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Corporate Liability for Trafficking in Human Beings: Gaps in Application and Ways Forward

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Abstract

This article is based on analyses conducted by the authors concerning corporate criminal liability for trafficking in human beings (THB) and claims for unpaid wages in the civil justice system. Both strands of research were driven by the question to which extent corporate liability for THB can be used by exploited persons in order to claim unpaid wages from corporations. This article distils the conclusions from both research strands and formulates recommendations. European Union Member States and States Parties of the Council of Europe Convention against THB are obliged to hold companies liable for human trafficking. Furthermore, States should ensure that workers have the possibility to claim unpaid wages from their employers and, in very limited cases, also from contractors and subcontractors higher up in the subcontracting chain. Case-law analysis and interviews show that the implementation in practice is challenging. Difficulties in receiving legal aid and lengthy proceedings are barriers to claiming unpaid wages for exploited persons. In relation to corporate criminal law for THB, it is shown that the exclusive application of monetary sanctions has a limited deterring effect. Legal instruments in the EU to claim unpaid wages in subcontracting systems are rarely applied, hence leaving workers in subcontracting chains inadequately protected. Therefore, the authors recommend establishing effective complaints mechanisms, setting non-monetary sanctions and pursuing additional approaches to prevent THB in corporations. Furthermore, alternative complaints mechanisms for exploited persons and a statutory duty for companies to conduct human rights due diligence are discussed.

1. Introduction

Exploited persons face numerous challenges in claiming unpaid wages. In theory, claiming wages from corporations by holding them liable

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for trafficking in human beings should be one possibility. In practice, corporate liability is only used in exceptional cases to gain access to unpaid wages. This article is based on analyses conducted by the authors about corporate liability for trafficking in human beings and to which extent corporate liability can be used by exploited persons to claim unpaid wages from corporations. The authors identified corporate criminal law cases[1] and researched claims for unpaid wages in the civil justice system.[2] Methodologically, qualitative data in the form of semi-structured interviews, case-law of Member States of the Council of Europe and relevant legal mechanisms were analysed. The main conclusion of both research strands is that currently available legal tools to hold companies liable for trafficking in human beings are rarely applied in practice. This article provides suggestions for future reforms such as alternative complaints mechanisms or the implementation of a duty to conduct human rights due diligence. The article starts with a short overview of the different research strands and its outcomes. After a section on conclusions based on the identified gaps, the article formulates specific recommendations.

2. Corporate Liability for Trafficking in Human Beings and Its Current Application

The Special Rapporteur on trafficking in persons, especially women and children, stressed that States have to implement legislation against THB, prevent, investigate and punish THB through their laws and policies, and make sure that these measures are also implemented in view of business entities.[3] Measures to ensure this objective include strengthening the enforcement of labour laws or mandating companies to conduct human rights due diligence[4] in order to increase corporate accountability. The corporate responsibility to respect human rights, the second pillar of Special Representative of the Secretary-General Ruggie's 'Protect, Respect and Remedy' – Framework and its Guiding Principles,[5] means that companies are supposed to have imple-

1 J. Planitzer, N. Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation', *Global Policy* 8 (2017) 505-511.

2 J. Planitzer, N. Katona, B. Linder, K. Lukas, 'Searching for accountability of the private sector: Civil liability of corporations for trafficking in human beings for the purpose of labour exploitation in the European context', in: Alison Brysk, Michael Stohl (eds.), *Contracting Human Rights – Crisis, Accountability, and Opportunity* (2018), 194-208.

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

4 Ibid.

5 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', A/HRC/8/5 (2008) and UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, John Ruggie,'Guiding Principles on Business and Human Rights - Implementing the United

mented policies and processes to meet their obligation to respect human rights[6] and conduct human rights due diligence.[7]

The Council of Europe (CoE) Convention against THB[8] and the EU Directive 2011/36[9] regulate the obligation of States to establish corporate liability for THB. Sanctions on legal persons should be effective, proportionate and dissuasive, which includes not only criminal sanctions but also administrative fines. Although the legal framework is in place, prosecutions of corporations in relation to THB are rare in Europe.[10] In Belgium, courts also dealt with the even rarer cases of corporate liability for THB in supply chains. In a supply chain, the contractor (corporation A) is held liable for a corporation that supplies to A (corporation B, the subcontractor) by establishing A as an accomplice for the offence of THB committed by B.[11] Reasons for the limited number of cases on corporate criminal law related to THB come from the difficulty to prosecute due to bankruptcy of companies, limited experience in applying relevant corpor-

Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (2011), hereinafter 'Guiding Principles'.

6 R. McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights', in: Lara Blecher, Nancy Kaymar Stafford & Gretchen C. Bellamy (eds.), *Corporate Responsibility for Human Rights Impacts* (2014), 64 and Guiding Principle 15.

7 Guiding Principle 17.

8 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, adopted 16 May 2005, entered into force 1 February 2008, hereinafter CoE Convention against THB, Article 22.

9 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 5.

