

Addressing Slavery and Trafficking in UK and US Public Procurement Frameworks

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Thesis submitted in fulfilment of the requirements for the degree of Master of Philosophy in Law

Trinity Term 2021

Wolfson College
University of Oxford

(30,000 words)

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Abstract

In this thesis, I undertake a doctrinal and normative analysis of public procurement policies seeking to eradicate slavery, servitude, forced labour and human trafficking (slavery and trafficking) from the supply chains of the UK and US Governments. Situated at the interface of public procurement law and human rights law, slavery and trafficking procurement policies must reconcile a diverse set of normative principles and goals in meeting the needs of stakeholders, including contracting agencies, contractors, workers in supply chains, and more remotely, taxpayers. I argue that while international human rights law does not require states to adopt slavery and trafficking procurement policies, it is desirable that the UK and US Governments do so in order to reinforce broader efforts in legislation, policy and the private sector to protect workers in supply chains from slavery and trafficking. The disadvantages of slavery and trafficking policies can be minimised through careful policy design. I then propose a theoretical framework drawing from public procurement principles (competition and fairness to contractors), public administration principles (clarity and specificity in rulemaking), and human rights principles (particularly the concept of human rights due diligence) to critically evaluate three UK and US slavery and trafficking procurement policies: contractor exclusions, contract conditions and award criteria. My analysis highlights that each policy in both jurisdictions fails to satisfy and maximise one or more of the theoretical framework's key principles. To address this, I offer insights on how to make them more pragmatic, responsive to human rights goals and capable of effective implementation by procurement officers and contractors as part of their day-to-day procurement activities.

Declaration

I certify that this is my own work, and it has not previously been submitted for any assessed qualification.

Elinor Buys
28 July 2021

Acknowledgements

I could not have completed this thesis without the support of a number of people.

It has been a privilege to be supervised by Professor Anne Davies, whose guidance and advice has been invaluable. She has challenged and inspired me to grow as a researcher, for which I am grateful.

I wish to thank Fellowships Fund Inc, and its Management Committee from Graduate Women Queensland, Australia, for supporting my research through the Margaret Mittelheuser AM Commemorative Fellowship.

Heartfelt thanks are also due to the colleagues and mentors who have kindly offered their insights and encouragement along the way. Special mention goes to Professor Bill Duncan (Queensland University of Technology) for his mentorship, support and fascinating conversation throughout the various stages of my university education. I would also like to thank Lisa Hsin (University of Oxford) and Sarah Lince (Verité) who have opened my eyes to the importance and challenges of forced labour research.

Last, but not least, I wish to thank my family. I owe a large debt of gratitude to my grandmother, Lucie Refsland, who has played an important role in enabling me to study at Oxford through her generous financial support. I am deeply thankful for my parents, Laurie and Nick, and my sister, Sarah, who have always believed in me. Although we have been geographically separated due to closed borders, their love and guidance from afar has kept me going. Finally, I wish to thank Oliwier, whose love and companionship has been a source of strength and inspiration, including throughout the challenges of COVID-19.

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Table of Abbreviations

AJIL	American Journal of International Law
BHHRC	Business & Human Rights Resource Centre
BHRJ	Business and Human Rights Journal
CAA Council	Civil Agency Acquisition Council
CCS	Crown Commercial Service
CESCR	Committee on Economic, Social and Cultural Rights
CJIL	Chicago Journal of International Law
CSR	Corporate social responsibility
CUP	Cambridge University Press
CYELS	Cambridge Yearbook of European Legal Studies
DAR Council	Defense Acquisition Regulations Council
DOD	Department of Defense
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ELLJ	European Labour Law Journal
EU	European Union
FAR	Federal Acquisition Regulation
GPA	Agreement on Government Procurement
HRDD	Human rights due diligence
HUP	Harvard University Press
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IJHR	The International Journal of Human Rights
IHRL	International human rights law
ICLQ	International & Comparative Law Quarterly
ILO	International Labour Organization
MAC	Model Award Criteria
MEAT	Most economically advantageous tender
MJIL	Melbourne Journal of International Law
MLR	Modern Law Review

MSA 2015	Modern Slavery Act 2015
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
OMB	Office of Management and Budget
OUP	Oxford University Press
PCR 2015	Public Contracts Regulations 2015
PCLJ	Public Contract Law Journal
PPNs	Procurement Policy Notes
PPLR	Public Procurement Law Review
SME	Small and medium-sized enterprises
Slavery and trafficking	Slavery, servitude, forced labour and human trafficking
TVPA	Trafficking Victims Protection Act of 2000
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States
UN	United Nations
UNTS	United Nations Treaty Series
UNGPs	United Nations Guiding Principles
WTO	World Trade Organization
YILC	Yearbook of the International Law Commission

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Cabinet Office, *Procurement Policy Note–Tackling Modern Slavery in Government Supply Chains* (PPN 05/19, 18 September 2019) 46, 47, 48, 55, 61

Home Office, 'Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland' (January 2021) 12

US

Statutes

Crimes and Criminal Procedure 18 U.S.C. §1589 13

Office of Federal Procurement Policy Act, 41 U.S.C. §421 43

Tariff Act of 1930, 19 U.S.C. 29

Trafficking Victims Protection Act 22 U.S.C. 78 12, 13, 14, 29

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ILO Convention (No. 105) concerning the Abolition of Forced Labour (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291 11, 54

ILO Convention (No. 29) concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 11, 13, 53

John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex 16, 19, 22, 23, 31, 54, 58, 64, 65, 76

Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 11, 12

Supplementary Convention on the Abolition of Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3 11

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 11

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1. Introduction

1.1. Research problem

The ILO estimates there are 24.9 million victims of forced labour and human trafficking around the world.[1] The products and services supplied through the severe exploitation of these victims are consumed in every country, including those considered to have strong human rights records. UN Member States committed to eradicating practices described as 'modern slavery' by 2030, and child labour by 2025 (Sustainable Development Goal 8.7).[2] These goals complement an existing range of international and regional anti-slavery, forced labour and human trafficking obligations.[3] Yet, the governments of Member States are an ongoing part of the problem, as evidence is frequently brought to light of their continued procurement of goods and services produced by victims of forced labour and trafficking.[4] As a result, governments are faced with mounting public pressure to take steps to eradicate slavery, servitude, forced labour and human trafficking ('slavery and trafficking') in their supply chains.

Public procurement offers potential as a regulatory strategy to combat slavery and trafficking in supply chains, as governments wield significant buying power purchasing the goods, services and works they need to carry out their activities.[5] Both the UK and US Governments have demonstrated a commitment to harnessing their buying power for this purpose, by introducing slavery and trafficking policies in their regulatory frameworks for public procurement.[6] However, public procurement has traditionally been underpinned by a strong economic efficiency agenda, to the exclusion of other objectives. As a non-economic

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1 ILO, *Global estimates of modern slavery* (ILO Publications 2017).

2 SDSN, 'Target: 8.7' (*SDSN*, 2012) <https://indicators.report/targets/8-7/> accessed 5 January 2021.

3 Discussed in Chapter 2.

4 E.g. Pete Pattisson, Ifang Bremer, and Annie Kelly, 'UK Sourced PPE from Factories Secretly Using North Korean Slave Labour' *The Guardian* (20 November 2020) <https://www.theguardian.com/global-development/2020/nov/20/uk-sourced-ppe-from-factories-secretly-using-north-korean-slave-labour> accessed 4 March 2021.

5 'How governments spend: Opening up the value of global public procurement' (*Open Contracting Partnership*, 2020) <https://www.open-contracting.org/resources/how-governments-spend-opening-up-the-value-of-global-public-procurement/> accessed 6 January 2021. Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol 1 (3rd edn, Sweet & Maxwell 2014), 1-2.

6 Cabinet Office, *Procurement Policy Note–Tackling Modern Slavery in Government Supply Chains* (PPN 05/19, September 2019); Federal Acquisition Regulation 22.17.

objective, the implementation of slavery and trafficking policies gives rise to a potential 'clash' of values between the protection of supply chain workers' human rights and the purchase of goods and services at the lowest price.

Nevertheless, the normative values of UK and US public procurement have not remained static, as governments are increasingly utilising public procurement as a regulatory strategy to pursue non-economic objectives, including social and human rights goals. Public procurement frameworks have thus become a 'point of confluence for multiple normative systems and policy goals' and traditional procurement principles such as a 'value for money' have evolved to embrace quality and social value considerations.[7] In this context, the UK and US Governments have taken on the complex challenge of integrating and harmonising the goals of human rights with the goals of public procurement regulation. This thesis aims to examine the slavery and trafficking policies at the heart of this challenge, with a view to determining the extent to which they balance the diverse range of normative goals underpinning them and have the potential to demand action from contracting agencies and contractors throughout the procurement process.

1.2. Research contributions

There is a growing body of literature examining and analysing human rights procurement policies from various perspectives, including in different sectors,[8] different jurisdictions,[9] and

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7 Olga Martin-Ortega and Claire Methven O'Brien, 'Public Procurement and Human Rights: Interrogating the Role of the State as Buyer' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities, risks and dilemmas for the state as buyer* (Elgar 2019) 3.

8 E.g. James Sinclair, 'Outsourcing and Bonded Labour in Military and Diplomatic Security Services' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities, risks and dilemmas for the state as buyer* (Elgar 2019); Caroline Emberson and Alexander Trautrims, 'Public Procurement and Modern Slavery Risks in the English Adult Social Care Sector' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities, risks and dilemmas for the state as buyer* (Elgar 2019).

9 Opi Outhwaite, 'Human Rights and National Procurement Rules in the World Trade Organization Agreement on Government Procurement' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public procurement and human rights: opportunities, risks and dilemmas for the state as buyer* (Elgar Publishing 2019); Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Hart Publishing 2017); Olga Martin-Ortega, Opi Outhwaite and William Rook, 'Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods' (2015) 19 IJHR 341; Robert Stumberg, Anita Ramasastry and Meg Roggensack, 'Turning a Blind Eye? Respecting Human Rights in Government Purchasing' (ICAR 2014).

different ideologies.[10] Through these perspectives, scholars have challenged traditional public procurement thinking as to the desirability of lowest cost purchasing. They have also revealed the complexities involved in regulating supply chains and the entrenched businesses practices which often lead to human rights violations. However, current literature tends to deal with 'human rights' as a homogenous group of legal norms, reflecting that governments typically approach the protection of human rights in procurement through a single 'human rights clause'. This generalised approach engages minimally with the significant variations between rights from a legal perspective, the diverse duties attaching to each right, and the fact that different rights may require different enforcement mechanisms in law and policy. Right-specific analysis thus remains an underexplored aspect of human rights procurement policies.

The primary contribution of this thesis is its exploration of the relationship between human rights and public procurement through the lens of the specific right to freedom from slavery, servitude, forced labour and human trafficking. Focussing on this right provides an opportunity for the right's unique characteristics and its practical application in a public procurement context to be examined. This thesis makes three analytical and normative contributions to what is currently the limited body of existing literature addressing slavery and trafficking procurement policies.[11] First, I examine the measures states are required take to discharge their duties to respect, protect and fulfil the freedoms from slavery and trafficking. In particular, I determine whether a legal obligation arises within these duties which *requires* states to implement slavery and trafficking procurement policies to protect workers in government supply chains. Second, I justify why national governments *should* implement slavery and trafficking procurement policies in their regulatory frameworks for public procurement. In furtherance of this position, I highlight the advantages and defend the disadvantages of such policies, having regard to specific challenges facing the enforcement of general slavery and trafficking laws and related corporate initiatives in supply chains. Finally,

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[10] Albert Sanchez Graells, 'Public Procurement and Core Human Rights: A Sketch of the European Union Legal Framework' in Olga Martin-Ortega and Claire Methven O'Brien (eds), *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Elgar 2019).

[11] E.g. Richard Craven, 'The Role of Public Procurement in the Fight to Eradicate Modern Slavery in the UK Construction Industry' in Gustavo Piga and Tunde Tatrai (eds), *Public Procurement Policy* (Routledge 2015); Olga Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector' (2017) 8 Global Policy 512; Nicole Fleury, 'Offering a Carrot to Complement the Stick: Providing Positive Incentives in Public Procurement Frameworks to Combat Human Trafficking' (2019) 48 PCLJ 397.

I develop an analytical framework for slavery and trafficking procurement policies which reconciles four key principles of public procurement and human rights. Through an application of this framework, I critically analyse UK and US slavery and trafficking procurement policies and offer fresh insights on making them more pragmatic, responsive to human rights goals and capable of effective implementation by procurement officers and contractors as part of their day-to-day procurement activities.

1.3. Methodology

The field of inquiry of this thesis is situated at the interface of public procurement law and human rights law. It explores how these bodies of law connect and interact in the context of the right to freedom from slavery, servitude, forced labour and human trafficking. Fully engaging with the synergies and tensions between these bodies of law requires an examination of their normative goals, as well as their legal and regulatory mechanisms, and institutional contexts. Public procurement law emphasises objectives such as competition, fairness to contractors and value for money, which facilitate the efficient spending of public money. In contrast, human rights law champions the interests of individuals, and seeks to protect their enjoyment of fundamental rights as against the state, private actors and otherwise powerful countervailing interests, such as economic gain. Human rights carry special normative force by virtue of their role in protecting the autonomy, dignity and basic interests of all persons.[12] Thus, at the crossroads of public procurement and human rights law, tensions inevitably arise due to their differing normative goals and objectives. This thesis' analysis of slavery and trafficking policies in public procurement aims to explore these intersecting dynamics with a view to improving the potential impact of such policies.

This thesis engages in a doctrinal and normative analysis of the research problem, using a comparative methodology. An important first step in the process of doctrinal analysis is the choice of 'authoritative texts' from which a critical 'analysis of legal rules and principles from the perspective of an insider in the system' may be undertaken.[13] These texts also provide the basis for normative questions to be addressed. The primary texts analysed are international

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12 Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) ch 2.

13 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 115.

conventions, domestic statutes, statutory instruments regulating public procurement and guidance on those instruments as published by the relevant department. Cases and judicial reasoning are also analysed, but to a lesser extent. The analysis of the primary texts is further supplemented with secondary materials, including monographs, edited books, reports and journal articles, to provide a more comprehensive analysis of the topic.

The analysis of the above-mentioned sources is undertaken through a comparison of the legal and regulatory frameworks for national public procurement in the UK and US. By comparing a specific area of law existing in the two jurisdictions,[14] the analysis aims to bring varied perspectives to addressing the research problem, thereby gaining a deeper understanding of the limits and possibilities of proposed solutions.[15] To this end, it adopts a functional approach, bringing together two different 'objects', namely UK and US public procurement frameworks, by reference to their common practical purpose in regulating public sector purchasing to address slavery and trafficking in government supply chains.[16] In applying the functional approach, this thesis emphasises 'differences within similarity',[17] having regard to the UK and US's diverse approaches to law, regulation and policy, as well as their different institutional structures and contexts for decision-making by procurement officers. This is particularly important for comparative inquiries in the field of public law, which are 'closely bound up with national institutions and traditions, as well as national constitutional values and ways of operating.'[18] Thus, this comparative inquiry seeks to go beyond what is immediately observable in the law, as written down, to address the legal and administrative frameworks for public procurement, but also the broader normative and non-legal influences impacting them.[19]

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14 Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 50.

15 ibid 18.

16 Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), 342.

17 ibid 381.

18 John S. Bell, 'Comparative Administrative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006), 1260.

19 Elizabeth Fisher, 'Through "Thick" and "Thin": Comparison in Administrative Law and Regulatory Studies Scholarship' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (OUP 2020), 625.

An important step in the comparative inquiry is the selection of appropriate jurisdictions. This thesis adopts a binary comparison of slavery and trafficking policies implemented in the regulatory frameworks for UK central government and US federal government procurement. The two jurisdictions were chosen using Hirschl's 'most similar cases' approach.[20] It requires the comparativist researcher to 'compare cases that have similar characteristics, or cases that are matched on all variables or potential explanations that are not central to the study, but vary in the values on the key independent and dependent variables'.[21] The process of identifying what may be described as 'matched', 'independent' and 'dependent' variables is not used within the strict rules of quantitative research; rather, it provides a useful metaphorical framework for thinking through the choice of comparators and potential relationships between their characteristics.

The UK and US share a number of characteristics which may be described as 'matched variables', due to their substantial similarities. At a fundamental level, the UK and US are both advanced industrialised liberal democracies with mixed economies that permit government intervention in the market where necessary to promote social welfare. They are both English-speaking (thereby avoiding translation issues for the author) and have common law legal systems. At a more specific level, the UK and US are signatories to most of the key human rights treaties concerning slavery, servitude, forced labour and human trafficking, and have implemented prohibitions against these human rights violations as criminal offences in their domestic law. Both national governments have also explicitly supported the use of slavery and trafficking policies in public procurement and have taken steps to incorporate such policies into their regulatory frameworks. Moreover, the regulatory frameworks for public procurement in the UK and US are shaped and driven by substantially similar normative goals.

The 'independent' variables are the key differences between the UK and US legal and administrative systems which influence the way in which they devise and implement slavery and trafficking policies (i.e. the 'dependent variables'). As indicated above, these include the UK and US's different approaches to public procurement law, regulation and policy, and their different institutional structures for decision-making by public sector officials. In turn, the key

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[20] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 American Journal of Comparative Law 125, 133-139.

[21] ibid.

'dependent' variable in this research is the way in which the UK and US Governments implement slavery and trafficking policies into their public procurement processes, including the type, form, what they require contracting agencies and/or contractors to do, and the degree of discretion afforded to procurement officers, among other things. These characteristics are evaluated through the lens of the normative considerations described above.

1.4. Structure of thesis

Chapter 2 provides a brief critique of the term 'modern slavery', contending that in legal and administrative contexts the more specific terms of slavery, servitude, forced labour and human trafficking should be used. The key characteristics and complexities of these terms are explored, highlighting the need for definitional clarity in public procurement law and policy. I then explore the cluster of state duties flowing from the freedoms from slavery and trafficking in international human rights law (IHRL). I argue that they do not require national governments to implement slavery and trafficking procurement policies except in rare circumstances, although such policies are nevertheless a mechanism by which states may discharge their duty to protect workers in government supply chains.

Chapter 3 considers the political legitimacy and desirability of using public procurement as a regulatory tool for implementing slavery and trafficking policies. It defends national governments' use of their wealth as a regulatory lever and unpacks the key arguments for and against public procurement being used in this manner to address slavery and trafficking in government supply chains. Ultimately, I argue that while national governments are not legally required to implement slavery and trafficking policies in public procurement, there are several important reasons for doing so, including reinforcing existing legislation and developments in the private sector around slavery and trafficking, and maintaining consistency in government policy implementation.

Chapter 4 introduces the key UK and US regulations and policies which are most likely to interact with slavery and trafficking procurement policies. It also highlights the differing institutional contexts within which UK and US government agencies operate, which bears strongly on the mechanisms used by each government to regulate decision-making by public procurement officers and slavery and trafficking policies in general. In addition, the chapter examines four fundamental principles shaping public procurement in both jurisdictions, including competition, fairness to contractors, value for money/best value, and clarity and

simplicity. These principles are applied in the analysis of slavery and trafficking policies in the following chapter.

Chapter 5 analyses three UK and US slavery and trafficking procurement policies using a theoretical framework containing four criteria based on public procurement principles (competition and fairness to suppliers), public administration (clarity and simplicity) and human rights principles (particularly the concept of human rights due diligence). The policies include exclusion of contractors, contract conditions and award criteria. My analysis offers insight into how the criteria can be reconciled in a way that supports the formulation and implementation of slavery and trafficking procurement policies which are pragmatic and capable of demanding action from contracting agencies and contractors.

Chapter 6 summarises the research contributions of this thesis.

