

## Sliding scales of health and harm: Lessons from personal protective equipment procurement in a crisis

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### ABSTRACT

The response to COVID-19 generated an unprecedented global demand for personal protective equipment (PPE), with governments and the private sector in all parts of the world competing to secure huge volumes of protective gloves, masks, aprons and medical gowns as quickly and cheaply as possible. As public health systems were put under enormous strain, States responded waiving their normal procurement processes to respond to the emergency. This article analyses a number of key discoveries regarding the supply chain of PPE as a consequence: firstly, many public health systems relied on large suppliers that showed little understanding of where the PPE was being sourced from; and secondly, once these were revealed, public buyers realised there was a high level of dependence on a limited number of countries where PPE is manufactured at the scale and quality that was needed – China and Malaysia in particular. Through the study of the way the USA, Swedish and UK responded to the need to procure PPE in an emergency, and the models they had set in place prior to the pandemic to address human rights risks in their supply chain, this article argues that there is not one single system which currently provides a comprehensive and adequate response to human rights abuses in public supply chains. Instead, this article argues that there are strengths in each system, and that a combination of all of them in some form could provide the basis for a more effective and resilient approach – not only during a crisis, but also in the longer-term. The insights and analysis in this article offer lessons and recommended approaches for future crisis responses.

### KEY WORDS

(maximum of 5 key words in alphabetical order)

COVID-19, labour exploitation, public procurement, supply chain, trade

### I. INTRODUCTION

From early in 2020, COVID-19 generated an unprecedented global demand for personal protective equipment (PPE). As more became known of the disease, the treatment of patients and how to protect the public from the effects of the pandemic, governments and the private sector in all parts of the world scrambled and competed with one another to secure huge volumes of protective gloves, masks, aprons and medical gowns as quickly and cheaply as possible.

Public health systems were, and remain, under enormous strain, which led States to waive their normal procurement processes to respond to the emergency. A number of key discoveries were made about the supply chain at this time of crisis. Firstly, many public health systems relied on large suppliers that showed little understanding of where the PPE was being sourced from. Secondly, once these were revealed, public buyers realised there was a high level of dependence on a limited number of countries where PPE is manufactured at the scale and quality that was needed – China and Malaysia in particular. This 'wake up moment' echoed a wider global recognition of the lack of resilience as well as limited transparency of supply chains in many other sectors.

At the same time as States and businesses were faced with the practical challenges to secure high volumes of PPE with the right specifications on cost, speed and quality, many ignored or waived their responsibilities to demonstrate human rights due diligence in their operations and supply chains. During 2020-21, a growing number of alarming reports of labour rights abuse and exploitation were revealed in the media and by NGOs – particularly in the rubber glove sector in Malaysia, and in the production of masks and other PPE equipment in the Xinjiang Province of China, using Uyghur labour in situations of state-sponsored forced labour.

This article explores whether and to what degree the human rights risks were factored into the acquisition of PPE by governments during the peak of the COVID-19 crisis.<sup>1</sup> It focuses on how States exercise their leverage to assess, prevent and mitigate the risks of human rights in their supply chains and whether they did so during the initial crisis response to the pandemic, or whether putting aside similar practices was necessary or inevitable. It analyses the three forms of leverage and tools that public bodies can resort to, namely: trade import restrictions, transparency in supply chain regulation and public procurement norms and processes. The article examines the way in which these levers were, and continue to be used by the USA, Sweden and the UK, and reviews their efficacy before and during the pandemic. In the USA, the government uses public procurement provisions to some degree, but mostly relies on trade regulations and import bans to manage human rights risks. In Sweden, contracting authorities have taken initiative and organised their own procurement regimes to engage with suppliers. In the UK, the regulatory framework to combat modern slavery in supply chains, through transparency and reporting regulation, has supported procurement practices to develop certain due diligence in public supply chains. Analysing these different approaches, we raise questions about their efficacy in preventing human rights violations and labour exploitation, and the relative benefits of engaging different stakeholders and processes to achieve similar or the same goals.

Through the study of the USA, Swedish and UK models, this article argues that there is not one single system which currently provides a comprehensive and adequate response to human rights abuses in public supply chains – particularly during an emergency or crisis. Instead, we argue that there are strengths in each system, and that a combination of all of them in some form could provide the basis for a more effective and resilient approach – not

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<sup>1</sup> Focus on PPE: because it is “*a critical component of infection control strategies in healthcare settings*” (quoted in Patel et al 244: Branch-Elliman W, Savor Price C, Bessesen MT, Perl TM. Using the pillars of infection prevention to build an effective program for reducing the transmission of emerging and re-emerging infections. *Curr Environ Health Rep*2015;2(3):226-235)

only during a crisis, but also in the longer-term. The insights and analysis in this article offer lessons and recommended approaches for future crisis responses.

The following sections consider the methodology and limitations of this study (Section 2), the nature of labour exploitation in global health supply chains and the impact of COVID-19 on working conditions (Section 3), the models developed by the three states as the primary object of study: USA, Sweden and UK (Section 4), and finally, an analysis of the strengths and weaknesses of these systems (Section 5). Our conclusions offer some lessons for ethical public procurement – both during a crisis and under normal conditions.

## II. METHODOLOGY AND LIMITATIONS OF THE DATA

This article draws primarily on available academic and grey literature to analyse how the three countries sought to identify and manage human rights risks in procurement of PPE supplies during the COVID pandemic. That said, there is little publicly available information on public procurement regulations, adherence (or lack thereof) to these procurement regulations or compliance with established systems. As such, we have had to draw on media reports, opinion pieces and anecdotal evidence for some findings. The authors have conducted informal, off-the-record interviews with key professionals in several procurement and public bodies, as well as others at the front line of PPE procurement during 2020, to understand the challenges they faced – especially at the early stages of the crisis. They described the initial desperate scramble to secure supplies – in the face of fierce competition between countries and even between public and private health bodies within the same country, and the decisions of ministers and senior government officials to put the health and protection of their own citizens and security of PPE supply above all other considerations.

Little is actually known about labour standards in the production of many PPE goods – including the countries where raw materials are sourced or the manufacturing sites where they are produced. The two high-risk issues that received considerable public attention during the COVID-19 pandemic were the manufacture of rubber gloves from Malaysia using vulnerable migrant workers, and a high dependence on procurement of PPE equipment from China, some of which were produced using state-imposed forced labour of Uyghur workers in Xinjiang or other provinces. Limited reporting also focused on protective masks made in North Korea using prison labour<sup>2</sup>. Beyond this, however, there is little information about the labour conditions in the production of PPE equipment, including aprons, gowns and uniforms made in countries known to have high risks of labour exploitation (including in Eastern Europe, Vietnam, Bangladesh, Mexico, Brazil, India and Turkey) (Trueba et al, 2021). Reports on the impacts of the pandemic on workers in global supply chains have tended to focus on other sectors (such as fashion, domestic labour and construction). In this article, Malaysia and China serve as a proxy for assessing human and labour rights risks in public health supply chains because of media and NGO attention on them, but it should not be

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<sup>2</sup> <https://www.theguardian.com/global-development/2020/nov/20/uk-sourced-ppe-from-factories-secretly-using-north-korean-slave-labour>

implied that these are the only countries where workers in PPE supply chains are subjected to human and labour rights abuses.

It is also important to add that the three countries studied in this article represent a small number of countries that have systems in place to identify, monitor and manage risks of human rights and labour exploitation in supply chains. The vast majority of public sector buyers in most countries have little or no visibility of their supply chains, nor do they ask questions about these human and labour rights risks. Moreover, they do not face scrutiny from the media, parliamentarians, NGOs or citizens about these issues.

Lastly, it should be noted that the three forms of leverage analysed in this article, that is, trade import restrictions, transparency regulations and public procurement processes, are not directly comparable, as each has a different scope of influence and different objectives. The public bodies responsible for achieving them are also different: while import restrictions are implemented on a national level, as we will see, most procurement processes work at a regional, subregional or local level. These public bodies have different constraints in terms of function, resources and expertise, as well as the capacity to work directly with suppliers. This, in turn, may affect their ability to implement one or more of the abovementioned forms of leverage, making it difficult to directly compare them. However, together they provide important elements to consider in addressing human and labour rights risks in supply chains.

