Forced Labour in International Law
and Responsibility of States for Private Actors

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Filomena Medea Tulli

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Referent:	Prof. Dr. jur. Christian Walter (*Betreuer LMU*)
Korreferenten:	Prof. Dr. Peter Hilpold (*Universität Innsbruck*) Prof.ssa Giovanna Adinolfi (*Universität Mailand*)
Betreuer Universität Trient:	Prof. Giuseppe Nesi
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TABLE OF CONTENTS

ABSTRACT

The severity of the phenomenon of forced labour, among other forms of human exploitation, has garnered paramount significance in the context of contemporary socio-economic changes. For this reason, the present work seeks to address the issue through the lens of international law with two primary objectives. Firstly, to delineate the actual legal status surrounding the prohibition of forced labour and secondly, to clarify the nature of State responsibility for the utilisation of forced labour by private actors. Built upon this foundation, the research unfolds in a tripartite structure.

The first chapter is introduced by an historical overview focused on States' acknowledgement of forced labour alongside abolitionist movements against slavery between the XIX and XX centuries. The overview serves as a basis for an in-depth examination of relevant key international agreements drafted within the League of Nations and later the United Nations, as well as the International Labour Organization, up to the latest developments. The analysis then extends to forced labour provisions enshrined in regional human rights conventions and other pertinent international agreements, as to the most recent practice developed by international organisations.

The second chapter is divided into two sections. In the first part, the focus lies on the case law on the prohibition of forced labour as interpreted by the International Court of Justice and regional human rights courts, where State responsibility arises from the employment of forced labour by private actors. In the subsequent part, examples of national legislation aimed at combating forced labour through corporate accountability are outlined, alongside supranational initiatives aligned with this overarching objective.

Drawing from the insights garnered in the preceding chapters, the concluding chapter presents an exploration of the status of the prohibition of forced labour within the framework of international law. This is followed by the analysis of three potential hypotheses aimed at elucidating the nature of State responsibility regarding the employment of forced labour by private actors.

On these grounds, the prominence of forced labour in contemporary international law and the critical role of States in addressing it towards private actors is ultimately unveiled. The outcomes of the work assess if States' strategies align with the urgency of the issue, suggesting future approaches to effectively tackle forced labour in the actual global landscape.

FOREWORD

The resurgence of various forms of human exploitation in the twenty-first century has taken on a tragically heightened relevance, seemingly entwined with the rapid socio-economic shifts unfolding globally. The backdrop of exploitation of man by man has persisted across ages, intricately woven into the fabric of major historical events, adapting in response. This evolution persisted in its most formidable manifestation, slavery, until the beginning of the nineteenth century, when States embarked on the transformative journey towards its official abolition, backed by international commitments. As the subsequent century unfolded, the 20th century, legal nuances distinguishing among the existing forms of exploitation surfaced. Concurrently, resolute efforts were undertaken by States and international organisations in a parallel pursuit to strive for the eradication of these exploitative practices. Thus, in the latter half of the century, the figures of servitude, debt bondage, and forced marriage emerged. Nevertheless, among the recognised forms of exploitation, the first and initially unique distinction that arose was the one between slavery and forced labour. This distinction found expression in the first international agreement on slavery forged within the League of Nations as early as 1926. While forced labour was legally acknowledged in its peculiarity and severity, its acceptance for "public purposes" initially prevailed, primarily influenced by the enduring European colonial presence in Africa. Subsequent to this phase, commitments were made to gradually phase out the tolerance of forced labour for "public purposes", but it was not until 2014 that an explicit prohibition in this regard finally materialised. Nonetheless, vestiges of these pockets of tolerance still persist, as we shall explore, manifested through a series of exceptions to the use of forced labour that are still allowed today, albeit in specific circumstances.

The pertinence of the phenomenon of forced labour, among other forms of exploitation, becomes especially pronounced in the context of contemporary socio-economic changes. This connection is further intricately tied to the escalating influence wielded on the global stage by private actors who shape economic relations in today's capitalist society. Consequently, within this dynamic landscape, the crucial imperative to examine the role undertaken by the State, as primary subject of international law, arises.

More precisely, it becomes essential to scrutinise the nature of responsibility that the State may bear in the intricate relationship between the victim of forced labour and the private perpetrator thereof.

Built on this foundation, the present work sets forth ambitious objectives. Primarily, it aims to legally frame, through the lens of international law, the contemporary manifestation of forced labour. This involves a comprehensive analysis of the historical evolution of the case within the main international agreements established over the years. Concurrently, by delving into international case law and relevant scholarly contributions, the study endeavours to deepen the comprehension of the potential State responsibility arising from the exaction of forced labour by private actors. Additionally, the research seeks to assess the adequacy and effectiveness of responses developed at the national and supranational level to tackle this outlined phenomenon.

Navigating a subject of such expansive dimensions – spanning legal, historiographical, and even geographical realms – has of course compelled certain limitations in the scope of the present research. For this reason, it is crucial to establish early on, that the work will not adopt a criminalistic perspective. Consequently, responses offered by the criminal legal system to the phenomenon of forced labour will not undergo scrutiny, neither on an international nor national scale. Only a brief mention will surface regarding definitional aspects, aiming to better elucidate the contours of forced labour in relation to slavery. As gleaned from the preceding lines, it is also important to note that the research will deliberately omit an examination of the relevant and pervasive phenomenon of forced labour directly employed by the State and its organs. In fact, this aspect, owing to its distinct dynamics, elicits own responses from the international legal system that are markedly separate from those that will emerge from our inquiry. This clarification is especially pertinent in the context of the jurisprudential analysis of the prohibition of forced labour, as the focus will be exclusively on cases where the factual basis involves private actors engaging in the use of forced labour. For similar reasons, it is then imperative to also underline that the phenomenon of child labour will not be considered. Finally, regarding the presentation of certain national and supranational legislative models aiming to hold companies accountable for upholding workers' human rights, it is further important to acknowledge from the outset that these will be offered merely as illustrative examples, not asserting to provide an exhaustive global coverage.

On this basis, the work will follow a tripartite structure. The first part will be introduced by an historical overview aimed at outlining the context within which the need for States to eradicate the scourge of slavery developed and how, concurrently, the reality of forced labour, initially condoned for public purposes, came to be acknowledged. Subsequently, the initial legal milestones when States committed to addressing this demand will be traced, beginning with the first Declaration Relative to the Universal Abolition of the Slave Trade of 1815, recognising slavery as a "scourge" that had "so long afflicted mankind". The entire 19th century will be then marked by a profound diplomatic discourse towards new political balances, where the abolition of slavery occupied a prominent position. Within this context, the League of Nations formulated the inaugural Slavery Convention in 1926, marking the first occasion when the issue of forced labour was formally addressed. Shortly thereafter, the issue was taken up and developed by the newly formed International Labour Organization through its Forced Labour Convention, which drafted the definition of forced labour that remains valid to this day and has been most recently confirmed by the related 2014 Protocol. In this vein, an analysis of the content embedded in multilateral international agreements forged after the establishment of the United Nations will follow. Within the framework of both the United Nations and the International Labour Organization, the earlier surfaced concepts have been then further revisited and expanded upon by means of subsequent international agreements. It is still within the International Labour Organization sphere that the issue of forced labour is guided in the transition to the new millennium, with consequent changes in vocabulary and perspective.

In order to better frame the legal contours of the prohibition of forced labour, it will then be necessary to take a closer look at the provisions dedicated to the prohibition of slavery and forced labour within key international agreements protecting human rights, both of general and regional nature. As we shall see, it is precisely these latter that will play a pivotal role in precisely demarcating the legal boundaries of the prohibition of forced labour. Subsequently, the investigation will progress to scrutinise the contemporary legal landscape of forced labour, navigating new challenges between attempts to assimilate it with other contemporary forms of exploitation and decisive guidance provided by doctrinal projects. In conclusion, attention will be directed towards understanding the role played by international organisations in this context. Particularly

relevant in this regard is the work of the human rights treaty bodies established within the United Nations, as well as the establishment of the Special Rapporteur on contemporary forms of slavery and the investigations carried out within the International Labour Organization. This comprehensive analysis aims to provide a tangible understanding of the actual extent and context of forced labour occurrence.

The second part of the work unfolds in a similar direction, comprising two distinct sections. The initial section is dedicated to delineating the evolution of the prohibition of forced labour within judicial interpretation. To this end, the occasions on which the International Court of Justice grappled with this prohibition will first be recalled. The subsequent focus shifts to the extensive body of work in this domain carried out by regional international human rights courts. Within the nuanced and varied jurisprudence of the European Court of Human Rights, the interpretative development of the prohibition of forced labour will emerge, illustrating a trajectory subjected to varying degrees of expansive and restrictive interpretations over time. The jurisprudence of the Inter-American Court of Human Rights significantly contributes to this framework, further refining and articulating European positions, adapting them to the specific contexts of the relevant geographical area. Although less abundant in interpretative insights concerning the prohibition of forced labour, the African system for the protection of human rights ultimately provides noteworthy instances that warrant closer examination.

The second section within the central chapter aims to shed light on various national and supranational endeavours aimed at curbing the prevalence of forced labour by private actors. This objective is chiefly pursued through the implementation of measures compelling companies to assume responsibility for their operations through prospective commitments. By way of example, and without laying claim to exhaustive coverage, a closer look will be taken of certain legislative initiatives undertaken by European countries in this sense. Emphasis will be placed on the German initiative, epitomised by its *Lieferkettengesetz*, which stands out as the most recent and comprehensive legislative model to that effect. A scrutiny of initiatives pursued by France, the United Kingdom, and the Netherlands will follow suit. These initiatives are crafted to minimise the impact of business activities on workers' rights, extending throughout the entire production chain. This latter aspect becomes particularly salient in light of concurrent efforts at both the European Union and global levels, exemplified by

the Corporate Sustainability Due Diligence Directive on the one hand and the process for a Business and Human Rights Treaty on the other.

The final segment of the work aims to draw comprehensive conclusions based on the elements gathered throughout the preceding chapters. This entails, in particular, the imperative to seek a precise legal qualification of the prohibition of forced labour on one side, and on the other, to comprehend the nature of State responsibility that may arise due to conduct contravening the prohibition of forced labour by private actors. To establish an accurate legal framework for forced labour, it becomes essential, therefore, to initially scrutinise the legitimacy of the scholarly proposed use of a cumulative category encompassing all contemporary forms of exploitation, exemplified by the category of "modern slavery". Such an examination is inherently crucial as, based on the ensuing outcome, it will determine whether it is necessary to delve into the legal characteristics of forced labour in its singularity or whether these characteristics are shared with all prevailing forms of exploitation, commencing with slavery. In relation to the results obtained from this preliminary scrutiny, it will then be feasible to ascertain whether the prohibition of forced labour can be categorized among the peremptory norms of international law and whether the prohibition gives rise to an *erga omnes* obligation for States.

Moreover, an exploration ensues into the nature of State responsibility arising from the private use of forced labour, a facet intricately linked to the broader issue of State responsibility for private actors. Specifically, three avenues have been discerned to elucidate this nature. The first involves the courts, predominantly regional human rights courts, leveraging positive obligations imposed on States. These obligations necessitate substantive and procedural actions, compelling States to adhere to the provisions of the international agreements to which they are bound. A second avenue traces back to States' due diligence, which relates to their conduct, mandating them to implement suitable measures. These ensure that private individuals refrain from causing harm, with States actively striving to achieve this goal to avoid any lapse in implementing necessary and diligent measures in this regard. Lastly, the sustainability of a predominantly doctrinal theory will be evaluated, positing that the State could be held responsible to the extent that the conduct of the private actor is to be attributed to it. This relationship, under certain circumstances, implies the complicity of the two parties involved.

In light of the definition of the prohibition of forced labour as outlined in chapter one and drawing from the jurisprudential insights addressed to States as elucidated in chapter two, the exploration in the concluding chapter will enable to better grasp the contemporary understanding of forced labour. It seeks to delineate its legal standing within international law and ascertain the potential repercussions for States in the event of a violation of the prohibition of forced labour by private actors, potentially implicating State responsibility. These assessments are of paramount importance to discern whether States, through their national and supranational legislative initiatives, are aligning with a desirable direction or whether a slightly modified or alternative course would be advisable for the future, towards the full and complete realisation of fundamental rights for workers and beyond contemporary exploitative trends.

The realisation of the present research owes a debt of gratitude to Professor Giuseppe Nesi, whose unwavering support and guidance have been crucial from the outset of my interest in the issues at hand and have been instrumental in my formation, going back to my participation in the International Law course at the University of Trento.

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CHAPTER I
SLAVERY AND FORCED LABOUR: FROM CHALLENGING DEFINITIONS TO SHARED SOLUTIONS?

1. *The slow abolition of the legal practice of human ownership: a brief historical overview of slavery*

In these first opening pages, it is perceived as an unavoidable necessity to provide an historiographical basis in relation to the development of the history of slavery over the last centuries, to better understand the terms and the contemporary phenomena that the present work will deal with. To briefly outline as accurately and comprehensively as possible the main stages in the recent history of slavery is of course a highly difficult and dangerous task for a non-historian. As it has been observed, the history of slavery «is the global history, or rather, the history of humanity»[1]. Precisely because of this magnitude, historical scholars mainly observe the phenomenon of slavery both in a diachronic and diatopic way, that is over time and space, as well as for different types of slavery or in relation to specific subjects[2]. Of course, these criteria are often inevitably intertwined in studies and analyses. This is also why we will stick here to present a mirror of the main stages of the history of slavery that appear to be of unanimous opinion in doctrine and beneficial to the subsequent discourse.

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[1] M. ZEUSKE, *Handbuch Geschichte der Sklaverei – Eine Globalgeschichte von den Anfängen bis zur Gegenwart*, Berlin, 2019, p. XIV. Even more specifically, see M. ZEUSKE, *Sklaverei – Eine Menschheitsgeschichte von der Steinzeit bis heute*, Ditzingen, 2021, in which the author elaborates the metaphor of the „very old snake" to define the history of slavery over the centuries – «Sklaverei – eine sehr alte Schlange», p. 7-40.

[2] Slavery studies have obviously spilled over in time into every discipline and immense is the literature on the subject, which often limits the study to a specific historical period, geographical area or aspect. There are, however, many examples of research, often adopting a particular study point of view, that aspire to an all-encompassing result. In this regard see for instance the following volumes: G. HEUMAN, T. BURNARD, *The Routledge History of Slavery*, London, 2011 and M. ZEUSKE, *op. cit.*, which combine an historical analysis with an analysis of the characteristics of slavery in certain contexts of society; the massive research offered by the four volumes of *The Cambridge World History of Slavery*, Cambridge, 2011-2021, which strictly follow the historical-chronological criterion; S. ENGERMAN, S. DRESCHER, R. PAQUETTE, *Slavery*, Oxford, 2001, that deals with the subject by macro-topics ('laws', 'resistance', 'abolition' etc.). A legal-historical perspective on the topic, with a particular focus on more recent developments, is then offered by C. M. STORTI, *Economia e politica vs libertà – Questioni di diritto sulla tratta atlantica degli schiavi nel XIX secolo*, Torino, 2020.

It seems unavoidably to go back to classical antiquity to retrace the roots of slavery. To the Greek civilisation, but above all and certainly to a greater extent to the Roman society, where the servile status has been regulated over the centuries and in connection with the expansion of the Roman Empire by a large number of laws within the *jus gentium*. On the systemic level, members of society were roughly divided into two broad categories: those who were free and those who were unfree[3]. As it is known, in the Roman society slaves carried out a wide range of activities, as they played an important, sometimes central role in the key sectors of the economy – agriculture, mining and crafts – but also served their masters in the household and in administration[4]. In the Roman Empire, the development of an economy based on slave labour was closely linked to the expansionist policies of the third and second centuries B.C., whose military successes provided access to many slaves. At the same time, these wars led to a decline in the number of free peasants, many of whom had to serve in the legions, while Rome's elites invested in ever larger latifundia in the newly conquered territories, run by slave labour. All in all, ancient sources mention a number of routes into slavery – besides captivity in war, descent from a slave, self-selling and sale, abandonment, human abduction, in early times also debt bondage, punishment for a crime, finally a marriage-like union with a foreign slave. In Rome, slave's freeing (*manumissio*) dated back to the early days of the Republic, when the majority of slaves still came from immediately neighbouring regions. Freedmen were automatically granted citizenship regardless of their origin, but only gained access to magistrate offices and the army in the third generation. The *manumissio* took place in different ways. The earliest form of liberation (*manumissio vindicta*) took place in the presence of a third authority, with a formal and solemn transaction, which became simpler and simpler over the centuries. A master could otherwise register a slave as a citizen in a census (*manumissio censu*) or release him by testamentary disposition (*manumissio testamento*), which Emperor Augustus limited to a maximum number of one hundred slaves[5].

[3] It is in fact with this *summa divisio* that Gaius famously begins the part of his work *Institutes* relating to persons: «Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.» (Gaius, Institutiones I, 9-12).

[4] To identify the salient turning points in the earliest history of slavery, the volume by A. ECKERT, *Geschichte der Sklaverei. Von der Antike bis ins 21. Jahrhundert*, München, 2021, has been taken as guiding light. Here at p. 24.

[5] A. ECKERT, *op. cit.*, p. 25-28.

Christianity, elevated to the status of state religion under Emperor Constantine the Great (272-337 AD), did not push for the abolition of slavery. Several elements rather point to an interest in the continued existence of the institution. Only the severe crises in the late period of the Roman Empire contributed to the partial decline of slavery. In any case, there is no question of a temporary end to slavery in the Western world, with the advent of tenant farmers (*coloni*) in the Late Roman Empire which would have given way to serfdom on a broad scale in the Middle Ages, a juridically complex figure, lying somewhere between the slave and the free man, which bound the peasant to a specific piece of land. Despite considerable fluctuations, the concept of slavery seems therefore to have been always present in the life of Mediterranean antiquity[6].

Longer-term continuities and new forms of slavery can be traced not only in the Mediterranean region and in Byzantium, but slavery and the trade in human beings were also widespread practices in parts of Western, Northern and Eastern Europe. One specific feature that characterised slavery and the slave trade in the medieval millennium was a new dynamic triggered by monotheistic religions: Muslims, Christians and Jews set out to increasingly restrict or completely prohibit enslavement and trade among themselves. In this way, the global network of slave trade routes and slave reservoirs was transformed in a drastic way, leading to the emergence of new "enslavement zones" and "enslavement-free zones". The former were increasingly located on the peripheries or outside of Muslim and Christian empires. Within these units, however, no enslavement of the indigenous population and no human trafficking across the borders of the dominions were allowed. Of course, practice did not always correspond to theory. Rulers here did set out from the 9th century onwards to enforce Christian norms also with regard to slavery and the slave trade, thus banning concubine and prohibiting Muslims and Jews from owning Christian slaves. Christians continued to buy slaves mainly for domestic work, for which they mainly used Slavs. The term slave, in fact, which came into use in the 10th century instead of the Latin *servus*, derives from Slav: Otto I deported defeated Slavs in the Balkans to the West as slaves. From the 9th to the 12th century slavery and the slave trade were also strongly influenced in Western Europe by the Vikings, who on their raids along the coasts and rivers of France captured not only jewellery and money from the raided churches and monasteries, but above all people, whom they sold at slave markets. In addition to slaves

[6] A. ECKERT, *op. cit.*, p. 30.

from the "pagan" countries of Northern and Eastern Europe, they sold numerous Christian captives they brought back from Western European raids. In Eastern Europe, slavery was a common phenomenon during the Early and High Middle Ages. The routes into slavery were manifold: indebtedness was a common reason, as was punishment for violations of the law. Some inherited the status from their parents or had been sold by their relatives. Abduction in raids and wars was also common[7].

The thesis of the disappearance or transformation of slavery with the development of feudal society[8], appears to have been questioned by recent research, particularly in regard to the Mediterranean region. Here, slaves were engaged in a wide range of activities, although their initially widespread use in agriculture was limited in the High Middle Ages to a few regions, such as Sicily and North Africa. In both Christian and Muslim dominions, they functioned as an important status symbol of urban elites. According to the Koran, a female slave who converted to Islam could attain free status by marrying a free man. Moreover, female slaves, through gift-giving and marriage practices, were strongly integrated into family structures[9].

The slave trade as well as slave ownership expanded considerably at the beginning of the 13th century when Italian merchants gained access to the ports of the eastern Mediterranean. The vast majority of women and men bought or sold by the Italians came from Eastern Europe and Central Asia. In the Italian cities, numerous professional groups participated in the business with slaves or were slave owners, although the prices for slaves were comparatively high. Before the slave trade turned increasingly towards the Atlantic towards the end of the 15th century, merchants from Genoa, Venice, Palermo and other Italian cities supplied Muslim and Christian markets with slaves. The decline of the Roman Empire and transformations in the land ownership had contributed to the decline of slavery in Italy, but it seems they did not make it disappear. In fact, Venetian merchants sold slaves to Muslims as early as the 8th century. The Genoese and Venetians in particular were active in the sugar business early on. In Cyprus, Rhodes and Crete, they also used their own slaves, mostly from the coasts of the Levant and the Black Sea. Sugar cane, from which sugar was extracted, had arrived in the Levantine region from Persia with the

[7] A. ECKERT, *op. cit.*, p. 30-31.

[8] The thesis has to be traced back to the renowned French historian Marc Bloch. See in particular M. BLOCH, *Comment et pourquoi finit l'esclavage antique*, in *Annales. Économies, Sociétés, Civilisations*, vol. II, n.1, 1947, p. 30-44, posthumously published.

[9] A. ECKERT, *op. cit.*, p. 32.

expansion of Islam in the 7th and 8th centuries. In the time of the Crusades, sugar was then also produced by Europeans themselves, for example by Venetians on Cyprus. Soon, sugar cane also reached the Iberian coasts, but only on the climatically favourable subtropical islands of Madeira and the Canary Islands, which were located off the coast of Africa. Primary characteristics of the slave trade associated with Africa are both the enormous quantity of enslaved people and the diversity of the geographical flow of slaves. From the areas of sub-Saharan Africa, where most, though not all, captives originated, slaves reached almost every region of the world seeking to exploit their labour or services[10]. It is commonly believed that from the 15th century on, four major slave trade routes can be distinguished: the trans-Saharan trade, the Indian Ocean, the Atlantic and the sub-Saharan Africa itself. Of course, each of these four flows was much more segmented and diverse than their respective geographical designations[11].

Notoriously, of these, the Atlantic route is by far the most intense and best known. In fact, it is at the origin of most of the existing images of the slave trade in general. According to authoritative historical doctrine, the reasons for this are multiple and interconnected: Africa was brought into direct contact with other continents and, following colonisation, the Atlantic trade was largely interpreted in the light of the history of European influence in Africa, subject of numerous historical controversies and ideological debates, especially since the 1960s. The abolitionist movement then, born in the West, had the Atlantic trade as its main target[12].

The Atlantic trade, which saw its strongest phase from the late 1600s, owes its birth primarily to the changes in a world that had suddenly become gigantic, thanks to the great geographical discoveries and the opening of Europe onto the great spaces, the oceans. Settlers from the respective European mother country, slaves from nearby Africa, and on the Canary Islands also local inhabitants were used for the field work on the Atlantic islands. The latter had long offered massive resistance to the Europeans and had finally been enslaved. The islands of West Africa served as a laboratory, in which Europeans accumulated the logistical and agricultural know-how that would make it

[10] A. ECKERT, *op. cit.*, p. 34.

[11] Referring again to the texts indicated so far, see G. HEUMAN, T. BURNARD, *The Routledge History of Slavery*, cit., p. 35-98; D. ELTIS, S. L. ENGERMAN (ed.), *The Cambridge World History of Slavery – Volume 3: AD 1420-AD 1804*, cit., p. 23-476; A. ECKERT, *op. cit.*, p. 36. See also O. PÉTRÉ-GRENOUILLEAU, *Les traites négrières – Essai d'histoire globale*, Paris, 2004, p. 144-208.

[12] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 35.

easier for them to exploit the Americas in the following centuries. For here, as soon afterwards in the Brazilian, Caribbean and North American plantation colonies, the labour force for the export-oriented agricultural production set up with great capital input was ensured by enslaving natives and increasingly Africans, since European labour was not available in sufficient numbers or was too expensive. The establishment of plantation economies in the "New World"– with sugar as one of the most important crops and slaves from Africa as labour – was to lead to one of the most extensive forced migrations in world history[13]. Estimates of the numbers of people brought from the African continent to the shores of America are of course a matter of debate. However, broadly speaking and considering the main studies carried out on the subject, it can certainly be said that over a period of about three centuries, from the beginning of the 1500s to the end of the 1800s, more than 11 million people were deported. The peak of the phenomenon took place during the 18th century, during which approximately 6.5 million people were deported[14].

Within these displacements, Portugal played a pioneering role. The need for labour, the search for gold, the demand for spices and scientific curiosity were the main reasons why the Portuguese initially pushed southwards, to discover the coast of Africa, until they reached the Cape of Good Hope in 1487. Five years later, advances in astronomical navigation enabled the discovery of the New World by Christopher Columbus. By the end of the 15th century, the coasts of Africa were known, and America discovered: the geographical foundations of the Atlantic route were in place[15].

Soon, and in an ever-increasing way, conditions were created for what would later be called the 'triangular trade', which, in a nutshell, has been the trade movement involving the transport of European products to Africa, in exchange for which European lords bought captives to take to the plantations, built in the new colonial world. The third and final phase involved the transportation of the resulting tropical products back to Europe. Indeed, after the genocide of the Indians, the Spanish and Portuguese colonialists started to raid and buy new cheap labour in Africa to employ on plantations. First Portuguese, then Spanish, Dutch, French and especially British specialised in raiding or

[13] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 36.
[14] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 165.
[15] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 39.

buying from local merchants African slaves, which they then transported and sold in America[16].

Between the late 15th and early 19th centuries, there were at least two African slaves for every immigrant from Europe in the Americas. Africans and their descendants, forcibly shipped across the Atlantic, provided much of the labour force that enabled the emergence of dynamic economies and the creation of international mass markets for consumer goods such as sugar, rice, tobacco, dyes and cotton. Nevertheless, from the beginning, the "New World" was seen by many as a promised land, a place of new beginnings that offered opportunities to break free from the shackles and dependencies of the past. Paradoxically, the degradation of millions of people who toiled in bondage on the plantations seemed to enable many others to take their fate into their own hands and redefine their existence[17].

In the last decades of the 18th and the first of the 19th century, the European empires in the Americas started to suffer significant setbacks. Slavery in the Atlantic region emerged from these decades both weakened and strengthened. In Spanish Latin America, the wars of independence weakened slavery, but the process of absolution was extremely slow in many places. In Brazil, the proclamation of an independent empire in the autumn of 1822 represented a compromise, as it were, between the interests of the ancestral plantation-owning aristocracy and the Portuguese new immigrants, who were mostly active in overseas trade and wanted close ties to the "mother country". For the slaves, however, independence initially changed nothing. It was not until 1888 that a single sentence, Article 1 of the "Golden Law", formally freed more than 1.5 million slaves[18].

However, the transatlantic slave trade was not the only human trafficking complex of the modern era in which Africa had an essential place. For well over a thousand years, transport routes through the Sahara connected the Mediterranean world with the rest of the African continent. Not only material goods, such as gold, and slaves were transported by camel caravans to the desert and the cities of the neighbouring regions, but along with

[16] O. PÉTRÉ-GRENOUILLEAU, *La traite des Noirs*, Paris, 2018, from p. 52.
[17] A. ECKERT, *op. cit.*, p. 8.
[18] A. ECKERT, *op. cit.*, p. 74. The *Lei Áurea* ("Golden Law"), was made of only three brief articles, the first of which stated «É declarada extinta desde a data desta lei a escravidão no Brasil.» ("Slavery in Brazil is declared extinct from the date of this law"). The law in question was signed on the 13th of May 1888 by Imperial Princess of Brazil Isabel, nicknamed for this reason 'A Redentora' (The Redeemer).

commerce inevitably also the culture of Islamic traders expanded. The beginning of the slave trade through the Sahara can be dated to around the 8th century, shortly after Islam had begun to spread in North Africa. For a long time, gold remained the most important commodity transported overland through the Sahara. But from the beginning of the Islamic presence in the Sahara, there was a high demand for slaves in North Africa as well as in the Arab regions further east, which continued in the Islamic world and even in some parts of Mediterranean Europe until the early 20th century. The slaves who were forcibly transported across the Sahara from sub-Saharan Africa rarely served in agriculture or other commercial activities, unlike their counterparts in the Americas and the Caribbean. The vast majority, however, came as servants to wealthy urban families in the Arabic-speaking countries of Mediterranean Africa, where they were employed in the household. Male slaves sometimes also served in the armed forces of Muslim rulers in North Africa[19].

Precise information on the quantitative extent of the trans-Saharan slave trade is not available, however. It is estimated that between 1400 and 1900, about four million people were trafficked across the Sahara, not counting an additional 1.5 million individuals who died in transit[20].

The global economy of the Indian Ocean was a multi-layered and enduring system of long-distance trade that linked China with Southeast and South Asia, the Middle East and Africa. It created a demand for various forms of slave labour, which was mainly satisfied through the military and political conquest of neighbouring societies. Capturing and transporting local slaves was usually cheaper and less risky than trans-regional slave hunts. Most of the slave trade in the Indian Ocean world was overland, this was especially true in Africa, Hindu India and the Confucian Far East. Slaves at times made up 20 to 30 % of the population in the societies of India; in India alone, there were probably over eight million native slaves in the mid-19th century. Estimates of the quantitative extent of the trade must remain highly speculative. However, there is widespread agreement that the number of people enslaved in this system exceeded the size of the transatlantic slave trade. Black Africans constituted only a minority. It is also revealing that the numerous trade networks within the Indian Ocean region were mainly under indigenous control.

[19] A. ECKERT, *op. cit.*, p. 37-38.
[20] O. PÉTRÉ-GRENOUILLEAU, *Les traites négrières*, p. 148.

Trade with people in the Indian Ocean world was closely linked to economic development in the various regions, but also to the regularly recurring natural disasters, famines and epidemics that resulted in high mortality rates, for example in the middle of the 17th century. During sustained economic booms, there was a high demand for slave labour for agriculture, handcrafts, trade and transport, as well as for domestic work and sexual services[21].

The eastern route saw the deportation of some 2.3 million people between the early 1500s and the end of the 1700s. The slave trade in the Indian Ocean reached its peak in the 19th century, when around 4,3 million people were exported, of which an estimated 1.5 million people from East Africa alone, across the Red Sea and from the Swahili coast[22].

Finally, with regard to the history of the inland, so-called sub-Saharan routes, again according to authoritative historical doctrine, to this day there is still 'a giant black hole'. This would be linked both to the lack of data and to the historians' desire to concentrate on export routes. These are the reasons why the importance of these routes can only be assessed in broad strokes. It seems that it can be stated with reasonable certainty that until about 1850, only one third of the captives remained in black Africa, and that after that date, almost all of the captives remained slaves on the spot. In particular, as far as numbers are concerned, it can be estimated that more than 9 million slaves were held in Africa before 1850 and that the total number of internal routes led to the enslavement of 14 million people[23].

Before embarking on the concluding lines of the present brief historical overview, it is also necessary to briefly refer to the slave trade that took place in North America in the same time frame considered so far for the description of the major slave routes. In fact, we will see to what extent the independence of the United States of America and the emancipation of slaves and the birth of the first abolitionist movements are interconnected. Based on the fundamental and indispensable Enlightenment reflections developed in the "old continent", these movements were in turn a necessary prelude to the international agreements aimed at the elimination and condemnation of the practice of slavery.

[21] A. ECKERT, *op. cit.*, p. 43-47.
[22] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 149.
[23] O. PÉTRÉ-GRENOUILLEAU, *op. cit.*, p. 185-186.

Within a hundred years of first contact with Europeans the number of Native Americans decreased by an estimated 90%. Pathogens introduced from Europe were primarily responsible for this decimation. Wars, expulsions and famine did the rest. The settlers' violent actions against the indigenous population still weigh heavily on the present in the United States. This is even more true of the enslavement of Africans, which has shaped the society and economy of the North American colonies, especially since the end of the 17th century. At this point, the practice of "chattel slavery" was established, which reduced Africans to chattel and commodity. Although the proportion of slaves shipped to North America was only about 5% of the total number of people trafficked to the Americas in the transatlantic trade, involuntary immigrants from Africa constituted a weighty part of the objection. At the end of the 18th century, at the time of the American Revolution, out of a total population of 3 million, there were around 500,000 slaves living in the thirteen colonies, which then merged to form the United States of America. Unlike Brazil and the Caribbean, sugar did not play a significant role in North America's slave economy. By contrast, the Chesapeake Bay region was the world's largest tobacco producer in the mid-18th century. At that time, around 145,000 slaves worked on tobacco plantations here. Further south, in Georgia and North Carolina, rice farming dominated, employing about 40,000 slaves. What sets North American slavery apart from any other, from ancient to modern times, is the high natural growth of the American slave population. This reflected an overall better material situation of the slaves, but also the result of favourable epidemiological conditions[24].

The American Revolution culminated in 1776 with the Declaration of Independence, largely formulated by Thomas Jefferson. Twelve years later, the Constitution came into force, which was expanded in 1791 with a catalogue of fundamental rights. The Constitution has been considered the work of slaveholders with a guilty conscience: it was so vague that it did not prevent the expansion of slavery in the southern states after the turn of the century, nor did it prevent racist attacks against former slaves in the north. Between the end of the 18th and the beginning of the 19th century, a greater number of Africans arrived in North America than any other twenty-year period. In the southern states of the USA, the Golden Age of Slavery, seen from the perspective of the slaveholders, did not even begin until the first half of the 19th century, when early

[24] A. ECKERT, *op. cit.*, p. 68.

European industrialisation created a gigantic demand for cotton. The rise of "King Cotton" based on slave labour took place at a breath-taking pace. The massive expansion of cotton production not only reinforced slavery overall, but also led to a huge shift of slave labour from the upper to the lower South, especially to the Mississippi-Delta. Cotton farming implied the constant hunt for labour and the attempt to control it. This involved massive physical and psychological violence. Southern slaveholders faced no legal barriers to the cruelty they could inflict on their slaves[25].

Meanwhile, the conflicts between the northern and southern states intensified considerably. Concerned for the security of their territorial and human possessions, Southern slaveholders seceded from the Union. Notoriously, the ensuing Civil War was also a war over what was euphemistically called the "peculiar institution" of slavery. Numerous slaves managed to leave the plantations after Northern troops invaded the Southern states in 1863. Many of them joined the Army of the North, where they fought in segregated units in some of the main battles against the Confederacy. The high numbers of the runway caused the plantations to collapse. In this sense, the slaves, with the support of the Northern armies, freed themselves[26].

As it is well known, the 18th century was the century in which even in Europe the view of slavery slowly began to change. The abolitionists of the late century mobilised pre-existing Western European normative and legal traditions to ultimately shake the entire transatlantic system of slavery to its foundations. As early as 1689, John Locke described the slave trade as unworthy of a gentleman. Although it is disputed in scholarly research whether Locke has been a supporter or a descent critic of slavery, he may of course be regarded as one of the individuals who paved the way for the view that slavery violated a natural right of human beings. A new chapter in the debate on slavery was opened in 1748 by Montesquieu, who formulated a sharp critique of slavery in "De l'esprit des lois". After his doctrine, the slave trade was an irresponsible waste of human life and, more importantly, slavery violated natural law, according to which all human beings were born free and independent. Although the considerations formulated by Montesquieu led to a broader debate about the sense and nonsense of the slave trade and slavery, the pragmatic profit from the slave trade prevailed because of economic

[25] A. ECKERT, *op. cit.*, p. 70-71.
[26] A. ECKERT, *op. cit.*, p. 72.

considerations[27]. Certainly, also under the impetus of the ideas born from the Revolution of 1789, France was the first European nation to officially grant the abolition of slavery on the territory of the colony of Saint-Domingue, today's Haiti. As a result of a long battle started in 1791, led by the former slave Toussaint Louverture, the rebels succeeded in obtaining the abolition of slavery in 1794, a situation however restored eight years later with the advent of Napoleon Bonaparte[28].

The classics of the European Enlightenment were of only limited importance in their treatment of slavery for further progress. Rather, a central role for abolition was played by political disputes and the rather uncoordinated interaction of religiously awakened prophets and moralists. While in France the political struggle against the slave trade and slavery remained comparatively insignificant, in England a heterogeneous anti-slavery movement quickly developed, supported by a majority of evangelicals. Slavery was seen as a sin and a crime against divine providence, and the fight against slavery was waged as a crusade to purify individual and national sins[29].

In this context, in 1807 the Parliament of the United Kingdom passed the Slave Trade Act, officially "An Act for the Abolition of the Slave Trade". Even if the act did not of course abolish the practice of slavery *per se*, it sought to convince other states involved in the slave trade to prohibit this business, also sending ships to the west coast of Africa to put a concrete stop to the trade. The suppression of the slave trade by the British Royal Navy was often carried out by imperialist methods, that is by coercion and intimidation of other states. Britain strongly pushed for an international treaty regime to regulate the abolition of the trade in "human goods". The actions of the British navy to fight the international, and particularly the Atlantic slave trade were pursuant to a growing web of treaties which aimed at the prohibition of the international slave trade, and eventually slavery itself. In this development, the Vienna Congress of 1814-1815 played a crucial role. As we shall see later on[30], the Congress of Vienna was the venue where, among others, the Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade of 8 February 1815 was signed. Compared to the other international

[27] A. ECKERT, *op. cit.*, p. 80-81
[28] A. ECKERT, *op. cit.*, p. 77.
[29] A. ECKERT, *op. cit.*, p. 82.
[30] See *infra*, par. 2.1.1.

agreements, the Declaration was the least concrete in terms of legal enforcement, but, as achievement of British diplomacy, proved to be of great historic significance[31].

Certainly, existing humanitarian considerations were always accompanied by geostrategic and economic considerations, since at the same time, the British supplied significant amount of goods that were exchanged for slaves on the coasts of Africa during the 19th century[32]. The internal African slave trade increased therefore even more, and the declining American demand for slaves was offset by increasing domestic African demand. The combination of all these mechanisms meant that in parallel with the growth of the abolitionist movements, the establishment of colonial domination was gradually strengthened. Nowhere in Africa, mainly in East Africa, and at no other time, did slavery and the slave trade expand as significantly as in in the 19th century. The rulers of many communities there now exported goods grown by slaves, instead of the people who produced those goods. Notoriously, imperial powers staged themselves as bringing civilisation, while the Africans were slaveholders, incapable of order and self-control. The European powers would cooperate to create those structures that would enable the orderly and rational use of African resources and labour. The Europeans thus claimed that their colonisation of Africa was a disciplined, limited and at the same time forward-looking enterprise. The establishment of such rules also depended on the cooperation of local African elites, who in turn were often among the most important slave owners in the respective colonies. Thus, although the colonial powers passed laws to end slavery and the slave trade almost everywhere, the local administrations usually did not do much to enforce them[33].

In their efforts to make the colonies profitable, the Europeans themselves also resorted to various instruments to mobilise unfree labour. This included forced labour, conscription into the army or police forces such as the recruitment of contract workers through a variety of dubious means. For the most part, the enlistment of labour came from indigenous intermediaries, usually chiefs, who sought to manipulate the colonial system as much as that system manipulated them, and who regularly used the labour force

[31] In this regard, see extensively J. S. MARTINEZ, *The Slave Trade and the Origins of International Human Rights Law*, Oxford, 2012, from p. 16.

[32] On this point see See also J. ALLAIN, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, in *British Yearbook of International Law*, Volume 78, Issue 1, 2007, p. 346 ff.

[33] A. ECKERT, *op. cit.*, p. 95-98.

for their own purposes, such as the plantations. Until the First World War, there were mass escapes of slaves in some areas, especially in French West Africa. In most areas south of the Sahara, however, the slaves stayed where they were. However, many managed to renegotiate the terms of their dependency with their masters. In many African societies, slavery transitioned into other forms of forced labour during the first decades of the colonial era. Thus, especially during periods of crisis or famine, but also in response to the tax demands of the colonial state, the pawning of people increased significantly in many regions[34].

The anti-slavery movement slowly formed an important framework for an international discourse on a kind of "minimum standard" of human rights as it developed in the early 20th century. This discourse was closely linked to questions of a "minimum social standard", it related to the tearing apart of families and communities and the violence of labour discipline in the colonies, and it related to the ideology of free labour. In this context, the complex question of how and why people worked was transformed into the dichotomy between free and forced labour, and in this simple shape the labour question could be internationalised. As we shall see, this is exactly what the League of Nations and the International Labour Organization (ILO) did. From a humanitarian perspective, this first normative approach of the ILO to the problems of colonial labour certainly set limits to the worst abuses. But those missionaries and humanitarian-minded groups who argued for the elimination of slavery-like forms of labour from the repertoire of colonial powers used a rather narrow definition of forced labour. Their evocation of a centuries-old tradition of opposition to slavery abstracted way too far the opposition between free and forced labour and diverted the attention from complex webs of power and social relations in which working people in Africa actually operated. This meant that forms of labour that were not declared to be coercive were absolved from critique. Everything that was not defined as slavery in the narrow sense was justified as "free labour". In this way, many repressive practices could be ignored or justified, especially during and after the Second World War, when various forms of forced labour experienced a massive revival, under the cruel and merciless rule of European colonial empires, until the 1960s and 1970s, when African states slowly managed to gain their independence. After 1945, England and France officially distanced themselves from forced labour, but

[34] A. ECKERT, *op. cit.*, p. 100-101.

it did not disappear during the decolonisation period and manifested itself in the form of the construction of new villages in Africa. The colonial development discourse that began in the 1930s and continued into Africa's post-independence period renamed activities that would otherwise have been labelled as forced labour as forms of "voluntary labour" or "investment in human capital". In this context, certain areas of African labour were rendered invisible and instead constructed as "beneficiaries" or "volunteers": the problem of labour performed under duress did not disappear[35].

As we shall see, from this legacy, although partially changed on the basis of deep-rooted inequalities and adapted to contemporary business needs, slavery and other forms of exploitation are today widely ramified, found in numerous sectors and woven into a multitude of labour relations. The North American Civil War led to the liberation of most slaves in the "New World" and exerted an indirect influence on the fate of the unfree in the Caribbean and Latin America. The age of emancipation, which began with the revolution in Haiti in 1791 and ended with the "Golden Law", the liberation of slaves in Brazil in 1888, merely shifted the problem of slavery and freedom on different parameters. In the 21st century, the legacy of slavery remains visible in many corners of the globe, especially in the American continent. The descendants of some twelve million involuntary migrants from Africa still suffer from the stigma of slavish dependence, perpetuated by racism, poverty and limited opportunities for advancement. The movements that fight against structural racism, police violence and discrimination against African Americans, address this continuity.

As we have observed, the long shadow of slavery has not fallen only on the Americas. And the reality today sees 50 million people worldwide in "modern slavery" on any given day, according to ILO documents[36]. Of these people, 28 million are in forced labour and 22 million are trapped in forced marriage. More than 12 million are children, and women and girls comprise over half of the total. These people are either forced to work against their will or in a marriage that they are forced into. Of the 28 million people in forced labour, 17.3 million are exploited in the private sector, rendering the use of

[35] A. ECKERT, *op. cit.*, p. 102-103.

[36] ILO, Walk Free, International Organization for Migration (IOM), *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, 2022. The numbers collected by the report refer to the year 2021. The number of people in modern slavery has risen significantly, to say the least, in the last five years: 10 million people more are now in conditions of modern slavery compared to the last report of the ILO, which dates back to 2017.

forced labour by private actors the most widespread and thus pressing phenomenon among the others. Although Asia and the Pacific region register the highest number of people in modern slavery and the Arab States the most elevated occurrence, slavery is currently a truly global phenomenon, that can also be found in the heart of Europe: «no region, rich or poor, is spared»[37].

The majority of the enslaved have neither the possibility nor the knowledge to publicly state their condition or to complain before a proper court. Unlike in previous centuries, current forms of exploitation are illegal and largely take place in the dark. And unlike then, slaves are usually no longer an expensive investment, but mostly "cheap" and easily replaceable. The thin line between forced and "free" but exploitative labour is often blurred. In the next few pages, on the basis of the analysis of the instruments of international law available, an attempt will be pursued to precisely discover what lies between these blurred lines, in order to better understand what today may be included among cases of forced labour. What is certain is that human exploitation, a long and "very old snake"[38], has repeatedly shed its skin, seems difficult to be killed, and is therefore too often perceived as the normal case, rather than the exception, over long stretches of world history until the present day.

[37] ILO, op. cit., at p. 19.
[38] M. ZEUSKE, *Sklaverei*, *op. cit.* See *supra*, note 1.

2. *Primary international law instruments for the prohibition of slavery and forced labour*

As we have seen, the 18th century was characterised by an increasing attention to the economic issues that the centenary slave trade made come to light and to the ethical questions that the phenomenon of slavery brought with it. A radical change in perspective has to be traced back to philosophers and governors of the Enlightenment, who slowly raised awareness on these issues and started to grant ever greater spaces of autonomy in the countries controlled by their empires. After the independence of the United States of America, the following century witnessed a further push in this direction, with the progressive independence of other American countries from the Spanish and Portuguese empires of the old continent. These further steps enabled ethical-political considerations to slowly turn into written commitments by states, both at national and international level. The United Kingdom Slave Trade Act and the Brazilian *Lei Áurea*[39] on the one hand, and the Declaration Relative to the Universal Abolition of the Slave Trade of 1815[40] on the other, stand out in this sense. With the very first written and binding legal acts in the early 19th century, the factual situation also began to change.

From the 20th century onwards with increasing consciousness of the slavery related circumstances, legal instruments were developed in ever greater numbers and characterised by ever greater specification. As we will see, over time there has been a shift from a general prohibition of slavery to a series of particular prohibitions related to different types of slavery. A decisive step in this direction can of course be traced back to the founding of first International Labour Organization and then the United Nations. The present section of the chapter sets out the content of the main instruments that international law has been able to put in place over the last two centuries, between the 19th and 21st centuries, to prohibit the phenomena of slavery and forced labour. It has been estimated that between 1815 and 1957 some 300 between bilateral and multilateral international agreements were implemented to this end[41]. Of course, we will deal with the

[39] See *supra*, par. 1.

[40] See *infra*, par. 2.1.1.

[41] For a detailed overview of these numbers see the report D. WEISSBRODT, ANTI-SLAVERY INTERNATIONAL, *Abolishing Slavery and its Contemporary Forms*, Geneva, 2002, from p. 3, available on the website of the Office of the United Nations High Commissioner for Human Rights, under: https://www.ohchr.org/sites/default/files/Documents/Publications/slaveryen.pdf.

primary texts that helped form today's safety net against slavery and forced labour. Starting with the Declaration Relative to the Universal Abolition of the Slave Trade of 1815, the analysis of the League of Nations Slavery Convention of 1926 and its Supplementary Convention on the Abolition of Slavery of thirty years later will follow. Special attention will be then devoted to two ILO conventions: the Forced Labour Convention n. 29 of 1930 and the Convention concerning the Abolition of Forced Labour n. 105 of 1957.

As we will observe, over time and especially over the last twenty years, the term "modern slavery" has emerged and consolidated also within the language of international institutions, which contains within itself a wide number of contemporary phenomena of slavery. As we shall see, the locution hasn't unfortunately found an official definition or precise classification still now[42]. The term in fact encompasses practices ranging from human trafficking, through debt bondage, to forced marriage and domestic servitude, among which however forced labour represents the most widespread form today. The present work intends to refer above all at this last phenomenon, and it is for this reason that, in the analysis of the international agreements that will follow, special attention will be given to the reality of forced labour among others that today fall under the scope of "modern slavery forms".

Given these premises and taking the founding of the United Nations as a point of reference in time, the following paragraphs will analyse the international agreements concluded before and after 1945 that have as their primary objective the fight against slavery and the fight against of forced labour, two historically and legally interconnected purposes, as we shall see. Last part of this second section will be dedicated to an overview of how slavery and forced labour are addressed within the main international agreements aimed at the protection of human rights, both international human rights treaties and regional human rights conventions. Starting with more general agreements against slavery, we will see on the one hand how charters will gradually be issued only on forced labour and how, on the other hand, in charters that turn to the protection of human rights, regional or otherwise, forced labour is often looked at as a phenomenon in its own right.

[42] For an initial exploration of the issue of the definition of the term 'modern slavery' see J. MENDE, *The Concept of Modern Slavery: Definition, Critique, and the Human Rights Frame*, in *Human Rights Review*, vol. 20, 2019, p. 229-248, in particular p. 233. See also *infra*, par. 3.2.

2.1. Pre-1945 multilateral international agreements on the prohibition of slavery and forced labour

The following first three international agreements under scrutiny were all composed at a particular time, considering on the one hand at the history of slavery as set out above, and the history of international law, on the other. Concluded at the Vienna Congress in 1815, the Declaration Relative to the Universal Abolition of the Slave Trade was the very first international response to the centuries-old exploitation of goods and people. Although embryonic, this first result was achieved in terms of content mainly thanks to the considerations of French philosophers of the previous century and on the factual level thanks the British diplomatic drive, as part of a general renewal of world political balances.

Later on, the Slavery Convention of 1926 was then the outcome of further negotiations that took place at the turn of the 19th and 20th centuries, under the crucial aegis of the newly formed League of Nations. The Temporary Slavery Commission appointed by the Council of the League of Nations in 1924 played a crucial role that brought the year after to a Draft Protocol proposed by the British Government and to a Draft Convention one year before final approval. It is on this occasion that the phenomenon of forced labour is first incorporated and regulated within an international agreement.

Finally, the third text that will be considered is the Forced Labour Convention No. 29 of 1930, adopted by the International Labour Organization, the first international agreement exclusively dedicated to forced labour, introducing the initial definition of this phenomenon. This text has stood the test of time for over eighty years, remaining the cornerstone for addressing any issue concerning forced labour, beginning with its definition.

2.1.1. The 1815 Declaration Relative to the Universal Abolition of the Slave Trade and the late 19th century slave trade conferences

A very first and clear signal of the abolition of slavery as a legal practice can be traced back to the *Declaration relative à l'Abolition Universelle de la Traite des Nègres*[43], signed at Vienna the 8th of February 1815. The Declaration is indeed widely recognised as the first international condemnation of the slave trade. The seven prominent members of the anti-Napoleonic coalition, including Austria, Great Britain, Prussia, Russia, Portugal, Spain, and Sweden, along with France, signed the Declaration which was subsequently included as Annex XV in the Final Act of the Vienna Congress on the 9th of June 1815[44].

Although motivated by many reasons, not necessarily related to humanitarian and charitable drives[45], Great Britain was the State that, through its diplomacy and politics, made the greatest commitment to the cause. Leading up to the Congress of Vienna in 1814, Lord Castlereagh, the British Foreign Minister, secured the formal backing of France, which had been defeated, for ending the slave trade and his efforts to internationalise the issue at the conference. At the Congress, Great Britain proposed outlawing the trade within three years, establishing a permanent institution to monitor compliance with the treaty obligations, and creating a reciprocal right of visitation. However, France and the Iberian States opposed the proposal, and Castlereagh failed to obtain a binding commitment on the abolition of the slave trade beyond a declaration by the Powers due to the changing political climate at Vienna[46].

The Declaration opens with the solemn statement affirming that « […] the Trade known as the "African Negroes Trade" has been regarded by just and enlightened men of all times as repugnant to the principles of humanity and universal morality»[47]. Also in the

[43] *Déclaration des 8 Cours, relative à l'Abolition Universelle de la Traite des Nègres*, Vienna, 8 February 1815. The text of the Declaration can be found online in the Oxford Historical Treaties section, under the reference 63 CTS 473, or in *British and Foreign State Papers*, vol. 3 (1815-1816), London, 1838, p. 972.

[44] See R. LESAFFER, *Vienna and the Abolition of the Slave Trade*, in *Oxford Historical Treaties*, 8 June 2015, for a detailed overview of the political conditions that led to the signing of 1815.

[45] See *supra*, par. 1.

[46] J. ALLAIN, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, op. cit., p. 355.

[47] Here and in the passages that follow an own translation from the French text of the Declaration is proposed: « […] le Commerce connu sous le nom de "Traite de Négres d'Afrique", a été envisagé par

recitals, the Parties then express « […] the wish to put an end to a scourge which has so long desolated Africa, degraded Europe, and afflicted mankind»[48].

Against this background, the states then explain what commitment they made by signing the agreement: « […] they declare, in the face of Europe, that, considering the universal Abolition of the Negro Trade as a measure particularly worthy of their attention, in conformity with the spirit of the age and the generous principles of their August Sovereigns, they are animated by the sincere desire to contribute to the execution of the most prompt and effective of this measure, by all the means at their disposal, and to act, in the employment of these means, with all the zeal and perseverance which they owe to a so great and beautiful Cause»[49].

Either way, the States «Too well informed, however, of the sentiments of their Sovereigns […] recognize, at the same time, that this general Declaration cannot prejudge the term which each particular Power may consider as the most suitable for the definitive Abolition of the Negroes Trade», a fact that would be «object of negotiation between the Powers»[50].

The Declaration always concludes solemnly with a choral invitation to «all the civilised nations of the earth» to get engaged «in abolishing the Slave Trade […] a Cause, the final triumph of which will be one of the most beautiful monuments of the century which has embraced it, and which will have brought it to a glorious close»[51].

The reading of the Declaration's albeit very brief text evidently reveals the intention to create a clear break with the practice that had characterised the policies of the major European powers over the previous three centuries. And this intent is reiterated as

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les hommes justes et éclairés de tous les tems, comme répugnant aux principes d'humanité et de morale universelle».

[48] « […] le vœu de mettre un terme à un fléau qui a si long-tems désolé l'Afrique, dégradé l'Europe, et affligé l'Humanité».

[49] « […] ils déclarent, à la face de l'Europe, que, regardant l'Abolition universelle de la Traite des Négres comme une mesure particulièrement digne de leur attention, conforme à l'esprit du siècle et aux principes généreux de leurs Augustes Souverains, ils sont animés du desir sincère de concourir à l'exécution de la plus prompte et la plus efficace de cette mesure, par tous les moyens à leur disposition, et d'agir, dans l'emploi de ces moyens, avec tout le zèle et toute la persévérance qu'ils doivent à une aussi grande et belle Cause».

[50] «Trop instruits toutefois des sentiments de leurs Souverains, […] reconnoissent, en même temps, que cette Déclaration générale ne saurait préjuger le terme que chaque Puissance en particulier pourroit envisager comme le plus convenable, pour l'Abolition définitive du Commerce des Nègres. […] sera un objet de négociation entre les Puissances».

[51] « […] de toutes les Nations civilisées de la terre […] en abolissant la Traite des Nègres […] une Cause, dont le triomphe final sera un des plus beaux monumens du siècle qui l'a embrassée, et qui l'aura glorieusement terminée».

we have seen in serious form in several passages of the Declaration. The powers appear, however, to be aware that a phenomenon as far-reaching in economic terms and as solidified over time as the Atlantic trade could not be allowed to suddenly vanish through the signing of a brief agreement. This is why the parties state that the timing and manner of the gradual abolition of the slave trade would be subject to further negotiation. It can certainly be argued that this promise was actually followed up in the years immediately after the signing of Vienna. And, again, it was Great Britain that played the role of the political-diplomatic leader in order to finally and practically eradicate the slave trade, and it did so through a long series of bilateral pacts.

After a series of negotiations, Great Britain's efforts finally paid off in 1817 with successful agreements reached with the Netherlands, Portugal and Spain. These agreements allowed for mutual search rights and established mixed courts to prosecute and condemn slave ships that were captured. The newly established courts under the treaties would have prospective jurisdiction, meaning they would have the authority to hear and decide on cases that may have arisen in an indefinite future. What made these treaties noteworthy was that they appeared to be not just empty clauses, unlike previous declarations and treaties. They included strong enforcement measures to implement the promised ban on the slave trade. Each of the new treaties included provisions for mutual search and seizure of suspected slave ships, as well as trial and condemnation of these vessels before the mixed commission courts. The new courts established by the treaties were authorized to make judgments without any possibility of appeal, as per the terms and intent of the Treaty signed on that date. Furthermore, all three treaties were specifically aimed at condemning the slave trade as a violation of human rights. As a result, in 1817, the world witnessed the creation of the first international courts dedicated to safeguarding human rights[52]. The commissions began to actually operate and decide the first cases from 1820 onwards and their activity lasted until the 1860s. Throughout these decades, the assistance provided by the slave trade courts had diverse consequences. It successfully attained its objective of aiding the victims of the slave trade and safeguarding the liberty of millions of Africans, while not preventing many others from sufferings. Some were forced onto ships under harsher conditions than usual, as slave traders aimed to increase the profitability of each voyage and avoid detection. Some

[52] J. S. MARTINEZ, *op. cit.*, p. 34-36.

succumbed to illnesses due to the courts taking too long to resolve cases. The slaves themselves were seldom involved in legal proceedings as claimants of their rights. Instead, they were silent bystanders and only occasionally provided testimony[53].

In the years that followed the Napoleonic Wars, Great Britain had therefore brought a significant transformation in the legal status of the slave trade at the international level, a practice considered lawful under the law of nations just a few years prior. It had progressed from taking unilateral actions based on concepts of natural law to establishing specific and binding treaty obligations and international enforcement measures. The world's most influential nations had finally reached a consensus in principle to put an end to this trade.

Five years later than the conclusion of the bilateral agreements with Netherlands, Portugal and Spain, Great Britain attempted to secure an international agreement at the Congress of Verona in 1822, but their effort to establish a universal treaty banning the slave trade was once again unsuccessful due to a lack of agreement on the details. Despite all maritime powers having already abolished the trade domestically, consensus could not be reached on the modalities to be used. The British representative proposed a plan at Verona that included renewing the 1815 Vienna Declaration and treating slave trading as piracy, but the continental powers were not willing to agree. In fact, declaring the slave trade as a form of piracy could have likened slave traders to pirates, considered *hostis humani generis* – 'enemies of mankind' – and therefore subject to capture and trial in the courts of any nation[54].

With regard to the abolition of trafficking, only a renewed commitment emerged from the Verona Congress, in line with what had already been affirmed in Vienna seven years earlier: «That they invariably persist in the principles and sentiments, which these Sovereigns have manifested by the Declaration of the 8th of February, 1815 - That they have not ceased, and will never cease to regard the Negro Trade, as a "Scourge, which has for too long desolated Africa, degraded Europe, and afflicted Mankind", and are ready to concur in all that can secure and accelerate the complete and definite abolition of this

[53] On the impact of the work of the mixed courts on the slave trade, see, extensively J. S. MARTINEZ, *op. cit.*, Chapter 4 – *The Courts of Mixed Commission for the Abolition of the Slave Trade*, p. 67-98.

[54] J. S. MARTINEZ, *op. cit.*, p. 114.

Trade»[55]. It is therefore clear that, while the diplomatic community showed a willingness to move beyond the 1815 Declaration, no mechanism to enforce the suppression of the slave trade emerged from Verona. It was only in the last decades of the 19th century that political mechanisms and balances began to change and take a different turn. In fact, turning points for the Western powers' relationship with the slave trade issue and with the African continent more generally can be traced back to the Berlin Conference of 1884-1885 and to the Brussels Conference that took place between 1889 and 1890[56].

The Berlin Conference of 1884-1885[57], also called the West African Conference or Congo Conference, certainly reaffirmed the general principles established in Vienna and Verona, but went further on a practical level, recognizing and applying these principles to the African territory. Article 9, Chapter Two, entitled "Declaration concerning the Slave Trade", of the General Act of the Conference unequivocally reiterated the common intention to put a definitive end to trafficking, stating that «In accordance with the principles of the law of nations, as recognised by the Signatory Powers, the Slave Trade being prohibited, and operations which, on land or sea, supply slaves for the Trade being equally considered as prohibited, the Powers exercising or to be exercising rights of sovereignty or influence in the territories forming the Conventional Basin of the Congo, declare that these territories shall not be allowed to serve as a market for, or as a route of transit through, the Slave Trade of any race whatsoever. Each of these

[55] *Résolutions relatives à l'Abolition de la Traite des Nègres*, Verona, 28 November 1822, in *British and Foreign State Papers*, vol. 10 (1822-1823), London, 1838, p. 109-110: « Qu'ils persistent invariablement dans les principes et le sentimens, que ces Souverains ont manifesté par la Déclaration du 8 Février, 1815 – Qu'ils n'ont pas cessé, et ne cesseront jamais de regarder le Commerce des Nègres, comme "Un Fléau, qui a trop long-tems désolé l'Afrique, dégradé l'Europe, et affligé l'humanité", sont prêts à concourir à tout ce qui pourra assurer et accélérer l'Abolition complète et définitive de ce Commerce».

[56] Between the Verona conference of 1822 and the Berlin and Brussels conferences, numerous other meetings naturally took place, including the London's World Anti-Slavery Convention of 1840, that saw steps taken towards the global abolition of slavery as a legal practice. During the Convention, representatives from predominantly English-speaking countries met, led by Great Britain, the United States and Ireland. Ultimately, the Convention unanimously resolved to denounce not only slavery but also religious leaders worldwide and any community that had neglected to condemn the practice until that time. On the World Anti-Slavery Convention, see in more detail M. BRIC, *Debating Slavery and Empire: The United States, Britain and the World's Anti-slavery Convention of 1840*, in W. MULLIGAN, M. BRIC (ed.), *A Global History of Anti-Slavery Politics in the Nineteenth Century*, London, 2013, p. 59-77.

[57] For a comprehensive survey of the Conference see A. ECKERT, *Die Berliner Afrika-Konferenz (1884/85)*, in J. ZIMMERER (ed.), *Kein Platz an der Sonne. Erinnerungsorte der deutschen Kolonialgeschichte*, Frankfurt am Main, 2013, p. 137-149.

Powers undertakes to use all the means in its power to put an end to this trade and to punish those engaged in it»[58].

However, translating the theoretical anti-slave trade principles enunciated in Vienna and Verona into practice implied a curious outcome. Indeed, the result was mainly that rules for European commerce in West-Central Africa, particularly in the regions encompassing the Congo and Niger rivers were established. Additionally, the Conference authorised the establishment of the Congo Free State, which was under the control of Leopold II of Belgium. The Conference was called at the request of both German Chancellor Otto von Bismarck and France, who sought to coordinate the various European ventures in the Congo River Basin region[59].

In addition to authorising the creation of the Congo Free State, the Berlin Conference of 1884-1885 endorsed regulations related to trade and humanitarian activities, as well as colonisation rules applicable exclusively to coastal areas. It should be noted that nearly all the coastal regions of the continent were already occupied at that time. Nevertheless, the Conference introduced the notions of "sphere of influence to be consolidated" and "hinterland", a German-introduced concept that granted a power with territorial claims along the coast and the right to control the adjacent hinterland[60]. The concluding resolution of the Berlin Conference specified that a nation claiming ownership of a coastal area as its colony had to notify the other signatories and establish a significant degree of control over it. Article 34 of the Conference Treaty also allowed any participating power, even unofficially, to establish protectorates in Africa with the agreement of the other parties involved: «The Power which shall henceforth take

[58] Article 9, Article 34, General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo, signed at Berlin, 26 February 1885. Translation from the French: «Conformément aux principes du droit des gens, tels qu'ils sont reconnus par les Puissances Signataires, la Traite des Esclaves étant interdite, et les opérations qui, sur terre ou sur mer fournissent des esclaves à la Traite davant être également considérées comme interdites, les Puissances qui exercent ou qui exerceront des droits de souveraineté ou une influence dans les territoires formant le bassin conventionnel du Congo, déclarent que ces territoires ne pourront servir ni der marché ni de voie de transit pour la Traite des Esclaves de quelque race que ce soit. Chacune de ces Puissances s'engage à employer tous les moyens en son pouvoir pour mettre fin à ce commerce et pour punir ceux qui s'en occupent». The text of the Declaration can be found online in the Oxford Historical Treaties section, under the reference 165 CTS 485 or in *British and Foreign State Papers*, vol. 76 (1884-1885), p. 4.

[59] A. WIRZ, A. ECKERT, *The Scramble for Africa – Icon and idiom of modernity*, in O. PÉTRÉ-GRENOUILLEAU (ed.), *From Slave trade to Empire – Europe and the colonization of Black Africa 1780s-1880s*, London, 2004, p. 134.

[60] *Ibi*, p. 138.

possession of a territory on the coast of the African Continent outside its present possessions, or which, not having had any hitherto, shall acquire one, and likewise the Power which shall assume a Protectorate therein, shall accompany the respective act with a Notification addressed to the other Powers who are Signatories of the present Act, in order to put them in a position to assert, if necessary, their claims»[61].

This enabled Berlin, already during the conference, to have Cameroon recognised and, shortly afterwards, allowed it to proclaim a protectorate over the territory of what was to become German East Africa: the German colonial empire was born. From this moment on, the various powers, but above all France and Great Britain, fought each other for the conquest of new territories within the African continent, what was later called the "scramble for Africa", and marked the definitive step for the start of the Western colonisation of Africa[62].

One last meeting between 'the Powers' that should be mentioned is the Brussels Conference of 1889-1890. On 18 November 1889, seventeen invited States met in Belgium to inaugurate the Conference to discuss the end of the slave trade by land and sea. Based on the certainty of a broad and general consensus, the purpose of the Conference was to establish as a binding universal instrument efficient measures to put into practice and to substitute individual action for collective action. On this occasion, Great Britain was finally able to subsume bilateral arrangements concluded up to that time with several states, into the General Act of the 1890 Brussels Conference. Britain gradually locked a growing number of States into its web of bilateral treaties while isolating those remained outside the system, a fact that resulted mainly in diplomatic clashes with France[63]. This approach brought Britain closer to its ultimate objective of universally prohibiting the slave trade.

In any case, in the wake of what was decided in Berlin, strengthened by their purpose, the powers gathered in Brussels went much further. In fact, the General Act of

[61] Article 34, General Act of the Conference signed at Berlin, 26 February 1885. Translation from the French: «La Puissance qui dorénavant prendra possession d'un territoire sur le côtes du Continent Africain situé en dehors de ses possessions actuelles, ou qui, n'en ayant pas eu jusque-là, viendrait à en acquérir, et de même la Puissance qui y assumera un Protectorat, accompagnera l'acte respectif d'une Notification adressée aux autres Puissances Signataires du présent Acte, afin de les mettre à même de faire valoir, s'il y a lieu, leurs réclamations».

[62] A. WIRZ, A. ECKERT, *op. cit.*, p. 138 and p. 150.

[63] J. ALLAIN, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, cit., p. 379-380 and ff.

the Brussels Conference opens by stating that: «The Powers declare that the most effective means of combating the traffic in the interior of Africa are: 1. the progressive organization of administrative, judicial, religious, and military services in the territories of Africa placed under the sovereignty or Protectorate of civilized nations»[64]. Through this argument colonisation of Africa was expressly and definitively institutionalised into an instrument of abolition.

The rules concerning the abolition of the slavery trade by sea were included in Section III of the Act. In particular, articles 21-24 of the General Act defined on one side a maritime zone with centre on the high seas contiguous to the East Coast of Africa and which covered both the Red Sea and the Persian Gulf. On the other, and more importantly, it acknowledged «the reciprocal right to visit, search and detain vessels at sea in the abovementioned area» («le droit réciproque de visite, de recherche, et de saisie des navires en mer, à la zone susdite», art. 22). This marks an extremely important point of arrival for the Brussels Act, always strongly supported by British representatives, around which the Powers had debated at length over the previous 75 years, since the Congress of Vienna. Through long diplomatic debates, it was definitively established that each signatory power had the right to search, inspect and possibly seize the ships of other states that were suspected of transporting slaves by sea.

It was then established that this right would be subject to specification in further treaties, that would have remained in force "in so far as they are not modified by the present General Act" («Toutes les autres dispositions des Conventions concludes entre les dites Puissances pour la suppression de la Traite restent en vigeur pour autant qu'elles ne sont pas modifies par le present Acte Général» art. 24). Although Britain had undisputed naval superiority for much of the 19th century, its desire to establish a "right to visit" would have been curtailed for decades not by the reluctance of other nations, but by the international legal obligation to uphold the Grotian principle of freedom of the

[64] General Act of the Brussels Conference relating to the African Slave Trade between Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Spain, Sweden-Norway, Turkey, the United States and Zanzibar, signed 2 July 1890. The text of the Declaration can be found online in the Oxford Historical Treaties section, under the reference 173 CTS 293 or in *British and Foreign State Papers*, vol. 82 (1889.1890), p. 55. Translation from the French: «Les Puissances déclarent que les moyens les plus efficaces pour combattre la Traite à l'intérieur de l'Afrique sont le suivants: 1. Organisation progressive des services administratifs, judiciaires, religieux, et militaires dans les territoires d'Afrique placés sous la souveraineté ou le Protectorat des nations civilisées».

seas, for which the high seas in time of peace are open to all nations and may not be subjected to national sovereignty[65].

The so-called "right to visit" was then at the centre of strong diplomatic tensions between Great Britain and France, a fact that brought the two countries before the Permanent Court of Arbitration in 1904, only a few years after its foundation in 1899. The fourth case decided by the court, the *Muscat Dhows case (France v. Great Britain)*[66], arouse because France had permitted a number of vessels ('dhows') owned by subjects of the Sultan of Muscat to fly the French flag. Precisely on the basis of what had been established in Brussels fifteen years earlier, the Court carried out a 'purposive or teleological examination' in the sense that the arbitration award was intended to have as its point of reference the eradication of the slave trade. To fully grasp the significance of this recognition, it is essential to consider the efforts made throughout the 19th century to combat the African slave trade. Given that the award was founded on the General Act of 1890, it represented a notable advancement in the abolition of slavery and played a crucial role in the global safeguarding of human rights[67].

2.1.2. The League of Nations Slavery Convention of 1926

After the failure of the purpose to establish an international peace agreement resulting from the two Hague Conferences of 1899 and 1907 due to the outbreak of the First World War[68], French and British diplomatic representatives worked, with the war still in progress, on proposals that led to the founding of the League of Nations, in 1919[69]. Notoriously, during the Paris Peace Conference of 1919-1920 a long series of agreements aimed at re-establishing a new world order at the conclusion of the First World War were

[65] J. ALLAIN, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, op. cit., p. 388.

[66] Permanent Court of Arbitration, *Muscat Dhows (France / Great Britain)*, case n° 1904-01, 07 August 1905. For further reading see D. NELSON, *The Muscat Dhows*, in *Max Planck Encyclopedia of Public International Law*, May 2007.

[67] *Ibi*, par. 16.

[68] For a more detailed discussion, please refer here to B. BAKER, *Hague Peace Conferences (1899 and 1907)*, in *Max Planck Encyclopedia of Public International Law*, November 2009.

[69] Here, too, we refer for more background on the context in which the League of Nations was born to C. J. TAMS, *League of Nations*, in *Max Planck Encyclopedia of Public International Law*, September 2006.

signed, all of which were included in the Treaty of Versailles. Among them there was the Convention of Saint Germain-en-Laye, which in turn contained the Covenant of the League of Nations, including the Mandate system, as Part I of the Versailles Peace Treaty, articles from 1 to 26. On this occasion, the issue of labour began to surface, as the signatories of the Covenant, in Article 23, committed themselves to «secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations». Part XIII of the Versailles Peace Treaty, articles 387 to 427, then provided for the Constitution of the International Labour Organisation[70].

The Brussels' General Act of 1890 was abrogated by the 1919 Convention of Saint Germain-en-Laye for certain States. In fact, as the official title of the Convention of Saint Germain-en-Laye (*Convention revising the General Act of Berlin of 26 February 1885 and the General Act and Declaration of Brussels of 2 July 1890*)[71] indicates, its purpose was to revising the General Act of Berlin of 26th February 1885 and the General Act and Declaration of Brussels of 2nd July 1890. The abrogation primarily arose from the States Parties' desire to address trade restrictions in the Congo Basin that were present in both previous instruments. However, the 1919 Convention presented challenges as it also indeed included the Covenant of the League of Nations, resulting in the exclusion of States like the United States of America, which did not join the League. Consequently, two regimes for suppressing the slave trade at sea coexisted during the first half of the Twentieth Century: one for states bound by the General Act of 1890 and another for the

[70] See F. SCHORKOPF, *Versailles Peace Treaty (1919)*, in *Max Planck Encyclopedia of Public International Law*, October 2010, for a detailed description of the contents of the Treaty of Versailles. Article 22 of the Covenant established the so-called Mandate system for the member states of the League of Nations. The mandate system emerged following World War I as a means to address the issue of governance for colonial territories separated from Germany and the Ottoman Empire, which were defeated in the war. As part of this system, specific States were assigned mandates by the League of Nations to govern particular territories. This arrangement established a framework of international oversight over colonial administration, as the mandated nations assumed the responsibility of safeguarding the welfare and progress of the inhabitants in the mandates, considering it a solemn duty of civilization. For further reading refer to R. GORDON, *Mandates*, in *Max Planck Encyclopedia of Public International Law*, February 2013.

[71] Convention between Belgium, the British Empire, France, Italy, Japan, Portugal and the United States revising the General Act of Berlin of 26 February 1885 and the Declaration of Brussels of 2 July 1890 relative to the Congo etc., signed at St. Germain-en-Laye, 10 September 1919. The text of the Declaration can be found online in the Oxford Historical Treaties section, under the reference 225 CTS 500.

states party to the 1919 Convention of Saint Germain-en-Laye. In comparison to the 1890 General Act, the 1919 Convention went much further by mandating that colonial powers in Africa actively strive to eliminate slavery in all its forms and suppress «the slave trade by land and sea»[72].

Within the newly established international organisation of the League of Nations, the issue of slavery naturally came up, building on the long discussions that had characterised the previous century. In particular it was in 1922 that Sir Arthur Steel-Maitland, representing New Zealand at the League of Nations, presented two Resolutions to the League of Nations Assembly. The first Resolution addressed the issue of slavery in Ethiopia, while the second Resolution aimed to refer the matter of the resurgence of slavery in Africa to the relevant Committee. The purpose was to thoroughly examine the situation and propose effective measures to combat this detrimental practice[73].

In 1896, at the Battle of Adwa, Ethiopia had succeeded in defeating the Kingdom of Italy on the battlefield and thus gained its total independence. The admission of Ethiopia to the League of Nations proved to be a strategic move to protect itself against potential external intervention by the British, French, or Italians. In fact, in 1906, these countries had established a tripartite agreement to establish “spheres of influence” over Ethiopia, which made Ethiopia vulnerable to outside encroachment. During the initial stages of the League of Nations, there had been a suggestion to place Ethiopia, which was seen as failing to effectively combat the slave trade within its borders, under the Mandate system. However, this proposal faced immediate opposition and sparked significant repercussions. Within a year, in 1923, Ethiopia was granted membership in the League of Nations, and the concern regarding the slave trade was broadened to encompass the issue at a more general level[74].

This was the reason why, of the two resolutions presented by the New Zealand delegate, only the second was accepted, which considered slavery a question of international concern. Upon the adoption of Steel-Maitland’s proposal, the Assembly of

[72] *Ibi*, art. 11. See J. ALLAIN, *Slavery in International Law – Of Human Exploitation and Trafficking*, Leiden, 2013, p. 76.

[73] J. ALLAIN, *The Slavery Conventions – The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Leiden, 2008, p. 31.

[74] On the question of the admission of Ethiopia in the League of Nations see extensively J. ALLAIN, *Slavery and the League of Nations: Ethiopia as a Civilised Nation*, in J. ALLAIN (ed.), *The Law and Slavery – Prohibiting Human Exploitation*, Leiden, 2015, from p. 129.

the League of Nations referred the issue to its Sixth Committee, specifically the Political Committee. The Political Committee subsequently established a Sub-Committee to examine various aspects, including the matter of slavery. A year later, the Sub-Committee proposed that the Council of the League of Nations delegate the responsibility of further investigating the issue of slavery to a competent entity, aiming to gather additional information on the subject. Simultaneously, the Council of the League of Nations instructed the Secretary-General to distribute letters to League Members, requesting them to provide any relevant information regarding the current state of slavery. The Secretary-General fulfilled this task in both 1922 and 1923. Consequently, on 14th March 1924, the Council of the League of Nations established the Temporary Slavery Commission, a body with a limited lifespan of two years but with a transformative purpose. The composition of the commission was diverse, consisting of individuals with different backgrounds and experiences. It included former colonial governors like the British Frederick Lugard, as well as representatives from Haiti and the International Labour Organization. This diverse composition brought together a range of perspectives and expertise to address the issue of slavery comprehensively. In its final report on 25th July 1925, the Temporary Slavery Commission acknowledged its inability to present a comprehensive overview of the existing situation regarding slavery to the Council. Nevertheless, it did offer suggestions to the League's Council on potential areas for further action, including advocating for the abolition of slavery's legal status. Consequently, the final report of the Temporary Slavery Commission emphasized that the most crucial step towards the gradual abolition of slavery was the cessation of legal recognition of slavery[75]. By abolishing 'the legal status of slavery' the Commission meant «that every slave has the right to assert his freedom, without ransom and without going through any formal process of fulfilling any prior condition, by simply leaving his master if he desires to do so. He enjoys and can exercise all the civil rights of a free man – e.g., can sue and be sued in court, can prosecute his master for ill-treatment, and can bequeath and inherit property»[76].

Although the Temporary Commission admitted its inability to give a comprehensive picture of the phenomenon of slavery, its primary objective was to shift

[75] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 31-32.

[76] League of Nations, Temporary Slavery Commission, Report of the Temporary Slavery Commission adopted in the Course of its Second Session, 13th–25th July, 1925, A.19.1925. VI, 25 July 1925, p. 3.

the League's focus from mere monitoring to enacting international legislation for the suppression of slavery. In fact, there were two major contributions it made. On the one hand, it launched a strong call for states to commit themselves to drafting an international normative instrument that would definitively abolish slavery as a legal practice. On the other hand, in focusing such strong attention on the issue, the Commission was able, for the first time, to bring to light a long series of phenomena that could not be strictly included in the practice of slavery, but instead needed to be considered and analysed in their peculiarities. The Commission's members indicated a wide range of topics on which, in their opinion, the new international instrument should have focused its attention. These included, besides the «Abolition of the legal status of slavery», the «The transport of slaves by sea to be regarded as an act of piracy», issues related to the «suppression of the abuses of peonage», the «non-recognition of the legal status of predial slavery or serfdom»[77] but above all, the issue of forced labour made its appearance for the first time. In fact, the Temporary Slavery Commission included in its indications the «Prohibition of forced or compulsory labour», however with the exception of «essential public works and services and in return for adequate remuneration»[78].

It was in this framework that the debates for the adoption of the 1926 Slavery Convention developed. In those years and throughout the first half of the 20th century, Great Britain continued to take the lead that had characterised it until then towards the goal of abolishing slavery and the slave trade. Viscount Cecil of Chelwood, the British representative to the League of Nations, played a crucial part in the establishment of the 1926 Slavery Convention. Serving as the Rapporteur to the League of Nations Assembly, he significantly contributed to the drafting process between 1925 and 1926[79]. With a strong determination to address the issue of slavery and the slave trade, he expressed his ambitious vision for a convention during the introduction of its proposal for the Draft Convention in 1925: «I personally have no doubt that, if this Convention is accepted by the nations and carried into effect, […] it will free tens or hundreds of thousands of unhappy beings from conditions which closely resemble slavery and which now exist. It

[77] *Ibi*, p. 3.
[78] *Ibidem*.
[79] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 8.

will be of untold advantage to humanity in general»[80]. The Draft Convention that Viscount Cecil presented to the Assembly originated from the writing of Sir Frederick Lugard, the British member of the Temporary Slavery Commission. Lugard, a prominent authority on slavery issues at that time, considered the eradication of slave raiding and trading to be his life's primary mission. Initially, Lugard intended to present his draft to the Temporary Slavery Commission but sought the support of Viscount Cecil, and thereby the British Government, for his proposal. The Assembly of the League of Nations reviewed the 1925 British Draft Protocol, which underwent modifications by the Sixth Committee with the assistance of a Sub-Committee and a small Drafting Committee. The Drafting Committee comprised Viscount Cecil, Albrecht Gohr (the former Chairman of the Temporary Slavery Commission), and delegates from France, Italy, Portugal, and the Netherlands. Meanwhile, the Sub-Committee included representatives from Abyssinia, Australia, Belgium, Brazil, the British Empire, France, India, Italy, Japan, the Netherlands, Norway, Portugal, Spain, and Uruguay. During the year following the adoption of Viscount Cecil's 1925 Resolution by the Assembly, several countries provided feedback on the League of Nations' Draft Convention. Subsequently, in 1926, revisions were made to its provisions. However, it is important to note that the core elements of the 1925 Draft Convention were largely maintained and ultimately formed the basis of the 1926 Convention to Suppress the Slave Trade and Slavery. Thus, the 1925 Draft Convention persisted and found its way into existence by being incorporated into the final version of the 1926 Slavery Convention[81].

The convention[82] opens with a series of introductory remarks, recalling the aims stated in the General Act of Berlin of 1885 and the General Act and Declaration of Brussels of 1890, as well as the Convention of Saint-Germain-en-Laye of 1919 to secure «the complete suppression of slavery in all its forms and of the slave trade by land and sea». It is then claimed that on the basis of the work carried out by the Temporary Slavery Commission, the signatory parties express their desire «to complete and extend the work accomplished under the Brussels Act» and to find «more detailed arrangements» than the

[80] League of Nations, Question of Slavery: Report of the Sixth Committee; Resolution, League of Nations Official Journal (Special Supplement 33) Records of the Sixth Assembly: Text of Debates, Nineteenth Plenary Meeting, 26 September 1925, p. 157.

[81] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 34-36.

[82] League of Nations, Convention to Suppress the Slave Trade and Slavery, signed at Geneva, 25 September 1926, 60 LNTS 253, Registered No. 1414.

ones contained in the Convention of Saint-Germain-en-Laye, finding «a means of giving practical effect throughout the world to such intentions».

The first of the twelve articles that make up the Convention introduces for the first time in international law a clear and relevant definition of slavery and slave trade. It is necessary to emphasise from the outset that this is the milestone definition that is still valid and fundamentally still referred to today. Article 1 of the 1926 Slavery Convention states that slavery is to be understood as «the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised» whereas slave trade «includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery […] with a view to selling or exchanging him». It is important to highlight that Article 1(1) does not refer to a 'right of ownership' over another person, but rather the 'powers' associated with such right of ownership. The *travaux préparatoires* of the 1926 Slavery Convention also clarify what does not constitute slavery. It indicates that states were unwilling to include conditions similar to slavery (such as "domestic slavery and similar conditions") within the definition specified in Article 1, unless there were powers attached to the right of ownership[83]. The definition of the slave trade in international law was developed by Albrecht Gohr, the Chairman of the Temporary Slavery Commission and a member of the League of Nations' Drafting Committee responsible for reviewing the British Draft Protocol. Gohr carefully analysed the British proposal, deconstructing it into its fundamental aspects. He then examined the elements encompassed in domestic legislation's definition of the slave trade and identified the following components as constituting the slave trade[84].

Under article two, the parties are committed to take the necessary steps both «(a) to prevent and suppress the slave trade» and «(b) to bring about […] the complete abolition of slavery in all its forms». The definitions and intentions contained in articles one and two show the Convention's two-folded objectives already anticipated in the foreword: «the complete suppression» and «securing the abolition of slavery and the slave trade». This is why it is possible to say that, precisely by going beyond what was established in past agreements, in 1926 States for the first time sought not only to end

[83] J. ALLAIN, *The Slavery Conventions*, cit., p. 9.

[84] J. ALLAIN, *Slavery in International Law*, op. cit., p. 78. See also M. R. SAULLE, *Schiavitù (dir. internaz.)*, in *Enciclopedia del diritto*, vol. 41, 1989, p. 641 ff.

slavery and the slave trade in fact, but also in law, that is to abolish laws which allowed for such enslavement[85].