2. Slavery, servitude, forced labour and human trafficking

2.1. Introduction

Until recently, public procurement was rarely used to enforce human rights, including the freedoms from slavery, servitude, forced labour and human trafficking. Yet, government departments and agencies ('contracting agencies') and contractors in the UK and US are increasingly required to apply these concepts during their procurement operations, which present interpretive challenges due to their technical and sometimes complex legal definitions. 'Modern slavery', as an umbrella term, adds further ambiguity where it is used without clarification. Section 2.2 of this chapter explores the key characteristics and complexities of each term, starting with 'modern slavery', to highlight the interpretive challenges which may be faced by procurement officers and contractors applying them in practice. This discussion illustrates that definitional clarity is needed in law and policy to ensure that procurement officers and contractors clearly understand the human rights abuses they are seeking to address. Section 2.3 then investigates the duties flowing from the freedoms from slavery and trafficking in IHRL to determine whether they give rise to a legal obligation on states to implement slavery and trafficking policies in their regulatory frameworks for procurement. Ultimately, I argue that there is not a strong basis in human rights law for asserting an obligation on states to implement slavery and trafficking procurement policies, although such policies are nevertheless a mechanism by which states may discharge their duty to protect workers from slavery and trafficking in government supply chains.

2.2. Definitional challenges

2.2.1. Modern slavery

'Modern slavery' is used as a hypernym for a collection of criminal offences related to slavery and trafficking.[22] In the US, 'modern slavery' is used in political discourse and by government agencies, particularly the Office to Monitor and Combat Trafficking in Persons (TIP Office).[23]

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[22] Lisa K.E. Hsin, 'Modern Slavery in Law: Towards Continuums of Exploitation' (2020) 26 Australian Journal of Human Rights 165, 168.

[23] TIP Office, '2021 Trafficking in Persons Report' (*U.S. Department of State* 2021) <https://www.state.gov/reports/2021-trafficking-in-persons-report/> accessed 12 July 2021.

In the UK, it is frequently used by political leaders[24] and government agencies,[25] as well as in legal and administrative contexts (including public procurement) due to the Modern Slavery Act 2015 (MSA 2015).[26] However, despite its common usage, 'modern slavery' remains a controversial term.[27] Its use as an umbrella term arguably enables a process of 'exploitation creep', whereby previously narrow legal categories prescribed in law (e.g. 'slavery', 'human trafficking') are expanded in public discourse in order to bring a broader range of practices within 'public opprobrium'.[28] Exploitation creep confuses the definitional boundaries between distinct offences and as a result, creates opportunity for misinterpretation and inaccuracy.[29] For instance, the conflation of slavery with related offences risks raising the threshold of harm expected of a victim to prove they have been trafficked or subjected to forced labour.[30] In different circumstances, it may lift lesser forms of exploitation to the level of these crimes, which poses risks to the legal certainty and predictability of law.[31] Thus, it is problematic when the term is utilised without proper clarification in criminal and administrative contexts to carry out victim identification or impose penalties on accused persons.[32]

'Modern slavery' is a useful emotive term for growing public awareness of exploitation in supply chains and amassing political will for measures designed to tackle these crimes and support victims.[33] However, considering the above criticisms, the term ought to be utilised with

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24 E.g. Rt Hon Theresa May, 'PM Speech to UNGA on Modern Slavery' (*GOV.UK*, 20 September 2017) <https://www.gov.uk/government/speeches/pm-speech-to-unga-on-modern-slavery-behind-these-numbers-are-real-people> accessed 4 July 2021.

25 Home Office, 'Modern slavery training: resource page' (*GOV.UK*, 7 July 2021) <https://www.gov.uk/government/publications/modern-slavery-training-resource-page/modern-slavery-training-resource-page> accessed 8 July 2021.

26 See e.g. Government Commercial Function and Civil Service, *Tackling Modern Slavery in Government Supply Chains* (September 2019).

27 Janne Mende, 'The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame' (2019) 20 Human Rights Review 229, 230.

28 Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 AJIL 609, 611.

29 ibid 634-635.

30 ibid 632-635.

31 See e.g. Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2013) 247-252, 288-289.

32 Chuang (n 28) 635

33 ibid 629, 639.

greater care, particularly in legal and administrative arenas such as public procurement. There should be more emphasis on and acknowledgement that 'modern slavery' merely offers a convenient umbrella term, rather than a descriptor for the definitional content of the specific offences embodied by it. For instance, when used in public contracting documents, reference to the specific terms of slavery, servitude, forced labour and human trafficking should be used, as explored in the following section.

2.2.2. Slavery, servitude, forced labour and human trafficking

The freedoms from slavery,[34] servitude,[35] forced labour,[36] and human trafficking are codified and defined in a range of international and domestic instruments.[37] They are sophisticated legal terms which have been developed and refined in jurisprudence and scholarship, at both international and domestic levels. They key complexities or controversies of each term are explored as follows, to highlight the importance of definitional clarity in the contexts of public administration and public procurement.

First, the prohibition of slavery is recognised by the international community of states as a *jus cogens* norm, from which no derogation is permitted.[38] Article 1 of the 1926 Slavery Convention defines 'slavery' as 'the status or condition of a person over whom any or all of

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34 Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253 (1926 Slavery Convention); Supplementary Convention on the Abolition of Slavery (adopted 7 September 1956, entered into force 30 April 1957) 266 UNTS 3; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 4; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 8(1); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 4(1). In the UK and US, slavery is prohibited in MSA 2015 s 1 and the 13th Amendment to the United States Constitution.

35 UDHR, art 4; ICCPR, art 8(2); ECHR, art 4(1).

36 ILO Convention (No. 29) concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 (ILO Forced Labour Convention); ILO Convention (No. 105) concerning the Abolition of Forced Labour (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291; ICCPR, art 8(3); ECHR, art 4.

37 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2225 UNTS 209 (Palermo Protocol), art 6. See also, Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT).

38 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

the powers attaching to the right of ownership are exercised'.[39] There is controversy as to whether the text in fact requires 'legal ownership', as traditionally understood.[40] Representing one view, the Bellagio-Harvard Guidelines contend that the powers described in Article 1 are exercised where a person exerts control over a person, through physical constraints or other restrictions of movement, in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation.[41] In contrast, the European Court of Human Rights (ECtHR) maintains that Article 1 embodies the 'classic' meaning of slavery as historically practised, whereby slaves were legally owned and reduced to the status of 'objects'.[42] Evidently, this remains a point of contention and it is important that national governments adopt an interpretation which can be applied consistently by public procurement officers. The UK Home Office took steps in this direction by committing to the concept of 'ownership' as a distinguishing element of slavery, but in the sense of using a person as a commodity going beyond 'mere control'.[43] However, in the Trafficking Victims Protection Act of 2000 (TVPA) (from which the Federal Acquisition Regulation (FAR) takes its definitions), the term is used primarily to describe 'contemporary manifestations of slavery', primarily human trafficking and forced labour.[44] As another example of 'exploitation creep', this approach obscures the technical definition of slavery and may be unnecessarily confusing for procurement officers applying the term in practice.

Second, the concept of 'servitude' is challenging from a definitional perspective, as it is difficult to locate a clear definition of the term in international texts. However, it is generally considered to encompass a broader range of practices than 'slavery' and denotes a 'particularly serious form of denial of freedom'.[45] The Home Office adopted a more nuanced interpretation

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39 1926 Slavery Convention, art 1.

40 Nicholas Lawrence McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law' (2012) 16 IJHR 436, 444.

41 Research Network on the Legal Parameters of Slavery, 'Appendices 2012 Bellagio-Harvard Guidelines on the Legal Parameters of Slavery' in Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (OUP 2012), guidelines 2 and 3.

42 *Siliadin v France* (2006) 43 EHRR 16 [112] (*Siliadin*).

43 Home Office, 'Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland' (January 2021) 27.

44 See Trafficking Victims Protection Act 22 U.S.C. 78 §7101(b).

45 *C.N. and V. v France,* App no 67724/09 (ECHR, 11 October 2012), [89] (*C.N.*).

based on ECtHR jurisprudence, which holds that servitude is an 'aggravated' form of 'forced or compulsory labour', distinguished by the fact that victims of servitude feel their condition is permanent and unlikely to change.[46] The distinguishing features of servitude are less explicit in US law, although the TVPA provides a relatively clear definition specifying that servitude may arise from the abuse of the legal process, or any scheme, plan, or pattern intended to cause a person to believe that, if he or she did not enter into servitude, serious harm or physical restraint would result.[47]

Third, 'forced or compulsory labour' is defined in the ILO Forced Labour Convention as: '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'.[48] Unlike slavery and servitude, several practices are explicitly excluded from the scope of this definition, including military service, normal civic obligations, work exacted during emergencies and as a consequence of a conviction in court.[49] The term 'forced or compulsory labour' in MSA 2015 s 1 is construed in accordance with ECHR art 4, which takes the ILO definition as its starting point.[50] The ECtHR interprets the phrase 'menace of penalty' as including both physical and psychological forms of coercion, ranging from use of force or threat of arrest,[51] to withholding documents, to threats of societal rejection or stigma.[52] The definition of 'forced labor' in the US Code similarly acknowledges a broad range of harms, including actual and threatened physical psychological, financial or reputational harms.[53] It is important that procurement officers and contractors are aware of these varied forms of coercion in their supply chains.

Forced labour is often difficult to identify in practice, as: (1) it may arise through a combination of variable factors; and (2) it requires a high degree of harm or coercion. On the first point, the ILO developed 11 'Indicators of Forced Labour', including abuse of

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46 ibid [91].

47 22 U.S.C. 7102(8).

48 ILO Forced Labour Convention, art 2(1).

49 ibid art 2(2).

50 See *Van der Mussele v Belgium* (1984) 6 EHRR 163 [35].

51 See *Siliadin* (n 42) [118].

52 Home Office (n 43) 28.

53 Crimes and Criminal Procedure 18 U.S.C. §1589.

vulnerability, deception, restriction of movement, isolation, violence, intimidation and threats, retention of identity documents, wage withholding, debt bondage, abusive working and living conditions, and excessive overtime.[54] These indicators should be reflected in law or policy guidance applied by procurement officers and contractors. On the second point, UK and US law is prescriptive. In the US, the harm must be 'sufficiently serious… to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing [the labor] in order to avoid incurring that harm'.[55] Similarly, the UK High Court determined that low wages for excessive work in poor conditions are not sufficient, without further evidence of coercion.[56] The UK Supreme Court also rejected a claim that forcing 'Job Seeker's Allowance' recipients to perform unpaid work experience as a condition of receipt was 'forced labour', as it supported the social purpose for which the conditional benefit was provided.[57]

Finally, the definition of 'trafficking in persons' is set out in Palermo Protocol art 3(1):

> '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'.[58]

'Exploitation' includes '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'.[59] MSA 2015 s 2 and the definition of 'severe forms of trafficking in persons' in the TVPA both reflect this three pronged definition encompassing action (recruitment, transportation, etc.), which is achieved by a means (threat or use of force, etc.), for the purpose of exploitation (forced labour, etc.).[60] Nevertheless, a key interpretative

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54 ILO, 'ILO Indicators of Forced Labour' (Special Action Programme to Combat Forced Labour, 29 October 2013) 3.

55 18 USC §1589(a), (c)(2).

56 *R (Saadawi) v SSHD* [2017] EWHC 3032 (Admin).

57 *R v Secretary of State for Work and Pensions* [2013] UKSC 68 [78]-[90].

58 Palermo Protocol, art 3(1).

59 ibid.

60 Explanatory Notes to the MSA 2015, para 26; 22 U.S.C. §7102.

difference is that in the UK, some form of movement or travel is necessary,[61] while the US Government asserts that trafficking may include, but does not require, movement.[62] The drivers for the US's unique interpretation are thought to be largely political. [63] In 2000, the 'Trafficking In Persons Office' was created by the TVPA and empowered with responsibility over US anti-trafficking efforts, while other US labor-related agencies were tasked with addressing forced labour issues. By expanding the definition of human trafficking, the TIP Office expanded its bureaucratic and political reach over the problem of forced labour in the US. [64] This approach became institutionalised over time.

In sum, the definitional nuances and complexities highlighted in this analysis illustrate the potential challenges faced by procurement officers and contractors in interpreting slavery and trafficking policies during their day-to-day procurement activities. To mitigate the risk of misapplication, definitional clarity in procurement policies and documents is crucial for ensuring that procurement officers and contractors recognise the harms they are seeking to prevent.

2.3. Human rights duties

The freedoms from slavery, servitude, forced labour and human trafficking give rise to a 'cluster of obligations', encompassing three correlative duties: the duties to respect, protect and fulfil.[65] The duties to respect and protect are examined below to determine whether they give rise to a duty on states to implement slavery and trafficking procurement policies in their regulatory frameworks. The concept of human rights due diligence (HRDD) is also introduced in the context of the duty to protect. However, the duty to fulfil is not elaborated upon as it provides very little scope for such an obligation and is thus less relevant to this dissertation.

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61 MSA 2015, s 2(5).

62 Chuang (n 28) 620. See 'Trafficking in Persons Report' (*U.S. Department of State*, 2006) 10.

63 See Chuang (n 28) 620.

64 Chuang (n 28) 620.

65 See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) 51.

2.3.1. Duty to respect

The duty to respect human rights requires states to refrain from unjustifiably interfering with individuals' enjoyment of their rights.[66] Violations perpetrated by government departments, agencies, and officials, as well as other entities and corporations owned or controlled by the government, may be attributable to the state entailing international responsibility.[67] In the context of public procurement, the wrongful behaviour of government contractors and sub-contractors may be attributable to the state in situations where the contractor exercises governmental authority (e.g. a public or regulatory function)[68] or acts under state's control in perpetrating the wrongful activity.[69] Thus, the establishment of hybrid public-private bodies to deliver essential public services may give rise to the state's liability under human rights law.[70] However, a mere contractual relationship between a contracting agency and a private firm would not, without more, reach the requisite level of control or trigger the state's duty to respect.[71]

At a domestic level, the Human Rights Act 1998 and the human rights obligations contained therein apply to private contractors carrying out government contracts to the extent that they are exercising functions of a 'public nature', as a type of 'hybrid' authority.[72] However, private contractors will rarely be treated as hybrid authorities in the public procurement sphere, except for certain special cases, such as where the contractor exercises the

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66 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 69-70.

67 See 2001 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA); 'Chapter IV State Responsibility' (2001) vol 2(2) YILC 20; Philippa Webb and Rosana Garciandia, 'State Responsibility for Modern Slavery: Uncovering and Bridging the Gap' (2019) 68 ICLQ 539, 547-548; John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('UNGPs') 9-10 (UNGP 4 and Commentary).

68 ARSIWA, art 5; 'Chapter IV State Responsibility' (n 67) 42-43.

69 ARSIWA, art 8.

70 Claire Methven O'Brien and Olga Martin-Ortega, 'Discretion, Divergence, Paradox: Public and Private Supply Chain Standards on Human Rights' in Sanja Bogojević, Xavier Groussot and Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing 2018) 196-197.

71 'Chapter IV State Responsibility' (n 67) 47-48.

72 Section 6(3)(b).

coercive powers of the state in detention facilities.[73] Similarly, in the US, the actions of private contractors and subcontractors are not attributable to the state simply by virtue of their engagement in performing government contracts.[74] Contractor action may be treated as state action where it is undertaken as a 'joint activity' between the two parties, which share a 'symbiotic relationship'.[75] State responsibility may also be established where the contractor is 'controlled' by the state, or the state 'exercised coercive power or provided significant encouragement…either overt or covert' to the contractor in engaging in the human rights abuse.[76] This would rarely be the case in most government contracts for the supply of goods and services.

2.3.2. Duty to protect

The duty to protect human rights requires the state to prevent third parties, including natural and legal persons, from interfering with individuals' enjoyment of the right.[77] Three aspects of the duty to protect flowing from the freedoms from slavery and trafficking are adverted to in this section to delineate the duty and determine whether it supports an obligation on states to implement slavery and trafficking procurement policies: (1) the duty to implement legal and administrative frameworks; (2) the operational duty; and (3) the duty to establish broader regulatory frameworks. I also use this section as an opportunity to introduce the concept of HRDD and thereby lay some of the groundwork for the analytical framework established in Section 5.2, which refers to HRDD.

2.3.2.1. Legal and administrative frameworks

The duty to protect places a substantive obligation on states to criminalise violations of the prohibition of slavery and trafficking,[78] and to establish criminal and administrative law

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73 *YL v Birmingham City Council* [2007] UKHL 27 [63] (Baroness Hale).

74 *Rendell-Baker v Kohn*, 457 U.S. 830 (1982).

75 ibid; *Blum v Yaretsky*, 457 US 991 (1982) (*Blum*).

76 *Blum* (n 75); *Brentwood Academy v Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

77 Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 70.

78 *Siliadin* (n 42) [89], [112], [141]; *C.N.* (n 45) [105].

frameworks that facilitate the effective prosecution and penalisation of offenders.[79] They must also provide protection for victims, through effective identification, remedies and support mechanisms.[80] Further, the duty places a procedural obligation on states to investigate situations of potential trafficking promptly once the matter comes to the attention of authorities, in an independent manner that is capable of the identification and punishment of perpetrators.[81] These obligations are fundamental to the duty to protect, but do not touch on the regulation of public procurement.

2.3.2.2. Operational duty

States have an operational duty to prevent harm against a specific individuals at a real and immediate risk from slavery and trafficking which the state is or ought to be aware.[82] In public procurement, this duty may triggered where the state procures goods and services from specific individuals or groups of whom the authorities know or ought to know are being subjected to slavery or trafficking.[83] The knowledge element may be more easily satisfied in high risk sectors.[84] However, appropriate responses typically involve prompt action by authorities, including police and national anti-trafficking bodies, to remove the individuals from the harm. The implementation of slavery and trafficking procurement policies would not constitute an appropriate operational response to an imminent or ongoing threat.

2.3.2.3. Public procurement

There is increasing recognition that the duty to protect goes beyond the establishment of criminal, administrative and operational frameworks into broader regulatory spheres, most notably the private sector.[85] Where an individual is subjected to slavery or trafficking in a government supply chain, this implies a shortcoming in the state's current approach to

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79 *V.C.L. and A.N. v UK*, App nos. 77587/12 and 74603/12 (ECHR, 16 February 2021) (*V.C.L.*) [151].

80 Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (CUP 2017) 329, 329.

81 See *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [288].

82 *V.C.L.* (n 79) [152]; *Chowdury and Others v Greece*, App no 21884/15 (ECHR, 30 March 2017) [110].

83 Methven O'Brien and Martin-Ortega (n 70) 195.

84 ibid.

85 *Fadeyeva v Russian Federation*, App no 55273/00 (ECHR, 30 November 2005) 89, 92; Stoyanova (n 79) 370.

discharging their duty to protect. In this context, it could be argued that governments are under an obligation to protect individuals through targeted policies in their regulatory frameworks for public procurement. To demarcate the scope of such an obligation and to determine if it arises under IHRL, the following considerations are relevant.

The first issue concerns the jurisdictional limits of the state's duty to protect. Traditionally, a state's jurisdictional competence was held to be primarily territorial,[86] although it has been extended to include situations where: (a) the state exercises 'effective control of an area' outside its territory ('spatial' model);[87] and (b) the state exercises authority or control over an individual outside its territory ('personal' model).[88] Both models are particularly relevant in conflict situations, where military or diplomatic services are contracted out.[89] However, in general, jurisdiction does not extend to the extraterritorial human rights violations of corporations only linked to the state through supply chain contracts.[90] Thus, any duty to implement slavery and trafficking procurement policies would be limited to those parts of the supply chain located within the state's jurisdiction.

Second, it is arguable that a positive obligation to prevent abuses against individuals in government supply chains arises by virtue of the proximity between the harm and the state, as the state is procuring and benefiting from the goods or services produced by those being harmed.[91] In turn, government purchasers are funding businesses perpetrating slavery and trafficking offences with taxpayer money, which in turn, sustains the continued operation of those businesses. Governments are also benefiting from the cost reductions which typically flow from the perpetration of such offences (and enable the firm to win the contract in the first place).[92] Thus, a link may be established between the government's funds and the activity

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86 *Banković and Others v Belgium and Others*, App no. 52207/99 (ECHR, 12 December 2001) [59].

87 *Loizidou v Turkey*, App no 15318/89 (ECHR, 23 March 1995) [62]; *Legality of the Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 46-180 [107]-[111].

88 *Al-Skeini and others v UK*, App no 55721/07 (ECHR, 7 July 2011); *Lopez Burgos v Uruguay*, Communication No. 52/1979 (U.N. Doc. CCPR/C/OP/1, 29 July 1981) para 12.

