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Immigrant Labour exploitation: the development of the "Corporate Due Diligence" as a new response to the phenomenon

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1. Introduction

One of the most complex challenge of today's society is the violation of fundamental rights related to labour exploitation which often results in a real enslavement, with the loss of the victim's ability to self-determination. This phenomenon is strictly linked with the development of migratory pressure, globalisation and economic competition.

Today, labour exploitation represents the choice made by several enterprises, at the expense of the migrant workforce, in order to unlawfully bypass their own manufacturing costs within an increasingly competitive and fierce labor market. The labour market is interested by a sort of *deregulation*[1] and it is characterised by a

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[1] R. DE PUNTA, *Diritto del lavoro*, Milano, Giuffrè, 2018, p. 7.

Contributo sottoposto a referaggio

reduction of guarantees in the employment relationship. On the one hand, strong economic operators has increased the power exercisable and, on the other side, the workforce is often forced to accept contractual conditions highly detrimental to human dignity[2]. In a high percentage, this workforce is represented by migrants who leave their Countries of origin in search of better living conditions in the hosting Countries, where unfortunately they can't benefit from social policies capable of removing them from a state of marginalization and of promoting their skills. This represents a huge social, humanitarian and economic challenge which has been to long undervalued and not well counteracted by national and international measures, except from a purely criminal point of view[3]. The phenomenon of labour exploitation, which is strictly linked with the trafficking in human being, is not confined to the sphere of organized crime but involves many activities and profiles that permeate entire sectors of the production system[4].

From a legal point of view, the issue under analysis is mainly faced by an top-down or a "governamental" approach that is to say by a set of rule posed by international and national legislative instruments that tried to regulate the phenomenon as a whole but they can't capture the infinite features of it.

The scope of the present research is to show the necessity of a change of perspective. Long term structural measures should in fact drift away from a merely top-down and criminal perspective and above all, by means of a multisector, bottom up and soft law approach, concern the responsibility of companies involved

[2] See E. SANTORO, *Diritti Umani, lavoro, soggetti migranti: procedure e forme di neo-schiavismo,* in T. CASADEI (ed.), *Diritti umani e soggetti vulnerabili, violazioni, trasformazioni ed aporie,* Torino, Giappichelli, 2012, p. 230; C. STOPPIONI, *Intermediazione illecita e sfruttamento lavorativo: prime applicazioni dell'art. 603-bis c.p.,* in *Diritto, Immigrazione e Cittadinanz.,* 2019, n. 2, pp. 70-94.

[3] L. TRUCCO, *L'evoluzione della normativa relativa allo sfruttamento lavorativo dei migranti/caporalato e fattispecie correlate*, in *Ius Migrandi*, FrancoAngeli, 2020, pp. 639-66; C. COSTELLO, M. FREEDLAND, *Migrants at work and the division of labour law,* in C. COSTELLO, M FREEDLAND. (eds.) *Migrants at work. Immigration and vulnerability in labour law*, Oxford University Press, 2014, pp. 1-26.

[4] Numerous international reports highlight the progressive expansion of the phenomenon on a global level. See, Council of Europe, *9th General Report on Group of Experts on Action against Trafficking in Human Beings* (GRETA) activities, 2019, available at rm.coe.int/9th-general-report-on-the-activities-of-greta-covering-the-period- from/16809e169e; United Nations, *Statement by Ms Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children*, 25.10.2019, in www.ohchr.org.

in the production system. This new approach can facilitate the emergence of a new collective consciousness that can help to prevent the rise of the phenomenon rather than fighting the consequences of it on a criminal level.

2. Labour exploitation, between Slavery, Trafficking and Forced Labor in the the International and European Law

At international and European level, the situation seems to be confused because it may be hard to determine whether labour exploitation should be included within the offence of "trafficking" or under the umbrella of the so called "modern slavery". Historically, International and European Human Rights Law relating to labour exploitation addresses specific phenomena, such as: slavery, servitude, forced labour and, more recently, trafficking in human beings. At the same time, labour law standards emerged in the framework of the International Labor Organization (ILO) in order to promote decent working conditions, including safety and health at work.

The question is much more complex considering that the boundaries between slavery and trafficking are not well defined. Moreover, it is not easy to define modern forms of slavery because no national or international instrument, today, includes any express notion of "modern slavery" and this lack generates continuous uncertainties. There is no certainty whether the general international rule on the prohibition of slavery offered by the first multilateral Slavery Convention of 25 September 1926[5] today may include new cases and current situations that are assimilated to slavery.

After the Second World War, thanks to the humsn rights movements, the prohibition of slavery was included in various Declarations and Charters, in particular in art. 4 of the Universal Declaration of Human Rights, adopted on the

[5] See, Slavery Convention, signed at Geneva on 25th of September 1926, entry into force on the 9th of March 1927, in accordance with article 12, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.13_slavery%20conv.pdf.

10th of December 1948 by the General Assembly of the United Nations[6], which explicitly prohibits slavery and servitude, as well as any form of slave trade. Among the regional instruments, art. 4 of the European Convention on Human Rights also prohibits slavery and forced labour. Similar norms are provided for in art. 6, entitled "*Freedom from slavery*" of the American Convention on Human Rights and in art. 5 of the African Charter. Finally, contemporary international criminal law includes slavery among the international crimes.

