

LABOUR MIGRATION IN THE TIME OF COVID-19: INEQUALITIES AND PERSPECTIVES FOR CHANGE

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**HUMAN TRAFFICKING FOR LABOUR EXPLOITATION IN THE
PANDEMIC GLOBAL SCENARIO:
BEYOND CRIMINAL LAW THROUGH PREVENTION
IN BUSINESSES' ACCOUNTABILITY AND HEALTHCARE**

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1. INTRODUCTION

The COVID-19 pandemic is affecting communities worldwide, including in areas already impacted by other crises before the outbreak. Not only the pandemic is claiming victims, but it has also severely impacted the global economy, from the loss of livelihoods to the changing migration patterns and the disruption of family and social networks.

Now a significant number of people who were vulnerable even before the pandemic finds themselves in even more precarious circumstances. This means that a vulnerable population has now become even more exposed to the risk of severe exploitation while looking for means to secure their livelihoods. On the other hand, the pressure on businesses due to the large losses caused by restrictions (e.g., lockdowns, partial closures and limitations imposed on non-essential economic activities) would probably prompt them to rapidly scale up production, even if this would mean neglecting the sustainability profiles of the work activities (both in term of working conditions and environmental good practices). It may ultimately turn into a risk factor for exponentially increasing the chance of modern slavery in supply chains. Therefore, there is a growing concern among international organisations that the phenomenon of human trafficking will get worse,¹ with a large number of bad consequences both from the point of view

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¹ United Nations Office on Drugs and Crime, “Impact of COVID-19 Pandemic on Trafficking in Persons. Preliminary Findings and Messaging Based on Rapid Stock Taking”, 24 April 2020, available at: <<https://www.un.org/ruleoflaw/wp-content/uploads/2020/05/Thematic-Brief-on-COVID-19-EN-ver.21.pdf>>.

of the increase in human trafficking crime and from a more general point of view of human trafficking as a means of worsening global health conditions.

As a matter of fact, while national governments are adopting stringent measures for mobility between countries, also taking into account their respective infection rates, illicit trafficking knows no restrictions. Hence, the aggravation of the subjective conditions that lead to overexposure to the risk of trafficking, besides being likely for a possible increase in crime, in a global pandemic scenario would also threaten thwarting the efforts to limit interactions made by national governments, letting the virus spread via illicit flows.

Hence, managing human trafficking in such a situation appears to be particularly awkward and it requires an integrated policies approach. This paper is intended to assess the question of how to prevent the commission of the crime of trafficking in human beings acting on some of the preconditions that foster it. In fact, a criminal law approach deals with human trafficking only after the harm has occurred, while prevention should be the goal.

From this point of view, as the first step, it is appropriate to understand the reasons standing beyond people's 'willing' to enter this kind of relationship.² The concept of vulnerability to exploitation will thus be explored. We consequently discuss the reasons why we assume that a criminal law approach, although indispensable, shall be accompanied by preventive measures in order to better combat the crime. Then, some suggestions on perspective preventive interventions will follow.

2. "ARE THEY VULNERABLE ENOUGH TO BE ENSLAVED?". THE ROLE OF VULNERABILITY

The concept of 'vulnerability' has long been at the centre of the international community debate, as scholars and professionals have tried to identify its real content.³

² It is not so appropriate speaking about 'willing', since "the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used": see UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, UN Doc. A/RES/55/25 (2000), Art. 3(b); see also *infra*, note 22 and accompanying text.

³ For a summary of the debate, including reference to the relevant legal framework see GALLAGHER, "The International Legal Definition of 'Trafficking in Persons': Scope and Application", in KOTISWARAN (eds.), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, Cambridge, 2017, pp. 83 ff. Among the scholarly works see, at least, GALLAGHER, MCADAM,

It had not been directly addressed in the Palermo Protocol as it speaks of ‘a position of vulnerability’ without defining it.⁴ Some years later, in 2006, the interpretative notes and preparatory work of the Protocol and its Annexes were published, according to which it was described as a situation where a person has no real and acceptable alternative but to submit to the abuse of which he or she is a victim.⁵

Within the European community, the picture seems to be more complicated. The first reference to vulnerability as a feature inherent to (some group of) people was provided by the European legal instruments concerning the standing of victims in criminal proceedings. Here expressions such as ‘particularly vulnerable (person)’, ‘most vulnerable groups’, ‘vulnerable persons’⁶ are used to build up what has been called a concept of ‘inherently vulnerability’,⁷ based on specific characteristics of certain groups of people, assuming that these put them in an ontological condition of impossibility to protect themselves from harm.

“Abuse of a Position of Vulnerability within the Definition of Trafficking Persons”, in PIOTROWICZ, RIJKEN, UHL (eds.), *Routledge Handbook of Human Trafficking*, London, 2018, pp. 185-98; BROWN, ECCLESTONE, EMMEL, “The Many Faces of Vulnerability”, *Social Policy & Society*, 2017, pp. 497 ff.; MASFERRER, GARCÍA-SÁNCHEZ (eds.), *Human Dignity of the Vulnerable in the Age of Rights. Interdisciplinary Perspectives*, Cham, 2016; MACKENZIE, ROGERS, DODDS (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, New York, 2013; HOFFMASTER, “What Does Vulnerability Mean?”, *Hastings Center Report*, 2006, pp. 38 ff.; WATTS, BOHLE, “The Space of Vulnerability: The Causal Structure of Hunger and Famine”, *Progress in Human Geography*, 1993, pp. 43 ff.

⁴ See UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, *cit. supra* note 2, Art. 3(a).

⁵ UN, *Travaux Préparatoires* of the negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, UN Doc. A/55/383/Add. 1 (2006), para. 63. Anne Gallagher, who participated in the drafting of the Protocol, in a recent paper written with Marika McAdam, explains how this wording was introduced because it seemed capable of encompassing the myriad means of coercion through which people are forced to accept exploitation. She also suggests that the position of vulnerability is important but should not be overemphasized, as it was used as a compromise to overcome the exhausting debate on trafficking for prostitution – which was always linked to the topic of ‘being vulnerable’ –, leaving each State free to regulate it nationally as they saw fit: see GALLAGHER, MCADAM, *cit. supra* note 3, p. 187; see also GALLAGHER, *cit. supra* note 3, p. 89.

⁶ See Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 2001/220/JHA, OJL 82, Art. 8, para. 4, Art. 14, para. 1. The same approach has also been followed in subsequent EU instruments mainly concerning asylum seekers and international protection. For a summary see SANTORO, “Vulnerability between Political Theory and Normative Texts: A New Language to Repeat Old Things or a New Tool to Problematize Differences in Social Power?”, *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2020, pp. 319-21.

⁷ SANTORO, *cit. supra* note 6, p. 319; the A. further distinguishes between his interpretation of vulnerability and the one offered by MACKENZIE, ROGERS, DODDS, “What is Vulnerability and Why Does It Matter for Moral Theory?”, in MACKENZIE, ROGERS, DODDS, *cit. supra* note 3, pp. 1-32.