89 Sinclair (n 8).

90 Methven O'Brien and Martin-Ortega (n 70) 195-196.

91 Stoyanova (n 79) 380.

92 Commentary to UNGP 17.

which perpetrates the violation. Although it is too remote to trigger the state's duty to respect, the link may tentatively provide a basis for a duty on the state to implement slavery and trafficking procurement policies to protect the victims exploited by contractors involved in producing goods and services for the government.

However, a third consideration is that IHRL allows for 'a certain latitude for differential human rights protection across states'.[93] To this end, human rights courts, particularly the ECtHR, explicitly afford states a 'margin of appreciation' in fulfilling their human rights obligations.[94] Within their margin of appreciation, states are generally required to take 'reasonable and appropriate' steps to protect human rights.[95] However, IHRL prohibits slavery in absolute terms. The freedoms from slavery and trafficking carry significant weight and human rights jurisprudence demonstrates they are more difficult to displace than other rights, such as the right to freedom of association.[96] Thus, while reasonable and appropriate steps may be sufficient for some rights, it is arguable that states must do 'all that could be reasonably expected'[97] to *ensure* that individuals are not subjected to slavery and trafficking.[98] On this basis, it is arguable that states can reasonably be expected to implement slavery and trafficking procurement policies to protect individuals in government supply chains. Yet, states could potentially meet that standard by implementing a range of other regulatory measures, such as mandatory HRDD in the private sector, and criminal measures, such as 'slavery and trafficking prevention and risk orders', to tackle perpetrators and prevent harm to individuals at risk.[99] As states may choose to invest their resources in other measures deemed more suitable than slavery and trafficking procurement policies in discharging their duty to protect, it cannot be said that states must implement slavery and trafficking procurement policies, only that they may do so.

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93 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012) 7, 38.

94 ibid ch 1.

95 *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204 [34].

96 Fredman (n 66) 76.

97 ibid 75-76.

98 *Z v UK*, App no 29392/95 (ECHR, 10 May 2001) [73].

99 MSA 2015, ss 14-22, 23-29.

Taking these factors in combination, I argue that there is not a strong basis for asserting that the duty to protect gives rise to an obligation on states to implement slavery and trafficking policies in their public procurement frameworks. However, the adoption of such policies offers clear potential as regulatory mechanism for the protection of workers in government supply chains. Moreover, although there is currently no IHRL instrument or judicial decision which requires the implementation of slavery and trafficking procurement policies, the development of such an obligation in the future should not be discounted. Legal duties in customary international law evolve over time, through a combination of widespread state practice and states accepting that the practice is obligatory.[100] In the business and human rights context, this evolution may occur along the linear but dynamic relationship between moral, social, and legal norms, where norms justified on moral grounds become accepted social norms and then eventually crystallise as legal norms.[101] While the law is not yet at a point where a general obligation to introduce slavery and trafficking procurement policies can be confidently asserted, states should be encouraged along this trajectory and further arguments on this point are presented in Chapter 3.

2.3.2.4. HRDD

As foreshadowed above, HRDD is gaining increasing recognition as a key strategy for demanding action by businesses to address slavery and trafficking in their supply chains. The most comprehensive HRDD framework is set out in the UNGPs, which situates HRDD within a 'corporate responsibility to respect human rights'. HRDD is increasingly becoming institutionalised and mandated through international,[102] regional,[103] and domestic instruments as part of the relevant state's duty to protect.[104] It is also utilised to an increasing degree in

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100 *North Sea Continental Shelf (Federal Republic of Germany and Denmark) (Judgment)* [1969] ICJ Rep 3, 44 [77].

101 John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Elgar 2020) 75.

102 See e.g. OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD, 2018).

103 E.g. 'European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (*European Parliament*, 10 March 2021) <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title1> accessed 9 July 2021.

104 E.g. *Wet zorgplicht kinderarbeid* (Dutch Child Labour Due Diligence Law); *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)* JO, 27

slavery and trafficking procurement policies as a practical way in which government contractors can identify and address risks in their supply chains.[105] States are encouraged,[106] but not legally required under IHRL to implement mandatory HRDD laws,[107] although a proposed UN business and human rights treaty seeks to create binding obligations in this respect.[108] In light of its increasing importance within the overarching duty to protect, as well as slavery and trafficking procurement policies, the elements of HRDD are briefly examined.

HRDD requires businesses to uncover and assess actual or potential adverse human rights risks in their supply chains through a continuous process over the entire lifecycle of their activities in order to mitigate and prevent those risks.[109] It extends to adverse human rights impacts that the business 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'.[110] UNGP 19 distinguishes between three types of involvement and the expected response attaching to each:

1 where the business causes the adverse human rights impact, it should take steps to cease or prevent the impact;

March 2017 (French Law on the Duty of Viligance); 'Norway: Parliament Passes Due Diligence Law Incl. Right to Information about Corporate Impacts' (*BHRRC*, 14 June 2021) <https://www.business-humanrights.org/en/latest-news/norway-govt-proposes-act-regulating-corporate-supply-chain-transparency-duty-to-know--due-diligence/?mc_cid=deebc36e77&mc_eid=60931ed4a4> accessed 16 June 2021; 'German Parliament Passes Mandatory Human Rights Due Diligence Law' (*BHRRC*, 11 June 2021) <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/?mc_cid=deebc36e77&mc_eid=60931ed4a4> accessed 16 June 2021.

105 See Chapter 5.

106 CESCR, 'General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', UN doc E/C.12/ 60/R.1 (10 August 2017).

107 Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20 MJIL 221, 225-226.

108 'Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises' (OEIGWG Chairmanship Second Revised Draft 6 August 2020).

109 John Gerard Ruggie and John F Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 EJIL 921, 924; UNGPs 16-17 (Guiding Principle 17).

110 UNGP 18(a).

2 where the business contributes to the impact, it should take steps to cease or prevent its contribution, and use its leverage to mitigate any remaining impact; and

3 where the impact is directly linked to a business's operations without cause or contribution on its part, an appropriate response must be devised having regard to factors such as the business's leverage over the infringing entity, how crucial the business relationship is, whether terminating the contract would itself have adverse human rights impacts, among others.[111]

Under the UNGPs, HRDD is composed of several compounding elements which should applied flexibly to a given situation, having regard to the size, nature and context of the operations, as well as the severity of the risk. First, businesses should regularly assess the actual and potential adverse human rights impacts of a business activity, by consulting appropriate internal or external experts and/or engaging in meaningful consultation with affected, vulnerable and marginalised groups.[112] Second, businesses should integrate their assessment findings into their operations and take appropriate action to mitigate and prevent potential adverse impacts.[113] What constitutes 'appropriate action' must be ascertained with respect to the type of the business's involvement (see the three types above) and the extent to which it exercises leverage over the activity or entity causing the adverse impact.[114] Third, businesses should track the effectiveness of their actions based on appropriate qualitative and quantitative indicators, to verify they are being adequately implemented.[115] Feedback may be sought from internal and external groups and stakeholders.[116] Fourth, businesses should engage in a process of external accountability by communicating their assessment findings and active responses with stakeholders.[117] Finally, where a business identifies that it caused or contributed to adverse human rights impacts, it should remediate those impacts through legitimate processes.[118]

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111 Ruggie and Sherman (n 109) 927.

112 UNGP 18.

113 UNGP 19.

114 Commentary to UNGP 19.

115 UNGP 20.

116 Commentary to UNGP 20.

117 UNGPs 17-21.

118 UNGP 22.

2.4. Conclusion

This thesis seeks to contribute towards the development of slavery and trafficking procurement policies which are pragmatic and capable of effective implementation by procurement officers and contractors. As a first step in this process, it is important that clear and specific terms and definitions are used to ensure that procurement officers and contractors adequately understand the harms they need to identify and prevent. Thus, in public administration and procurement contexts, the specific terms of 'slavery', 'servitude', 'forced labour' and 'human trafficking' should be utilised, with particular attention to the nuances and complexities of those terms. Furthermore, this chapter sought to establish whether the freedoms from slavery and trafficking in IHRL require states to protect supply chain workers through targeted procurement policies. In summary, the duty to protect arguably goes beyond the establishment of criminal and administrative frameworks, requiring states to establish the broader regulatory frameworks necessary to deter violations. However, states have a margin of appreciation within which a range of measures may be adopted to demonstrate the state is doing all that can reasonably be expected to protect individuals in supply chains. In this context, slavery and trafficking procurement policies may be implemented as one, but not the only way of discharging a state's duty to protect.

3. Justifying slavery and trafficking procurement policies

3.1. Introduction

In the previous chapter, I argued that while there is no specific legal obligation on states to implement slavery and trafficking procurement policies, states may nevertheless implement such policies to discharge their duty to protect victims in government supply chains. This chapter advocates that national governments *should* implement slavery and trafficking procurement policies. As a starting point, Section 2 introduces the theoretical basis for national governments using public procurement as a regulatory tool to implement policies not directly concerned with the pursuit of economic efficiency ('horizontal policies'). By virtue of their inherent regulatory function, it is submitted that governments may legitimately use their buying power to promote social policies, including those concerning slavery and trafficking. I then argue in Section 3 that national governments should use their buying power to implement slavery and trafficking procurement policies for three key reasons: reinforcing legislation, reinforcing private sector developments, and maintaining consistency in the application of policy across different government activities. To reinforce this position, I address three arguments against such policies, submitting that these concerns may be mitigated through careful policy design.

3.2. Techniques for policy implementation

Daintith identified two overarching techniques for the implementation of policy:[119] *imperium*, which employs instruments involving the use or threat of force and is used in a broad sense to refer to legislation and common law;[120] and *dominium*, which involves a government's deployment of its wealth as regulatory device to constrain private sector behaviour and promote its policies.[121] Both techniques are recognised as legitimate means by which national governments may pursue their policy goals. They may also be exercised concurrently, such

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[119] T. C. Daintith, 'Legal Analysis of Economic Policy' (1982) 9 Journal of Law and Society 191, 53.

[120] ibid 53.

[121] Terence Daintith, 'Regulation by Contract: The New Prerogative' (1979) 32 Current Legal Problems 41, 41-2.

that public procurement may be used to support and complement policy goals already implemented in legislation. [122]

By virtue of their inherent regulatory function and *dominium* powers, national governments are not neutral players in the market.[123] Both the UK and US Governments operate mixed economies and thus, even when participating in the market, they must continue to regulate it in order to address inefficiency, control failures, provide public goods, distribute wealth, etc.[124] In this context, governments cannot act, or be expected to act, in the same way as private sector firms.[125] As Daintith contends, a government contract necessarily constrains the behaviour of both parties for the purpose of achieving their joint commercial objective, but by virtue of the government's regulatory quality, the contract must also incorporate requirements 'reflecting public interests which by their breadth and importance pass far beyond the mutual objectives of the contract parties'.[126] In this context, governments may promote certain policy goals through the contracting process. As to the kinds of policies which may be pursued, Trepte usefully categorises procurement policies based on their 'primary objectives', being 'strategic', 'protective' or 'proactive'. [127]

The category of 'strategic' policies encompasses those in which the government utilises public procurement to stimulate its national economy and generate employment opportunities, by increasing public expenditure on public works and services. [128] Of a similar nature, 'protective' policies encompass policies designed to protect domestic industries and firms, as well as local economies, against competition from foreign competitors.[129] Both policies tend

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122 See generally, Catherine Barnard, 'Using Procurement Law to Enforce Labour Standards' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).

123 Peter Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012) 15 CYELS 283, 310-311.

124 Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (OUP 2007) 3.

125 Corvaglia (n 9) 124

126 Daintith (n 121) 41.

127 Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) ch 3.

128 ibid 140; Davies (n 135) 262.

129 Trepte (n 127) 152.

to present difficulties under international procurement agreements, such as the WTO Government Procurement Agreement (GPA),[130] as they are often accused of discriminating against foreign firms.[131] They are also accused of artificially creating demand for products or services in certain subsidised areas, which creates compounding inefficiencies by encouraging 'competitive complacency'.[132] However, it is unlikely that slavery and trafficking procurement policies would fall within these two categories of policy, as protectionism would rarely be the primary aim.

In contrast, 'proactive' policies involve the government's use of its procurement powers to implement policy goals 'unconnected' with the pursuit of efficiency and value for money.[133] Instead, they aim to achieve broader social goals, such as human rights protection.[134] Slavery and trafficking policies would generally be categorised as proactive policies. Although Trepte describes such policies as having a 'tenuous connection' with the procurement process, it is a question of degree. [135] Slavery and trafficking policies generally relate to the process by which the procured product or service is made or delivered and are likely to apply in specific ways to contracts concerning products and services from industries known as being at high-risk of such practices. Thus, there is still a clear connection between the proactive policy and the contract being awarded. Nevertheless, among procurement scholars, opinion is divided as to the desirability of policies which diverge from the goals of economic efficiency and value for money.[136] The following section explores these arguments in more detail.

3.3. Advantages and disadvantages

This section presents three advantages and three disadvantages of slavery and trafficking procurement policies. I argue that, on balance, the advantages outweigh the disadvantages, as

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130 World Trade Organization Agreement on Government Procurement (adopted March 2012, entered into force 4 April 2012).

131 ibid 143, 152-153.

132 ibid 141, 153-154.

133 ibid 169.

134 Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10(2) Journal of Public Procurement 149.

135 A. C. L. Davies, *The Public Law of Government Contracts* (OUP 2008) 263-264.

136 McCrudden (n 124) 15.

the latter may be significantly mitigated through careful design of the relevant policies (a key focus of Chapter 5). For these reasons, it is desirable for national governments to implement slavery and trafficking policies.

3.3.1. Advantages

3.3.1.1. Reinforcing legislation

Slavery and trafficking procurement policies provide a valuable tool for enforcing, or reinforcing, legislative standards in the specific context of government supply chains.[137] This is particularly important where legislation is of limited effectiveness due to challenges with design and implementation, or enforcement.[138] Mantouvalou argues that in certain areas of wrongdoing such as 'modern slavery', offences perpetrated in complex corporate supply chains, traditional command-and-control mechanisms may be unsuitable.[139] They tend to suffer from a lack of sophistication, having been designed by policymakers lacking an adequate understanding of the complex social problem, and are received by actors unwilling to comply.[140] Yet, governments wield enormous spending power and influence over these areas through their procurement activities, especially in industries such as defence where governments are leading customers.[141] Horizontal procurement policies thus present an important opportunity for targeted enforcement in areas of corporate activity where traditional enforcement measures have limited reach or are not effective.

In general, legislative requirements tackling human rights violations in supply chains are often designed to be 'light touch', as national governments seek to compete for private investment and therefore avoid imposing obligations on business which may be perceived as burdensome.[142] For example, MSA s 54 imposes an obligation on businesses with an annual

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137 ibid 122.

138 See John Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' in Shelley Marshall and Kate Macdonald (eds), *Fair Trade Corporate Accountability and Beyond: Experiments in Globalizing Justice* (Taylor & Francis Group 2010) 330.

139 Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 MLR 1017, 1038-1039.

140 ibid 1038-1039.

141 Amy Ludlow, 'Social Procurement: Policy and Practice' (2016) 7 ELLJ 479, 479-480.

142 Howe (n 138) 331-332.

turnover of £54 million to report the steps they have taken to address slavery and trafficking in their supply chains. Many government contractors are subject to this requirement. Yet, not only do a portion of contractors consistently fail to comply with the obligation or comply poorly,[143] but s 54 has been strongly criticised for its failure to drive changes in corporate behaviour.[144] Currently in practice, the only enforcement mechanism for s 54 is public scrutiny,[145] which is significantly constrained by knowledge and resource limitations and thus, largely ineffective in enforcing corporate compliance on a large scale.[146] In contrast, at the US federal level, the TVPA is enforced through measures such as individual prosecutions and foreign assistance, but there is no equivalent slavery and trafficking reporting obligation on US businesses. Thus, to enforce the TVPA in supply chains, the US Government recognised the need to employ its *dominion* powers through the 'Executive Order 13627—Strengthening Protections Against Trafficking in Persons in Federal Contracts' and Section 307 of the Tariff Act of 1930.[147] Thus, for different reasons, both UK and US scenarios highlight the importance of public procurement being available to national governments as regulatory tool for reinforcing legislation prohibiting slavery and trafficking, in the specific context of corporate supply chains.

3.3.1.2. Reinforcing private sector developments

Slavery and trafficking procurement policies have an important role to play in reinforcing broader movements within the private sector towards ethical, responsible and transparent supply chains. Corporate slavery and trafficking obligations are no longer a foreign or radical concept for most large and transnational businesses. In addition to guidelines published at the

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143 Sancroft Tussell, 'Eliminating Modern Slavery in Public Procurement' (2nd edn 2019).

144 See Patricia Carrier, 'Modern Slavery Act: Five Years of Reporting' (Business and Human Rights Resource Centre 2021) <https://media.business-humanrights.org/media/documents/MSR_Embargoed.pdf> accessed 16 June 2021.

145 Although see HM Government, 'UK Government Announces Business Measures Over Xinjiang Human Rights Abuses' (*GOV.UK*, 12 January 2021) <https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang-human-rights-abuses> accessed 9 July 2021; Modern Slavery (Amendment) HL Bill (2021-2022) 32.

146 Martin-Ortega (n 11) 514-515. See also, Rachel Chambers and Anil Yilmaz Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability' (2021) 21 CJIL 323, 351.

147 19 U.S.C. §1307.

international level,[148] recent years have seen a marked increase in the number of statutes passed by national governments imposing transparency obligations concerning slavery and trafficking in supply chains, and mandatory HRDD obligations on large businesses.[149] This trend is projected to continue, as future developments include a European Union HRDD law and a UN binding treaty imposing a legal obligation on states to require businesses to respect, prevent and mitigate human rights abuses and undertake HRDD.[150] These current and future legal obligations are bolstered by the growing corporate social responsibility (CSR) expectations placed on businesses, increasingly driven internally by management or shareholder activism,[151] as well as externally by conscious consumers, civil society organisations and activist investors.[152] They contribute towards increasing implementation of corporate slavery and trafficking initiatives within the private sector, driven by a range of international and domestic legal obligations and social pressure points.

National governments ought to implement slavery and trafficking procurement policies to reinforce these private sector initiatives and drive increased compliance among businesses falling behind, but also to signal their own commitment to the movement towards responsible business conduct.[153] After all, governments are the primary duty bearers in relation to the freedoms from slavery and trafficking.[154] As noted above, compliance with slavery and trafficking-related legal obligations across all sectors remains inconsistent, including those at high risk of violations, and stakeholder oversight may have only a limited impact on enforcing

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148 E.g. UNGPs; OECD (n 102).

149 See references at footnote 104.

150 'Legally binding instrument' (n 108).

151 Dominic Powell, 'Australia: Shareholders Urge Coles to Change Its Policies Covering Potential Modern Slavery in Its Supply Chains' (*BHRRC*, 11 September 2019) <https://www.business-humanrights.org/en/latest-news/australia-shareholders-urge-coles-to-change-its-policies-covering-potential-modern-slavery-in-its-supply-chains/> accessed 8 June 2021.

152 James Frost, 'Activist Investors Put Slavery on Corporate Agenda' (*Australian Financial Review*, 25 November 2020) <https://www.afr.com/companies/financial-services/activist-investors-put-slavery-on-the-corporate-agenda-20201125-p56hry> accessed 8 June 2021; 'Strengthening Supply Chain Transparency' (*Walk Free*) <https://www.walkfree.org/projects/strengthening-supply-chain-transparency/> accessed 16 June 2021.

153 Methven O'Brien and Martin-Ortega (n 70) 206.

154 ibid 190.

compliance by those businesses without a consumer facing front.[155] In this context, slavery and trafficking procurement policies provide national governments with an opportunity to reinforce ethical trading and responsible supply chain sourcing initiatives, level the playing field and internalise the negative externalities created by businesses producing goods and services with slave- or trafficked-labour.[156] Their contribution would be particularly strong in high-risk industries and sectors where the government is a main or major customer. In these contexts, governments should both meet and exceed private sectors initiatives to reinforce them and demonstrate its own commitment to the cause.