The most controversial question it that the notion of slavery, first codified in the aforementioned 1926 Convention, has been debated for a long time[7]. In fact, in art. 1.1 we read that: "*Slavery is the* status *or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised"*. The norm seems to refer to the condition of those who are legally considered as a "*private property*" and, therefore, deprived of all rights and completely subject to the will of the owner, thus approaching the condition in which slaves were considered as goods that could be sold (the so-called "*chattel slavery*"). But we must recall that legal slavery has been banned from all national legal system. So the 1926 slavery definition could appear, today, without meaning. That's why it was abandoned in its practical application by judges, even if it was not eliminated. Indeed, it was reproduced later in other international instruments such as the 1998 Rome Statute of the International Criminal Court. So, in the last year there have been many doctrinal studies aimed to "modernize" the 1926 definition in order to adapt it to new forms of slavery[8]. Today, in fact, the notion of slavery has further expanded to

[6] See. S. TONOLO, G. PASCALE, *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo,* Giappichelli, 2020.

7 See J. ALLAIN, *Contemporary Slavery and Its Definition in Law,* in A. BUNTING, J. QUIRK (ed.), *Contemporary slavery: Popular Rhetoric and Political Practice*, 2017, pp. 37-66; ID., *The Definition of Slavery in International Law,* in *Howard International Law Journal*, 239 ss.

[8] See C. DI STASIO, *Schiavi invisibili": minori stranieri non accompagnati*, in A. CALORE, P. DE CESARI (eds.), *Schiavi. Presente e passato,* I Quaderni-LaCIS II, Collana del Dipartimento di Giurisprudenza Università degli Studi di Brescia, Giappichelli, 2022, p. 209, where she recalls the works of the *Research Network on the Legal Parameters of Slavery* and the so called *Bellagio-Harvard Guidelines,* developed between 2010 and 2012, and aimed at guiding judges in understanding the current scope of the definition of slavery contained in the 1926 Convention. The group's work is published in J. ALLAIN (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford University Press, 2012.

include other new para-slavery practices whose characterizing element is no longer considered to be "*de jure*" property, as it was in the traditional notion of slavery, but the presence of "*de facto*" control on the person who can be considered equivalent to a form of possession when the "slave" is used, exploited and subjected to a power of management and control.

In order to modernize the existing 1926 Convention, on the 7th of September 1956 the States also adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery[9], undertaking to abolish specific cases such as debt bondage and serfdom. In any case, the Supplementary Convention does not give a definition of slavery or new forms of slavery.

Since there is not a definition of modern slavery and contemporary forms similar to it, uncertainties have also arisen in relation to the definition of "trafficking". There is a close relationship between trafficking and modern forms of slavery even if it is not easy to determine the boundary between the two offences. As far as trafficking is concerned, apart from the definition contained in the 1926 Convention and a series of bi-lateral and multi-lateral agreements from the early 19th century, more specific attention to this phenomenon was given only with the creation of the United Nations, which promoted a series of Conventions, mostly of a sectoral nature[10], which have produced a rather confused picture on the subject. However,

[9] See https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-4&chapter=18&Temp=mtdsg3&clang=_en.

[10] See for example: *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others*, approved by General Assembly Resolution n. 317 (IV) of 2 December 1949, entry into force on 25 July 1951, in accordance with article 2 https://www.ohchr.org/en/professionalinterest/pages/trafficinpersons.aspx; *Convention on the Elimination of All Forms of Discrimination against Women New York*, 18 December 1979, available at https://www.ohchr.org/en/professionalinterest/pages/trafficinpersons.aspx; *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly Resolution n. 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, disponibile all'indirizzo https://www.ohchr.org/en/professionalinterest/pages/crc.aspx; *Worst Forms of Child Labour Convention*, 1999 (No. 182), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, adopted and opened for signature, ratification and accession by General

only in December 2000, with the signature of the Palermo Convention against transnational organized crime[11], accompanied by two additional Protocols, not only the first internationally recognized definition of trafficking was provided, but alongside a merely repressive logic, complementary social protection measures for victims were for the first time regulated. This orientation is also reflected within the legislative framework of the European Union, both with the issue of Directive 2011/36/EU[12], which highlights for the first time the irrelevance of the consent of victims of trafficking, and the adoption of Directive 2009/52 /EC[13]. The latter, in addition to providing for sanctions against employers who hire irregular workers as their employer, contains the provision of information obligations on the means of protection provided for them.

The discipline of the Palermo Protocol was taken up and developed also by the 2005 Council of Europe Trafficking Convention[14], which had the merit of privileging the protection of victims of trafficking, through the adoption of provisions that introduce specific assistance and support measures.

Finally, it should be noted that, after the Palermo Protocols and the Convention on Trafficking of the Council of Europe, no new treaties have been signed at the international level, apart from the Protocol of 28 May 2014, no. 29 relating to the

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Assembly Resolution n. A/RES/54/263 of 25 May 2000, entry into force 12 February 2002, https://www.ohchr.org/en/professionalinterest/pages/opaccrc.aspx; *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly Resolution n. 55/25 of 15 November 2000, available at https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

[11] *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, adopted and opened for signature, ratification and accession by General Assembly Resolution n. 55/25 of 15 November 2000, available at https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

[12] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, in OJ L 101, 15.4.2011, p. 1–1.

[13] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, in OJ L 168, 30.6.2009, p. 24–32.

[14] https://rm.coe.int/168047cd70.