### III. LABOUR EXPLOITATION IN HEALTH SUPPLY CHAINS AND THE IMPACT OF COVID-19

The problem of labour exploitation and abuse is not new in health sector supply chains,<sup>3</sup> nor in any other supply chain. Many supply chains have been characterised by widespread human rights violations long before the pandemic: abusive working conditions, excessive working hours, and inadequate health, safety and security measures have led to thousands of workers being harmed as a result of poor employment practices and poor business models. The majority of PPE supplies are manufactured in countries where labour rights are routinely violated even before the massive increase of demand. COVID-19 generated even greater pressure to produce goods at an accelerated rate, but did not necessarily create a new problem. In China, democratic freedoms have been denied to citizens, including workers, for decades. The lack of independent trade union representation and state-imposed forced labour in the Xinjiang province have been well documented. Similarly, there has been extensive evidence of exploitation and abuse of migrant workers in Malaysia - where manufacture and other sectors rely heavily on workers from South and East Asia. (Bhutta and Santhakumar, 2016). Other countries where PPE has traditionally been produced include Vietnam, Mexico and Thailand, which are all associated with poor labour conditions and are also reliant on migrant workers. Child labour and other forms of

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<sup>3</sup> Child labour in the surgical instruments supply chain in Pakistan has been documented for two decades, see ILO, Surgical instruments in Pakistan, 09 September 2002; [https://www.ilo.org/global/about-the-ilo/multimedia/video/video-news-releases/WCMS\\_074421/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/multimedia/video/video-news-releases/WCMS_074421/lang--en/index.htm) Add in Swedwatch reports + ETI reports There are other reports too relating to Malaysia etc. See BMA, etc.

exploitation have also been uncovered in other health supplies - including in surgical instruments sourced from Pakistan .<sup>4</sup>

Even prior to COVID-19, human rights violations had been exposed in the production of disposable gloves. In 2016 Dr. Mahmood Bhutta, a surgeon in the UK NHS and co-founder of the British Medical Association's Medical Fair and Ethical Trade Group, called attention to the conditions in which workers produced around 150 billion pairs of gloves per year, with a market value of over 5 billion USD, nearly exclusively for the medical sector (Bhutta and Santhakumar, 2016:3). At that time, Malaysia produced around two-thirds of all disposable gloves, with Thailand as the second largest supplier (Bhutta and Santhakumar, 2016:4). In the manufacturing industries of both countries, labour rights abuses were then, and remain, endemic because of their high reliance on vulnerable migrant workers (Bhutta and Santhakumar, 2016:8). Adding to these, there are also industry-specific hazards, which include exposure to chemical products, risk of fire, noise induced hearing loss, physical injuries and lung diseases.<sup>5</sup>

The COVID-19 pandemic amplified existing dynamics in the global economy, including the human rights risks to workers in global supply chains (ILO, 2020). During initial lockdowns, workers were quarantined in their living quarters with no ability for safe distancing, they had no wages or access to food, were denied health treatment, and their families back home lost out on their remittances. Once factories returned to full production, wages were often reduced, workers made to work excessive hours, while also expected to continue working and living in unsafe and unhealthy environments. In some cases, migrant workers were repatriated involuntarily without being paid wages they were owed, found themselves saddled with debts they could not repay due to exorbitant recruitment fee costs they had paid to secure their jobs, and denied the ability to return to their jobs for which they had been contracted. The weaknesses and governance failures in laws and policies to protect workers from labour rights violations were exacerbated in countries that relied on migrants, women and ethnic minorities. Even before COVID-19, such workers were most often excluded from any form of labour rights protections, and were also denied the right or opportunity to voice grievances or have access to remedy or justice for human rights abuses and violations. Therefore, workers that were already vulnerable to the risks of forced labour, modern slavery and human trafficking before 2020 became even more vulnerable during the pandemic.

During the initial wave of COVID-19, most governments prioritised the health of certain populations (i.e. the citizens of buying authorities) at the expense of harming others (i.e. the workers producing health protective equipment). After some time, when greater control of procurement systems was re-established and there was a more predictable supply of PPE, public authorities responded differently – in some cases, strengthening previously weak or ineffective due diligence systems, or putting new measures in place – in partnership with others. Some did this in response to media stories and pressure from NGOs. Looking back,

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<sup>4</sup> [Labour Standards in Pakistan's Surgical Instruments Sector](#), Ethical Trading Initiative & Pakistan Institute for Labour Education and Research, 2020.

<sup>5</sup> The abuses featured in various reports in the media and concerned major glove manufacturers such as Ansell, Kossan, Sempermed, Top Glove and WRP. (Bhutta and Santhakumar, 2016)

we reflect on whether the initial abandoning of human rights due diligence during the emergency procurement of PPE was inevitable or necessary when the pandemic hit.

In the early stages of the coronavirus pandemic, the recognition of the importance of personal protective equipment for use in hospitals, care homes and in public spaces prompted a crisis in supply chains and an unprecedented focus on procurement. In a number of countries, at the outset of the pandemic, devolved health authorities had complete autonomy to procure their own PPE. The required PPE was being manufactured in a limited number of countries such as Malaysia, which supplies 80% of the world's rubber gloves. Not only were countries competing with one another to buy equipment, but within countries, health authorities were competing with one another in a chaotic scramble to purchase PPE. Some health providers were stockpiling equipment, while others had shortages. This exacerbated the health care crisis: medical and health care workers all around the world had inadequate supplies of protective equipment, with the result that more people were getting ill and dying. Costs soared and the race to procure huge volumes at great speed, meeting the right quality standards, generated a procurement crisis that demanded more centralised intervention.

#### IV. ADDRESSING HUMAN RIGHTS RISKS IN PUBLIC SUPPLY CHAINS: IMPORT BANS, ANTI-TRAFFICKING AND MODERN SLAVERY REGULATION AND PUBLIC PROCUREMENT

In public procurement processes, the State shares a double burden of responsibility –to guarantee not only the rights of the end users of its goods and services (its' own taxpayers / citizens), but also those of people involved in their production and delivery processes, such as supply chain workers. Public health procurement systems also carry the additional responsibility of preventing harm and protecting the health of a State's own citizens, but also preventing harm and ensuring the health of those who produce and supply health products. Private sector suppliers to public bodies carry the responsibility to respect human rights in their own operations and supply chains, with an obligation to demonstrate that they have conducted human rights due diligence in their supply chains, and to remedy harm as and where it is found.

States can choose between different policy and regulatory approaches to try to address human rights violations in their supply chains. We have identified three main regulatory tools at their disposal: Trade restrictions, transparency in supply chain obligations and public procurement regulations.

Firstly, trade restrictions seek to prevent goods from entering the territory of the state, through banning the import of certain goods (regardless of whether procured by private or public sectors). These include, for example, goods which are believed to be produced with forced or child labour. Since 2005, the USA Bureau of International Labor Affairs (ILAB) has maintained a list of goods and their source countries that are at risk of being produced by child or forced labour in violation of international standards, as required under the Trafficking Victims Protection Reauthorization Act (TVPRA). As of September, 2020, the list included 155 goods from 77 countries (ILAB web, 2021). Similar measures have been considered at the international and regional level as well. For example, the UN Committee on the Rights of the Child recommended them on several occasions (CRC, 2011a, 2011b,

2011c), and, in the past, the European Parliament had also urged the European Commission to approve a regulation banning the import into the EU of goods produced using modern forms of slavery, forced labour, especially forced labour of particularly vulnerable groups, in violation of basic human rights standards (European Parliament, 2010). The use of these kind of bans, however, are not without controversy, and their effectiveness has been questioned when used beyond a last resort mechanism, when cooperation with suppliers is not feasible (e.g. Nissen, 2018).

Secondly, in recent years, a string of transparency in supply chain regulations have been passed by governments, which create obligations for private sector companies to disclose their efforts to identify, prevent and mitigate risks in their supply chain. These regulation cover a wide range of risks - ranging from minerals used in armed conflicts (US Dodd Frank Act, Section 1502; EU Conflict Minerals Regulation); the use of human trafficking, forced and child labour in supply chains (California Transparency in Supply Chains Act; UK Modern Slavery Act; Australia Modern Slavery Act; New South Wales Modern Slavery Act) or regulations that require companies to report more generally on a range of non-financial information covering human rights, social issues, environmental aspects and corruption (EU Non-Financial Reporting Directive). More stringent legislation includes proactive measures to substantively demonstrate measures to avoid and address human rights violations (e.g. EU Timber, French Duty of Vigilance, Dutch Child Labour Law, German Due Diligence Law). Very few states have chosen to extend these regulations to the public sector. In the UK a limited number of public bodies, mostly universities, were obliged to report under the UK MSA, whilst others did so voluntarily (Martin-Ortega, 2017). The UK government committed in 2020 to extending the reporting obligations to all public sector buyers under a certain threshold of spend and itself published a MSA statement that year. The Australia MSA is currently the only law that includes a public sector obligation to scrutinise its' own supply chains and report on them. Whilst these regulations have resulted in corporate policy changes, there is no evidence that they are having a positive impact in practice, on the rights of workers at factory level (Nelson et al., 2020).