3.3.1.3. Consistency in government policy implementation

According to the principle of 'consistency' in public administration, the government is encouraged to 'carry over' important policy agendas across the entirety of its activities as a whole, including public procurement.[157] One area of government activity, such as public procurement, should not contradict or undermine a policy being implemented in another area of government.[158] In addition, national governments ought to pursue 'horizontal policy coherence' whereby their departments and agencies are equipped with the tools and resources they need to implement an important public policy and tackle the relevant social issue in a coherent and unified manner.[159] In this context, the notion of consistency serves a 'signalling' function to the public, and plays an central role in protecting the credibility of both the government and its policies among citizens and the private sector.[160] Moreover, maintaining consistency in public procurement policy also contributes to the contracting agency achieving 'value for money' by ensuring that public money is not spent on goods or services that are harmful from the perspective of, or undermine, a particular government policy.[161]

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155 See e.g. Andrew Phillips and Alexander Trautrims, 'Agriculture and Modern Slavery Act Reporting: Poor Performance Despite High Risks' (Office of the Independent Anti-Slavery Commissioner, University of Nottingham Rights Lab 2018).

156 McCrudden (n 124) 124-126;

157 Davies (n 135) 265-266.

158 McCrudden (n 124) 123; Kunzlik (n 123) 348.

159 See UNGP 8 and Commentary.

160 Davies (n 135) 266.

161 Kunzlik (n 123) 348-349.

It is problematic for the UK government to impose transparency obligations on corporations so as to rid their supply chains of slavery and trafficking, while failing to ensure that slavery and trafficking is not occurring in their own. As concluded by the Joint Committee on Human Rights, '[i]f the Government expects businesses to take human rights issues in their supply chains seriously, it must demonstrate at least the same level of commitment in its own procurement supply chains'.[162] Similarly, where the US Government promulgates a 'zero-tolerance policy' for government employees participating in human trafficking, it would be problematic for the Government to then purchase goods made with forced labour. These scenarios exhibit clear policy clashes which ought to be avoided under the principle of consistency.[163] Thus, to facilitate trust in public administration and government policy, national governments ought to instil a slavery and trafficking agenda in their public procurement activities, consistent with their broader policies.

3.3.2. Disadvantages

3.3.2.1. Costs

It is often argued that horizontal procurement policies increase the costs of the contract,[164] and therefore present a challenge to the contracting agency's primary aim of achieving value for money and its duty to spend public money with propriety.[165] This is particularly the case where the contracting agency adopts a narrow interpretation of value for money which is equated with the outcome of maximum allocative and productive efficiency, and excludes non-price and quality-related factors.

There are two general areas in which costs may be increased by a horizontal policy, the first being the cost of the contract itself. Horizontal policies may place additional compliance costs on bidders which are passed on to the contracting agency through the final contract.[166] The presence of the additional compliance costs is believed to cause some bidders to increase

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162 Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability* (HL Paper 153, HC 443, 5 April 2017).

163 Davies (n 135) 266.

164 Sanchez Graells (n 10) 112; Kunzlik (n 123) 323-324.

165 Davies (n 135) 267.

166 Arrowsmith (n 134) 166.

the price of their bid or prevent their participation entirely.[167] In turn, the remaining bidders, facing less competition, are likely to raise the price of their bids, which then increases the overall cost of the contract once awarded.[168] Second, horizontal policies may impose additional administrative burdens imposed on contracting agencies. To achieve their desired impacts, human rights-related policies typically require implementation through a range of verification and compliance-related processes which may span the lifecycle of the contract. These processes cost time and resources,[169] and may require contracting officers to take on additional roles such as 'investigator' or 'enforcer' of the policy, for which they may not be trained or adequately resourced.[170] Both these administrative costs, and increased contract costs, have the potential to undermine the efficiency of the procurement process.[171]

Although these concerns may present an initial barrier against slavery and trafficking policies, the cost implications of such policies may be mitigated. As a starting point, contracting agencies are increasingly encouraged to adopt an understanding of 'value for money' which encompasses both price and non-price related factors, such as quality and social value.[172] By shifting this paradigm, the costs of implementing a slavery and trafficking procurement policy may be justified as necessary for achieving the social value element of 'value for money', rather than as an additional cost extraneous to the primary goal of the contract.

With respect to cost and reduced competition concerns, the potential cost burden on bidders largely depends on what the policy requires. As analysed further in Chapter 5, most slavery and trafficking procurement policies require that bidders have not recently been convicted of a slavery or trafficking offence, incorporate certain contractual terms, and undertake due diligence to address risks. These requirements are likely to demand the expenditure of certain costs related to programme development and implementation, but once internalised, should become part of a businesses' day-to-day operations. Many businesses are likely to have already initiated these processes pursuant to their obligations under legislation

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167 McCrudden (n 124) 117.

168 ibid.

169 Sanchez-Graells (n 10) 98; Corvaglia (n 9) 73.

170 Sanchez-Graells (n 10) 112-113; McCrudden (n 124) 121.

171 Barnard (n 122) 212-213.

172 PCR 2015, reg 67; FAR 15.101.

such as the MSA 2015, or as part of a CSR program. Admittedly, such costs may be higher for international bidders not subject to equivalent or similar domestic laws or CSR expectations. However, requiring the implementation of such policies contributes to levelling the playing field between compliant and non-compliant businesses, the latter of which may otherwise be more competitive and unfairly advantaged due to their reduced labour costs by employing trafficked or bonded labourers.[173] Thus, the potential for increased contract costs may be mitigated and ought not to override the important benefits afforded by slavery and trafficking procurement policies.

In relation to the increased administrative burden on contracting agencies, this again depends on the design of the policy and the extent to which the contracting agency resources and trains its contracting officers. The allocation of trained personnel and adequate resources to the performance of verification and compliance procedures is essential. Slavery and trafficking policies tend to be designed around the concept of HRDD, which is a form of process-based regulation that 'capitalises on a company's inherent capacity to regulate itself'.[174] Whilst the contracting agency may need to undertake some verification and compliance procedures, most of the 'regulation' and monitoring will take place at the contractor and sub-contractor levels. Thus, assuming appropriate policy design, the administrative burden on contracting agencies should not be prohibitive.

3.3.2.2. Increased discretion

The inclusion of extraneous non-price related requirements may increase the complexity of the procurement process, particularly the award criteria. Critics contend that increasing the complexity of the process leads to a range of potential negative effects, most notably the increased discretion afforded to decision-makers.[175] As expounded upon in Chapter 4, the UK and US procurement systems tolerate discretion to different degrees. Increased discretion due to the inclusion of additional non-economic criteria is believed to provide greater opportunity for decision-makers to make poor decisions or abuse the criteria to engage in favouritism,

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173 Joint Committee on the Draft Modern Slavery Bill, *Report on the Draft Modern Slavery Bill* (3 April 2014) para 172.

174 Landau (n 107) 234.

175 Sanchez Graells (n 10) 107.

uncompetitive behaviour, and ultimately, corruption.[176] These behaviours are inimical to the fundamental principles of both national procurement systems such as integrity and transparency,[177] as well as international trade regimes promoting non-discriminatory and reciprocal market access between states.[178]

The risks of abusive behaviour occurring in slavery and trafficking procurement policies can be managed through the implementation of appropriate safeguards. In fact, many procedural safeguards such as transparency requirements are entrenched within the UK and US procurement systems to manage the ever-present risk of abusive behaviour in public procurement generally.[179] These safeguards will continue to perform their role in relation to contracts containing slavery and trafficking criteria. Further, in addition to ensuring that appropriate review mechanisms are available to disgruntled bidders, certain cautionary steps may be taken in the design of slavery and trafficking policies to reduce the potential for poor or abusive decision-making. For example, discretion may be limited through clear and precise award criteria. Simplicity in procurement does not necessarily mean the absence of detail; rather, it denotes that the rules are clear, coherent and easily understandable by those to whom they apply.[180] Slavery and trafficking policies should be designed according to these principles to increase the quality and fairness of decision-making.

3.3.2.3. Incompatibility with the GPA

A final contention is that slavery and trafficking policies are not accommodated by the WTO GPA, to which the UK and US are both parties. Sanchez Graells, for example, argues that the regulatory space for human rights protection through procurement under EU Public

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176 Corvaglia (n 9) 74.

177 See Steven Schooner, 'Desiderata: Objectives for a System of Government Contract Law (2002) 11 PPLR 103.

178 See Robert D. Anderson and Sue Arrowsmith, 'The WTO Regime on Government Procurement: Past, Present and Future' in Robert D. Anderson and Sue Arrowsmith (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP 2011).

179 E.g. PCR 2015, regs 86-87, 89-91; Steven W. Feldman, *Government Contract Guidebook* (4th edn, Thomson Reuters 2020-2021) ch 7.

180 Sue Arrowsmith, 'Modernising the European Union's Public Procurement Regime: A Blueprint for Real Simplicity and Flexibility' (2012) 3 PPLR 71, 76.

Procurement Directive 2014 is 'severely limited',[181] and similar arguments may be made in relation to the GPA, as both share a primary purpose in liberalising trade and procurement markets among their signatories.

The GPA imposes non-discrimination and transparency requirements designed to create the conditions for fair treatment and competition between domestic and foreign suppliers. Parties must accord the goods, services and suppliers of any other party 'treatment no less favourable' than the treatment accorded to domestic goods, services and suppliers, or those of any other party.[182] Parties must also not discriminate against local suppliers which supply goods or services from another party,[183] or treat local suppliers 'less favourably' than other local suppliers on the basis of degree of foreign affiliation or ownership.[184] The GPA's non-discrimination principles limit the capacity of signatory Parties to implement horizontal policies in their domestic public procurement regulations and procedures.[185] However, recent scholarly analyses offer various routes by which Parties may justify the implementation of human rights procurement policies.[186]

First, in their coverage Schedules, governments may exclude their slavery and trafficking procurement policies from the scope of the GPA's coverage.[187] As Parties must 'pay' for these exceptions through other concessions,[188] governments rarely use this option, although the US has done so in relation to certain set-asides.[189] As an alternative, nothing in the GPA prevents Parties from imposing measures necessary to protect, *inter alia*, public morals, order or safety, insofar as those measures do not constitute a 'means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international

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181 Sanchez-Graells (n 10) 100.

182 GPA, art IV:1.

183 ibid art IV:2(b).

184 ibid art IV:2(a).

185 Corvaglia (n 9) 98.

186 See Arwel Davies, 'The National Treatment and Exceptions Provisions of the Agreement on Government Procurement and the Pursuit of Horizontal Policies' in Sue Arrowsmith and Robert D. Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP 2011); Outhwaite (n 9).

187 See the annexes of the coverage Schedules in GPA Appendix 1 GPA. Outhwaite (n 9) 31.

188 McCrudden (n 124) 470.

189 See GPA, US, General Notes, Annex 7.

trade'.[190] The variety of scholarly opinions as to which of the three grounds could best justify a horizontal labour or human rights-based policy suggests there is an arguable case for any of the three grounds.[191] For the sake of brevity these arguments will not be re-explored here.

At a more specific level, there is scope for Parties to justify horizontal policies within the specific rules on conditions for participation and evaluation criteria.[192] Article VIII:1 provides that any conditions for supplier participation must be limited to 'those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement'. Nevertheless, where there is supporting evidence, a Party *may* exclude a supplier on various grounds, including final judgments in respect of serious crimes or other serious offences,[193] and professional misconduct.[194] It is not clear whether these exclusions are subject to the general principle that exclusions must relate to the capacity to perform in Article VIII:1. Corvaglia submits that the wording of Article VIII in the current GPA compared to its 1994 equivalent[195] appears more open to the exclusion of suppliers for horizontal policy reasons, as it draws a link between the 'integrity' of the supplier and its legal capacity to perform the contract.[196] Thus, an example of professional misconduct adversely reflecting on the supplier's commercial integrity would be a violation of international slavery and trafficking laws in the production of the procured goods or services.[197] The serious crimes and offences ground may also apply where a conviction results from such behaviour.

As to evaluation criteria, contracting authorities must provide tender documentation including 'all information necessary to allow suppliers to prepare and submit responsive tenders',[198] including all evaluation criteria to be applied in the awarding of the contract, and,

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190 GPA, art III:2(a)-(b).

191 Davies (n 186); McCrudden (n 124) 497; Outhwaite (n 9) 34-35.

192 ibid.

193 GPA art VIII:4(d).

194 ibid art VIII:4(e).

195 (adopted 15 April 1994, entered into force 1 January 1996).

196 Corvaglia (n 9) 147.

197 ibid.

198 GPA, art X:7.

except where price is the sole criterion, the relative importance of such criteria.[199] The evaluation criteria 'may include, among others, price and other cost factors, quality, technical merit, environmental characteristics and terms of delivery'.[200] This is a non-exhaustive list and as such, contracting authorities are afforded discretion as to the type and weighting of different criteria, subject to the general principles. Accordingly, the inclusion of slavery and trafficking policies in tender documentation would arguably be permissible as long as they do not violate the principles of transparency and non-discrimination and are explicitly stated in the tender documentation with a prescription as to their relative importance and weight in the evaluation process.

Overall, slavery and trafficking procurement policies will not be incompatible with the GPA insofar as they follow the specific requirements set out in the GPA and do not fall foul of the general non-discrimination and transparency principles. Thus, as with the other two arguments against slavery and trafficking policies, concerns as to incompatibility with the GPA may be significantly mitigated through careful design of the policies. On balance, they should not be seen as a barrier against the implementation of slavery and trafficking policies, given the important advantages of such policies.

3.4. Conclusion

In this chapter, I argued that national governments should implement slavery and trafficking procurement policies, even though they are not required to do so under IHRL. I situated the legitimacy of public procurement as a regulatory mechanism within the state's *dominium* powers and positioned slavery and trafficking policies within Trepte's category of 'proactive policies', to highlight the fundamental purpose of such policies to use state wealth to achieve social goals. I then argued that there are three key advantages of adopting slavery and trafficking procurement policies. They provide governments with a valuable tool for enforcing legislative standards and reinforcing broader movements within the private sector towards transparent supply chains. They also contribute towards maintaining consistency in the application of government policy on slavery and trafficking. The disadvantages of slavery and trafficking policies include increased cost burdens, discretion, and potential for abuse, as well

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199 ibid art X:7(c).

200 ibid art X:9.

as potentially being in tension with the GPA. However, each of these concerns can and should be minimised by designing slavery and trafficking policies carefully and with in-built safeguards. Suggestions on appropriate design are offered in Chapter 5. Ultimately, their advantages outweigh their disadvantages and thus, there is a strong case for governments implementing policies to address slavery and trafficking in their supply chains.

4. UK and US public procurement frameworks

4.1. Introduction

In Chapter 3, I argued that national governments should utilise their economic power as a lever to enforce slavery and trafficking procurement policies. This chapter introduces the domestic regulatory frameworks for public procurement which support the implementation of these horizontal policies in the UK and US, as well as the principles that shape them. Sections 4.2 and 4.3 respectively explore the key elements of the UK and US regulatory frameworks for public procurement which are most relevant to the implementation of slavery and trafficking procurement policies. I emphasise the influential role of internal guidance in the UK in contrast to the prescriptive regulations applied in the US, which are underpinned by broader institutional differences between the two jurisdictions. Section 4.4 then discusses the key principles shaping both procurement frameworks which are most likely to interact with the slavery and trafficking procurement policies. It is important that these principles are considered in the design of slavery and trafficking procurement policies to ensure that such policies contribute to rather than undermine the integrity and efficiency of the procurement system and can be implemented by procurement officers without infringing their obligations under public procurement law.

4.2. UK regulatory framework

A fundamental feature of the UK regulatory tradition for public procurement is the significance of internal government guidance. This guidance is not formal law, nor is it delegated legislation; rather, it is a form of 'soft law', designed to provide contracting officers with detailed information on the contracting process. In practice, internal guidance functions as a form of law, utilised by the parts of government that regulate, to control those parts of government whose activities are regulated.[201] For example, in central government, the Treasury closely monitors the activities of other departments which spend on procurement contracts and thus, exercises quite significant power over those departments.[202] In the context of this power dynamic, guidance issued by the Treasury is generally regarded as binding by those to whom it applies.[203] The Treasury's regulatory power is reinforced by accounting officers within

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201 Davies (n 135) 33-34.

202 ibid 34.

203 ibid.

government departments, who often rely on Treasury guidance when carrying out their special responsibility to advise the minister on the propriety and value for money of proposed expenditure.[204]

The binding functional nature of internal guidance reflects the norms of the broader institutional framework for administrative decision-making in the UK, in which government agencies are considered part of the executive branch in a pyramidal structure and therefore subject to a form of 'hierarchical management' from the executive, rather than external control.[205] As a result, the executive maintains extensive control and influence over the bureaucracy, the latter of which understands its role to support elected officials to 'implement their policies and values'.[206] Thus, the concentration of executive and bureaucratic power, channelled through a relationship of internal management, enables the executive to adopt a pluralistic approach to regulation, much of which is based on guidance traditionally thought of as 'non-legal', but functions as binding upon those subject to it.[207] Internal procurement guidance is currently published by the Treasury and Cabinet Office, including the Crown Commercial Service (CCS). Examples of guidance from these bodies include the Treasury's 'Managing public money' handbook and the Cabinet Office's Procurement Policy Notes (PPNs).[208] PPNs clarify the government's policy preferences and often provide detailed guidance on best practice for public procurement officials.[209]

In addition to guidance, regulations play a central role in regulating procurement by UK government agencies. Current UK public procurement regulations are based on EU law requirements, which promote the EU's objectives in creating a common market and eliminating barriers to trade in goods and services between Member States.[210] Most public procurement spending takes place under the Public Contracts Regulations 2015, which applies to public works contracts, public supply contracts and public service contracts over certain value

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204 HM Treasury, *Managing Public Money* (revised May 2021) ch 3.

205 Peter Cane, *Controlling Administrative Power: An Historical Comparison* (CUP 2016) 312.

206 ibid 313.

207 Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 53-56.

208 HM Treasury (n 204).

209 Cane (n 205) 273.

210 See Treaty on the Functioning of the European Union [2012] OJ C326/47, arts 18, 26, 28, 45, 49, 56.

thresholds.[211] The PCR 2015 outlines the key procurement principles underpinning the regulatory framework and contains rules on each type of procedure, the conduct of a procedure, contract performance, specific procurement regimes, remedies and other miscellaneous obligations. In December 2020, the Cabinet Office published a Green Paper detailing its proposals for public procurement reform,[212] intended to align with principles of the WTO GPA.[213] Nevertheless, as these reforms are still in the consultation phase, central government procurement continues to be regulated by the PCR 2015 and related statutes.

4.3. US regulatory framework

In contrast, the US regulatory framework for public procurement is characterised by a highly prescriptive system of 'complex and technical legal provisions',[214] which prefers rules over discretion.[215] Various institutional factors shape this legalistic approach to procurement. Described as a culture of 'adversarial legalism', US policy-making occurs through 'lawyer-dominated litigation' to a much greater degree than other jurisdictions.[216] In other words, US policymaking is influenced by the belief that courts are a key forum for debating the legitimacy of administrative action and thus, enforceable legal rights and duties must be established to facilitate that process.[217] A second factor contributing to this approach is that power and influence over the bureaucracy is constitutionally divided between the executive (in particular the President) and Congress,[218] in a type of 'legislative-executive competition'.[219] By virtue of this division of power, US government agencies enjoy a relatively significant degree of freedom as 'semi-autonomous' policy makers.[220] Thus, the exercise of political control through non-legal policies is insufficient to bring decision-making across all agencies in line with a

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211 See Cabinet Office, *Procurement Policy Note–New Thresholds 2020* (PPN 06/19, November 2019).

212 Cabinet Office, *Transforming Public Procurement* (December 2020).

213 ibid 7.

214 Arrowsmith (n 5) 4.

215 Cane (n 205) 273.

216 Robert A Kagan, *Adversarial Legalism: The American Way of Law* (HUP 2003) 3.

217 ibid 9, 13; Fisher (n 207) 56.

218 Cane (n 205) 311.

219 Kagan (n 216) 189; Daniel P. Gitterman, 'The American Presidency and the Power of the Purchaser' (2013) 43 Presidential Studies Quarterly 225, 227.

220 Cane (n 205) 312; Kagan (n 216) 9, 187.

common government policy framework. The use of legal rules and the limitation of discretion is necessary to achieve consistency.[221] These two factors are reflected in the FAR, which contains as a lengthy set of rules controlling almost all aspects of US executive agency acquisitions and embody legally enforceable rights and duties.