10 The authors analysed the reports issued by the CoE's Group of Experts on Action against THB (GRETA) and found relevant cases in Belgium, Cyprus, Romania and Slovenia. At the time of this analysis (February 2017), 40 reports of the first evaluation round (2010-2015) and 12 of the second evaluation round (ongoing) were available. See GRETA's reports concerning Belgium, Cyprus, Romania and Slovenia: CoE - GRETA, Report Concerning the Implementation of the CoE Convention on Action against THB by Belgium, GRETA (2013) 14, para 208; CoE - GRETA, Report Concerning the Implementation of the CoE Convention on Action against THB by Cyprus, GRETA (2015) 20, para 135; CoE - GRETA, Report Submitted by the Romanian Authorities on Measures Taken to Comply with Committee of the Parties Recommendation CP (2012) 7 on the Implementation of the CoE Convention on Action against THB, GRETA (2014) 9 (2014), 26; CoE - GRETA, Report Concerning the Implementation of the CoE Convention on Action against THB by Slovenia, GRETA (2013) 20, para 156. See also A. Tamas et al., 'Deliverable D6.5: TRACE-ing Human Trafficking: Project Findings' (2016), 18.

11 See for instance the '*Carestel*-case', First Instance Court of Gent, 5 November 2012, 19th chamber. See on that case also S. Rodríguez-López, 'Criminal Liability of Legal Persons for Human Trafficking Offences in International and European Law', *Journal of Trafficking and Human Exploitation* 1 (Paris Legal Publishers 2017), 107. Further example is the '*Quick*-Case', First Instance Court of Brussels, 25 May 2016, 59th chamber. See for further discussion on this case J. Planitzer, N. Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation', *Global Policy* 8 (2017) 507.

ate criminal laws to prosecute legal persons and different overlapping legal frameworks such THB, social fraud or underpayment of workers.[12]

With regard to the civil liability of corporations, claiming payments of unpaid wages in the civil justice system is often more challenging for trafficked persons than filing these claims in criminal proceedings in the European context. One deterring factor is the lack of legal aid for civil proceedings.[13] A successful example in the UK is the *Chicken Catcher* case,[14] where for the first time, the UK High Court held a company liable to pay compensation to trafficked persons. A further deterring factor might be the length of proceedings. Exploited persons in a case of corporate liability in THB in Cyprus did not receive compensation in the criminal procedure and therefore turned to the civil court which can take about six to seven years.[15]

In summary, States in Europe have to implement a legal framework that provides for corporate liability for trafficking in human beings. However, the application of this framework is rather rare. Even rarer are cases that deal with exploited workers who work in a subcontracted company or in a subsidiary. The following section discusses the challenges in making contractors or subcontractors higher up in the subcontracting chain and – in the case of subsidiaries – parent companies liable for unpaid wages.

3. Claiming Unpaid Wages in Subcontracting Chains or from Parent Companies: Identified Gaps and Conclusions

3.1. Gaps in the EU Acquis for Unpaid Wages in Subcontracting and the Limited Application of Existing Legal Possibilities for Claiming Unpaid Wages in Subcontracting

The EU acquis identifies two categories of workers within the EU system of joint and several liability in subcontracting processes to claim

12 J. Planitzer, N. Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation', *Global Policy* 8 (2017) 508.

13 European Union Agency for Fundamental Rights, *Severe Labour Exploitation: Workers Moving within or into the European Union* (2015), 82.

14 *Galdikas & Ors v DJ Houghton Catching Services Ltd & Ors*, High Court of Justice of the UK EWHC 1376 (QB), 10 June 2016.

15 Decision of the District Court Nicosia, *Chief of Police of Nicosia v. Comet Hatcheries LTD*, No. 36876/12, 24 June 2015 and Interview with Lawyer/Cyprus, 01 March 2016, cited after J. Planitzer, N. Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation', *Global Policy* 8 (2017) 507.

wages. These liability mechanisms should ensure that the direct employer and the contractor of the employer can be held liable for unpaid wages. This means that if company A subcontracts to company B and company B does not pay wages accordingly, the workers employed by B can also turn to company A to claim unpaid wages. In the EU acquis, we find this form of liability for undocumented workers in the Employers' Sanctions Directive (ESD)[16] and for posted workers in the Posted Workers Directive[17] and the Enforcement Directive[18] linked to it.

Cases involving liability in subcontracting are rare because employees refrain from taking action.[19] The system under the Enforcement Directive is very recent and had to be implemented by the EU Member States until June 2016. In contrast, the procedure under the ESD should have been implemented since July 2011 by the EU Member States. However, cases in which liability in subcontracting would have been applied are not known.[20] Consequently, the EU acquis concerning joint and several liability leaves big groups of migrant workers in the EU without protection. All migrant workers who are not posted workers in the construction sector or undocumented workers in the EU are not covered by the currently available mechanisms. The following sub-section discusses the challenges of claiming unpaid wages from an employer under the ESD.