Forced Labour Convention of 1930[15]. This instrument, adopted to address the shortcomings of the oldest 1930 Convention, states, in its preamble, that forced labour is an offense to the fundamental rights and dignity of millions of men, women and minors. ILO works has highlighted, however, that the sole labour exploitation, in cases where there is also no actual subjection with deprivation of individual freedom, does not constitute a form of slavery[16]. At international level, and with particular reference to the activity carried out by the ILO, an attempt was made to define what is meant by extreme exploitation and forced labour[17]. The definition was not easy to reach and for this reason a special Committee of experts of the Organization was appointed which identified six indicators: physical violence, including sexual violence; the restriction of the freedom of movement of the persons involved; threats, including those of reporting to the authorities if the worker is illegal; work performed in the context of debt bondage or other forms of slavery; wages withheld or unpaid; the removal or seizure of passport or identity documents[18].

This brief reference to the norms of international instruments shows that there is a persistence, albeit unclear, distinction between slavery and trafficking as also international jurisprudence has underlined in the decisions we will analyze in the follow paragraph[19].

3. The position of the International Courts on Labour Exploitation, Trafficking and Slavery

[15] The Protocol, which is accompanied by a Recommendation entered into force on 9th of November 2016, but, to date, has not been ratified by Italy; the 1930 Convention entered into force on 1 May 1932. The texts of both instruments are published on the website https://www.ilo.org.

[16] See "*Forced Labour, Modern Slavery and Human Trafficking*", available at ILO www.ilo.org.

[17] See S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, 2018, Giappichelli, Torino.

[18] ILO, *Forced Labour*, cit. See also, L. CALAFÀ, *Il ruolo dei core labour standards e del decent work*, in Rivisteweb, 2019, 2.

[19] See N. SILLER, "*Modern Slavery" Does International Law Distinguish Between Slavery, Enslavement and Traffiking*, in *Journal of International Criminal Justice,* 2016, 14, n. 2, p. 405 ss.

It should be immediately pointed out that there are not many cases related to the modern forms of slavery, trafficking and labour exploitation decided by international Courts. This situation shows that the issues surrounding the new forms of slavery are elusive and the victims often invisible. Furthermore, as we have said, the conventions do not contain precise definitions.

In the first decision, *Siliadin* v. *France*[20] of 26 October 2005, the European Court of Human Rights refers to the definition contained in the 1926 Convention on slavery, interpreting it in a narrow way, like "chattel slavery" and bringing it back into rigid way to exercise the right of ownership over a person. Therefore in the decision, relating to a case of domestic exploitation of a minor, the Court offers a notion of forced labour qualifying it as an obligation to provide one's services imposed with the use of coercion. For the notion of forced labour, the Court, considering that the ECtHR, in art. 4, par. 2, does not offer a definition of forced labour, appeals to the ILO Convention of the 21 June 1930, n. 29, we have already mentioned.

In the subsequent case *Rantsev* v. *Cyprus and Russia*, the ECtHR, since trafficking is excluded by art. 4 of the ECHR, it states to include it in the offence of slavery. This ruling represents an important jurisprudential achievement, as it not only expressly established that trafficking in human beings falls within the scope of art. 4 of the ECHR, but also because it goes beyond the limited vision, linked to the traditional definition of slavery, that is a "*de jure*" slavery, adopted in the *Siliadin* case. However, the Court leaves the problem of the relationship between slavery and trafficking opened, since it is not possible to derive, from this ruling, sufficient elements to affirm that trafficking is fully attributable to slavery.

More recently, in the case of *S.M.* v. *Croatia* of 25 June 2020[21], the Court faces again the relationship between trafficking and slavery, confirming the previous jurisprudence, namely that trafficking, even if not provided for by art. 4 of the ECHR, constitutes a violation of it as it represents a threat to the rights and

[20] European Court of Human Rights, *Siliadin* v. *France*, n. 73316/01.

[21] European Court of Human Rights, *S.M.* v. *Croatia,* application n. 60561/14.

freedoms of the people who are victims of it. Once again, however, while making more complex arguments than previous decisions, it is not clear whether trafficking is itself a form of slavery or whether it represents an autonomous case.

Another important decision is the one pronounced in the case of *Chowdry et al.* v. *Greece* of 30 March 2017[22], where the Court states that the situation of the applicants, irregular immigrants who, in a region of Greece, worked in the strawberry harvesting business, in difficult physical conditions, without being paid and under the control of armed guards, constituted trafficking in human beings and forced labour and recognized in this case the violation of art. 4 of the ECHR. The sentence, like previous decisions, refers to the definition of forced labor pursuant to art. 2 of the ILO Convention n. 29/1930. The Court also adds some other useful observations. In particular, it considers that the expression "under threat of punishment" should be understood in an elastic way, because it must adapt to the notions of the contemporary age, seen from an evolutionary perspective and therefore it affirms that not all work must be considered forced, but only what is such as to create a disproportionate burden for the victim. The Court, however, unfortunately, does not set out general principles to explain what is meant by disproportionate burden for the victim and so they don't give a notion of extreme exploitation.

The Inter-American Court of Human Rights has also had the opportunity to address the issue of contemporary slavery in the well known case of 20 October 20 2016, *Hacienda Brasil Verde Workers* v. *Brasil*[23], concerning the responsibility of the State for not respecting the prohibition of slavery and servitude, provided by art. 6 of the American Convention on Human Rights. The matter submitted to the Court concerned a case of new slavery in one of the largest livestock farms, located in an area in northern Brazil. They were workers recruited from the poorest areas of that State convinced to leave their country with false promises. In the workplace they had been forced to work under the threat of violence and in inhumane conditions

[22] European Court of Human Rights, *Chowdury and others* v. *Greece*, application n. 21884/15,

[23] See *Trabajadores de la hacienda Brasil Verde* v. *Brasil*, sent. 22 August 2017, available at https://www.corteidhor.cr./docs/casos/ articulos/seriec_337 esp.pdf.

and not even paid the promised salary. More than three hundred workers had been released by the authorities, but no criminal convictions had been imposed on the company that had exploited them in an extreme way.