The FAR is the primary set of regulations applied by all federal executive agencies in their acquisition of supplies and services. Revisions to the FAR are prepared, issued and maintained by the Defense Acquisition Regulations (DAR) Council, and the Civil Agency Acquisition (CAA) Council. The FAR sets out uniform policies and procedures for procuring government agencies. Importantly, FAR pt 52 establishes solicitation provisions and contract clauses which are incorporated into every federal government procurement contract and therefore, are enforceable as contractual terms.[222] Accordingly, public procurement is heavily regulated at all stages of the award process.[223] Agencies are permitted to publish their own FAR supplements, but only where necessary to implement special FAR policies and procedures in order to satisfy the specific needs of the agency.[224] Otherwise, they may be struck down or amended by the Office of Federal Procurement Policy, as the body charged with promoting economic efficiency and effectiveness in procurement.[225]

In addition to the FAR and supplemental regulations, a range of policies and directives also play a role in regulating federal public procurement practice. Highlighting the relative autonomy of US departments and agencies, these policies and directives are issued by specific departments and agencies to regulate their internal affairs and inform the public as to the agencies interpretation of certain legal rules.[226] These so-called 'housekeeping regulations' do not create enforceable legal rights and duties.[227] Guidance is also frequently issued in the form of Office of Management and Budget (OMB) Circulars, Office of Federal Procurement Policy

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221 Cane (n 205) 314.

222 *Gold Line Refining, Ltd. v. U.S.*, 43 Fed. Cl. 291 (1999).

223 Davies (n 135) 58.

224 FAR 1.302.

225 Office of Federal Procurement Policy Act, 41 U.S.C. §421.

226 Ralph C. Nash and John Cibinic, 'Legal status of government manuals and instructions: Putting the fox in charge of the chickens' (1987) 1(10) Nash & Cibinic Report 77.

227 Feldman (n 179) §2:11.

Letters, DOD Acquisition Circulars and Departmental Letters, and various military and civil directives and instructions.[228]

Finally, the President has authority to issue Executive Orders, which require or authorise action by federal executive agencies and have the force of law, but do not require approval from Congress. Depending on their content, the authority to issue and enforce Executive Orders may be located in the US Constitution, statutory authority or an act of Congress.[229] They are often used by Presidents to implement specific social policy objectives through public procurement,[230] and may be incorporated into procurement regulations and contracts by the DAR and CAA Councils.[231]

4.4. Procurement principles

A range of procurement principles underpin UK and US public procurement regulation. This section focusses on those principles most likely to interact with slavery and trafficking procurement policies and should be considered in the design of such policies to ensure they do not damage the procurement system or cause contracting agencies to make unlawful or unviable decisions during the procurement process. These principles are competition, fairness to contractors and value for money. 'Clarity' and 'specificity' are also relevant, as although they represent broader principles of public administration, they nevertheless play an important role in ensuring the viability of slavery and trafficking procurement policies within the procurement system.

4.4.1. Competition

Competition is a central goal of both the UK and US public procurement systems, as it represents the main vehicle through which contracting agencies pursue 'value for money' on their procurements in terms of a range of factors, including price, quality, contractual terms

228 ibid.

229 Gitterman (n 219) 248.

230 ibid 248.

231 Feldman (n 179) §2:7

and social benefits.[232] The principle holds that contracts should be awarded after a competitive bidding process providing the contracting agency with a pool of bids from which it can accept the cheapest or best quality bid.[233] Free competition drives contractors to improve and innovate in order in to survive and succeed, thereby producing the best possible prices and terms, as well as the highest quality and most advanced products and services.[234]

Importantly, the principle of competition in both the UK and US public procurement systems goes beyond securing the allocative and dynamic efficiency of the market or seeking to replicate the conditions of private markets, as some scholars argue.[235] Rather, it embodies a broader goal in 'protecting the structure of the market and equality of competitive opportunity of traders in the interests of customers, competitors and ultimate consumers'.[236] Maximising the effective use of competition requires a commitment to encouraging participation by the widest possible pools of potential competitors.[237] In turn, this commitment demands that the regulatory framework for public procurement works to prevent distortion of the competitive environment and to encourage sustained participation by ensuring fair and equal treatment, non-discrimination and eliminating corruption and collusion.[238] Thus, as a general principle, competition underpins a wide range of the rules and regulations shaping public procurement procedures in the UK and US, including those that concern publication of tender/procurement notices and transparency, and contractor qualification and exclusion, among others.[239]

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232 Robert D. Anderson, William E. Kovacic, and Anna Caroline Müller, 'Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance' in Robert D. Anderson and Sue Arrowsmith (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP 2011) 690; Kunzlik (n 123) 347-348.

233 Davies (n 135) 125.

234 Schooner (n 177); Anderson, Kovacic, and Müller (n 232) 690.

235 See e.g. Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Bloomsbury 2011) ch 1.

236 Kunzlik (n 123) 335.

237 Schooner (n 177).

238 See Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki & HKL-Bussiliikenne* [2002] ECR 1-7213, para 81; Anderson, Kovacic, and Müller (n 232) 690-692.

239 See PCR 2015, regs 48-55, 56-58; FAR pts 5, 9

4.4.2. Fairness to contractors

The principle of fairness to contractors requires that the capabilities and bids of potential contractors should be evaluated according to fair and transparent rules and standards.[240] Procedural fairness is an important principle of public law, which has relevance to public contracting as the purpose of procurement rules and policies is to ensure good decision-making by public bodies.[241] The principle does not guarantee a 'correct' outcome as such, rather it seeks to ensure that decisions are fairly made. To these ends, the principle requires that contractors are treated equally throughout the procurement procedure, that the award criteria are applied with consistency and that contractors have access to review mechanisms, which operate in an impartial and timely manner.[242] In essence, 'fairness imposes two broad requirements: (1) that [a tenderer] be told the substance of the decision-maker's concerns about his own case, and (2) that each [tenderer] be treated like every other: there should… be a level playing-field'.[243] For instance, where a bidder is to be excluded from a procurement process in the UK or disbarred in the US, the decision must be openly justified according to clear and established rules which have been applied consistently to all other bidders, and be capable of review by an impartial adjudicator.[244] Ultimately, procedural fairness contributes to maintaining the integrity of the procurement system, as it precludes abuses of discretion and encourages participation by promising all contractors equal treatment in the process.[245]

4.4.3. Value for money/best value

The concept of 'value for money' serves as a fundamental principle shaping all public procurement decisions, particularly by central government agencies UK,[246] but also in the US where it is referred to as 'best value'.[247] The principle makes an important contribution to shaping the goals of competitive tendering, as it recognises that the lowest-cost bid may not

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240 Cabinet Office (n 212) 15.

241 Davies (n 135) 69.

242 OECD, 'OECD Principles for Integrity in Public Procurement' (OECD 2009) 44.

243 *Abbey Mine Ltd v The Coal Authority & Anor* [2008] EWCA Civ 353 [34].

244 See PCR 2015, regs 56-58; FAR, pt 9.

245 Davies (n 135) 69; Arrowsmith (n 5) 155.

246 HM Treasury (n 204) Annex 4.6.

247 Although see Local Government Act 1999, pt 1.

necessarily be the best in terms of overall quality and for meeting their needs. To this end, it requires contracting agencies to consider a range of factors in addition to price, such as a tender's probity and suitability, when awarding a contract. Achieving 'value for money' in the UK procurement context means 'securing the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought'.[248] This involves assessing and 'allocating risks' appropriately, and regard may be had beyond price for the wider economic, social and environmental benefits of a contract,[249] as well as the quality of the product or service and the capacity of the contractor to perform successfully over the lifecycle of the project.[250] As a principle, 'value for money' is premised on the notion that government must spend public money in a proper manner (including delivering value for money) for democratic purposes.[251]

Similarly in the US, 'best value' is defined as 'the expected outcome of an acquisition that, in the government's estimation, provides the greatest overall benefit in response to the requirement'.[252] The principle embodies a 'best value continuum', according to which the relative importance of cost or price may vary depending on the circumstances of the acquisition.[253] Pursuant to this continuum, there are two main approaches for selecting the source of supplies or services. The first is the 'lowest price technically acceptable', which applies when 'best value' is expected to result from simply selecting the lowest priced proposal from the pool of technically acceptable proposals.[254] However, the more commonly used interpretation of 'best value' involves a trade-off between cost factors with non-cost factors, whereby an a contracting agency may accept a proposal which does not offer the lowest price where the quality of the proposal in other respects outweighs the price difference.[255] This interpretation more closely aligns with the UK approach, in that it involves a complex value-driven equation balancing a variety of factors of different qualities.

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248 HM Treasury (n 204) Annex 4.6.

249 Cabinet Office (n 212) 34.

250 Anderson, Kovacic, and Müller (n 232) 347-348.

251 Arrowsmith (n 5) 21.

252 FAR 2.101.

253 FAR 15.101.

254 FAR, 15.101-2.

255 FAR, 15.101-1(c).

4.4.4. Practical considerations: simplicity and clarity

In addition to the above principles, there are several practical considerations shaping the development of procurement rules to ensure they are capable of implementation by procurement officers in the spirit of efficient public administration. For the purposes of Chapter 5, the most important of these considerations are the notions of clarity and administrative simplicity in the formulation of legal rules and policies.[256] Reform in the UK regulatory public procurement framework is often driven by a longstanding desire to simplify rules that are complex, confusing and challenging for contracting agencies and contractors to navigate and apply.[257] Achieving simplicity, clarity and uniformity are also explicit aims of the FAR.[258] Simplicity and clarity are very important to both procurement systems because complex and unclear rules increase compliance costs, divert resources to formal legal compliance rather than achieving substantive outcomes, and lead to increased litigation due to misinterpretation and incorrect decision-making.[259] As a consequence, complexity and uncertainty tend to undermine the efficiency of the procurement process and drive risk aversion among contracting agencies, which stifles creativity and innovation.[260] Thus, it is important that procurement rules and policies are drafted in a way that reduces uncertainty by being clear, unambiguous and easy to understand for all relevant parties.[261]

4.5. Conclusion

This chapter highlighted several key features of the UK and US public procurement frameworks which impact upon the regulation of slavery and trafficking procurement policies. The UK framework is characterised by the central role of informal guidance and the decision afforded to agencies and decision-makers, reflecting the highly centralised and influential nature of the UK executive. Nevertheless, the PCR 2015 contains a comprehensive body of rules which shape procurement practices and policies. In contrast, the US framework displays

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256 Anderson, Kovacic and Müller (n 232) 695.

257 Explanatory Memorandum to the PCR 2015, paras 7.1-7.2; Cabinet Office (n 212) 22.

258 FAR, Foreword.

259 Arrowsmith (n 257) 76.

260 Schooner (n 177).

261 Arrowsmith (n 259) 76.

a clear preference for formal rules entrenched in the detailed FAR, consistent with its culture of 'adversarial legalism'. This position is reflected in its formulation of slavery and trafficking policies, discussed in Chapter 5. This chapter also delineated three public procurement principles and one principle of public administration which should be considered in the design of slavery and trafficking procurement policies: competition, fairness to contractors, value for money, and clarity and simplicity in rules. Applying these principles will ensure that slavery and trafficking policies contribute to rather than damage the ongoing integrity and efficiency of the procurement system, and that contracting agencies can implement such policies without infringing their other obligations under public procurement law.

5. Analysis of slavery and trafficking procurement policies

5.1. Introduction

In previous chapters, I examined the positive human rights duties to protect victims from slavery and trafficking, which states should aim to discharge by adopting slavery and trafficking procurement policies and implementing HRDD on businesses, among other measures. I also examined the UK and US regulatory frameworks for public procurement, their fundamental principles, and practical considerations for ensuring that procurement rules and policies are capable of implementation by contracting agencies. Slavery and trafficking procurement policies exist at a point of convergence between these different normative systems. In this chapter, I establish an analytical framework for the evaluation of slavery and trafficking procurement policies which reconciles these different systems. The framework employs four criteria assessing the extent to which the policies satisfy and maximise adherence to the principle of competition, the principle of fairness to contractors, the principles of clarity and simplicity, and the values and goals of HRDD. I apply these criteria to evaluate three UK and US slavery and trafficking procurement policies, including exclusion mechanisms to prevent participation by unscrupulous contractors (Section 5.3), contract conditions (Section 5.4), and award criteria (Section 5.5). Through this analysis, I argue that each policy fails to satisfy one or more of the criteria and ought to be modified accordingly. Ultimately, my analysis offers key insights into how the fundamental principles of public procurement and human rights may be reconciled in a way that supports the implementation of slavery and trafficking procurement policies which are pragmatic, sensible and capable of effective implementation by procurement officers and contractors as part of their day-to-day procurement activities.

5.2. Analytical framework

Traditionally, public procurement law focussed on achieving economic efficiency, with little interest in human rights. However, human rights legal frameworks have become much stronger than they were historically, such that they now impose a range of legal obligations on the state and corporations. Thus, in formulating slavery and trafficking procurement policies, lawmakers are faced with two bodies of law which must be reconciled. The prevention of slavery and trafficking should not be treated as a secondary aim to the principles of public procurement and ‘value for money’ should be pursued in a manner compliant with human

rights law.[262] However, slavery and trafficking procurement policies should not be formulated in a way that damages the day-to-day functioning of the public procurement system or undermine its fundamental principles. Concerted action must be taken to mitigate the disadvantages raised in Section 3.3.2, including concerns as to costs arising from reduced competition, administrative burdens, and abuse of discretion. This presents a significant challenge, but one which may be managed with careful consideration for the different norms and perspectives involved.

To address this challenge, I argue that law and policymakers should apply a set of four criteria when formulating and reviewing slavery and trafficking procurement policies. The first and second criteria embody public procurement principles (competition and fairness to contractors), the third criterion supports practicality in public administration (simplicity and clarity), and the fourth criterion promotes a human rights perspective by focussing on the prevention of slavery and trafficking in public supply chains through HRDD. These criteria were chosen because they directly work to mitigate concerns related to the reduction of competition, increased discretion and added administrative burdens, while also utilising a recognised business and human rights framework with which contractors are likely to accept and comply. Slavery and trafficking procurement policies should satisfy each criterion to at least a minimum level, although a high level of satisfaction should be sought as far as possible. Maximising adherence to each criterion is important, as each represents a key principle from the different normative systems involved, all of which must be safeguarded for slavery and trafficking procurement policies to achieve their goals while also functioning effectively within the procurement system.

The public procurement principles which form the first and second criteria are the principles of competition and fairness to contractors. They are mutually reinforcing and play a fundamental role in maintaining the efficacy of both the UK and US public procurement systems during the application of slavery and trafficking procurement policies. Introduction in Section 4.4.1, competition is a central goal of public procurement which supports contracting agencies' pursuit of value for money by facilitating a diverse competitive environment. In line with this principle, it is crucial that slavery and trafficking procurement policies are not

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[262] Methven O'Brien and Martin-Ortega (n 70) 191.

formulated in ways that are overly burdensome or discriminatory, or unduly prevent participation by a wide variety of firms. Along similar lines, the principle of 'fairness to contractors', explored in Section 4.4.2, must be safeguarded as it contributes towards maintaining the integrity of the procurement systems, precludes abuses of discretion and encourages participation. Slavery and trafficking procurement policies must not undermine or be beyond the scope of rules which ensure that contractors and their bids are evaluated according to fair and transparent rules and standards.

The third criterion, which promotes practicality in public administration, is the notion of simplicity and clarity in the way that slavery and trafficking procurement policies are drafted and implemented. Presented in Section 4.4.4, clarity and simplicity play a critical role in ensuring that rules and policies are capable of correct and proper implementation by procurement officers, thereby avoiding unnecessary administrative burdens, and compliance costs and risks. In relation to slavery and trafficking policies, clarity and specificity is particularly important for ensuring that contracting agencies know the specific harms they are seeking to address and can implement measures which directly respond to that specific harm. Clarity is also important for contractors to understand the expectations set out in slavery and trafficking policies in order to plan and regulate their behaviour accordingly.

The final criterion promotes a human rights perspective and is concerned with ensuring that slavery and trafficking policies are practically capable of contributing towards the prevention of slavery and trafficking in public supply chains. In doing so, it evaluates extent to which slavery and trafficking procurement policies align with and the promote the values of HRDD (Section 2.3.2.4). Framing slavery and trafficking procurement policies around HRDD is a pragmatic decision. HRDD brings human rights from the 'theoretical' to the 'practical' for businesses and commercially driven stakeholders, and thus, provides an opportunity for governments to increase engagement by contracting agencies and contractors with slavery and trafficking challenges, but through a framework that is relatively business-friendly and increasingly familiar to companies operating in the UK and US. In addition, HRDD is an important means by which the prevention of slavery and trafficking in complex supply chains may be pursued. It requires businesses to actively participate in the development and integration of human rights policies over the entire lifecycle of their activities to identify, mitigate and prevent slavery and trafficking. Although mandating HRDD alone may not

achieve the full eradication of slavery and trafficking in government supply chains, it should still be a first step in the formulation of policies tackling the problem.

Ultimately, these four criteria, and the requirement that they must maximised as far as possible, constitutes this thesis' analytical framework for critically evaluating the following slavery and trafficking procurement policies. By applying this framework, I aim to ensure that the policies reconcile the different normative systems underpinning them in a way that is pragmatic and demands productive action from contracting agencies and contractors to address slavery and trafficking through the procurement process.

5.3. Contractor exclusions

5.3.1. Exclusion under the PCR 2015

In the UK, contractors and subcontractors may be excluded from participating in procurement procedures on a mandatory or discretionary basis.[263] PCR 2015 reg 57(1)(ma) requires the mandatory exclusion of firms for up to five years where the authority establishes through appropriate means of verification,[264] or is otherwise aware, that the firm has been convicted of an offence listed in the provision, including an offence under MSA 2015 ss 1, 2 or 4.[265] It applies where the convicted person is a member of the firm's administrative, management or supervisory body, or exercises powers of decision-making, representation or control in the firm.[266] Authorities may only derogate from this mandatory exclusion 'on an exceptional basis, for overriding reasons relating to the public interest'.[267] The PCR 2015 also enable contracting agencies to exclude firms from a particular procurement procedure for up to three years on a discretionary basis, where it can demonstrate by any appropriate means a violation of social, environmental and labour laws, which are established in national law, collective agreements or in the ILO's eight 'fundamental' Conventions.[268] The ILO Forced Labour Convention and ILO

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263 PCR 2015, reg 71(8)–(9).

264 ibid regs 59, 60, 61.

265 ibid reg 57(1)(ma) and (11).

266 ibid reg 57(2).

267 ibid reg 57(6).

268 ibid reg 57(8)(a), (12), reg 56(2).

Abolition of Forced Labour Convention are included in this group.[269] It has also been argued that the provision permits the exclusion of contractors if they fail to comply with MSA 2015 s 54.[270] However, in practice, this approach would undermine competition by significantly narrowing the pool of eligible contractors, as many businesses submit non-compliant statements or not at all, including among the government's top 100 suppliers.[271]

Firms excluded under a mandatory or discretionary exclusion may prevent their exclusion if they can demonstrate they have 'self-cleaned' by: (a) compensating the damage caused; (b) collaborating with investigating authorities; and (c) taking concrete and appropriate measures to prevent further misconduct.[272] These measures must be evaluated having regard to the gravity of the criminal offence or misconduct and where such measures are deemed insufficient, the contracting agency must provide a statement of reasons for rejecting the defence.[273]

From a human rights perspective, these mandatory and discretionary exclusions promote consistency between the procurement framework and the UK Government's policies against slavery and trafficking in supply chains and the spending of public money on firms violating the MSA 2015.[274] The exclusions may go some way towards protecting the contracting agency's supply chain from contractors who have not satisfied the self-cleaning requirements and thus, are likely to both continue their abusive business practices and cause the contracting agency to effectively 'inherit' the contractor's ongoing human rights risks, which will be costly to manage and pose risks of further prosecution.[275] However, in practice, prosecution rates for slavery and trafficking, while increasing, are low and tend to involve individuals involved in

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269 European Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ L094/65, Annex X.

270 Paul Henty, 'Procurement Policy Note-Tackling Modern Slavery in Government Supply Chains' (2020) 2 PPLR 73, 74.

271 Sancroft Tussell (n 143).

272 PCR 2015, reg 57(13)–(17).

273 ibid reg 57(16)–(17).