3.2. Practical Barriers to Have Access to Rights as Described in the Employers' Sanctions Directive

The Employers' Sanctions Directive (ESD)[21] requires EU Member States to have a mechanism in place that allows undocumented workers to claim unpaid wages. Undocumented workers have to be in a position that enables them to file a complaint against an employer for unpaid wages,[22]

16 Directive 2009/52, Art. 8. A posted worker works in a different EU Member State from the State in which she or he usually works.

17 V|Directive 1996/71/EC concerning the posting of workers in the framework of the provision of services.

18 Directive 2014/67/EU on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), Art. 12 (2).

19 Y. Jorens et al., *Study on the Protection of Workers' Rights in Subcontracting Processes in the European Union* (2012), 156-157.

20 Interview with NGO/Belgium, 24 February 2017 and interview with NGO/EU, 28 February 2017.

21 Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals.

22 Directive 2009/52, Art. 6(2).

which should be embedded in an effective complaints mechanism.[23] A report on the ESD implementation by the European Commission shows that only four States implemented a specific right for undocumented workers to file a complaint against the employer, while the majority of EU Member States refers to general rules on bringing a case before civil or labour courts.[24] Currently, there has been no data collected by the European Commission on how many complaints have been lodged and in how many cases compensation was received.[25]

Belgium, for example, established a complaint system but the application in practice is challenging. A representative of the NGO 'OR.C.A.' (Organisation for Undocumented Workers in Belgium) indicates that in the last years probably only two to three complaints led to a satisfying result.[26] Complaints need evidence of a working relationship in order to be followed up by the prosecutor and to eventually come before courts. Evidence collected by the workers such as pictures are not considered admissible, while proofs gathered by the labour inspection itself would support the procedure. This means that labour inspectors would inspect the work place and secure evidence for the employment of the undocumented worker at this work place. However, if labour inspectors do that, they have to inform the relevant immigration authorities about the residence status of the undocumented person which can lead to deportation.[27] Filing a complaint directly at court is possible, but then undocumented workers face the risk that the costs of the proceedings have to be covered.[28]

A major issue in the implementation of an effective complaints mechanism under the ESD is the clear lack of a firewall between the complaints mechanism and immigration regulations in the EU Member States. This deters workers from complaining[29] since making a complaint safely without fearing deportation is challenging and the likelihood of a positive outcome is low.[30] In conclusion

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23 Directive 2009/52, Art. 13.

24 European Commission, *Communication from the Commission to the European Parliament and the Council on the Application of Directive 2009/52/EC of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures against Employers of Illegally Staying Third Country Nationals*, COM(2014) 286 final (Brussels, 2014), 7.

25 K. Soova et al., *Employers' Sanctions: Impacts on Undocumented Migrant Workers' Rights in Four EU Countries* (Brussels, 2015), 11 and interview with NGO/EU, 28 February 2017.

26 Interview with NGO/Belgium, 24 February 2017.

27 Interview with NGO/Belgium, 24 February 2017 and PICUM, 'Summary of findings in Belgium and the Czech Republic on the implementation of the Employers' Sanctions Directive', 2-3, http://picum.org/picum.org/uploads/publication/PICUM%20Summary%20EmployerSanctionsDirective%20implementation_BE%20and%20CZ.pdf (last accessed 03 April 2017).

28 Interview with NGO/Belgium, 24 February 2017.

29 K. Słubik, *Implementation of the Employers' Sanctions Directive in the Czech Republic, Hungary, Poland, Romania and Slovakia* (2014), 18.

30 Interview with NGO/EU, 28 February 2017.

the ESD might be implemented to a certain extent in the legal frameworks of the EU Member States but practical barriers or incoherence with other legislation, in particular immigration laws, make the implementation of the obligation to establish effective complaints mechanisms at practical level unrealistic. After showing the challenges of workers who work in subcontracting chains, the following section discusses the possibility of establishing liability of a parent company when a subsidiary exploits its workers.

3.3. Protecting Rights of Exploited Workers in Subsidiaries: Challenges in Establishing a Breach of a Company's Duty of Care

Workers of a subsidiary may gain redress for labour exploitation by claiming a breach of the parent company's duty of care. However, the existence of the duty of care depends on whether the parent company is directly involved by owning or controlling the subsidiary or has or should have knowledge about foreseeable harm.[31] There still exists little case-law clarifying these elements and the potential breaches of a parent company's duty of care.[32] Two cases have been of particular relevance in this regard: *Chandler v. Cape PLC* (UK, 2012) and *Choc v. Hudbay Minerals Inc.* (Canada, 2013).[33] In both cases the courts ruled that parent companies were directly liable for their subsidiaries' wrongdoings based on a violation of their own duty of care to all persons affected by the subsidiaries' conduct.[34]

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31 G. Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Violations*, ICAR, (September, 2015), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/591c8ebdbf629a23e7e35da0/1495043779017/PCAP+Report+2015.pdf, p. 18; R. Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Human Rights* (January, 2012). *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston 2012), https://ssrn.com/abstract=2389325 or http://dx.doi.org/10.2139/ssrn.2389325 (last accessed 22 February 2018), p. 13-17; N. Mardirossian, *Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of Their Foreign Subsidiaries* (May 7, 2015), https://ssrn.com/abstract=2607592 or http://dx.doi.org/10.2139/ssrn.2607592 (last accessed 22 February 2018), p. 15-26.