The Court focuses on the concept of slavery in the contemporary world starting from the classical notion contained in the 1926 Convention. Those judges tries to clarify the meaning of the expression "powers attaching to the rights of ownership" and, to this end, they uses the *Bellagio-Harward Guidelines*, developed by scholars of the Research Network on the Legal Parameters of Slavery stating that there is a situation of slavery only when there is control over the victim corresponding to possession, that is to say when the person is exploited in order to take advantage of it and his life is managed by isolating him from his previous social relationships. The Court also highlighted that, in these situations, the possession exercised over the person also involves the physical and psychological weakening of the same[24].

The input provided by the International Courts, and particularly by the European Court of Human Rights is significant. However, even maintaining a distinction from the ontological point of view, such bodies have been regarding both slavery and trafficking as serious violations of fundamental human rights, particularly as far as a "commercialisation" of the worker is concerned alongside the purpose of the conduct and the various coercive methods put in place.

4. A change of perspective: the 2011 "*United Nations Guiding Principles on Business and Human Rights (UNGPs)*".

The aim of the current analysis is to emphathise the necessity of an urgent change of course. Long term structural measures should drift away from a merely to-down and criminal perspective and above all, by means of a multisector approach, concern the responsibility of the production chains, through the adoption of a proper "code of conduct" they all should abide by. Although the majority of business enterprises were faced with a "human rights and business" agenda,

[24] See C. DI STASIO, *Schiavi invisibili,* cit.

attempts to define human rights duties for business enterprises, particularly multinational enterprises, have marked the UN agenda for several decades.

An attempt to formulate the UN *Draft Code of Conduct on Transnational Corporations* was abandoned in the late 1980s, and followed by polarising discussions over the *Draft UN Norms on Human Rights Responsibilities of Transnational Corporations and other Business Enterprises* (UN Economic and Social Council, 2003). These were adopted by the Sub-Commission on the Promotion and Protection of Human in 2003, but subsequently rejected by the UN Commission on Human Rights in 2004. Hence, neither of those efforts have yielded success, although undoubtedly they have contributed to advancing discussion and identifying the most contentious issues. Other international organisations, such as the Organisation for Economic Co-operation and Development (OECD) in the 1976 OECD *Guidelines for Multinational Corporations*, were more successful in addressing the challenges raised by companies' activities and outlining their responsibilities. These are binding on member States and consist of recommendations by governments to corporations on 'all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations. Another example is the *1977 International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. However, in both cases it was not until the paradigm shifting 2000 revision that the inclusion of a more detailed reference to human rights was ensured in their texts.

To overcome the highly polarised discussion on rules for companies and create grounds for a more constructive dialogue than existed in 2004 when the UN Commission on Human Rights rejected the Draft UN Norms, the mandate of the Special Representative of the Secretary General on Human Rights and Business (SRSG) was created in 2005. Unlike his predecessors, the SRSG decided against developing a new legal standard and focused instead on how to achieve the improvement of business respect for human rights. He based his approach on a 'smart mix' model, which amalgamated existing, binding legal obligations for

states, stemming from ratified international human rights treaties, and accepted the ethical/moral responsibility of business enterprises, coming up with what was soon to be described as 'principled pragmatism'. This new and initially very controversial approach proved successful. Not only did the Human Rights Council endorse the UN "Protect, Respect and Remedy" Framework presented by the SRSG in 2008, but his mandate was also extended when he was tasked with its operationalisation. The *UN Guiding Principles on Business and Human Rights (UNGPs)* developed subsequently by the SRSG were unanimously endorsed by the HRC on 16 June 2011 [25].

Resulting from six years of in-depth research, extensive multi-stakeholder consultations with an unprecedented variety of actors from all continents, as well as practical road-testing, the *UNGPs* clarified the duties and responsibilities of both States and businesses on tackling human rights risks related to business activities. Condensed into three pillars and comprising 31 Foundational and Operational Principles, they affirmed:

1. States' existing obligations to respect, protect and fulfil human rights against adverse impacts by non-state actors, including business (Pillar I: State Duty to Protect);

2. The responsibility of business enterprises to respect human rights (Pillar II: Business Responsibility to Respect); and

3. The need for State and non-sSate based, judicial and non-judicial remedies to ensure that rights and obligations are matched to appropriate and effective remedies when breached (Pillar III: Access to Remedy).

The value of the *UNGPs* lies in their providing practical guidance not only on "who" (State) and "what" (duty to protect), but also on "how" States can provide the appropriate policy and regulatory environment to foster corporate respect for human rights. They also identify specific areas where States interact with

[25] See Resolution adopted by the Human Rights Council, *Human rights and transnational corporations and other business enterprises*, 6 July 2011, A/HRC/RES/17/4, available at https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement.

businesses (e.g. State-Owned Enterprises, public procurement and privatisation, conflict-affected areas, international economic agreements, access to remedy, etc.) and articulate how these areas can be used as avenues to ensure corporate respect for human rights.

