



Accountability for
forced labor in a
globalized economy

Lessons and challenges
in litigation, with
examples from Qatar

ECCHR

EUROPEAN CENTER FOR
CONSTITUTIONAL AND
HUMAN RIGHTS





“The possibility of changing one’s destiny is the single driving force that pushes people into precarious journeys all across the globe.”

Shahidul Alam*

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I. Introduction

Close to 25 million people in the world are currently in forced labor, according to figures of the International Labour Organization (ILO).¹ Among the most vulnerable in society, they often include women and children, people with little to no formal education, and migrants. Most migrant workers come from marginalized situations, setting out abroad with the hope of earning an income to feed themselves and their families. For many, reflects activist Shahidul Alam, “migration offered an opportunity to change their lives. It was risky, uncertain and certainly hard, but it was a risk they were prepared to take. The absence of choice made the choice simple.”²

The topic of forced labor has received increased public attention through reporting on the massive expansion of construction projects in Qatar ahead of the 2022 FIFA World Cup. However, the phenomenon of forced labor is not limited to the Gulf region, which represents only 1.4% of the total forced labor registered worldwide, compared to 66.6% in the Asia-Pacific region. The highest prevalence is found in the Asia-Pacific region (4 people per 1,000) and in Europe and Central Asia (3.6 people per 1,000).³ While current heightened attention on the Gulf risks distorting the perception of the global extent of the problem, it has, at the same time, produced a significant amount of data and analysis that can facilitate further interventions for change in the Gulf region and beyond.

This report discusses the findings of the European Center for Constitutional and Human Rights’ (ECCHR)⁴ investigation into labor abuses and forced labor in the construction sector in the Gulf, with a focus mainly, though not exclusively, on Qatar.⁵ It focuses on the legal responsibility of companies, specifically European transnationals, for forced labor along their labor supply chains. It discusses possibilities for holding these actors accountable and structural reasons why cases of labor exploitation and forced labor often enjoy impunity. Based on these findings, using our research from Qatar as an example, it makes suggestions for civil society advocates and other stakeholders, including companies and governments, on how to move forward in the struggle to eliminate forced labor and other forms of extreme labor exploitation.

FORCED LABOR

means that a person is coerced to work through violence or other means, such as intimidation or threats with a penalty, such as detention or deportation, debt bondage is another example.

HUMAN TRAFFICKING

means the recruitment, transportation, transfer, harboring or receipt of a person, over international borders or also within the boundaries of a country, for the purpose of exploitation, such as sexual or labor exploitation.

* Shahidul Alam, a prize-winning Bangladeshi photojournalist, teacher and social justice activist, was detained on 5 August 2018 after he publicly criticized the Bangladeshi government. In November 2018, he was released on bail awaiting further proceedings.

¹ International Labour Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2017), available at: www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

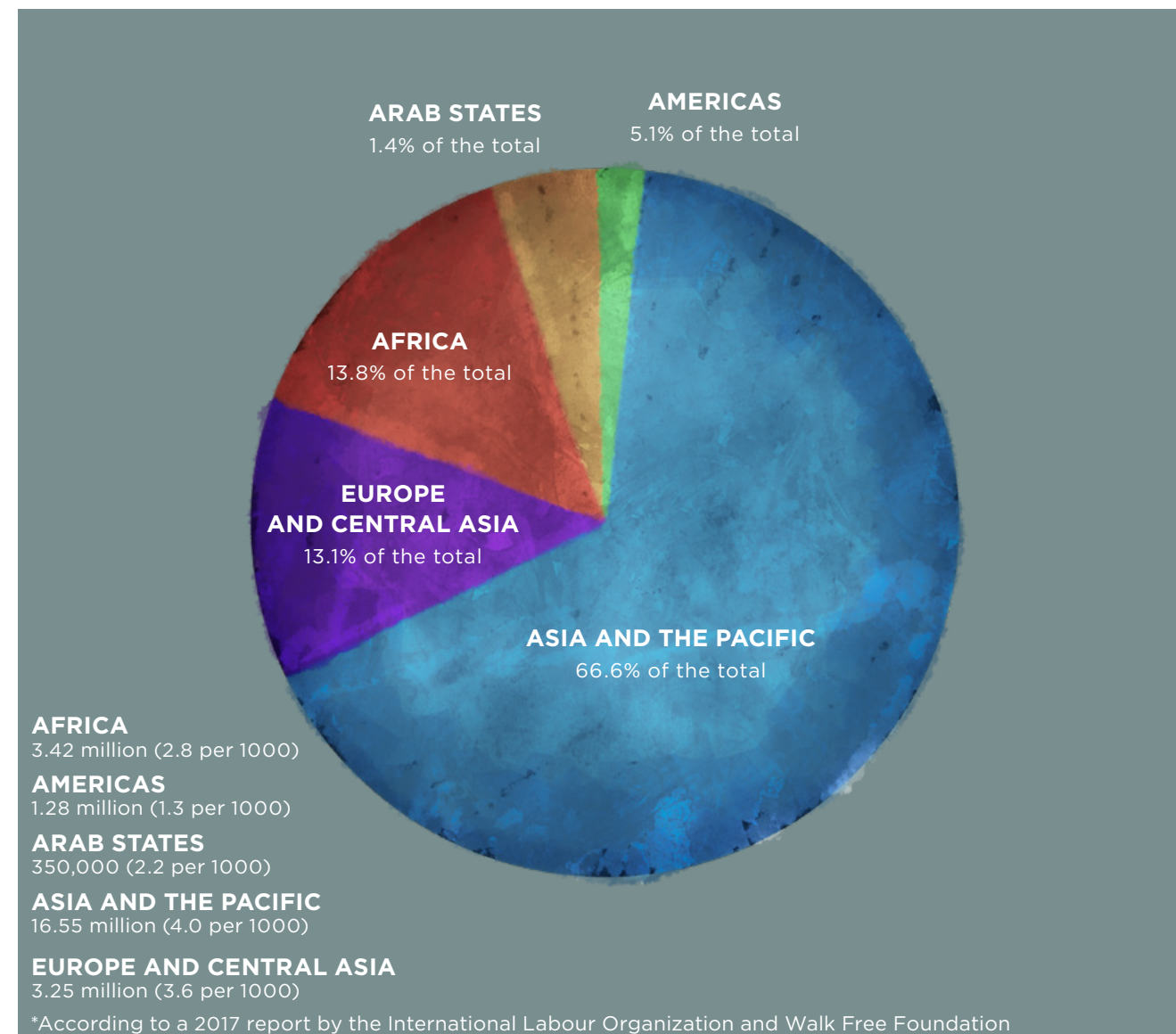
² S. Alam, *The Best Years of My Life* (2016), Dhaka: Drik Picture Library Ltd., p. 8-9.

³ See International Labour Organization and Walk Free Foundation, *supra* note 1, p. 19.

⁴ ECCHR’s Business and Human Rights Program (www.ecchr.eu) specializes in developing strategic legal interventions that target corporate human rights abuses worldwide, in particular those related to European economic actors, including companies, banks and states.

⁵ Most of ECCHR’s research into European companies operating in the construction sector in the Gulf region saw to Qatar. Further, the largest part of the interviews with migrant workers, was taken with those working in Qatar, hence why this report’s main focus is on Qatar.

IN 2016, 24.85 MILLION PEOPLE WERE IN FORCED LABOR*



II. Research into forced labor in the Gulf region

METHODOLOGY

Our investigation focused on transnational companies from Europe that cause or contribute, either directly or indirectly, to forced labor or other labor abuses in the Gulf. It examined the viability of legal interventions that aim to end impunity and provoke change in the systems upholding such human rights violations. In total, approximately 60 current and former migrant workers were interviewed, mainly from the construction and hospitality sectors, as well as a number of investigators, activists, journalists and civil society members.

Our investigations both in Qatar, as a country of migrant worker deployment, and in states of origin, such as Pakistan, Nepal and India, presented difficulties for the collection of forensic evidence. Certain interviews were also conducted with migrant workers who had been employed in the United Arab Emirates (UAE) or Saudi Arabia. In states of origin, it was difficult to find migrant workers who had kept relevant documents to prove their work history and conditions, such as pay slips, contracts, receipts of recruitment fees, etc. In Qatar, in contrast, the fear of losing their jobs prevented many workers from speaking out against the companies under investigation. In one instance, when corporate security officers scanned through a café where interviews with migrant workers were being taken, workers got worried and refrained from discussing their situation. Others later retracted their testimonies.

FINDINGS: ABUSES

Our results confirmed that serious problems, as also described by many reports from civil society organizations, investigative journalists and UN bodies in recent years,⁶ still continue, and that certain conditions allow these abuses to persist.

We found the following main problems, clustered below into (I) abuses facilitated by migrant workers' extreme dependence on their employers and recruiters, and (II) structural conditions that allow these abuses to persist.

Illegal fees and corruption

Of the workers interviewed, many paid high recruitment fees. For example, a security guard from Bangladesh who now earns a salary of €280 per month paid a recruitment fee of €3,525. Sometimes both the employers and the migrant workers have to pay: *"I think [the company] also pays for this [visa and flight], but the agent 'eats from both sides'."*⁷

Migrant workers often pay high recruitment fees, including fees for visa and medical examinations, even if these fees are illegal in many states of origin and destination states like the UAE and Qatar. Recruitment agents and sub-agents

in several tiers – from the capital down to the home village – all demand their share and corruption often lubricates the system. Most of the time workers, not the employers, end up paying all of the recruitment fees.

What further pushes up the fees is the “business” of selling labor demand letters and related visas. These are sold by agents based in the Gulf to recruitment agencies in states of origin, which is an illegal practice according to laws in several Gulf countries.⁸ There is also the “Azad Visa” practice involving the re-sale of “sponsor-free” visas: a worker finds his or her job independently and pays a monthly royalty to the visa re-seller. The employer does not take any responsibility for the worker and reports “absconding” in case of trouble, which leaves migrant workers in an extremely vulnerable position.

