



The European Union Should Not Ignore the Female Face of Forced Labour

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Abstract

This article discusses the European Commission's proposal for a regulation to ban products from forced labour in the European Union (EU) of September 2022. It argues that the Commission failed to conduct an impact assessment which could have addressed gender dimensions. This was omitted because the proposal would be 'urgent'. While not atypical—the EU has often turned a blind eye to women's issues—the gender-blind nature of the proposal is unfortunate. At least three indicators of forced labour that are used by the International Labour Organization—including the two most common indicators vulnerability and wage non-payment—have a differentiated impact on women. Drawing from the three-step framework in the Gender Guidance of the United Nations Working Group on Business and Human Rights, this article suggests a way to start discussions to include a gender perspective in the regulation.

Keywords

feminism, gender, global value chains, import bans

1. Introduction

Forced labour covers a wide variety of coercive labour practices where work or service is exacted from persons who have not offered it themselves voluntarily.¹ While collecting data on forced labour is notoriously difficult,² there was an estimated 2.7 million increase in the number of people in forced labour between 2016 and 2021.³ Nowadays, an estimated 27.6 million people are in forced labour worldwide, including allegedly, according to recent communications by United Nations (UN) representatives, in horticulture in Italy, on tobacco farms in Malawi, on cotton fields in Turkmenistan and in hospitality in the United King-

1. See Art 2(1) ILO Forced Labour Convention (No 29), 28 June 1930, 39 UNTS 55. For an overview of relevant legal and policy frameworks, see United Nations Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences (UN Special Rapporteur on contemporary slavery), Report (2018) UN Doc A/73/139, 12-16. All references to 'women' in this article should be understood to include girls as well as transgender and intersex women: cf United Nations Working Group on Business and Human Rights (WGBHR), Gender Dimensions of the Guiding Principles on Business and Human Rights (2019) UN Doc A/HRC/41/43, 1.
2. See generally International Labour Organisation (ILO), 'Hard to See, Harder to Count' (2012) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182096.pdf> accessed 20 October 2023; Trade and Labour Ministers of the US, Japan and the EU, 'Trilateral Joint Statement on the International Labour Organization's Forced Labour Estimates' (15 September 2022) <https://policy.trade.ec.europa.eu/news/trilateral-joint-statement-trade-and-labour-ministers-us-japan-and-eu-international-labour-2022-09-15_en> accessed 20 October 2023. All subsequent URLs were accessed on the same date.
3. ILO, 'Global Estimates of Modern Slavery Forced Labour and Forced Marriage' (2022) 2 <www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854733.pdf>.

dom.⁴ Forced labour per capita is highest in the Arab States and lowest in Africa.⁵ The international community committed to eradicating forced labour by 2030 in UN Sustainable Development Goal 8.7 in 2015.

Forced labour is experienced ‘in different ways as a result of gender-based discrimination’.⁶ The concept ‘gender’ refers to ‘socially constructed roles of and power relations among men, women and gender non-binary persons, all of whom may be affected differently by business activities’.⁷ Gender causes of forced labour are ‘dynamic’ and vary between and within geographical regions.⁸ From a binary perspective, women in forced labour are *disproportionally* represented in apparel, cut flowers, electronics, food services, tourism and waste collection, while men in forced labour are disproportionately represented in construction, fishing, manufacturing and the military.⁹ This article focuses only on women, considering they have long been discriminated against owing to patriarchal norms (ie the privileging of men in social relations) and power structures.¹⁰

Gender-discrimination is exacerbated by *intersecting* forms of oppression. The term ‘intersecting’ refers to the fact that people’s disadvantage is ‘composed of multiple and interlocking systems of power’.¹¹ Different forms of discrimination do not just ‘add up but ... interact’.¹² Thus, not all women suffer evenly. Amongst others, girls, women from minorities and poor women face heightened risks to end up and stay in forced labour.

The European Commission under Ursula von der Leyen made a commitment to achieve a Union of Equality in von der Leyen’s 2020 State of the Union address.¹³ The European

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4. *ibid* 2; UN Special Rapporteur on contemporary slavery (n 1) 29, 41; UN Special Rapporteur on contemporary slavery, Communication AL TKM 2/2021 (30 August 2021) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26624>>; UN Special Rapporteur on Trafficking in Persons, especially Women and Children and others, Communication AL OTH 41/2022 (5 July 2022), <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27338>>. See also Gary Craig, ‘“Flexibility”, Xenophobia and Exploitation: Modern Slavery in the UK’ in Ian Greener, Chris Holden and Majella Kilkey (eds), *Social Policy Review* 22 (Bristol University Press 2010) 173, 180-181 <<https://doi.org/10.51952/9781847427137.ch008>>; Ruggero Scaturro, ‘Modern Slavery Made in Italy—Causes and Consequences of Labour Exploitation in the Italian Agricultural Sector (2021) 3(2) *Journal of Illicit Economies and Development* 181 <<https://doi.org/10.31389/jied.95>>.
 5. ILO (n 3) 3.
 6. UN Special Rapporteur on contemporary slavery (n 1) 7. This report discusses gender-related dimensions of contemporary forms of slavery in certain sectors of the global economy. Section 3 of this article explains that women have been traditionally excluded and marginalised in the UN.
 7. *ibid* 9
 8. *ibid* 17.
 9. *ibid* 9; UN Special Rapporteur on contemporary slavery, Report (2022) UN Doc A/77/163, 32; European Commission and EEAS (European External Action Service), ‘Guidance on Due Diligence for EU Businesses to Address the Risk of Forced Labour in their Operations and Supply Chains’ (2021) 8 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3664>. Section 2 of this article explains that women have been traditionally excluded and marginalised in the European Union.
 10. Cf WGBHR (n 1) 9. For a further discussion of the concept ‘patriarchy’, see Aleydis Nissen, ‘Gender-Transformative Remedies for Women Human Rights Defenders’ (forthcoming) *Business and Human Rights Journal*.
 11. Shreya Atrey, ‘The Intersectional Case of Poverty in Discrimination Law’ (2018) 18 *Human Rights Law Review* 415 <<https://doi.org/10.1093/hrlr/ngy021>>. See also eg Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 4 *University of Chicago Legal Forum* 139; Jacco van Sterkenburg, Rens Peeters and Noortje van Amsterdam, ‘Everyday Racism and Constructions of Racial/Ethnic Difference in and Through Football Talk’ (2019) 22 *European Journal of Cultural Studies* 195 <<https://doi.org/10.1177/1367549418823057>>.
 12. Sophie Jacquot and Clémence Ledoux, ‘Les Partenaires Sociaux à l’Épreuve du Genre et de l’Intersectionnalité Dans l’Union Européenne’ (2021) 4(74) *Politique Européenne* 10, 12 <<https://doi.org/10.3917/poeu.074.0010>>.
 13. Ursula von der Leyen, President of the European Commission, ‘State of the Union Address’ (16 September 2020) <https://state-of-the-union.ec.europa.eu/state-union-2020_en>.

Union's Gender Equality Strategy presents policy objectives and actions to make significant progress towards a gender-equal EU by 2025.¹⁴ The Strategy pursues a dual approach of gender mainstreaming combined with targeted actions, and intersectionality is a horizontal principle for its implementation. Various key objectives in this Strategy are relevant for women in forced labour, including ending gender-based violence, achieving equal participation across different sectors of the economy and closing gender pay gaps.

