

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

Edited by Fulvia Staiano
Giulia Ciliberto





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P.le Aldo Moro 7
00185 Roma
ISBN 978-88-8080-348-5

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Since 2015, the Institute for Research in Innovation and Services for the Development of the National Research Council of Italy (CNR-IRISS) promotes projects on ‘Migration and Development’ with the view of offering innovative tools for sustainable migration.

The timely volume edited by Giulia Ciliberto, post-doc research fellow of the Institute, and Fulvia Staiano, Associate Professor of International Law at the University ‘Giustino Fortunato’ and Associate to CNR-IRISS, on ‘Labour Migration in the Time of COVID-19: Inequalities and Perspectives for Change’ offers a wide and in-depth analysis of the consequences that migrant workers are facing in these days: as a vulnerable group, they have to cope with an unpredictable and exceptional situation – COVID-19 pandemics – adding elements of weakness to their already fragile state.

The idea of collecting some papers came to the mind of the Editors during the planning of the first edition of the Summer School on Labour Migration in the European Union (www.eulab.unina.it), organised by the Law Department of University of Naples Federico II.

The result of their project are under your eyes. The rationale of the volume and the way in which its preparation have been carried out is a ‘good practice’ that I would recommend for future initiatives.

CNR-IRISS will continue its co-operation with the Law Department of the University Federico II, and encourage further partnership with Italian and International institutions.

A special thank is due to Maria Grazia Spronati (focal point CNR-IRISS for CNR Edizioni) and Angela Petrillo (graphic design of the volume) for their kind cooperation.

Giovanni Carlo Bruno

The pandemic caused by the diffusion of COVID-19 has produced a dramatic impact on economies and societies all over the world. Migrant workers and labour migration fluxes have been far from exempt from the negative consequences of the so-called “new coronavirus”. In fact, the current pandemic affects this category in diverse and significant ways in host countries. Less than two months after the World Health Organization characterised the COVID-19 outbreak as a pandemic, the International Labour Organization highlighted the increased vulnerability of migrant workers as a consequence of the virus – also because of their concentration in sectors of the labour market characterised by high levels of job insecurity, informality as well as a lack of labour and social protections.¹ Almost two years after these events, it has become apparent that the pandemic has produced serious effects on migrant workers in general and that it has disproportionately affected certain categories of migrant workers, such as those employed in the agricultural sector and domestic workers. For these categories, restrictions on mobility, closures of borders and quarantine orders have aggravated previous situations of isolation and social exclusion as well as significantly reduced their employment opportunities – both formal and informal.² Increased xenophobia, discrimination and violence are also among the negative consequence of the COVID-19 pandemic. The International Organization for Migration has highlighted that the pandemic has caused the stigmatization of migrants as allegedly responsible for the spreading of the virus as well as forms of hate speech, physical or verbal assault and social or institutional exclusion.³

At the same time, it must be highlighted that the current global health crisis has not created but simply unveiled and aggravated pre-existing sources of vulnerability generated by a combination of legal, social and political factors within host countries’ migration law and policies.⁴ It is indeed crucial, when approaching the topic of labour migration, to carefully reflect on the distinction between ‘emergency’ and ‘everyday’ issues in order to avoid characterising

¹ BELSER, ‘COVID-19 cruelly highlights inequalities and threatens to deepen them’, 20 March 2020, available at: <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_740101/lang-en/index.htm>.

² JONES, MUDALIAR, PIPER ‘Locked down and in limbo: The global impact of COVID-19 on migrant worker rights and recruitment’, 2021, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_821985.pdf>.

³ International Organization for Migration, Countering Xenophobia and Stigma to Foster Social Cohesion in the Covid 19 Response and Recovery, 14 July 2020, available at: <https://www.iom.int/sites/g/files/tmzbdl486/files/documents/countering_xenophobia_and_stigma_130720.pdf>.

⁴ International Organization for Migration, World Migration Report 2022, 1st December 2021, available at: <<https://publications.iom.int/books/world-migration-report-2022>>.

situations of structural inequality as exceptional instances caused by temporary crises. In this light, the COVID-19 pandemic can be more appropriately framed as an additional factor of social exclusion, as a further obstacle to migrant workers' full enjoyment of their socio-economic rights, and as a compound cause of insecurity of work and residence status.

These considerations shape the structure of the collected volume and the content of the contributions hereby gathered. Each of them offers topical and telling illustrations of this phenomenon by analysing the protection gaps unveiled by COVID-19 and by discussing the strengths and weaknesses of States' responses to the difficulties experienced by migrant workers worldwide during the pandemic.

The book has been divided into three parts, considering the chapters' specific standpoint of analysis. The three chapters of Part I critically investigate the problems for global perspectives. Chapter 1 by Matteo Borzaga and Michele Mazzetti explores the capability of human rights standards established by legal sources developed in the context of both the United Nations and the International Labour Organization to remedy the vulnerability experienced by migrant workers during the COVID-19 pandemic. Their analysis highlights the strengths and weakness of such systems, and includes a reflection on best practices at domestic level which have at least mitigated the impact of the pandemic on migrant workers. Chapter 2, by Maria Giovanna Brancati, outlines the link between, on the one hand, the impact of the COVID-19 pandemic on the global economy and, on the other, the probable increased rise of trafficking in persons for the purpose of labour exploitation. This starting point, which also takes into account the vulnerability of the individuals involved, serves the purpose of assessing perspective preventive initiatives with the view of countering some of the factors triggering the phenomenon, rather than adopting a criminal law approach alone. Chapter 3, by Tatiana Cardoso Squeff, Antonio Teixeira Junqueira Neto, and Laura Mourão Nicoli, explores the limits and effectiveness of the actions taken by the UN Special Rapporteur on the Human Rights of Migrants during the pandemic by comparing them to the impact of the pronouncements of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. The Authors suggests that the works of these two actors may complement each other so as strengthen the impact of their activities towards migrant workers.

Part II encompasses chapters focusing on specific categories of migrant workers. Chapter 4, by Jacqueline F. Espenilla, analyses the legal framework protecting seafarers at both the international and domestic level. As for the former, the Author explores whether the COVID-19 pandemic falls within the notion of *force majeure* for the purpose of establishing the responsibility of duty-bearers. As for the

latter, the contribution takes into account the situation of the Filipino seafarers as a case-study. The chapter further highlights the gaps in the protection of seafarers despite the efforts of the relevant stakeholders in enhancing their protection *vis-à-vis* States' restrictive measures to limit the spread of the virus. Chapter 5, by Zoe Nutter, Zoe Nutter examines the challenges faced by posted workers in the context of the European Union in accessing their labour rights, also as a result of the regulatory gaps that undermine their enjoyment of working conditions equal to the ones ensured to citizens of their host countries. On the basis of this analysis, she reflects on the possible future directions of EU social policy in the light of the vulnerabilities uncovered by the COVID-19 pandemic. Chapter 6, by Annalisa Geraci, focuses on migrant workers in the agricultural sector, analysing the measures adopted at EU level as well as by EU Member States with the aim to foster their mobility and employment in the face of a shortage of seasonal workers. Her contribution reflects on the degree to which such policies have also been coupled by an enhanced protection of the labour rights of such workers, with a special focus on workplace health and safety as well as protections against labour exploitation.

Part III unpacks regional and national perspectives. Chapter 7, by Saidatul Nadia Abd Aziz, Usanee Aimsiranun, studies the impact of the COVID-19 pandemic in two systems of regional integration, namely the EU and the ASEAN. The contribution compares their migration policies and their frameworks recognising and protecting the rights of migrant workers, also considering the structural differences among the two systems, and ends with some policy suggestions. Chapter 8, by Nguyen Thi Hong Yen and Nguyen Phuong Dung highlights the impact of COVID-19 on Vietnamese migrant workers, analysing Vietnamese legislation applicable to citizens working abroad as well as the specific national measures adopted to ensure the protection of such workers during the pandemic. Chapter 9, by Poonam Sharma, explores the impact of the virus on the mass migratory movements of workers within India both immediately after the announcement of the lockdown and months after its lift. The situation of the mass migration of internal labour migrants travelling from the urban city centers to rural areas represents the starting point to analysing the long-lasting effects of the pandemic and the lockdowns on India's internal migration. Chapter 10, by Amy Weatherburn and Lisa Berntsen, analyses the working conditions of migrants employed in the meat industry sector in Belgium and the Netherlands, reflecting on the interaction between different risk factors and on their broader impact on not just workers themselves but also customers and the broader public. Through a comparison of the measures adopted in the Belgian and Dutch contexts, they propose an assessment of the most effective policies with respect to the reduction of Covid-related risks for migrant workers. Chapter 11, by Vittorio

Cama, assesses the protection offered to irregular migrants employed in the Italian agricultural sector in the context of the COVID-19 pandemic, with specific regard to the phenomenon of *caporalato* (an illegal form of recruiting and organising the workforce where intermediaries who are usually affiliated with organised crime). The chapter ascertain the possibility to bring the phenomenon under the under the meaning of human trafficking and forced labour under the international and European legal framework and, subsequently, which protection is offered to victims of *caporalato* according to the European Convention of Human Rights, the European Social Charter and EU law, and whether the responses of the EU and its Member have been in line with such standards. Lastly, Chapter 12, by Anna Zapsi, Rocío Garrido, Juan Carlos Aceros and Armando Agüero Collins, centers on the labour exploitation of migrant women workers in Southern Spain, with a focus on three sectors: agricultural workers, hotel maids, and domestic and caregiving workers, This situation allows the authors to address systemic inequalities through the lens of a particularly vulnerable group, namely workers who are women and foreigners. The chapter also presents the MICAELA Project, which was developed during the COVID-19 pandemic, and discusses its main conclusions and recommendations.

The editors would like to thank the Authors for their invaluable contributions and their collaboration during each of the phases of the publication process. The editors would also like to thank Giovanni Carlo Bruno for his precious support and guidance throughout the preparation of this volume. The authors are also grateful to Donato Greco, Giuliana Lampo, Loris Marotti, Caterina Milo, Gustavo Minervini, Roberto Ruoppo and Alessandro Stiano for their kind assistance in seeing this edited volume to completion.

Last but not least, this collected volume would have not seen the light without CNR Edizioni and the EULab Summer School on Labour Migration in the European Union, a project which has been funded with the support of the Erasmus+ Programme of the European Union.

Giulia Ciliberto and Fulvia Staiano

Part I. Global perspectives

MIGRANT WORKERS AND THE COVID-19 PANDEMIC: A GAP IN HUMAN RIGHTS PROTECTION?

*Matteo Borzaga and Michele Mazzetti**

1. INTRODUCTION

If one considers international migration in relative percentage terms, it appears to be a limited phenomenon; the 2020 estimated proportion of migrants in the total world population amounts to 3.5%, only 0.7% higher than the 2000 estimates. However, in absolute terms, international migration reaches much greater proportions. Between 2000 and 2020, the global number of international migrants has grown from 150 million to 272 million, with almost two-thirds of them – 164 million – being migrant workers.¹

Among migrants, workers are a vulnerable group, and their conditions have worsened as a consequence of the COVID-19 pandemic.² The majority of migrant workers come from developing countries and move to high-income countries. These workers are often employed in low-skilled jobs, which makes them vulnerable to exploitation and violence.³ Furthermore, xenophobia and structural racism contribute to enhancing migrants' vulnerability, as they are embedded in the restrictive

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Introduction and Conclusion were written by both the authors; Sections 2, 4, 4.1, 4.2 and 5 were written by Michele Mazzetti; Sections 3, 3.1, 3.2 and 3.3 were written by Prof. Matteo Borzaga.

¹ International Organization for Migration, "World Migration Report 2020", p. 10, available at: <<https://publications.iom.int/books/world-migration-report-2020>>.

² For a complete analysis see Jenna Hennebry and Hari KC, 'Quarantined! Xenophobia and migrant workers during the COVID-19 pandemic', Think Pieces (Geneva, 2020), available at: <<https://publications.iom.int/system/files/pdf/quarantined.pdf>>.

³ World Migration Report 2020, *cit. supra* note 1, 19–47; International Labour Conference, *Migrant Workers. General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151* (Geneva: International Labour Office, 1999), 17, available at: <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(1999-87_1B\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(1999-87_1B).pdf)>.

immigration systems of the host States.⁴ Over the past two decades, western countries passed migration legislation based on the neoliberal model of ‘temporary migration’.⁵ This migration policy paradigm, far from ensuring effective protection of the rights of migrant workers, only values their economic contribution to sending and receiving countries.⁶ According to Hepple, the main outcome of this policy is a paradoxical situation where the facilitation in the movements of commodities and capitals has not been matched by a similar condition for the workforce.⁷

Regarding the core international instruments on labour migration, the United Nations (UN) and the International Labour Organisation (ILO) have adopted three Conventions and two Recommendations: the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW), the ILO Migration for Employment Convention (Revised), 1949, No. 97, the ILO Migration for Employment Recommendation (Revised), 1949, No. 86, the ILO Migrant Workers Convention, 1975, No. 143, and the Migrant Workers Recommendation, 1975, No. 151. Nevertheless, these international instruments are not sufficient to address the vulnerability of migrant workers. While recommendations are not binding, conventions are only binding once they have been ratified. However, ratifications are limited and mainly from sending countries.⁸

To strengthen the protection of the rights of migrant workers, the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the ILO Committee on the Application of Standards (CAS) have adopted a rights-based approach to extend international labour standards, in particular the Core Labour Standards (CLS), and generally recognised fundamental human rights to migrant workers.⁹

Although these monitoring bodies’ main function is to supervise, promote and denounce violations of international labour migration law, their lack of power to

⁴ HENNEBRY AND KC, *cit. supra* note 2, 3.

⁵ PIYASIRI WICKRAMASEKARA, *Circular Migration: A Triple Win or a Dead End?*, *GURN Discussion Paper* (Geneva: International Labour Office, Bureau for Workers’ Activities, 2011).

⁶ COLLINS and BAYLISS, “The good migrant: Everyday nationalism and temporary migration management on New Zealand dairy farms”, *Political Geography* 80, 2020, p. 1 ff.

⁷ HEPPLER, *Labour Laws and Global Trade*, Oxford, 2005, p. 5.

⁸ According to migration legal doctrine, in this work countries of origin of international migrants are referred to as ‘sending countries’ and destination countries as ‘receiving countries’. See for example Organization for Economic Co-operation and Development, “Is Migration Good for the Economy?”, *Migration Policy Debates*, 2014, pp. 1–4; ZIMMERMANN, ‘Circular Migration’, *IZA World of Labor*, 2014, 1–10; SCHMITTER HEISLER, ‘Sending Countries and the Politics of Emigration and Destination’, *International Migration Review*, 1985, p. 469 ff.; ASCH and REICHMAN (eds.), *Emigration and Its Effects on the Sending Country, Emigration and Its Effects on the Sending Country*, Santa Monica, 1994.

⁹ International Labour Conference 1999, *cit. supra* note 3, 19–20.

enforce the international instruments impacted negatively on their commitment to protecting migrant workers. Nevertheless, monitoring bodies have highlighted the structural human and labour rights violations affecting migrant workers. These violations and abuses have been further aggravated in terms of discrimination, exploitation, and health risks by the COVID-19 pandemic.¹⁰ The weakest categories of migrants, namely seasonal workers, and irregulars, have been hit the hardest.¹¹

This research aims to examine to what extent UN and ILO standards have reduced the vulnerability of migrant workers in these challenging times (i.e., between March 2020 to March 2021). Therefore, the analysis will be carried out in three stages. Firstly, the legal instruments developed by the ILO and by the UN will be analysed to identify the core rights of migrant workers (Section 3). Secondly, the main violations of these rights will be assessed, focusing on monitoring committees' decisions and interpretations (Section 4). Finally, the impact of the COVID-19 pandemic on the rights of migrant workers will be addressed through the analysis of the most recent reports from international organisations (Section 5).

2. METHODOLOGY

The determination of a research methodology is still an open debate in the legal field. Legal history presents a complex set of theories and approaches, not always systematic, nor adequately justified, that regulate the way of analysing the legal phenomenon.

¹⁰ FASANI and MAZZA, *A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic*, Luxembourg, 2020; LANDRY et al., "The Systemized Exploitation of Temporary Migrant Agricultural Workers in Canada: Exacerbation of Health Vulnerabilities during the COVID-19 Pandemic and Recommendations for the Future", *Journal of Migration and Health*, 2021, p. 1 ff.; BHANOT et al., "Stigma and Discrimination During COVID-19 Pandemic", *Frontiers in Public Health*, 2021, p. 1 ff.; ELIAS et al., 'Racism and Nationalism during and beyond the COVID-19 Pandemic', *Ethnic and Racial Studies*, 2021, p. 783 ff.; "«Sei Cinese, Hai Il Coronavirus. Vattene». Donna Picchiata a Torino", *Il Messaggero - Online*, 22 February 2020, available at: <https://www.ilmessaggero.it/italia/coronavirus_cinese_picchiata_torino-5068450.html>; "Coronavirus, Quando La Paura Del Contagio Serve Solo a Mascherare Il Razzismo", *La Stampa (Online Edition)*, 2 February 2020, available at: <<https://www.lastampa.it/cronaca/2020/02/02/news/coronavirus-da-casapound-ai-campi-di-calcio-il-razzismo-e-di-casa-in-italia-1.38415778>>.

¹¹ In the literature there are different terms to define the same phenomenon: "illegal migrant", "clandestine migrant", "undocumented migrant" and "irregular migrant." This wide range of terms meant that a careful choice had to be made to avoid negative connotations and to adopt a term as broad as possible, thus the term "irregular migrant" was preferred. The selection was based on the definition given by PERRUCHOUD and REDPATH-CROSS (eds.), *Glossary on Migration*, 2nd ed., Geneva, 2011, p. 54. Indeed, the definition of the Glossary covers both the profile of undocumented migrants and the profile of labour exploitation resulting from irregularity.

Historically, jurists focused on the letter of statutes and on methods of interpreting them.¹² Even the intellectuals of the Enlightenment, who have always been sceptical about exegesis, had to recognise the need to adapt abstract commands to concrete reality.¹³ The principle of authority, attached to the body from which the norm emanates, has been the basis for the method of exegesis. However, these reflections are less suited to the contemporary vision of legal research carried out by scholars. Exegesis of the legislation is still necessary, however, academic research combined it with the methodologies of the social sciences, including those of qualitative and quantitative research. Indeed, the affirmation in the 19th and 20th centuries of social sciences, and foremost of sociology, which found their validity on the method like the natural sciences,¹⁴ has gradually encouraged reflection on the methodology of legal research.¹⁵ These reflections led to the distinction between doctrinal legal research – focused on theoretical aspects and legal exegesis – and empirical legal research – focused on the effectiveness of the norm, policy issues, and reforms.¹⁶

This research aims to assess the effectiveness of international standards in protecting migrant workers during the ongoing COVID-19 pandemic. Therefore, a doctrinal legal approach suits the evaluation of the international legal framework of international labour migration law, whereas an empirical legal approach assesses the effectiveness of labour migration law by analysing reports and cases of CMW, CEACR and CAS.

The combination of doctrinal and empirical approaches enables, on the one hand, a description of the migration law established by the ILO and the UN and, on the other hand, an evaluation of its implementation. Moreover, the deployment of these two approaches in different non-overlapping fields led to integrated results.

The analysis of the international legal framework was carried out by interpreting the instruments to describe the basic legal principles and the content of the rights of migrant workers. Conversely, the assessment of reports and decisions of monitoring bodies employed a qualitative analysis that combined a case-based and comparative approach with the tools of legal exegesis. In doing so, this research analysed five types of sources: a) annual reports of the CMW to the General

¹² VIOLA, *Orientamenti Storici in Tema Di Interpretazione Della Legge*, Palermo, 1975, p. 49 ff.

¹³ ALVAZZI DEL FRATE, “Interpretazione Giudiziale e Illuminismo Da Beccaria Al Code Civil”, in ROSSI and ZANUSO (eds.), *Attualità e Storicità Del «Dei Delitti e Delle Pene» a 250 Anni Dalla Pubblicazione*, Napoli, 2015, p. 75 ff.

¹⁴ DELLA PORTA and KEATING, *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective*, Cambridge, 2008.

¹⁵ MCCONVILLE and HONG CHUI, *Research Methods for Law*, Edinburgh, 2017, p. 1 ff.

¹⁶ ALI, YUSOFF, and AYUB, “Legal Research of Doctrinal and Non-Doctrinal”, *International Journal of Trend in Research and Development*, 2017, p. 493 ff.; MCCONVILLE and CHUI, *Research Methods for Law*, Edinburgh, 2017; LANGBROEK et al., “Methodology of Legal Research: Challenges and Opportunities”, *Utrecht Law Review*, 2017, p. 1 ff.

Assembly published between 2018 and 2020,¹⁷ b) observations (particularly concluding observations) on national reports examined by the CMW between 2018 and 2020,¹⁸ c) all cases discussed by the CAS,¹⁹ d) observations on national reports examined by the CEACR between 2019 and 2020,²⁰ and e) the 1999 and 2016

¹⁷ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. A/75/48, 2020; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families', UN Doc. A/74/48, 2019.