High debts and interest rates

To pay these fees, many workers sell their land or what little possessions they may have, or take out loans with local banks or money lenders, often with exorbitant interest rates. For example, one of the workers from Bangladesh reported: *"For one lakh [100,000 taka, €1,050], we have to pay 30,000 in interest."* As a consequence, they frequently arrive with great debts in a destination country where they do not know the language, the local context, habits or their rights. A migrant worker from Kenya who had secured a loan with a 50% interest rate to pay the recruitment fee said: *"I'm still repaying it [the loan] because I have competing interests. I have to cater to my family, pay their school fees and rent. Sometimes I talk to her [the person who provided the loan] when I don't have money to pay her. She can postpone. I'm still paying. And the more it stays, the more the interest accrues."*

Restriction of movement

While the illegal confiscation of passports by employers in Qatar seems to have decreased in some cases over the past years, at least on the FIFA-related construction sites, we found that the delay and withholding of legal residence papers persists, sometimes for 18 months or longer. Without legal documentation in the country, workers are confined to their accommodation camps, for fear of police checks on the streets that could result in arrest, detention and abuse, the imposition of a fine, or a deportation order.⁹



⁶ Business and Human Rights Resource Centre, *A Human Rights Primer for Business: Understanding Risks to Construction Workers in the Middle East* (2018); D. Segall and S. Labowitz, *Making Workers Pay, Recruitment of the Migrant Labor Force in the Gulf Construction Industry* (2017); Amnesty International, *The Ugly Side of a Beautiful Game* (2016), AI Index: MDE 22/3548/2016; International Trade Union Federation: Frontlines Report, *Qatar: Profit and Loss* (2015); Swedwatch, *Shattered Dreams, Migrant Workers and Rights Violations in the Dubai Tourism Sector* (2015); Reports of the UN Special Rapporteur on migrants' missions to Qatar (2013) and Nepal (2018), to name but a few.

⁷ Worker's interview, conducted during our research in June 2018.

⁸ Segall and Labowitz, *Making Workers Pay, Recruitment of the Migrant Labor Force in the Gulf Construction Industry*, NYU Stern (2017), p. 3, available at: www.stern.nyu.edu/experience-stern/faculty-research/making-workers-pay-recruitment-migrant-labor-force-gulf-construction-industry.

⁹ Another requirement restricting migrants' freedom of movement is the practice of exit permits that need to be obtained by migrant workers from employers to leave the country within the contract period. This practice is still in place in Saudi Arabia (www.hrw.org/news/2018/09/06/qatar-end-all-migrant-worker-exit-visas). In Qatar, Law No. 13 of 2018 abolished the requirement of exit permits for migrant workers. Nevertheless, this law does not apply to domestic workers and allows employers to still request exit permits from 5% of its staff. See Amnesty International, "Qatar: Partial abolition of 'exit permit' lifts travel restrictions for most migrant workers", 5 September 2018, available at: www.amnesty.org/en/press-releases/2018/09/qatar-exit-system-reform-first-step/.

Contract substitution

Contract substitution and deception were also common complaints amongst the migrant workers interviewed. Migrant workers are frequently promised a certain job, but once they arrive in the destination country, are then forced to work in a different job for which they are not trained or, in many cases, which pays less than half the salary that was promised to them during recruitment. Sometimes the location, not only the nature of the work, may also differ entirely from the location relayed to them during recruitment.¹⁰ In one example, migrant workers who were supposed to work in construction ended up tending to camels in the desert. In another case, a Bangladeshi worker reported: “*The [local village] agent told me that I would get 1,200 Qatari riyals basic salary, and food and accommodation would be taken care of. I got the contract at the airport just a few hours before boarding the flight and it said 600 riyals + 200 riyals for food allowance. The agent said ‘If you want to go, take it, if not, don’t.’ We had no option, we had already paid so much. We were forced to get on the flight.*”

Workers frequently accept these last-minute job changes because their visa is often only valid for a specific employer. Without a job, they would lose their visa and, without a visa, they risk detention, deportation or having to return to their families empty-handed and still indebted.

Inability to change one’s employer

In most Gulf States, workers are fully dependent on the employers who sponsor their visa and residence permit. To change their employer, migrant workers need their initial employer’s approval in the form of a “non-objection certificate” (NOC), which employers can withhold without justification.¹¹ As one of the migrant workers interviewed stated: “*I would change my job, but they don’t give an NOC. You have to exit, go home and come back at your own expense.*” If a worker leaves without the employer’s approval, he or she is considered an “absconder” and could be criminally charged, risking not only detention and deportation, but also being blacklisted, with little chance of being recruited again for the same or another employer.

Salaries

Migrant workers’ salaries are often delayed and paid after unlawful deductions. This is particularly problematic because workers often depend on these salaries for the monthly maintenance of entire families with children at home. Further, their debt repayments, if not met, can incur penalties from the money lenders.¹² In some cases, workers raised concerns that, in Qatar, salaries are deposited into their bank account, while the debit/ATM cards are retained by the managers, who do not allow them to control their salary withdrawal. This is illegal under the Wage Protection System in Qatar, which if effectively implemented, should ensure that workers are paid on time into a bank account that they control, with repercussions for employers who fail to do so.¹³

Health and safety

Health and safety risks are notorious in the construction sector. Thanks to the increased international attention on Qatar since December 2010 when it was granted the hosting of the 2022 World Cup, since 2017, improvements have been reported at FIFA-related construction sites.¹⁴ However, just over 25,000 workers are deployed on these sites,¹⁵ comprising less than 2% of all migrant workers in Qatar. In relation to other worksites, where the remaining 98% are employed,

¹⁰ For more information on deceptive recruitment practices suffered by migrant workers, see: Amnesty International, *Turning People into Profits: Abusive Recruitment, Trafficking and Forced Labour of Nepali Migrant Workers* (2017), available at: www.amnesty.org/en/documents/asa31/6206/2017/en.

¹¹ In Qatar, employees do not require the employer’s approval to change their job under the following circumstances: (1) if the duration of the contract has been completed (limited/definite/fixed term contract), or if the employee has completed a term of five years with the employer (unlimited/indefinite contract), (2) if the employer terminates the employment, or (3) in case of breach of contract by the employer, the Labour Department and National Human Rights Committee will assist the employee for a temporary employment transfer.

¹² Amnesty International, *supra* note 10, p. 27.

¹³ The Wage Protection System was introduced pursuant to Law No. 1 of 2015 (amending Labour Law No. 14 of 2004). It provides that salaries and other payments due to a worker who is on an annual or monthly salary shall be paid at least once a month, other workers shall be paid at least once every two weeks. The salary shall be transferred to the worker’s account at a financial institution in Qatar. If not, the salary is deemed to not have been paid. Article 3 of the law foresees a fine in case of violations.

¹⁴ The Supreme Committee for Delivery & Legacy and Building and Wood Workers’ International Joint Working Group 2017 Report, available at: www.bwint.org/web/content/cms/media/793/datas/SC_BWI_JWG_Report2017.pdf.

¹⁵ See the Supreme Committee for Delivery & Legacy’s website: www.sc.qa/en/opportunities/workers-welfare.

groups like Lawyers Beyond Borders¹⁶ continue to report serious work accidents that cause permanent physical damage and inhibit individuals’ capacity to work. Informal communication platforms used by civil society, trade union activists and media personnel also continue to report cases of health and safety abuse.

Deaths

Cases of relatively young and healthy construction workers dying on the job at construction sites in Qatar have been frequently reported.¹⁷ In Qatar, at least 75% of such deaths go officially unexplained. A 2014 report commissioned by the Qatari government found that the number of worker deaths attributed to “cardiac arrest,” a general term that does not specify a cause of death, was “seemingly high,” and recommended that the Qatari authorities reform state laws to allow proper investigations and autopsies or post-mortem examinations in cases of “unexpected or sudden deaths.”¹⁸ However, such reforms have yet to be implemented. The Gulf climate, with extreme sunlight and very high temperatures and humidity, could expose outdoor workers to dangerously high heat stress levels. Some of these worker deaths could result from insufficient protection from the climate, but further studies are required to examine this possible link.

FINDINGS: STRUCTURAL CONDITIONS THAT ALLOW THESE ABUSES TO PERSIST

Absence of trade unions

Workers are prohibited from joining or forming trade unions in Qatar, the UAE and Saudi Arabia.¹⁹ Where domestic laws allow for formation of workers’ committees, migrant workers are often excluded by law.²⁰ This means that many workers lack independent access to information about their rights in the destination country, as well as legal advice, training, a collective action platform and union support for complaints. Interviews also revealed that recruitment agencies sometimes explicitly advise migrant workers not to join trade unions or workers’ committees, warning that they might be deported or detained for doing so.

Double standards, lack of effective remedy and enforcement

In 2014, the Qatari government’s Supreme Committee for Delivery & Legacy (Supreme Committee) issued Worker Welfare Standards that apply to companies involved in the construction of the FIFA World Cup sites. To support workers’ welfare and provide a venue for workers’ complaints, the Supreme Committee established Workers’ Welfare Forums, along with a grievance hotline and trainings for workers.²¹ Together with the global union federation Building and Wood Workers International (BWI),²² joint labor inspections are undertaken on a regular basis on Supreme Committee projects. The Supreme Committee has announced that the contractors engaged in FIFA projects have agreed to reimburse workers for their recruitment charges.²³ Yet, as pointed out, these measures cover only around 2% of all migrant workers in the country. So, we see a double standard at work in Qatar between a small number of sites currently under the international spotlight, and all others.

In contrast, the workers interviewed for this research do not see any accessible and effective remedies available to them, be it for lack of information, lack of time or lack of confidence in existing mechanisms to resolve their problems.²⁴ Employers escape their obligations to provide remedy simply because they can, due to a lack of enforcement by the state. Such was the case for Mr K., an Indian worker who lost four fingers on his right hand in a work accident in

¹⁶ Lawyers Beyond Borders (LBB) is an international network of lawyers, organized by Migrant Forum Asia, to assist disadvantaged migrant workers.

¹⁷ For example, D. Conn, “Thousands of Qatar World Cup workers ‘subjected to life-threatening heat’”, *The Guardian*, 27 September 2017, available at: www.theguardian.com/football/2017/sep/27/thousands-qatar-world-cup-workers-life-threatening-heat, www.dw.com/en/is-qatar-failing-to-deliver-on-its-world-cup-promises/a-45292278.

¹⁸ DLA Piper, *Migrant Labour in the Construction Sector in Qatar* (2014), p. 15.

¹⁹ In the UAE, Federal Law No. 8 of 1980 on Regulation of Labour Relations as amended by Federal Law No. 12 dated 29/10/1986, prohibits labor unions. Also, in Saudi Arabia, trade unions are not permitted.