Yet, this article argues that the Commission failed to apply a gender lens in its proposal for regulation to ban products from forced labour in the EU of September 2022 (proposal).¹⁵ The structure of the article is as follows. Section 2 of the article discusses the long and winding road that has led to the proposal. It explains that the Commission waited a decade to follow up on calls of the European Parliament. Regardless, the Commission framed its proposal as 'urgent' and, in so doing, failed to conduct an impact assessment which might have considered gender issues. Section 3 of the article argues that this is not atypical. Most regulations in the EU (and its Member States) are gender-blind (ie '[fail] to recognise that the roles and responsibilities of women/girls and men/boys are ascribed to, or imposed upon, them in specific social, cultural, economic and political contexts').¹⁶ While similar issues exist in the UN, the UN Working Group on Business and Human Rights (WGBHR) crafted a useful framework in 2019, the Gender Guidance, which was annexed to its report 'Gender Dimensions of the Guiding Principles on Business and Human Rights' in 2019.¹⁷ This framework—consisting of gender-responsive assessments, gender-transformative measures and gender-transformative remediation—is introduced in section 4 of the article. Notably, the WGBHR explained in its 2019 report that 'the gender-neutral nature of current modern slavery legislation' illustrates that 'neither States nor business enterprises have paid adequate attention to gender equality in discharging their respective obligations and responsibilities'.¹⁸ Admittedly, integrating such gender perspective in regulation on forced labour is not straightforward because the academic literature on women in forced labour is relatively limited.¹⁹ Therefore, section 5 of the article propels the debate forward. It analyses the *differentiated* impact of forced labour on women by drawing upon the (limited) gender information provided by the International Labour Organisation (ILO). Finally, section 6 discusses the proposal of the Commission to ban products from forced labour in the EU. After briefly summarising the content of the proposal, this section discusses the failure to apply a gender lens in this proposal. It then sums up the key elements that will need to be included in the final EU regulation. The proposed way forward builds upon the Gender Guidance of the WGBHR and suggests, amongst others, gender-transformative remedies that change direct and structural abuses affecting women in forced labour.

14. European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Union of Equality: Gender Equality Strategy 2020-2025 (2020) COM(2020)15 final.

15. Art 3 European Commission, Proposal for a Regulation of the European Parliament and the Council on Prohibiting Products Made with Forced Labour on the Union Market (2022) COM(2022) 453 final (proposal).

16. European Institute for Gender Equality, 'Glossary' <<https://eige.europa.eu/gender-mainstreaming/glossary#:~:text=Gender%20refers%20to%20the%20social,women%20and%20those%20between%20men>>.

17. WGBHR (n 1).

18. *ibid* 3. For a discussion of the concept 'modern slavery', see generally Judy Fudge, 'Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization' (2017) 27 *Social and Legal Studies* 414 <<https://doi.org/10.1177/096466391774673>>; Lisa Hsin, 'Modern Slavery in Law: Towards Continuums of Exploitation' (2020) 26 *Australian Journal of Human Rights* 165 <<https://doi.org/10.1080/1323238X.2020.1807115>>.

19. UN Special Rapporteur on contemporary slavery (n 1) 16.

2. A Long and Winding Road

The European Parliament has been asking the European Commission for a legislative proposal on an effective traceability mechanism for goods produced through forced labour and child labour since 2010.²⁰ At the time, it was said that such mechanism could pave the way for a complete ban on the importation of these goods in the EU, if (and as long as) more cooperative measures are not feasible. In 2016, the Parliament adopted an own-initiative resolution that reiterated the 2010 request, calling for a ‘balanced and realistic proposal for legislation’, including through ‘import prohibitions on products made using child labour’.²¹ In a 2021 resolution regarding sustainable and responsible corporate behaviour, the Parliament called for an import ban on products related to severe human rights violations such as child labour and forced labour.²² Finally, the Parliament called for banning goods made by forced labour and international cooperation with partners who support ending forced labour in a June 2022 resolution on new EU rules on products made by forced labour.²³

After a decade of calls from the European Parliament, the Commission undertook action. The Commission’s President von der Leyen first announced its plans to propose regulation that prohibits the placing and making available products made with forced labour on the EU market in the 2021 State of the Union.²⁴ The proposal has also been mentioned in the Commission’s Communication on Decent Work Worldwide and its proposal for a Directive on corporate sustainability due diligence of 2022.²⁵ Executive Vice-President and Commissioner for Trade, Valdis Dombrovskis stressed that the aim of the proposal was ‘to eliminate all products made with forced labour from the EU market’.²⁶

The Parliament and the Commission had good reasons for these initiatives. Forced labour is in direct opposition to the respect for human dignity and the universality and indivisibility of human rights as laid down in Article 21 of the Treaty on the European Union (TEU).²⁷ Article 5(2) of the EU Charter of Fundamental Rights (CFREU) also explicitly prohibits forced labour.²⁸ And the EU’s 2020-2024 Action plan on human

20. European Parliament, Human Rights, Social and Environmental Standards in International Trade Agreements (2009) 2009/2219(INI). See also European Parliament, EC/Uzbekistan Partnership and Cooperation Agreement: Bilateral Trade in Textiles (2010) 2010/0323(NLE)), Recommendation ix; European Parliament, Resolution on Child Labour in Cocoa Sector (2011) 2011/2957(RSP), 11; European Parliament, Resolution on Sustainability in the Global Cotton Value Chain (2012) 2012/2841(RSP)), 14 and 16; European Parliament, Annual Report on Human Rights and Democracy in the World 2013 and the European Union’s Policy on the Matter (2014) 2014/2216(INI)), 111.

21. European Parliament, Implementation of the 2010 Recommendations of Parliament on Social and Environmental Standards, Human Rights and Corporate Responsibility (2015) 2015/2038(INI) 12.

22. European Parliament, Resolution with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020) 2020/2129(INL).

23. European Parliament, Resolution on a New Trade Instrument to Ban Products Made by Forced Labour (2022) 2022/2611(RSP).

24. Ursula von der Leyen, President of the European Commission, ‘State of the Union Address’ (15 September 2021) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701>.

25. European Commission, Communication to the European Parliament, the Council and the European Economic and Social Committee on Decent Work Worldwide for a Global Just Transition and a Sustainable Recovery (2022) COM(2022)66 final; 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 (2022) COM(2022)71 final.

26. European Commission, ‘Commission Moves to Ban Products Made with Force Labour on the EU Market’ (14 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5415>.

27. Art 21 Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 (TEU).

28. Charter of Fundamental Rights of the European Union [2000] OJ C 364/1. See also Art 4(2) European Convention on Human Rights [1950] ETS 5 (ECHR).

rights and democracy includes as a priority the promotion of the eradication of forced labour.²⁹

Yet, with a system based on the principle of conferred powers, it must be positively established to what extent the EU has the competence to act externally to promote and protect certain values and interests and the methods by which it can do so. The proposal is based on Articles 114 and 207 of the Treaty on the Functioning of the European Union (TFEU).³⁰ Article 114 TFEU allows the EU to issue regulatory measures with the object of establishing or ensuring the proper functioning of the internal market. The proposal aims to avoid obstacles to the free movement of goods and remove the distortions of competition in the internal market that would result from divergences in national laws, regulations or administrative provisions regarding the placing and making available on the Union market of products made with forced labour. Article 114 TFEU has been used by the EU to justify action in a wide variety of domains.³¹ It was, for example, the legal basis of two other regulatory initiatives to implement that touch upon ‘business and human rights’ issues, the new Corporate Sustainability Reporting Directive and the (yet to be adopted) proposal for a directive on corporate sustainability due diligence.³² Article 207 TFEU confers exclusive competence relating to the Common Commercial Policy on the EU. This Policy needs to be conducted in the context of the principles and objectives of the EU’s external action, including the advancement of the universality and indivisibility of human rights and fundamental freedoms.³³ Article 207 TFEU was previously the legal basis of another regulation that fits in the EU’s ‘business and human rights’ agenda: the Conflict Minerals Regulation (2017).³⁴

The Commission did not carry out an impact assessment for its proposal. Such assessments are normally conducted to ‘collect evidence (including evaluation results) to assess whether future legislative or non-legislative EU action is justified and, if so, how it can best be designed to achieve relevant policy objectives’.³⁵ Impact assessments are required for all regulatory initiatives that have ‘significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options’.³⁶ They should identify stakeholders, such as women and ethnic minorities, in a balanced and comprehensive way.³⁷ However, a derogation was granted under the Commission’s Better Regulation Guidelines because forced labour requires ‘urgent action’.³⁸ This derogation does not seem to be warranted for two reasons. First, the EU did not consider the urgency of curbing forced labour and did not take any unilateral action on this front for more than two decades (since the ILO’s Declaration on Fundamental Principles and

29. EU, Action Plan on Human Rights and Democracy 2020-2025 (2020) 1.4.b <www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf>.

30. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

31. See Armin Cuyvers, ‘The Legal Framework of the EU’ in Emmanuel Ugirashebuja and others (eds), *East African Community Law* (Brill 2017) 119 <https://doi.org/10.1163/9789004322073_007>.