Within just a year of the *UNGPs* endorsement, an unprecedented level of alignment took place involving key standards as well as initiatives of global, regional and national reach, covering all geographic regions and business sectors. Among the first standards to be updated were the *OECD Guidelines for Multinational Enterprises*, which saw the addition of a whole new chapter focused on human rights in the business context, including the human rights due diligence recommendations. The ILO, through its work on a proposed resolution concerning decent work in global supply chains, refers extensively to the UNGPs. The UNGPs also saw an uptake at the regional level with the EU[26], the Council of Europe (CoE)[27] and the Organization of American States (OAS)[28] all undertaking concrete measures to support the UNGPs' implementation. Finally, various stakeholder groups are very active in their attempts to bring the UNGPs to the attention of their members as well as clarifying and adapting them to their own specific contexts.

[26] The European Commission's Communication on *Corporate Social Responsibility* (CSR) (European Commission, 2011) in 2011 not only set out steps and regulatory efforts aimed at contributing to the UNGPs' implementation, but also encouraged EU member States to incorporate those principles into their own national laws.

[27] On the 16th of April 2014, the Council of Europe first issued a *Declaration on the UNGPs*, stressing that their effective implementation by both States and business enterprises is essential to ensure respect for human rights in the business context. Subsequently, in 2016, the Committee of Ministers of the Council of Europe adopted the *Recommendation CM/Rec* (2016) on human rights and business. For information about the work of the CoE Steering Committee for Human Rights, see the Council of Europe Steering Committee for Human Rights website.

[28] The Organization of American States has so far adopted two resolutions of relevance to the UNGPs. The first, adopted in 2012, encouraged OAS member States to "promote corporate social responsibility programs and initiatives among the private sector, the community and other stakeholders"; to "promote among businesses operating in or from their countries the use of applicable corporate social responsibility initiatives, tools, and best practices", including the UN Guiding Principles on Business and Human Rights, and to 'encourage dialogue between legislative bodies and the private sector on the subject of corporate social responsibility' (OAS, 2012). The resolution adopted in June 2014 (OAS, 2014), was strongly supportive of the UNGPs and triggered the creation of measures to promote and implement them, including exchanges of information and sharing of best practices.

First references to the UN Guiding Principles have been slowly included in court decisions, which will add weight to the endorsement of the UNGPs, if not for moral reasons then at least to prove that companies are making an effort to prevent human rights abuses[29]. Such a unique global convergence of international standards and processes around the Guiding Principles and their core concepts carries additional value in helping to clarify, simplify and reinforce the implementation by both States and business enterprises.

5. Directs Impacts of *UNGPs*: *National Action Plan (Nap) on Business and Human Rights* and their Effectiveness in addressing violations and abuses

The most important result of the *UNPGs* was the approval of the first National Action Plans. The National Action Plans (NAPs)[30] are the Government-led policy strategies outlining strategic orientation and concrete activities to address specific policy issues. They comprise the key policy tools for States that want to honour their duties to protect against adverse human rights impacts by business enterprises in line with the UNGPs. They have been adopted in many fields, not only in the one under analysis.

The broad framing offered by the NAPs drafting process not only encourages the cross-governmental participation necessary to ensure horizontal policy coherence, but also "*allow[s] the government to make an assessment of the current legal-cum-policy framework so as to identify what is working and what is not in terms of ensuring that companies respect human rights*[31]". Most countries often have a vast "*legal framework*

[29] See for example: The Ontario Superior Court of Justice mentioned the UNGPs in *dicta* in Ontario Superior Court of Justice, 2013; High Court of South Africa, 2015. The Supreme Court of British Columbia rejecting efforts by Vancouver-based Nevsun Resources Limited (TSX: NSU / NYSE MKT: NSU) to dismiss a lawsuit brought by three Eritrean men who allege they were forced to work at Nevsun's Bisha Mine, the court references the UNGPs as part of the evidence introduced regarding the due diligence that the company undertook to avoid human rights abuses at the mine (Supreme Court of British Columbia, 2016: para 60-66). For more information about the case see for example: Canadian Centre for International Justice, 2016.

[30] More information about existing NAPs as well as other NAPs that are currently being developed is available on the BHRRC website – National Action Plans.

[31] As pointed out by S. DEVA, *Background Paper for India's National Framework on Business and Human Rights*, in *The Ethical Trading Initiative,* 2016, http://s3-eu-west1.amazonaws.com/www.ethicaltrade.org.files/shared_resources/india

that applies (albeit in a patchy manner) human rights norms to companies. Instead of adopting a piecemeal approach of reviewing different segments of this legal framework (such as labour laws or environmental laws), a holistic assessment that does not ignore the human rights impact of creating an environment conducive to private investment-driven development may be preferable[32]".

The advantage lies in their allowing States to identify and articulate their priorities as well as future actions in the area of concern, thus ensuring comprehensiveness. The development of business and human rights-related NAPs together with the uptake of the UNGPs are corresponding and complementary processes. Apart from the advantages already mentioned, the NAP development process, if well designed and adjusted to the local context, can contribute greatly to ensuring not only that the implementation of UNGPs is efficient, targeted, measurable, informed and supported by relevant stakeholders, but also that it contributes to the strengthening of national human rights protection mechanisms. In 2015, the UN General Assembly unanimously adopted the 2030 Agenda for Sustainable Development[33] and 17 Sustainable Development Goals. The 2030 Agenda seeks to achieve transformative change with respect to people, planet, prosperity, peace and partnership. Responsible business has a key role to play; the 2030 Agenda underlines the potential of the private sector to foster innovation and inclusive growth, while calling on States to ensure that their efforts to implement the 2030 Agenda align with the standards laid out by the UNGPs and other international agreements. This can be achieved in a number of ways, including through business and human rights NAPs. To ensure their effective implementation, it is criucial that business and human rights NAPs go hand in hand with national implementation of the 2030 Agenda.