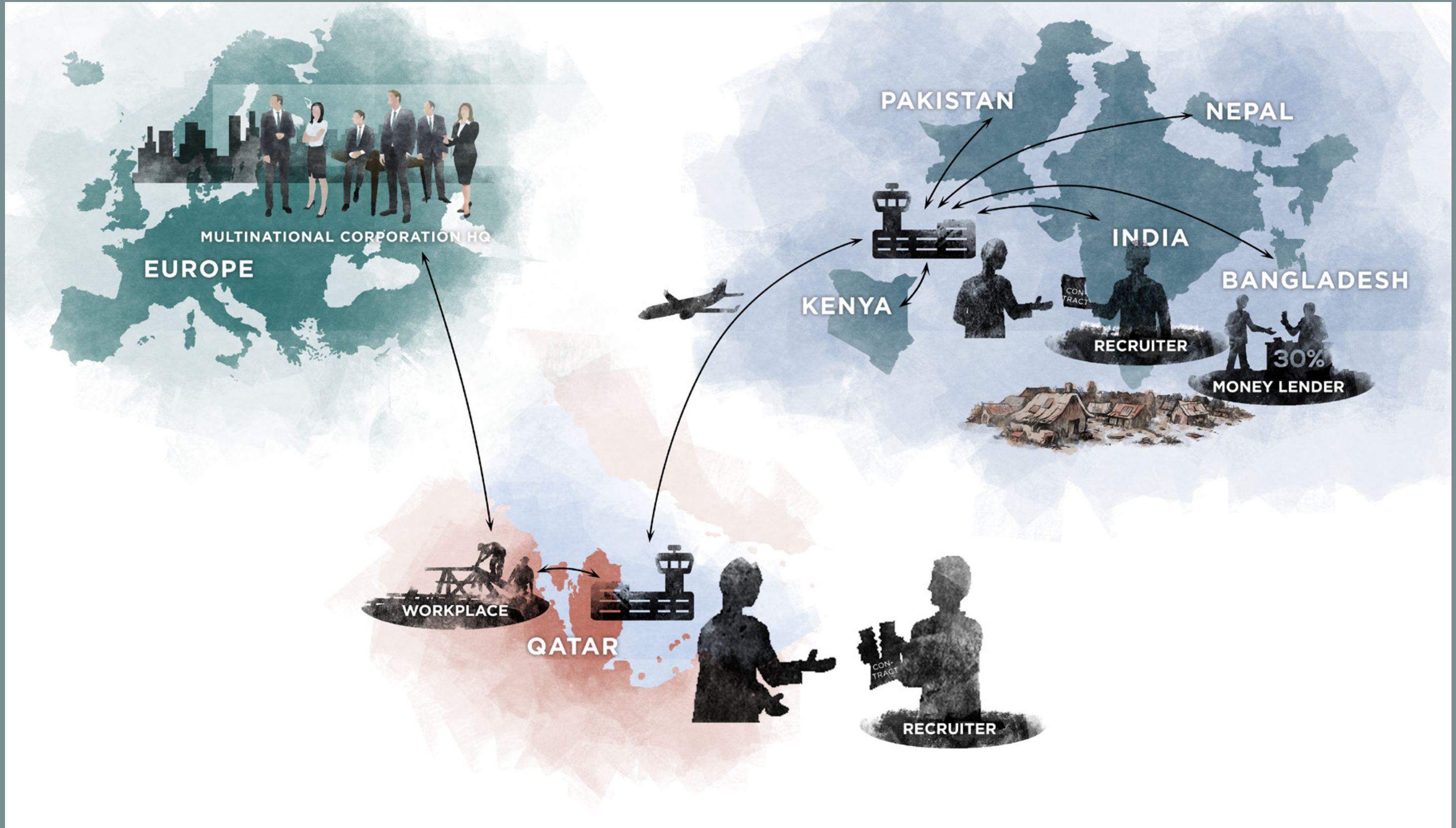
²⁰ Saudi Arabia’s Labour Code of 2006 (Royal Decree No. M/51) bars foreign nationals from joining workers’ councils. The Qatar Labour Law No. 14 of 2004, Article 116 only allows for the formation of workers’ committees in companies where there are more than 100 Qatari workers, which is a criterion that is rarely met.

²¹ Supreme Committee for Delivery & Legacy, *Third Annual Workers’ Welfare Progress Report*, p. 13, available at: www.sc.qa/en/opportunities/workers-welfare.

²² In November 2016, BWI and the Supreme Committee signed a Memorandum of Understanding to undertake joint inspections that cover all workers on Supreme Committee projects, including their accommodation, starting with projects in which companies headquartered in countries where workers are members of BWI-member trade unions. The Supreme Committee’s Workers’ Welfare Standards are not limited to health and safety, but also include the topic of recruitment. See the Supreme Committee & BWI Joint Working Group Report 2017, *supra* note 14.

²³ “2022 World Cup Contractors to reimburse”, *The Peninsula*, 22 October 2018, available at: www.thepeninsulaqatar.com/article/22/10/2018/2022-World-Cup-Contractors-to-reimburse-QR52.5m-to-workers?fbclid=IwAR3wwkYrS1xNRzxIAJiJZABGJcm0R9TC_Yev8ErLITcqlOVUH-9HNglBxwoo.

²⁴ At the same time, in Nepal and South Asia migrant workers refrain from seeking legal remedies, blaming instead their fate. There is also a broad lack of awareness about rights and remedies among the low-skilled and least educated workers.



the UAE. He went to court, won a labor case against his employer, but still remains with-out compensation since the judgment was not enforced. Domestic workers, mostly women, face an even harder situation in terms of vulnerability to abuse and exploitation, as the new labor law in Qatar explicitly excludes domestic workers from its remit.²⁵ In addition to labor abuses, many domestic workers face physical and sexual abuse. Their access to information, support and remedy is particularly curtailed, as they tend to live in controlled spaces, in the private houses of their employers, with barely any freedom of movement, limited free time and restricted phone and internet access.

As a positive step in April 2018, the ILO opened an office in Qatar to work with the government and other stakeholders to improve employment conditions and recruitment practices for migrant workers, ensure timely payment of wages, strengthen labor inspection and occupational safety and health standards, enhance protection from forced labor and give workers a voice in labor-related matters.²⁶

Corruption in the recruitment chain

Studies and interviews with expert organizations on migration from Nepal, the Philippines, the United States and India confirmed that corruption and so-called “kickbacks”²⁷ are widespread along migrant labor recruitment chains, extending from employers’ human resource departments through government agencies and local recruitment agencies down to the village level.²⁸ Corruption not only increases workers’ financial burden, but also erodes accountability structures and access to justice.

To summarize, a number of elements work together to hold migrant workers under extremely exploitative conditions. Underlying structural conditions ensure that the situation persists unchallenged.

INTERPRETATION: THE PROBLEM AND THE SYSTEM THAT SUSTAINS IT

These findings should be seen within a broader economic analysis. Forced labor is driven by the dynamics of a market-oriented global economy that is not specific to Qatar or the Gulf region. Labor supply chains are structured in a way that dissociates transnational corporations from labor abuses on the ground, while also increasing their risk of being directly linked to forced labor through their business relationships.

Since 2010, when Qatar won the bid to host the 2022 FIFA World Cup, the country’s labor practices have been in the international public eye. Qatar is a monarchy with considerable wealth due to natural resources. This attracts investors and, in turn, creates a high demand for migrant labor. Labor immigration to Qatar is regulated by the so-called *kafala* system, variations of which also exist in other Gulf States. Some media and civil society reports have referred to the *kafala* system as “medieval” and to Qatar as a “slave state,” implying that the causes of forced labor lie in the “particularities” of Qatar’s culture and law, dissociated from the policies and practices of international investor companies.

However, most of the labor abuses that we identified are caused by conduct that is illegal both under Qatari law and the laws of many states of origin. For

example, high recruitment fees and corruption are illegal in Qatar and most countries of origin. Destination-country violations like involuntary passport retention, the substitution of contracts and hiring by deceit are all formally outlawed in Qatar, Saudi Arabia and the UAE. Yet, our research confirms that companies frequently disregard such local laws, which means that “modern slavery” is not a problem particular to certain states, regions or “cultures,” but is a problem for which companies are also responsible. Companies that benefit from labor exploitation are from and operate all over the world. The core market dynamics of supply and demand apply to a worldwide labor marketplace. In countries like Bangladesh, India, Nepal or Kenya, there is a growing number of “working poor,” who are not only poor in terms of money, but also education, skills-training, access to health, sanitation and so on. These various factors of exclusion make them vulnerable to labor exploitation. If they are offered a job abroad, away from their families, for a salary of no more than €400 a month, many will accept. As expressed by a Kenyan migrant worker in Doha: “*I had no option. When you find yourself between a rock and a hard place, you take the option at hand.*”

In the eyes of a market-driven globalized enterprise, migrant workers seem like an endless supply of cheap labor. This supply is not simply the consequence of poor people looking for work, just as poverty is not a “natural” phenomenon. Both poverty and the production of a global work force vulnerable to forced labor are socially and economically constructed conditions to feed a demand for cheap labor that ensures the profitability of certain economic sectors.²⁹

The labor supply chain

On the labor demand side in Qatar, the multi-million-euro contracts for the construction of the 2022 FIFA World Cup infrastructure have been awarded to transnational companies, for example from China, South Korea, Lebanon, Saudi Arabia, and Europe, such as Vinci, Porr, Besix and ACS.³⁰ These companies remain dissociated from the places where workers’ human rights are abused because they operate through complex transnational business structures. For example, a transnational company might:

- create a foreign local subsidiary to legally operate in another country;
- become the majority shareholder of a local company to control its business operations and ensure the initial investment generates the desired returns;
- enter into a joint venture with one or more partners, who then receive the tender for a construction project;
- hire subcontractors to execute certain tasks, including the hiring of employees, which subcontractors often outsource to yet another firm;
- work with one or more – sometimes thousands of – suppliers of materials and services;
- establish a franchise model³¹ that allows each local franchisee to operate the business according to their own guidelines.

²⁵ Qatar’s new Domestic Workers Law came into force in March 2018. It requires that domestic workers have government-verified contracts, receive adequate employer-provided food, accommodation, medical benefits, one day off per week, limited ten-hour workdays, sick leave, return flight tickets once each year, three weeks paid vacation per year, full end-of-service payments, guaranteed access to the new dispute resolution committees to resolve workplace grievances and allowances for domestic workers to leave their employers in cases of exploitation or violation of contract terms. However, until now, enforcement and knowledge of the new law remain limited, leaving domestic workers significantly vulnerable to forced labor.

²⁶ The establishment of the ILO office in Qatar followed a complaint brought before the ILO in June 2014 against Qatar regarding non-compliance with its obligations as a signatory to the ILO Convention No. 29 on Forced Labour and Convention No. 81 on Labour Inspections. The complaint was closed by the ILO’s Governing Body in November 2017, but a technical cooperation between the ILO and the Qatari government was agreed on.

²⁷ A kickback in this context could be an irregular payment to a party for providing favorable treatment, such as a recruitment agency paying a company’s human resources officer to obtain the company’s service order award. This expense is then eventually passed on to the migrant worker.

²⁸ Segall and Labowitz, *supra* note 8, p. 3.