Finally, the use of public procurement for social justice is not new, and dates back to the beginning of the XX century. In recent years, however, the role of governments as 'mega-consumers' has placed them in a unique position to influence the market, generate demand for sustainably produced goods and responsibly delivered services, and incentivise responsible business conduct, not only within states' borders, but also beyond them (Martin-Ortega and Methven O'Brien, 2019). At the international level, states have adopted commitments that draw explicit links between procurement and all dimensions of sustainability, i.e. economic, environmental and social, including the respect and protection of human rights. For example, the UN Guiding Principles on Business and Human Rights (2011) extends the obligation of the state to protect human rights when it acts as an economic actor, including through procurement (UNGP 6, see Commentary) and the UN Sustainable Development Goals include sustainable public procurement as part of its targets in SDG 12, regarding sustainable consumption and production (SDG 12.7). In March 2020 the group of states referred to as the Five Eyes (Australia, Canada, New Zealand, USA and UK) publicly made a commitment at the UN General Assembly to 'analyze, develop, and implement measures to identify, prevent and reduce the risk of human trafficking in government procurement supply chains.'

Additionally, some governments have provided tools and incentives and adopted risk assessment policies and procedures that require their procurement officers and contractors to assess the nature and extent of potential exposure to human trafficking in their supply chains; and take targeted action, including adopting appropriate due diligence processes, to identify, prevent, mitigate, remedy, and account for how they address human trafficking (Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains, Principle 1)<sup>6</sup>. Even the international and regional legal regimes, which have traditionally been restrictive in terms of using public procurement to address human rights, especially human rights in global supply chains (Martin-Ortega and Methven O'Brien, 2017), are being reinterpreted to provide states with tools to manage risks in their supply chains (WTO Plurilateral Agreement on Government Procurement (GPA),<sup>7</sup> on WTO system see Outhwaite, 2019). The EU normative framework<sup>8</sup> has been opening up to this possibility since the passing of the more recent EU Procurement Directives in 2014, and in 2021, the updated Guidance on Buying Social by the European Commission shows how public procurement can integrate human rights due diligence considerations within current EU rules.

Despite a growing awareness of the need for public bodies to exercise human rights due diligence in their supply chains, and increasing number of regulations and laws in countries with obligations for public bodies to ensure they fulfil their Duty to Protect, however, there remain very few countries that have robust procurement systems in place to prevent harm to workers, including labour exploitation and abuse (Martin-Ortega and Methven O'Brien, 2017; Martin-Ortega and Methven O'Brien, 2019).<sup>9</sup>

Having identified these regulatory tools, we have analysed three examples which rely on one or more of them at the same time. We characterize these three approaches as 'Nudge', 'Incentivise and Engage' and 'Comply or Die'. Whilst we recognise the nuances and complexities in each of these systems, and the challenges with trying to draw parallelisms, they are caricatured in this way for the purposes of our overall argument:

- The USA 'Comply or Die' model involves the banning of goods imports from suppliers that are found to use forced labour, child labour or human trafficking using import trade and border control legislation with stringent penalties for suppliers. These operate separately from anti-trafficking legislation involving federal public contracts.
- In Sweden, we see the 'Incentivise and Engage' model, which relies on public procurement regulations and systems to drive cooperation among contracting

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/872438/Principles\\_to\\_Guide\\_Government\\_Action\\_to\\_Combat\\_Human\\_Trafficking\\_in\\_Global\\_Supply\\_Chains.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872438/Principles_to_Guide_Government_Action_to_Combat_Human_Trafficking_in_Global_Supply_Chains.pdf)

<sup>7</sup> World Trade Organisation, Agreement on Government Procurement, as amended on 30<sup>th</sup> March 2012.

<sup>8</sup> The European framework comprises a number of directives, of which the most relevant ones for this analysis are Directive 2014/24 on Public Procurement and Repealing Directive 2004/18, and Directive 2014/25 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services and repealing Directive 2009/17.

<sup>9</sup> Insert OECD Guidelines, EU, MSA UK, MSA Australia, French, etc. etc. Cite very low numbers for OECD Survey 2018/9 on number of countries with firm social / labour requirements.

authorities. They provide suppliers with incentives and tools to drive incremental change where there are known human and labour rights risks.

- The UK model, or 'Nudge', is aligned with the country's overall strategy on transparency in supply chains and combatting modern slavery, taking a light-touch approach to business as well as public procurement regulation. Significant autonomy is given to regional and local authorities with devolution of financial and administrative authority. The guiding philosophy is to 'lead by example' and to limit the use of penalties for those that do not take this path.

The following subsections explore each model in more detail.

### **A. USA model: 'Comply or Die': zero tolerance public procurement regulations and import bans**

To manage human rights risks in public procurement supply chains, the USA has opted for what we are characterizing as a "comply or die" model, in which products which are allegedly produced with forced labour can neither be sold to the federal government nor can they even enter the country. This approach is used in both public contracting regulations as well as trade regulations. In 2015, the US passed the Trade Facilitation and Trade Enforcement Act<sup>10</sup> which prohibits the import of goods made by forced labour and allows customs officials to seize them at the border. This policy reflected a strong commitment by the Obama Administration to tackle trafficking in human beings more specifically focused on labour exploitation, where previous anti-trafficking efforts had prioritised trafficking for sexual exploitation. The Trade Facilitation and Trade Enforcement Act amended Section 307 of the 1930 Tariff Act on forced labour. Prior to the amendment, the import ban was only enforced if the product was already available in the U.S. market in quantities high enough to meet consumptive demand. The Trade Facilitation and Trade Enforcement Act closed this loophole effectively translating in all importing companies needing to conduct supply chain due diligence to prove to U.S. Customs and Border Protection (CBP) authorities their products were not made using forced labour. The prohibition is enforced by US Customs and Border Protection, the largest agency in the US Department of Homeland Security, which can decide to detain shipments at their US port of entry (Gianopoulos 2021, 1).

There are two main ways in which Section 307 is applied. If conclusive evidence is provided on the use of forced labour, a CBP Commissioner publishes a formal finding, and the importer has three months to prove the contrary, failing which the goods are seized (U.S. Customs and Border Protection, 2016). If incidence of forced labour can be proved "reasonably but not conclusively", the Commissioner can issue "Withhold Release Orders" (WROs) instead, to detain goods at the border pending further investigation. In this case, the importer can either re-export the goods elsewhere, or provide satisfactory evidence that forced labour was not used. If this is not satisfactory, the goods will be excluded (U.S.

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<sup>10</sup> <https://www.congress.gov/bill/114th-congress/house-bill/644/text#toc-HF4BB0BA6977E41648581227DC17880F5>

Customs and Border Protection, 2016). WROs can be applied for specific manufacturers, or for a category of good produced in a specific location, country or region (Gianopoulos 2021, 9 quoting 19 C.F.R. § 12.44(a)).

The main challenge to effective implementation of the legislation is the complexity and opacity of supply chains, which often make it hard to ascertain the products origins (Sadiq and Kessa, 2020: 637; Gianopoulos, 2021: 30). To address this, CBP guidance recommends that companies importing products in the US exercise “reasonable care” over their supply chains, which should include due diligence to identify where and how their goods are produced and address any forced labour risks which may arise (U.S. CBP, What Every Member of the Trade Community Should Know: Reasonable Care, An Informed Compliance Publication, September 2017).

Some academic and grey literature has been fairly critical about the use of import bans, highlighting their unintended negative impacts. Some argue that, if labour exploitation is endemic in the country or sector which has produced the goods subject to import bans, their impact is largely symbolic – isolating one company or work site operating in a sea of abuse and exploitation. Also, they argue, if other countries continue to buy from the same companies or countries, the import ban could have limited or no impact at all (ibid). Others have argued that import bans may be more likely to increase workers’ vulnerability for several reasons. Firstly, workers may lose their jobs if companies go out of business or are forced to suspend production – jobs they depend on to feed their families and repay their debts to secure their jobs. Secondly, when supply chain links with international companies that have due diligence requirements are lost, the chances of improved working conditions with this leverage are also lost. Thirdly, scholars have suggested that the US approach may be more appropriate in exceptional circumstances, where forced labour is systemic and sponsored by the state, such as in Xinjiang, where remediation is unlikely to be achieved.<sup>11</sup> These criticisms apply particularly to the use of the US Section 307.