69Policy Department, Directorate-General for External Policies _national_framework_bhr_background.pdf?FeQtVeqQG8lntPXXHzNOIGnH3hUOPIlc

[32] As pointed out by S. DEVA, . *Background Paper for India's National*, cit.

[33] Resolution adopted by the General Assembly on 25 September 2015, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

There have been also some obstacles in the States' commitments to develop NAPs for business and human rights. In the first phase, the implementation of the UNGPs have been rather slow in materialising. The implementation of UNGPs at domestic level requires in fact legal and policy reform. Additionally NAPs, just as human rights due diligence that companies should undertake, are not a singular effort but rather a continuous process that requires constant monitoring, follow-up and improvement. Not all governments seem to be ready for such change. The fact that in many States there is the objective to ensure greater respect for human rights but without resorting to binding regulation, makes a poor prognosis for the meaningfulness of the NAP development process[34].

Now the tendency is an increasing number of States that are developing NAPs that show the growth from of a consciousness on human rights issues related to business. Over the last ten years, 42 business and human rights NAPs have been published or are in-development worldwide[35]. To evaluate the effectiveness of such instruments to address issues relating to the protection of human rights in business related affairs, it can be helpful, consider it relevant to investigate whether business and human rights NAPs processes function in line with experimentalist governance theory, a line of inquiry embarked on by scholars in other policy fields[36]. Experimentalist governance could be seen in policy areas characterised by

[34] https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights

[35] By the end of 2020, twenty-five States have published business and human rights NAPs. Nineteen of these came from Council of Europe States and fifteen from EU member States. Asian States account for three; Latin America for two; and the USA the last. While adoption of NAPs across world regions is hence uneven, regional differences could diminish in future: of seventeen States developing business and human rights NAPs the Americas and Asia each account for five, Africa for four and Europe three. Also at end 2021, four States were producing revised, updated or second business and human rights NAPs. A few States have been prompted to develop NAPs by recommendations received through the UN Universal Periodic Review (UPR) process. An overall total of forty- two published and in-development business and human rights NAPs compares with thirty-nine general human rights NAPs produced since1993. Source https://globalnaps.org.

[36] See for example G. GOLDSTEIN, C. ANSELL *Experimentalist governance in global public health: The case of UNAIDs*, in *Arizona Journal of International & Comparative Law,* 2018, n. 35, pp. 219-256; J. KENNER, K. PEAKE, *The Bangladesh Sustainability Compact: An effective exercise of global experimentalist EU governance*, in *Cambridge Yearbook of European Legal Studies,* 2017, n. 19, pp. 86-115.

persistent uncertainty or value conflicts, where governments or other parties could agree on a broad problem definition but lacked the know-how or agreement necessary to isolate specific solutions[37]. Experimentalist governance regimes "set provisional goals" rather than fixed rules. In response to social complexity[38] or where the issue at hand is characterised by "insufficient information and uncertainty[39]", experimentalist regimes institutionalise stakeholder participation and processes for revision. This approach, according to scholars, produces greater learning, adaptation and reliability over time. De Burca, for example, in her analysis of the human rights treaty system, argues that the "*iterative interaction between civil society actors, UN treaty bodies, and governmental actors", transforms the human rights treaty process "into [a] more participatory and accountable experimentalist governance system*…[40]". In their 2013 publication, de Búrca and other authors[41] identify five key features of experimentalist governance:

1) Openness to participation of "stakeholders" who must share at least a broad perception of a common problem in a non-hierarchical process;

2) Articulation of a framework definition of a problem or goals which identifies open-ended objectives to be pursued;

3) Implementation is "left to 'lower-level' actors with knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts[42]";

4) Continuous feedback from local actors incorporating "mutual monitoring and peer review, involving elaborate processes of consultation that are horizontal rather than vertical in structure[43]", serving an accountability function;

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[37] See G. DE BÚRCA, R. KEOHANE, R.C. SABEL, *New modes of pluralist global governance,* in *New York University Journal of International Law and Politics*, 2013, n. 45, p. 740.

[38] M. NANCE, M. COTTRELL, *A turn toward experimentalism? Rethinking security and governance in the twenty-first century*, in *Review of International Studies*, 2014, n. 40, pp. 277-301.

[39] I. BAR-SIMAN-TOV, *Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study*, in *Regulation and Governance*, 2016, n. 12, pp. 192-219.

[40] G. DE BÚRCA, *Human Rights Experimentalis,* in *American Journal of International Law*, 2017, n. 2, p. 279 e 310.

[41] See G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *New modes of pluralist global governance,* cit., p. 723.

[42] G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *Global experimentalist governance,* in *British Journal of Political Science,* 2014, n. 44, pp. 477-486; G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *New modes of pluralist global governance,* cit., p. 739.

5) Revision and re-evaluation: goals and practices are "periodically and routinely re-evaluated and, where appropriate, revised in light of the results of the peer review and the shared purposes[44]".

Experimentalist governance is a theory derived from institutional observation by social scientists. Yet, it is also viewed by its socio-legal scholar exponents as "normatively attractive[45]" insofar as it is claimed to encourage "*participatory, deliberative, locally-informed, and adaptive problem solving*[46]", while being able to address contemporary transnational challenges in a ways that state-based actors and "traditional" governmental processes, for a variety of reasons as alluded to above, cannot[47].