²⁹ For a comprehensive analysis of the political economy of forced labor, see G. LeBaron et al., *Confronting the Root Causes: Forced Labour in Global Supply Chains* (2018), available at: www.opendemocracy.net/beyondslavery/genevieve-lebaron-neil-howard-tybosthobos-penelope-kyritsis/confronting-root-causes.

³⁰ See Business and Human Rights Resource Centre’s research project on construction awards in the Gulf here: www.gulftracker.business-humanrights.org/gulf.

³¹ More common in the hospitality than in the construction sector.



Direct hiring of workers is the exception. To minimize legal and operational responsibilities, many tasks are outsourced. Employers of construction workers might be third or fourth-tier subcontractors of a main contractor. Recruitment is often delegated to a network of recruitment agencies that may include local manpower companies, recruiters based in countries of origin and local subagents. Government agencies in both origin and destination states may fail to regulate, monitor and enforce recruitment and labor standards.

In sum, the problem of forced labor is created by many actors, over whom the main contractors at the top do not always have a full overview. The longer the chain of outsourcing, the higher the risk of encountering labor rights infringements along it. Back in Europe, transnational companies claim that it is nearly impossible for them to track this process. This may be true, but by participating in a system that allows them access to labor at a minimal cost, they can potentially benefit from and be complicit in forced labor.

III. Legal accountability of transnational corporations and access to justice

This chapter discusses the legal basis and procedural viability of transnational litigation against corporations in their home country for forced labor that occurs in their globalized supply chains abroad. This transnational focus is needed to address the globalized economic structures that sustain forced labor complementing strategic litigation actions that address state responsibility or local corporate actors in domestic forums.

We will focus on transnational litigation options that directly address human rights violations rather than other approaches in commercial, tax or anti-corruption law. We believe that victims and survivors of human rights violations should be at the center of human rights litigation. While a legal proceeding against a transnational corporation might be difficult to win in the courtroom, the process of building and realizing a litigation project should aim to generate positive impacts for victims and survivors, such as self-empowerment, reclaiming agency, transforming a victimizing experience, undoing injustice and shifting the system.

In cases at the domestic level that have not involved transnational companies, NGOs have achieved important successes through Public Interest Litigation. In Nepal, for example, the Supreme Court has issued orders to the government to introduce reforms to curb forced labor, such as decentralizing investigations into recruitment abuses and introducing bilateral agreements with destination countries that include the appointment of labor attachés.³²

State responsibility has also been successfully addressed in international fora, such as the European Court for Human Rights³³ and the Court of Justice of the Economic Community of West African States.³⁴ Both venues have provided important clarification regarding the concept of forced labor in international law.

Corporate actors have been addressed in several domestic legal cases, mainly in common law jurisdictions. The case of *David vs Signal International*³⁵ marked an important achievement, as a US construction company had to compensate Indian migrant workers for forced labor. The relatively simple corporate structure of the company and the fact that the case was located in only one jurisdiction contributed to the workers' success. Other cases have been rejected³⁶ or questioned³⁷ at admissibility level in domestic jurisdictions, often because transnational business relationships were not considered to sustain a liability argument.

To date, there have been several transnational attempts to bring corporate actors to justice for forced labor in the Gulf. FIFA has been called to respond in an OECD complaint proceeding³⁸ and was also a defendant in a civil action in Switzerland filed by Dutch trade union FNV together with a migrant

TRANSNATIONAL LITIGATION

means cross-border litigation, often before a domestic forum, where elements such as parties, investigations, evidence and applicable law are spread across various countries.

³² Interview with Migrant Forum Asia on 5 November 2018.

³³ *Chowdury et al vs Greece*, Decision of 30 March 2017, *Rantsev vs Cyprus and Russia*, Decision of 7 January 2010, *Siliadin vs France*, Decision of 26 October 2005.

³⁴ *Hadijatou Mani Koraou vs Niger*, Decision of 27 October 2008.

³⁵ *David vs Signal International*, 735 F. Supp. 2d 440 (E.D. La. 2010) (United States District Court, E.D. Louisiana).

³⁶ *Adhikhari vs KBR*, (US District Court for the Southern District of Texas, Civil action No. 4:16-CV-2478 (*Adhikhari II*)), to be distinguished from the parallel case against the local company, *Adhikhari vs Daoud & Partners* (Civil Action No. 4:09-CV-1237).

³⁷ *Araya et al vs Nevsun Resources Ltd.*, (Supreme Court of British Columbia, 2016 BCSC 1856).

³⁸ Organisation for Economic Co-operation and Development (OECD). The case was concluded with an agreement by both parties on a continued engagement on several topics, including FIFA's use of leverage towards actors in Qatar, labor inspections, and a complaint mechanism for workers (www.tuacoecdmguidelines.org/CaseDescription.asp?id=185).



worker from Bangladesh, which was rejected as inadmissible.³⁹ Meanwhile, the French construction giant Vinci was subjected to criminal investigations in France for forced labor on construction sites in Qatar.⁴⁰ However, these actions remain few and far between, with no positive precedents generated so far.

We will now look into the legal basis of such actions against forced labor in the Gulf, as well as their procedural and forensic hurdles.

BASIS FOR LIABILITY IN INTERNATIONAL LAW

The exploitative labor conditions we found in the Gulf can amount to forced labor. Forced labor is prohibited by the International Covenant on Civil and Political Rights (ICCPR)⁴¹ and the two fundamental ILO Conventions on Forced Labor (C-029 and C-105),⁴² as well as further international instruments. The ILO defines forced labor 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 him (or her)self voluntarily.*”⁴³

Whether or not someone offers him (or her)self voluntarily for work must be assessed by all relevant circumstances.⁴⁴ Workers do not offer themselves for work voluntarily when an employer takes advantage of their vulnerability in order to exploit them.⁴⁵ Thus, in most cases, deception of migrant workers regarding expected salaries invalidates consent, as it increases their vulnerability, particularly when they have significant debts. This means that recruitment malpractice, such as high recruitment fees and deception, creates a concrete risk of forced labor. Confiscation of passports, restricting access to wages, withholding legal residence papers with the resulting risk of detention or deportation and not providing an exit permit or non-objection certificate all can amount to *the menace of any penalty, constitutive of forced labor.*

Forced labor and other extreme forms of labor exploitation of migrant workers go hand in hand with human trafficking. Human trafficking is the process through which individuals are placed or maintained in an exploitative situation for economic gain, such as forced labor.⁴⁶ The home states of many transnational corporations engaged in managing construction sites in the Gulf, as well as many migrant workers’ states of origin, have ratified the relevant ILO Conventions, the ICCPR and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.⁴⁷

These human rights conventions pose obligations on the state parties to respect and not violate human rights, to protect from abuses by third parties and to fulfil the enjoyment of human rights through positive measures. In that respect, individuals can file complaints before the UN Human Rights Committee against a state under the ICCPR, if the respective state has signed the Optional Protocol to the ICCPR. Qatar, for example, has not.⁴⁸ The UN Special Rapporteurs on contemporary forms of slavery, on the human rights of migrants and on trafficking in persons can also be approached to request country visits, act on individual cases and send communications to states to highlight violations and abuses connected with forced labor. At the ILO level, member states, ILO delegates or the ILO Governing Body – but notably, not the affected individuals themselves – can file a complaint against another member state for not complying with the ILO Convention on Forced Labor.⁴⁹

³⁹ For an analysis, see N. Bueno, “La responsabilité des entreprises de respecter les droits de l’homme”, *Aktuelle juristische Praxis – Pratique juridique Actuelle*, 8/2017.

⁴⁰ On 31 January 2018, the public prosecutor closed the investigation. Sherpa, the organization that was involved in filing the complaint, has announced that it will file a criminal indemnification to refer the case to an investigative judge.

⁴¹ Article 8 of the Covenant prohibits forced labor.

⁴² See for Qatar’s ratifications of the respective conventions: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103429.

⁴³ ILO Convention No. 29 (1930).

⁴⁴ *Chowdury et al vs Greece*, Decision of 30 March 2017, p. 96.

⁴⁵ *Ibid.*

⁴⁶ United Nations Human Rights Office of the High Commissioner, *Human Rights and Human Trafficking, Factsheet 36* (2014), p.1. Human trafficking differs from the smuggling of migrants in the sense that in the case of the smuggling of migrants, the focus lies on the movement across an international border for profit, whereas with trafficking, the purpose is eventual exploitation.

⁴⁷ Saudi Arabia has ratified the Protocol with a reservation to Article 6(3)(d), Article 7(1), and stated that it is not bound by Article 15(2) of the Protocol. Qatar and the UAE have acceded to the Protocol with similar reservations. Saudi Arabia and the UAE are not state parties to the ICCPR. Qatar acceded to the ICCPR stating that it was not bound by Articles 3 and 23.4, making exceptions for the application of Sharia law, and stating that in relation to Qatar’s interpretation of the term “trade unions” and all related matters of Article 22, this shall be in line with the Labor Law and national legislation and that it reserves the right to implement the article in accordance with such understanding. Qatar’s accession is a positive step as Qatar is now legally obliged to respect, protect and fulfil the range of rights guaranteed by the ICCPR for everybody within its territory, without discrimination – which includes the hundreds of thousands of migrant workers currently building its World Cup infrastructure, or employed as domestic workers.

⁴⁸ Statuses of ratification of all countries available at: www.indicators.ohchr.org/.