32 C. van Dam, F. Gregor, *Corporate Responsibility to respect human rights vis-à-vis legal duty of care*, in: Juan José Àlvarez Rubio, Katarina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London and New York: Routledge 2017), 130.

33 England and Wales Court of Appeal, *Chandler v. Cape plc.* [2012] EWCA Civ 525, http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html (last accessed 22 February 2018); Superior Court of Justice Ontario, *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (22 July 2013), https://www.canlii.org/en/on/onsc/doc/2013/2013onsc1414/2013onsc1414.html?autocompleteStr=choc&autocompletePos=2 (last accessed 24 February 2018).

34 G. Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Violations*, ICAR, (September, 2015), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/591c8ebdbf629a23e7e35da0/1495043779017/PCAP+Report+2015.pdf (last accessed 22 February 2018), p. 19.

In the *Chandler* case, an employee of a British subsidiary filed a complaint against the British parent company Cape plc. for adverse health impacts resulting from his exposure to asbestos. Considering the facts of the case the Court of Appel acknowledged that "in appropriate circumstances" the parent company may incur a duty of care for employees of its subsidiaries (third parties). It specified that "those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection."[35] The Court concluded that Cape had a duty of care with regard to the health and safety of its subsidiary workers as it dictated the health and safety policy for the whole group and was overall responsible for preventing harm resulting from the exposure to asbestos.[36]

The *Choc* case is one of three related and still on-going lawsuits filed by members of the Guatemalan indigenous Mayan Q'eqchi community against Hudbay Minerals Canada. The plaintiffs complained against human rights violations (shootings, killings, gang rapes) in the vicinity of the mining project committed by the security personnel of Hudbay's wholly controlled subsidiaries and pleaded for tort liability on the basis of the parent company's negligence of its duty of care.[37] The cases are of particular interest as they deal with the extraterritorial dimension of the duty of care.

The preliminary application judgement has already indicated three elements for establishing the parent company's duty of care in this context: The first one is the *foreseeability,* which means that 'the harm that occurred must have been a reasonably foreseeable consequence of the defendant's act.'[38] According to the plaintiffs, 'Hudbay's managers and executives were informed of rising tensions regarding the land conflict [...], knew that violence had been used at the previous forced evictions of the Mayan Q'eqchi' communities requested by Hudbay, knew that the Chief of Security [...] had been credibly accused of committing previous serious and similar acts, including issuing death threats against Mayan Q'eqchi' communities and shooting his gun recklessly, [and also] knew that the security personnel were unlicensed, inadequately trained

35 *Chandler v. Cape*, para 80.
36 Ibid., paras 75-77.
37 *Choc v. Hudbay Minerals Inc.*, para 4.
38 Ibid., para 59.

and in possession of unlicensed and illegal firearms [...].'[39] The Court noted that if proven at trial, these facts could establish that the harm was a foreseeable consequence of Hudbay's conduct.[40]

The second element is the *proximity* which assesses whether 'there is a proximate relationship between the plaintiffs and the defendants in each action' on the basis of which it may be argued that the defendant, in this case the parent company, has an 'obligation to be mindful of the plaintiffs' legitimate interests in conducting his or her affairs.'[41] Factors to consider when defining the proximity of a relationship include 'the expectations, representations, reliance, and the property or other interests involved.'[42] In the present case, Hudbay had made public statements to engage with local representatives, to do everything in its power to ensure that the evictions were carried out in respect of human rights and to find equitable solutions to land claims and resettlement. It had equally underlined that it would abide to the Voluntary Principles on Security and Human Rights and that its executives would be directly in charge of the operations in the mine.[43] Based on these facts the Court affirmed the existence of a relationship of proximity between Hudbay and the plaintiffs and acknowledged the prima facie existence of a duty of care.[44]

The third element are *policy considerations* that may exist to restrict the *prima facie* assumption of a duty of care. In the Hudbay case there existed competing policy considerations from both sides. Hudbay negated its duty of care arguing among others that recognising a duty of care would expose Canadian companies to a myriad of claims which would overburden the judicial system. Furthermore, it argued that this would 'impinge upon the fundamental principle of separate corporate personality.'[45] The plaintiffs argued among others that 'recognizing the duty of care would support the government's stated goal of reducing risks of excessive force or human rights abuse related to deployment of private security at Canadian enterprises abroad and [that] local communities should not have to suffer without redress when adversely impacted by the business activity of a Canadian corporation [...].'[46] The court acknowledged the competing policy considerations but noted however that the latter would not restrict the prima facie existence of a duty of care.[47]

39 Ibid., para 61.
40 *Choc v. Hudbay Minerals Inc.*, para 65.
41 Ibid., para 66.
42 Ibid., para 69.
43 Ibid., para 67.
44 Ibid., para 70.
45 Ibid., para 72.
46 Ibid., para 73.
47 Ibid., para 74.