The provision was hardly used until 2016, when the Trump Administration applied it as part of a foreign trade strategy. This was particularly evident during 2020-21: at the height of the COVID-19 pandemic, it was used on several occasions. However, the use of WROs has been inconsistent, and enforcement of Section 307 has encountered several challenges and criticisms (Cimino-Isaacs et al., 2021: 2). Leaving aside the fact that the CBP’s Forced Labour Division, in charge of enforcing the Act, is understaffed (“about six of CBP’s 62.450 staff are dedicated to tackling the entry of slave-made goods”) and underfunded, which limits its ability to enforce the Act comprehensively (Fields, 2019), the main issue highlighted by scholars is the lack of transparency regarding the rationale and evidentiary standards for applying, modifying and lifting WROs (Zsombor 2020; Gianopoulos 2021, 16). (Cimino-Isaacs et al., 2021: 28; International Labor Rights Forum, 2020: 4; Gianopoulos, 2021: 17, 24). This has several consequences.

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<sup>11</sup> See expert remarks during “Using Trade Tools to Combat Forced Labor: The Roles of Government, Business, and Civil Society,” Washington International Trade Association event, October 15, 2020; “Joint statement from NRF, AAFA, FDRA, RILA and USFIA on reports of forced labor in Xinjiang,” March 10, 2020; and Testimony by Stephen Lamar, President and CEO, AAFA, U.S. Congress, House Ways and Means Committee, Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang, hearing, 116th Cong., 2nd sess., September 17, 2020).

Firstly, it considerably impacts the ability of companies affected by them to address the problem (Gianopoulos, 2021:28). In fact, when issuing WROs, CBP does not recommend any specific follow-up action, nor does it require companies to implement due diligence practices (Gianopoulos 2021, 16). Instead, it only requests proof that forced labour is not present, or that the company has implemented remediation plans (Gianopoulos 2021, 16). Companies and NGOs have pointed out that Section 307 may discourage transparency and the provision of remedy altogether. In fact, trying to avoid WROs may lead the private sector to hide risk for abuses from CBP and, when violations are identified, drop their own suppliers, which removes the opportunity to address or change the abusive labour practices (Gianopoulos, 2021: 32). Secondly, lack of transparency and communication also impacts the ability of other US agencies to support enforcement of Section 307, or to implement more collaborative approaches, focused on prevention and remediation of human and labour rights abuses (Gianopoulos, 2021:28, 31). Lastly, the lack of transparency also makes it harder to judge the real impact of the US import bans (Zsombor, 2020).

Other sources, however, have a more optimistic view of the WROs. They argue that some companies, as a result of the WRO, started to address forced labour issues in their factories, for example by repaying crippling recruitment fees to migrant workers. In the Top Glove case, while the company had a policy to cover recruitment fees since the start of 2019 (Lee, 2020; Zsombor, 2020), the WRO pushed it to provide retrospective payments for those paid before then (Zsombor, 2020). Similar payback schemes have since been adopted by three more Malaysian glove producers, Hartalega, Kossan and YTY, despite not having experienced WROs of their own (Zsombor, 2020) (need more sources/verify). This has led some labour rights advocates to argue that the US measures were in fact having the intended impact and prompted action for fear that future sanctions may be applied to those not yet on the list. (Zsombor, 2020) US officials agree and argue that Section 307 can *“motivate private sector entities to conduct due diligence, address forced labor violations, and implement safeguards against the risk of forced labor”* (Gianopoulos, 2021: 30).

Overall, it has been argued, Section 307 may have more impact than transparency legislation, analysed next, which requires companies to report on their due diligence measures, because of its potential to affect their profits - especially in large markets like the USA (Gianopoulos, 2021: 30). However, increased transparency is needed to ensure its effectiveness, and to assess its impact in practice (Zsombor, 2020).

A similar comply or die approach is used in the context of public procurement in the US. Regulating public contracts by federal agencies, the Federal Acquisition Regulation contains a series of provisions prohibiting the acquisition of products produced by forced or indentured child labour (Subpart 22.15), which strengthen its commitments on trafficking in persons (Subpart 22.17). Under these provisions, to be awarded a contract, companies must confirm they will not sell a product on the ILAB List of Products Produced by Forced or Indentured Child Labor. As mentioned above, the ILAB maintains a list of products and their source countries which it has a reasonable basis to believe are produced by forced or indentured child labour. Executive Order 13126 seeks to prevent U.S. federal agencies from procuring goods made by forced or indentured child labour. If they do supply products on the List, the contractors, must certify that they have made a good faith effort to determine whether forced or indentured child labour was used to produce the items supplied (FAR, at Subpart 22.17). (Business & Human Rights Resource Centre, 2017: 22;(Conrad et al., 2015);

(Methven O'Brien et al., 2016). The global significance of these procurement regulations cannot be underestimated, given that the US federal government is the largest purchaser of goods in the world (Conrad et al., 2015). Unlike Section 307, which leaves all the controls to companies themselves, the law places a greater burden on procurement officials, further involving them in the process (Cimino-Isaacs et al 10). Like Section 307 though, the model is an all or nothing approach which may incentivise businesses either to disengage with the public sector or to cut ties with some of their own suppliers.

## **B. 'Incentivise and Engage'- the Swedish model**

In Sweden, 21 county councils and regions, responsible for public healthcare, have collaborated to identify and address human rights risks in their supply chains since 2010 (Gothberg, 2019: 166). Their model comprises three main elements: a) standardised human rights requirements for suppliers; b) a division of responsibility among the councils to exercise human rights due diligence and oversee follow up measures; and c) sharing costs and non-financial resources, such as staff time and capacity building (Gothberg, 2019: 168).

The model applies to eight spend categories, selected because of their high procurement volume, higher human rights and environmental risks, and which include disposable surgical products and gloves (Gothberg, 2019:170, Sjostrom and Scott Jacobsson, 2016:17). The requirements for suppliers are set out in a Code of Conduct, which incorporates the Universal Declaration of Human Rights, the ILO Core Conventions, and the UN Convention on the Rights of the Child (Art 32). It includes all provisions of national legislation on labour rights and environmental protection in the country of production, and the UN Convention against Corruption (Social Responsibility in Public Procurement, 2013). The Code is embedded in all invitations to tender for contracts, and there are supplementary contract clauses strengthening these provisions once the suppliers have been selected. These supplementary provisions include sanctions for non-compliance (including suspension following investigation and a period to improve or terminate if the suppliers consistently fail to engage). Suppliers are required to demonstrate that they have procedures based on the UNGPs human rights due diligence to monitor the conditions in which the goods and services are produced and delivered (Gothberg, 2019: 173).

This approach is based on the principle that bidders should not be excluded from tendering at the early stages if they do not meet these criteria at the outset, and the preference is to work with suppliers over time to improve their due diligence. Some exceptions have been applied on five occasions in recent years for known high-risk commodities: multi-function printers, gloves, surgical instruments and other medical articles (Sjostrom and Scott Jakobsson, 2016: 17). [Martina's comment: need to look it up and include it without undermining our argument (if they excluded bidders rather than engaging with suppliers)]

Once awarded a contract, suppliers must detail how they meet the Code requirements through a self-assessment questionnaire. The councils, supported by an Expert Working Group with specially trained officials, evaluate their responses and conduct follow-ups on identified risks, which may include audits at suppliers' factories and offices (Gothberg, 2019: 177; Methven O'Brien et al., 2016: 40; Sjostrom and Scott Jakobsson, 2016: 18). If a violation is discovered, contract termination is only used as last resort, as it would undermine the councils' commitment to help victims of abuse. Instead, public bodies use

their leverage to advance change and improvement over time, by developing a time-bound remedial action plan and monitoring its implementation by suppliers (Gothberg, 2019: 174, Methven O'Brien et al., 2016: 18). This approach has been found to work well as it incentivises good practice (ref). In some cases, a supplier may be suspended temporarily if gross violations are found, pending further investigation.