¹⁸ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Second Periodic Report of Algeria", UN Doc. CMW/C/DZA/CO/2, 2018; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Second Periodic Report of Albania", UN Doc. CMW/C/ALB/CO/2, 2019; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Initial Report of Guyana", UN Doc. CMW/C/GUY/CO/1, 2019; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Initial Report of Madagascar", UN Doc. CMW/C/MDG/CO/1, 2018; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Initial Report of Mozambique", UN Doc. CMW/C/MOZ/CO/1, 2018; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Second Periodic Report of Guatemala", UN Doc. CMW/C/GTM/CO/2, 2019; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on Saint Vincent and the Grenadines in the Absence of a Report", UN Doc. CMW/C/VCT/CO/1, 2018; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Second Periodic Report of Tajikistan", UN Doc. CMW/C/TJK/CO/2, 2019; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina", UN Doc. CMW/C/BIH/CO/3, 2019; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Third Periodic Report of Colombia", UN Doc. CMW/C/COL/CO/3, 2020; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Second Periodic Report of Argentina", UN Doc. CMW/C/ARG/CO/2, 2020; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, "Concluding Observations on the Initial Report of Libya", UN Doc. CMW/C/LBY/CO/1, 2019.

¹⁹ ILO Committee on the Application of Standards, "Individual Case (CAS) – Israel", 2009; ILO Committee on the Application of Standards, "Individual Case (CAS) – Malaysia", 1997; ILO Committee on the Application of Standards, "Individual Case (CAS) – Malaysia", 1998; ILO Committee on the Application of Standards, "Individual Case (CAS) – Malaysia", 1996; ILO Committee on the Application of Standards, "Individual Case (CAS) - Spain", 2001; ILO Committee on the Application of Standards, "Individual Case (CAS) - Italy", 2009.

²⁰ ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) – Barbados", 2021; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention, 1975 (No. 143) - Benin", 2021; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) and Convention, 1975 (No. 143) – Cyprus", 2021; ILO Committee of Experts on the Application of Conventions and

general surveys on labour migration elaborated by the CEACR.²¹ Although these sources dealt with heterogeneous cases (for instance, in terms of geographical location, level of economic and social development), they all involved the same monitoring bodies, the same set of rights, and the same period. Therefore, they offer a valuable insight into the phenomenon of migrant workers' protection in its entirety.

3. THE LEGAL FRAMEWORK OF INTERNATIONAL LABOUR MIGRATION LAW

Five are the core international instruments on labour migration – three conventions and two recommendations – that have been studied in this research: the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW), the ILO Migration for Employment Convention (Revised), 1949, No. 97, the ILO Migration for Employment Recommendation (Revised), 1949, No. 86, the ILO Migrant Workers Convention, 1975, No. 143, and the Migrant Workers Recommendation, 1975, No. 151.

According to international legal doctrine, conventions are hard law instruments since they are legally binding for the countries that have ratified them, while recommendations are soft law instruments. Therefore, recommendations are non-binding instruments, which encourage the addressees to comply with their provisions. Concerning the five legal instruments, the conventions have been ratified by few countries, among which almost no receiving countries (see Figures 1-3), while the recommendations are scarcely implemented in national practices due to their non-binding nature.

Notwithstanding their limited scope, these instruments have been analysed for three main reasons. Firstly, these regulations are specifically designed for migrant workers. Secondly, these regulations are the most comprehensive and protective instruments for migrant workers. Thirdly, these regulations are the only ones with

Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) - New Zealand", 2021; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) - Barbados", 2019; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention, 1975 (No. 143) – Kenya", 2019; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) – Malaysia", 2019; ILO Committee of Experts on the Application of Conventions and Recommendations, "Observation (CEACR) - Convention (Revised), 1949 (No. 97) – Spain", 2019.

²¹ International Labour Conference, Migrant Workers. General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151); ILO Committee of Experts on the Application of Conventions and Recommendations, "Promoting Fair Migration. General Survey Concerning the Migrant Workers Instruments", 2016, available at: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_453898.pdf>.

monitoring bodies performing efficiently. Hence, these five legal documents represent both a fundamental body of legislation and the starting point for any theoretical and empirical reflection on international labour migration.

The theoretical reflection moves from the definition of the notion of ‘migrant worker’ and consequently of the rights guaranteed to those who fall under its scope. Clarifying the limits of each legal concept is essential to understanding the purpose of the legislation to which the rights are attributed: the first step is defining the notion of ‘migrant worker’ through a comparative analysis of the three Conventions. Then, it is necessary to consider what rights are guaranteed to the migrant worker. These rights result from the combination of the five *ad hoc* legal instruments and the ILO Core Labour Standards (CLS). Since CLS are a legally binding set of instruments for all ILO Member States, they have been employed to address the problem of limited ratifications of the *ad hoc* conventions. The outcome of this assessment is a scheme of the legal framework of migrant workers’ rights or the law in the books. By analysing the international trends in migration policy and monitoring system reports, the aporias between the applicative reality of law (i.e., law in action) and the theory (i.e., law in the books) will emerge. Finally, law in action and law on the books will be compared in order to bring out the main problems of the current discipline.

3.1. *The Definition of ‘Migrant Worker’*

Starting from the definition of ‘migrant worker’, there is a clear evolution in the three conventions. While ILO Convention No. 97 of 1949 provided for a narrow definition of ‘migrant worker’, the following ILO Convention No. 143 of 1975 and the ICMPW had a wider approach, aiming at protecting an increasing number of people.²²

According to Article 11 of ILO Convention No. 97 of 1949, the term ‘migrant worker’ refers:

to a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

Therefore, the oldest definition of ‘migrant worker’ is based on two elements: the existence of an employment relationship and the condition of the regularity of

²² BORZAGA, “Le Migrazioni per Motivi Umanitari e per Motivi Economici Nel Quadro Regolativo Internazionale”, in CHIAROMONTE, FERRARA, and RANIERI (eds.), *Migranti e Lavoro*, Bologna, 2020, p. 30 ff.

the persons involved. In other words, self-employed people and irregular migrant workers are excluded from the personal scope of the Convention.²³

ILO Convention No. 143 of 1975, which contains “supplementary provisions” to the previous one and therefore somehow extends it, provides a very similar (i.e., almost identical) definition of ‘migrant worker’, based again on the existence of an employment relationship and the condition of the regularity of the persons involved. From a formal point of view, the only difference is that ILO Convention No. 143 refers not just to a person who migrates, but also to a person who has migrated:²⁴ implying that also migrant persons who do not work anymore because of unemployment or other reasons can be granted with the protection provided by the Convention. A second substantial difference, showing the first important step in the evolution of the definition of ‘migrant worker’, arises from Article 1 of the Convention.²⁵ Indeed, according to Article 1:

each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

This means that ILO Convention No. 143 stipulates not only that regular migrant workers enjoy labour and civil rights, but also that irregular migrant workers enjoy at least fundamental human rights. Therefore, it can be affirmed that the personal scope of the Convention includes regular and irregular migrant workers, although the degree of protection accorded to each of the two categories differs considerably.²⁶

The most relevant change in the definition of ‘migrant worker’ is in any case offered by the ICPMW, which states in Article 2, para. 1:

the term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

²³ SERVAIS, *International Labour Law*, Alphen an den Rijen, 2011, p. 243.

²⁴ Article 11, para. 1 of the ILO Convention No. 143 of 1975: “For the purpose of this Part of this Convention, the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.”

²⁵ Contained in its Part I, titled “Migration in abusive conditions”.

²⁶ CHOLEWINSKY, “ILO Conventions 97 and 143”, in ALES et al. (eds.), *International and European Labour Law*, Baden-Baden, 2018, p. 856 ff.

This definition has a broader personal scope, covering all persons migrating for employment, without excluding irregular migrants or the self-employed.²⁷ Consequently, regarding its material scope, the Convention can be divided into two different parts: the first one applies to all migrant workers (and members of their families) irrespective of their status (or their contract) and the second is specifically devoted to regular ones (with some adjustments for self-employed people).²⁸

The most important outcome of this evolution was the enlargement of the personal scope of the international protection granted to migrant workers, including the most vulnerable among them, i.e., the irregular migrants.

3.2. *The Protection Granted to Migrant Workers at the International Level*

Although the three Conventions we are focussing on were adopted by different international organisations (the ILO and the UN) and at different times, they have similar contents (more precisely, the ICPMW is the most detailed one) and therefore will be jointly analysed.

These treaties regulate three main aspects: a) the prohibition of discrimination, b) the access to the labour market and the conditions of employment, and c) the access to social security.

At the very essence of the protection of migrant workers stands the prohibition of discrimination. Indeed, migrants frequently risk being treated less favourably by the host State because of their nationality. To avoid (or at least to mitigate) this danger, both ILO Conventions No. 97 of 1949 and No. 143 of 1975 pursue the goal of eliminating discrimination against migrant workers inside and outside the workplace.²⁹ Specifically, Article 6 of Convention No. 97 prohibits unequal treatments in a list of various employment and social security matters,³⁰ whereas Article 10 of Convention No. 143 provides for a much more general rule, banning discrimination:

in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

²⁷ SERVAIS, *cit. supra* note 23, p. 240.

²⁸ See Article 63 of the ICPMW.

²⁹ CHOLEWINSKY, *cit. supra* note 26, p. 848 ff.

³⁰ VALTICOS, *International Labour Law*, Deventer, 1979, p. 208 ff.

Notwithstanding the evolution in terms of widening the material scope of the prohibition of discrimination, ILO Conventions generally remain anchored to the concept of regular migrant workers, thus limiting the impact of this prohibition. Irregular migrant workers are also entitled to fundamental human rights (Article 1 of Convention No. 143) – i.e., protection against discrimination – but this protection is indirect and therefore subject to interpretation and structurally weaker (see next section on the role of Core Labour Standards).

The ICPMW completely overcomes the dichotomy between regular and irregular migrant workers by prohibiting discrimination. Indeed, according to the part of the Convention concerning the rights granted to all migrant workers and members of their families (Article 7):

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Therefore, the ICPMW prohibits discrimination against all migrant workers, including irregular ones.³¹

Regarding the access to the labour market, the ILO Conventions affirm that the principle of non-discrimination applies under two different conditions: that the migrant workers concerned are in a regular position and that they have been admitted to the territory of the host State for working purposes.³² Accordingly, the ILO Conventions do not impair the right of States to freely decide about their migration policies.³³ At the same time, there is the possibility for the same States to introduce some limited and justified restrictions (or exceptions)³⁴ to the access to the labour market for migrant workers.³⁵

Concerning the conditions of employment, Article 10 of ILO Convention No. 143 is much broader than Article 6 of ILO Convention No. 97, not only in terms of its contents but also because of the wording used. Indeed, Article 10, on the one

³¹ SERVAIS, *cit. supra* note 23, p. 241.

³² Article 14 of ILO Convention No. 143 of 1975.

³³ BORZAGA, *cit. supra* note 22, p. 41 ff.

³⁴ Article 14 of ILO Convention No. 143 of 1975: “A Member may [...] (c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.”

³⁵ ILO Committee of Experts, *cit. supra* note 20, p. 119 ff.

hand, adopts general terms like “employment” and “occupation” and, on the other, commits States Parties to promote and guarantee equal opportunities and treatment in the employment relationship and living conditions. Conversely, Article 6 details the matters to which the non-discrimination principle has to be applied; for instance: working time, the minimum age for employment, and women and child labour. This different approach may be due to the advancement of labour standards at the ILO level. Because at the time of its adoption, the issues in ILO Convention No. 97 were important for the organisation (as evidenced by several other legal instruments).³⁶ Although the approaches and material scope of the ILO Conventions partially diverge, the level of protection of regular migrant workers on conditions of employment is high in both instruments.

In Articles 25, 26 and 52, the ICPMW also stipulates specific provisions concerning conditions of employment. Articles 25 and 26 are applied to all migrant workers (including irregular migrant workers) and establish a separate regulation for individual and collective rights.³⁷ Indeed, Article 25 stipulates that migrant workers are entitled to treatment no less favourable than that accorded to nationals of the host State with regard to remuneration and “other conditions of work”.³⁸ As Servais points out, recalling the list provided for in Article 25 of the ICPMW, equal treatment applies to working time, weekly rest, paid holidays, the minimum age for employment, health and safety at work, termination of employment, and any other matter falling within the concept of “term of employment” under national law and practice.³⁹ Additionally, the same provision establishes that host States have to ensure that migrant workers are not deprived of these rights because of their condition of irregularity (in terms of stay or employment). Regarding collective rights, Article 26 grants migrant workers the right to join a trade union, participate in their activities, and profit from the protection they offer. Article 52 of the ICPMW, only applicable to regular (i.e., documented) migrant

³⁶ Such as several ILO conventions concerning minimum age: No. 5 of 1919, No. 7 of 1919, No. 10 of 1921, No. 15 of 1921, No. 33 of 1932; CHOLEWINSKY, *cit. supra* note 26, p. 859 ff.

³⁷ DE GUCHTENEIRE and PÉCOUD, “Introduction: The UN Convention on Migrant Workers Rights”, in CHOLEWINSKY, DE GUCHTENEIRE, and PÉCOUD (eds.), *Migration and Human Rights. The United Nations Convention on Migrant Workers’ Rights*, Cambridge, 2009, p. 8 ff.

³⁸ Article 25, para. 1 of ICPMW: “Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.”

³⁹ SERVAIS, *cit. supra* note 23, p. 241; BORZAGA, *cit. supra* note 22, p. 39.

workers, establishes their right to freely choose their remunerated activity, although some restrictions can be introduced by the host State. These restrictions are of different kinds and pertain, for example, to the interest of the host State to reserve some functions to its citizens or to the difficulties of the same host State to recognise occupational qualifications acquired abroad.⁴⁰

The three Conventions unanimously stipulate that the principle of non-discrimination also applies to social security. Therefore, with some exceptions, migrant workers are entitled to receive the same social security benefits as nationals.

Starting with the ILO Conventions, the relevant provisions are Article 6 of Convention No. 97 and Article 10 of Convention No. 143. Moreover, concerning this topic, while Convention No. 143 is much more general (and wide), as shown by the use of the expression “social security” without any other specifications, Convention No. 97 specifies which are the benefits that pertain to social security and provides for some possible limitations.⁴¹ These limitations regard benefits entirely financed by public funds (i.e., by taxes), mainly relating to social assistance (and not to social insurance, which is contribution-based).⁴²

In this context, Article 8 of Convention No. 143 of 1975 is also worth mentioning. It explicitly establishes that the principle of equal treatment applies to migrant workers who have lost their job, too. Therefore, this circumstance cannot automatically affect their status (making them irregular): on the contrary, they have access, at the same conditions which apply to nationals, to the protection the host State provides in case of unemployment (like unemployment benefits and other benefits).⁴³

The provisions devoted by the ICPMW to the social security of migrant workers are Article 27, on the one hand, and Article 54, on the other hand. Although they widely affirm, as the ILO Conventions do, that migrant workers have to be granted the right to social security under the same conditions as nationals, their contents are quite different. Article 27, which applies to all migrant workers (irrespective of their status), contains a very general reference to social security (without specifying the benefits involved) and, at the same time, admits some (general) exceptions to the application

⁴⁰ BORZAGA, *cit. supra* note 22, p. 40.

⁴¹ See Article 6, para. 1, lett. b): “social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations (...).”

⁴² See Article 6, para. 1, lett. b): “(...) (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.”

⁴³ BORZAGA, *cit. supra* note 22, p. 43.

of the principle of equal treatment.⁴⁴ On the contrary, Article 54 of the ICPMW applies only to documented migrant workers contains, more specifically, a range of social security rights concerning unemployment, which makes it very similar to Article 8 of ILO Convention No. 143 of 1975.

In conclusion, the three Conventions analysed have received a low number of ratifications, mostly from sending countries (as shown in the maps below). As of March 2021, out of 187 ILO member States, ILO Convention No. 97 of 1949 has been ratified by 50 States and ILO Convention No. 143 of 1975 by 25 States. Moreover, out of 198 UN member states, the ICPMW has been ratified by 56 states. This situation heavily affects the enforcement of this legislation and the effectiveness of the (formally, very broad) protection it grants to migrant workers.

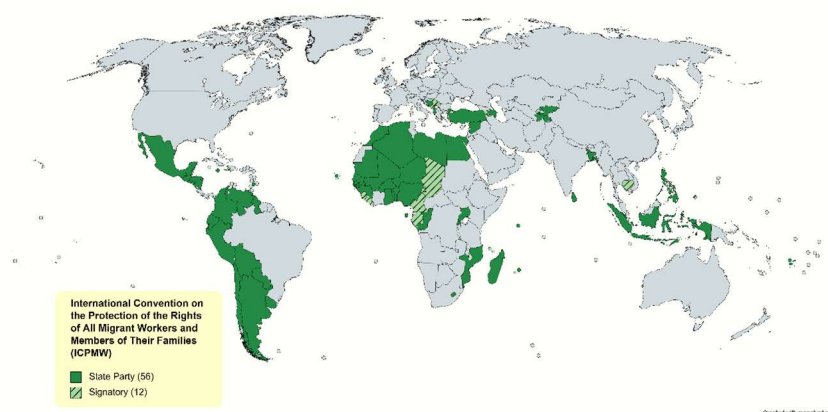


Figure 1. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW)⁴⁵

⁴⁴ As established by Article 27, para. 2 of the ICPMW: “Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.”

⁴⁵ State Parties: Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cabo Verde, Chile, Colombia, Congo, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Togo, Turkey, Uganda, Uruguay, Venezuela; Signatory: Armenia, Cambodia, Cameroon, Chad, Comoros, Gabon, Haiti, Liberia, Montenegro, Palau, Serbia, Sierra Leone. Source: <<https://indicators.ohchr.org/>>.

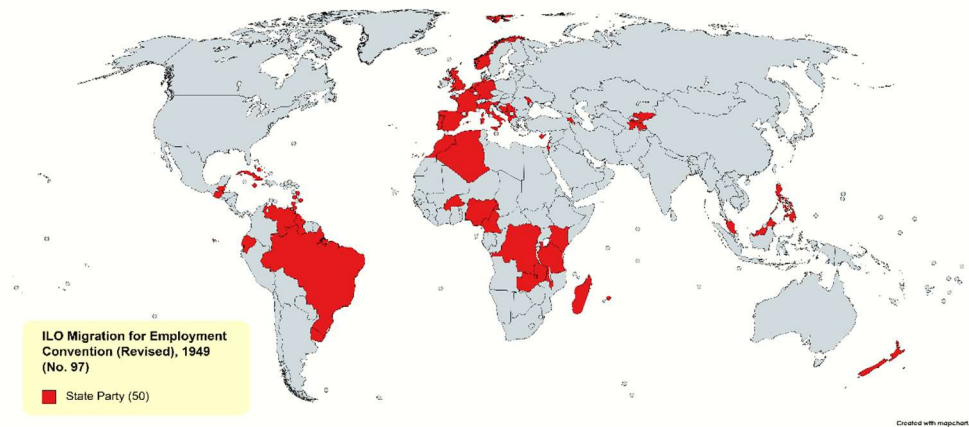


Figure 2. ILO Migration for Employment Convention (Revised), 1949 (No. 97)⁴⁶

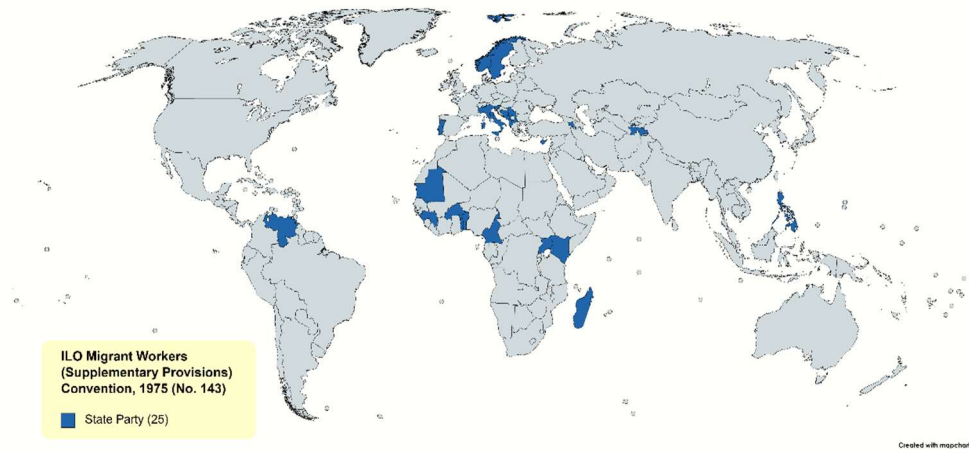


Figure 3. ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)⁴⁷

⁴⁶ State Parties: Albania, Algeria, Armenia, Bahamas, Barbados, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Kyrgyzstan, Madagascar, Malawi, Malaysia – Sabah, Mauritius, Montenegro, Morocco, Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Philippines, Portugal, Republic of Moldova, Saint Lucia, Serbia, Slovenia, Spain, Tajikistan, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, Zambia. Source: <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:14412854217160:::P11300_INSTRUMENT_SORT:1>.

⁴⁷ State Parties: Albania, Armenia, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Cyprus, Guinea, Italy, Kenya, Madagascar, Mauritania, Montenegro, North Macedonia, Norway, Philippines, Portugal, San Marino, Serbia, Slovenia, Sweden, Tajikistan, Togo, Uganda, Venezuela. Source: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO>.