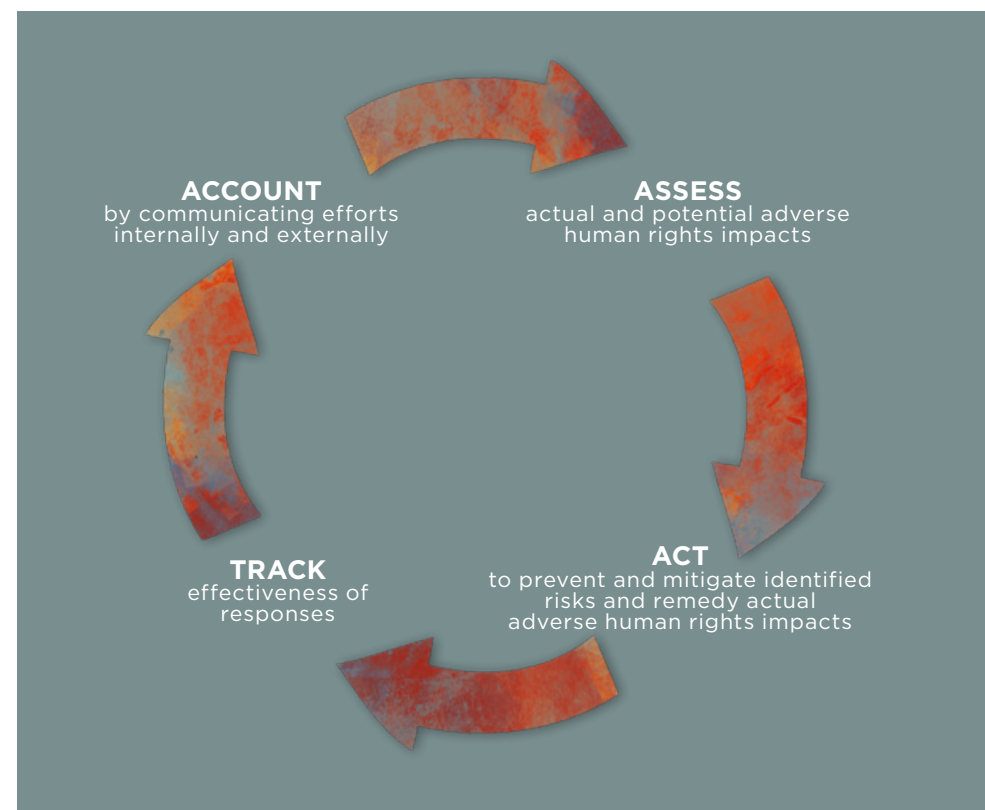
⁴⁹ See ILO Constitution Articles 26 to 34, available at: www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

However, this publication will not discuss the international human rights mechanisms available to address state responsibility in detail, but instead focus on transnational litigation against transnational corporate actors.

The mentioned human rights conventions do not pose obligations on private companies, nor do they provide mechanisms for legal accountability. Yet, non-binding international human rights standards for private companies do, of course, exist. The 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs) confirm that corporations have a responsibility to respect – but not to protect or fulfil, like states – human rights. That means they must help prevent human rights abuses, including forced labor, and provide remedy for such abuses if they occur. This responsibility applies not only to the relevant company or its corporate group, but to all of its business relationships: subsidiaries, subcontractors, agents, joint ventures and suppliers.⁵⁰

The UNGPs explain what is expected of companies in terms of human rights due diligence, also in cases where companies are not directly committing human rights abuses, but contributing to them. Human rights due diligence is a continuous practice, consisting of four steps:

HUMAN RIGHTS DUE DILIGENCE



The OECD Guidelines for Multinational Enterprises provide a soft law complaint mechanism against companies in case of human rights abuses.⁵¹ Communities and individuals affected by corporate activities can submit their complaints to the competent mechanism, the National Contact Point. Most European states have such a Contact Point and can receive complaints against European multinationals.⁵² The National Contact Point provides for a specific instance procedure, aimed at resolving the conflict through dialogue or recommendations. This procedure does not provide for legal accountability in the strict sense, which is the focus of the following sections.

⁵⁰ Principle 13 of the UN Guiding Principles on Business and Human Rights, available in various languages at: www.business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles.

⁵¹ The OECD Guidelines for Multinational Enterprises define standards for socially and environmentally responsible corporate behavior. They include provisions on human rights, environment, bribery, due diligence and supply chain responsibility, available at: www.oecdwatch.org/oecd-guidelines.

⁵² Currently, 48 states have National Contact Points. These are mostly in Europe and the Americas, very few in Africa and Asia, none in the Gulf region. OECD Watch (www.oecdwatch.org) and the Trade Union Advisory Committee (TUAC) (www.tuacoecdmguidelines.org) provide guidance to trade unions and civil society organizations who wish to file complaints.

BASIS FOR LIABILITY IN DOMESTIC CRIMINAL LAW

Situations of labor exploitation in Qatar might amount to several crimes under domestic laws in companies' home states, as well as migrant workers' destination and origin states. Despite the existence of relevant legislation, however, other hurdles may obstruct accountability.

The crime

Most, if not all domestic legal orders criminalize **forced labor and human trafficking**.

If the facts of a case do not fulfil all elements of the crime of forced labor or human trafficking, they might still qualify as another crime. For example, in the case of contract substitution, a person signs a binding recruitment agreement and accrues debts under the false impression that they will receive a much higher salary upon arrival in Qatar than they will eventually earn. This could amount to **fraud**, generally defined as tricking a person into financial decisions detrimental to their own interest.

As another example, **health and safety incidents** like work accidents are not directly constitutive of forced labor, but they may – depending on the case – qualify as **manslaughter or bodily harm caused by negligence**.

Those responsible

When assessing if a transnational actor, whether an individual or a corporation, is criminally liable for a crime in its domestic jurisdiction, it is necessary to identify which specific conduct of theirs contributed to the commission of a crime. An employer who hires and keeps workers under exploitative conditions might be directly committing the crime of forced labor. However, business partners who effectively facilitate, encourage or instigate forced labor (aiding and abetting), or who do not prevent the crime from occurring when it lies within their power to do so, might also be held criminally liable.

Many companies are indirectly involved in forced labor and might still be complicit.

What conduct qualifies as effectively facilitating, encouraging, or instigating a crime like forced labor? Although the law is often expected to give clear-cut answers, legal definitions are abstract and need to be substantiated with good arguments, based on the facts of each case. Two critical arguments for proving criminal liability involve demonstrating that the facts of a case show that company officers (1) had knowledge of the risks and (2) did, in effect, help or encourage the direct perpetrator, e.g. the employer.

CRIMINALIZATION OF FORCED LABOR AND HUMAN TRAFFICKING – EUROPEAN LEGAL ORDERS COMPARED

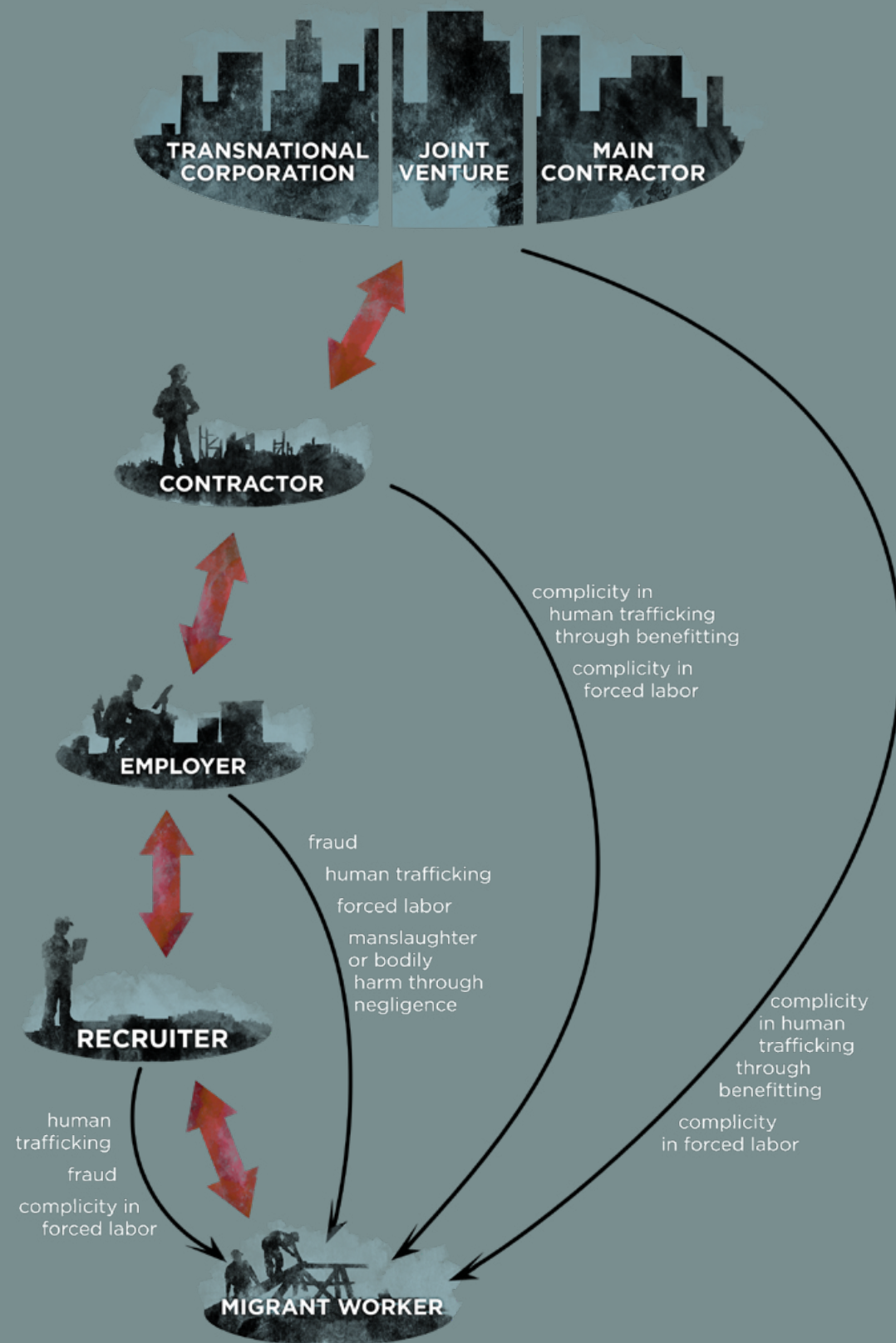
In domestic legal jurisdictions, the definitions of the crimes of forced labor and human trafficking may differ from their definitions under international human rights law.

Under **German criminal law**, the labor exploitation component, set out in Articles 232-233 of the German Criminal Code, which applies extra-territorially, does not correspond to the provisions of the ILO Convention No.29 or the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. German law considers labor conditions to be exploitative only when they are in a “striking disproportion” to labor conditions of workers with similar employment. As such, this provision covers fewer cases and seems unsuited to address situations of generalized exploitation, which can be found for unskilled and low-skilled migrant workers in the construction or domestic labor sectors in Qatar or other Gulf countries, where there is no comparable national work force.

In the United Kingdom, the 2015 **Modern Slavery Act (MSA)** construes its criminal provision on forced labor with an explicit reference to Article 4 of the European Convention on Human Rights, which prohibits slavery and forced labor. The MSA applies to crimes committed abroad, including where a person is trafficked from country x to country y and enters or leaves the UK.

In **Spain**, under Article 311 of the Spanish Criminal Code, which applies extraterritorially, all imposition – through deceit or abuse – of conditions that may jeopardize working or social conditions constitute a criminal offence. This includes all sorts of violations of legally or contractually established labor rights. Violence or intimidation are aggravating circumstances.