In the health sector, and rubber glove manufacturing in particular, the problem of labour rights violations was known about as early as 2015, following an audit commissioned by the Region of Jönköping on the supply chains of the Swedish supplier Bröderna Berner, which distributes gloves for Ansell (Bhutta and Santhakumar, 2016: 14). Audits identified 23 violations, including confiscation of passports, recruitment fees and compulsory overtime (Gripstrand and Muchlizar, 2015). In response, Ansell engaged in corrective action plans which, within a year, successfully addressed 21 of those violations, including a commitment to reimburse recruitment fees paid by workers in all factories it owned (Bhutta and Santhakumar, 2016: 18; Gothberg, 2019: 175). In this case, national collaboration on public procurement was regarded as an effective tool to improve conditions in supply chains.<sup>12</sup>

The strength of the Swedish approach is that it aims at changing the operating environment for suppliers to public sector buyers. Whilst it does not necessarily address root causes of exploitation (actually, none of the models analysed here do), the focus is on establishing effective and lasting partnerships with its key suppliers to help them manage and oversee improvements in their own sourcing practices and supply chains, beyond the limited timeframe of the contract. This model has welcomed by suppliers, as they argue it instils greater levels of trust and transparency. It is also well-regarded in the international human rights community - often cited as best practice in ethical public procurement today.

### **C. UK 'Nudge' approach – Transparency in Supply Chains and Public Procurement**

In the UK health sector, efforts to address supply chain issues date back to 2009, following a model that initiated the 'incentivise and engage' approach described above, but unfortunately failed to work effectively. As such, the UK model today is mostly focused on incentivising transparency and good practice without increasing regulatory burdens. In this section we explain the pioneering Labour Standards Assurance Systems (LSAS)<sup>13</sup> and the UK Modern Slavery Act (2015) that is more focused on transparency and public reporting of efforts to combat exploitation.

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<sup>12</sup> More recent example – all in Malaysia glove factories 2019-20:  
<https://inkopsradet.se/upphandling/handskar-i-hallbarhetens-tecken/>; <https://xn--hllbarupphandling-8qb.se/aktuellt/392-hallbar-upphandling-gar-samman-med-samverkanspartners-i-ett-brev-till-handskfoeretagens-branschorganisation-i-malaysia>; <https://www.xn--hllbarupphandling-8qb.se/aktuellt/436-svt-uppmaerksammare-region-oestergoetlands-handsk-uppfoeljningar>;  
<https://www.svt.se/nyheter/lokalt/ost/skuldslaveri-och-stickande-kemikalier-nar-vardhandskar-tillverkas>;  
article by Karin from November 2020 on webinar by Region F (Östergötland, Kalmar, Jönköping) & audits carried out in Malaysia 2019 on gloves. Action work seems to have continued during COVID - pre-existing actions to address supply chain vulnerability continued, but unable to start new ones on new supply chains at the beginning

<sup>13</sup> <https://www.supplychain.nhs.uk/about-us/sustainability/lzas/>

A decade ago, the UK's National Health Service (NHS) was arguably a world leader when it established the LSAS to prevent and mitigate against labour rights abuses. The system came about as a result of pressure from trade unions and civil society organisations – most notably the British Medical Association Medical Fair and Ethical Trade Group, which was established to advocate for greater worker protection in medical supply chains (Bhutta and Santhakumar, 2016: 3). It was and remains an important toolkit for labour standards management used by NHS Supply Chain, the largest supplier of goods to the National Health Service (Bhutta and Santhakumar, 2016: 17). In 2018 the Secretary of State for Health and Social Care changed its nature, but establishing it as a limited company wholly owned by that department. NHS Supply Chain has acted as a sector leader for other regional public health bodies in Scotland, Wales and Northern Ireland. Regional and local health service providers have also had the choice to contract directly.

The LSAS exemplified a light-touch, incentive-based model. It was developed with the Department of Health, and with the support of The Ethical Trading Initiative (ETI) and the British Medical Association. An Ethical Procurement for Health Handbook was first published in 2008 and updated in 2019.<sup>14</sup> The system was developed to implement the Supplier Code of Conduct introduced in 2009 (Trueba et al, 2021), based on the ETI Base Code – a voluntary code of practice for businesses covering nine ILO labour standards in global supply chains (forced labour, child labour, living wages, working hours, non-discrimination, health and safety, freedom of association, inhumane treatment and the right to employment contracts). The LSAS set out specific contract requirements for suppliers sourcing commodities known to be associated with labour rights violations or risks, such as surgical instruments, gloves and textiles.

It required suppliers to commission external third-party audits to assess how they were managing labour rights risks in their organisation and in their supply chains. This system predated the UNGPs, but was in essence a human rights due diligence framework covering the policies, processes and procedures that an organisation is expected to employ to identify labour standards issues, mitigate risk and drive improvement. It had a four-level system for suppliers in which contractors had to demonstrate eligibility by meeting certain criteria at entry level, and demonstrate continuous improvement as they progressed through the levels to secure and maintain contracts. As many of the NHS suppliers are small and medium enterprises (SMEs), the system also took account of limitations in their capacity to address labour rights risks occurring several tiers down their supply chains, where visibility was even lower than it is today.

One example of how this system worked was in 2015, when the NHS put out a tender for a new surgical gloves contract. NHS Supply Chain<sup>15</sup> was made aware of serious labour concerns from a report in 2014 by an NGO, Finnwatch (Bhutta In Good Hands p11). Using the LSAS system, it demanded that Sempermed and Ansell, two of its suppliers named in the

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<sup>14</sup> [https://www.bma.org.uk/media/2409/ethical\\_procurement\\_for\\_health\\_workbook\\_20\\_final\\_web.pdf](https://www.bma.org.uk/media/2409/ethical_procurement_for_health_workbook_20_final_web.pdf)

<sup>15</sup> NHS Supply Chain was established in 2015 as a public-private partnership set up to manage the sourcing, delivery and supply of healthcare products, services and food for NHS trusts and healthcare organisations across England and Wales. It was designed to improve operational efficiencies, resolve unwarranted variation in procurement practices, improve quality of goods and services, and deliver savings to NHS frontline services through centralised specialist buying functions.

report, should conduct labour rights audits at several factories, acknowledge these concerns and set out a specific plan to address these issues. (Bhutta and Santhakumar, 2016: 17). At the time, actions taken that resulted in improvements in those factories. The value of LSAS was recognised and it continued to be used.<sup>16</sup>

The lighter-touch, incentive-driven approach promoted by the LSAS was intended to reward transparency and good practice, to build trust and foster lesson-learning, and to promote continuous improvement through a collaborative, partnership approach with suppliers. Unfortunately, the LSAS became a 'tick-box' exercise that eventually lost its credibility because little investment was made in ensuring the system was effective in practice: NHS Supply Chain hired very few experienced staff with the skills and experience to monitor and evaluate the credibility of information provided by suppliers or to drive the programme it had established. There were no commercial benefits to reaching Level 4 – only additional auditing costs for suppliers – and as a result, most suppliers remained at the required minimum Level 3. It is a lesson about the limitations of a good light-touch system designed to reward good practice, but without the political will to impose penalties for non-compliance, or the necessary investments to make it work in practice beyond the minimum requirements. Attempts are now being made to re-design the system in a way that will be more effective, with additional technology platform components.

The pressures from civil society organisations, parliamentarians and an active media that prompted the LSAS, the Gangmasters Licencing Authority<sup>17</sup>, and other initiatives to tackle human rights abuses, prompted the UK government to adopt, in 2015, its Modern Slavery Act. Included in the Act is the Transparency in Supply Chains Clause 54 that requires all commercial entities operating in the UK with a turnover of £36m to produce an annual public statement setting out the steps they are taking to prevent modern slavery from occurring in their supply chains. The Act was the first-of-its-kind legislation and referred to as global leading practice in tackling modern slavery, forced labour and trafficking for the purposes of labour exploitation. While encouraging greater public transparency and accountability, there was no requirement for commercial organisations to develop any specific procedures or take any kind of action. At the time it came into effect, Section 54 did not apply to public bodies, but an increasing number of public sector chose to develop modern slavery policies and report on their efforts to prevent labour exploitation in their supply chains (Martin-Ortega, 2017).