3.3. *Migrant Workers and Core Labour Standards*

As pointed out in the previous subsection, the ILO Conventions No. 97 of 1949 and No. 143 of 1975, as well as the ICPMW of 1990, grant to migrant workers a wide range of rights regarding access to employment, employment conditions and social security benefits, which must be ensured through the application of the principle of non-discrimination. At the same time, the low number of ratifications of these legal instruments weakens their effectiveness.

The protection of migrant workers at the international level is not limited to the above-mentioned treaties. In the last decades, the ILO has developed two new policies, the Core Labour Standards (CLS) and the “decent work agenda”, through which it tries to set the priorities for its Member States regarding their enforcement activities of the adopted Conventions.⁴⁸ These policies aim to compensate for the limited number of States that have ratified the two Conventions. In other words, even within the ILO, there is a tendency to use soft law instruments to strengthen the protection of workers’ rights and to face the limited implementation of binding instruments.

For our purposes, the most important of these policies certainly is the CLS one,⁴⁹ which is based on a Declaration adopted by the International Labour Conference in June 1998.⁵⁰ This soft law tool establishes four “fundamental principles and rights at work” (“freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or

⁴⁸ MAUPAIN, “Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, *European Journal of International Law*, 2005, p. 439 ff.; MAUPAIN, “New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization”, *European Journal of International Law*, 2009, p. 334 ff.

⁴⁹ CLS are a particular category of ILO standards. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, the second of the four declarations so far (the first was the Declaration of Philadelphia), a non-binding instrument listing four fundamental principles in eight conventions. These standards are: freedom of association and the effective recognition of the right to collective bargaining (ILO Conventions No. 87 and 98), elimination of all forms of forced and compulsory labour (ILO Conventions No. 29 and 105), effective abolition of child labour (ILO Conventions No. 138 and 182), elimination of discrimination in respect of employment and occupation (ILO Conventions No. 100 and 111). These standards are “fundamental” as they are a prerequisite for the development of effective labour law. The ILO considers the CLS to be binding on States Parties, regardless of whether they have ratified the conventions establishing them. However, the ILO has promoted the ratification of the eight core conventions. This has borne fruit as the eight conventions have received a very high number of ratifications. For more information see BORZAGA and MAZZETTI, “*Core labour standards e decent work: un bilancio delle più recenti strategie dell’OIL*”, *Lavoro e Diritto*, 2019, p. 447 ff.

⁵⁰ International Labour Organization, “ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up”, 1998.

compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation”),⁵¹ which Member States should respect because of the very fact of their membership to the ILO, i.e., irrespective of ratification of the relevant eight ILO Conventions.⁵²

In the Preamble of the Declaration, there is an explicit reference to all migrant workers (without any distinction between regular and irregular ones), which are considered as a category of particularly vulnerable people (together with the unemployed) and therefore deserve special attention: this means that fundamental principles and rights at work have to be also granted to them (or, perhaps, *a fortiori* to them).⁵³

The success of the CLS policy and the high number of ratifications of the conventions that enshrine them means that the inclusion of migrant workers in the text of the 1998 Declaration is of paramount importance for the effective protection of migrants’ rights.⁵⁴ More precisely, as of March 2021, the least implemented Convention (No. 87 of 1948 regarding freedom of association) has been ratified by 155 States Parties, whereas the most successful one (No. 182 of 1999 concerning the worst forms of child labour) has been universally ratified (i.e., by all 187 ILO Member States) in summer 2020.⁵⁵

Accordingly, CLS could be an additional and perhaps more effective tool to protect and safeguard migrant workers’ rights alongside the ILO and UN Conventions specifically devoted to them.

This is true for all CLS (and the respective eight ILO Conventions) but seems to be particularly true regarding two of them, i.e., the elimination of all forms of forced and compulsory labour and the effective abolition of child labour (and the respective four Conventions).⁵⁶ Indeed, these standards can be considered of paramount importance for protecting primarily irregular migrant workers, but also regular migrants.

Exactly because of being undocumented, they often are victims of forced or compulsory labour, as defined by Article 2, para. 1 of ILO Convention No. 29 del 1930.⁵⁷ This possibility is explicitly considered by the 2014 Protocol to Convention

⁵¹ See point 2 of the ILO Declaration of 1998.

⁵² MAUPAIN, “Revitalization Not Retreat”, *cit. supra* note 48, p. 439 ff.

⁵³ “Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation.”

⁵⁴ See note 51.

⁵⁵ BORZAGA and MAZZETTI, *cit supra* note 51.

⁵⁶ See ILO Conventions No. 29 and 105 concerning the elimination of all forms of forced and compulsory labour and ILO Conventions No. 138 and 182 regarding the effective abolition of child labour.

⁵⁷ Article 2, para. 1 of ILO Convention No. 29 of 1930: “for the purposes of this Convention the term forced, or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

29 of 1930, which somehow updates the latter.⁵⁸ According to the latter, States Parties, which have ratified the Protocol commit themselves to take a range of measures for the prevention of forced labour,⁵⁹ including the protection of “persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process” (Article 2, para. 1, let. d).⁶⁰

Moreover, a quite large number of (often irregular) migrant workers are minors and can enjoy the protection recognised to all children under the age of 18 years (irrespective of their status) by Convention No. 182 of 1999, which concerns the worst forms of child labour (slavery and forced labour included)⁶¹ and, as already pointed out, was universally ratified in 2020.

The way in which the ILO supervisory machinery has made use of the supplementary protection granted to migrant workers (and in particular to the irregular ones) by the CLS will be discussed in depth in the next sections.

4. LAW IN THE BOOKS AND LAW IN ACTION

The regulation of migration – including the aspects related to labour migration - remains largely in the domain of States. The sovereignty of States and their wide discretion in determining and regulating migration policies is a rule of customary international law.⁶²

As Dauvergne explained back in 2004, States in the age of globalisation threatened the loss of control over important domains, such as economic policy, international trade, or monetary policy (i.e., EU Economic and Monetary Union). As a result, they have implemented a variety of measures to ‘crack down’ on immigration, which has become the “last bastion of sovereignty”.⁶³ These policies have negatively affected the human and labour rights of migrants. Furthermore, States, especially receiving countries, refuse any international cooperation on migration, rather than implementing severe legislation and criminalising the phenomenon. Such a restrictive migration policy clashes harshly with the economic

⁵⁸ VALTICOS and VON POTOBSKY, *International Labour Law*, Deventer, 1995, p. 109.

⁵⁹ As of March 2021, the 2014 Protocol to Convention 29 of 1930 was ratified by 49 countries.

⁶⁰ ANTON, “Protocol of 2014 to the Forced Labour Convention, 1930 (I.L.O.)”, *International Legal Materials*, 2014, p. 1129 ff.

⁶¹ BORZAGA, *Contrasto Al Lavoro Infantile e Decent Work*, Napoli, 2018.

⁶² OPESKIN, PERRUCHOUD, and REDPATH-CROSS, *Foundations of International Migration Law*, Cambridge, 2012, p. 312; KRATOCHWIL, “Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System”, *World Politics*, 1986, p. 27 ff.

⁶³ DAUVERGNE, “Sovereignty, Migration and the Rule of Law in Global Times”, *The Modern Law Review*, 2004, p. 588 ff.

and trade liberalisations of the last twenty years, showing the ideological nature of this policy. Nevertheless, the numerical significance and the economic importance for receiving countries of migration flows require a change in strategy.⁶⁴ There is an increased need for a common approach to tackle the phenomenon of migrant workers based on two pillars: the promotion of international migration law and the monitoring of the effectiveness of these rules.

The previous sections described the existing international legal framework on migrant workers. Within this framework, this work sheds light on the role of international organisations, both general (the UN) and sectoral (the ILO), in helping to produce and detail international migration law. In this context, the UN and the ILO play a fundamental role in promoting the protection of migrant workers using both hard and soft law instruments.⁶⁵ These standards are monitored by three main bodies: the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW),⁶⁶ the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), and the ILO Committee on the Application of Standards (CAS).⁶⁷

The CMW, the CEACR and the CAS have assessed several cases of violations of international law concerning migrant workers and have worked to ensure that States take appropriate measures to restore legality. Furthermore, after the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the ILO monitoring bodies attempted to enlarge and strengthen migrant workers' protection by referring to the CLS and not merely to international labour standards on labour migration.

The next section will briefly reconstruct the monitoring mechanisms within the ILO and the UN to understand the advantages and limitations that these organisations encounter in their actions. A later section of this work will focus on the contribution that the monitoring bodies play in the implementation of international migration labour law. This later analysis aims at highlighting the strengths and weaknesses of the system. It will be based on individual cases of the CAS, reports, and observations of the CMW and the CEACR. In addition, the final part will analyse the impact of the COVID-19 pandemic on migrant workers' rights.

⁶⁴ World Migration Report, *cit. supra* note 1, pp.172–83.

⁶⁵ CHOLEWINSKI, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, 1997, pp. 77 and 137.

⁶⁶ *Ibid.*, pp. 193–99.

⁶⁷ VALTICOS, *cit. supra* note 30, pp. 239–44; ADAM, *Attività Normative e Di Controllo Dell'OIL e Evoluzione Della Comunità Internazionale*, Milano, 1993, pp. 136–37.

4.1. Monitoring Bodies: Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), Committee of Experts on the Application of Conventions and Recommendations (CEACR), and Committee on the Application of Standards (CAS)

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the most recent of three international bodies that monitor the rights of migrant workers. This committee, which held its first session in 2004 and consists of 14 members, combines efficiency and representativeness as its members, elected by States Parties for four-year terms, are selected from experts who guarantee impartiality and competence.⁶⁸ The CMW was established, after extensive negotiations,⁶⁹ by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW), adopted by Resolution A/RES/45/1581 of 18 December 1990 of the General Assembly of the United Nations and entered into force on 1 July 2003.⁷⁰

The CMW conducts multi-level monitoring based on State reporting, inter-state complaints, and individual complaints. While State reporting has been applied from the outset, inter-state complaints and individual complaints will come into force when at least 10 States Parties will deposit the declaration required by Articles 76, para. 1, and 77, para. 1 of the ICPMW.⁷¹

State reporting is designed based on similar procedures already applied by other human rights institutions. According to articles 73 and 74, para. 1 of the

⁶⁸ CHOLEWINSKI, *cit. supra* note 66, p. 194; United Nations General Assembly, “Report of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families”, UN Doc. A/C.3/43/1, 1988, paras 172–175, 179, 181–188, 196–202; Article 72, United Nations, “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”, UN Doc. A/RES/45/158 (1990).

⁶⁹ LONNROTH, “The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation”, *International Migration Review*, 1991, pp. 710.

⁷⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. See also CHOLEWINSKI, “International Labour Migration”, in OPESKIN, PERRUCHOUD, and REDPATH-CROSS, *cit. supra* note 62, p. 283 ff.

⁷¹ Office of the United Nations High Commissioner for Human Rights, “Human Rights Bodies - Complaints Procedures”, 2021, available at: <<https://www.ohchr.org/en/hrbodies/tbpetitions/pages/hrtbpetitions.aspx>>; Office of the United Nations High Commissioner for Human Rights, ‘Status of Ratification Interactive Dashboard - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’, 2021, available at: <<https://indicators.ohchr.org/>>.

ICPMW, States Parties are required to report periodically⁷² on the “legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the convention.”⁷³

As far as the procedure is concerned, the CMW receives the national reports and analyses them and engages in an intensive dialogue with governments (i.e., preliminary and concluding observations, recommendations, and surveys).⁷⁴ Moreover, the CMW annually submits a comprehensive report on the implementation of the Convention to the UN General Assembly. This report contains CMW’s considerations and recommendations, based on the examination of the reports and any observations presented by States Parties.⁷⁵

Article 76 of the ICPMW governs inter-state complaints, which have not yet been established.⁷⁶ These complaints require a State Party to urge another State Party that is not fulfilling its obligations to restore legality.⁷⁷ If the violation persists, the complaining State Party may refer the case to the CMW, which in turn proceeds to the good offices.⁷⁸ Individual complaints, which are the third control procedure, have not yet been established.⁷⁹ However, the procedure has been adopted and it is based on a complaint by an individual directed to the CMW. Following the complaint, the CMW investigates and dialogues with the State to resolve the dispute.⁸⁰

Under Article 74, para. 5 of the ICPMW, the “International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.”⁸¹ In addition, to enable effective support to the CMW by the ILO, the UN Secretary-General must

⁷² The initial report is to be issued within one year after ratification, subsequent reports are to be issued every five years or upon request of the CMW.

⁷³ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 73, paragraph 1.

⁷⁴ Article XII, UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘Rules of Procedure’, UN Doc CMW/C/2, 2019.

⁷⁵ *Ibid.*, rule 31.

⁷⁶ Office of the United Nations High Commissioner for Human Rights, ‘Status of Ratification Interactive Dashboard - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’.

⁷⁷ CHOLEWINSKI, *cit. supra* note 65, p. 194.

⁷⁸ *Ibid.*

⁷⁹ As of March 2021, only four countries (Ecuador, El Salvador, Mexico, and Uruguay) deposited the declaration foreseen in Article 77, Office of the United Nations High Commissioner for Human Rights, ‘Status of Ratification Interactive Dashboard - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’.

⁸⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 77; CHOLEWINSKI, *cit. supra* note 65, pp. 194–95.

⁸¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 74, paragraph 5.

communicate all reports from States Parties to the ILO Director-General.⁸² The involvement of the ILO in CMW monitoring activities is a key factor in creating a link between organisations protecting migrant workers, thus leading to a coherent development of international labour migration law. This choice is a compromise following the debate between States for and against devolving the monitoring of the application of the ICPMW entirely to the ILO.⁸³

Since there are no specific enforcement mechanisms, the impact of CMW's pronouncements⁸⁴ is limited.⁸⁵ As a matter of fact, the ICPMW does not provide for *ad hoc* sanctions since the pronouncements of the committee are non-binding. However, Articles 83 and 84 of the ICPMW provide that: a) the State Party shall ensure that every person enjoys an effective remedy against the violation of his/her rights; b) the State Party shall ensure that the decision on the remedy is made by a competent judicial, administrative or legislative authority; c) the State Party shall ensure that there is appropriate judicial review of the decisions made; d) the State Party shall ensure that the decision lawfully made is implemented by the competent authorities; and e) the State Party shall ensure that all legislative measures necessary to implement the Convention are in place.⁸⁶ Notwithstanding its limitations, the CMW remains an important international body, whose pronouncements are indispensable for the protection of migrant workers' rights. The reason lies in the phenomenon of 'naming and shaming' that, although it is a non-sanctioning mechanism, still exerts a certain level of moral constraint because it damages the international reputation of the state. An analysis of the main CMW's pronouncements and the 'naming and shaming' effect will be developed in the following sections.

The international labour migration law is not only limited to the ICPMW, but it also includes the ILO's International Labour Standards on Labour Migration: Migration for Employment Convention (Revised), 1949 (No. 97), Migration for Employment Recommendation (Revised), 1949 (No. 86), Migrant Workers

⁸² CHOLEWINSKI, *cit. supra* note 65, p. 196.

⁸³ LONNROTH, *cit. supra* note 69, pp. 731–35; United Nations General Assembly, "Report of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families", UN Doc. A/C.3/44/4, 1989, para. 196; CHOLEWINSKI, *cit. supra* note 65, 196.

⁸⁴ The term "pronouncements" refers to the CMW's observations and recommendations on the periodic reports of States since this is the only monitoring mechanism currently established. However, although they are not yet applied, the considerations on the non-binding nature of CMW's "pronouncements" equally extend to inter-state and individual complaints procedures.

⁸⁵ CHOLEWINSKI, *cit. supra* note 65, p. 197.

⁸⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 83 and 84.

(Supplementary Provisions) Convention, 1975 (No. 143), Migrant Workers Recommendation, 1975 (No. 151). All these instruments are supervised by what Valticos calls “the General Supervisory Machinery of the ILO”,⁸⁷ i.e., the periodic review mechanism that the organisation carries out on the state of application of international labour standards, regulated in Chapter II, Articles 22-34 of the ILO Constitution. The General Supervisory Machinery consists of two bodies: the CEACR and the CAS. These committees are the two other bodies monitoring the rights of migrant workers.

Particularly, Article 22 provides that:

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.⁸⁸

Before being transmitted to the ILO, trade unions are requested to comment on these reports in order to have a complete picture of the information on the implementation of the international standards.⁸⁹ Under Article 23 of the Constitution, the Director-General reports on these reports to the Labour Conference. Since the mid-1920s,⁹⁰ Article 23 has provided the legal basis for the creation of two subsidiary bodies to carry out monitoring activities: the CEACR and the CAS.

The CEACR was created in 1926 as a subsidiary committee of the Governing Body and consists of twenty independent persons with expertise in international labour law appointed for a renewable three-year term.⁹¹

The CEACR annually analyses the reports submitted by States and, in case of discrepancies, makes observations and direct requests.⁹² While observations are comments on fundamental issues raised by a State’s implementation of a particular convention, direct requests concern technical issues or requests for further information.⁹³ Once the analysis is complete, the Committee of Experts approves a

⁸⁷ VALTICOS, *cit. supra* note 30, p. 239 ff.

⁸⁸ ILO Constitution, Article 22.

⁸⁹ International Labour Organization, *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, Geneva, 2019, p. 28.

⁹⁰ ZANGHÌ, *La Funzione Di Controllo Negli Enti Internazionali*, Milano, 1966, p. 237; VALTICOS, *Droit International Du Travail*, Paris, 1983, p. 585.

⁹¹ ADAM, *Regulatory and Supervisory Activities of the ILO and the Evolution of the International Community*, Milano, 1993, p. 144; VALTICOS, *cit. supra* note 30, p. 240; International Labour Organization, “Monitoring Compliance with International Labor Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations”, 2019, p. 17.

⁹² International Labour Organization, “Monitoring Compliance”, *ibid.*, p. 19.

⁹³ *Ibid.*, pp. 11–17, 19–20.

final report consisting of three parts: a) the General Report on Member States' compliance with their constitutional obligations, b) the Observations on the application of international labour standards, and c) the General Survey on a specific topic selected by the ILO Governing Body.⁹⁴ While direct requests are sent only to governments, observations are public as they are published in the second part of the report.

The Committee of Experts' report is technical advice aimed at identifying and highlighting national compliance or non-compliance with international labour standards for subsequent discussion in the International Labour Conference.⁹⁵ The Conference is not bound by the CEACR's conclusions, although it often adopts them.⁹⁶

The close link between the CEACR and the Conference is strengthened by the CAS.⁹⁷ Besides being the third monitoring body of the rights of migrant workers, the CAS is a tripartite committee of the International Labour Conference, governed by Articles 7 and 56 *et seq.* of the Rules for the Conference.⁹⁸

This committee has a key function: it selects the most significant cases listed in the annual report of the CEACR, it calls on governments to provide explanations, it conducts a preliminary debate on the most significant violations of international labour standards and it prepares a report on these violations, which is then discussed and approved by the plenary of the International Labour Conference.⁹⁹ The most important section of the report by CAS is the one that identifies cases "where governments apparently encountered serious difficulties in discharging their obligations under the ILO Constitution or under Conventions they had ratified", i.e., special list.¹⁰⁰ Although it has no direct sanctioning purpose, this section has a deterrent function because it highlights the failures of States.

Successful ILO monitoring requires that the CEACR and CAS operate effectively and cooperate. Indeed, the monitoring mechanism requires all the bodies to function. Indeed, without the report of the CEACR, the CAS cannot operate and

⁹⁴ *Ibid.*, p. 19.

⁹⁵ CORNIL, "Le Rôle de La Commission d'experts de l'OIT Dans Le Contrôle de l'application Des Conventions Internationales Du Travail", *Revue Belge de Droit International*, 1970, p. 268 ff.

⁹⁶ ADAM, *cit. supra* note 67, p. 145.

⁹⁷ International Labour Organization, "Monitoring Compliance", *cit. supra* note 91, pp. 13–14.

⁹⁸ ADAM, *cit. supra* note 91, p. 144; International Labour Organization, "International Labour Conference - Rules for the Conference", 2021, available at: <[https://www.ilo.org/ilc/Rulesfortheconference/lang--en/index.htm#Article 7](https://www.ilo.org/ilc/Rulesfortheconference/lang--en/index.htm#Article%207)>.

⁹⁹ VALTICOS, *cit. supra* note 30, p. 242; International Labour Organization, "Monitoring Compliance" *cit. supra* note 91, pp. 13–15, 19; Committee on the Application of Standards of the International Labour Conference, "A Dynamic and Impact Built on Decades of Dialogue and Persuasion", 2011, pp. 5–12.

¹⁰⁰ VALTICOS, *cit. supra* note 30, p. 242; Committee on the Application of Standards of the International Labour Conference, *ibid.*, pp. 5–22.

without the CAS, the Conference cannot carry out its monitoring duties. The 2012 ILO monitoring system crisis has highlighted the limitations of this machinery.¹⁰¹ However, the machinery remains essential for protecting labour rights.¹⁰²

4.2. State of the Art: Major Violations of the Rights of Migrant Workers

A systematic analysis of relevant CMW, CEACR and CAS reports was conducted to understand the role of international monitoring bodies in enhancing the implementation of international labour migration conventions. The relevant legal parameters applied in this analysis are derived from ICMPW, Convention No. 97 of 1949, Recommendation No. 86 of 1949, Convention No. 143 of 1975, and Recommendation No. 151 of 1975. The parameters cover three main aspects: the prohibition of discrimination, the access to the labour market and the conditions of employment, and the access to social security enclosed in. Furthermore, to develop a comprehensive evaluation of the major violations of migrant workers' rights, the three main aspects are supplemented with the CLS.