274 See HM Government, UK Government Modern Slavery Statement (26 March 2020) <https://www.gov.uk/government/publications/uk-government-modern-slavery-statement> accessed 4 July 2021.

275 UNGP 17 and Commentary.

sex and drug trafficking rather than businesses producing the kinds of goods and services procured by government.[276] These businesses often operate at a distance, contractually and physically, from the portions of their supply chain which are most at risk from slavery and trafficking.[277] Further, slavery and trafficking offences committed abroad cannot be prosecuted under the MSA 2015, except where the offence involves trafficking to or from the UK, or the trafficking is committed by a UK national.[278] Thus, it would be very rare for a government contractor to be convicted of a slavery or trafficking offence, rendering reg 57(1)(ma) largely disused in practice.

In contrast, the discretionary exclusions in PCR 2015 reg 57(8) require a greater degree of discretion and decision-making on the part of the contracting agency, based on available evidence indicating a violation but not necessarily a conviction. However, allowing procurement officers to exclude potential contractors without a conviction creates scope for poor or abusive decision-making due to, for example, a lack of expertise as to how to apply the legal frameworks relevant to determining a contractors' culpability by assessing the evidence according to a fair standard. Although procurement agencies are required to undertake some training on identifying and tackling modern slavery,[279] this is generally limited to one-off seminar type training.[280] In practice, lack of expertise is likely to be compounded by the lack clarity and guidance as to how contracting agencies should apply the relevant ILO Conventions, what severity of violation is sufficient to justify the exclusion of contractor, what contextual factors are relevant and to what standard the allegations of forced labour must be proved. The lack of guidance is especially problematic in the context of forced labour, which does not arise through a specific, isolatable action, but is identified through the accumulation of a range of indicators.[281] As argued in Chapter 2, the complexity of these factors can make

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276 Independent Anti-Slavery Commissioner, *Annual Report 2019-2020* (September 2020) 21-23.

277 Even in cases involving a parent company and subsidiary, complainants must overcome major hurdles in establishing parent company accountability, see: *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3; *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

278 MSA 2015, s 2.

279 Cabinet Office, *Procurement Policy Note–Tackling Modern Slavery in Government Supply Chains* (PPN 05/19, 18 September 2019), 2.

280 See Government Commercial Function and Civil Service, *Tackling Modern Slavery in Government Supply Chains* (September 2019), Part 5.

281 See ILO (n 54).

properly identifying forced labour, as opposed to merely poor working conditions, difficult in practice. The disputability as to the factual indicators of forced labour, and therefore the increased risk that the decision may be challenged, may cause procurement officers to be hesitant to exclude contractors on this basis or struggle to adequately justify their reasons in accordance with the standards of procedural fairness. The significant discretion afforded by these discretionary exclusions may also increase the risk of abusive decision-making, which discriminates or favours certain suppliers. From a public procurement perspective, incorrect and abusive decision-making risks distorting competition and discouraging contractors from participating. These challenges also ultimately undermine the goal of the exclusions to prevent participation by perpetrators of slavery and trafficking.

5.3.2. Suspension and debarment under the FAR

The FAR provides for a highly structured suspension and debarment framework,[282] through which an agency's Suspension and Debarment Officer may exclude participation by certain contractors 'in the public interest for the Government's protection and not for the purposes of punishment'.[283] Relevant risks include risks to the Government's commercial and reputational interests.[284] Debarment involves excluding a contractor from all government contracting for up to three years,[285] while suspension involves disqualifying a contractor temporarily, such as pending the completion of an investigation.[286] There are both mandatory and discretionary grounds for disbarment, although there are few of the former.[287] The latter are similar to the PCR 2015's mandatory exclusion grounds.[288] Causes for discretionary suspension and discretionary debarment are also very similar,[289] and can only be applied upon 'adequate

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282 Sati Harutyunyan, 'Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States' (2016) 45 PCLJ 449, 457.

283 FAR 9.402.

284 Christopher Yukins and Michal Kania, Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement (2019) GWU Law School Public Law Research Paper No. 2019-39, 52.

285 FAR 9.406.

286 FAR 9.407.

287 E.g. Walsh-Healey Public Contracts Act, 41 USC §5502-6504.

288 ibid 48; Harutyunyan (n 282) 461.

289 FAR 9.406-2(c) (debarment); 9.407-2 (suspension).

evidence' to show a violation or failure occurred.[290] FAR 52.222-50 'Combatting Trafficking in Persons' stipulates that violations of the clause may result in suspension or debarment,[291] particularly where none of the other remedies provided are appropriate or successful.[292] As argued further in Section 5.4.2, FAR 52.222-50 is commendable for its clear and specific drafting on prohibited behaviours. However, contracting officers will need to consider whether such action aligns with the overarching objective of the suspension and debarment system to protect the government's commercial and reputational interests.[293]

From a public procurement perspective, the 'Government's interests' approach protects the competitive environment by limiting the reasons for which a contractor may be suspended or debarred, thereby protecting the pool of firms permitted to compete. However, from a human rights perspective, this risk-based approach is problematic for two reasons. The first is that the ability to suspend or debar contractors violating trafficking laws is limited to situations where those violations impact upon the contractor's ability to perform the contract and put a commercial or reputational interest of the Government at stake.[294] The severity of the violation and the interests of victims would only be relevant insofar as they impacted upon those governmental interests. Although there may be some overlap between the goals of protecting the government's reputation and mitigating slavery and trafficking risks in accordance with a HRDD framework, these different risks are ultimately not managed in the same way, as the former focusses on external stakeholder and public perceptions, while the latter focusses on internal prevention and remediation for affected individuals.[295] To this end, a reputational and commercial risk management assessment may tolerate certain activities which nonetheless amount to slavery or trafficking.[296]

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290 See FAR 9.407 (suspension) and 9.406 (debarment).

291 FAR 52.222-50(e)(7). See also, FAR 52.222-19.

292 See FAR 52.222-50(e).

293 Yukins and Kania (n 284) 52.

294 ibid.

295 Björn Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2017) 2 BHRJ 225, 236, 242.

296 ibid.

Second, and conversely, excluding a contractor may not always provide the greatest benefit from the perspective of preventing slavery and trafficking. In a HRDD context, where a first entity (a contracting agency) has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations by a business relationship with a second entity (a contractor), that business relationship should only be ended where the first entity lacks the leverage to prevent or mitigate the adverse impacts and is unable to increase its leverage.[297] In many cases, the contracting agency will maintain some leverage over the contractor to engage in HRDD monitoring, or enforce remedial and accountability processes. These measures may enforce greater changes in the contractor's behaviour than if the contractor was excluded.[298] However, such considerations would be irrelevant to a Suspension and Debarment Officer's determination on excluding a contractor for breach of contract, as they would only consider the government's commercial and reputational interests. Thus, under the current approach, the utility of suspension and debarment as a mechanism for addressing slavery and trafficking is limited.

5.3.3. Comparative discussion

The above analysis highlights that the regulations of both jurisdictions provide scope for the exclusion of contractors for slavery and trafficking violations. The UK discretionary exclusions and the US suspension and debarment mechanisms pose the greatest challenges under the criteria. Analysed further in section 5.4.2, FAR 52.222-50 embodies a relatively high degree of clarity in relation to its definitions and explanations of the key terms and prohibitions. As a result, the provision is relatively clear as to the violations which may lead to suspension or debarment. In contrast, the UK discretionary exclusions are framed in an open-ended manner, are vague as to the circumstances in which a contractor may be excluded and provide significant discretion to contracting officers to determine a potential violation. Despite not being trained adjudicators of the law, the UK discretionary exclusions invite contracting officers to make judgments about past contractor behaviour against a range of legal standards which are complex to apply in practice, such as forced labour, without adequate and comprehensive guidance. Enabling contracting officers to make consequential decisions on

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297 UNGP 19 and Commentary.

298 Martin-Ortega and O'Brien (n 7) 12.

matters in which they lack expertise presents a risk of poor decision-making, among other concerns.

The significant discretion and lack of clarity involved in the UK discretionary exclusions also undermines the other criteria in the analytical framework. Too much discretion provides scope for abusive decision-making which may be used to narrow competition in favour of a particular supplier, thereby undermining competition. Concurrently, the lack of guidance in applying the discretionary exclusions increases the risk that decisions will be made arbitrarily and without adequate legal reasoning, thereby undermining the fairness of the procedure. Conversely, contracting officers may seek to avoid these risks by not utilising the discretionary exclusions at all. Also problematic, the US suspension and debarment system is heavily underscored by a strong reluctance to intervene in the competitive environment, which ultimately prevents the mechanisms from contributing to the prevention of slavery and trafficking in supply chains to any significant extent. It potentially tolerates abusive behaviours or may lead to a contractor being suspended or debarred where the government still has an opportunity to use its leverage through HRDD monitoring. Thus, neither system adequately responds to all four criteria in the analytical framework.

Despite these criticisms, exclusionary mechanisms serve a useful purpose in enabling a contracting agency to exclude contractors which are clearly abusive but have escaped conviction. However, they should respond adequately to each of the four criteria. In the UK context, clarity and simplicity are crucial. The exclusions should be re-drafted or supplemented with substantial guidance on the violations for which contractors may be excluded, how and to what standard alleged violations must be proved, and any other details necessary to ensure fair and transparent decision-making. With respect to the US, the risk-based approach of the suspension and debarment system is deeply ingrained and unlikely to be reformed in the foreseeable future. However, within this system, contracting officers may reflect on the value of maintaining consistency in the application of government policies, particularly the US Government's zero-tolerance policy for human trafficking by government contractors. The US Government frequently proclaims this policy on both international and domestic stages as a central way in which it is meeting its duty to protect individuals against slavery and trafficking. Violations of the anti-trafficking rule that are not met with an appropriate response from the relevant contracting agency pose a threat to the public interest generally and undermine the integrity of the US Government's zero-tolerance policy. Framing violations of the anti-

trafficking rule in these grave terms may provide a hook for procurement officers to justify suspending or debarring contractors who violate the anti-trafficking rule, even where commercial or reputational damage is harder to demonstrate.

5.4. Contract clauses

5.4.1. Optional contract clauses for UK contracting agencies

The PCR 2015 distinguishes between technical specifications setting out the characteristics of the product, works or services required, and special conditions relating to the performance of the contract.[299] Most requirements of a 'social' nature will be special conditions, except those directly defining the characteristics of the product, works or services.[300] A contracting authority may incorporate any special conditions including social and employment-related considerations,[301] as long as they are linked to the subject matter of the contract and indicated in the call for competition or in the procurement documents.[302] This is to ensure that contractors are not required to meet overly broad policy considerations, to prevent abuse and to minimise the extent to which competition is limited.[303] The notion of 'linked to the subject matter of the contract' should be interpreted broadly.[304] It permits the incorporation of policies concerning how the product is produced, even where those production factors do not affect the quality or characteristics of the product, works or services.[305] However, special conditions may only relate to work undertaken for the specific contract in issue, not to the entire workforce of the contractor as a whole.[306] If a tenderer refuses to accept a special condition, the tender will not comply with the requirements and condition set out in the procurement documents, and the contracting agency must refuse to contract with that tenderer.[307] During contract performance,

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299 See PCR 2015, regs 42, 70.

300 Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol 2 (3rd edn, Sweet & Maxwell 2014) 757.

301 PCR 2015, reg 70(2).

302 ibid reg 70(1).

303 Arrowsmith (n 300) 762-763.

304 ibid 758.

305 ibid 756.

306 ibid 755.

307 PCR 2015, reg 56(1)(a); ibid 760;.

if a contractor fails to comply with the special condition, the contracting agency will be entitled to exercise its contractual remedies, including damages.[308]

Cabinet Office PPN 05/19 requires contracting agencies to use the 'Tackling Modern Slavery in Government Supply Chains' Guide to identify and manage risks in government contracts.[309] In line with the competition principle, any measures adopted must be relevant to the subject matter and proportionate, so as 'not to impose any unnecessary burdens that would deter a wide diversity of suppliers'.[310] The Guide recommends that contracting agencies use Joint Schedule 5 of the Public Sector Contract, which contains a clause relating to 'Modern Slavery, Child Labour and Inhumane Treatment'.[311] This clause is a special condition, as it seeks to improve the conditions under which the workforce will perform the relevant contract. The Public Sector Contract is the standard template for framework contracts developed by the CCS. Only a relatively small portion of government spending is channelled through CCS agreements, although contracting agencies more broadly are encouraged to use Joint Schedule 5 and thus, as a model for all contracting agencies, it is worthy of analysis.[312] The sub-clauses are stated below, but not necessarily in order.

Clause 3.1 of Joint Schedule 5 (Clause 3.1) provides as follows:

> 3.1 The Supplier:
>
> 3.1.1 shall not use, nor allow its Subcontractors to use forced, bonded or involuntary prison labour;
>
> …
>
> 3.1.8 shall prepare and deliver to CCS, an annual slavery and human trafficking report setting out the steps it has taken to ensure that slavery and human trafficking is not taking place in any of its supply chains…;
>
> 3.1.9 shall not use, nor allow its employees or Subcontractors to use physical abuse or discipline, the threat of physical abuse, sexual or other harassment and verbal abuse or other forms of intimidation of its employees or Subcontractors;
>
> 3.1.10 shall not use or allow child or slave labour to be used by its Subcontractors;

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308 Arrowsmith (n 300) 760.

309 Cabinet Office (n 279) 2.

310 ibid 7.

311 ibid 35.

312 Crown Commercial Service, *Annual Report and Accounts 2019/20* (15 July 2020), 30.

Clauses 3.1.1 and 3.1.8-10 require contractors to comply with existing law contained in criminal and employment law, including MSA 2015 s 54 (clause 3.1.8, in essence). However, the drafting is poor and fails to provide clarity as to what offences are covered by the provision or how they are defined. For example, sub-clause 3.1.1 appears to prohibit prison labour that is forced, bonded or involuntary, rather than forced or bonded labour, in addition to involuntary prison labour. In addition to this ambiguity, the scope of the clause seems peculiarly limited, as it omits other important terms such as slavery, servitude and human trafficking, despite 'modern slavery' and 'inhumane treatment' being referenced in the clause title. 'Child and slave labour' is prohibited in sub-clause 3.1.10, but it is confusing that these terms are scattered throughout the various sub-clauses and left undefined. The omission of the other terms demonstrates a lack of insight into the different offences that fall within this topic and the distinctions between them. As argued in Chapter 2, failing to incorporate and explain key terms such as forced labour and human trafficking in a 'modern slavery' contract is likely to cause confusion and misapplication, and leave significant gaps in the scope and enforceability of the clause.

> 3.1 The Supplier:
>
> …
>
> 3.1.2 shall not require any Supplier Staff or Subcontractor Staff to lodge deposits or identify [sic] papers with the Employer and shall be free to leave their employer after reasonable notice;

Clause 3.1.2 is also ambiguous, although presumably, it seeks to address some of the factors that contribute to situations of forced or bonded labour. The requirement that employees must be free to leave their employer is a good example of one such factor. However, it is unclear what a 'deposit' is, as no further guidance is provided as to what this means or the context in which 'deposits' may be lodged.[313] International and other national materials on forced and bonded labour focus on preventing the charging of 'recruitment fees' or 'recruitment costs', as this is consistently identified as one of the key indicators of abuse.[314] Additionally, any reference to fees and costs related to recruitment, particularly in a legal context, should be accompanied by a detailed definition. Countries take different approaches to the charging of various costs that may be considered 'recruitment fees' and in some labour markets, the

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313 See e.g. ILO (n 54).

314 ILO, 'ILO general principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs' (ILO Publications 2019).

charging of a variety of recruitment fees is common.[315] Clarity and specificity is therefore necessary as to what counts as a 'recruitment fee', or in this case, a 'deposit'. Otherwise, the prohibition will be redundant, or may be applied arbitrarily in different contexts.

> 3.1 The Supplier:
>
> …
>
> 3.1.3 warrants and represents that it has not been convicted of any slavery or human trafficking offences anywhere around the world.
>
> 3.1.4 warrants that to the best of its knowledge it is not currently under investigation, inquiry or enforcement proceedings in relation to any allegation of slavery or human trafficking offenses anywhere around the world.
>
> 3.1.5 shall make reasonable enquires to ensure that its officers, employees and Subcontractors have not been convicted of slavery or human trafficking offenses anywhere around the world.
>
> …
>
> 3.1.11 shall report the discovery or suspicion of any slavery or trafficking by it or its Subcontractors to CCS, the Buyer and Modern Slavery Helpline.

The warranties in clauses 3.1.3-5 are limited in their utility. Clauses 3.1.3 and 3.1.5 address one of the limitations of PCR 2015 reg 57(1)(ma), as they capture international convictions. However, some flexibility should be built into the clauses to allow for self-cleaning or a time limit on the applicability of the warranty to past convictions. The purpose of initiatives such as MSA 2015 s 54 is to enforce to changes in corporate practices and thus it is important that companies which do take positive steps are not held in breach of warranty *indefinitely* due to a past conviction. To maintain a blanket prohibition may be too burdensome on competition and may also have a disproportionate effect on companies from certain countries.

Clause 3.1.4 may catch some of the instances which fall through the cracks of the PCR 2015's discretionary exclusions, as it is triggered by the occurrence of a specific event, such as an investigation or inquiry, rather requiring contracting agents to assess whether a violation may have occurred. However, contractors should be encouraged to report potential instances of forced labour or trafficking in their supply chains, so that changes can be made—generally after an investigation or inquiry. Thus, the warranty in 3.1.4 reinforces that being under

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315 See e.g. Ellina Samantroy, 'Regulating International Labour Migration: Issues in the Context of Recruitment Agencies in India' (2014) 22 Contemporary South Asia 406, 407, 411-412.

investigation is to be avoided, contradicting the intention of other clauses to increase transparency and honest reporting by contractors in line with the goals of HRDD, such as the obligation to report the discovery or suspicion of any slavery or trafficking to the CCS (where appropriate), the buyer and the Modern Slavery Helpline in clause 3.1.11. Instead of punishing contractors involved in any investigation, the emphasis should be on active engagement between the contractor and contracting agency in investigating and managing modern slavery risks as part of an established HRDD program, as well as protecting whistle-blowers and remediation through cooperation.

> 3.1 The Supplier:
>
> …
>
> 3.1.6 shall have and maintain throughout the term of each Contract its own policies and procedures to ensure its compliance with the Modern Slavery Act and include in its contracts with its Subcontractors anti-slavery and human trafficking provisions;
>
> 3.1.7 shall implement due diligence procedures to ensure that there is no slavery or human trafficking in any part of its supply chain performing obligations under a Contract;

Clauses 3.1.6 and 3.1.7 seek to implement some elements of HRDD. An important aim of HRDD is to entrench the multi-faceted goal of identifying, preventing and mitigating adverse human rights impacts 'across all relevant internal business functions and processes, including in internal decision-making, budget allocations and oversight processes'. [316] Integration can occur through various means, but one important way is through the development of internal policies and procedures for the implementation of HRDD. Clause 3.1.6 embodies this task by requiring the ongoing maintenance of policies and procedures to ensure compliance with the MSA 2015 in contracts and subcontracts. However, it should be emphasised that these policies and procedures are part of a broader HRDD effort seeking to integrate effective management of actual or potential slavery and trafficking risks across the whole of the business's activities related to the government project. Making this connection is important for promoting a broader understanding within the business of what it means to 'comply' with the MSA 2015, including its spirit and purpose. Indeed, broad 'compliance' goes beyond developing policies and procedures to protect the company from the risk of prosecution

316 UNGP 19. See also, Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) Business Ethics Quarterly 145, 156.

under the MSA 2015. Thus, clause 3.1.6 should be subsumed into the due diligence requirement in clause 3.1.7, which in turn requires much further expansion.

Clause 3.1.7 presents a very weak HRDD provision, with two major issues. First, the clause is framed such that the goal of undertaking due diligence is to ensure that no slavery or trafficking exists in the supply chain. This is problematic, given that due diligence in the business and human rights context is a standard of conduct, not a standard of result. HRDD places emphasis on the *process* of identifying and mitigating human rights impacts, not on the outcome of having a slavery-free supply chain. The danger of focussing on the outcome rather than the process is that it sets too high a burden for contractors to meet, particularly in the short- to medium-term. As the UNGPs note, 'even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent'.[317] Focussing on the outcome of a slavery-free supply chain may disincentivise contractors to conduct thorough investigations of their supply chains, for fear of uncovering modern slavery or trafficking and therefore falling short of the obligation in 3.1.7. Rather, the focus should be on how the contractor mitigates and remedies an adverse impact once identified, in open cooperation with other supply chain stakeholders and the contracting agency. Fostering an environment of action and support is more likely to generate openness and effective HRDD practices.