The passing of the MSA brought some changes in the procurement system, in particular the obligation to exclude an economic operator that has been convicted of slavery, servitude, forced or compulsory labour child labour or an offence in human trafficking and other forms of trafficking in human beings.<sup>18</sup> If the supplier was convicted within the last five years, they

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<sup>16</sup> It is worth noting that in 2021 similar (and more serious) concerns remain today in rubber glove factories in Malaysia involving the same companies. amongst others. This highlights both the need to recognise the need for ongoing monitoring and due diligence, as well as engaging with governments and industry bodies in sourcing countries to deal with systemic issues of abuse and exploitation of migrant workers in the country as a whole. See also Trueba et al, 2021.

<sup>17</sup> Ref... GLA

<sup>18</sup> 6 Public Contracts Regulations 2015, Regulation 57(2)

must be excluded from participation in the procurement. However, the efficacy of these mandatory exclusions has been challenged due to the rarity of convictions for these crimes.

In 2019, the Government published Procurement Policy Note 05/19, 'Tackling Modern Slavery in Government Supply Chains', which requires Central Government Departments, their executive agencies and non-departmental public bodies to identify and manage modern slavery risks in their procurement activities. New guidance was published and on-line awareness training modules were made available for relevant staff.<sup>19</sup> In 2020, the Government committed to extend the obligation to produce a modern slavery statement to all public sector bodies (within the financial turn over threshold). It also took the step to 'walk the talk' on its own legislation, resulting in its first Modern Slavery Statement covering the whole of Government.<sup>20</sup> Thereafter, it was expected that each Department would produce its own Statement, but this was stalled due to the COVID-19 pandemic.

Section 54 of the MSA exemplifies the UK's overall light-touch 'Nudge' approach to business regulation. It is based on the assumption that civil society organisations will hold companies accountable, and that leadership for good reporting and ethical practices amongst businesses would be rewarded by public recognition, with no need for sanctions. This was strongly challenged by the stakeholders that had advocated for the legislation: they argued that transparency regulation alone without strong enforcement powers and substantive requirements can only have limited impact on working conditions due to the supply chains. Several reviews of the legislation have shown the 'nudge' approach to have had very limited impact in driving businesses to ensure better labour practices in high-risk supply chains. During the pandemic, workers were subject to even higher levels of exploitation and abuse in supply chains, and any expectations that this 'nudge' approach would work, were revealed, to be wholly erroneous, as section V analyses.

## V. PROCURING PPE IN THE MIST OF THE PANDEMIC

As discussed in Section III, during the pandemic, millions of vulnerable workers were made even more vulnerable to exploitation and abuse, including in the supply chains of PPE. During the response to COVID-19, especially in the first months, public health buyers had to procure protective equipment very quickly in the face of ruthless competition, and they prioritised timely supply while suspending 'normal procurement' regulations and safeguards.<sup>21</sup> Public buyers faced extreme market conditions in which prices were changing

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/833280/Modern\\_Slavery\\_PPN\\_05\\_19\\_FINAL.docx.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/833280/Modern_Slavery_PPN_05_19_FINAL.docx.pdf);

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/830150/September\\_2019\\_Modern\\_Slavery\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830150/September_2019_Modern_Slavery_Guidance.pdf);

<sup>20</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/875800/UK\\_Government\\_Modern\\_Slavery\\_Statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875800/UK_Government_Modern_Slavery_Statement.pdf)

<sup>21</sup> In the UK, for example, the National Audit Office has established that the months following the emergence of the COVID-19 pandemic in March 2020 in the UK, government awarded around £18 billion of contracts using emergency procurement regulations to buy goods, services and works to support its response to the pandemic. See UK National Audit Office, Investigation into government procurement during the COVID-19 pandemic, available at <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>.

by the hour, where traders and intermediaries multiplied and many offered their supply services without having previous experience on supplying such products and with no assurance of quality or even of delivery. Public buyers lacked information to take fast decisions, including being able to check whether they were buying at reasonable price or to check the reputation of a supplier. Even where checks were made, the terms and conditions of contracts offered changed quickly. Costs soared and the race to procure huge volumes at great speed, meeting the right quality standards, generated an unprecedented procurement crisis. It was only after security of supply was stabilised that some countries brought ethical considerations back into focus. This section explored how the three countries reacted in the crisis.

In the UK, one of the most significant changes during the initial procurement crisis was the initial suspension of open tender processes. The National Audit Office produced a report which found that during the months following the declaration of the COVID-19 pandemic in March 2020, the UK government awarded around £18 billion of contracts using emergency procurement regulations to buy goods, services and works to support its response to the pandemic (UK National Audit Office, Investigation into government procurement during the COVID-19 pandemic).<sup>22</sup> In a number of cases, supplies were bought at vastly inflated costs.<sup>23</sup> In relation to PPE, the UK Government continued to source gloves from a Malaysian company repeatedly accused of using “slave-like conditions” in its factories (Pattisson); Personal Protective Equipment (PPE) sourced from factories using North Korean slave labour<sup>24</sup> and exporters connected to the Chinese state won UK Personal Protective Equipment (PPE) contracts,<sup>25</sup> despite evidence that several factories across China were manufacturing medical grade protective equipment for global export allegedly using forced Uyghur labour (Xiao and others). There was some evidence of corruption in some procurement contracts, involving 'cosy deals' with businesses that had links with senior government officials.<sup>26</sup> The existing lack of transparency in these supply chains makes the identification of exploitation even harder, and with that, appropriate steps to prevent or mitigate harm.<sup>27</sup> The scale of the procurement crisis, however, demanded more centralised intervention, and the initial lack of coordination was superseded by centralisation of procurement processes and abandonment of tailored procedures which had been developed at local or sectoral level (ref) and direct contracting was stopped. After a few months, the Government brought in procurement specialists from all parts of government and the private sector in a single unit to coordinate the purchase of PPE and medical supplies, which enabled a smoothing of demand and supply, and gradual improvements in the supply chains that were more reliable and resilient.

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<sup>22</sup> <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>

<sup>23</sup> The Guardian **UK's 'chaotic' PPE procurement cost billions extra**

<sup>24</sup> Guardian, <https://www.theguardian.com/global-development/2020/nov/20/uk-sourced-ppe-from-factories-secretly-using-north-korean-slave-labour>

<sup>25</sup> The New York Times, <https://www.nytimes.com/2020/07/19/world/asia/china-mask-forced-labor.html>

<sup>26</sup> **BBC Timeline: Covid contracts and accusations of 'chumocracy'**

<sup>27</sup> See for example, The Guardian, <https://www.theguardian.com/world/2020/may/15/firms-given-1bn-of-state-contracts-without-tender-in-covid-19-crisis>; more info: <https://www.theguardian.com/global-development/2018/dec/09/nhs-rubber-gloves-made-in-malaysian-factories-accused-of-forced-labour>

In 2021, there is some evidence that issues concerning human rights violations in public supply chains are becoming more prominent for the NHS and parliamentarians.<sup>28</sup> It is likely that the Modern Slavery Act will be strengthened, and that parts of government – particularly the Modern Slavery Unit in the Home Office - will continue to press the rest of government to align its procurement systems with policy commitments on modern slavery. NHS Supply Chain may strengthen the LSAS and other compliance requirements in online platforms. It is likely that high levels of media attention and a wider public focus on government accountability during the pandemic will become important drivers for change.

Sweden was no different to other 'buying' countries when, during the Covid-19 PPE procurement crisis, emergency measures were used to procure equipment at great volume and speed. One of their key medical suppliers, OneMed, distributed masks and protective equipment to several Swedish municipalities and regions (Westerberg and Bankel, 2020). An investigation revealed that the Hubei Haixin factory making this equipment was using Uyghur workers that had been transferred from Xinjiang Province (Westerberg et al., 2020). China's Xinjiang region is widely recognised for state-sponsored forced labour and genocidal practices in relation to the Uyghur population (US ILAB). Action was taken to suspend the supplier and demanded that workers were allowed to return home. During the height of the pandemic, monitoring visits were suspended, and as such, it was difficult to assess how long this took, but was eventually addressed (Westerberg and Bankel, 2020).

During 2020, OneMed was also no different to many other rubber glove suppliers that were reliant on factories in Malaysia using exploited migrant workers and sought to manage risks by engaging with suppliers that reimbursed recruitment fees and demonstrated improvements in the living and working conditions of migrants. As a general rule, where the problems are systemic for whole categories of workers - such as migrants in Malaysia and Uyghurs in Xinjiang, the options for both public bodies and their suppliers to exert leverage are extremely limited. Hence the focus on individual factories and suppliers.