32. European Commission, Doc 2019/1937 (n 25); Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December amending Regulation (EU) No 537/2014, Directive 2004/19/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting [2022] OJ L 322/15. See further Aleydis Nissen, *The European Union, Emerging Global Business and Human Rights* (Cambridge University Press 2023) 134 and 136 <<https://doi.org/10.1017/9781009284295>>.

33. Arts 21-22 TEU.

34. Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold originating from Conflict-affected and High-risk Areas [2017] OJ L 130/1; Nissen (n 32) 97.

35. European Commission, Staff Working Document Better Regulation Guidelines (2020) SWD/2015/0111 final, 12.

36. *ibid* 30.

37. *ibid* 75.

38. European Commission (n 15) 8.

Rights at Work (1998) stressed that all Members of the ILO—including all EU Member States—have to respect, promote and realise all forms of forced labour, regardless of whether they have ratified the relevant conventions).³⁹ For at least one form of forced labour, forced child labour, I determined in previous work that the Commission went to great lengths *not* to adopt any regulation.⁴⁰ The EU’s position can be contrasted with the situation in the United States (US), where such regulation has existed for over nine decades.⁴¹ Section 307 of the Tariff Act (1930) prohibits the importation in the US of all goods, wares, articles and merchandise mined, suspected to be produced or manufactured, wholly or in part by forced labour (and/or indentured labour and/or convict labour) in any foreign country. This type of regulation is much older than any kind of other global value chain regulation that aims to reduce corporate human rights violations.⁴² Second, at the time of publishing this article, it has been one year since the proposal was rushed. It is currently on hold because other files have to be ‘treated as a priority’.⁴³

The most likely reason for the sudden ‘urgent’ nature of the proposal were the messages of alleged forced labour in Chinese factories that have been circulating since 2017.⁴⁴ Although the Commission’s proposal does not directly target specific products or regions in line with Article I:1 of the General Agreement on Tariffs and Trade,⁴⁵ it refers indirectly to Uyghur labour in China and migrant labour in Chinese factories outside China. In footnote 30, the proposal refers to the following resolutions of the European Parliament: the resolution of December 2020 on forced labour and the situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region and the resolution of December 2021 on forced labour in the Linglong factory and environmental protests in Serbia.⁴⁶ According to the latter resolution, passports of workers were allegedly confiscated in the Chinese Linglong Tire and Zijin mining com-

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39. ILO, Declaration on Fundamental Principles and Rights at Work (86th International Labour Conference (ILC) session of 18 June 1998 (as amended in 110th ILC session of 11 June 2022), 5; Dalia Palombo, ‘The US at the Margins of Business and Human Rights’ (2023) 25 *International Community Law Review* 247, 256 <<https://doi.org/10.1163/18719732-bja10105>>; Daria Pietropaolo and Kathleen Claussen, ‘Labor Movement and Trade’ in Julien Chaisse and Christoph Hermann (eds), *The International Law of Economic Integration* (Oxford University Press forthcoming).
40. Aleydis Nissen, ‘Kinderarbeid: Wat Zegt de Commissie-von der Leyen (Nog) Niet’ *EU Explainer* (10 September 2020) <<https://doi.org/10.5281/zenodo.10018542>>.
41. See Stephen Lee, ‘The Food We Eat and the People Who Feed Us’ (2017) 94 *Washington University Law Review* 1249, 1261-1263; Cedric Ryngaert, ‘Addressing North Korean Forced Labour by Means of International Economic Sanctions’ in Remco Breuker and Imke van Gardingen (eds), *People for Profit North Korean Forced Labour on a Global Scale* (Leiden Asia Centre 2018) 281, 290.
42. For overviews of recent transparency and value chain regulation, see Nissen (n 32) 8-12; Chiara Macchi and Claire Bright, ‘Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation’ in Martina Buscemi and others (eds), *Legal Resources in Business and Human Rights* (Brill 2020) 218-247 <https://doi.org/10.1163/9789004401181_012>.
43. Silvia Ellena, ‘Progress on Forced Labour Products Ban Too Slow Says Leading Rapporteur’ *Euractiv* (12 April 2023) <www.euractiv.com/section/economy-jobs/news/progress-on-forced-labour-products-ban-too-slow-says-leading-rapporteur/>.
44. UN Human Rights Office of the High Commissioner, ‘OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China’ (2022) <<https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf>> para 122; UN Special Rapporteur on contemporary slavery, Report (2022) UN Doc A/HRC/51/26, 23.
45. General Agreement on Tariffs and Trade, 15 April 1994, 1867 UNTS 154. However, the European Commission proposal (n 15) largely ignores other aspects of this agreement. I do not discuss this matter in depth in this article, but refer to the compatibility of import bans on products of fundamental labor rights violations with GATT in earlier work. See Nissen (n 32) 42-61; Aleydis Nissen, ‘Import Bans on Products from Forced Labor in the Trump Era’ (2022) 6(2) *University of Bologna Law Review* 367 <<https://doi.org/10.6092/issn.2531-6133/14495>>.
46. European Parliament, Resolution on Forced Labour and the Situation of the Uyghurs in the Xinjiang Uyghur Autonomous Region (2020) 2020/2913(RSP); European Parliament, Resolution on Forced Labour in the Linglong Factory and Environmental Protests in Serbia (2021) 2021/3020(RSP).

panies in Serbia.⁴⁷ The former resolution alleges that forced labour is an ‘intrinsic and generalized characteristic of cotton harvesting in the Xinjiang Uyghur Autonomous Region at least since 2018’.⁴⁸ Other reports have situated ‘mass’ forced labour in the same region and timeframe.⁴⁹ In response, other ILO Member States around the world have created import restrictions, such as the US Uyghur Forced Labor Prevention Act (2019) and the Canadian S-204 Customs Tariff (Goods from Xinjiang) Act (2021).⁵⁰

Any legislation in response to alleged mass-scale forced labour serves not just human rights purposes, but also economic purposes. The use of forced labour is associated with a comparative advantage, especially in labour-intensive goods.⁵¹ Import bans can take away this advantage away and serve as protectionist instruments. The proposal thus also serves the EU’s economic interests. This is a considerable incentive for the EU because, as argued in my recent monograph, the EU has to date only moved to adopt ‘business and human rights’ regulation if such regulation directly serves economic purposes.⁵²

Relying upon the principles of process-tracing, this hypothesised reason is not double decisive in the sense that all other hypotheses would be eliminated.⁵³ But it is also not just a spurious correlation. Strong evidence has been presented that ties the cause to the phenomenon over time. Whatever the reason for the ‘urgent’ nature of the proposal, the result is that the Commission has failed to assess *who* is particularly impacted by the proposal. Section 6.2 of this article explains in more detail how the Commission failed to apply a gender lens in the proposal. A gender impact assessment could—according to the glossary of the European Institute for Gender Equality—have considered whether the proposal affects ‘women and men *differently*’ and ensure that ‘gender equality is promoted’.⁵⁴

3. The Invisible Women

While an impact assessment might have contributed to the consideration of gender issues to a greater extent, it needs to be acknowledged that there are broader issues at play. Most regulations ignore the issues of women and those who suffer interlocking forms of discrimination, even when impact assessments are conducted. The radical feminist Catherine MacKinnon was one of the first to point out that ‘the law sees and treats women the way men see and treat women’.⁵⁵ Gender-blindness continues today and is reflected in legal systems.⁵⁶

47. European Parliament (2020) (n 46) F.

48. European Parliament (2021) (n 46) I.

49. Marco Colacurci, ‘Riconoscimento Facciale e Rischi per I Diritti Fondamentali Alla Luce Delle Dinamiche Di Relazione Tra Poteri Pubblici, Imprese e Cittadini’ (2022) *Sistema Penale* 1, 11-12.

50. See also Customs Amendment (Banning Goods Produced by Forced Labour) Bill 2021 (AU). For a current analysis of Chinese perspectives, see Matthieu Burnay and Li Bin, ‘Chinese Perspectives on Sustainable Development’ (2023) 25 *International Community Law Review* 291 <<https://doi.org/10.1163/18719732-bja10107>>.