The sources employed in this analysis are: a) annual reports of the CMW to the General Assembly published between 2018 and 2020, b) observations (particularly concluding observations) on national reports examined by the CMW between 2018 and 2020, c) all cases discussed by the CAS, d) observations on national reports examined by the CEACR between 2019 and 2020, and e) the 1999 and 2016 general surveys on labour migration elaborated by the CEACR. Although these sources deal with heterogeneous cases, they offer an insight into the phenomenon of migrant workers' protection in its entirety.

In detail, reports from the monitoring bodies suggest that have opted for different approaches to the protection of migrant workers over time. Indeed, the CEACR points out that States, at least from an early stage, focused mainly on

¹⁰¹ In June 2012, the rift that had characterised employers' and employees' representatives in the ILO since the early 1990s became apparent. In 2012, the employers' representatives requested that the technical nature of the CEACR's annual report on the right to strike be specified. The opposition of the workers' representatives was produced as a reaction to the refusal by the employers to accept the presence of cases relating to the right to strike in the list of those that the CEACR submits to the CAS. Consequently, the entire monitoring mechanism was blocked. In the following years, the rift was not healed. In 2015, rather than resorting to the ECJ's opinion, a declaration by governments' representatives expressing confidence in the monitoring mechanism and recognising (although not explicitly codified in any ILO Convention) the importance of the right to strike for workers' rights protection was adopted. No definitive solutions have been adopted so far to address the limitations of the ILO monitoring mechanism.

¹⁰² PERTILE, "La Crisi Del Sistema Di Supervisione Dell'OIL Nel Suo Contesto: Il Timore è Fondato, Ma Agitarsi Non Serve a Nulla", *Lavoro e Diritto*, 2019, p. 407 ff.

combating the exploitation of migrant children,¹⁰³ while neglecting other fundamental rights, particularly trade union rights.¹⁰⁴ Nowadays, the situation has improved. Although most states now grant the right of association to migrant workers, major obstacles are placed in the way of its effective implementation: from residency to work permit requirements.¹⁰⁵ The CEACR and the CMW unanimously agree that the main victims of these policies are irregular migrant workers.¹⁰⁶ The latter are non-existent under national law and are therefore unprotected.

As for the prohibition of discrimination and the principle of equal treatment, all the monitoring bodies emphasise that this principle is often and seriously violated. As stated in the 2016 survey, “Xenophobia against non-nationals, and in particular, migrants, constitutes one of the main sources of contemporary racism [...]”¹⁰⁷ The violation of the due process of law,¹⁰⁸ of the right to remedy and judicial review, and the abuse of administrative detention and deportation, especially in the case of minors,¹⁰⁹ are particularly serious manifestations of the discriminatory policies and the violation of civil rights that are widespread in some countries. Above all, the criminalisation of migrant status is particularly worrying because it “increases the vulnerability of migrant workers to violations of their basic human rights.”¹¹⁰

¹⁰³ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, pp. 93–94.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, p. 95.

¹⁰⁶ See among others: UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Argentina”, p. 9; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Tajikistan”, p. 7; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina”, p. 8; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Algeria”, 11 ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, p. 94.

¹⁰⁷ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, p. 95.

¹⁰⁸ See among others: UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina”, pp. 6–7; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Tajikistan”, p. 6.

¹⁰⁹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Argentina”, pp. 3–4; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina”, pp. 6–7.

¹¹⁰ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, p. 95.

Migrant women workers deserve a special focus. They are subject to precarious working conditions and violence, especially in domestic and care work. The CEACR and the CMW have specifically addressed this issue on several occasions.¹¹¹ It is no coincidence that in all the cases analysed, the CMW has always stressed the importance of a “comprehensive gender-responsive and human rights-based migration policy and strategy.”¹¹²

Finally, the CEACR in its 2016 survey points out that labour exploitation, servitude, slavery and forced labour are particularly widespread among migrant workers and especially among irregular workers.¹¹³ The two sectors most affected by these practices are agriculture and domestic work. Moreover, this exploited labour force is procured through ‘trafficking in persons’, or through the enslavement of migrants already present in a State as a result of ‘smuggling of migrants’.¹¹⁴

¹¹¹ *Ibid.*, 97.

¹¹² See among others: UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Algeria”, 3; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Tajikistan”, 3; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Argentina”, 2; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina”, 3; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Initial Report of Guyana”, 3.

¹¹³ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, p. 98.

¹¹⁴ Regarding the legal distinction between ‘trafficking in persons’ and ‘smuggling of migrants’, some clarifications are necessary as the topic is debated in the literature. This article follows the definitions adopted in the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime” and in the “Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime”. Thus, ‘trafficking in persons’ is defined as a crime against the person which takes the form of “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion [...] for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” Conversely, ‘smuggling of migrants’ is the crime against the State that takes the form of “procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.” See Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted on 15 November 2000, entered into force on 28 January 2004) 2241 UNTS 507; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force on 25 December 2003); STOYANOVA, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law*, Cambridge, 2017; STOYANOVA, “Human Trafficking and Slavery”, in Robin GEIß and Nils MELZER (eds.), *The Oxford Handbook of the International Law of Global Security*, Oxford, 2021.

Although smuggling and trafficking are two different criminal acts, both have the effect of violating human rights and exploiting migrant workers.¹¹⁵

These issues, except for a few specific cases, can be traced to five general macro-categories: a) violation of civil rights, b) violation of the rights of children and women, c) labour exploitation and enslavement, d) discrimination and violation of equal treatment, and e) violation of freedom of association. These five macro-categories combine the violation of fundamental human and labour rights. Indeed, the national tendency to violate the fundamental rights of migrant workers was already evident in the 1999 general survey. This was due to a profound conflict of interest “between the sovereign right of States wishing to protect the interests of their domestic labour market and the fundamental human rights of individuals who, for various reasons, are forced or choose to migrate in search of employment.”¹¹⁶

To address these abuses, both the UN and the ILO have long applied a comprehensive human rights approach to protect migrant workers.¹¹⁷ These Organisations affirmed that the rights of migrant workers are those set out in *ad hoc* conventions, international labour standards – especially CLS – and human rights.¹¹⁸ This human rights-based approach is legitimised given the dual nature of the subjects considered, understood not only as migrant workers but also as human beings.¹¹⁹ Hence, the scope of investigation of the three monitoring bodies has been extended, leading to extensive monitoring of all types of rights violations and especially those of the CLS.

¹¹⁵ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 20, pp. 98–99; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina”, pp. 11–12; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Tajikistan”, p. 10; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Algeria”, p. 12; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, “Concluding Observations on the Second Periodic Report of Argentina”, p. 10.

¹¹⁶ International Labour Conference, Migrant Workers. General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 11.

¹¹⁷ *Ibid.*, 19–20.

¹¹⁸ CHOLEWINSKI, “Human Rights of Migrants: The Dawn of a New Era?”, *Georgetown Immigration Law Journal*, 2010, p. 585 ff.

¹¹⁹ International Labour Organization, “International Labour Migration A Rights-Based Approach, International Labour Office”, 2010, pp. 215, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_208594.pdf>.

4.3. *The Enforcement Issue*

Having identified the main problems affecting migrant workers, this section will outline issues related to the enforcement of the pronouncements of the supervisory bodies, trying to indicate the causes of the fragility of the supervisory system.

Strong denunciation, and individual and collective recommendations issued by monitoring bodies are the most important tools that international organisations have to raise awareness about violations of human and migrant workers' rights. As a matter of fact, monitoring bodies are deprived of the enforcing and sanctioning powers.¹²⁰ Their mandate is to identify, investigate and suggest possible solutions to prevent and repair the violations. As a result, the CEACR, the CAS, and the CWM have only a power of 'name and shame',¹²¹ lacking the authority to decide and sanction unlawful conduct. Thus 'naming and shaming' is a result of the founding principles of Public International Law (i.e., States sovereignty, States equality, and exclusive territorial jurisdiction) and at the same time the strongest tool to pursue the objectives of monitoring bodies.¹²²

The effectiveness of 'naming and shaming' is controversial; some scholars are confident that it gives good results, while others are sceptical. In the last twenty years, reliable research has been carried out by Hafner-Burton, Hendrix, and Wong, Ausderan, Krein, and DeMeritt,¹²³ agreeing that 'naming and shaming' is generally effective but with a highly variable trend.

While Krain show an optimistic view of 'naming and shaming' claiming that it reduces major human rights violations (killings, massacres and genocides),¹²⁴ Ausderan¹²⁵ and Hafner-Burton argue that "governments subjected to global

¹²⁰ ROUSSEAU, 'Power, Mechanisms, and Denunciations: Understanding Compliance with Human Rights in International Relations', *Political Studies Review*, 2018 p. 324 ff.

¹²¹ RISSE, ROPP, and SIKKINK, *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge, 2013, p. 126.

¹²² CAPLAN, "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", *The American Journal of International Law*, 2003, p. 741 ff.

¹²³ HAFNER-BURTON, "Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem", *International Organization*, 2008, p. 689 ff.; HENDRIX and WONG, "When Is the Pen Truly Mighty? Regime Type and the Efficacy of Naming and Shaming in Curbing Human Rights Abuses", *British Journal of Political Science*, 2012, p. 651 ff.; AUSDERAN, "How Naming and Shaming Affects Human Rights Perceptions in the Shamed Country", *Journal of Peace Research*, 2014, pp. 81 ff.; KRAIN, "J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?", *International Studies Quarterly*, 2012, p. 574 ff.; DEMERITT, "International Organizations and Government Killing: Does Naming and Shaming Save Lives?", *International Interactions*, 2012, p. 597 ff.

¹²⁴ KRAIN, *ibid.*

¹²⁵ AUSDERAN, *cit. supra* note 123, p. 93.

publicity efforts often behave in contradictory ways.”¹²⁶ Several factors are responsible for this variability: the political regime of the state (democracy, authoritarian or mixed regime), the level of economic development, the level of integration of the state into the international community, the level of press freedom, as well as the pressure of national and international public opinion.¹²⁷ Although in some cases international pressure and fear of loss of control by the government increase the number of violations, there is a tendency to reduce abuses that are easier to temper and those that are more serious (major violations).¹²⁸

This same variable behaviour can also be seen in the case of violations of migrants’ rights. Especially receiving countries legislated to protect migrant workers’ rights; however, there is a lack of enforcement. Moreover, irregular migrants are excluded from the protection and therefore face greater vulnerability. The same problem exists under international law: on the one hand, there are protective regulations, and, on the other hand, there is a lack of enforcement.

What appears to be an element of weakness, i.e., the impossibility of applying immediate sanctions to violations of the rights of migrant workers, does, however, guarantee those same monitoring bodies the authority to provide technical support to States and thus have an indirect impact on people’s lives.

Furthermore, pronouncements of monitoring bodies can indirectly impact national law through case law and moral suasion of legislators due to the prestige of the issuing bodies. In this way, although indirectly, monitoring bodies contribute to improving migrants’ conditions. It is precise because of the perceived impartiality of the monitoring bodies – guaranteed both through the selection of their members and by preventing direct intervention –¹²⁹ that they can make up for the lack of enforcement through international cooperation and technical support. The ILO and the UN have made extensive use of these two instruments, involving civil society, trade unions, and NGOs. However, it is the ILO that has stressed the importance and committed itself to promote international cooperation aimed at increasing the accountability of States.¹³⁰ This has resulted, among others, in the conclusion of the

¹²⁶ HAFNER-BURTON, *cit. supra* note 123, p. 713.

¹²⁷ HENDRIX and WONG, *cit. supra* note 123; HAFNER-BURTON *cit. supra* note 123; DEMERITT *cit. supra* note 123; AUSDERAN, ‘How Naming and Shaming Affects Human Rights Perceptions in the Shamed Country’; KRAIN, *cit. supra* note 123.

¹²⁸ HAFNER-BURTON, *cit. supra* note 123.

¹²⁹ International Labour Organization, *cit. supra* note 91, p. 35; International Labour Organization, *cit. supra* note 93, p. 13; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘Rules of Procedure’, *cit. supra* note 76.

¹³⁰ International Labour Organization, *cit. supra* note 121, p. 216.

‘Trade Union Agreement on Migrant Workers’ Rights’, which connects and develops the potential of trade unions in sending and receiving countries to enable effective protection of migrant workers.¹³¹

5. IMPACT OF THE COVID-19 PANDEMIC ON THE RIGHTS OF MIGRANT WORKERS

Globally, the protection of migrant workers by both sending and receiving countries is insufficient and inadequate, a situation that has been worsening since the outbreak of the pandemic. Nevertheless, these consequences are not surprising considering the functioning of the migration policy of western countries since the late 1990s.

According to Castles and Ozkul and Wickramasekara, this policy can be defined as “circular migration” or “temporary migration”;¹³² it is based on the “Triple Win” discourse,¹³³ which emphasises that:

[circular migration] offers destination countries a steady supply of needed workers in both skilled and unskilled occupations, without the requirements of long-term integration. Countries of origin can benefit from the inflow of remittances while migrants are abroad and their investments and skills upon return. The migrants are also thought to gain much, as the expansion of circular migration programs increases the opportunities for safer, legal migration from the developing world.¹³⁴

Regardless of its rhetoric, the ideological approach of “temporary migration” is closely linked to a neo-liberal view of economics “where the value of individual migrants is their productive contribution to labour markets and mutual (economic) benefits for sending and receiving States.”¹³⁵ This migration policy has been implemented mainly through three types of legal instruments: a) stringent requirements for access to host countries, b) residence permits limited in time and mainly linked to temporary work contracts, and c) limits on access to healthcare and

¹³¹ International Trade Union Confederation and International Labour Organization, ‘Model Trade Union Agreement on Migrant Workers’ Rights’, International Labour Organization, 2015, available at: <https://www.ilo.org/dyn/migpractice/migmmain.showPractice?p_lang=en&p_practice_id=61>.

¹³² CASTLES and OZKUL, “Circular Migration: Triple Win, or a New Label for Temporary Migration?”, in BATTISTELLA (ed.), *Global and Asian Perspectives on International Migration* Cham, 2011, p. 27 ff., 51 ff.

¹³³ CASTLES and OZKUL, *ibid.*.

¹³⁴ RANNVEIG AGUNIAS and NEWLAND, “Circular Migration and Development: Trends, Policy Routes, and Ways Forward”, MPI Policy Brief, 2007, available at: <<http://www.migrationpolicy.org/research/circular-migration-and-development-trends-policy-routes-and-ways-forward>>.

¹³⁵ COLLINS and BAYLISS, *cit. supra* note 6, p. 2.

social security systems.¹³⁶ Based on the data, it is safe to assume that this policy limits the rights of migrant workers,¹³⁷ makes the workforce docile, prevents effective integration and family reunification,¹³⁸ keeps wages and remittances low,¹³⁹ indirectly encourages exploitation and irregularity.¹⁴⁰

The COVID-19 pandemic had a strong impact on this fragile framework based on the temporary and precarious nature of migration. It has brought to the surface the structural problems of western countries' migration policies and exacerbated violations of the rights of migrant workers. It is no coincidence that the ILO has pointed out that the level of vulnerability of regular and irregular migrant workers has increased significantly as a result of the COVID-19 pandemic.¹⁴¹ Indeed, although the most affected were irregular migrants because they lacked legal status, regular migrants were also severely affected, losing their jobs and residence permits.¹⁴²

According to Guadagno, the COVID-19 pandemic has exacerbated racism, discrimination and xenophobia that were already plaguing migrant workers before the health crisis.¹⁴³ This issue manifested explicitly and implicitly during the months of the first and second waves of the disease,¹⁴⁴ leading to an increase in cases of verbal and physical abuse towards migrants.¹⁴⁵ Examples were the attacks and stigma against Asian people in Italy at the beginning of 2020.¹⁴⁶ However, the major problem is related to the structural xenophobia and racism embedded in the migration law of each country, which

¹³⁶ YEOH, "Temporary Migration Regimes and Their Sustainability in Times of COVID-19", Think Pieces 2020, available at: <<https://publications.iom.int/system/files/pdf/temporary-migration.pdf>>.

¹³⁷ RUDNYCKYJ, "Technologies of Servitude: Governmentality and Indonesian Transnational Labor Migration", *Anthropological Quarterly*, 2004, p. 418 ff.

¹³⁸ *Ibid.*

¹³⁹ COLLINS and BAYLISS, *cit. supra* note 6, p. 2.

¹⁴⁰ LEWIS et al., "Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North", *Progress in Human Geography*, 2015, p. 580 ff.

¹⁴¹ O'BRIEN and EGER, "Suppression, Spikes, and Stigma: How COVID-19 Will Shape International Migration and Hostilities toward It", *International Migration Review*, 2020, p. 1 ff.

¹⁴² YEOH, "Temporary Migration Regimes and Their Sustainability in Times of COVID-19".

¹⁴³ GUADAGNO, "Migrants and the COVID-19 Pandemic: An Initial Analysis", *Migration Research Series*, 2020, p. 1 ff., available at: <<https://publications.iom.int/system/files/pdf/mrs-60.pdf>>.

¹⁴⁴ HENNEBRY AND KC, *cit. supra* note 2.

¹⁴⁵ International Labour Organization, "Protecting Migrant Workers during the COVID-19 Pandemic: Recommendations for Policy-Makers and Constituents", ILO Brief, 2020, p. 1 ff.

¹⁴⁶ MOSELLO, "Coronavirus, Roma a Rischio Psicosi. Raggi: "Stop Allarmismi"", *La Stampa (Online Edition)*, 1 February 2020, available at <<https://www.lastampa.it/cronaca/2020/02/01/news/coronavirus-roma-a-rischio-psicosi-raggi-stop-allarmismi-1.38412261>>; "Coronavirus, Quando La Paura Del Contagio Serve Solo a Mascherare Il Razzismo"; "«Sei Cinese, Hai Il Coronavirus», *cit. supra* note 10.

produced the systematic restriction of migrants' rights and the violation of equal treatment principle, like in the access to healthcare and social security systems.¹⁴⁷

Precisely in agriculture, as pointed out by FAO,¹⁴⁸ limits on access to the health system and social security increase the risk of infection among migrant workers,¹⁴⁹ because:

[migrants are] living in crowded on-farm housing, where they may face lack of access to safe water, sanitation and ventilation, food storage and preparation, as well as being isolated on farm properties without access to transportation or communication and facing barriers to accessing health care.

The COVID-19 pandemic has aggravated migrants' conditions. The Western States found themselves in extreme need of workers in the farming sector and migrants went from being "disposable" to "essential".¹⁵⁰ Indeed, the ban on international mobility has led to a reduction in the number of labourers in a variety of sectors, including the agro-industrial one.¹⁵¹ However, working conditions have not improved, rather the phenomenon of exploitation has increased.¹⁵²

In response to these problems, some countries have introduced measures and plans to mitigate some aspects of the "temporary migration" model: exemptions from travel ban for certain categories of migrant workers have been introduced,¹⁵³ deadlines for the expiration of residence permits have been extended, new (long and short term)

¹⁴⁷ HENNEBRY AND KC, *cit. supra* note 2.

¹⁴⁸ Food and Agriculture Organization of the United Nations, 'Migrant Workers and the COVID-19 Pandemic', 2020, p. 1 ff., available at: <<http://www.fao.org/3/ca8559en/CA8559EN.pdf>>.

¹⁴⁹ GUADAGNO, *cit. supra* note 143, p. 5.

¹⁵⁰ TRIANDAFYLLIDOU AND NALBANDIAN, "'Disposable' and 'Essential': Changes in the Global Hierarchies of Migrant Workers after COVID-19", Think Pieces, Geneva, 2020, available at: <<https://publications.iom.int/system/files/pdf/disposable-and-essential.pdf>>.

¹⁵¹ Organization for Economic Co-operation and Development, "Managing International Migration under COVID-19", 2020, available at: <<https://www.iatatravelcentre.com/international-travel-document-news/1580226297.htm>>.

¹⁵² GUADAGNO, *cit. supra* note 143, p. 7 ff.; FASANI and MAZZA, *cit. supra* note 10; GARROTE SANCHEZ et al., "Which Jobs Are Most Vulnerable to COVID-19? What an Analysis of the European Union Reveals", World Bank Research and Policy Briefs, 2020, p. 1 ff., available at: <<http://documents.worldbank.org/curated/en/820351589209840894/Which-Jobs-Are-Most-Vulnerable-to-COVID-19-What-an-Analysis-of-the-European-Union-Reveals>>; REID, RHONDA-PEREZ, and SCHENKER, "Migrant Workers, Essential Work, and COVID-19", *American Journal of Industrial Medicine*, 2021, p. 73 ff.

¹⁵³ Organization for Economic Co-operation and Development, *cit. supra* note 154, pp. 3–5.

permits have been issued, resettlement and forced returns have been limited or suspended, and¹⁵⁴ access to health services and social security was facilitated.¹⁵⁵

Although these measures were certainly insufficient, they have at least mitigated the worst consequences of the COVID-19 pandemic. Nevertheless, these measures do not solve the structural violations of the rights of migrant workers described in this and the previous sections. The main question of whether this health crisis will lead to an overall rethinking and improvement of migration policies in destination countries remains.