In the **Netherlands**, Article 273f (1)(6^o) of the Dutch Criminal Code criminalizes the act of profiting from exploitation. Based on this provision, in the Netherlands in November 2018, a criminal complaint was filed against a Dutch company that bought products from a Polish manufacturer where migrant workers were employed under severe labor conditions. (More on the case at www.prakkendoliveira.nl/en/)



For example, assuming a worker has been trafficked⁵³ into forced labor, then:

The **recruiter and sub-recruiter** may be responsible for trafficking, but also for aiding and abetting forced labor, if they knew or were informed beforehand about the risk of forced labor.

The **contractor** of a sub-contractor who exploits workers is not criminally liable if the contractor does not know that the sub-contractor uses forced labor. However, lack of knowledge is no longer an excuse if such knowledge is brought to the contractor's attention, for example by an NGO report, a lawyer or investigative journalist. Whether the contractor has facilitated or encouraged forced labor will depend on the specific setup of the business relationship. This is where whistleblowers can be very important.

For a **main contractor** who works with a large web of sub-contractors in several tiers, the required level of closeness to the direct perpetrator to show facilitation or encouragement, thus triggering criminal liability, may not exist. However, lack of knowledge of one's own supply chain and the forced labor risks within it still breaches human rights due diligence standards.

In a **joint venture**, the diversification and delegation of tasks might be such that one joint venture partner is in charge of hiring and managing the labor force for the entire project. However, a joint venture relies on mutual cooperation precisely because each partner needs the others to implement a project. Thus, if forced labor cases are brought to the attention of any of the partners and they remain unresponsive, even if they are not the partner in charge of the labor force, criminal liability may arise on the basis of effective facilitation or encouragement.

Where a **parent company** effectively controls its subsidiary both financially and operationally, the mere knowledge of management in the parent company of a human rights abuse occurring at the subsidiary's level might lead to criminal liability of the parent company.

Procedural and forensic challenges

The particular challenges of criminal proceedings for human rights litigators are:

Various jurisdictions: In transnational forced labor cases, relevant facts must often be investigated in several jurisdictions. For example, in Nepal, a worker was recruited through the illegal charging of fees. The employer in the destination country, say, Qatar, might have sent an officer to coordinate the recruitment process in Nepal and, as such, might have knowledge of the illegal charging of fees. The labor abuse might only occur in Qatar. Whether a transnational contractor, parent company or joint venture partner knew of or supported this practice might still have to be investigated in its home country, for example Italy, where the company has its offices, with relevant documentation or witnesses. In practice, the **absence of mutual legal assistance treaties** greatly hampers the ability of prosecutors in home states, states of origin and destination states to obtain evidence from other jurisdictions.

Availability of evidence: Illegal practices may not be documented. For example, pay slips might show correct salary amounts, despite illegal salary deductions by employers. Similarly, workers may not receive receipts for the payment of

⁵³ Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (2003), defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

illegal recruitment fees. Where there is no documentary evidence, one has to rely on witness testimonies. Workers are often key witnesses, but frequently do not feel free to give comprehensive accounts of their experiences due to fear of reprisals for incriminating their employer, recruiter or relevant contractor.

Complexity of corporate structures: Where not only the direct employers/recruiters are examined, but also complex business relationships, it can require specialized corporate investigation skills, as well as transnational judicial assistance.

Lack of corporate criminal liability: Not all legal systems provide for corporate criminal liability. In these cases, criminal actions need to be individualized, which runs counter to the way corporations function, namely through the diversification of tasks and responsibilities. A complex situation of forced labor or trafficking may be the result of many individual actors in various units of a business network.

Prosecutorial discretion: Prosecutors have high workloads and must prioritize. The described difficulties at the investigative level may lead a prosecutor to close an investigation against a company or company officer if it shows no clear likelihood of positive results.

BASIS FOR LIABILITY IN CIVIL LAW

Civil law regulates the relations between private persons. A worker who suffers abuses during recruitment or at work might first consider suing their recruiter or employer, respectively. Yet, often such cases do not yield much success, particularly if the defendant is not financially solvent or the judgement is not effectively enforced.

In addition to recruiters and employers, transnational litigation can also address corporate actors further up the supply chain. This is appropriate if one aims – as is the case with strategic litigation – to provoke structural changes, given that structural change is not a matter for migrant workers' countries of origin alone. Companies' supply chains should also be addressed: local and transnational contractors, parent companies and joint ventures that win tenders and outsource the project work and, with it, the responsibility towards workers.

Tort law

Labor law generally does not apply outside the relationship between employer and employee.⁵⁴ For labor cases seeking to address other actors in the supply chain, tort law is generally the option available. For example, if the Nepali worker in the example above filed a tort case against the Italian joint venture partner of her Qatari employer, an Italian court would hear the claim and it would decide according to Qatari tort law. While tort law differs from jurisdiction to jurisdiction, the basic ground rules are largely equivalent in common and civil law jurisdictions. Because many states retained the legal systems imposed by colonial powers, rules like the standard of care in tort law, equivalent to that of a “reasonable person” in both common and civil law systems, can be seen “as a universal rule that applies between people, business and public bodies.”⁵⁵ One can sue another for damages if the other has breached a duty of care, i.e. not observed the necessary due diligence, and as a foreseeable consequence, has caused harm to the plaintiff.

⁵⁴ In some countries, for example the Philippines, joint and several (individual) liability rules apply in such a way that a worker can sue their recruiter for claims against a foreign employer.

⁵⁵ C. van Dam, “Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights” (2011), 2 *JETL* 221, p. 237.

Human rights abuses often involve harm in the sense of tort law, where the concept of harm not only relates to financial or economic damage, but can also include moral damage, such as pain and suffering.⁵⁶ Deprivation of freedom of movement, loss of property, or loss of health will, of course, produce harm. Even though this harm cannot be undone through financial means, the rules of tort law provide for the possibility of compensation for damages.

For cases of labor exploitation that occur in the supply chain, the question arises whether, next to the employer, also the (transnational) main contractor, parent company or joint venture partner has breached its duty of care, or, in other words, whether it has failed to apply the relevant due diligence standards. The applicable due diligence standards can be found in laws, but also in relevant soft-law standards or customary practice.⁵⁷ In that respect, it is arguable that a judge should – in line with the state's duty to protect and provide effective remedy – acknowledge that the human rights due diligence standards of the UNGPs can be applied (next to statutory provisions) to show whether the transnational corporation has breached its duty of care along the supply chain. How the UNGPs can work in practice will be discussed in the next chapter.

Those responsible

When assessing if a transnational actor, whether an individual or a corporation, is responsible and can be held liable for damages incurred by a migrant worker, it is necessary to determine whether this actor has breached its duty of care towards the migrant worker. The content of this duty varies from actor to actor:

An **employer's** duties of care towards their employees are described in the applicable labor law.

A **parent company** that exercises de facto control over its subsidiary also owes a duty of care to the subsidiary's workers, as established through jurisprudence.⁵⁸

A **main contractor** that works with a network of sub-contractors in several tiers has a due diligence obligation under the UNGPs to know the supply chain and make the best possible use of his or her leverage to help prevent and mitigate human rights abuses. This might include mandatory stipulations in supplier contracts – at least with its first tier partners, closest to them in their supply chain – against forced labor and recruitment malpractice, accompanied by effective sanctioning mechanisms.

A **recruiter**, under joint liability and several (individual) liability rules applicable in some jurisdictions, must respond to claims brought against the foreign employer.

For a tort action to be successful, the **plaintiff** carries the burden of proof and must show that the defendant – the employer, recruiter, or company (executive) – did not observe the applicable due diligence obligations and, hence, breached a duty of care that resulted in a foreseeable harm. To prove that the harm was foreseeable, the plaintiff must show that the defendant had knowledge of the risks.

Human rights litigators and labor rights organizations can investigate a specific supply chain and inform all relevant actors within it about forced labor risks and incidents. They can challenge corporations on their human rights

⁵⁶ The type of harm that falls under tort law differs per country. In certain jurisdictions, false imprisonment, personal injury and harassment would also be covered. Under English law, moral damage can include pain, suffering and loss of amenity, but is only actionable if there is a physical injury or recognized psychiatric illness.

⁵⁷ Van Dam, *supra* note 55, p. 241.

⁵⁸ *Ibid.*, p. 248. See also *Chandler vs Cape plc* (2012) EWCA Civ 525 (Court of Appeal of England and Wales).

due diligence processes, which should have prevented them from committing or contributing to human rights violations for which they could be held liable under tort law.

Procedural and forensic challenges

Access to justice: Migrant workers are often not aware of their rights or the possibility that they can file a court case for abuses suffered. Moreover, costs of legal representation may be prohibitive, particularly considering existing debts and other obligations. For transnational cases involving multiple jurisdictions, a network of lawyers with a wide range of legal expertise will have to collaborate with each other, which increases effort and costs.

Fear of repercussions: For most workers, becoming a plaintiff in a tort case is not an attractive prospect, as they are intimidated and fear losing their job and being blacklisted from future work. Procedures can be lengthy and there are few encouraging precedents of successful tort cases.

Evidence: Evidentiary challenges were already highlighted under the section on criminal law. These challenges are aggravated in civil law cases because it is the workers, as plaintiffs in civil suits, who bear the heavy burden of proof, which often fails to reflect their lived realities.⁵⁹ Migrant workers might not know the exact name of their employer, much less the names of contractors. Some may not remember the names of their recruiters or have relevant paper work. Illegal payments often leave no paper trail. Even more difficult for workers is proving the concrete relations between recruiters, employers, contractors and parent companies. Discovery is not available in several jurisdictions and, where it is, it is difficult to handle without expert assistance.

Statute of limitations: Limitation periods in tort actions are often between one and two years only. This is too short to organize a transnational legal action that requires investigations in several countries, in different languages and with evidentiary challenges as described.

Lack of enforcement: If the defendant company has become insolvent or has transferred its assets to another country by the time the case is won, the worker may never see compensation.⁶⁰

STRUCTURAL OBSTACLES TO ACCOUNTABILITY AND ACCESS TO JUSTICE

During the research for this report, none of the cases in which we identified serious rights infringements would make a suitable case for strategic litigation. This is not because the workers we interviewed failed to remember relevant details, but due to structural factors:

Workers' vulnerability and lack of access to justice: As highlighted before, many workers who are forced into labor are vulnerable at multiple levels, with their jobs being existential for them. This dependency and a lack of information about their rights and remedies often prevents them from bringing legal claims in response to labor abuses.

No trade unionization: Not only are migrant workers unable to organize in trade unions in Qatar, but also in many other countries, including in Europe.