51. Cécile Jacob and others, ‘Trade-Related Policy Options of a Ban on Forced Labour Products’ (2022) 23 <[www.europarl.europa.eu/RegData/etudes/IDAN/2022/702570/EXPO_IDA\(2022\)702570_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702570/EXPO_IDA(2022)702570_EN.pdf)>; Temisan Fanou, ‘Literature Review: Forced Labour Import Bans’ (2023) 2 <<https://gflc.ca/wp-content/uploads/2020/10/Forced-Labour-Import-Bans.pdf>>.

52. Nissen (n 32) 152-153 and 301.

53. Cf David Collier, ‘Understanding Process Tracing’ (2011) 44 *PS: Political Science and Politics* 823, 825 <<http://doi.org/10.1017/S1049096511001429>>; Andrew Bennett and Jeffrey Checkel, ‘Process Tracing From Philosophical Roots to Best Practices’ in Andrew Bennett and Jeffrey Checkel (eds), *Process Tracing: From Metaphor to Analytical Tool* (Cambridge University Press 2014) 1, 16-17 <<https://doi.org/10.1017/CBO9781139858472.003>>.

54. European Institute for Gender Equality (n 16) (emphasis added).

55. Catherine MacKinnon, ‘Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence’ (1983) 8 *Signs* 635, 644.

56. Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 67.

While some feminists find that ‘law reforms are a waste of time’, others have engaged with the law.⁵⁷

Gender discrimination can be explicit or implicit in regulation. On the one hand, there are laws that contain discriminatory measures, including procedural rules that accord inferior status to women.⁵⁸ Such laws are embedded in contexts that severely limit women’s social, political and economic independence. On the other hand, facially neutral legislation and policies can further entrench discrimination.⁵⁹ For example, while pregnant workers are increasingly being recognised in law,⁶⁰ attention has turned only recently to the invisibility of pregnancy losses.⁶¹

Foucauldian discourses of neoliberal governmentality—which study all types of governments, extending beyond the capacities of the state—have examined how gender is represented in the EU. While the EU ‘shall aim to eliminate inequalities, and to promote equality, between men and women’ in all its activities (Article 8 TFEU),⁶² many feminist scholars agree that the EU has not championed women’s issues in its regulations and policies.⁶³ There is a hierarchical understanding of gender in the European tradition, which considers women as subordinated and segregated.⁶⁴ At best, the EU ‘tolerates’ feminist discourse.⁶⁵

Parallel to feminist scholars, scholars in Third World Approaches of International Law (TWAAIL) have pointed out how the European tradition has been entrenched in legal systems around the world and in international law through colonisation, imperialism and racism.⁶⁶ While there is no need to romanticise or generalise the position of women in non-Western traditions, it has been well-documented that European interference has privileged economic rationalities, disregarded women’s paid work and worsened women’s relative access to economic resources and income.⁶⁷ Not much has changed. For example, the EU has recently allegedly actively supported the patriarchy and discrimination by sponsoring a land ownership program in Cote d’Ivoire.⁶⁸ In total, 225 out of 241 certificates were given to men, in

57. For an overview, see Susan Boyd and Elizabeth Sheehy, ‘Canadian Feminist Perspectives on Law’ (1986) 13 *Journal of Law and Society* 283, 294 <<https://doi.org/10.2307/1410013>>.

58. Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 33 on Women’s Access to Justice (2015) UN Doc CEDAW/C/GC/33, 23 and 25(a)(iv).

59. Marianne Constable, ‘Law as Claim to Justice: Legal History and Legal Speech Acts’ (2011) 1 *UC Irvine Law Review* 631.

60. Margaret Thornton, ‘Feminist Jurisprudence: Illusion or Reality’ (1986) 3 *Australian Journal of Law and Society* 5, 10 <<https://doi.org/10.22459/lqge.2022.02>>.

61. Susan Devaney, ‘Why It’s Time for All Pregnancy Losses to Be Recognised with Paid Leave’ *British Vogue* (5 April 2021) <<https://www.vogue.co.uk/arts-and-lifestyle/article/paid-leave-pregnancy-loss>>.

62. See also Arts 2 and 3(3) TEU; Arts 8, 10, 19 and 157 TFEU; Arts 21 and 23 CFREU.

63. Roberta Guerrina and others, ‘Does European Union Studies Have a Gender Problem? Experiences from Researching Brexit’ (2018) 20 *International Feminist Journal of Politics* 252 <<https://doi.org/10.1080/14616742.2018.1457881>>; Lyn Tjon Soei Len, ‘On Politics and Feminist Legal Method in Legal Academia’ in Marija Bartl and Jessica Lawrence (eds), *The Politics of European Legal Research* (Elgar 2022) 31, 37-42 <<https://doi.org/10.4337/9781802201192.00009>>.

64. Jacquot and Ledoux (n 12) 11.

65. Cf Doris Buss and Ambreena Manji, ‘Introduction’ in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart 2005) 3.

66. Diamond Ashiagbor, ‘Race and Colonialism in the Construction of Labour Markets and Precarity’ (2021) 50 *Industrial Law Journal* 506, 515-517 <<https://doi.org/10.1093/indlaw/dwab020>>. See also Penelope Simons, ‘International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights’ (2012) 3 *Journal of Human Rights and the Environment* 5, 29 <<https://doi.org/10.4337/jhre.2012.01.01>>.

67. Giovanna Maria Frisso, ‘Third World Approaches to International Law: Feminists’ Engagement with International Law and Decolonial Theory’ in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Elgar 2019) 479, 488 <<https://doi.org/10.4337/9781785363924.00038>>.

68. UN Rapporteuse Spéciale dans le Domaine des Droits Culturels and others, Communication AL CIV 1/2017 (2017) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23370>>.

defiance of International Land Coalition's, Tirana Declaration (2011). Such policies exacerbate women's subordinate economic and social position abroad.

4. UN Gender Guidance

Just as in the EU, women and peripheral perspectives have been traditionally excluded and marginalized in the UN.⁶⁹ The UN has formally been committed to gender mainstreaming since the adoption of the Vienna Declaration and Programme of Action in 1993.⁷⁰ Yet, women's issues are still often overlooked. Notoriously, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) (2011)—which serve as a catalysator for the EU's structured and targeted approach to matters concerning 'business and human rights' issues including the proposal that is discussed here⁷¹—failed to take a gender-lens, by referring to the UN Convention on the Elimination of All Forms of Discrimination against Women as a 'second order' treaty.⁷²

The UN Working Group on Business and Human Rights rectified this, by re-interpreting the UN Guiding Principles through a gender lens in the Gender Guidance, which was annexed to its report 'Gender Dimensions of the Guiding Principles on Business and Human Rights' in 2019.⁷³ This framework stimulates a more structural approach to gender equality.⁷⁴ It proposes that states (and businesses) should carry out gender-responsive assessments, gender-transformative measures and gender-transformative remedies.⁷⁵ States and businesses should periodically carry out gender-responsive assessments of regulations to identify existing gender inequalities and discriminations, as well as the impact of their respective current and future actions or omissions on such a terrain.⁷⁶ The assessment should be responsive, meaning that it should respond to *differentiated, intersectional and disproportionate* adverse impacts on women's human rights as well as to discriminatory norms and patriarchal power structures.⁷⁷ The findings of the assessments should inform states and businesses in taking a full range of measures to achieve substantive gender equality in all spheres of life.⁷⁸ Remedies should change existing power structures that discriminate against women and achieve substantive gender equality.⁷⁹ The measures and remedies should be

69. Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2nd edn, Manchester University Press 2022) 174 <<https://doi.org/10.7765/9781526163592>>.

70. UN General Assembly, Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23.

71. European Commission (n 15) Explanatory Memorandum, 3 and 7 referring to UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) UN Doc A/HRC/17/31 (UN Guiding Principles); UNHRC, Res 17/4 (2011), UN Doc A/HRC/RES/17/4. See Nissen (n 32) 90; Radu Mares, 'Corporate Self-Regulation and the Climate: The Legal Trajectory of Sustainability Due Diligence in the European Union' in Quirico and Baber (eds), *Implementing Climate Policies* (Cambridge University Press 2023) 12, 14-15.

72. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13; Penelope Simons and Melisa Handl, 'Relations of Ruling: A Feminist Critique of the United Nations Guiding Principles on Business and Human Rights and Violence against Women in the Context of Resource Extraction' (2019) 31 *Canadian Journal of Women and the Law* 113, 131-135 <<https://doi.org/10.3138/cjwl.31.1.06>>.