Articles 3 and 4 deal with the elimination of the slave trade by sea. In particular the contracting parties «undertake to adopt all appropriate measures with a view to preventing […] transport of slaves in their territorial waters and upon all vessels flying their respective flags». To this end States «are entirely free to conclude between themselves […] special agreements» (art. 3) and «shall give to one another every assistance» (art. 4). Despite this outcome, the United Kingdom faced yet another setback in its attempt to equate the slave trade with piracy and thereby failed to secure agreement on universal jurisdiction for addressing the trade. Concerning the slave trade at sea, the States that were party to the 1926 Convention fell short of the expectations of British negotiators, as they were unwilling to commit to any comprehensive multilateral obligations. During the negotiation process leading to the adoption of the 1926 Slavery Convention, Viscount Cecil of Chelwood brought up the idea of assimilating the slave trade to piracy. However, it was recognized that while negotiators shared a similar moral stance on the matter, many felt that significant legal challenges arose when applying this proposal. As a result of the negotiations, there was no provision granting the right to visit ships based on the assimilation of the slave trade to piracy, and therefore no universal jurisdiction was bestowed[86].

Before embarking on the provisions against forced labour set out by the Convention, the content of Articles 6 to 8 should here be mentioned. These articles outline the ultimate responsibilities of the States Parties. Article 6 mandates that States establish sufficient laws to impose «severe penalties» in order to enforce the Convention effectively. Consequently, Article 6 places a positive duty on State Parties to enact domestic legislation that penalizes violations of the Convention. The last obligation arising from the 1926 Slavery Convention can be found in Article 7, which mandates State Parties to furnish the Secretary-General of the League of Nations and each other with the laws and regulations they have enacted to ensure the implementation of the Convention[87]. Based on the provisions of these two articles, it has been argued that the

[85] See in this regard J. ALLAIN, *Introductory Note to the Slavery Conventions*, in *United Nations Audiovisual Library of International Law*, September 2017.
[86] J. ALLAIN, *Slavery in International Law*, op. cit., p. 80.
[87] *Ibi*, p. 82.

1926 Convention also had the function of an instrument of penal law[88]. Finally, Article 8 refers to disputes arising between parties «relating to the interpretation or application of this Convention» which should be «settled by direct negotiation» or «referred for decision to the Permanent Court of International Justice».

In accordance with Article 12, the Convention entered into force the 9th of March 1927. As of 2023, ninety-nine are the States Parties to the 1926 Slavery Convention[89].

2.1.2.1 The first international law provision addressing forced labour: Article 5 of the 1926 Slavery Convention

The Slavery Convention is wider in scope than its title suggests, as it addresses not only slavery, but also the slave trade as we have seen and, above all and for the first time, «compulsory or forced labour» in its article 5. Both from the proposal first put forward by the British representation and then from the draft of the Convention, it is clear that in the course of the drafting work, the indications given by the Temporary Slavery Commission were followed[90], in particular in dealing also with the issue of forced labour, an issue that had not yet emerged until then.

Forced labour has been indeed the issue which States and their representatives at the League of Nations paid close attention to. And a fact of such magnitude revealed to be by no means a foregone conclusion for the times. During the negotiations of the 1926 Convention under the auspices of the League of Nations, it seems that the participating States were quite certain that slavery and the slave trade were not taking place within their own territories or their colonial holdings, but it was not the same with forced labour. In the notes of the individual representatives and in the preparatory work of the Convention, the sign of the long and burdensome past – with which an attempt was now being made, at least in part, to come to terms – continually emerges. Throughout the discussions, there are mentions of "the natives", "backwards people" as well as references to countries deemed "semi-civilised" or "uncivilised". Emerging from the speeches and comments

[88] J. ALLAIN, *Introductory Note to the Slavery Conventions*, op. cit.

[89] As per the *United Nations Treaty Collection* online database (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-2&chapter=18&clang=_en).

[90] See *supra* par. 2.1.2.

there are ideas and concepts that fundamentally divide the world between civilised and non-civilised nations, and it is precisely from the latter that the scourge of slavery had to be eliminated. The contrast between the notions of civilised and uncivilised is particularly evident in a Note presented by the Portuguese Delegate regarding forced labour. In this Note, General Freire d'Andrade expressed the belief that prohibiting forced labour would convey a misleading message to the indigenous populations of the colonies, implying that they had a "right to idleness". Additionally, he argued that the abolition of forced labour could hinder the adequate development of the African countries under their sovereignty, thus impeding the utilization of their riches and resources "in the interest of humanity". Precisely on the strength of this last consideration, a debate will develop, as we shall see, on the distinction between forced labour of private and public nature, with the latter form being maintained as entirely lawful, insofar as it was necessary 'in the public interest'. Consequently, for these reasons, efforts were made to remove the provision concerning forced labour from the Convention in order to weaken its core principles and to avoid explicitly mentioning territories under the mandate of League of Nations members[91].

In the 1925 English draft of the Convention, the article devoted to forced labour held position number three – showing how relevant the issue had become – and proposed to « […] take all necessary precautions particularly where the labourers belong to the less advanced races, to prevent conditions analogous to these of slavery from resulting from such employment». Forced labour could indeed result in «grave evils», but this was not the case «for essential public services», which were still the exception, perceived as «necessary for special reasons»[92]. In order to reassure the states that they would be able to continue to use forced labour on their territories for public work, Viscount Cecil of Chelwood highlighted in his introduction of the Protocol that when it came to Article 3, the British proposal did not go as far as the Temporary Commission had advised and that they had not included a clause for an adequate remuneration. Viscount Cecil further stated that, in any case, this particular article did not overstep its boundaries. It did not impede the labour required for essential public services, but it did emphasise the importance of preventing forced labour from descending into slavery – an undeniable principle that all could support. He highlighted that this illustrated the meticulous drafting of the

[91] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 11-12.
[92] Article 3, 1925 British Draft Protocol to the Slavery Convention. Cfr. J. ALLAIN, *The Slavery Conventions*, cit., p. 102.

document, as each government would have had the possibility and responsibility to determine what constituted an essential public service and the necessary precautions to prevent forced labour from turning into slavery[93].

The provisions concerning forced labour sparked the greatest disagreement towards the British Protocol as it underwent the process of being revised for inclusion in the 1925 Draft Convention. In an uncommon move, the Portuguese Delegation found it necessary to directly communicate their concerns to the Drafting Committee regarding the 1925 British Draft Protocol. They expressed that while they agreed with the overall principles outlined in Article 3 of the 1925 British Draft Protocol, they believed that the matter was not yet adequately developed or mature enough to be addressed.

In the same year that the English draft was presented, the Assembly of the League of Nations succeeded in drawing up its proposal for the Slavery Convention. Article 6 was dedicated to the issue of forced labour. As in the English draft, the parties certainly committed themselves to «to take all necessary measures to prevent conditions analogous to those of slavery from resulting from compulsory or forced labour», but they settled on three points: that «compulsory and forced labour» may only be required «for public purposes»; that «In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence»; and that «In all cases, the responsibility for any recourse to compulsory or forced labour»[94].

Still the Portuguese Note, highlighting the differentiation between forced labour and compulsory labour, raised the question of what defines this type of labour, asserting that they believe the term “compulsory labour” is more appropriate. According to their perspective, the term “forced labour” could be interpreted as referring to the punishment handed down by courts to specific criminals under common law. The Portuguese delegation then stated that Article 6 as drafted was not acceptable for two reasons. The Note examined the efforts of the Temporary Slavery Commission and acknowledged that

[93] *Ibi*.
[94] Article 6, 1925 League of Nations Draft Protocol to the Slavery Convention.

the recommendations put forth by the Commission offered essential flexibility by outlining principles rather than imposing obligations. Secondly, the Note highlighted that the Commission explicitly stated that labour matters were outside its jurisdiction as they fell within the realm of the International Labour Organisation, recognizing the latter's expertise in this area. The Note concludes by further justifying the disagreement with the already mentioned arguments of the "right of idleness" that would imply "grave difficulties" for colonial powers, particularly those operating in Africa, who would face significant challenges, «vital to the development of the colonies as well as that of the natives», if those arguments were to be accepted[95].

The work on the forced labour article then carried on. There were textual proposals made by individual states such as France, Holland and even Great Britain and Portugal, raising a whole series of issues ranging from the definition of "essential public works" to the question of provision of work in substitution for the payment of taxes. The Spanish delegate even proposed to remove the provision on forced labour altogether because a protocol designed to establish binding obligations among states in the fight against slavery would also strive to condemn forced labour, but only to the extent that it bore similarities to slavery, letting untouched what was not slavery "in the real sense of the word". All these proposals were not accepted by the Drafting Sub-Committee. An attempt was therefore made to form a smaller group of people who would dedicate themselves exclusively to the article in question. At this point, instead of presenting a draft of a specific article, Viscount Cecil proposed a set of principles that could be considered as the foundation for such an article, triggering a process of back-and-forth with the Drafting Committee, which finally led to the already mentioned Draft version of Article 6, which was now open for debate in order to get to the final version that would find its place in the 1926 Slavery Convention[96].

In presenting the result of the work of the Sixth Committee to the Assembly of the League of Nations Viscount Cecil of Chelwood highlighted that the League was addressing, for the first time in international agreements, the issue of forced labour. He acknowledged that forced labour, in one form or another, was recognised as prevalent in

[95] League of Nations, Note Submitted to the First Sub-Committee of the Sixth Committee by the Portuguese Delegate, General Freire d'Andrade, A.VI/S.C.1/2.1925, 11 September 1925. See J. ALLAIN, *The Slavery Conventions*, cit., p. 105.

[96] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 107-111.

every State for public services, as required by the respective government of that State. However, he noted that in "uncivilised or semi-civilised countries", such demands for forced labour to build social services would naturally and evidently occur much more frequently compared to "civilised" nations. Consequently, if required, these social services had to be carried out through compulsory labour by the citizens. Within the work of the sixth committee, however, a milestone was reached: on the basis of a clear distinction between forced labour dictated by public necessity or of a private nature, the latter was addressed in the Convention in a manner identical to slavery, and this implied that this type of labour should have been discontinued as soon as possible. In any case, forced labour of any type under no circumstance should have been allowed to degenerate into conditions analogous to slavery. It was finally hoped that, regardless of the distinction between public and private forced labour, the arrangement would ensure that any form of forced labour involving the worker moving from his or her place would be abolished in the future. Born of the mediation between general principles and possible obligations to which States would agree to submit, Article 6 of the Draft «set up a minimum standard which was clearly understood and accepted. The above drafting […] represents a definite attempt to deal with the question of forced labour in a general international agreement»[97].

Compared to any other article in the 1925 Draft Convention, the provision on forced labour received the most comments from States, although there were minor changes between the provisions of the 1925 Draft Convention and the 1926 Slavery Convention. In sharp contrast with Draft Article 6 were the positions of Portugal, as we have seen, and those of the Union of South Africa, claiming that the provisions should have been cancelled or further clarified, since the condition of a forced labourer would only imply a temporary condition, unlike that of a slave. Belgium suggested modifications to permit the use of forced labour for educational and social welfare purposes. Germany then suggested at the same time introducing more severe punitive measures for the use of forced labour in native populations and a time restriction of 90 days per year when resorting to forced labour if there were no possible alternatives to complete public works. Although these proposals were not accepted in the final text of the article, there were other suggestions that on the contrary found space and consensus

[97] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 113-114.

within the draft debate. In particular, the German argument in support of an adequate remuneration and the Indian-British call for responsibility for the use of compulsory labour remaining to the central authorities of the territories concerned were accepted [98].

At the end of the discussions, the final version of the article on forced labour – the first in an international treaty on the subject –, Article 5 of the Slavery Convention, was reached in 1926:

«Article 5 – The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

It is agreed that: (1) Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes. (2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence. (3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned».

Already announced in the preamble to the convention («Considering, moreover, that it is necessary to prevent forced labour from developing into conditions analogous to slavery »), Article 5 of the 1926 Convention was the most controversial and most discussed provision among States during the drafting process. At the same time, in the words of Viscount Cecil, it proved to be «the most important provision in the whole Convention»[99].

The discussions that led to the final version of Article 5 enabled the League of Nations to achieve a number of important results, albeit sometimes cut short in what could have been an even better outcome. As a general principle it was established that it was

[98] *Ibi*, p. 115.

[99] League of Nations, Slavery Convention: Report of the Sixth Committee: Resolution, League of Nations Official Journal (Special Supplement 44) Records of the Seventh Ordinary Assembly: Text of Debates, Seventeenth Plenary Meeting, 25 September 1926, p. 132.

necessary to act so that forced labour did not develop into "into conditions analogous to slavery" (Article 5, paragraph 1). Then, based on the distinction between forced labour for public and private purposes, it was agreed that the latter should end as soon as possible, while the former should be of an absolutely exceptional nature, should always receive adequate remuneration and should not involve the removal of the labourers from their usual place of residence (Article 5, paragraph 2.2). Thus, a third figure was created that was to be completely abolished – forced labour of a private nature – which, however, did not find its prominent place and definition in Article 1, nor a commitment to its abolition in Article 2, along with slavery and the slave trade. Finally, decisions on liability arising from conduct contrary to the requirements, would remain to the authorities of the territory concerned.

It is therefore clear that the great step of recognising the phenomenon of forced labour for the first time and placing it almost on the same level as the purposes for which the Convention was originally conceived, namely the abolition of the slave trade and slavery, has certainly been taken. However, the intent in ending forced labour that emerges from the Convention is certainly less far-reaching than the other two phenomena, for at least three reasons. Firstly, Article 5 introduces the issue by paying attention to the fact that this may turn into slavery as defined in Article 1; secondly, states are not obliged to adopt precise measures to combat it, but are "invited to make an effort" («High Contracting Parties shall endeavour») to put an end to forced labour; finally, it is admitted that forced labour may still exist, albeit within certain definitions and limits. The admission of the persistence of forced labour for public work, not even with the time regulation proposed by Germany, effectively allowed the powers to continue using this labour force in their colonial territories, "vital to their development", as the Portuguese Delegation wrote.

The States did, however, agree on one further point. As indicated by the Temporary Slavery Commission and at the initiative of Viscount Cecil, the member States pointed to the International Labour Organisation as competent body in the matter of forced labour. Thus, with the adoption of the Slavery Convention, the Assembly of the League of Nations passed a Resolution[100] requesting the ILO to take over the matter of

[100] League of Nations, Slavery Convention, Resolutions adopted by the Assembly at its meeting held on September 25th, 1926, A.123.1926.VI, 25 September 1926.

forced labour in general, and particularly in cases where it may give rise to conditions resembling slavery. In particular, the resolution called on the agency to consider the adopted Slavery Convention, in light «of the work undertaken by the Office with a view to studying the best means of preventing forced or compulsory labour from developing into conditions analogous to slavery»[101]. This invitation resulted, four years later, in the adoption by the ILO of the Forced Labour Convention n. 29.

2.1.3. The International Labour Organization Forced Labour Convention n. 29 of 1930

Since the beginning of the 19th century, there has been recognition of the fact that improving working conditions on a national level requires international collaboration. The advent of industrialisation led to deplorable living situations for the working class, including issues like child labour, excessively long work hours, and hazardous work environments. The Berlin Conference addressed some of these concerns by adopting resolutions that focused on minimum social standards concerning mining work, weekly rest, and the employment of children, young individuals, and women. Unfortunately, these resolutions were not effectively implemented. In 1900, the International Association for the Legal Protection of Workers was established as a private organization based in Basel. Comprised of scholars and administrators, their objective was to compile and evaluate national labour laws. However, the outbreak of World War I abruptly halted the Association's efforts, preventing the adoption of additional proposed agreements. It wasn't until the peace negotiations that the importance of establishing social standards regained significant prominence. The International Labour Organisation was in fact founded as Part XIII of the 1919 Versailles Peace Treaty, articles 387 to 427[102].

Within the organisation, in 1926, a Committee of Experts on Native Labour was then created – from whose name it can certainly be inferred that the colonialist mentality was entirely parallel to that which characterised the Legue of Nations in drafting the contemporary Slavery Convention. After analysing the existing legislation and expert

[101] *Ibidem*.

[102] V. *supra* note 70. For an historical overview of the ILO's birth see H. SAUER, *International Labour Organization (ILO)*, in *Max Planck Encyclopedia of Public International Law*, August 2014.

opinions, the Secretariat of the International Labour Organization and the Committee of Experts reached a consensus. They determined that certain principles could be derived to effectively regulate forced labour in cases where it persisted, aiming to eliminate any conditions that resembled slavery, mitigate associated negative consequences, and ultimately work towards its complete eradication. It was concluded that these principles were suitable for incorporation into a legal instrument. Thus, in 1930 the ILO Forced Labour Convention No. 29 came into being. The Convention entered into force the 1 May 1932 and records today the second highest number of ratifications among the ILO Conventions[103].

Two elements stand out clearly from the reading of the text of the Convention. Firstly, the fact that the majority of the provisions in the 1930 Convention were designed to be applicable during a transitional period. The Convention opens in fact with the following statement: «Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period» (Article 1). This fact led, only in 2014, the ILO Members to adopt the Protocol to the Forced Labour Convention. Secondly, there is a clear impression that the Convention tends to «regulate rather than suppress forced labour»[104]. The text of the Convention still valid today, as amended by the 2014 Protocol to the 1930 Forced Labour Convention[105] – the version that will be here considered –, retains the phrase 'forced or compulsory labour' that emerged during the preparatory work for the Slavery Convention[106]. Article 2 provides for the first time in an instrument of international law a definition of forced labour, whereby «the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». This definition embodies the Convention's main contribution, providing the definition of forced labour that is still valid in international law today. In order to understand more

[103] ILO, Forced Labour Convention, 1930 (No. 29) (C029). At the beginning of 2023, the number of ratifications is 180, among which the ratification by China in 2022 is particularly noteworthy, as is the fact that the United States of America has not yet acceded to the Convention. Together with Convention No. 29, the conventions with the highest number of ratifications are the Abolition of Forced Labour Convention, 1957 (No. 105), with 178 ratifications, and the Worst Forms of Child Labour Convention, 1999 (No. 182), which, with its 187 ratifications, is the ILO Convention most widely accepted by states. All numbers are of course taken from and available on the ILO website, on the 'Normlex' portal.

[104] J. ALLAIN, *Slavery in International Law*, op. cit., p. 217.

[105] ILO, Protocol of 2014 to the Forced Labour Convention, 1930 (P029).

[106] See *supra*, note 95.

precisely what the key wording in the Convention's definition of forced labour mean, concrete help can be found in the analyses conducted by the Committee of Experts on the Application of the Conventions and Recommendations founded in 1926 within the ILO[107]. For instance, concerning the locution 'work or service', in its 1979 annual report the Committee highlighted the fact that these conducts are certainly to be distinguished from obligations requiring both education and training, including vocational training, because compulsory education is acknowledged in numerous international instruments as the mechanism to ensure the right to education[108]. Beyond the educational context, however, the scope of application can be considered to be far-reaching. There are no specific restrictions mentioned regarding the nature of the relationship between the work or service provider and the person imposing it. This relationship can be either *de facto* or *de jure*, permanent or temporary, and explicitly or implicitly accepted.

Turning then to the definition of 'menace of any penalty', during the negotiation process, it was agreed that the term 'penalty' should not be strictly interpreted as punishment imposed by a court of justice. Instead, it was understood to encompass any penalty or punishment inflicted by individuals or entities. In the Report to the 1930 International Labour Conference, the occasion on which the 1930 Convention was adopted, the Worker's Group proposed an additional amendment. They sought to include the phrase 'or the loss of any rights or privileges' after the phrase 'under the menace of any penalty'. However, this proposal was ultimately withdrawn as it was deemed unnecessary. It was demonstrated that the expression 'under the menace of penalty' already covered the contingencies envisioned by the amendment[109]. Therefore, the phrase 'under the menace of any penalty' should be interpreted to include the loss of any rights or privileges. This highlights that a penalty does not have to be strictly legal, but even

[107] Established in 1926, the ILO Committee of Experts was created to assess the increasing number of government reports regarding ratified Conventions. Presently, the committee comprises 20 distinguished jurists appointed by the Governing Body for three-year terms. Its primary function is to evaluate the implementation of international labour standards impartially and technically in member states of the ILO. In addition to producing an annual report, the Committee of Experts provides two types of feedback, observations and direct requests, when examining the application of international labour standards.

[108] International Labour Conference, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey on the Reports relating to Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report III (Part 4B), 1979, p. 8.

[109] International Labour Conference, 14th Session, Item I, Report of the Committee on Forced Labour to the Twelfth Session of the Conference, Forced Labour, 1930, p. 691.

actions by an employer that effectively act as a penalty would be inconsistent with the definition[110].

As we will observe, international jurisprudence over the years has then further helped clarify what is meant by 'menace of any penalty'. The Inter-American Court of Human Rights in the *Ituango Massacres v. Colombia* case of 2006 stated that it «can consist in the real and actual presence of a threat, which can assume different forms and degrees, of which the most extreme are those that imply coercion, physical violence, isolation or confinement, or the threat to kill the victim or his next of kin»[111]. The European Court of Human Rights, in the 2005 *Siliadin v. France* case considered the fact that, although the applicant was not threatened with a penalty in the literal sense of the term, the condition in which she found herself could perfectly well be compared to that of a threatened punishment. Her fear of being arrested by the police, which was instilled by a couple who violated her rights, was considered to fulfil the criteria of being subjected to labour under the threat of a penalty: «she was in an equivalent situation in terms of the perceived seriousness of the threat»[112].

Finally, regarding the concept of 'voluntary offer of labour' based on the assumption that «the worker's right to free choice of employment remains inalienable», the ILO Committee of Experts determined that «account must be taken of the legislative and practical framework which guarantees or limits that freedom»[113]. This element is closely related to that of the threat of penalty, with which it may sometimes even overlap. the Committee also underlined that a worker's freedom to 'offer himself voluntarily' may be compromised by means of "indirect coercion", where it results «from an employer's practice, e.g. where migrant workers are induced by deceit, false promises and retention of identity documents or forced to remain at the disposal of an employer; such practices represent a clear violation of the Convention»[114]. Again, the Inter-American Court of Human Rights in the *Ituango* case argued that the absence of willingness in performing

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[110] J. ALLAIN, *Slavery in International Law*, op. cit., p. 219.

[111] Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, Series C, No. 148, 1 July 2006, par. 161, p. 79. See *infra*, Chapter II, part I, par. 2.2.

[112] European Court of Human Rights, *Siliadin v. France*, Application no. 73316/01, 26 July 2005, par. 118, p. 32. See *infra*, Chapter II, part I, par. 2.1.

[113] International Labour Conference, 96th Session, Item III, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey concerning Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report III (Part 1B), 2007, par. 38, p. 20.

[114] *Ibi*, par. 39.

one's work «consists in the absence of consent or free choice when the situation of forced labour begins or continues. This can occur for different reasons, such as illegal deprivation of liberty, deception or psychological coercion» – in the specific case, under threat for applicants of being killed[115].

In any case, as early as 1961, the ILO Committee of Experts already offered its interpretation of what constituted forced labour as a whole, in light of the interpretation of the individual components that formed the definition given in Article 2 of the Forced Labour Convention n. 29 of 1930. Forced or compulsory labour should be therefore understood as the «work done under threat of some kind of punishment, and work for which individuals do not offer themselves of their own free will»[116]. Paragraph two of Article 2, however, specifies on the other hand as many as five areas (letters (a)-(e)) within which forced labour is not understood as a punishable practice to be suppressed. Synthetically, these areas include: military service; civic obligations; penalty work imposed as a consequence of a conviction; work exacted in cases of emergency. These exceptions remain valid to this day, as the 2014 Protocol left the text of Article 2, paragraph two intact.

The already mentioned 2014 Protocol to the Forced Labour Convention was adopted during the 103rd International Labour Conference, on 11 June 2014, complemented by Recommendation n. 203, and entered into force on 9 November 2016[117]. Unlike Convention n. 29, the Protocol is not programmatic in nature and with transitional measures, but with its Article 7 rather expressly provides for the deletion of the 1930 transitional provisions (former Articles 3-24 of the 1930 Convention). The agreement makes the signatory States strictly responsible for the fight against forced labour, by taking «effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators». In addition, States must «develop a national policy and plan of action for the effective and sustained suppression of forced or

[115] Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, cit., par. 164-165, p. 79-80.

[116] International Labour Office, International Labour Conference, Forced Labour, General Conclusions on the Report relating to the International Labour Conventions and Recommendations dealing with Forced Labour and Compulsion to Labour, 1957 (No. 105), Part 3, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part IV, 1962, p. 195.

[117] See on the subject S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, Torino, 2019, p. 102-104.

compulsory labour in consultation with employers' and workers' organizations, which shall involve systematic action by the competent authorities» (Article 1).

Article two then gives specific indications on the content such national policies should have. Emphasis is placed on the education and information of persons, especially the most vulnerable who can easily be victims, and of employers so that they are not involved in prohibited practices (lett. (a)) and (b)). Efforts are then required in the enforcement and control of legislation, i.e. a strengthening of inspection services (lett. (c)). Special attention is to be paid to the protection of persons, in particular migrants, during the recruitment process (lett. (d)). It is then envisaged to implement mechanisms for the reconnaissance of working conditions in both the private and public sector, in order to prevent and respond to the risks of forced or compulsory labour (so-called 'due diligence', lett. (e)), and to tackle the root causes leading to such practices (lett. (f)). The following article 3 is dedicated to the protection of victims and calls for «effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour».

Among the provisions of the 2014 Protocol of particular interest is the one contained in Article 4. The article in fact, after prescribing that victims must be assured access to «appropriate and effective remedies», introduces a measure that is also preventive in nature. Indeed, Members are asked to take the necessary measures to ensure that competent authorities are required to not prosecute victims of forced labour or impose penalties on them because of illegal activities they have been forced to engage in as a direct result of being compelled into forced labour.

Finally, Article 5 imposes an obligation on signatory States to cooperate with each other to ensure the prevention and elimination of all forms of forced labour, to be implemented through the sharing of measures taken and the exchange of information, as Recommendation n. 203 points out (Article 14, lett. (e)). As in this case, the Recommendation points out to States in detail the ways in which they can effectively implement the requirements of the 1930 Convention and the 2014 Protocol. To this end, its structure is schematically divided into the sections of 'Prevention', 'Protection', 'Remedies', 'Enforcement' and 'International Cooperation'.

The crucial importance of the 2014 Protocol to the Forced Labour Convention is confirmed by what is stated in its very Preamble. It is acknowledged that forced labour

«violates the human rights and dignity of millions of women and men, […] contributes to the perpetuation of poverty and stands in the way of the achievement of decent work for all» and that its prohibition «forms part of the body of fundamental rights». On the other hand, the text raised an urgent alarm. Based on the recognition that «the context and forms of forced or compulsory labour have changed» and that «trafficking in persons for the purposes of forced or compulsory labour […] is the subject of growing international concern», the Protocol draws attention on the «urgency of eliminating forced and compulsory labour in all its forms and manifestations». The area to which more attention needs to be paid today is the private economy, since «there is an increased number of workers who are in forced or compulsory labour» in that sector, in which «certain groups of workers have a higher risk of becoming victims of forced or compulsory labour, especially migrants». Given these findings and the Protocol's urgent appeal, it is worrying to note that to date, almost 10 years after the text was drafted, only 59 states have ratified it. In light of the content of the Protocol just outlined, a broad adoption of the Protocol appears of paramount importance for a real fight against forced labour in its changed, modern forms and would prove a real will on the part of States to implement it.

2.2. Multilateral international agreements post 1945 on the prohibition of slavery and forced labour

The legal instruments of international law that that will be addressed in the following section arose in a very different and rapidly changing world than the texts seen so far. There are mainly two events that characterised the post-World War II period and that will assume fundamental importance for the persecution of the fight against forced labour and slavery. On the one hand, of course, the Second World War marked a watershed in the history of human rights. After the suppression of individual rights and the denial of the very idea of humanity, the international community was called upon to take responsibility for the future. Following the failure of the League of Nations, the victorious powers of the conflict conducted the negotiations that led first to the founding of the United Nations and then to the Universal Declaration of Human Rights in 1948. Thus the process of internationalisation of rights began, through which the fundamental

rights of individuals and peoples were placed on a normative level as priority principles over the sovereignty and interests of states. This process will also continue with the regional conventions established to safeguard fundamental human rights. On the other hand, the visible legacy of what happened in the previous four centuries remained present on the African continent. As we have seen, the imprint, specifically and especially on forced labour, was still very clear during the discussions that led to the adoption of the 1926 Slavery Convention, as well as in the text of the Convention itself. It is for this reason that the decline of colonialism only began to take its first steps in the 1960s.

From 1930 to 1939, the International Labour Conference took an additional stride in distinguishing the rights of workers in developed regions from those in "underdeveloped" areas. This differentiation was evident in the adoption of the "Native Labour Code", which encompassed regulations on forced labour and the working conditions of "indigenous workers", a term that referred to individuals in colonial territories. These Conventions and Recommendations marked the initial effort to establish guidelines governing the exploitation of labour among the populations in European colonies in Africa and Asia.

After fifteen years since the adoption of Convention No. 29 in 1930, the transitional measures outlined within it played a significant role in bringing about a substantial change in favour of equal protection. This shift occurred as the post-war system began to lay the foundation for the dismantling of colonialism and the initiation of the decolonization movement. During the Second World War, the International Labour Organization underwent a transformation in its stance. It transitioned from accepting and providing a legal framework for colonial regimes to asserting equal rights for all, as evidenced by the 1944 Declaration of Philadelphia, adopted at the 26th Conference of the ILO[118]. The Declaration of Philadelphia reaffirmed the longstanding goals of the International Labour Organization and also introduced two new dimensions: the recognition of human rights as essential to social policy and the importance of international economic planning. As the end of the world war approached, the declaration aimed to align the core principles of the ILO with the emerging realities and the aspirations for a brighter future. It sought to adapt and respond to the changing

[118] ILO, Declaration concerning the aims and purposes of the International Labour Organisation, adopted at the 26th session of the ILO, Philadelphia, 10 May 1944.

circumstances and the optimism for a more favourable global environment. In reaffirming «the fundamental principles on which the Organization is based» the Declaration opens with a statement that will mark the work of the ILO in the decades to come: «Labour is not a commodity».

During the revision of the International Labour Organization's constitution in 1946, the General Conference held in Montreal included the Declaration of Philadelphia as an annex to the Constitution. This action made the declaration an essential and inseparable component of the constitution, as specified in Article 1. By incorporating the Declaration of Philadelphia, the ILO reinforced its significance and ensured that its principles and objectives were firmly embedded in the Organization's Constitution. This marked a definitive departure from its colonialist history and contributed to the emergence of a post-colonial world following 1945. In the initial fifteen years following the war, the ILO took significant strides by either adopting or revising nearly all of its fundamental human rights standards. Additionally, it played a pivotal role in establishing the groundwork for United Nations human rights standards, alongside implementing practical initiatives through technical cooperation. Over the past three decades, the ILO has further enhanced its approach by fostering a stronger synergy between legal measures and practical implementation[119].

In light of these elements, we can therefore analyse which instruments of international law for the prohibition of forced labour emerged during this period. In the course of the next few pages, we will first look at an instrument adopted by the United Nations General Assembly less than ten years after its establishment, namely the 1956 Supplementary Convention on the Abolition of Slavery. A second essential instrument is the Convention concerning the Abolition of Forced Labour n. 105, adopted by the ILO only one year later.

[119] See G. RODGERS, E. LEE, L. SWEPSTON, J. VAN DAELE, *The ILO and the Quest for Social Justice, 1919-2009*, Geneva, 2009, p. 41 ff.

2.2.1 The United Nations 1956 Supplementary Convention on the Abolition of Slavery

In 1949, Resolution 238 was adopted by the United Nations Economic and Social Council (ECOSOC). This resolution directed the UN Secretary-General to designate a "small *ad hoc* committee of no more than five experts" to address the matter of slavery and, among other things, propose strategies to combat this issue. When outlining the responsibilities of the Ad Hoc Committee on Slavery, the Secretary-General underscored the mandate of ECOSOC and thus examined approaches to tackling slavery within the framework of economic and social collaboration[120].

In response to a request from the United Nations General Assembly, the United Nations Ad Hoc Committee on Slavery was established in 1949. The Secretary-General, while appointing members to the Committee, highlighted the possibility that if the substantive provisions of the 1926 Slavery Convention were deemed insufficient given the current circumstances, the committee could explore proposing a new convention on slavery. Additionally, the United Nations assumed organisational responsibility for ensuring that the obligations of the League of Nations were legally enforced within its framework. Considering this, the Secretary-General proposed that the United Nations assume the functions and powers previously entrusted to the League of Nations regarding the 1926 Slavery Convention to the Economic and Social Council's Ad Hoc Committee on Slavery. In its initial session's report, the Ad Hoc Committee on Slavery acknowledged the need for "certain modifications" to the International Slavery Convention of 1926. The committee also considered the possibility of drafting a new convention with broader coverage or creating a supplementary instrument to supplement the existing convention. Throughout its discussions, the Ad Hoc Committee did not conclude that the Slavery Convention of 1926 was inadequate. Instead, the committee viewed it as a valuable foundation to be supplemented «to provide more precise definitions of the specific forms of servitude addressed»[121]. Additionally, the Ad Hoc Committee recognised that certain provisions of the existing Convention made references

[120] United Nations Economic and Social Council, Resolution 238 (IX), *The problem of slavery*, 20 July 1949.

[121] United Nations Economic and Social Council, Report of the First Session of the Ad Hoc Committee on Slavery, UN Doc E/AC.33/9, 27 March 1950, p. 11.

to officials or organs that were no longer in existence. The Ad Hoc Committee on Slavery in 1950-51 heeded the Secretary's advice and prepared a protocol along with an accompanying annex to incorporate the 1926 Convention into the United Nations framework. The initial draft of the Protocol underwent revisions, first by the Secretary-General and later by the United Kingdom in 1953. Subsequently, the draft Protocol was reviewed by the Sixth Committee (Legal) and ultimately adopted as General Assembly Resolution 794 (VIII) on 23 October 1953. The Protocol effectively integrated the Slavery Convention into the United Nations system for the States Parties. In essence, the language of "League of Nations" was substituted with that of the "United Nations"[122].

The realisation that the time was ripe to reconsider the issues raised in the 1926 Slavery Convention, under pressure from the General Assembly and the Economic and Social Council of the United Nations, led to the adoption of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[123].

Despite the contrasting contexts in which the 1926 and 1956 Conventions were negotiated, the negotiation processes for both instruments followed similar patterns. The Slavery Convention and the Supplementary Convention, despite their differences, originated from provisions initially proposed by the United Kingdom. The evolution of each article of the Convention can be traced from a 1954 British Draft Convention to a 1956 Draft Convention prepared by the Ad Hoc Committee on the Drafting of a Supplementary Convention on Slavery and Servitude, consisting of ten members of the Economic and Social Council. This drafting process eventually culminated in the final version of the 1956 Supplementary Convention, which was adopted by the United Nations Conference of Plenipotentiaries. The Committee on the Drafting of a Supplementary Convention on Slavery and Servitude convened in New York from 16 January to 6 February 1956 and reviewed the British Draft Supplementary Convention,

[122] UNGA, Resolution A/RES/794 (VIII), *Transfer to the United Nations of the functions exercised by the League of Nations under the Slavery Convention of 25 September 1926*, 23 October 1953. See J. ALLAIN, *The Slavery Conventions*, cit., p. 173 ff.

[123] United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Final Act and Supplementary Convention, UN Doc. CONF.24/23, 7 September 1956.

taking into account comments provided by twenty-seven States and the International Labour Organisation[124].

The content of the 1956 Supplementary Convention will not be dwell in depth as it does not deal in detail and specifically with the phenomenon of forced labour, but for our purposes it is necessary to look at some relevant elements introduced by it. As early as 1951, in its second report, the ECOSOC Ad Hoc Committee on Slavery made two key recommendations. Firstly, the Committee proposed the reaffirmation of the 1926 Convention in its entirety. Secondly, the Committee advised that States should make efforts to abolish, as early as possible, four institutions and practices that were similar to slavery or had similar effects. These included debt bondage, serfdom, interminable labour pledges, forced marriage, and the exploitation of children through their transfer[125]. The objective was to address these forms of oppression that were not explicitly covered by Article 1 of the International Slavery Convention of 1926.

These indications found full acceptance in the final version of the Convention, since under Article 1, four newly recognised types of practices – debt bondage, serfdom, forced marriage and child exploitation – required State Parties to act upon by taking «all practicable and necessary legislative measures to bring about progressively and as soon as possible» their complete abolition. Article 1 of the Supplementary Convention genuinely complements the 1926 Slavery Convention as it aims to eradicate the existence of four servile statuses, «whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention». To put it differently, as previously underlined, the absence of powers associated with the right of ownership is a crucial factor in determining whether a situation falls under the scope of slavery. For instance, if debt bondage can be proven to involve the powers associated with ownership rights, it would be classified as slavery. On the other hand, if such powers are not present, debt bondage would be considered a servile status according to the 1956 Supplementary Convention. It is important to note that in cases where debt bondage involves the powers attached to ownership, it would be covered by both the 1926 Convention and the 1956 Supplementary Convention[126].

[124] For a detailed description of the discussion process that led to the approval of the 1956 Supplementary Convention, see J. ALLAIN, *The Slavery Conventions*, cit., p. 217-218.

[125] United Nations Economic and Social Council, Report of the Second Session of the Ad Hoc Committee on Slavery, UN Doc E/1998, E/AC.33/13, 4 May 1951, p. 16–19.

[126] J. ALLAIN, *The Slavery Conventions*, op. cit., p. 18.

As can be seen from the preamble, the text of the Convention takes into account the Forced Labour Convention of 1930 and the «subsequent action by the International Labour Organisation in regard to forced or compulsory labour». Throughout the Convention, the profile of forced labour emerges indirectly on two occasions, or rather, for two of the above listed practices namely for the practices of 'serfdom' and 'child labour'. Serfdom is defined as «the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status» (Article 1, lett (b)), while the definition of child labour is described as «Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour» (Article 1, lett. (d)). Although addressed in an indirect manner, it is evident how the issue of working against one's will is dealt with differently in the 1956 Supplementary Convention than in the 1926 Slavery Convention.

In fact, it emerges how the practices are described in close relation to the phenomenon of slavery and how this fact also implies a close correlation with the aspect of the ownership of the person forced to work. These are certainly two particular practices, the first of which sees the presence of a worker forced by another person to work and live on land owned by that person, homologating land and worker; while the second sees a relationship, if not one of property, of vigilance and custody, which can easily turn into a sense of ownership. Hence the close relationship with slavery and the clarification enunciated by the Supplementary Convention itself, that the practices described could still fall within the scope of what was already condemned and prescribed in 1926. On the contrary, 1926 Slavery Convention clearly distinguished and looked independently at the phenomenon of forced labour, never placed in direct correlation with slavery. Certainly, the phenomenon of forced labour *per se* was not addressed in 1956 as the new Convention was designed as a supplement to the 1926 Convention and it can therefore be deduced that the provisions concerning forced labour contained in the 1926 Convention, and in particular in its Article 5, devoted entirely to forced labour, remain valid until then[127]. However, the close correlation with slavery and the presence of the

[127] See *supra*, par. 2.1.2.1.

characteristics of ownership will emerge again in the course of the following pages when dealing with the question of forced labour and will therefore be issues that we will return to in the forthcoming investigations.

2.2.2 The ILO Convention concerning the Abolition of Forced Labour n. 105 of 1957

The provisions of ILO Convention No. 29 of 1930 were supplemented by those contained in the Abolition of Forced Labour Convention, No. 105 of 1957[128], a result of the joint work of the ECOSOC and the 1951 established Ad Hoc Committee on Forced Labour[129]. The Ad Hoc Committee was constituted to have five members to be appointed jointly by the Secretary General of the United Nations and the Director general of the ILO, «to study the nature and extent of the problem raised by the existence in the world of systems of forced or "corrective" labour, which are employed as a means of political coercion or punishment for holding or expressing political views, and which are on such a scale as to constitute an important element in the economy of a given country»[130].

The Abolition of Forced Labour Convention, No. 105 of 1957 introduced measures aimed at achieving the immediate and total elimination of forced labour. This was a departure from Convention No. 29, which allowed for a deferral of commitment to address the demands of colonialist States that were reluctant to abolish forced labour. The 1957 Convention established binding obligations on States to prohibit forced labour with immediate effect. Hence, it should be clarified that the new Convention, rather than being a revision of Convention No. 29, results in an integration of it. The definition of forced labour, as drafted in the previous Convention, remained unchanged and States that ratified both the 1957 Convention on the Abolition of Forced Labour and the 1930 Forced Labour Convention are obligated to eliminate forced or compulsory labour in accordance with

[128] ILO, Abolition of Forced Labour Convention, 1957 (No. 105) (C105). With its 178 ratifications, after the Worst Forms of Child Labour Convention, 1999 (No. 182) and the Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105) ranks as third most ratified ILO Convention. As with the 1930 Forced Labour Convention, China ratified the 1957 Convention No. 105 in 2022, the year in which the Convention has been also ratified by Japan. Among others, Lao People's Democratic Republic, Myanmar and the Republic of Korea have not yet ratified it.

[129] United Nations Economic and Social Council, Forced labour and measures for its abolition, 12th session, Resolution of 19 March 1951, E/RES/350(XII).

[130] *Ibidem*, point 1 (a).

the provisions of the 1957 Convention, even if such labour could potentially be considered an exception under the 1930 Convention[131].

As regards the mentioned exceptions, Convention No. 105, in its scope, does not prohibit the imposition of forced or compulsory labour on common offenders who have been convicted of offenses such as robbery, kidnapping, bombing, or other violent acts that have endangered the lives or health of others. In these cases, although a prisoner may be compelled to work under the threat of punishment and against their will, the labour imposed on them does not fall under the reasons specified in the Convention. Therefore, in most situations, labour imposed on individuals as a consequence of a legal conviction will not be relevant to the application of the Convention. However, the situation for which a person is compelled to work due to their political beliefs or expression, a breach of labour discipline, or participation in a strike, falls within the purview of the Convention. It is important to note that while prison labour imposed on common offenders aims to reform or rehabilitate them, the same rationale does not apply to individuals convicted for their opinions or involvement in a strike. Moreover, when it comes to persons convicted for expressing certain political views, any attempt to reform or educate them through labour would fall under the explicit terms of the Convention, which encompasses compulsory labour as a means of political education[132].

To ensure compliance with the provisions, various levels are be considered by the Convention: firstly, at the level of civil and social rights and liberties, where political activities, expression of views, ideological opposition, breaches of labour discipline, and participation in strikes should not be subject to criminal punishment; secondly, at the level of penalties imposed, which should be limited to fines or other non-work-related sanctions; and finally, at the level of the prison system. In certain countries, prisoners convicted of specific political offenses may enjoy a special status similar to that of individuals in pretrial detention, exempting them from compulsory prison labour imposed on common offenders, although they may engage in activities by their own request[133].

However, the focus of the new Convention was to address the specific practices of labour camps and re-education, incorporating elements of a purely political nature.

[131] S. CANTONI, *op. cit.*, p. 57. See also S. VILLALPANDO, *Forced Labour/Slave Labour*, in *Max Planck Encyclopedia of Public International Law*, April 2007.

[132] M. KERN, C. SOTTAS, *The abolition of forced or compulsory labour*, in ILO, *Fundamental rights at work and international labour standards*, Geneva, 2003, p. 45.

[133] *Ibi*, p.47.

This marked a significant shift in the understanding of forced labour, as it not only addressed economic exploitation but also encompassed forms of political and social coercion. This development was influenced by the ongoing process of establishing international human rights protection. However, it is important to note that the historical context in which the convention was drafted, characterized by the decolonization process and the intensification of the Cold War, also played a significant role in shaping its provisions. The conversations that led to the formulation of the Convention were significantly influenced by concerns and interventions directed towards the Soviet Union and China.

The 1957 Convention, in its formulation, appears to be a result of political conflicts during the Cold War era in the outlining of five specific instances in which forced or compulsory labour should be abolished. The Convention essentially highlights practices that largely align with the definition of forced or compulsory labour established in the 1930 Convention. The culmination of this contentious process was a joint report by the United Nations and the ILO's Ad Hoc Committee on Forced Labour of 1953[134], which revealed that certain Western colonial states were employing forced labour systems for economic purposes against indigenous populations, contravening the UN Charter and the Universal Declaration of Human Rights. Simultaneously, the Soviet Union was found to be employing forced labour as a means of political coercion against individuals expressing ideological opposition to the established political order within their own country. The genesis of both the joint UN-ILO report and the 1957 Convention on the Abolition of Forced Labour can be traced back to the same origin. It is evident that the United States of America took the lead in shaping the agenda on the issue of forced or compulsory labour, leveraging their numerical advantage within the United Nations during the 1950s[135].

Consisting of ten articles, the core of the Convention's provisions is contained in its first two articles. Article 2 of the 1957 Convention urges Members «to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1», which provides for five precise and particular areas in which states must make efforts to avoid the use and abolition of forced labour, namely when it

[134] United Nations and International Labour Office, Report of the Ad Hoc Committee on Forced Labour, UN Doc. E/2431, 1953.

[135] J. ALLAIN, *Slavery in International Law*, op. cit., p. 236.

is (a) a means of coercion or political education or a punishment for political or ideological opponents; (b) a method of utilising labour for economic development; (c) a disciplinary measure in the employment relationship or (d) as a punishment for participation in strikes; (e) a means of racial, social, national or religious discrimination.

As with the 1930 Convention, the Committee of Experts on the Application of the Conventions and Recommendations[136] with its observations contributed extensively to the interpretation of the provisions contained in the 1957 Convention, of course especially with regard to the five areas identified in Article 1, and it did so especially in its third 2007 Report[137]. For instance, as regards forced labour used as a means of coercion or political education or a punishment for political or ideological opponents (Article 1, (a)), in its initial three reports, the Committee of Experts fulfilled its role as the guardian of the 1957 Convention by clarifying this stance. It emphasised that forced prison labour, which is imposed for common crimes, does not fall under any of the reasons listed in the Convention. However, the 1957 Convention aims to abolish all forms of forced or compulsory labour, including prison labour used as a means of political coercion or for any other purpose with the same intent. In contrast, the Committee of Experts, in its 2007 General Report, introduced a possibility of using forced or compulsory labour in situations prohibited by Article 1(a) if the expression of political views was accompanied by violence.[138]

Again, for forced labour use in purpose of economic development (Article 1, (b)), always according to the 2007 Survey conducted by the Committee of Experts, progress has been made in several countries over the past few decades in eliminating provisions that impose compulsory labour for economic purposes. It was acknowledged that in practice, the use of forced labour had been viewed as a productive means of promoting national economic development. The Committee further clarified the legal framework by explaining that the terms "mobilizing" and "economic development" mentioned in Article 1(b) of the Convention only apply in situations where forced or compulsory labour is used to a certain extent and for economic purposes. The Experts highlighted that Article

[136] See *supra*, note 107.
[137] See *supra*, note 113.
[138] International Labour Conference, 96th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey 2007, *cit*., p. 82, par. 154. See J. ALLAIN, *Slavery in International Law*, op. cit., p. 240.

1(b) prohibits such practices even if they are of a temporary or exceptional nature, emphasizing that the prohibition remains applicable[139].

As to the most far-reaching provisions contained in Article 1 (c), namely the use of forced labour as a «means of labour discipline», the Committee of Experts highlights in its 2005 General Report that instances of forced or compulsory labour, which violate the provisions of the 1957 Convention, can still occur through prison labour. These situations may arise due to various breaches of labour discipline, such as the failure to implement or violate any settlement, award decision, or court order related to fulfilling an employment contract. Additionally, breaches may occur in relation to avoiding wastage of goods or materials, conforming to technical standards, or complying with general production plans. Also in its 2007 assessment, the Committee concluded that the 1957 Convention does not forbid the imposition of sanctions, including those involving compulsory labour, on individuals who have violated labour discipline in a way that hinders or poses a potential threat to the functioning of essential services[140]. It has been noted that this interpretation of the Convention, which allows for limitations on forced or compulsory labour in certain circumstances, may appear regressive from a legal standpoint and more aligned with the provisions of the International Covenant on Civil and Political Rights (ICCPR)[141]. This would suggest that the Committee of Experts has the authority to exercise judgment and impose restrictions on the application of forced or compulsory labour provisions.[142]

Regarding the area of forced labour used as punishment for taking part in strikes (Article 1 (d)), the Committee in its latest Report, contrary to its previous broad acceptance of such use, focused on the question of proportionality. States are advised to exercise proportionality when taking action related to forced or compulsory labour. The Committee emphasizes the significance it places on the general principle that, irrespective of the legality of a strike, any sanctions imposed should be commensurate with the

[139] International Labour Conference, 96th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey 2007, *cit*., p. 91-92, par. 168.

[140] *Ibi*, p. 94-95, par. 174-175.

[141] See *infra*, par. 2.3.1.

[142] J. ALLAIN, *Slavery in International Law*, op. cit., p. 244.

severity of the violations committed[143]. Consequently, the Committee's current approach aims to limit the use of forced labour in cases of strike participation rather than completely abolishing it.

Finally, the last and most general prohibition of forced labour «as a means of racial, social, national or religious discrimination» (Article 1 (e)) is widely accepted by the Experts. In its 2007 General Report, the Committee of Experts upholds the fundamental principle of the 1957 Convention, which is the eradication of all forms of forced or compulsory labour by States. The Committee demonstrates a strong and assertive stance on this matter, emphasizing the imperative to suppress and refrain from utilizing any form of forced or compulsory labour, as clearly stated in the provisions of Article 1: «Even where the exaction of a particular kind of labour is not otherwise covered by the Conventions on forced labour, […] any discriminatory distinction made on the above grounds should be abolished under this provision. Similarly, even where the offence giving rise to the punishment is a common offence which does not otherwise come under the protection of Article 1(a), (c) or (d) of the Convention, but the punishment involving compulsory labour is meted out more severely to certain groups defined in racial, social, national or religious terms, this situation falls within the scope of the Convention»[144].

From reading the comments made by the Committee of Experts in the last 2007 Report on the Eradication of Forced Labour, it is evident that the chosen course of action has not been one of extreme rigidity with regard to the conduct of states, but rather, as we have seen, there has often been a wide margin of tolerance for the use of forced labour, especially in some of the areas identified in Convention No. 105 of 1957. This way of proceeding mainly concerned the cases of forced labour as a means of political coercion, labour discipline and punishment for having participated in strikes (Article 1 (a,c,d)). The Committee of Experts would have been accommodating towards the efforts of States to expand the exceptions, thereby narrowing the scope of the prohibition against forced or compulsory labour. Not acting like a guardian of limiting forced or compulsory labour, there would have been no genuine commitment within ILO to eradicate forced or

[143] International Labour Conference, 96th Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Eradication of Forced Labour, General Survey 2007, *cit*., p. 106, par. 187.

[144] *Ibi*, p. 108, par. 190.

compulsory labour. Instead, the ILO would have permitted the widening of exceptions, leading to a significant limitation in the application of the prohibition on forced or compulsory labour[145].

In terms of major multilateral labour treaties, one of the first occasions within which the 1930 and 1957 principles and limitations to the notion of forced labour made their entry alongside the forced labour issue was the 1990 signed International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW)[146]. Article 11, paragraphs 1 and 2, of the Convention state that migrant workers or members of the family shall neither «be held in slavery or servitude» nor «be required to perform forced or compulsory labour». On the other hand, paragraphs 3 and especially 4 introduce precisely these limitations to the notion of forced labour, stipulating that that it should not include «work or service […] under detention in consequence of a lawful order of a court», «service exacted in cases of emergency», «work or service that forms part of normal civil obligations». The 1990 Convention thus incorporates three of the five exceptions to forced labour introduced by the ILO in 1930, not including military labour and minor communal service. As expressed in the recitals, the Convention advocates the widest recognition of fundamental rights to all migrant workers, including irregular ones, but this recognition must be functional in discouraging the employment of migrants in an illegal situation.

2.3 Other international agreements referring also to the prohibition of slavery and forced labour

In order to provide as complete a picture as possible of the legal instruments that over time have contributed to combating the phenomenon of forced labour and slavery, as well as their essential definition, it is necessary to address some further international

[145] J. ALLAIN, *Slavery in International Law*, op. cit., p. 246.

[146] UNGA, Resolution A/RES/45/158, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990. The convention became effective just on 1 July 2003, following the attainment of the necessary ratification from 20 States in March 2003. As of June 2023, the convention has been implemented in only 58 countries, most of them of Central and South America and North Africa. For further reading on the Convention see R. CHOLEWINSKI, P. DE GUCHTENEIRE, A. PECOUD, *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, Cambridge, 2009.

agreements. In the next section devoted to the analysis of other instruments of international law also referring to the prohibition of forced labour and slavery, as often held together within the same provision, we shall look at two different groups of acts.

On the one hand, it is indeed necessary to highlight, albeit briefly, the provisions against slavery and forced labour contained in major international agreements, some of which not necessarily strictly framed as human rights treaties. For this we will certainly refer here to the International Bill, in its components of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). At the same time, this is also the occasion to look at what is provided for in the treaty establishing the International Criminal Court (ICC), the Rome Statute of the International Criminal Court. Here, the Statute's proposed definition of "enslavement" proves interesting from an historical as well as a legal perspective. Finally, in this first part of the section, it is also imperative to bring out the content of the more recent United Nations Convention against Transnational Organised Crime of 2000.

On the other hand, a more in-depth look will be given to regional international human rights systems. First and foremost, reference will of course be made to the Conventions for which a corresponding enforcement mechanism has been created: the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR). It should be specified from the outset that the relevant case law on the mentioned Conventions on which the relevant regional international courts perform their jurisdictional function will be the subject of analysis in the next chapter, devoted precisely but not only to the jurisprudential perspective on the issue of forced labour. Finally, a quick overview will be proposed of what is provided for in this regard in other regional international human rights systems, in particular in the Arab world and Asia.

2.3.1 International agreements

Although conceived as a soft law instrument, the first international charter that is unavoidable to consider in this section is certainly the Universal Declaration of Human

Rights (UDHR)[147], that together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) forms what is now known as the International Bill of Human Rights. The term "forced labour" never emerges from the text of the Declaration, nevertheless there are two provisions of interest to us. On the one hand, Article 4 states that «No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms», on the other, Article 23(1) establishes that «Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment». It is indicative of the combination of these two provisions that the issue of forced labour was not explicitly mentioned, yet so much considered in the years before during the debates of other venues and after the adoption of the Declaration. However, an implicit reference would be found in the residual expression of "all other forms", also according to the UDHR *travaux préparatoires*[148].

On the other hand, Article 23 introduces the right to work as the right to assert oneself through work, along a line that would later become the strategy entrusted to numerous conventions over the years. This principle entails the commitment of States to the pursuit of full employment as stated, albeit in a rather general way, as early as Article 55(a) of the UN Charter and reaffirmed in ILO Convention No. 122/1964 on Employment Policy[149]. The provisions in place should ensure that work becomes the means through which individuals can engage in the economy of a society that achieves a just distribution of resources, thereby granting everyone a satisfactory living standard. The right to work

[147] UNGA, Resolution A/RES/217(III), *Universal Declaration of Human Rights*, 10 December 1948. The Universal Declaration of Human Rights, drafted over the course of two and a half years by the Commission on Human Rights, appointed by the Economic and Social Council and chaired by Mrs Eleanor Roosevelt, was approved by the UN General Assembly with 48 votes in favour and 8 abstentions (Saudi Arabia, Belarus, Czechoslovakia, Yugoslavia, Poland, South Africa, Ukraine, Soviet Union) at the plenary session on 10 December 1948 in Paris. For a recent commentary on the text of the Declaration published on the 70th anniversary of its adoption, see S. TONOLO, G. PASCALE, *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo*, Torino, 2020.

[148] On this point as well as on a more general commentary on Article 4, see G. ASTA, *Il contributo della Dichiarazione universale dei diritti umani alla lotta contro la schiavitù e le altre gravi forme di sfruttamento umano*, in see S. TONOLO, G. PASCALE, *La Dichiarazione universale dei diritti umani nel diritto internazionale contemporaneo*, Torino, 2020, p. 219.

[149] Article 55 (a) UN Charter establishes in fact that «the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development», whereas According to Article 1 of the ILO, Employment Policy Convention, 1964 (No. 122) (C122), «With a view to stimulating economic growth and development, raising levels of living, […] each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.».

is recognised as one of the fundamental rights that uphold human self-determination, the expression of one's identity, and social integration[150]. It is clear that this guideline was then taken up at the end of the 1990s with the introduction of the controversial idea of 'decent work', which seems not to stand in line with the issue of forced labour. The four pillars of the Decent Work Agenda – employment creation, social protection, rights at work, and social dialogue – seem in fact to go hand in hand with the conception of the right to work as a way to social integration[151].

Turning to the other two constituent elements of the International Bill of Human Rights, Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[152], also consistent with the spirit of the pact, seem to be in the vein of the just-mentioned predictions regarding the right to work as reason for self-determination and social inclusion. Indeed, the right to work «includes the right of everyone to the opportunity to gain his living by work» and has to be ensured by States through «policies and techniques to achieve steady economic, social and cultural development» (Article 6). Article 7 is then dedicated to working conditions with fair wages, safe and healthy working conditions, equal opportunities and "reasonable limitation of working hours"[153]. Finally, Article 8 is dedicated to the right of trade union association.

By contrast, the International Covenant on Civil and Political Rights (ICCPR)'s[154] consideration of slavery and forced labour is much more substantial. Indeed, the extensive Article 8 is tripartite between the prohibition of slavery and slave trade (par. 1), servitude

[150] S. CANTONI, *op. cit.*, p. 17-18.

[151] See *infra*, par. 3.1.

[152] UNGA, Resolution A/RES/2200(XXI), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. The became effective on 3 January 1976. Its purpose is to encourage its member states to strive for the realization of economic, social, and cultural rights, encompassing labour rights, the right to health, the right to education, and the right to an adequate standard of living. As of June 2023, the Covenant has been ratified by 171 parties. Additionally, there are countries, such as the United States, that have signed the Covenant but have not yet ratified it (UN Web Treaties).

[153] For a recent contribution of the aspects addressed by Art. 7 ICESCR in the current global context see K. SCHMALENBACH, *Sozialer Nachhaltigkeit im globalen Kontext: Rechts auf angemessenen Lohn*, in *Das Recht der Arbeit*, vol. 412, 2024, p. 91-96.

[154] UNGA, Resolution A/RES/2200(XXI), *International Covenant on Civil and Political Rights*, 16 December 1966. The Covenant referred obligates nations to uphold the civil and political rights of individuals. These rights include the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights, and the right to due process and a fair trial. It came into effect on 23 March 1976, after it received ratification or accession from 35 countries. As of June 2023, the Covenant has been ratified by 173 parties, with six additional signatories that have yet to ratify it. Notable signatories include the People's Republic of China and Cuba, while North Korea is the only country that has attempted to withdraw from the Covenant (UN Web Treaties).

(par. 2) and forced labour (par. 3). The significance attached to the provision on slavery in the Covenant is underscored by its designation as a non-derogable right, as stated in Article 4(2). This implies that even in times of emergency or exceptional circumstances, the right to be free from slavery can not be suspended or waived (Article 4(1)). The Covenant acknowledges the fundamental and inviolable nature of this right, highlighting its utmost importance and the commitment to its absolute protection.

Part of the doctrine proposes that in Article 8(1), the term 'slavery' should be understood in accordance with the definition outlined in Article 1 of the 1926 Convention. Furthermore, it is asserted that it is justifiable to use the term 'slavery-like practices' when discussing 'servitude' mentioned in Article 8(2). Here, 'servitude' refers to the 'institutions and practices similar to slavery' that were addressed in the 1956 Convention, which extends beyond the traditional concept of slavery. This perspective highlights the importance of considering both the historical context and the broader scope of exploitative practices resembling slavery when interpreting these provisions[155].

Others then point out that according to the drafters of the Covenant, the term 'slavery' was understood to involve the complete annihilation of a person's legal identity and had a relatively narrow and technical definition. On the other hand, 'servitude' was viewed as having broader connotations, encompassing various forms of human subjugation and domination. The drafters recognized that 'servitude' could encompass a wide range of situations where one person exercises control or authority over another, extending beyond the specific concept of slavery. This understanding underscores the drafters' intention to address not only traditional forms of slavery but also the broader spectrum of oppressive relationships between individuals[156].

Still according to this part of the doctrine, Article 8(3) of the Covenant establishes that no individual shall be compelled to engage in forced or compulsory labour, which may sometimes overlap with the concepts of slavery and servitude. In cases where the conduct described in Article 8(3) intersects with that covered in Article 8(1) or (2), it should be treated more rigorously under the provisions of Article 8(1) and (2), without

[155] W. A. SCHABAS, *U.N. International Covenant on Civil and Political Rights – Nowak's CCPR Commentary*, Kehl am Rhein, 2019, from p. 220.

[156] P. M. TAYLOR, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*, Cambridge, 2020, p. 219. See also S. JOSEPH, J. SCHULTZ, M. CASTAN, *International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2. Ed., Oxford, 2013, p. 329-334.

any exceptions or limitations, in order to uphold their principles. The wording of Article 8(3) is relatively more extensive due to the presence of exceptions. The exceptions outlined in Article 8(3)(c), the most extensive among them, were derived from the International Labour Organization's 1930 Forced Labour Convention. As we have seen, this convention was developed to address concerns regarding the use of forced labour in colonial contexts. While the term 'forced or compulsory labour' is not explicitly defined, the inclusion of exceptions from the Forced Labour Convention within Article 8(3), albeit with some modifications, implies that the definition of 'forced or compulsory labour' under that convention may be applicable for the purposes of Article 8(3)[157].

Following the 1957 ILO Abolition of Forced Labour Convention[158] the provisions of Article 8(3) include certain savings and exceptions that permit specific forms of labour. These exceptions allow for imprisonment with hard labour, the imposition of prison work and community service, as well as the requirement of military service and alternatives for conscientious objectors. Furthermore, there are exceptions for work that is demanded in response to emergency situations or disasters that pose a threat to the life or well-being of the community. Additionally, normal civic obligations may also fall under the exceptions outlined in Article 8(3).

To complete the proposed framework of the ICCPR, it is important to highlight that the prohibition of slavery, servitude, and forced labour, as outlined in Article 8, is further safeguarded by the First Optional Protocol. This protocol establishes a mechanism for individual complaints, wherein the parties to the ICCPR acknowledge the jurisdiction of the United Nations Human Rights Committee (HRC) to address complaints filed by individuals who assert that their rights under the Covenant have been infringed upon, after they have exhausted all available domestic remedies. This additional layer of protection reinforces the commitment to upholding and enforcing the rights enshrined in the ICCPR[159].

[157] *Ibi*, p. 220.
[158] See *supra*, par. 2.2.2.
[159] UNGA, Resolution A/RES/2200(XXI), *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966. The Protocol came into force on 23 March 1976 and as of June 2023, it had 117 state parties and 35 signatories. See also *infra*, par. 3.3.

In contrast, forced labour is not considered by the Rome Statute of 1998 establishing the International Criminal Court (ICC)[160]. However, according to Article 7(1)(c) of the Rome Statute of the International Criminal Court (ICC), "enslavement" is counted among the crimes against humanity falling within the jurisdiction of the Court. Article 7(2)(c) further explains what has to be understood under the term "enslavement" for the purposes of the Statute, namely «the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children», a definition that is very reminiscent of, not to say exactly the definition proposed since 1926 in the Slavery Convention of the League of Nations[161].

In this regard, it is considered that «the evolution of the crime of enslavement has stayed true to the understanding of the definition of 'slavery' as established in the 1926 Convention», although others believe that the characteristics of slavery are to be sought elsewhere, moving away from the inherently legal character that such a term instead requires[162]. On the contrary, there would be no alternative but to see how the 1926 definition has managed to reach even the new century. One would otherwise fall into the paradox of noting a distance or a difference between the wording 'to exercise the powers attaching to the right of ownership' (1926) and the wording 'to exercise of any or all of the powers attaching to the right of ownership' (1998)[163].

Another international instrument that contemplates, albeit indirectly, the prohibition of slavery and forced labour, is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC, Palermo

[160] Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998. The Statute was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and entered in force on 1 July 2002.

[161] See *supra*, par. 2.1.2. For convenience, the definition of slavery used in 1926 by the Slavery Convention is given below: «Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised» (Article 1(1)).

[162] J. ALLAIN, *The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute*, in J. ALLAIN (ed.), *The Law and Slavery – Prohibiting Human Exploitation*, Leiden, 2015, p. 450-451. Kevin Bales agrees that slavery's characteristics are based on the three elements of the loss of free will, the appropriation of labour power, and the use or threat of violence. See K. BALES, '*No One Shall be Held in Slavery or Servitude' – A Critical Analysis of International Slavery Agreements and Concepts of Slavery*, in K. BALES, *Understanding Global Slavery – A Reader*, Berkeley, 2005, p. 57.

[163] J. ALLAIN, *The Definition of 'Slavery' in General International Law and the Crime of Enslavement within the Rome Statute*, op. cit., p. 452.

Convention)[164]. The Protocol referred to is the latest universal Convention that mandates States to actively collaborate in combating the issue of trafficking in persons. It represents an important treaty falling under the category of "international criminal cooperation" agreements, aimed at addressing this pervasive problem through the enforcement of robust penalties, while also respecting the jurisdiction of national criminal systems. By emphasising effective cooperation and enforcement measures, the Protocol seeks to eradicate trafficking in persons on a global scale, acknowledging the need for international collaboration to effectively combat this crime[165].

In the text of the Protocol, slavery, servitude and forced labour emerge in Article 3, in which the terms of use for the Protocol are outlined. In particular letter (a) specifies what is to be meant by «"Trafficking in persons" […] for the purpose of exploitation». And it is exploitation which has to 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».

However, the Protocol does not explicitly provide definitions for the terms that we are concerned with, namely forced labour and slavery. In fact, the Convention does not explicitly refer to or recall any of the Conventions analysed up to this point, neither approved in the League of Nations, nor of the UN General Assembly, and least of all neither to the work of the ILO. Nonetheless, the Protocol's significance lies in its crucial contribution to clarifying the concept of victim consent. Article 3(b) of the Protocol establishes that victim consent is deemed "irrelevant" when coercion, as defined in the trafficking definition, is used or threatened. The evaluation of "exploitation", including in cases of forced labour and slavery, renders consent inconsequential when, due to the victim's state of fear or necessity, it is compelled to restrict her own freedom under certain presumed conditions of self-determination. By addressing the issue of victim consent within the context of coercion and exploitation, the Protocol provides valuable insights

[164] UNGA, Resolution A/RES/55/25, *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, 15 November 2000. The Convention entered into force the 29 September 2003. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on 25 December 2003 and as of June 2023 counts 181 State Parties. Two other Protocols belong to the Convention: the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, which was adopted by the United Nations General Assembly as Resolution 55/255 on 31 May 2001. For a recent commentary on the Palermo Convention see S. FORLATI (ed.), *The Palermo Convention at Twenty: Institutional and Substantive Challenges*, Leiden, 2021.

[165] S. CANTONI, op. cit., p. 96.

into the complex dynamics of trafficking in persons[166]. Nevertheless, the Convention and the Protocol leave the specific means to combat trafficking in human beings to domestic law, so that States remain in control of policy and security choices in their jurisdictions, a fact that requires a great deal of effort for States to share with each other[167].

Finally, it is necessary to mention one last international instrument, albeit of regional character, that tackles slavery and forced labour, that is the Charter of Fundamental Rights of the European Union (CFREU)[168]. In Title I, under the heading "Dignity", Article 5, the Charter concisely states that «1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour; 3. Trafficking in human beings is prohibited».

Upon closer examination, it becomes evident that the CFREU faithfully mirrors the provisions of Article 4 of the European Convention on Human Rights in its first two points. By explicitly replicating the general regulations of Article 4 ECHR, the Charter demonstrates a clear commitment to align with the normative and jurisprudential framework established by the ECHR. This alignment is evident in the preparatory work of the CFREU, as elucidated in the explanatory notes accompanying the draft Charter of Rights. However, it is worth noting that the third point of the CFREU diverges from the corresponding provision of the ECHR[169]. The inclusion of a reference in the Charter would indicate the potential applicability of the exceptions pertaining to forced or compulsory labour outlined in Article 4(3) of the ECHR, although these exceptions, however, are not explicitly reproduced in Article 5 of the CFREU[170]. The question of

[166] *Ibi*, p. 98.

[167] See Articles 4(1) and 5(1) of the UNTOC.

[168] European Union, *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, 26 October 2012. The Charter of Fundamental Rights of the European Union (CFREU) was initially solemnly proclaimed on 7 December 2000 in Nice, and subsequently reaffirmed in an adapted version on 12 December 2007 in Strasbourg by the Parliament, the Council, and the Commission. Following the entry into force of the Treaty of Lisbon in 2009, the CFREU, in its revised form, holds the same legal status as the Treaties. As stated in Article 6 of the Treaty on European Union, the Charter carries full binding force on both the European institutions and the Member States. It stands as a cornerstone of the European Union's legal framework, positioned on an equal footing with the Treaties and their annexed Protocols. Thus, the CFREU represents the apex of the European Union's legal order, ensuring the protection and promotion of fundamental rights within the Union. For a recent commentary, please refer to C. AMALFITANO, M. D'AMICO, S. LEONE, *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela – Atti del convegno svoltosi nell'Università degli Studi di Milano a venti anni dalla sua proclamazione*, Torino, 2022.

[169] A. GRATTERI, *Articolo 5 – Proibizione della schiavitù e del lavoro forzato*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (ed.), *Carta dei Diritti Fondamentali dell'Unione Europea*, Milano, 2017, p. 84.

[170] *Ibi*, p. 87.

whether the same exclusions concerning forced or compulsory labour under Article 4(3) ECHR can be invoked within the framework of the CFREU will arise again in chapter two, where recent European legislative trends regarding supply chains will be analysed.

2.3.2 Regional human rights conventions

Regional international human rights conventions play of course a pivotal role in the definition and application of the phenomena we are dealing with. The three key regional human conventions, namely the European Convention on Human Rights (ECHR) in Europe, the American Convention on Human Rights (ACHR) in the Americas, and the African Charter on Human and Peoples' Rights (ACHPR) in Africa, all incorporate specific provisions addressing the issues of forced labour and slavery. Moreover, each Convention includes a jurisdictional mechanism that ensures the enforcement of these provisions. These mechanisms enable the Conventions to hold accountable those who engage in forced labour and slavery, reinforcing the commitment to combating these phenomena within their respective regions. As it will emerge in detail in the following chapter, by highlighting these provisions and establishing robust enforcement measures, the Conventions are indispensable in safeguarding human rights and combating the grave violations of forced labour and slavery.

The European Convention on Human Rights[171] addresses slavery and forced labour in its Article 4, which consists of three paragraphs, the third of which has four sub-

[171] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, European Treaty Series - No. 5., 4 November 1950. The European Convention on Human Rights (ECHR), also known as the Convention for the Protection of Human Rights and Fundamental Freedoms, is an international treaty aimed at safeguarding human rights and political freedoms in Europe. It was initially drafted in 1950 by the Council of Europe, which had recently been established at the time. The convention came into effect on 3 September 1953 and applies to all member states of the Council of Europe. Section II of the Convention established the European Court of Human Rights (ECtHR), to which individuals who believe that their rights have been violated by a state party under the provisions of the convention can appeal. The court's judgments, which determine whether violations have occurred, are legally binding on the states involved, and they are obligated to implement the court's decisions (Article 46 ECHR). The Committee of Ministers of the Council of Europe closely monitors the execution of these judgments, ensuring that the states make appropriate payments to compensate applicants for the harm they have suffered. In addition to the main text of the convention, there are eleven protocols that serve to amend and enhance its framework, addressing various aspects of human rights protection within Europe. These protocols contribute to the evolution and adaptation of the convention to contemporary challenges and changing societal norms.

paragraphs. In the first paragraph, the Charter establishes a fundamental principle: «No one shall be held in slavery or servitude». This provision shares identical wording with the opening phrase of Article 4 in the Universal Declaration of Human Rights. However, it is important to note that the Universal Declaration further expands on this principle by adding the clause "slavery and the slave trade shall be prohibited in all their forms".

Paragraph 2 of the Charter addresses the specific issue of forced or compulsory labour, stating that «No one shall be required to perform forced or compulsory labour», however not providing a definition. This provision is complemented by paragraph 3, which elaborates on the concept of forced or compulsory labour in a comprehensive manner. The detailed provisions of paragraph 3 serve to clarify and define the scope of what constitutes forced or compulsory labour, reiterating the content of the exceptions already provided for in the ILO Forced Labour Convention of 1930. In particular, Article 4 identifies four contexts within which, for the purposes of the application of the Charter, the term forced labour shall not be applied. The exceptions concern: work required to be done in the ordinary course of detention; service of a military character; service exacted in case of an emergency; work or service which forms part of normal civic obligations.

Finally, according to Article 15 of the ECHR, which addresses the possibility of derogations during times of emergency, it is explicitly stated that even in the face of a «public emergency threatening the life of the nation», there is no permissible derogation from Article 4 of the Convention. This means that in no circumstances, including emergencies, a State can deviate from the prohibition of slavery or servitude as outlined in the first paragraph of Article 4. However, it should be noted that the provision explicitly refers only to the first paragraph of Article 4, that is to slavery and servitude, which implies that in times of emergency derogation may be permissible for forced labour (Article 15, paragraph 2).

The European Court of Human Rights (ECtHR), over the years and through its pronouncements, has substantially clarified the scope of Article 4. As of now, it is worth noting that Article 4 of the Charter, more than any other provision, primarily focuses on positive obligations for States rather than negative ones. In other words, it emphasises the proactive responsibilities and actions that need to be undertaken to prevent and combat forced or compulsory labour, rather than merely refraining from engaging in

such practices. The State has therefore a responsibility to take practical measures to safeguard individuals who are victims or potential victims of violations under Article 4 of the European Convention on Human Rights. As we will see in more detail in the next chapter, there is a procedural obligation associated with Article 4, which requires the State to conduct a prompt, effective, and independent investigation when there is a "credible suspicion" that rights protected under Article 4 have been infringed. This obligation remains regardless of whether a complaint has been lodged by the victim or their next-of-kin. Typically, the existence of a "credible suspicion" arises from a complaint made by the victim. However, in the absence of a complaint, the Court may be inclined to relieve the State of a finding that it failed to fulfil its obligations. To fulfil the procedural dimension of this obligation, States must enact laws and establish mechanisms to penalise and prosecute any acts that aim to subject individuals to slavery, servitude, forced labour, or compulsory labour. This necessitates the implementation of an effective legislative and administrative framework that addresses and prohibits such practices. By having robust legal and administrative structures in place, States can ensure that perpetrators are held accountable for their actions and that victims receive the protection and reparation they deserve[172].

From the interpretations carried out by judges over the years, the ECtHR adopts the definition of 'slavery' as set out in the 1926 Slavery Convention. This definition is widely recognised and authoritative, and the Court has endorsed it for the purpose of interpreting and applying Article 4. The Court refers to this definition as the "classic" understanding of slavery that prevailed for centuries. On the other hand, 'servitude' is distinguished from slavery in that it does not involve the concept of ownership. Servitude refers to an obligation to provide services that is imposed through coercion or force, but without the ownership element associated with slavery[173].

While the *travaux préparatoires* of the ECHR would not offer much guidance in interpreting the concept of forced labour, the Court has acknowledged that the drafters

[172] W. SCHABAS, *The European convention on human rights: a commentary*, Oxford, 2015, p. 206. See also extensively, N. BOSCHIERO, *Art. 4. Proibizione della schiavitù e del lavoro forzato*, in S. BARTOLE, B. CONFORTI, G. RAIMONDI (ed.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 77-113. A long list of main commentaries on the ECHR is available on the Court's website (<https://www.echr.coe.int/fr/convention-collections>) Among the many, see in particular U. KARPENTSTEIN, F. C. MAYER, *EMRK – Konvention zum Schutz der Menschenrechte und Grundfreiheiten: Kommentar*, 3. Ed., München, 2022.

[173] W. SCHABAS, *The European convention on human rights: a commentary*, op. cit., p. 207.

of the European Convention and the early version of the International Covenant on Civil and Political Rights drew significant inspiration from the ILO Convention No. 29 on Forced or Compulsory Labour. The Convention has in fact received widespread ratification among Council of Europe member States and is generally accepted as a valuable reference for defining forced labour and its related concepts. According to the Court, there is a not accidental striking similarity, between article 2 of the ILO Convention No. 29 and article 4(3) of the European Convention on Human Rights. The Court further confirmed that both requirements of Article 2 of the 1930 ILO Convention must be present for there to be forced labour: labour must be "exacted […] under the menace of any penalty" and the victim "has not offered himself voluntarily". As for voluntariness, the Court takes into account the overall circumstances to determine if prior consent was genuinely implied. In cases where the working conditions are severe and exploitative, it becomes apparent that genuine consent could not have been given[174].

Nevertheless, the most significant similarity between the 1930 and 1950 Conventions lies in the provision pertaining to the areas or circumstances that should be exempted from the practice of forced labour. It is in fact evident that these exceptions have been slavishly taken over, albeit in a different order, from the exceptions dictated since 1930 by the ILO Forced Labour Convention: penitentiary, military, emergency or civic domains are to be excluded from the scope of both articles 2 Forced Labour Convention and 4 ECHR [175].

Indeed, a striking similarity can be observed between Article 4 of the ECHR and Article 6 of the American Convention on Human Rights (ACHR)[176]. Both provisions

[174] *Ibi*, p. 211-212.

[175] See *supra*, par. 2.1.3.

[176] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San José"*, Costa Rica, 22 November 1969. The Convention came into force on 18 July 1978 and as of June 2023, it has been adopted by 25 Central and North American countries (oas.org). The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the key institutions entrusted with the responsibility of ensuring compliance with the American Convention on Human Rights. These bodies operate within the framework of the Organization of American States. The Inter-American Commission on Human Rights serves as a monitoring and investigative body, receiving and examining complaints of human rights violations submitted by individuals, groups, or organizations. It also conducts on-site visits, promotes human rights standards, and issues recommendations to member states. For a primer detailed analysis on the functions of the Inter-American Commission on Human Rights please refer to C. MEDINA QUIROGA, C. NASH ROJAS, *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*, Santiago de Chile, 2007, especially p. 47-78. The Inter-American Court of Human Rights, on the other hand, is a judicial body that adjudicates cases concerning alleged violations of human rights protected under the American Convention. Following its Article 62, Inter-American Court's decisions are binding on the states involved.

address the issue of forced labour and share a comparable structure. They prohibit slavery, servitude, and forced labour, emphasising the fundamental importance of safeguarding individuals from these exploitative practices. The alignment in structure and substance between Article 4 ECHR and Article 6 of the American Convention reflects a shared commitment among these regional human rights instruments to protect against forced labour and uphold the dignity and rights of individuals within their respective jurisdictions.

Although the American Declaration of the Rights and Duties of Man[177], adopted in 1948, did not specifically address freedom from slavery, the American Convention on Human Rights rectified this "omission". The ACHR includes in fact Article 6, which establishes a comprehensive prohibition on slavery and servitude. This provision reflects a widely accepted norm that categorically prohibits these practices. It aligns with similar provisions in other international human rights instruments, such as Article 4 of the Universal Declaration of Human Rights, Article 8 of the International Covenant on Civil and Political Rights, and Article 4 of the ECHR. Despite the historical involvement of the Americas in the slave trade, the ACHR reaffirms the commitment to uphold human dignity and protect individuals from the abhorrent practices of slavery and servitude. Furthermore, the *corpus juris* pertaining to forced labour and slavery is augmented by specific conventions developed by the International Labour Organization, which can serve as valuable tools for interpreting Article 6 of the American Convention on Human Rights. The jurisprudence of the Inter-American Court has demonstrated the relevance of the two key ILO conventions of 1930 and 1957 in this context. These conventions provided important insights and guidance for understanding the scope and application of the provisions related to forced labour and slavery within the American Convention. By referring to these ILO Conventions, the Inter-American Court has

[177] The American Declaration of the Rights and Duties of Man, commonly referred to as the Bogotá Declaration, holds the distinction of being the world's first comprehensive and universally applicable declaration of human rights that extended beyond national boundaries, as it emerged prior to the Universal Declaration of Human Rights, with a gap of over six months between their respective adoptions. The Declaration was embraced by the nations of the Americas during the Ninth International Conference of American States, which took place in Bogotá, Colombia, in April 1948. It was during this significant gathering that not only was the Bogotá Declaration adopted, but also the Organization of American States was established, signifying a pivotal moment in promoting regional cooperation and safeguarding human rights in the Americas.

crucially contributed to the interpretation and development of human rights standards in the American region[178].

Article 6 of the ACHR is structured in three paragraphs, the first of which prohibits «slavery or to involuntary servitude […] in all their forms». The paragraph concludes with further references to «slave trade and traffic in women». Paragraphs 2 and 3 are then devoted to forced labour, whereby «No one shall be required to perform forced or compulsory labour» (par. 2). Anticipating the exceptions listed in paragraph 3, paragraph 2 emphasises from the outset that this provision should not be construed to imply that in countries where the prescribed punishment for certain offenses involves the imposition of forced labour as a form of deprivation of liberty, the execution of such sentences imposed by a competent court is prohibited. It is then emphasized that forced labour must not undermine the dignity, physical well-being, or intellectual capacity of the imprisoned individuals. Paragraph 3 follows then with the usual list of areas that do not constitute forced labour: penitentiary, military, emergency and civic scopes. Interestingly, unlike the order found in Art. 4 ECHR, the ACHR strictly reproduces the order of the exceptions introduced in 1930 by the ILO Convention. Placing great emphasis on respect for the fundamental rights of detainees, Article 6 of the ACHR would exercise a nuanced equilibrium on the fundamental dignity of individuals and their inherent right to a certain degree of freedom, which could be however circumscribed in specific circumstances outlined within the article[179].

The terms “slavery”, “slave trade” and “forced labour” are not explicitly defined within the ACHR. Consequently, insights can be gleaned on one side from the definitions provided in the 1926 Slavery Convention, which can serve as persuasive reference for comprehending these concepts within the context of the Convention. Regarding forced labour, the interpretations put forth by the Inter-American Court of

[178] L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights: A Commentary*, Oxford, 2022, p. 254. The recent Oxford commentary by Hennebel and Tigroudja represents a unique and comprehensive article-by-article analysis in English of the 1969 American Convention on Human Rights. While other commentaries on the Convention do exist, it is worth noting that Article 6, in particular, is not commonly selected for in-depth analysis in those works. See, for instance, C. MEDINA QUIROGA, *The American Convention on Human Rights: crucial rights and their theory and practice*, Cambridge, 2016, and T. M. ANTKOWIAK, A. GONZA, *The American Convention on Human Rights – Essential Rights*, Oxford, 2017. However, it is important to mention F. ANDREU-GUZMÁN, *Artículo 6. Prohibición de la esclavitud y servidumbre*, in C. STEINER, M.C. FUCHS (ed.), *Convención Americana sobre Derechos Humanos*, II ed., Bogotà, 2019 p. 200-221. Here the author set the contribution on the basis of a close comparison with Article 4 ECHR, within a comprehensive commentary on the Convention in Spanish.

[179] L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights*, op. cit., p. 255.

Human Rights shed light on its understanding within the Convention. Accordingly, as we will observe more in depth in the following chapter, forced labour must involve coercion "under the menace of a penalty", be performed involuntarily, and be attributable to the State. The latter condition necessitates the demonstration of the involvement or acquiescence of State agents in the alleged violation. By establishing the attribution to State agents, it is imperative to substantiate their participation or complicity in the perpetration of forced labour[180].