However, the European legal framework regarding trafficking in human beings adopted a different approach. The Framework Decision 2002/629/JHA,⁸ aimed at harmonising the laws of Member States on trafficking and to define trafficking in human beings for the purposes of labour or sexual exploitation, gives a definition of trafficking nearly closed to the one of the Palermo Protocol,⁹ and it also refers to a position of vulnerability as a condition where “the person has no real and acceptable alternative but to submit to the abuse involved.”¹⁰ Here the perspective appears to be changed, since the European legislator speaks of ‘position of vulnerability’, suggesting that the position may not (necessarily) be linked to ontological characteristics of the person, but rather dependent on the subjective situation where the person finds him/herself.

The subsequent Directive 2011/36/EU,¹¹ as it was for the Framework Decision, not only mention the position of vulnerability while providing the definition of trafficking in human beings, but it also refers to the concept within the text. For instance, Whereas No. 12 says:

“Particularly vulnerable persons should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability.”¹²

⁸ This was followed by the Directive 2004/81/EC, Directive 2009/52/EC and, finally, Directive 2011/36/EU, which have encompassed the provisions of the Joint Action 97/154/JHA, concerning actions to struggle and sexual exploitation of children, adopted by the Council of the European Union based on Article K.3 of the Treaty on the European Union. However, it seems that the Joint Action remained semi-clandestine: see SANTORO, *cit. supra* note 6, p. 325, note 16.

⁹ The definition of trafficking provided at the European level is faithful to the one included in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which supplements the United Nations Convention against Transnational Organised Crime: see *supra* note 2.

¹⁰ 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJL 203, Art. 1.

¹¹ 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, OJL 101/1.

¹² *Ibid.*, Whereas 12.

There is still a strong EU concern on the personal qualities of individuals who need special protection, aiming at breaking the wall of inequality.¹³ As it has been told, this “schizophrenia”¹⁴ of the European legislation might find reasonableness if we would assume that – in some context and at certain conditions – consistent personal features can weak one’s free choice, making him/her vulnerable.

Vulnerability is a flexible concept, capable of encompassing the heterogeneous panorama of increasingly pervasive and growing exploitation phenomena today, that are strictly connected to the capability of being actually free. In other words, it is a lack of a real and acceptable alternative, if not to submit to the abuse:¹⁵ a relational notion, therefore, which must be understood in accordance with the context where the person is set and depending on the existence of someone else willing to abuse him/her. It is not by chance that all the mentioned legal instruments when are refereeing to vulnerability in exploitative contexts, use the term ‘position of vulnerability’ in order to assess all the circumstances – whether subjective and objective – that should be taken into account to evaluate trafficking situations.¹⁶ Basically, a person who is in a position of vulnerability is whoever is included within a legal, social, economic or political horizon within which it is actually disadvantaged.¹⁷

This conception of ‘situational vulnerability’ owes its epistemological foundation to the reflection made by political theorists in the matter of exploitation, as it requires that the condition which makes people vulnerable to exploitation entails both structural and personal features. Plus, it is not the sole vulnerability that makes the potential victim’s position risky, but the fact that this condition can be taken advantage of. Hereafter, two basic elements should be considered: a pre-existing position of inequality, which determines an imbalance of bargaining power (the situational variable); the purpose of abuse for taking (unfair) advantage of this unbalanced relationship (the teleological variable).

¹³ Over the years, this has been used to construct the identity of certain individuals as vulnerable: the creation of different statuses based on different degrees of vulnerability and needs is intertwined with the dichotomies created by the ‘normative’ model of the citizen-subject: see SANTORO, *cit. supra* note 6, p. 314.

¹⁴ SANTORO, *cit. supra* note 6, p. 325.

¹⁵ United Nations Office on Drugs and Crime, “Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons”, April 2013, available at: <https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf>, pp. 15 ff.

¹⁶ See UN, Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children, *cit. supra* note 2, Art. 3(a).

¹⁷ ZANETTI, *Filosofia della Vulnerabilità. Percezione, Discriminazione, Diritto*, Rome, 2019 speaks of “situated vulnerability” referring to vulnerabilities that are not determined by metaphysical factors, anthropological invariants, or natural and timeless factors; instead, they consist of a complex mix of historical and institutional factors, which precisely determine a normative horizon where a given category is indeed disadvantaged (*ibid.*, p. 9, translation by the Autor).

We may try to get further into the topic by comparing the definition coming from the relevant literature with the one offered by the abovementioned legal instruments.

Political theorists of exploitation have demonstrated that in each exploitative relationship there are some *ex ante* and *ex post* inequalities between the two parties of the reciprocal relationship.¹⁸ As it has been pointed out, these inequalities can be led by as much subjective as objective conditions.¹⁹ For instance, a poor economic background could be considered as a personal condition that yields people exposed to unfair pressures. On the other hand, a weakness in the local social security system, which fails to provide adequate means of subsistence to overcome the poverty line, is a structural condition of defencelessness. These kinds of conditions prevent the most disadvantaged party from making free will choices, due to the (psychological even if not necessarily physical) pressure made on him/her. In the words of the law, all these background conditions perfectly fit the concept of (situational) vulnerability as it has been defined above. Indeed, when the Framework Decision speaks about the “position of vulnerability” as a situation in which “the person has no real and acceptable alternative but to submit to the abuse”²⁰ clearly refers to a panorama of whether personal or structural circumstances that make one’s subjective position precarious and weak, and the person unable to take independent decisions.

¹⁸ Starting from very different premises and coming to equally different conclusions about the causes and antidotes to exploitation, they tend to agree that the mere presence of inequalities or disproportions, although it is an essential feature or a necessary ‘pre-condition’, it cannot be read as exploitation per se, since something more is required. These scholars locate the source of inequalities in several unfair circumstances that may derive from structural conditions of the society where the exploitative relationship is embedded, whether personal characteristics of individuals: amongst others, ATAK et al., “‘Migrants in Vulnerable Situations’ and the Global Compact for Safe and Orderly Regular Migration”, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 273/2018; SAMPLE, *Exploitation: What it is and Why it’s Wrong*, New York, 2003, p. 82; for Marxist theorists the core of this inequality as a precondition for exploitation lies in the unequal distribution of goods, see COHEN, “The Labor Theory of Value and the Concept of Exploitation”, *Philosophy & Public Affairs*, 1979, p. 341; for liberal theorists, it stands in the initial unequal distribution of the means of production, see ROEMER, “Should Marxists be Interested in Exploitation?”, *Philosophy & Public Affairs*, 1985, p. 65; others, embracing more personalistic than structural theories of exploitation, identify this assumption whether as the lack of means of subsistence, see SYNDER, “Exploitation and demeaning choices”, *Politics, Philosophy & Economics*, 2013, pp. 347-348; or as the absence of alternatives, see ZWOLINSKI, “Structural Exploitation”, *Social Philosophy and Policy*, 2011, p. 154.