6. CONCLUSION

The protection of the rights of migrant workers is weak, and the pandemic has further reduced it. This is the most immediate conclusion one can draw from this research. However, it would be simplistic to limit the findings merely to this conclusion. Indeed, this research explores the internationally recognised rights of migrant workers, maps the main violations of these rights, and shows the impact of the COVID-19 pandemic on migrant workers.

The starting point for this research was the definition of ‘migrant worker’ and his rights. Thus, we have identified the relevant legal instruments on migrant workers: ICPMW, the ILO Convention of 1949, No. 97, the ILO Recommendation of 1949, No. 86, the ILO Convention of 1975, No. 143, and the ILO Recommendation of 1975, No. 151. These instruments set out the basic rights of migrant workers, to which the ILO’s core rights (CLS) have to be added, as well as those inherent to human beings. This human rights-based approach aims to ensure the broadest legal protection for migrant workers.

Supervision over States’ implementation of these rights is delegated to three monitoring bodies: CMW, CEACR and CAS. However, there are two main limitations of this mechanism: a) the lack of enforcement authority, and b) the low number of ratifications.

As for the lack of enforcement authority, none of the three bodies has the authority to enforce the rights of migrant workers. Nevertheless, their supervision is of paramount importance in preventing States from violating fundamental rights.

As for the low number of ratifications, this is a serious weakness as it prevents widespread monitoring across all states. Only a minority of UN and ILO Member

¹⁵⁴ *Ibid.*, p. 12.

¹⁵⁵ *Ibid.*, pp. 5–6.

States have ratified the three conventions on migrant workers, mainly sending countries. The lack of ratification by receiving, driven by political and ideological reasons, represents a threat to the protection of migrant workers.

The CEACR and the CAS have mitigated the lack of ratifications by applying to migrant workers the CLS and international standards that do not expressly refer to the national labourers. Although this solution could not be applied to the CMW, decisions of the ILO's monitoring bodies extended their scrutiny over the rights of migrant workers; thus, giving substance to the human rights-based approach.

Notwithstanding the limitations, the CMW, the CEACR and the CAS have conducted an extensive analysis highlighting five main violations of the rights of migrant workers: a) violation of civil rights, b) violation of the rights of children and women, c) labour exploitation and enslavement, d) discrimination and violation of equal treatment, and e) violation of freedom of association. Moreover, receiving countries have adopted restrictive migration policies based on the neoliberal paradigm of 'temporary migration'. This model does not focus on the rights of migrant workers, but rather on the economic benefit that sending and receiving states derive from the migrant. These policies are permeated with xenophobia and structural racism and aim, on the one hand, to gain economic benefits from migrant workers and, on the other hand, to restrict their rights and stay.

The outbreak of the pandemic has worsened conditions for migrant workers. The health protection of migrant workers, especially in the agricultural sector, has deteriorated due to their living and working conditions. At the same time, the pandemic has also exacerbated the exploitation of migrants: they have gone from being a cheap 'disposable' labour force to an exploited 'indispensable' one. Moreover, there is a worsening tendency towards discrimination, xenophobia, and racism, resulting in violence, especially against Asian migrants accused of being "plague spreaders". To address this situation, host States have partly modified temporary migration policies, extending permits, suspending deportations and expulsions, and allowing greater access to healthcare and social security. Nevertheless, the protection of the rights of migrant workers remains a central issue for the future along with the need to radically rethink migration policies.

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

*Maria Giovanna Brancati**

1. INTRODUCTION

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

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

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

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

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

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

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

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

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

³ For a summary of the debate, including reference to the relevant legal framework see GALLAGHER, "The International Legal Definition of 'Trafficking in Persons': Scope and Application", in KOTISWARAN (eds.), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, Cambridge, 2017, pp. 83 ff. Among the scholarly works see, at least, GALLAGHER, MCADAM, "Abuse of a Position of Vulnerability within the Definition of Trafficking Persons", in PIOTROWICZ, RIJEN, UHL (eds.), *Routledge Handbook of Human Trafficking*, London, 2018, pp. 185-98; BROWN, ECCLESTONE, EMMEL, "The Many Faces of Vulnerability", *Social Policy & Society*, 2017, pp. 497 ff.; MASFERRER, GARCÍA-SÁNCHEZ (eds.), *Human Dignity of the Vulnerable in the Age of Rights*.

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

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

However, the European legal framework regarding trafficking in human beings adopted a different approach. The Framework Decision 2002/629/JHA,⁸

Interdisciplinary Perspectives, Cham, 2016; MACKENZIE, ROGERS, DODDS (eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, New York, 2013; HOFFMASTER, “What Does Vulnerability Mean?”, Hastings Center Report, 2006, pp. 38 ff.; WATTS, BOHLE, “The Space of Vulnerability: The Causal Structure of Hunger and Famine”, *Progress in Human Geography*, 1993, pp. 43 ff.

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

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

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

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

⁸ This was followed by the Directive 2004/81/EC, Directive 2009/52/EC and, finally, Directive 2011/36/EU, which have encompassed the provisions of the Joint Action 97/154/JHA, concerning actions to struggle and sexual exploitation of children, adopted by the Council of the European Union

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

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

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

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

based on Article K.3 of the Treaty on the European Union. However, it seems that the Joint Action remained semi-clandestine: see SANTORO, *cit. supra* note 6, p. 325, note 16.

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

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

¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJL 101/1.

¹² *Ibid.*, Whereas 12.

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

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

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

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

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

Political theorists of exploitation have demonstrated that in each exploitative relationship there are some *ex ante* and *ex post* inequalities between the two parties of the reciprocal relationship.¹⁸ As it has been pointed out, these inequalities can be

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

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

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

¹⁸ Starting from very different premises and coming to equally different conclusions about the causes and antidotes to exploitation, they tend to agree that the mere presence of inequalities or disproportions, although

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

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

“In spite of the economic boom, the average Thai’s income is very low by Western standards. Within an industrializing country, millions still live in rural poverty. If a rural family owns its house and has a rice field, it might survive on as little as 500 baht (\$20) per month. Such absolute poverty means a diet of rice supplemented with insects (crickets, grubs, and maggots are widely eaten), wild plants, and what fish they can catch themselves. Below this level, which

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

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

²⁰ See *supra* note 5 and accompanying text.

can be sustained only in the countryside, is hunger and the loss of any house or land. For most Thais an income of 2,500 to 4,500 baht per month (\$100 to \$180) is normal. Since the economic crash in 1997, the poor have only gotten poorer and more numerous as jobs evaporated: in the cities rent will take more than half of the average income, and prices climb constantly. At this income there is deprivation but no hunger since government policies artificially depress the price of rice (to the impoverishment of farmers). Rice sells for 20 baht (75 cents) a kilo, with a family of four eating about a kilo of rice each day. They might eat, but Thais on these poverty wages can do little else. Whether in city, town, or village, to earn it they will work six or seven twelve-to fourteen-hour days each week. Illness or injury can quickly send even this standard of living plummeting downward. There is no system of welfare or health care, and pinched budgets allow no space for saving. In these families, the 20,000 to 50,000 baht (\$800 to \$2,000) brought by selling a daughter represents a year's income. Such a vast sum is a powerful inducement and blinds parents to the realities of sex slavery”.

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

Nevertheless, this is not enough to argue that a relationship in which there are inequalities *means* exploitation. It takes that someone would be able to take advantage of this unbalanced situation: what in the words of law is called “abuse (of the position of vulnerability)”. This nuance can be well understood by looking at the functioning of the market in the context of a capitalist economic system: in fact, an

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

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

imbalance of bargaining power here is an inherent feature; even if asymmetry in bargaining power between the two parties can be seen as a clear indication of an inequalities issue, nonetheless, it does not necessarily mean that labour relations in the capitalistic system are always exploitation. According to a pure Marxist perspective, the inherent contradiction between capital and labour indeed implies a systemic exploitative relationship. This notion of exploitation yet seems to be excessively broad for the purposes of the law.

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

However, a more in-depth distinction could be made: the act of taking advantage may be substantively unfair due to the benefit to the exploiter (and this is basically the pure Marxist approach); or to the effect on the exploited. Tough, to argue that the relationship is not exploitative, we may consider, for instance, if the exploited had gained some advantages as well or eventually his/her chances have been increased. Secondly, the unfair advantage can derive from a defect in the process by which the unfair outcome has come about. We may take into account how both negative and positive liberty are affected here. Negative liberty can be seen as the freedom to act without any kind of external pressures,²⁴ whereas positive liberty is about the capacity of a person to use his/her negative liberty in order to be able to do or to be something that he or she previously could not do or could not be.²⁵ While means as threat, force, coercion, and deception attack a person's negative liberty,²⁶ since the free choice (to act) of the person is intentionally defeated against someone else's will; an offer disadvantageous to the weaker party, made in the knowledge of that party's vulnerable position, may exploitatively prevent positive liberty from becoming available to someone. In both cases, there could be exploitation, yet for the second we shall be aware that it is a kind of mutually advantageous exploitation. Someone who decides to withdraw from his/her positive liberty in order to gain a

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

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

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

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

temporary benefit cannot be considered exploited in the sense of (criminal) law, even if the offer's conditions are unfair. Other essentials should be well-thought-out here, such as the relevance of consent and the freedom of self-determination.²⁷

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

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

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

Human trafficking is frequently recognised as one of the new forms of slavery.²⁹ Beyond the different interpretations of the commonly accepted classification of modern slavery,³⁰ trafficking would be better understood as a serious

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

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

²⁹ BALES, *cit. supra* note 21.

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

form of coercion over a person for the purpose to allocate him/her into a profitable situation of exploitation.³¹ Thus it shares with slavery – and the new forms of slavery – the coercive nature of the conduct and the situation of unbalanced powers that stands at the bottom. However, unlike being equated to slavery-like practices, trafficking seems to re-echo the deportation of the slave trade,³² as it is intended to punish the mere movement of people for lucrative reasons, even in the absence of actual exploitation.³³

A definition of human trafficking was first given by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which is one of the three Protocols supplementing the United Nations Convention against Transnational Organised Crime (also known as Palermo Protocol),³⁴ alleging that each State Party shall have adopted appropriate measures to criminalise the conduct of trafficking and related offences.

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

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

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

³⁴ For the purposes of this Protocol: (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to

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

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

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

The solely criminal law approach has shown itself to be unable to catch the entire complexity of the phenomenon, also due to reasons related to the nature of the crime: human trafficking is a high-hidden crime as people are not leaning to report it either because they do not often realise, they are or have been victims of a criminal offence, or because they are afraid of the consequences of the denunciation. Besides, the establishment of the facts often encounters considerable procedural obstacles, most related to evidence, that does not allow the responsibility of the alleged perpetrators to be reached beyond a reasonable doubt. Yet, the answer to these

slavery, servitude or the removal of organs;”: UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, *cit. supra* note 2, Art. 3(a).

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

difficulties lies not in bending the criminal justice system to fit the shape of the crime (which is always a fallacious operation), but in trying to prevent the commission of the offence itself, by acting on the causes that animate it.

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

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

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

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

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

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

³⁷ *Ibid.*, p. 53.

business model where respect for human rights can be considered an added value in the companies' economic strategies.

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

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

Nonetheless, with increasing individual vulnerabilities and growing awareness of new forms of slavery,⁴⁰ even the focus of international organisations, scholars and practitioners on human trafficking has increased. Over time, it has also become clear that trafficking in human beings is not only a criminal matter, but it has precise roots in economic, political, social features, and, for some aspects, it should be considered a global health problem.⁴¹ Public health is a discipline in medicine and hygiene that primarily encompasses the fields of epidemiology and social medicine,⁴² hence it could seem weird to address a criminal matter from this perspective. However, the primary goal of public health is the prevention of disease as well as the protection and promotion of a population's wellbeing through the combined efforts of society, organisations and individuals. As mentioned above, trafficking is not only a criminal offence; it is also a complex phenomenon, resulting from numerous social and economic variables, both individual and systemic. Therefore, looking at the issue of human trafficking through a public health lens helps in identifying vulnerability and

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

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

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

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

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

facilitating early interventions that reach individuals before traffickers do.⁴³ It is furthermore essential to understand that victims of trafficking are a hidden population,⁴⁴ and that public awareness of this critical health concern should be raised in the countries of origin, transit, and destination.

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

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

From the first perspective, to tackle the structural determinants of such a matter, it is appropriate to recognise that we do face a multifaceted problem, which has causes (or, rather, pre-conditions) whose occurrence contributes to the existence of the same phenomenon: acting on the preconditions that foster it shall lead to its (at least partial) prevention. It has been shown that there is a link between the effect of precarious work, multiple forms of marginalisation and legal and settlement structures on individual and population health,⁴⁶ that should be investigated by the analysis of the interaction of multiple factors that protect or put individuals and populations at risk of exploitation to seek potential mechanisms to minimise these risks or enhance protection. This first means we need to clarify the circumstances under which trafficking takes place: besides vulnerability, there are economic, political, and social features involved in the process. While, from the perspective of the country of origin making trafficked persons vulnerable – as explained above –

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

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

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

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

can be both individual and systemic, the economic, political, and social structure of the country of destination is crucial to understand the mechanism of trafficking.

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

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

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

As for the second point of view, huge attention must be paid amongst others to the denial of health care, substandard nutrition, poor clothing and living conditions, the sedation of victims with drugs, unsanitary working environments, and the exposure to sexually transmitted diseases.⁴⁸ All the victims of trafficking have experienced some or all these situations. From this point of view, a critical framework for the health of a large

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

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

section of the population, i.e., people who are trafficked, is shaped: in short, it is a public health issue that shall lead to large-scale recovery efforts.

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

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

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

This creates a kind of vicious circle as health and living conditions worsen, and the number of vulnerable groups in the population increases; meanwhile, access

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

⁵⁰ *Ibid.*

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

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

to healthcare and, more generally, the attainment of decent living and working conditions for these sections of the population is gradually more and more difficult, and the virus may continue to circulate via illicit flows because of human trafficking. And so, back to square one.

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

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

However, history has proved they were wrong. Thus, a corporate compliance system for defining 'codes of conduct' has gradually become established worldwide.⁵³ Self-regulation was initially perceived as a way to avoid more severe regulatory actions by governments.⁵⁴ Yet, in the international community, this was supposed to be still insufficient and needed to be reinforced by the adoption of 'soft law' instruments. Among the many of them that flourished over the years, mention should be made of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (from now on, MNE Declaration),⁵⁵ the Sustainable Development Goals (from now on, SDGs)⁵⁶ and the UN Guiding Principles on Business and Human Rights (from now on, UNGPs).⁵⁷

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

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

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

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

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

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

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

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

There is an attempt to balance the fulfilment of economic requirements in businesses and the protection of fundamental human rights. Anyway, these soft law measures are non-binding obligations for States and companies, and, as a result, noncompliance with them does not normally give rise to legal consequences. In some cases, their implementation has taken place at the supranational, national, and firm levels. At the supranational level, in 2011 the Organisation for Economic Cooperation and Development (OECD) has adopted and incorporated the UNGPs

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

⁵⁹ *Ibid.*, Principle 13.

⁶⁰ *Ibid.*, Principle 17.

into its “OECD Guidelines for Multinational Enterprises”⁶¹ and in sector-specific human rights due diligence guidance such as those for the garment and footwear sector.⁶² In some national legislation, we can face shy attempts to turn UNPGs from soft to hard law, through their inclusion in binding legal acts for natural persons and enterprises: just to mention a few, the UK Modern Slavery Act, the French Duty of Vigilance Law, the Dutch Child Labour Due Diligence Act are examples. All these legal instruments have in common the effort to put in place legal duty on companies in avoiding and preventing human rights violations and monitoring along their GVCs. Great attention, globally, has been paid to the topic, since a large number of European countries are clamouring for similar measures.⁶³ The point is that, perhaps, as long as national legislations move independently, there will remain a problem of homogenisation of companies’ obligations and duties, and, consequently, a difficulty in harmonising protection systems.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁴ See *supra* para. 4.1.

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

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

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

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

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

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

The actual crisis shall lead to a different scenario, even considering the financial resources that can be invested by European Union. “Never let a good crisis to go waste”, says a popular maxim. And even the United Nations Office on Drugs

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

⁸⁰ *Ibid.*, p. 470.

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

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

and Crime has expressed its hope on the need to embrace the unique opportunity of acting against the deeply entrenched inequalities in our economic development model that feed marginalisation, gender-based violence, exploitation and trafficking in persons while recovering from the pandemic.⁸³

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

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

⁸³ *Ibid.*, p. 4.

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

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

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

**THE ROLE OF THE U.N. SPECIAL RAPPORTEUR
ON THE HUMAN RIGHTS OF MIGRANTS
ON THE SUPERVISION OF THE CONDUCTS OF STATES
DURING THE COVID-19 PANDEMIC AND ITS EFFECTIVENESS**

*Tatiana Cardoso Squeff, Antônio Teixeira Junqueira Neto, Laura Nicoli Mourão**

1. INTRODUCTION

There is no doubt that the COVID-19 pandemic has imposed great issues to international society, being the situation of migrants one of the most pressing ones. After all, the health emergency brought by the new coronavirus caused the circulation of people to be restricted and, with that, a market readjustment that led to the dismissal and the reduction of wages of several categories of workers around the world, especially within the migrant community.¹ Consequently, this group not only found itself in the midst of a situation of greater vulnerability, but also pressured to submit itself to

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¹ International Labour Organization (ILO), “Crise causada pela pandemia exacerba a vulnerabilidade no trabalho de migrantes na América Latina e no Caribe”, 2021, available at: https://www.ilo.org/brasilia/noticias/WCMS_778911/lang-pt/index.htm; Migration Data Portal, “Migration data relevant for the COVID-19 pandemic”, 2021, available at: <https://www.migrationdataportal.org/themes/migration-data-relevant-COVID-19-pandemic>.

dangerous health situations, due to either the need to continue working for its livelihood or the fear of seeking medical support because of one's migration status.²

It is in this sense that the present study and its relevance are introduced, as it seeks to highlight the role of the United Nations (U.N.) Special Rapporteur on the Human Rights of Migrants. Appointed in 1999 under the auspices of the then existent Commission on Human Rights (today replaced by the Human Rights Council – HRC), the mandate of the Special Rapporteur was intended to examine the situation of migrants, and promote ways to overcome the obstacles that might exist to their full and effective protection, in particular of women, children and those undocumented or in an irregular situation.³ After multiple renewals (the last being of 19 June 2020 through Resolution No. 46/3 of the HRC), the mandate of the Special Rapporteur remains active, at least until 2023, when the 3-year-mandate established by the Resolution is finished. Its intention is to remain seized of all matters that may affect the migrant population irrespective of the global context at the time, and covering all U.N. members, irrespective of whether a certain country has ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention).⁴

Hence, at first, this paper intends to highlight the appointment of the Special Rapporteur and its work during the pandemic, in order to analyse its actions and the scope of its effects, especially towards nations that are not party to the aforementioned Migrant Workers Convention – a document that, unfortunately, has not been ratified by any State member of the European Union. Because of this, in fact, in the second part of the study the policies and measures toward migrant workers, and the supervision of the Special Rapporteur during the COVID-19

² SAPARAMADU et al., “Low-wage migrant workers during coronavirus disease 2019: a social determinants analysis”, *Journal of Public Health Policy*, 2021, p. 1 ff [ahead of print]; BERSANI et al., “A saúde de migrantes e refugiados no contexto da pandemia do coronavírus”, *Veja Saúde*, 2020, available at: <<https://saude.abril.com.br/blog/com-a-palavra/a-saude-de-migrantes-e-refugiados-no-contexto-da-pandemia-do-coronavirus/>>; SRINIVAS and SIVARAMAN, “Impact of the Coronavirus Disease Pandemic on the Sustainable Development Goals”, in ID, *Understanding Relevant Sustainable Development Goal Targets Related to Labour Migration in the Association of Southeast Asian Nations During the Coronavirus Disease Pandemic*, Jakarta: ERIA, 2021, p. 30 ff, pp. 53 and 58.

³ The Office of the United Nations High Commissioner for Human Rights (OHCHR), “Special Rapporteur on the human rights of migrants”, 2021, available at: <<https://www.ohchr.org/en/issues/migration/srmigrants/pages/srmigrantsindex.aspx>>.

⁴ See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

pandemic will be addressed aiming to see if the supervision of the Special Rapporteur may be considered a useful tool to protect migrants.

More specifically, the hypothesis we intend to either confirm or refute is that, although the idea of a Special Rapporteur seems important, especially in times of emergency as the one generated by the pandemic, it is not enough to recommend actions that will be truly applied by the States. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is another tool that, along with the Special Rapporteur, may help safeguarding migrants most basic rights. Nevertheless, the fact that it is not applicable to the European Union Member States will also be addressed, being the intention of this paper also to prove the need of them to ratify the Migrant Workers Convention in order for the work of the Special Rapporteur to be implemented in full.

2. THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS AND ITS WORK DURING THE PANDEMIC OF COVID-19

2.1. *The structuring of the Special Rapporteur and its role*

The United Nations Human Rights Council (former Commission on Human Rights) created the mandate of the Special Rapporteur on the Human Rights of Migrants in 1999 pursuant to Resolution 1999/44 of the Commission on Human Rights, supported by the United Nations General Assembly Resolution 54/166.⁵ The Special Rapporteur was, according to that Resolution, expected to examine means to overcome obstacles to achieve the protection of the human rights of migrants as well as difficulties regarding the return of non-documented migrants or their irregular situation.⁶ The aforementioned Resolution also requested the appointed Special Rapporteur “to formulate strategies and make recommendations for the promotion and implementation of policies to protect the human rights of migrants, and to establish the criteria on which those policies should be based”, in the words of Gabriela Rodriguez, former Special Rapporteur on Human Rights.⁷

⁵ Protection of migrants, UN Doc. A/RES/54/166 (2000), para. 5.