They may be prohibited from joining unions by law, or they may be prevented from doing so by their lack of legal residence status or formal labor contracts. As a consequence, they frequently lack access to training, collective action platforms and support for complaints. Trade unions can be valuable partners in strategic litigation cases for advocacy reasons and, particularly in cases of forced labor, can play an important role in counteracting structural disadvantages by strengthening workers through collective action. The inaccessibility of trade unions structurally perpetuates workers' vulnerability to forced labor and labor exploitation.

Corporate risk diversion through globalized business structures: The diversification of business structures, from shareholding to outsourcing, is used as an incentive for investment by reducing risks through decentralization. The flipside of this is that actors in and evidence of exploitation and abuse are spread out across different units and even jurisdictions with little to no transparency. This makes it practically impossible to identify, attribute and prove individual actions and responsibilities.

THE ROAD TO JUSTICE



⁵⁹ In the Philippines, for example, the rules on evidence put the burden on the employer to prove payment when the worker alleges non-payment for the reason that it is the employer who is in possession of pay-slips, and other related documents.

⁶⁰ Corporate structures involving a parent company with a mass of subsidiaries are often used to separate risks from assets. A subsidiary can be used to carry out risky operations whilst at the same time having limited assets, causing it to remain without capital if found liable. See P. Morgan, "Vicarious Liability for Group Companies: the Final Frontier of Vicarious Liability?" (2015), *Journal of Professional Negligence*, p. 279.

IV. Moving forward: Suggestions

A complex situation with multiple causes requires a multi-actor and multi-level approach. Many different actors are engaged in the struggle against forced labor, from international trade union organizations to local migrant organizations, governments, inter-governmental organizations, lawyers and investigative media, as well as workers and corporations themselves. What this study offers to all of them is a clarification of the international standards of legal accountability for forced labor along corporate supply chains, with a special focus on transnational business relations and structural obstacles for workers' access to justice. This chapter offers suggestions on how to move forward despite these obstacles. It offers ideas to a variety of stakeholders for responding to the challenges of a transnationally organized economy.

FROM ACCOUNTABILITY TO COMPLIANCE

Thanks to the increased level of public reporting about forced labor in the Gulf region, transnational construction companies in Europe and elsewhere are becoming more aware of the problems in their supply chains and their duty to help eliminate them. Today, no corporate director in the construction sector can claim ignorance of the risks involved in using complex corporate structures and supply chains. Indeed, companies have increasingly embraced the incorporation of human rights due diligence practices into their management, as required by the UNGPs, but also by binding legislation like the EU Non-Financial Reporting Directive (2014/95/EU), the UK Modern Slavery Act (2015) and France's Due Diligence Law (2017).

These laws oblige companies to develop systems to manage human rights risks, including in their supply chains. As detailed in the UNGPs, although a single actor may not be able to change an entire system, each actor must analyze its role and leverage, and develop its potential to contribute to long-term sustainable change. Yet, highly diversified business models can make it difficult for companies to act in accordance with the required human rights due diligence standards because companies do not always have a full overview of or control over every aspect of their supply chain. In addition, companies often do not see themselves as wielding relevant influence over or bearing legal responsibility for recruitment practices and labor conditions in their supply chain. When supply chains become too complex to control, legal remedies lose their capacity to serve as an effective corrective for corporate human rights abuses. This is when prevention, meaning human rights risk management through due diligence, becomes the main instrument for companies to ensure respect for human rights.

Sectors that rely on outsourcing their operations, such as construction, agriculture, food-processing, hospitality, garments, electronics and domestic or care work are known to be risk sectors for forced labor.⁶¹ As shown, bad recruitment

practices specifically increase these risks for forced labor. Hence, a company that operates through outsourcing in these sectors and continues to do business as usual, without verifying and acting upon bad recruitment practices in its supply chain, not only sustains the conditions for forced labor, but also risks complicity.

Even if the sub-agent of a recruiter in a rural province in India falsely promising a particular salary to an unskilled laborer may be at fault, this does not erase the responsibility of a transnational enterprise at the other end of the chain. The responsibility to perform human rights due diligence applies to recruiters, employers and any business partners of an employer that benefit from low labor costs in keeping prices for projects or final products down.

Recruitment practices are an issue for every compliance department in these companies. In assessing compliance with human rights due diligence, prevention efforts must be effective:

- General policies without monitoring or enforcement mechanisms are not enough;
- A policy that is only designed to cover one's own direct employees will not be suited to identifying and addressing risks for third party employees further down supply chains;
- Whistleblowing mechanisms that are only offered to employees and are not made accessible to persons within the supply chain and the general public are inadequate;
- A statement of corporate compliance with due diligence standards, such as an MSA Statement in the UK, that does not mention the risks of bad recruitment and corruption⁶² is an indicator of insufficient supply chain risk awareness;
- Proclaiming an expectation of fair recruitment, but not paying a recruitment agency the real cost of recruitment is clearly contradictory;
- A company that cannot show how it responds to high corruption risks in its supply chains and to the increased challenges where activities are undertaken in different jurisdictions lags behind its accounting responsibilities;
- If a company does not respond to the lack of access to justice for aggrieved workers, including subcontracted ones, through facilitating support or alternative grievance mechanisms, it lacks a relevant monitoring mechanism.

This exemplary rather than exhaustive list of indicators can help trade unions and NGOs publicly monitor corporate human rights performance and engage with companies.

⁶¹ LeBaron et al., *supra* note 29, p. 47.

⁶² MSA statements in the UK are limited in their scope. In addition, there is no provision for these to be challenged from the perspective of a third party.

CORPORATE HUMAN RIGHTS DUE DILIGENCE APPLIED

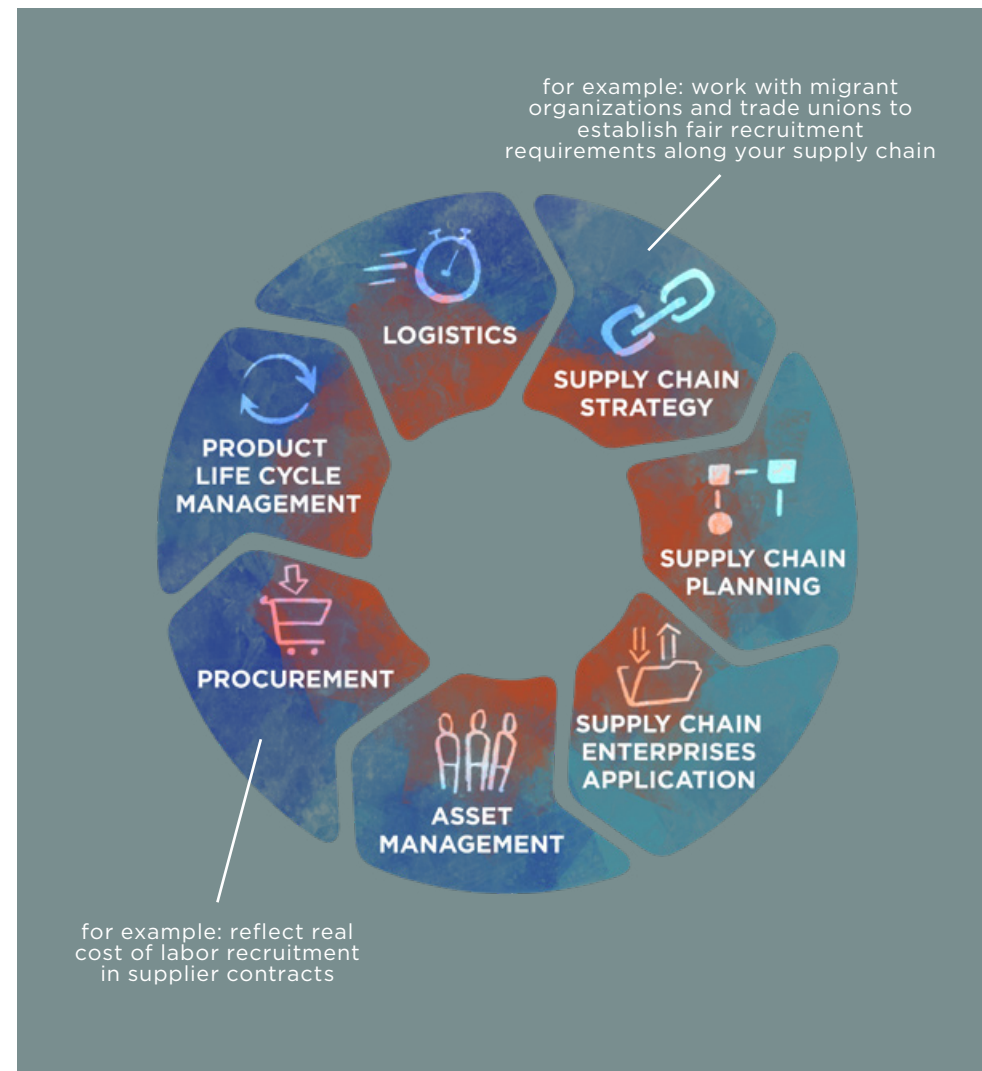
Transnational responses should begin with connecting international human rights standards, namely those elaborated in the UNGPs, with local realities. Below, and informed by suggestions from peers and partners,⁶³ we offer concrete suggestions for filling out the abstract principles of the UNGPs with specific content in relation to forced labor and human trafficking.

Human rights due diligence consists of a continuous procedure involving four major steps. For a transnational corporation with complex corporate structures and supply chains, and operating in a sector with a high risk of forced labor, such as construction, this can translate as follows:

ASSESS human rights impact

- Identify the supply chain and assess whether there are concrete risks of labor exploitation and forced labor along it;
- Conduct a study on real costs of recruitment.

HUMAN RIGHTS DUE DILIGENCE ALONG THE SUPPLY CHAIN



⁶³ These include several peer reviewers and conversations with BWI related to this report, as well as recommendations made in Segall and Labowitz, *supra* note 8.

ACT upon the findings

- Insert clauses into contracts with contractors and suppliers that allow for the imposition of fines or termination of contract upon findings of labor exploitation. Such clauses should also establish direct legal effect for the affected employees of the suppliers, so as to give them the right of legal action also against the contractors;
- As a minimum, apply the “employer pays” principle in relation to recruitment fees and be prepared to show how it is implemented;
- Build long-term relationships with recruiters and cover the real costs of recruitment;
- Include real costs of recruitment into bidding proposals;
- Until non-objection certificates are effectively abolished, provide them unconditionally;
- Allow freedom of association and organizing, as trade unions and work committees can help remedy and reduce the vulnerability of workers;
- Honor first-instance contracts and recruitment promises made to workers;
- Address the problem of demand letters and visa sales, e.g. by establishing a chain of custody, monitoring and sanctions;
- Establish recruitment standards for your own as well as sub-contracted labor, which could include:
 - Not hiring from countries where high fees are legal and making this policy public to motivate respective governments to move on the topic;
 - Working with ethical recruiters and obtaining expert advice from trade unions and migrants’ rights organizations;
 - Transparency in labor supply chains;
 - Direct hiring.