¹⁹ See the distinction between vulnerability (inherent/personal) and precariousness (structural) made by ATAK et al., *cit. supra* note 18, pp. 2-5.

²⁰ See *supra* note 5 and accompanying text.

To give an example, let's have a look at a well-known case of 'new slavery' in Thailand:

"In spite of the economic boom, the average Thai's income is very low by Western standards. Within an industrializing country, millions still live in rural poverty. If a rural family owns its house and has a rice field, it might survive on as little as 500 baht (\$20) per month. Such absolute poverty means a diet of rice supplemented with insects (crickets, grubs, and maggots are widely eaten), wild plants, and what fish they can catch themselves. Below this level, which can be sustained only in the countryside, is hunger and the loss of any house or land. For most Thais an income of 2,500 to 4,500 baht per month (\$100 to \$180) is normal. Since the economic crash in 1997, the poor have only gotten poorer and more numerous as jobs evaporated: in the cities rent will take more than half of the average income, and prices climb constantly. At this income there is deprivation but no hunger since government policies artificially depress the price of rice (to the impoverishment of farmers). Rice sells for 20 baht (75 cents) a kilo, with a family of four eating about a kilo of rice each day. They might eat, but Thais on these poverty wages can do little else. Whether in city, town, or village, to earn it they will work six or seven twelve-to fourteen-hour days each week. Illness or injury can quickly send even this standard of living plummeting downward. There is no system of welfare or health care, and pinched budgets allow no space for saving. In these families, the 20,000 to 50,000 baht (\$800 to \$2,000) brought by selling a daughter represents a year's income. Such a vast sum is a powerful inducement and blinds parents to the realities of sex slavery".

Here Kevin Bales²¹ is optimally describing a scenario that includes both objective and subjective conditions which make Thai have no real and acceptable alternative but to submit to sex slavery of their children, which, on the other hand, seems to be quite profitable. The imbalance of bargaining power does not depend on exclusively economic circumstances; instead, they can be rather defined as existential: in this example, it is quite clear that the economic variable is just a particular element of a broader life situation where the choice between keeping on to live with little (if any) means of subsistence and giving in to the promise of better living conditions in exchange for being exploited is a non-choice.²²

²¹ BALES, *Disposable People: New Slavery in the Global Economy, Updated with a New Preface*, Berkeley and Los Angeles, 2012, pp. 59-60.

²² Tatjana Hörnle and Mordechai Kremnitzer correctly enlighten that "in a difficult situation or in a situation of helplessness due to her presence in a foreign country, a person's consent to what is asked of her cannot be considered 'free choice'". In other words, this is a *position of vulnerability*; see HÖRNLE, KREMNITZER, "Human Dignity as a Protected Interest in Criminal Law", *Israel Law Review*, 2011, pp. 143 ff., p. 159.

Nevertheless, this is not enough to argue that a relationship in which there are inequalities *means* exploitation. It takes that someone would be able to take advantage of this unbalanced situation: what in the words of law is called “abuse (of the position of vulnerability)”. This nuance can be well understood by looking at the functioning of the market in the context of a capitalist economic system: in fact, an imbalance of bargaining power here is an inherent feature; even if asymmetry in bargaining power between the two parties can be seen as a clear indication of an inequalities issue, nonetheless, it does not necessarily mean that labour relations in the capitalistic system are always exploitation. According to a pure Marxist perspective, the inherent contradiction between capital and labour indeed implies a systemic exploitative relationship. This notion of exploitation yet seems to be excessively broad for the purposes of the law.

As a matter of fact, there can be (and there actually is) exploitation whenever the stronger party abuses the vulnerable position of the weaker party to gain an advantage that could not be otherwise obtained.²³ It follows that one cannot take unfair advantage of the exploited unless he/she gets at least some advantage from the same exploited.

However, a more in-depth distinction could be made: the act of taking advantage may be substantively unfair due to the benefit to the exploiter (and this is basically the pure Marxist approach); or to the effect on the exploited. Tough, to argue that the relationship is not exploitative, we may consider, for instance, if the exploited had gained some advantages as well or eventually his/her chances have been increased. Secondly, the unfair advantage can derive from a defect in the process by which the unfair outcome has come about. We may take into account how both negative and positive liberty are affected here. Negative liberty can be seen as the freedom to act without any kind of external pressures,²⁴ whereas positive liberty is about the capacity of a person to use his/her negative liberty in order to be able to do or to be something that he or she previously could not do or could not be.²⁵ While means as threat, force, coercion, and deception attack a person’s negative liberty,²⁶ since the free choice (to act) of the person is intentionally defeated against someone

²³ MEYERS, “Wrongful Beneficence: Exploitation and Third World Sweatshops”, *Journal of Social Philosophy*, 2004, pp. 319 ff., p. 324.

²⁴ BERLIN, “Introduction (1969)”, in HARDY (eds.), *Liberty. Incorporating Four Essays on Liberty*, Oxford, 2002, p. 35.

²⁵ BERLIN, *cit. supra* note 24, pp. 168-69, pp. 178-81 and pp. 187-91.

²⁶ VAN KEMPEN, LESTRADEP, “Limiting the Criminalisation of Human Trafficking”, in HAVERKAMP, HERLIN-KARNELL, LERNESTEDT (eds.), *What is Wrong with Human Trafficking? Critical Perspectives on the Law*, Oxford, 2018, p. 222.

else's will; an offer disadvantageous to the weaker party, made in the knowledge of that party's vulnerable position, may exploitatively prevent positive liberty from becoming available to someone. In both cases, there could be exploitation, yet for the second we shall be aware that it is a kind of mutually advantageous exploitation. Someone who decides to withdraw from his/her positive liberty in order to gain a temporary benefit cannot be considered exploited in the sense of (criminal) law, even if the offer's conditions are unfair. Other essentials should be well-thought-out here, such as the relevance of consent and the freedom of self-determination.²⁷

Another determinant for trafficking stands on the side of the demand for poor labour. In the contemporary global market, the 3D labours'²⁸ demand concerns labour-intensive, low-skill and low-value adding activities that are outsourced to countries with extensive and cheap labour markets or activities related to low-tech manual jobs remain in hometown countries (e.g., construction, agriculture, logistic, domestic work). Some features of the contemporary economic-productive system have built up and still raise market strategies with a low economic impact and a strong social weight, eg., extended and winding supply and value chains, hardly monitored; few technologisation in primary sectors which entails low-skilled workforce; strong market pressure towards the production of 'cheap' goods and services. Accordingly, on the demand side, there is a growing need for flexible, poorly qualified, anonymous and blackmailable labour. Whereas on the supply side, the higher the vulnerability profiles, the greater the thrust to accept unfair conditions.

At this point, it should be clear that at the root of exploitative relationships, there are also political reasons: the demand for exploited labour is largely a question of inequality. That is why we might think that intervening with mechanisms aimed at redistributing risks and resources and reducing the inequalities gap, could be a worthy manner to prevent trafficking for labour exploitation and, more broadly, indecent working conditions. The following sections there will be analysed two different approaches that try to develop this principle of prevention.