Based on the above-mentioned criteria it concluded that Hudbay's *prima facie* duty of care was established so that it may be held responsible for the losses of the plaintiffs.[48] The final decision of the Canadian court will have a significant influence on interpreting a parent company's extraterritorial dimension of its duty of care. Recent developments have indicated that the court might rule in favour of a duty of care for employees of subsidiaries abroad.[49]

These cases might open a promising pathway for parent company accountability.[50] Nevertheless, there still exists a range of practical challenges for exploited subsidiary workers when drawing on the duty of care. Above all, they need to have sufficient information proving the parent company's knowledge or potential knowledge about the harm as well as its involvement in the subsidiary's wrongdoings. For many plaintiffs this information is difficult to obtain. Furthermore, the duty of care requires that the parent owns the majority of the subsidiary's shares, and that it controls its activities.[51] These requirements often limit its application to a small number of subsidiary employees. Employees who work for a subsidiary with a looser relationship to the parent company cannot prove the parent's control or direct involvement. Consequently, they cannot file a claim based on the parent's violation of the duty of care. This holds also true if the parent may have the same benefits from low labour standards and the same knowledge about the wrongful conduct of the subsidiary.[52] From a human rights perspective the duty of care is thus only partly satisfying as it cannot fully ensure exploited workers' access to justice.

4. The Way Forward: Recommendations to Enhance Access to Justice

This section discusses ways to improve the access to justice for exploited persons. The recommendations list alternatives to the currently available legal framework on corporate liability. Enhanced application of corporate liability would be necessary. However, corporate liability also has weaknesses such as the limited deterring effect of monetary sanctions. Therefore, this section starts with recommending an enhanced application of non-monetary sanctions.

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48 *Choc v. Hudbay Minerals Inc.*, para 75.

49 K. Coon et al., 'BC Case Against Canadian Mining Company for Overseas Human Rights Violations to Proceed to Trial' (Baker McKenzie: Canadian Labour and Employment Law, 10 November 2016).

50 See also J. Planitzer, N. Katona, B. Linder, K. Lukas, 'Searching for accountability of the private sector: Civil liability of corporations for trafficking in human beings for the purpose of labour exploitation in the European context', in: Alison Brysk, Michael Stohl (eds.), *Contracting Human Rights – Crisis, Accountability, and Opportunity* (2018), 194-208.

51 C. van Dam, 'Tort Law and Human Rights', *Journal of European Tort Law* 2 (2011), 248, 249.

52 G. Skinner, *Parent Company Accountability* (ICAR, 2015), 21-23.

Corporate liability can be seen as one among several tools to improve access to justice and herewith access to unpaid wages for exploited workers. Only the application of multiple tools might have an effective impact. Hence, the recommendations continue with exploring alternative complaints mechanisms and discussing a statutory duty to conduct human rights due diligence.

4.1. Enhanced Application of Non-Monetary Sanctions and Alternative Approaches to Prevent THB in Corporations from Taking Place

Since the exclusive application of monetary sanctions in cases of corporate liability for THB has only limited deterring effect,[53] stakeholders should be encouraged to apply other or additional measures. As EU Directive 2011/36 demonstrates, further measures such as the exclusion from public benefits or aid and temporary or permanent disqualification from the practice of commercial activities should be applied in addition to criminal (monetary) sanctions.

In order to prevent THB from taking place in corporations, possible impacts of sanctions or measures have to be more deterring than monetary sanctions. One possibility would be to offer consumers access to more information on the company's practices. Hence, following the third approach, mandatory reporting to achieve enhanced transparency in supply chains should be regulated by States. Mandatory reporting, as for instance implemented by the UK Modern Slavery Act,[54] has an impact on the awareness within corporations. Research shows that already in the first year after the entry into force of the Modern Slavery Act, twice as many senior management members are involved in addressing issues relevant to the Act, such as THB for labour exploitation, as before.[55] Consequently, mandatory reporting on measures within a company and its supply chain could have a preventive effect. Additionally, non-reporting could lead to the unwanted effect of reputational damage which companies certainly would try to prevent. The implementation of the EU directive on non-financial information (NFI)[56] would be an important first step, since the Modern Slavery Act in the UK is the only legislation in Europe currently having a transparency

53 J. Planitzer, N. Katona, 'Criminal Liability of Corporations for Trafficking in Human Beings for Labour Exploitation', *Global Policy* 8 (2017), 509-510.

54 Section 54 of the Modern Slavery Act 2015.

55 Q. Lake et al., *Corporate Leadership on Modern Slavery* (Hult International Business School and The Ethical Trading Initiative, 2016), 12.