In contrast to the agreements examined so far, and specifically unlike the European Convention on Human Rights and the American Convention on Human Rights, it is noteworthy that the African Charter on Human and Peoples' Rights (ACHPR, African or "Banjul" Charter)[181] does not explicitly address the issue of forced labour. In his first sentence, Article 5 of the Charter safeguards «the respect of the dignity inherent in a human being» and «the recognition of his legal status». Subsequently, the second sentence prohibits «All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment».

[180] *Ibi*, p. 267.

[181] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981. The Charter was unanimously adopted by the Organisation of African Unity on 27 June 1981 and came into force on 21 October 1986. The African Charter has achieved significant regional participation, with fifty-four States ratifying the Charter out of the fifty-five Members of the African Union (AU), the union that replaced the OAU since 2002. The only country that has not ratified the Charter is Morocco, which withdrew from the OAU in 1984 in protest against its openness towards the Saharawi Arab Democratic Republic, and later joined the organisation. The most recent addition to the list of Parties to the African Charter is the Republic of South Sudan, which ratified the Charter on October 23, 2013. Finally, it must be emphasised that the African Charter also imposes an obligation on state parties to protect certain rights of which peoples are indicated as beneficiaries. With the sole exception of the two United Nations Covenants of 1966, the African Charter constitutes the only international legal instrument with a general vocation that expressly enshrines these rights. Another peculiarity of the African Charter is that it includes a chapter dedicated to the duties of the individual (Part I, Chapter II – Duties, Articles 27-29), among which figures the duty to «work to the best of his abilities and competence» (Art. 29 (6)). In 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Creation of an African Court on Human and Peoples' Rights (the Protocol) was adopted by the Member States of the former Organization of African Unity (OAU) in Ouagadougou, Burkina Faso. The Protocol officially came into effect on 25 January 2004, outlining the creation of an African Court on Human and Peoples' Rights, which was founded in accordance with Article 1 of the Protocol. The Court's initial judges were chosen in 2006, and it delivered its inaugural verdict in 2009. For a general overview of the human rights protection system in Africa see G. PASCALE, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Napoli, 2017, as well as R. MURRAY, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, Oxford, 2007.

Since its establishment, the African Commission[182] has consistently addressed the matters outlined in Article 5 of the African Charter. These issues have remained a recurring topic on the Commission's agenda, reflecting its commitment to upholding and promoting the rights enshrined in this article. While the broader aspects of Article 5, such as dignity and recognition of the legal status of the human being, have received relatively less attention, they have not been entirely overlooked, indicating a recognition of their importance within the context of human rights in Africa. The emphasised concept of dignity not only serves as the foundation for the prohibition of torture and ill-treatment but also allows the African Commission to extend the scope of Article 5 to encompass various situations. The interpretation of human dignity as both a duty and an inherent fundamental right has led to the recognition that all individuals, regardless of their mental capabilities or disabilities, possess an entitlement to it without any form of discrimination. Furthermore, the African Commission has consistently upheld the absolute prohibition of torture. This prohibition is deemed 'non-derogable' and applies without exception, even in challenging circumstances such as public emergencies or times of armed conflict. The absence of a derogation clause in the African Charter underscores the Commission's stance that the prohibition remains in effect at all times, emphasizing its unwavering commitment to protecting human rights[183].

While much of the focus on Article 5 of the African Charter has centered on the prohibition of torture and ill-treatment, it is worth noting that the provision also encompasses the prohibition of slavery. Although there have been limited instances on the issue, they proved significant relevance, where the African Commission and other entities have interpreted Article 5 in relation to slavery. The discussions on slavery have touched upon various aspects, including its historical context in colonial Africa and its contemporary manifestations such as trafficking, domestic servitude, child exploitation and labour, forced and early servile marriages, and forced labour. The African Commission has not provided a specific definition of slavery, but it has made references to Article 1 of the Slavery Convention of 1926 and the ILO Global Estimates of Modern

[182] The African Commission on Human and Peoples' Rights, established on 2 November 1987, in Addis Ababa, Ethiopia and currently based in Banjul, Gambia, is responsible for overseeing and interpreting the provisions of the African Charter on Human and Peoples' Rights. See G. PASCALE, *op. cit.*, from p. 141.

[183] R. MURRAY, *The African Charter on Human and Peoples' Rights: A Commentary*, Oxford, 2019, p. 132-136.

Slavery of 2014. Additionally, the Commission has incorporated guidelines and principles on economic, social, and cultural rights within the African Charter. It has urged states to enact legislation that explicitly prohibits "slavery-like practices" and to safeguard indigenous populations from all forms of violence, servitude, and practices resembling slavery. Furthermore, states have been encouraged to establish commissions or investigative bodies for such practices to ensure the prosecution and punishment of those responsible for such acts[184]

By contrast, the relatively recent Arab Charter on Human Rights[185] explicitly mentions the issue of forced labour. Its Article 10, after establishing that «1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law», states in its second paragraph that «2. Forced labour, trafficking in human beings […] are prohibited».

Due to the absence of an operational Court related to the Arab Charter, we cannot rely on any official interpretations or pronouncements to determine the precise content of Article 10. Although the Statute for an Arab Court of Human Rights was approved by the Ministerial Council of the League of Arab States on 7 September 2014, it has not been put into effect. Similarly, the establishment of an Arab Human Rights Committee, as stipulated in Article 45 of the Charter, has not been pursued or implemented. Therefore, the practical implementation and interpretation of Article 10 remain unresolved due to the non-functioning of these intended enforcement mechanisms.[186].

In its preamble, however, the Arab Charter refers to various acts of the United Nations as points of reference. It reaffirms «the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the

[184] *Ibi*, p. 168-169.

[185] League of Arab States, *Arab Charter on Human Rights*, 23 May 2004. In accordance with Art. 49, it entered into force on 15 March 2008, following the seventh ratification. Of the twenty-two member countries of the Arab League, as of January 2021, there are 16 States parties to the Arab Charter on Human Rights. The first draft for an Arab human rights Charter was approved in 1994 by the Permanent Arab Commission for Human Rights founded in 1968, and never came into force. In 2008 Louise Arbour, the UN High Commissioner for Human Rights, stated that the Arab Charter on Human Rights contradicted the principles outlined in the UN Universal Declaration of Human Rights, primarily regarding women's rights and death penalty (<https://news.un.org/en/story/2008/01/247292>). For an in-depth analysis of the Arab Charter on Human Rights see C. ZANGHÌ, R. BEN ACHOUR, *La nouvelle Charte arabe des droits de l'homme – Dialogue italo-arabe*, Torino, 2005, particularly p. 285-322.

[186] A. ALMUTAWA, *The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights*, in *Human Rights Law Review*, Volume 21, Issue 3, 2021, p. 506.

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights». In light of these circumstances, it is reasonable to speculate that the definitions and implications ascribed to the terms 'slavery' and 'forced labour' within the Arab Charter may align with those adopted by other relevant charters and international instruments. While the lack of an operational Court or established human rights committee prevents from accessing specific clarifications, it was possible to infer a degree of consistency in the understanding and interpretation of these terms. Consequently, it is plausible to assume that the intended scope and understanding of 'slavery' and 'forced labour' in the Arab Charter may be in line with the definitions and interpretations commonly recognised in similar agreements and international legal frameworks.

Finally, in order to provide as complete a picture as possible of the international instruments of a regional nature that deal with slavery and forced labour, it is necessary to acknowledge the ongoing efforts put forward in the Asian region as regards the development of its own comprehensive human rights charter.

In 2009, the Association of Southeast Asian Nations (ASEAN) took significant strides towards establishing a regional human rights framework by creating the ASEAN Intergovernmental Commission on Human Rights. This Commission aimed to promote human rights across the ten ASEAN countries. Subsequently, by 2012, the commission had formulated the ASEAN Human Rights Declaration (AHRD) [187], which delineates a comprehensive set of principles and standards pertaining to human rights. This declaration serves as a testament to the commitment of ASEAN nations in upholding human rights for their vast population of over 600 million individuals.

Article 13 of the AHRD unequivocally states that «No person shall be held in servitude or slavery in any of its forms or be subject to human smuggling or trafficking in persons», reflecting the region's recognition of the importance of safeguarding individuals from such egregious violations. While the AHRD marks a significant milestone in the region's human rights efforts, it has not been without critique. Critics have raised concerns about its limitations – including the absence of a forced labour provision – and perceived lack of robust enforcement mechanisms. These concerns

[187] Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012. The Declaration was adopted unanimously by the ten ASEAN members in Phnom Penh, Cambodia.

highlight the need for continuous refinement and improvement to ensure the effective protection and promotion of human rights within ASEAN countries[188].

3. *The challenging framing of forced labour in the XXI century*

To gain a comprehensive understanding of contemporary forced labour, it is imperative to give account of additional integrative elements relevant to the overarching issue. By incorporating these concluding aspects, it will be possible to strive towards a more exhaustive framework that encompasses the various actual dimensions of forced labour. Undoubtedly, a significant contribution towards comprehending present-day forced labour arises from international and national court judgments, which will be explored in the subsequent chapter.

An examination of the evolution of the forced labour issue within the ILO at the turn of the 20th and 21st centuries will initially be presented. The reaffirmation of the centrality of the issue within the organisation in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, as amended in 2022, will be observed. It will transpire how this centrality seems to contrast with subsequent semantic shifts that will have lasting repercussions in following years. These shifts will culminate in the inclusion of future goals in the global labour agenda, as evidenced by the 2030 Agenda of Sustainable Development Goals.

Additionally, the ongoing doctrinal discourse on so-called "modern forms of slavery" will offer valuable insights. In the forthcoming analysis, we will witness the emergence of this expression during the formative years of the current century. It swiftly permeated the vocabulary of diverse academic disciplines, transcending the confines of legal discourse. Furthermore, this categorisation found resonance not only in the United Nations' official documentation, but also across different levels and types of acts within the organisation itself. This first part of the concluding section of chapter one aims to present a concise overview of this debate, illuminating its potential utility for our objectives.

[188] C. S. RENSHAW, *The ASEAN Human Rights Declaration 2012*, in *Human Rights Law Review*, Volume 13, Issue 3, 2013, p. 570.

The third part of the section delves into the pivotal role played by select international organisations in refining the legal and substantive parameters surrounding forced labour. To this end, reports issued by Commissions of Inquiry formed within the ILO for non-compliance with previously observed ILO Labour Conventions will be analysed. As we shall see, these reports will give us, from a more practical point of view, the evolution over the years of the legal figure of forced labour that has already emerged from the analysis of the relevant international conventions previously explored. Then, the General Comments and the broader jurisprudence of the major Human Rights Treaty Bodies associated with the examined international agreements. By scrutinising these analyses and comments, we aim to paint a more accurate picture that aligns closely with the realities of the phenomena under consideration. In conclusion, we will take a closer look at the role and contribution of the Special rapporteur on contemporary forms of slavery in this area, highlighting some cases of closest interest.

3.1 From the ILO Declaration on Fundamental Principles and Rights at Work to the UN 2030 Agenda for Sustainable Development: towards the idea of 'decent work'

The ILO faced a major challenge posed by globalisation and the role it would play within the international labour standards regime. By the 1980s, it became evident that the integration of companies, national economies, and regions into a unified global economy was rapidly expanding. This acceleration was driven by various factors such as technological advancements, intricate global financial systems, liberalisation of trade and investment, the rise of supranational economic alliances, globalisation of labour markets, and other related influences. Globalisation came with its own dominant ideology, which gained prominence during the 1970s and 1980s. The concept of an unregulated global market, guided only by essential regulations, captivated the minds of market fundamentalists[189].

Several factors further supported this trend. The fall of the Soviet bloc, market-oriented reforms in China, and the supremacy of the United States in the global order all

[189] S. HUGHES, N. HAWORTH, *The International Labour Organisation (ILO) – Coming in from the cold*, London, 2011, p. 33.

contributed to the momentum of globalisation. Throughout much of the period between 1970 and 2000, any challenges to the core principles of globalisation, whether intellectual or policy-based, were met with disbelief by economic orthodoxy. Governments either wholeheartedly embraced this orthodoxy or, if not entirely convinced by its arguments, succumbed to internal and external pressures to adopt most of its principles. Corporatist traditions, which many believed were conducive to ILO-type interventions, were weakened. Modern social democracy tended to adopt many of the economic prescriptions associated with market fundamentalism. As the new orthodoxy took hold, significant changes were made to domestic policies. The preferred policy direction advocated for free trade and the elimination of protectionist measures for domestic industries. It also called for unregulated exchange rates and the liberalization of the financial sector. Promoting the unrestricted international flow of capital became a priority. In terms of employment policy, labour markets underwent deregulation with the belief that flexible labour markets would enhance productivity and competitiveness. Under the pretext of liberating individuals from the perceived monopoly of trade unions, measures were implemented to bolster the authority of management in employment relationships and diminish the influence of trade unions. Trade unions faced growing difficulties in maintaining their membership levels, resulting in a decline in union density. The prevalence of collective bargaining similarly diminished. From the perspective of the ILO, one of the key social partners, trade unions experienced a significant weakening of their position[190].

In 1989, Jean-Paul Hansenne became the first Director-General of the ILO in the post-Cold War era. He was re-elected for a second term in 1993. During the 1994 International Labour Conference, which marked the ILO's 75th anniversary, Hansenne emphasised the necessity for the organisation to undertake a fresh evaluation of its objectives and aspirations. This call for assessment was driven by «a drastic acceleration in the globalization of the economy»[191].

Hansenne asserted that it is imperative to "rethink, improve, reorient"[192] the activities and goals of the ILO, signalling the need for a revitalization of the organization

[190] *Ibi*, p. 34.
[191] ILO, *Defending values, promoting change: social justice in a global economy: an ILO agenda*, Report of the Director-General to the International Labour Conference, 81st Session, Geneva, 1994, p. 4.
[192] *Ibi*, p. 5.

to regain its diminished significance and stature over the preceding two decades. Following Hansenne's address, the ILO subsequently embraced the social dimensions of globalisation as a central theme in its deliberations and pioneering initiatives, reflecting a renewed focus on these aspects. The desired renewal resulted in the 1998 Declaration on fundamental Principles and Rights at Work[193].

The introduction to the Declaration presented by Hansenne himself states that the intention is to «stimulate national efforts to ensure that social progress goes hand in hand with economic progress […] requesting States parties to the corresponding ILO Conventions to fully implement them and other States to take into account the principles embodied in them». Furthermore, the most important aim of the Declaration was to establish «a social minimum at the global level to respond to the realities of globalization»[194].

Article 1 reaffirmed the obligation of ILO member States to respect and promote the already endorsed «the principles and rights set out in its Constitution and in the Declaration of Philadelphia», articulated and expanded through the formulation of specific rights and obligations in Conventions that are widely acknowledged as fundamental «both inside and outside the Organization». It is, however, with Article 2 that the intention to lay the cornerstones of the new reorganisation of ILO guiding principles is realised. In particular, there are four pillars set by the ILO, letters (a)-(d), to which a fifth was added in 2022[195], letter (e): «(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; (d) the elimination of discrimination in respect of employment and occupation; and (e) a safe and healthy

[193] ILO, *Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 86th Session, Geneva, 18 June 1998.

[194] *Ibidem*.

[195] During the 110th session of the International Labour Conference of May 2022 among others, the topics of occupational safety and health, apprenticeships, as well as the social and solidarity economy were addressed. In connection with this, the fifth pillar regarding «a safe and healthy working environment» was introduced: ILO, International Labour Conference Resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work, International Labour Conference, 110th session, ILC.110/Resolution 1 (June 10, 2022). Along with the adoption of this resolution, the 2008 ILO Declaration on Social Justice for a Fair Globalization – considered third major statement of principles and policies adopted by the International Labour Conference along with the Philadelphia Declaration of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998 – was also updated (see *infra*).

working environment». The pillars – also known as "core labour standards"[196] – are protected in their content and implementation by eleven Conventions that have been identified by the Governing Body[197] of the ILO and are considered fundamental: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29) and its 2014 Protocol; Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Occupational Safety and Health Convention, 1981 (No. 155); Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

What is especially relevant for our purposes – with regard to the second pillar, which provides for «the elimination of all forms of forced or compulsory labour» – is introduced by the 1998 Declaration still in Article 2: «all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions».

The follow-up to the Declaration provides for a monitoring procedure that particularly concerns those members of the Organisation that have not yet ratified the relevant conventions. These states are asked to prepare annual reports on the implementation of the five fundamental principles. The reports are made public, are subject to comments by employers' and workers' representatives and may be submitted to experts for their opinion. An annual report is prepared by the Director-General of the ILO ('Global Report on fundamental principles and rights at work'). Furthermore,

[196] See P. ALSTON, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, in *EJIL*, vol. 15, n. 3, 2004, p. 457-521, T. TREU, *OIL: un secolo per la giustizia sociale*, in V. FERRANTE, *A tutela della prosperità di tutti – l'Italia e l'Organizzazione internazionale del lavoro a un secolo dalla sua istituzione*, Milano 2020, p. 7 ff and also W. PLASA, M. P. CARL, *Reconciling International Trade and Labor Protection – Why We Need to Bridge the Gap Between ILO Standards and WTO Rules*, Minneapolis, 2015. For a more in-depth look at the phenomenon of child labour, which is not covered by the present research, see G. NESI, L. NOGLER, M. PERTILE (ed.), *Child Labour in a Globalized World. A Legal Analysis of ILO Action*, London, 2008.

[197] With its 187 Member States, the ILO is the only tripartite U.N. agency with government, employer, and worker representatives. These meet three times a year at the ILO's Governing Body and annually at the International Labour Conference (ILC).

technical assistance is provided to countries committed to the principles of the Declaration[198].

Only a year after the Declaration on Fundamental Principles and Rights at Work was approved, however, the ILO's outlook on labour seems to be starting to take on a change. In 1999 the newly elected Director-General of the ILO, Mr. Juan Somavia, presented a Report to the International Labour Conference, at its 87th Session, titled "Decent work"[199], introducing this new concept from the very first lines: «The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equality, security and human dignity»[200]. In particular, the new concept of 'Decent work' was based on four main points: human rights and work; employment and incomes; social protection and security; social dialogue[201]. The first of these pillars includes the intention to promote the Declaration on Fundamental Principles and Rights at Work approved only a year earlier. A second Report of 2001 by the Director-General with a more comprehensive articulation of the potential of Decent Work specified that the agenda presented both challenges and imperatives that needed to be realized, not only for the ILO as an institution but also for the world at large[202].

The concept of Decent Work underwent significant elaboration following its introduction by Somavia. The discussions primarily aimed to present Decent Work as a fusion of the ILO's established traditions and a modernisation to address the evolving global landscape. An essential aspect of this was recognising that the conventional ILO approach of setting standards was heavily influenced by the priorities of developed

[198] In this regard, see for instance ILO, *Stopping forced labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 89th Session, 2001 and ILO, *A Global Alliance against Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 93rd Session, 2005.

[199] ILO, *Decent Work*, Report of the Director-General, International Labour Conference, 87th Session, 1999.

[200] *Ibi*, p. 3.

[201] *Ibi*, p. 13-44. For a more in-depth look at the four pillars introduced in the ILO strategy at the turn of the 20th and 21st centuries see D. GHAI, *Decent work: Universality and diversity*, in D. GHAI (ed.), *Decent work: objectives and strategies*, Geneva, 2006, p. 1-76. For a more extensive overview of the issue see also J. M. SERVAIS, *International Labour Law*, VII ed., Alphen aan den Rijn, 2022 and C. DI TURI, *Globalizzazione dell'economia e diritti umani fondamentali in materia di lavoro: il ruolo dell'OIL e dell'OMC*, Milano, 2007, from p. 75.

[202] ILO, *Reducing the decent work deficit – a global challenge*, Report of the Director-General, International Labour Conference, 89th Session, 2001, p. 13.

countries. Even during its initial "development phase" from the 1960s to the 1980s, when development issues were given explicit prominence in ILO discussions, the traditional approach still wielded significant influence, leading to imbalances. By embracing Decent Work as a unified framework comprising the four strategic objectives, the ILO would have been better equipped to effectively address the diverse experiences of different countries and achieve a more equitable positioning that caters to the needs of all its constituents[203].

Initially, the implementation of Decent Work was assigned to pilot interventions that aimed to integrate Decent Work principles into policymaking. These interventions focused on capacity building as a means to achieve this integration. As a next step, several related programmes were introduced, one of which was the launch of pilot projects in 2002 that aimed to incorporate Decent Work into poverty reduction strategies. Subsequently, in 2005, the concept of Decent Work Country Programmes was introduced. These programmes involved the development of national initiatives that extensively incorporated Decent Work priorities and objectives[204].

In 2008, the concept of decent work was formally institutionalised with the adoption of the ILO Declaration on Social Justice for a Just Globalisation[205]. This significant document marks a crucial milestone in the evolution of the ILO, comparable in importance to the Philadelphia Declaration, and serves as a fundamental reference for advancing a fair form of globalization centred around decent work. Adopted during the ninety-seventh session of the International Labour Conference, this document represents the modern perspective of the ILO's mission in the era of globalisation, aligning with the principles outlined in the 1944 Philadelphia Declaration and the 1998 Declaration on Fundamental Principles and Rights at Work. The 2008 Declaration reaffirmed the ILO's goals of promoting employment, enhancing social protection, fostering dialogue between social partners, and upholding and implementing fundamental principles.

The 2008 Declaration established the ILO as a leading advocate for global social justice and equitable globalisation. It positioned the Decent Work agenda as the primary means to accomplish these objectives. A key argument put forth by Somavia in 1999 was

[203] S. HUGHES, N. HAWORTH, *op. cit.*, p. 75.

[204] This concerned in particular the programmes Decent Work Pilot Programme (DWPP), the Poverty Reduction Strategy Papers (PRSP). See S. HUGHES, N. HAWORTH, *op. cit.*, p. 77.

[205] ILO, *Declaration on Social Justice for a Fair Globalization*, International Labour Conference, 97th Session, Geneva, 10 June 2008.

the interconnection of the four objectives, emphasizing that each objective is crucial for the attainment of the others[206]. The ILO, with its principles, values, track record, and technical capabilities, was seen as the sole international institution capable of achieving these goals. The follow-up process aimed to equip the ILO with the necessary resources and capacities to assist member States in implementing the principles outlined in the 2008 Declaration. This support would involve enhanced and targeted technical assistance, reliable research provision, and effective evaluation of the 2008 Declaration by the International Labour Conference[207]. Furthermore, as with the 1998 Declaration, the 2008 Declaration underwent an update in 2022 to incorporate the inclusion of a safe and healthy working environment within the ILO's framework of fundamental principles and rights at work. This revision acknowledges the importance of ensuring a workplace that is safe and promotes the well-being of workers as an integral part of the ILO's core principles and rights[208].

The Decent Work agenda is closely related to another important turning point that took place in 2015. With the endorsement of 193 countries, on 25 September 2015 the United Nations General Assembly adopted Resolution 70/1, the 2030 Agenda for Sustainable Development[209]. The resolution sets out a post-development agenda which incorporates 17 goals, the so-called Sustainable Development Goals (SDGs). The 17 targets are part of a comprehensive programme of action with a total of 169 targets that states have committed to achieve over the subsequent 15 years, that is by 2030.

These goals are a follow-up to the eight Millennium Development Goals (MDGs)[210], which states had agreed as priorities and crucial for the development of the planet precisely at the beginning of this millennium. The 2030 Agenda has identified a number of common goals on an important set of issues related to development that is

[206] ILO, *Decent Work*, Report of the Director-General, cit., p. 4.

[207] See the Annex, *Follow-up to the Declaration* of ILO, *Declaration on Social Justice for a Fair Globalization*, cit. p. 11.

[208] The revisions were introduced at the 110th session of the International Labour Conference of May 2022. See *supra*, note 194.

[209] UNGA, Resolution A/RES/70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 September 2015.

[210] UNGA, Resolution A/RES/55/2, *United Nations Millennium Declaration*, 18 September 2000. The Resolution was adopted following a three-day Millennium Summit of world leaders gathered in New York at the headquarters of the United Nations. Adopted by 189 votes in favour, the Millennium Declaration contained eight chapters regarding, among the others, peace, development, environment, human rights and "the Special Needs of Africa".

qualified as 'sustainable'[211], such as fighting climate change, gender equality, quality education, economic growth and, indeed, decent work.

Unlike the MDGs, widely criticised for the exclusion of the human rights dimension in the development, monitoring and adaptation of the Goals themselves, the 2030 Agenda is explicitly based on internationally accepted standards to protect human rights. Indeed, paragraph 10 specifies that: «The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome»[212]. Furthermore, the Agenda emphasises «the responsibilities of all States […] to respect, protect and promote human rights and fundamental freedoms for all»[213].

Again, unlike the MDGs, which while addressing many of the root causes of slavery, made no mention whatsoever of this gross violation of human rights, Sustainable Development Goal 8 of the 2030 Agenda is headed "Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all". In particular then target 8.7 is dedicated to forced labour and slavery and reads: «Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms». The following target then specifies that it is necessary to «Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment»[214]. The inclusion of these specific targets in the 2030 Agenda can be attributed to the widespread recognition, during its drafting, of the significant impact that persistent human rights violations have on the lives of millions of adults and children. Despite the progress made with the MDGs, certain socio-economic trends prevalent at the time

[211] The concept of sustainability, which we will discuss several times throughout the work, was understood already almost 40 years ago as «meeting the needs of the present without compromising the ability of future generations to meet their own needs» in the Report *Our Common Future* (or *Brundtland Report*) of 1987, drawn up by the World Commission on Environment and Development (WCED), which was the first to provide the meaning of the term 'sustainable development'. The Report was published in October 1987 by the United Nations through the Oxford University Press.

[212] UNGA, Resolution A/RES/70/1, cit., par. 10.

[213] *Ibi*, par. 19.

[214] *Ibi*, SDG 8, Target 8.7 and 8.8, p. 20.

necessitated addressing these issues in order to create a meaningful impact and improve the overall well-being of individuals[215].

Since its inception by the ILO in 1999, the concept of decent work has gained universal recognition and has been incorporated into major human rights declarations and United Nations resolutions, as we have seen. In 2015, as part of the new 2030 Agenda for Sustainable Development, decent work, along with its core objectives of employment creation, social protection, rights at work, and social dialogue, became an integral component in Goal number 8.

It has been remarked, however, that while decent work emerged from extensive literature on precarious and nonstandard work, much of which was published by the ILO itself, its initial launch focused primarily on institutional initiatives within the ILO, limiting its broader impact and engagement in the wider socioeconomic debate. One notable aspect would be the inherent vagueness of the term, which some viewed as advantageous while others found it prone to empty rhetoric. This lack of clarity and coherence hindered efforts to measure decent work, discouraging their implementation. Nonetheless, the concept of decent work successfully permeated the policy discourse as a universal development objective. The significance of decent work was in fact reaffirmed when, in September 2015, world leaders decided to adopt the UN 2030 Agenda for Sustainable Development, with "Decent work and economic growth" listed as the 8th goal among the 17 Sustainable Development Goals. This renewed attention brought decent work back into the policy debate and elevated its prominence on the international stage[216].

The passages outlined so far have shown how, at the turn of the 20th century and the beginning of the 21st century, the focus on labour of the international institutions considered, first and foremost of course the ILO, seems to have shifted. Between 1998 and 1999, the Fundamental Principles and Rights at Work were first approved, soon afterwards followed by the additional guidelines presented by the newly elected ILO's

[215] See N. BOSCHIERO, *Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù – Una valutazione alla luce del diritto internazionale consuetudinario, del diritto internazionale privato europeo e dell'agenda delle Nazioni Unite 2030*, Torino, 2021, p. 22-23.

[216] Regarding the theoretical development of decent work see A. PIASNA, K. SEHNBRUCH, B. BURCHELL, *Decent Work: Conceptualization and Policy Impact*, in W. LEAL FILHO, A. M. AZUL, L. BRANDLI, A. LANGE SALVIA, T. WALL (ed.), *Decent Work and Economic Growth. Encyclopedia of the UN Sustainable Development Goals*, Berlin, 2021, p. 215-224, and especially p. 216-217.

Director-General Somavia. The introduction of the concept of 'decent work', albeit not formally, meant that the labour issue was framed in a new and different perspective. Reflecting this is the fact that the terminology and idea of 'decent work' comes to be fully considered and embraced in an act passed in full solemnity such as the SDGs Resolution 70/2015. We have seen how the new idea of decent work for all has been criticised for its vagueness. It could be consequently added, that 'decent work' could not be all that helpful in eradicating the phenomenon of forced labour, if only for the fact that such term is no longer mentioned as frequently as before, from ILO Reports, to Declarations, to UN General Assembly Resolutions.

The framing of the labour issue has shifted from considering the goal of the elimination of forced labour, a goal that had marked the entire 20th century, to the aspiration of decent work for all. Forced labour in all its forms can be considered the antonym to decent work, and the eradication of forced labour advances the Decent Work Agenda in all its dimensions. As mentioned above, the elimination of forced labour is the subject of two of ILO's eight fundamental Conventions, which must be in any case observed by all ILO member States, irrespective of having them ratified or not.

3.2 A glimpse into the doctrinal debate on "modern slavery" and the support provided by The Bellagio–Harvard Guidelines on the Legal Parameters of Slavery

The term "modern slavery" – used alternatively with its counterparts of "contemporary" or, again, "modern forms of slavery" – gained prominence in the early 21st century as a descriptive phrase to encompass various forms of exploitation and human rights violations reminiscent of historical slavery practices. While it is challenging to pinpoint a specific occasion or individual responsible for its first usage, it seems that the term began to gain traction in international discourse around the early 2000s[217]. Efforts to combat the phenomena that were intended to be covered by the large umbrella of "modern slavery" led to the adoption and promotion of this term to raise awareness and galvanise action. The term aimed to highlight the persistence of harsh exploitative conditions in contemporary society, emphasising the need for urgent attention and intervention. Since its emergence, the term "modern slavery" has also been widely employed by scholars[218], policymakers, activists, and international organisations to address and combat various forms of exploitation violating fundamental human rights.

It is therefore crucial to underscore and introduce our concise examination of the discourse surrounding the locution "modern slavery" by acknowledging that, thus far, it has not been included in legally binding instruments at the international level, and, at the very least, no explicit international legal definition of the term has been established until now. However, numerous scholars, extending beyond the realm of international

[217] One notable instance, among the first, where the term "modern slavery" appears to have been used can be traced back to the 2008 Vienna Forum to Fight Human Trafficking. At this gathering, Antonio Maria Costa, the former Executive Director of the United Nations Office on Drugs and Crime (UNODC), capturing the audience's attention on the issue of human trafficking, stated: «In order to fight this monster, we must know more about it. Lack of information, statistical and otherwise, have left us looking at footprints of a creature whose shape, size and ferocity we can only guess. It lurks in the shadows. The profiles of its cronies and their networks are sketchy. Its victims are too afraid to run away and speak up, their number unknown. The monster takes different shapes, depending on the culture, time and the context, in collusion with other unlawful undertakings: illegal migration, forced labour, paedophilia, child exploitation, civil conflicts and coerced prostitution. […] Ladies and gentlemen, let's call it what it is: modern slavery». The entire speech can be read on <https://www.unodc.org/unodc/en/about-unodc/speeches/2008-02-13.html>.

[218] In the legal sphere, to give just one example, see P. WEBB, R. GARCIANDIA, *State Responsibility for modern slavery: uncovering and bridging the gap*, in *International & Comparative Law Quarterly*, Volume 68, Issue 3, 2019, p. 539-571.

human rights law and into broader academic discourse, have commented on the adoption of a term capable of encompassing all existing forms of exploitation.

As for the debate among international law scholars, authoritative doctrine warns against a 'risk of dilution' of the subject matter by the term, in particular to include 'all contemporary evils' under the label of "modern slavery" would mean «risquer de banaliser la définition même de l'esclavage et surtout de diluer les efforts entrepris pour son eradication complète»[219]. Instead, new, precise and detailed definitions of specific cases would be needed that would «permettre une coopération internationale efficace»[220]. In a complementary manner, others state that it is only by looking at the existing definitions in international legal instruments that «conceptual clarity emerges and, with it, the ability to disaggregate concepts such as "trafficking," "modern slavery," "contemporary forms of slavery," or other umbrella terms meant to capture various forms of exploitation»[221].

Slightly discordantly, part of the doctrine argues that it is necessary to reexamine the extent of the well-established customary international law norm that prohibits slavery. Additionally, the absence of a precise definition for the concept of 'contemporary forms of slavery' is highlighted, urging caution when assessing international practice and *opinio juris* in determining the existence of a prohibition in this context, as well as the significance of preserving the clear legal definition of the offense and avoiding any dilution thereof. A new definition of slavery compared to the one dating back to 1926 would not be needed so much as a «the drafting of a new legal overarching human rights-based framework treaty on contemporary forms of slavery [that] would fill-in eventual remaining loopholes in this field»[222].

Furthermore, recalling the 'risk of dilution' it is affirmed that the umbrella-concepts under scrutiny «allow to avoid careful scrutiny of the uncertain legal boundaries under international law of the exploitative practices mentioned in this study, as well as to transcend considerations about the eventual inclusion of these exploitative practices into

[219] E. DECAUX, *Les formes contemporaines de l'esclavage*, Leiden, 2009, p. 66.
[220] *Ibi*, p. 69.
[221] J. ALLAIN, *Contemporary Slavery and Its Definition in Law*, in A. BUNTING, J. QUIRK (ed.), *Contemporary Slavery – The Rhetoric of Global Human Rights Campaigns*, Ithaka, 2018, p. 44.
[222] S. SCARPA, *Conceptual unclarity, human dignity and contemporary forms of slavery: An appraisal and some proposals*, in *Questions of International Law*, *Zoom-in*, vol. 64, 2019, p. 19-41.

the concept of slavery, as defined in the 1926 Slavery Convention»[223] and it is reiterated the call for «a conceptual clarification on the use of the concept of contemporary (forms of) slavery – or similar ones – by global governance actors […] necessary as a way to guarantee a much needed concerted global action»[224].

Other scholars also express their concerns about encompassing many, too many different forms of exploitation under a single term. The distinct concepts therefore «are often lost, including in efforts to raise public awareness; to implement policies and programs designed to prevent trafficking; and to protect and provide reintegration assistance to its victims»[225]. This assertion stems from a consideration developed in the historical context, whereby the term 'slavery' now covers «such a wide range of practices as to be virtually meaningless»[226].

Outside of the legal debate about the appropriateness of the use of the term 'modern slavery', it is within the realm of sociology, among others, that there is a greater propensity on the issue[227]. The too stringent legal requirements wouldn't be able to indicate the presence of a form of slavery today[228]. Political scientists also contemplate the inherent risk of overly restrictive definitions that fail to acknowledge and address other forms of exploitation, as well as the potential drawbacks of excessively broad definitions that can lead to confusion and render them ineffectual[229].

Other standings from the field of political science take an intermediary position and propose an approach that avoids relying on a rigid binary division between slavery and non-slavery, not advocating for the complete abandonment of the concept of

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[223] S. SCARPA, *The Nebulous Definition of Slavery: Legal versus Sociological Definitions of Slavery*, in J. WINTERDYK, J. JONES (ed.), *The Palgrave International Handbook of Human Trafficking*, Berlin, 2020, p. 140.

[224] *Ibi*, p. 143.

[225] R. VIJEYARASA, J. M. BELLO Y VILLARINO, *Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev*, in *Journal of International Law and International Relations*, vol. 9, issue 1, 2013, p. 39.

[226] S. MIERS, *Slavery in the Twentieth Century – The Evolution of a Global Problem*, Lanham, 2003, p. 453.

[227] For an overview of the sociological debate on this point, see S. SCARPA, *The Nebulous Definition of Slavery*, op. cit., from p. 140.

[228] See *supra*, note 161. See also Bale's first publication on the issue, considered the pioneering publication in the field of sociology: K. BALES, *Disposable people: New slavery in the global economy*, Berkeley, 1999.

[229] J. QUIRK, *Defining slavery in all its forms: Historical inquiry as contemporary instruction*, in J. ALLAIN (ed.), *The legal understanding of slavery – From the historical to the contemporary*, Oxford, 2013, p. 276.

"modern slavery". In sum, an approach «that is re-connected to the human rights frame, in order to normatively, conceptually and contextually embed modern slavery»[230].

Lastly, it is essential to point out significant political scientist's contributions who dedicated a substantial portion of their work to the subject of forced labour. However, it is worth noting that this seems not to delve extensively into the specific nuances of the term 'modern slavery', but to focus primarily on examining the socioeconomic impacts of forced labour in everyday contexts[231].

Building upon the preceding doctrinal overview, it is essential to reiterate the foundational premise: the term "modern slavery" has never been included in any legally binding instrument of international law and no official definition of the term has been formally adopted. Consequently, the ongoing terminological debate surrounding this term appears to be of little consequence and may still require further exploration. It is certainly important not to dismiss the fact that the term has gained widespread usage within the discourse concerning the phenomena it seeks to encompass. Nevertheless, adopting a positivist perspective, it appears unavoidable to maintain the existing Conventions on slavery and forced labour as the sole possible valid points of reference. Hence, with regard to terminology and definitions, the primary sources of guidance are of course the 1926 Slavery Convention and the 1930 ILO Forced Labour Convention No. 29. These conventions continue to provide essential frameworks for understanding and addressing the phenomena of slavery and forced labour.

A recent concrete attempt to navigate the definitions provided by legal international instruments, as well as to make them adhere to contemporary phenomena of exploitation, was carried out in 2012. In that year, a group of twenty scholars, who recognised themselves as Members of the Research Network on the Legal Parameters of Slavery, adopted the so-called "Bellagio–Harvard Guidelines on the Legal Parameters of Slavery"[232]. These were developed with the intention of providing legal clarity to the

[230] J. MENDE, *The Concept of Modern Slavery*, op. cit., p. 244. See also J. MENDE, *Moderne Sklaverei: Unschärfen eines Begriffs*, in *Blätter für deutsche und internationale Politik*, vol. 9, 2016, p. 33-36.

[231] Among the many, see G. LEBARON, J. PLILEY, D. W. BLIGHT (ed.), *Fighting Modern Slavery and Human Trafficking: History and Contemporary Policy*, Cambridge, 2021 and G. LEBARON (ed.), (2018) *Researching Forced Labour in the Global Economy: Methodological Challenges and Advances*, Oxford, 2018.

[232] In particular, it comprises a heterogeneous group of scholars in very different fields and practitioners: Jean Allain (Queen's University, Belfast), Kevin Bales (University of Hull, and Free the

internationally recognized definition of slavery, as outlined in the 1926 Slavery Convention. They were conceived as a tool to aid judges in understanding and applying the concept of slavery in the context of a modern world that has abolished legal ownership of individuals. The aim was to bridge the gap between historical notions of slavery and the contemporary understanding of its manifestations, enabling judges to navigate the complexities of identifying and addressing instances of slavery in today's society[233].

The Guidelines assume that there is a «lack of legal clarity with regard to the interpretation of the definition of slavery in international law» and begin from the firm assumption that «the starting point for understanding that definition is Article 1(1) of the 1926 Slavery Convention». The ten guidelines then follow, each with its own heading. Particularly relevant for our purposes is Guideline 8, headed "Distinction between slavery and forced labour". Starting from the fact that «The 1926 Slavery Convention recognises that forced labour can develop "into conditions analogous to slavery"» and recalling the 1930 definition of forced labour provided by the ILO Forced Labour Convention No. 29[234], scholars emphasise the difference between the two different forms of exploitation by referring to the pivotal concept that has been at the core of their discussions, namely the concept, as well as the legal institution, of property. This difference is in fact essentially traced back to «the exercise of the powers attaching to the right of ownership», which, if exercised, turn forced labour into slavery. In addition, it is specified that «Slavery will not be present in cases of forced labour where the control over a person

Slaves), Annie Bunting (York University), John Cairns (University of Edinburgh), William M. Carter Jr. (Temple University), Holly Cullen (University of Western Australia) Seymour Drescher (University of Pittsburgh), Stanley Engerman (University of Rochester), Paul Finkelman (Albany Law School), Bernard Freamon (Seton Hall University), Allison Gorsuch (Yale University), Robin Hickey (Durham University), Richard Helmholz (University of Chicago), Antony Honoré (University of Oxford), Aidan McQuade (Anti-Slavery International), Orlando Patterson (Harvard University), James Penner (University College, London), Joel Quirk (University of Witwatersrand), Jody Sarich (Free the Slaves), Rebecca Scott (University of Michigan). The work carried out by the group started in 2010 at a symposium entitled "The Parameters of Slavery" at the Rockefeller Foundation's Conference Center in Bellagio, and was then continued in 2011 at a meeting under the auspices of the Harriet Tubman Institute for Research on the Global Migrations of African Peoples at the York University, as well as at a symposium entitled "The Legal Parameters of Slavery: Historical to the Contemporary" at Harvard University. The work developed by the Members of the Research Network on the Legal Parameters of Slavery resulted in the edited volume by J. ALLAIN (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford, 2012, where also the text of the Guidelines can be found.

[233] . ALLAIN (ed.), *The Legal Understanding of Slavery*, op. cit., p. 5. As we shall see in the next chapter, so far international courts, and in particular the Inter-American Court of Human Rights, have indeed used the Guidelines as a means of aid and referred to them in their pronouncements.

[234] That is, «"Forced or compulsory labour" shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily» (Article 2). See *supra*, par. 2.1.3.

tantamount to possession is not present». The differentiation between slavery and forced labour and the legitimacy of the adoption of a term that encompasses all forms of exploitation will recur in the final chapter, serving as a critical focal point for a series of considerations[235]. It is crucial, therefore, to keep in mind the valuable interpretative insights offered by the Guidelines regarding this distinction.

3.3 The role of international organisations: the ILO Commissions of Inquiry, the jurisprudence of the human rights treaty bodies and the mandate of the Special Rapporteur on contemporary forms of slavery

In concluding this chapter, we will explore additional components that are instrumental in attaining a comprehensive grasp of the terms 'forced labour' and 'slavery' as delineated in international legal instruments. These elements comprise, firstly, the contribution to the definition of the content of forced labour given by the ILO Commissions of Inquiry, then the jurisprudence derived from the Human Rights Treaty bodies that pertain to our subject matter, and finally, the reports issued by the Special Rapporteur on contemporary forms of slavery, mandated in 2007. All three these sources provide valuable insights that further enrich our understanding of the legal framework and conceptual nuances surrounding forced labour and slavery in contemporary contexts.

The ILO Commissions of Inquiry stand as a vital mechanism within the framework of the Organization, serving as an indispensable avenue for addressing complaints. This specialized procedure plays a crucial role in investigating and resolving issues brought before the ILO, embodying a structured and comprehensive approach to ensure adherence to international labour standards. In particular, Articles 26 to 34 of the ILO Constitution regulate the ILO complaints procedure, allowing for the filing of a complaint against a member State for non-compliance with a ratified Convention by another member State that has ratified the same Convention, a delegate to the International Labour Conference, or the Governing Body acting independently. Upon receiving a complaint, the Governing Body holds the authority to establish a Commission of Inquiry, comprised of three impartial members. This Commission bears the

[235] See *infra*, Chapter III, par. 2.1.

responsibility of conducting a thorough investigation into the complaint, meticulously gathering all pertinent facts and presenting recommendations regarding actions to rectify the issues raised in the complaint. The Commission of Inquiry stands as the highest-level investigative mechanism within the ILO and is typically convened in instances where a member State faces accusations of persistent and severe violations, having consistently failed to address them. As of 2023, fourteen Commissions of Inquiry have been established under these provisions. Over the course of time, the International Labour Organization has established four Commissions of Inquiry to address instances where states have been found in violation of their commitments under the ratified Labour Conventions. For the purposes and in view of the forthcoming analyses in the subsequent chapters, it is imperative to underscore right from the outset that the cases that will be reported hereafter by the Commissions exclusively revolve around instances where the demand for forced labour originated directly from the governmental entities facing indictment. Importantly, these instances do not therefore involve requisitions from private actors within the respective state territories.

The first established Commission, inaugurated in 1963 with regard to Portugal, operated within the backdrop of a global landscape shaped by the lingering remnants of colonial empires, particularly pronounced on the African continent post-Second World War. This historical context lends depth to the Commission's efforts, underscoring the intricate interplay between the legacies of colonialism and the imperative to address non-compliance with labour standards. In particular, against the backdrop of escalating organised anti-colonial violence in Angola, the government of Ghana lodged a complaint with the ILO, contending that Portugal had neglected its obligations under the 1957 Convention on forced labour. The accusations posited that forced labour in Portuguese colonies was a direct consequence of colonialism and that it was exercised beyond the scope of labour for public purposes. The establishment of a Commission of Inquiry facilitated the formation of a diverse standpoint, offering fresh insights and testimonies pertaining to the labour conditions prevailing in Portuguese colonies.

In its conclusive report, the Commission acknowledged the historical existence of some instances of forced labour, yet emphatically dismissed Ghana's assertion that the ratification of the Forced Labour Convention was a mere diplomatic gesture aimed at

concealing the harsh reality of forced labour[236]. This categorical stance was intricately tied to the stringent, primarily juridical, terms outlined in the Commission's mandate. Crucially, the commission and ILO officials were, to a certain extent, content with the reforms implemented by the Portuguese government. By May 1961, compulsory cotton cultivation was abolished, and administrative intervention in recruitment ceased and a legal framework for autonomous labour inspectorates was established. Significantly, at the time of the Commission's final report in 1962, the Portuguese government had committed to repealing the local labour Code, which was subsequently replaced by a new code a few months later. This revised code, on paper made no racial or ethnic distinctions, disallowed any form of coerced labour, and importantly, was the outcome of meticulous scrutiny by the ILO Committee of experts on the application of conventions and recommendations[237].

A comparable outcome was attained in the subsequent year with the initiation of the Commission of Inquiry for Liberia in 1963, whose work mainly focused on the content of the 1930 ILO Forced Labour Convention. The Commission recognised in this case that extensive economic and social transformations had occurred in Liberia, markedly diverging from the conditions prevalent at the time of the Convention's ratification in 1931. The Commission acknowledged the argument posited by the parties, recognizing that until the 1940s, Liberia's economic resources were insufficient to facilitate substantial social advancement. Moreover, and significantly, it was recognised that the challenges faced by the country were exacerbated by the absence of significant external contributions to its political, economic, and social development[238].

The most recent two of Commissions established under the auspices of the ILO, specifically to address instances of non-compliance by States with the obligations they undertook upon ratifying the 1930 Convention, pertain to the identical State – Myanmar. The first Commission concluded its investigation in 1998, revealing that in Burma

[236] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the complaint filed by the Government of Ghana concerning the observance by the Government of Portugal of the Abolition of Forced Labour Convention, 1957 (No. 105)*, 21 February 1962, par. 697 ff.

[237] Ibi, par. 319 ff.

[238] See ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the complaint filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No. 29),* 4 February 1963, par. 465 ff.

authorities extensively employed forced labour for predominantly military objectives, encompassing tasks such as the construction and upkeep of training camps and barracks. Furthermore, the exploitation extended to benefiting private companies with ties to the ruling regime. Notably, the military junta, which had governed the country since 1988, offered cultural justifications, even contending that forced labour was intrinsic to a set of values and practices rooted in the Buddhist religion. This revelation underscored the complex interplay between political power, economic interests, and cultural assertions surrounding the contentious use of forced labour in the region.

The thorough analysis undertaken by the commission, the legal intricacies of which hold paramount significance and will be scrutinized more comprehensively subsequently[239], culminated in the determination that there was flagrant impunity exhibited by government officials, notably the military, in treating the civilian population as an inexhaustible tool of unpaid forced labourers and servants, which reflected a political system founded on the utilization of force and intimidation. According to the Commission, this system aimed to deprive the people of Myanmar of their democratic rights and the establishment of the rule of law. Therefore, it was concluded that there was a need for the existing order to undergo transformation, giving way to a new era in Myanmar where every individual had the chance to live with human dignity and unfold their full potential in a manner of their choosing, for a society devoid of subjugation or enslavement imposed by others[240].

The second Myanmar Commission was instead established in 2022. After the military assumed control in Myanmar in February 2021, both the ILO Governing Body and the International Labour Conference expressed apprehensions regarding reported infringements of freedom of association and forced labour within the country. In June 2021, the Labour Conference adopted a resolution advocating for a return to democracy and the upholding of fundamental rights in Myanmar. Subsequently, in March 2022, the Governing Body opted to establish a Commission of Inquiry under Article 26 of the ILO

[239] See *infra*, Chapter III, par. 2.2.

[240] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, 2 July 1998, par. 539 ff. On the impact of the ILO in Myanmar see F. MAUPAIN, *Is the ILO Effective in Upholding Workers' Rights? – Reflections on the Myanmar Experience*, in P. ALSTON, *Labour Rights as Human Rights*, Oxford, 2005, p. 85-142. In addition to the ILO Commissions of inquiry, the Special Action Programme to combat Forced Labour (SAP-FL), in operation since 2002, influence on the broader strategy to combat forced labour is also recognized within the ILO.

Constitution. This move was in response to Myanmar's non-compliance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Forced Labour Convention, 1930 (No. 29). Myanmar had ratified both Conventions in 1955. The Commission consequently urged Myanmar, among others, to end the exaction of all forms of forced or compulsory labour also through the establishment of an adequate legislative criminal framework, to assess the functioning of the national authorities and mechanisms responsible for the suppression and to take specific measures to end the exaction of forced labour from Rohingya people and other ethnic or religious minorities[241].

Turning instead to the jurisprudence of the so called human rights treaty bodies[242], the jurisprudence that most pertains to our interests is to be found in particular in the Human Rights Committee (HRCttee) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)[243], which respectively monitor the application of two international treaties on slavery and forced labour, namely the 1966 International Covenant on Civil and Political Rights and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[244].

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[241] ILO, *Towards Freedom and Dignity in Myanmar – Report of the Commission of Inquiry established in accordance with article 26 of the ILO Constitution concerning the non-observance by Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Forced Labour Convention, 1930 (No. 29)*, 4 August 2023, par. 635 ff.

[242] The committees of independent experts known as human rights treaty bodies play a crucial role in overseeing the adherence to the core international human rights treaties. Each State party to a treaty is obligated to implement measures to guarantee that all individuals within the State can avail themselves of the rights outlined in the respective treaty. Comprising experts of acknowledged proficiency in human rights, the ten existent human rights treaty bodies are appointed and elected by State parties for fixed, renewable terms of four years. For a comprehensive exploration of their functioning, see the bibliographical references suggested in the next footnote.

[243] The HRCttee members provide opinions on member countries' adherence to the treaty's provisions and render judgments on individual complaints filed against nations that have ratified an Optional Protocol to the ICCPR. These judgments, referred to as "views", do not possess legal binding force. The committee convenes approximately three times a year to conduct sessions, during which they deliberate on matters related to the promotion and protection of civil and political rights. The establishment of the Committee on Migrant Workers took place in 2004. The committee carries out the task of reviewing reports submitted by states every five years. However, its authority to receive complaints regarding specific violations will only be granted once ten member states provide their consent, granting the committee the necessary jurisdiction to address individual cases. For an in-depth look at the function mechanisms of both committees see H. KELLER, G. ULFSTEIN (ed.), *UN Human Rights Treaty Bodies – Law and Legitimacy*, Cambridge, 2012 and M. C. BASSIOUNI, W. SCHABAS (ed.), *New challenges for the UN human rights machinery: what future for the UN treaty body system and the Human Rights Council procedures?*, Cambridge, 2011.

[244] See *supra*, par. 2.3.1 and par. 2.2.2.

As far as the Human Rights Committee is concerned, communications invoking the prohibitions against slavery, servitude and forced labour, as articulated in Article 8 ICCPR, have been exceptionally infrequent in cases brought before the Human Rights Committee[245]. In instances where Article 8 has been invoked, it has predominantly been at the behest of respondent States. These cases typically arose in response to communications that contest the exceptions to forced labour outlined in Article 8(3)(c), with a specific focus on compulsory military service[246].

A notable case that involved a more direct reliance on Article 8 of the ICCPR was *Faure v Australia*. This case pertained to Australia's "Work for Dole" programme, which mandated individuals seeking unemployment benefits to engage in labour activities. The Human Rights Committee concluded that the program raised a plausible contention of forced or compulsory labour under Article 8(3) of the Covenant. Significantly, the Committee determined that there were no adequate avenues for individuals to challenge the nature of the scheme and seek redress, thereby contravening the requirements of Article 2 of the ICCPR. On this occasion, the Committee had the opportunity to better explain what, in its view, is the content of the term forced labour: «In the Committee's view, the term 'forced or compulsory labour' covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where punishment as a comparable sanction is threatened if the labour directed is not performed. The Committee notes, moreover, that article 8, paragraph 3(c)(iv), of the Covenant exempts from the term 'forced or compulsory labour' such work or service forming part of normal civil obligations. In the Committee's view, to so qualify as a normal civil obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant»[247].

In reviewing State reports, the Human Rights Committee has repeatedly encountered the presence of forced labour, especially in the agricultural sector. For

[245] A. CONTE, R. BURCHILL, *Defining civil and political rights – the jurisprudence of the United Nations Human Rights Committee*, II ed., London, 2016, p. 117.

[246] *Ibi*, p. 118.

[247] HRCttee, *Bernadette Faure v. Australia*, Communication No. 1036/2001, U.N. Doc. CCPR/C/85/D/1036/2001, 2005, par. 7.5.

instance, this is the case of Uzbekistan and Kazakhstan, where in 2015 and 2016 the use of forced labour in the tobacco, cotton and silk sectors was reported. Or the case of Greece, where migrants were assessed to work in slavery-like conditions in 2015, or again, in 2018 in El Salvador forced labour in the so-called "maquiladora" industry and in agricultural and domestic sectors was ascertained[248].

As for the Committee on Migrant Workers, even given its relatively recent establishment, from the available documents no particular cases were found to be relevant for our purposes, especially not in the General Comments, six in total as 2023. Furthermore, neither the inter-State communications procedure nor the individual complaint mechanism have yet entered into force[249].

In conclusion, it is pertinent to reflect upon an additional UN mechanism, whose nature deeply differs from the one pertaining the treaty bodies just observed, as well as highly dedicated to monitoring the occurrences of forced labour and slavery in the modern era. This mechanism refers to the mandate bestowed upon the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, whose primary objective is to closely observe and analyse these critical issues.

At the end of the Second World War, the United Nations intended to continue the work of the League of Nations' Temporary Slavery Commission by establishing a special Working Group on Contemporary Forms of Slavery in 1975. This particular Working Group, entrusted with the task of preparing comprehensive reports on all international treaties and customary international law regarding traditional and contemporary forms of slavery and related practices, no longer exists as of 2007[250]. The Working Group on Contemporary Forms of Slavery was in fact replaced in that year by the mandate of the Special Rapporteur on contemporary forms of slavery, including its causes and

[248] HRCttee, Uzbekistan, CCPR/C/UZB/CO/4, 2015, par. 19; HRCttee, Kazakhstan, CCPR/C/KAZ/CO/2, 2016, par. 35; HRCttee, Greece, CCPR/C/GRC/CO/2, 2015, par. 21; HRCttee, El Salvador, CCPR/C/SLV/CO/7, 2018, par. 25. See P. M. TAYLOR, *A Commentary on the International Covenant on Civil and Political Rights*, op. cit., p. 221.

[249] For the functioning system of the Committee on Migrant Workers see V. CHETAIL, *The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families*, in F. MÉGRET, P. ALSTON (ed.), *The United Nations and Human Rights: A Critical Appraisal*, II ed., Oxford, 2020.

[250] The Commission on Human Rights, the Human Rights Council's predecessor, asked its Sub-commission on the Promotion and Protection of Human Rights to address the issue of slavery. The latter established the Working Group with Resolution 11 (XXVII) of 21 August 1974. It is worth noting that The Working Group came into being under the name of 'Working Group of Slavery', which in 1988 changed in 'Working Group on Contemporary Forms of Slavery'. As for the League of Nations' Temporary Slavery Commission see *supra*, par. 2.1.2.

consequences, based on Human Rights Council (HRC) Resolution 6/14[251]. According to the Resolution, adopted on the «two hundredth anniversary of the beginning of the abolition of the transatlantic slave trade»[252], the Special Rapporteur «shall examine and report on all contemporary forms of slavery and slavery-like practices, but in particular those defined in the Slavery Convention of 1926, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956», and in respect to these "slavery-like practices" the Rapporteur has to «promote the effective application of relevant international norms and standards on slavery» and to «recommend actions and measures applicable at the national, regional and international levels» [253]. On his actions, the Special Rapporteur has finally to present «submit annual reports on the activities of the mandate to the Human Rights Council together with recommendations on measures that should be taken to combat and eradicate contemporary forms of slavery and slavery-like practices», which are usually thematic reports[254]. Professor Tomoya Obokata was appointed as Special Rapporteur on contemporary forms of slavery on 13 March 2020 and his mandate was renewed for a further three years period in October 2022[255].

Since 2007, the Special Rapporteurs have had numerous opportunities to present the annual thematic report as well as address specific States concerning matters related to forced labour. Over the years, these occasions have provided valuable platforms for the Rapporteurs to delve into various aspects of forced labour issues, highlighting concerns, providing analysis, and making recommendations for effective action.

In this regard, it is interesting and highly significant to point out that the first ever report of the new 2007 mandate on contemporary forms of slavery, written by the first rapporteur in charge, Ms. Gulnara Shahinian, deals with "Forced and child labour"[256]. Presumably, as can be seen from the report's conclusions, this is due to the fact that since

[251] HRC, Resolution 6/14 Special Rapporteur on contemporary forms of slavery, A/HRC/RES/6/14, 28 September 2007.

[252] The Resolution refers here to the Adoption of the Slave Trade Act by the United Kingdom in 1807. See *supra*, par. 1.

[253] A/HRC/RES/6/14, par. 2.

[254] *Ibi*, par. 7. In addition to the annual reports, where the activities undertaken are presented, the Special Rapporteur may conduct internal country visits and draft communications to individual countries, which may be more or less urgent.

[255] HRC, Resolution 51/15, A/HRC/RES/51/15, 6 October 2022.

[256] HRC, Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, A/HRC/9/20, 28 July 2008.

«there are many cross-cutting issues and overlaps with the mandates of other special procedures and other human rights mechanisms», the Rapporteur decided to «therefore focus on working on forced labour, child labour as it relates to the economic exploitation of children, and domestic work»[257].

However, the means most directly aimed at countering the cases of forced labour and slavery that the Rapporteur intends to denounce are communications, which can be sent to Governments on particular cases based on reliable information received with regard to cases of "contemporary forms of slavery". Communications are confidential until they are published in the joint communications report three to six months after they are transmitted to the concerned Governments. Among the most recent cases, the communication sent by Special Rapporteur Obokata to Turkmenistan in August 2021[258] appears of particular interest. In the communication, the rapporteur expresses his deep concern about reports received concerning «alleged forced and – to some extent – child labour in the cotton harvest of Turkmenistan, with a particular focus on the harvests of 2019 and 2020». The case interestingly starts by acknowledging the fact that in Turkmenistan agricultural lands are owned by the State. Therefore, in this instance the suspected case of forced labour has to be traced directly back to the state apparatus. After reporting what had happened, Obokata asked the government to indicate the sources and provide information about the measures taken by the government to fulfil its obligations arising from the ratification of the ILO Conventions against forced labour, that is the Forced Labour Convention of 1930 and the Conventions aimed at combating child labour. The Turkmen government responded to the Rapporteur's request the following October[259].

In conclusion, it is perceived as more than necessary to highlight that the Special Rapporteur on contemporary forms of slavery can send communications jointly with other Special procedure mandates, thus constituting joint communications. This type of communication can be addressed not only to States, but also to private individuals and in particular to companies and multinationals. The database of the UN Human Rights Office

[257] *Ibi*, par. 51.

[258] HRC, Special Rapporteur on contemporary forms of slavery, *Turkmenistan – Concerns raised regarding allegations of forced labour in the cotton picking harvest of 2019 and 2020*, AL TKM 2/2021, 30 August 2021.

[259] HRC, Special Rapporteur on contemporary forms of slavery, *Reply from Turkmenistan*, HRC/NONE/SP/2021/78/TKM, 7 October 2021.

of the High Commissioner (OHCHR) shows 379 mostly joint communications from 2011 to May 2023. Of these, 218 concern cases of forced labour, the vast majority of them directed at multinationals[260]. This last figure perfectly adheres to the reality photographed by the ILO Report on Global Estimates of Modern Slavery of 2022, observed at the beginning of our work, whereby almost two thirds of people in forced labour are exploited in the private sector[261].

[260] The data can be found on the OHCHR electronic database, at: <https://spcommreports.ohchr.org/TmSearch/Mandates?m=85>.

[261] See *supra*, par. 1.

INTERIM CONCLUSIONS

Throughout this initial chapter, our endeavour has been to attain a comprehensive understanding of the contemporary legally recognized definitions of slavery and forced labour. To accomplish this, we have carefully examined the substantive provisions of the principal international legal instruments relevant for our purposes. By engaging with these foundational texts, our aim has been to establish a robust framework for comprehending the intricacies and parameters of these concepts.

We have seen how the very first international agreements aimed at curbing the phenomenon of slavery and the slave trade are intrinsically linked to the long and dense history of slavery, particularly the phenomena that occurred between the 16th and 19th centuries. It was at the Congress of Vienna that States, together, for the first time recognised slave trade as a "scourge" that had "so long afflicted mankind". With the establishment of the League of Nations and the International Labour Organization the first crucial definitions were introduced. Firstly, the 1926 Slavery Convention played a pivotal role in clearly delineating the concepts of slavery and the slave trade. Article 5 of the Convention marked the first instance in an international treaty where space was allocated to the phenomenon of forced labour, albeit without provisions for a distinct definition for it and, albeit for exceptional cases, admitted its use for "public purposes". Four years later, the ILO Forced Labour Convention No. 29 of 1930 granted forced labour its own distinct definition: «forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». As with the definitions established in 1926, the definition of forced labour outlined in 1930 continues to serve as a reference point for the international community to this day. Similarly, the Convention's five exceptions to forced labour will be taken up over the following decades by many other international agreements.

Following World War II, the United Nations and the ILO established two symmetrical additional instruments. The UN 1956 Supplementary Convention on the Abolition of Slavery, without addressing forced labour, introduced the figure of the "Practices Similar to Slavery" – debt bondage, serfdom, forced marriage, child labour. In contrast, the 1957 ILO Abolition of Forced Labour Convention No. 105 specified five

specific circumstances in which States are required to exert exceptional efforts to prohibit the utilisation of forced labour, including «for purposes of economic development» (Article 1, lett. b).

The primary international treaties that also incorporate the prohibition of slavery, slave trade, and forced labour generally refer to the definitions established in the 1930s when they provide explicit definitions, as for the crime of 'enslavement' in the Rome Statute of the International Criminal Court. In cases where international treaties do not explicitly provide definitions for the terms related to slavery, slave trade, and forced labour, their preambles often make explicit reference to the texts of 1926 and 1930. Additionally, for the specific context of forced labour, the exceptions introduced in 1930 are consistently taken into account and addressed. The latter is the case for both Art. 4 of the European Convention on Human Rights and Art. 6 of the American Convention on Human Rights.

Several shifts in perspective and linguistic discourse regarding forced labour then occurred at the turn of the XX and XXI centuries. Following the ILO Declaration of 1998, which derived the obligation to eliminate forced labour from the mere fact of membership in the ILO, irrespective of the ratification of Conventions No. 29 and No. 105, there appeared to be a gradual shift away from the explicit focus on forced labour. This shift coincided with the introduction of the concept of 'decent work' and its subsequent integration into the 2030 Agenda for the Sustainable Development Goals.

As already mentioned, primary objective of this work is to concentrate on the phenomenon of forced labour. However, as we have seen, it was essential to begin by addressing issues related to slavery, since it was precisely in relation to this that the issue of forced labour emerged. The question of forced labour emerged in fact as a distinct entity as early as Article 5 of the 1926 Slavery Convention, predating the recognition of other forms of exploitation that, in the 21st century, have been commonly classified under the term "modern slavery".

As evidenced by the comprehensive Bellagio-Harvard Guidelines of 2012 and the extensive research conducted by the ILO Commission of Inquiry's reports, the jurisprudence of the Human Rights Treaty Bodies and the Special Rapporteur on contemporary forms of slavery, the central concern in the current era seems to revolve around the intricate relationship between these diverse types of mistreatment. Moreover,

as evidenced precisely by the communications of the Special Rapporteur, the picture captured by the ILO data is confirmed, whereby forced labour, being the most prevalent form of exploitation, is predominantly perpetrated by private actors, notably multinational corporations. Starting from the fact that the definitions of slavery and forced labour date back to 1926 and 1930 respectively, and are still the valid and binding definitions today, understanding and addressing the difficult relationship between forced labour and other forms of exploitation constitutes a crucial aspect that will repeatedly emerge throughout the course of this work and that will shape possible outcomes.

CHAPTER II

INTERNATIONAL CASE LAW AND DOMESTIC AND SUPRANATIONAL LEGISLATION IN RELATION TO FORCED LABOUR

1. Methodological remarks

The present chapter adopts a bipartite structure. The first part focuses on the examination and analysis of international case law concerning private actors' use of forced labour, along with the inevitable juxtaposition of related phenomena of as slavery, servitude, and also human trafficking. Following a brief exploration of instances where the International Court of Justice has encountered forced labour, the study extensively delves into the decisions of the three regional international human rights courts: the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights. This comprehensive examination serves as an opportunity to closely scrutinise the evolution of courts' interpretations over the years regarding the content of relevant provisions identified in the preceding chapter, and how scholars responded to these judicial pronouncements. It is essential to emphasise once again that cases pertaining to the utilisation of forced labour by States or State organs will not be examined herein, as such instances constitute a distinct thread with unique legal complexities and corresponding responses, falling outside the scope of the present research.

Building on the earlier premise regarding the uncontested predominance of forced labour committed by private actors, the second part of this chapter aims to underscore the endeavours of States in combating the forced labour phenomenon within their borders, leaving aside what is provided for under criminal law. Notably, there is a growing commitment within national legislations, particularly in certain regions, to hold companies accountable for upholding human rights across their production chains. Among the numerous instances of legislation addressing this aspect, specific emphasis will be placed on the German experience, that, with its *Lieferkettengesetz*, represents the most recent and pertinent manifestation of this trend. By way of example, the chapter will

then delve into various instances of national legislation, wherein companies are required, to varying extents, to pledge their commitment to respecting the human rights of workers along the supply chain, with a primary focus on the prohibition of forced labour. Notable legislative initiatives to be analysed include the French *Loi de vigilance*, known for its substantial impact on culpable companies, the English *Modern Slavery Act*, and the Dutch *Wet Zorgplicht Kinderarbeid*.

Concluding this chapter, an exploration of ongoing supranational processes will be presented, wherein the draft proposals share a common objective with the content of the earlier-discussed national regulations. In particular two directives proposed by the European Commission will be scrutinised, one directed at fostering greater responsibility among European companies in upholding the human rights of workers and another, though still in its nascent stages, geared towards prohibiting the trade in products within European territory if the use of forced labour is substantiated. Furthermore, a project of international significance, imperative for scrutiny, involves the United Nations' negotiations towards a binding treaty that aims to regulate the interactions and dynamics between businesses and the respect for human rights. The urgency and necessity of addressing the issue explored in the second part of this chapter, specifically the efforts towards countering forced labour, become evident in the backdrop of the revelations emerging on the side-lines of recent global political venues.

Part I
International case law on forced labour

1. The International Court of Justice dealing with slavery and forced labour

The vast majority of international legal instruments aimed at prohibiting forced labour and slavery, as discussed in the preceding chapter, incorporate mechanisms enabling parties to resort to the International Court of Justice (ICJ) in the event of disputes concerning the interpretation or application of these instruments.

With regard to the two Conventions of the League of Nations first, Slavery Convention of 1926, and the United Nations later, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956, both provide that the ICJ – or, before 1945, the Permanent Court of International Justice – is the competent body to settle any dispute between States arising from the "interpretation or application" of the text of either Convention. In particular Article 8 of the 1926 Convention states that «disputes arising between them relating to the interpretation or application of this Convention shall, if they cannot be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice. In case either or both States Parties to such a dispute should not be Parties to the Protocol of December 16th, 1920, relating to the Permanent Court of International Justice, the dispute shall be referred, […] either to the Permanent Court of International Justice or to a court of arbitration […] ». More concisely, Article 10 of the 1956 Convention establishes that «Any dispute between States Parties to this Convention relating to its interpretation or application, which is not settled by negotiation, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute, unless the parties concerned agree on another mode of settlement». To date, there is no evidence that States Parties to either Convention have ever had recourse to the Court for disputes arising out of the "interpretation or application" of the Conventions[1].

[1] See the list of all cases settled by the ICJ, available on the Court's website (https://www.icj-cij.org/list-of-all-cases).

With regard to the other considered international agreements concerning the abolition of forced labour, and in particular those concluded under the aegis of the ILO, the Forced Labour Convention n. 29 of 1930, with its 2014 Protocol, and the Abolition of Forced Labour Convention n. 105 of 1957 reference should be made to a provision in the ILO's founding act, the ILO Constitution. In fact, Article 37, paragraph 1, of the 1919 constitution act of the Organisation[2] states that «Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice». Article 37, paragraph 2, outlines the creation of an internal tribunal with the purpose of efficiently resolving disputes related to the interpretation of the Conventions. This recognition stems from the understanding that not every interpretation issue is sufficiently contentious or intricate to warrant referral to the ICJ.

During its early years, the ILO turned to the advisory capacity of the Permanent Court of International Justice (PCIJ) on six occasions between 1922 and 1932. Among these instances, five pertained to the clarification of the Constitution, and only one involved seeking advisory opinion for the interpretation of an international labour Convention[3]. To this day, the ILO has not utilized the advisory jurisdiction of the International Court of Justice, and the idea of establishing an internal tribunal for the swift resolution of interpretation disputes has not progressed beyond preliminary studies[4].

Beyond the cases in which the ICJ could potentially be called upon to adjudicate issues related to forced labour or slavery, either in its contentious or advisory opinion function, there has been only one case in which, albeit incidentally, the Court has ruled on the issue or at least in its surroundings. The occasion arose in the decision of the

[2] See *supra*, Chapter I, par. 2.1.2.

[3] This is the case where the Permanent Court of International Justice was asked to give an opinion on the interpretation of the Night Work (Women) Convention n. 4 of 1919. PCIJ, *Interpretation of the Convention of 1919 concerning employment of Women during the night*, XXVIth Session, Advisory opinion of 15 November 1932.

[4] See ILO's website under https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/organigramme/jur/legal-instruments/WCMS_711647/lang--en/index.htm. More detailed analysis of the modalities and scope of action under article 37 of the Constitution was provided to the 344th Session of the Governing Body, in March 2022, the outcome document of which is available under https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_837472.pdf.

Barcelona Traction case of 1970[5]. In a noteworthy remark made as an *obiter dictum* within its ruling on the case, the International Court of Justice introduced a distinct category of international obligations known as *erga omnes*. Synthetically, these obligations represent commitments that States hold towards the entire international community, designed to safeguard and advance fundamental values and shared interests. One of the illustrative instances of an *erga omnes* obligation, as underscored by the International Court in the Barcelona Traction case, is the duty to prevent and combat slavery[6].

The ICJ stated in particular that «an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection» and that «the former are the concern of all States», which «can be held to have a legal interest in their protection», therefore «they are obligations erga omnes» (par. 33). The Court moved on in the subsequent paragraph by giving a few examples of norms from which this newly introduced category of obligations would derive: «the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination» (par. 34). Furthermore, it is the opinion of the Court that «Some of the corresponding rights of protection have entered into the body of general international law, others are conferred by international instruments of a universal or quasi-universal character» (par. 34).

It has been observed that although the mention of *erga omnes* obligations in the Barcelona Traction case is specifically related to slavery, this prohibition would logically extend to encompass the slave trade as well, by placing the two phenomena in a causal relationship with each other[7]. At the same time, the emergence and consolidation of this specific *erga omnes* obligation has had a quite different historical and legal development

[5] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, 5 February 1970. For a more recent valuable overview of the case see C. J. TAMS, A. TZANAKOPOULOS, Barcelona Traction *at 40: The ICJ as an Agent of Legal Development*, in *Leiden Journal of International Law*, Vol. 23, Issue 4, 2010, p. 781-800. See also S. WITTICH, *Barcelona Traction Case*, in *Max Planck Encyclopedia of Public International Law*, May 2007.

[6] ICJ, *Barcelona Traction, ibi*, par. 33-34. The literature on *erga omnes* obligations is of course immense. On this point, see M. RAGAZZI, *The Concept of International Obligations Erga Omnes*, Oxford, 1997 from p. 105. As for the importance and general scope of the Court's *obiter dictum* in the context of exploitative practices see E. DECAUX, *Les formes contemporaines de l'esclavage*, in *Recueil des cours à l'Académie de droit international de La Haye*, vol. 336, 2008, from p. 105. On the possibility of counting forced labour among the *erga omnes* obligations, see *infra*, Chapter III, par. 2.3.

[7] M. RAGAZZI, *op. cit.*, p. 106.

from the other cases, such as genocide, considered by the Court[8]. In the light of these considerations and of the historical path highlighted in the previous pages, we will see in the course of the next chapter what place the phenomenon of forced labour may occupy within this framework.

Finally, it is necessary to recall here, albeit briefly, another case in which the Court had to deal with the phenomena of slavery and forced labour, namely the *Jurisdictional Immunities of the State* case of 2012[9]. Similarly to the Barcelona Traction case, the question posed before the Court in the present context did not directly revolve around the legal categorisation of slavery or forced labour. Nonetheless, the historical events leading up to the 2012 judgment are intricately intertwined with these phenomena, particularly within the unique backdrop of wartime circumstances. The legal dispute between Germany and Italy is intricately tied to the atrocities committed on Italian territory by the Nazi army, as well as the plight of the Italian Military Internees (IMI), who were deported to German prison camps and subjected to gruelling forced labour in support of the German war machine throughout the duration of the conflict.

After facing multiple convictions in Italian courts, Germany sought recourse at the International Court, seeking recognition of its jurisdictional immunity. Italy, on the other hand, raised the prospect of acknowledging a constraint on the customary rule of state immunity. Among its various arguments, Italy underscored the legal nature of the rules that Germany had purportedly breached, including the working conditions of forced labour, contending that they fell within the category of *jus cogens* norms. Nonetheless, in a decision that would go on to receive substantial criticism[10], the Hague Court declined to endorse this reconfiguration as legitimate[11]. It asserted that the principles surrounding

[8] *Ibi*, p. 116.

[9] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012.

[10] The 2012 ICJ judgment appears to have sparked a division among international law scholars, giving rise to a polarizing debate. This decision faced extensive critique, with a prominent point of contention being the Court's arguably excessive emphasis on a 'state-centric' perspective of the international order. In this sense, see for instance M. KRAJEWSKI, C. SINGER, *Should Judges Be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, in *Max Planck Yearbook of United Nations Law*, vol. 16, 2012, p. 1-34 and B. CONFORTI, *The Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity*, in *Italian Yearbook of International Law*, vol. 21, 2011, p. 133-142. As a very peculiar issue anchored in historical facts going back in time, for this wartime forced labour case a negotiated solution was suggested by the Court itself (para. 104), as well as by G. NESI, *The quest for a 'full' execution of the ICJ judgment in Germany v. Italy*, in *Journal of International Criminal Justice*, vol. 11, 2013, p. 185-198.

[11] ICJ, *Jurisdictional Immunities of the State*, par. 93.

State immunity were fundamentally procedural, essentially governing whether the courts of one State could assert jurisdiction over another State. Consequently, these rules were deemed to exist on a separate plane from the rules of *jus cogens* within the framework of international law, as they pertained to different aspects and were not hierarchically in conflict with each other. Without further examining the nature of the rules violated, but «Assuming for this purpose that the rules of the law of armed conflict which prohibit […] the deportation of prisoners of war to slave labour are rules of *jus cogens*», the Court concluded that «there is no conflict between those rules and the rules on State immunity»[12].

Given the limited number of reported cases in which the ICJ has directly addressed issues of slavery and forced labour, in establishing its connection with the protection of human rights, the Court would assume anyway a pivotal role in an evolving international legal discourse, where traditional international law intersects with the new. Positioned as a significant actor, the Court would thus contribute to a dynamic process whereby human rights and general international law mutually shape and influence each other in future perspective[13].

2. *The case law of international regional human rights courts relating to forced labour and slavery*

In the context of forced labour, the case law of regional international human rights courts, particularly of the European Court of Human Rights (ECtHR), is notably comprehensive. Through this body of case law, the intention is to elucidate two essential aspects. This will be accomplished first through an exploration of the boundaries defined by the Courts that delimit the legal scope of forced labour, and second, through an examination of how States' responsibility in addressing such practices has evolved over time.

Regarding the jurisprudence of the ECtHR, it is important to note that while the Court has evaluated numerous cases to determine violations of Article 4 of the European

[12] *Ibidem*.

[13] In this sense B. SIMMA, *The Interational Court of Justice and Human Rights*, in A. DI STEFANO, R. SAPIENZA (ed.), *La Tutela dei Diritti Umani e il Diritto Internazionale*, Napoli, 2012, at p. 28-29.

Convention, the scope of the analysis had to be partially restricted. In this regard, cases involving the specific exceptions outlined in Article 4 for forced labour have been excluded, namely those covered in subparagraphs (a) to (d) of paragraph 3 of the same article, which pertain to labour within prison, military, emergency, and civic contexts. The choice of cases then relates exclusively to the Court's examination of hypotheses of State liability in which the judges had to address circumstances where abuses inflicted by non-state actors may be qualified as slavery, servitude, forced labour or human trafficking under Article 4. The line of (few) cases where the Court found infringement for forced labour perpetrated directly by the State and not by private actors has not been taken into account.

Naturally, we will consider those rulings in which the Court establishes key legal principles related to the prohibition of forced labour that it frequently references in subsequent decisions. Furthermore, significant attention will be given to those judgments in which the matter of forced labour, aside from slavery, is explicitly and directly addressed, particularly in the context of cases involving forced domestic and agricultural labour. Through the examination of these cases, we will observe that the Court's stance sometimes suggests a particular perspective regarding the legal connection that binds various forms of exploitation, an aspect that will play a crucial role in addressing and legally framing forced labour cases.

The Inter-American Court of Human Rights (IACHR) on the other side has expressed its opinions on issues related to slavery and forced labour in violation of Article 6 of the Convention to a lesser extent, if compared to the ECtHR, in part due to its more recent establishment. However, we will explore how and why the Court's stance in this domain will bear great significance and importance for the development of framing such cases, extending beyond its regional scope. One recent case will hold considerable impact for our analysis. Furthermore, variations will arise in the Court's interpretation, in comparison to the choices made by the ECtHR, partly influenced by the differences in the wording of the prohibitions of slavery and forced labour present in the two Conventions.

In the context of the African human rights system, we have attempted to explore any instance, not necessarily of a jurisdictional nature, in which the issues of slavery and forced labour have arisen and gained attention. This broader exploration is prompted by

the fact that, as recalled in the preceding chapter, Article 5 of the African Charter does not explicitly mention forced labour among the various forms of exploitation it covers. However, one specific case, which the Economic Community of West African States Court of Justice has addressed, although not embodying a human rights jurisdiction, has been particularly enlightening in better comprehending how the African system deals with the violation of slavery and forced labour.

2.1 An overview of the European Court of Human Rights' case law: landmark cases involving forced labour

In a case discussed shortly after the establishment of the European Court of Human Rights itself, the judges had already the opportunity to question the content and meaning of the terms 'forced and compulsory labour' appearing in Article 4 of the Convention. In the *I. v. Norway* case of 1963[14], a dentist submitted an application to condemn his own state, citing various grievances, notably the allegation of forced labour imposed upon him, which the court ultimately deemed inadmissible. In its analysis of the letter of the content of Article 4, the Court noted that the two terms accompanying the term 'labour' in the Convention – 'forced and compulsory' – indicated two forms of work that had necessarily to be distinguished. Indeed, "compulsory labour" would cover a wider range of cases than "forced labour", as is also evident from the respective French and German words: «'travail obligatoire' and 'Pflichtarbeit' have wider scope than 'travail forcé' and 'Zwangsarbeit'»[15]. The judges then reflect on the historical post-World War II origin of the Convention in order to establish which content should be traced back to the terms, stating that it would be «incorrect to maintain that the intention only was to prevent future inhumanities comparable with war crimes», but, on the contrary, «the preparatory works on the Convention showed clearly the intention of establishing a much wider scope than merely to prevent outright criminal acts»[16].

The ECtHR appears to rule more extensively on a possible violation of Article 4 of the Convention in the 1980s and 1990s. In particular, in 1983, the *Van der Mussele v.*

[14] ECtHR, *I. v. Norway*, Application n. 1468/62, 17 December 1963.
[15] ECtHR, *I. v. Norway*, par. 7.
[16] *Ibidem*.

Belgium[17] case allowed the Court to delineate the contours of what should not be considered forced labour under the Convention. The applicant, a Belgian student advocate, was tasked with offering *pro bono* legal services to aid financially disadvantaged defendants. He filed a complaint contending that he had been obligated to render these services without compensation or reimbursement for his expenses. Additionally, he raised concern that the Judicial Code of Belgium could subject him to penalties if he declined to represent the accused. His argument revolved around the notion that these conditions amounted to a form of forced or compulsory labour, in violation of Article 4 of the European Convention on Human Rights. Beginning its examination, the Court observes that «the authors of the European Convention», as well as the drafters of Article 8 in the International Covenant on Civil and Political Rights, relied significantly on a prior treaty established by the International Labour Organization, namely Convention No. 29 of 1930. For this reason, although the ECHR does not provide a definition of forced labour, the Court considers that it is possible to refer to the 1930 notion, also because it is contained in a widely ratified Convention – «nearly [by] all the member States of the Council of Europe»[18]. After ascertaining that both the 1930 ILO Convention and the ECHR in condemning forced labour do not only refer to manual labour[19], the Court proceeds to examine whether the labour in dispute has been "forced or compulsory". For this test, the Court refers to the elements contained in the 1930 definition, namely that the work was performed "under the menace of any penalty", and that the person "has not offered himself voluntarily" for that work. With regard to the first element, the Court considers that the consequences of Mr. Van der Mussele's possible refusal to continue in his job, that is being ousted as a trainee lawyer or not being able to register with the bar association in the future, constitutes a sufficient threat to fall within the definition of "menace of penalty"[20]. Nevertheless, it is the second component that eludes recognition by the Court in the case presently before it: the trainee lawyer had conscientiously volunteered to undertake his obligations as regards defending clients free of charge, meticulously assessing both the favourable and unfavourable aspects of the duties that would be assigned to him.

[17] ECtHR, *Van der Mussele v. Belgium*, Application n. 8919/80, 23 November 1983.
[18] ECtHR, *Van der Mussele v. Belgium*, par. 32.
[19] *Ibi*, par. 33.
[20] *Ibi*, par. 35.

Nonetheless, for a situation to qualify as forced labour, the two pivotal elements that have been considered since the 1930 Convention must, according to the perspective of the judges, be cumulatively fulfilled: «not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be "unjust" or "oppressive" or its performance must constitute "an avoidable hardship", in other words be "needlessly distressing" or "somewhat harassing"»[21]. The Court further considers that this scenario could arise if the demanded service placed an onerous burden that was exceptionally disproportionate to the benefits expected from the future professional practice, rendering it impossible to consider the service as having been willingly accepted in advance.

The Court's determination rested on the absence of these conditions. It held that the services in question did not stray from the typical duties of a practicing lawyer, as they actively contributed to the individual's professional development. Moreover, the burden imposed was not deemed unduly excessive or disproportionate, given that the individual had ample time available for gainful employment alongside these obligations – an evaluation that would later lead to the coining of the 'disproportionate burden test'[22]. Consequently, the Court reached the conclusion that there was no infringement of Article 4 of the European Convention[23].

