **Article 12**

The English and French versions of the text of this Protocol are equally authoritative.

Full text of ILO P029 – Protocol of 2014 to the Forced Labour Convention, 1930 can be found here:

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:P029](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029)

## 5. C094 – Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

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This Convention applies to contracts which fulfil the following conditions:

- (a) that one at least of the parties to the contract is a public authority;
- (b) that the execution of the contract involves--
  - (i) the expenditure of funds by a public authority; and
  - (ii) the employment of workers by the other party to the contract;
- (c) that the contract is a contract for--
  - (i) the construction, alteration, repair or demolition of public works;
  - (ii) the manufacture, assembly, handling or shipment of materials, supplies or equipment; or
  - (iii) the performance or supply of services; and
- (d) that the contract is awarded by a central authority of a Member of the International Labour Organisation for which the Convention is in force.

Full text of C094 – Labour Clauses Convention 1949 (No. 94) can be found here:

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C094](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C094)

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