56 Directive 2014/95/EU amending Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC and repealing Council Directives 78/660/EEC and 83/349/EEC.

clause that focuses on modern slavery. However, implementation comes with two caveats: Firstly, legal initiatives on mandatory reporting do not require companies to implement specific measures to prevent THB, which would be necessary in order to achieve sustainable impacts.[57] Secondly, mandatory reporting must indicate that also subsidiaries and suppliers, going beyond the direct first-tier supplier, are falling under the reporting to prevent loopholes.[58]

Initiatives in public procurement could be used to incentivise corporations to draw more attention to the prevention of THB. Under the heading of Sustainable Public Procurement (SPP), States should consider not only economic but also environmental and social consequences of the procurement process.[59] Therefore, human rights-related factors should also be considered. Whereas environmental considerations have a longer tradition in SPP, the promotion of human rights, in particular related to THB in supply chains, has been only recently explored.[60] The new Public Procurement Directive 2014/24/EU[61] offers possibilities to also include social aspects in public procurement. One example is the possibility to reject 'abnormally' low tenders when the costs calculated might result from non-compliance with national or international labour law provisions.[62]

4.2. Exploring Alternative Complaints Mechanisms for Exploited Persons

When exploited persons file claims for unpaid wages under the currently available procedures, they face lengthy proceedings, gaps in legal aid and, even when successful, huge obstacles in actually obtaining any payments. Hence, further legal avenues should be explored in order to ensure compensation in cases where companies exploit workers. The authors suggest the following legal avenues:

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57 J. Planitzer, 'Trafficking in Human Beings for the Purpose of Labour Exploitation: Can Obligatory Reporting by Corporations Prevent Trafficking?', *Netherlands Quarterly of Human Rights*, 34 (2016) 4, 337.

58 Ibid., 338.

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

60 O. Martin-Ortega, O. Outhwaite, W. Rook, 'Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods', *The International Journal of Human Rights* 19 (2015), 3, 345.

61 Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC.

62 Recital 103 and Art. 69 para 3 of Dir 2014/24/EU.

1. Introducing a specific civil remedy for THB for the purpose of labour exploitation

In the UK, THB as such is not an actionable tort and has therefore the risk of not fitting in any of the established categories of tort such as assault or harassment.[63] Using other civil law possibilities, such as claims under labour law, might also not establish an effective alternative. Competencies of labour courts are limited. For example, it has been shown in Austria that it is very difficult for a worker to prove that there was or is a valid employment relationship between the claimant and the defendant company, in particular when the contract was agreed outside the company's premises.[64] Hence, it is recommended to establish a specific civil remedy[65] tailored to cases of THB. This should offer the possibility of filing a complaint for compensation on a civil law basis, independently of a prior conviction or certain status of criminal law procedure. This would leave trafficked persons in a stronger position since the dependence on the state prosecutors' decision on whether or not to continue proceedings are lowered. Nevertheless, one existing example, the private right of legal action under the US Trafficking Victims Protection Act of 2000 also reveals weaknesses. One obstacle is that companies can only be held liable under this legal action when they 'knew or should have known' about the exploitation, which may not be deterring enough for contractors concerning the actions of subcontractors.[66] Furthermore, expected payments based on the claim might be low compared to the litigation costs incurred.[67] These weaknesses need to be taken into account when developing a specific civil remedy for cases of THB.

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63 S. Martin, 'Slavery and Access to Justice', https://www.opendemocracy.net/openjustice/shanta-martin/slavery-in-uk, 2 December 2016 (last accessed 03 April 2017); FLEX, Working Paper, *Access to Compensation for the Victims of Human Trafficking*, (July 2016), 10; M. Evans, http://thejusticegap.com/2015/09/human-rights-human-trafficking-what-rights-for-the-victims/ (last accessed 03 April 2017).

64 Interview with Lawyer/Austria, 9 June 2016. See on the matter of contracts agreed outside the premises for instance the Austrian Supreme Court (OGH) 1 Ob 188/98y and 1 Ob 547/86.

65 FLEX, Working Paper, *Access to Compensation for the Victims of Human Trafficking*, (July 2016), 10.

66 K. Dryhurst, 'Liability up the Supply Chain: Corporate Accountability for Labor Trafficking', (2013) 45 *N.Y.U. Journal of International Law and Politics 641*, 661-663.

67 K. Dryhurst, 'Liability up the Supply Chain: Corporate Accountability for Labor Trafficking', (2013) 45 *N.Y.U. Journal of International Law and Politics* 641, 671. See for further discussion on advantages and disadvantages of using tort law in Australia for suitable remedies for victims of trafficking in human beings, P. Stewart, 'Tortious Remedies for Deliberate Wrongdoing to Victims of Human Trafficking and Slavery in Australia' (2011) 34 *UNSW Law Journal* 898. Challenges that Stewart identifies are for instance the issue of getting pro bono legal advice (p. 929) or the actual recovery of the verdict money form the defendant (p. 935).