3. THE CRIME OF HUMAN TRAFFICKING FOR LABOUR EXPLOITATION: BRIEF DISCUSSION OVER (THE INSUFFICIENCY OF) THE CRIMINAL LAW APPROACH

²⁷ See GALLAGHER, *cit. supra* note 3, pp. 92-98.

²⁸ Dirty, dangerous, demanding: it is an expression used to refer to certain kinds of labours often performed by migrants looking for higher wages, as these jobs require low skills but high effort: see ABELLA, PARK, BÖHNING, "Adjustments to Labour Shortages and Foreign Workers in the Republic of Korea", ILO International Migration Papers No. 1 (1994).

Human trafficking is frequently recognised as one of the new forms of slavery.²⁹ Beyond the different interpretations of the commonly accepted classification of modern slavery,³⁰ trafficking would be better understood as a serious form of coercion over a person for the purpose to allocate him/her into a profitable situation of exploitation.³¹ Thus it shares with slavery – and the new forms of slavery – the coercive nature of the conduct and the situation of unbalanced powers that stands at the bottom. However, unlike being equated to slavery-like practices, trafficking seems to re-echo the deportation of the slave trade,³² as it is intended to punish the mere movement of people for lucrative reasons, even in the absence of actual exploitation.³³

A definition of human trafficking was first given by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which is one of the three Protocols supplementing the United Nations Convention against Transnational Organised Crime (also known as Palermo

²⁹ BALES, *cit. supra* note 21.

³⁰ O'CONNELL, *Modern Slavery: The Margins of Freedom*, London, 2015.

³¹ Terms as 'human trafficking', 'modern slavery' and 'slavery' are often used as synonymous, while a distinction should be made; people are trafficked into a slavery-like situation, but from a criminal perspective this represents the purpose of the crime. Trafficking itself is the recruitment, transportation, transfer, harbouring or reception of a person, using coercivity moods and for the purpose of exploiting that person: it is not properly *a form* of slavery in the sense that trafficking may occur even if the slavery-like practice to which the person was destined does not actually take place. The understanding of the crime could be misled if one does not take into account this difference, with the consequence that it would be harder to distinguish between a case of human trafficking for – let's say – forced labour from forced labour as a crime in those legislations which criminalise both; for a definition of trafficking, including a distinction within the various forms of slavery, see BURKE, BRUIJN, "Introduction to Trafficking. Definitions and Prevalence", in BURKE (eds.), *Human Trafficking. Interdisciplinary Perspectives*, New York, 2018, pp. 3 ff.

³² According to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, slave-trade "means and includes all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance." See OHCHR, "Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery", ORG-1956-IA-67061, 1956, Art. 7(c).

³³ As Malcolm Thorburn as pointed out, "The point of human trafficking legislation is to prohibit the trade in persons for exploitation *as such*;" see THORBURN, "Human Trafficking. Supplying the Market for Human Exploitation", in HAVERKAMP, HERLIN-KARNELL, LERNESTEDT (eds.), *cit. supra* note 26, p. 165.

Protocol),³⁴ alleging that each State Party shall have adopted appropriate measures to criminalise the conduct of trafficking and related offences.

In the light of the Protocol, yet there was also suggested the embracing of various non-criminal actions to prevent the commission of the crime. They may include “measures (...) to alleviate the factors that make persons (...) vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity” and “educational, social or cultural measures (...) to discourage the demand that fosters all forms of exploitation of persons (...) that leads to trafficking.” In the same words of the Protocol, therefore, the inadequacy of a purely repressive approach is clear, since although crime must be fought, some conditions enhance it and that can be removed or – at the very least – weakened.

After the impulse offered by the Palermo Protocol against human trafficking, in the past decade, numerous governments have taken significant steps to combat the phenomenon. Their approach so far, though, has been largely concerned with building a stark criminal law framework, by introducing the offence of trafficking in persons for those countries that did not have it, increasing penalties, setting up agencies to prosecute the crime, tightening immigration law and strengthening border controls. Some assistance programs for victims have occasionally been provided, but almost no measures addressing the root causes of the problem.

As a matter of fact, criminal justice systems all over the world systematically fail to prosecute and convict traffickers: the 2021 United States Trafficking in Persons Report records only a global total of 9,876 prosecutions, 5,271 convictions and 109,216 identified victims in 2020 worldwide (just to give an idea, they were respectively 14,939, 9,072 and 68,453 in 2016).³⁵ The small number of convicted traffickers compared to a much higher amount of identified victims suggests that there is a huge gap between the profusion of international instruments aimed at combating trafficking and the problematic anti-trafficking enforcement.

The solely criminal law approach has shown itself to be unable to catch the entire complexity of the phenomenon, also due to reasons related to the nature of the crime: human trafficking is a high-hidden crime as people are not leaning to report

³⁴ For the purposes of this Protocol: (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;”: UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, *cit. supra* note 2, Art. 3(a).

³⁵ US Department of State, “Trafficking in Persons Report” (US, Department of State, June 2021), p. 60.

it either because they do not often realise, they are or have been victims of a criminal offence, or because they are afraid of the consequences of the denunciation. Besides, the establishment of the facts often encounters considerable procedural obstacles, most related to evidence, that does not allow the responsibility of the alleged perpetrators to be reached beyond a reasonable doubt. Yet, the answer to these difficulties lies not in bending the criminal justice system to fit the shape of the crime (which is always a fallacious operation), but in trying to prevent the commission of the offence itself, by acting on the causes that animate it.

We may agree that human trafficking can be seen as one of the most serious crimes today and it requires to be addressed and punished with severe criminal law measures. Nonetheless, it should be noted that this crime has its roots in precise social, economic, and geopolitical causes, which over the years have gradually increased its scope. To mention some, very poor economic conditions in the country of origin and/or low level or absence of education, poor health, problematic and/or difficult family context e.g., large family, or total absence of family ties: these are all risk factors for being trafficked.³⁶

Particularly in the case of trafficking for labour exploitation, other terms may increase the probability of being exploited, such as working in a sector of the economy prone to exploitation; working in isolation, with little contact with clients or people from outside; precarious or insecure situations of employment, e.g. formally self-employed; being a worker not directly employed by the organisation where he/she works; seasonal work; being a worker is not a member of a trade union; employment as a posted worker by a foreign company.³⁷ Legal systems shall consider intervening on these structural flaws, reinforcing the position of those who are subject to exploitation.

Indeed, not only criminal law is not able to face these challenges, but it is also undermined if the system where it runs on the one hand, punishes conduct and on the other feeds the conditions that reinforce that conduct, becoming ultimately ineffective.