The second major issue is that the clause fails to provide clarity on what contractors are required to do as part of the due diligence procedures. 'Due diligence' itself is an inherently ambiguous phrase.[318] The provision's simplicity does not make it easier to interpret; rather, the lack of detail likely makes the requirements more challenging for contracting officers to apply, as they must decipher what 'due diligence procedures' entail in the slavery and trafficking context to determine whether the contractor is compliant. This ambiguity also creates an additional burden on contractors to interpret what the expectations and what practical steps needs to be taken to meet those expectations. A balance must be struck, such that the terms are not overly complex. However, either way, if contractors perceive the due diligence compliance

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317 UNGP 22 and Commentary.

318 Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 EJIL 899.

burden to be too great due to confusion or over-complexity, they may be reluctant to participate in government contracts.

5.4.2. Prescribed contract clauses under the FAR

The FAR prescribes several clauses relevant to the protection of workers in government contracts;[319] however, the focus of this analysis is FAR 22.222-50 relating to 'combating trafficking in persons'. The clause contains many elements, addressed as follows: (1) the main policy; (2) the notification requirements; and (3) the 'compliance plan' requirement.

First, FAR 52.222-50 establishes a mandatory policy which must be inserted as a flow-down provision in all government contracts and subcontracts.[320] The policy provision prohibits all contractors and their employees, subcontractors and their employees, and their agents from, *inter alia*:[321]

1 engaging in severe forms of trafficking;
2 using forced labour in the performance of the contract;
3 confiscating or denying access by an employee to their identity or immigration documents;
4 using misleading or fraudulent recruitment practices;
5 using recruiters that do not comply with local labour laws of the country in which the recruiting takes place;
6 charging employees recruitment fees;
7 failing to provide and pay for return transportation upon the end of employment;
8 providing or arranging housing that fails to meet the host country housing and safety standards; or
9 if required by law, failing to provide an employment contract, recruitment agreement, or other required work document in writing. Further:

> 'The employee's work document shall include, but is not limited to, details about work description, wages, prohibition on charging recruitment fees, work location(s), living accommodations and associated costs, time off, roundtrip transportation arrangements,

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319 See FAR 52.222-1–52.222-62.

320 FAR 52.222-50(i).

321 ibid 52.222-50(b).

grievance process, and the content of applicable laws and regulations that prohibit trafficking in persons.'

This policy addresses many of the ILO's indicators of forced labour.[322] In particular, the policy covers the retention of identification documents and the related indicator of restriction of movement, deception, debt bondage and withholding of wages in compensation for recruitment costs, and abusive living conditions. Nevertheless, other relevant forced labour indicators should be addressed in this provision, such as references to withholding of wages generally and abusive working conditions. Some of these indicators are dealt with under the Walsh-Healey Act, although the scope of this legislation is limited to domestic contracts.[323]

Nevertheless, in addition to prohibiting forced labour and trafficking, the policy prohibits specific practices which can lead to and keep a person in those situations. The ILO recognises that the offences of forced labour and trafficking are difficult to identify in practice, in part because they require a decision-maker to evaluate a range of facts and indicators as a whole and decide if they point to a situation of forced labour or trafficking. This requires a close familiarity with the complexities of forced labour and trafficking in practice, and the social and economic contexts in which they arise. However, under FAR 52.222-50, where a contracting officer is presented with an allegation of forced labour, they need not make the difficult judgement as to whether the offences of forced labour or trafficking are made out. Instead, they can refer to the more specific prohibitions, such as those relating to recruitment fees and adequate housing, to determine whether a violation of the clause has occurred. Determining a violation of the specific prohibitions would be easier for a procuring officer to prove on the evidence and therefore, a more defensible decision if it were subject to challenge.

Further, the clause is also detailed and prescriptive as to how the key terms should be defined. For example, it provides detail as to what constitutes fraudulent or misleading practices, as well as the specific requirements for an acceptable contract.[324] It also provides a detailed definition of 'recruitment fees', establishing that any charges or costs related to recruitment (including identifying and interview candidates, visa and other government-

322 ILO (n 54).

323 FAR 22.604-2.

324 ibid 52.222-50(b).

mandated fees, equipment charges etc.), which are paid the employee in any form (such as money or property, wage deductions, through free labour, etc.) are illegal.[325] Thus, overall, this contract clause is clear and detailed such that both the contracting officer and contractor are likely to understand the specificities of the obligation. It will therefore have a greater chance of being applied and enforced meaningfully.

Second, the clause contains two 'notification requirements'. Primarily, contractors and subcontractors must notify their employees of the prohibited activities, as well as the actions that may be taken against them for violating them, such as reduction in benefits or termination of employment.[326] Appropriate action must then be taken when violations occur.[327] In addition, contractors must notify the Contracting Officer and the agency's Inspector General upon becoming aware of any 'credible information' from 'any source' alleging that a contractor employee, subcontractor, subcontractor employee, or their agent has engaged in any of the prohibited activities.[328] Contractors must also provide information on any actions taken against the offending employee, subcontractor, or agent pursuant to the contractual clause.[329]

On one hand, this provision reinforces the importance of disseminating information down the supply chain, so that all parties involved are aware of the prohibitions and thus are better able to identify problematic situations. Individuals further down the supply chain are more likely to see, or be at risk of, forced labour or trafficking. The clause also contains a duty to cooperate with investigators and auditors, and importantly, a duty to protect all suspected victims and witnesses.[330] However, the clause places emphasis on addressing potential violations by taking action against a single offending employee or single subcontractor. Assuming the problem may be eradicated through the punishment of a single individual or subcontractor risks ascribing to the narrative commonly advanced by the US and UK Governments that slavery and trafficking is perpetrated by individual criminal operators who

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325 FAR 52.222-50(b).

326 ibid 22.1703(b); 52.222-50(c).

327 ibid 52.222-50(c).

328 ibid 52.222-50(d).

329 ibid 52.222-50(d)(1)(ii).

330 ibid 52.222-50(g).

find their way into supply chains which are otherwise not blameworthy.[331] This narrative overlooks the corporate structural factors and drivers that enable such behaviour to occur in the first place.[332] In failing to address potential broader influences, this clause allows for too narrow a scope of action from contractors to show they have dealt with the problem, which in turn, may lead to regression after remedial action.

Third, for contracts and subcontracts performed abroad and valued at over $500,000, contractors and subcontractors must implement an 'anti-trafficking compliance plan' and publish it on their website and in relevant workplaces.[333] The compliance plan should be prepared in a manner that is appropriate in relation to the size and complexity of the contract, as well as the number of non-US citizens expected to be employed and the risk that the contract will involve services or supplies susceptible to trafficking.[334] A degree of variation is therefore expected in different compliance plans. However, the clause incorporates a set of minimum requirements, including:

1 An awareness program to inform contractor employees about the Government's policy prohibiting trafficking-related activities, the activities prohibited and the punishments for violations;
2 A process for employees to report, without fear of retaliation, potential violations;
3 A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to employees and ensures that wages meet applicable host-country legal requirements or explains any variance;
4 A housing plan that ensures that the housing meets host-country housing and safety standards;
5 Procedures to prevent agents and subcontractors at any tier from engaging in the prohibited activities and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.

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331 See e.g., Rt Hon Theresa May MP, 'PM speech at ILO centenary conference: 11 June 2019' (*GOV.UK*, 11 June 2019) <https://www.gov.uk/government/speeches/pm-speech-at-ilo-centenary-conference-11-june-2019> accessed 11 July 2021.

332 Steve New, 'Modern slavery and supply chain transparency' in T.Y. Choi and others (eds), *The Oxford Handbook of Supply Chain Management* (OUP 2020) 5-6; Genevieve LeBaron, 'The Role of Supply Chains in the Global Business of Forced Labour' (2021) 57 Journal of Supply Chain Management 29, 31.

333 FAR 22.1703(c); 52.222-50(h); 52.222-56.

334 ibid 52.222-50(h)(2).

The elements of this plan generally correspond to the various activities prohibited in the policy clause above and importantly, they require contractors and subcontractors to consider how they will tackle several of the indicators of forced labour and trafficking in practical terms.

In addition, contractors and subcontractors must certify, prior to award and then annually, that: (a) they have established an appropriate compliance plan; (b) after conducting 'due diligence', neither they nor any of their subcontractors have engaged in the prohibited trafficking activities; or (c) if violations have been identified, the contractor or subcontractor has taken the appropriate remedial and referral actions.[335] Part (c) of this requirement encourages contractors to address and remediate findings of slavery and trafficking in the supply chain, and is therefore an improvement on sub-clause 3.1.7 of Clause 3.1. Yet, the provision is similarly superficial. A simple reference to 'due diligence', without more, does not provide a strong basis for contracting agencies to then assert and enforce their expectations as to what contractors must do to comply with the due diligence requirement. Without this basis, contractors are likely to engage in superficial compliance, which will be met with little to no enforcement by contracting agencies.[336] Further, the provision has been criticised on the basis that contractors are still disincentivised to comprehensively investigate their supply chains, since they are only required to act on impacts of which they are 'aware'.[337] Without additional oversight from the contracting agencies, contractors may be able to 'turn a blind eye' to potential impacts.[338] This is indeed a risk in any situation of self-monitoring, hence why the UNGPs emphasise that effective integration of HRDD should be undertaken throughout the entire project and its lifestyle, to embed its goals as a corporate commitment rather than just an external obligation. Nevertheless, there is force in the argument that an additional oversight mechanism lead by the contracting agency may encourage better HRDD processes, particularly among unwilling businesses.

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335 ibid 22.1703(c); 52.222-50(h)(5), (i); 52.222-56.

336 Landau (n 107) 234-238.

337 Caitlin Grimmer, 'Procuring Protection: Using the False Claims Act to Combat Human Trafficking by Government Contractors' (2013) 43 PCLJ 127, 133.

338 Sariana García-Ocasio, 'How Tolerant Is Zero Tolerance? The Loopholes in Anti-Trafficking Federal Contract Regulations' (2014) 44 PCLJ 551, 562-563.

Moreover, the due diligence and compliance plan requirements only apply in very limited situations. The requirements only apply to contracts and subcontracts *abroad*, and valued at more than $500,000, such that contractors may circumvent the requirements by issuing a number of smaller contracts. Further, the requirements do not apply to contracts and subcontracts for commercially available off-the-shelf items.[339] From a public procurement perspective, these limitations serve a purpose in ensuring that bidders for domestic contractors are not faced with additional compliance burdens and to this end, they prevent any disruption to competition. Maintaining competition is important; however, in doing so, these limitations exclude a wide range of contracts which relate to products and services in sectors known to have high risks of forced labour and trafficking.[340] Thus, these blanket limitations are problematic in that they catch, without distinction, many domestic contracts in relation to which due diligence and compliance plans may be most needed. Nevertheless, to promote voluntary compliance planning, the OMB issued guidance encouraging contractors under all government contracts to prepare a compliance plan, particularly where there is a heightened risk of forced labour or trafficking.[341] As an incentive, the remedies clause in FAR 52.222-50 states that where a violation of the clause as a whole occurs, the fact the contractor developed and was in compliance with a compliance plan may be a mitigating factor. However, the optional nature of both requirements, in contrast to the highly prescriptive nature of the FAR in general, suggests that only contracting agencies with a very strong interest in tackling forced labour and trafficking would consider investing time and resources to developing a compliance plan and undertaking HRDD.

5.4.3. Comparative discussion

The slavery and trafficking contractual provisions in UK policy and the FAR are formulated very differently. Contracting agencies in the UK are permitted to incorporate special conditions related to slavery and trafficking in their contracts, such as those in Clause 3.1, but are not

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339 FAR 2.101, 22.1703(c)(1)(i); 52.222-50(h)(1).

340 See Verité, 'Strengthening Protections Against Trafficking in Persons in Federal and Corporate Supply Chains' (*Verité*, 2017) <https://www.verite.org/wp-content/uploads/2017/04/EO-and-Commodity-Reports-Combined-FINAL-2017.pdf> accessed 11 July 2021.

341 See Executive Office of the President, 'Memorandum for the Heads of Executive Departments and Agencies' (21 October 2019) <https://ctip.defense.gov/Portals/12/FINAL_Federal%20Acquisition%20Guidance%20on%20Anti%20Trafficking%20Requirements.pdf> accessed 11 July 2021.

required to do so. This discretionary approach reflects the UK's broader administrative framework, in which discretion is tolerated to a certain degree and procurement guidance carries special weight due to the relationship of control and hierarchical management between the Executive and Treasury over the procurement practices of government agencies. Thus, although it may seem desirable to suggest that slavery and trafficking clauses should be a mandatory part of every government contract (or at least in high-risk contracts), this would not align with the broader UK institutional framework. In contrast, the US Government has mandated FAR 52.222-50, reflecting its own unique administrative setting and culture of 'adversarial legalism, in which the implementation of enforceable rules is the preferred method of implementing policies in procurement. In relation to setting out the activities and offences prohibited by the clause, FAR 52.222-50 is much clearer and more detailed than Clause 3.1. By setting out a range of prohibited activities which broadly align with the ILO's Forced Labour Indicators, FAR 52.222-50 establishes a range of definitions which are capable of implementation by procurement officers who are not trained extensively in social and legal complexities of slavery and trafficking law. Contractors will also benefit from this level of clarity, as they will be more aware of what activities they must avoid and can plan their behaviour accordingly. As argued by the ILO, 'the more comprehensive the contract, the more stable and guaranteed the overall context in which the suppliers operate'.[342]

However, a shortcoming of both approaches is that they deal with the concept of 'due diligence' only in a superficial manner. In both contexts, due diligence is framed as a task that contractors must perform to tick the slavery and trafficking box, independently of their daily business activities. This fails to encapsulate the goals of HRDD, which calls on businesses to entrench the elements of HRDD into their internal processes and to create a culture of transparency, accountability and remediation around human rights risks and impacts. Moreover, it is not sufficient for the FAR and Clause 3.1 to simply refer to 'due diligence'. The UNGPs formulate HRDD as a non-binding social responsibility that national governments may implement domestically as legal obligations, as FAR 52.222-50 and Clause 3.1 do to some degree. However, when implemented, HRDD must be translated into domestic laws with a higher degree of detail and contextual specificity. As Landau argues, the language of HRDD

[342] International Labour Office, 'INWORK Issue Brief No. 10: Purchasing practices and working conditions in global supply chains: Global Survey results' (June 2017) 3.

in the UNGPs is insufficiently specific as to what constitutes adequate HRDD procedures in practice and the manner in which they should be performed.[343] It provides businesses with an opportunity to manipulate the ambiguous terminology to engage in 'opportunistic behaviour' that benefits the business reputationally but falls well short of the achieving the actual goals of the standard.[344] Evidently, domestic legislation or policy which uncritically adopts this approach would suffer the same criticisms. Thus, legislators and policy makers should use the UNGPs as a springboard from which to further concretise the legal duties and specific obligations on businesses in performing HRDD. To this end, the adoption of clear and definitive language in the domestic drafting process is crucial for removing any ambiguity as to the legal status of HRDD and the steps that businesses must take to comply with it as a domestic legal obligation.

Admittedly, detailed HRDD obligations may be problematic from a public procurement perspective, as they will increase the compliance burden on contracting agencies and contractors, as well as increase the complexity of decision-making, thereby creating increased discretion and opportunities for abusive decision-making. These issues pose at least some threat to competition, as less bidders may be willing or able to meet the detailed requirements. However, both UK and US governments committed to addressing slavery and trafficking in government supply chains through horizontal procurement policies. As they chose to do so, it is important that such policies are capable of having a meaningful effect on contractor behaviour, otherwise there is little point to using procurement as a strategy to address slavery and trafficking. Thus, where HRDD obligations are implemented in UK and US public procurement, there needs to be less emphasis on the end goal of achieving a slavery and trafficking free supply chain. Rather, the due diligence provision should set out the elements of HRDD, with a particular emphasis on rigorous due diligence and monitoring, and establishing robust mitigation and remediation procedures for situations where slavery or trafficking is found.

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343 Landau (n 107) 236.

344 ibid, quoting Kimberly D Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81(2) Washington University Law Quarterly 487, 494.

5.5. Award criteria

5.5.1. Award criteria under the PCR 2015

In the UK, contracting authorities must base the award of public contracts on the most economically advantageous tender (MEAT) standard, which may include consideration for the 'best price–quality ratio, assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.'[345] There are only two exceptions to this rule. The first is that contracting authorities are permitted to reject the MEAT where it is established that the tender does not comply with relevant social, environmental and labour laws.[346] Second, contracting authorities are required to reject a tender, even if it is the MEAT, where it is established that the tender is 'abnormally low' due to not complying with these laws.[347]

In order to satisfy the 'linked to the subject-matter of the contract' requirement, the criteria can relate to contract supplies or services 'in any respect and at any stage of their life cycle, including factors involved in the specific process of production, even where those factors do not form part of their material substance'.[348] Except where price is the only factor, the contracting authority must specify the relative weighting attributed to each criteria.[349] This provides contracting authorities with wide discretion in weighing up different award criteria and criteria related to slavery and trafficking initiatives could be adopted.[350] However, contracting agencies must adhere to two requirements which broadly align with the public procurement principles of competition and fairness to contractors. First, PCR 2015 reg 67(7)(a) is explicit that award criteria must not stifle effective competition.[351] Second, contracting agencies must adhere to certain procedural requirements ensuring that the process is conducted in a fair and transparent manner. Contracting agencies must clearly set out the award criteria to all interested bidders and then award the contract based on that award criteria, provided that

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345 PCR 2015, reg 67(1)–(3).

346 ibid reg 56(2).

347 ibid reg 69(5).

348 ibid reg 67(5).

349 ibid reg 57(9).

350 Arrowsmith (n 300) 789.

351 PCR 2015, reg 67(7)(a).

the tender complies with the requirements, conditions and criteria set out in the contract notice and procurement document, and is not excluded under PCR 2015 reg 57. Additionally, to ensure transparency in the assessment of tenders, contracting authorities must specify how the information required from contractors in fulfilment of the criteria will be verified.[352]

In addition, the Public Services (Social Value) Act 2012 (Social Value Act 2012) imposes a duty on contracting authorities (for the purposes of PCR 2015) to consider, before starting the process of procurement:[353] (a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area; and (b) how, in conducting the process of procurement, it might act with a view to securing that improvement.[354] Contracting authorities must consider only matters relevant to what is being procured, as well as the extent to which it is proportionate in all the circumstances to take those matters into account.[355] On 1 January 2021, the UK Government launched the 'Social Value Model', pursuant to which contracting agencies must apply a minimum overall weighting for social value of 10% of the overall score.[356] More than one type of social value outcome may be pursued within this range,[357] and a higher weighting for social value may be pursued 'where there is higher market maturity'.[358]

In the Social Value Model, 'tackling modern slavery' is a priority within the policy outcome of 'tackling workforce inequality'.[359] It contemplates that modern slavery-related award criteria may be relevant and proportionate to the subject matter of the contract when the contract is 'vulnerable to modern slavery threats', such as in particular sectors or countries indicating higher modern slavery risks.[360] Moreover, the Social Value Model sets out various 'Model Award Criteria' (MAC). Most relevantly, MAC 6.3 provides the following criteria:

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352 ibid reg 67(7).

353 Social Value Act, sub-ss 1(1), 1(2).

354 ibid s 1(3).

355 ibid s 1(6).

356 Government Commercial Function, *Guide to using the Social Value Model* (1st edn, 3 December 2020) 15.

357 ibid 16.

358 ibid 15.

359 ibid 7.

360 ibid 21.