Several years later, the Court found itself tasked with adjudicating a case characterised by markedly distinct circumstances, as it entailed a minor of Togolese nationality, Ms. Siliadin, who had been brought to domestic work in a Parisian household since the year 1994. In the *Siliadin v. France* case[24], when interpreting Article 4 of the European Convention on Human Rights to establish the parameters of forced labour, the Court drew upon the ILO Convention No. 29. It meticulously assessed the components defining a forced labour scenario as outlined in Article 2 of this Convention. As a result of this analysis, the Court reached the determination that Siliadin had, in fact, endured forced labour within the scope of Article 4 of the ECHR. The Court considered, on the one hand, that it is clear from the reported facts that the girl did not "offer herself

[21] *Ibi*, par. 37.
[22] *Ibi*, par. 39. See also *infra*, present paragraph.
[23] For a detailed discussion of the case see I. FAHRENHORST, *Bedeutung der „Zwang- oder Pflichtarbeit" (Art. 4 Abs. 2 und 3 EMRK) u.a.*, in *Europäische Grundrechte-Zeitschrift*, vol. 12, p. 477-485 and Eur. Court. H. R., Series B no. 55, *Van der Mussele case*, Strasbourg, 1987.
[24] ECtHR, *Siliadin v. France*, Application No. 73316/01, 26 July 2005.

voluntarily" to work; on the other hand, that despite the absence of a direct "penalty" threat to the applicant, her circumstances placed her in an analogous position concerning the perceived gravity of the threat: «although the applicant was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police»[25].

After establishing that the situation qualified as forced labour, the Court proceeded to delve into the question of whether it could be characterised as slavery or servitude. However, upon careful examination of the facts, the Court determined that the circumstances were more aligned with the concept of servitude, primarily because there was no «slavery in the proper sense» understood as a «genuine right of legal ownership over her, thus reducing her to the status of an "object"»[26]. Considering that the Court encountered one of its initial cases necessitating a demarcation line among various forms of exploitation under Article 4 of the ECHR, the aforementioned words have faced criticism due to their apparent ambiguity[27]. Indeed, it was observed that even at that time, a growing terminological confusion was increasingly manifesting itself between the national, European, and international contexts[28].

Ms. Siliadin further contended that the criminal laws in effect in France did not provide her with adequate and efficacious safeguards against the state of servitude to which she had been subjected, or, at the very least, against the forced or compulsory labour she had been compelled to undertake. It is through this assertion that the Court seizes the opportunity to articulate, for the first time, a principle that it will emphatically reaffirm in numerous subsequent judgments. In essence, Article 4 of the ECHR, along with its antecedents in Articles 2 and 3, «enshrines one of the basic values of the democratic societies making up the Council of Europe»[29]. Building upon this premise,

[25] *Ibi*, par. 118.
[26] *Ibi*, par. 122.
[27] See in this sense R. J. SCOTT, *Under Color of Law* – Siliadin v France *and the Dynamics of Enslavement in Historical Perspective*, in J. ALLAIN (ed.), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, Oxford, 2012, at 164.
[28] A. NICHOLSON, *Reflections on* Siliadin v. France*: slavery and legal definition*, in *International Journal of Human Rights*, vol. 14, n. 5, 2010, p. 714-715 provides for an extensive terminological reflection, especially concerning the term 'slavery'.
[29] *Ibi*, par. 82.

and also referring to a 1930 ILO Convention article no longer in force[30], the judges draw a compelling inference: if, as consistently asserted by internal case-law, there exist positive obligations for the State arising from Articles 2 and 3 of the ECHR, mandating the State to implement suitable measures to combat the related phenomena, then a similar standard must be upheld with regard to the substance of Article 4. Therefore, «States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice», otherwise, a different behaviour would be «inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective»[31].

Indeed, the case under scrutiny marks the first clear confirmation by the Court of the existence of positive obligations for States in upholding the principles enshrined in Article 4 of the ECHR. Setting aside critiques of a primarily semantic nature, the unanimous decision reached by the ECtHR judges in 2005 garnered a generally favourable reception within legal scholarship. With the growing awareness of the then emerging phenomenon of so-called "modern forms of slavery", the decisive importance of States' positive obligations asserted itself increasingly, as the means through which the above-mentioned terminological distinctions could be effectively applied[32].

[30] This is Article 4 of the ILO Forced Labour Convention No. 29 of 1930, the text of which read: «The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations». This article, along with others, was deleted following the adoption of the Protocol of 2014 to the Forced Labour Convention, 1930, the purpose of which is precisely to take over and expand the positive obligations on the member state necessary to combat the phenomenon of forced labour. See also *supra*, Chapter I, par. 2.1.3.

[31] *Ibi*, par. 89. Positive obligations under the ECHR refer to a state's duty to actively undertake actions that ensure the full realization of a fundamental right, contrasting with the traditional negative obligation, which entails refraining from human rights infringements. The Court's initial mention of positive obligations can be traced back to the 1980s, and since that time, this concept has undergone significant expansion, encompassing both procedural and substantive obligations in contemporary jurisprudence. For a detailed discussion see D. XENOS, *The positive obligations of the state under the European Convention of Human Rights*, London, 2012; for specific analysis of ECtHR related State's positive obligations under labour law see also P. COLLINS, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation*, Oxford, 2022, especially from p. 58. More recently, see V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights – Within and Beyond Boundaries*, Oxford, 2023. See *infra*, Chapter III, par. 3.1.

[32] This is the opinion of V. MANTOUVALOU, *Servitude and forced labour in the 21st century: the human rights of domestic workers*, in *Industrial Law Journal*, vol. 35, n. 4, 2006, at p. 413-414 and of H. CULLEN, Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights*, in *Human Rights Law Review*, vol. 6, n. 3, 2006, at p. 592.

Four years later, the discourse surrounding these legal-terminological distinctions was significantly intensified by the *Rantsev v. Cyprus and Russia* ruling[33], which resulted in the condemnation of both States for breaching Article 4 of the ECHR. The facts saw the 20-year-old applicant's daughter, who went to Cyprus to work as a cabaret artiste but found herself victim of sexual exploitation and wanted therefore to return to Russia. Following investigations by the Cypriot police, it was established that the girl was in possession of a valid working visa and was afterwards taken to a flat from whose balcony she fell. It then turned out that neither the Cypriot nor the Russian authorities conducted sufficiently thorough investigations into the causes of the girl's death.

Rantsev notoriously stands as a seminal case[34], notable for the Court's pivotal ruling that Article 4 of the ECHR extends its reach to also encompass the prohibition of human trafficking, even though this form of exploitation is not explicitly enumerated within the text of the article. Despite this absence, the Court considered it important to emphasise the fact that the Convention «is a living instrument which must be interpreted in the light of present-day conditions»[35]. To that effect, «The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years»[36]. Based on the definition of human trafficking provided by the 2000 Palermo Protocol[37] the Court contended that human trafficking, due to its inherent nature and its intent to exploit, fundamentally relies on the exercise of rights associated with ownership[38], thus bringing trafficking closer to the nature of slavery, prohibited precisely by Article 4 ECHR.

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[33] ECtHR, *Rantsev v. Cyprus and Russia*, Application No. 25965/04, 7 January 2010.

[34] In this regard, see for instance J. ALLAIN, Rantsev v Cyprus and Russia: *The European Court of Human Rights and Trafficking as Slavery*, in *Human Rights Law Review*, vol. 10, n. 3, 2010, at p. 553 and C. LINDNER, *Die Effektivität transnationaler Maßnahmen gegen Menschenhandel in Europa: eine Untersuchung des rechtlichen Vorgehens gegen die moderne Sklaverei in der Europäischen Union und im Europarat*, Tübingen, 2014, from p. 226.

[35] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 277.

[36] *Ibi*, par. 278.

[37] This is specifically the definition contained in one of the three protocols adopted on the 12th of December 2000 in Palermo under the auspices of the United Nations, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3 (a) of which defines "trafficking in persons" as «the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs». See also *supra*, Chapter I, par. 2.3.1.

[38] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 281.

Nonetheless, the judges in the *Rantsev* ruling went further, propounding an innovative framework to assess the intricate landscape of contemporary forms of exploitation. They argued in particular that «in light of present-day conditions, […] it is unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour"»[39].

Through the *Rantsev* decision, the Court not only extended the applicability of Article 4 of the ECHR to encompass situations of human trafficking, a scenario not explicitly mentioned within the article's text, but it also contended that in the specific instance at hand, it was unnecessary to definitively categorise the applicant's daughter as a victim of slavery, servitude, or forced labour – the three scenarios outlined in Article 4. This novel approach of the Court, which cumulates various forms of exploitation, has drawn sharp critique within legal scholarship. It has been argued that by combining trafficking with slavery, the Court demonstrates a lack of substantial engagement with the nuanced legal distinctions that separate these two concepts. Consequently, the Court would have inadvertently «further muddied the waters» of legal differentiations that should be drawn concerning different manifestations of human exploitation, whether it pertains to forced labour, servitude, or slavery[40]. Similarly following the same reasoning, the judges have been accused to have poorly justified the addition of human trafficking to the apparatus of Article 4. Without introducing the characteristic elements of trafficking, the judges referred to it «in an evasive manner», rendering the concept «inoperative and unhelpful»[41]. It has been also suggested that, considering the unique circumstances of the case in question, it was not strictly imperative to invoke the figure of human trafficking. Instead, the Court could have equally concentrated its attention on the pre-existing categories outlined in Article 4, precisely on the basis of the concept of ownership[42].

In requiring Russia and Cyprus to prevent trafficking in human beings, protect actual and potential victims, and prosecute and punish those responsible, the Court set out positive obligations for these States falling within Article 4 ECHR, as it did in the

[39] *Ibi*, par. 282.

[40] J. ALLAIN, Rantsev v Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery*, in *Human Rights Law Review,* vol 10, n. 3, 2010, at p. 546 and 557.

[41] V. STOYANOVA, *Human Trafficking and Slavery Reconsidered – Conceptual Limits and States' Positive Obligations in European Law*, Cambridge, 2017, at 294-295.

[42] *Ibi*, from p. 301.

Siliadin case. However, the Court would not have sufficiently explicated the material scope covered by the article in question precisely by adding the new figure of 'human trafficking' and not characterising it. Therefore, it seems that the legal analysis relating to protective operational measures in the *Rantsev* case «is far from persuasive and leaves many questions unanswered»[43].

In two other decisions, close in time, the Court found a violation of Article 4 in two cases of forced domestic labour: the cases *C.N. and V. v. France*[44] and *C.N. v. United Kingdom*[45] of 2012. In fact, as stated in the first case, the facts have «more in common with the *Siliadin* case than with the *Rantsev* case».[46] In *C.N. and V. v. France*, two underage sisters from Burundi faced forced labour at the French house of a former UNESCO staff member, who enjoyed diplomatic immunity. Immunity was then suspended by the French domestic authorities to initiate investigations that led to a conviction, later withdrawn on appeal. Referring to the ILO Declaration on Fundamental Principles and Rights at Work of 1998[47], the judges observed that the "menace of any penalty" as referred to in the definition of the 1930 Convention «does not need to be in the form of penal sanctions but may also take the form of a loss of rights and privileges»[48], as was the case for the two Burundi girls. Furthermore, with regard to the requirement of voluntariness, the argument was taken up that «Many victims enter forced labour situations initially out of their own choice, albeit through fraud and deception, only to discover later that they are not free to withdraw their labour, owing to legal, physical or psychological coercion»; this is the reason why «Initial consent may be considered irrelevant when deception or fraud has been used to obtain it»[49].

In contrast to the *Rantsev* case, and in an original not to say curious manner, the judges in 2012 seem to have considered it appropriate to draw a definitional distinction between the specific types of exploitation, arguing in particular that «servitude

[43] V. STOYANOVA, *Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the* Rantsev *case*, in *Netherlands Quarterly of Human Rights*, vol. 30, n. 2, 2012, p. 194.

[44] ECtHR, *C.N. and V. v. France*, Application No. 67724/09, 11 October 2012.

[45] ECtHR, *C.N. v. United Kingdom*, Application No. 4239/08, 13 November 2012.

[46] ECtHR, *C.N. and V. v. France*, cit., par. 88.

[47] That is the ILO, *Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 86th Session, Geneva, 18 June 1998. See *supra*, Chapter I, section 2.2.3.

[48] ECtHR, *C.N. and V. v. France*, cit., par. 52.

[49] *Ibidem*.

corresponds to a special type of forced or compulsory labour or, in other words, "aggravated" forced or compulsory labour»[50].

As to the positive obligations, the Court confirmed what already established in *Siliadin*, by condemning France for a violation of Article 4 of the Convention in respect of the first applicant, «as to set in place a legislative and administrative framework to effectively combat servitude and forced labour»[51].

The Court also confirmed its standing in the very approximated case *C.N. v. United Kingdom*, which saw the applicant put in forced domestic labour in London after escaping from Uganda because of sexual harassment. Finding a violation of Article 4 ECHR, the judges interestingly held «that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably required greater firmness in assessing breaches of the fundamental values of democratic societies»[52]. And this statement has to be traced back to the duties that States have in complying with the content of Article 4 ECHR, which, as the Court has repeatedly stated, together with Articles 2 and 3, «enshrines one of the basic values of the democratic societies making up the Council of Europe»[53].

Again, four years later, the Court was faced with a case whose facts were comparable to those seen in the *Rantsev* case. In *L.E. v. Greece*[54], held unanimously that there had been a violation of Article 4 ECHR, following a complaint by a Nigerian national who was forced into prostitution in Greece. The 2016 case against Greece resonates with the previous case from 2010, as both center around the issue of trafficking. In this most recent case, the Court reiterated that trafficking falls within the scope of Article 4, even though it is not explicitly enumerated in the article's text, just as it had been stated previously in *Rantsev*. Nevertheless, it was pointed out that this is only the fifth case in which the Court, since its establishment, has verified a violation of Article 4 ECHR for cases of exploitation by private actors. The European Court thus reaffirmed the demanding positive obligations imposed on States by Article 4, but this could have

[50] ECtHR, *C.N. and V. v. France*, cit., par. 91.
[51] *Ibi*, par. 108.
[52] ECtHR, *C.N. v. United Kingdom*, cit., par. 75.
[53] *Ibi*, par. 65.
[54] ECtHR, *L.E. v. Greece*, Application No. 71545/12, 21 January 2016.

been the occasion for an even greater potential in a more effective protection of exploitation victims[55].

In the subsequent years, the Court's verdicts regarding potential infringements of Article 4 by member States of the Council of Europe have notably increased in frequency and significance. In 2017, in particular, the judges of the European Court had three distinct opportunities to weigh in on these matters. This uptick in the Court's involvement underscores a heightened focus on addressing issues related to Article 4, reflecting a broader commitment to upholding human rights standards across member States. In two of these instances, where applicants raised a variety of allegations, the Court ultimately did not find a breach of Article 4. One notable example is case *Tibet Menteş and Others v. Turkey*[56], where the judges specifically did not identify the crucial element of involuntariness, which, as has been consistently emphasised in all prior cases, is a prerequisite for the classification of forced labour. On the other hand, in case *J. and Others v. Austria*[57], regarding once more a case of a group of trafficked human beings, the Court did not ascertain any breach of Austria's positive procedural obligation under Article 4, which pertains to the duty to conduct a thorough investigation.

Nonetheless, it was in another judgment, also delivered in 2017, that the Court significantly expanded upon its jurisprudence regarding the infringement of States' positive obligations to prevent forced labour. Indeed, the *Chowdury and Others v. Greece*[58] ruling provided further clarification on the scope of Article 4 of the ECHR. The case revolved around 42 Bangladeshi citizens who lacked the necessary work permits and were subjected to forced labour. These workers had been recruited by their employers to harvest strawberries on a farm located in Manolada, a village in the Elis region of Greece, and resided in rudimentary shanties constructed from cardboard, nylon, and bamboo, lacking basic amenities such as toilets or access to running water. Instead of receiving their rightful wages, they were compelled to toil in physically demanding conditions, all while being closely monitored by armed guards, which, on one alarming occasion, as the labourers dared to demand their rightful wages, resorted to firing shots at them. It was

[55] See in this sense V. STOYANOVA, L.E. v. Greece*: Human Trafficking and the Scope of States' Positive Obligations under the ECHR*, in *European Human Rights Law Review*, vol. 3, 2016, at p. 299.

[56] ECtHR, *Tibet Menteş and Others v. Turkey*, Applications nos. 57818/10, 57822/10, 57825/10, 57827/10 and 57829/10, 24 October 2017. See in particular paragraphs 64-69.

[57] ECtHR, *J. and Others v. Austria*, Application no. 58216/12, 17 January 2017. See par. 125.

[58] ECtHR, *Chowdury and Others v. Greece*, Application no. 21884/15, 30 March 2017.

from this episode that the region's public prosecutor began investigating the incident, only to discover that thirty-five workers, who had all been injured during the incident, were victims of human trafficking. Subsequently, the case made its way to the Patras Assize Court, where the prosecutor underscored that exploitation within a labour context constituted a component of the broader concept of exploitation outlined in European and other international legal instruments, serving as a method to perpetrate the crime of human trafficking. He pointed out that both Article 4 of the Convention and Article 22 of the Greek Constitution expressly prohibit forced or compulsory labour[59]. Furthermore, he clarified that the concept of exploitation through labour encompassed any actions that violated labour laws, encompassing aspects such as working hours, working conditions, and workers' insurance[60]. However, the Assize Court acquitted all four defendants of the human trafficking charges citing that the essential element of the offense was not established in this particular instance[61].

Hence, the 42 workers turned to the ECHR complaining that their work in the strawberry fields of Manolada had constituted forced or compulsory labour. They claimed that the State had a positive obligation – which it failed to fulfil – to prevent their subjection to human trafficking, to adopt preventive measures to that effect and to impose sanctions on their employers who, in their view, were guilty of that offence. In sum, they complained that there had been a violation of Article 4, par. 2 of the Convention.

For the purposes of the decision, the Court then also stated and took into account the external intervention of third parties in the judgement. Third-party interveners included a representative group from the Law Faculty of the Swedish University of Lund. The group conducted an analysis of the concept of forced labour within the framework of Article 4 of the Convention and explored how it could be differentiated from servitude in accordance with the Court's established case law. In doing so, it suggested the need for clarification regarding the application of an "impossible or disproportionate burden" test to ascertain the specific factual circumstances that might constitute forced labour. According to its perspective, the Court should evaluate whether there was a threat of punishment and compare the actual working conditions of the applicants with the relevant

[59] It is in particular, Article 22(4) of the Greek constitution which states that «4. Any form of compulsory work is prohibited.» («4. Οποιαδήποτε μορφή αναγκαστικής εργασίας απαγορεύεται»).

[60] ECtHR, *Chowdury and Others v. Greece*, cit., par. 18.

[61] *Ibi*, par. 22.

employment legislation. It posited that the restriction on freedom of movement was a distinguishing factor characterizing servitude but not forced labour. The third-party intervener contended that to determine whether the situation met the threshold for qualifying as servitude, one should consider factors such as whether the applicants were in complete isolation, deprived of autonomy, and subjected to subtle forms of control over various aspects of their lives[62].

Also as a third-party intervener, the International Trade Union Confederation then pointed out that ILO Convention No. 29 encompassed a more comprehensive scope than that of human trafficking and underscored the significance of incorporating specific provisions within national legal systems that consider the principle of a stringent interpretation of criminal law[63].

Finally, there was one last intervention by a third party, namely the NGO Anti-Slavery International, which made it known that the interpretation and categorization of the concepts outlined in Article 4 of the Convention have undergone a transformative process over time. The common thread running through all the different forms of exploitation delineated therein would be the "abuse of vulnerability". From the intervenor's perspective, this concept should serve as the fundamental point of departure for the Court's assessment of the specific form of exploitation under Article 4 of the Convention. The NGO further specified that a situation may arise where surveillance becomes oppressive, on-site accommodation is provided, working hours are excessively long, wages are meagre or remain unpaid, and there are threats of violence in cases of non-cooperation. In such instances, labour is obtained under duress, without the consent of the individuals involved, and thus qualifies as forced labour. Additionally, the intervenor asserted that these elements can also be encompassed within the definition of human trafficking, which, in its view, serves as a means to impose slavery or forced

[62] *Ibi*, par. 78.

[63] *Ibi*, par. 80. Established in 2006, the International Trade Union Confederation (ITUC) is a global labour federation that represents and advocates for the rights and interests of workers and trade unions worldwide. It works on various issues, including labour rights, job security, fair wages, workplace safety, and social protections. The ITUC operates as a federation, with national trade union centers from different countries as its members. It plays an important role in advocating for workers' rights on the international stage and has a strong presence in various international forums, such as the ILO and the United Nations.

labour. It maintained that human trafficking is defined by slavery and forced labour, rather than the other way around[64].

Taking into account all these considerations, it is evident that the judges in the *Chowdury* case did indeed identify a breach of Article 4, par. 2 of the ECHR. In fact, both elements of the "menace of penalty" and "involuntariness", to which the Court always refers from the definition of forced labour contained in ILO Convention No. 29 of 1930, clearly emerge from the finding of facts. Regarding the second element, interestingly, the Court noted that in any case «where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily» and that «the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour»[65].

However, what elevates the significance of this ruling is the extent to which it delineated, with greater clarity and depth than previous judgments, the specific positive obligations incumbent upon States on the basis of this article. The Court asserted that in certain circumstances, the State will be under an obligation to take operational measures to protect actual or potential victims of treatment contrary to Article 4. As with Articles 2 and 3 of the Convention, Article 4 may, in certain circumstances, require a State to take such measures. Article 4 would in particular establish a procedural requirement to probe potential trafficking scenarios. When authorities become aware of such matters, they are mandated to initiate an investigation independently, and this obligation does not hinge upon a formal complaint from the victim or a close relative. To be deemed effective, the investigation must remain impartial and free from any influence from those involved in the incidents. Furthermore, it should have the potential to uncover the identities of the individuals responsible and lead to their prosecution. The Court at this point makes it clear that for the State «This is not an obligation of result, but of means»[66].

[64] *Ibi*, par. 82-84. Anti-Slavery International is one of the world's oldest and most prominent non-governmental organizations dedicated to combating modern slavery and human trafficking. Founded in 1839, it was formerly known as the "Anti-Slavery Society" and played a significant role in the global abolitionist movement, advocating for the end of transatlantic slavery. The organization operates globally, conducting research, raising awareness, advocating for policy changes, and supporting local and grassroots initiatives to combat slavery and protect the rights of vulnerable individuals. Anti-Slavery International collaborates with governments, civil society organizations, and international institutions to develop and implement strategies to prevent slavery, protect victims, and hold perpetrators accountable.

[65] *Ibi*, par. 96.

[66] *Ibi*, par. 86-89. The quotation belongs to paragraph 89.

Schematically, the Court presents three types of positive obligations to which States are bound by Article 4: (i) the obligation to put in place an appropriate legal and regulatory framework; (ii) operational measures; (iii) effectiveness of the investigation and judicial proceedings. It indicates the last two as having the nature of an obligation of means and not of result and finds Greece as having complied with the first positive obligation, but not with the second and third positive procedural obligations[67].

The obligation to put in place an appropriate legal and regulatory framework aims «to penalise and effectively prosecute the practices referred to in Article 4 of the Convention», in order «to prohibit and punish forced or compulsory labour, servitude and slavery»[68]. Operational measures must then aim at the prevention of trafficking on the one hand – «measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage the demand, which promotes all forms of exploitation of persons, including border controls to detect trafficking» – and at the protection of the victims' rights on the other – that is «facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery»[69]. Finally, as regards the third type of positive obligations, the judges state that «for an investigation into exploitation to be effective, it must be capable of leading to the identification and punishment of the individuals responsible»[70].

With regard to the differentiation between forced labour and other forms of exploitation, an aspect that has started to emerge since the *Rantsev* decision, the Court seems both wanting to distinguish between these figures and not. Indeed, the inseparable link between forced labour and human trafficking – as we have seen, a figure of exploitation not explicitly provided for in Article 4 but added by the Court also in *Rantsev* – is widely emphasised: «exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights the intrinsic relationship between forced or compulsory labour and human trafficking»[71]. On the other hand, however, only slightly further on, a clear line is then drawn between forced labour and servitude, excluding that the latter is applicable to the present case: «the fundamental distinguishing feature between servitude and forced or compulsory labour within the

[67] See *ibi*, par. 105-116 and par. 127.
[68] *Ibi*, par. 105.
[69] *Ibi*, par. 110.
[70] *Ibi*, par. 116.
[71] ECtHR, *Chowdury and Others v. Greece*, cit., par. 93.

meaning of Article 4 of the Convention lies in the victim's feeling that his or her condition is permanent, and that the situation is unlikely to change»[72].

The *Chowdury* ruling from the ECtHR has garnered extensive attention and analysis within the international legal doctrine. One of the significant aspects that has drawn considerable interest is the groundbreaking application of the prohibition of forced labour, as articulated in paragraph two of Article 4 of the ECHR, to situations of labour exploitation in agriculture. Prior to this, violations committed by private individuals had primarily been established in the context of domestic work and prostitution, marking this decision as a pivotal moment in expanding the scope of its application. The doctrine has generally welcomed the ruling with a positive reception. However, it has not been without its fair share of critical and negative assessments, primarily revolving around the intricate interplay between forced labour and human trafficking.

In fact, a commentary by a member of the Lund University group that intervened as a third party in the judgement was published immediately after the ruling and accentuated the need for «more conceptual clarity» on the part of the Court, «by grappling with the modern meaning of the concepts explicit in the text of Article 4», and «not rushing to use the concept of human trafficking»[73].

In a parallel vein it has been observed that the Court employed the 'disproportionate burden' test, initially introduced in *Van der Mussele*: if the service or work demanded is excessive or disproportionate compared to the benefits it yields, it must be considered as not voluntarily accepted and, if conducted even 'under the menace of any penalty', constitutes forced labour. This test would play a decisive role in providing a more defined demarcation between bad labour practices, instances of exploitation and forced labour practices[74]. Overall, the strong merits of the ruling have been recognised in having specified the content of the positive obligations arising from Article 4 ECHR and in having better clarified the concept of forced labour, especially in its element of

[72] *Ibi*, par. 99.

[73] V. STOYANOVA, *Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labour & Human Traficking under Article 4 of the ECHR*, in *EJIL:Talk!*, 26 April 2017.

[74] C. RIJKEN, *When Bad Labour Conditions Become Exploitation – Lessons Learnt from the Chowdury Case*, in C. RIJKEN, T. DE LANGE (ed.), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, Amsterdam, 2018, at p. 196.

voluntariness, which can thus be assessed in light of the harshness of the working conditions of the victims[75].

As highlighted in the discussions following the *Rantsev* ruling, a pivotal aspect that continues to shape a significant portion of the interpretation of the text of Article 4 of the ECHR, even after the 2017 judgment, is the question of whether to regard the elements present in the article as independent or interconnected. Compared to other judgments, *Chowdury* would be characterised precisely by the fact that the judges placed the case of human trafficking and forced labour in close relation to each other, however without clarifying how and to what extent the applicants' working conditions amounted to these legal concepts[76]. Not only, considering the ongoing dearth of legal precedents on this issue and the increasing development of trafficking and forced labour, this «lack of reasoning» on the notion of forced labour when related to migrant workers might extend its repercussions beyond the specific case, potentially affecting the seminal significance of the ruling[77].

Yet, the observation made by legal scholars to be emphasised is the one that warns against an even more severe risk. It seems, in fact, that if the path of merging the various forms of exploitation outlined in Article 4 with human trafficking were to continue, there would be a significant risk of excluding certain victims of exploitation from the scope of the same article. According to some scholars, there would be room to contemplate the generalisation of equating trafficking with forced labour. It would be plausible that in situations unrelated to labour exploitation or marked by more extreme forms of exploitation (such as involvement in armed conflicts or the forced sale of human organs), the European Court might opt for an alternative framework and potentially categorize certain violations under the prohibition of slavery and servitude. In the same way that trafficking can manifest in cases not linked to the labour exploitation of victims, the concept of forced labour also possesses an independent dimension. This would be evident in the many individuals who, while moving autonomously, still find themselves

[75] V. STOYANOVA, *Sweet Taste with Bitter Roots: Forced Labour and* Chowdury and Others v Greece, in *European Human Rights Law Review*, vol. 1, 2018, at p. 75.

[76] In this sense see G. ASTA, *The* Chowdury *Case before the European Court of Human Rights: A Shy Landmark Judgment on Forced Labour and Human Trafficking*, in *Studi sull'integrazione europea*, vol. 13, 2018, at p. 199. In particular, the Court asserted that «The facts of the case, and in particular the applicants' working conditions, […] clearly demonstrate the existence of human trafficking and forced labour» (ECtHR, *Chowdury and Others v. Greece*, cit., par. 100).

[77] G. ASTA, *The* Chowdury *Case before the European Court of Human Rights*, op cit., at 210-212.

susceptible to labour exploitation. In this sense, there is hope for the emergence of a progressive and alternative reading of Art. 4(2), which may disregard the connection to trafficking in certain cases[78].

In the same line, there has been warning of the risks associated with the strictly combined reading of the two phenomena of forced labour and human trafficking, as in a hendiadys. Indeed, it would be precisely the reference to trafficking that would limit the scope of application of Article 4 ECHR to a narrow circle of subjects, neglecting many articulations of a problem that has much broader dimensions. Leaving aside the condition of migrant workers, the notion of forced labour would also include those situations in which the worker's consent to the illicit service is vitiated by the more general context in which the worker is placed, in the presence of a particularly uncomfortable environment. It would therefore be desirable for the Court to open up new avenues of interpretation, aimed at considering those situations in which the lack of valid alternatives, in a context of serious unemployment and poverty, leaves no room for a real possibility of choice for the victim, recognising also in these cases the requirement of the lack of willingness to perform the work, typical of the conduct referred to in Article 4 ECHR[79].

The tendency of the two cases under consideration to overlap would also appear problematic with respect to the assessment of the fulfilment of positive obligations pending upon States. In fact, it appeared in the *Chowdury* ruling that Greece had a sufficient legislative framework to combat trafficking in human beings, but the assessment of compliance with those positive obligations could have been entirely different, had the Court focused instead on the sole case of forced labour, for which the Court itself acknowledged that Greece had not provided for any specific criminalisation rules[80].

A final group of scholars then observed that the Court with the *Chowdury* pronouncement missed the opportunity to interpret the phenomena in question in the light of further relevant and then novel international legislative instruments on forced labour.

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[78] D. RUSSO, *Lo sfruttamento del lavoro negli Stati membri del Consiglio d'Europa: una riflessione a margine del caso* Chowdury, in *Rivista di Diritto Internazionale*, vol. 3, 2017, at p. 839-840.

[79] E. CORCIONE, *Nuove forme di schiavitù al vaglio della Corte europea dei diritti umani: lo sfruttamento dei braccianti nel caso* Chowdury, in *Diritti Umani e Diritto Internazionale*, vol. 11, n. 2, 2017, at p. 521.

[80] *Ibidem*, at p. 520. The court found in particular that «The [Greek] Criminal Code does not contain specific provisions on forced labour» (ECtHR, *Chowdury and Others v. Greece*, cit., par. 35).

The reference only to ILO Conventions No. 29 and No. 105 on Forced Labour would not be sufficient to exhaust the scope of international law relevant to *subiecta materia*: a reference to the Protocol to the Forced Labour Convention, adopted by the ILO in 2014 and then recently entered into force, as well as to Recommendation No. 203 on Forced Labour[81] containing complementary measures adopted at the same time as the Protocol, would have been instead very useful. The Recommendation invites States, *inter alia*, to introduce transparent forms of contractual agreements on terms and conditions of employment, to eliminate labour costs for workers (para. 8), to protect them from intimidation or reprisals by employers (para. 9), and to pay them unpaid wages (para. 12(b)). The reference to these provisions would in fact have strengthened the Court's reasoning. Their non-use in the context of a systemic interpretation could not be explained by the circumstance of Greece's non-ratification of the Protocol, given the obligation of this State, a member of the ILO, to submit to the supervisory procedures of this international organisation, which also apply in the case of non-ratified conventions and acts of soft law such as the recommendations adopted by its plenary body. It is also in light of these considerations that an evolutionary interpretation can be reached, taking into account the progressive development of customary law on the subject, in light of the extraordinary spread, diversification and seriousness of contemporary forms of slavery and servitude[82].

Labour law scholars are also of the same opinion and argue that in this case it would have been necessary to emphasise the so-called labour rights approach, that is the more comprehensive assessment of laws, practices and regulatory gaps that underlie vulnerability to forced labour. This approach implies a development of the legislative protections for workers in the market consistent with ILO Protocol No. 29 of 2014, as well as truly attentive and sensitive to the positive obligations given by the 1930 Convention. The minimum guarantees granted to workers would thus be confirmed as a minimum of economic and normative treatment to which the protection of occupational

[81] C. DI TURI, *Ancora sul caso* Chowdury*: quale tutela per i diritti dei lavoratori migranti irregolari vittime di sfruttamento? L'Art. 4 CEDU e le forme contemporanee di schiavitù*, in *La Comunità Internazionale*, vol. 4, 2017, at p. 579. See also *supra*, Chapter I, par. 2.1.3.

[82] C. DI TURI, *Ancora sul caso* Chowdury, op. cit., at p. 581. On this issue, see also *infra*, Chapter III, par. 2.1.

health and safety is also linked in accordance with the gradual extension of standards by the ILO in the logic of supporting so-called decent work[83].

Due to the new perspectives opened by the pronouncement and the wide attention aroused by internationalist doctrine, it can undoubtedly be said that the 2017 *Chowdury and Others v. Greece* ruling has marked an important point within the interpretative path of Article 4 ECHR by the judges of the European Court of Human Rights. And yet one cannot help but consider that, as we have seen, such an interpretation could develop further to mitigate the risk of excluding potential victims to whom the article's very text seems to address. From the comments of the doctrine observed, it appears that is possible to avoid this risk only by embracing a method of distinct analysis of exploitation phenomena in their individuality, abstaining from conflating them, and assessing, on a case-by-case basis, which international legal standards are applicable.

Two years later, Greece was convicted again of violating its positive obligations under Article 4 of the Convention. Three Russian applicants alleged that they had been compelled to engage in prostitution in Greece. They contended that the Greek authorities had not met their responsibilities to enact and prosecute laws concerning human trafficking. Additionally, they raised concerns about deficiencies in the investigative and judicial processes. The Court, in a unanimous decision, *T.I. and Others v. Greece*[84], found Greece in breach of Article 4 par. 2, applying the overarching principles established in prior cases like *Rantsev*, *L.E v. Greece*, and *Chowdury and others v. Greece*[85]. However, the text of the judgment clearly indicates that the Court's primary focus was on the issue of human trafficking, with limited consideration given to forced labour.

With regard to the positive obligations, as in *Chowdury*, the Court reiterated the three obligations under Article 4 applicable to ECHR member States: the obligation to put in place an appropriate legal and regulatory framework, to take operational measures and the obligation of the effectiveness' investigation and judicial proceedings. Unlike in *Chowdury*, this time the Court found that Greece did not put in place a suitable legal and regulatory framework to ensure the prevention and prosecution of human trafficking in an effective and efficient manner. The national courts applied the provisions of the

[83] L. CALAFÀ, *Focus Europa. La lotta al lavoro forzato e obbligatorio. Riflessioni sul lavoro indecente dopo la pronuncia Chowdury*, in *Lavoro e Diritto*, n. 3, 2019, at p. 505-506.
[84] ECtHR, *T.I. and Others v. Greece*, Application No. 40311/10, 18 July 2019.
[85] *Ibi*, par. 108.

Criminal Code as it stood prior to the 2002 amendments, in which human trafficking was not delineated as a distinct criminal offense, and this allowed the national courts to declare the proceedings as time barred[86]. As for the operational measures, on the contrary, the Court did not identify a violation of the positive obligation to implement appropriate operational measures to safeguard the applicants. It determined that the applicants had been acknowledged as victims of human trafficking shortly after they reported to the police. Consequently, the enforcement of their expulsion orders was halted, and the first applicant was accommodated in a residential facility[87]. Finally, the police inquiries and legal proceedings were not conducted with the requisite diligence. The criminal proceedings concerning the applicants' exploitation extended over multiple years, and some of the applicants did not experience an adequate investigation into the search for one of the key suspects. Furthermore, none of the applicants was adequately engaged in the visa inquiry[88].

The European Court will further analyse the violation of Art. 4 in the context of forced prostitution in the case of *S.M. v. Croatia*[89], which led also to a pronunciation by the Grand Chamber in 2020[90]. The judgment pertains to a young Croatian woman's case, who was enticed on Facebook by T.M., a former Croatian policeman with a prior criminal record for rape and involvement in prostitution. In the second instance trial involving T.M., Croatian judges had decided to acquit him, citing insufficient evidence of victim coercion. Upon recognising that this outcome was a consequence of several flaws in the investigative procedure, the Grand Chamber found Croatia responsible for violating the standard of protection outlined in Article 4 of the ECHR, and in particular, referring to the well-established positive obligations entailed in the Article, for violating the States' positive procedural obligation to investigate[91]. The Grand Chamber judgment echoed a similar stance to that of the Chamber, which had previously already condemned Croatian authorities for violating the prohibition of slavery, servitude, and forced labour as stipulated in Article 4 of the ECHR, albeit mostly by referring to its own previous case

[86] *Ibi*, par. 141-146.
[87] *Ibi*, par. 147-150.
[88] *Ibi*, par. 153-168.
[89] ECtHR, *S.M. v Croatia*, Application No. 60561/14, 19 July 2018.
[90] ECtHR, Grand Chamber, *S.M. v Croatia*, Application No. 60561/14, 25 June 2020.
[91] Ibi, par 306 ff.

law, and in particular to the *Rantsev* pronouncement, the most akin *ratione materiae*[92]. In fact, the Court literally repeated the words used in the 2010 ruling, asserting the fact that «There can be no doubt that trafficking and exploitation of prostitution threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention» and, further, that «In view of its obligation to interpret the Convention in the light of present-day conditions, the Court considers it unnecessary to identify whether the treatment of which the applicant complained constituted "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself as well as exploitation of prostitution, […] fall within the scope of Article 4 of the Convention»[93].

The Croatian Government's referral to the Grand Chamber provided an opportunity to rectify several gaps in interpretation that had already emerged prior to the first stage of the proceedings. Legal clarifications were also necessary in light of certain peculiarities presented by the case, including the absence of transnational elements. The Grand Chamber's statement aligns with the previous Chamber's findings, indicating that human trafficking only partially coincides with the offenses of slavery, servitude, and forced labour, and therefore naturally falls within the purview of Article 4 of the ECHR[94]. However, in contrast to prior statements, this perspective is enhanced and expanded. Most notably, the Court maintains a concept of human trafficking that does nott require a mandatory transnational aspect[95]. Moreover, and of even greater significance for our discussion, it establishes that instances of coerced prostitution can be considered a type of forced or compulsory labour according to Article 4, par. 2 ECHR, regardless, in the given case, of whether there is a specific connection with human trafficking: «The notion of "forced or compulsory labour" under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context»[96].

The Court reaches this conclusion by aligning itself with the practices of the ILO, which has gradually developed a comprehensive concept of forced labour. This broader

[92] See ECtHR, *S.M. v Croatia*, cit., par. 51 ff.
[93] *Ibi*, par. 54, as well as ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 282.
[94] ECtHR, Grand Chamber, *S.M. v Croatia*, cit., par. 292.
[95] *Ibi*, par. 294 ff.
[96] *Ibi*, par. 303.

perspective encompasses instances of severe exploitation that extend beyond mere violations of fundamental employment conditions, rendering the legality or illegality of the work irrelevant. What matters for interpretation is solely the relationship between the worker and the exploiter. Consequently, even activities like prostitution, though often considered illegal in most member States of the ECHR, can be seen as a form of labour carried out "under the menace of any penalty" and "not voluntarily"[97].

The Grand Chamber's approach would thus mark a welcome 're-expansion' not only of the prohibition of forced labour, but of all the prohibitions expressly provided for in Article 4 ECHR. In this respect, the Grand Chamber thus has the merit of bringing certain widespread contemporary forms of slavery back within the model of severity and gradualness of Article 4 ECHR, giving them a broader meaning in view of the current social order. Such an approach, lacking at the time in the *Rantsev* judgment, would enhance existing legal categories, thus contributing to the interpretation of the Convention 'as a living instrument'[98]. However, some scholars who commented on the ruling believe that there are still definitional and material scope uncertainties[99].

One year later, in the *V.C.L. and A.N. v. the United Kingdom*[100] case, the Court dealt with the case of two minors from Vietnam who were found by the police working as gardeners in cannabis facilities and subsequently faced criminal charges for their participation in the cultivation of a controlled substance. The Court was called upon to evaluate whether the prosecution of individuals who might be victims of trafficking could implicate a State's accountability under the European Convention on Human Rights.

The Court recognised that victims should not be held liable for unlawful acts committed as a direct consequence of their trafficking and clarified the scope of Article 4 ECHR as regards the affirmative responsibilities placed on States to promptly identify and then safeguard individuals who may be trafficking victims. The Court emphasised

[97] *Ibi*, par. 141-151.

[98] See in this sense F. TAMMONE, *Tratta di esseri umani e sfruttamento della prostituzione quali forme contemporanee di schiavismo: la pronuncia della Grande Camera nel caso* S.M., in *Diritti Umani e Diritto Internazionale*, vol. 15, n. 1, 2021, at p. 230.

[99] In this respect K. HUGHES, *Human Trafficking,* SM v Croatia *and the Conceptual Evolution of Article 4 ECHR*, in *The Modern Law Review*, vol. 85, n. 4, 2022, at p. 1061 and G. KANE, *Building a House upon Sand? Human Trafficking, Forced Labor, and Exploitation of Prostitution in* S.M. v. Croatia, in *International Labor Rights Case Law*, vol. 7, 2021, at 78-79.

[100] ECtHR, *V.C.L. and A.N. v. the United Kingdom*, Applications nos. 77587/12 and 74603/12, 16 February 2021. For an initial commentary see G. KANE, V.C.L. and A.N. v. the United Kingdom*: Bridging the Gap between Children's Rights and Anti-trafficking Law under the ECHR?,* in *International Labor Rights Case Law*, vol. 7, n. 3, 2021, p. 307-312.

that the formal identification determinations made by national competent authorities play a crucial role in ensuring justice for victims of trafficking, with domestic courts also having a complementary role in shielding these victims from unjust prosecutions. Therefore, the Court found a violation of Article 4, and among the three related positive obligations, that the United Kingdom didn't fulfil its duty to take operational measures to protect the applicants as recognised victims of trafficking[101]. Furthermore, it has been acknowledged that the failure to recognise an individual as a trafficking victim can substantially affect the fairness of the trial[102].

Nevertheless, when it comes to differentiating between the various forms of exploitation, it appears that the lines became blurred once more in this instance. Referring to *Rantsev*, the Court stated that since «It is now well established that both national and transnational trafficking in human beings […] falls within the scope of Article 4 of the Convention, […] it is not necessary to identify whether the treatment of which the applicant complains constitutes "slavery", "servitude" or "forced [or] compulsory labour"»[103]. Possibly also due to the specific factors to consider in this case – the young age of the victims and the unlawful activities they were compelled into – it seems in fact that in this case there has been a regression in clarifying individual cases falling under Article 4, if compared to the results reached by the Grand Chamber in the case of *S.M. v. Croatia*.

One final case reviewed by the European Court of Human Rights regarding breaches of Article 4 ECHR warrants a closer examination, as it might offer valuable insights for our purposes. This is the *Zoletic and Others v. Azerbaijan* case of 2021[104]. As to the facts, the case revolved around the grievance raised by thirty-three individuals from Bosnia and Herzegovina who were enlisted in Azerbaijan for construction work. They claimed that while in Azerbaijan, they were subjected to forced labour as they lacked work permits, had their passports confiscated, endured unsanitary living conditions, and

[101] *Ibi*, par. 173 and 182. For a more in-depth discussion of this aspect see P. J. SIEGLE, *The Non-Punishment Principle as Cornerstone of a Robust European Modern Slavery Law Framework*, in *European criminal law review*, vol. 12 n. 2, 2022, p.178-189.

[102] *Ibi*, par. 184 ff.

[103] *Ibi*, par. 148.

[104] ECtHR, *Zoletic and Others v. Azerbaijan*, Application no. 20116/12, 7 October 2021. The judgment, which became final in January 2022, seems to have not yet been commented on in depth by international law scholars. For an introductory commentary, see in any case E. ADOMAKO, *A Precedent That Finally Clarifies the Definitional Ambiguities Surrounding Forced Labor and Human Trafficking*, in *International Labor Rights Case Law*, vol. 8, n. 3, 2022, p. 284-287.

were denied their wages. On the legal level the case brought before the Court pertained to the purported inadequacy of the respondent State's investigation into the applicants' claims of being subjected to both forced labour and human trafficking. Therefore, the violation of the relevant positive procedural obligation by Azerbaijan to conduct an effective investigation into the applicants' complaints was verified. The authorities' neglect in safeguarding the applicants' rights resulted eventually in a breach of Article 4, par. 2 ECHR.

In finding this violation, the Court expressly refers to the distinction made by the Grand Chamber in 2020 in *S.M. v. Croatia* between forced labour and human trafficking. For the first time in a restricted chamber, the autonomy of the figure of forced labour has been thus expressly emphasised: «The notion of "forced or compulsory labour" under Article 4 of the Convention aims to protect against instances of serious exploitation, irrespective of whether, in the particular circumstances of a case, they are related to the specific human trafficking context»[105].

The principles expounded in the *Chowdury* case concerning the voluntariness or lack thereof in the provided labour are subsequently addressed, namely that «where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily» and, even further, that the «prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour»[106]. As to the notion of "penalty", this «to be understood in the broad sense», since it «may go as far as physical violence or restraint, but it can also take subtler forms, of a psychological nature»[107].

Considering all the factors in conjunction – encompassing the aspects of 'penalty' and voluntariness, which once more stem from the 1930 ILO Forced Labour Convention's definition – the Court ultimately reaches the conclusion that the allegations «amounted to an arguable claim that the applicants were subjected to work or service which was exacted from them under the menace of penalty and for which they had not offered themselves voluntarily. There was accordingly an arguable claim of "forced or compulsory labour" within the meaning of Article 4, par. 2 of the Convention»[108].

[105] ECtHR, *Zoletic and Others v. Azerbaijan*, cit., par. 148.
[106] *Ibi*, par. 149.
[107] *Ibi*, par. 151.
[108] *Ibi*, par. 167.

This recent ruling from the European Court of Human Rights appears to embrace the broadest interpretations of the components found in Article 4, par. 2 of the ECHR. It marks a significant shift where forced labour is recognised as an independent and distinct issue from human trafficking, a concept that was not entirely developed in the *Chowdury* case. What's even more noteworthy is that the two fundamental elements of forced labour, consistently considered by the Court since its initial judgments on the matter, are accepted in their most comprehensive interpretation, as demonstrated earlier. This interpretation appears to address all the concerns raised by international legal scholars in response to the 2017 *Chowdury* ruling, particularly the risk of excluding potential victims from the scope of the article. Indeed, by separating forced labour from human trafficking, the Court appears to be better equipped to examine the intricacies of each individual case, thus allowing for a more nuanced analysis of the specific circumstances. It seems reasonable to hold the expectation that the Court will persist in considering this distinctive approach in forthcoming judgements concerning violations of Article 4, par. 2 that involve allegations of forced labour.

2.2 The distinctive forced labour related case law of the Inter-American Court of Human Rights

As we recalled in the first chapter, the American Convention on Human Rights (ACHR) similarly prohibits slavery and forced labour, specifically within its article 6. Concerning forced labour, the second paragraph of the same Article 6, like in the European Convention, refrains from providing a definition. Instead, it delineates what does not qualify as forced labour through a list of circumstances. Consequently, to ascertain whether a particular conduct amounts to a form of forced or compulsory labour, the Inter-American Court of Human Rights (IACHR) has often resorted to referencing other international instruments, as its practice reveals[109].

Notably, among the States under its jurisdiction, the Inter-American Court identified only in two occasions a breach of Article 6, par. 2 of the Convention for forced labour instances. In the first of these rulings, the 2006 case of the *Ituango Massacres v.*

[109] See *supra*, Chapter I, par. 2.3.2.

Colombia[110], the IACHR examined a situation in which, after committing a massacre against the population, a paramilitary group forced a group of peasants to collect and move stolen horses, mules and cattle for approximately 17 days. In this case, it was established that the Colombian military authorities were not only complicit in the tragic massacre but were also aware of the cattle theft. Furthermore, they not only failed to prevent the paramilitaries from coercing the villagers into forced labour but also actively facilitated its imposition. Among the many additional violations detected, the IACHR therefore concluded that «the State violated the right not to be required to perform forced or compulsory labour, enshrined in Article 6(2) (Freedom from Slavery) of the Convention»[111].

To examine the scope of Article 6, par. 2, the Court referred to «other international treaties than the American Convention, such as the ILO Convention No. 29 concerning Forced Labour», in order to «interpret its provisions in keeping with the evolution of the inter-American system, taking into consideration the developments on this issue in international human rights law»[112].

According to that definition, the Court devised a three-element test, the first two elements of which are common to the assessments made by the ECHR, precisely because they are deduced from the 1930 ILO Convention No. 29. Hence, in the opinion of the Inter-American Court to constitute a violation of the Convention, the work or service must have been extracted "under the menace of penalty", carried out involuntarily, and attributed to the State. According to the Court, the term "menace of penalty" is construed broadly but should be interpreted as «a real and actual presence of a threat». The forms and degrees of the threat may vary depending on the circumstances, but, as exemplified in the present case, it is understood that the most extreme threat encompasses «coercion, physical violence, isolation of confinement, or the threat to kill the victim of his next of kin»[113].

[110] IACHR, *Case of the Ituango Massacres v. Colombia*, 1 July 2006, Series C No. 148. For a careful analysis of the case, refer to M. FERIA TINTA, *The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child – Protecting the Most Vulnerable at the Edge*, Leiden, 2008, Chapter V, especially from page 250.

[111] IACHR, *Case of the Ituango Massacres vs Colombia*, cit., Resolution point 4 (p. 149).

[112] *Ibi*, par. 157.

[113] *Ibi*, par. 161-163.

As for the unwillingness element, the Court explains that this «consists in the absence of consent or free choice when the situation of forced labour begins or continues», which can arise due to various factors, such as «illegal deprivation of liberty, deception or psychological coercion», which anyway do not matter for the purpose of demonstration[114].

Finally, the last condition requested by the IACHR for forced labour to be detected lies in the possibility of attributing the alleged violation to State agents. This implies that it is necessary to establish the involvement or tacit approval of State agents. In the facts, as ascertained by the judges, although forced labour was mainly orchestrated by a paramilitary group, members of the army were directly engaged in the operation. They imposed a curfew to aid the paramilitary group in stealing livestock and accepted stolen livestock from the herders. For the Court, these factors clearly indicated their active participation in the operation[115].

Ten years after the *Ituango Massacres* case the Inter-American Court of Human Rights issued a new ruling condemning Brazil for the violation of the right not to be subjected to slavery, forced labour and also trafficking established in Article 6 of the ACHR in the case of the *Hacienda Brasil Verde Workers v. Brazil*[116]. The facts pertaining to the ruling, as reconstructed by the judges, concern hundreds of workers, primarily men aged between 15 and 40 hailing from low-income communities, which were recruited to work at Hacienda Brasil Verde with the expectation of receiving decent wages. Upon their arrival at the *hacienda*, these workers were compelled to surrender their work certificates to the manager and sign blank documents. They found themselves subjected to excessively long working hours, threats, and violence, as well as forced to endure deplorable living conditions, all while being constantly watched over by armed guards. These dire circumstances, coupled with the non-payment of wages and the remote location of the ranch, trapped the labourers, preventing them from returning home[117].

[114] *Ibi*, par. 164-165.

[115] *Ibi*, par. 166-168. On the assessment of the three elements addressed by the Court in the *Ituango Massacres* ruling to identify State's responsibility for forced labour see L. HENNEBEL, H. TIGROUDJA, *The American Convention on Human Rights: A Commentary*, cit., at p. 267.

[116] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, 20 October 2016, Series C No. 318.

[117] *Ibi*, par. 108-188.

Complaints from workers who managed to escape from the *hacienda* triggered a series of administrative inspections and police investigations between 1989 and 2000. During this period, approximately 130 men were rescued from the ranch. However, efforts to bring about lasting improvements in conditions at the *hacienda* proved largely ineffective, including court proceedings that faltered on procedural grounds[118].

In response to these ongoing challenges, two non-governmental organisations, the Brazilian Pastoral Land Commission and the Center for Justice and International Law, initiated international proceedings in 2013 within the Organization of American States. Following the Organization's standard procedures, the *Hacienda Brasil Verde* case was initially examined by the Inter-American Commission on Human Rights. In its Merits Report, the Commission held Brazil accountable for a situation of forced labour and debt-based servitude akin to slavery and presented several corresponding recommendations. Unhappy with Brazil's response, the Commission escalated the case in March 2015 to the Inter-American Court of Human Rights, which a year and a half later handed down the sentence[119].

To establish the legal framework from which it derives its conclusions, the Court makes reference to both the relevant ECHR jurisprudence on the subject[120], and to the Bellagio Harvard Guideline No. 2, as regards the concept of ownership and the related powers attaching to it[121]. But, even more relevantly, the Inter-American Court recalls Convention No. 29 on forced labour to reiterate what it had already observed in the *Ituango* case ten years earlier concerning the elements of the "menace of penalty" and the "unwillingness". The first element occurs therefore when there is a «real and actual presence of intimidation that can assume multiple forms and degrees», while the second

[118] *Ibi*, par. 192-207.

[119] For the retracing of the legal course that led to the 2016 ruling, please refer to the valuable reconstruction of N. POSENATO, *The UNDROP and the case law of the Inter-American human rights system – Potential impacts and insights from Hacienda Brasil Verde case*, in M. ALABRESE, A. BESSA, M. BRUNORI, P. F. GIUGGIOLI (ed.), *The United Nations' Declaration on Peasants' Rights*, London, 2022, p. 238 ff. The volume analyses in particular all facets of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted with Resolution 73/165, adopted in 2018 by the UN General Assembly (A/RES/73/165), a human rights declaration of universal understanding, with the aim to reaffirm and protect the rights of peasants and rural workers.

[120] The Court refers in particular to the *Siliadin* case, at par. 263 ff., and the *Rantsev* case, at par. 287 ff. See *supra*, par. 2.1.

[121] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 271. See also *supra*, Chapter I, par. 3.2.

consists in the «absence of consent or of free choice at the time of beginning or continuing the situation of forced labour»[122].

Nonetheless, there is a noteworthy departure concerning the third element that the Court, a decade earlier, had deemed a prerequisite for establishing State responsibility in cases involving the prohibition of forced labour. In the *Hacienda Brasil Verde* case, the Court held that attributing the conduct under consideration to State agents, either due to their direct involvement in the events or their acquiescence to them, needed no longer to be deemed a mandatory requirement for establishing liability, at least when «the alleged violation refers to the obligation to guarantee and to prevent harm to a human right established in the American Convention; thus, it is not necessary that the violation could be attributed to State agents in order to constitute forced labour»[123].

With regard to this last aspect, the court proceeds to delineate the State's obligations regarding adherence to the provisions of Article 6 ACHR. Therefore, it is not sufficient for States to comply with the negative obligation to refrain from acting in a way that could be considered as enslaving or forcing someone to servitude or to work, but the State has to «adopt positive measures determined on the basis of the specific needs for protection of the subject of law»[124]. In particular, for the content of Article 6 to be effectively respected and put into practice, it must be read in conjunction with Article 1 of the same Convention[125], from which it follows that States are required «to adopt all appropriate measures to end such practices and prevent violations of the right not to be subjected to such conditions pursuant to the obligation to ensure the free and full exercise of their rights to every person subject to their jurisdiction»[126]. What is more, the Court fleshes out the obligations that States must comply with to prevent and investigate possible situations of slavery, servitude and forced labour, indicating a list of five measures to be taken to this end: «(i) open, ex officio and immediately, an effective investigation that permits the identification, prosecution and punishment of those

[122] *Ibi*, par. 293.
[123] *Ibidem*.
[124] *Ibi*, par. 316.
[125] Article 1 of the Convention reads: «Obligation to Respect Rights – 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, "person" means every human being».
[126] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 317.

responsible, when a report has been filed or there is justified reason to believe that persons subject to their jurisdiction are subjected to one of the offenses established in Article 6(1) and 6(2) of the Convention; (ii) eliminate any laws that legalize or tolerate slavery and servitude; (iii) define such offenses under criminal law, with severe penalties; (iv) conduct inspections or other measures to detect such practices, and (v) adopt measure of protection and assistance for the victims»[127].

One noteworthy aspect that sets the 2016 *Hacienda Brasil Verde* judgment by the Inter-American Court of Human Rights apart is the repeated reference by the judges in the text to the socio-economic context in which the events under consideration transpired. As also amply highlighted in the Court's Vice-President separate opinion, judge Ferrer Mac-Gregor Poisot, it is the first time for the Court that «poverty has been considered a component of the prohibition of discrimination based on "economic status"», within a ruling on "slave labour"[128]. The Court affirms that «Despite the legal abolition, poverty and the concentration of land ownership were some of the structural causes that led to the continuation of slave labour in Brazil»[129]. Thus, the judges emphasise the urgency for the State to take the listed measures due to the fact that there is an increasing count of individuals liberated by authorities in Brazil from slavery, trafficking, and forced labour and to the fact that «the change in the perception of these phenomena and their occurrence "in the last links of the supply chains of a globalized economy"»[130]. Not only, the Court directly attributes the non-compliance of the State with Article 6 obligations to these factors. Given that these labourers originated from the nation's most impoverished areas, characterised by minimal human development and limited job opportunities, and they possessed low levels of literacy and education, they found themselves in a vulnerable position that made them susceptible to recruitment through deceitful assurances. This precarious circumstance, which posed an imminent threat to a particular group of individuals sharing common traits and hailing from the same regions of the country, had deep historical origins and had been acknowledged by the Brazilian Government before

[127] *Ibi*, par. 319.

[128] See IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, 20 October 2016, par. 2.

[129] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 111. As to the beginning stages of the abolition of legal slavery in Brazil, see *supra*, Chapter I, par. 1, regarding the *Lei Áurea* ("Golden Law"), of 13 May 1888.

[130] *Ibi*, par. 318. The Court's citation comes from Professor Allain's expert opinion, who provided evidence during the public hearing, from which the Court benefited from in rendering its judgment.

the incidents, explicitly recognising the presence of "slave labour" within the nation[131]. According to the judges, these are the conditions that lead workers to voluntarily accept such working conditions, a fact from which only one conclusion can be drawn: «Poverty, therefore, is the main factor behind modern-day slavery in Brazil, since it increases the vulnerability of a significant portion of the population, making them easy prey for enticers of slave labour»[132]. In light of these considerations, Brazil failed to take into account the «vulnerability» of the workers «owing to discrimination based on their economic status» and to the workers' detriment «This constitutes a violation of Article 6(1) of the American Convention, in relation to Article 1(1) ACHR»[133].

Subsequently in the judgment, the Court delves deeper into the dimension of structural and historical discrimination that would characterise the actions of the Brazilian authorities. The judges noted that the absence of proper scrutiny and penalties for the act of subjecting individuals to conditions akin to slavery was tied to a prejudiced notion that it was customary for labourers on the plantations in the northern and north-eastern regions of Brazil to endure such conditions. This prejudice exhibited discrimination against the

[131] The notion of "trabalho escravo" (slave labour) is a distinctive legal concept within Brazil's criminal law framework. It finds its legal definition in Article 149 of the Brazilian Penal Code, as amended in 2003. This article criminalizes activities that compel individuals to engage in labour under degrading circumstances, involving strenuous work hours, conditions of coerced labor, or situations where their freedom is constrained due to debt or isolation. Notably, this Brazilian concept draws upon the ILO's definition of forced labor, which is articulated in two ILO conventions, but it extends further by encompassing other dimensions of unacceptable or degrading working conditions. This allows for the prosecution of employers who subject their workers to particularly demeaning conditions, irrespective of whether clear evidence of coercion in the employment relationship exists. On this point, see R. PLANT, Workers of the Hacienda Brasil Verde v Brazil*: Putting the Judgement in Perspective*, in *International Labor Rights Case Law*, vol. 3, n. 3, 2017, at p. 390, who also offers a valuable summary of the Brazilian legal-political circumstances aimed at combating slavery in which the Court's pronouncement intervened and the possible implications the same pronouncement might have on other South American countries. The significance of the ruling on the particular Brazilian phenomenon is further emphasized by A. R. COUTINHO, *Corte interamericana de direitos humanos e o caso da Fazenda Brasil Verde vs. República Federativa do Brasil: por um conceito contemporâneo de escravidão*, in R. ROMBOLI, A. RUGGERI (ed.), *Corte europea dei diritti dell'uomo e Corte interamericana dei diritti umani: modelli ed esperienze a confronto – XI Giornate italo-spagnolo-brasiliane di diritto costituzionale*, Torino, 2019, p. 275-296.

[132] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 340.

[133] *Ibi*, par. 341. Approximately 40,000 individuals were reportedly liberated from forced labour conditions in Brazil between 2003 and 2018, with a significant majority, 73%, engaged in agricultural work. Among these, a substantial portion comprised both domestic and foreign migrants who had relocated to regions undergoing agricultural expansion in pursuit of fresh opportunities or enticed by deceptive assurances. In the Americas, the ILO estimates that more than 1.2 million people were affected by forced labour as of 2016. On the point see N. POSENATO, *The UNDROP and the case law of the Inter-American human rights system – Potential impacts and insights from Hacienda Brasil Verde case*, op. cit., at p. 237. In the Americas, the ILO estimates that more than 3.6 million people were affected by forced labour as of 2022. See ILO, Walk Free, IOM, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, 2022, p. 18.

victims in this case and played a role in shaping the actions of the authorities, obstructing the conduction of proceedings against those responsible[134].

The ACHR finally establishes that «the State is responsible for the violation of Article 6(1) of the American Convention, in relation to Article 1(1) […] to the detriment of the 85 workers rescued on March 15, 2000, in Hacienda Brasil Verde, […] which occurred in the context of a situation of historical structural discrimination, based on the economic status of the 85 workers identified»[135]. In the context of our analysis, it is necessary to underscore that the Court did not condemn the State of Brazil for actions that constitute forced labour under the definition of Article 6, par. 2 of the IACHR. Instead, it found Brazil at fault for engaging in practices amounting to slavery, as defined in the preceding paragraph of the same article. This particular choice was likely made because, even though the victims were categorised as workers, the Court, considering the circumstances it examined, aimed to send a resolute message of condemnation against the pervasive practice of "slave labour" within the Brazilian State.

The *Hacienda Brasil Verde* ruling has garnered attention from international legal scholars, who have underscored numerous facets of this pronouncement. Its novelty, coupled with the specificity of judges' analysis, has been a focal point of discussion. The judgement has been welcomed primarily because it «places a positive obligation on all States that have ratified the American Convention to take measures to prevent slavery, forced labour, and trafficking in persons»[136]. Furthermore, it has been argued that, due to specific characteristics of the Inter-American regional system, which have been tested in the Court's 2016 ruling, such as the identification of vulnerable groups and the application of the *pro personae* principle[137], the UN Declaration on Peasant's Rights[138] can serve as a pivotal reference for interpreting the ACHR and other regional instruments. It can also

[134] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 419.

[135] *Ibi*, Resolution point 3 and 4 (p. 120).

[136] J. S. VOGT, *The Legacy of Slavery in Brazil: Interpreting Article 6 of the American Convention on Human Rights*, in *International Labor Rights Case Law*, vol. 3, 2017, at p. 400.

[137] The pro personae principle frequently finds its basis in Article 29 of the ACHR as well as Article 31 of the Vienna Convention on the Law of Treaties (VCLT). The former article explicitly forbids any interpretation that curtails or diminishes the full enjoyment and exercise of the rights and freedoms acknowledged in the convention, along with other treaties and domestic laws. On the other hand, the latter article offers a solid framework for incorporating novel advancements in the interpretation of human rights treaties. On this point, see A. RODILES, *The Law and Politics of the* Pro Persona *Principle in Latin America*, in H. P. AUST, G. NOLTE (ed.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence*, Oxford, 2016, p. 153-174.

[138] See *supra*, note 119.

serve as a vital source of principles to safeguard the rights of rural populations in the Americas. Considering the significance of violence in rural regions across Latin America, the Inter-American human rights system is anticipated to place greater emphasis on the welfare of peasants and other rural stakeholders, encompassing rural labourers, while also offering legal recourse to those affected[139].

In this regard and in connection with the decent work concept formalised in 1999 by the International Labour Organization[140], it has been argued that both dignity of the individual and sustainable development entail that work activities should uphold environmental integrity while also promoting the health and well-being of workers and the global population. In light of these considerations, the *Hacienda Brasil Verde* pronouncement would be an effective example illustrating the connection between human dignity and the environment[141].

In a similar way, the importance of the ruling has been further underlined, as it would have established the legal association between poverty and human rights, a crucial step towards poverty eradication endeavours. Not only that, but the fact also that the Court has ultimately attributed State responsibility for human rights violations in connection with the principle of equality and non-discrimination based on economic status should not be underestimated. The Inter-American Court would also have lastly set novel judicial benchmarks in the fight against poverty that could potentially be considered by other courts[142].

Precisely with regard to the relationship with the case law of other international courts, some scholars have explored the relation between the ECtHR and the ACHR interpretation of the respective provisions against forced labour and slavery. In this regard both courts would not have managed to construct a consistent comprehension of these obligations, and their rationale on these critical matters is notably troubling. Apart from that, it has been argued that the ECtHR should «take note» of the IACHR's proceeding

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[139] N. POSENATO, *The UNDROP and the case law of the Inter-American human rights system – Potential impacts and insights from Hacienda Brasil Verde case*, op. cit., at p. 244.

[140] See *supra*, Chapter I, par. 3.1.

[141] P. GRAZZIOTIN NOSCHANG, *Aplicação do controle de convencionalidade para erradicação da escravidão no Brasil: o caso* Trabalhadores da Fazenda Brasil Verde c. Brasil, in J. O. DE NORONHA, P. P. DE ALBUQUERQUE (ed.), *Comentário à Convenção Americana sobre os Direitos Humanos*, São Paulo, 2020, at p. 505.

[142] R. MARTINÓN, I. WENCES, *Corte Interamericana de Derechos Humanos y pobreza. Nuevas incursiones a la luz del caso* Hacienda Brasil Verde, in *Anuario Mexicano de Derecho Internacional*, vol. 20, 2020, p. 193 ff.

on various aspects. Firstly, regarding the connection between human trafficking and the behaviours prohibited under Article 4 of the ECHR, the IACHR appears to have established a clear and flexible relationship between trafficking on one hand and slavery, servitude, and forced labour on the other. While the ECtHR initially treated them as unrelated and subsequently as interchangeable, the IACHR correctly has characterised them as closely linked yet distinct. Moreover, the IACHR would employ a logical and consistent approach. It initially identifies the exploitative actions to which the applicants were subjected and then promptly evaluates whether this situation could also be classified as trafficking[143].

Two other lessons that the European Court should take note of, are the valuable aspect of *Hacienda Brasil Verde* in its recognition of the positive obligations delineated by the Court, which are applicable to all behaviours proscribed in Article 6, par. 1 and par. 2 and the remark of the fact that the states' obligation include the duty to address the underlying factors that foster exploitative practices, particularly by addressing the deeply ingrained discrimination and marginalisation experienced by specific groups. It should be hoped that the IACHR will persist in emphasising this aspect and may even extend it to encompass racial discrimination. Hopefully, its approach would serve as a catalyst for the ECtHR. Therefore, it would be paramount for the European Court, should it adhere to a more strictly human rights-centric approach to such issues, to return to a framework that appropriately recognises the significance of addressing the deep-seated and systemic roots of these exploitative practices[144].

It is precisely on the aspect of racial discrimination that some legally-economically oriented contributions focus. Just the *Hacienda Brasil Verde* case would offer «a particularly powerful basis through which to reflect both on the perils of ignoring race and the significance of engaging with racial capitalism for international economic law», as «racialization is a feature of slavery that has not been left to the past»[145]. It would be essential to highlight poverty and extreme poverty, but what the Court would have overlooked is recognising the enduring historical connection between slavery,

[143] V. MILANO, *Human Trafficking by Regional Human Rights Courts: An Analysis in Light Of Hacienda Brasil Verde, The First Inter-American Court's Ruling In This Area*, in *Revista Electrónica de Estudios Internacionales*, vol. 36, 2018, p. 28.

[144] *Ibi*, p. 29.

[145] A. BLACKETT, *Racial Capitalism and the Contemporary International Law on Slavery: (Re)membering* Hacienda Brasil Verde, in *Journal of International Economic Law*, vol. 25, 2022, at p. 336.

marginalisation, and the role of Black labourers in the Brazilian economy. This would be most evident as the Court addresses workers as «individuals with certain characteristics from Brazil's poorest states»[146]. However, the fact that should have been emphasised and recognised by the judges instead is that of the attempted escape of some workers from the company, because «Resistance […] is the insight at the core of an emancipatory vision of labour law. Through the active resistance to slavery is found an acute consciousness of freedom, and the insistence to move beyond objectifying, colonial recognition to assert thickened understandings of reparative justice»[147]. Ultimately, in cases where racial subjugation is concealed, this aspect should be brought to light and challenged in order to be rectified. This involves listening to the voices of the marginalised workers themselves and honouring their actions, making it essential for full emancipation to be achieved, for that «Redressing slavery in international economic law requires transformative change»[148].

Although the jurisprudence of the Inter-American Court of Human Rights is not rich in pronouncements on forced labour and slavery, probably also due to its more recent establishment compared to the ECtHR, it is undeniable that its jurisprudence has made a crucial contribution to the discourse on the matter. In fact, the two pivotal judgements *Ituango Massacres v. Colombia* of 2006 and *Hacienda Brasil Verde Workers v. Brazil* of 2016 have significantly refined the framework of the Inter-American human rights protection system regarding the issues covered by Article 6 ACHR and more in general. In fact, the first judgment, albeit indirectly, paved the way for the jurisdictional acknowledgment of such exploitative practices, while the second judgment delineated the boundaries within which States party to the Convention must operate in order to avoid incurring the responsibilities stipulated in Article 6 of the ACHR.

A crucial aspect to underscore for our analysis is the contrast in the specific violations for which the two affected States, ten years apart, were held accountable. Following the first judgement, Colombia faced condemnation by the Court for breaching the second paragraph of Article 6, which pertains to forced labour. In the subsequent ruling, although the case had its origins in labour-related circumstances, Brazil was

[146] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 418.

[147] A. BLACKETT, *Racial Capitalism and the Contemporary International Law on Slavery: (Re)membering* Hacienda Brasil Verde, op. cit., at p. 343.

[148] *Ibi*, p. 347.

censured for transgressions of the provisions contained in the first paragraph of Article 6, addressing slavery, in relation to the specific Brazilian phenomenon of "slave labour". Within the South American context, especially from the doctrinal perspective, the decisive specific importance of the *Hacienda* pronouncement has emerged, tied precisely to the Brazilian reality of this phenomenon. A very strong signal, albeit not entirely complete, has therefore been conveyed in this regard.

Finally, it is worth noting that in its two pronouncements, the Inter-American Court has placed itself in dialogue with the other courts, referencing the same ILO Conventions that the ECtHR has invoked over the years in its pronouncements on article 4 ECHR[149]. It has also drawn direct inspiration from ECtHR judgments while simultaneously advancing the interpretation of the prohibition of forced labour and slavery as developed by the European Court up to that point. One possible wish that can be expressed is for the two regional human rights courts to progressively establish a more stringent dialogical relationship, forming a robust and interconnected web of shared and unassailable principles for combatting exploitative practices. As we will explore in the second part of the chapter, these practices are in fact emerging as global phenomena, in need of global responses.

2.3 The African human rights system facing slavery and forced labour

As we have seen in the previous Chapter, the African Charter on Human and Peoples' Rights (ACHPR) does not explicitly address the issue of forced labour. However, the second sentence of its Article 5 prohibits «All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment». In its judgements, the African Court on Human and Peoples' Rights

[149] This aspect is corroborated and further explored, extending beyond the specific area under consideration, by A. DI STASI, *La Corte interamericana e la Corte europea dei diritti dell'uomo: da un* trans-regional judicial dialogue *ad una* cross-fertilization*?*, in L. CASSETTI, A. DI STASI, C. LANDA ARROYO (ed.), *Diritti e giurisprudenza – La Corte interamericana dei diritti umani e la Corte europea di Strasburgo – Derechos y jurisprudencia – La Corte interamericana y el Tribunal europeo de derechos humanos*, Napoli, 2014, p. 1-25.

(ACtHPR) centred most of the attention on Article 5 around the concept of torture and the other ill-treatments covered by the article[150].

However, the African Commission on Human and Peoples' Rights[151], on some relevant occasions, has interpreted Article 5 in the context of slavery and forced labour. In fact, in its Principles and guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights[152], the Commission defined the "Minimum Core Obligations" for States inherent to the right to work covered by Article 15 ACHPR. In particular, it acknowledged the prohibition of slavery and forced labour «which include all forms of work or service exacted from any person under the menace of any penalty and/or for which the said person has not offered himself/herself voluntarily», also specifying that «it includes also all forms of economic exploitation of children and other members of vulnerable and disadvantaged groups»[153].

The Commission has repeatedly emphasised the obligation of individual States to address various forms of exploitation[154], criticized them for their failure to safeguard individuals from these practices[155], and urged them to ratify relevant international agreements, encouraging the adoption of legislation that prohibits «all types of slavery»[156]. One country which has received significant attention from the African Commission in the context of slavery is Mauritania, for which in 2012 the Commission noted ample traces of slavery's legacy, reiterating that those found guilty of such practice

[150] See R. MURRAY, *The African Charter on Human and Peoples' Rights: A Commentary*, op. cit., at 167.

[151] Where the ACtHPR was established in 2004, according to the 1998 Protocol to the ACHPR, the foundation of African Commission on Human and Peoples' Rights dates back to 1987 and holds the responsibility for supervising and elucidating the stipulations of the African Charter on Human and Peoples' Rights. See *supra*, Chapter I, from par. 2.3.2.

[152] African Commission on Human and Peoples' Rights, *Principles and guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 24 October 2011.

[153] *Ibi*, par. 59.

[154] See for instance African Commission on Human and Peoples' Rights, *Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament*, ACHPR/Res. 165, 26 May 2010.

[155] For instance, African Commission on Human and Peoples' Rights, *Resolution on the Human Rights Situation in Uganda*, ACHPR/Res. 94, 5 December 2005.

[156] See African Commission on Human and Peoples' Rights, *Resolution on the Situation of Human Rights in Africa*, ACHPR/Res.14, 16th Ordinary Session, 25 October to 3 November 1994, para 3 and 4.

should be held accountable, raised the need of greater awareness and compensation for victims, amending accordingly the relevant legislation[157].

In addition to the cases addressed by the African Commission, for the analysis' purpose it is necessary to highlight a noteworthy case adjudicated by the Community Court of Justice (ECCJ) of the Economic Community of West African States (ECOWAS)[158] in 2008. In the case of *Hadijatou Mani Koraou v. Niger*[159], the ECOWAS Court of Justice was tasked with examining the circumstances of Hadijatou Mani Korau, who had been forced into marriage with her husband when she was just twelve years old. Based on the facts of the case, the Court's inquiry involved the application of Article 5 ACHPR to this case. The Court noted that Ms Korau «went through almost a decade of numerous psychological pressures characterised by subjugation, sexual exploitation, forced labour in the home and on the farm, physical violence, insults, and a permanent constraint on her movements exercised by her buyer». In addition, the judges ascertained that, on 18 August 2005, the buyer issued the victim «with a document entitled "certificate of emancipation (from slavery)", stating that from the date of signature of the said deed, "she (the Applicant) was free and was nobody's slave"»[160]. The ECOWAS Court referred to the ownership-based slavery definition of Article 1 of the Convention 1926 Slavery Convention, stating that: «The foregoing do portray the Applicant's condition of servitude and they bring out all the indicators of the definition of slavery»[161].

Actually, the Court did not refer directly to the 1926 definition, but rather referred to the use of it by the International Criminal Tribunal for ex-Yugoslavia (ICTY) in its case

[157] African Commission on Human and Peoples' Rights, *Report of the Promotion Mission of the Committee for the Prevention of Torture in Africa to the Islamic Republic of Mauritania*, 26 March-01 April 2012, par 112-115. The 1997 Commission's Comunication on the *Bah Ould Rabah v Mauritania* case is relevant in this context, on which see R. MURRAY, *The African Charter on Human and Peoples' Rights: A Commentary*, op. cit., at 169. African Commission on Human and Peoples' Rights, *Bah Ould Rabah v Mauritania*, Communication 197/97, 4 June 2004.

[158] The Community Court of Justice of the Economic Community of West African States (ECOWAS) represents a sub-regional judicial body within the larger framework of the ECOWAS, which is a regional alliance encompassing fifteen West African countries with shared political and economic objectives. The Protocol governing the establishment of the ECOWAS Court of Justice was initially established in 1991 and subsequently modified in 2005, primarily to empower the Court with the capacity to adjudicate human rights disputes. This enhancement allowed the Court to play a pivotal role in the enforcement and interpretation of human rights within the ECOWAS region. On this last point see, above all, S.T. EBOBRAH, *A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice*, Copenhagen, 2009.

[159] Economic Community of West Africa States Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.

[160] *Ibi*, par. 76.

[161] *Ibi*, par. 77.

law[162]. In referring to the mentioned criminal case-law, the Court made a critical distinction between slavery and torture, also involving the practice of forced labour. The ECCJ judges asserted that each of these violations could occur independently of the other: « […] it is trite that slavery may exist without the presence of torture. Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave if he is illegally deprived of his freedom through force or constraint. All evidence of ill treatment may be erased, hunger may be forgotten, as well as beatings and other acts of cruelty, but the acknowledged fact about slavery remains, that is to say, forced labour without compensation. There is nothing like goodwill slavery. Even when tampered with humane treatment, involuntary servitude is still slavery». The Court considered «the issue of knowing the nature of relationship between the accused and the victim is essential» and to the relevant facts established that the exercise of «the attributes of the right of ownership over the Applicant, even so, after the document of emancipation had been made»[163].

As regards positive obligations of the State, the ECOWAS Court further on briefly also quoted the International Court of Justice in the 1970 *Barcelona Traction* case[164] as stating that «Outlawing of slavery is an obligation *erga omnes* imposed on all State's organs»[165]. Finally, favouring the applicant, the Court proceeded to censure the domestic court for its acknowledgment of Hadijatou Mani as a slave but its failure to condemn this grave offense, effectively tolerating the crime. The responsibility for this issue extended to the State, both domestically and internationally, and it became evident that the domestic judge had not fulfilled his mandate to protect her rights[166].

In a critical analysis published a few months after the ruling, several significant points concerning the analysis and the approach adopted by the African sub-regional court have been raised. One of the primary concerns highlighted pertained to the Court's endeavour to distil a clear definition of slavery from the international instruments mentioned above. In fact, the ECCJ would have transposed the definition of

[162] The ECOWAS Court of Justice precisely looked at and cited the case ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, No. IT-96-23 & IT-96-23/1-A, Judgment, 22 February 2001, par. 118-19.

[163] Economic Community of West Africa States Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, cit. par. 79-80.

[164] See *supra*, par. 1.

[165] Economic Community of West Africa States Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, cit. par. 81.

[166] *Ibi*, par. 83-86.

"enslavement" from international criminal law to the international human rights law concept of "slavery". Even the ICTY itself would have acknowledged that the criminal definition of "enslavement" – as provided for in Article 7(1)(c) and (2)(c) of the Rome Statute[167] – might encompass a broader scope than the traditional and sometimes seemingly distinct definitions of slavery, the slave trade, servitude, or forced or compulsory labour found in other areas of international law. Given that this was a straightforward case of *de jure* slavery, the ECCJ could have based its judgment solely on the definition of slavery as established by the 1926 Slavery Convention, in conjunction with Article 5 of the African Charter on Human and Peoples' Rights. By incorporating the jurisprudence of international criminal law, the Court would instead have «cross-pollinated different "species" of international law», creating a hybrid approach by merging wartime precedents with international human rights law. Furthermore, this approach would contradict the consistent normative distinction maintained in international human rights law between slavery, servitude, and forced labour[168].

Not only, the ECOWAS Court, when delving into matters of positive obligations, would have misquoted the well-known statement from the 1970 *Barcelona Traction* case, in which the ICJ asserted that as obligations *erga omnes* should be understood «the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination»[169]. Therefore, the ECOWAS Court would not have needed to try attributing statements to the International Court of Justice, as there is ample precedent in the field of international human rights law concerning positive obligations[170]. Taking all these elements into account, a harshly critical conclusion results, as «*Mani v. Niger* appears to have reached the right outcome in determining that Hadijatou Mani Koraou had been held in slavery; however, it did so at the expense of the law»[171].

In a different vein, other scholars have painted a substantially positive picture of the pronouncement under analysis, since the Court's acknowledgment of the *erga omnes*

[167] See *supra*, Chapter I, par. 2.3.1.

[168] J. ALLAIN, *Hadijatou Mani Koraou v. Republic of Niger*, in *American Journal of International Law*, vol. 103, n. 2, 2009, at p. 316.

[169] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, cit., par. 34. See also *supra*, par. 1.

[170] J. ALLAIN, *Hadijatou Mani Koraou v. Republic of Niger*, op. cit., p. 317.

[171] *Ibidem*.

nature of the obligations pertaining to slavery carries significant weight. It would serve as a reminder of the far-reaching consequences of the existence of slavery, for other states, who share common interest and, in specific situations, may even have an obligation to cooperate in ending such violations. Furthermore, the judgment by the ECOWAS Court would represent a valuable addition to the relatively small body of jurisprudence addressing slavery in international law. And this valuable addition acquires even greater significance since the Court has endorsed the notion that slavery can be present not only when there are powers of ownership in the strict legal sense, but it can also exist when one individual exerts a certain degree of control over another, sufficient to indicate the latter's enslavement[172]. However, on the other hand, it should be considered that the Court did not adequately delve into the arguments concerning other human rights violations. It would be regrettable that the Court did not accord in particular the issue of discrimination the level of attention warranted. This way of proceeding could be due to the Court's belief of having sufficiently addressed the factual aspects of the applicant's case through its slavery claim. This would have led to a decision that, in certain aspects, appears inconsistent with international law and established practices, as well as with the Court's own view of State responsibility in respect of slavery[173].

Particular and insightful analysis on the *Hadijatou* case were finally also presented, the observations of which aim to uncover the various linguistic, epistemological, and legal conceptions that remained hidden beneath the surface of the case, which in the scholar believes are unacknowledged in the official written record[174]. Also on the basis of personal and direct experience, the author explains that individuals residing within a particular interpretive community, in this case, the rural community of Niger, did not perceive Hadijatou as a "slave" because the Western and international human rights concept of "slave" was not a part of the community's epistemological framework. In their perspective, Hadijatou was considered as a "wahay" (not accurately translatable as "concubine")[175]. According to the epistemological beliefs held by the people in rural Niger, Hadijatou's owner had the authority to oversee her work, her

[172] H. DUFFY, Hadijatou Mani Korua v Niger*: Slavery Unveiled by the ECOWAS Court*, in *Human Rights Law Review*, vol. 9, no. 1, 2009, p. 159-160.

[173] Ibi, at p. 164-165.

[174] T. KELLEY, *Apples to Oranges: Epistemological Dissonance in the Human Rights Case* Hadijatou Mani v. Niger, in *Quinnipiac Law Review*, vol. 32, no. 2, 2014, p. 325 ff.