Besides being a sub-field of human rights, experimentalist governance theory highlights the dynamic, dialogic and iterative character of human rights implementation as well as the role of stakeholders. The experimentalist lens appears appropriate to business and human rights for many reasons. As argued by scholarship[48] business and human rights problems, in terms of abuses and implementation gaps, are endemic across economies; root causes are multiple and hard to diagnose; value conflicts are pervasive; and solutions, if they are to be had, imply the pooling of knowledge, resources and sustained multi-actor cooperation. Accordingly, business and human rights carries a likelihood of value conflicts across States, local policy variation and a need to evaluate effectiveness over time, rather than against a prior universal template.

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[43] G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *ibidem,* p. 742.

[44] G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *Global experimentalist governance,* cit., p. 748.

[45] G. DE BÚRCA, G. *Human Rights Experimentalis,* cit., p. 281.

[46] See G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *Global experimentalist governance,* cit., p. 480. See also C. ARMENI, *Global experimentalist governance, institutional law and climate change technologies,* in *International and Comparative Law Quarterly*, 2015, n. 64, pp. 875-904.

[47] See C. METHVEN O'BRIEN, J. FORD, *Business and human rights: from domestic institutionalisation to transnational governance and back again*, in *Nordic Journal of Human Rights,* 2019, n. 3, p. 204; G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *Global experimentalist governance,* cit.; G. DE BÚRCA, R. KEOHANE, R. C. SABEL, *New modes of pluralist global governance,* cit., p. 727.

[48] C. METHVEN O'BRIEN, J. FORD, *Business and human rights,* cit.

On the above basis, an experimentalist governance analysis of business and human rights NAPs is relevant while also making a novel scholarly contribution[49]. It may illuminate whether the national implementation of business and human rights norms mirrors or diverges from that of other human rights standards. It may shed light on the ongoing debate over how an international business and human treaty should be designed, in terms of substantive content, institutionalisation, oversight and accountability mechanisms. It may also help to better qualify understanding of the reasons for ready pursuit of business and human rights NAPs by States and others, while also guiding reflection about what may be expected to result from this trend in the years ahead.

A study conducted by scholars[50] has analysed NAPs processes in twenty-five states against five experimentalist governance criteria relating to: 1) stakeholder participation; 2) agreement on a broad problem definition; 3) local contextualisation; 4) monitoring and peer review and 5) periodic revision and learning. According to the study, NAPs on business and human rights in most States demonstrate resemblance to the traits of experimentalist governance[51]. In particular, the analysis points out the emergence of relatively sophisticated and demanding institutional governance mechanisms within NAPs, including the institutionalisation of complex deliberative processes. Nevertheless, it also identifies some significant shortcomings, related to the lack of inclusion of vulnerable groups and the lack of explicit indicators and targets. Nevertheless, the weaknesses of NAPs identified do not seem fatal or to signify a lack of traction of international business and human rights norms, even those of a soft law nature

Consequently, NAPs may have potential to provide the basis for an institutional framework to address the complex problems that emerge in the business and

[49] See M. NANCE, M. COTTRELL, *A turn toward experimentalism* cit.; J. KENNER, K. PEAKE, *The Bangladesh Sustainability Compact,* cit.; G. GOLDSTEIN, C. ANSELL, *Experimentalist governance in global public,* cit.

[50] To see a summary of the study see C.M. O'BRIEN, J. FERGUSON, M. MCVEY, *National Action Plans on Business and Human Rights: an Experimentalist Governance Analysis,* in *Human Rights Review,* 2022, n. 23, pp. 71–99.

[51] G. GOLDSTEIN, C. ANSELL, *Experimentalist governance in global public,* cit., p. 243.

human rights context and as a basis for "*dealing with the failure of traditional problem-solving strategies and multilevel cooperation in decision making*[52]".

6. Indirect Impacts of UNGPs: National Legislations Targeting Modern Slavery and Forced Labor

While one of the very few, if not the only really visible trend is the growing interest and uptake of NAPs by an increasing number of States globally, the UNGPs' implementation should not be limited to NAPs. When we compare the existing NAPs and non-NAPs related initiatives that do contribute at achieving the outcomes set out by the UNGPs, it is noticeable that many if not the majority of existing binding regulations were developed outside the NAPs framework. It is noteworthy also that, for instance, major companies' disclosures about how they try to eradicate slave labour from their supply chains came around the time when the *UK Modern Slavery Act* was adopted. However, it is certainly the case that ongoing discussions first leading to the "Protect, Respect and Remedy" Framework and later the UNGPs endorsement, along with large business-caused tragedies (Rana Plaza[53], Deepwater Horizon) and scandals (e.g. slavery work in the Nestlé and Unilever supply chains) contributed to the atmosphere conducive for their adoption.

Below are some of the most interesting pre-NAP or non-NAP related initiatives that could be copied or at least used as inspiration by other Countries to develop similar or even better regulations that fit other countries regulatory framework. Those initiatives include, for example, different regulations requiring businesses to report publicly on measures to reduce human trafficking or forced labour in their supply chains.

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[52] C. ARMENI, *Global experimentalist governance*, cit., p. 884.

[53] For example, it is worth noting that the original preamble of the French first draft bill on the duty of vigilance, which was put forward in November 2013, mentions 'as justifications for the bill, the Rana Plaza disaster; see N. BERNAZ, *Unpacking the French Bill on Corporate Due Diligence: a presentation at the International Business and Human Rights Conference in Sevilla'*, in *Blog "Rights as Usual"*, 2016, http://rightsasusual.com/?p=1087.