73. WGBHR (n 1).

74. Eva Grosser, 'Gender, Business and Human Rights: Academic Activism as Critical Engagement in Neoliberal Times' (2021) 28 *Gender, Work and Organization* 1624, 1633 <<https://doi.org/10.1111/gwao.12608>>.

75. WGBHR (n 1) 39.

76. *ibid* 40.

77. *ibid* 39 (emphasis added). While intersectional and disproportionate adverse impacts of forced labour on women are addressed in section 1 of this article, differentiated impacts are further discussed in section 5.

78. *ibid* 40.

79. *ibid*.

gender-transformative, meaning that they should bring change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping.⁸⁰ This framework is used in section 6 of this article below to make recommendations to include a gender lens in the proposal.

5. Differentiated Impacts of Forced Labour on Women

The Gender Guidance explains that ‘States should integrate a gender perspective in mandatory human rights due diligence laws, including those concerning modern slavery ...’⁸¹ Integrating such a gender perspective in regulation is, however, not straightforward. The former UN Special Rapporteur on contemporary forms of slavery, including its causes and consequences Urmila Bhoola noted in this regard ‘most existing initiatives have not directly linked efforts to achieve gender equality with the prevention and eradication of contemporary forms of slavery.’⁸² While feminist scholars have long studied women in the labour force, the literature on women in forced labour is more limited. Therefore, this section of the article propels the debate forward. It discusses the *differentiated* impacts of forced labour on women. This analysis is needed, as section 2 of this article set out that gender impact assessments consider whether women and men are treated differently and section 4 noted that gender-responsive assessments should respond to differentiated adverse impacts on women’s human rights as well as to discriminatory norms and patriarchal power structures.

To start this analysis, I draw from the (limited) gender information provided by the ILO. This is appropriate, as the definition of forced labour in the Commission’s proposal (included in the first sentence of this article) draws from the definition used by the ILO.⁸³ It has also been noted in section 2 of this article that the EU Member States, like all other members of the ILO (187 out of 195 countries in the world), have to respect, promote and realise the elimination of all forms of forced or compulsory labour, as defined in fundamental labour rights Conventions 29 and 105.⁸⁴ As in most other parts of the UN system, women’s issues have often been sidelined in the ILO.⁸⁵ Yet, in their edited collection *Women’s ILO*—published to celebrate the ILO’s recent centenary anniversary—Eileen Boris, Dorothea Hoehltker and Susan Zimmermann argue that women’s organisations have always made their voices heard in the ILO to a considerable extent.⁸⁶

For the purposes of this article, the ILO report on forced labour of 2022 helpfully explains that the indicators of forced labour are gendered (from a binary perspective).⁸⁷ Men are more likely to be coerced through threats of financial penalties and deportation, forced confinement in the workplace and confiscation of identity documents.⁸⁸ Women are more likely

80. *ibid.*

81. *ibid* Annex 1(e).

82. UN Special Rapporteur on contemporary slavery (n 1) 16 and 18.

83. Preamble 1 European Commission (n 15).

84. ILO Forced Labour Convention (No 29), 28 June 1930, 39 UNTS 55; ILO Abolition of Forced Labour Convention (No 105), 25 June 1957 320 UNTS 291.

85. Eileen Boris, Dorothea Hoehltker and Susan Zimmermann, ‘Introduction: A Century of Women’s ILO’ in Eileen Boris, Dorothea Hoehltker and Susan Zimmermann (eds), *Women’s ILO* (ILO and Brill 2018) 1, 4-6 <https://doi.org/10.1163/9789004360433_002>.

86. *ibid.*

87. ILO (n 3) 41.

88. *ibid.* Two notes need to be made. First, ‘confiscation of identity documents’ might disproportionately affect men because women and girls are ‘often denied their right to identity documents’ altogether, as noted in UN Special Rapporteur on contemporary slavery, Report (2014) UN Doc A/HRC/27/53, 9. An older ILO report also stresses that women would be more likely to have their passports withheld, while men would be more likely subjected to threats against family, denial of food and sleep and threats of legal action: Global Estimates of Modern Slav-

to be coerced through the two most common forms of coercion faced by workers: abuse of vulnerability and withholding of wages.⁸⁹ Women are also more likely to be subjected to violence.⁹⁰ Each of the three factors that have a differentiated impact on women in forced labour are discussed in the remainder of this section.

First, women are more likely to be placed in a situation where their vulnerability is abused.⁹¹ While it is important to not reinforce stereotypes that cast women as an homogeneous innately ‘vulnerable’ group of ‘victims’ without any agency,⁹² women are disproportionately affected by forced labour due to patriarchal norms and discriminatory economic structures.⁹³ As Surya Deva aptly explains, ‘slavery is essentially about lack of autonomy and informed choices, something that women have experienced for long in both public and private spheres.’⁹⁴ Accordingly, business models can be ‘configured to profit from women’s unequal position within the industry and society more broadly.’⁹⁵ While an obligation to stay in a job due to absence of alternative opportunities does not amount to forced labour, exploitation of this fact (and the extreme vulnerability which arises from it) to impose more extreme working conditions than would otherwise be possible, amounts to forced labour.⁹⁶ Women are disproportionately represented in jobs with the lowest levels of autonomy and job security.⁹⁷ For example, the Spanish strawberry industry recruits Moroccan mothers between the age of 25 and 45 to ‘ensure the return of these migrant women to their country of origin at the end of the harvesting period to care of their young children and/or families.’⁹⁸ In a communication on this case, the current UN Special Rapporteur on contemporary slavery, Tomoya Obokata, and his co-rapporteurs also touched upon the gendered dimensions of various other indicators of forced labour, including deception, restriction of movement and isolation.⁹⁹

Second, women in forced labour are more likely to be coerced through wage non-payment.¹⁰⁰ The Guidance on due diligence for EU businesses to address the risk of forced labour in their operations and supply chains (2021), the Commission and the European

ery: Forced Labour and Forced Marriage (2017) 35 <www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_854733.pdf>. Second, the ILO does not give enough information regarding the indicators that would have a differentiated impact on men to assess them. For example, while the ILO (n 3) 41 claims that men are more likely to be threatened with violence than woman, Joy Twemlow, Catherine Turner and Aisling Swaine have argued that ‘women’s everyday lives are frequently polluted with an atmosphere laden with potential threats’ that do not fit in the accepted delimited frames for experience: ‘Moving in a State of Fear: Ambiguity, Gendered Temporality, and the Phenomenology of Anticipating Violence’ (2022) 48(1) *Australian Feminist Law Journal* 87, 94 <<https://doi.org/10.1080/13200968.2022.2138185>>.

89. ILO (n 3) 41.

90. *ibid.*

91. *ibid.*

92. UN Special Rapporteur on contemporary slavery (n 1) 11 and 22.

93. Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (UNSW Press 2019) 151.

94. Surya Deva, ‘Slavery and Gender-Blind Regulatory Response’ *Cambridge Core Blog* (8 March 2019) <www.cambridge.org/core/blog/2019/03/08/slavery-and-gender-blind-regulatory-responses/>.

95. Genevieve LeBaron and Ellie Gore, ‘Gender and Forced Labour: Understanding the Links in Global Cocoa Supply Chains’ (2020) 56 *The Journal of Development Studies* 1095, 1097 <<https://doi.org/10.1080/00220388.2019.1657570>>.

96. ILO (n 2) 16.

97. Marianne Marchand and Rocío del Carmen Osorno Velázquez, ‘Markets/Marketization’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 428, 438 <<https://doi.org/10.1093/oxfordhb/9780199328581.013.22>>.

98. United Nations Relator Especial sobre la Extrema Pobreza y Los Derechos Humanos and others, Communication AL ESP 2/2020 (2020) 4 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25356>> (translation by the author).