[175] *Ibi*, p. 341.

physical self, and her reproductive capabilities, akin to the control he exerted over his wives' lives. While Hadijatou lived much of her life as a "wahay", she consistently resisted the violent and degrading treatment she endured from the very beginning[176].

Reflections on the issue regarding the ongoing debate in comparative law in the context of legal transplants were also put forward. In essence, the manifold linguistic, cultural, and epistemological complexities underlying the *Hadijatou* case significantly challenge the argument regarding the effortless and unrestricted transfer of legal principles between diverse societies and countries. In this instance, introducing the Western legal interpretation of "slave" into rural Niger would have led to confusion due to the fact that, although there were shared characteristics between the Western social category and the Nigerien servile status known as "wahay", they were not identical. At the same time, the case should cast some scepticism on certain more radical contentions regarding the impracticality of legal transplants. There would be, in fact, some indication that other individuals designated as "wahay" have started to follow the course initiated by Hadijatou, bringing their grievances to the awareness of human rights organizations. The *Hadijatou* case may allegedly have initiated a transformative discourse within the rural Nigerian reality[177].

Finally, it is precisely on this last aspect that other scholars' remarks focus, that is to assess the impact that the judgement has had on Niger's domestic system, government policy and courts. In particular, the impact the pronouncement may have had on other ECOWAS countries and beyond, acting also as promoter of legislative reforms has been considered. As for its impact on the executive branch, it seems that although the Nigerien Government has taken measures to strengthen anti-slavery provisions within the penal code, executive action in the post-*Hadijatou* era has been sluggish[178]. The domestic courts, influenced by cultural and to some extent, religious biases, have proven to be the most effective avenues for bringing about change. The cases discussed by the author have illustrated both progressive and conservative inclinations among local judges. A comprehensive examination of the ECCJ's human rights jurisprudence then revealed indications that other domestic legal systems in the region and even outside have been

[176] *Ibi*, p. 347 ff.
[177] *Ibi*, at p. 351.
[178] H. S. ADJOLOHOUN, *The ECOWAS Court as a Human Rights Promoter? Assessing five year's impact of the Korau Slavery Judgement*, in *Netherlands Quarterly of Human Rights*, Vol. 31, n. 3, 2013, p. 352 ff.

impacted by the Court's work, thanks to what can be called a 'spill-over' effect. Furthermore, active participation from civil society and legal practitioners has also contributed to the ECCJ's influence, with stakeholders pointing out the catalytic effects of the *Hadijatou* decision[179].

In summary, while it may not have attained the level of the influential European model, the scholar suggests that there is substantial evidence that the ECOWAS human rights framework has demonstrated the potential to exert an influence on the legal systems of defendant States, as exemplified in the discussion of the *Hadijatou* case. The scholar contends that it is necessary to reflect on the sustainability of the ECOWAS human rights regime and the Community Court's ability to maintain its current trajectory while bolstering its credibility and authority in the region. In time, that would ultimately depend on whether ECOWAS member States have made a steadfast commitment to establish a comprehensive human rights regime and have invested sufficient dedication to transform the region into an «"ECOWAS of rights"»[180].

[179] *Ibi*, p. 356 ff. and p. 366 ff.
[180] *Ibi*, p. 370-371.

Part II
National and supranational efforts to counter forced labour

1. *Outlines of domestic legislation and national case law elements in the realm of private actors' liability for forced labour*

As we have explored in the previous chapter, over the past decades States have increasingly shown a growing commitment to upholding specific legal standards, both binding and non-binding, to safeguard workers' rights within the context of an evolving globalised world. Alongside the ILO Conventions on forced labour, this led, in 1999, to the development by the ILO of the idea of "Decent Work" and then, in 2015, to the adoption of the UN 2030 Agenda for Sustainable Development, with "Decent work and economic growth" listed as the 8th goal among the 17 Sustainable Development Goals[181].

On the other hand, we have observed that the data provided by ILO reports over the years indicate that the overwhelming majority of forced labour cases are committed by private individuals or entities[182]. Furthermore, our examination of regional international human rights courts case law in the first part of the present chapter has revealed a consistent pattern of these courts condemning states for prohibition of forced labour, on the grounds of their respective Conventions' provisions. In particular, States have been found breaching their positive obligations for failing to implement effective countermeasures or suitable legislative frameworks in order to counteract and prevent forced labour practices.

Leaving aside the specific criminal law provisions within each individual State, one answer to the States' need to fulfil their positive obligations for serious exploitative practices seems to be found in the recent trend on the part of some, predominantly Western States[183], to adopt domestic legislation to address the so-called human rights due diligence, that is «to take manifold actions to prevent potential violations of rights by

[181] See *supra*, Chapter I, par. 3.1.
[182] See *supra*, Chapter I, par. 1 and 3.3.
[183] A validation of this comes from M. MONNHEIMER, *Due diligence obligations in international human rights law*, Cambridge, 2021, from p. 309, who conducted an in-depth analysis of all possible fields of application of due diligence in human rights, from the reported examples of national legislation applying this concept in the field of our interest.

companies and also to provide victims of such company abuses with access to effective remedies»[184].

The concept of human rights due diligence finds its major point of reference in the 2011 United Nation's Guiding Principles for Business and Human Rights[185], known as the "Ruggie Principles" by its author John Ruggie, Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Guiding Principles represent a global impetus defining the standards according to which countries and companies should agree upon policies, parameters and procedures for their respective responsibilities. Notoriously, the Ruggie Principles lie upon three main pillars: the State duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need to help victims achieve remedy. The Guiding Principles aim to provide for new obligations under international law, in particular relating to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the ILO core labour regulations[186]. It is in particular from Article 17 of the Guiding Principles that human rights due diligence is presented as a process by which companies can know and show their respect for human rights by identifying, preventing, mitigating, documenting and reporting on how they address the human rights impact of their activities and those of their business relations[187].

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[184] See T. KOIVUROVA, K. SINGH, *Due Diligence*, in *Max Planck Encyclopedia of Public International Law*, August 2022, par. 18. A comprehensive overview of the issue of the human rights protection through the company's due diligence tool is presented by B. BAADE, *Due Diligence and the Duty to Protect Human Rights,* in H. KRIEGER, A. PETERS, L. KREUZER (ed.), *Due Diligence in the International Legal Order*, Oxford, 2020, p. 92-108.

[185] UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (Guiding Principles)*, UN Doc HR/PUB/11/04, 2011. On the website of the United Nations High Commissioner for Human Rights (OHCHR) the full text of the Guiding Principles for Business and Human Rights is available: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf. Precious insights on the topic are offered by C. RODRIGUEZ-GARAVITO (ed.), *Business and Human Rights – Beyond the End of the Beginning*, Cambridge, 2017 and by N. BERNAZ, *Business and Human Rights – History, Law and Policy - Bridging the Accountability Gap*, London, 2017.

[186] For a comprehensive examination of the efficacy of the UN Guiding Principles, se P. HILPOLD, *Maßnahmen zur effektiven Durchsetzung von Menschen- und Arbeitsrechten – Völkerrechtliche Anforderungen*, in *Berichte der Deutschen Gesellschaft für Internationales Recht – Unternehmensverantwortung und Internationales Recht*, vol. 50, 2020, p. 182-228, who contends that numerous proposed measures require further specification and testing before binding obligations can be imposed, as additional discussion and experience are necessary to refine these measures.

[187] UN, *Guiding Principles on Business and Human Rights*, cit., Art. 17: «In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating

Making human rights due diligence as a mandatory requirement for companies seems to enable States to transpose the concept into a legal duty[188], and this is a visible trend especially in Europe, where more and more countries are starting to develop legislation in this respect, including at the EU-level. In the forthcoming pages, through illustrative examples, we will observe how various nations have taken legislative actions to establish a robust framework for human rights due diligence, mandating companies to fulfil specific obligations in this regard. We will focus, in particular, on the case of the German law, which serves as the latest and most pertinent example of this phenomenon. As we delve deeper, it becomes evident that this German model is not only a pioneering benchmark at the national level but also influences and guides European endeavours in this direction.

1.1 *An effective example of corporate responsibility for respecting human rights in global supply chains: the German* Lieferkettengesetz

In February 2019 the German Federal Ministry for Economic Cooperation and Development drafted a framework law for the sustainable design of global value chains and for the amendment of economic regulations (*Nachhaltige Wertschöpfungskettengesetz*, NaWKG) including a law regulating human rights and environmental due diligence in global value chains (*Sorgpfaltpflichtengesetz*). The main

how impacts are addressed». For a reference to the article, refer to R. MCCORQUODALE, C. BLANCO-VIZARRETA, *Guiding Principle 17: Human Rights Due Diligence*, in B. CHOUDHURY (ed.), *The UN Guiding Principles on Business and Human Rights – A Commentary*, Cheltenham, 2023, p. 126-136.

[188] Reasons and scope of business responsibility for "modern slavery" are promptly tackled by J. MENDE, J. DRUBEL, *At the Junction: Two Models of Business Responsibility for Modern Slavery*, in *Human Rights Review*, vol. 21, n. 3, 2020, p. 313-335. The comprehensive contributions by S. CANTONI, *La responsabilizzazione delle imprese private nell'attuazione dei diritti fondamentali dell'uomo e del diritto internazionale in materia di lavoro*, in *Diritto dell'economia*, vol. 2, n. 4, 2005, p. 677-714, and by N. BOSCHIERO, *Lo sfruttamento economico dei lavoratori migranti: vecchie e nuove forme di schiavitù nell'era della private economy?*, in *Diritti umani e diritto internazionale*, vol. 2, 2010, p. 344-366, already underscored the significant potential of corporate accountability as imposed by States in ensuring the effective international protection of human rights. More critically, F. FRANCIONI, *Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations*, in W. BENEDEK, K. DE FEYTER, F. MARRELLA (ed.), *Economic Globalisation and Human Rights*, Cambridge, 2009, p. 245-265, on the other hand, contends that while corporate accountability is indeed vital, it is just one among several avenues to ensure the protection of human rights, as the primary responsibility for upholding these rights lies with the States. For a more strictly private-law point of view, see also F. BUCCELLATO, M. RESCIGNO (ed.), *Impresa e «forced labour»: Strumenti di contrasto*, Bologna, 2015.

purpose of the draft law was to implement the provisions of the UN Guiding Principles, by strengthening the obligation to analyse the business activity on possible human rights impacts, to take precautions to prevent human rights violations, to remedy and redress any human rights violation that may be carried out, and finally provide for a complaint mechanism[189].

However, the Federal Government distanced itself from the draft, and in June 2019 declared that it did not plan to formulate a Sustainable Value Chain Act announcing that the National Action Plan on Economic Affairs and Human Rights (NAP) and a Coalition Agreement would have formed the basis for any future action. The Government's NAP relied on companies' voluntary commitments and in order to check whether bigger companies were meeting their human rights due diligence obligations along their supply chains, a monitoring system was set up using independent service providers. The compliance target of 50% was clearly not being met under this system: in the first company survey of 2019, about 400 of the roughly 3000 companies invited to take part completed the questionnaire and only about 20% of them were shown to be compliant. In the second survey round of 2020, the methodology was improved and about 450 from a total of 2250 companies responded. Roughly 17% were compliant[190]. Therefore, the Coalition Agreement acknowledged that the voluntary commitment of companies was not sufficient and envisaged for this situation the enactment of further national legislation by the German Government, also advocating an EU-wide regulation[191].

That was the reason to take legislative action. This action was strongly accompanied by defensive activities in line of about 120 organisations that came together to form the so-called Supply Chain Act Initiative (*Lieferketteninitiative*). The Initiative was supported by Trade Unions, human rights and environmental protection

[189] For a detailed account of the passages that preceded the adoption of the law currently in force see B. KRAMER, *Wann haftet ein deutsches Unternehmen für extraterritoriale Menschenrechtsverletzungen?*, in *Recht der Internationalen Wirtschaft*, vol. 3, 2020, from p. 97.

[190] All figures and data are taken from the website of the German Federal Foreign Office and are available here: https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010.

[191] See J. MENDE, *Unternehmen als gesellschaftliche Akteure: Die unternehmerische Verantwortung für Menschenrechte zwischen privater und öffentlicher Sphäre*, in N. GOLDBACH, F. PAULMANN (ed.), *Interdisziplinäre Perspektiven auf Soziale Menschenrechte*, Baden-Baden, Nomos, 2020, at p. 83 on tension between voluntary commitment of companies and mandatory human rights due diligence.

organisations, and development organisations. So far constituting one of the biggest lines for one political issue in Germany in the last decades[192].

Three Ministers coming from different political parties were then commissioned to draft a Law out of the expectations of the Federal Government: the Minister of Labour, the one of Development and Economic Cooperation and the one of Economic Affairs. Since the path of voluntary commitments by companies had failed, the political government coalition introduced a bill for a due diligence law into the Bundestag in April 2021, which had been previously approved by the German Cabinet in March. The bill had been examined by the Committee for Labour and Social Affairs in May, was adopted by the Bundestag on the 11th of June, finally passed by the Bundesrat on the 25th of June and was published on the *Bundesgesetzblatt*, the German Federal Law Gazette, on the 22nd of July 2021[193].

The German Supply Chain Law (*Lieferkettensorgfaltspflichtengesetz* - LkSG)[194] entered into force the 1st of January 2023 for companies with headquarters in Germany with at least 3000 employees and from the 1st of January 2024 for companies with more than 1000 employees. A period of evaluation of the results obtained and improvement of the law will then follow[195]. The law is thereby primarily addressed to large capital companies, as well as controlled companies operating in high-risk sectors or in conflict or high-risk areas (art. 1, par. 1).

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[192] Detailed information about the *Initiative* is easily traceable at: https://lieferkettengesetz.de.

[193] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG), 16 July 2021, BGBl. I 2021, Nr. 46 of 22.07.2021, p. 2959 (https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s2959.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1699127348330). For insights into the perspectives that German law had already presented prior to its adoption, refer to M. MONNHEIMER, P. NEDELCU, *Wirtschaft und Menschenrechte – Kommt ein Sorgfaltspflichtengesetz?*, in *Zeitschrift für Rechtspolitik*, 2020, p. 205-209.

[194] For detailed technical commentary on the law see, R. GRABOSCH, *Das neue Lieferkettensorgfaltspflichtengesetz*, Baden-Baden, 2021, D. F. BERG, M. KRAMME, *Lieferkettensorgfaltspflichtengesetz (LkSG)*, München, 2023 and more extensively M. KALTENBORN, M. KRAJEWSKI, G. RÜHL, M. SAAGE-MAAß, *Lieferkettensorgfaltspflichtenrecht*, München, 2023. Critical observations on the German law are provided by P. NEDELCU, S. SCHÄFERLING, *The Act on Corporate Due Diligence Obligations in Supply Chains – An Examination of the German Approach to Business and Human Rights*, in *German Yearbook of International Law*, Vol. 64, n. 1, 2021, p. 443-457; L. NOGLER, Lieferkettensorgfaltspflichtengesetz: *perché è nata e quali sono i suoi principali contenuti*, in *Giornale di diritto del lavoro e di relazioni industriali*, vol. 1, n. 173, 2022, p. 1-37, who also provides a valuable analysis of the German context within which the law is set.

[195] The German Ministry of Labour has released a report detailing the outcomes of the law's first year in effect, revealing encouraging results. These findings not only highlight positive impacts but also emphasize the necessity for companies not yet subject to the law to align with its provisions: https://www.csr-in-deutschland.de/DE/Aktuelles/Meldungen/2023/ein-jahr-lieferkettensorgfaltspflichtengesetz.html.

The concept of value chain is broadly understood, according to the text of the law, as value creation encompassing the entire life cycle of a product or service (art. 2, par. 5). These companies are expected to ensure the protection of human rights and the environment throughout the global value chain. This means that corporate due diligence obligations apply to the entire supply chain, from the raw materials to the completed sales product. The requirements that companies must meet are appropriate and tiered, based for example on the degree of influence the company has on those committing the violation and also based on the different stages within the supply chain. The requirements that companies must meet are in fact tiered based on the different stages within the supply chain: the company's own business operations, direct suppliers, indirect suppliers. The requirements are also based on the kind and extent of the business activity, the degree of influence the company has on the one directly committing the violation and the typically expected severity of the violation (art. 2, par. 8).

In its introducing part, dedicated to the definition of concepts, the Supply Chain Law translates human rights to some very specific definitions of risks. In article 1, paragraph 2, eleven plus one risks are listed and explained in detail on three pages of the statute. More particularly, a human rights risk within the meaning of the act is a situation in which, due to actual circumstances, there is a reasonable likelihood of a breach of one of the thereafter listed prohibitions, which can be concisely stated as follows: minimum age for child labour; worst forms of child labour; forced labour; safety at work; labour unions; equal treatment at work; living wage; pollution of land, water and air; possession of land; excessive force by security services; any act or omission beyond numbers 1 to 11, which has the potential to directly violate human rights in a particularly severe manner and the wrongfulness of which is obvious on sensible evaluation of all circumstances.

In establishing the duty of care for companies, German law follows the triad of risk analysis, preventive measures and remedial measures, derived from the UN Guiding Principles. In particular, undertakings are obliged to analyse annually the risk of human rights violations in the value chain as a result of their economic activities and to take appropriate preventive measures and remedial measures in response to identified risks and to monitor their implementation. They should provide for a complaint mechanism that allows anyone to claim direct or indirect negative effects of the company's business activities on themselves, others or the environment.

The law then provides for a comprehensive documentation and public reporting obligation. Companies must in fact implement precise measures: draft and adopt a policy statement on respecting human rights; carry out a risk analysis by implementing procedures for identifying disadvantageous impacts on human rights; engage in risk management, including remedial measures, to prevent potential negative impacts on human rights; establish a grievance mechanism; implement transparent public reporting (art. 2, par. 4 and 5). As to the event of a violation of rights, the law imposes that the firm ensures the establishment of an internal company complaint procedure, enabling persons which are directly affected by economic activities in the company's own business area or by economic activities of a direct supplier or who may be infringed in a protected legal position or an environmental obligation, to draw attention to human rights and environmental risks or violations (art. 2, par. 8). Anyway, the company must immediately take steps to remedy the situation in its own area of business, steps that will necessarily cause the violation to cease. In addition to that, it must also introduce further prevention measures. If the company is not able to end the violation in the case of a direct supplier in the foreseeable future, then it must draw up a concrete plan to minimise and avoid the problem (art. 2, par. 7).

Regarding the supervision of companies' compliance with duties and obligations imposed, the Supply Chain Law establishes that firms should also provide for a responsible internal compliance officer. In fact, Article 2, indexed "Risikomanagement", at his paragraph 4 foresees that the company must determine who within the company is responsible for monitoring risk management, for instance by appointing a human rights officer. The managing director of the company shall inform itself regularly, at least once a year, about the work of the responsible.

However, the most decisive means of control the law introduces in the observance of due diligence is the external monitoring by a government authority, specifically the Federal Office for Economic Affairs and Export Control, which has the task of monitoring compliance with the law, checking the company's reports and investigating any grievances. In fact, people whose human rights have been violated can also directly report their complaints to this purposely established authority. Article 2, paragraph 19, also establishes that the Federal Ministry for Economic Affairs and Energy is responsible for the tasks under the Supply Chain Law. Still the same Ministry for Economic Affairs

exercises legal and technical supervision in agreement with the Federal Ministry of Labour and Social Affairs.

Not only can people whose human rights have been violated use the German courts to get their rights upheld, but the Federal Office for Economic Affairs and Export Control will also ensure the effective implementation of the law through various punitive procedures. Indeed, infringements of the law may result in fines and companies found to have committed serious infringements may be excluded from public procurement processes for up to three years (art. 2, par. 22). At the same time, the German Government will offer substantial support programmes for companies. The authority will work with a fully electronic and easy to fill in reporting format. Existing reporting obligations will be integrated into this format so as to avoid creating parallel structures. The law provides for further simplifications for companies, setting up a recognition mechanism for existing certification systems, in order to give companies guidance as to where and when existing certificates can be used as proof of due diligence (art. 2, par. 20).

Finally, last section of the Supply Chain Law (art. 2, par. 23 and 24) establishes that sanctions such as fines and penalties are provided for enforcement. This is entrusted to the Federal Office for Economic Affairs and Export Control, a higher federal authority within the portfolio of the Federal Ministry of Economics, which, however, has so far dealt with completely different topics than the control of human rights due diligence[196].

The amount of the periodic penalty payment in the administrative enforcement proceedings of the competent authority is set up to a minimum 1000 euros to a maximum of 800.000 euros. However, companies with an average annual turnover of more than 400 million euros that may have committed a regulatory offence may be punished with a fine of up to 2 per cent of the average annual turnover. In determining the average annual turnover of the company, the worldwide turnover of all natural and legal persons as well as of all associations of persons in the last three financial years shall be considered, as long as these persons and associations of persons operate as an economic unit. This provision allows therefore the application of the punitive section of the norm to include large economic groups, first of all multinationals which have under their umbrella of control a significant number of subsidiaries [197].

[196] See in this sense E. M. KIENINGER, *Miniatur: Lieferkettengesetz - dem deutschen Papiertiger fehlen die Zähne, in Zeitschrift für die gesamte Privatrechtswissenschaft*, vol. 2, 2021, at p. 252.

[197] *Ibi*, p. 253.

The basis for determining the fine for legal persons and associations of persons depends on the significance of the administrative offence. As to the text of the law, the assessment shall take into account the economic circumstances of the legal person or association of persons. In the assessment, the circumstances, insofar as they speak for and against the legal person or association of persons, must be weighed against each other. In particular, the following are considered: the charge against the offender of the regulatory offence; the motives and objectives of the offender of the regulatory offence; the weight, extent and duration of the administrative offence; the nature of the execution of the regulatory offence, in particular the number of perpetrators and their position in the legal person or association; the effects of the regulatory offence; previous administrative offences for which the legal person or association of persons is responsible, as well as precautions taken before the regulatory offence to prevent and detect regulatory offences; the consequences of the regulatory offence which the legal person or association of persons has committed (Art. 2, par. 24).

As a counterbalance art. 24 finally establishes that efforts of the legal person or association of persons to detect the regulatory offence and to repair the damage, as well as precautions taken after the regulatory offence to avoid and detect regulatory offences also have to be taken into account in order to determine an appropriate fine.

Scholars who have so far commented on the German Supply Chain Law have focused mainly on three different issues: the lack of a civil liability standard and the following legal uncertainty; the fact that the act's scope does not include the business of foreign companies; and the fact that fines for breaches of statutory due diligence standards would be too low in relation to the dimension of the companies to which the law is addressed.

As regards the first issue, it is necessary to highlight the fact that the government's justification for the bill makes it clear that every duty analysis act has to be the outcome of an obligation of means, not of an obligation of result. Companies are in fact expected to make appropriate efforts in order to supervise and report the impact of their activities, but if a damage or a violation of human rights occurs anyways, the company won't be liable[198]. Private enforcement is indeed wholly non-existent throughout the text of the law, both regarding German domestic law and private international law. As a result, legal

[198] *Ibi*, p. 254.

uncertainty would rule over applicable law and procedural path to take and everything would be left to court practice[199].

For this reason, it has been suggested that some more specific points of reference could be possibly added to the law. The four specific absolute rights, which are protected under German Tort Law under paragraph 823 section 1 of the *Bürgerliches Gesetzbuch* (BGB), should be in particular protected in the Supply Chain Law as well: life, health, freedom, property[200]. As we have seen, article 1, paragraph 2, lists eleven plus one risk deriving from gross violations of human rights. The proposal to refer to par. 823 BGB entails that if a company has violated or infringed the listed human rights, and this has led to an infringement of life, health, freedom, property, then there should be a presumption that the damage was caused by a lack of human rights due diligence and there should be a reversal of burden of proof in order to have a functioning private enforcement for the law[201].

Linked to this legal empty space, another important point to face is precisely the burden of proof. Under German Law there is an all or nothing principle, pursuant to which generally is up to the parties asserting the claim, proving their case beyond reasonable doubt[202]. This entails that either the victim is able to proof that the loss suffered was caused by a human rights due diligence violation, or the victim will lose the case. For cases of forced labour, but not only, this mechanism makes it very difficult for victims and very easy for companies to be on the winning side. Actually, companies would regularly oppose the fact that they completely proceeded according to the Supply Chain Act, but still subsidiaries in the global South would have probably caused the material violation and the harm. Proofing the causal link and the connection between subsidiary and main company would weight completely on the victim's shoulders[203].

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[199] This is the view of E. M. KIENINGER, *Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz*, in *Recht der Internationalen Wirtschaft*, vol. 6, 2021, at p. 337.

[200] Towards a combination of public, private, and criminal law to ensure effective enforcement of human rights against global corporations see A. PETERS, S. GLESS, C. THOMALE, M.-P. WELLER, *Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law*, in *MPIL Research Paper Series*, n. 6, 2020, from p. 38.

[201] E. M. KIENINGER, *Miniatur: Lieferkettengesetz - dem deutschen Papiertiger fehlen die Zähne*, op. cit., at p. 254.

[202] Par. 345 *Bürgerliches Gesetzbuch* (BGB).

[203] E. M. KIENINGER, *Miniatur: Lieferkettengesetz - dem deutschen Papiertiger fehlen die Zähne*, op. cit., at p. 255. On the relation between German main and subsidiary company towards the related human

This last consideration leads us to another critical juncture of the law. Foreign companies largely fall out of the scope of the law unless they have their principal place of business in Germany. It would really help German companies if their foreign suppliers, as well as foreign competitors were also obliged to apply diligence by law. Especially if those foreign companies operate with business sites located in Germany, like warehouses or stores. As we will see, the Netherlands with the Child Labour Regulation (*Wet Zorgplicht Kinderarbeid*) included companies that do business in Netherlands in the scope of application of the law. The Dutch act in fact applies to German companies if they deliver goods twice a year to the Netherlands[204].

The debate around such types of acts that apply also to foreign companies has raised concerns about the protection of European basic freedoms stated in the Charter of Fundamental Rights of the European Union, in particular the freedom to conduct a business (art. 16). But worries speaking of business' freedom have immediately downsized when Jurisdiction under the Brussels I Regulation has been recalled[205]. In fact, as far as the Brussels Regime is applicable to all companies incorporated or having a principal place of business within Europe, the Brussels I regulation applies, and suing a company would be not only possible at the place where the corporate domicile is, but also at the place where the harmful event occurred. Relying this regime to human rights due diligence violations, the harmful event is the act or the omission of the company. As long as the company's headquarters are within the EU there will no problem suing a company in Germany or in front of another Member State's Court, but if the company has its principal place of business outside Germany and outside the EU, Brussels I Regulation would not be applied, and violations would probably fall out of the extent of the Supply Chain Act and remain uncovered[206].

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rights violation responsibility, see also S. NORDHUES, *Die Haftung der Muttergesellschaft und ihres Vorstands für Menschenrechtsverletzungen im Konzern - Eine Untersuchung de lege lata und de lege ferenda*, Baden-Baden, 2019.

[204] See *infra*, par. 1.2. In this regard, on the relationship between global and local value chains, see A. CRANE, G. LEBARON, J. ALLAIN, L. BEHBAHANI, *Governance gaps in eradicating forced labor: From global to domestic supply chains*, in *Regulation & Governance*, vol. 13, 2019, p. 86-106.

[205] We are referring here to the European Regulation no. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 12 December 2012, Official Journal, L163, p. 1.

[206] E. M. KIENINGER, *Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz*, op. cit., p. 337.

Last criticism about the German new-born act concerns the amount of fines for companies who have operated in breach of the prescriptions. As we have seen, art. 2, at paragraphs 23 and 24, establishes that sanctions start from 1.000 € to a maximum of 800.000 € for violations of due diligence duties. If one considers the size of the companies that are presently within the realm of application of this act, it appears immediately clear that it might be worthwhile for these companies to infringe due diligence requirements, even running the risk of a fine and still have the possibility to profit from the circumstances[207]. The only occasion where there is a considerable fine, which would probably hurt a company financially, is the case of companies with more than 400 million € annual turnover for which the fine can amount up to 2% of that turnover. Nevertheless, this fine can actually only be stated for violations under risks listed in article 1, paragraph 6 and 7, so for rights related to labour unions and to equal treatment at work. Significant fines for forced labour or child labour are as a matter of fact not foreseen.

Some German business representatives are criticising the Supply Chain Act, describing it as a "political failure" and as a "unreasonable imposition", asserting companies are held responsible for monitoring "vaguely defined standards along their global supply chains"[208]. These reactions to the act seem actually to hide other concerns, in order to obfuscate the debate and escape the burden of responsibility, rather than engaging in constructive exchange. Fears of business associations lie in dealing with floods of lawsuits[209], something not that bound to happen, because of the essence of the German and the European legal system. It has in fact been noted that, contrary to what happens in the USA, in Germany mechanisms like punitive damages or class actions are not commonly employed in trials. There are therefore really very low incentives of going to court, especially considering the burden of proof and all the difficulties derived from

[207] In this sense see M. SAAGE-MAAß, S. RAU, *Transnationale juristische Kämpfe gegen Menschenrechtsverletzungen durch Unternehmen*, in *Forschungsjournal Soziale Bewegungen*, vol. 28, n. 4, 2015, at p. 108.

[208] For comments to the German law by representatives of German companies, see here https://www.vdma.org/viewer/-/v2article/render/16643921, https://www.vdma.org/viewer/-/v2article/render/16248650, and here https://www.faz.net/aktuell/wirtschaft/unternehmen/lieferkettengesetz-17226151.html.

[209] In this sense see C. DOHMEN, *Lieferkettengesetz: Die Haftungsfrage*, in *Süddeutsche Zeitung*, 4 November 2020, available under: https://www.sueddeutsche.de/wirtschaft/lieferkettengesetz-hubertus-heil-gerd-mueller-entwurf-1.5104713 (last seen February 2024).

bringing an international lawsuit before German courts, that would be the actual economic loss[210].

Irrespective of the validity of these criticisms and the identified limitations within the text of the German law as revealed during our analysis, it remains imperative, if not unequivocally indispensable, to address the topic of human rights protection within the corporate sphere. The human rights risks brought to the forefront by the German Supply Chain Act serve as a reminder, harkening back to international conventions, charters, and covenants that have been in existence for approximately half a century. These are principles and standards that responsible companies should already have been attuned to. It appears that the Act does not demand a substantial departure from these pre-existing obligations but rather streamlines and reinforces their implementation in a straightforward and supportive manner. If the common goal is to achieve the Sustainable Development Goals (UN SDGs) by 2030, there is really a need for statues like the German Supply Chain Act to be enacted[211]. For instance, according to SDG number 8.7, Child Labour, listed in the German Act in risks number 1 and 2, must be eradicated by 2025, just around the corner.

From the premises we have found out that the new-born German Supply Chain Act is the outcome of a compromise between different political opinions inside the German government. Maybe for this reason the Act appears in some parts fragile, especially looking at law enforcement and at the lack of civil liability for companies. We have in fact analysed which critical points have been highlighted by scholars and understood that it is a law too weak for the NGOs on one hand, and it is asking too much for the companies on the other.

However, if compared to other countries' similar statutes of France, United Kingdom and Netherlands we will be analysing, the German Supply Chain Act proves to be a conceivably strong and advanced human rights due diligence statute. The potential is clear: if after the evaluation mechanisms over the next five years the Act will show to be successful, the German legal system would have something to be proud of, hoping that

[210] M. SAAGE-MAAß, S. RAU, *Transnationale juristische Kämpfe gegen Menschenrechtsverletzungen durch Unternehmen*, op. cit., p. 113.

[211] On the importance of due diligence as additional tool in addressing systemic human rights issues, a full and convincing argumentation is offered by B. BAADE, *Due Diligence and the Duty to Protect Human Rights,* op. cit., from p. 107.

other countries will follow the same footprints, towards an avenue to reach the targets set by the SDGs.

Despite flaws that have been outlined, this law could be described as a game changer, due to the fact that it turns away from voluntary standards into binding regulations. In contrast to the previous scenario, a procedurally actionable mechanism for victims has emerged in Germany, signifying a pivotal shift where workers' human rights issues can no longer be disregarded. This marks a significant departure, as it compels companies to integrate human rights considerations into their risk management practices for the first time in German corporate accountability. The fact that this is done with the involvement and obligation of companies corresponds to a modern understanding of international law that does not remain at the level of the State but recognises the (*de facto*) power of companies and creates corresponding responsibilities without placing an excessive burden on them through these regulations[212].

Another reason why this law represents a crucial turning point in corporate regulation, is that the debate in the *Bundestag* sends a clear signal to Europe in favour of a strong European law. With its innovative and forward-looking purposes, the German law has in fact proved to be basis and support for the European level. Over the next few years, the EU could hopefully consider integrating a more helpful and common trade policy, by reason of the fact that it is not only task of companies to look for human rights, but it is also responsibility of governments to protect citizens. This implies that also connections between different countries are essential, in order to ensure that the path towards a safer workplace turns out to be as accessible as possible for workers.

The actual enforcement of the Supply Chain Act remains to be seen. There has to be a vast mechanism in which companies have to enter into and a successful implementation will require all strength and commitment coming from the side of academics, lawyers, trade unions. Since the civil society network *Initiative Lieferkettengesetz* has represented one of the main leading subjects behind the approval of the law, primary aim has to be to involve members who were constant in these processes and the potential victims of labour law violations along the global supply chain.

[212] In this sense see M. MONNHEIMER, P. NEDELCU, *Wirtschaft und Menschenrechte – Kommt ein Sorgfaltspflichtengesetz?*, op. cit., at p. 209 and also M. KRAJEWSKI, K. TONDAL, F. WOHLTMAN, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, in *Business and Human Rights Journal*, 2021, p. 1-9.

The reception and application of the *Lieferkettengesetz* by German courts will be a focal point of interest in the coming years, especially in light of the law's gradual expansion to encompass larger companies. This expansion over time, widening the law's scope of application, is expected to influence and potentially reshape how the German legal system interprets and enforces the Act. The legal community and stakeholders will keenly observe how these developments unfold, as they hold the potential to set significant precedents and establish crucial legal standards within the context of supply chain due diligence and corporate accountability. The evolution of this legal landscape and the responsiveness of the German judiciary to these changes will indeed be a noteworthy aspect to monitor. Bearing in mind the Sustainable Development Goals' aim, the German Supply Chain Law embodies only a starting step and an opening contribution to the ILO outlined fair globalisation, but a game-changing one.

1.2 Further examples of corporate due diligence in Europe: France, United Kingdom and the Netherlands

Without any presumption of completeness, in the following pages it is intended to make brief reference to European legislative experiences of other countries that have taken into account the same issue addressed by the German Supply Chain Act. In countries such as France, the United Kingdom and the Netherlands, in a similar way as in Germany, attempts have been made to regulate and monitor the impact that activity of enterprises, or at least the largest of them, has on human rights of workers present along their production chain.

In 2017 France introduced a bill in the National Assembly to establish a corporate vigilance duty for parent companies and contract-awarding companies, known as *Loi de vigilance*[213]. The law established a new provision in the *Code de Commerce* to provide for reporting duties subject to liability and sanctions. Large companies in all industry sectors are required to monitor controlled companies and certain business partners in an

[213] Loi n. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/. For an in-depth commentary on the French law, see L. NASSE, *Loi de vigilance: Das französische Lieferkettengesetz*, Heidelberg, 2022.

appropriate manner in order to avoid risks of human rights and environmental violations. Just like the German Supply Chain Act, the French bill incorporated the essence of the UN Guiding Principles on Business and Human Rights, corporate due diligence, and expanded the application of due diligence in addition to human rights of workers, also to environmental and corruption risks. The new provision in the Code de Commerce applies to all companies and all industries with 5.000 or more employees in the parent company and French subsidiaries and sub-subsidiaries. The law also applies to companies with 10.000 or more employees worldwide, including subsidiaries and sub-subsidiaries (art. 1).

The law defines due diligence as a duty to draft and implement a monitoring plan (*plan de vigilance*) for all controlled companies and established business relationships (art. 1, new art. L.225-102-4 (1) *Code de Commerce*). This provision addresses various and generally listed topics: human rights and basic freedoms, health and safety of persons and the environment. Unlike the German Act, the French law does not closely define these public protected rights. The legislator and the government decided against a catalogue of international or national standards, since they are in constant development[214]. Thus, the monitoring plan must include appropriate prevention measures against severe infringements on the protected rights, but the relationship of these protected rights and their definitions would remain blurry[215].

If a company does not fulfil their duties within three months of being requested to do so, the appropriate court may order the fulfilment of duties, upon the request of any person who has a justified interest (new Art. L. 225-102-4, paragraph 2, sentence 1 Code de Commerce). Initially the court may threaten to impose a fine (the so-called *astreinte*), and then order payment of a fine. The fine will be recurrent if the violation continues and in urgent cases the court president may issue a preliminary ruling (Art. 2, sentence 2 Loi de vigilance). Not only aggrieved parties, but also any person or organization who has a justified interest in the procedure is entitled to apply to the court. Thus, even NGOs or unions are entitled to file an application with the courts[216].

[214] So S. BRABANT, E. SAVOUREY, *Scope of the Law on the Corporate Duty of Vigilance*, in *Revue Internationale de la Compliance et de l'Éthique des Affaires*, n. 50, 2017, p. 6.

[215] This is the opinion of R. GRABOSCH, *Companies and human rights – A Global Comparison of Legal Due Diligence Obligations*, Berlin, 2020, at p. 31.

[216] S. BRABANT, E. SAVOUREY, *op. cit.*, p. 2.

In the opposite direction of the German Supply Chain Act, the main enforcement mechanism of the *Loi* lies in the risk that companies are likely to be held liable for damages. The legislators have thus successfully closed a loophole that had existed in French tort law[217]. The basis for civil liability can be found in the new art. L. 225-102-5 of the Code de Commerce. Whoever does not develop and implement a monitoring plan, is liable for damages under general French tort law, if the damage could have been prevented otherwise. A company does not have to pay all damages, only the ones which were caused by the action of the company, its controlled companies or business partners in a type of no-fault guarantee or risk liability scheme, and only those which could have been prevented by fulfilment of the due diligence duties. Like what has been established by the German Parliament, companies' duties do not consist in an obligation based on reaching a particular result, but in an obligation based on making an effort, that is of means[218].

The few, recent court proceedings related to the French law seem to have shed light on its weaker aspects. In fact, on January 30, 2020, the Tribunal de Grande Instance of Nanterre made a significant decision in the 'Total in Uganda' case, asserting its lack of jurisdiction to adjudicate on matters related to the duty of supervision[219]. Instead, the case was deferred to the consular courts. This incident underscores that the intricacies of a company's internal management are not typically within the purview of a judicial judge, making the involvement of the consular judge more relevant[220].

Within the same case, l'*affaire* "TotalEnergies", on February 28, 2023, the Judicial Court of Paris issued an interim order within the context of a legal dispute related to the enforcement of the French *Loi de vigilance*[221]. This particular ruling marked the culmination of a protracted legal process that commenced in 2019 when various NGOs summoned the defendant to court, alleging a breach of their vigilance obligation. Fast

[217] R. GRABOSCH, *Companies and human rights*, op. cit., p. 34.

[218] On this aspect see S. COSSART, J. CHAPLIER, T. BEAU DE LOMENIE, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, in *Business and Human Rights Journal*, vol. 2, 2017, at p. 321.

[219] Ordonnance Tribunal de Nanterre, 11 février 2021, n. 20/00915.

[220] In the framework of the French legal system, the consular judge is sourced from civil society and diverges from the professional judiciary. Unlike the judicial judge, the consular judge is a non-professional figure obligated to be enlisted in the Trade and Companies Register. Operating within the domain of commercial courts, the consular judge adjudicates conflicts involving traders, craftsmen, credit institutions, or financial companies. Beyond dispute resolution, the consular judge also plays a proactive role in averting challenges and predicaments for businesses.

[221] Tribunal judiciaire de Paris, 28 février 2023, n. 22/53942 et 22/53943.

forward three years, and the Court has declared this legal action as inadmissible. In essence, the Court determined that a fundamental procedural prerequisite of the French Vigilance Law had not been met – specifically, the requirement that the plaintiff must first serve a formal notice to the concerned company, urging it to adhere to its vigilance obligation, before resorting to legal action.

The Courts' considerations would be tied to the fact that many facets addressed by this law would transcend strict legal aspects, as they encompass ethical and operational dimensions vital to a company's functioning. As a result, the emergence of a body of highly jurisprudential rules, necessitating consistency in future decisions, could be envisaged. Furthermore, this would explain the surprisingly low number of formal notices and legal actions based on the supervisory obligation since the law's enactment[222].

The *Modern Slavery Act* (MSA) was introduced in the United Kingdom in 2015 and obliges companies to report their measures fighting slavery and human trafficking[223]. The law introduces new criminal offences related to slavery, servitude and forced and compulsory labour (par. 30) and contains protective provisions for persons affected by slavery and human trafficking and provides for an independent Anti-Slavery Commissioner (par. 40-44). The Anti-Slavery Commissioner's duty consists of working towards the «prevention, detection, investigation and prosecution of slavery and human trafficking offences» and to identify the of victims of those offences (par. 41). Paragraph 54 outlines the reporting duties for companies who do business or part of a business in the UK and who have a worldwide turnover of £ 36,000,000 or more, regardless of whether the revenue is derived by the parent company or its subsidiaries. The British Government estimates that 9000 companies are affected by the reporting duty[224].

Paragraph 1, in declaring the prohibition of slavery, servitude and forced or compulsory labour, refers to article 4 of the European Convention on Human Rights, not

[222] So O. CLAUDE, A. LÉVY, *Les enseignements des premiers contentieux de la loi sur le devoir de vigilance*, in *La Revue Européenne du Droit*, vol. 1, n. 1, 2020, at p. 107.

[223] Modern Slavery Act 2015, c. 30, 26 March 2015. The text of the MSA is available under: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted. A valuable guide to the Act can be found in S. RAO, *Modern Slavery Legislation – Drafting History and Comparisons between Australia, UK and the USA*, London, 2020, from p. 30. See also O. MARTIN-ORTEGA, *Due Diligence, Reporting and Transparency in Supply Chains: The United Kingdom Modern Slavery Act*, in A. BONFANTI (ed.), *Business and Human Rights in Europe – International Law Challenges*, London, 2019, p. 110-121.

[224] The data is taken from the UK Government Impact Assessment on Modern Slavery Act, available under: https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide/transparency-in-supply-chains-a-practical-guide#who-is-required-to-comply.

explicitly providing a definition of these terms. However, paragraph 2 defines human trafficking as «arranging or facilitating the travel of another person with a view of the victim being exploited» and paragraph 3 lists six contexts in which exploitation may occur: slavery, servitude, forced or compulsory labour, sexual exploitation, removal of organs, violence, threats or deception as well as minority (under the age of legal consent) or particular vulnerability.

Reporting duties are regulated in paragraph 54 and the act makes it clear that whether there is the inspection of a prohibited conduct is the outcome of a case-by-case decision and depends on the circumstances. Companies have to publish on their website for each of their fiscal years the actual measures taken to assure that «modern forms of slavery» and human trafficking are prevented in all supply chains and business units. Reporting duties as to slavery and human trafficking apply worldwide and do not end at borders or at any particular level of the supply chain (par. 54, section 12).

If a company does not publish the statement, the Secretary of State may bring civil proceedings in the High Court for an injunction and unlimited fines may be imposed against non-compliant companies. The government will consider court action if a company has not issued any statement, or the statement does not address any measures taken. The government does not examine whether the statement is accurate regarding its content or whether it is written in a clearly understandable manner: it only relies on consumers and civic organizations to find the statements, assess and compare them, and publicly denounce weak statements[225].

Finally, and most importantly, like the German Supply Chain Act, the Modern Slavery Act does not establish civil liability for companies who become known for slavery in their supply chain. The government has stated that violation of reporting duties does not imply such liability[226]. Probably, it is the intertwining of these elements that has led to the predominant, if not exclusive, utilisation of the Act within the framework of the UK criminal justice system. It is noteworthy that the MSA introduces novel criminal offences, which have seemingly propelled its primary invocation in the British legal landscape. These offences not only underscore the Act's significance but also highlight

[225] R. GRABOSCH, *Companies and human rights*, op. cit., p. 26.
[226] *Ibidem*.

the particular emphasis placed on its enforcement within the criminal justice domain of the United Kingdom.

Some authors have stated doubts about certain weaknesses of the MSA, especially regarding the lack of requirements related to complex business relationships and supply chains, pointing to the lack of consultation with interest groups during the formation process of the act, defining it as a 'top-down legislation'[227]. In consideration of the fact that the UK Government counts "modern forms of slavery" and human trafficking among the worst crimes, legal scholars have assessed the MSA as rather weak[228].

In order to offer a clearer picture of the different laws posed by States to protect basic human rights in consequence of companies' activity, a final example is here briefly provided: Netherland's *Wet Zorgplicht Kinderarbeid* (Child Labour Regulation)[229]. The Dutch Senate voted the Regulation on the 14th of May 2019 for a law addressing due diligence duties to prevent child labour. To define the term 'child labour' the law refers to the ILO Conventions: the Minimum Age Convention, n. 138 of 1973, that regulates the minimum age for labour by young persons and children in consideration of the circumstances of the employment conditions, with special provisions for labour that is harmful to the health or development of young persons; The Worst Forms of Child Labour Convention n. 182 of 1999, which regulates the worst forms of child labour and its prevention (art. 2)[230].

The law applies to all companies who deliver goods or services to Dutch consumers, no matter whether the final consumer is a company or an individual consumer. Foreign companies who sell goods or services to Dutch consumers at least twice a year

[227] So R. BROAD, N. TURNBULL, *From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK*, in *European Journal on Criminal Policy and Research*, vol. 25, 2019, at p. 12.

[228] See among all V. MANTOUVALOU, *The UK Modern Slavery Act 2015 Three Years On*, in *The Modern Law Review*, vol. 81, n. 6, 2018, at p. 1045.

[229] Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Staatsblad 2019, 401, 24 October 2019. Available on the Government's Gazette in Dutch: https://zoek.officielebekendmakingen.nl/stb-2019-401.html. For a full analysis of the Dutch text see A. HOFF, *A Bill for Better Business. Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative*, in *Völkerrechtsblog*, May 2021.

[230] For a reference to the content of the two conventions in relation to our discussion, see respectively, M. BORZAGA, *Limiting the minimum age: Convention 138 and the origin of the ILO's Action in the field of child labour*, and D. RISHIKESH, *The worst forms of child Labour: a guide to ILO Convention 182 and Recommendation 190*, in G. NESI, L. NOGLER, M. PERTILE (ed.), *Child Labour in a Globalized World. A Legal Analysis of ILO Action*, London, 2008, from p. 39 and 83.

are explicitly included in the law, even if they do not have an office in the Netherlands. The only foreign companies that are excluded are those who only transport or tranship goods (art. 4). However, the law indirectly effects additional companies in the global supply chain, since companies who are subject to the law must develop and implement measures to reduce risks of child labour in the whole supply chain[231].

Under art. 5, companies must submit a onetime declaration that they observe appropriate due diligence to prevent child labour. Companies must fulfil their due diligence duties by taking the following three steps: a due diligence assessment must be performed to determine whether there is a reasonable suspicion (*redelijk vermoeden*) that child labour is used in the supply chain; if there is a reasonable suspicion, the company must develop and implement an action plan, following the recommendations of the ILO Child Labour Guidance Tools; the company submits finally a declaration about the application of appropriate due diligence. The Dutch government has offered financial assistance with measures against child labour to those companies who participate in one of the sector-specific human rights roundtables[232].

As to the enforcement provisions, every person and every company whose interest is affected may file a complaint with the supervisory authority, pointing to a specific violation against the law (art. 3). It is not sufficient to voice a general suspicion, the government clarified that concrete evidence is required instead[233]. If the company does not remedy the violation within six months, the supervisory authority may impose a fine of 820.000 € or may order a fine of up to 10% of annual company revenue in special cases. Managers could expect criminal consequences if they are charged with recurrent violations within five years, and a prison sentence of up to six months may be imposed (art. 6). Such severe and substantial penalties are certainly justified by the importance the Dutch Government has given to the attempt to eradicate, by all means and as far as possible, the involvement of Dutch companies in the widening of child labour.

[231] R. GRABOSCH, *Companies and human rights*, op. cit, p. 43.

[232] The Dutch government has in fact established a specific fund against Child Labour in 2018. More information under: https://english.rvo.nl/subsidies-programmes/fbk.

[233] R. GRABOSCH, *Companies and human rights*, op. cit, at p. 44.

2. *Relevant supranational ongoing regulation projects and recent policy developments against forced labour*

Within the investigation outlined in the preceding pages, a discernible shift towards an enhanced focus on the sustainability of companies' activity has become increasingly prominent within recent domestic regulation developments, incorporating a particular emphasis on safeguarding the fundamental rights of workers. These legislative reporting trends, whether mandatory or voluntary in nature, share a common objective: to hold companies increasingly accountable for the repercussions of their operations throughout the supply chain, specifically concerning workers' human rights and environmental protection. This growing trend underscores the broader recognition of the intricate interplay between business activities and their social and environmental consequences unfolding globally.

A concrete proof of these trends is the rich and dense European Union regulation that has developed in recent times. In the wake of the final approval of the Corporate Sustainability Reporting Directive (CSRD)[234] that came into force in December 2022, the European Commission put forth a proposal for a Corporate Sustainability Due Diligence (CSDD) Directive on 23 February 2022, which subsequently gained approval from the European Parliament on 2 May 2023[235]. With a mutually endorsed text in hand, the stage at the beginning of 2024 is set for a 'trilogue' involving the European Commission and the European Council. Should the proposal find favour and secure adoption by the Council, it would then gain final approval, heralding a two-year window during which member States are tasked with transposing the Directive's provisions into their respective national laws[236].

[234] This is the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, 16 December 2022.

[235] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022)71, 23 February 2022.

[236] For the content of the directive in relation to the next steps before its approval see K. H. ELLER, *Regulating the Sustainability Transition – The Corporate Sustainability Due Diligence Directive Ahead of the Trilogue*, in *Verfassungsblog*, 9 June 2023. Following indications of a finalised political agreement in December 2023 (https://www.business-humanrights.org/en/latest-news/eu-csddd-political-agreement/), and despite more recent resistance to the directive's ultimate approval from Germany and Italy (https://www.eunews.it/en/2024/02/09/italy-and-germany-block-eu-agreement-on-business-ethics-just-before-the-finish-line/), the European Parliament approved the CSDD on 24 April 2024, so that he next, last step to adopt the CSDDD is a final formal approval in Council.

The proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence involves a wide range of companies, which can be divided into two macro-categories: European companies and non-EU companies. As far as European companies are concerned, both large companies, regardless of the sector in which they operate, which have, on average, more than 500 employees and a net turnover, worldwide, of more than 150.000.000 €, and medium-sized companies in high-impact sectors (among others textiles, agriculture, extraction of mineral resources) with more than 250 employees and a net turnover of more than 40.000.000 € will be subject to the Directive (Art. 2, para. 1). In addition, under paragraph 2, the CSDD will also apply to non-European companies with a net turnover generated in the EU of more than 150.000.000 €. Companies with a smaller turnover, even if higher than 40.000.000 €, with at least 50% of the turnover being generated in the EU in one or more high impact sectors as identified by Art. 2, para. 1, letter (b) of the proposed Directive will also be affected.

Article 4 presents a list of due diligence obligations of companies with respect to actual or potential negative impacts on human rights and the environment, the content of which is then specified in the following articles. These obligations range from identifying, mitigating and eliminating actual and potential negative impacts to establishing and maintaining a related complaints procedure and publicising their actions in this regard.

Failure to comply with the duty of care on supply chains may result in sanctions and fines for companies and may expose them to liability if they fail to prevent, mitigate and/or terminate the relationship with suppliers (Art. 1, para. 1). In order to make the due diligence obligations effective, the Commission has provided for individual member States to identify the sanctions applicable in the event of violation of the national provisions that will be adopted to implement the Directive. The States will also have to identify the authority that will be called upon to ensure the effective implementation of the rules in question (Art. 20).

It is then in Article 22 that we also find the provision of a civil liability regime for the companies covered by the discipline. In the event of the final approval of the CSDD, companies will in fact be held liable for damages caused if they fail to comply with the obligations imposed by the Directive with regard to both the prevention of negative impacts and the halting of actual negative impacts, and if, as a result of such failure, a negative impact occurs that should have been identified, prevented, halted or minimised.

The CSDD Proposal marks a step towards the promotion of good practices by companies active in the European market to contribute to sustainable development and economic and social transition. In fact, the entry into force of this Directive in the Union aims to promote the respect of human rights and the protection of the environment by companies in the activities they carry out, in the activities carried out by their subsidiaries and throughout the supply chain in which they participate. A uniform due diligence framework would promote respect for human rights and environmental protection, create a level playing field for companies within the Union and avoid fragmentation resulting from autonomous action by Member States.

From a comparison between the text of the Draft Directive by the European Commission and the German Supply Chain Act, it appears that many aspects missing in the Act are present in the former: provision has been made for the inclusion of civil liability and the relevant burden of proof, as well as a presumption of causation and a presumption of violation of due diligence duties if a harm occurs. Furthermore, the Directive would be applicable to all companies with more than 500 workers, even to foreign companies that have their principal place of business in the EU. Apparently, all the criticism addressed to the Supply Chain Act has been already taken up by the Draft Directive, that will hopefully be the driving force for the implementation of European companies' due diligence obligations in the next months. Scholar's hopes for a Directive that persists in what the EU Parliament voted on are up, but it is believed that also the business community has its lobbies capacities taking up force[237].

[237] E. M. KIENINGER, *Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz*, op. cit., at p. 338. For further reading on the proposed Directive see C. PATZ, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *Business and Human Rights Journal*, vol. 7, n. 2, 2022, p. 291-297, as well as the analysis mandated by the European Parliament by O. MARTIN-ORTEGA, C. METHVEN O'BRIEN, *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective – In-depth analysis*, Brussels, 2022. Negative or improvable aspects of the proposed directive are then highlighted by J. VOGT, R. SUBASINGHE, P. DANQUAH, *A Missed Opportunity to Improve Workers' Rights in Global Supply Chains*, in *Opinio Juris*, 18 March 2022, C. METHVEN O'BRIEN, J. HARTMANN, *The European Commission's proposal for a directive on corporate sustainability due diligence: two paradoxes*, in *EJIL:Talk!*, 19 May 2022 and M. FASCIGLIONE, *Luci ed ombre della Proposta di DIrettiva Europea sull'obbligo di due diligence d'impresa in materia di diritti umani e ambiente*, in *SIDI Blog*, May 2022. Regarding the formulation of the directive based on established national experiences, refer to C. CLERC, *The French 'Duty of Vigilance' Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains*, in *ETUI Policy Brief - European Economic, Employment and Social Policy*, n. 1, 2021 and C. BRIGHT, *Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?*, in *EUI Working Paper MWP*, 2020.

While still in its nascent stages, another initiative, of even greater relevance to our subject of exploration, is emerging within the European Union. Specifically, the European Commission has set forth a Proposal for a Regulation "on prohibiting products made with forced labour on the Union market"[238]. More specifically, the Regulation would aim to prohibit «economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour» (Art. 1, para. 1).

As it comes to definitions, the Proposal also refers to the 1930 ILO Convention on Forced Labour n. 29, with regard to the definition of forced labour (Art. 2). The proposal encompasses a broad spectrum of products, including those produced within the EU for both domestic consumption and exports, as well as imported goods. Importantly, it refrains from singling out specific companies or industries. Instead, it relies on established international definitions and standards, emphasizing the necessity of fostering strong collaboration with global partners. The proposal confers the authority upon national authorities to remove products manufactured with forced labour from the EU market, contingent on the outcomes of a thorough investigation. The prohibition will be put into effect by national authorities in the Member States through a resilient and risk-driven enforcement strategy. In the initial stage, they will evaluate forced labour risks by drawing insights from a wide array of information sources. These collective sources should aid in the identification of risks and direct their enforcement efforts. Such sources may involve input from civil society organisations, a comprehensive database outlining forced labour risks linked to specific products and geographical regions, and the diligence processes undertaken by companies (Art. 4 ff.).

Additionally, EU customs authorities are tasked with the responsibility of detecting and halting the entry of products manufactured through forced labour at the EU's borders (Art. 15 ff.), and the Commission is scheduled to release guidelines within 18 months from the Regulation's enactment (Art. 23). These guidelines will encompass directives on due diligence for combating forced labour and will provide information about the indicators of forced labour risks.

On the 17th October 2023 the Internal Market and International Trade Committees of the European Parliament made adjustments to the Commission's proposal, tasking the

[238] European Commission, Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM(2022) 453 final, 14 September 2022.

Commission with compiling a list of geographical regions and economic sectors deemed high-risk for forced labour utilization. In the case of goods originating from these high-risk areas, authorities would no longer be required to substantiate instances of forced labour; instead, the burden of proof would shift to the companies. The Committees also advocate for a process where goods removed from the market can only be reintroduced once a company demonstrates it has ceased the use of forced labour in its operations or supply chain and has rectified any pertinent issues.

The two Committees have adopted the draft report with a vote of 66 in favour, 0 against, and 10 abstentions. The next phase involves the plenary confirming it as the European Parliament's negotiating mandate. Subsequently, discussions can commence to determine the final shape of the regulation once the Council also adopts its position[239].

Another significant initiative that is necessary to highlight in this context is to trace back to 2014, three years after the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs)[240]. Resolution 26/9 by the United Nations Human Rights Council (HRC)[241] established then «an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises» (Art. 1). The Resolution was drafted by Ecuador and South Africa and was voted in favour by other twenty countries, mostly from the Global South, while being resisted by the member States of the European Union and the United States.

The open-ended intergovernmental working group (OEIGWG) was founded within the Office of the United Nations High Commissioner for Human Rights (OHCHR) mandate aimed at strengthening the implementation of the Access to Remedy Pillar of the UNGPs and thus improve the prospects for corporate accountability and remedy in

[239] The latest version of the draft Regulation as amended by the European Parliament Committees can be found at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ33/DV/2023/10-16/FinalCAs1-6ArticlesEN.pdf. The development and approval process can be followed on the European Parlament's website: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/0269(COD).

[240] See *supra*, par. 1.

[241] HRC, Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 14 July 2014.

business and human rights cases. The OEIGWG reached its ninth session in 2023 and submitted the relative updated Draft of the proposed Treaty[242].

The current Draft includes mandatory due diligence for business enterprises through the obligation on States in Article 6, under the heading 'Prevention', as well as the promotion of an effective and eased access to remedy for the victims in Article 7. In addition and most importantly, provision is made for civil liability according to Article 8: «Each State Party shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of transnational character».

Towards what is supposed to become a binding UN Business and Human Rights Treaty (BHR Treaty)[243], it is interesting to note that, throughout the current draft, the term 'forced labour' only appears once in the text, embedded in a particular context, in provisional Article 16, headed "Implementation". At its paragraph 3, the draft article states that «Special attention shall be undertaken in the cases of business activities in conflict- affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence, the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour»[244].

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[242] OEIGWG, Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, July 2023. The 2023 version of the Draft Business and Human Rights Treaty is available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf. The progress of the Treaty process and related documents can be found under: https://www.business-humanrights.org/en/latest-news/9th-session-oct-2023/.

[243] For a more detailed discussion, refer here to I. BANTEKAS, *Towards a UN Business and Human Rights Treaty*, in I. BANTEKAS, M. A. STEIN (ed.), *The Cambridge companion to business & human rights law*, Cambridge, 2021, p. 583-610. As regards the 2020 version of the BHR Draft Treaty, in-depth analysis is offered by R. MARES, *The United Nations Draft Treaty on Business and Human Rights: an analysis of its emergence, development and potential*, in A. MARX, G. VAN CALSTER, J. WOUTERS (ed.), *Research Handbook on Global Governance, Business and Human Rights*, Cheltenham, 2022, p. 22-44.

[244] In connection with the framework within which the term 'forced labour' is included here, please refer to the valuable considerations on mandatory due diligence legal instruments in the context of armed conflicts by M. PERTILE, *Gli obblighi di diligenza delle imprese e i minerali provenienti da zone di conflitto: riflessioni sull'origine e sulla rilevanza del concetto di conflict minerals*, in *Giornale di diritto del lavoro e di relazioni industriali*, vol. 171, n. 3, 2021, p. 391-420.

In order to achieve the goal of treaty adoption, the OHCHR also leverages the support of its internal Accountability and Remedy Project (ARP), which proposed a set of actions aimed at bolstering the efficiency of diverse remedial mechanisms, both within the judicial and non-judicial spheres, in instances of human rights violations associated with business activities. Still, another helping body is to be found in the Working Group on Business and Human Rights, established with HRC Resolution 17/4, whose mandate lies among the others in promoting the effective and comprehensive dissemination and implementation of the UNGPs and enhancing access to effective remedies, also in the context of the 2030 SDGs Agenda[245]. While the complexity of getting all relevant stakeholders to agree around a binding legal instrument of a supranational nature such as the BHR Treaty is of course conceivable, the desired effects of the work of these bodies remain to be seen over the next few years, as the OEIGWG's mandate reaches its 10-year mark.

To underscore the current relevance of the supranational discourse on combating forced labour and the corresponding dedication of States to address this issue, it is finally noteworthy to highlight the concluding statement released during the latest gathering of G20 countries, which took place on September 9 and 10, 2023, in New Delhi, India. The G20 New Delhi Leaders' Declaration[246], is divided into ten sections, the first of which is entitled "A. Strong, Sustainable, Balanced, and Inclusive Growth". Within this section, under the heading of "Global Economic Situation" representatives of States recognize «the critical role of private enterprise in accelerating growth and driving sustainable economic transformations», they therefore undertake «to work with private sector to: 1. Create inclusive, sustainable, and resilient global value chains, and support developing countries to move up the value chain […] » (point 17). In an even more timely and compelling way, further on in the Declaration, under the heading of "Preparing for the Future of Work", leaders commit «to addressing skill gaps, promoting decent work and ensuring inclusive social protection policies for all», recovering the concept of Decent

[245] HRC, Resolution 17/4 Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4, 6 July 2011. In relation to the 2030 SDGs Agenda, see *supra*, par. 1.

[246] Group of 20, *G20 New Delhi Leaders' Declaration – One Earth, One Family, One Future*, New Delhi, India, 9-10 September 2023, available at: https://www.g20.org/content/dam/gtwenty/gtwenty_new/document/G20-New-Delhi-Leaders-Declaration.pdf.

work born within the ILO in the late 1990s[247]. The implementation of the decent work aim is followed by a list of States' commitments among which, in the last one, they pledge to «increase our efforts for the elimination of child labour and forced labour along global value chains» (point 20, ix). The Leaders' Declaration, however, met with harsh criticism from the group of Civil Society Organizations (CSOs) united in the so-called People's 20, a global network comprising civil society actors and organisations that engage with the G20 summit and related processes. In fact, in the CSOs' opinion, «beneath its eloquent rhetoric» the Declaration would fall «short in providing substantial analysis and tangible solutions for the pressing global crises», as the listed commitments «lack of an independent accountability and monitoring mechanism to assess their implementation»[248].

[247] See *supra*, Chapter I, from par. 3.1.

[248] People's 20, Press Statement on the New Delhi G20 Leaders' Declaration, 11 September 2023, available at: http://peoples20.org/en/images/03_07.pdf?ckattempt=1.

INTERIM CONCLUSIONS

Throughout the initial section of this chapter, the case law of the International Court of Justice and the regional human rights courts pertaining to incidents of forced labour and slavery has been examined in depth. Notably, within the ICJ's decisions on these matters, the Barcelona Traction case stands out, underscoring the significance of *erga omnes* obligations for States and specifically referencing slavery among the examples provided. The issue of the legal nature of obligations associated with the forms of exploitation observed is paramount for an overarching comprehension of the corresponding State responsibilities from a legal standpoint. However, delving into this aspect will be deferred to the forthcoming chapter, where, on the basis of the evidence collected, an endeavour will be made to illuminate the nature of States' obligation nature for forced labour conducts.

Through the study of the European Court of Human Rights' case law, we have witnessed the nuanced evolution that the Court has undergone in interpreting Article 4 of the Convention over the years. Commencing with the assertion of positive obligations in *Siliadin*, progressing to the inclusion of the unprecedented scenario of human trafficking, almost blending seamlessly with other forms of exploitation in *Rantsev*, and further maturing in the elaboration of positive obligations in the case of the Greek camp workers in *Chowdury*. This evolution culminated in a Grand Chamber decision, seemingly at odds with *Rantsev*, emphasising the imperative for a clear delineation of distinct forms of exploitation in *S. M. v. Croatia*, a stance reaffirmed by the interpretation in *Zoletic*, the latest chronological pronouncement by the European judges on Article 4.

From the valuable decisions of the Inter-American Court of Human Rights, a prominent focus emerged on the distinctive issues of the region, and in particular of Brazilian slave labour in *Hacienda Brasil Verde*, prompting the Court to delineate the content of positive obligations for States concerning compliance with Article 6 of the Convention. The Inter-American Court further actively engaged in a discourse with the European Court in its pronouncements, frequently referencing its rulings and employing the same legal instruments for its interpretation purposes. This interaction is considered to be a noteworthy aspect in a collective effort to combat a phenomenon that exhibits both national and increasingly global dimensions.

While the African Court on Human and Peoples' Rights has not extensively addressed the interpretation of Article 5 of the Charter, encompassing diverse and heterogeneous forms of human exploitation and degradation, yet omitting explicit mention of forced labour, it is crucial to acknowledge that the African human rights system has provided insightful responses. These responses are derived from the manifold contributions on the subject by the African Commission and the seminal case of *Hadijatou Mani* adjudicated by the ECOWAS Court in 2008, offering a profound reflection of the social reality in Niger and the corresponding understanding of the phenomenon of slavery.

In the latter part of this chapter, at first we closely examined several instances of national legislation designed to hold companies accountable for upholding human rights across their supply chain, employing the concept of human rights due diligence. The most recent illustration in this realm, the German *Lieferkettengesetz*, underwent a convoluted approval process and, despite its ambitious scope, has ultimately resulted in a somewhat limited accountability for companies, particularly following the non-provision of civil liability. In contrast, French law has already established such liability since 2017, amending an article of the French *Code de commerce*, although, once again, due diligence is also in this case framed not as an obligation of result, but as an obligation of means, as for the German law. The English *Modern Slavery Act* proved to represent a peculiar example, introducing novel criminal offenses within the English legal framework alongside the due diligence mechanism.

It appears that the critiques articulated by scholars regarding the aforementioned instances of national legislation on human rights due diligence have been incorporated into the drafts of a European Directive on Corporate Sustainability Due Diligence. It almost seems so as if these national experiences have served as a testing ground for the formulation of a potentially more comprehensive supranational regulation. The draft European Directive, in the final stages before its impending approval, also endeavours to delineate the obligations of companies from non-EU States engaging in trade within the EU. This aspect is mirrored in the nascent proposal for a directive by the European Commission, focusing on the prohibition of products manufactured with forced labour within the Union market, thereby imposing a restriction on the entry of such products from third countries.

A noteworthy international example explored in this context is the ambitious initiative originating within the United Nations, specifically undertaken by an intergovernmental working group mandated by the Human Rights Council. This initiative, primarily championed by States from the Global South, aspires to formulate a binding treaty governing the relationship between businesses and the respect for human rights, with work on its formulation now entering its tenth year. In 2023, the third draft of this prospective treaty was unveiled, and upon scrutiny, it was revealed that the term 'forced labour' makes a singular appearance in the text, specifically in the context of armed conflicts – a detail that warrants emphasis and note in view of the future final version of the treaty.

From the case law of international regional courts, from national legislation and supranational regulatory commitments, it is evident that forced labour has garnered heightened attention in recent years. The evolving interpretation of Article 4 ECHR by the European Court has reached a pivotal juncture as concerning the categorisation of different forms of exploitation, a topic slated for deeper exploration in the next chapter. Although the other two regional courts have focused less explicitly on this specific aspect, the Inter-American Court seems to have engaged in dialogue with the European Court. This is a fact that will certainly prove helpful in choosing whether the appropriate approach involves analysing a unified concept of "new forms of slavery" or if it remains necessary to differentiate between the diverse forms of exploitation encompassed by this unified concept.

Another crucial signal that demands prominence is the advocacy of countries from the so-called Global South for the initiative linked to the creation of a Business and Human Rights Treaty. Given the heightened attention to the phenomenon, as also underscored by the conclusion of the G20 meeting in India of 2023, a palpable need for coordination clearly surfaces. This coordination is essential at both an interpretative-jurisprudential level among the courts and at a political-regulatory level, bridging developments in the Western world with those in the Global South, where, according to ILO data, forced labour is most prevalent.

Certainly, the ECtHR will persist in its broad interpretations, and Western corporate responsibility standards will advance along their established trajectory. However, for a truly impactful endeavour to marginalise the phenomenon of forced

labour, it seems imperative for these interpretations and standards to extend their influence on the Global South. A potential avenue for progress may consist of intensified legislative efforts in a more stringent and empowering manner, placing greater emphasis on the responsibilities of companies throughout the entire production chain.

Beyond legislative and political considerations, from a legal standpoint, particularly owing to the interpretations provided by ECtHR judges, at a regional level a clear responsibility of States for the violation of positive obligations associated with the prohibition of forced labour by private actors has come to light, particularly in the last fifteen to twenty years. These obligations encompass procedural aspects and the establishment of legislative and administrative frameworks adequately equipped to combat forced labour within national boundaries. In essence, there is a recurring duty at the State level to institute a legislative framework geared towards preventing, prohibiting, and penalising the phenomenon. To grasp the nature of this recurring duty, or rather responsibility, for States necessitates further exploration, a topic that will be delved into in the next chapter, moving on the grounds of a detailed examination and analysis of the relevant elements gathered so far.

CHAPTER III

FORCED LABOUR LEGAL QUALIFICATION AND STATE RESPONSIBILITY: ANSWERS FROM PRACTICE AND DOCTRINAL DEBATE

1. Introduction

Numerous issues have surfaced through the comprehensive analysis undertaken in the preceding chapters. These issues stem primarily from the identification and scrutiny of regulatory frameworks addressing forced labour, the role played by international organisations, the exploration of international and regional jurisprudence, and the examination of national endeavours aimed at regulating the conduct of private entities in relation to forced labour. Notably, our examination has in particular traced the evolution of the prohibition of forced labour over the past century within international agreements, revealing current trends that strive to encompass all forms of exploitation under a unified category. Delving into the decisions rendered by regional human rights courts concerning violations of the prohibition of forced labour by private individuals, we have elucidated the obligations imposed on States by these courts in connection with this prohibition. Additionally, we documented a discernible inclination among certain States to hold companies accountable for their conduct, particularly concerning the impact of their activities on the protection of workers' human rights. This emergent trend is further manifested in significant supranational initiatives with similar aims.

Building upon the collected insights, it appears now imperative to search for possible answers to the issues that have surfaced thus far. The initial step involves determining the accurate legal characterisation of the prohibition of forced labour. As a first step, this entails assessing the legitimacy of employing an inclusive term like "modern slavery" to encapsulate all existing forms of exploitation nowadays. The objective is to discern whether, from a legal standpoint, forced labour should be analysed distinctly or can be examined alongside other manifestations of exploitation, spanning from slavery to servitude. Following this examination, the focus primarily shifts to ascertaining whether the prohibition of forced labour qualifies as a peremptory norm of international law (*jus cogens*). Drawing from a rich doctrinal debate and leveraging the

groundwork laid by the International Law Commission, an evaluation will be conducted to establish whether this prohibition fulfils the essential criteria for inclusion within this category of norms. In the subsequent phase, the inquiry extends to determine whether the prohibition of forced labour assumes the status of an obligation *erga omnes*. In navigating this aspect, insights from the International Court of Justice and, again, doctrinal contributions play a pivotal role in identifying the elements that constitute such an obligation. This comprehensive analysis aims to provide a robust legal foundation for addressing the complexities arising from the prohibition of forced labour.

Upon establishing the legal framework governing the prohibition of forced labour in international law, the second part of this chapter will delve into the other inquiry critical to the present work's purposes: to comprehend the mechanisms through which a State incurs responsibility for violations of the forced labour prohibition resulting from private actors' actions. This exploration will closely examine the avenues that have surfaced, from case law and scholarly discourse, in addressing State responsibility concerning private actors' actions. Building upon insights from the first part of the preceding chapter, it is evident that one of such avenues involves the imposition of positive obligations on States. These obligations necessitate the implementation of measures to prevent, prohibit, and punish such conduct within their territories. Subsequently, an analysis will unfold around the due diligence obligation incumbent upon States. This obligation underscores responsible conduct by States to adopt appropriate measures, ensuring that private individuals do not inflict harm, and actively working toward achieving this outcome. As we will see, the breach of such obligation could manifest in the failure to take requisite and diligent measures in this regard. Lastly, the exploration will extend to another potential avenue linking private individuals' conduct with potential State responsibility through the theory of complicity between the State and private actors. This will entail a scrutiny, grounded in the general regime of international State responsibility, to ascertain the foundations supporting this theory.

To tackle the various issues outlined above a comprehensive exploration will be pursued in this chapter, carried through an in-depth analysis of the international doctrine that has addressed the relevant aspects and by juxtaposing the evidence collected from international practice so far. As highlighted earlier, the initial focus will be on elucidating the legal qualification of the prohibition of forced labour. Subsequently, we will delve

into the intricate landscape of assigning responsibility to States in connection with violations of the prohibition of forced labour by private actors. The insights provided aim not only to enhance clarity on the overarching current issue of forced labour but also to serve as critical considerations in assessing the adequacy of actual State responses to this complex issue.

2. Framing the legal qualification of the prohibition of forced labour

In this section of the concluding chapter, an endeavour will be undertaken to delineate the legal parameters surrounding the prohibition of forced labour within international law. This endeavour will be grounded in the defining elements compiled throughout the first chapter and the insights gleaned from international case law in the second chapter. However, the elucidation provided by international law scholars will of course serve as a guiding beacon in the quest for better understanding and for some possible answers.

To ascertain the legal classification of forced labour, it becomes imperative to address the lingering uncertainties encapsulated in a query that surfaced during the first chapter. Specifically, the inquiry revolves around whether, from a legal standpoint, the prohibition of forced labour can be conjoined into a singular category encompassing other contemporary forms of exploitation. This thrusts us into the realm of deliberating the appropriateness of employing terminologies such as “modern slavery” or analogous expressions within the discourse of international law. To gain a comprehensive understanding of the legal characterisation of the prohibition of forced labour, it is paramount to begin our exploration from this juncture. This is rooted in the fundamental need to ascertain whether an argument can be substantiated for the uniformity of characteristics among various forms of exploitation, ranging from slavery to servitude and forced labour. The potential peril lies in the propensity to homogenise the legal attributes of slavery across all other categories of exploitation.

A salient feature contributing to the distinctiveness of the prohibition of slavery is its unequivocal non-derogation status, a characteristic that stands firm and is universally acknowledged across pertinent sources of international law. In light of the indisputable

status of slavery within the realm of *jus cogens* norms, it is necessary to determine whether this distinctive legal framework can be extended to encompass all other forms of exploitation. This inquiry necessitates a thorough exploration of the doctrinal discussions, scrutinizing whether the prohibition of forced labour can unequivocally align with the peremptory norms of international law, which, by their inherent nature, preclude any exceptions in the realm of international law.

Building on the insights derived from the examination of the collocation of forced labour among the norms of *jus cogens*, the subsequent step involves delving into the realm of norms within international law that impose obligations on all States, better said on the international community, that is, obligations *erga omnes*. This intricate exploration necessitates a nuanced understanding, enriched not only by scholarly perspectives but also guided by the precedents set by the International Court of Justice. In navigating this terrain, the goal is to decipher the contemporary indicators that can illuminate the essential features defining international norms qualified as bearers of obligations *erga omnes*. Subsequent to assembling the requisite elements, the ensuing step entails scrutinising the compatibility of these identified characteristics with the attributes intrinsic to the prohibition of forced labour. This scrutiny seeks to determine whether the prohibition of forced labour can be acknowledged as possessing validity vis-à-vis the international community, irrespective of a specific State's interest, whether harmed or unharmed. For this reason, the pivotal question at the forefront lies in the legal appropriateness of adopting a comprehensive term encompassing all contemporary forms of exploitation together. This inquiry prompts in fact an exploration of the legal qualifications unique to each distinct case of exploitation, emphasising the importance of understanding their singularities.

2.1. On the legitimacy of the category of "modern slavery" including forced labour

The previously introduced discourse surrounding the concept of "modern slavery"[1] encompasses a broad and diverse spectrum within doctrinal discussions,

[1] See *supra*, Chapter I, par. 3.2.

extending beyond the boundaries of legal scholarship into realms of sociology, political science, and even anthropology. At its core, this debate questions whether the term "modern slavery" adequately encapsulates all "contemporary" forms of exploitation. While we've touched upon viewpoints from these interdisciplinary areas, it seems, at this stage of our analysis, that further insights drawn from these realms might not offer much beyond the reflections already explored. This is because, by their very nature, these non-legal perspectives often stem from differing assumptions, which, from our perspective, diverge from or overlook the essence of international agreements and the jurisprudential decisions of international courts previously extensively examined. Hence, it is here deemed necessary to focus on the legal legitimacy – of course within the scope of international law – surrounding the utilisation of the term "modern slavery" or of similar expressions that have evolved over time.

Amid the discourse within international law regarding the utilisation of these terms, a further distinction arises between human rights law and criminal law branches. While this work primarily focuses on non-criminal law perspectives, the upcoming pages will underscore the doctrinal debate within human rights law. It is however crucial to note an intense debate among scholars of international criminal law regarding the suitability of employing a cumulative term for various forms of exploitation[2]. Clearly, individual

[2] As for the international criminal doctrinal debate, among those who favour a broad scope of application of Article 7 of the Rome Statute in relation to the crime of 'enslavement' there are C. STAHN, *Article 7 – The different subparagraphs*, in K. AMBOS (ed.), *Rome Statute of the International Criminal Court – Article-by-Article-Commentary*, 4th ed., München, 2022, at par. 52, p. 182; G. WERLE, F. JEßBERGER, *Principles of International Criminal Law*, 4th ed., Oxford, 2020, from p. 399; F. POCAR, *Human Trafficking: A Crime Against Humanity*, in E.U. SAVONA, S. STEFANIZZI (ed.), *Measuring Human Trafficking – Complexities And Pitfalls*, Berlin, 2007, at p. 5-12; K.L. CORRIE, *Could the International Criminal Court Strategically Prosecute Modern Day Slavery?*, in *Journal of International Criminal Justice*, vol. 14, no. 2, 2016, p. 285-303. A further supporting position in this sense can be traced back to Professor Obokata, who would later become the UN Special Rapporteur on contemporary forms of slavery (see *supra*, Chapter 1), see in particular T. OBOKATA, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, in *International and Comparative Law Quarterly*, vol. 54, n. 2, 2005, p. 445-457. Against a broader application of Article 7 of the Rome Statute are in contrast, among others, A. CASSESE et al., *Cassese's International Criminal Law*, 3rd ed., Oxford, 2013, at p. 37, who, on the basis of the mental element, emphasises the difference between international crimes and criminal offences committed for personal purposes, listing among the latter those with transnational dimensions such as slave trade and trade in women and children; H. VAN DER WILT, *Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts*, in *Chinese Journal of International Law*, vol. 13, n. 2, 2014, p. 297-334; H. VAN DER WILT *Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?*, in *Amsterdam Law School Research Paper*, No. 2014-13, 10 February 2014; N. SILLER, *'Modern Slavery' - Does International Law Distinguish between Slavery, Enslavement and Trafficking?*, in *Journal of International Criminal Justice*, vol. 14, 2016, p. 405-427. On the need to maintain the distinction between slavery and forced labour in the realm of international criminal

stances, whether in favour or against the use of such a term, are based on the reference point in Article 7 of the Rome Statute, which, as previously examined, addresses the crime of 'enslavement' among crimes against humanity[3]. Of course, there are then also voices advocating for a robust partnership between the domains of international criminal law, human rights law and refugee law to establish a tangible trajectory in overcoming the most severe forms of exploitation[4]. Moreover, observations regarding the use of the "modern slavery" term within the outlined frameworks are abundant among legal practitioners, encompassing individuals associated with international organizations, non-governmental entities, and also human rights lawyers[5]. To accommodate and discern between these diverse commentaries, it becomes imperative to thoroughly ascertain whether the utilization of the term "modern slavery" or analogous expressions seeking to encompass multiple forms of exploitation has, from a strictly legal standpoint, a justified foundation or not.

Among international law scholars, there is a noticeable dichotomy between proponents who embrace the adoption of a comprehensive term encompassing contemporary exploitative forms and those staunchly opposing this idea. Those aligning with the former position primarily lean on the premise that the "traditional demarcations"[6] between forced labour, servitude, and slavery are progressively becoming confused. Starting precisely from the analysis of forced labour, this would now constitute a transnational phenomenon, no longer confined to a single economic relationship, that intersects with and becomes inseparable from today's manifestations of slavery,

law, see in particular A. GALLAGHER, *Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage*, in L. N. SADAT, M. P. SCHARF, *The Theory and Practice of International Criminal Law – Essays in Honor of M. Cherif Bassiouni*, Leiden, 2008, from p. 427.

[3] See *supra*, Chapter I, par. 2.3.1.

[4] In this sense I. ATAK, J. C. SIMEON, *Human trafficking: Mapping the legal boundaries of international refugee law and criminal justice*, in *Journal of International Criminal Justice*, vol. 12, n. 5, 2014, at p. 1038 and also A. PETERS, S. GLESS, C. THOMALE, M.-P. WELLER, *Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law*, op. cit.

[5] For a more in-depth discussion of this aspect in the present context see G. ADINOLFI, *Il linguaggio giuridico negli atti delle organizzazioni internazionali: le raccomandazioni dell'Assemblea Generale dell'ONU in epoca di contrapposizione tra paesi occidentali e in via di sviluppo*, in G. GARZONE, F. SANTULLI, *Il linguaggio giuridico – Prospettive interdisciplinari*, Milano, 2008, p. 123-138.

[6] So S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., at p. 110.

trafficking and servitude[7]. As proof of this argument, there are some, albeit tentative, expressions interpreted by the authors in the sense of overcoming the distinction in question, that would be evident in international agreements, international case law, and international practice.

As far as the aspect of practice is concerned, the question arises mainly because of the activity and the associated impressive number of documents and publications, especially by international bodies and organisations, in which the category "new slavery" is used. There are, for instance, cases in which the term has also been used by the UN General Assembly[8], or occasions encountered in the course of the present analysis, such as the establishment of the Special Rapporteur on contemporary forms of slavery in 2007[9] or the more recent reports by the ILO on "modern slavery"[10]. As we have seen, it is however worth mentioning that, both in the observations of the Special Rapporteur and in the data provided by the ILO, there is a clear demarcation of the individual cases of contemporary forms of slavery, hence a separate analysis of the different phenomena. In fact, it is the ILO itself that, in a recurring introductory specification of a terminological nature, indicates of course that the term "modern slavery" «refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power», but on the other hand specifies that «it covers a set of specific legal concepts including forced labour», and «it is used as an umbrella term that focuses attention on commonalities across these legal concepts»[11].

Within the context of international agreements, a notable contention persists the fact that from the adoption of the Supplementary Convention on the Abolition of Slavery in 1956[12] to the present day, there has been no subsequent 'redefinition' of the concept of slavery at the international level. This would suggest that the original hierarchy

[7] *Ibi*, p. 104. See also L. MAGI, *Protezione dei diritti fondamentali dei lavoratori e attività delle organizzazioni economiche e finanziarie internazionali – Problemi di coordinamento e di responsabilità internazionale*, Napoli, 2010, p. 80 ff.

[8] One example in this regard is the adoption by the General Assembly of a fund aimed at assist representatives of non-governmental organisations «dealing with issues of contemporary forms of slavery» (Art. 1, lett. b, UNGA, A/RES/46/122, *United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, 17 December 1991).