When COVID-19 struck **the US**, the country was quickly faced with shortage of medical supplies, due to its heavy reliance on imports (Sadiq and Kessa, 2020: 637). This had already been anticipated by Patel et al. (2017: 245) in 2017, who argued that the US PPE supply chain was not prepared to meet a large, unexpected increase in demand following a public health emergency. As a consequence, federal government, states, local governments and hospitals had to compete between each other to ensure sufficient stock of the necessary supplies (Atkinson et al., 2020: 630; Vecchi et al., 2020: 644).

The non-centralised nature of the US healthcare system also impacts its ability to address human rights violations in its supply chains (Barnett et al., 2021: 2). Limited information and oversight, emergency circumstances and the different mandates by trade officials and health supplies procurement officials were revealed in a number of cases involving the purchase of COVID-19 related medical supplies. For example, the first company to be approved following an “emergency approval process for Chinese PPE suppliers” by the U.S. Food and Drug Administration in April, had been previously linked to Uyghur forced labour (Newhauser and Hamilton, 2020; Xiuzhong Xu et al., 2020)

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<sup>28</sup> UK suspending imports from Xinjiang or certain factories in Malaysia? There were some news reports - Independent / Guardian / TR. Sources needed.

Another example is the WRO that was imposed initially against disposable rubber gloves produced in Malaysia by WRP Asia Pacific (U.S. Customs and Border Protection, 2019). It was suspended a few months later, citing new information “showing the company is no longer producing the rubber gloves under forced labor conditions” and “continuous communication” between CBP and WRP (U.S. Customs and Border Protection, 2020). At the time of the WRO, CBP had only suggested that WRP “adjust its manufacturing and labor practices to ensure compliance with international labor standards”, without specify any steps it may wish to take (Gianopoulos 2021, 16). The lack of clarity on the process for revoking the WRO left US embassy officials at a loss to explain their reasoning (Gianopoulos, 2021:28).

## VI. CONCLUSIONS

The lack of policy coherence within States prior to COVID-19 meant that the response to the pandemic, in terms of accessing PPE equipment, was inadequate, inefficient and disregarded known and predictable human rights risks in the supply chain. Different parts of government took decisions on procurement of PPE without considering the implications of their own legal obligations, principles and publicly stated commitments on human rights and modern slavery. During the coronavirus crisis, decisions were taken by different actors operating according to different interests and priorities: health authorities; procurement bodies, customs and border authorities and trade and commercial departments. In addition, central, regional and local authorities were all responding differently.

This article has argued that no one system has been able to address the human rights risks, nor has any one managed to prevent higher levels of labour exploitation and abuse of workers during COVID-19. As such, we propose that a combination of all three should be considered. The different regulatory instruments that states have developed to prevent or mitigate the risk of goods produced with labour exploitation entering their supply chains can be powerful tools for states to comply with their international human rights obligations, but deployed in isolation, there are significant limitations in their efficacy. This has been clearly evident in the procurement of PPE during the COVID-19 emergency.

We have shown that trade restrictions and import bans can be powerful tools that demonstrate clear commercial and reputational consequences for companies that fail to comply with their human rights obligations. However, they are blunt instruments, and beyond short-term impacts on suppliers, they do not deal with systemic issues in a high-risk commodity or supply chain. Nor do they tackle the enabling environment that allow labour rights abuses to flourish. There is somewhat limited evidence on whether boycotts, bans and sanctions benefit the workers whose rights are violated. In some cases, there may be short-term benefits for specific workers (such as repayment of recruitment fees), but there is also significant evidence that these measures inadvertently result in greater levels of risk and harm for categories of workers in the longer term if there is backlash and resulting knock-on punitive measures (such as job losses if businesses have to close if they lose their ability to trade, increased visa restrictions for migrant workers, or displacement of jobs to even more exploitative employers or countries where labour standards and human rights are worse). These 'all or nothing' measures often trigger a 'cut and run' approach from importers and buyers, ultimately forfeiting their leverage in the supply chain. In situations of

widespread abuses, such as those detected in Xinjiang, this leaves workers completely unprotected (COAC, Report of the Intelligent Enforcement Subcommittee Forced Labor Working Group, July 15, 2020, p. 8).

Regarding public procurement, there must be political will to enable relevant competent authorities to exercise a command and control model that creates a fair and ethical level playing field. It is of little value to have good systems in place such as the NHS Labour Standards Assurance System if they do not exclude unscrupulous commercial actors, and if they do not reward and incentivise those suppliers that demonstrate robust ethical standards and human rights due diligence. It will require changes to tendering and contracting criteria - de-emphasizing 'lowest price' in favour of 'social value' incentives. We argue that more ethical practices may cost more, but will yield greater efficiencies, more sustainable, resilient and high-quality supply of goods in the long-run. We assert that there must be a red line below which no supplier is allowed to operate, and it must be applied consistently and rigorously to be effective.

Our analysis has suggested that scale matters in exerting leverage for systemic and sustainable change. The Swedish regional health authorities (along with their Norwegian and Finnish counterparts not analysed here) have a world-leading, progressive approach to ethical and responsible public procurement. They set clear tendering requirements, award criteria and reward continuous improvement and partnership, yet they are small. As a result, they have to manage risks as best as they can, selecting the few suppliers they trust, but recognise the limited leverage they have to influence wider systemic changes in a sector, industry or country. Without strategic partnerships and a change in competition laws to enable collaborative purchasing and open tendering practices across national borders, the value and impact of each approach and model analysed here will always remain limited.

Finally, encouraging the development of human rights due diligence in supply chain and reporting on efforts to prevent violations relies on greater levels of transparency in supply chains. In public procurement supply chains, including PPE, there are many layers of suppliers. Most often, there is some knowledge of the first one or two tiers of the supply chain, but little beyond that. Responsibility and accountability for labour rights violations throughout the supply chain (including raw materials) cannot be apportioned without understanding who is producing what. During the COVID-19 crisis, new suppliers were brought on board with little information available about where they were sourcing PPE commodities and what labour practices were being used in the production of these goods.

Whilst these tools are not in fact designed to improve the working conditions of workers producing goods in public supply chains, they can, if applied well, play an important role in reducing the incidence of exploitation and abuse. The legal and policy instruments of public bodies are influential levers that signal the unacceptability of these practices and the need for oversight of the private sector in upholding human rights obligations. If applied in isolation, they will not be able to exercise adequate leverage nor drive a virtuous cycle of improvements in labour standards in public supply chains.

The protection of life and health in some parts of the globe should not be achieved at the expense of risking the life and health of others in less developed economies.<sup>29</sup> The interests and rights of workers must be at the heart of ethical public procurement policies and systems. When workers are treated with dignity and respect, they are healthier, happier, more productive and loyal to their employer.

Wherever possible, public procurement systems should incentivise suppliers to ensure that workplaces enable workers to freely and independently elect their own representatives to negotiate on their collective behalf. That would reduce human rights risks by enabling worker grievances and concerns to be raised directly with their employers, and resolved timely in a way that builds trust between workers and their employers. If external audits are conducted, workers and their representatives must be interviewed and enabled to express their concerns freely. Suppliers and employers should have the trust and confidence from public buyers that they will be rewarded for better treatment of workers.

Without a whole-of-government approach with clearly specified regulations and the capacity to monitor and enforce these across the board, there will continue to be contradictions, accusations of hypocrisy, and lost opportunities to exert the valuable leverage that ethical public procurement processes can offer to improve human rights due diligence or prevent modern slavery.

Our analysis suggests that, where there are centralised purchasing systems in place which include considerations about human rights in supply chains, there are clear benefits in assuring security of supply, as devolved health authorities are prevented from competing with one another and stockpiling supplies while others are left without. There are also leverage benefits due to greater scale of purchase, with associated administrative and cost efficiencies. In addition, there is the potential for stronger oversight of ethical and human rights considerations and centrally enforced due diligence requirements. Equally, authorities or departments with specific responsibilities such as trade restrictions on imports can have a far greater impact if their systems are robust and they have the expertise and capacity to monitor labour rights risks in health commodity supply chains.

In conclusion, the need for PPE will continue to rise as new disease risks and their prevention will continue to be a high priority for States around the world. There has never been a better time for rectifying the mistakes and learning the lessons from unethical procurement of PPE during the COVID-19 crisis. We are understanding more and more about what works and what doesn't, and this paper shows that a careful combination of different approaches, using the right levers in the right ways for the right reasons and in a coherent strategic way, offers a clear way forward. If future PPE procurement can demonstrate the lessons of COVID-19 through increased transparency, trust, partnerships and raised labour standards across the health supplies sector, we believe it could inspire other public bodies and suppliers to do the same in other sectors.