TRACK the impact of measures

- Do not overly rely on social audits, as these carry a number of conceptual and practical risks;⁶⁴
- To reduce limitations of audits, encourage better quality through liability clauses in contracts with auditors, and complement audits with other verification methods, especially for non-auditable issues like corruption and the effectiveness of grievance mechanisms;
- Proactively ask workers (including sub-contracted ones) about fees, debts, contract substitution (without requiring proof) and the withholding of legal documents;
- Establish independent worker-organized grievance mechanisms that include protection for migrant workers and allow structural problems to be identified and addressed in a structural rather than case-by-case manner;
- Enforce contract clauses upon findings of labor exploitation.

ACCOUNT for human rights risk management

- Collaborate with trade unions on labor inspections with the power to impose sanctions;
- Advocate for the registration of sub-agents until a “critical mass” of sub-agents are registered and can exert pressure on unregistered competition through peer monitoring.

⁶⁴ For more information on concerns related to social audits see: C. Terwindt and M. Saage-Maaß, *Liability of Social Auditors in the Textile Industry* (2016), available at: www.ecchr.eu/fileadmin/Publikationen/Policy_Paper_Liability_of_Social_Auditors_in_the_Textile_Industry_FES_EC-CHR_2016.pdf.

This list can serve as a pool of arguments for workers, migrant organizations, trade unions, litigators, corporations, governments and other relevant stakeholders. We do not pretend to offer a comprehensive scheme, but rather wish to encourage and inspire stakeholders, including litigators, civil society advocates and companies, to develop ideas further.

SUGGESTIONS FOR HUMAN RIGHTS LITIGATORS AND CIVIL SOCIETY ORGANIZATIONS

Transnational human rights litigation in business and human rights is still a rather young field, in which learning and growing is an everyday experience. ECCHR wants to share lessons and challenges we have faced to improve litigation options and access to justice in the future. We suggest:

Building genuinely collaborative transnational working relationships:⁶⁵ These relationships should involve genuine partnerships with local migrant organizations, trade unions, investigators and lawyers from the various jurisdictions involved. Local civil society structures are the most likely to ensure sustainability in the work towards change. Their spaces of action are increasingly threatened, precisely because their work is so powerful. For litigators from the Global North, it is important to deconstruct perspectives that view local actors as merely “support structures” for transnational strategic litigation projects. Litigation should not only use local actors’ knowledge, data and analytical expertise, but should be designed to serve and support their causes and demands. Local actors should demand the deconstruction of existing power imbalances and inequalities, and the construction of a common framework for collaboration.

Work transnationally: Support the transfer of successful milestones to other countries. While legislation and judicial review remain in the domestic domain, many actions can be copied or adapted in various jurisdictions in parallel, even if they require a certain level of adjustment. Sharing of experiences and knowledge between organizations and lawyers of different jurisdictions should be supported.

Use the networks at the earliest point: When considering a case for transnational strategic litigation against a corporation, it is important to liaise with different experts – and to build and maintain a broad and diversified network of such experts – as early as possible. The forensic standards of evidence for litigation against private actors as well as the use of various legal orders is new and challenging for human rights activists and litigators who are used to addressing state responsibility. Clarifying these questions at an early stage may be relevant for the viability of a case for the purposes of transnational litigation.

Develop the UNGPs: They are abstract principles that need to be filled with content. This is an opportunity for civil society stakeholders to claim this definitional power.

SUGGESTIONS FOR TRADE UNIONS

Trade unions can have an impact locally, but also transnationally through global unions and regional trade union federations. This power can be used to act for and in solidarity with those migrant workers who are prevented from organizing.

Include migrant workers in trade unions: The plight of forced laborers goes far beyond the construction sector in the Gulf. Across the world, construction work is one of several sectors with a high risk of labor abuses, next to agriculture, forestry, fishing, textiles and domestic work.⁶⁶ Across these sectors, it is often migrant workers who are at risk of forced labor and, due to their conditions as migrants, are unable to organize collectively. They may be prohibited from joining unions by law, or may be prevented due to the lack of legal residence status or formal labor contracts. Their exclusion from collective organizing will perpetuate the precariousness of labor conditions in these risky sectors.

Connect the local and the global: Trade unions can coordinate strategies and campaigns globally, across workers’ destination and origin countries, and corporations’ home states. They should also work with their relevant global unions or regional trade union federations. Specifically in Qatar, the ILO and international trade union federations are doing an important job and filling a much-needed role there by negotiating with transnational companies and the government. For this, they need the support from national unions who have the power to exert pressure on the central headquarters of transnational corporate groups and to strengthen broader trade union federations’ work.

Advocate for mandatory standards: Because of their experiences, knowledge and skills, trade unions are well placed to work towards mandatory recruitment standards, effective monitoring mechanisms and effective access to remedy. This could be done within their spaces of participation, such as worker councils, management councils and global networks for companies, with the aim of improving standards along the entire labor supply chains of a corporate group. The main challenge will be to extend the scope of action to include those workers who are currently deprived of direct labor protections in the global labor supply chain system.

Include questions related to access to remedy in pre-departure trainings for migrant workers: Trade unions in migrant workers’ countries of origin can empower current and prospective members seeking to work abroad by training them on their rights in destination states and explaining what information is relevant for proving a case of exploitation or abuse, including ways to document abuses for further forensic use.

Make human rights compliance a union interest: Trade unions have an interest in ensuring sound corporate risk management, good governance and corporate compliance. They can use their power to be involved in processes within companies that determine how compliance and human rights due diligence are handled in all units of these transnational companies.

SUGGESTIONS FOR STATES OF ORIGIN OF MIGRANT WORKERS

Some states of origin of migrant workers are strongly engaged in improving conditions and protecting the interests of their citizens who work abroad. However, the broad scope and structural dimensions involved in the business of cheap labor recruitment pose a particular challenge in terms of resources for monitoring and enforcement. States of origin can:

⁶⁵ A. Ancheita and C. Terwindt, “Towards Genuine Transnational Collaboration between Human Rights Activists from the Global North and the Global South” (2015), *Forschungsjournal Soziale Bewegungen*, available at: www.forschungsjournal.de/sites/default/files/downloads/fjsb_2015-4_ancheita_terwindt_engl.pdf.

⁶⁶ European Union Agency for Fundamental Rights, *Severe Labour Exploitation: Workers Moving Within or Into the European Union. States’ Obligations and Victims’ Rights* (2015), available at: www.fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf.

Enter into publicly accessible bilateral agreements and Memoranda of Understanding with destination states of migrant workers and home states of transnational companies in order to contribute to the protection of migrant workers through mandatory and enforceable regulations. They should also offer dispute resolution mechanisms for workers and provide for mutual judicial assistance.

Prosecute those charging illegal recruitment fees, this will serve as deterrence. Due to the transnational aspect of the conduct involved, states should consider establishing specialized investigation units for transnational and corporate investigations.

Include questions on access to remedy in pre-departure trainings for migrant workers, as well as information about how to prove and document your case of exploitation and abuse, for further forensic use. Offer the option for workers to grant a Power of Attorney to their respective origin state's embassy by default.⁶⁷

Adopt joint and several liability of the employer and the recruitment agencies for all claims of migrant workers arising from their overseas deployment. It will also allow migrant workers to pursue their claims against a foreign employer or recruiter after they have returned home.⁶⁸

Strengthen regulations to license recruiters through national laws: Monitoring systems and accessible complaint mechanisms should be in place to address non-compliances.

Extend mutual judicial assistance, not only in the field of anti-corruption, but also for criminal and civil proceedings and the execution of foreign court orders.

SUGGESTIONS FOR DESTINATION STATES OF MIGRANT WORKERS

Enter into bilateral agreements to enhance migrant workers' protection, see the first recommendation under "Suggestions for states of origin."

Strengthen enforcement and labor inspection: Ensure enforcement of the criminalization of passport confiscation and effectively abolish all requirements for exit permits and non-objection letters from one's employer.⁶⁹ Enforce existing domestic laws that grant protection to migrant workers and guarantee them equal treatment and access to effective remedy. Consider establishing specialized investigation units for transnational and corporate investigations.

Guarantee freedom of association and collective bargaining: This should be guaranteed for all workers, including migrant workers.

Intensify efforts in the field of mutual judicial assistance: This should not only apply to anti-corruption cases, but also to other **criminal and civil proceedings**, especially with states from which migrants or investments and business partnerships originate.

Introduce and implement uniform standards for the construction sector, to provide for an even playing field for competitors. Procurement requirements should include ensuring labor rights and proper labor conditions so that companies that take living-wage salaries and international labor standards seriously will not be undercut in bidding competitions.

Strengthen regulations for licensing recruiters through national laws: Monitoring systems and accessible complaint mechanisms should be in place to address non-compliances.

Avoid double standards, when it comes to labor rights protection, for example between sectors, or between national and foreign workers.

SUGGESTIONS FOR HOME STATES OF TRANSNATIONAL COMPANIES

Regulate extraterritorial activities of the economic sector: Extraterritorial obligations need to be regulated to ensure that human rights abuses are not outsourced to third countries. Recent regulations and proposals to regulate corporations focus on transparency. However, these should also include information about business relationships and must resolve the tension between the public interest in transparency for the sake of securing access to remedy versus private interests in keeping these relations secret from competitors.

Adopt mandatory human rights due diligence and liability legislation.

Include agreements on mutual judicial assistance in bilateral economic cooperation agreements: These agreements should not only apply to the field of anti-corruption, but also to other criminal and civil proceedings.

Investigate and prosecute transnational corporations for forced labor: Corporations that are involved in or benefit from forced labor or other forms of labor exploitation abroad, should be investigated and prosecuted. Due to the transnational conduct involved, establishing specialized investigation units for transnational and corporate investigations should be considered.

⁶⁷ This is a solution that has been proposed by Migrant Forum Asia.

⁶⁸ This suggestion follows the Philippine model. See Migrant Forum Asia, *Policy Brief 11: Joint and Several Liability of Recruitment/Placement Agencies with the Principal Employer under Philippine Laws*, available at: www.mfasia.org/migrantforumasia/wp-content/uploads/2015/06/policybrief_jointandseveral_liability_winter2014.pdf.

⁶⁹ In Qatar, Law No. 13 of 2018 to abolish the requirement of exit permits is an important positive step. However, its application should extend to all migrant workers, including domestic workers.

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Migrants at Kuala Lumpur airport being taken to a separate room.
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