[9] See *supra*, Chapter I, par. 3.3.

[10] Reference is here made to the report by ILO, Walk Free, International Organization for Migration (IOM), *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, 2022. See also *supra*, Chapter I, par. 1, as well as the OHCHR-commissioned report by D. WEISSBRODT, ANTI-SLAVERY INTERNATIONAL, *Abolishing Slavery and its Contemporary Forms*, Geneva, 2002.

[11] *Ibi*, p. 13.

[12] See *supra*, Chapter I, par. 2.2.1.

established between the case of slavery and other forms of exploitation would have over time been gradually 'diluted' in distinctions between different cases, based on different levels of limitation of personal freedom. On the contrary, the contemporary focus would shift towards discerning the circumstances surrounding the victims of these phenomena, in order to encompass them within a more general category of institutions and practices that could be comprehensively referred to as "modern forms of slavery". Indeed, these contemporary manifestations might be discerned based on three pivotal factors: the extent of individual restrictions imposed, the level of control exerted over their belongings, and whether the victim consents, albeit informed, to the established arrangement with the exploiter. The presence of control dynamics, often coupled with the threat or actuality of violence, stands central in identifying this new classification of modern exploitative practices. Even forms less severe than slavery, considered as the most extreme, could fall under this category if the three mentioned elements are present. This delineation would allow for the identification of such practices, particularly when the degree of control amounts to an individual's actual 'possession' by another person[13].

Apart from creating detailed classifications, some scholars also perceive existing international agreements as acknowledging a cumulative category of forms of exploitation. This trend would be notably observed in the 2014 ILO Protocol to Convention No. 29, stating the need for «specific action against trafficking in persons for the purpose of forced or compulsory labor» (Art. 1, par. 3), thus linking the two phenomena. The same juxtaposition between trafficking and forced labour is also to be found in the text of the Palermo Protocol, where, in defining "trafficking in persons" as for the purpose of exploitation, it states that «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» (Art. 3 (a)). Still, this aspect of the definition of trafficking would also be included in the 2005 Council of Europe Convention on Action against Trafficking in Human

[13] This detailed suggestion is provided by N. BOSCHIERO, *Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù*, op. cit., at p. 6-7 and p. 44 ff.

Beings and in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims[14].

Finally, as far as the jurisprudential expressions of what would be this new trend are concerned, much of the ECtHR case law would point in the direction of overcoming the distinction between forms of exploitation[15]. Of all the pronouncements, *Rantsev* is the one that most would move in this direction, where the Court, «in light of its obligation to interpret the Convention in light of present-day conditions», held that it was «unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour»[16]. In *Chowdury* then, forced labour would be recognised as one of the main purposes of human trafficking by the Court, which emphasises «the intrinsic relationship»[17] between the two offences, thus moving towards the recognition of the correlation between the different acts. However, this observation should be brought up to date with the even more recent pronouncement of *S. M. v. Croatia*, which highlighted that, according to the Grand Chamber's assessment, these two offences may not inherently intertwine. This becomes especially evident in cases akin to those at stake, where the absence of transnational elements aligns all actions within a singular national jurisdiction. The Grand Chamber therefore observed that «The notion of "forced or compulsory labour" under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they are related to the specific human-trafficking context»[18]. Furthermore, it is crucial to underscore that the distinction between single cases is further echoed and reaffirmed without reservations in the most recent 2021 *Zoletic*, even though the facts of the case showed the character of transnationality[19].

[14] So S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., p. 110-111. The mentioned acts are Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, CoE Treaty Series No. 197, 16 May 2005 and Council of the European Union, 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, 15 April 2011.

[15] It is still primarily S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., p. 121 ff. who insists on this point.

[16] ECtHR, *Rantsev v. Cyprus and Russia*, cit. par. 282. For all the ECtHR rulings mentioned hereafter, see also *supra*, Chapter II, part I, par. 2.1.

[17] ECtHR, *Chowdury and Others v. Greece*, cit., par. 93.

[18] ECtHR, Grand Chamber, *S.M. v Croatia*, cit., par. 303.

[19] ECtHR, *Zoletic and Others v. Azerbaijan*, cit., par. 148.

An overarching observation stemming from the examination of three realms – practice, international conventions, and case law – is the escalating confusion between distinct offences, particularly noticeable when the offence of trafficking in human beings is under scrutiny. This is where the lines blur, leading to increased ambiguity between individual terms. In fact, it is from the definitions of human trafficking contained in the conventions that the individual figures begin to overlap, thus the Palermo Protocol, or as is the case when ECtHR judges have to deal, in *Rantsev*, with a victim of trafficking, and also a victim of other types of exploitation, that the concepts seem to blur. This highlighted aspect has garnered significant attention within certain scholarly reflections, acknowledging the complexity of finding a term that comprehensively encompasses all prevailing forms of exploitation. While not entirely dismissing the idea of a unifying term, this perspective emphasises the crucial necessity of crafting precise, distinct legal definitions tailored to the single concepts concerned[20]. The notion of human trafficking, if analysed and related to the concepts of slavery, servitude and forced labour, would be «ineffective and even in some situations redundant»[21]. Consequently, due to the existing limitations and uncertainties surrounding the definition of human trafficking, there are instances where forgoing such blanket terms might prove advantageous, as exemplified in the *Rantsev* decision. In fact, it was noted that for the specific circumstances of the case, the well-established and robust legal definitions of slavery and forced labour would have sufficed for the courts to adjudicate effectively[22]. Conversely, others argue that human trafficking, as one of the most alarming phenomena of the 21st century, necessitates its alignment with the concept of "modern slavery" or "slavery-like practice"[23], although, as has been noted[24], such alignment carries a significant risk of inducing confusion.

A further aspect worth considering around the reflections on the adoption of the "modern slavery" term is the one linked to the fact that there are mostly legal

[20] Reference is here made to the extensive study by V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., especially from p. 290 and p. 427.

[21] *Ibi*, at p. 318.

[22] In this sense V. STOYANOVA, *Dancing on the Borders of Article 4*, op. cit., at p. 193.

[23] We refer to the work by S. SCARPA, *Trafficking in Human Beings: Modern Slavery*, Oxford, 2008, see from p. 41 and p. 84.

[24] See, just as a comment on the cited study, J. ALLAIN, *Silvia Scarpa. Trafficking in Human Beings: Modern Slavery, 2008*, in *European Journal of International Law*, vol. 20, n. 2, 2009, p. 453-457.

practitioners[25] seeing favourably this adoption. It is thus acknowledged that «there has been a tendency to use "modern slavery" as an umbrella term to capture all these forms of coercion», of which «Lawyers and analysts tend to emphasize the legal differences […] interminably»[26]. For this reason, «Time should not be spent in seeking an exact consensus over definitions. It is more important to reach agreement on how best […] to stand up to the challenges ahead»[27]. In this regard, one might wonder how to find the right legal path to seize the "challenges ahead", for instance also with regard to the access to remedy for victims, if not by starting from common definitions, who are usually reached also thanks to a rich and dense doctrinal debate, which is, by definition, constantly developing and evolving.

In a similar vein, authoritative doctrine also converges to the conclusion on the imperative need to move beyond words and to carry out commitments made in international agreements[28]. Nevertheless, this natural conclusion is preceded by extensive reflection on the appropriateness of adopting 'the label of modern slavery'[29]. Indeed, it is noted that if this were the case, this would imply the risk of trivialising the very definition of slavery and, above all, the dilution of the efforts being made to eradicate it completely. More specifically, this would entail, for example, that by including organ trafficking in the definition of slavery as the Palermo Convention does, the human body would somehow be commodified in turn. Similarly, the issue of migration cannot be equated with the issue of trafficking in human beings. Irregular migration could encourage both trafficking in human beings and the exploitation of undocumented workers, with "moonlighting" or in illegal clandestine workshops, without any social protection. But it is the clandestine exploitation that would be at issue, rather than the migratory flows as such. All the more so, there would be a risk of losing all precise reference points when,

[25] Regarding this trend, please refer to the discussion in R. NAPIER-MOORE ET AL., *Special Issue - Forced Labour and Human Trafficking*, in *Anti-Trafficking Review*, n. 5, 2015, especially from p. 146, which offers a series of short reflections on the subject by people with work experience in international organisations or non-governmental organisations.

[26] So R. PLANT, *Modern slavery: The concepts and their practical implications*, ILO, Geneva, 2014, p. 1.

[27] *Ibi*, p. 21.

[28] We refer to E. DECAUX, *Les formes contemporaines de l'esclavage*, in *Recueil des cours*, op. cit., p. 197.

[29] *Ibi*, p. 64.

on the other hand, it is globalisation that is called into question under this name, through the 'capitalist system', as with the 'global economy'[30].

As far as concerns the formal construction of the international regime related to human exploitation, it has been noted that the regime creates a variable geometry wherein a growing number of instruments deal with very diverse forms of exploitation. Even though the different instruments are linked logically and legally, they would have led to a fragmentation of the law on human exploitation. Nevertheless, unique characteristics have developed with respect to slavery, forced labour, servitude, and human trafficking. This would constitute 'a universe of three if not four dimensions' and thus cannot speak of a common genealogy[31].

These considerations are complemented by a broad doctrine that firmly and decisively rejects the possibility of encompassing all existing forms of exploitation under a singular umbrella term like "modern slavery". Even before the idea of using such a term became widespread, it was pointed out that the term slavery alone was already being misused, far from its 1926 legal meaning of «status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised» (Slavery Convention, Article 1, par. 1) – as also clearly reiterated by the much more recent Bellagio-Harvard Guidelines on the Legal Parameters of Slavery of 2012[32]. Thus, adopting an expanded meaning of the term, would have «led to an interpretation of the term "slavery" as being so all-encompassing as to render it meaningless in law»[33]. Likewise, expressions that have emerged over the years such as "slavery-like practice"[34] and "practices similar to slavery"[35], «grinded to a halt any evolution which might have transpired with regard to the law of human exploitation»[36]. A reverse tendency, and thus

[30] *Ibi*, p. 64-65.

[31] *Ibi*, p. 77.

[32] See *supra*, Chapter I, par. 3.2.

[33] J. ALLAIN, *The Definition of Slavery in International Law*, in *Howard Law Journal*, vol. 52, no. 2, 2009, at p. 274.

[34] This term seems to have slowly and gradually taken hold within the United Nations human rights system since by the end of the 1960s, as a means of denouncing apartheid. For a reconstruction of its emergence, see J. ALLAIN, *The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: "Slavery-like Practice"*, in *Cahiers de la recherche sur les droits fondamentaux*, n. 10, 2012, from p. 32.

[35] The expression was introduced, as we have seen, when the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was adopted in 1956. See *supra*, Chapter I, par. 2.2.1.

[36] J. ALLAIN, *The International Legal Regime of Slavery and Human Exploitation and its Obfuscation by the Term of Art: "Slavery-like Practice"*, op. cit., at p. 27.

a «referral back to the legal», could be observed since the coming into force of the Statute of the International Criminal Court and the introduction of the crime against humanity of enslavement[37]. Hence, ultimately, when referencing the established legal definitions contained in international law instruments, a clear conceptual framework arises, enabling the dissection of concepts like "trafficking", "modern slavery", "contemporary forms of slavery", or other «umbrella terms» intended to encompass diverse forms of exploitation[38].

Part of the doctrine even more opposed to adopting a single term encompassing multiple forms of exploitation holds that what is referred to as "modern slavery" actually refers to human trafficking in generalised terms, hence, behind this label, the phenomenon would have sparked a swift expansion of anti-trafficking laws at international, regional, and national levels and motivated governments to allocate substantial financial and bureaucratic resources toward its elimination. Even more, this trend would have created «an industry of non-profits that have elevated its "abolition" into a pressing moral crusade, which anyone can join with the click of a mouse»[39]. The roots of this trend could be traced back to a phenomenon that has even garnered a newly coined term to characterise it, that is "philanthrocapitalism", «a relatively new form of philanthropy, born of a new generation of the ultra-rich who aspire to use their business skills to fix the world's social problems»[40].

Scholars from many areas of international law, who urged governments to mobilise efforts to this end, would not be exempt from criticism either. The dilemma lies in the lack of precise clarity regarding the specific target of this movement. Despite the apparent worldwide agreement on the necessity to eradicate trafficking, the realm of anti-trafficking operates within a glaring «"rigor-free zone"» concerning the legal delineation of this concept's parameters[41]. Starting from a victim-centred vision, the pressing task at hand would involve rallying the extensive support for contemporary "anti-slavery" initiatives to direct it towards addressing the systemic factors perpetuating forced labour

[37] *Ibi*, at p. 42.

[38] In these terms J. ALLAIN, *Contemporary Slavery and Its Definition in Law*, op. cit., at p. 44.

[39] J. A. CHUANG, *Exploitation Creep and the Unmaking of Human Trafficking Law*, in *American Journal of International Law*, vol. 108, n. 4, 2014, p. 609.

[40] On this point see extensively J. A. CHUANG, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, in *UCLA Law Review*, vol. 62, 2015, p. 1516-1556, here at p. 1518.

[41] J. A. CHUANG, *Exploitation Creep and the Unmaking of Human Trafficking Law*, op. cit., p. 609.

within the global economy. Shifting focus towards a labour-centric viewpoint would significantly enhance comprehension of power dynamics within the interactions among employees, employers, contractors, recruiters, and other stakeholders within a globalised economy. Crafting interventions rooted in this empirical understanding stands as the most efficacious approach to target the systems fostering and sustaining vulnerability to modern human exploitation for financial gain. Only in this way labelling a practice as "slavery" would imply «not only a powerful call to action, but a productive one»[42]. Even more so, if one considers that each facet of contemporary exploitation – slavery, forced labour, servitude and human trafficking – carries distinct definitions within international law, governed by separate legal frameworks and overseen by distinct international bodies. Conflating trafficking and forced labour with the more narrowly defined and extreme concept of "slavery" would then be not only legally inaccurate but it would also jeopardise the effective application of pertinent legal instruments. Precise legal definitions would result crucial as a common ground for governments worldwide to outline national legislation aimed at undermining such phenomena, coordinate policies with other nations, and hold significant weight for individuals directly impacted by these legal frameworks aimed at identifying perpetrators and providing recourse to victims of slavery, trafficking, and forced labour practices[43]. Further, a «more nuanced depiction of 'modern-day slavery'» would unveil unsettling realities regarding the foundational structure of our societies and economies. Yet, facing these realities also presents numerous opportunities aimed at thwarting exploitation by addressing systemic vulnerabilities. Alternative approaches should encompass reforms within existing labour and migration frameworks that inadvertently encourage and incentivise the exploitation of the world's impoverished populations. This could involve initiatives such as enhancing interstate mechanisms to oversee the recruitment of foreign labour and reinforcing domestic labour safeguards to empower workers more effectively in actively resisting coercive exploitation[44]. Indeed, in order not to feed what has been called "a judicial catchall for trafficking, slavery and labour exploitation", it seems imperative to enhance safeguards for migrant workers who face the peril of exploitative work conditions,

[42] *Ibi*, p. 649.

[43] J. A. CHUANG, *The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"*, in *Anti-Trafficking Review*, n. 5, 2015, at p. 147.

[44] *Ibi*, p. 149.

ensuring their unequivocal entitlement to legal recourse within the law. To this end, «The distortion of established legal concepts […] is not the best way of achieving this goal»[45].

Given the scholarly discourse thus far and the legal lens applied to the debate regarding the suitability of a blanket term such as "modern slavery" to encapsulate the diverse spectrum of contemporary exploitative practices, it becomes imperative to heed the dissenting voices against its usage. And this is due to several reasons. Primarily, the overarching term "modern slavery" may oversimplify and consequently dilute the nuanced legal nature of various forms of exploitation prevalent today. By homogenizing distinct manifestations of exploitation, the risks lie in masking the specific legal contexts within which these exploitative practices operate. The introduction of such a term, particularly in the wake of the inclusion of trafficking offences, should not be allowed to erase or blur the boundaries distinguishing various forms of exploitation. Instead of dissolving these distinctions, there is a risk that such categorisation might inadvertently amalgamate these distinct forms, creating a singular and generalised portrayal of exploitation under the umbrella of "modern" exploitation. This homogenisation overlooks the intricate differences among these exploitative practices. The peril seems to emerge precisely due to the expansive political, economic, and legal focus on combatting human trafficking. This intense concentration can inadvertently overshadow other forms of exploitation, rendering their identification at times seemingly «ineffective and […] redundant»[46], as evidenced in our discussions.

By channelling significant attention and resources primarily toward combatting human trafficking, there's a risk of neglecting equally critical forms of exploitation that may not fit neatly within the trafficking framework. This skewed emphasis might obscure the nuances inherent in other types of exploitation, thereby hindering a comprehensive understanding and response to these diverse challenges. Moreover, such a broad categorisation may of course also have negative consequences on a practical level, impeding tailored and precise interventions necessary to combat specific facets of exploitation effectively. In essence, the concern lies in the unintentional consequence of an overarching focus on human trafficking, leading to the overshadowing and potential neglect of other equally impactful forms of exploitation, which demand distinct and

[45] So R. VIJEYARASA, J. M. BELLO Y VILLARINO, *Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev*, op. cit., at p. 76.
[46] V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., p. 318.

specific attention within the broader discourse on exploitation. The use of a singular term to encapsulate multifaceted exploitative conditions could in fact inadvertently limit the understanding of the complexities inherent in different forms of exploitation. This reductionist approach may hinder the comprehensive analysis required for crafting targeted policies and legal frameworks aimed at eradicating specific types of exploitation. Ultimately, there appears to be a genuine risk that the adoption of a collective term such as "modern slavery" might result in a significant gap between the abstract legal concept and the specific legal instance of exploitation. This disconnection poses a significant risk, potentially leading as a result to a perilous state of legal ambiguity and uncertainty.

A second concern lies in the fact that employing an all-encompassing term for forms of exploitation might lead to the overshadowing or neglect of historically entrenched forms of exploitation that may not align neatly with their still currently valid definitions. By focusing predominantly on modern manifestations, there is a risk of overlooking systemic issues rooted in older, but equally pernicious, forms of exploitation that persist within societies. This is precisely the case with forced labour. The circumstances leading to the use of forced labour may certainly have changed over the decades, but the substance, and thus the definition of the phenomenon, remains as dictated by the definition given by the 1930 ILO Forced Labour Convention, Article 2, and thus there is forced labour only in case of «all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». A definitive confirmation of this can certainly be found both in the text of the most recent international agreements and in the jurisprudence of international human rights courts. This is indeed the case with the 2014 Protocol to the Forced Labour Convention, which, while recognising "gaps in its implementation" and calling "for additional measures", recalls the definition of forced or compulsory labour under Article 2 of the 1930 ILO Forced Labour Convention, confirming that it «covers forced or compulsory labour in all its forms and manifestations and is applicable to all human beings without distinction»[47]. Furthermore, in all observed ECtHR and IACHR cases concerning forced labour judges repeatedly refer to the 1930 definition in order to legally frame the issues addressed by the courts. The reason of this ongoing validation is also linked to the first presented argument: even if, on a theoretical level, a preference would

[47] ILO, Protocol of 2014 to the Forced Labour Convention, 1930, cit., Preamble.

lean towards the adoption of a unified category, the material application of rules demands an examination of the unique circumstances of the case, to which unavoidably only the existing norms can be applied.

A final observation is then linked to an historically rooted argument, that is the "ownership argument". As we have seen, since the first written international agreements to abolish slavery at the beginning of the last century, the figure of the most serious form of exploitation has in fact always been linked to the legal concept of ownership. Thus, Article 1 par. 1 of the 1926 Slavery Convention defines slavery as «the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised». This definition, too, has been confirmed and taken up over the decades by international case law and international agreements – only mentioning the 1956 Supplementary Convention on the Abolition of Slavery and the 1998 Rome Statute's crime of 'enslavement'. It follows that slavery, legally, can only be understood in cases where there is «the controlling of another person as one would possess a thing», and its use of the person with the resulting powers, namely «the buying, selling, use, management, profit, transfer, or even the destruction of a person held in slavery»[48].

Starting from this foundational point, it becomes challenging to ignore the distinctiveness between other forms of exploitation, notably forced labour, when juxtaposed against the pure material control over another individual. Although there might be instances where the delineation between these two concepts thins or interlaces at a material level, this does not warrant the amalgamation into a singular category of exploitation. In such scenarios, it is the judiciary, leveraging the well-established definitions available, that would have to determine whether it aligns with slavery, forced labour, another specific form of exploitation, or even a convergence of multiple forms. Distinguishing situations that involve the exercise of property rights from those devoid of such exercises also serves to broaden the reach of international law application. This broader approach ensures the encompassment of a broader spectrum of cases, attributing to each its distinct characterisation. Without this differentiation, there would be, one more time, a risk of legal ambiguity, leading to uncertainties about the prerequisites for constituting a generic form of exploitation. It would raise questions about whether to

[48] J. ALLAIN, *Contemporary Slavery and Its Definition in Law*, op. cit., p. 62.

apply property-related criteria, considerations of penalties and assessments of voluntariness concerning labour, which could result in legal impasses in practice.

In conclusion, within the realm of international law's legal discourse, be it from the vantage of definitions, historical context, or empirical evidence, the prospect of adopting an overarching term encompassing all contemporary forms of exploitation, like "modern slavery", emerges as unequivocally untenable. Such an approach would inevitably plunge the legal landscape of the exploitation prohibition into a convoluted state, fostering a swirling vortex of legal confusion in a para-juridical cauldron where clarity evaporates and ambiguity brews.

Moreover, delving into the subsequent section, it becomes imperative to ponder the legal consequences stemming from the choice to consolidate all forms of exploitation into a singular category. As confirmed by the assertions of the very proponents advocating for a unified classification, these implications would reverberate broadly, extending even into the realm of norms acknowledged as mandatory within international law – specifically, the norms of *jus cogens*.

2.2. The prohibition of forced labour as a peremptory norm of general international law?

In delving into the assessment of whether the prohibition of forced labour falls within the peremptory norms of general international law (*jus cogens*)[49], it was deemed crucial to initially examine the appropriateness of employing an encompassing term for all contemporary forms of exploitation. This preliminary investigation arose precisely from the arguments of those who contend that despite varying degrees of severity, all

[49] The international law literature that has dealt with the notion of *jus cogens* is of course countless. The following are some indicative bibliographical references with some more recent reflections, also in relation to the distinction with *erga omnes* obligations, which, in connection with the prohibition of forced labour, will be discussed in the next section: G. GAJA, Jus cogens *Beyond the Vienna Convention*, in *Recueil des cours à l'Académie de droit international de La Haye*, vol. 172, 1981, p. 271-316; A. ORAKHELASHVILI, *Peremptory Norms in International Law*, Oxford, 2006; C. TOMUSCHAT, J.-M. THOUVENIN (ed.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, Leiden, 2006; P. PICONE, *The Distinction between* Jus Cogens *and Obligations* Erga Omnes, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention,* Oxford, 2011, p. 411-424; E. CANNIZZARO (ed.), *The Present and the Future of* Jus Cogens, Roma, 2015; R. KOLB, *Peremptory International Law:* Jus Cogens *– a General Inventory*, Oxford, 2015; D. TLADI (ed.), *Peremptory Norms of General International Law (*Jus Cogens*) – Disquisitions and Disputations*, Leiden, 2021.

diverse contemporary exploitation phenomena can be viewed collectively. In fact, that part of the doctrine moreover often asserts, in a consequential manner, the possibility of attributing to all these phenomena – from slavery to servitude, forced labour, and human trafficking – the same legal features inherent in the most severe form of exploitation, namely slavery. The prohibition of slavery can indeed without a doubt be counted among the norms that possess the status of *jus cogens*[50]. However, those who look favourably on the figure of "modern slavery" ultimately argue that what would have simply changed over time is not the prohibition of slavery, nor its imperative nature, but rather the content of the notion of slavery in relation to which this prohibition applies. Originally, the notion of slavery, when it was codified in the first United Nations Convention of 1926, would have been very narrow and legally limited, as it only referred to the condition of an individual over whom "the attributes of the right of ownership or certain of them are exercised". Today, on the other hand, this notion would have definitely "broadened". This fact wouldn't imply a negative judgement, in the sense that this notion has been debased by its excessive dilution, as it has been pointed out[51] . Rather, the exact opposite would be true, since it is a notion that has been considerably enriched over time to include aberrant forms of exploitation and "possession" not contemplated or envisaged a century ago. The cogent nature of the prohibition would remain, but its cogency would extend to the "new" notion of slavery to which it refers, which by specific circumstances can be defined as "modern forms of slavery"[52]. In this way, even human trafficking, as "new form of slavery", would fall under the peremptory norms of general international law[53].

On the basis of the arguments contained in the reports of the ILO Commission of Inquiry on Myanmar[54], part of this doctrine also argues that the prohibition of forced labour has an undisputed peremptory nature and that furthermore, this prohibition has evolved to embrace new criminal forms, which are difficult to ascribe to the "classical"

[50] Further evidence supporting this contention can be gleaned from the most recently draft conclusions adopted by the International Law Commission (ILC) Drafting Committee in 2022: ILC, *Peremptory norms of general international law (*jus cogens*)*, A/CN.4/L.967, 11 May 2022. In particular, Conclusion 23, headed "Non-exhaustive list", provides eight cases of rights or prohibitions that can claim the status of *jus cogens* norms under international law. Under letter (f) there is precisely «The prohibition of slavery».

[51] J. A. CHUANG, *The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"*, op. cit., at p. 146.

[52] So N. BOSCHIERO, *Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù*, op. cit., at p. 43-44.

[53] It is the opinion of S. SCARPA, *Trafficking in Human Beings: Modern Slavery*, op. cit., p. 78 ff.

[54] See *supra*, Chapter I, par. 3.3 and *infra*, present paragraph.

category of forced labour[55]. Moreover, based on an apparent partial overlap between the imperative norms of *jus cogens* and the norms that establish *erga omnes* obligations for States, it is argued that the status of the prohibition of forced labour as a binding customary norm would affect the effectiveness of the relevant ILO agreements, which would therefore automatically acquire a particular force in view of the fact that they now enunciate an *erga omnes* obligation[56].

Be that as it may, given the extensive arguments against adopting a singular term to encapsulate contemporary exploitation, as detailed earlier, it becomes evident that equating the inherent *jus cogens* status of slavery with other forms of exploitation cannot be supported. In fact, as has been shown, the international law perspective does not seem to permit the incorporation of a concept that encompasses all types of exploitation under a singular designation. Consequently, and all the more so, those advocating to attribute the exclusive *jus cogens* status of slavery to all contemporary forms of exploitation, considered cumulatively, face an unviable path. It therefore remains crucial to analyse each distinct form of exploitation independently. Thus, to our ends, it is now necessary to assess whether the prohibition of forced labour, in its singularity, qualifies as a peremptory norm of general international law or not.

A pivotal starting point for exploring whether forced labour's legal status aligns with *jus cogens* rules can be found in the reports presented by Special Rapporteur Tladi to the International Law Commission (ILC) working on "peremptory norms of general international law (*jus cogens*)" between 2015 and 2022. It is in particular in the fourth report that the Special Rapporteur addresses the issue on whether forced labour can be counted among the *jus cogens* norms. Tladi acknowledges that historically, slavery and forced labour have had markedly different origins, as «Forced labour, however, was not at the time characterized as slavery. Slavery was defined as the condition over which some form of ownership was exercised over a person, while forced labour was always compensated and labourers could not be compelled to relocate»[57]. In a concise manner it

[55] These are for instance the deductions of S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., at p. 105 and of L. MAGI, *Protezione dei diritti fondamentali dei lavoratori e attività delle organizzazioni economiche e finanziarie internazionali*, op. cit., at p. 76.

[56] In this sense S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., at p. 107-109.

[57] ILC, *Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi*, *Special Rapporteur*, A/CN.4/727, 31 January 2019, p. 47, par. 104.

is then said that «The Supplementary Convention of 1956 extended the scope of the prohibition to cover practices similar to slavery, which would include the practice of forced labour»[58]. In this regard, however, it is worth noting that the 1956 Convention, as examined in this text earlier[59], notably omits direct mention of forced labour, except for a brief reference in the preamble to the 1930 Convention. The primary objective of the 1956 Convention appears to encompass the incorporation of then newly emerged forms of exploitation. Article 1 of the Convention specifically addresses issues like debt bondage, serfdom, forced marriage, and forced child labour among its focal points. Hence, uncertainties raise on how the identified forms of exploitation align with the prohibition of slavery, especially considering that the text of the 1956 Convention seems to grant them distinct significance and independence. This appears to be all the truer regarding the inclusion of forced labour within the "scope of the prohibition of slavery". Since its conspicuous absence from the entirety of the Convention, it remains unclear how forced labour can be appropriately considered or factored into this particular context. In concluding the examination pertaining to slavery, the Special Rapporteur arrives at a notable conclusion: owing to the uncertainty surrounding the specific types of conduct falling under the broad prohibition of slavery, «given the constant refrain contained in the instruments that slavery "in all its forms" is prohibited, it can be stated that modern forms of slavery, however they may be defined, fall within the scope of the prohibition»[60]. This rushed conclusion seems to overlook critical factors that surfaced in the course of the present study. Firstly, through historical lens, it disregards the intricate genesis and evolution of the specific legal frameworks and definitions of slavery and forced labour as established by international agreements across time. Secondly, it fails to acknowledge the evolving interpretation, albeit not universally consistent, offered by judges in international courts regarding the essence and application of these two concepts. Lastly, it dismisses the extensive contributions made by legal scholarship, particularly the comprehensive debates enriching our understanding, notably concerning the classification of "modern slavery". Remarkably, the ILC *Draft conclusions on identification and legal consequences of peremptory norms of general international law*

[58] *Ibidem*.
[59] See *supra*, Chapter I, par. 2.2.1.
[60] ILC, *Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi*, *Special Rapporteur*, op. cit., p. 48, par. 107.

*(*jus cogens*)* entirely omit any reference to forced labour while emphasising slavery, notably listing it in the Annex as part of the "Conclusion 23 – Non-exhaustive list"[61] illustrating examples of *jus cogens* norms. This selective mention appears to underscore a distinct emphasis on slavery in its autonomy within the realm of peremptory norms according to the ILC's perspective.

Contrarily, a notable instance acknowledging forced labour as falling within the realm of *jus cogens* norms traces back to 1998. This recognition stems from the report generated by the Commission of Inquiry instituted within the ILO[62] concerning Myanmar's non-compliance with the Forced Labour Convention of 1930[63]. Indeed, in the report the Commission of Inquiry stated that «[…] there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights»[64]. This conclusion is reached following the observation, in the preceding paragraphs, of the signing of numerous international agreements aimed at strengthening the prohibition of slavery, which however today should «be understood as covering all contemporary manifestations of this practice»[65]. Following the diachronic recognition of all the agreements against slavery and forced labour, the Commission also recalls that «many States have prohibited forced labour at the constitutional level» and that «several international human rights instruments explicitly prohibit this form of denigration of the individual»[66], among which, however, the 1948 Universal Declaration of Human Rights does not appear[67]. Still, the prohibition of forced labour would be «closely related to the

[61] ILC, *Peremptory norms of general international law (*jus cogens*)*, cit., Conclusion 23. For a more recent comment on the ILC's work please refer to H. P. AUST, *Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility – Observations in the Light of the Recent Work of the International Law Commission*, in D. TLADI (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)*, op. cit., p. 227-256.

[62] See *supra*, Chapter I, par. 3.3.

[63] For an in-depth look at the deep-rooted question of forced labour in Myanmar see R. HORSEY, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime*, London, 2011.

[64] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, 2 July 1998, par. 203.

[65] *Ibi*, par. 198.

[66] *Ibi*, par. 202.

[67] See *supra*, Chapter I, par. 2.3.1.

protection of other basic human rights: the right not to be subjected to torture or to other cruel, inhuman or degrading treatment, and even the right to life»[68].

These considerations precisely culminate in the Commission's determination that the prohibition of forced labour stands as a *jus cogens* norm – «a very short peg upon which to rest such a determination» as it has been observed[69] –, however further stressed twice in the course of the report. The first time, after recalling that the provisions of the 1930 Convention could no longer be considered provisional, it is stated that «The Commission of Inquiry shares this view, having regard also to the status of the abolition of forced or compulsory labour in general international law as a peremptory norm from which no derogation is permitted»[70]. The report's conclusions then affirm that «A State which supports, instigates, accepts or tolerates forced labour on its territory commits a wrongful act and engages its responsibility for the violation of a peremptory norm in international law»[71]. The seizure of power by the Myanmar military authorities in February 2021 prompted the ILO Governing Body to institute a subsequent Commission of Inquiry in March 2022. This action culminated in the issuance of yet another report in 2023, which briefly acknowledges the designation of forced labour as a peremptory norm of international law by the preceding Commission in 1998. However, the report neither reiterates nor further elaborates on this pivotal point[72].

Beyond the previously addressed argument concerning "contemporary manifestations" of forms of slavery – thus referred to in the 1998 report at paragraph 198 – the conclusion drawn by the Commission of Inquiry on Myanmar in 1998 gives rise to two primary issues worth consideration.

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[68] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, 2 July 1998, par. 202.

[69] J. ALLAIN, *Slavery in International Law*, op. cit., p. 249.

[70] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, cit., par. 218. The standards contained in the 1930 ILO Forced Labour Convention were in fact designed and approved in provisional form, pending their transposition by states within their own jurisdictions. This invitation for incorporation was embraced with the approval of the Protocol of 2014 to the Forced Labour Convention, 1930. See *supra*, Chapter I, par. 2.1.3.

[71] *Ibi*, par. 538.

[72] ILO, *Towards Freedom and Dignity in Myanmar – Report of the Commission of Inquiry established in accordance with article 26 of the ILO Constitution concerning the non-observance by Myanmar of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Forced Labour Convention, 1930 (No. 29)*, 4 August 2023, see especially from par. 145 and 470.

One first significant aspect to note is that the case involving Myanmar revolves around the State government's requisition of forced labour, involving its administrative organs and military entities. Hence, it represents a markedly distinct scenario from the matrices observed throughout this study. The Myanmar case implicates in fact the State in first instance for its utilization of forced labour, chiefly through its military apparatus[73]. Nevertheless, it is crucial to recognise, as especially evident in prominent international case law, that the majority of instances involving State accountability for breaches of prohibitions of forced labour typically involve the State's failure to prevent, prohibit, and punish forced labour perpetrated by private entities. This means that the prevalence of cases where States face scrutiny for forced labour violations often centres on their failure to adequately address instances perpetrated by private actors. This consistent trend emphasises a distinct dimension of State responsibility – a lack of effective regulation or enforcement concerning forced labour conducted by non-state entities within their jurisdiction.

On this assumption, broadening the scope of *jus cogens* norms to encompass situations where States fall short in regulating private entities engaging in forced labour poses notable challenges. *Jus cogens* norms in fact traditionally embody universally recognised principles that hold absolute importance, allowing for no derogation. Expanding these norms to encompass State accountability for private actors' actions might undermine the core essence of *jus cogens* norms, potentially undermining their distinct and absolute nature in international law. Furthermore, the extension of peremptory norms of international law to cover instances of State inaction regarding private actors' forced labour activities might lead to ambiguity in delineating State obligations, blurring the lines between State responsibility for directly committed actions and its obligations to regulate and enforce the phenomenon within its jurisdiction. While addressing forced labour by private entities is undeniably crucial, stretching *jus cogens*

[73] For an accurate examination of the scenarios where the State, via its entities' actions, could incur international liability as the direct perpetrator of exploitative conduct, refer to P. WEBB, R. GARCIANDIA, *State Responsibility for Modern Slavery: Uncovering and Bridging the Gap*, op. cit. In this sense, it is perhaps possible to detect a timid opening on the part of the ICJ judges, who in the *Germany v. Italy* case – in context of armed conflicts –, while not analysing the point in depth 'assume' in some passages of the judgment, that «the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*», see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, cit., par. 93.

norms to encompass this facet might risk weaken their inherent strength and clarity. Preserving the distinctive and unwavering nature of *jus cogens* norms stands as paramount to sustain their efficacy in safeguarding fundamental principles within international law, while expanding the scope of peremptory norms, although well-intentioned, might inadvertently dilute their unequivocal and universal nature. In this regard, it has been argued that forced labour could acquire the threshold of a peremptory norm only «where labour, when exacted under menace of a penalty and
for which a worker does not offer him or herself voluntarily, manifests powers attaching to the right of ownership. When the labour compelled is, in law, slavery»[74]. Whereas establishing clear State obligations concerning forced labour by non-state actors remains pivotal, delineating and reinforcing this clarification within the established legal frameworks could be a more prudent and judicious approach than broadening the purview of *jus cogens* norms, the integrity and effectiveness of which needs to remain uphold.

The second issue that emerges from the conclusions of the 1998 report relates to the statement contained therein that «the status of the abolition of forced or compulsory labour in general international law [is] a peremptory norm from which no derogation is permitted»[75]. It is precisely with regard to the fact that it is not possible to provide for exceptions from the prohibition of forced labour, if it is considered a rule of *jus cogens*, that it is necessary to emphasise how the very definition of forced labour given in 1930 by the Forced Labour Convention no. 29, still valid today, provides for a number of exceptions, which refer precisely to occasions when forced labour is imposed by State authorities. The exact same approach has been followed and taken up in the drafting of the relevant provisions of the ICCPR, as well as of the ECHR and the ACHR, all of which provide that, for the purposes of interpreting their respective articles, forced labour is not

[74] J. ALLAIN, *Slavery in International Law*, op. cit., p. 255. It should be emphasised that, even with regard to human trafficking, there are those who, assuming a distinction between the various forms of exploitation, warn against describing even the prohibition of this form of exploitation as a jus cogens rule. In this sense, see A. T. GALLAGHER, *The International Law of Human Trafficking*, Cambridge, 2010, at p. 252, who affirms that although «legal conceptions of slavery have expanded to embrace practices that go beyond chattel slavery, it is difficult to sustain an absolute claim that trafficking, in all its modern manifestations, is included in the customary and jus cogens norm prohibiting slavery and the slave trade».

[75] ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)*, cit., par. 218.

to be considered when it is required as a consequence of a conviction, military service, community service or emergency[76].

As has been highlighted, precisely because of the existence of these exceptions, the assumption of forced labour as a peremptory norm «is difficult to see how, in legal terms, […] holds»[77]. Indeed, even though the 1930 Forced Labour Convention underwent an update through its 2014 Protocol – interestingly devoid of any mention of *jus cogens* –, countries persist in employing remnants of forced or compulsory labour. Still, it has been noted that States not only perceive forced labour exceptions as acceptable in certain situations, but the European Court of Human Rights also does not consider these as breaches of human rights, peremptory or not, and views them instead as tools for interpretation. According to the Strasbourg court, these exceptions are in fact justified by overarching principles of general interest, social cohesion, and what is ordinary in regular circumstances[78]. In brief, advocating for the peremptory character of forced labour becomes challenging when nations persist in utilising the exemptions inherent in the definition outlined in the 1930 Forced Labour Convention. Should these exemptions to the concept of forced or compulsory labour be discarded, this would enable the norm to solidify itself as a genuine peremptory norm in both practice and legal terms, compellingly binding States without any allowance for deviation. Therefore, to earnestly progress toward recognising forced labour as *jus cogens* rule, States should rather engage in thorough deliberations «to consider whether there is continued justification for the exceptions to forced or compulsory labour in the light of the adoption of the 2014 Protocol to that Convention»[79].

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[76] Respectively we refer here to Article 8, par. 3 (c) ICCPR, to Article 4, par. 3 ECHR and to Article 6, par. 3 ACHR. See also *supra*, Chapter I, par. 2.3.1. and 2.3.2. With specific regard to the language of Article 4(3) ECHR, it is essential to point out that some scholars argue that the scenarios outlined in this provision should not be construed as exceptions allowing for forced labour. Instead, these instances would serve as a delineation of the application scope of the forced labour provision. In other words, the situations or contexts specified in Article 4(3) signify conditions in which the work mandated by the State would not qualify as forced labour. In this sense refer to V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., p. 260-266.

[77] J. ALLAIN, *The Implications of Preparatory Works for the Debate Regarding Slavery, Servitude and Forced Labour*, in A. BLACKETT, A. TREBILCOCK (ed.), *Research Handbook on Transnational Labour Law*, Cheltenham, 2015, at p. 532.

[78] *Ibi*, p. 534. Reference is here made to ECtHR, Grand Chamber, *Stummer v. Austria*, Application No. 37452/02, 7 July 2011, where, at par. 120, in reference to Article 4 ECHR, it is stated that «[…] paragraph 3 serves as an aid to the interpretation of paragraph 2. The four subparagraphs of paragraph 3, notwithstanding their diversity, are grounded on the governing ideas of general interest, social solidarity and what is normal in the ordinary course of affairs».

[79] *Ibi*, p. 535.

2.3. The erga omnes *obligation arising from the prohibition of forced labour*

Thus far, we have comprehended the imperative for a meticulous legal analysis of various exploitation cases, recognizing the intrinsic need to assess each in its singular context. Particularly noteworthy has proven to be the imperative and accurate approach, both historically and legally, of differentiating the prohibition of forced labour from the prohibition of slavery. The attempt to amalgamate these distinct legal concepts into a singular category, like "modern slavery", not only proves legally inaccurate but also falls short in capturing the nuanced complexities of each. The prohibition of forced labour and slavery, with their unique historical underpinnings and legal implications, resists facile compression into a single classification, especially when considering other extant forms of exploitation in contemporary contexts. Building on this foundation, our inquiry aimed to unravel whether the prohibition of forced labour, examined in its unique context, shares the same legal attributes as slavery under international law. The unequivocal categorisation of slavery as *jus cogens*, a peremptory norm allowing no derogation, is firmly established. However, the parallel assertion for forced labour seems elusive. From the delineations of forced labour offered by international conventions, it becomes evident that numerous exceptions persist, affording States a degree of latitude. Primarily due to this latter consideration, the attribution of *ius cogens* status to the prohibition of forced labour becomes a contentious proposition. This assertion contradicts the stance taken by the ILO Commission of Inquiry for Myanmar in 1998, a standpoint that has however not been subsequently reaffirmed by the same.

The comprehensive analysis undertaken thus far provides a foundation for assessing whether, the prohibition of forced labour can currently be acknowledged as possessing the customary nature of an *erga omnes* obligation for States. This inquiry naturally stems from the well-established and reiterated assumption in international law that the categories of *jus cogens* and obligations *erga omnes* are not entirely coincident. While it holds true that all rules of *jus cogens* impose *erga omnes* obligations on States[80],

[80] This conclusion aligns with the stance taken by the ILC, encapsulated in its 2022 *Peremptory norms of general international law (*jus cogens*)*, specifically in Conclusion 17, where it is affirmed that: « 1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest».

it remains undisputed that there are in international law general rules delineating joint and several obligations (*erga omnes*) for States that do not fall within the realm of *jus cogens*[81]. This standing lies on the fundamental assumption of not conflating the respective material content, which entails their enforceability by all States for the collective functioning of the international community, with their possible inherent quality of derogation or non-derogation[82]. Beyond customary source norms, specific norms articulated by multilateral treaties are then of course instrumental in safeguarding the collective interests of the group of States parties. These norms are deemed constitutive of obligations *erga omnes partes*, meaning constitutive of obligations to all parties to the treaty, a concept exemplified by numerous instances related to the prohibition of forced labour, as we have explored[83].

With the preceding considerations in mind, we are now poised to examine whether the prohibition of forced labour, in its singularity and not being considered as a peremptory norm, indeed constitutes a customary *erga omnes* obligation for States in international law. Certainly, proponents advocating for a unified, cumulative classification encompassing all forms of exploitation posit that the defining attributes of slavery permeate all contemporary exploitative practices. Accordingly, under this

[81] A robust doctrine has evolved in international law over the years, articulating a clear stance in favour of the imperative to maintain the difference between the two categories of *jus cogens* norms and obligations *erga omnes*. Prominent within this discourse are scholars such as, primarily, P. PICONE, *La distinzione tra norme internazionali di* jus cogens *e norme che producono obblighi* erga omnes, in *Rivista di Diritto Internazionale*, vol. 91, n. 5, 2008, p. 5-38; P. PICONE, *The Distinction between* Jus Cogens *and Obligations* Erga Omnes, op. cit.; P. PICONE, *Comunità internazionale e obblighi «erga omnes»*, III ed., Napoli, 2013. More in general about *erga omnes* obligations in international law, see also, among the many, G. GAJA, *Obligations* Erga Omnes*, International Crimes and* Jus Cogens: *A Tentative Analysis of Three Related Concepts*, in J. H. WEILER, A. CASSESE, M. SPINEDI (ed.), *International Crime of State*, Berlin, 1989, p. 151-160; R. AGO, *Obligations* Erga Omnes *and the International Community*, *ibidem*, p. 237-239; T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989, from p. 181; M. RAGAZZI, *The Concept of International Obligations* Erga Omnes, op. cit.; C. J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge, 2005; S. KADELBACH, Jus Cogens, *Obligations* Erga Omnes *and Other Rules – The Identification of Fundamental Norms*, in C. TOMUSCHAT, J. M. THOUVENIN (ed.), *The Fundamental Rules of the International Legal Order* – Jus Cogens *and Obligations* Erga Omnes, Leiden, 2006, p. 21-40, and, more recently, M. M. BRADLEY, Jus Cogens' *Preferred Sister – Obligations* Erga Omnes *and the International Court of Justice – Fifty Years after the* Barcelona Traction *Case*, in D. TLADI (ed.), *Peremptory Norms of General International Law (*Jus Cogens*)*, op. cit., p. 192-226.

[82] P. PICONE, *Gli obblighi* erga omnes *tra passato e futuro*, in *Questions of International Law*, 31 July 2015, at p. 8.

[83] See *supra*, Chapter I. For a comprehensive exploration of the evolution of international law from managing bilateral state-to-state interactions to fortifying the entire international community, refer to the massive research by U. FASTENRATH, R. GEIGER, D.E. KHAN, A. PAULUS, S. VON SCHORLEMER, C. VEDDER (ed.), *From Bilateralism to Community Interest – Essays in Honour of Bruno Simma*, Oxford, 2011.

perspective, every existing form of exploitation, including forced labour, would be considered as *jus cogens* norm, and concurrently entail *erga omnes* obligations for States[84]. This conclusion follows from the well-known *obiter dictum* of the ICJ in the 1970 Barcelona Traction case, whereby «an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State […]. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination»[85]. Consequently, if the prohibition of slavery is deemed an *erga omnes* obligation, this characteristic would extend to all contemporary forms of exploitation precisely because they could be subsumed under a broad and indiscriminate "modern" category. However, having rejected this line of argument and having acknowledged the necessity for a nuanced legal examination of each distinct case, it becomes imperative to ascertain whether the prohibition of forced labour, considered in isolation, indeed qualifies as an *erga omnes* obligation for States. In particular, drawing upon the language and the examples articulated by the ICJ over half a century ago, it becomes now imperative to scrutinise whether this distinctive characteristic can similarly be invoked in the context of the prohibition of forced labour.

Erga omnes obligations have predominantly been conceptualized within the framework of State responsibility. Characterised as obligations owed to the international community of States, they entail unique duties for the responsible States that may extend beyond the typical bilateral reparations seen in reciprocal legal relationships. A key aspect involves the entitlement of States not directly impacted by an internationally wrongful act to invoke the responsibility of the wrongdoer, whether on their own behalf, on behalf

[84] In this sense, see N. BOSCHIERO, *Art. 4. Proibizione della schiavitù e del lavoro forzato*, op. cit., from p. 87 and S. CANTONI, *Lavoro forzato e "nuove schiavitù" nel diritto internazionale*, op. cit., p. 107-109.

[85] ICJ, *Barcelona Traction,* cit., par. 33-34. See *supra*, Chapter II, part I, par. 1. Regarding the evolution of the *erga omnes* obligation inherent in the prohibition of slavery since the ICJ's pronouncement up to the present, refer to J. ALLAIN, *Slavery and Its Obligations* Erga Omnes, in *Australian Year Book of International Law*, vol. 36, n. 1, 2019, p. 85-124.

of entities in the international legal realm unable to assert claims independently, or merely as members of the broader international community of States[86].

Given these distinctive characteristics, the inquiry into the practical implementation of the *erga omnes* obligation category has however proven to be a more intricate and multifaceted challenge. This challenge mainly lies in the realisation of the full potential of obligations *erga omnes* in practice, irrespective of the conceptual relevance of this legal concept. As it has been observed «Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"»[87]. However, this would not only be a problem of implementation, «between *is* and *ought*, *Sein* and *Sollen*», as if the *erga omnes* concept was fully developed. A lack of consensus would in fact persist regarding its scope and the legal ramifications associated with that status. The uncertainties surrounding these aspects contribute to the complexity of implementing the concept, and it may not be coincidental that its realisation has proven to be challenging and contentious[88]. The statement from the 1970 ICJ judgement itself would introduce certain unanswered questions. Specifically, it raises the question of whether the term "basic rights of the human person", leading to *erga omnes* obligations, is equivalent to human rights in its entirety or not. Alternatively, it could refer only to those rights intricately linked to the human person and human dignity, widely acknowledged by legal norms, such as protection from slavery and racial discrimination.

[86] In this sense, see C. TOMUSCHAT, *Obligations Arising for States without or against Their Will*, in *Recueil des cours à l'Académie de droit international de La Haye*, vol. 241, 1993, p. 295 ff.; B. SIMMA, *From bilateralism to Community Interest in International Law*, in *Recueil des cours à l'Académie de droit international de La Haye*, vol. 250, 1994, p. 308 ff.; K. ZEMANEK, *New Trends in the Enforcement of erga omnes Obligations*, in *Max Planck Yearbook of United Nations Law*, vol. 4, 2000, p. 8 ff; S. KADELBACH, Jus Cogens, *Obligations* Erga Omnes *and Other Rules*, op. cit., p. 26. As regards the intervention of the international community, the ICJ recently confirmed, with regard to the right of self-determination as an *erga omnes* obligation, that «all member States must co-operate with the United Nations to put those modalities into effect» in ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, at par. 180; see M. M. BRADLEY, Jus Cogens' *Preferred Sister – Obligations* Erga Omnes *and the International Court of Justice*, op. cit., from p. 208.

[87] So B. SIMMA, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?*, in J. DELBRÜCK (ed.), *The Future of International Law Enforcement. New Scenarios – New Law?*, Berlin, 1993, at p. 125.

[88] C. J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, op. cit., p. 4. In the same vein, see also, more recently, G. GAJA, *Claims Concerning Obligations* Erga Omnes *in the Jurisprudence of the International Court of Justice*, in R. PISILLO MAZZESCHI, P. DE SENA (ed.), *Global Justice, Human Rights and the Modernization of International Law*, Berlin, 2018, p. 39-46.

Such a distinction would find, among other things, a basic lack of clarity as to what pertains 'basic rights of the human person' and 'ordinary' human rights[89].

Concerning the realm of State responsibility, a subject yet to be codified in a convention, identifying generally accepted criteria for *erga omnes* rules proves challenging. The conventional approach would involve scrutinising State practices in instances where States not directly impacted by an international wrong undertook countermeasures without being deemed liable for any wrongful act themselves[90]. Yet, even then, the presence or absence of legal consequences for a wrongful act, especially when scrutinising the efficacy of the rule establishing a primary obligation[91], prompts intriguing inquiries. In the context of a human rights violation, it is conceivable that no State may pursue reparations or take countermeasures. This raises the question of whether such a scenario implies the existence of an obligation, the violation of which is essentially pardoned, or whether it fosters the perception that the term 'obligation' is employed in a manner that grants States considerable leeway in disregarding the rule imposing it[92].

To ascertain whether the prohibition of forced labour qualifies for this category, the pivotal question revolves around determining which dispositive obligations – as placed outside of the circle of peremptory norms – hold "sufficient importance"[93] to be deemed *erga omnes* by States. Answering this question proves challenging in the abstract, given the absence of a comprehensive set of criteria by which the international community and its members can clearly express the values they consider paramount. Explicit declarations by States or courts undoubtedly constitute the most apparent means of establishing the importance of a specific obligation, and such direct evidence can manifest in various forms. Nevertheless, the ICJ's case law on *erga omnes* offers valuable insights into the relevant features that should be considered. In particular, in the *East Timor* case of 1995[94], the Court identified specific factors that, in its perspective,

[89] T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, op. cit., p. 192-194. The same observation is also raised by M. RAGAZZI, *The Concept of International Obligations* Erga Omnes, op. cit., at p. 139.

[90] S. KADELBACH, Jus Cogens, *Obligations* Erga Omnes *and Other Rules*, op. cit., p. 35.

[91] See *infra*, par. 3.

[92] G. GAJA, *Obligations* Erga Omnes*, International Crimes and* Jus Cogens: *A Tentative Analysis of Three Related Concepts*, op. cit., p. 155.

[93] C. J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, op. cit., p. 153.

[94] ICJ, *East Timor (Portugal v. Australia)*, 30 June 1995. In 1991, Portugal initiated legal proceedings against Australia concerning certain Australian actions regarding East Timor. Among various requests, Portugal sought a judgment from the ICJ declaring that Australia, through negotiating, concluding,

underscored the significance of such an obligation. When acknowledging the *erga omnes* status of a particular obligation, it notably relied on factors such as its recognition in the UN Charter[95], the practices of UN organs, inclusion in other treaties, preferably universal treaties, acknowledgment in general international law, or endorsement in the jurisprudence of the ICJ itself[96].These factors would actually fall short of establishing a definitive test. They are in fact interconnected – recognition in treaties, for instance, can bolster the customary character of an obligation[97]. Furthermore, meeting one or some of the various factors is not sufficient for an obligation to be deemed *erga omnes*. The UN Charter, for instance, imposes numerous obligations, varying in significance. It is evident that acknowledgment in general international law is a necessary but not a sole condition

and implementing the Timor Gap Cooperation Treaty of 1989 with Indonesia, violated its obligation to respect Portugal's powers as the administering authority of East Timor. Portugal also alleged that Australia was infringing upon the right of the people of East Timor to self-determination and permanent sovereignty over natural resources. The Court, however, determined that to address Portugal's claims, it would need to pass judgment on the actions of a third State, Indonesia, without its consent. Consequently, by a vote of fourteen to two, the International Court ruled that it lacked jurisdiction to adjudicate on the dispute. For an extensive analysis of the case refer to P. HILPOLD, *Der Osttimor-Fall – Eine Standortbestimmung zum Selbstbestimmungsrecht der Völker*, Lausanne, 1996.

[95] Concerning the letter of the UN Charter as a basis for the enforcement of *erga omnes* obligations for states, refer again to B. SIMMA, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?*, op. cit., who argues that in principle the Charter may be a good basis for this purpose, provided that it is achieved «in general international law to ultimately overcome the paradigm of individualist, uncommitted sovereignty in favor of some inter-state solidarity. But such solidarity is still far from being "in the blood" of international law», at p. 145.

[96] ICJ, *East Timor*, cit., par. 29. In particular, with respect to the right of self-determination, the Court stated that: «The assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law». The content of this judgement's passage has been discussed by J. DELBRÜCK, "*Laws in the Public Interest" – Some Observations on the Foundations and Identification of* erga omnes *Norms in International Law*, in V. GÖTZ, P. SELMER, R. WOLFRUM (ed.), *Liber amicorum Günther Jaenicke – zum 85. Geburtstag*, Berlin, 1998, p. 17-36, see in particular p. 31-32. The dissenting opinion of judge Weeramantry further reasoned the issue of the need for substantiation of *erga omnes* obligations in international law by arguing that «The present case, had it passed the jurisdictional stage, would have been just such a case where the doctrine's practical effects would have been considered», ICJ, *East Timor (Portugal v. Australia)*, *Dissenting opinion of Judge Weeramantry*, 30 June 1995, at p. 215.

[97] In this sense, see ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, 20 February 1969, at par. 71, where Article 6 of the 1958 Geneva Continental Shelf Convention regarding boundaries of the continental shelves has been considered «a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed».

for *erga omnes* status. Despite these challenges, the jurisprudence of the Court holds at least indicative value[98].

These considerations also imply that the identification of *erga omnes* obligations arising from dispositive rules of international law can be a complex process, necessitating a thorough examination of international practices. The Court's jurisprudence highlights the factors that prove particularly relevant in this regard and serve as a starting point for analysing obligations *erga omnes*. The true contours of the importance test outlined by the Court will only become distinctly visible with more frequent invocations of the *erga omnes* concept. The preceding discussion, however, indicates the likely directions in which these debates will unfold. Despite conceptual shortcomings, it is asserted that the pragmatic approach proposed – which can occur not only through institutionalised processes but also through a broad spectrum of collective, loosely formalised procedures of concerted State action, which may unfold in political or diplomatic circles[99] – facilitates the application of the *erga omnes* concept[100].

Returning to the legal qualification of the prohibition of forced labour, especially regarding whether it can entail an *erga omnes* obligation for States, we can now attempt to draw conclusions based on the evidence collected. Particularly, considering that, as we have observed, the debate on the identification of obligations *erga omnes* beyond *jus cogens* is still ongoing, we can assess whether the indications highlighted by the doctrine and provided by the ICJ jurisprudence regarding the identification of obligations *erga omnes* are applicable to the prohibition of forced labour. The initial criterion that requires reflection pertains to the guidance provided by ICJ judges in 1970 concerning the 'basic rights of the human person'[101]. Here, the acknowledged difficulty of discerning which human rights qualify as 'basic' and which do not emerges[102]. In addition to the presence of the prohibition in international regional human rights Conventions, a first useful indication in this sense can certainly be derived from the presence of the prohibition of forced labour within the ICCPR, in Article 8(3)(a). Indeed, it is the Covenant itself that

[98] C. J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, op. cit., p. 154.

[99] So M. IOVANE, P. ROSSI, *International Fundamental Values and Obligations* Erga Omnes, in M. IOVANE, F. M. PALOMBINO, D. AMOROSO, G. ZARRA (ed.), *The Protection of General Interests in Contemporary International Law – A Theoretical and Empirical Inquiry*, Oxford, 2021, at p. 66-67.

[100] C. J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, op. cit., p. 156-157.

[101] ICJ, *Barcelona Traction,* cit., par. 34.

[102] See, once more, T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, op. cit., p. 192-194, and M. RAGAZZI, *The Concept of International Obligations* Erga Omnes, op. cit., at p. 139.

recognises that 'fundamental' human rights are contained and protected within it[103]. In this vein, another more recent indicator supporting the consideration of the prohibition of forced labour as a 'basic' human right could be traced back to its inclusion in the SDGs under Agenda 2030, specifically at point 8.7[104]. Last but not least, the prohibition of forced and compulsory labour constitutes one of the four pillars set by the ILO in 1998 in their Fundamental Principles and Rights at Work, at Article 2, lett. (b). The pillars notoriously denote "core labour standards", which are protected in their content and implementation by eleven conventions that have been identified by the Governing Body of the ILO and are considered fundamental, including, of course, the Forced Labour Convention, 1930 (No. 29) and its 2014 Protocol and the Abolition of Forced Labour Convention, 1957 (No. 105)[105]. Regarding the latter aspect, it is noteworthy to consider the opinion of authoritative scholars who suggest that, given that international labour conventions typically aim to satisfy a general interest managed by the contracting States, the rights corresponding to the obligations imposed on each State by the conventions are owed to all the other contracting States. This perspective would be also supported by Article 25 of the ILO Statute, which permits any State, regardless of the infringement of its specific interests, to file a complaint with the International Labour Office regarding the fulfilment of a Convention to which it is a party[106].

Regarding the criteria outlined by the ICJ in the *East Timor* case, the absence of the prohibition of forced labour in the UN Charter appears of limited concern. The Charter itself lacks in fact several other prohibitions that undoubtedly imply *erga omnes* obligations for States, such as the prohibitions against slavery and genocide, and in any case refers several times to the enforcement of 'human rights'. As regards the practice of UN organs, the inclusion in treaties, preferably of universal character, and its acknowledgment in general international law, the prohibition of forced labour has, as we have seen throughout the research so far, proven to play a central role in each of these

[103] See for instance Article 5, par. 2 ICCPR, which states that «2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant». See *supra*, Chapter I, par. 2.3.1.

[104] See *supra*, Chapter I, par. 3.1.

[105] See *supra*, Chapter I, par. 2.1.3 and 2.2.2.

[106] So G. GAJA, *Lavoro (disciplina internazionale)*, in *Enciclopedia del diritto*, vol. XXIII, 1973, at p. 626-627.

areas: from the very existence of the ILO and its founding pillars, from the ICCPR, to the Forced Labour Conventions, to its inclusion in regional human rights conventions.

The only aspect identified by the ICJ as not fulfilled for the categorisation of the prohibition of forced labour as carrying *erga omnes* obligations for States is its endorsement in the jurisprudence of the ICJ itself. All the other criteria established over the years by the jurisprudence of the ICJ align with the characteristics of forced labour that the prohibition has acquired over time. It is for this reason that the prohibition of forced labour could potentially be regarded as an *erga omnes* obligation, despite the ambiguous nature of the importance requirement for rules to be deemed valid *erga omnes* and the consequent limited instances of jurisdictional practice. Consequently, if a State were to violate this prohibition, it could be held liable even by a State not directly affected by the violation, but «merely as a member of the international community»[107]. While this is a conclusion which seems possible to endorse wholeheartedly, it is essential to acknowledge that the factual verification of this assumption remains contingent. Specifically, the prohibition of forced labour, viewed in its singularity rather than as a facet of "modern slavery", is likely to ultimately constitute an *erga omnes* obligation for States when explicitly declared as such, primarily through the guidance of ICJ jurisprudence.

3. Responsibility of States for private actors' violation of the prohibition of forced labour

Having sought a more profound comprehension of the legal categorisation of the prohibition of forced labour in international law, our next endeavour is to discern the implications of States adhering to this prohibition. Specifically, we aim to fathom how States can be held internationally accountable in cases of violations of the prohibition of forced labour by private actors. As emphasized earlier, this objective serves as a focal point in our inquiry. Consequently, throughout the preceding chapter, our analysis focused exclusively on judicial decisions pertaining to actions perpetrated by private entities.

Before delving into this research, it is imperative to elucidate the definitions of the terms that will be frequently employed in the forthcoming pages. The term 'private

[107] S. KADELBACH, Jus Cogens, *Obligations* Erga Omnes *and Other Rules*, op. cit., p. 26

actors' is not consistently employed in international law and is sometimes used interchangeably with expressions like *de facto* organs of a State and non-State actors. It refers to a broad category that includes all individuals who do not possess the status of State organs. In essence, 'private actors' encompass entities such as individuals, groups, or others that operate outside the framework of State authority or as non-State entities[108]. Conversely, the category of non-State actors includes both individuals and entities, with the latter encompassing a diverse array of organisations and institutions at various levels – global, regional, sub-regional, and local. These entities exhibit a wide range of characteristics, and their identification is not based on common sociological features. This category includes, among others, international organisations, corporations, non-governmental organisations, de facto regimes, trade associations, and even transnational criminal organisations. It is important to note that, while not universally applicable, most non-state actors possess some form of legal capacity under international law[109]. Given the diversity of interpretations of the term 'private actors', it is crucial to clarify its usage for the purpose of this research. In the following section, 'private actors' will be specifically utilised to denote 'individuals', referring to persons or groups of persons acting not as subjects of international law, to which national law may confer legal subjectivity as legal persons, as for instance, in the case of corporations.

On the other hand, of course, a State, the traditional and most important subject of international law[110], incurs responsibility for every internationally wrongful act, consisting of an action or omission, which is attributable to the State under international law, and which constitutes a breach of an international obligation of the State. What amounts to a breach of international law by a State depends on the actual content of that State's international obligations[111]. Therefore, State responsibility for private individuals delineates instances where individual's actions are imputed to a State, even if that individual is not a state organ. In instances where such attribution is not applicable, the State bears no responsibility for the individual's conduct. However, the State may still be

[108] See A. KEES, *Responsibility of States for Private Actors*, in *Max Planck Encyclopedia of Public International Law*, March 2011, par. 2.

[109] See M. WAGNER, *Non-State Actors*, in *Max Planck Encyclopedia of Public International Law*, July 2013, par. 1-2.

[110] See C. WALTER, *Subjects of International Law*, in *Max Planck Encyclopedia of Public International Law*, May 2007, par. 5.

[111] See J. CRAWFORD, *State responsibility*, in *Max Planck Encyclopedia of Public International Law*, September 2006, par. 1-3.

accountable for the actions or omissions of its organs that are connected to the private act in question. This holds true in situations involving a breach of a norm of international law that bonded the State to a specific course of action regarding non-State activities[112].

Based on these foundational principles, the aim of this second part of the concluding chapter is to channel the insights garnered on the legal characterisation of the prohibition of forced labour toward the responsibility of states for the previously discussed conduct, particularly as illuminated through the analysis of case law in chapter Two. Specifically, the focal point is to comprehend how the State can be held accountable for its failure to prevent, prohibit, and punish instances of the prohibition of forced labour on its territory, concerning the actions of private actors. Three distinct avenues have been particularly discerned through which a State can be held responsible for the actions or omissions of its organs concerning the behaviour of private individuals in violation of an international law norm, specifically, the prohibition of forced labour. It is important to emphasise and bear in mind that this avenues traverse the established division between primary and secondary norms of State responsibility in international law, between substantive obligations across different domains of international law and those that elucidate the implications of a State being accountable for breaches of these obligations[113]. The first avenue involves the utilisation of the positive obligations instrument, primarily developed within the jurisprudence of regional human rights courts, as already partially observed during the precedent chapter. On the other hand, the second identified path pertains to the broader realm of state due diligence – a concept with extensive potential that has lately sparked considerable debate and poses challenges in delineating its boundaries, as we shall explore. Lastly, the third avenue recognised is associated with the so called theory of complicity between the State and private actors, involving the attribution of the latter's conduct to State entities. This theory has gained a degree of consensus over time and is inherently connected to other crucial areas of

[112] A. KEES, *Responsibility of States for Private Actors*, op. cit., par. 3.

[113] J. CRAWFORD, *State responsibility*, op. cit., par. 12-13. Regarding the consequences of violations of peremptory norms and *erga omnes* obligations, between primary and secondary rules see A. GIANELLI, *Le conseguenze delle gravi violazioni di obblighi posti da norme imperative tra norme primarie e secondarie*, in in M. SPINEDI, A. GIANELLI, M. L. ALAIMO (ed.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti – Problemi e spunti di riflessione*, Milano, 2006, from p. 246, as well as for a valuable insight into the contribution of Italian doctrine on the particular point, see A. GIANELLI, *Il contributo della dottrina italiana al tema della responsabilità internazionale degli Stati per fatto illecito: qualche osservazione*, in *Rivista di Diritto Internazionale*, vol. 99, n. 4, 2016, p. 1042-1070.

international law on State's responsibility. We will thus delve into an examination of the robustness of the foundations supporting this theory, also on the basis of the International Law Commission's paramount work on State responsibility. After outlining the theoretical and characteristic features of these three avenues, we will investigate the extent to which the case law scrutinised in the previous chapter has trodden upon these paths.

On this basis, it is clear that the insights provided are therefore not only intended to shed light on the delineation of the contours of State responsibility in the considered cases. The obtained results could in fact also serve as valuable considerations in evaluating the effectiveness of actual State responses to the forced labour phenomenon, as it is presumed that States aim to minimise such responsibility whenever possible.

3.1. Full compliance with the prohibition of forced labour: State's positive obligations

The examination of how a State can be held accountable for the actions of a private actor violating the prohibition of forced labour has to begin with an exploration of State's positive obligations. This avenue of analysis primarily falls within the domain of human rights law, that exhibits a dual nature, extending beyond the mere proclamation of rights to the identification of duty-holders and their corresponding obligations. In international human rights instruments, this entails specifying the obligations of States parties. Thus, with regard to the prohibition of forced labour, this translates into the State's obligation to respect this prohibition on one hand and to ensure that individuals can effectively exercise the guarantees it proclaims on the other. This formulation therefore implies that the scope of State obligations is both negative and positive, imposing not only a State duty to refrain from interfering with the exercise of the right but also to protect the right from infringement by third parties. Hence, these types of obligations are categorised under the umbrella of primary norms in international law[114]. Positive obligations are thus generally considered to be obligations requiring States to take action, necessitating

[114] V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., p. 50, note 40.

affirmative steps to ensure rights protections. In contrast, negative obligations essentially mandate States not to interfere in the exercise of rights[115].

The idea of State responsibility, encompassing both positive and negative obligations, originated primarily in the field of diplomatic protection before the emergence of human rights law. In a broader sense, the principles of State responsibility have long mandated that a State must rectify any breaches and provide reparations when it fails to fulfil an obligation under international law, either through its actions or omissions that can be attributed to it. The breach may result from the harmful actions of State officials directly or from the State's failure to meet its international duty to take reasonable and adequate measures to prevent private wrongs. This duty includes the obligation to apprehend and bring offenders to justice. It's important to note that the State is not held directly and primarily responsible for private wrongs, as such an approach would essentially make the State an insurer of the safety and well-being of foreigners. However, not respecting the content of positive obligations by State organs can still lead to the State being held responsible for private wrongs. This occurs when the State fails to take measures that, under the given circumstances, should have been "reasonably expected" to prevent, address, or impose penalties for acts causing harm[116]. Understanding the extent and nature of these positive obligations is crucial for determining the State's responsibility in preventing and addressing forced labour committed by private entities. This framework involves assessing the proactive measures that States should take to ensure the protection of individuals from forced labour. In pursuit of this objective, we will conduct a brief analysis of both the structure and content of the positive obligations that have been adopted, as previously discussed, within the

[115] See D. SHELTON, A. GOULD, *Positive and Negative Obligations*, in D. SHELTON (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, 2013, at p. 562. On the use and evolution of the positive obligations instrument, see also C. DRÖGE, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Berlin, 2003; A. R. MOWBRAY, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, London, 2004; X. DIMITRIS, *The positive obligations of the State under the European Convention of Human Rights*, London, 2012; L. LAVRYSEN, *Human Rights in a positive state – Rethinking the relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge, 2016.

[116] *Ibi*, p. 563.

framework of the two prominent regional international human rights systems case law, the ECtHR and the IACHR[117].

As regards the ECtHR, the same reasoning applies as for positive obligations considered in the broader sense. That is, since the ECHR encapsulates broad principles of human rights entitlements expressed at a high level of abstraction, ensuring the practical implementation of ECHR norms necessitates a clear understanding of the rights' meaning and a concrete delineation of the obligations assumed by States. To translate these rights into specific, tangible, and definite rules, it is imperative to identify the corresponding obligations that accompany these rights[118]. As previously observed, the initial incorporation of the concept of positive obligations linked to the content of Article 4 of the ECHR occurred in 2005, notably through the case *Siliadin v. France*. It was during this pivotal moment that the ECtHR chose to employ this method of finding States in violation of the prohibition of forced labour, an approach that had been earlier established for the interpretation of Articles 2 and 3 of the ECHR[119]. The Court recognised that «limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective»[120].

In this context it appears necessary to further investigate the aspect relevant to our purposes, namely, to understand how, through positive obligations, States can be held liable for acts performed by private actors and specifically in forced labour instances. This aspect is unavoidably linked to the connection between the injury suffered by the applicant – which falls within the defined scope of the prohibition –, and the claimed failure by the State to safeguard that right, that is on the issue of causation[121]. Regrettably,

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[117] See *supra*, Chapter II. For a general overview of the use of positive obligations by regional human rights Courts refer to D. SHELTON, A. GOULD, *Positive and Negative Obligations*, op. cit., from p. 569.

[118] V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., p. 7.

[119] See *supra*, Chapter II, part I, par. 2.1. It is worth noting here that some critics admonish the Court for occasionally relying excessively on the tool of positive obligations, rather than turning to the more conventional mechanisms of State responsibility in international law: J. CRAWFORD, A. KEENE, *The Structure of State Responsibility under the European Convention on Human Rights*, in A. VAN AAKEN, I. MOTOC (ed.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, p. 178-198.

[120] ECtHR, *Siliadin v. France*, cit., par. 89.

[121] V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., from p. 45. On the question of causation in the specific context of positive obligations for rights

delineating this domain within stringent and precise standards appears to be a challenging task. Instead, the Court's evaluation of causality appears to exhibit significant variability across the diverse fields of application and forms of connection it is adjudicating. The evaluation of State responsibility is grounded in the premise that the State bears the responsibility of safeguarding the rights of individuals within its jurisdiction. Consequently, the ECtHR navigates a delicate balance between ensuring the effective protection of human rights and avoiding an undue burden on the State[122].

Nevertheless, concerning the specific infringement of Article 4, it is evident that the lack of sufficient control by the State often serves as the foundation for determining that the State has failed to meet positive obligations. In this context, ECtHR has consistently identified breaches of positive obligations when there is a deficiency in suitable and effective domestic legislation to deter violations. As it was the case in many of the observed ECtHR judgments, it has been argued that detecting a breach of obligations is often more immediate when it stems from a lack of or inadequacy in legislation rather than negligence on the part of authorities in safeguarding against wrongful actions. Furthermore, if appropriate legislation is in place, it must be accompanied by effective prosecutions[123].

This determination concerning the causal connection between the suffered offense and the State's obligation to prevent it leads us to delve into the substance of the positive obligations' content in cases of Art 4 ECHR violations. Specifically, into the Court's conceptualisation of the States' positive obligations in cases of violation of the prohibition of forced labour[124]. Regarding this particular violation, it is evident that over the years,

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protected by the ECHR, see also V. STOYANOVA, *Causation between State Omission and Harm within the Framework of Positive Obligations under the ECHR*, in *Human Rights Law Review*, vol. 18, 2018, p. 309-346.

[122] *Ibi*, p. 70-71. This relates more generally to the foreseeability element reiterated by the Court, that positive obligations intervene where the "state authorities know or ought to have known about the risk of harm". For a critical look at this aspect see V. STOYANOVA, *Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights*, in Leiden Journal of International Law, Volume 33, Issue 3, 2020, p. 601-620.

[123] So B. CONFORTI, *Reflections on State Responsibility for the Breach of Positive Obligations – The Case-Law of the European Court of Human Rights*, in *Italian Yearbook of International Law*, vol. 13, 2003, at p. 8.

[124] In addition to the positive obligations associated with the substance of Article 4, the Court has, over the years, articulated numerous other positive obligations related to the various provisions within the Convention. Bearing in mind that the Court itself has not developed a particular classification of positive obligations, various efforts have been undertaken to categorise these obligations, not necessarily in conflict with each other. Consider, in this regard, the reconstructions suggested by A. CLAPHAM, *Human Rights*

the Court has observed and underscored that there are primarily three positive obligations incumbent upon states: the obligation to put in place an appropriate legal and regulatory framework, the obligation to investigate and, finally, the obligation to take protective operational measures to protect victims. As also explained by the Court itself, the first of these obligations is to be considered of a substantive nature, whereas the other two of a procedural nature and amount to obligations of means[125]. While employing slight variations in terminology, the ECtHR judges consistently reiterated the substance of all three positive obligations in all the cases scrutinised, as well as the fact that the three obligations encompass, in essence, the duties to prevent, protect and punish[126].

The first 'substantive' obligation, pertaining to the legislative framework, presents a notable aspect of variability in the guidance offered by the Court, contingent upon the specific factual context of each case. Furthermore, the degree of scrutiny applied by the Court to the legislative frameworks of individual States would exhibit variance across different cases. The Court underscores as fundamental to the essence of this first positive obligation the imperative to enact comprehensive domestic criminal legislation that effectively criminalizes the diverse offenses delineated in Article 4. Despite its frequent existence on the national level, this legislation is frequently deemed 'inadequate' or insufficient in its coverage of the rights enshrined in Article 4 ECHR[127]. Moreover, the Court has frequently directed its scrutiny towards the efficacy of domestic regulations pertaining to labour law and immigration rules, at times adopting a stance of considerable

Obligations of Non-State Actors, Oxford, 2006, especially p. 349-436, by A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, op. cit., and by C. DRÖGE, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, op. cit., who distinguishes between an 'horizontal' dimension and 'social' dimension of positive obligations.

[125] Among the many occasions on which these three obligations have been identified by the Court in connection with the prohibition of forced labour, see their schematic presentation in ECtHR, *Chowdury and Others v. Greece*, cit., from par. 105. See also V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., from p. 329, who, considering the whole scope of Article 4 ECHR, including the prohibition of slavery and servitude, identifies other positive obligations besides the three presented here in her systematization.

[126] In particular, refer to ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 283 ff.; ECtHR, *C.N. and V. v. France*, cit., par. 105 ff.; ECtHR, *V.C.L. and A.N. v. United Kingdom*, cit., par. 151 ff.; ECtHR, Grand Chamber, *S.M. v. Croatia*, cit., par. 306 ff.; ECtHR, *Zoletic v Azerbeijan*, cit., par. 183 ff.

[127] See for instance ECtHR, *Siliadin v. France*, cit., par. 142, and ECtHR, *C.N. v. United Kingdom*, cit., par. 76, and ECtHR, *Chowdury and Others v. Greece*, cit., from par. 87. See V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., from p. 338 and also V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., from p. 171.

scrutiny and persistence[128]. This divergence in the intensity of examination would pose a challenge in precisely defining the extent of positive obligations regarding the adoption of an appropriate legislative and regulatory framework that States should adhere to. Consequently, it would also complicate the formulation of a universally applicable standard for such positive obligation[129].

As emphasized most recently in the Grand Chamber case *S.M. v. Croatia*, the converse holds true concerning the content associated with the other two 'operational' or 'procedural' obligations identified by the Court in cases of forced labour violations[130]. These represent specific duties and exhibit a more solid foundation, for their delineation aspects seem in fact to have been meticulously developed by the Court, drawing upon the content previously identified for positive obligations related to Articles 2 and 3 ECHR. These obligations would be specific in nature, as they pertain to situations involving identifiable individuals whose rights have been violated by privateactors. They come into effect only under specific conditions, contingent upon the State's actual or presumed awareness of the relevant circumstances[131].

As regards the positive obligation to investigate, five conditions are always to be met in the Court's view: authorities must act of their own motion once the matter has come to their attention; the investigation must be independent from those implicated in the events; the victim or the next- of- kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests; the requirement of promptness and reasonable expedition if possible as a matter of urgency; the investigation must be capable of leading to the establishment of the facts of the case and to the identification and punishment of individuals responsible[132]. Nonetheless, judges often specify that «The procedural obligation must not be interpreted in such a way as to impose an impossible

[128] On all, see ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 284 ff. and 292 ff., and see V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., from p. 369 for a critical remark on this aspect.

[129] In this sense see M. JOVANOVIC, *State Responsibility for 'Modern Slavery' in Human Rights Law – A Right Not to Be Trafficked*, Oxford, 2023, at p. 127.

[130] See most recently ECtHR, Grand Chamber, *S.M. v. Croatia*, cit., par. 306 ff., echoing what already stated in the *Rantsev* ruling (par. 288 ff.).

[131] See M. JOVANOVIC, *State Responsibility for 'Modern Slavery' in Human Rights Law*, op. cit., p. 120.

[132] All of these elements occur in ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 288; ECtHR, *CN v. the United Kingdom*, cit., par. 69; ECtHR, *L.E. v. Greece*, par. 68; ECtHR, *Zoletic and Others v. Azerbaijan*, cit., par. 187.

or disproportionate burden on the authorities»[133]. Regarding the positive obligation to implement operational measures for victim protection, here the primary objective lies in proactively prevent harm or its recurrence[134]. To achieve this objective, following the *Rantsev* judgment, the Court has consistently emphasized that the activation of the obligation to implement protective operational measures necessitates that «the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identifiable individual had been, or was at real and immediate risk of being subjected to abuses» falling within the scope of Article 4[135]. Similarly to the drafting of the protective measure concerning Articles 2 and 3 ECHR, the adoption of this expression has consequently transformed these prescribed standards into what doctrine interprets as a sort of test, serving as a benchmark against which a set of criteria can be assessed to determine whether the state has fulfilled its corresponding positive obligation and, thereby, avoided a violation of Article 4[136]. The Court's embrace of this test serves as a clear manifestation of the derivation of 'procedural' obligations from the positive obligations outlined in Articles 2 and 3 of the ECHR. However, this aspect has not been immune to criticism.

This would in fact effectively result in a 'blanket transposition' of the duty to investigate and implement operational measures under Articles 2 and 3. This approach would overlook the nuanced nature of the investigation needed in Article 4 cases and would fail to consider the distinct characteristics of the facts necessary to initiate procedural obligations under these different Convention article. Additionally, the determination of what constitutes a 'credible suspicion' or 'arguable claim', and the point

[133] So in ECtHR, Grand Chamber, *S.M. v. Croatia*, cit., par. 315 and in ECtHR, *Zoletic and Others v. Azerbaijan*, cit., par. 188. As regards the procedural positive obligation to investigate, see also V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., from p. 123.

[134] Lastly, see ECtHR, *Zoletic and Others v. Azerbaijan*, cit., par. 184.

[135] ECtHR, *Rantsev v. Cyprus and Russia*, cit., par. 286. See also ECtHR, *L.E. v. Greece*, par. 66.

[136] It is in fact with the case ECtHR, *Osman v. the United Kingdom*, Application no. 23452/94, 28 October 1998, concerning the violation of Article 2 ECHR, that the theory of the so-called 'Osman-test' arose. In this sense see V. STOYANOVA, *Human Trafficking and Slavery Reconsidered*, op. cit., from p. 400, who indicates two necessary elements for the test, namely the 'knowledge' element and the 'reasonableness' element. M. JOVANOVIC, *State Responsibility for 'Modern Slavery' in Human Rights Law*, op. cit., from p. 144 instead identifies three elements: the presence ofobjective circumstances, the official awareness of these objective circumstances, and the adoption of measures required to protect an individual at risk of or subject to the risk at issue.

at which such a claim is adequately brought to the attention of the relevant domestic authorities, would not be readily discernible from the jurisprudence[137].

Before concluding with some overarching observations on the application and role of positive obligations in enforcing the prohibition of forced labour, it is pertinent to highlight that other regional international human rights systems have also resorted to the same enforcement mechanisms. The IACHR has in fact of course also incorporated the use of positive obligations in its *rationale* concerning the infringement of Article 6, par. 2, of the ACHR. Already in case *Ituango Massacres*, issued only one year after the ECtHR judgement of *Siliadin*, the IACHR recognised that «in light of their obligation to ensure the full and free exercise of all human rights, […] States adopt all appropriate measures to protect and preserve the right to life (positive obligation) of those subject to their jurisdiction»[138]. In *Hacienda Brasil Verde* the Court recognises the effectiveness of this instrument, since «it is not sufficient that States refrain from violating rights; it is also essential that they adopt positive measures determined on the basis of the specific needs for protection of the subject of law»[139]. Not only that, it is still in this 2016 case that the Court further elaborates on the instrument of positive obligations in relation to the violation of the content of Article 6 ACHR, when it recognises that the State bears the obligation to investigate. The state is in particular required to take five actions: «(i) open, ex officio and immediately, an effective investigation that permits the identification, prosecution and punishment of those responsible, when a report has been filed or there is justified reason to believe that persons subject to their jurisdiction are subjected to one of the offenses established in Article 6(1) and 6(2) of the Convention; (ii) eliminate any laws that legalize or tolerate slavery and servitude; (iii) define such offenses under criminal law, with severe penalties; (iv) conduct inspections or other measures to detect such practices, and (v) adopt measure of protection and assistance for the victims»[140]. While more precisely articulated in their substance, these five guidelines outlined by the IACHR exhibit echoes of the same obligations identified by the ECtHR in the context of positive obligations associated with the violation of the prohibition of forced labour: the obligation to adopt an appropriate legislative framework is in fact detectable in points (iii) and also

[137] M. JOVANOVIC, *State Responsibility for 'Modern Slavery' in Human Rights Law*, op. cit., from p. 128.
[138] IACHR, *Ituango Massacres v. Colombia*, cit., par. 130 and see also par. 137.
[139] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 317.
[140] *Ibi*, par. 319.