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<sup>29</sup> This, however, is not a new phenomenon: in 2016, Martin-Ortega and Davies pointed out the unacceptability of public hospitals buying surgical instruments 'made in factories by workers who routinely suffered injuries because working conditions were so poor, which was echoed by Gothberg in 2019 (in Martin-Ortega and Methven O'Brien, 2019: 168). Most recently, Trueba et al. (2021) have argued that procuring health-related goods at the cost of workers' health is immoral.

## References

- Atkinson CL, McCue C, Prier E, et al. (2020) Supply Chain Manipulation, Misrepresentation, and Magical Thinking During the COVID-19 Pandemic. *The American Review of Public Administration* 50(6–7), 628–634.
- Barnett B, Carlo A, Mezzadri A et al. (2021) The Invisible People Behind Our Masks. *Annals of Internal Medicine*, 1-3.
- Bhutta M and Santhakumar A (2016) *In good hands: Tackling labour rights concerns in the manufacture of medical gloves* (British Medical Association).
- Bureau of International Labour Affairs, *List of Goods Produced by Child Labor or Forced Labor*. Available at: <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods#:~:text=The%20most%20common%20agricultural%20goods,and%20fireworks%20appear%20most%20frequently.>
- Business & Human Rights Resource Centre (2017) *Modern Slavery in Company Operation and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence*. September. Available at: [www.business-humanrights.org](http://www.business-humanrights.org) (accessed 4 March 2021).
- Cimino-Isaacs CD, Casey CA and O'Reagan KC (2021) *Section 307 and U.S. Imports of Products of Forced Labor: Overview and Issues for Congress*. 1 February. Available at: <https://crsreports.congress.gov> (accessed 5 March 2021).
- European Parliament, 2010 [https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/TA-7-2010-0434_EN.html?redirect)
- Fields J (2019) U.S. ban on slave-made goods nets tiny fraction of \$400 billion threat. Available at: <https://www.reuters.com/article/us-trade-slavery-idUSKCN1RK0H8> (accessed 5 March 2021).
- Gianopoulos K (2021) *Forced Labor: CBP Should Improve Communication to Strengthen Trade Enforcement*. U.S. Government Accountability Office
- Göthberg P (2019) Public procurement and human rights in the healthcare sector: the Swedish county councils' collaborative model. In: *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer*. Edward Elgar, pp. 165–179.
- Gripstrand S and Muchlizar E (2015) *Audit report of Bröderna Berner (on behalf of Region Jönköping, Sweden)*. Stockholm.
- International Labour Organization (2020) COVID-19 Impact on Child Labour and Forced Labour: The Response of the IPEC+ Flagship Programme. Available at: [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@ipecc/documents/publication/wcms\\_745287.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipecc/documents/publication/wcms_745287.pdf) (accessed 8 March 2021)
- International Labor Rights Forum (2020) *Combatting Forced Labor and Enforcing Workers' Rights Using the Tariff Act*. February.

- Lee L (2020) Amid virus crisis, U.S. bars imports of Malaysia's Top Glove over labour issues. Available at: [www.reuters.com/article/us-top-glove-usa/amid-virus-crisis-us-bars-imports-of-malaysias-top-glove-over-labor-issues-idUSKCN24H0K2](http://www.reuters.com/article/us-top-glove-usa/amid-virus-crisis-us-bars-imports-of-malaysias-top-glove-over-labor-issues-idUSKCN24H0K2) (accessed 8 March 2021).
- Martin-Ortega O, Davies A (2016), *Protecting human rights in the supply chain. A guide for public procurement practitioners* (CIPS).
- Martin-Ortega O, Methven O'Brien C, 'Advancing Respect for Labour Rights Globally through Public Procurement' (2017) 5 *Politics and Governance* 69.
- Martin-Ortega and Methven O'Brien, *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar 2019).
- Methven O'Brien C, Vander Meulen N and Mehra A (2016) *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (The International Learning Lab on Procurement and Human Rights).
- Nelson V, Martin-Ortega O and Flint M (2020) 'Making Human Rights Due Diligence Work for Small Farmers and Workers: An Analysis of Impact and Legal Options' (University of Greenwich for the Fair Trade Advocacy Office and Brot für die Welt).
- Newhauser D and Hamilton K (2020) Trump Blacklisted This Chinese Company. Now It's Making Coronavirus Masks for U.S. Hospitals. *Vice News*. April.
- Patel A, D'Alessandro MM, Ireland KJ, et al. (2017) Personal Protective Equipment Supply Chain: Lessons Learned from Recent Public Health Emergency Responses. *Health Security* 15(3), 244–252.
- Reuters (2020) Banned by U.S., but Top Glove sales hit record. *Yahoo! News*. December.
- Sadiq AA and Kessa R (2020) U.S. Procurement in the Age of COVID-19: Challenges, Intergovernmental Collaboration, and Recommendations for Improvement. *American Review of Public Administration* 50(6–7). 635–641.
- Sjöström T and Scott Jakobsson L (2016) *Agents for change: How public procurers can influence labour conditions in global supply chains. Case studies from Brazil, Pakistan and Thailand*. 15 November. Available at: [www.swedwatch.org](http://www.swedwatch.org), (accessed 24 February 2021).
- Social Responsibility in Public Procurement (2013) *Code of Conduct for Suppliers*. 4 February. Available at: <https://www.sll.se/globalassets/6.-om-landstinget/upphandling/code-of-conduct-english-.pdf> (accessed 25 February 2021).
- Trueba ML, Bhutta MF, Shahvisi A (2021), 'Instruments of health and harm: how the procurement of healthcare goods contributes to global health inequality' *Journal of Medical Ethics* 47, 423-429.
- UN Committee on the Rights of the Child (CRC), Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Finland, UN Doc. CRC/C/FIN/CO/4 (2011a).
- UN Committee on the Rights of the Child (CRC), Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Italy, UN Doc. CRC/C/IT/A/CO/3-4 (2011b).

- UN Committee on the Rights of the Child (CRC), Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Republic of Korea, UN Doc. CRC/C/KOR/CO/3-4 (2011c)
- U.S. Customs and Border Protection (2016) *Forced Labor Enforcement, Withhold Release Orders, Findings, and Detention Procedures*. CBP Publication # 0550-0816. August. Available at: <https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations> (accessed 5 March 2021).
- U.S. Customs and Border Protection (2019) *CBP Issues Detention Orders against Companies Suspected of Using Forced Labor*. October. Available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-orders-against-companies-suspected-using-forced> (accessed 5 March 2021).
- U.S. Customs and Border Protection (2020) *CBP Revokes Withhold Release Order on Disposable Rubber Gloves*. March. Available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-revokes-withhold-release-order-disposable-rubber-gloves> (accessed 8 March 2021).
- US Bureau of International Affairs (ILAB) (2021), *Against Their Will: The Situation in Xinjiang*. Available at: <https://www.dol.gov/agencies/ilab/against-their-will-the-situation-in-xinjiang> (accessed 30 June 2021).
- Vecchi V, Cusumano N and Boyer EJ (2020) Medical Supply Acquisition in Italy and the United States in the Era of COVID-19: The Case for Strategic Procurement and Public–Private Partnerships. *The American Review of Public Administration* 50(6–7), 642–649.
- Westerberg O and Bankel A-K (2020) Misstänkt tvångsarbete bakom munskydd i Sverige (Suspected forced labor behind face masks in Sweden). Available at: <https://www.svt.se/nyheter/granskning/ug/misstankt-tvangsarbete-bakom-munskydd-i-sverige> (accessed 3 March 2021).
- Westerberg O, Belford A, Civillini M, et al. (2020) China's Oppressed Uighurs Made COVID-19 Protection Sold Throughout Europe. Available at: <https://www.occrp.org/en/coronavirus/chinas-oppressed-uighurs-made-covid-19-protection-sold-throughout-europe> (accessed 3 March 2021).
- Xiuzhong Xu V, Cave D, Leibold J, et al. (2020) Uyghurs for sale. Australian Strategic Policy Institute.
- Zsombor P (2020) After US Sanctions, Malaysia Migrant Workers Get Millions in Restitution from Glove Makers. Available at: <https://www.voanews.com/east-asia-pacific/after-us-sanctions-malaysia-migrant-workers-get-millions-restitution-glove-makers> (accessed 24 February 2021).