'Demonstrate action to identify and manage the risks of modern slavery in the delivery of the contract, including in the supply chain.' It also sets out a range of sub-criteria, such that contracting agencies may judge a tender based on the tenderer's existing or planned:

1 Understanding of the modern slavery risks and issues affecting the market, industry, sector, country, as well as the supply chain workforce.
2 Measures to identify, mitigate and manage modern slavery risks relating to the contract and how these will be implemented;
3 Policies and practices to mitigate and management modern slavery risks, including pre-employment checks, recruitment practices, safeguarding and monitoring plans etc.
4 How the tenderer will work with NGOs, trade unions etc to address risks.
5 Means of influencing staff, suppliers, customers, communities and/or any other appropriate stakeholders with respect to modern slavery risks.

Embodying several aspects of the HRDD framework, these criteria notably require information on the bidder's measures, policies and practices to 'identify, mitigate and manage modern slavery risks',[361] including broader company procedures relating to whistleblowing and grievance mechanisms,[362] its cooperative efforts with groups such as NGOs and trade unions,[363] and its leverage over stakeholders.[364] Incorporating these matters into award criteria and utilising them to distinguish between bids will reveal early on the extent to which individual contractors are willing to actively support and participate in addressing slavery and trafficking in their supply chains throughout the contract's lifecycle. In this way, slavery and trafficking award criteria complements the imposition of slavery and trafficking contract conditions as a way of essentially 'weeding out' those contractors who demonstrate little or no enthusiasm for such policies. However, the challenge is whether contracting agencies will use slavery and trafficking award criteria in practice.

In its most recent MSA Statement, the UK Government claimed that the 10% minimum social value requirement constitutes a 'strong incentives for government suppliers to improve

361 UNGPs 18 and 19.

362 UNGP Pillar III.

363 UNGP 20.

364 UNGP 19.

their anti-slavery activity'.[365] However, contracting agencies need not choose to apply slavery and trafficking-related award criteria to satisfy the 10% minimum, even where the contract in question relates to a sector or commodity known to be at high risk of slavery and trafficking. In fact, there is currently no particular incentive for contracting agencies to include modern slavery-related award criteria. If eventually implemented, the extension of section 54 of the MSA 2015 to public bodies may go some way to providing that incentive. By virtue of their public nature, the modern slavery statements of public departments and agencies will likely receive greater scrutiny than those of many private companies. Nevertheless, to satisfy this reporting obligation, public bodies could merely take other steps rather than award criteria, such as including basic contractual provisions or responsibilities in a supplier code of conduct requiring compliance with the MSA 2015. This has generally been the approach of the few public bodies which have reported to date.[366]

Although courts are generally hesitant to interfere in the commercial assessments of contracting agencies,[367] decisions as to which award criteria may be taken into account and how they are applied, are subject to challenge in the High Court.[368] The significant flexibility and discretion afforded contracting agencies in choosing award criteria leaves those decisions open to challenge. The threat that the incorporation of slavery-related award criteria and the method of their application may be subject to challenge by a disappointed bidder may dissuade a contracting agency from incorporating them or exercising creativity in developing them to respond to the specificities of the contract. Although it is important that the decisions of contracting agencies can be challenged where appropriate, perceptions of risk in practice are heightened by the strong focus in UK procurement culture on driving the commerciality of a procurement, rather than its social value.[369]

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365 HM Government (n 274) 3, 23

366 E.g. British Museum, 'Modern Slavery Act Transparency Statement 2019-2020' (September 2020) <https://www.britishmuseum.org/modern-slavery-act-transparency-statement> accessed 14 July 2021; Bank of England, 'Supplier Code of Practice' (April 2020) <https://www.bankofengland.co.uk/-/media/boe/files/about/supplier-code-of-practice.pdf?la=en&hash=F5B3DB8FE1579A0D30430DFA474F262BE53C3A6E> accessed 14 July 2021.

367 Arrowsmith (n 300) 984.

368 ibid 982.

369 Luke Georghiou and others, 'Policy Instruments for Public Procurement of Innovation: Choice, Design and Assessment' (2014) 86 Technological Forecasting and Social Change 1, 8-11.

The entrenched culture of risk aversion among contracting agencies is reflected in the UK Government's Green Paper, which seeks to create a 'regulatory framework that delivers the best commercial outcomes with the least burden on our businesses'.[370] The Green Paper proposes to amend the current 'MEAT' concept to become the 'most advantageous tender', so as to reinforce 'to contracting authorities that they can take a broader view of what can be included in the evaluation of tenders in assessing value for money including social value as part of the quality assessment'.[371] However, these considerations already permitted under 'MEAT', so the change is nominal. Additionally, the Green Paper proposes to establish a new unit tasked with maintaining oversight of public procurement and given powers to review and intervene in order to 'drive improvements in the commercial capability of contracting authorities'.[372] This emphasis on oversight, process and 'commercial capabilities' ascribes to and reinforces the existing culture of risk of aversion, which disincentivises agencies from exercising creativity and innovation.[373] In this context, unless there are clear incentives or pressures to do so, contracting officers are unlikely to adopt or innovate in respect of slavery and trafficking award criteria for fear that their initiatives may be perceived to fall below the standard of commerciality expected of agencies and therefore be subject to criticism and intervention. More broadly, contracting agencies may find it difficult to pursue the prevention of slavery and trafficking as a standalone goal in award criteria. Thus, although the Social Value Model has incorporated a respectable set of slavery and trafficking award criteria, the UK public procurement system's focus on commerciality and culture of risk aversion present barriers to the take-up of such award criteria by contracting agencies in practice.

5.5.2. Award criteria under the FAR

In the US, the use of discretionary award criteria is limited to certain methods of procurement. Two commonly used methods of public contracting are sealed bidding and competitive negotiation. Governed by FAR Part 14, sealed bidding involves advertising the government's requirements and an invitation for bids.[374] The Contracting Officers awards the contract to the

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370 Cabinet Office, *Transforming Public Procurement* (December 2020) 4-5.

371 ibid 35.

372 ibid 18.

373 Georghiou and others (n 369) 8-11.

374 Davies (n 135) 58.

bidder who submits the lowest responsive bid, which is most advantageous to the government considering only price and the price-related factors included in the invitation for bids.[375] To distinguish two or more equally low bids, the FAR sets out certain distinguishing factors, including specific socio-economic factors such as small business concerns, but not forced labour and trafficking concerns.[376] Thus, there is no scope for the incorporation of horizontal award criteria in sealed bidding.

However, competitive negotiation governed by FAR Part 15 is a more flexible procedure. The overall objective of competitive negotiation is to source the 'best value' for the government.[377] As alluded to in Section 4.4.3, there are two approaches for achieving 'best value' in source selection. There is no scope for modern slavery-related award criteria under the 'lowest price technically acceptable' process. However, the 'trade-off process' allows for the consideration of other factors. To protect competition and ensure fairness to contractors and 'meaningful comparison' in this process,[378] the request for proposals must set out all factors and significant subfactors (price and non-price related) which will be assessed by the agency, including the relative importance of those factors and price.[379] The factors and subfactors must be tailored to the acquisition, representing the 'key areas of importance and emphasis to be considered' in the source selection process and supporting 'meaningful comparison'.[380] Once this disclosure is made, the contracting authority is afforded significant flexibility in weighing the various factors during the evaluation process.[381]

The 'trade-off' process offers an opportunity for contracting agencies to incorporate trafficking-related evaluation factors, such as the quality of HRDD policies and procedures. Contracting agencies may link their trafficking-related evaluation factors to the mandatory clause FAR 52.222-50, which provides a clear basis and justification for incorporating such

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375 FAR 14.408-1(a).

376 ibid 14.408-6, 19.202-3.

377 ibid 15.302.

378 ibid 15.304(b)(2).

379 ibid 15.304, 1-1(b)

380 ibid 15.304(a)-(b).

381 Christopher R. Yukins, 'The U.S. Federal Procurement System: An Introduction' (2017) 2 Procurement Law Journal 1, 83.

evaluation factors consistently throughout the award process. When issuing the Final Rule, the CAA and DAR Councils confirmed that the compliance plan may be included as a source selection factor where it is a key discriminator, but insisted that it must remain at the discretion of the contracting agency.[382] There is currently no circular, directive or policy letter which encourages contracting agencies to adopt trafficking-related evaluation factors and subfactors. By way of justification, the CAA and DAR Council reiterated the rule that factors and subfactors must be tailored to the specific acquisition its unique requirements and how best to assess an offeror's ability to meet those requirements.[383] However, this suggests that tackling slavery and trafficking in government supply chains is optional depending on what the specific contracting agency determines its needs are at the time, and whether its management or contracting officers regard preventing slavery and trafficking in its supply chain as a 'key area of importance'. In the light of the US culture of 'adversarial legalism', it is unlikely that US contracting agencies would expose themselves to additional litigation risks by incorporating slavery and trafficking award criteria, except in exceptional circumstances where there were strong overriding reasons to do so, such as unusually high reputational risks. The CAA and DAR Councils' approach therefore undermines the US Government's zero-tolerance policy for government contractors engaging in any form of trafficking. It also does not align with the US Government's 'zero-tolerance' justifications for incorporating FAR 52.222-50 and the compliance plan requirement as mandatory requirements, rather than mere discretionary opportunities for contracting agencies personally concerned about trafficking.

5.5.3. Comparative discussion

While UK and US contracting agencies are permitted to engage with their tenderers on the challenge of addressing slavery and trafficking in supply chains through relevant award criteria, the implementation of such criteria may pose risks from a public procurement perspective. For example, requiring bidders to develop competitive slavery and trafficking policies may be too onerous for some potential bidders, or put some bidders with otherwise excellent bids at a disadvantage against lower-quality bidders with better slavery and trafficking policies. Further, such criteria may increase the complexity of the decision-making overall and in turn, increase

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382 See Department of Defense, General Services Administration and National Aeronautics and Space Administration, 'Federal Acquisition Regulation; Ending Trafficking in Persons' (2015) 80(19) Federal Register 4967.

383 ibid.

the discretion afforded to the decision-maker and the potential for them to engage in undue favouritism or abuse. In these ways, slavery and trafficking award criteria may distort competition and create opportunities for unfairness against certain contractors.

However, these risks ought not to outweigh the benefits of introducing such criteria. As analysed in the previous sections, both the UK and US procurement regulations contain provisions designed to minimise the distortion of competition and procedural unfairness resulting from any type of award criteria. Slavery and trafficking award criteria constitute only one decision-making factor and thus are one of many bases upon which a contractor may win or lose a contract. Additionally, award criteria should be used in conjunction with slavery and trafficking contract conditions. Where a contracting agency has committed to incorporating slavery and trafficking contract conditions, related award criteria will play a reinforcing role, rather than imposing obligations that are significantly more burdensome that those to which the winning bid will be committed. In any case, such obligations are mandatory in the US. Thus, it is not the case that slavery and trafficking award criteria are likely to have a significantly negative impact on competition or lead to abusive decision-making.

However, neither jurisdiction has created the conditions in which contracting agencies are likely to use slavery and trafficking award criteria. This failure mitigates any risk to the procurement principles of competition and fairness to contractors but is problematic from a human rights perspective. Requiring potential contractors to assess and plan to mitigate potential human rights impacts during the project planning phase increases the extent to which those assessments can be integrated in and become a core part of the project from its inception.[384] Under the HRDD framework, early identification and engagement with potential human rights impacts before the project starts represents best practice. The use of award criteria, or evaluation criteria, would encourage contractors to anticipate and formulate concrete plans for preventing and mitigating impacts, having regard to the specific industry and commodity involved in the project.[385]

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384 Fasterling (n 295) 245.

385 Fleury (n 11) 416.

By way of reform, the UK Government should impose greater pressure on contracting agencies in procurement guidance to incorporate slavery and trafficking award criteria as part of social value, particularly in high-risk procurements. It should also set expectations that contracting agencies will demonstrate their use of such policies when they are required to publish Modern Slavery Statements under the revised MSA 2015 s 54. In the US, it would be desirable for a rule to be introduced that where the compliance plan requirement applies, the contracting agency must assess the compliance plan as an evaluation factor. In all other situations, the CAA and DAR Councils should publish guidance which strongly recommends that contracting agencies adopt slavery and trafficking considerations into their award criteria.

5.6. Conclusion

In this chapter, I provided an in-depth critique of three types of slavery and trafficking policies implemented within the UK and US public procurement frameworks. My analysis employed an analytical framework drawing from public procurement, public administration, and human rights principles, to reconcile the different normative systems at play. I argued that UK and US law and policymakers are failing to recognise and safeguard key public procurement and human rights principles when they formulate their slavery and trafficking procurement policies, including contractor exclusion mechanisms, contract conditions and award criteria. None of the three slavery and trafficking procurement policies in either jurisdiction adequately satisfy each criterion in the analytical framework. Key issues include too great an emphasis on protecting competition at the expense of human rights protection, a lack of clarity and specificity in drafting which undermines fairness to contractors and HRDD, and a lack of safeguards for fairness and competition where human rights policies are inserted without due care and consideration for the procurement system. As highlighted in the reform proposals offered, engaging with the criteria and their practical considerations ensures that slavery and trafficking procurement policies may be formulated in a way that is pragmatic and capable of effective implementation by procurement officers and contractors.

6. Conclusion

6.1. Introduction

This thesis conducted a legal and normative analysis of slavery and trafficking policies implemented within UK and US regulatory frameworks for public procurement. To this end, I employed a functional comparative methodology based on the 'most similar cases' approach and engaged in a deeper analysis of UK and US slavery and trafficking procurement policies by considering the broader international, institutional, normative and political influences surrounding them. Through an application of these methods, I developed my key arguments over four substantive chapters and the purpose of this final chapter is to summarise the research contributions of this thesis.

6.2. Research contributions

There is a growing body of literature examining 'human rights' policies in public procurement in a range of contexts and jurisdictions, but a lack of research which 'goes deep' on specific human rights and their challenges. My thesis has contributed towards filling this gap by analysing public procurement policies concerning the freedom from slavery, servitude, forced labour and trafficking in UK and US Government supply chains. Its specific research contributions are as follows.

After defining the freedoms from slavery, servitude, forced labour and human trafficking, I examined the duties to respect and protect flowing from those freedoms in IHRL. I sought to determine whether they gave rise to a legal obligation on states to address slavery and trafficking through their public procurement regulatory frameworks. In relation to the duty to protect, governments may be liable for a contractor's slavery and trafficking violation where the contractor is a hybrid public-private body exercising functions of a public nature. However, a mere contractual relationship between a contracting agency and a contractor would not, without more, reach the requisite level of control needed to trigger the government's correlative duty to respect. The duty to protect requires states to prevent third parties from interfering with individuals' enjoyment of their freedoms and in some circumstances, this requires states to regulate the business activities of private companies to prevent or address human rights violations. Governments are generally afforded a margin of appreciation within which they can implement the measures they deem most suitable for protecting human rights. As the

prohibition of slavery is absolute, I argued that states must do 'all that could be reasonably expected' to ensure that individuals are not subjected to slavery and trafficking and thus, must meet a more stringent standard in this context. Nevertheless, states may meet this standard and discharge their duty to protect by implementing regulatory measures other than slavery and trafficking procurement policies, such as mandatory HRDD. Additionally, there is currently no authoritative source of IHRL which holds that national governments *must* implement slavery and trafficking procurement policies. However, they are a permitted mechanism by which states may seek to fulfil their duty to protect in the context of government supply chains and it should not be discounted that a legal duty may crystallise over time.

Having established that there is no legal obligation on states to implement slavery and trafficking procurement policies, I then investigated whether the implementation of such policies is something that states ought to do. By virtue of their inherent regulatory function in mixed economies, governments may legitimately use their buying power to promote broader government policies, including those concerning slavery and trafficking. Going a step further, I argued that governments should implement slavery and trafficking procurement policies, as they offer three important advantages. Specifically, they provide governments with a valuable tool for enforcing legislative standards and reinforcing broader movements within the private sector towards transparent supply chains. They also contribute towards maintaining consistency in the application of government policy on slavery and trafficking. Admittedly, there are disadvantages associated with these policies, including the administrative and cost burdens they pose which may be prohibitive for contractors and contracting agencies, their complexity and potential to increase discretion and abuse, and potential to be in tension with the WTO GPA. However, these disadvantages can be minimised through carefully considered policy design. As the advantages outweigh the disadvantages, governments should utilise horizontal public procurement policies as an opportunity to discharge their duty to protect workers in government supply chains from slavery and trafficking.

Where governments choose to implement slavery and trafficking procurement policies, it is important they are designed with an awareness that such policies function at the interface of public procurement law and human rights law, and therefore, must safeguard key principles arising from within those normative systems. To analyse the extent to which existing UK and US slavery and trafficking procurement policies meet this goal, I developed an analytical framework assessing the extent to which three policies satisfy the principle of competition, the

principle of fairness to contractors, the principles of clarity and simplicity, and the values and goals of HRDD. Under the framework, policies should satisfy each criterion to a minimum level and ideally to as high a level as possible. By maximising their adherence to each criterion, it is possible to formulate slavery and trafficking procurement policies which are pragmatic, achieve greater identification and mitigation of slavery and trafficking risks in government supply chains, and are more capable of effective implementation by procurement officers and contractors as part of their day-to-day procurement activities.

First, in relation to contractor exclusion mechanisms, I argued that whilst the discretionary exclusions in the PCR 2015 may allow for the exclusion of contractors which perpetrate slavery and trafficking, they lack clarity and afford a high degree of discretion to decision-makers which puts the fairness of the process and competition at risk. Thus, they should be supplemented with substantial guidance on the violations for which contractors may be excluded, how and to what standard alleged violations must be proved, and any other details necessary to ensure fair decision-making. In contrast, the US suspension and debarment mechanisms are clearer and more comprehensive, but place too great an emphasis on reputational and commercial risks at the expense of protecting the rights of supply chain workers. In turn, they do little to no work in increasing contractor engagement with slavery and trafficking risks in government supply chains. To address this shortcoming, contracting agencies should be permitted to justify their application or non-application (as appropriate) of a suspension and debarment having regard to the public interest in combatting slavery and trafficking in government supply chains, regardless of the impact on the government's interests.

Second, with respect to contract conditions, I argued that the US anti-trafficking contract provision is commendable for its clear and specific definitions and recognition of the specific behaviours contributing to slavery and trafficking in supply chains. It is in contrast with the UK's Clause 3.1 of Joint Schedule 5, Public Sector Contract, which lacks definitional clarity, fails to identify key offences and their indicators, and places undue emphasis on the end goal of a slavery-free supply chain without implementing the processes necessary to identify and deal with perpetrators. Problematically however, both the US and UK contractual terms fail to engage substantively with the concept of HRDD. As a result, they pose minimal burdens and risks of unfairness, but at the same, increase the risk that such obligations will be met with perfunctory compliance rather than meaningful changes in corporate behaviour. Both

provisions should be amended to clearly and specifically set out the elements of HRDD (as they pertain to and are appropriate in the context), with a particular emphasis on rigorous due diligence and monitoring and establishing mitigation and remediation procedures for situations where slavery or trafficking is found. To this end, they should de-emphasise the end-goal of achieving a slavery-free supply chain and focus instead on ensuring that contractors implement and integrate comprehensive slavery and trafficking policies and procedures over the entire lifecycle of the project.

Finally, I argued that while the use of slavery and trafficking award criteria is permitted, neither the UK nor the US procurement framework adequately supports contracting agencies utilising them in practice. Current barriers to their implementation include the lack of incentives for contracting agencies to incorporate such criteria, compounded by the risks of review and litigation which necessarily flow from their incorporation. The UK Government should impose greater pressure on contracting agencies in procurement guidance to incorporate slavery and trafficking award criteria as part of social value, particularly in high-risk procurements. It should also set expectations that contracting agencies will demonstrate their use of such policies when they are required to publish Modern Slavery Statements under the revised MSA 2015 s 54. In the US, it would be desirable for a rule to be introduced stating that where the compliance plan requirement applies, the contracting agency must assess the compliance plan as an evaluation factor. In all other situations, the CAA and DAR Councils should publish guidance which strongly recommends that contracting agencies adopt slavery and trafficking considerations into their award criteria.

In sum, this analysis of UK and US slavery and trafficking procurement policies has presented practical insights into how the key principles of public procurement and human rights may be reconciled in a way that is pragmatic and capable of effective implementation by procurement officers and contractors as part of their day-to-day procurement activities. Contractor exclusions, contract conditions and award criteria offer a valuable opportunity for national governments to protect workers in government supply chains from slavery and trafficking, and it is hoped that this thesis will contribute towards the effective and productive use of public procurement to these ends.

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