99. *ibid.*

100. ILO (n 3) 41.

External Action Service (Commission and EEAS Forced Labour Guidance to EU businesses) stresses in this regard that ‘women are more likely to be paid lower wages than men and are more often linked to precarious, informal or irregular employment (risk factors for forced labour)’.¹⁰¹ Marxist and socialist feminists long studied that women’s work is often not seen or remunerated at all. They have examined the intricate interplay between capitalist production and the societal construct of ‘social reproduction’ in structuring women’s oppression.¹⁰² Marxist feminists argue that women are subjugated to benefit capitalists.¹⁰³ Familial ideology—which dictates that women’s economically undervalued reproductive labour serves to sponsor productive activities—justifies this system. Socialist feminists determined that individual men also accrue benefits by capitalising on the fruits of such labour within domestic settings, while simultaneously reaping the rewards of the gender-segregated division of labour at work.¹⁰⁴ Multifaceted activities associated with women’s social reproduction are intricately interwoven within the contextual milieu into which they are born.¹⁰⁵ While domestic servitude has garnered attention for a while,¹⁰⁶ the literature has only recently linked women’s unpaid work to forced labour in global value chains.¹⁰⁷ For example, Genevieve LeBaron and Ellie Gore document that women are most commonly trapped in forced labour in the Ghanaian cocoa industry, as they are doing most of the hidden work in under-remunerated or unpaid jobs.¹⁰⁸ Such women remain, however, invisible in official statistics, as they do not reflect the conditions under which women work on farms in contexts of servile marriages or debt bondage.¹⁰⁹ Similarly, UN Special Rapporteur on contemporary slavery, Bhoola, wrote that women are performing embroidery work under oppressive conditions in El Salvador.¹¹⁰ They need to meet quotas and targets (that increase over time) in order to be paid. If not, ‘they are reported to forfeit payment for the work they have completed, and in some instances the work that has been completed is even destroyed in their presence as punishment for not having met the production quota.’¹¹¹

Finally, women are more likely to be subjected to violence.¹¹² For example, Justine Nolan and Martijn Boersma write that forced labourers in the apparel industry are predominantly

101. Commission and EEAS (n 9). This is one of the few pronouncements on gender in this document that was not literally copied from OECD, ‘Due Diligence Guidance for Responsible Business Conduct’ (2018) 41-42 <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>>.

102. Suzanne Bergeron, ‘Formal, Informal and Care Economies’ in Lisa Disch and Mary Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford University Press 2016) 179, 287 <<https://doi.org/10.1093/oxfordhb/9780199328581.013.10>>.

103. See eg Nancy Fraser *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso 2013).

104. See eg Thornton (n 60) 42-43; Heidi Hartmann, ‘The Unhappy Marriage of Marxism and Feminism: Toward a More Perfect Union’ in Lydia Sargent (ed), *Women and Revolution* (Black Rose Books 1981) ch 10 <https://doi.org/10.1057/9780230117457_14>.

105. Frisso (n 67) 366.

106. See eg Judy Fudge and Kendra Strauss, ‘Migrants, Unfree Labour and the Legal Construction of Domestic Servitude. Migrant Domestic Workers in the UK’ in Cathryn Costello and Mark Freedland (eds), *Migrants at Work* (Oxford University Press 2014) 160 <<https://doi.org/10.1093/acprof:oso/9780198714101.003.0009>>.

107. LeBaron and Gore (n 95) 1096.

108. *ibid* 1109-1110.

109. UN Special Rapporteur on contemporary slavery (n 1) 27; UN Special Rapporteur on contemporary slavery (n 88) 9. This might be a reason why the ILO (n 88) said previously that men are more likely to be coerced through wage non-payment.

110. UN Special Rapporteur on contemporary slavery, Report (2017) UN Doc A/72/139, 39. See also UN Special Rapporteur on contemporary slavery (n 1) 35-36 on the textile industry in India and Pakistan.

111. UN Special Rapporteur on contemporary slavery, Report on her Mission to El Salvador (2016) UN Doc A/HRC/33/46/Add.1, 40

112. ILO (n 3) 41.

female, vulnerable to physical, verbal and sexual violence by male supervisors.¹¹³ The Commission and EEAS Forced Labour Guidance to EU businesses explains in this regard that ‘women suffer disproportionately from sexual and gender-based violence and harassment at the workplace to bring or keep them in forced labour’.¹¹⁴ As violence against women has gendered causes and impacts, it is emphasised that such violence is ‘gender-based’.¹¹⁵ It concerns violence ‘directed against a woman because she is a woman or that affects women disproportionately’.¹¹⁶ In the long history of slavery, gender-based violence against women has been a constitutional element.¹¹⁷ Yet, due to the stereotype that gender-based violence is a private issue within intimate relationships (as opposed to a structural issue),¹¹⁸ this has long remained under the radar.¹¹⁹ However, UN Special Rapporteur on contemporary slavery, Bhoola, stressed that there is a ‘causal relationship between neoliberal globalisation and violence against women [...], including through their exploitation in contemporary forms of slavery’.¹²⁰ Structural gender-based violence is functional to the interests of powerful economic groups and states.¹²¹

6. The Proposal

6.1 Content

This section first summarises the content of the Commission’s proposal for a regulation to ban products from forced labour in the EU. The proposal targets both domestically produced and imported products. Competent authorities of the EU Member States should carry out their work in two phases. During the first phase, the competent authorities shall assess the risk of infringement arising from the placing, making available on the Union market or exporting of products that are made with forced labour by any natural or legal person or association of persons that function as economic operators. If there is a substantiated concern of such infringement, then the competent authorities will be required to proceed to the second phase in which they investigate the products and operators concerned.¹²² Competent authorities shall assess all information and evidence available, including submissions made by civil society. If the competent authorities find a violation of the prohibition on forced labour products, they shall without delay adopt a decision containing (1) a prohibition to place or make the products available on the EU market and to export them; (2) an order for the economic operators to withdraw from the EU market the products concerned that have already been placed or made available on the market; and (3) an order for the economic

113. Nolan and Boersma (n 93) 83.

114. European Commission and EEAS (n 9) 8. This is another pronouncement on gender that was not literally copied from the OECD (n 101).

115. CEDAW, General Recommendation 35 on Gender-Based Violence Against Women (2017) UN Doc CEDAW/C/GC/35, 9.

116. *ibid.*

117. LeBaron and Gore (n 95) 1097; Arturo Aldama, ‘Violence, Bodies, and the Color of Fear’ in Arturo Aldama (ed), *Violence and the Body. Race, Gender and the State* (Indiana University Press 2003) 1, 5.

118. Barbara Stark, ‘Women and Globalization: The Failure and Postmodern Possibilities of International Law’ (2000) 33 *Vanderbilt Journal of Transnational Law* 503, 563 <<https://doi.org/10.4324/9781315092591-3>>.

119. Grosser (n 74) 1632.

120. UN Special Rapporteur on contemporary slavery (n 1) 19; See also Kalowatie Deonandan and Colleen Bell, ‘Discipline and Punish: Gendered Dimensions of Violence in Extractive Development’ (2019) 31 *Canadian Journal of Women and the Law* 24, 44 <<http://dx.doi.org/10.3138/cjwl.31.1.03>>.

121. Nissen (n 10).

122. European Commission (n 15) Art 5.

operators to dispose of the products concerned in accordance with national law consistent with EU law.¹²³ Customs authorities in turn act primarily on the basis of decisions taken by competent authorities, at the external EU borders to identify and stop products made with forced labour entering or leaving the EU market.¹²⁴

The Commission will create a public non-exhaustive and dynamic database and issue guidelines to support EU Member States. First, the database will provide public information on risks in specific geographic areas or with respect to specific products.¹²⁵ Second, the guidelines will provide information on forced labour due diligence and risk indicators of forced labour to economic operators and competent authorities.¹²⁶

The proposal addresses international cooperation to support successful implementation.¹²⁷ On the one hand, products banned from the EU single market cannot be rerouted to countries that do not have a ban in place (or vice versa).¹²⁸ On the other hand, import bans should be accompanied by tailor-made accompanying measures to support the efforts of partner countries and companies in tackling forced labour.¹²⁹ This is the only right approach, as bans on forced labour might have adverse effects and do not tackle substantial issues that lie at the root of it.¹³⁰

Access to remediation is omitted altogether in the proposal. This omission is threefold. First, the proposal does not include a formalised complaint mechanism to allow affected workers and civil society, including NGOs or trade unions, to submit complaints for investigation, despite calls for such mechanism by the European Parliament.¹³¹ Second, the proposal does not require companies to provide remediation to the affected people in forced labour prior to import restrictions being lifted, despite calls for such remediation from the European Parliament.¹³² Third, the proposal does not contain provisions on civil remediation, which form the backbone of remediation in business and human rights, according to the UN Guiding Principles.¹³³

6.2 Failure to Apply Gender Lens

This section discusses the failure to apply a gender lens in the proposal with reference to the content of the proposal. The proposal only considers gender issues indirectly. According to preamble 11 and 33, the guidelines should build on the Commission and EEAS Forced Labour Guidance to EU businesses.¹³⁴ This guidance contains a section on ‘gender-responsive due diligence’. This section copy-pasted most (but not all) gender-related provisions of the OECD Due Diligence Guidance for Responsible Business Conduct.¹³⁵

123. *ibid* Arts 4 and 6(4). EU Member States are required to determine penalties (*ibid* Art 30).