⁶ Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 3.

⁷ RODRIGUEZ, “The Role of the United Nations Special Rapporteur on the Human Rights of Migrants”, in APPLEYARD (ed.), *The Human Rights of Migrants*, Geneva, 2000, p. 73 ff., p. 74; see also the specific wording of the Resolution in regard to the Rapporteur tasks: “(a) To request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families; (b) To formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur; (c) To promote the

The UN Human Rights Commission appointed Ms. Gabriela Rodríguez Pizarro, from Costa Rica, as the first Special Rapporteur on the Human Rights of Migrants.⁸ She was also demanded,

“[...] in carrying out his/her mandate, to give careful consideration to the various recommendations of the Working Group of intergovernmental experts aimed at the promotion and protection of the human rights of migrants, and to take into consideration relevant human rights instruments of the United Nations to promote and protect the human rights of migrants”.⁹

After the first three-year period, the mandate of the Special Rapporteur was extended by the Commission on Human Rights by Resolutions 2002/62¹⁰ and 2005/47.¹¹ In more recent events, it was renewed by the Human Rights Council through Resolutions 8/10, 17/12, 26/19, 34/21, and 43/6.¹² During all mandates, it is not required that the Special Rapporteur watch for the exhaustion of domestic remedies to take actions. In other words, he/she does not have to wait for States to take any measures regarding human rights violations before acting, since his/her mandate comprehends the formulation of appropriate recommendations and procedures that could be taken by national authorities to eliminate such abuses committed domestically against migrants.¹³ Moreover, the Rapporteur may work in

effective application of relevant international norms and standards on the issue; (d) To recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants; (e) To take into account a gender perspective when requesting and analysing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women”, in Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 3.

⁸ Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2000/48, UN Doc. E/CN.4/2001/83 (2001), para. 4; Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 3.

⁹ Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 4.

¹⁰ Human rights of migrants, UN Doc. E/CN.4/RES/2002/62 (2002).

¹¹ Human rights of migrants, UN Doc. E/CN.4/RES/2005/47 (2005).

¹² Human rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/RES/8/10 (2008); Human rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/RES/17/12 (2011); Human rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/RES/26/19 (2014); Human rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/RES/34/21 (2017); Human rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, UN. Doc. A/HRC/RES/43/6 (2020).

¹³ Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 3.

joint missions and communications when the matters addressed fall within the scope of more than one mandate created by the Commission and, therefore, collaborate with other Special Rapporteurs.¹⁴

As the Special Rapporteur on the Human Rights of Migrants also has to request and receive information on violations of the human rights of migrants from all relevant sources, including migrants themselves,¹⁵ it is necessary to carry out *in locu* visits. Although not mandatory, these invitations are extremely important to the protection of migrants' human rights. They are seen as the only way the Special Rapporteur can make himself/herself familiar with a certain situation within a country that has been brought to the attention of the HRC regarding migrants and their rights.¹⁶

During the 20 years of the mandate's existence, the Special Rapporteur addressed numerous topics. The first United Nations members to have received a communication from the Special Rapporteur as prescribed by Resolution 1999/44¹⁷ were Canada and Lebanon in September 2000.¹⁸ These cases were brought to the then Rapporteur's attention, Ms. Pizarro, through the HRC communication procedure as they regarded the ill-treatment of asylum seekers and the violation of the *non-refoulement* principle¹⁹ by local authorities.²⁰ In regard to the first, the Special Rapporteur addressed the possibility of deportation of a Pakistani citizen whose life was under threat in his home country ;²¹ whereas the second concerned a group of Sudanese migrants seeking asylum in Lebanon who were imprisoned on illegal entry charges and mistreated during incarceration.²² In both situations, urgent

¹⁴ OHCHR, "About the mandate of the Special Rapporteur on the human rights of migrants", 2021, available at: <<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Mandate.aspx>>.

¹⁵ *Ibid.*

¹⁶ RODRIGUEZ, *cit. supra note 7*, p. 74.

¹⁷ Human rights of migrants, UN Doc. E/CN.4/RES/1999/44 (1999), para. 10.

¹⁸ RODRIGUEZ, *cit. supra note 7*, p. 74.

¹⁹ This principle grants migrants the right not to be sent back to the country they came from if they could be submitted to a situation of physical or psychological abuse. See DUFFY, "Expulsion to Face Torture? Non-refoulement in International Law", *International Journal of Refugee Law*, 2008, p. 373 ff., p. 373; BHUIYAN, "Protection of Refugees Through the Principle of Non-Refoulement", in ISLAM and BHUIYAN, *An Introduction to International Refugee Law*, Leiden, 2013, p. 99 ff., p. 100; NAGORE, "The Instruments of Pre-border Control in the EU: A New Source of Vulnerability for Asylum Seekers?", Buenos Aires, Paix et Sécurité Internationales, 2019, p. 161 ff., p. 190

²⁰ Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2000/48, UN Doc. E/CN.4/2001/83 (2001), p. 3.

²¹ See *Masih Shakeel v. Canada*, Communication No. 1881/2009, UN Doc. CCPR/C/108/D/1881/2009 (2013).

²² See Amnesty International, "Torture/Medical concern/detention of asylum seekers", 2000, available at: <<https://www.amnesty.org/download/Documents/140000/mde180132000en.pdf>>;

appeals were sent to the Government of Canada and to the Government of Lebanon by the Special Rapporteur in the form of recommendations.

Another action from the Special Rapporteur worthy of mentioning happened in 2010, when Mr. Jorge Bustamante, another former Special Rapporteur, debated the impact of the criminalization of migration on the protection and enjoyment of human rights. In his report, he raised a specific concern on the fact that insufficient progress was made in transforming migrants' human rights into true migration governance, regulating collective and individual problems faced by this group and achieving common goals,²³ chiefly in regard to irregular labour migration, which he considered to be a topic of great relevance for most countries in the world.²⁴

More recently, in 2015, concerning migrant workers from the Global South, the Special Rapporteur brought into discussion the recruitment fees that migrants were being charged, based on the wage level of the opportunities offered, when looking for jobs in other countries. In light of that, it was recalled that effective regulations and monitoring of recruiters were necessary measures to overcome these violations towards migrant workers.²⁵ In addition, when it comes to gender issues, a report of Mr. Felipe González Morales, current mandate holder, stressed good practices on gender-responsive migration legislation and policies.²⁶

In 2019, Brazil was mentioned as a positive example to follow as its general legislation is applicable to all those residing in its territory, including migrant workers. The report also introduced the country's legislation regarding the recognition of people with diverse gender identities and their registration in public information systems, not being it a cause of discrimination of any sort, including in terms of recruitment.²⁷ Other States were referred to as they have gone further in this aspect, providing a definition of "gender mainstreaming" in their national legislation as, for instance, Slovakia.²⁸

Hence, as seen, the Special Rapporteur on the Human Rights of Migrants has been showing a great relevance when it comes to promoting the rights of this group

Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2000/48, UN Doc. E/CN.4/2001/83 (2001), p. 3.

²³ THOUÉZ, "Strengthening migration governance: the UN as 'wingman'", *Journal of Ethnic and Migration Studies*, 2018, p. 1 ff., p. 2.

²⁴ Report of the Special Rapporteur on the human rights of migrants, UN Doc. A/65/222 (2010), para. 8.

²⁵ Report of the Special Rapporteur on the human rights of migrants, UN Doc. A/70/310 (2015), paras. 50-51.

²⁶ Report of the Special Rapporteur on the human rights of migrants: good practices and initiatives on gender-responsive migration legislation and policies, UN Doc. A/74/191 (2019), para. 18.

²⁷ *Ibid.*, para. 20.

²⁸ *Ibid.*, para. 23.

of people and extolling means to overcome many issues faced by them in various nations, chiefly when taking into account that the above-mentioned Migrant Workers Convention and, thus, its Committee (U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of their Families)²⁹ still does not cover a considerable part of the countries of the globe.³⁰ After all, while most nations are still unwilling to ratify the Convention as a whole, “advocacy to incorporate migrant rights into regional conventions and agreements and, particularly, national legislation and policies [are seen as] a more effective way to protect these rights”.³¹

In other words, it could be argued that the work of the Special Rapporteur on the Human Rights of Migrants in helping to identify problems of migrant integration and promote best practices regarding migrant treatment around the world is a first step to confront the various difficulties migrants face abroad,³² especially when the Migrant Workers Convention cannot be yet applied worldwide.³³ Nevertheless, as Ms. Rodríguez recalled in 2001, the work of the Special Rapporteur is not enough to bar violations to happen as its recommendations are *soft law* instruments, thus, they do not impose legal obligations as conventions do.³⁴ Consequently, they can be said to be even mutually

²⁹ The aforementioned Committee was established by Art. 72 of the Migrant Worker Convention, and its main purpose is to hear submissions concerning violations of migrants’ rights brought either by other States (Art. 76) or by individuals (Art. 77), as prescribed by Art. 74.

³⁰ The Migrant Workers Convention has been in force since 1st July 2003, and as of February 2021 it has 56 State-Parties, which are: Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cabo Verde, Chile, Colombia, Congo, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Timor-Leste, Togo, Turkey, Uganda, Uruguay, Venezuela. See OHCHR, The International Convention on Migrant Workers and its Committee, Fact Sheet no. 24 (Rev. 1), 2005, p. 10.

³¹ MARTIN, “The legal and normative framework of international migration”, Policy Analysis and Research Programme of the Global Commission on International Migration (GCIM), 2005, p. 379, available at <https://www.iom.int/sites/g/files/tmzbd1486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP9.pdf>.

³² OHCHR, The International Convention on Migrant Workers and its Committee, Fact Sheet no. 24 (Rev. 1), 2005, p. 10; TRINDADE, “Uprootedness and the protection of migrants in the International Law of Human Rights”, *Revista Brasileira de Política Internacional*, 2008, p. 137 ff, pp. 147-148.

³³ TARAN, “Human Rights of Migrants: Challenges of the New Decade”, *International Migration*, 2002, available at: <<https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2435.00141>>.

³⁴ RODRIGUEZ, *cit. supra* note 7, p. 75.

dependent, as to one pushing to the effectiveness of the other, aiming at comprehensively fulfilling the rights of migrant workers and their families.³⁵

Hence, due to its work, through visits in countries, reporting situations, proposing good practices, and even working for the ratification of the Migrant Workers Convention, the Special Rapporteur has shown an increasing involvement in the present challenges surrounding the migrant community, including basic human rights' violations. And during the COVID-19 pandemic, it has been no different.

2.2. The Special Rapporteur work during the COVID-19 pandemic

Since the outbreak of the COVID-19 pandemic as a Public Health Emergency in 30 January 2020,³⁶ more than 106.1 million people were infected and around 2.3 million have died as a consequence of the disease.³⁷ Although there are currently 72 countries³⁸ administering vaccines and publishing rollout data,³⁹ the pandemic has already affected many States in different ways around the world. This context gets even worse when it comes to how individuals – especially those who are in vulnerable situations – are suffering from such emergency.

Firstly, among the 272 million migrants existing worldwide,⁴⁰ there are some people who are to be considered more vulnerable than others because of personal, social, situational and structural factors. Mobility can also create vulnerability. For example, some countries have closed their borders entirely (e.g., Australia and New Zealand), others have suspended labour migration temporarily (e.g., United States and Italy), and in some States migration processing and assistance to asylum seekers were slowed down (e.g., Germany, France and Canada), impairing the circulation of people

³⁵ *Ibid.*, p. 74.

³⁶ World Health Organization (WHO), “A Joint Statement on Tourism and COVID-19 - UNWTO and WHO Call for Responsibility and Coordination”, 27 February 2020, available at: <<https://www.who.int/news/item/27-02-2020-a-joint-statement-on-tourism-and-COVID-19---unwto-and-who-call-for-responsibility-and-coordination#:~:text=On%2030%20January%202020%2C,set%20of%20Temporary%20Recommendations>>.

³⁷ “Covid map: Coronavirus cases, deaths, vaccinations by country”, BBC News, 15 February 2021, available at: <https://www.bbc.com/news/world-51235105>; Status as at 27 February 2021.

³⁸ Status as at 27 February 2021.

³⁹ *Ibid.*

⁴⁰ World Migration Report 2020, IOM Doc. PUB2019/006/L (2020), p. 19.

between borders. Besides, many migrants may become vulnerable because of the lack of access to health services and other barriers (e.g., Greece, Malaysia and Singapore).⁴¹

The first response of the Special Rapporteur on the Human Rights of Migrants was made through the publication of a Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants together with the U.N. Committee on the Protection of the Rights of All Migrant Workers and Members of their Families in 26 May 2020.⁴² This document stressed not only the increase of the vulnerabilities migrants face during the pandemic, but also the need for States to take non-discriminatory measures when handling the pandemic, thus, avoiding violating migrants' rights.⁴³ Besides, States were called upon to integrate migrant workers into national COVID-19 prevention plans and policies, to guarantee them with access to social assistance and labour rights, as well as to integrate migrant workers trained in health-related sectors so as that they might have helped in the fight against the disease, and to include this group, regardless of their migration status, in economic recovery policies.⁴⁴

Another issue dealt by Mr. Morales regarded the imprisonment of migrant children. In its Report of 20 July 2020, the Special Rapporteur stated that at least 330,000 children were detained because of migration-related purposes. He also recalled that detention is never in the best interest of the child, constituting a clear violation of international human rights law⁴⁵ as these individuals are being deprived of their childhood and their fundamental rights.⁴⁶ And when it comes to the COVID-19 pandemic, this situation is even worse.⁴⁷

⁴¹ International Organization for Migration (IOM), "Migration Factsheet No. 6 – The impact of COVID-19 on migrants", 2020, available at: <https://www.iom.int/sites/default/files/our_work/ICP/MPR/migration_factsheet_6_COVID-19_and_migrants.pdf>.

⁴² UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, "Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants", 26 May 2020, available at: <<https://www.ohchr.org/Documents/Issues/Migration/CMWSPMJointGuidanceNoteCOVID-19Migrants.pdf>>.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Corroborating to his view, the U.N. Special Rapporteur on Torture has affirmed that these acts may constitute a particular form of degrading treatment of children, stating that this situation can be extremely traumatic to these individuals. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/28/68 (2015), para. 80.

⁴⁶ Ending immigration detention of children and providing adequate care and reception for them, UN Doc. A/75/183 (2020), para. 13.

⁴⁷ The detention of migrant children is well-known in the international community. Over 100 countries detain children based solely on their or their families' immigration status. Nevertheless, according to the United Nations International Children's Emergency Fund (UNICEF), evidence shows that such practice is very expensive and difficult for States to maintain, but they continue using detention as a form of handling undocumented migration, exposing children to inhuman treatment. See UNICEF,

As he stated, migrant children are being exposed to inadequate medical services and treatment while in detention facilities, not to mention the overcrowded conditions faced by them, which increase the risk of infections. First and foremost, these risks are exacerbated by the current pandemic as the virus spreads by contact between people. Secondly, deficient responses to the health crisis also expose migrant children to ill-treatment, violating their inherent rights.⁴⁸ Hence, Mr. Morales recommended States, in the above-mentioned Report, to “ensure that measures taken in the context of the COVID-19 pandemic meet international human rights standards and that migrants, especially migrant children, are included in all aspects of national responses to the global health crisis”.⁴⁹

He also called States upon the need to release these migrants and their families from detention, giving preference to non-custodial and community-based alternatives in order to protect their rights and health.⁵⁰ This request, accordingly, is connected to the fact that it is impossible to exercise the physical distance in overcrowded facilities, as mentioned by the mandate holder.⁵¹ Therefore, besides the violation of the international human rights of children, the international health recommendations demonstrate that the detention of migrants, especially during the pandemic, constitutes an inhuman and risky treatment.

In other statements, the Special Rapporteur also had the opportunity to express his concern regarding the fact that migrants in irregular situations, asylum seekers, exploited and trafficked persons may suffer a particular risk in face of the new coronavirus as a consequence of their living and working environments, in which they are deprived from access to necessary protection.⁵² Notably, the incidence of risk of the disease is considered higher among migrants and forcibly displaced populations. However, hospitalisation rates concerning this group are lower than those of the rest of the population/workers due to their fear of having their status situation reported

“Alternatives to Immigration Detention of Children”, September 2018, available at: <[https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20\(ENG\).pdf](https://www.unicef.org/media/58351/file/Alternatives%20to%20Immigration%20Detention%20of%20Children%20(ENG).pdf)>.

⁴⁸ Ending immigration detention of children and providing adequate care and reception for them, UN Doc. A/75/183 (2020), para. 29.

⁴⁹ *Ibid.*, para. 23.

⁵⁰ *Ibid.*, para. 23.

⁵¹ “UN experts call on Governments to adopt urgent measures to protect migrants and trafficked persons in their response to COVID-19”, UN News, 3 April 2020, available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25774&LangID=E>>.

⁵² *Ibid.*

to the authorities,⁵³ especially when we take into consideration migrants in lower paid jobs and those who are working in critical sectors are usually undocumented.⁵⁴

Likewise, Singapore's situation during the pandemic in 2020 may illustrate better the exposure of migrants in lower paid jobs. On 19 June 2020, migrants totalled about 95 per cent of the confirmed cases in the country, and over 93 per cent of these cases were related to their dormitories, according to State's official data.⁵⁵ These dormitories, in fact, were the focal point of the pandemic throughout the first year of the pandemic in the country.⁵⁶ Same was the case of Thailand and Malaysia.⁵⁷

In 2017, 164 million people were estimated to be migrant workers and they now make important contributions to face the pandemic.⁵⁸ Among the 20 countries with the highest number of COVID-19 cases as of 4 February 2021, around seven depend on migrant workers in important sectors of healthcare services.⁵⁹ The Special Rapporteur on the Human Rights of Migrants also calls the world's attention to the fact that some of these individuals work in agriculture or other informal sectors and do not have access to the necessary protection measures to avoid contamination. In regard to this situation, he welcomed the decision of some States to grant temporary residency rights to migrants and asylum seekers, including providing them with social and health benefits.⁶⁰

In this sense, the Special Rapporteur, as an example to be followed, mentioned Qatar's improvement of migrant rights:

⁵³ HINTERMEIER et al., "SARS-CoV-2 among migrants and forcibly displaced populations: a rapid systematic review", medRxiv, 2020, available at: <<https://www.medrxiv.org/content/10.1101/2020.12.14.20248152v1.full.pdf+html>>.

⁵⁴ "Migration data relevant for the COVID-19 pandemic", *cit. supra note 1*.

⁵⁵ *Ibid.*; Singapore Ministry of Health, "COVID-19 Situation Report", 18 February 2021, available at: <<https://covidsitrep.moh.gov.sg/>>.

⁵⁶ Singapore Ministry of Health, *ibid.*

⁵⁷ VANDERGEEST, MARSHKE and DUKER, "Migrant worker segregation doesn't work: COVID-19 lessons from Southeast Asia", The Conversation, 2021, available at: <<https://theconversation.com/migrant-worker-segregation-doesnt-work-COVID-19-lessons-from-southeast-asia-155260>>.

⁵⁸ ILO, *ILO Global Estimates on International Migrant Workers – Results and Methodology*, 2nd ed., Geneva, 2018, p. 4.

⁵⁹ Organisation for Economic Co-operation and Development (OECD), "Recent Trends in International Migration of Doctors, Nurses and Medical Students", OECD Publishing, 2019, p. 20; "Migration data relevant for the COVID-19 pandemic", *cit. supra note 1*.

⁶⁰ "UN experts call on Governments to adopt urgent measures to protect migrants and trafficked persons in their response to COVID-19", *cit. supra note 51*.

“[...] Law No. 18 of 2020, and Law No. 17 of 2020 will allow migrant workers to change jobs before the end of their contract without first having to obtain a No Objection Certificate (NOC) from their employer, and will introduce a monthly minimum wage of 1,000 Qatari riyal (roughly USD \$275). In addition to the increased minimum wage for all, employers are obliged to provide workers with adequate housing and food or pay allowances to cover these expenses”.⁶¹

Although not referring to any downside that this measure might impose to employers who have also been negatively affected by the pandemic, Mr. Morales affirmed that this improvement might facilitate migrants to escape exploitation and abusive working conditions.⁶² And even though employers, too, have suffered with the backlashes of COVID-19, we understand that, by introducing a non-discriminatory minimum wage, Qatar gave an important step towards the protection of this group during to the detriment of employers, as migrants in lower paid jobs are more vulnerable and exposed to the difficulties brought by the global health, as stressed above. But we also recognize that this measure has an impact beyond the containment of the effects of the pandemic, as the precarious situation of migrant workers in Qatar is already well known, being it possible to affirm that such law, at the end, contemplates several agendas.

Since the outbreak of the pandemic the Special Rapporteur on Human Rights of Migrants has been providing the international community with reports on the migrants’ situation as well as monitoring States actions on this filed. For that, it may be said that its work is to be considered essential, especially when it comes to migrants who are not protected by the 1990 Migrant Workers Convention in the State of destination due to their non-adherence to it. In relation to this, in fact, considering that the States that are part of the European Union (EU) are not party to this treaty, it is important to analyse the specific role of the Rapporteur in relation to their conduct towards migrants, as well as during the pandemic.