2. Exploring the application of a collective redress action for exploited persons

Recent documents issued by the Council of Europe and the European Parliament in relation to business and human rights formulate the need for collective redress action. The Council of Europe's Recommendation of the Committee of Ministers to Member States on Human Rights and Business[68] states that Member States should allow third parties like trade unions to bring claims on behalf of alleged victims. Foundations, associations or other organisations should be able to bring claims of, as in the case of this study, exploited persons against companies, with the support of the exploited persons and if these organisations have a particular link to this group of exploited persons.[69]

Another recommendation is the possibility to have a 'collective determination of similar cases' of corporate human rights abuses.[70] The European Parliament calls on EU Member States to tackle procedural burdens in civil litigation concerning cases of serious human rights abuse in third countries. Thus, for actions occurring outside the EU that lead to human rights abuses, the European Parliament recommends implementing collective redress mechanisms.[71] *Enneking* shows that there is a multitude of possibilities for collective redress in Europe. However, in many countries, collective redress might be limited to areas such as consumer protection or competition law, [72] which would not be relevant for THB committed by companies. In the human rights context, the use of the collective complaints procedure under the European Social Charta[73] still waits to be used for this topic and has only been ratified by 15 EU Member States thus far.[74] In the context of severe labour exploitation in Europe, it is shown that –

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

69 Recommendation CM/REC(2016)3, para 39 and CoE Steering Committee for Human Rights (CDDH), *Explanatory Memorandum to the Recommendation CM/REC(2016)3 of the Committee of Ministers to Member States on human rights and business*, para 62.

70 CoE Steering Committee for Human Rights (CDDH), *Explanatory Memorandum to the Recommendation CM/REC(2016)3 of the Committee of Ministers to Member States on human rights and business*, para 62, see also *Recommendation CM/REC(2016)3*, para 42.

71 European Parliament, *European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI))*, para 26, referring to the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

72 L.F.H. Enneking, 'Judicial remedies: The issue of applicable law', in: Juan José Àlvarez Rubio, Katarina Yiannibas (eds.), *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (London and New York: Routledge 2017), 68.

73 See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ETS No. 158, adopted 9 November 1995, entered into force 1 July 1998.

74 Council of Europe, The Collective Complaints Procedure, http://www.coe.int/en/web/turin-european-social-charter/collective-complaints-procedure (last accessed 11 April 2017).

where allowed – third party interventions by for instance trade unions are only rarely used.[75] Collective redress mechanisms including strengthening third party interventions would be an option to reduce costs for each individual involved. Since the high costs are also one of the deterring effects for exploited persons to come forward with civil claims, collective redress mechanisms for corporate human rights abuse should be established.

4.3. Recommendation to Implement a Statutory Duty on Companies to Conduct Human Rights Due Diligence

Since the current application of the duty of care reveals a series of challenges for exploited workers and case-law in this regard is limited in Europe, the authors are in favour of implementing a statutory duty of the company to conduct human rights due diligence.[76] Such a duty would require a company to identify, prevent, mitigate and remedy human rights abuses for which it is directly or indirectly responsible. This includes abuses of its business partners in the supply chain. In contrast to the classical duty of care, human rights due diligence is not limited to situations where the company fulfils strict criteria of legal or factual control over the subsidiary. It requires only a causal link between the human rights violation in the supply chain and the company's failure to effectively conduct human rights due diligence.[77] These requirements would thus encompass not only subsidiaries but also suppliers (or subcontractors) and contractors and would therefore allow coverage of all workers in the supply chain.[78]

The exact requirements of human rights due diligence will depend on the respective circumstances of each case (the sector, country, company's involvement etc.) and might be best compared to the standard of 'acting as a reasonable person' under tort law.[79] Accordingly, a company would become liable if it could have identified a risk of labour exploitation but failed to take adequate measures to prevent or mitigate it. A statutory duty to conduct human rights due diligence

75 European Union Agency for Fundamental Rights, *Severe Labour Exploitation* (Vienna, 2015), 85.

76 See as an example R. Klinger et al., *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht* (2016). This report shows how statutory duty of the company to conduct human rights due diligence could be established in the German legal system. See for the legal proposals in particular pp. 37-79.

77 Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, *The Corporate Responsibility to Respect Human Rights in Supply Chains – 10th OECD Roundtable on Corporate Responsibility Discussion Paper* (2010), http://www.oecd.org/investment/mne/45535896.pdf (last accessed 11 April 2017).

78 C. van Dam, F. Gregor, 'Corporate Responsibility to respect human rights vis-à-vis legal duty of care', 132, 133.

79 Ibid., 131.

would enable claimants to obtain compensation or other forms of redress on the basis of a binding legal decision under tort law. Under classical tort law, the burden of proof with respect to the violation would however still be on the claimant. Given that it has been extremely difficult, in particular for exploited workers who are likely to work under precarious conditions, to get access to the necessary information, the authors also suggest linking the statutory duty with a shift of the burden of proof through a rebuttable presumption of control.[80] In this case the company would have to prove that it had acted with due diligence and taken all steps to prevent and mitigate the human rights violation. This scenario would considerably strengthen the position of exploited workers and improve their access to justice.