124. *ibid* Arts 15 and 16.

125. *ibid* Art 11.

126. *ibid* Art 23.

127. *ibid* Arts 24 and 26(1). See Art 2(1) International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 and art 4 Convention on the Rights of the Child 20 November 1999, 1577 UNTS 3 for the concept of ‘international cooperation’.

128. European Commission (n 15) 7.

129. *ibid* Art 26(2).

130. European Parliament (n 23) J; Nissen (2022) (n 45) 378.

131. European Commission (n 15) 7; European Parliament (n 23) 7.

132. European Parliament (n 23) 8.

133. Commentary to UN Guiding Principle 26. Access to civil remediation has not explicitly been mentioned in European Parliament (n 23).

134. Preamble 11 and 33 European Commission (n 15) referring to European Commission and EEAS (n 9).

135. Five provisions were not copy-pasted from OECD (n 101). Two of these provisions are mentioned in footnotes 101 and 114 above.

This indirect reference is not sufficient. The proposal relates to EU Member States, while the Commission and EEAS Forced Labour Guidance targets EU businesses. According to the UN Guiding Principles, the responsibility of corporations to respect human rights exists independently of the ability and/or willingness of States to meet their obligations and does not diminish these obligations. Yet, the connection is weakened between obligations that EU governments impose on themselves, and the responsibilities that are expected from companies. This issue has recently also been flagged by Marco Bronckers in relation to other rights and other recent responsible business initiatives in the EU.¹³⁶ He pointedly asked: ‘Why does the European Commission demand much more from business [...] than it can or wants to do itself?’¹³⁷

In particular, the omission of *any* remediation mechanisms in the Commission’s proposal has a disproportionate impact on women (and women human rights defenders).¹³⁸ Participating in grievance processes tends to be costly and time-consuming, especially to those not used to their protocols and norms.¹³⁹ Direct costs include filing fees, expenses for expert reports, representation and translations, transportation and internet, expenses to secure evidence and witnesses. There are also indirect costs, such as risks to social standing or professional development. The stronger under-remuneration of women’s work in combination with a lower level of literacy, gender stereotyping and a larger share in care responsibilities leads women to being less economically empowered to obtain and spend resources needed to access grievance mechanisms.¹⁴⁰ Those women who face intersectional discrimination are disproportionately impacted. Women who have a complaint can simply not afford to lose the limited income that their forced work provides for their households. In previous empirical research in the cut flowers industry (in which women are at a disproportionate risk of forced labour according to the Commission and EEAS Forced Labour Guidance to EU businesses), I have found that this dynamic impedes the willingness of women workers to seek access to justice.¹⁴¹ Similarly, women human rights defenders need considerable resources to engage in strategic litigation when they question status quo gender stereotypes and power relations.

Furthermore, fears of stigmatisation and further victimisation disproportionately discourage women from seeking remediation.¹⁴² Women are often also automatically blamed, even when there is an obvious abuse of power.¹⁴³ Some women fear that their husbands will find

136. Marco Bronckers, ‘The EU’s Inconsistent Approach Towards Sustainability Treaties: Due Diligence Legislation v. Trade Policy’ *EJIL:Talk!* (9 November 2022) <www.ejiltalk.org/the-eus-inconsistent-approach-towards-sustainability-treaties-due-diligence-legislation-v-trade-policy>.

137. *ibid.* It is useful to note here that contrary to European Commission (n 15), Commission and EEAS (n 9) 8 refers to remediation. This Guidance notes that businesses should provide remediation. Furthermore, companies should put in place a system to report crimes to local authorities. Where they have caused or contributed to forced labor, companies should cooperate with local authorities to help provide appropriate forms of remedy, in consultation with impacted rights holders. Other forms of remediation are, however, not mentioned in Commission and EEAS (n 9).

138. Cf WGBHR (n 1) 19; Ramona Vijeyarasa, ‘What is Gender-Responsive Legislation? Using International Law to Establish Benchmarks for Labour, Reproductive Health and Tax Laws that Work for Women’ (2020) 29 *Griffith Law Review* 334, 343-344 <<https://doi.org/10.2139/ssrn.3886059>>.

139. CEDAW (n 58) 17.a.

140. WGBHR (n 1) Annex 52(a).

141. Commission and EEAS (n 9) 8; Aleydis Nissen, ‘Kenyan Vulnerable Workers’ Access to Justice: A Case Study’ (2021) 7(2) *Labour & Law Issues* C.23, C.31 <<https://doi.org/10.6092/issn.2421-2695/14095>>; Aleydis Nissen, ‘Business and Human Rights: Remediation through a Gender Lens’ *In the Long Run* (20 April 2020) <https://aleydisnissen.com/gallery/publicationsp-Inthelongrun_Cambridge_Nissen_2.pdf>.

142. WGBHR (n 1) 14; CEDAW (n 58) 8.

143. Benedetta Faedi Duramy, ‘#MeToo and the Pursuit of Women’s International Human Rights’ (2020) 54 *University of San Francisco Law Review* 228.

out sexual harassment by their supervisors and blame them. Stigma and shame are particularly impactful stereotypes. For example, in the palm oil industry in Indonesia and Malaysia, an industry in which women are particularly at risk of forced labour, parents sometimes force their daughter to marry her rapist to lessen the shame, often after pregnancy occurs.¹⁴⁴

Gender-based violence is also used to silence women human rights defenders.¹⁴⁵ Technological developments have created new risks, including doxing and the publication of private or identifying information on the internet with malicious intent.

6.3 Way Forward

This section sets out the key elements that will need to be included in the final EU regulation. In line with the 2019 Gender Guidance and the accompanying report of the WGBHR (introduced in section 4 of this article), the regulation based on the Commission's proposal should be based on gender-responsive assessments and contain gender-transformative measures and gender-transformative remedies.¹⁴⁶ These three topics are discussed in turn (with reference to the Commission and EEAS Forced Labour Guidance to EU businesses).¹⁴⁷

To begin, a gender-responsive assessment of the proposal needs to identify existing gender inequalities and discriminations, as well as the impact of their respective current and future actions or omissions.¹⁴⁸ Due to the lack of a gender perspective in the proposal, the priority is to determine how the current omissions exacerbate the inequalities in social contexts in which men have been privileged. Gender-specific trends and patterns should be identified.¹⁴⁹ Future assessments—after the regulation enters into force—need to consider how any omissions and actions in the regulation (and measures that implement the regulation such as the proposed database with risk of forced labour and guidelines) adversely affect women.

Three points are important. First, the assessment should engage 'gender-sensitive' experts and 'include consultations with women's organizations, including those operating at the grassroots level'.¹⁵⁰ This assessment should identify hidden forms of forced labour that are carried out by women and it should 'identify, prevent, mitigate and address' impacts in which women are disproportionately impacted.¹⁵¹ Second, gender-disaggregated data should be collected and disclosed.¹⁵² It can, for example, be useful to include such data in the

144. Pesticides Action Network Asia Pacific, 'Submission to the UN Working Group on Discrimination Against Women and Girls Women's Human Rights in the Changing World of Work: The Case of Women Oil Palm Plantation Workers in Indonesia and Malaysia' (2019) <www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ChangingWorldofWork/CSOs/PANAP/PANAPSUBMISSIONONWomensHumanRightsintheChangingWorldofWork.docx>; Margie Mason and Robin McDowell, 'Rape, Abuses in Palm Oil Fields Linked to Top Beauty Brands' *AP* (Sumatra, 18 November 2020) <<https://apnews.com/article/palm-oil-abuse-investigation-cosmetics-2a209d60c42bf0e8fcc6f8ea6daa11c7?fbclid=IwAR3wQ88HTqjwvWbaQlHCNvrXc1A8FtZwKn6IpxrdEIdRRyeHmqxvbjEuI>>.