³⁶ See UNHCR, “L’identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di *referral*”, 2021, available at: <https://www.unhcr.org/it/wp-content/uploads/sites/97/2021/01/Linee-Guida-per-le-Commissioni-Territoriali_identificazione-vittime-di-tratta.pdf>, p. 50 (tr. en. by the Author: *Identification of victims of trafficking on applicants for international protection and referral procedures*).

³⁷ *Ibid.*, p. 53.

4. PERSPECTIVE POLICIES IN PREVENTING HUMAN TRAFFICKING FOR LABOUR EXPLOITATION PURPOSES

If it is true, therefore, that human trafficking for the purpose of labour exploitation can also be tackled by repriming crime through preventive instruments, the outlook that we suggest below moves along two lines. First, from the supply side, public health should help to identify and to address weaknesses; from the demand side, the business and human rights approach may lead towards a sustainable business model where respect for human rights can be considered an added value in the companies' economic strategies.

4.1. The Contribution of Public Health in Assessing Determinants of Trafficking

For decades migration has been alternatively treated either as a market issue or a public security problem. Indeed, on the one hand, moving within and across national borders has been an economic mobility strategy that has benefited millions of people around the world.³⁸ On the other hand, smuggling has slowly become a problem of defending national borders and fighting against organised crime linked to illegal entry into the countries.³⁹

Nonetheless, with increasing individual vulnerabilities and growing awareness of new forms of slavery,⁴⁰ even the focus of international organisations, scholars and practitioners on human trafficking has increased. Over time, it has also become clear that trafficking in human beings is not only a criminal matter, but it has precise roots in economic, political, social features, and, for some aspects, it should be considered a global health problem.⁴¹ Public health is a discipline in medicine and hygiene that primarily encompasses the fields of epidemiology and social medicine,⁴² hence it could seem weird to address a criminal matter from this perspective. However, the

³⁸ ZIMMERMAN, KISS, "Human Trafficking and Exploitation: A Global Health Concern", *PLOS Medicine*, 2017, pp. 1/11 ff., p. 1/11.

³⁹ Smuggling of migrants is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"; UN, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, UN Doc. A/RES/55/25 (2000), Art. 3(a).

⁴⁰ The Polaris Project, "The Typology of Modern Slavery: Defining Sex and Labor Trafficking in the United States", 1 March 2017, available at: <<https://polarisproject.org/resources/the-typology-of-modern-slavery-defining-sex-and-labor-trafficking-in-the-united-states/>>.

⁴¹ TODRES, "Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking", *North Carolina Law Review*, 2011, pp. 447 ff., pp. 469 ff.

⁴² KIRCH (eds.), *Encyclopedia of Public Health*, New York, 2008.

primary goal of public health is the prevention of disease as well as the protection and promotion of a population's wellbeing through the combined efforts of society, organisations and individuals. As mentioned above, trafficking is not only a criminal offence; it is also a complex phenomenon, resulting from numerous social and economic variables, both individual and systemic. Therefore, looking at the issue of human trafficking through a public health lens helps in identifying vulnerability and facilitating early interventions that reach individuals before traffickers do.⁴³ It is furthermore essential to understand that victims of trafficking are a hidden population,⁴⁴ and that public awareness of this critical health concern should be raised in the countries of origin, transit, and destination.

The exploitation, which is the core of human trafficking, involves various forms of personal abuse that can lead to significant physical and mental health concerns for those who have suffered them. There is an obvious difficulty in collecting evidence on the social, financial, and legal harm experienced by trafficked persons – due to the very nature of the crime; nevertheless, much research on health and trafficking has been able to connect the survivors' multiple forms of experienced abuses, sector-specific occupational hazards in low- and middle-income countries, and dangerous living conditions with a range of poor health consequences.⁴⁵

We can assume that there are at least two forms of expression of this relationship: (I) the influence of socioeconomic and cultural determinants in mortality and morbidity patterns; (II) post-traumatic effects resulting from exposure to abuse, exploitation, and degrading living/working conditions.

From the first perspective, to tackle the structural determinants of such a matter, it is appropriate to recognise that we do face a multifaceted problem, which has causes (or, rather, pre-conditions) whose occurrence contributes to the existence of the same phenomenon: acting on the preconditions that foster it shall lead to its (at least partial) prevention. It has been shown that there is a link between the effect of precarious work, multiple forms of marginalisation and legal and settlement structures on individual and population health,⁴⁶ that should be investigated by the

⁴³ HAASE, “‘Human Trafficking, Public Health and the Law’: a Comprehensive Analysis of Intersections”, *Journal of Public Health*, 2014, pp. 121 ff., p. 122.

⁴⁴ SUCH et al., “Modern Slavery and Public Health: A Rapid Evidence Assessment and an Emergent Public Health Approach”, *Public Health*, 2020, pp. 168 ff.

⁴⁵ ZIMMERMAN, KISS, *cit. supra* note 38, pp. 2/11-7/11; see also WORSNOP, “The Disease Outbreak-Human Trafficking Connection: A Missed Opportunity”, *Health Security*, 2019, pp. 181 ff., pp. 182-183.

⁴⁶ AHONEN, BENAVIDES, BENACH, “Immigrant Populations, Work and Health – A Systematic Literature Review”, *Scandinavian Journal of Work, Environment & Health*, 2007, pp. 96 ff.

analysis of the interaction of multiple factors that protect or put individuals and populations at risk of exploitation to seek potential mechanisms to minimise these risks or enhance protection. This first means we need to clarify the circumstances under which trafficking takes place: besides vulnerability, there are economic, political, and social features involved in the process. While, from the perspective of the country of origin making trafficked persons vulnerable – as explained above – can be both individual and systemic, the economic, political, and social structure of the country of destination is crucial to understand the mechanism of trafficking.

Destination countries are characterised by free-market economies with a high level of technology and low attractiveness of low-skilled jobs to the home workforce. Enterprises are embedded in rather long and articulated value chains, where the demand pressure often drives towards unauthorised subcontracting and large grey areas between legality and illegality. Results thus include insufficient controls on working conditions, noncompliance with employment regulations (e.g., working hours, length of the working day, pay, holidays, rest, maternity leave), avoidance of employers' obligations and responsibilities.

In most countries, migration policies make a legal presence on the national territory conditional on obtaining a contract of employment. This approach may have at least two consequences on people's vulnerability: on the one hand, it supports the proliferation of undocumented migrants living in the country without the requirement to obtain a residency permit since they are employed in the informal market (i.e., activities without a formal contract), thus they become increasingly blackmailed and dependent on their oppressors for access to any social service. On the other hand, it contributes to making migrants willing to accept every working condition in order to get a formal contract of employment.⁴⁷ Furthermore, States do not always provide forms of protection addressing this situation.

These interactions are then worsened by weak labour governance that fails to protect workers from production processes frequently fuelled by demands for low-cost goods and services. Besides, there social security is not always able to cope with the increasing demand, while access to healthcare is for few. All these circumstances meet the subjective vulnerabilities of individuals who have no substantial alternatives but submit to them, making up 'the balance of inequalities.'