In recent years, it has been increasingly argued that the statutory duty to conduct human rights due diligence should not only be based on civil law but equally handled by public law. The idea would be to have a public authority, akin to those overviewing e.g. competition law or financial service law, mandated to overview and fine companies for breaches of human rights due diligence or eventually even to provide a remedy.[81]

France and Switzerland have already undertaken steps in this regard. In November 2016 the French *Assemblée Nationale* adopted a draft law on the duty of vigilance. It requires large stock companies operating in France and worldwide to develop and implement a *plan de vigilance* which has to include measures to prevent severe human rights violations resulting from its own activities as well as the related activities from its subcontractors and suppliers in other countries.[82] In March 2017, the French Constitutional Court (*Conseil Constitutionnel*) approved the draft law with some minor changes. Accordingly, all companies with more than 5,000 employees in France or more than 10,000 employees worldwide including their subsidiaries are from now on required to implement and publish a *plan de vigilance*. Initially, the law included a triple mechanism in case of non-respect of this obligation which provided for monetary sanctions of the parent, civil liability and a mandatory publishing requirement.[83] The Constitutional Court subsequently rejected the monetary sanction provision as it was

80 C. van Dam, F. Gregor, 'Corporate Responsibility to respect human rights vis-à-vis legal duty of care', 131.

81 Ibid., 131.

82 European Coalition for Corporate Justice, *French Duty of Vigilance Law*, https://business-humanrights.org/en/france-draft-law-on-corporate-human-rights-environmental-due-diligence-in-supply-chains, December 2016.

83 Conseil constitutionnel, Décision n°2017-750 DC, du 23 mars 2017 Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2017750DC2017750dc.pdf, last accessed 24 April 2017.

considered as too broadly formulated. It accepted however the potential civil liability of the parent company. Thereby, the law might be assessed as weakening the fundamental principle of separate corporate personality to a certain extent.[84] In practice this means that a person who has suffered from labour exploitation in France may from now on require compensation via civil liability on the basis of the new law.

In Switzerland, more than 80 organisations have joined to launch a petition for a constitutional change which aims at introducing a mandatory duty to conduct human rights due diligence and respect environmental standards for the operations of Swiss based corporations abroad. The latter also includes the activities of suppliers and subcontractors under their control. The initiative has already gathered more than 140,000 signatures so that the constitutional change may be voted for by the Swiss people. If adopted, the law will enable human rights victims to seek redress for human rights violations including labour exploitation suffered by Swiss companies, their subsidiaries, suppliers and subcontractors abroad.[85]

In Germany, experts published a very interesting proposal on how a law on human rights due diligence embedded in public law could be integrated into the German system. They suggest a national public law enshrining a material duty to conduct human rights due diligence which sets the standard that should be referred to, monitored and enforced by public or private enforcement mechanisms such as administrative orders, fines, conditions for accessing public support, export credits and guarantees or civil liability.[86] The law requires large companies as well as other companies which operate in a high risk sector or in high-risk or conflict zones to assess, prevent, mitigate and remedy human rights violations. This general duty should be concretised by sector-specific regulations in the respective areas.[87]

The major advantage of public law would lie in the fact that a requirement to conduct due diligence is oriented towards preventing human rights abuses instead of providing remedies after the violation has happened which is the classical approach of civil law. Requiring and monitoring human rights due diligence under public law might be the task of a specific authority which can execute these tasks within the country where the corporation is incorporated.

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84 Interview with Researcher/Austria, 19 April 2017.
85 Swiss Coalition for Corporate Justice, http://konzern-initiative.ch/initiativtext/?lang=en, last accessed 03 April 2017.
86 R. Klinger et al., *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, 38-41, 48.
87 Ibid., 48.

Under public law it is not necessary to prove the damage so that difficult questions of burden of proof typical for civil law need not be addressed.[88]

Finally, it is important to note that a statutory duty of care needs to encompass human rights violations wherever they occur. Labour exploitation may be found in any country and existing legal provisions are often still incomplete. A statutory duty to conduct human rights due diligence would require the company to assess the risk of labour exploitation of all workers throughout the whole supply chain and ensure a comprehensive coverage of all workers. In general, it should assess all human rights risks. If it has only limited leverage further down the supply chain, the company needs to prioritise some sector-specific risks.[89]

In concluding, although EU Member States and States Parties of the CoE Convention against THB installed a legal framework that should ensure corporate liability and access to unpaid wages from the employer or from other contractors in the subcontracting chain, challenges in practice exist. Challenges are for instance lengthy proceedings and gaps in legal aid and gaps in the protection of rights of workers in subsidiaries. Furthermore, workers face practical barriers in accessing rights as defined in the EU's Employers' Sanctions Directive. Hence, the authors explore how the legal framework could be more conducive and discuss effective complaints mechanisms. Imposing liability on companies for THB has to be embedded in a set of measures that encompass further approaches such as obligatory reporting on measures against THB in supply chains or using public procurement as a tool to prevent THB. Furthermore, alternatives such as collective redress action or a statutory duty of companies to conduct human rights due diligence are presented.

88 R. Klinger et al., *Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht*, 46, 47.
89 Ibid., 27.

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