3. EUROPEAN UNION’S BEHAVIOUR TOWARD MIGRANTS, INCLUDING MIGRANT WORKERS, AND THE SUPERVISION OF THE SPECIAL RAPPORTEUR DURING THE COVID-19 PANDEMIC

⁶¹ “UN human rights experts welcome Qatar’s improvement of migrant rights”, UN News, 3 September 2020, available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26204&LangID=E>>.

⁶² *Ibid.*

3.1. EU's (Labour) Migration Policy: an overview

The conducts perpetuated by EU authorities regarding the treatment of undocumented and/or irregular migrants are frequently questioned because of the Pact on Migration and Asylum of 2008,⁶³ but also due to the various violations of migrants' rights. With the adoption of the 'Return Directive' in June 2008 and the European Pact on Immigration and Asylum, the EU intensified the fight against so-called irregular immigration, while leaving Member-States with a wide scope for defining national immigration policies. These States have implemented a number of policies aiming to reinforce border control and ensure the return of undocumented migrants to their countries of origin – notably through 'readmission agreements'.⁶⁴ The result of these policies has been the increased stigmatisation, and even criminalisation, of asylum-seekers and undocumented migrants, including their detention and deportation, which violates their basic human rights.⁶⁵

Based on national security and the criminalization of the act of migration, EU's policy has long been adopting, as we classify, a discriminatory approach. This perception derives from the *Hirsi Jamaa and Others v. Italy* case, adjudged by the European Court of Human Rights (ECtHR). In it, the Court found Italy to be responsible for violating the European Convention on Human Rights (ECHR) because of its push-backs – collective expulsions at sea – of asylum-seekers who came from Libya and Somalia to the Lebanese territory, where they were systematically arrested and detained in inhuman conditions⁶⁶, clearly violating the

⁶³ According to Carrera and Guild “[t]he Pact constitutes a political document, and therefore a non-legally binding act, providing the general lines and principles expected to guide future EU policies on immigration, asylum and border management.” See CARRERA and GUILD, “The French Presidency’s European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?”, *CEPS Policy Brief*, No. 170, September 2008. See also European Pact on Immigration and Asylum, 2008, Brussels, 13189/08 ASIM 68.

⁶⁴ These bilateral agreements grant opportunities for legal migration in exchange for commitments by countries of origin to participate in the control of undocumented migrants. Social Watch, European Social Watch Report 2009, ‘Migrants in Europe as Development Actors - Between hope and vulnerability’, Dangers of Readmission Agreements, p. 17, available at <http://www.socialwatch.cz/wp-content/uploads/2011/08/European_SW_Report_2009_eng.pdf#page=64>.

⁶⁵ *Ibid.*, p. 17.

⁶⁶ The migrants submitted complaints under Article 2 (right to life) and Article 3 (prohibition of torture and inhumane or degrading treatment) of the ECHR, but also under Article 4 of Protocol no. 4, which prohibits collective expulsions. See *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012.

non-refoulement principle.⁶⁷ This was not the only case, as the ECtHR has already addressed similar migrant mistreatment in at least other six occasions regarding conducts of Spanish, Russian, Greek and Belgian authorities,⁶⁸ thus, indicating the existence of a continuous European wrongful conduct.

Specifically concerning migrant workers, in 2017, the ECtHR ruled on *Chowdury and others v. Greece* against the Greeks for failing to protect 42 migrant workers from Bangladesh who had been subject to forced or compulsory labour and shot at by security guards when they protested over unpaid wages.⁶⁹ In that case, the migrants were recruited in Athens and in other parts of Greece between 2012 and 2013 without a Greek permit to work at the main strawberry farm in Manolada, where they were severely exploited and where 21 of them were even shot.⁷⁰ But this was not the first case that ECtHR ruled against a State-Party for the mistreatment of migrant workers. The first one was the 2005 *Siliadin v. France*, which addressed the forced and compulsory labour of a female Togolese national who lived in Paris was submitted to, which violated article 4 of the European Convention on Human Rights.⁷¹ Since then, the European Court recognized the obligation of States to ensure the protection against slavery and forced labour in their territory, regardless of the migratory status of the person subjected to the violation.⁷² Therefore, it is noticed that the combination of past precedents with present events demonstrates a logic of repetition in which migrants residing in Europe may be subject to.⁷³

Nevertheless, besides the ECtHR,⁷⁴ the Special Rapporteur on the Human Rights of Migrants has, too, showed his concerns to some migration aspects common

⁶⁷ *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012.

⁶⁸ See *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgment of 15 December 2016; *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, Judgment of 21 October 2014; *Georgia v. Russia (I)*, Application No. 13255/07, Judgment of 3 July 2014; *Conka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002; and still ongoing *S.S. and others v. Italy*, Application No. 21660/18.

⁶⁹ *Chowdury and others v. Greece*, Application No. 21884/15, Judgment of 30 June 2017.

⁷⁰ *Ibid.*

⁷¹ *Siliadin v. France*, Application No. 73316/01, Judgment of 26 July 2005.

⁷² *Ibid.*, p. 6.

⁷³ Indeed, in 2010, Europe was considered to have one of the most restrictive labour migration policy index, being only preceded by Asia – a situation that has not changed nowadays. See “Europe’s index is 0,4. Labour Migration Policy Index (0 - least restrictive; 1 - most restrictive)”, Migration Data Portal, 26 March 2019, available at: <https://migrationdataportal.org/data?i=impic_lab&t=2010&m=1&m49=150>.

⁷⁴ For the sake of the argument, we highlight our awareness that the ECtHR is linked to the Council of Europe and not the EU, thus, encompassing 47 nations, in which four are full members of the Migrant Workers Convention (Albania, Azerbaijan, Bosnia and Herzegovina, and Turkey). None of them, however, have made any declarations recognizing the competence of the Committee to hear

to the European reality, thus, calling upon authorities to change their actions. The Steering Committee for Human Rights (CDDH, in the Portuguese acronym), a body of Council of Europe, for instance, published in 2017 a document analysing the legal and practical aspects of effective alternatives to detention in the context of migration taking into consideration some of the reports of the Special Rapporteur.⁷⁵

First, as a reaction to Report No. A/HRC/65/222 written by Mr. Jorge Bustamante, a former Special Rapporteur on the Human Rights of Migrants, the CDDH responded that “victims or potential victims of human trafficking should not, under any circumstances be detained, punished or prosecuted for the illegality of their entry or residence, or for their involvement in unlawful activities as a direct consequence of their situation as trafficked persons”.⁷⁶ Moreover, it stressed the need of considering migrants’ particularities, vulnerabilities and circumstances whenever addressing the issue of detention, so that alternatives to immigration detention should be considered, and not only for trafficked persons.⁷⁷

Second, responding to Report No. A/HRC/20/24 written by Mr. François Crépeau, Special Rapporteur on the Human Rights of Migrants from 2011 to 2017, the CDDH agreed that the imposition of detention should be only considered as a last resort measure, defined by a proportionate response to the risk an individual pose.⁷⁸ After all, in some States of the European-Mediterranean region, the Report said, a wide range of reasons to justify the detention of migrants was being used, particularly those that interpret irregular migration as a national security problem or a criminal issue, ending up neglecting their human rights.⁷⁹

In addition to that, the CDDH addressed the impact on human rights due to the criminalization of migration, and draw attention to the disproportionate use of the criminal justice system to manage irregular migration as well as the inappropriateness of labelling migrants as “criminals” or “illegal”.⁸⁰ By doing so, the CDDH was seeking stress the impossibility of profiling migrants by patterns of ethnicity, race, national origin or religious belief – a veiled practice used by authorities to create objective

communications of States or individuals, showing the importance, still, of the Special Rapporteur and its work regarding the observation of State practices towards migrant workers.

⁷⁵ Steering Committee for Human Rights (“CDDH”), “Legal and practical aspects of effective alternatives to detention in the context of migration”, 7 December 2017.

⁷⁶ *Ibid.*, p. 82, para. 157.

⁷⁷ *Ibid.*, p. 84, para. 163. See also Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, UN Doc. A/65/222 (2010), paras. 92, 95.

⁷⁸ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, UN Doc. A/HRC/20/24 (2012), para. 68.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

presumptions of criminal activity based on immigration status, causing, therefore, disproportionately law enforcement. After all, States should provide presumptions in favour of undocumented migrants, ensuring that a broad range of human rights-based alternatives were available and established in law.⁸¹

However, even after those considerations, in a movement contrary to what prescribes the recommendations of the Rapporteur, some EU countries continue to disrespect migrants' rights, as some situations that occurred in the midst of the pandemic have showed. In this sense, it is worth checking the role of the Special Rapporteur to face these circumstances.

3.2. The COVID-19 pandemic, the EU (in)action, and the role played by the U.N. Special Rapporteur in regard to the overview of migrant workers' rights

As mentioned above, the foundation of U.N. Special Rapporteurs on the Human Rights of Migrants have “played an important role over a long period of time in promoting and protecting human rights in some of the most difficult circumstances and on some of the most challenging issues” – a work made through monitoring, fact finding and standard-setting over the past decades.⁸² In this sense, the relationship between the HRC, as a political body, and special rapporteurs is crucial for an effective promotion of human rights, specially providing a voice for victims of abuses, who have few opportunities to be heard in/by the international system.⁸³

Nevertheless, as shown by the COVID-19 pandemic, sometimes it seems not to be enough. It is not unknown that the present situation is hitting more severely vulnerable groups such as refugees and economic migrants, chiefly the undocumented ones who live on the budget and in overcrowded accommodations where they are unable to implement physical distancing,⁸⁴ being often exposed to the virus with limited tools to protect themselves since public health measures rarely

⁸¹ *Ibid.*

⁸² SUBEDI et al., “The role of the special rapporteurs of the United Nations Human Rights Council in the development and promotion of international human rights norms”, *The International Journal of Human Rights*, 2011, p. 155 ff., p. 155.

⁸³ *Ibid.*, p. 160.

⁸⁴ In a survey carried out by the World Health Organisation (WHI), among migrants, “around 20% of respondents said that it was difficult to avoid public transport or avoid leaving the house.” See WHO, “ApartTogether survey”, 18 December 2020, p. viii, available at: <<https://www.who.int/publications/i/item/9789240017924>>.

reach them.⁸⁵ Moreover, migrants in general also report being less likely to seek medical care for suspected COVID-19 symptoms because of financial constraints⁸⁶ or fear of deportation.⁸⁷ Hence, the pandemic has exacerbated migrants often precarious living and working conditions around the world, including Europe.

According to the International Commission of Jurists (ICJ), this situation must be brought to the attention of the European authorities since the measures taken by EU Members States in order to control the spread of COVID-19 such as the mere change in service hours of businesses had serious consequences in employment, “where those most affected were often people in lower-paid jobs”, such as migrants.⁸⁹ Not only that, many were the reports of companies in sector whose employees were largely migrants, such as shops, restaurants and bars, going out of business – or very close to it – because of the social distancing measures.⁹⁰ In this

⁸⁵ “COVID-19 exposes and amplifies inequalities for refugees and migrants”, Faculty of Health and Medical Sciences, 18 December 2020, available at: <<https://healthsciences.ku.dk/newsfaculty-news/2020/12/COVID-19-exposes-and-amplifies-inequalities-for-refugees-and-migrants/>>.

⁸⁶ Independent Monitoring, Research, and Evidence Facility (IMREF), “Exploring the Impact of COVID-19 on the Vulnerabilities of Migrants on the Central Mediterranean Route”, 2020, available at: <https://www.integrityglobal.com/wp-content/uploads/20200727_imref_impact-of-COVID-19-on-migrants-part-2_executive-summary.pdf>.

⁸⁷ OHCHR, “COVID-19 does not discriminate; nor should our response”, 2020, available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25730&LangID=E>>. In fact, this is also the case for migrants to resist being vaccinated against COVID-19. See BEDFORD, “Fear Of Deportation Prompts Undocumented Immigrants To Resist COVID-19 Vaccine”, GBH News, 7 January 2021, available at: <<https://www.wgbh.org/news/local-news/2021/01/05/fear-of-deportation-prompts-undocumented-immigrants-to-resist-covid-19-vaccine>>; CAVA, GONZALEZ and PLEVIN, “As COVID-19 vaccine rolls out, undocumented immigrants fear deportation after seeking dose”, USA Today, 19 December 2020, available at: <https://www.usatoday.com/story/news/nation/2020/12/19/covid-19-vaccine-undocumented-immigrants-fear-getting-dose/3941484001/>.

⁸⁸ The percentages are: financial constraints, 35 percent; and fear of deportation, 22 per cent. WHO, “ApartTogether survey”, *cit. supra note 84*.

⁸⁹ “The impact of COVID-19 related measures on human rights of migrants and refugees in the EU”, International Commission of Jurists, Briefing paper, 26 June 2020, available at: <<https://www.icj.org/wp-content/uploads/2020/06/Covid19-impact-migrants-Europe-Brief-2020-ENG.pdf>>. See also ILO, “The impact of the COVID-19 pandemic on jobs and incomes in G20 economies”, 2020, p. 24-25, available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/-cabinet/documents/publication/wcms_756331.pdf>.

⁹⁰ “The disproportionately high incidence on immigrants is especially notable in Sweden, where 58% among the newly unemployed since August 2019 are immigrants. In Austria, Norway and Germany, more than a third of the newly unemployed are immigrants or foreign nationals. In Greece, the changes in unemployment rates for immigrants and native-born even go in different directions. While the unemployment rate for immigrants increased by more than 2 percentage points, the unemployment rate declined slightly for the native-born. The situation is also continuously evolving.” See OECD,

sense, following the implementation by States of such actions, combined with the previous social, economic and cultural difficulties migrants faced by being in a foreign country with a different lifestyle, migrants workers represent a high percentage of those who lost their jobs, had their income decreased, or stopped receiving income at all during the pandemic.⁹¹ For this reason, the already mentioned Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, highlighted the necessity to guarantee migrants with access to social services, in particular for those who already lacked access to social protection as well as the need to guarantee the labour rights of migrant workers in order to protect their health in such a difficult time.⁹²

The ICJ also recalled that the employment problem impacted migrant workers' right to social security, which is protected under Article 9 of International Covenant on Economic, Social and Cultural Rights and reaffirmed by the U.N. Committee on Economic, Social and Cultural Rights, when it clarified that the right to social security encompasses the right to access and maintain benefits without discrimination in order to secure protection for those whose family access to health care is unaffordable.⁹³ The ICJ further stressed that non-European nationals, as refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals, should enjoy equal treatment in access to non-contributory social security schemes consistent with international standards, since "all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care".⁹⁴ Additionally, the ICJ highlighted that under international human rights law, States have a duty to respect the right to health by ensuring that all persons, including migrants and refugees, have equal access to preventive, curative and palliative health services, regardless of employment, or of

"What is the impact of the COVID-19 pandemic on immigrants and their children?", OECD Policy Responses to Coronavirus, 19 Oct. 2020, available at: <<https://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/>>.

See also ROOKS, "Bankruptcy: Going out of business during the COVID-19 pandemic", DW, 17 Jun. 2020, available at: <<https://www.dw.com/en/bankruptcy-going-out-of-business-during-the-covid-19-pandemic/g-53823620>>.

⁹¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants, "Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants", 26 May 2020, p. 2, para. 3.

⁹² *Ibid.*, p. 2, paras. 3, 4.

⁹³ "The impact of COVID-19 related measures on human rights of migrants and refugees in the EU" *,cit. supra note 89*; General Comment No. 19: The right to social security (Art. 9), UN Doc. E/C.12/GC/19 (2008), para. 2.

⁹⁴ General Comment No. 19: The right to social security (Art. 9), UN Doc. E/C.12/GC/19 (2008), paras. 37, 38.

their legal status and documentation, “abstaining from enforcing discriminatory practices as a State policy”.⁹⁵

On this matter, it should be recalled that the applicability of international human rights of migrants in times of emergency are determined by three layers of legal norms in accordance to the International Organization for Migration interpretation: “a core content of fundamental rights that applies in any circumstances; a derogation mechanism under some human rights conventions; and lawful restrictions to human rights”.⁹⁶ The right to life, freedom from torture, inhuman and degrading treatment, and the prohibition of forced labour and slavery are typical instances of fundamental rights that are applicable in any circumstances, including times of emergency, and to every human being, including migrants, refugees and stateless persons, since they are covered by the category of fundamental principles of international law.⁹⁷

And taking this into consideration, the International Labour Organization (ILO) released a brief with recommendations for policy-makers and constituents aiming to protect migrant workers during the COVID-19 pandemic. Among the suggestions prescribed were precisely the extension of the access to health services and social protection coverage to migrant workers, indicating they should be integrated into risk-pooling mechanisms to ensure the universality of coverage not to incur in any core human right violations.⁹⁸ Besides, considering the essentiality of the force they provide, the ILO recommended the regularization of migrant workers as well, including the adoption of special measures to facilitate extension of visas, work or residence permit renewals.⁹⁹ Moreover, the ILO also appointed to the need of guaranteeing migrants their access to legal assistance and remedies due to the unfair treatment they are subjected to, including those related to reduced or non-payment of wages, denial of other entitlements and workplace discrimination.¹⁰⁰

Nevertheless, although all the recommendations made were seen as essential, some of the EU State practice did not follow them accordingly. Among the situations noticed by the Special Rapporteur on the Human Rights of Migrants in regard to the condition of migrant workers during the pandemic, one that had been previously

⁹⁵ General comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4 (2000), para. 34.

⁹⁶ CHETAIL, “COVID-19 and human rights of migrants: More protection for the benefit of all”, IOM, 2020, p. 3.

⁹⁷ *Ibid.*

⁹⁸ ILO, “Protecting migrant workers during the COVID-19 pandemic: Recommendations for Policy-makers and Constituents”, Policy Brief, 2020, p. 3-5.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

denounced has once again surfaced: the exploitation of migrant workers in strawberry fields in Spain, more specifically, the case of 3.000 women brought over from Morocco as essential workers during the pandemic in precarious conditions and without basic hygiene, combining exploitation, unpaid wages and abuse.¹⁰¹

Although the situation did not amount to a violation of rights typically/directly affected by the pandemic, such as the right to health or social security to name but a few, the case amounted to forced labour, as the Moroccan migrant women were coerced to work, violating international human rights standards. It was particularly problematic since the women were misinformed about their work conditions still in Huelva, Spain; they did not speak the language – being unable to communicate properly –, and they did not have any unions capacity, being, thus, considered victims in a very vulnerable position to be exploited.¹⁰² In this case, “the coronavirus pandemic has shed light on the system’s inability to protect the pickers human rights and dignity”,¹⁰³ confirming this hiring model as a modern form of slavery that States are obliged to effectively combat, and not simply pass the buck to employers as the ones who are taking advantage of migrants, disclaiming itself all responsibility.¹⁰⁴

It should be recalled that the 2020 situation described exists due to a bilateral agreement signed in 2001, which allowed thousands of Moroccan women from the countryside to work in Spain as seasonal workers from April to June to cultivate and harvest strawberries.¹⁰⁵ By coming from a region where poverty and unemployment are rampant, they are less likely to complain; moreover, since a requisite for them to apply is that they need to be mothers in order to preserve their willingness to return home, they rarely question their situation.¹⁰⁶

¹⁰¹ OHCHR), “Spain: Passing the buck on exploited migrant workers must end, says UN expert”, Geneva, 26 Jun. 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26007&LangID=E>. See also: DAVIES, “‘Shocking’ abuse of migrants forced to pick strawberries in Spain, U.N. says”, Reuters, 1 July 2020, available at: <https://www.reuters.com/article/us-spain-morocco-farms-migrants-trfn-idUSKBN24271J>.

¹⁰² OHCHR, “Spain: Passing the buck on exploited migrant workers must end, says UN expert”, *ibid.*

¹⁰³ “Strawberry pickers’ plight exposes ‘modern slavery’ in Spain”, DW, available at: <https://www.dw.com/en/strawberry-pickers-plight-exposes-modern-slavery-in-spain/a-54239756#:~:text=Around%2017%2C000%2C%20mostly%20female%2C%20Moroccan,duo%20the%20coronavirus%20pandemic>.

¹⁰⁴ OHCHR, “Spain: Passing the buck on exploited migrant workers must end, says UN expert”, *cit. supra note 101*.

¹⁰⁵ ALAMI, “Workers in Spain’s Strawberry Fields Speak Out on Abuse”, The New York Times, 20 July 2019, available at: <https://www.nytimes.com/2019/07/20/world/europe/spain-strawberry-fields-abuse.html>.

¹⁰⁶ *Ibid.*

This is exactly why the work of the Special Rapporteur is necessary, as he/she monitors the situation and calls for State action.¹⁰⁷ Nevertheless, despite such international alarm,¹⁰⁸ authorities in Spain and Morocco have taken little or no action,¹⁰⁹ demonstrating the limitations of this mechanism before the unlawful conduct of EU Member States.¹¹⁰

According to a network of NGOs present in 40 European countries called European Council of Refugees and Exiles, other human rights have been violated in Spain during the COVID-19 pandemic. On 10 November 2020, it reported a situation of mass deportation of Senegalese nationals to Mauritania, which was carried out due to a readmission agreement signed in 2003 that allows the deportation of non-Mauritanian citizens by Spain to Mauritania, if they travelled through that country on their way to Spain.¹¹¹

Although the Special Rapporteur has not yet specifically addressed the situation of Senegalese nationals, he recalled that EU Member States need to provide migrants with asylum procedures and assess the situation they might face in the

¹⁰⁷ OHCHR, “Spain: Passing the buck on exploited migrant workers must end, says UN expert”, *cit. supra note* 101.