As for the second point of view, huge attention must be paid amongst others to the denial of health care, substandard nutrition, poor clothing and living conditions, the sedation of victims with drugs, unsanitary working environments, and the exposure to

⁴⁷ International Labour Organization, "Protecting Migrant Workers During the COVID-19 Pandemic: Recommendations for Policy-makers and Constituents. Policy Brief," 2020, p. 4, available at: <https://www.ilo.org/global/topics/labour-migration/publications/WCMS_743268/lang--en/index.htm>.

sexually transmitted diseases.⁴⁸ All the victims of trafficking have experienced some or all these situations. From this point of view, a critical framework for the health of a large section of the population, i.e., people who are trafficked, is shaped: in short, it is a public health issue that shall lead to large-scale recovery efforts.

The recent global outbreak of COVID-19 has then caused major challenges to the global fight against human trafficking, both due to severe limits to social interaction and movement restrictions of individuals and populations. This global crisis is likely exacerbating vulnerabilities to trafficking since there have been tragic changes in the economy worldwide, i.e., significantly increases in unemployment, poverty, and homelessness. Furthermore, because of the measures imposed to limit contacts, personal relationships have also been harshly impacted with the disruption of any access to informal support networks.⁴⁹ Thus, occurrences of domestic or intra-family violence have increased, as well as individual isolation and social distancing – which has made people already vulnerable even more exposed to possible abuse and exacerbated mental health issues.⁵⁰

Many businesses in developing and emerging economies and those in the belly of the supply chain have felt the impact of COVID-19 as well; examples include the textile and fashion industries. Indeed, countries such as Myanmar, Bangladesh or Sri Lanka are home countries for most of the companies that process the raw materials to produce clothes in the textile and fashion markets: with lockdowns and restrictions imposed between states, many brands have revisited their contracts with overseas suppliers, invoking force majeure⁵¹ and cancelling orders. The result, globally, is that vulnerability and poverty are growing, as economies slow down. This trend may make working conditions even more precarious than they already are, making people more vulnerable to modern slavery⁵². Furthermore, it should not be overlooked that the reduction and/or total dismissal of the possibility of moving legally from one country to another, against the increased need to generate income, could even become a major risk factor for the escalation of illegal migration routes.

⁴⁸ HAASE, *cit. supra* note 43, p. 123.

⁴⁹ United Nations Office on Drugs and Crime, *cit. supra* note 1, p. 2.

⁵⁰ *Ibid.*

⁵¹ VOSS, “Implications of the COVID-19 Pandemic for Human Rights and Modern Slavery Vulnerabilities in Global Value Chains”, *Transnational Corporations*, 2020, pp. 113 ff., p. 115.

⁵² CRANE, “Modern Slavery as a Management Practice: Exploiting the Conditions and Capabilities for Human Exploitation”, *Academy of Management Review*, 2013, pp. 45 ff.

In addition to this, opportunities to benefit from healthcare (including primary care) has decreased due to the saturation of health systems, worsening the conditions of those social groups that already had difficulties accessing medical services.

This creates a kind of vicious circle as health and living conditions worsen, and the number of vulnerable groups in the population increases; meanwhile, access to healthcare and, more generally, the attainment of decent living and working conditions for these sections of the population is gradually more and more difficult, and the virus may continue to circulate via illicit flows because of human trafficking. And so, back to square one.

4.2. The Importance of Being Sustainable: Towards a Business and Human Rights (Legal) Framework

Business activity in the contemporary economic system, as it is well known, follows a balanced mechanism based on two profitable paths that allow on the one hand to produce goods and services meeting consumers' demand and on the other to accumulate capital to be invested in order to remain in this circuit. In the words of entrepreneurs, to *remain on the market*. For a long time, the preservation of human rights has not been a concern of companies, in the belief that doing business had nothing to do with the possibility of infringing fundamental rights.

However, history has proved they were wrong. Thus, a corporate compliance system for defining 'codes of conduct' has gradually become established worldwide.⁵³ Self-regulation was initially perceived as a way to avoid more severe regulatory actions by governments.⁵⁴ Yet, in the international community, this was supposed to be still insufficient and needed to be reinforced by the adoption of 'soft law' instruments. Among the many of them that flourished over the years, mention should be made of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (from now on, MNE Declaration),⁵⁵ the

⁵³ RAMASASTRY, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement", in DEVA, BILCHITZ (eds.), *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect?*, Cambridge, 2013, p. 168.

⁵⁴ JENKINS, "Codes of Conduct: Self Regulation in a Global Economy", UN Research Institute for Social Development: Technology, Business and Society Programme, 2001, p. 9.

⁵⁵ ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office, 5th ed. Geneva, International Labour Office (2017), available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>.

Sustainable Development Goals (from now on, SDGs)⁵⁶ and the UN Guiding Principles on Business and Human Rights (from now on, UNGPs).⁵⁷

The emergence of UNPGs has paved the way for a new means of doing business, laying the foundations for an entrepreneurial culture sensitive to corporate social responsibility. Principle 11 thus states that “business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”⁵⁸ It follows from here in Principle 13 that “the responsibility to respect human rights requires that business enterprises: (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”⁵⁹ Principle 13 clarifies thus that the responsibilities extend across a firm’s global supply chain. This is a fundamental point since, as we have seen above, the new global era of production is predominantly based on articulated and extended value chains, and it may be easy to escape from responsibilities.

In plain words, the primary goal of UNGPs should be the prevention of adverse impacts on people, including in relation to impacts on the planet, through the adoption of Human Rights Due Diligence Programmes by companies.⁶⁰

SDGs set out 17 goals and 169 targets to achieve economic and social prosperity while protecting the environment. The MNE Declaration is the only ILO global instrument elaborated and adopted by governments, employers, and workers from around the world that provides direct guidance to enterprises on social policy and inclusive, responsible, and sustainable workplace practices.

There is an attempt to balance the fulfilment of economic requirements in businesses and the protection of fundamental human rights. Anyway, these soft law

⁵⁶ See GEREFFI, “Global Value Chains and International Development Policy: Bringing Firms, Networks and Policy-Angaged Scholarship Back”, *Journal of International Business Policy*, 2019, pp. 195 ff.; BLAŽEK, “Towards a Typology of Repositioning Strategies of GVC/GPN Suppliers: the Case of Functional Upgrading and Downgrading”, *Journal of Economic Geography*, 2016, pp. 849 ff.

⁵⁷ RUGGIE, *Just Business: Multinational Corporations and Human Rights*, New York, 2014.

⁵⁸ UN, United Nations Guiding Principles on Business and Human Rights, adopted by UN Human Rights Council in UN Doc. A/HRC/17/31 (2011), Principle 11, available at: <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

⁵⁹ *Ibid.*, Principle 13.