(ii), the procedural duty to investigate in points (i) and (iv), and in point (v) the procedural obligation to protect.

Based on the comprehensive examination of the utilisation of positive obligations by international human rights courts in addressing violations of provisions related to forced labour, certain conclusions can be drawn. Analysing the form and content attributed to these obligations by the courts in the examined cases, it is evident that they serve as strong, direct, and immediate mechanisms for holding States accountable for actions perpetrated by private actors, enabling effective intervention in instances of violations. Both the substantive obligations, directed at compelling national jurisdictions to adopt appropriate legislative frameworks, and the procedural obligations, focusing on investigation and protection, have demonstrated a profound impact at the heart of States' failures in prevention, protection, and punishment concerning forced labour.

Nonetheless, it is crucial to acknowledge, as emphasised by certain scholars, that the precise content of these positive obligations, or the exact standards they necessitate, often proves elusive in particular with regard to the legislative framework. Similarly, there exists no precise classification of the various types of obligations associated with each individual provision in the Conventions. Recognising this gap, scholars have sought to propose multiple frameworks to potentially order these obligations[141]. Consequently, it would be highly desirable for the Courts to provide as precise indications as possible in this regard, assisting States in steering clear or limit their responsibility[142]. As a result, such clarity would undoubtedly enhance the protection afforded to forced labour victims at the hands of private actors. Indeed, examples of national legislation, the European Corporate Sustainability Due Diligence Directive, and the extensive efforts toward a potential international treaty on Business and Human Rights, all aimed at holding companies accountable for upholding human rights throughout their production chains, align with this trajectory. The question that persists is whether, as these measures become more prevalent and embraced, they will suffice to meet the standards anticipated by regional human rights courts, thereby preventing violations of the prohibition of forced labour by private actors.

[141] See *supra*, note 124.

[142] In this regard, see V. STOYANOVA, *Positive Obligations under the European Convention on Human Rights*, op. cit., from p. 67.

3.2. State's due diligence: obligation of conduct in State's duty to ensure compliance with the prohibition of forced labour

To further delve into the potential avenues through which the state could be held accountable for violations of the prohibition of forced labour by private actors, it is pertinent to also examine the concept of due diligence[143], as understood in international law and specifically in human rights law. This concept applies not only, as previously discussed, to private actors[144], but also of course to States. Due diligence is in fact defined as «an obligation of conduct on the part of a subject of law». Typically, the criterion employed to evaluate whether a State has fulfilled due diligence is that of the «responsible government». In addition, non-compliance with the standard by a party results in its

[143] The inception of the discourse on due diligence in international law cannot be said to be recent, yet some associated issues have gained escalating interest in doctrinal discussions over the past few years. On the origins of the introduction of due diligence discourse in international law, refer to M. MONNHEIMER, *Due diligence obligations in international human rights law*, op. cit., from p. 78. This heightened attention is likely attributed to the inherent connection of due diligence with broader issues of State responsibility. Furthermore, the topic has become exceptionally pertinent with the increasing scrutiny that doctrinal debates, not only within the realm of human rights law, dedicate to the imperative of corporate accountability. This last aspect also pertains, at least to some extent, to the purposes aligned with those of state due diligence, as we have previously observed (see *supra*, Chapter II, part II, par. 1). Worthy of note in this regard are R. PISILLO-MAZZESCHI, *The Due Diligence Rule and the Nature of the International Responsibility of States*, in *German Yearbook of International Law*, vol. 35, 1992, p. 9-51; J. KULESZA, *Due Diligence in International Law*, Leiden, 2016; H. KRIEGER, A. PETERS, L. KREUZER (ed.), *Due Diligence in the International Legal Order*, Oxford, 2020; M. MONNHEIMER, *Due diligence obligations in international human rights law*, op. cit.; A. OLLINO, *Due Diligence Obligations in International Law*, Cambridge, 2022.

[144] Reference is here made to due diligence standards required of companies by states through the examples of corporate responsibility legislation presented *supra*, Chapter II, part II, par. 1.1 and 1.2.

responsibility[145]. Further, obligations of conduct[146] in international law may be defined as «those where the State concerned is required to undertake a particular action»[147].

Based on these definitions, it can be stated that, as harm caused by private actors is not directly attributable to the State, due diligence serves as the framework for establishing a connection between the harm and the State. This is achieved by asserting that the State should have taken specific actions to prevent the harm. Consequently, the State can be held accountable for its omission to adopt the necessary conduct. In this context, human rights lawyers interpret due diligence as a standard of conduct mandated to fulfil an obligation[148].

Within the realm of human rights law, even when violations are perpetrated by private actors, a State bears a duty of due diligence within its jurisdiction. This duty encompasses taking appropriate measures to prevent human rights violations and holding perpetrators accountable[149]. As in fact articulated by the Human Rights Committee (HRCttee)[150], the UN treaty body for the ICCPR which encompasses the prohibition of forced labour in Article 8, par. 3, States are obliged to ensure the discharge of Covenant rights by safeguarding individuals against violations not only by State agents but also by

[145] See T. KOIVUROVA, K. SINGH, *Due Diligence*, op. cit., par. 1. See also T. KOIVUROVA, *What Is the Principle of Due Diligence?*, in J. PETMAN,J. KLABBERS (ed.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Leiden, 2003, p. 341-350.

[146] Obligations of conduct embody a contentious and extensively studied issue in international law. As traditionally opposed to obligations of result, the introduction of this distinction occurred in the initial stages of the ILC's efforts on the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). However, this categorsation did not find a place in the final version of ARSIWA due to scepticism from governments and the ILC. The argument posited was that not all obligations could be neatly classified as either obligations of conduct or result. See ILC, *Fifth report on State responsibility by Mr. Roberto Ago*, Special Rapporteur, A/CN.4/291, 1976 and see *infra*, par. 3.3. Among the many on the issue J. COMBACAU, *Obligations de résultat et obligations de comportement – Quelques questions et pas de réponse*, in D. BARDONNET, *Mélanges offerts à Paul Reuter – Le droit international: unité et diversité*, Paris, 1981, p. 181-204; P. M. DUPUY, *Reviewing the Difficulties of Codification: on Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, in *European Journal of International Law*, vol. 10, 1999, p. 371-385; C. P. ECONOMIDES, *Content of the Obligation – Obligations of Means and Obligations Of Result*, in J. CRAWFORD, A. PELLET, S. OLLESON, K. PARLETT, *The Law of International Responsibility*, Oxford, 2010, p. 371-381; R. WOLFRUM, *Obligation of Result Versus Obligation of Conduct – Some Thoughts About the Implementation of International Obligations*, in M. H. ARSANJANI, J. COGAN, R. SLOANE, S. WIESSNER (ed.), *Looking to the Future – Essays on International Law in Honor of W. Michael Reisman*, Leiden, 2011, p. 363-383.

[147] So R. WOLFRUM, *Obligation of Result Versus Obligation of Conduct*, op. cit., at p. 373.

[148] See V. STOYANOVA, *Due Diligence versus Positive Obligations: Critical Reflections on the Council of Europe Convention on Violence against Women*, in J. NIEMI, L. PERONI, V. STOYANOVA (ed.), *International Law and Violence Against Women – Europe and the Istanbul Convention*, London, 2020, at p. 96.

[149] T. KOIVUROVA, K. SINGH, *Due Diligence*, op. cit., par. 17.

[150] See *supra*, Chapter I, par. 3.3.

acts committed by private individuals or entities. Failure to uphold Covenant rights could result in violations by States parties, «as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress the harm caused by such acts by private persons or entities»[151].

As discernible from the definition of due diligence and the quoted statement from the HRCttee, the objectives and substance of due diligence, particularly in the realm of human rights law and concerning State liability for acts committed by private individuals, appear to closely align with those of positive obligations. This last point has in fact sparked extensive debate within international law scholars. The issue appears to arise at the very roots, due to the difficult placement of States' due diligence within the broader classification of rules in international law. Looking at the dichotomy between primary and secondary rules, while the positive obligations of States have been comfortably assigned to the former[152], the classification of due diligence is more intricate. Some even contend that it falls somewhere between primary and secondary rules, arguing for its placement in this intermediary space[153].

This ambiguous classification appears to directly impact the differentiation between the concepts of due diligence and positive obligations. This ambiguity has also at times surfaced in the jurisprudence of regional international courts, where the two concepts seem to be muddled or overlapping. For instance, in the *Hacienda Verde*, the IACHR, having outlined the content of the obligations imposed on the State to avoid a violation of Article 6 of the ACHR[154], states that: «The foregoing signifies that States must adopt comprehensive measures to act with due diligence in cases of servitude, slavery, trafficking and forced labour. In particular, States should have an appropriate legal framework and enforce it effectively, as well as prevention policies and practices that allow them to take effective measures when complaints are received»[155].

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[151] HRCttee, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 1326, 29 March 2004, par. 8.

[152] See *supra*, par. 3.1.

[153] This is the view of H. P. AUST, P. FEIHLE, *Due Diligence in the History of the Codification of the Law of State Responsibility*, in H. KRIEGER, A. PETERS, L. KREUZER (ed.), *Due Diligence in the International Legal Order*, Oxford, 2020, p. 42-58. See also T. KOIVUROVA, K. SINGH, *Due Diligence*, op. cit., par. 2.

[154] See *supra*, par. 3.1.

[155] IACHR, *Case of the Hacienda Brasil Verde Workers v. Brazil*, cit., par. 320. See also ECtHR, Grand Chamber, *S.M. v Croatia*, cit., par. 134 ff.

States bear the accountability to guarantee that neither government officials nor individuals, within the scope of their duties, infringe upon an individual's human right. This duty of respect imposes a stringent standard of liability, mandating the State to address any such violation attributable to it, irrespective of the actor's intent or motive. However, this standard does not occur as well-suited for positive obligations, which necessitate the State to take proactive measures to shield individuals from actions by others not acting in an official capacity. The State cannot of course ensure the prevention of all violations of guaranteed rights. Yet, at the opposite end of the spectrum, the State cannot remain passive in case of massive human rights violations. It is believed that somewhere between these extremes lies the criterion for assessing whether a State has fulfilled its affirmative obligations to ensure these rights. It is here that international tribunals commonly refer to due diligence as the appropriate standard[156]. Indeed, the categorisation of positive obligations under the ECHR, considering the practice of the ECtHR, is notably more intricate and nuanced than the overarching standard of due diligence. This complexity arises from the fact that, unlike due diligence, the criteria for triggering positive human rights obligations – such as the obligations to prevent harm, investigate, punish, and provide remedies – vary. Additionally, the standards for determining when the State is deemed to have fallen short of fulfilling these obligations differ[157].

Even scholars who have delved more extensively into the concept of due diligence concur with this characterisation. Within the domain of human rights law, due diligence would serve as the benchmark for evaluating compliance with positive human rights obligations. These obligations, designed to protect a legal interest and characterised by their generality and initial indeterminacy, would be scrutinised through the lens of due diligence. In human rights law, this standard of conduct evolves from the broader standard of reasonableness, demanding a judicious balance between individual and community interests. Proceeding from the premise that the practical application of due diligence criteria is intricately linked to the specific circumstances of each individual case, the doctrine has put forth various proposals to discern the recurrent components unique to due diligence. Referred to by various names at times, and with some variations in content,

[156] See D. SHELTON, A. GOULD, *Positive and Negative Obligations*, op. cit., at p. 577.
[157] In this sense V. STOYANOVA, *Due Diligence versus Positive Obligations*, at p. 130.

these factors primarily include three key components: State's knowledge, State's capacities and State's reasonableness of actions. In essence, these three factors encompass the foreseeability of the circumstances by the state apparatus, its capacity to enact corrective measures in response to infringements by private actors, and the considered implementation of these measures[158]. Slightly varying perspectives notwithstanding, some contend that these three elements revolve around the foreseeable risk to a legally protected interest, countervailing interests, and, notably, the ability to act in safeguarding the right and other human rights[159].

The varying interpretations of the due diligence standard, with some perceiving it as requiring less than a 'full' positive obligation and others framing it as a protective shield, particularly for businesses seeking to evade liability, would not be acceptable. Due diligence would, on the contrary, serve as a reconciliation mechanism, bridging the duty to protect – unquestionably essential for effectively safeguarding human rights – with other interests. It would therefore not allow for a mere, vague and 'formal' display of compliance while remaining substantively ineffective, or detracting from substantive rights, but would prove to be an additional tool in addressing systemic human rights issues[160]. As applied to the violation of the prohibition of forced labour, this is a point that the IACHR appears to have fully acknowledged and comprehended in its *Hacienda Brasil Verde* ruling.

Moreover, the expanding influence of private actors[161] seems to pose a challenge to the efficacy of international human rights provisions, especially in situations where powerful private actors operate in countries with limited capacities. While the absence of capabilities does not exempt States from fulfilling their positive human rights obligations – there are minimum requirements that States must adhere to even in times of crisis – compliance with these obligations remains deficient in numerous States. The human rights risks imposed by private actors are often of such magnitude that effective counterstrategies surpass the limited resources of weaker States. Given that many States lack the means to ensure sufficiently robust protection, the potential for private human

[158] This is the reconstruction of M. MONNHEIMER, *Due diligence obligations in international human rights law*, op. cit., from p. 116.

[159] So B. BAADE, *Due Diligence and the Duty to Protect Human Rights,* op. cit., at p. 97.

[160] *Ibi*, p. 107.

[161] For a more comprehensive exploration of this further significant aspect, please refer to the study conducted by A. PETERS, *Non-state actors as standard setters*, Cambridge, 2009.

rights violations has considerably heightened[162]. When influential private actors, like business corporations, operate in States ill-equipped to diligently prevent and penalise human rights contradictions, significant protection gaps inevitably emerge. Consequently, the due diligence standard could be aptly applied to extraterritorial scenarios to mitigate these deficiencies[163].

In any event, a crucial condition for its effectiveness would be that compliance with this necessarily flexible standard is subject to review by entities other than only the obligation's recipient. Human rights courts and treaty bodies can perform such reviews, but other States, civil society, and scholars would also have to play a role in holding actors accountable[164]. Ultimately, positive obligations and due diligence emerge as concepts predominantly crafted within jurisprudence, but there does seem to be considerable potential for their further development into robust and detailed legal standards that provide protection against human rights violations, whether committed by States or private actors.

3.3. Attribution of conduct to the State: complicity with private actors?

A final aspect to be contemplated in the context of State responsibility for acts committed by private actors falls all within the realm of secondary rules. Specifically, in instances where there is State involvement in human rights violations, albeit residual, it becomes imperative for the present research to take into account a further reconstruction of doctrinal origin. According to this reconstruction, a new secondary norm would have been evolving, stipulating that private wrongs are to be imputed to a State if the latter knowingly facilitated or otherwise cooperated in their commission, and it aligns with the scenario outlined in the preceding section, particularly in cases where transnational industries are in operation[165].

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[162] M. MONNHEIMER, *Due diligence obligations in international human rights law*, op. cit., at p. 257.

[163] See M. MONNHEIMER, *Due diligence obligations in international human rights law*, op. cit., from p. 258 and also J. KULESZA, *Due Diligence in International Law*, op. cit., p. 167 ff.

[164] *Ibi*, p. 108.

[165] See D. AMOROSO, *Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, in *Leiden Journal of International Law*, vol. 24, 2011, at p. 990.

This theory operates within the framework of rules pertaining to the conduct of a State, as codified in Part One, Chapter II of the 2001 ILC's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[166], Articles 4 to 11. According to these Articles, it can be concisely asserted that private actors' actions are considered acts of the State when conducted on behalf of the State or under its strict control. Indeed, this legal framework would prove inadequate in addressing State involvement in human rights abuses committed by powerful private actors, such as transnational corporations. These wrongs would in fact often be orchestrated with the significant contribution of a State, although not executed on its behalf or under its control, resulting in an inability to attribute them to the State. Considering this assumption, this new secondary norm, suggesting that private wrongs should be imputed to a State if it knowingly facilitated or cooperated in their commission, would have to be added to the traditional criteria outlined in the Articles. As further criterion for the attribution of conduct[167], this should aptly be labelled as complicity[168]. The concept of complicity has indeed been utilised by some authors as far back as the 19th century to attribute State responsibility in cases where it declined to prosecute or granted amnesty to an act that inflicted harm upon a foreigner. Such acquiescence or tolerance was construed as a type of involvement in the act, a contribution that implicates State responsibility for the said act[169].

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[166] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 A/56/10, 3 August 2001. The General Assembly later welcomed the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles in UNGA, *Responsibility of States for internationally wrongful acts*, A/RES/56/83, 12 December 2001. For insights into the matter of human rights protection within ARSIWA, refer to B. SIMMA, *I Diritti Umani nel Progetto della Commissione del Diritto Internazionale sulla Responsabilità Internazionale*, in M. SPINEDI, A. GIANELLI, M. L. ALAIMO (ed.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti – Problemi e spunti di riflessione*, Milano, 2006, p. 399-413, whose analysis affirms that the project reached the utmost extent feasible under the authority of the states, who are the masters of the ILC.

[167] On this topic, see, among others, G. ARANGIO-RUIZ, *State Responsibility Revisited – The Factual Nature of the Attribution of Conduct to the State*, in *Rivista di diritto internazionale – Quaderni di diritto internazionale*, Vol. 6, Milano, 2017 and M. MILANOVIC, *Special Rules of Attribution of Conduct in International Law*, in *International Law Studies*, vol. 96, 2020, p. 295-393.

[168] D. AMOROSO, *Moving towards Complicity as a Criterion of Attribution of Private Conducts*, op. cit., at p. 990. See also E. SAVARESE, *Issues of Attribution to States of Private Facts: Between the Concept of De Facto Organs and Complicity*, in *Italian Yearbook of International Law*, vol. 15, n. 1, 2006, at p. 112 and A. CLAPHAM, *State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations Responsibility*, in L. BOMANN-LARSEN, O. WIGGEN (ed.), *World Business – Managing Harmful Side-Effects of Corporate Activity*, New York, 2004, p. 50-81.

[169] See O. DE FROUVILLE, *Attribution of Conduct to the State: Private Individuals*, in J. CRAWFORD, A. PELLET, S. OLLESON, K. PARLETT, *The Law of International Responsibility*, Oxford, 2010, at p. 275, who, among others to support the theory of complicity since the 19th century, mentions the work of M.

The complicity theory has gained traction over the years, primarily in the international law realm of terrorism[170], but should now be understood as to encompass also instances of human rights violations by private individuals. In this sense, complicity would even have occasionally been considered in certain cases within regional international courts in slavery-related cases[171], finding backing above all in the albeit peculiar reality of U.S. domestic jurisprudence[172].

As regards human rights violations by corporations, the complicity between the State and the private actor should also be understood as an attribution of conduct rather than an attribution of responsibility, as some authors have argued. This latter reconstruction would be based on the provision of Article 16 of ARSIWA, headed 'Aid or Assistance in the Commission of an Internationally Wrongful Act', that could be applied by analogy to the interactions between States and non-state actors[173]. Linking complicity to an attribution of responsibility would be unfeasible as it would necessitate both parties being subjects of international law, an argument that cannot be claimed for private actors[174].

The emergence and application of this novel secondary rule of complicity as an attribution of conduct would then in particular address certain scenarios where due

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BLUNTSCHLI, *Le droit international codifié*, Paris, 1873, p. 264 ff (French translation of the original *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt*, 1868).

[170] See T. BECKER, *Terrorism and the State – Rethinking the rules of State responsibility*, Oxford, 2006, p. 43 ff and R.WOLFRUM, C. E. PHILIPS, *The Status of the Taliban: Their Obligations and Rights under International Law*, in *Max Planck Yearbook of United Nations Law*, vol. 6, 2002, p. 559-601.

[171] Among other examples, D. AMOROSO, *Moving towards Complicity as a Criterion of Attribution of Private Conducts*, op. cit., at p. 996 refers to IACHR, *Ituango Massacres v. Colombia*, cit., par. 125 and 133. However, while the Court highlights that the State was aware of paramilitary activities in Colombia, it also acknowledges, while not sufficient, the efforts and legislative measures taken by the State aimed to prohibit, prevent, and punish such activities (para. 134). Hence, it appears that the Court analyzed this case using the two usual criteria of positive obligations (para. 130) and due diligence (para. 291).

[172] D. AMOROSO, *Moving towards Complicity as a Criterion of Attribution of Private Conducts*, op. cit., p. 999 ff.

[173] Article 16 ARSIWA reads: «A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State». Regarding the complicity of the state in corporate abuses, the theory of complicity as an attribution of responsibility has been advocated by A. CLAPHAM, *State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations Responsibility*, op. cit., at p. 66 and R. MCCORQUODALE, P. SIMONS, *Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, in *The Modern Law Review*, vol. 70, 2007, at p. 611. For insights into the application of Article 16 ARSIWA regarding "aid or assistance" from one state to another in the realm of human rights, refer to the analysis of H. P. AUST, *Complicity and the Law of State Responsibility*, Cambridge, 2011, from p. 390.

[174] D. AMOROSO, *Moving towards Complicity as a Criterion of Attribution of Private Conducts*, op. cit., at p. 994.

diligence may not have a meaningful impact. The due diligence principle would prove insufficient when the State's conduct transitions from culpable inaction to more pronounced forms of collaboration. On one hand, as the due diligence principle places an obligation of conduct on States its violation may "only" involve an omission. Consequently, complicit behaviours, often involving commission, for instance through material or financial support, would largely fall outside its scope. On the other hand, this principle could offer a satisfactory legal response to cases where State inaction amounts to collusion with private wrongdoers – specifically, when the State consistently and knowingly neglects to prevent and punish unlawful actions carried out by private entities within its jurisdiction[175]. Complicity would therefore arise not in every instance of State inaction regarding private wrongs but only when there is a "qualified" State inaction, meaning when there is repeated occurrence of State's omission on the objective level and, on the subjective level, State's awareness of assisting the private wrongdoer[176].

ILC Special Rapporteur on State Responsibility Ago did consider the complicity criterion but later dismissed it, asserting that it had never been practically applied[177]. Nevertheless, some scholars propose that the attribution criterion outlined in Draft Article 11, titled 'Conduct Acknowledged and Adopted by a State as Its Own', might be interpreted as envisioning a form of *ex post facto* complicity. This theory suggests that the State, by acknowledging and adopting certain conduct as its own, could retrospectively be implicated in a form of complicity[178].

Be that as it may, the concept of complicity faced vehement criticism from voluntarist authors in the early 20th century, advocating a dualist view of legal orders. According to this perspective, the international and internal legal orders represent distinct spheres, each with its own subjects. Consequently, an individual, as a subject of internal

[175] *Ibi*, at p. 992.

[176] *Ibidem*.

[177] ILC, *Fourth report on State responsibility by Mr. Roberto Ago*, Special Rapporteur, A/CN.4/264, 1972, at par. 64. In particular Ago stated that «the internationally wrongful act with which the State is charged is the violation of an international obligation perpetrated through the action of the individual concerned and not, for example, some other delinquency committed by someone else».

[178] So E. SAVARESE, *Fatti di privati e responsabilità dello Stato tra organo di fatto e «complicità» alla luce di recenti tendenze della prassi internazionale*, in M. SPINEDI, A. GIANELLI, M. L. ALAIMO (ed.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti – Problemi e spunti di riflessione*, Milano, 2006, p. 53-66, at p. 55. Article 11 ARSIWA reads «Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own».

law, cannot violate international law, to which they have no obligations. Similarly, the State should not share responsibility or be an accomplice in a breach of internal law by an individual. The dual nature of these legal orders results in a rigid separation of responsibility systems[179].

However, this does not preclude the possibility of State responsibility arising from the commission of a breach of internal law by an individual. In fact, in certain instances, international law mandates the State not to allow or tolerate specific acts by individuals under its authority. These acts, when carried out by individuals, are not inherently contrary to international law, as individuals, being outside the scope of these laws, could not violate their principles. Therefore, in cases where the State fails to prohibit these acts or implement necessary measures to prevent them, the breach of international law is directly attributed to the State's omission. In such circumstances, the wrongful act, in the view of international law, is the State's omission, not the positive act of individuals. Consequently, the State is obligated due to its own actions, not as an accomplice to the actions of individuals[180].

Special Rapporteur Ago elucidated this method of invoking responsibility through the concept of 'catalysis'. According to this concept, the individual's act could not be regarded as an act of the State, either on its own or due to purported involvement or complicity of State organs. It would simply be an external event separate from the State's act. This does not imply that such an event would not impact the determination of the State's responsibility. Conversely, it could be «a condition for the existence of such responsibility acting externally as a catalyst on the wrongfulness of the conduct of the State organs in this particular case»[181].

Even more specifically, a distinction must be drawn between two cases: the first involves conduct by the State as a subject of international law, constituting a breach of a State obligation in itself, while the second case sees such a breach completed only when an external event is combined with the State's conduct. An illustrative example of the second case is a breach of international obligations primarily aimed at preventing attacks by individuals against specified aliens or aliens in general. This type of breach only occurs

[179] O. DE FROUVILLE, *Attribution of Conduct to the State: Private Individuals*, op. cit., at p. 276.
[180] So D. ANZILOTTI, *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers*, in *Revue Générale de droit International Public*, vol. 23, 1906, at p. 14-15.
[181] ILC, *Fourth report on State responsibility by Mr. Roberto Ago*, cit., par. 65.

if an attack is actually committed. It is in this sense that «the action of the individual can be said to act as a catalyst for the wrongfulness of the conduct of the State organs which have not taken the necessary steps to prevent the occurrence of such an action»[182]. In sum, the individual act is distinct from the State's act. However, it serves as a 'catalytic' element for State responsibility, that is, as a triggering element that accelerates the State's responsibility when it fails to meet its international obligations in response to that act. The theoretical rejection of the concept of complicity is therefore not necessarily tied to a dualist conception of legal orders. Instead, it would stem from the traditional structure of normativity in international law, which revolves around obligations, applicable exclusively to States as international law subjects. Specifically, these regulations would not aim to connect the collaborator to a distinct wrongdoing carried out by a main actor. Instead, they would attribute the actions of the main actor to the State, thus establishing State responsibility for those actions in terms of the State's own primary obligations. By their very nature, attributional regulations of this sort would fail to meet the normative assertion of this work, as the normative assertion requires that collaborators be held accountable for, and categorised based on, their own contributions to the wrongdoing of the principal actor. This form of responsibility would thus not align well with the historical framework of international law, primarily due to the lack of regulation of the conduct of non-state actors. Attempting to incorporate what appear to be typical forms of complicity within the secondary regulations would result in inconsistency in the rules of attribution and attributes responsibility to States for actions they or their representatives did not commit[183].

Concerning the issue of the attribution of conduct, State responsibility can arise when a private individual's action violates internationally protected rights or positions, and the State fails to intervene for their protection, despite being obligated to do so under international law. In this scenario, the State is not directly held responsible for the private conduct itself, but rather for the actions or, more accurately, its lack of action in response to the actions of private individuals. The private conduct serves therefore as the 'catalyst'

[182] *Ibidem*, note n. 120.

[183] M. JACKSON, *Complicity in international law*, Oxford, 2015, from p. 176, adeptly elucidates the inadequacy of this reconstruction within the normative framework of international law.

for international responsibility, with the focus on the actions or inactions of State officials[184].

However, the theory of catalysis has faced criticism, particularly concerning the idea that the actions of an individual causing harm to a foreign State – provided it is accompanied by an act or omission of a State organ – might be considered, and possibly recognised, as a component of the State's wrongful act under certain circumstances. The reluctance to acknowledge the private individual's conduct as an integral part of the State's wrongful act may be linked to the assumption that, from the perspective of international law, the individual could be considered a subject rather than an object of law. This implies that the actions or omissions of a private individual are viewed as the conduct of a subject rather than an object of international law[185]. It would therefore be inappropriate to assume that the conduct of the private party merely serves as a 'catalyst' for the State's wrongdoing, as such «remaining outside the *Tatbestand* of the international delict», as the private actor, or 'the catalyst', would actually be involved in the State's wrongdoing[186].

Nevertheless, a notable exception arises when the norms being violated apply to both individuals and States on an equal footing. Indeed, it is increasingly evident that international organisations formulate norms that address private individuals and States alike. In cases where both a private person and a State are bound by the same norm of international law, there seems to be a valid argument for considering them as potential accomplices in its breach. However, it is essential to acknowledge that, apart from these situations resulting from the recent evolution of international law, the concept of complicity has not found applicability in the vast majority of norms in public international law, where the State remains the sole subject[187].

Upon closer examination, the traditional basis for the concept of 'responsibility by catalysis' – which has not been included in the final version of ARSIWA – can still be identified in the obligation of due diligence. In the realm of human rights, jurisprudence would have adapted the classical doctrine of due diligence to establish the general duty

[184] In this sense R. WOLFRUM, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, in M. RAGAZZI (ed.), *International Responsibility Today – Essays in Memory of Oscar Schachter*, Leiden, 2003, at p. 425.

[185] G. ARANGIO-RUIZ, *State Responsibility Revisited*, op. cit., at p. 146, note 33.

[186] *Ibi*, p. 149.

[187] O. DE FROUVILLE, *Attribution of Conduct to the State: Private Individuals*, op. cit., p. 277.

of the State to safeguard individuals within its jurisdiction from acts perpetrated by private individuals that could be deemed violations of their rights as outlined in the relevant convention. On this basis, courts implicitly acknowledge 'positive obligations' for the State party concerning every protected human right[188].

Based on the collected evidence, it appears justified to endorse the perspective of a segment of the scholarly discourse that argues against the viability of the complicity theory as a means of attributing the conduct of private actors to the State. As elucidated earlier, complicity struggles to find a solid foundation both within the dualist conception of international law and the norms it establishes. In the context of human rights violations, specifically concerning the violation of the prohibition of forced labour in our case, holding a State accountable for wrongs committed by private actors necessitates viewing the latter as 'catalysts' of responsibility, as already emphasised by Ago. It appears that such 'catalysis' for the State can effectively manifest within the realm defined by due diligence on one hand and adherence to positive obligations on the other.

[188] *Ibi*, p. 278. See also ILC, *Fourth report on State responsibility by Mr. Roberto Ago*, cit., par. 65. This reconstruction is intricately related to our discourse, particularly concerning the action of regional human rights courts, and also aligns with the German doctrine of *Drittwirkung*, asserting that a state can be held accountable for failing to prevent the violation of an individual's human rights by another non-state person or private actor through jurisdictional or legislative enforcement methods. In this context, refer to L. CONDORELLI, *L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances*, in *Recueil des cours à l'Académie de droit international de La Haye*, vol. 189, 1984, p. 149-156.

INTERIM CONCLUSIONS

The first segment of the concluding chapter of the work focused on elucidating the legal characterisation of the prohibition of forced labour. In this context, an exploration was undertaken to examine the legitimacy of employing an overarching term like "modern slavery" to encompass all contemporary forms of exploitation. Despite some inclinations toward using this term observed also within international organisations, scholars of international law, not only in the field of human rights, appear to resist its adoption. The reason for this resistance can be attributed to various factors. Primarily, the rejection of a cumulative term for different forms of exploitation is rooted in historical considerations. As highlighted in the analysis of international conventions in the first chapter, the regulation of slavery emerged distinctly from that of forced labour. The latter continued to be accepted and employed for a period, contrasting with the concerted efforts to eliminate slavery at the onset of the last century. Another significant factor contributing to this resistance is the divergent legal content inherent in the prohibitions of slavery and forced labour. Indeed, dating back to the Slavery Convention of 1926, it has been firmly established, that slavery is a phenomenon for which there is a «status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised». In contrast, forced labour lacks the conditions of property rights. The definition formulated in 1930 by the ILO Forced Labour Convention, which remains applicable today, characterises forced labour as «all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». The fact that all international agreements, including regional human rights conventions, have consistently reaffirmed and continue to maintain the distinction between the two phenomena, finally indicates a third reason why the term "modern slavery" lacks legitimacy. Its use would risk oversimplifying and, consequently, diluting the nuanced legal nature of these two distinct phenomena.

This conclusion prompted us to delve into the legal qualification of the prohibition of forced labour in its singularity, distinct from being assimilated to slavery. In this regard, we explored the possibility of categorising the prohibition of forced labour among the peremptory norms of international law, that is, the norms of *jus cogens*. However, contrary to the prohibition of slavery, it does not seem plausible to argue that the

prohibition of forced labour belongs to the norms of *jus cogens*. This assertion is primarily linked to the nature of peremptory norms, which, by definition, do not allow for exceptions. This does not seem to align with the prohibition of forced labour, where both regional human rights conventions, particularly the ECHR (Art. 4) and the ACHR (Art. 6), along with the ICCPR (Art. 8), make provisions for various exceptions. In cases of State emergencies or following criminal convictions, States still appear to be entitled to use forced labour. The existence of such exceptions has even not been contradicted by the more recent ILO Additional Protocol to the Forced Labour Convention of 2014. As authoritative doctrine points out, the prohibition of forced labour could potentially attain *jus cogens* status if States would collectively strive to eliminate these outdated exceptions.

The exclusion of the prohibition of forced labour from the range of peremptory norms implied the consequent inevitable examination of whether such a prohibition could impose an *erga omnes* obligation on States. The intricate assessment of this aspect required predominantly identifying, based on elements provided by the ICJ jurisprudence, the nature of such an obligation. It appears possible to conclude, based on these elements, that the prohibition of forced labour gives rise to the establishment of an *erga omnes* obligation for states. A definitive confirmation of the *erga omnes* validity of this prohibition, however, may only occur when established in the courts, primarily by the ICJ itself.

In the second part of the chapter, we attempted to better delineate the contours of State responsibility for violating the prohibition of forced labour as a result of acts carried out by private actors. Three avenues emerged through which such responsibility can arise. The first avenue, involving positive obligations, is extensively employed by regional human rights courts. This utilisation is grounded in establishing a causal link between the harm experienced by the applicant, falling within the defined scope of the prohibition, and the alleged failure by the State to protect that right. From the practices observed in both the ECtHR and the IACHR, it becomes apparent that concerning their respective provisions on the prohibition of forced labour, these obligations primarily involve preventing, prohibiting, and punishing instances of forced labour. There are substantial positive obligations, as the obligation for the State to put in place an appropriate legal and regulatory framework, and procedural obligations, as the obligation to investigate and of taking protective operational measures to protect victims. Nevertheless, there is currently

no precise classification of the positive obligations that States must fulfil to avoid omissions and, consequently, potential liability. Some scholars have carried out various attempts to categorise these obligations, which could be beneficial to enhance the protection of victims and could provide States with clearer guidance on fulfilling their duties.

A similar discourse appears to be relevant to the broader obligation of due diligence, which, unlike positive obligations, straddles primary and secondary norms of international law. This obligation revolves around the State's knowledge of the phenomenon, its capacity to respond effectively, and the reasonableness of its actions. While the concept of due diligence has faced criticism for its perceived vagueness, it proved to be a powerful tool due to its flexibility and adaptability to the specific circumstances of individual cases. The more precise delineation of its content could be further refined through the contributions of human rights courts, treaty bodies, and scholarly discourse. Ultimately, positive obligations and due diligence emerge as concepts predominantly elaborated within jurisprudence, yet there appears to be significant potential for their further development into robust and detailed legal standards. These standards can serve as effective safeguards against human rights violations, irrespective of whether such violations are perpetrated by state or non-state actors.

A distinct discussion is warranted concerning the third avenue identified, through which States may be held accountable for the actions of private individuals. This pathway can be linked to the theory of complicity proposed by some scholars, contending that private wrongs should be imputed to a State if it knowingly facilitated or collaborated in their commission. Positioned as a secondary rule, proponents of this theory argue for its inclusion as an additional criterion of attribution of State conduct in the ILC Articles on Responsibility of States for Internationally Wrongful Acts. However, this theory appears to lack support both from the dualist conception perspective and when considering the very normative structure of international law. Indeed, on one hand, individuals could not violate a rule of international law as they are not subjects of that law, and therefore, they could not play the role of 'accomplice' of the State. On the other hand, the act of the individual remains distinct from the act of the State, which is the only entity capable of violating an obligation incumbent on it. However, the State-individual relationship seems to be aligned with the yet criticized 'catalytic' effect proposed by the ILC Special

Rapporteur Ago, where the act performed by the private actor is considered merely a trigger for State liability.

It can be conclusively asserted that, based on its distinct legal characteristics, the prohibition of forced labour should be scrutinised in its individuality, separate from other forms of exploitation prevalent today. The persistent presence and acceptance of exceptions to the prohibition of forced labour within the primary international and regional conventions unavoidably implies the exclusion of the hypothesis placing this prohibition among the peremptory norms of international law, which inherently do not allow for exceptions. Pending confirmation in the courts, it can be further asserted that the prohibition of forced labour implies an *erga omnes* obligation on the part of States, drawing from the established practice and elements indicated by the ICJ for identifying such obligations. Concerning the correlated responsibility that would ensue for States following a violation of the prohibition of forced labour by private actors, it is evident that the State would primarily be held responsible for failing to establish the necessary mechanisms to counteract this phenomenon, as mandated by positive obligations or due diligence obligations. In alignment with the scrutinised case law, the State's responsibility would therefore stem not from its complicity with the private actor, but rather from its omission.

CONCLUDING REMARKS

The present work undertook two primary objectives: firstly, to delineate the contemporary legal parameters surrounding the prohibition of forced labour and identify its status within international law, and secondly, to elucidate the intricacies of State responsibility stemming from the utilisation of forced labour by private actors and discern the nature of this responsibility. In pursuit of these objectives, the first chapter necessitated a thorough exploration of the historical evolution of the legally recognised definitions of slavery and forced labour through the substantive provisions of the relevant international legal instruments. The imperative to look at the legal definitions of both slavery and forced labour arose due to the inherent connection between the acknowledgment of the former and the emergence of the latter. After the first recognition at the Congress of Vienna of slavery and slave trade as a "scourge" that had "so long afflicted mankind", with the establishment of the League of Nations and the International Labour Organisation the first crucial definitions were introduced. The 1926 Slavery Convention drafted within the League of Nations, played a pivotal role in clearly delineating the concepts of slavery and the slave trade. In addition, its Article 5 enabled the first appearance of forced labour in an international convention. However, it did not furnish a distinct definition for forced labour and, except for exceptional cases, sanctioned its utilisation for "public purposes". The primary focus in this occasion was on implementing preventive measures to forestall the evolution of forced labour into "conditions analogous to slavery". Four years later, the ILO Forced Labour Convention No. 29 of 1930 granted forced labour its own distinct definition: «forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». The 1930 definition of forced labour has endured through the years and remains a benchmark for the international community to this day. The Convention also delineated five exceptions to forced labour – instances of what forced labour "shall not include" – such as labour during military service, for civic obligations, as a consequence of a court conviction, in emergencies, and for minor communal services. In a similar way to the definition, these exceptions to forced labour have been incorporated into numerous other

international agreements in the subsequent decades. This holds true for international instruments, as the International Covenant on Civil and Political Rights (Article 8 par. 3 (c)), and for regional instruments like the European Convention on Human Rights (Article 4 par. 3), and the American Convention on Human Rights (Article 6 par. 3). All these instruments meticulously incorporate the exceptions to the prohibition of forced labour outlined in 1930.

After World War II, the United Nations and the International Labour Organisation crafted two additional instruments. The UN 1956 Supplementary Convention on the Abolition of Slavery, while not directly addressing forced labour, introduced the concept of "Practices Similar to Slavery" – encompassing the further forms of exploitation of debt bondage, serfdom, forced marriage, and child labour. In contrast, the 1957 ILO Abolition of Forced Labour Convention No. 105 singled out five distinct circumstances wherein States are obliged to take extraordinary efforts to prohibit the use of forced labour: as a means of political coercion or education, for purposes of economic development, for labour discipline, as a punishment for having participated in strikes and as a means of racial, social, national or religious discrimination.

Following the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the imperative to eradicate forced labour was established as one of the four pillars underpinning the Organization's renewed framework. This decision endowed the prohibition with enforcement capabilities for member States, irrespective of their ratification status of Conventions No. 29 and No. 105. However, shortly thereafter, there appeared to be a gradual departure by the ILO from the explicit emphasis on forced labour. This shift coincided with the introduction of the concept of "decent work", subsequently integrated into the 2030 Agenda for the Sustainable Development Goals in 2015, specifically under Sustainable Goal 8.7.

Finally, it became evident that the evolution of the definition of the prohibition of forced labour has encountered persistent challenges since the start of this century. This complexity is intertwined with the connections to other identified forms of exploitation, as well as slavery. Based on a seemingly emerging international practice, particularly in scholarly discourse, there is a growing inclination to amalgamate all these figures under a collective term, such as "modern slavery" or "new forms of slavery". This trend finds reflection in the work undertaken by the Special Rapporteur on contemporary forms of

slavery, in the jurisprudence of the Human Rights Treaty Bodies and the results emerged from the ILO Commission of Inquiry's reports. The effort undertaken by the Bellagio-Harvard Guidelines of 2012 to elucidate the meaning of individual terms and the distinctive features of each case underscored the significance of the central concern that revolves around the intricate relationship between these diverse types of exploitation.

Nevertheless, it remains undeniable that the 2014 Protocol to the Forced Labour Convention of 1930 has incorporated and reaffirmed the definition of forced labour, including its exceptions. Moreover, through the Protocol, the importance of States' commitment to preventing and eliminating forced labour has been restated and reinforced, accompanied by specific operational guidelines for implementation. Similarly, by means of the 2022 amendments to the ILO Declaration of 1998, the central position of the elimination of forced labour was reaffirmed as one of the cornerstones of the Organization.

The second chapter not only allowed for a more thorough exploration of the legal boundaries surrounding the prohibition of forced labour but also introduced the issue of State responsibility for the resort of forced labour by private actors, through the analysis of case law by international courts, both regional and not. As the competent court to resolve disputes arising from the Slavery Conventions and ILO Forced Labour Conventions, the International Court of Justice has, however, never directly and thoroughly addressed the issue of the prohibition of forced labour. Nonetheless, its jurisprudence, in particular in the 1970 *Barcelona Traction* case, revealed how the prohibition of slavery has to be recognised by the Court as an illustration of a State's obligations toward the international community as a whole, that is obligations *erga omnes*. In addition, in the 2012 case *Jurisdictional Immunities of the State (Germany v. Italy)*, while addressing legal issues distant from those relevant to the present research, the Court, for the purposes of the decision and based on the historical facts underlying it, assumed that the rules of the law of armed conflict prohibiting the deportation of prisoners of war to slave labour are rules of *jus cogens*.

On the contrary, a wealth of more pertinent and substantial elements has surfaced through the scrutiny of the jurisprudence of regional international courts. The European Court of Human Rights' case law on the prohibition of forced labour revealed a development in the interpretation of the prohibition over the years. Through an in-depth

examination of the case law of the European Court of Human Rights, we have in fact observed the nuanced evolution that the Court has undergone in interpreting Article 4 of the Convention. It began with the assertion of positive obligations in 2005 with the *Siliadin* case, progressed to the inclusion of the unprecedented scenario of human trafficking, almost seamlessly blending with other forms of exploitation in *Rantsev*, and further matured in the elaboration of positive obligations in the case of the Greek camp workers in *Chowdury*. This evolution reached its culmination in a Grand Chamber decision, seemingly divergent from *Rantsev*, emphasising the imperative for a clear delineation of distinct forms of exploitation in *S. M. v. Croatia*, re-expanding the scope of Article 4 ECHR – a stance reaffirmed by the interpretation in the 2021 *Zoletic* case, the latest chronological pronouncement by the ECtHR judges on Article 4.

In the enlightening decisions of the Inter-American Court of Human Rights, a notable emphasis has emerged, particularly evident in the *Hacienda Brasil Verde Workers* case, on the unique challenges posed by Brazilian slave labour. This focus prompted the Court to delineate the substance of positive obligations for States in ensuring compliance with Article 6 of the Convention. Furthermore, the Inter-American Court actively engaged in a meaningful discourse with the European Court, frequently referencing its rulings and employing the same legal instruments for interpretative purposes. This collaborative interaction stands out as a noteworthy aspect of a collective endeavour to address a phenomenon that manifests both on a national and an increasingly global scale.

Although the African Court on Human and Peoples' Rights has not extensively delved into the interpretation of Article 5 of the Charter, which encompasses various forms of human exploitation and degradation, without explicit mention of forced labour, it was essential to recognise the insightful responses provided by the African human rights system. These responses are rooted in the multifaceted contributions on the subject by the African Commission and a landmark case adjudicated by the ECOWAS Court in 2008, that offered a profound reflection on the social reality in Niger and a corresponding understanding of the phenomenon of slavery.

Primarily due to the interpretations provided by judges of the ECtHR and followed by the ACHR, it became evident that the primary instrument employed by regional human rights courts to hold States accountable for violating the prohibition of forced labour as a result of actions by privates is that of positive obligations. In this specific context, through

the interpretation of judges, this instrument has evolved and been refined, particularly over the last fifteen to twenty years. Regarding compliance with the prohibition of forced labour, these obligations encompass procedural and substantive aspects like the establishment of legislative and administrative frameworks adequately equipped to combat forced labour within national boundaries. Essentially, there is a recurring assertion by regional judges for a duty at the State level – with its corresponding responsibility – to institute a legislative framework with corresponding operational duties aimed at preventing, prohibiting, and penalizing the phenomenon.

Just as significantly, among the conclusions drawn from the analysis of the case law of regional human rights courts, it became evident that the evolving interpretation of Article 4 of the ECHR by the Court reached a crucial juncture concerning the categorisation of different forms of exploitation. Initially, the various forms of exploitation referred to in Article 4 ECHR – slavery, servitude, and forced labour – were progressively lumped together until the *Rantsev* pronouncement of 2010, which even added the figure of human trafficking, although not explicitly provided for in the Convention. However, the most recent pronouncements on Article 4 suggest a 're-expansion' of the potential scope of the article itself. This is due to the affirmation that the forms of exploitation need not be connected to each other and can exist independently on a scale of increasing seriousness, potentially covering a wider range of exploitation cases in the future. While the other two regional courts have not explicitly focused on this specific aspect, the Inter-American Court nevertheless engaged in a crucial dialogue with the European Court. This interaction is likely to be a valuable tool in determining whether the appropriate approach involves analysing a unified concept of "new forms of slavery" or if it remains necessary to differentiate between the various forms of exploitation encompassed by this unified concept.

In the second part of the chapter, we delved deeper into various instances of national legislation, taken by way of example, specifically crafted to make companies accountable for safeguarding human rights throughout their supply chains, employing the concept of human rights due diligence.

The latest development in this domain, the German *Lieferkettengesetz*, which came into full effect in January 2024 for German companies with more than 1000 employees, underwent a complex approval process. Aligned with the 2011 UN Guiding

Principles on Business and Human Rights, the law delineates a set of eleven specific risks that companies might encounter, forming the basis for their obligatory compilation of due diligence commitments. Despite being in the early stages of implementation, the law has faced three primary criticisms from scholars. Notwithstanding its ambitious objectives, the *Lieferkettengesetz* has, to some extent, resulted in limited accountability for companies, especially due to the absence of civil liability and ensuing legal uncertainties. Moreover, the law's scope excludes the operations of foreign companies, and the fines for breaching statutory due diligence standards have been deemed insufficient in proportion to the scale of the companies targeted by the law.

In contrast to the German law, the French *Loi de vigilance* had already established civil liability for companies since 2017, amending an article of the French *Code de commerce* to incorporate reporting duties. Nevertheless, like the German law, due diligence is framed not as an obligation of result but as an obligation of means. Despite this, on the few occasions when evidence of the facts has been presented in courts, the law has exhibited procedural flaws, highlighted by the courts declaring a lack of jurisdiction in relevant cases. The Netherlands' *Wet Zorgplicht Kinderarbeid* and the English *Modern Slavery Act* then emerged as distinctive examples, with the former solely addressing instances of child labour and the latter introducing novel criminal offenses within the English legal framework alongside the due diligence mechanism.

It appeared that the critiques articulated by scholars regarding the aforementioned instances of national legislation on human rights due diligence have been taken into consideration in the drafts of a European Directive on Corporate Sustainability Due Diligence, as though these national experiences have served as a testing ground for formulating a potentially more comprehensive supranational regulation. In a highly significant manner, its Draft Article 22 actually anticipates the provision of a civil liability regime for companies covered by the discipline. When the CSDD will be finally approved, companies would be therefore held liable for damages caused if they fail to comply with the obligations imposed by the Directive regarding both the prevention of negative impacts and the halting of actual negative impacts. On this basis, if, as a result of such failure, a negative impact occurs that should have been identified, prevented, halted, or minimised, companies can be held accountable. The draft European Directive, in its final stages before impending approval, also aims to delineate the obligations of

companies from non-EU states engaging in trade within the EU. This last aspect is also reflected in the emerging proposal for a directive by the European Commission, focusing on the prohibition of products manufactured with forced labour within the Union market, thereby imposing a restriction on the entry of such products from third countries.

A significant international example explored in this context is the ambitious initiative originating within the United Nations, specifically undertaken by an intergovernmental working group mandated by the Human Rights Council. This initiative, primarily championed by States from the Global South, aspires to formulate a binding treaty governing the relationship between businesses and the respect for human rights, with work on its formulation now entering its tenth year. In 2023, the third draft of this prospective treaty was unveiled, and upon scrutiny, it was revealed that the term 'forced labour' makes a singular appearance in the text, specifically in the context of armed conflicts. This detail deserves emphasis and note, anticipating its potential implications in the final version of the treaty, as it evolves through subsequent negotiations and deliberations.

From the extensive case law of international regional courts, from national legislation and supranational regulatory commitments, it is evident that forced labour has garnered heightened attention in recent years. As discerned from the dialogue trends pursued by the Inter-American Court of Human Rights and the advocacy of countries from the so-called Global South for the initiative linked to the creation of a Business and Human Rights Treaty, the 2023 conclusions of the G20 meeting in India further emphasised a palpable need for coordination. This collective call for coordination underscores the imperative of aligning efforts and perspectives globally to address the multifaceted challenges posed by business-related human rights violations, particularly in the context of forced labour. Such coordination would reveal indispensable at both an interpretative-jurisprudential level among the courts and at a political-regulatory level and would serve to bridge overdevelopments in the Western world with exploitation in the Global South, where, according to ILO data, forced labour is most prevalent, fostering a comprehensive global approach to combat forced labour and its related human rights abuses.

Hopefully, the ECtHR will continue its expansive interpretations on Article 4 ECHR, and Western corporate responsibility standards will progress along their

established trajectory. Yet, for a truly impactful initiative to marginalise the phenomenon of forced labour, it appears crucial for these interpretations and standards to exert their influence on the Global South. To this end, there is a need to encourage intensified legislative efforts, implemented in a more stringent and empowering manner, with a heightened focus on the responsibilities of companies throughout the entire production chain. This multifaceted approach could contribute significantly to the global campaign against forced labour and advance the cause of human rights protection worldwide. While it may appear as an ambitious and distant goal, it is essential to acknowledge that comprehensive collaboration and concerted efforts are imperative in the face of the pervasive challenges posed by forced labour, as global challenges necessitate global responses.

The concluding chapter ultimately allowed for both a clarification on the legal characterisation of the prohibition of forced labour and the understanding of the nature of State responsibility in cases where private actors engage in the use of forced labour. In this context, a thorough exploration became essential to scrutinize the legitimacy of adopting a comprehensive term such as "modern slavery" to encompass diverse contemporary forms of exploitation. This preliminary examination was imperative to determine whether it was feasible to delineate the legal characteristics of the prohibition of forced labour in international law in its distinctiveness or whether to the prohibition could be attributed the characteristics shared by all other forms of exploitation.

Despite discernible inclinations towards adopting this term, noted even within international organisations, scholars of international law, particularly in the realm of human rights, exhibit a reluctance to embrace it. This hesitance can be attributed to diverse factors. Primarily, the resistance to employing a cumulative term for distinct forms of exploitation finds its roots in historical considerations. As elucidated in the examination of international conventions in the initial chapter, the regulation of slavery evolved together with, but separately to that of forced labour. As of 1926, the latter persisted and found acceptance for a certain duration, contrasting with the concerted endeavours to eradicate slavery at the outset of the last century. The acknowledgment and definition of additional forms of exploitation only surfaced later, notably with the Supplementary Convention on the Abolition of Slavery in 1956. Meanwhile, the prohibition of forced labour underwent further elucidation on its very own path primarily

through the efforts of the ILO, beginning with the 1957Abolition of Forced Labour Convention. Moreover, the persistent affirmation of this distinction in all observed pertinent international agreements, encompassing regional human rights conventions, underscores an additional rationale for rejecting the legitimacy of the term “modern slavery”.

A final significant factor contributing to this resistance stems from the inherent divergence in the legal content of prohibitions against slavery and forced labour. The Slavery Convention of 1926 firmly established that slavery involves a «status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised». On the other hand, the ILO Forced Labour Convention of 1930, still applicable today as confirmed by the 2014 Protocol, defines forced labour as «all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily». Building upon the definitions currently in force, and as affirmed and reiterated by the Bellagio-Harvard Guidelines of 2012, a crucial element of distinction endures between slavery and forced labour: the requirement of property rights. Notably, this requirement is absent in the defining framework of forced labour, which, in contrast, revolves around a labour or service relationship. Furthermore, forced labour remains within the boundaries of this relationship, necessitating conditions of non-voluntariness and coercion. This distinctive context markedly diverges from that of slavery, underscoring the importance of preserving the nuanced legal understanding of these separate phenomena. The requirement for the prerogatives of ownership, mandated by slavery, stands furthermore as a fundamental element that distinctly sets slavery apart from all other forms of exploitation identified over time. The use of a cumulative term for all exploitation forms would thus simply and plainly risk oversimplifying and, consequently, diluting the nuanced legal nature of these distinct phenomena.

This conclusion spurred an exploration into the distinct legal classification of the prohibition of forced labour, separate from its assimilation to slavery. Therefore, we firstly delved into the prospect of categorising the prohibition of forced labour among the peremptory norms of international law. However, unlike the prohibition of slavery, it does not appear tenable to argue that the prohibition of forced labour falls within the norms of *jus cogens*. This assertion is primarily tethered to the nature of peremptory norms, which,

by definition, do not permit exceptions. This seems incongruent with the prohibition of forced labour, as both regional human rights conventions, especially the ECHR (Art. 4) and the ACHR (Art. 6), as well as the ICCPR (Art. 8), include provisions for various exceptions. States still seem entitled to utilise forced labour in cases of State civic obligations or emergencies, following criminal convictions or within military service. The existence of such exceptions has not been contradicted even by the more recent ILO Additional Protocol to the Forced Labour Convention of 2014. As authoritative doctrine emphasises, the prohibition of forced labour could potentially achieve *jus cogens* status if States would collectively endeavour to eliminate these seemingly outdated exceptions.

The exclusion of the prohibition of forced labour from the realm of peremptory rules necessitated an inevitable examination of whether such a prohibition could entail an *erga omnes* obligation on States. This inquiry involved understanding which dispositive obligations, placed outside of the sphere of peremptory norms, hold sufficient importance to be deemed *erga omnes* by States, in absence of a comprehensive set of criteria by which the international community and its members can clearly express the values they consider paramount. The intricate assessment of this aspect primarily involved identifying, drawing on elements provided by ICJ jurisprudence, the nature of such an obligation. Thus, on one hand, the indication given by the ICJ in 1970 in *Barcelona Traction*, which deemed 'basic human rights of the human person' as worthy of rising to the level of *erga omnes*, was taken into consideration. On the other hand, the factors indicated in 1995 by the same Court in the *East Timor* case were considered, namely factors such as recognition in the UN Charter, practices of UN organs, inclusion in other preferably universal treaties, acknowledgment in general international law, or endorsement in the jurisprudence of the ICJ itself. Based on these elements, it appeared therefore possible to conclude that the prohibition of forced labour gives rise to the establishment of an *erga omnes* obligation for States, although a definitive confirmation of the *erga omnes* validity of this prohibition, may only occur when established in the Court, the only still missing factor.

In the latter section of the final chapter, a more refined understanding of the parameters surrounding State responsibility for the prohibition of forced labour as a consequence of private actors' actions was eventually embarked upon. To this end, it was first necessary to define the content of the terms in question. This is why, based on the

definitions commonly attributed to these terms by international law doctrine, 'private actors' were considered as 'individuals', persons or groups of persons acting not as subjects of international law, to which national law may confer legal subjectivity as legal persons, as for instance, in the case of corporations. On the other hand, a State is to be held responsible for any internationally wrongful act, whether an action or omission, attributable to it under international law, constituting a breach of its international obligations, depending on the specific international obligations of the state in question.

Given this premises, States typically do not bear responsibility for the actions of private individuals, unless those actions can be attributed to the State, being the individual a state organ or not. If attribution is not applicable, the State is not held accountable for the individual's conduct. However, the State may still be held responsible for the actions or omissions of its organs related to the private act in question, particularly in cases where there is a breach of an international norm that imposes obligations on the State regarding non-state activities. It is precisely in relation to the latter hypothesis that it has been possible to draw three possible scenarios, swinging between primary and secondary rules, on the basis of which the responsibility of the State for violation of forced labour can emerge as a result of acts carried out by private actors.

The first of these scenarios pertains to the use of positive obligations, deemed as primary rules, which constitute as observed a solution extensively adopted by regional human rights courts. This approach is rooted in establishing a causal connection between the harm suffered by the applicant, falling within the defined scope of the prohibition, and the purported failure by the State to safeguard that right. In essence, it aims to hold States accountable for omissions in fulfilling their duties. Regarding the scope of Article 4 of the ECHR, these principles were first introduced by the European Court of Human Rights in the *Siliadin* case in 2005 and have been consistently applied in subsequent rulings. Similarly, they were adopted and expanded upon by the Inter-American Court of Human Rights in 2016 in the *Hacienda Brasil Verde* case, concerning the scope of Article 6 of the ACHR.

From the practices observed in both the ECtHR and the IACHR, it became evident that concerning their respective provisions on the prohibition of forced labour, these obligations primarily involve duties to prevent, prohibit and punish instances of forced labour for the State. Moreover, there has been a progressive evolution and enhancement

of these obligations over time. Thus, substantive obligations evolved, such as the obligation for the State to establish an appropriate legal and regulatory framework concerning the prohibition, and procedural obligations, such as the obligation to investigate and implement protective operational measures to safeguard victims. However, Courts have so far been silent on a definite classification and definition of the content of the positive obligations that States must fulfil to avoid omissions and, consequently, potential responsibility. Some scholars have nevertheless put forward various attempts to categorise these obligations, aiming to enhance the protection of victims and provide states with clearer guidance on fulfilling their duties.

A similar discourse appears to be relevant to the broader obligation of due diligence, which, unlike positive obligations, lies in between primary and secondary norms of international law. State due diligence is understood as an obligation of conduct, whereby the State is required to undertake a particular action, acting according to the criterion of the "responsible government", for which its failure to act accordingly results in State responsibility. The State should therefore implement specific measures to avert the harm, which means that the State may be liable, once again, for its omission to undertake the requisite action. Considered a benchmark of behaviour mandated to fulfil an obligation, due diligence revolves around the State's awareness of the phenomenon, its ability to respond effectively, and the reasonableness of its actions. To that effect, the ICCPR's treaty body, the Human Rights Committee, confirmed that States are obliged to ensure the discharge of Covenant rights by safeguarding individuals against violations also by acts committed by private individuals or entities, as a failure could entail a violation of the due diligence to prevent, punish, investigate, or redress the harm caused. The IACHR fully grasped this aspect in its ruling *Hacienda Brasil Verde*, basing its entire reasoning on State's due diligence.

Despite facing criticism for its perceived ambiguity, the concept of due diligence has demonstrated its effectiveness by virtue of its flexibility and adaptability to unique circumstances in individual cases. There is no question that anyway further refinement of its specific parameters could be achieved through the insights provided by human rights courts, treaty bodies, and scholarly discussions. In essence, positive obligations and due diligence proved to be two valuable tools that have predominantly evolved through jurisprudence, but there is substantial potential for their further refinement into

comprehensive legal standards. These standards could effectively mitigate human rights violations, regardless of whether they are committed by States or private actors.

A distinct discussion is warranted concerning the third envisaged scenario, posited at the level of secondary norms, through which States may be held accountable for the actions of private actors. This scenario is to be traced back to a doctrinal theory contending that private wrongs could be imputed to a State at the condition that the latter knowingly facilitated or collaborated in their commission. Such a relationship between private actors and the State would imply a degree of complicity on both sides, thus giving rise to what is known as the theory of complicity. Moreover, this relationship would not be interpreted as attributing the responsibility of the private actor to the State. It would rather involve attributing to the State its conduct, leading proponents of this theory to advocate for the incorporation of complicity as an additional criterion of attribution of State conduct into the foreseen hypothesis of the ILC Articles on Responsibility of States for Internationally Wrongful Acts. The complicity theory has gained traction over the years, primarily in the international law realm of terrorism, but is now transposed by some even in the realm of international human rights law.

However, this theory appears to lack support from several points of view. Indeed, as some scholars have argued dating back already to the early 20th century, when adopting a dualist perspective on international law, individuals could not violate a rule of international law, as they are not subjects of that law. Therefore, they could not be deemed "accomplices" of the State. Even when considering the very normative framework of international law, it becomes evident that the actions of individuals remain separate from those of the State. The State, as the sole entity capable of breaching obligations imposed upon it, stands apart from the actions of individual actors within its jurisdiction. In this context, the State-individual relationship would thus only entail what aligns with the concept of the 'catalytic' effect proposed by the ILC Special Rapporteur on State Responsibility Ago. Here, the action undertaken by the private actor serves merely as a trigger for State liability, rather than as means for the direct attribution of responsibility or conduct to the State for the actions of the individual.

On the basis of the comprehensive evidence collected from international agreements, practice and case law, it is possible to draw some general conclusions in light of the principal objectives of the present work. As regards the contemporary legal

parameters surrounding the prohibition of forced labour and its status within international law it can be argued that the prohibition of forced labour, due to its distinct legal characteristics, should be scrutinised in its singularity, separate from other albeit present forms of exploitation today. The adoption of a collective term like "modern slavery" has not yet established its legitimacy in the international legal discourse. Based on that premise, the enduring existence and acknowledgment of exceptions to the prohibition of forced labour within key international and regional conventions inevitably preclude the possibility of placing the prohibition among peremptory norms of international law. *Jus cogens* does in fact inherently not allow for exceptions, thus rendering such inclusion untenable. Furthermore, drawing from the established practice and elements indicated by the ICJ for identifying *erga omnes* obligations, it can be further upheld that the prohibition of forced labour entails this type of obligation on the part of States, pending final confirmation in the courts.

With regard to the nature of State responsibility stemming from the utilisation of forced labour by private actors, it turned out that States are primarily held responsible for their failure to establish the requisite mechanisms to address this phenomenon effectively. As confirmed above all by the rich and dense case law of regional human rights courts, this failure is enshrined in the triad of preventing, prohibiting and punishing the exaction of forced labour by private actors as mandated by positive obligations and due diligence obligations. State's responsibility would thus arise not from its complicity with the private actor in permitting forced labour, but rather from its omission in not countering such conducts.

Based on these conclusions, we have reaffirmed what was initially posited in this study. In the context of the rapid socio-economic changes of the 21st century, private actors wield significant influence over related trends, particularly in the realm of labour. This prompted a crucial question about the role of States, as primary subjects of international law, especially concerning their responsibility, which primarily arises from omissive State conduct, as failure to adequately intervene to combat forced labour instances perpetrated by private actors. The vigorous thrust behind national and supranational legislative initiatives aimed at regulating this phenomenon, particularly by holding companies accountable, is undoubtedly a step in the right direction. However, the widespread prevalence of forced labour, as highlighted by ILO data, persists in regions

where such legislative efforts face considerable challenges. To address global phenomena effectively, a more concerted and comprehensive effort on a global scale appears necessary.

In this regard, there is hope for an expedited and strengthened outcome from the extensive efforts towards establishing a Business and Human Rights Treaty. Such a treaty, if comprehensive and inclusive of all pertinent issues, could lead to heightened awareness regarding the impact of business activities on forced labour. Additionally, on the basis of the evidence gathered there is anticipation for greater emphasis and substance to be accorded to human rights due diligence, both within the private sector and among States. Indeed, the concept of human rights due diligence appears to possess the flexibility and adaptability needed to implement effective global solutions against the scourge of forced labour.

Within this context, it becomes imperative for the prohibition of forced labour to reclaim its prominence among other forms of exploitation, emerging as the globally most relevant manifestation within the dynamics of contemporary socio-economic landscapes. Notably, the International Labour Organization has been at the forefront of this endeavour since 1998, prioritising the fight against forced labour as one of its fundamental pillars. Furthermore, recent pronouncements from the European Court of Human Rights, particularly those elevated to the Grand Chamber, have also echoed this direction, further expanding the legal scope dedicated exclusively to the prohibition of forced labour.

In this vein, there is merit in considering the prospect of revitalising the ILO Forced Labour Conventions for the future. On one hand, it would be desirable for States to contemplate surpassing or at least redefining the outdated exceptional circumstances identified in 1930, which seemingly still permit forced labour. On the other hand, to combat the described phenomena, it would be conceivable for the international community to effectively implement the suppression of the use of forced labour for purposes of economic development, as already established back in 1957.

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SINTESI DELLA RICERCA

Il lavoro forzato nel diritto internazionale e la responsabilità degli Stati per gli attori privati

Nel ventunesimo secolo le forme di sfruttamento dell'uomo hanno acquisito una nuova tragica attualità che sembra andare di pari passo con gli attuali rapidi cambiamenti socioeconomici mondiali. Lo sfruttamento dell'uomo da parte dell'uomo è persistito attraverso le epoche e sembra essersi sviluppato di pari passo con i più grandi avvenimenti storici, adattandovisi. Questo sviluppo è proseguito nella sua forma più estrema, la schiavitù, fino all'inizio del XIX secolo quando gli Stati hanno intrapreso il cammino verso la sua ufficiale abolizione, assumendo impegni in tal senso a livello internazionale. Nel corso del secolo successivo, il XX, hanno inizio da un lato le distinzioni giuridiche tra plurime esistenti forme di sfruttamento e dall'altro i paralleli sforzi intrapresi dagli Stati e dalle organizzazioni internazionali per la lotta verso la loro eradicazione. Nella seconda metà del secolo emergono così le figure della servitù, della servitù per debiti, del matrimonio forzato. Tra le varie forme di sfruttamento riconosciute, la prima e inizialmente unica distinzione che emerge è quella tra schiavitù e lavoro forzato, nel primo accordo internazionale in materia di schiavitù stipulato in seno alla Società delle Nazioni nel 1926. Seppur identificato e riconosciuto nella sua singolarità, il lavoro forzato fu inizialmente in gran parte tollerato per "scopi pubblici" principalmente a causa delle persistenti presenze europee coloniali nel continente africano. In seguito, seguirono sì impegni per la progressiva abolizione del lavoro forzato a "scopi pubblici", ma un esplicito divieto in tal senso emergerà solo nel 2014. Rimasugli di tali sacche di tolleranza dell'uso del lavoro forzato arrivano anche per tale motivo fino a noi, come vedremo, attraverso la predisposizione di una serie di eccezioni tutt'oggi tollerate, seppur in situazioni particolari.

È proprio in relazione ai cambiamenti socioeconomici odierni che sembra che il fenomeno del lavoro forzato assuma oggi, tra le altre forme di sfruttamento, una particolare rilevanza. Questa è legata alla sempre maggiore forza assunta nel panorama

internazionale dagli attori privati che regolano rapporti economici nella attuale società capitalistica. Ed è in conseguenza da qui che emerge la necessità di vedere quale ruolo assuma lo Stato, quale principale soggetto del diritto internazionale, in tale panorama. Ancor più precisamente, in che tipo di responsabilità possa quest'ultimo ricadere all'interno del rapporto tra vittima del lavoro forzato e perpetratore privato dello stesso.

Il lavoro si propone dunque obiettivi alquanto ambiziosi, ossia da un lato di inquadrare giuridicamente, attraverso la lente del diritto internazionale, il fenomeno del lavoro forzato per come esso si manifesta oggi, attraverso l'analisi dell'evoluzione storica della fattispecie all'interno dei principali accordi internazionali stipulati nel corso degli anni. Dall'altro di meglio comprendere, attraverso la lettura della giurisprudenza internazionale e dei contributi dottrinali, quale sia la possibile responsabilità statale che possa conseguire dall'utilizzo di lavoro forzato da parte di attori privati, nonché quanto siano adeguate le risposte elaborate a livello nazionale per contrastare tale fenomeno.

Trattare un tema dai contorni così ampi, dal punto di vista giuridico, storiografico e persino geografico, ha reso naturalmente necessarie alcune limitazioni rispetto all'ambito di ricerca. In tal senso, il lavoro non assume un taglio di carattere penalistico, motivo per cui non si indagano le risposte fornite al fenomeno del lavoro forzato dal sistema giuridico penale, né a livello internazionale, né nazionale. Un breve cenno emerge solo per quanto riguarda il lato definitorio della fattispecie al fine di meglio cogliere i contorni del lavoro forzato rispetto alla schiavitù. Come anche evincibile da quanto finora detto, non si esamina poi il pur rilevante e ampiamente diffuso fenomeno del lavoro forzato impiegato direttamente dallo Stato e dai suoi organi, il quale per le sue stesse dinamiche riceve risposte circoscritte e a sé stanti dal sistema giuridico internazionale, ben distinte da quelle che emergeranno dalla nostra indagine. Questo chiarimento è particolarmente pertinente nel contesto dell'analisi giurisprudenziale del divieto di lavoro forzato, poiché l'attenzione si concentra esclusivamente sui casi in cui la base fattuale coinvolge attori privati che impiegano lavoro forzato. Infine, saranno proposti solo in via esemplificativa alcuni modelli legislativi nazionali e sovranazionali che mirano a responsabilizzare le aziende per il rispetto dei diritti umani dei lavoratori, senza pretesa alcuna di fornire una copertura globale esaustiva in tal senso. Su questa base, il lavoro segue una struttura tripartita.

Il primo capitolo ha richiesto un'esplorazione approfondita dell'evoluzione storica delle definizioni giuridicamente riconosciute di schiavitù e lavoro forzato attraverso le disposizioni sostanziali degli strumenti giuridici internazionali pertinenti. L'imperativo di esaminare le definizioni legali di schiavitù e lavoro forzato è sorto a causa della connessione intrinseca tra il riconoscimento della prima e l'emergere del secondo. Dopo il primo riconoscimento al Congresso di Vienna della schiavitù e della tratta degli schiavi come "flagello" che "affliggeva da tempo l'umanità", con l'istituzione della Società delle Nazioni e dell'Organizzazione Internazionale del Lavoro (OIL) furono introdotte le prime definizioni cruciali. La Convenzione sulla schiavitù del 1926, redatta nell'ambito della Società delle Nazioni, ha svolto un ruolo fondamentale nel delineare chiaramente i concetti di schiavitù e di tratta degli schiavi. Il suo articolo 5 ha permesso la prima apparizione del lavoro forzato in una carta internazionale. Tuttavia, non forniva una definizione distinta del lavoro forzato e, salvo casi eccezionali, ne sanciva l'utilizzo per "scopi pubblici". L'attenzione principale in questa occasione era rivolta all'implementazione di misure preventive per prevenire l'evoluzione del lavoro forzato in "condizioni analoghe alla schiavitù". Quattro anni dopo, la Convenzione sul lavoro forzato n. 29 dell'OIL del 1930 ha dato al lavoro forzato una definizione distinta: "Per lavoro forzato o obbligatorio si intende ogni lavoro o servizio che viene richiesto a una persona sotto la minaccia di una sanzione e per il quale la persona stessa non si è offerta volontariamente". La definizione di lavoro forzato del 1930 ha resistito negli anni e rimane tuttora un punto di riferimento per la comunità internazionale ed è stata da ultimo confermata dal Protocollo relativo alla Convenzione del 2014. La Convenzione ha anche delineato cinque eccezioni al lavoro forzato – esempi di ciò che il lavoro forzato "non deve includere" – come il lavoro durante il servizio militare, per obblighi civici, come conseguenza di una condanna giudiziaria, in situazioni di emergenza e per servizi comunali minori. In modo simile rispetto a quanto accaduto per la definizione, queste eccezioni al lavoro forzato sono state incorporate in numerosi altri accordi internazionali nei decenni successivi. Questo vale per gli strumenti internazionali, come il Patto Internazionale sui Diritti Civili e Politici (Articolo 8, paragrafo 3 (c)) e per gli strumenti regionali come la Convenzione Europea sui Diritti Umani (Articolo 4, paragrafo 3) e la Convenzione Americana sui Diritti Umani (Articolo 6, paragrafo 3). Tutti questi strumenti incorporano testualmente le eccezioni al divieto di lavoro forzato delineate nel 1930.

Dopo la Seconda Guerra Mondiale, le Nazioni Unite e l'Organizzazione Internazionale del Lavoro hanno elaborato due strumenti aggiuntivi. La Convenzione supplementare delle Nazioni Unite del 1956 sull'abolizione della schiavitù, pur non affrontando direttamente il tema del lavoro forzato, ha introdotto il concetto di "pratiche simili alla schiavitù" che comprende le ulteriori forme di sfruttamento della servitù per debiti, della servitù della gleba, del matrimonio forzato e del lavoro minorile. Al contrario, la Convenzione n. 105 dell'OIL sull'abolizione del lavoro forzato del 1957 ha individuato cinque circostanze distinte in cui gli Stati sono obbligati a compiere sforzi straordinari per proibire l'uso del lavoro forzato: come mezzo di coercizione politica o di educazione, per scopi di sviluppo economico, per la disciplina del lavoro, come punizione per aver partecipato a scioperi e come mezzo di discriminazione razziale, sociale, nazionale o religiosa.

In seguito alla Dichiarazione dell'OIL sui Principi e i Diritti Fondamentali sul Lavoro del 1998, l'imperativo di sradicare il lavoro forzato è stato stabilito come uno dei quattro pilastri alla base del quadro rinnovato dell'Organizzazione. Questa decisione ha dotato il divieto di automatica capacità di applicazione per gli Stati membri, indipendentemente dalla loro ratifica delle Convenzioni n. 29 e n. 105. Tuttavia, poco dopo, sembra che l'OIL si sia gradualmente allontanata dall'iniziale enfasi posta sulla necessità dell'eliminazione del lavoro forzato. Questo cambiamento ha coinciso con l'introduzione del concetto di "lavoro dignitoso", successivamente integrato nell'Agenda 2030 per gli Obiettivi di Sviluppo Sostenibile nel 2015, in particolare nell'ambito dell'Obiettivo Sostenibile 8.7.

È risultato poi evidente che l'evoluzione della definizione del divieto di lavoro forzato ha incontrato sfide persistenti dall'inizio di questo secolo. Questa complessità si intreccia con le connessioni con altre forme di sfruttamento identificate nel corso del tempo, oltre alla schiavitù. Sulla base di una pratica internazionale apparentemente emergente, soprattutto nei discorsi degli studiosi, c'è una crescente inclinazione ad amalgamare tutte queste figure sotto un termine collettivo, come "schiavitù moderna" o "nuove forme di schiavitù". Questa tendenza si riflette nel lavoro intrapreso dal Relatore Speciale sulle forme contemporanee di schiavitù, nella giurisprudenza del Comitato per i Diritti Umani delle Nazioni Unite e nei risultati emersi dai rapporti delle Commissioni d'inchiesta dell'OIL. Lo sforzo intrapreso dalle Linee Guida Bellagio-Harvard del 2012

per chiarire il significato dei singoli termini e le caratteristiche distintive di ogni caso ha sottolineato l'importanza della preoccupazione centrale che ruota attorno all'intricata relazione tra questi diversi tipi di sfruttamento.

Tuttavia, resta innegabile che il Protocollo del 2014 alla Convenzione sul Lavoro Forzato del 1930 ha incorporato e riaffermato la definizione di lavoro forzato, comprese le sue eccezioni. Inoltre, attraverso il Protocollo, è stata ribadita e rafforzata l'importanza dell'impegno degli Stati a prevenire ed eliminare il lavoro forzato, accompagnato da specifiche linee guida operative per l'attuazione. Allo stesso modo, attraverso gli emendamenti 2022 alla Dichiarazione dell'OIL del 1998, la posizione centrale dell'eliminazione del lavoro forzato è stata riaffermata come una delle pietre miliari dell'Organizzazione.

Il secondo capitolo non solo ha permesso un'esplorazione più approfondita dei confini legali che circondano il divieto del lavoro forzato, ma ha anche introdotto la questione della responsabilità dello Stato per il ricorso al lavoro forzato da parte di attori privati, attraverso l'analisi della giurisprudenza dei tribunali internazionali anche di carattere regionale. In qualità di tribunale competente a risolvere le controversie derivanti dalle Convenzioni sulla schiavitù e dalle Convenzioni sul lavoro forzato dell'OIL, la Corte Internazionale di Giustizia (CIG) non ha mai affrontato in modo diretto e approfondito la questione della proibizione del lavoro forzato. Tuttavia, la sua giurisprudenza, in particolare nel caso *Barcelona Traction* del 1970, ha rivelato come il divieto di schiavitù debba essere riconosciuto dalla Corte come un'illustrazione degli obblighi di uno Stato nei confronti della comunità internazionale nel suo complesso, ossia obblighi *erga omnes*. Inoltre, nella causa del 2012 *Immunità giurisdizionali dello Stato (Germania contro Italia)*, pur affrontando questioni giuridiche distanti da quelle rilevanti per la presente ricerca, la Corte, ai fini della decisione e sulla base dei fatti storici sottostanti, ha assunto che le norme del diritto dei conflitti armati che proibiscono la deportazione dei prigionieri di guerra per lavoro in schiavitù sono norme di *jus cogens*.

Al contrario, una moltitudine di elementi più pertinenti e sostanziali è emersa attraverso l'esame della giurisprudenza dei tribunali internazionali regionali. La giurisprudenza della Corte Europea dei Diritti Umani sul divieto di lavoro forzato ha rivelato un'evoluzione nell'interpretazione del divieto nel corso degli anni. Attraverso un esame approfondito della giurisprudenza della Corte europea dei diritti dell'uomo,

abbiamo infatti osservato l'evoluzione sfumata che la Corte ha sviluppato nell'interpretazione dell'Articolo 4 della Convenzione. L'interpretazione ha infatti preso avvio con l'affermazione di obblighi positivi nel 2005 con il caso *Siliadin*, è progredita fino all'inclusione dello scenario senza precedenti della tratta di esseri umani, introdotta quasi senza soluzione di continuità con altre forme di sfruttamento in *Rantsev*, ed è ulteriormente maturata nell'elaborazione di obblighi positivi nel caso dei lavoratori dei campi greci in *Chowdury*. Questa evoluzione ha raggiunto il suo culmine in una decisione della Grande Camera, apparentemente divergente da *Rantsev*, che sottolinea l'imperativo di una chiara delimitazione tre le varie forme distinte di sfruttamento in *S. M. contro Croazia* – una posizione ribadita dall'interpretazione nel caso *Zoletic* 2021, l'ultimo pronunciamento cronologico dei giudici CEDU sull'Articolo 4.

Nelle esplicative decisioni della Corte Interamericana dei Diritti Umani, è emersa una notevole enfasi, particolarmente evidente nel caso *Hacienda Brasil Verde Workers*, sulle sfide uniche poste dal fenomeno del lavoro schiavistico presente in Brasile. Questa attenzione ha spinto la Corte a delineare la sostanza degli obblighi positivi per gli Stati nel garantire il rispetto dell'Articolo 6 della Convenzione. Inoltre, la Corte interamericana si è posta attivamente in un significativo dialogo con la Corte europea, facendo spesso riferimento alle sue sentenze e utilizzando gli stessi strumenti giuridici a fini interpretativi. Questa interazione collaborativa si distingue come un aspetto degno di nota di uno sforzo collettivo per affrontare un fenomeno che si manifesta sia su scala nazionale che sempre più globale.

Sebbene la Corte africana dei diritti dell'uomo e dei popoli non abbia approfondito l'interpretazione dell'Articolo 5 della Carta, che comprende varie forme di sfruttamento e degrado umano, senza menzionare esplicitamente il lavoro forzato, è stato essenziale riconoscere le rilevanti risposte fornite dal sistema africano dei diritti umani. Queste risposte sono radicate nei contributi sfaccettati sul tema da parte della Commissione Africana e nel caso emblematico giudicato dalla Corte ECOWAS nel 2008, un caso che ha offerto una profonda riflessione sulla realtà sociale del Niger e una corrispondente comprensione del fenomeno della schiavitù.

Soprattutto grazie alle interpretazioni fornite dai giudici della Corte Europea dei Diritti dell'Uomo e seguite dalla Corte Interamericana dei Diritti Umani, è evidente che lo strumento principale utilizzato dai tribunali regionali per i diritti umani per ritenere gli

Stati responsabili della violazione del divieto di lavoro forzato come risultato delle azioni dei privati è quello degli obblighi positivi. In questo contesto specifico, attraverso l'interpretazione dei giudici, questo strumento si è evoluto e perfezionato, soprattutto negli ultimi quindici-venti anni. Per quanto riguarda il rispetto del divieto di lavoro forzato, questi obblighi comprendono aspetti procedurali e sostanziali, come la creazione di quadri legislativi e amministrativi adeguatamente attrezzati per combattere il lavoro forzato all'interno dei confini nazionali. In sostanza, vi è un'affermazione ricorrente da parte dei giudici regionali di un dovere a livello statale – e quindi della relativa responsabilità – di istituire un quadro legislativo adeguato e corrispondenti misure operative volte a prevenire, proibire e sanzionare il fenomeno.

In modo altrettanto significativo, tra le conclusioni tratte dall'analisi della giurisprudenza dei tribunali regionali per i diritti umani, è emerso che l'interpretazione in evoluzione dell'Articolo 4 della CEDU da parte della Corte ha raggiunto un punto cruciale per quanto riguarda la categorizzazione delle diverse forme di sfruttamento. Inizialmente, le varie forme di sfruttamento a cui riferimento l'Articolo 4 della CEDU – schiavitù, servitù e lavoro forzato – sono state progressivamente raggruppate dalla Corte fino alla sentenza *Rantsev* del 2010, che ha persino visto l'aggiunta della figura della tratta di esseri umani, sebbene non esplicitamente prevista dalla Convenzione. Tuttavia, le pronunce più recenti sull'Articolo 4 suggeriscono una 'ri-espansione' del potenziale campo di applicazione dell'articolo stesso. Ciò è dovuto all'affermazione del fatto che le forme di sfruttamento non devono necessariamente essere collegate tra loro e possono esistere indipendentemente su una scala di gravità crescente, coprendo potenzialmente una gamma più ampia di casi di sfruttamento. Mentre gli altri due tribunali regionali non si sono concentrati esplicitamente su questo specifico aspetto, come detto la Corte interamericana ha comunque avviato un dialogo cruciale con la Corte europea. Questa interazione sarà probabilmente preziosa per determinare se l'approccio appropriato prevede l'analisi di un concetto unificato di 'nuove forme di schiavitù' o se rimane necessario differenziare tra le varie forme di sfruttamento che rientrano in questo concetto unificato.

Nella seconda parte del capitolo, abbiamo approfondito in via esemplificativa vari casi di legislazioni nazionali specificamente create per rendere le aziende responsabili della salvaguardia dei diritti umani lungo le loro catene di approvvigionamento,

utilizzando il concetto di *due diligence* dei diritti umani. L'ultimo sviluppo in questo campo, la legge tedesca *Lieferkettengesetz*, che è entrata in vigore nel gennaio 2024 per le aziende tedesche con più di 1000 dipendenti, ha attraversato un complesso processo di approvazione. Allineata ai Principi Guida delle Nazioni Unite su Imprese e Diritti Umani del 2011, la legge delinea una serie di undici rischi specifici che le aziende potrebbero incontrare, costituendo la base per la compilazione obbligatoria degli impegni di *due diligence*. Sebbene sia ancora nelle prime fasi di attuazione, la legge ha già riscontrato tre critiche principali da parte degli studiosi. Nonostante i suoi obiettivi ambiziosi, la legge *Lieferkettengesetz* ha portato, in una certa misura, a una responsabilità limitata per le aziende, soprattutto a causa dell'assenza di responsabilità civile e delle conseguenti incertezze legali. Inoltre, il campo di applicazione della legge esclude le operazioni delle società straniere, e le multe per la violazione degli standard di *due diligence* previsti dalla legge sono state ritenute insufficienti in proporzione alla grandezza delle società che ne sono oggetto.