145. Nissen (n 10).

146. WGBHR (n 1) 39.

147. Commission and EEAS (n 9) 8.

148. WGBHR (n 1) 39-40.

149. Cf OECD (n 101) 42.

150. Cf WGBHR (n 1) 40; Commission and EEAS (n 9) 8. The European Institute for Gender Equality (n 16) defines 'gender sensitivity' as 'policies that take into account the particularities pertaining to the lives of both women and men, while aiming at eliminating inequalities and promoting an equal distribution of resources, addressing and taking into account the gender dimension'.

151. Cf Commission and EEAS (n 9) 8; Deva (n 94).

152. Commission and EEAS (n 9) 8. Note that WGBHR (n 1) refers to 'sex-disaggregated data'.

database with risks of forced labour. Third, the assessment should be able to respond to differentiated, intersectional and disproportionate adverse impacts on women's human rights.¹⁵³ Significant *differentiated* impacts of forced labour on women that need to be taken into account have been analysed in section 5 of this article (with reference to the Commission and EEAS Forced Labour Guidance to EU businesses). The examples mentioned in this analysis indicate that women who suffer *intersecting* forms of discrimination face particular risks.¹⁵⁴ Migrant women and mothers are some of the women who are at an increased risk of forced labour. Regarding *disproportionate* impacts, the assessment needs to take into account whether women are in particular at risk of forced labour, such as in certain sectors where large numbers of women work (as explained in section 1 of this article) and in (post-) conflict contexts.¹⁵⁵

Furthermore, the findings of the gender-responsive assessments should inform EU Member States in taking a full range of gender-transformative measures and remedies. Gender-transformative approaches typically seek to go beyond simple incorporation in order to reappraise the existing structures.¹⁵⁶ Such approaches should be capable of bringing change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping according to the WGBHR.¹⁵⁷ Again, gender-sensitive experts need to be involved in the determination of gender-transformative approaches.¹⁵⁸

On the one hand, a range of gender-transformative measures needs to be included in the regulation. Three points can be highlighted here.¹⁵⁹ First, the proposal should contain a formal commitment to achieve gender equality and affirmative actions to achieve substantive equality. The proposal should thus signal that gender bias is not neutral and natural and that there is a commitment to eradicate its existence.¹⁶⁰ The regulation needs to consider feminized forced labour and its differentiated and disproportionate impacts on women, in particular women facing intersectional adverse impacts, including migrants and girls. Thereto, the regulation can refer to relevant international law frameworks addressing gendered, racial and other hierarchies. Second, the WGBHR notes that 'decision makers' should be sensitized about gender equality.¹⁶¹ Mandatory bias reduction and gender-sensitivity training need to be provided to staff working in competent national authorities and customs authorities. Such training should raise awareness that distorted perceptions based on stereotypes about what is considered to be 'appropriate behaviour for women' result in 'decisions based on preconceived beliefs and myths rather than relevant facts'.¹⁶² Third, the WGBHR suggests that states should practice rights-based empowerment of women.¹⁶³ Women human rights

153. WGBHR (n 1) 39.

154. *ibid.* See also Commission and EEAS (n 9) 8.

155. WGBHR (n 1) 39. See also Commission and EEAS (n 9) 8; Handl and Simons (n 72).

156. Cf Anne Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' (1997) 19(2) *Human Rights Quarterly* 283, 288 <<https://doi.org/10.1353/hrq.1997.0015>>.

157. WGBHR (n 1) 39.

158. *ibid.* 39 and image therein.

159. *ibid.* The WGBHR furthermore suggests the following gender-transformative measures: communicating regularly with stakeholders, conducting advocacy for gender equality and taking affirmative actions and other measures to eliminate all forms of discrimination, harassment and violence against women.

160. Cf Suzette Coleo and Madeline Heilman, 'What Could Go Wrong? Some Unintended Consequences of Gender Bias Interventions' (2019) 7 *Archives of Scientific Psychology* 71, 73 <<https://doi.org/10.1037/arc0000063>>.

161. WGBHR (n 1) 39, image therein and Annex 50(e).

162. Cf CEDAW (n 58) 26.

163. WGBHR (n 1) 39 and image therein.

defenders support national authorities in discharging their obligations to protect women from forced labour, but these defenders face specific risks and reprisals.¹⁶⁴ Thereto, the regulation should refer to women human rights defenders, including whistleblowers.¹⁶⁵

On the other hand, gender-transformative remedies should be available for affected women and those facing intersecting forms of discrimination.¹⁶⁶ Again, bias reduction and gender-sensitivity training for those working in remediation mechanisms are valuable. Gender-transformative remedies address both direct and structural abuses affecting women in forced labour. First, gender-transformative remedies should be able to redress (insofar as possible).¹⁶⁷ This involves an assessment of whether the affected women benefit equitably in compensation payments, or other forms of restitution. Relevant other reparations include legal aid and social services including acknowledgement of wrongdoing, reintegration assistance, effective measures aimed at the cessation of continuing violations, alternative livelihood support measures, compensation and medical care.¹⁶⁸ Such remedies should be inclusive and participatory. This means that they should respect the autonomy of women. The UN Special Rapporteur on contemporary slavery, Bhoola, noted in this regard that ‘raid and rescue’ operations ‘designed to extract women and girls from situations of contemporary forms of slavery, often without their knowledge or consent’ may cause more harm than do good.¹⁶⁹ She also writes that reintegration should not be in skills that have traditionally been viewed as ‘female’, such as caring and sewing. Such skills do not break the ‘feminised’ patterns of poverty and make it more difficult for women to move out of sectors in which they are disproportionately carrying out forced labour including gender-based violence.¹⁷⁰ Second, gender-transformative remedies should address structural abuses affecting women in forced labour.¹⁷¹ They should deter not only the scrutinised corporation but also others from committing the same or similar abuses in the future. Thereto, gender-transformative remedies engage with governments and other stakeholders to reform discriminatory laws and discriminatory power structures.¹⁷²

7. Conclusion

This article has determined that the European Commission’s 2022 proposal to ban products from forced labour in the EU failed to apply a gender-lens. This is likely in part an unfortunate result of the Commission’s failure to conduct an impact assessment for this proposal, despite the latter having significant economic, social and environmental consequences. The Commission made the unwarranted claim that there was no time to conduct such impact assessment. The gender-blind nature of the proposal is also symptomatic of the more general ‘invisibility’ of women’s issues in the EU. The Gender Guidance of the UN Working Group

164. *ibid* Annex 2.4.e.

165. Commission and EEAS (n 9) 8. The Council of the European Union, ‘Ensuring protection – European Union Guidelines on Human Rights Defenders’ (2008) 16332/2/08 should also be amended to refer to women human rights defenders.

166. WGBHR (n 1) 40.

167. *ibid*.

168. UN Special Rapporteur on contemporary slavery (n 1) 59; OECD (n 101) 41.

169. UN Special Rapporteur on contemporary slavery (n 1) 50.

170. *ibid*. See Sylvia Chant, ‘The Feminisation of Poverty and the Feminisation of Anti-poverty Programmes: Room for Revision?’ (2008) 44 *Journal of Development Studies* 165, 166 <<https://doi.org/10.1080/00220380701789810>>.

171. Cf WGBHR (n 1) 39 and *image therein*.

172. Cf *ibid*.

on Business and Human Rights has then been used to outline which features the European Parliament and the Council of the EU need to consider in further discussions of the proposal of a forced labour mechanism, in collaboration with gender-sensitive experts. In relation to gender-responsive assessments, the article has argued that the EU needs, amongst others, to take into account three indicators of forced labour that have a differentiated impact on women. In relation to gender-transformative measures, it is suggested, amongst others, that mandatory bias reduction and gender-sensitivity training need to be provided to staff working in competent national authorities and customs authorities in the EU. Finally, gender-transformative remedies should address both direct and structural abuses affecting women in forced labour.

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