⁶⁰ *Ibid.*, Principle 17.

measures are non-binding obligations for States and companies, and, as a result, noncompliance with them does not normally give rise to legal consequences. In some cases, their implementation has taken place at the supranational, national, and firm levels. At the supranational level, in 2011 the Organisation for Economic Cooperation and Development (OECD) has adopted and incorporated the UNGPs into its “OECD Guidelines for Multinational Enterprises”⁶¹ and in sector-specific human rights due diligence guidance such as those for the garment and footwear sector.⁶² In some national legislation, we can face shy attempts to turn UNPGs from soft to hard law, through their inclusion in binding legal acts for natural persons and enterprises: just to mention a few, the UK Modern Slavery Act, the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Act are examples. All these legal instruments have in common the effort to put in place legal duty on companies in avoiding and preventing human rights violations and monitoring along their GVCs. Great attention, globally, has been paid to the topic, since a large number of European countries are clamouring for similar measures.⁶³ The point is that, perhaps, as long as national legislations move independently, there will remain a problem of homogenisation of companies’ obligations and duties, and, consequently, a difficulty in harmonising protection systems.

In this regard, it is worth noting that, starting in early 2020, great attention was also paid to the issue by the European Union and its Commissioner for Justice Didier Reynders, who stated that the EU should consider adopting specific legislation on human rights and due diligence obligations for European companies as part of the EU’s COVID-19 recovery package and the European Green Deal.⁶⁴ A specific Directive on this subject would make it possible to create a multilevel system of safeguards and obligations in which companies could feel accountable for their wrongdoings, as well as States could rely on a strong legal framework.

For the sake of completeness, it is worth noting that even if these instruments are not binding, the recent practice has shown that occasionally they may have legal

⁶¹ Organisation for Economic Cooperation and Development, “OECD Guidelines for Multinational Enterprises”, 2011, available at: <<http://dx.doi.org/10.1787/9789264115415-en>>.

⁶² Organisation for Economic Cooperation and Development, “OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector”, 2018, available at: <<http://dx.doi.org/10.1787/9789264290587-en>>.

⁶³ BRIGHT et al., “Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?”, *Business and Politics*, 2020, pp. 667 ff., pp. 686 ff.

⁶⁴ European Parliament’s Committee on Legal Affairs, Draft Report with Recommendations to the European Commission on Corporate Due Diligence and Corporate Accountability, (2020/2129(INL)).

effects in international investment arbitration and before domestic courts,⁶⁵ as well as on hard law commercial treaties, such as new generation BITs.⁶⁶

The link between a lack of human rights due diligence instruments by companies in global value chains (from now on, GVCs) and human trafficking may not appear to be immediately clear. But this becomes well perceptible if we go back looking at the mechanisms of supply and demand behind human trafficking and, therefore, the motivations of the demand for poor labour: trafficking is a criminal fact, but it finds ample space where inequalities proliferate, and traffickers can exploit the victims' vulnerabilities to their advantage. In GVCs that do not comply with ethical norms concerning the way of doing business without undermining people's rights, even if only – for example – with regard to working conditions, there are governance gaps that built up the permissive environment for adverse human rights impacts to take place in various parts of the same value chains.⁶⁷ The abovementioned occurrences in the textile and fashion industries are an example, as well as trafficking of migrant workers on the Thai fishing boats, which supply supermarkets at an international level.⁶⁸ If there is no accountability by companies

⁶⁵ Recently, States started to use human rights arguments – including violation of soft law instruments such as UNPGs – both as defence and offence: as a counter defence to investor claims and as a weapon of attack, in the form of counterclaims against investors. Investment treaty courts have substantially engaged with these arguments and have also welcomed *amicus curiae* submissions related to human rights issues. See, for instance, International Centre for Settlement of Investment Disputes, *Burlington Resources Inc. v. Ecuador*, 7 February 2017, No. ARB/08/5, available at: <<https://www.italaw.com/cases/181>>; International Centre for Settlement of Investment Disputes, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, 8 December 2016, No. ARB/07/26, available at: <<https://www.italaw.com/cases/1144>>; as for domestic courts, see Supreme Court (UK), *Okpabi and others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.*, 12 February 2021, No. 2018/0068, available at: <<https://www.supremecourt.uk/cases/uksc-2018-0068.html>>.

⁶⁶ BITs are investment treaties, especially popular in the 1990s and 2000s. They are basically instruments at the disposal of the contracting parties to legally protect their respective interests. The expression “new generation BITs” refers to a new way of understanding these agreements, which includes a special interest in recalibrating the legal protection of the interests of all stakeholders and enhancing the chances for economically, socially, and environmentally sustainable investments – by expressively referring to these goals into the agreement. For a first overview, see Gazzini, “Nigeria and Morocco Move Towards a “New Generation” of Bilateral Investment Treaties”, 8 May 2017, available at: <<https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/>>.

⁶⁷ SRSB, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, SRSB Doc. A/HRC/8/5 (2008), p. 11.

⁶⁸ BONFANTI, BORDIGNON, ““Seafood from Slaves”: The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights”, *Global Policy*, 2017, pp. 498 ff.

– especially where value chains are long and dispersive – they may find themselves to be accomplices of serious violations of human rights, including trafficking. For example, cancellation of orders that leave millions of workers without wages can lead to increased vulnerability and complicity in human trafficking. On the other hand, scholars have reported that exist many forms of businesses’ wrongdoings both related to human degradation at work – including modern slavery – across industries, also occurring in the lowest levels of global supply chains orchestrated by highly reputable multinational corporations,⁶⁹ and to negative environmental impacts caused by industrial activities and their products.⁷⁰ Accordingly, if companies are part of the problem, they should also play an important role in the solution.⁷¹ We do recommend including businesses in process of establishing companies’ duties that they must follow in order to comply with these business and human rights instruments, through forms of inter-legality⁷² that engage them in their self-regulation. Thus, companies would be called upon to define the guidelines themselves, with the advantage that it would not be necessary to force them to comply with, as these would be useful strategies to enhance the value of the same business – for instance, by a “personal branding” system capable of connecting the company’s name to a certified sustainability profile throughout the supply chain.

This path, in the long run, could lead to a change on the demand side of poor labour since companies, willing to maintain the level of production quality required by their profile (e.g., environmental sustainability, decent working conditions, etc.), would no longer require low-skilled, anonymous, and vulnerable workers, but employees to be included with dignity in their workforce. Hence, human traffickers (for labour exploitation) would no longer have to offer their services.

5. CONCLUSIVE REFLECTIONS: RETHINKING THE ECONOMY AS A CORE OBJECTIVE TO FIGHT EXPLOITATION IN THE POST-PANDEMIC WORLD

The human rights due diligence advocated by UNGPs and SDGs concerns the risk of harm to people and the environment, not strictly to businesses. Nonetheless, the pandemic has shown how they can converge. It has been argued that damage to people’s health or the healthiness of the environment can send global health systems

⁶⁹ GIULIANI, “Regulating Global Capitalism amid Rampant Corporate Wrongdoing – Reply to ‘Three Frames for Innovation Policy’”, *Research Policy*, 2018, pp. 1577 ff., p. 1578.