As a consequence, the past years have seen a rapid development in national legislation targeting modern slavery and forced labor. In Germany, the *Supply Chain Law* that requires mandatory human rights due diligence on global supply chains was passed in June 2021 and will become effective from 2023. Large companies (initially those with more than 3.000 employees, but from 2024, those with more than 1.000 employees) in Germany will face a fine of up to 2% of their global turnover for violation.

In the US, requirements for corporations to report on measures to prevent modern slavery in the supply chain have been in place for several years – for example, the *California Transparency in Supply Chains Act* in 2012. More recently, the previous Trump administration used forced labour and other human rights abuses as a reason to impose sanctions against other Countries, an approach that Biden administration has continued so far. For US companies, the concept of corporate social responsibility, rather than statutory law, is the primary vehicle for extending human rights obligations throughout supply chains and communities. However, in the last few years, the US has also been active in using sanctions against forced labour and other human rights abuse by foreign companies and governments. This includes the *Global Magnitsky Human Rights Accountability Act* which imposes sanctions on foreign companies and governments, including police bureaus and political persons, and other specific legislation targeting such alleged human rights abuse. Sanctions are a political problem and usually have a political solution, but the overall development of supply chain legislation in various major developed economies above may compel businesses with global footprints and supply chains, especially in developing or emerging economies, to take more far-reaching action.

There were similar calls in the UK to tighten enforcement of modern slavery laws in order to target the alleged forced labour of minorities and under-represented groups in global supply chains. In particular, *section 54 of the UK Modern Slavery Act 2015* requires companies with a turnover of more than £ 36 million to prepare an annual statement with the steps they have taken to address modern slavery and human trafficking in their supply chains and in any part of their business. On the

22nd of September 2020, the UK government proposed new measures to strengthen those transparency provisions in its response to the transparency in supply chains consultation. These measures extende the application *of section 54* to public bodies with annual budgets over £ 36 million and mandating topics that modern slavery statements must cover. Despite this, the proposals have not yet been implemented.

In January 2019, the *Commonwealth Modern Slavery Act 2018* came into force. Under the Act, an Australian entity or a foreign entity undertaking business in Australia with a consolidated annual revenue of at least AUD100 million, must submit an *annual modern slavery statement* to the Department of Home Affairs. This act is proving to be fruitful not only from an economic point of view, but especially in terms of the protection of an individual's dignity, which is too often tacitly infringed.

In 2018, the *New South Wales state government* passed its own modern slavery legislation, the *Modern Slavery Act 2018*, though there is no date set for when it will come into force. It will require commercial organics actions with employees in NSW and a consolidated revenue of at least AUD50 million to prepare an annual statement similar to that required by the *Commonwealth Modern Slavery Act.*

Tasmania has also started the process of introducing its own modern slavery laws. In April 2020, the *Supply Chain (Modern Slavery)* Bill 2020 was tabled in Tasmania's lower house, though it has not progressed further. The bill is similar in operation to the NSW Act, but has an even lower revenue threshold of AUD30 million.

Among other initiatives, at regional level, we can't forget that on the 22nd February 2022, the European Parliament sent a proposal to the Commission regarding a new *Directive on Corporate Due Diligence and Corporate Accountability*[54], which is expected to set out a draft law later this year. This Directive would aim to create a level playing field in which the supply chain due diligence requirements will apply to both EU entities and non-EU entities operating in the EU. It will oblige Member States to adopt or adapt their own corporate due diligence laws. The Directive

[54] Proposal for a Directive of the European Parliament and of the Council on *Corporate Sustainability Due Diligence* and amending Directive (EU) 2019/1937, COM(2022)71 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

would also call for complementary measures, such as the prohibition of the importation of products related to forced labour or child labour.

7. Conclusion

While transnational company (TNCs) or business stand to benefit greatly from such form of labor exploitation, the most vulnerable workers, such as migrant, who absorb most of the costs associated with this economic activities in the form of lower labor and regulatory costs, are victim of many human rights violations.

The human rights agenda, in general, is plagued by a significant gap between the formal acceptance of norms and policy commitments, on the one hand, and, on the other hand, the achievement of compliance and implementation in practice[55]. The area of human rights and business is no different. Despite many efforts, business-related human rights abuse is still a serious problem. Further implementation of the *UNGPs* and related instruments is thus necessary.

Therefore, the "bottom up and multilateral approach" human rights oriented, since it is more participative, face the issue from different point of view and have frequent feed back, must be developed by international and national authorities and implemented by all companies and supply chains, because in the long term it could be the best way to eradicate such form of exploitation before they arise and it may be a more effective preventive strategy than criminal repression alone.

The media, politicians and other opinion makers and all stakeholders also need to recognise their responsibilities in shaping public discourse about labour exploitation. This sense of responsibility can be encouraged among all citizens through initiatives such as branding products and services that meet certain labour standards, thus allowing consumers to assess the likelihood of their purchases having been produced under exploitative work conditions. Creating a climate of zero tolerance is an essential first step in combating labour exploitation, as the

[55] E.M. HAFNER-BURTON, K. TSUTSUI, *Human rights in a Globalizing World: The Paradox of Empty Promises*, in *American Journal of Sociology*, 2005, pp. 1373-1411.

combination of current failings can lead to a situation of endemic impunity for exploiters, resulting in a systemic failure to acknowledge victims and redress violations of their human rights.