A differenza della legge tedesca, la *Loi de vigilance* francese aveva già stabilito la responsabilità civile per le aziende dal 2017, modificando un articolo del *Code de commerce* francese per incorporare il dovere degli obblighi informativi per le aziende. Tuttavia, analogamente alla legge tedesca, la *due diligence* non è inquadrata come un obbligo di risultato, ma come un obbligo di mezzi. Ciononostante, nelle poche occasioni di prova dei fatti in tribunale, la legge ha mostrato difetti procedurali, inizialmente evidenziati dai tribunali che hanno dichiarato la mancanza di giurisdizione nei relativi casi. Il *Wet Zorgplicht Kinderarbeid* dei Paesi Bassi e il *Modern Slavery Act* inglese sono poi emersi come esempi distintivi, con il primo che affronta esclusivamente i casi di lavoro minorile e il secondo che introduce nuovi reati all'interno del quadro giuridico inglese, accanto al meccanismo di *due diligence*.

Le critiche articolate dagli studiosi in merito ai suddetti casi di legislazione nazionale sulla *due diligence* dei diritti umani sembra siano state prese in considerazione nelle bozze di una Direttiva europea sulla Due Diligence della sostenibilità aziendale (*Corporate Sustainability Due Diligence Directive*, CSDD), come se queste esperienze nazionali fossero servite come terreno di prova per la formulazione di una normativa sovranazionale potenzialmente più completa. In modo molto significativo, la bozza dell'articolo 22 anticipa di fatto la previsione di un regime di responsabilità civile per le

aziende che rientrano nella disciplina. Quando il CSDD sarà approvato in via definitiva, le aziende saranno quindi ritenute responsabili per i danni causati se non rispettano gli obblighi imposti dalla Direttiva, sia per quanto riguarda la prevenzione degli impatti negativi sia per quanto riguarda l'eliminazione degli impatti negativi effettivi. Su questa base, se, a seguito di tale inadempienza, si verifica un impatto negativo che avrebbe dovuto essere identificato, prevenuto, fermato o minimizzato, le aziende possono essere ritenute responsabili. La bozza di Direttiva europea, nelle sue fasi finali prima dell'imminente approvazione, mira anche a delineare gli obblighi delle aziende di Stati non appartenenti all'Unione Europea attive nel commercio all'interno dell'UE. Quest'ultimo aspetto si riflette anche nell'emergente proposta di direttiva della Commissione Europea, incentrata sul divieto di prodotti fabbricati con lavoro forzato all'interno del mercato dell'Unione, imponendo così una restrizione all'ingresso di tali prodotti da paesi terzi.

Un significativo esempio di impegno a livello internazionale esplorato in questo contesto è l'ambiziosa iniziativa nata in seno alle Nazioni Unite, intrapresa in particolare da un gruppo di lavoro intergovernativo incaricato dal Consiglio dei Diritti Umani. Questa iniziativa, sostenuta principalmente dagli Stati del Sud Globale e oggetto di negoziato da una decina d'anni, aspira a formulare un trattato vincolante che regoli il rapporto tra le imprese e il rispetto dei diritti umani. Nel 2023, è stata presentata la terza bozza di questo potenziale trattato e, dopo averla esaminata, è emerso che il termine 'lavoro forzato' compare un'unica volta nel testo, in particolare nel contesto dei conflitti armati. È questo un dettaglio che appare meritevole di essere notato ed evidenziato nel corso dell'evoluzione della bozza del trattato attraverso i negoziati e le decisioni successive, in previsione delle sue potenziali implicazioni nella sua versione finale.

Dalla vasta giurisprudenza dei tribunali regionali internazionali, dalla legislazione nazionale e dagli impegni normativi sovranazionali, è evidente che il fenomeno del lavoro forzato ha beneficiato di una maggiore attenzione negli ultimi anni. Come si evince dalle tendenze di dialogo perseguite dalla Corte Interamericana dei Diritti Umani e dal sostegno dei Paesi del cosiddetto Sud Globale all'iniziativa legata alla creazione di un Trattato sulle Imprese e sui Diritti Umani, le conclusioni del 2023 della riunione del G20 in India hanno ulteriormente sottolineato una palpabile necessità di coordinamento. Questo appello collettivo al coordinamento sottolinea l'imperativo di allineare gli sforzi e le prospettive

a livello globale per affrontare le sfide multiformi poste dalle violazioni dei diritti umani legate alle imprese, in particolare nel contesto del lavoro forzato. Tale coordinamento si rivelerebbe indispensabile sia a livello interpretativo-giurisprudenziale tra i tribunali, sia a livello politico-regolamentare e servirebbe a collegare gli sviluppi eccessivi nel mondo occidentale con lo sfruttamento nel Sud globale, dove, secondo i dati dell'ILO, il lavoro forzato è più diffuso, promuovendo un approccio globale completo per combattere il lavoro forzato e le relative violazioni dei diritti umani.

È fondato l'auspicio che la Corte europea dei diritti dell'uomo prosegua nella sua interpretazione evolutiva dell'articolo 4 della CEDU e che gli standard occidentali di responsabilità aziendale progrediscano lungo la loro traiettoria consolidata. Tuttavia, per un'iniziativa realmente d'impatto per emarginare il fenomeno del lavoro forzato, sembra fondamentale che queste interpretazioni e standard esercitino la loro influenza sul Sud globale. A tal fine, è necessario incoraggiare un'intensificazione degli sforzi legislativi, attuati in modo più rigoroso e responsabilizzante, con una maggiore attenzione alle responsabilità delle aziende lungo l'intera catena di produzione. Questo approccio sfaccettato potrebbe contribuire in modo significativo alla campagna globale contro il lavoro forzato e far progredire la causa della tutela dei diritti umani in tutto il mondo. Sebbene possa sembrare un obiettivo ambizioso e lontano, è essenziale riconoscere che una collaborazione completa e sforzi concertati sono imperativi di fronte alle sfide pervasive poste dal lavoro forzato, in quanto sfide globali richiedono risposte globali.

Il capitolo conclusivo ha permesso di chiarire la caratterizzazione giuridica del divieto di lavoro forzato e di comprendere la natura della responsabilità dello Stato nei casi in cui gli attori privati facciano uso del lavoro forzato. In questo contesto, si è rivelata essenziale un'esplorazione approfondita per esaminare la legittimità dell'adozione di un termine generale come 'schiavitù moderna' per includere diverse forme contemporanee di sfruttamento. Questo esame preliminare era indispensabile per determinare se fosse possibile delineare le caratteristiche legali del divieto del lavoro forzato nel diritto internazionale nella sua specificità o se al divieto potessero essere attribuite le caratteristiche condivise da tutte le altre forme di sfruttamento, *in primis* quelle proprie della schiavitù.

Nonostante le evidenti inclinazioni verso l'adozione del termine 'schiavitù moderna', riscontrate anche all'interno delle organizzazioni internazionali, gli studiosi di

diritto internazionale, in particolare nel campo dei diritti umani, mostrano una certa riluttanza ad abbracciarlo. Questa esitazione può essere attribuita a diversi fattori. In primo luogo, la resistenza ad utilizzare un termine cumulativo per forme distinte di sfruttamento trova le sue radici in considerazioni storiche. Come spiegato nell'esame delle convenzioni internazionali nel capitolo iniziale, la regolamentazione della schiavitù si è evoluta insieme a quella del lavoro forzato, ma separatamente. A partire dal 1926, il lavoro forzato è infatti stato tollerato per un certo periodo di tempo, in contrasto con gli sforzi concertati per sradicare la schiavitù all'inizio del secolo scorso. Il riconoscimento e la definizione di ulteriori forme di sfruttamento sono emersi solo in seguito, in particolare con la Convenzione supplementare sull'abolizione della schiavitù del 1956. Nel frattempo, la definizione della proibizione del lavoro forzato ha subito un ulteriore chiarimento, soprattutto grazie agli sforzi dell'OIL, a partire dalla Convenzione sull'abolizione del lavoro forzato del 1957. Inoltre, la persistente presentazione distinta tra schiavitù, lavoro forzato e altre forme di sfruttamento in tutti gli accordi internazionali osservati, comprese le convenzioni regionali sui diritti umani, sottolinea un'ulteriore motivazione per rifiutare la legittimità del termine 'schiavitù moderna'.

Un ultimo fattore significativo che contribuisce a questa resistenza deriva dalla divergenza intrinseca nel contenuto legale delle proibizioni contro la schiavitù e il lavoro forzato. La Convenzione sulla schiavitù del 1926 ha stabilito con fermezza che la schiavitù comporta uno "stato o condizione di una persona sulla quale vengono esercitati tutti o alcuni dei poteri connessi al diritto di proprietà". D'altra parte, la Convenzione OIL sul Lavoro Forzato del 1930, tuttora applicabile come confermato dal Protocollo del 2014, definisce il lavoro forzato come "ogni lavoro o servizio che viene richiesto a qualsiasi persona sotto la minaccia di una pena e per il quale la persona stessa non si è offerta volontariamente". Sulla base delle definizioni attualmente in vigore, e come affermato e ribadito dalle Linee Guida di Bellagio-Harvard del 2012, permane un elemento cruciale di distinzione tra schiavitù e lavoro forzato: il requisito dei diritti di proprietà. In particolare, questo requisito è assente nel quadro di definizione del lavoro forzato, che, al contrario, ruota attorno a un rapporto di lavoro o di servizio. Inoltre, il lavoro forzato rimane all'interno di questa relazione, che richiede condizioni di non volontarietà e coercizione. Questo contesto distintivo si discosta nettamente da quello della schiavitù, sottolineando l'importanza di preservare la comprensione giuridica sfumata di questi

fenomeni come fenomeni separati. Il requisito delle prerogative della proprietà, richiesto dalla schiavitù, è inoltre un elemento fondamentale che distingue la schiavitù da tutte le altre forme di sfruttamento identificate nel tempo. L'uso di un termine cumulativo per tutte le forme di sfruttamento rischierebbe quindi di semplificare eccessivamente e, di conseguenza, di diluire la natura giuridica sfumata di questi fenomeni distinti.

Questa conclusione ha stimolato un'esplorazione della classificazione giuridica distinta del divieto del lavoro forzato, separata dalla sua assimilazione alla schiavitù. Pertanto, abbiamo innanzitutto approfondito la prospettiva di classificare il divieto del lavoro forzato tra le norme perentorie del diritto internazionale. Tuttavia, a differenza della proibizione della schiavitù, non sembra possibile sostenere che la proibizione del lavoro forzato rientri nelle norme dello *jus cogens*. Questa affermazione è legata principalmente alla natura delle norme perentorie che, per definizione, non consentono eccezioni. Ciò sembra incongruente con il caso del divieto del lavoro forzato, in quanto entrambe le carte regionali dei diritti umani, in particolare la CEDU (art. 4) e la Convenzione Americana sui Diritti Umani (art. 6), così come il Patto Internazionale sui Diritti Civili e Politici (art. 8), includono la previsione di varie eccezioni. Gli Stati sembrano infatti ancora autorizzati a utilizzare il lavoro forzato in caso di obblighi civili dello Stato o di emergenze, a seguito di condanne penali o nell'ambito del servizio militare. L'esistenza di tali eccezioni non è stata contraddetta nemmeno dal più recente Protocollo aggiuntivo dell'OIL alla Convenzione sul lavoro forzato del 2014. Come sottolineato da autorevole dottrina, il divieto di lavoro forzato potrebbe potenzialmente raggiungere lo status di *jus cogens* se gli Stati si impegnassero collettivamente per eliminare queste eccezioni che appaiono oramai obsolete.

L'esclusione del divieto di lavoro forzato dall'ambito delle norme perentorie ha reso necessario un esame inevitabile per stabilire se tale divieto possa comportare un'obbligazione *erga omnes* per gli Stati. Questa indagine ha comportato la comprensione di quali obblighi dispositivi, collocati al di fuori della sfera delle norme perentorie, rivestano un'importanza sufficiente per essere considerati *erga omnes* dagli Stati, in assenza di una serie completa di criteri con cui la comunità internazionale e i suoi membri possano esprimere chiaramente i valori che considerano fondamentali. L'intricata valutazione di questo aspetto ha comportato principalmente l'identificazione, sulla base degli elementi forniti dalla giurisprudenza della Corte Internazionale di Giustizia, della

natura di tale obbligo. Così, da un lato, è stata presa in considerazione l'indicazione fornita dalla CIG nel 1970 nel caso *Barcelona Traction*, che considerava i 'diritti umani fondamentali della persona umana' come qualificabili *erga omnes*. D'altra parte, sono stati presi in considerazione i fattori indicati nel 1995 dalla stessa Corte nel caso *Timor Est*, ossia fattori quali il riconoscimento nella Carta delle Nazioni Unite, la prassi degli organi delle Nazioni Unite, l'inclusione in altri trattati preferibilmente a carattere universale, il riconoscimento nel diritto internazionale generale o l'avallo nella giurisprudenza della stessa CIG. Sulla base di questi elementi, è sembrato quindi possibile concludere che il divieto di lavoro forzato dà luogo all'istituzione di obblighi *erga omnes* per gli Stati, anche se una conferma definitiva della validità *erga omnes* di questo divieto potrà arrivare solo nel momento in cui questo venga stabilito dalla stessa Corte, l'unico fattore ancora mancante.

Nell'ultima sezione del capitolo finale, è stato infine intrapreso un esame più complessivo dei parametri che circondano la responsabilità dello Stato per la proibizione del lavoro forzato come conseguenza delle azioni degli attori privati. A tal fine, è stato necessario innanzitutto definire il contenuto dei termini in questione. Per questo motivo, sulla base delle definizioni comunemente attribuite a questi termini dalla dottrina del diritto internazionale, gli 'attori privati' sono stati considerati come 'individui', persone o gruppi di persone che non agiscono come soggetti di diritto internazionale, ai quali il diritto nazionale può conferire soggettività giuridica quali persone giuridiche, come ad esempio nel caso delle società. D'altra parte, per quanto riguarda la responsabilità statale, si è naturalmente considerata l'ipotesi per cui uno Stato deve essere ritenuto responsabile di qualsiasi atto illecito a livello internazionale, sia esso un'azione o un'omissione, ad esso imputabile ai sensi del diritto internazionale, che costituisca una violazione dei suoi obblighi internazionali, a seconda degli obblighi internazionali specifici dello Stato in questione.

Date queste premesse, gli Stati in genere non possono essere ritenuti responsabili delle azioni dei privati, a meno che tali azioni non possano essere attribuite allo Stato, che l'individuo sia un organo statale o meno. Se l'attribuzione non è applicabile, lo Stato non è ritenuto responsabile della condotta dell'individuo. Tuttavia, è possibile che lo Stato possa essere ritenuto responsabile per le azioni o le omissioni dei suoi organi relative all'atto privato in questione, in particolare nei casi in cui vi sia una violazione di una

norma internazionale che imponga obblighi allo Stato in merito alle attività non statali. È proprio in relazione a quest'ultima ipotesi che è stato possibile tracciare tre possibili scenari, che si collocano in maniera variabile tra norme primarie e secondarie del diritto internazionale, in base ai quali è possibile che possa emergere la responsabilità dello Stato per la violazione del lavoro forzato come risultato di atti compiuti da attori privati.

Il primo di questi scenari riguarda l'uso di obblighi positivi, ritenuti essere norme primarie, che costituiscono una soluzione ampiamente adottata dai tribunali regionali per i diritti umani. Questo approccio si basa sullo stabilire una connessione causale tra il danno subito dal richiedente, che rientra nell'ambito definito del divieto, e il presunto fallimento dello Stato nel salvaguardare il suo relativo diritto. In sostanza, gli obblighi positivi mirano a ritenere gli Stati responsabili per le omissioni nell'adempimento delle loro funzioni. Per quanto riguarda l'ambito di applicazione dell'Articolo 4 della CEDU, questi obblighi sono stati introdotti per la prima volta dalla Corte Europea dei Diritti dell'Uomo nel caso *Siliadin* nel 2005 e sono stati costantemente applicati nelle sentenze successive. Allo stesso modo, gli obblighi positivi sono stati adottati e ampliati dalla Corte Interamericana dei Diritti Umani nel 2016 nel caso *Hacienda Brasil Verde*, relativo alla portata dell'Articolo 6 della Convenzione Americana sui Diritti Umani.

Dalla giurisprudenza sia della Corte europea dei diritti dell'uomo sia della Corte interamericana dei diritti umani, è emerso che, per quanto riguarda le rispettive disposizioni sulla proibizione del lavoro forzato, questi obblighi comportano principalmente il dovere per lo Stato di prevenire, proibire e punire i casi di lavoro forzato. Inoltre, è stata riscontrata una progressiva evoluzione e un rafforzamento di questi obblighi nel corso del tempo. Così, si sono evoluti gli obblighi positivi sostanziali, come l'obbligo per lo Stato di stabilire un quadro giuridico e normativo appropriato in merito al divieto, e obblighi procedurali, come l'obbligo di indagare e implementare misure operative di protezione per salvaguardare le vittime di lavoro forzato. Tuttavia, le corti regionali non hanno finora indicato una classificazione e definizione complessiva del contenuto degli obblighi positivi che gli Stati devono rispettare per evitare omissioni e, di conseguenza, una potenziale responsabilità. Alcuni studiosi hanno comunque proposto alcuni tentativi di categorizzazione di questi obblighi, con l'obiettivo di migliorare la protezione delle vittime e fornire agli Stati una guida più chiara sull'adempimento dei loro obblighi.

Un discorso simile sembra essere possibile per il più ampio obbligo di diligenza che grava in capo agli Stati, che, a differenza degli obblighi positivi, si colloca tra norme primarie e secondarie del diritto internazionale. La diligenza dello Stato è intesa come un obbligo di condotta, in base al quale lo Stato è tenuto a intraprendere un'azione particolare, agendo secondo il criterio del "governo responsabile", per il quale la sua mancata azione comporta la sua conseguente responsabilità. Lo Stato deve quindi attuare misure specifiche per evitare il danno, il che significa che lo Stato può essere responsabile, ancora una volta, per la sua omissione di intraprendere un'azione richiesta. Considerata come un parametro di comportamento per adempiere a un obbligo, come emerso dall'analisi dottrinale, la dovuta diligenza ruota intorno alla consapevolezza dello Stato del fenomeno, alla sua capacità di rispondere efficacemente e alla ragionevolezza delle sue azioni. In tal senso, il Comitato per i Diritti Umani delle Nazioni Unite ha confermato che gli Stati sono obbligati a garantire l'adempimento dei diritti contenuti nel Patto Internazionale sui Diritti Civili e Politici salvaguardando le persone contro le violazioni anche da atti commessi da individui o entità private, in quanto un fallimento potrebbe comportare una violazione della dovuta diligenza per prevenire, punire, indagare o riparare il danno causato. La Corte Interamericana dei Diritti Umani sembra aver del resto colto appieno questo aspetto nella sentenza *Hacienda Brasil Verde*, basando l'intero ragionamento sulla dovuta diligenza da parte dello Stato.

Nonostante le critiche per la sua apparente ambiguità, il concetto di dovuta diligenza ha dimostrato la sua efficacia in virtù della sua flessibilità e adattabilità alle circostanze precipue dei singoli casi. Non c'è dubbio che, in ogni caso, un ulteriore perfezionamento dei suoi parametri specifici potrebbe essere ottenuto grazie ai suggerimenti forniti dalle corti regionali per i diritti umani, dai cosiddetti *treaty bodies* e dalle discussioni degli studiosi. In sostanza, gli obblighi positivi e la dovuta diligenza si sono rivelati due preziosi strumenti evoluti prevalentemente attraverso la giurisprudenza, ma esiste un potenziale sostanziale per il loro ulteriore perfezionamento in standard legali completi volti a mitigare efficacemente le violazioni dei diritti umani, indipendentemente dal fatto che siano commesse da attori statali o non statali.

Un'analisi distinta si è rivelata necessaria per quanto riguarda il terzo scenario ricostruito, che si pone al livello delle norme secondarie, attraverso il quale gli Stati possono essere ritenuti responsabili per le azioni dei privati. Questo scenario è da

ricondurre ad una teoria dottrinale che sostiene che gli illeciti di natura privata potrebbero essere imputati a uno Stato a condizione che quest'ultimo abbia consapevolmente facilitato o collaborato alla loro commissione. Una tale relazione tra gli attori privati e lo Stato implicherebbe un coinvolgimento diretto da entrambe le parti, dando così origine alla cosiddetta teoria della complicità. Inoltre, questa relazione non verrebbe interpretata come un'attribuzione della responsabilità dell'attore privato allo Stato, quanto piuttosto della sua condotta. Quest'ultimo fatto ha spinto i sostenitori della teoria della complicità a sostenere la necessità di incorporare quest'ultima come criterio aggiuntivo di attribuzione della condotta allo Stato nel novero delle ipotesi previste dal progetto di articoli della Commissione del Diritto Internazionale sulla responsabilità degli Stati per gli atti illeciti internazionali. A partire dal secolo scorso, la teoria della complicità ha guadagnato consenso, principalmente nel settore del diritto internazionale del terrorismo, ma viene ora trasposta da alcuni studiosi anche nel campo del diritto internazionale dei diritti umani.

Tuttavia, questa teoria sembra mancare di supporto da diversi punti di vista. Infatti, come alcuni studiosi hanno sostenuto fin dall'inizio del XX secolo, nell'adottare una prospettiva dualista sul diritto internazionale, gli individui non potrebbero violare una norma del diritto internazionale, in quanto non soggetti di tale ordinamento. Pertanto, non potrebbero essere considerati 'complici' dello Stato. Anche considerando il quadro normativo stesso del diritto internazionale, appare evidente che le azioni degli individui rimangano separate da quelle dello Stato. L'azione dello Stato, quale unica entità in grado di violare gli obblighi che gli sono stati posti, si distingue dalle azioni dei singoli attori all'interno della sua giurisdizione. In questo contesto, la relazione Stato-individuo comporterebbe quindi solo ciò che si allinea con il pur criticato concetto di effetto 'catalitico' proposto dal Relatore Speciale della Commissione del Dritto Internazionale sulla Responsabilità dello Stato Ago. In tale prospettiva l'azione intrapresa dall'attore privato serve solo come fattore innescante della responsabilità dello Stato, piuttosto che come mezzo per l'attribuzione diretta della responsabilità o della condotta allo Stato per le azioni dell'individuo.

Sulla base delle prove complete raccolte dagli accordi internazionali, dalla prassi e dalla giurisprudenza, è stato dunque possibile trarre alcune conclusioni generali alla luce degli obiettivi principali della ricerca. Per quanto riguarda i parametri legali

contemporanei che circondano il divieto di lavoro forzato e il suo status all'interno del diritto internazionale, si può affermare che il divieto di lavoro forzato, a causa delle sue precipue caratteristiche legali, deve essere esaminato nella sua singolarità, separato da altre forme di sfruttamento oggi perpetrate. L'adozione di un termine collettivo come "schiavitù moderna" non si è ancora affermato nel discorso giuridico internazionale. Sulla base di questa premessa, la perdurante esistenza e il riconoscimento di eccezioni al divieto di lavoro forzato all'interno delle principali convenzioni internazionali e regionali precludono inevitabilmente la possibilità di collocare il divieto tra le norme perentorie del diritto internazionale. Lo *jus cogens,* infatti, non ammette per definizione eccezioni, rendendo così insostenibile tale inclusione. Inoltre, attingendo alla prassi consolidata e agli elementi indicati dalla Corte Internazionale di Giustizia per identificare le obbligazioni *erga omnes*, è stato ulteriormente possibile sostenere che il divieto di lavoro forzato comporta questo tipo di obbligo da parte degli Stati, in attesa di una conferma definitiva da parte della Corte.

Per quanto riguarda poi la natura della responsabilità dello Stato derivante dall'utilizzo del lavoro forzato da parte degli attori privati, è emerso che gli Stati sono principalmente ritenuti responsabili per la loro incapacità di stabilire i meccanismi necessari per affrontare questo fenomeno in modo efficace. Come confermato soprattutto dalla ricca e densa giurisprudenza delle corti regionali per i diritti umani, questa incapacità è racchiusa nella triade del dovere di prevenire, proibire e punire l'esazione del lavoro forzato da parte di attori privati, come previsto dagli obblighi positivi e dagli obblighi di diligenza. La responsabilità dello Stato non deriverebbe quindi dalla sua complicità con l'attore privato nel permettere il lavoro forzato, ma piuttosto dalla sua omissione nel non contrastare tali condotte.

Sulla base di queste conclusioni, abbiamo riaffermato ciò che era stato inizialmente ipotizzato all'inizio della ricerca. Nel contesto dei rapidi cambiamenti socioeconomici del XXI secolo, gli attori privati esercitano un'influenza significativa sulle correlate tendenze, in particolare nel campo del lavoro. Ciò ha suscitato il fondamentale interrogativo sul relativo ruolo degli Stati, quali soggetti primari del diritto internazionale, soprattutto per quanto riguarda la loro responsabilità, che risulta derivare principalmente da una condotta omissiva, causata dall'incapacità di intervenire adeguatamente per combattere i casi di lavoro forzato perpetrati da attori privati. La spinta

vigorosa delle iniziative legislative nazionali e sovranazionali volte a regolamentare questo fenomeno, in particolare responsabilizzando le imprese, è senza dubbio un passo nella giusta direzione. Tuttavia, la diffusa prevalenza del lavoro forzato, come evidenziato dai dati dell'ILO, persiste nelle regioni in cui tali sforzi legislativi non hanno avuto fin qui successo o stentano a trovare attuazione. Per affrontare efficacemente i fenomeni globali, appare dunque indispensabile uno sforzo maggiormente concertato e completo su scala mondiale.

Per quanto nell'attuale realtà internazionale possa apparire complesso e difficile pervenire a effettivi risultati convenzionali di carattere multilaterale non si può che sperare nella creazione di un Trattato sulle imprese e i diritti umani. Tale trattato, se completo e comprensivo di tutte le pertinenti questioni, potrebbe portare a una maggiore consapevolezza dell'impatto delle attività commerciali sul lavoro forzato. Inoltre, sulla base degli elementi raccolti sembra possibile prevedere che venga attribuita maggiore enfasi e sostanza alla *due diligence* sui diritti umani nel prossimo futuro, sia nel settore privato che tra gli Stati. In effetti, il concetto di *due diligence* sui diritti umani sembra possedere la flessibilità e l'adattabilità necessarie per raggiungere soluzioni globali efficaci contro il fenomeno del lavoro forzato.

In questo contesto, risulta essenziale che la proibizione del lavoro forzato riacquisisca la sua preminenza tra le altre forme di sfruttamento, emergendo come la manifestazione più rilevante e diffusa a livello globale all'interno delle dinamiche socioeconomiche contemporanee. L'Organizzazione Internazionale del Lavoro in particolare è in prima linea in questo sforzo dal 1998, avendo dato la necessaria priorità al contrasto al lavoro forzato come uno dei pilastri fondamentali della stessa Organizzazione. Inoltre, le recenti decisioni della Corte Europea dei Diritti Umani, in particolare quelle della Grande Camera, sembrano aver fatto eco a questa traiettoria, ampliando ulteriormente la portata applicativa esclusiva del divieto del lavoro forzato.

In questo senso, è possibile considerare la prospettiva di riconsiderare e rivitalizzare le Convenzioni OIL sul lavoro forzato per il futuro. Da un lato, sarebbe infatti auspicabile che gli Stati contemplassero il superamento o almeno la ridefinizione delle obsolete circostanze eccezionali che apparentemente consentono ancora il lavoro forzato identificate nel 1930. Dall'altro lato, al fine di combattere i fenomeni descritti, sarebbe immaginabile che la comunità internazionale attuasse in modo efficace la completa

soppressione dell'uso del lavoro forzato per scopi di sviluppo economico, come già indicato nel 1957.

ZUSAMMENFASSUNG DER FORSCHUNG

Zwangsarbeit in Völkerrecht und Staatenverantwortung für private Akteure

Im 21. Jahrhundert hat die Ausbeutung des Menschen eine neue dramatische Dimension erlangt, die mit den derzeit raschen sozioökonomischen Veränderungen auf globaler Ebene einherzugehen scheint. Die Ausbeutung des Menschen durch den Menschen hat die Jahrhunderte überdauert und scheint sich parallel zu den großen historischen Ereignissen entwickelt und diesen angepasst zu haben. Diese Entwicklung setzte sich in ihrer extremen Form, namentlich der Sklaverei, bis zum Beginn des 19. Jahrhunderts fort, als die Staaten den Weg zu ihrer offiziellen Abschaffung einschlugen und sich international dazu verpflichteten. Im folgenden Jahrhundert, dem 20. Jahrhundert, begannen die rechtlichen Unterscheidungen zwischen mehreren bestehenden Formen der Ausbeutung einerseits und den parallelen Bemühungen von Staaten und internationalen Organisationen um ihre Abschaffung andererseits. So tauchten in der zweiten Hälfte des Jahrhunderts die Begriffe Leibeigenschaft, Schuldknechtschaft und Zwangsheirat auf. Unter den verschiedenen anerkannten Formen der Ausbeutung wird im ersten internationalen Übereinkommen über die Sklaverei, das 1926 im Rahmen des Völkerbundes geschlossen wurde, erstmals und zunächst lediglich zwischen Sklaverei und Zwangsarbeit unterschieden. Obwohl die Zwangsarbeit in ihrer Einzigartigkeit erkannt und anerkannt wurde, wurde sie zunächst weitgehend für „öffentliche Zwecke" geduldet, was vor allem auf die anhaltende koloniale Präsenz Europas auf dem afrikanischen Kontinent zurückzuführen war. Später folgten Verpflichtungen zur schrittweisen Abschaffung der Zwangsarbeit für „öffentliche Zwecke", aber ein ausdrückliches Verbot wurde erst 2014 ausgesprochen. Wie wir sehen werden, gibt es aus diesem Grund noch Reste einer gewissen Toleranz gegenüber der Zwangsarbeit, denn es existieren eine Reihe von Ausnahmen, die auch heute noch toleriert werden, wenn auch nur in bestimmten Situationen.

Gerade im Zusammenhang mit den heutigen sozioökonomischen Veränderungen scheint das Phänomen der Zwangsarbeit neben anderen Formen der Ausbeutung heute eine besondere Bedeutung zu haben. Dies hängt damit zusammen, dass die privaten Akteure, die die wirtschaftlichen Beziehungen in der heutigen kapitalistischen Gesellschaft regeln, auf der internationalen Bühne immer mehr Macht erlangen. Daraus ergibt sich die Notwendigkeit, die Rolle des Staates als wichtigstes Subjekt des internationalen Rechts vor diesem Hintergrund zu untersuchen. Genauer gesagt, welche Art von Verantwortung kann der Staat in der Beziehung zwischen dem Opfer von Zwangsarbeit und dem privaten Verursacher übernehmen.

Die Arbeit verfolgt daher äußerst ehrgeizige Ziele. Einerseits soll das Phänomen der Zwangsarbeit, wie es sich heute darstellt, durch die Brille des internationalen Rechts betrachtet werden, indem die historische Entwicklung des Umgangs mit diesem Phänomen in den wichtigsten internationalen Abkommen, die im Laufe der Jahre geschlossen wurden, analysiert wird. Andererseits soll durch die Auseinandersetzung mit der internationalen Rechtsprechung und der Lehrbeiträgen ein besseres Verständnis für die mögliche Verantwortung des Staates für den Einsatz von Zwangsarbeit durch private Akteure sowie für die Frage gewonnen werden, inwieweit die auf nationaler Ebene entwickelten Maßnahmen zur Bekämpfung dieses Phänomens angemessen sind.

Die Behandlung eines Themas, das in rechtlicher, historischer und sogar geografischer Hinsicht so breit gefächert ist, macht natürlich gewisse Einschränkungen in Bezug auf den Umfang der Untersuchung erforderlich gemacht. In diesem Sinne ist die Arbeit nicht strafrechtswissenschaftlich ausgerichtet, weshalb die Antworten des Strafrechtssystems auf das Phänomen der Zwangsarbeit weder auf internationaler noch auf nationaler Ebene untersucht werden. Es wird lediglich auf definitorische Ansätze im Strafrecht zurückgegriffen, um die Konturen der Zwangsarbeit im Vergleich zur Sklaverei besser erfassen zu können. Wie aus dem bisher Gesagten hervorgeht, untersuchen wir auch nicht das zwar relevante und weit verbreitete Phänomen der Zwangsarbeit, die direkt auf den Staat und seine Organen zurückzuführen ist, das aufgrund seiner Dynamik vom internationalen Rechtssystem umschriebene und gesonderte Antworten erhält, die sich von denen unterscheiden, die sich aus unserer Untersuchung ergeben werden. Diese Klarstellung ist insbesondere im Zusammenhang mit der rechtswissenschaftlichen Analyse des Verbots der Zwangsarbeit von Bedeutung, da der Schwerpunkt

ausschließlich auf Fällen liegt, in denen die Tatsachengrundlage private Akteure betrifft, die Zwangsarbeit einsetzen. Schließlich werden einige nationale und supranationale Gesetzgebungsmodelle, die darauf abzielen, Unternehmen für die Achtung der Menschenrechte von Arbeitnehmern verantwortlich zu machen, lediglich als Beispiele vorgeschlagen, ohne den Anspruch auf eine globale Abdeckung in dieser Hinsicht zu erheben. Auf dieser Grundlage folgt die Arbeit einer dreiteiligen Struktur.

Das erste Kapitel erforderte eine eingehende Untersuchung der historischen Entwicklung der rechtlich anerkannten Definitionen von Sklaverei und Zwangsarbeit anhand der materiellrechtlichen Bestimmungen der einschlägigen internationalen Rechtsinstrumente. Die Notwendigkeit, die Definitionen von Sklaverei und Zwangsarbeit zu untersuchen, ergab sich aus dem engen Zusammenhang zwischen der Anerkennung von Sklaverei und Zwangsarbeit und dem Aufkommen von Zwangsarbeit. Nachdem Sklaverei und Sklavenhandel auf dem Wiener Kongress erstmals als „Geißel" anerkannt wurden, die „die Menschheit seit langem heimsucht", wurden mit der Gründung des Völkerbundes und der Internationalen Arbeitsorganisation (IAO) die ersten nennenswerte Definitionen eingeführt. Das im Rahmen des Völkerbundes ausgearbeitete Sklaverei-Übereinkommen von 1926 spielte eine Schlüsselrolle bei der klaren Abgrenzung der Begriffe Sklaverei und Sklavenhandel. In Artikel 5 des Übereinkommens wurde die Zwangsarbeit erstmals in einer internationalen Charta erwähnt. Die Charta enthielt jedoch noch keine eindeutige Definition von Zwangsarbeit, sondern sanktionierte, von Ausnahmefällen abgesehen, lediglich deren Einsatz für „öffentliche Zwecke". Das Hauptaugenmerk lag hier auf der Durchführung von Präventivmaßnahmen, um die Entwicklung von Zwangsarbeit zu „sklavenähnlichen Bedingungen" zu verhindern. Vier Jahre später gab das IAO-Übereinkommen Nr. 29 von 1930 der Zwangsarbeit eine eigene Definition: «Zwangs- oder Pflichtarbeit ist jede Arbeit oder Dienstleistung, die von einer Person unter Androhung von Strafe verlangt wird und für die sie sich nicht freiwillig zur Verfügung gestellt hat». Diese Definition von Zwangsarbeit aus dem Jahr 1930 hat sich über die Jahre gehalten und ist nach wie vor ein Maßstab für die internationale Gemeinschaft. Zuletzt wurde sie durch das Protokoll zum Übereinkommen von 2014 bestätigt. In dem Übereinkommen von 1930 werden auch fünf Ausnahmen von der Zwangsarbeit genannt – Beispiele dafür, was Zwangsarbeit „nicht einschließen darf" –, wie etwa Arbeit während des Militärdienstes, für staatsbürgerliche Pflichten, als Folge

einer gerichtlichen Verurteilung, in Notsituationen und für kleinere kommunale Dienstleistungen. Ähnlich wie die Definition wurden diese Ausnahmen von der Zwangsarbeit in den folgenden Jahrzehnten in zahlreiche andere internationale Abkommen aufgenommen. Dies gilt sowohl für internationale Instrumente wie den Internationalen Pakt über bürgerliche und politische Rechte (Artikel 8 Absatz 3 Buchstabe c) als auch für regionale Instrumente wie die Europäische Menschenrechtskonvention (Artikel 4 Absatz 3) und die Amerikanische Menschenrechtskonvention (Artikel 6 Absatz 3). In all diesen Instrumenten sind die Ausnahmen vom Verbot der Zwangsarbeit aus dem Jahr 1930 wortwörtlich enthalten.

Nach dem Zweiten Weltkrieg entwickelten die Vereinten Nationen und die Internationale Arbeitsorganisation zwei weitere Instrumente. Das UN-Zusatzübereinkommen über die Abschaffung der Sklaverei von 1956 befasste sich zwar nicht direkt mit der Frage der Zwangsarbeit, führte aber das Konzept der „sklavereiähnlichen Praktiken" ein, dass die zusätzlichen ausbeuterischen Formen der Schuldknechtschaft, Leibeigenschaft, Zwangsheirat und Kinderarbeit umfasst. Im Gegensatz dazu werden im IAO-Übereinkommen Nr. 105 über die Abschaffung der Zwangsarbeit von 1957 fünf verschiedene Umstände genannt, unter denen die Staaten verpflichtet sind, außerordentliche Anstrengungen zu unternehmen, um den Einsatz von Zwangsarbeit zu verbieten: als Mittel des politischen Zwangs oder der Erziehung, zu Zwecken der wirtschaftlichen Entwicklung, zur Arbeitsdisziplin, als Strafe für die Teilnahme an Streiks und als Mittel der rassischen, sozialen, nationalen oder religiösen Diskriminierung.

Im Anschluss an die Erklärung der IAO über grundlegende Prinzipien und Rechte bei der Arbeit von 1998 wurde das Gebot, Zwangsarbeit zu beseitigen, als eine der vier Säulen festgelegt, die den erneuerten Rahmen der Organisation untermauern. Mit diesem Beschluss wurde das Verbot für die Mitgliedstaaten automatisch einklagbar, unabhängig davon, ob sie die Übereinkommen Nr. 29 und Nr. 105 ratifiziert haben. Kurz danach scheint sich die IAO jedoch allmählich von ihrer ursprünglichen Betonung der Notwendigkeit der Beseitigung von Zwangsarbeit entfernt zu haben. Diese Verschiebung fiel mit der Einführung des Konzepts der „menschenwürdigen Arbeit" zusammen, das später in die Agenda 2030 für nachhaltige Entwicklungsziele im Jahr 2015 aufgenommen wurde, insbesondere unter dem Nachhaltigkeitsziel 8.7.

Es hat sich auch gezeigt, dass die Entwicklung der Definition des Verbots von Zwangsarbeit seit Beginn dieses Jahrhunderts auf anhaltende Herausforderungen gestoßen ist. Diese Komplexität ist mit Verbindungen zu anderen Formen der Ausbeutung verflochten, die im Laufe der Zeit neben der Sklaverei festgestellt wurden. Auf der Grundlage einer sich scheinbar abzeichnenden internationalen Praxis, insbesondere im wissenschaftlichen Diskurs, gibt es eine wachsende Neigung, all diese Figuren unter Sammelbegriffen wie „moderne Sklaverei" oder „neue Formen der Sklaverei" zusammenzufassen. Diese Tendenz spiegelt sich in der Arbeit des Sonderberichterstatters über moderne Formen der Sklaverei, in der Rechtsprechung des UN-Menschenrechtsausschusses und in den Ergebnissen der Berichte der IAO-Untersuchungskommissionen wider. Die in den Bellagio-Harvard-Leitlinien von 2012 unternommenen Anstrengungen zur Klärung der Bedeutung der einzelnen Begriffe und der Besonderheiten jedes einzelnen Falles unterstrichen die Bedeutung des zentralen Anliegens, das sich um die komplizierte Beziehung zwischen diesen verschiedenen Arten der Ausbeutung dreht.

Es ist jedoch unbestreitbar, dass das Protokoll von 2014 zum Zwangsarbeitsübereinkommen von 1930 die Definition von Zwangsarbeit, einschließlich ihrer Ausnahmen, aufgenommen und bekräftigt hat. Darüber hinaus wurde durch das Protokoll die Bedeutung der Verpflichtung der Staaten zur Verhinderung und Beseitigung von Zwangsarbeit, begleitet von spezifischen operativen Leitlinien für die Umsetzung, erneut bekräftigt und verstärkt. In ähnlicher Weise wurde durch die Änderungen 2022 der IAO-Erklärung von 1998 die zentrale Stellung der Beseitigung von Zwangsarbeit als einer der Eckpfeiler der Organisation bekräftigt.

Das zweite Kapitel ermöglichte nicht nur eine eingehendere Untersuchung der rechtlichen Grenzen des Verbots von Zwangsarbeit, sondern führte auch in die Frage der staatlichen Verantwortung für den Einsatz von Zwangsarbeit durch private Akteure ein, indem die Rechtsprechung sowohl regionale als auch nichtregionaler internationaler Gerichte analysiert wurde. Der Internationale Gerichtshof (IGH), der für die Beilegung von Streitigkeiten im Zusammenhang mit den IAO-Übereinkommen über Sklaverei und Zwangsarbeit zuständig ist, hat sich nie direkt und ausführlich mit der Frage des Verbots von Zwangsarbeit befasst. Seine Rechtsprechung, insbesondere in der Rechtssache *Barcelona Traction aus* dem Jahr 1970, hat jedoch gezeigt, dass das Verbot der Sklaverei

vom Gerichtshof als Beispiel für die Verpflichtungen eines Staates gegenüber der gesamten internationalen Gemeinschaft, d. h. als Verpflichtungen *erga omnes,* anerkannt werden sollte. In der Rechtssache *Jurisdictional Immunities of the State (Germany v. Italy)* aus dem Jahr 2012 befasste sich der Gerichtshof zwar mit Rechtsfragen, die von den für die vorliegende Untersuchung relevanten Fragen weit entfernt sind, ging aber für die Zwecke der Entscheidung und auf der Grundlage der zugrunde liegenden historischen Fakten davon aus, dass die Normen des Rechts der bewaffneten Konflikte, die die Deportation von Kriegsgefangenen zum Zwecke der Sklavenarbeit verbieten, *jus cogens* Normen seien.

Im Gegensatz dazu hat sich bei der Prüfung der Rechtsprechung regionaler internationaler Gerichte eine Vielzahl relevanterer und substanziellerer Elemente herauskristallisiert. Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zum Verbot der Zwangsarbeit hat im Laufe der Jahre eine Entwicklung bei der Auslegung des Verbots erkennen lassen. Bei einer eingehenden Untersuchung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte war eine nuancierte Entwicklung zu beobachten, die der Gerichtshof bei seiner Auslegung von Artikel 4 der Konvention durchlaufen hat. Die Auslegung begann mit der Bestätigung positiver Verpflichtungen im Jahr 2005 in der Rechtssache *Siliadin*, ging über in eine Einbeziehung des bis dato nie behandelten Szenarios des Menschenhandels, das in der Rechtssache *Rantsev* fast nahtlos mit anderen Formen der Ausbeutung verbunden wurde, und reifte in der Rechtssache *Chowdury* zur Ausarbeitung positiver Verpflichtungen im Fall der griechischen Lagerarbeiter aus. Diese Entwicklung gipfelte in einer Entscheidung der Großen Kammer, die scheinbar von *Rantsev* abwich und die Notwendigkeit einer klaren Abgrenzung zwischen den verschiedenen Formen der Ausbeutung in der Rechtssache *S. M. gegen Kroatien* betonte – eine Position, die durch die Auslegung in der Rechtssache *Zoletic* von 2021, der letzten chronologischen Äußerung der EGMR-Richter zu Artikel 4, bekräftigt wurde.

In den erläuternden Entscheidungen des Interamerikanischen Gerichtshofs für Menschenrechte wurde insbesondere in der Rechtssache *Hacienda Brasil Verde Workers* der Schwerpunkt auf die besonderen Herausforderungen gelegt, die das Phänomen der Sklavenarbeit in Brasilien mit sich bringt. Dieser Schwerpunkt veranlasste den Gerichtshof, den Inhalt der positiven Verpflichtungen der Staaten bei der Gewährleistung

der Einhaltung von Artikel 6 der Konvention zu umreißen. Darüber hinaus hat sich der Interamerikanische Gerichtshof aktiv an einem sinnvollen Dialog mit dem Europäischen Gerichtshof beteiligt, indem er sich häufig auf dessen Urteile bezog und dieselben Rechtsinstrumente zu Auslegungszwecken verwendete. Diese Zusammenarbeit ist ein bemerkenswerter Aspekt der kollektiven Bemühungen, ein Phänomen zu bekämpfen, das sich sowohl auf nationaler als auch zunehmend auf globaler Ebene manifestiert.

Obwohl sich der Afrikanische Gerichtshof für Menschenrechte und Rechte der Völker sich nicht mit der Auslegung von Artikel 5 der Charta befasst hat, der verschiedene Formen der Ausbeutung und Erniedrigung des Menschen abdeckt, ohne Zwangsarbeit ausdrücklich zu erwähnen, war es wichtig, die einschlägigen Antworten des afrikanischen Menschenrechtssystems anzuerkennen. Diese Antworten beruhen auf den vielfältigen Beiträgen der Afrikanischen Kommission zu diesem Thema und einem bahnbrechenden Fall, der 2008 vor dem ECOWAS-Gerichtshof verhandelt wurde und eine tiefgreifende Reflexion über die soziale Realität in Niger und ein entsprechendes Verständnis des Phänomens der Sklaverei bot.

Insbesondere durch die Auslegungen der Richter des Europäischen Gerichtshofs für Menschenrechte und des Interamerikanischen Gerichtshofs für Menschenrechte wird deutlich, dass das Hauptinstrument, das von regionalen Menschenrechtsgerichten eingesetzt wird, um Staaten für Verstöße gegen das Verbot der Zwangsarbeit durch Handlungen von Privatpersonen zur Rechenschaft zu ziehen, das Instrument der positiven Verpflichtungen ist. In diesem spezifischen Kontext hat sich dieses Instrument durch die Auslegung der Gerichte insbesondere in den letzten fünfzehn bis zwanzig Jahren weiterentwickelt und verfeinert. Was die Einhaltung des Verbots der Zwangsarbeit betrifft, so umfassen diese Verpflichtungen sowohl verfahrensrechtliche als auch materiellrechtliche Aspekte, wie die Schaffung eines angemessenen legislativen und administrativen Rahmens zur Bekämpfung der Zwangsarbeit innerhalb der nationalen Grenzen. Im Wesentlichen machen die regionalen Richter immer wieder geltend, dass der Staat dazu verpflichtet ist, einen angemessenen Rechtsrahmen und entsprechende operative Maßnahmen zur Verhinderung, zum Verbot und zur Sanktionierung des Phänomens zu schaffen, und somit eine entsprechende Verantwortung trägt.

Zu den Schlussfolgerungen aus der Analyse der Rechtsprechung der regionalen Menschenrechtsgerichte gehört auch, dass die sich entwickelnde Auslegung von Artikel

4 EMRK durch den Gerichtshof einen entscheidenden Punkt in Bezug auf die Kategorisierung der verschiedenen Formen der Ausbeutung erreicht hat. Ursprünglich wurden die verschiedenen in Artikel 4 EMRK genannten Formen der Ausbeutung – Sklaverei, Leibeigenschaft und Zwangsarbeit – vom Gerichtshof bis zum *Rantsev-Urteil* im Jahr 2010 schrittweise zusammengefasst, wobei sogar der Begriff Menschenhandel hinzugefügt wurde, obwohl er in der Konvention nicht ausdrücklich vorgesehen ist. Die jüngsten Verlautbarungen zu Artikel 4 deuten jedoch auf eine „erneute Ausweitung" des möglichen Anwendungsbereichs des Artikels hin. Dies ist auf die Behauptung zurückzuführen, dass die Formen der Ausbeutung nicht miteinander verknüpft sein müssen, sondern unabhängig voneinander bestehen können, wobei der Schweregrad zunimmt und möglicherweise ein breiteres Spektrum von Ausbeutungsfällen erfasst wird. Während sich die beiden anderen regionalen Gerichte, wie erwähnt, nicht ausdrücklich auf diesen spezifischen Aspekt konzentriert haben, hat namentlich der Interamerikanische Gerichtshof dennoch einen wichtigen Dialog mit dem Europäischen Gerichtshof aufgenommen. Diese Interaktion dürfte sich als wertvoll erweisen, wenn es darum geht, festzustellen, ob der geeignete Ansatz in der Analyse eines einheitlichen Konzepts der „neuen Formen der Sklaverei" besteht oder ob es weiterhin notwendig ist, zwischen den verschiedenen Formen der Ausbeutung zu unterscheiden, die unter dieses einheitliche Konzept fallen.

Im zweiten Teil des Kapitels wurden mehrere Fälle nationaler Gesetzgebung eingehend untersucht, die speziell geschaffen wurden, um Unternehmen für den Schutz der Menschenrechte in ihrer gesamten Lieferkette verantwortlich zu machen und dabei das Konzept der menschenrechtlichen Sorgfaltspflicht anzuwenden. Die jüngste Entwicklung in diesem Bereich, das deutsche Lieferkettengesetz, das im Januar 2024 für deutsche Unternehmen mit mehr als 1.000 Mitarbeitern in Kraft tritt, durchlief einen komplexen Entstehungsprozess. In Anlehnung an die UN-Leitprinzipien für Wirtschaft und Menschenrechte aus dem Jahr 2011 beschreibt das Gesetz eine Reihe von elf spezifischen Risiken, mit denen Unternehmen konfrontiert werden könnten, und bildet die Grundlage für verbindliche Sorgfaltspflichten. Obwohl sich das Gesetz noch im Anfangsstadium seiner Umsetzung befindet, wurde es von Wissenschaftlern bereits in drei Punkten kritisiert. Trotz seiner ehrgeizigen Ziele hat das Lieferkettengesetz in gewissem Maße zu einer eingeschränkten Haftung der Unternehmen geführt, was vor

allem auf das Fehlen einer zivilrechtlichen Haftung und die daraus resultierenden Rechtsunsicherheiten zurückzuführen ist. Darüber hinaus schließt der Anwendungsbereich des Gesetzes die Tätigkeit ausländischer Unternehmen aus, und die Bußgelder für Verstöße gegen die Sorgfaltspflichten des Gesetzes wurden als unzureichend im Verhältnis zur Größe der betroffenen Unternehmen angesehen.

Im Gegensatz zum deutschen Gesetz hat das französische *Loi de vigilance* die zivilrechtliche Haftungfür Unternehmen bereits 2017 eingeführt, indem ein Artikel des französischen *Code de commerce* geändert wurde, um darin die Pflicht zur Offenlegung für Unternehmen zu verankern. Ähnlich wie das deutsche Gesetz ist die Sorgfaltspflicht jedoch nicht als Ergebnis-, sondern als Mittelverpflichtung ausgestaltet. Das Gesetz wies allerdingsin den wenigen Fällen, in denen es um den Nachweis von Tatsachen vor Gericht ging, Verfahrensmängel auf, die von den Gerichten, die sich in den betreffenden Fällen für unzuständig erklärten, zunächst hervorgehoben wurden. Die niederländische *Wet Zorgplicht Kinderarbeid* und der englische *Modern Slavery Act* wurden später zu weiteren markanten Beispielen von Regulierungen, wobei sich erstere ausschließlich mit Fällen von Kinderarbeit befasste und letzterer neben dem Sorgfaltspflichtmechanismus neue Straftatbestände in den englischen Rechtsrahmen einführte.

Die von Wissenschaftlern geäußerte Kritik an den oben genannten Beispielen nationaler Rechtsvorschriften zur Sorgfaltspflicht im Bereich der Menschenrechte scheint in den Entwürfen für eine europäische Richtlinie über die Sorgfaltspflicht von Unternehmen im Bereich der Nachhaltigkeit (CSDD) berücksichtigt worden zu sein, sodass der Eindruck entsteht, diese nationalen Erfahrungen hätten als Testfeld für die Formulierung einer potenziell umfassenderen supranationalen Gesetzgebung gedient. Sehr bezeichnend ist, dass der Entwurf von Artikel 22 tatsächlich eine Haftungsregelung für Unternehmen vorsieht, die unter den Rahmen fallen. Nach der endgültigen Verabschiedung der CSDD können Unternehmen für Schäden haftbar gemacht werden, die entstehen, wenn sie den Verpflichtungen der Richtlinie nicht nachkommen, und zwar sowohl im Hinblick auf die Vermeidung negativer Auswirkungen als auch im Hinblick auf die Beseitigung tatsächlicher negativer Auswirkungen. Auf dieser Grundlage können Unternehmen haftbar gemacht werden, wenn infolge einer solchen Nichteinhaltung negative Auswirkungen auftreten, die hätten erkannt, verhindert, gestoppt oder minimiert werden müssen. Der Entwurf der EU-Richtlinie, der sich in der letzten Phase vor der

bevorstehenden Verabschiedung befindet, zielt auch darauf ab, die Verpflichtungen von Unternehmen aus Nicht-EU-Staaten zu umreißen, die innerhalb der EU-Handel treiben. Letzteres spiegelt sich auch in dem sich abzeichnenden Richtlinienentwurf der Europäischen Kommission wider, der sich auf das Verbot von Produkten konzentriert, die unter Einsatz von Zwangsarbeit auf dem EU-Markt hergestellt werden, und somit eine Beschränkung der Einfuhr solcher Produkte aus Drittländern vorsieht.

Ein bedeutendes Beispiel für internationales Engagement, das in diesem Zusammenhang untersucht wurde, ist die ehrgeizige Initiative im Rahmen der Vereinten Nationen, die insbesondere von einer zwischenstaatlichen Arbeitsgruppe im Auftrag des Menschenrechtsrats durchgeführt wird. Diese Initiative, die vor allem von den Staaten des sogenannten Globalen Südens unterstützt wird, zielt auf die Formulierung eines verbindlichen Vertrags ab, der die Beziehung zwischen Unternehmen und der Achtung der Menschenrechte regelt. Die Arbeit an dem Vertragsentwurf geht in das zehnte Jahr. Im Jahr 2023 wurde der dritte Entwurf vorgelegt, bei dessen Prüfung die vorliegende Arbeit zu der Erkenntnis kam, dass der Begriff „Zwangsarbeit" im gesamten Text nur einmal vorkommt, und zwar im Zusammenhang mit bewaffneten Konflikten. Dies ist ein Detail, das es wert ist, bei der Weiterentwicklung des Vertragsentwurfs durch nachfolgende Verhandlungen und Entscheidungen in Erwartung seiner potenziellen Auswirkungen in der endgültigen Fassung beachtet und hervorgehoben zu werden.

Aus der umfangreichen Rechtsprechung regionaler internationaler Gerichtshöfe, der nationalen Gesetzgebung und den supranationalen Verpflichtungen geht hervor, dass das Phänomen der Zwangsarbeit in den letzten Jahren zunehmend Beachtung gefunden hat. Wie aus den Dialogtendenzen des Interamerikanischen Gerichtshofs für Menschenrechte und der Unterstützung der Länder des so genannten Globalen Südens für die Initiative zur Schaffung eines Vertrags über Unternehmen und Menschenrechte hervorgeht, wurde auch in den Schlussfolgerungen des G20-Treffens in Indien im Jahr 2023 ein deutlicher Koordinierungsbedarf betont. Dieser kollektive Aufruf zur Koordinierung unterstreicht die Notwendigkeit, die Anstrengungen und Perspektiven weltweit zu bündeln, um die vielfältigen Herausforderungen zu bewältigen, die sich aus unternehmensbezogenen Menschenrechtsverletzungen insbesondere im Zusammenhang mit der Zwangsarbeit ergeben. Eine solche Koordinierung würde sich sowohl auf der Ebene der Auslegung und Rechtsprechung zwischen den Gerichten als auch auf der

Ebene der politischen Regulierung als unverzichtbar erweisen und dazu dienen, exzessive Entwicklungen in der westlichen Welt mit der Ausbeutung im globalen Süden zu verknüpfen, wo nach Angaben der IAO Zwangsarbeit am weitesten verbreitet ist, und einen umfassenden globalen Ansatz zur Bekämpfung von Zwangsarbeit und damit verbundenen Menschenrechtsverletzungen zu fördern.

Es besteht die begründete Hoffnung, dass der Europäische Gerichtshof für Menschenrechte seine evolutionäre Auslegung von Artikel 4 EMRK fortsetzen wird und dass die westlichen Standards für die Unternehmensverantwortung auf ihrem bewährten Weg fortschreiten werden. Für eine wirklich wirksame Initiative zur Eindämmung des Phänomens der Zwangsarbeit scheint es jedoch von entscheidender Bedeutung zu sein, dass diese Auslegungen und Standards ihren Einfluss auf den globalen Süden ausüben. Zu diesem Zweck müssen gesetzgeberische Bemühungen verstärkt werden, die rigoroser sind, zu mehr Befugnissen führen und die Verantwortung der Unternehmen entlang der gesamten Produktionskette stärker in den Fokus rücken. Dieser vielschichtige Ansatz könnte wesentlich zur globalen Kampagne gegen Zwangsarbeit beitragen und den Schutz der Menschenrechte weltweit vorantreiben. Auch wenn es ein ehrgeiziges und weit entferntes Ziel zu sein scheint, ist es wichtig zu erkennen, dass eine umfassende Zusammenarbeit und konzertierte Anstrengungen angesichts der Allgegenwärtigkeit von Zwangsarbeit unerlässlich sind, da globale Herausforderungen globale Antworten erfordern.

Im abschließenden Kapitel wurde die rechtliche Charakterisierung des Verbots der Zwangsarbeit geklärt und ein Einblick in die Art der staatlichen Verantwortung in Fällen gegeben, in denen private Akteure Zwangsarbeit einsetzen. In diesem Zusammenhang erwies sich eine gründliche Untersuchung der Legitimität der Verwendung eines allgemeinen Begriffs wie „moderne Sklaverei" zur Erfassung verschiedener zeitgenössischer Formen der Ausbeutung als wesentlich. Diese Voruntersuchung war unerlässlich, um festzustellen, ob es möglich ist, die Merkmale des völkerrechtlichen Verbots der Zwangsarbeit in ihrer Besonderheit abzugrenzen oder ob dem Verbot die Merkmale zugeschrieben werden können, die alle anderen Formen der Ausbeutung, *vor allem* die der Sklaverei, gemeinsam haben.

Trotz der offensichtlichen Neigung zur Übernahme dieses Begriffs, die auch von internationalen Organisationen praktiziert wird, zeigen Völkerrechtswissenschaftler

insbesondere im Bereich der Menschenrechte eine gewisse Zurückhaltung, ihn zu übernehmen. Dieses Zögern lässt sich auf mehrere Faktoren zurückführen. Erstens ist der Widerstand gegen die Verwendung eines kumulativen Begriffs für verschiedene Formen der Ausbeutung auf historische Überlegungen zurückzuführen. Wie in der Übersicht zu den die internationalen Übereinkommen im ersten Kapitel erläutert, entwickelte sich die Regelung der Sklaverei parallel zu der der Zwangsarbeit, aber getrennt davon. Im Gegensatz zu den konzertierten Bemühungen um die Abschaffung der Sklaverei zu Beginn des letzten Jahrhunderts wurde die Zwangsarbeit ab 1926 für einige Zeit geduldet. Die Anerkennung und Definition weiterer Formen der Ausbeutung erfolgte erst später, vor allem mit dem Zusatzübereinkommen über die Abschaffung der Sklaverei von 1956. In der Zwischenzeit wurde die Definition des Verbots der Zwangsarbeit weiter präzisiert, vor allem durch die Bemühungen der IAO, beginnend mit dem Übereinkommen über die Abschaffung der Zwangsarbeit von 1957. Darüber hinaus ist die Tatsache, dass Sklaverei, Zwangsarbeit und andere Formen der Ausbeutung in allen beobachteten internationalen Übereinkommen, einschließlich regionaler Menschenrechtsübereinkommen, nach wie vor getrennt aufgeführt werden, ein weiterer Grund, die Legitimität des Begriffs „moderne Sklaverei" abzulehnen.

Ein letzter wichtiger Faktor, der zu diesem Widerstand beiträgt, ergibt sich aus den inhärenten Unterschieden im rechtlichen Inhalt der Verbote von Sklaverei und Zwangsarbeit. Das Sklaverei-Übereinkommen von 1926 legte fest, dass Sklaverei einen «Zustand oder eine Bedingung einer Person, über die alle oder einige der mit dem Recht auf Eigentum verbundenen Befugnisse ausgeübt werden», beinhaltet. Das IAO-Übereinkommen über Zwangsarbeit von 1930, das nach wie vor gilt und durch das Protokoll von 2014 bestätigt wurde, definiert Zwangsarbeit als «jede Arbeit oder Dienstleistung, die von einer Person unter Androhung von Strafe verlangt wird und für die sich die Person nicht freiwillig zur Verfügung gestellt hat». Auf der Grundlage der derzeit geltenden Definitionen und wie in den Bellagio-Harvard-Leitlinien von 2012 bestätigt und bekräftigt, gibt es nach wie vor ein entscheidendes Merkmal für die Unterscheidung von Sklaverei und Zwangsarbeit: das Erfordernis von Eigentumsrechten. Dieses Erfordernis fehlt im Definitionsrahmen für Zwangsarbeit, der im Gegenteil auf ein Arbeits- oder Dienstleistungsverhältnis abstellt. Darüber hinaus bleibt die Zwangsarbeit innerhalb dieses Verhältnisses, das Bedingungen der Unfreiwilligkeit und

des Zwanges erfordert. Dieser besondere Kontext unterscheidet sich deutlich von dem der Sklaverei, was unterstreicht, wie wichtig es ist, das nuancierte Rechtsverständnis dieser unterschiedlichen Phänomene zu bewahren. Das Erfordernis des Eigentumsrechts für Sklaverei ist auch ein Schlüsselelement, das die Sklaverei von allen anderen im Laufe der Zeit festgestellten Formen der Ausbeutung unterscheidet. Die Verwendung eines kumulativen Begriffs für alle Formen der Ausbeutung würde daher die Gefahr einer zu starken Vereinfachung und damit einer Verwässerung des differenzierten rechtlichen Charakters dieser unterschiedlichen Phänomene mit sich bringen.

Diese Schlussfolgerung veranlasste dazu, die rechtliche Einordnung des Verbots der Zwangsarbeit unabhängig von seiner Gleichstellung mit der Sklaverei zu untersuchen. Daher wurde zunächst die Möglichkeit untersucht, das Verbot der Zwangsarbeit unter die zwingenden Normen des Völkerrechts einzuordnen. Im Gegensatz zum Verbot der Sklaverei scheint es jedoch nicht möglich zu sein, zu argumentieren, dass das Verbot der Zwangsarbeit unter *jus cogens* fällt. Diese Behauptung hängt vor allem mit der Natur zwingender Normen zusammen, die per definitionem keine Ausnahmen zulassen. Dies scheint im Fall des Verbots der Zwangsarbeit nicht zuzutreffen, da sowohl die regionalen Menschenrechtschartas, insbesondere die EMRK (Art. 4) und die Amerikanische Menschenrechtskonvention (Art. 6), als auch der Internationale Pakt über bürgerliche und politische Rechte (Art. 8) verschiedene Ausnahmen vorsehen. In der Tat scheinen die Staaten immer noch befugt zu sein, Zwangsarbeit im Falle von zivilen Verpflichtungen des Staates oder in Notfällen, aufgrund von strafrechtlichen Verurteilungen oder im Rahmen des Militärdienstes einzusetzen. Die Existenz solcher Ausnahmen wird auch durch das jüngste IAO-Zusatzprotokoll zum Zwangsarbeitsübereinkommen von 2014 nicht in Frage gestellt. Wie die maßgebliche Lehre betont, könnte das Verbot der Zwangsarbeit möglicherweise den Status von *jus cogens* erlangen, wenn die Staaten sich gemeinsam darum bemühen, diese Ausnahmen, die heute obsolet erscheinen, zu beseitigen.

Der Ausschluss des Verbots der Zwangsarbeit aus der Sphäre der zwingenden Normen erforderte zwangsläufig eine Prüfung der Frage, ob ein solches Verbot eine *erga omnes*-Verpflichtung der Staaten nach sich ziehen könnte. Bei dieser Untersuchung ging es darum, zu verstehen, welche dispositiven Verpflichtungen außerhalb der Sphäre der zwingenden Normen von ausreichender Bedeutung sind, um von den Staaten als *erga*

omnes angesehen *zu* werden, da es keine umfassenden Kriterien gibt, anhand derer die internationale Gemeinschaft und ihre Mitglieder die Werte, die sie für grundlegend halten, klar formulieren können. Bei der komplizierten Bewertung dieses Aspekts ging es vor allem darum, auf der Grundlage der in der Rechtsprechung des Internationalen Gerichtshofs enthaltenen Elemente die Art dieser Verpflichtung zu bestimmen. So wurden zum einen die vom IGH 1970 in der Rechtssache *Barcelona Traction* gegebenen Hinweise berücksichtigt, wonach die „grundlegenden Menschenrechte der menschlichen Person" *erga omnes* zu berücksichtigen seien. Zum anderen wurden die 1995 wiederum vom Gerichtshof in der Rechtssache *East Timor* genannten Faktoren berücksichtigt, d.h. Faktoren wie die Anerkennung in der UN-Charta, die Praxis der UN-Gremien, die Aufnahme in andere Verträge vorzugsweise mit universellem Charakter, die Anerkennung im allgemeinen Völkerrecht oder die Bestätigung in der Rechtsprechung des internationalen Gerichtshof selbst. Auf der Grundlage dieser Elemente schien es daher möglich, zu dem Schluss zu kommen, dass das Verbot der Zwangsarbeit eine *erga omnes*-Verpflichtung für die Staaten begründet, wenngleich eine endgültige Bestätigung der *erga omnes*-Gültigkeit dieses Verbots erst dann erfolgen kann, wenn dies vom Gerichtshof selbst festgestellt wird, was als einziger Faktor noch fehlt.

Im letzten Abschnitt des Schlusskapitels wurde schließlich eine umfassendere Untersuchung der Rahmenbedingungen für die staatliche Verantwortung für das Verbot von Zwangsarbeit als Folge des Handelns privater Akteure vorgenommen. Dazu war es zunächst notwendig, den Inhalt der betreffenden Begriffe zu definieren. Aus diesem Grund wurden „private Akteure" auf der Grundlage der Definitionen, die die Völkerrechtslehre diesem Begriff gemeinhin zuschreibt, als „Einzelpersonen", Personen oder Personengruppen betrachtet, die nicht als Völkerrechtssubjekte handeln und denen das nationale Recht Rechtssubjektivität in Form von juristischen Personen verleihen kann, wie z. B. im Falle von Unternehmen. Was hingegen die Verantwortlichkeit des Staates anbelangt, so wurde natürlich davon ausgegangen, dass ein Staat für jede völkerrechtswidrige Handlung verantwortlich gemacht werden muss, sei es eine Handlung oder eine Unterlassung, die ihm nach dem Völkerrecht zuzurechnen ist und die eine Verletzung seiner internationalen Verpflichtungen darstellt, je nach den spezifischen internationalen Verpflichtungen des betreffenden Staates.

Unter diesen Voraussetzungen können Staaten im Allgemeinen nicht für die Handlungen von Privatpersonen haftbar gemacht werden, es sei denn, diese Handlungen können dem Staat zugerechnet werden, unabhängig davon, ob die Person ein Staatsorgan ist oder nicht. Ist eine Zurechnung nicht möglich, kann der Staat nicht für das Verhalten des Einzelnen haftbar gemacht werden. Es ist jedoch möglich, dass der Staat für die Handlungen oder Unterlassungen seiner Organe im Zusammenhang mit der betreffenden privaten Handlung haftbar gemacht werden kann, insbesondere wenn eine internationale Norm verletzt wird, die dem Staat Verpflichtungen in Bezug auf nichtstaatliche Tätigkeiten auferlegt. Gerade in Bezug auf die letztgenannte Hypothese konnten drei mögliche Szenarien skizziert werden, die zwischen primären und sekundären Normen des Völkerrechts variieren und in denen eine staatliche Verantwortung für die Verletzung von Zwangsarbeit als Folge von Handlungen privater Akteure entstehen kann.

Das erste dieser Szenarien betrifft die Anwendung positiver Verpflichtungen, die als Primärnormen gelten, eine Lösung, die von regionalen Menschenrechtsgerichten weitgehend übernommen wurde. Dieser Ansatz basiert auf dem Nachweis eines Kausalzusammenhangs zwischen dem vom Kläger erlittenen Schaden, der in den definierten Geltungsbereich des Verbots fällt, und dem angeblichen Versäumnis des Staates, das betreffende Recht zu schützen. Im Wesentlichen zielen die positiven Verpflichtungen darauf ab, die Staaten für Unterlassungen bei der Erfüllung ihrer Pflichten zur Rechenschaft zu ziehen. Im Hinblick auf den Anwendungsbereich von Artikel 4 EMRK wurden diese Verpflichtungen erstmals vom Europäischen Gerichtshof für Menschenrechte in der Rechtssache *Siliadin* im Jahr 2005 eingeführt und in nachfolgenden Urteilen konsequent angewandt. In ähnlicher Weise wurden positive Verpflichtungen vom Interamerikanischen Gerichtshof für Menschenrechte im Jahr 2016 in der Rechtssache *Hacienda Brasil Verde* bezüglich des Anwendungsbereichs von Artikel 6 der Amerikanischen Menschenrechtskonvention angenommen und erweitert.

Die Rechtsprechung sowohl des Europäischen Gerichtshofs für Menschenrechte als auch des Interamerikanischen Gerichtshofs für Menschenrechte hat gezeigt, dass diese Verpflichtungen in Bezug auf ihre jeweiligen Bestimmungen über das Verbot von Zwangsarbeit hauptsächlich die Pflicht des Staates beinhalten, Fälle von Zwangsarbeit zu verhindern, zu verbieten und zu bestrafen. Darüber hinaus ist eine allmähliche Entwicklung und Stärkung dieser Verpflichtungen im Laufe der Zeit zu beobachten. So

haben sich positive materielle Verpflichtungen, wie die Verpflichtung des Staates zur Schaffung eines angemessenen Rechts- und Verwaltungsrahmens für das Verbot, und verfahrensrechtliche Verpflichtungen, wie die Verpflichtung zur Untersuchung und Durchführung operativer Schutzmaßnahmen zum Schutz der Opfer von Zwangsarbeit, entwickelt. Die regionalen Gerichte haben es jedoch bisher versäumt, eine endgültige Klassifizierung und Definition des Inhalts der positiven Verpflichtungen vorzunehmen, die die Staaten erfüllen müssen, um Unterlassungen und damit eine mögliche Haftung zu vermeiden. Einige Wissenschaftler haben jedoch den Versuch unternommen, diese Verpflichtungen zu kategorisieren, um den Schutz der Opfer zu verbessern und den Staaten eine klarere Anleitung für die Erfüllung ihrer Pflichten zu geben.

Ein ähnlicher Diskurs scheint für die umfassendere Sorgfaltspflicht der Staaten möglich zu sein, die im Gegensatz zu positiven Verpflichtungen zwischen primären und sekundären Normen des Völkerrechts liegt. Die staatliche Sorgfaltspflicht wird als Verhaltenspflicht verstanden, bei der der Staat verpflichtet ist, bestimmte Maßnahmen zu ergreifen und nach dem Kriterium der „verantwortungsvollen Staatsführung" zu handeln, für deren Unterlassung er haftet. Der Staat muss dann bestimmte Maßnahmen ergreifen, um den Schaden zu vermeiden, was wiederum bedeutet, dass der Staat für die Unterlassung einer erforderlichen Handlung haftbar gemacht werden kann. Betrachtet man die Sorgfaltspflicht als Verhaltensnorm zur Erfüllung einer Verpflichtung, so geht es, wie die Analyse der Doktrin gezeigt hat, um das Bewusstsein des Staates für das Phänomen, seine Fähigkeit, wirksam zu reagieren, und die Angemessenheit seiner Maßnahmen. In diesem Sinne hat der Menschenrechtsausschuss der Vereinten Nationen bestätigt, dass die Staaten dazu verpflichtet sind, die Erfüllung der im Internationalen Pakt über bürgerliche und politische Rechte enthaltenen Rechte zu gewährleisten, indem sie Personen vor Verletzungen schützen, selbst wenn diese von Einzelpersonen oder privaten Einrichtungen begangen werden, da ein Versäumnis eine Verletzung der Sorgfaltspflicht zur Verhinderung, Bestrafung, Untersuchung oder Wiedergutmachung des verursachten Schadens zur Folge haben könnte. Im Übrigen scheint der Interamerikanische Gerichtshof für Menschenrechte diesen Aspekt in seinem Urteil in der Rechtssache *Hacienda Brasil Verde* vollständig erfasst zu haben, da er seine gesamte Argumentation auf die Sorgfaltspflicht des Staates stützt.

Trotz der Kritik an seiner offensichtlichen Mehrdeutigkeit hat sich das Konzept der Sorgfaltspflicht aufgrund seiner Flexibilität und Anpassungsfähigkeit an die besonderen Umstände des Einzelfalls bewährt. Es besteht kein Zweifel daran, dass seine spezifischen Parameter durch die Vorschläge regionaler Menschenrechtsgerichte, so genannter *treaty bodies* und wissenschaftlicher Diskussionen in jedem Fall weiter verfeinert werden könnten. Im Wesentlichen haben sich die positiven Verpflichtungen und die Sorgfaltspflicht als zwei wertvolle Instrumente erwiesen, die sich vor allem durch die Rechtsprechung entwickelt haben, aber es besteht ein erhebliches Potenzial für ihre weitere Verfeinerung zu umfassenden Rechtsstandards, die darauf abzielen, Menschenrechtsverletzungen wirksam zu mildern, unabhängig davon, ob sie von staatlichen oder nichtstaatlichen Akteuren begangen werden.

Das dritte rekonstruierte Szenario, das auf der Ebene des Sekundärrechts angesiedelt ist und in dem Staaten für die Handlungen von Privatpersonen haftbar gemacht werden können, bedarf einer gesonderten Analyse. Dieses Szenario geht auf eine Lehrmeinung zurück, die besagt, dass dem Staat unerlaubte Handlungen privater Akteure zugerechnet werden können, wenn er sie wissentlich erleichtert oder an ihrer Begehung mitgewirkt hat. Eine solche Beziehung zwischen privaten Akteuren und dem Staat würde ein gewisses Maß an Komplizenschaft auf beiden Seiten voraussetzen, was zur sogenannten „Komplizenschaftstheorie“ führt. Außerdem würde diese Beziehung nicht so interpretiert, dass die Verantwortung des privaten Akteurs dem Staat zugeschrieben wird, sondern vielmehr dessen Verhalten. Diese letzte Tatsache veranlasste die Befürworter der „Komplizenschaftstheorie“ dazu, für die Aufnahme der Komplizenschaft als zusätzliches Kriterium für die Zurechnung des Verhaltens an den Staat in die Liste der Hypothesen zu plädieren, die in den Artikeln der Völkerrechtskommission über die Verantwortlichkeit der Staaten für völkerrechtswidrige Handlungen vorgesehen ist. Seit dem letzten Jahrhundert hat sich die „Komplizenschaftstheorie“ im Laufe der Jahre vor allem im Bereich des internationalen Terrorismusrechts durchgesetzt, wird aber inzwischen von einigen Wissenschaftlern auch auf den Bereich des internationalen Menschenrechts übertragen.

Diese Theorie scheint jedoch unter mehreren Gesichtspunkten keine Unterstützung zu finden. Wie einige Wissenschaftler seit Anfang des 20. Jahrhunderts argumentiert haben, könnten Einzelpersonen, die eine dualistische Perspektive auf das

Völkerrecht einnehmen, nicht gegen eine Norm des Völkerrechts verstoßen, da sie keine Subjekte dieser Ordnung seien. Daher könnten sie nicht als „Komplizen“ des Staates betrachtet werden. Auch wenn man den Rahmen des Völkerrechts selbst betrachtet, ist es offensichtlich, dass die Handlungen von Einzelpersonen von denen des Staates getrennt bleiben. Die Handlungen des Staates, der als einziges Rechtssubjekt in der Lage ist, die ihm auferlegten Verpflichtungen zu verletzen, unterscheiden sich von den Handlungen der einzelnen Akteure innerhalb seiner Gerichtsbarkeit. In diesem Zusammenhang würde die Beziehung zwischen Staat und Individuum also nur das beinhalten, was dem vom Sonderberichterstatter der Völkerrechtskommission zur Staatenverantwortlichkeit von Ago vorgeschlagenen, wenn auch kritisierten Konzept der „katalytischen” Wirkung entspricht. Aus dieser Sicht dient die Handlung des privaten Akteurs nur als Auslöser für die staatliche Haftung und nicht als Mittel, um dem Staat unmittelbar die Verantwortung oder das Verhalten für die Handlungen des Einzelnen zuzuweisen.

Auf der Grundlage der umfassenden Belege, die aus internationalen Abkommen, der Praxis und der Rechtsprechung zusammengetragen wurden, konnten daher einige allgemeine Schlussfolgerungen im Hinblick auf die Hauptziele dieser Arbeit gezogen werden. Im Hinblick auf die gegenwärtigen rechtlichen Rahmenbedingungen für das Verbot der Zwangsarbeit und seinen Status im internationalen Recht kann argumentiert werden, dass das Verbot der Zwangsarbeit aufgrund seiner einzigartigen rechtlichen Merkmale in seiner Einzigartigkeit und getrennt von anderen Formen der heutigen Ausbeutung untersucht werden muss. Die Annahme eines Sammelbegriffs wie „moderne Sklaverei” ist im internationalen Rechtsdiskurs noch nicht legitimiert. Ausgehend von dieser Prämisse schließt das Fortbestehen und die Anerkennung von Ausnahmen vom Verbot der Zwangsarbeit in den wichtigsten internationalen und regionalen Übereinkommen zwangsläufig die Möglichkeit aus, das Verbot in die zwingenden Normen des Völkerrechts aufzunehmen. Tatsächlich lässt das *jus cogens* per Definition keine Ausnahmen zu, so dass eine solche Aufnahme nicht möglich ist. In Anlehnung an die gängige Praxis und die vom Internationalen Gerichtshof genannten Elemente zur Identifizierung von Verpflichtungen *erga omnes* konnte darüber hinaus argumentiert werden, dass das Verbot der Zwangsarbeit bis zur endgültigen Bestätigung durch den Gerichtshof diese Art von Verpflichtung für die Staaten mit sich bringt.

Was die Art der staatlichen Verantwortung für den Einsatz von Zwangsarbeit durch private Akteure betrifft, so hat sich herausgestellt, dass die Staaten hauptsächlich für ihre Unfähigkeit verantwortlich gemacht werden, die notwendigen Mechanismen zur wirksamen Bekämpfung dieses Phänomens zu schaffen. Wie vor allem durch die reichhaltige und dichte Rechtsprechung der regionalen Menschenrechtsgerichte bestätigt wird, ist diese Unfähigkeit in dem Dreiklang der Pflicht zur Verhinderung, zum Verbot und zur Bestrafung der Ausübung von Zwangsarbeit durch private Akteure enthalten, wie er in den positiven Verpflichtungen und Sorgfaltspflichten vorgesehen ist. Die Verantwortung des Staates ergäbe sich somit nicht aus seiner Komplizenschaft mit dem privaten Akteur bei der Zulassung von Zwangsarbeit, sondern vielmehr aus seinem Versäumnis, einem solchen Verhalten entgegenzuwirken.

Auf der Grundlage dieser Schlussfolgerungen wurde bekräftigt, was zu Beginn der Arbeit angenommen worden war. Im Kontext der rasanten sozioökonomischen Veränderungen des 21. Jahrhunderts üben private Akteure einen erheblichen Einfluss auf damit verbundene Trends aus, insbesondere im Bereich der Arbeit. Dies hat zu einer grundlegenden Infragestellung der relativen Rolle der Staaten als Hauptakteure im internationalen Recht geführt, insbesondere im Hinblick auf ihre Verantwortung, die sich hauptsächlich aus einem unterlassenen Verhalten zu ergeben scheint, das durch ihre Unfähigkeit verursacht wird, angemessen auf Fälle von Zwangsarbeit zu reagieren, die auf privaten Akteuren zurückgehen. Das energische Vorantreiben nationaler und supranationaler Gesetzesinitiativen zur Regulierung dieses Phänomens, insbesondere indem Unternehmen zur Verantwortung gezogen werden, ist zweifellos ein Schritt in die richtige Richtung. Wie die Daten der IAO zeigen, ist Zwangsarbeit jedoch auch in Regionen weit verbreitet, in denen sich solche Gesetzesinitiativen nur schwer durchsetzen können. Um globale Phänomene wirksam zu bekämpfen, scheint daher eine konzertierte und umfassende globale Anstrengung erforderlich.

In dieser Hinsicht kann man auf ein beschleunigtes und verstärktes Ergebnis der umfangreichen Bemühungen um einen Vertrag über Wirtschaft und Menschenrechte hoffen. Ein solcher Vertrag könnte, wenn er umfassend ist und alle relevanten Fragen einschließt, zu einer stärkeren Sensibilisierung für die Auswirkungen der Wirtschaft auf die Zwangsarbeit führen. Ausgehend von den gesammelten Erkenntnissen scheint es darüber hinaus möglich, dass der menschenrechtlichen Sorgfaltspflicht in naher Zukunft

sowohl im privaten Sektor als auch unter den Staaten mehr Gewicht und Substanz beigemessen wird. Das Konzept der menschenrechtlichen Sorgfaltspflicht scheint in der Tat die nötige Flexibilität und Anpassungsfähigkeit zu besitzen, um wirksame globale Lösungen zur Bekämpfung des Phänomens der Zwangsarbeit umzusetzen.

In diesem Zusammenhang ist es von entscheidender Bedeutung, dass das Verbot der Zwangsarbeit unter den anderen Formen der Ausbeutung wieder in den Vordergrund rückt und sich als die wichtigste und am weitesten verbreitete Erscheinungsform der heutigen sozioökonomischen Dynamik erweist. Insbesondere die Internationale Arbeitsorganisation steht seit 1998 an der Spitze dieser Bemühungen und hat dem Kampf gegen Zwangsarbeit als einem der Grundpfeiler der Organisation die notwendige Priorität eingeräumt. Auch die jüngsten Entscheidungen des Europäischen Gerichtshofs für Menschenrechte, insbesondere die der Großen Kammer, scheinen diesen Weg zu bestätigen und den ausschließlichen Geltungsbereich des Verbots der Zwangsarbeit weiter auszudehnen.

In diesem Sinne ist es möglich, die IAO-Übereinkommen über Zwangsarbeit für die Zukunft zu überdenken und neu zu beleben. Einerseits wäre es in der Tat wünschenswert, dass die Staaten über die Überwindung oder zumindest über eine Neudefinition der überholten Ausnahmetatbestände nachdenken, die offenbar immer noch die 1930 festgestellte Zwangsarbeit zulassen. Andererseits wäre es zur Bekämpfung der beschriebenen Phänomene denkbar, dass die internationale Gemeinschaft, wie bereits 1957 angedeutet, die vollständige Unterbindung des Einsatzes von Zwangsarbeit zu Zwecken der wirtschaftlichen Entwicklung wirksam umsetzt.