⁷⁰ RODRIK, *Straight Talk on Trade: Ideas for a Sane World Economy*, New Jersey, 2017.

⁷¹ GIULIANI, *cit. supra* note 69, p. 1580.

⁷² See PALOMBELLA, “Theory, Realities, and Promises of Inter-Legality: A Manifesto”, in *The Challenge of Inter-Legality*, KLABBERS, PALOMBELLA (eds.), Cambridge, 2019, pp. 363 ff.

into a loop of continuous outbreaks and quickly create substantial harm to businesses due to the responses meant to reduce the spread of the virus.⁷³

In the ongoing crisis, on the one hand, the loss of livelihoods of an increasing number of people, the changing migration patterns and the disruption of family and social networks put a great number of people who were already vulnerable in even more precarious circumstances. This means that the proportion of the population exposed to exploitation is growing, as well as the difficulties for companies are greater. An example is given by the occurrence in the textile industry discussed above,⁷⁴ where, due to the worldwide lockdowns, some businesses alongside the value chain found it more difficult to source products globally, encountering challenges in exporting goods, or pre-emptively closing down their supply chains. Thus, many of them decided to cut off or suspend deliveries from overseas, leaving their workers unemployed and exposed to vulnerability.

On the other hand, once restrictions will be uplifted and economic production resumed, we can imagine that incentives for companies to rapidly scale up production would create demand pressure that will drive towards unauthorised subcontracting or other forms of informal employment, exponentially increasing the risk of modern slavery (and trafficking) in supply chains. As it has been told, “human trafficking is the result of the failure of our societies and economies to protect the most vulnerable and enforce rights under national laws.”⁷⁵ In the long term, lack of housing, healthcare, legal and other services can increase vulnerabilities both to re-trafficking and to COVID-19 infection, hence continuing to put the economy at risk.

For a few years now, economists are expressing concern about the negative societal impacts of economic activities, and their global investments and trade,⁷⁶ and the evidence tells us that economic growth – if intended as so far done – will not lead to greater and diffused wellbeing, nor will it eliminate global injustice.⁷⁷ It instead will increase inequalities and, alongside them, the alarm of wise economists.⁷⁸ Planning to rearrange the post-pandemic economic-productive system in the sense of a sustainable human rights-oriented model, thus, is not rhetorical, and the two

⁷³ Fujita, Hamaguchi, “Globalisation and the COVID-19 Pandemic: A Spatial Economics Perspective”, 16 August 2020, available at: < <https://voxeu.org/article/globalisation-and-COVID-19-pandemic>>.

⁷⁴ See *supra* para. 4.1.

⁷⁵ United Nations Office on Drugs and Crime, *cit. supra* note 1, p. 4.

⁷⁶ RODRIK, *cit. supra* note 70; STIGLITZ, *Making Globalisation Work*, New York, 2006.

⁷⁷ SEN, *The Idea of Justice*, Cambridge, Massachusetts, 2009.

⁷⁸ PIKETTY, *Capital in the Twenty-first Century*, Cambridge, Massachusetts, 2014.

approaches referred to in this essay can find a proper synthesis in a sole argument: trafficking in human beings and, more generally, exploitation have their roots in multiple social, economic, and environmental factors, and preventing them by acting on these circumstances is possible. Plus, COVID-19 has made it clear that the existence of wide gaps in inequality is ultimately detrimental to the recovery of the entire country in a breakdown, and, accordingly, this should be treated as both a public interest issue and a private economic concern.

Criminal offences related to labour exploitation – such as human trafficking for this purpose – depend on structural flaws in our economic and social systems. Therefore, a solely criminal law approach will always lack meaningful progress prompts.⁷⁹ We do recommend addressing trafficking through a public health approach that can help to recognise vulnerabilities and risk factors.⁸⁰ In the COVID-19 era, this will also be useful in identifying the best strategies to counter the spread of the virus, since leaving marginalised groups without access to care means putting the whole population at risk. On the other hand, the business and human rights approach would lead to an economic-financial system capable of preventing a global crisis, as businesses can make a difference in promoting an economic model that not only produces goods and services but also takes care of the environment and human rights. Scholars have pointed out how the financial crisis in 2008 was largely caused by excessive credit flowing into the real estate and financial sectors, inflating asset bubbles and household debt instead of supporting the real economy of goods and services, hence promoting sustainable growth. This pressure has cascaded downwards, leading to an ever-increasing squeeze on investment in social programs, education, healthcare, research, development.⁸¹ Moreover, the massive use of environmentally unfriendly energy sources has gradually enlarged the global warming issue, whose connection to the pandemic outbreak has been considered more than plausible by public health scholars⁸². The result has been an even harsher policy of ‘austerity’, which has meant less and fewer investments in sectors deemed expendable and increasing inequalities.

The actual crisis shall lead to a different scenario, even considering the financial resources that can be invested by European Union. “Never let a good crisis to go waste”, says a popular maxim. And even the United Nations Office on Drugs and Crime has expressed its hope on the need to embrace the unique opportunity of

⁷⁹ TODRES, *cit. supra* note 41, pp. 456 ff.

⁸⁰ *Ibid.*, p. 470.

⁸¹ MAZZUCATO, “Capitalism after the Pandemic. Getting the Recovery Right”, *Foreign Affairs*, 2020, pp. 50 ff., p. 52.

⁸² WU, et al., “Air pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis”, *Science Advances*, 2020, pp. 45 ff.

acting against the deeply entrenched inequalities in our economic development model that feed marginalisation, gender-based violence, exploitation and trafficking in persons while recovering from the pandemic.⁸³

Indeed, as we have seen above, inequalities gaps, denial of healthcare, environmental unhealthiness contribute to feeding individual vulnerabilities, forcing more and more people to surrender to the abuse. In order to neutralise the causes that lead to exploitation, consequently, it is first necessary to rethink the values of a society and the relationship between the public and private sectors⁸⁴. Public health and economy should work side by side in fighting human trafficking: we consider that a businesses' commitment to respecting UNGPs would be an important first step towards more care towards all the stakeholders – instead of solely the shareholders –, as well as the governments' efforts in identifying vulnerabilities and investing in more equitable redistribution of resources. Public interventions shall, at least, include the promotion of decent working conditions⁸⁵, access to justice and healthcare – even during the pandemic, social security measures for all – including migrants.⁸⁶

In this way, we may think of building up a world in which the value of human dignity would not be crushed by profit and the fight against trafficking in persons reinforced by the erosion of the preconditions underlying the crime.

⁸³ *Ibid.*, p. 4.

⁸⁴ MAZZUCATO, *cit. supra* note 81, pp. 54 ff.

⁸⁵ See International Labour Organization, “Issue Paper on COVID-19 and Fundamental Principles and Rights at Work”, 7 October 2020, available at: <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/governance/fprw/WCMS_757247/lang--en/index.htm>.

⁸⁶ International Labour Organization, *cit. supra* note 47, pp. 2-5.