¹⁰⁸ The U.N. Special Rapporteur on the Human Rights of Migrants was not the only one to address the issue of Moroccans working at strawberry. The U.N. Special Rapporteur on Extreme Poverty, Mr. Philip Alston, and the U.N. Special Rapporteur on extreme poverty and human rights, Mr. Olivier De Schutter, also cited the inhuman situation migrants were being subjected to in Spain. See OHCHR, “Lives at risk unless conditions for Spain’s seasonal migrant workers are rapidly improved, UN expert warns”, 24 July 2020, available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26122&LangID=E>>; FAUS, DOCE and CASTILLEJA, “Soccer player puts spotlight on plight of migrant fruit pickers in Spain”, Reuters, 19 June 2020, available at: <<https://www.reuters.com/article/us-health-coronavirus-spain-immigrants-idUSKBN23Q221>>.

¹⁰⁹ Alami, *cit. supra note* 105.

¹¹⁰ This very same situation was reported in the United States in 2020, where Mexican migrants were submitted to inhuman treatment in the Californian Salinas Valley strawberry fields, and had been neglected by the State when it comes to legal protection, aside from not receiving financial relief measures adopted by the government during the pandemic. However, the United States is another State who does not bind directly to the U.N. Special Rapporteur recommendations. See HO, “‘An impossible choice’: farmworkers pick a pay check over health despite smoke-filled air”, *The Guardian*, 23 August 2020, available at: <<https://www.theguardian.com/us-news/2020/aug/22/california-farmworkers-wildfires-air-quality-coronavirus>>; MARTINEZ and BERGER, “Blocking Undocumented Immigrants From Vaccination Is Self-Sabotage”, *Foreign Policy*, 28 January 2021, available at: <<https://foreignpolicy.com/2021/01/28/blocking-undocumented-immigrants-covid-vaccination-self-sabotage/>>.

¹¹¹ “COVID-19 measures and updates related to asylum and migration across Europe”, European Council on Refugees and Exiles (ECRE), 2020, p. 13, available at: <<https://www.ecre.org/wp-content/uploads/2020/12/ECRE-COVID-information-sheet-Dec-2020.pdf>>.

country of origin if returned not to violate the *non-refoulement* principle.¹¹² Despite of this, such situation demonstrates how a number of irregularities and concerns on migrants' human rights have been raised in 2020 due to the pandemic.¹¹³ Nevertheless, it also shows that the EU still sees migration as a national security concern since many of its actions are not only recurring issues, but they are also not dealt through a human rights approach as the Rapporteur recurrently recommends. In fact, EU Member States tend to adopt a restrictive policy in order to shield their borders, as it was reaffirmed on 23 September 2020 when the EU proposed a new Pact on Migration and Asylum.¹¹⁴

Because of this, one may say that if EU countries adopt the 1990 Migrant Workers Convention they would end up complying with the Special Rapporteur soft recommendations in any event, since they would have to internalize the Convention's rules and regulations, which constitute a major step forward in protecting the human rights of migrants workers and are aligned with the Special Rapporteur agenda. After all, the Convention views

“migrants not simply as labourers or economic entities but as social entities, with families; recognize[s] that by being non-nationals they were not always protected by the national legislation of receiving states; emphasize[s] that all migrant workers, including the undocumented, have fundamental rights; call[s] for an end to illegal and clandestine movements; and the establishment of

¹¹² OHCHR, “Pushback practices and their impact on the human rights of migrants”, 1 February 2021, available at: <<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/Pushback-practices.aspx>>

¹¹³ PLA, “Atlantic Moria in the making in overcrowded Gran Canaria camp”, Statewatch, 24 November 2020, available at: <<https://www.statewatch.org/analyses/2020/atlantic-moria-in-the-making-in-overcrowded-gran-canaria-camp/>>.

¹¹⁴ It is the wording of the Commission: “In particular, the Commission is proposing to introduce an integrated border procedure, which for the first time includes a pre-entry screening covering identification of all people crossing the EU's external borders without permission or having been disembarked after a search and rescue operation. This will also entail a health and a security check, fingerprinting and registration in the Eurodac database. After the screening, individuals can be channelled to the right procedure, be it at the border for certain categories of applicants or in a normal asylum procedure. As part of this border procedure, swift decisions on asylum or return will be made, providing quick certainty for people whose cases can be examined rapidly.” See European Commission, “A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity”, 23 September 2020, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706>.

minimum standards of protection for migrant workers and members of their families.”¹¹⁵

Not only that, EU Member States’ participation would also trigger the compulsory submission of regular reports to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) – a body of independent experts that monitors implementation of the Convention – on how the rights are being implemented.¹¹⁶ This could reinforce the findings of the Special Rapporteur, and even impact the interpretation of the new provisions recently adopted by the EU, as it can be observed from other situations.

Take the case of Syria, who is a party to the CMW since 2005,¹¹⁷ as an example. Even though Syria is not the country of destination (as the EU), but the country of origin, it does not mean it does not have any obligation under the Migrant Worker Convention in regard to the rights of those who flee its territory due to the ongoing civil war it is involved in since March 2011.

Turkey is a typical destination for Syrians due to its labour supply shortages both in the agricultural sector and the industrial sector of goods processing, but also due to the pandemic,¹¹⁸ despite the adverse and precarious work conditions to which they are subjected.¹¹⁹ Lebanon is another neighbouring nation who has received Syrians, notwithstanding the fact that the COVID-19 crisis has resulted in a high number of permanent (60 per cent) and temporary job lay-offs (31 per cent) among migrants, particularly informal Syrian workers.¹²⁰ Furthermore, in Jordan, one-third of the Syrian workers, in particular those who were under informal work

¹¹⁵ APPELYARD (ed.), *The Human Rights of Migrants*, Geneva, 2000, p. 3-4 ff., p. 5.

¹¹⁶ OHCHR, “Introduction: Monitoring the protection of the rights of all migrant workers and members of their families”, available at: <<https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx>>.

¹¹⁷ Status of Ratification Interactive Dashboard. Available at: <<https://indicators.ohchr.org/>>.

¹¹⁸ “Protecting seasonal workers in Turkey’s tent settlements from COVID-19”, UNFPA News, 5 May 2020, available at: <<https://reliefweb.int/report/turkey/protecting-seasonal-workers-turkey-tent-settlements-COVID-19>>.

¹¹⁹ KIRIŞCI and YAVÇAN, “As COVID-19 worsens precarity for refugees, Turkey and the EU must work together”, Brookings, 11 June 2020, available at: <<https://www.brookings.edu/blog/order-from-chaos/2020/06/11/as-COVID-19-worsens-precarity-for-refugees-turkey-and-the-eu-must-work-together/>>; IOM, “IOM Turkey Calls for Greater Assistance for Migrants and Refugees as COVID-19 Restrictions Ease”, 5 June 2020, available at: <<https://www.iom.int/news/iom-turkey-calls-greater-assistance-migrants-and-refugees-COVID-19-restrictions-ease>>.

¹²⁰ ILO, “Evidence for policy brief: Impact of COVID-19 on Syrian refugees and host communities in Jordan and Lebanon”, 2020, p. 3, available at: <https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/briefingnote/wcms_749356.pdf>.

arrangements, lost their jobs permanently due to the pandemic, triggering challenges relating to their maintenance and, thus, life and health conditions.¹²¹

And because Syria is part of the Convention, the CMW was pressured to publish a list of issues in relation to the combined second and third periodic reports of the country, requesting clarifications in regard to measures taken to provide its nationals who leave the country with information about their human rights under the Convention, principally on matters of arbitrary arrest and detention, forced labour, torture and ill-treatment, gender-based violence and violence against children, including sexual violence, and unlawful killings.¹²² The document also orders Syria to indicate efforts taken on behalf of their migrant workers and members of their families to include them in pandemic prevention and response plans either nationally – in case they are returned – or abroad, especially in relation to ensuring access to a vaccine,¹²³ showing some similarities to the Special Rapporteur’s concerns.

Still, although the accession to the Convention would be a reinforcement with regard to the protection that could be offered to migrants, in particular to migrant workers, the EU does not seem willing to ratify it, which makes the existence of Special Rapporteur essential at least to point out the flaws and recommend changes, as noted above. However, it is certainly not enough. The problem of the unlawful treatment of migrants remains worrisome considering that many questions involving migrants’ human rights and, more specifically, migrant workers, remain invisible to some EU nations, being this the “painful dimension of commonplace denial of the rights and dignity of migrants” that ought to be overturned.¹²⁴

4. CONCLUDING REMARKS

Although the idea of a Special Rapporteur seems important, especially in times of emergency as the one generated by the pandemic, it is not enough to recommend actions that will be truly applied nationally or regionally. Even though a historical background demonstrated a trend of non-observance of the human rights of migrants in the EU, the same kind of events occurred in other nations, even in countries that ratified the Migrant Workers Convention. It is true that the protection granted by such treaty

¹²¹ *Ibid.*

¹²² List of issues in relation to the combined second and third periodic reports of the Syrian Arab Republic, UN Doc. CMW/C/SYR/Q/2-3 (2021), para. 7.

¹²³ *Ibid.*, para. 10.

¹²⁴ APPEYARD (ed.), *The Human Rights of Migrants*, Geneva, 2000, p. 3 ff., p. 2.

may facilitate the existence of surveillance and inspection mechanisms by international bodies, in particular the CMW. However, since the participation of countries in the CMW has been rather scarce, it is difficult to affirm whether it really encourages the implementation of protection measures for migrant workers by States in a more effective way than the Special Rapporteur has done throughout the years. The Syrian example is certainly an important positive indicator, although it is not a country that has a great influence on international politics or even receives large-scale migration flow (albeit, as stated above, this does not matter for the performance of the CMW regarding the prescription of measures in favour of the rights of migrant workers).

We indeed believe the effective protection of migrant, especially workers, considering all the social, linguistic and cultural barriers that surround them in the country of destination, passes through the existence of mechanisms for the surveillance and the recommendation of actions. Both the Special Rapporteur and the CMW provide that. If combined, they ought to improve the effectiveness of migrants' rights. After all, if we consider all the contributions related to the promotion of the human rights introduced by the two mentioned frameworks, from surveillance, inspection and the request of reports on the protection of migrant workers, their role is not dispensable, but rather imperative.

However, to prove this assertion, a more active participation of the EU Member States would be important, chiefly after what has been observed in the case of the exploitation of migrant workers in strawberries filed in Spain brought to the public's attention by the Special Rapporteur. To do so, States would have to ratify the Migrant Workers Convention and accept the jurisdiction of the CMW to receive and analyse State and individual complaints, which, by now, has not been promising. As per February 2021, only 56 nations are part of the Convention out of 193 U.N. members – none of the EU. And considering the latest EU developments on migration issues, it seems that a more humane view of migrants and their rights, as the one promoted by the Convention (a hard law) and carried out by the Special Rapporteur (through soft law), is not in its plans.

In any event, a message that needs to be reaffirmed is that migrants need to have their rights safeguarded, in particular for the numerous violations they are likely to be subjected to, as seen during the COVID-19 pandemic. Besides, the Special Rapporteur's work demonstrated to be of great importance to point out such situations, and recommend actions to be taken to safeguard them, regardless of their migratory status, due to their contribution to socioeconomic development of States. Nevertheless, it seems imperative for nations to ratify the Migrant Workers

Convention in order not only for the Rapporteurs work to be more effective, but also for the rights themselves to be guaranteed.

Part II. Specific categories of migrant worker

4.

**SEAFARING IN THE TIME OF COVID-19:
UNDERSTANDING PROTECTION GAPS FOR THE OCEAN'S INVISIBLE
WORKFORCE**

*Jacqueline F. Espenilla**

1. INTRODUCTION

The COVID-19 pandemic swept the world in 2020, leading some to dub it as the “lost year”.¹ What began as an ostensibly localized contagion in China rapidly spread to practically all corners of the globe. Countries were forced to take drastic and unprecedented measures to halt the spread of a novel virus that was made more frightening by the lack of information about its origins, effects, and cure. Some of the more widely-used measures included border closures and locational lockdowns, school and office cancellations, severe restrictions on business operations, and the imposition of stringent rules on social distancing and mask-wearing. Despite these measures, the World Health Organization (WHO) continues to note the steady increase in the number of confirmed cases of COVID-19 worldwide, as well as the number of deaths.² No continent was spared as even Antarctica reported some infections.³ In addition to being a global health crisis, COVID-19 also triggered an economic crisis that will have knock-on effects for years to come. Economies shrank and growth prospects dimmed for both developed and developing countries. Governments thus had the unenviable task of balancing health-related restrictions with initiatives intended to keep their economies afloat.

Within this context of global hardship, this chapter aims to examine a specific albeit often overlooked aspect of the COVID-19 crisis: the plight of seafarers – the ocean’s invisible workforce.

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¹ Pinsker, “The Year We Lost”, *The Atlantic*, 15 December 2020, available at: <<https://www.theatlantic.com/family/archive/2020/12/2020-lost-year/617382/>>.

² See generally the data on the WHO website <<https://covid19.who.int/>>.

³ RETTNER, “Antarctica has its first COVID-19 outbreak”, *Livescience.com*, 22 December 2020, available: <<https://www.livescience.com/antarctica-COVID-19-outbreak.html>>.

Against all odds, shipping and the maritime transport of goods – particularly essential foods and medicines – seem to have continued uninterrupted. The question is, does this continuity equal normalcy? Ordinarily, the absence of disruption signals that all is as it should be. But just because the industry is operating in a “business as usual” fashion does not mean that all aspects of operations are indeed operating as they would in pre-pandemic times. The problem is that this “normalcy” comes at a high cost for seafarers that is often taken for granted.

At the outset, it should be established that seafarers are migrant workers in the sense that they fit the classical definition of this category of worker under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁴ That is to say that a seafarer – defined as a worker employed on board a vessel registered in a State of which he or she is not a national⁵ – is a person who “is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁶ However, the International Labour Organization (ILO) treats them as a class apart due to their unique circumstances. First of all, seafaring is undoubtedly the most international of industries. It is not uncommon for a seafarer from country X to work on a ship owned by a company registered in country Y but flagged under country Z. Throughout the course of his career, the seafarer will be visiting ports of and transiting through territories of different countries in order to leave and join ships. The interactions of these stakeholders introduce a degree of complexity to issues that are not found in land-based work. Second, seafarers face working conditions and circumstances that are distinctive of the profession. As a result, some of the guidelines and standards of work that apply to other migrant workers are not necessarily appropriate for seafarers. Thus, while the ILO developed protection standards for migrant labour under the 1949 Migration for Employment Convention⁷ and the 1975 Migrant Workers Convention,⁸ it explicitly excluded seafarers from their general coverage in favour of subjecting them to more specific protections under other instruments. The

⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 [ICMW].

⁵ *Ibid.*, Art. 2(2)(c).

⁶ See ICMW, *cit. supra note 4*, Art. 2(1).

⁷ Migration for Employment Convention (Revised) (adopted 1 July 1949, entered into force 22 January 1952) 120 UNTS 71 [ILO Convention No. 97]

⁸ Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 9 December 1978) 1120 UNTS 324 [ILO Convention No. 143].

most comprehensive and relevant of these is the 2006 Maritime Labour Convention (MLC 2006).⁹

In the early months of the pandemic, there was an understandable lack of clarity on what rules and regulations were still in place, and on what protections were suspended. In order to be effective, governments had to be flexible. However, the consequence of such flexibility was the constantly changing nature of regulations and policies that were implemented in order to respond to evolving situations. This is admittedly a continuing source of confusion for the various stakeholders of the merchant shipping and cruise industries. Seafarers, who even in normal times had limited real-time access to information, suffered the most from these policy and regulatory shifts.

This paper is divided into five parts. Section 2 lays out the various pre-pandemic international legal protections for seafarers that existed under the mandate of specialist international institutions such as the ILO, the International Maritime Organization (IMO), and, more broadly, the United Nations (UN) itself. It demonstrates how the interaction of both hard and soft laws within this context created a relatively robust seafarer protection framework that enjoyed general support and compliance from stakeholders. For this purpose, particular focus is given to MLC 2006 as the main instrument that serves as a convergence point for these protections. Section 3 answers the question of whether the COVID-19 pandemic can be treated as a *force majeure* event in international law. The premise is that a positive answer can be used to preclude the wrongfulness of a breach of a Contracting State's international obligations under the legal protection framework described in the previous section. This section thus puts into proper context the occurrence of the pandemic and whether that can be considered "unforeseen" or "irresistible" within the meaning of the International Law Commission's (ILC) Articles of State Responsibility (ARSIWA), and whether compliance with international legal obligations could thereafter be considered "materially impossible". Section 4 examines the various pressure points that were created as a result of the range of measures taken by countries in response to COVID-19. This section then identifies some of the responses that stakeholders (including ship owners, flag States, port States, and labour-supplying States) were constrained to adopt as a result. These are further examined through the specific perspective of the Philippines, which is a leading source of maritime labour as well as a major crew change hub. Section V

⁹ Migrant Labour Convention (adopted 23 February 2006, entered into force 20 August 2013) 2952 UNTS [MLC 2006].

briefly considers some striking protection gaps that still remain despite the stakeholder efforts identified in the previous section. These are: (1) the continued denial of shore leaves where relevant port States are unwilling to compromise on their sovereign right to control borders in the face of potential health, safety, and security concerns; (2) the persistent difficulties in arranging seafarer repatriation and its unintended effect of extending work contracts beyond what is allowed by law; (3) the reality of seafarer abandonment and the resulting costs that are passed on to seafarers; and finally, (4) the absence of a compliance mechanism that could facilitate the redress of seafarer grievances in the context of the COVID-19 pandemic. Section VI concludes and offers some thoughts on possible ways forward.

2. PRE-PANDEMIC SEAFARER PROTECTION FRAMEWORK

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families notes that the term “migrant worker” refers to “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”¹⁰ It specifically identifies seafarers – defined as “migrant workers employed on board a vessel registered in a State of which he or she is not a national”¹¹ – as being included in the concept. They are thus entitled to a whole body of international legal protections that apply to that sector, including more general standards under international human rights law and international labour law. With respect to the latter, it is interesting to note that seafarers are explicitly excluded from the ILO instruments specifically pertaining to migrant workers – the 1949 Migration for Employment Convention¹² and the 1975 Migrant Workers Convention.¹³ However, this does not mean that they are not treated as migrant workers. It must be clarified that the exclusion only applies with respect to Part II of the Migrant Workers Convention (on the equality of employment opportunities with nationals). As will be seen below, the ILO also has a number of conventions and instruments which are specifically intended for the protection of seafarers.

Even before COVID-19 came along, seafarers as migrant workers already enjoyed an ostensibly robust protection framework under the MLC 2006 and, to a lesser and more indirect degree, other related IMO instruments including the 1974

¹⁰ See ICMW, *cit. supra note 4*, Art. 2(1).

¹¹ See ICMW, *cit. supra note 4*, Art. 2(2)(c).

¹² See ILO Convention No. 97, *cit. supra note 7*, Art. 11(2)(c).

¹³ See ILO Convention No. 143, *cit. supra note 8*, See Art. 11(2)(c).

International Convention on the Safety of Life at Sea,¹⁴ the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers,¹⁵ and the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the 1978 Protocol.¹⁶ Together, these international legal instruments have come to be regarded as the “four pillars of international maritime law” that ensure the safety and security of merchant shipping.

The MLC 2006 is an international legal instrument under the auspices of the ILO. Although it was adopted during the ILO’s 94th International Labour Conference on 23 February 2006, it only entered into force on 20 August 2013 after it received the minimum number of ratifications. The MLC 2006 has since been ratified by a total of 97 countries, resulting in “more than 91% of the world’s shipping fleet being regulated”¹⁷ by the Convention. It currently serves as the main source of direct protections for seafarers, and sets out the minimum standards for various aspects of their work and life onboard and ashore.

The rather complex structure¹⁸ of the MLC 2006 is interesting and reflects the range of stakeholder interests that were considered in the crafting of the instrument. The complexity lies in the fact that under each Title, the MLC 2006 proceeds to enumerate Regulations which are operationalized via both mandatory Standards (List A) and discretionary Guidelines (List B). Whilst States parties are required to fully comply with List A, they have wide discretion to implement List B. They may even deviate from the Regulations provided they implement “substantially equivalent” domestic laws and regulations. The flexibility afforded by this implementation structure garnered both praise and criticism from stakeholders. Seafarers, in particular, bemoaned the MLC 2006’s “lack of teeth” and silence on many critical aspects of employee life.

¹⁴ International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3 [SOLAS]

¹⁵ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, opened for signature 7 July 1978, entered into force 28 April 1984.

¹⁶ International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1546 UNTS 19.

¹⁷ See Seafarers Rights, Introduction to the maritime labour convention, available at <<https://seafarersrights.org/introduction-to-the-maritime-labour-convention/>>.

¹⁸ MLC 2006 contains five Titles: Title 1 – Minimum requirements for seafarers to work on a ship; Title 2 – Conditions of employment; Title 3 – Accommodation, recreational facilities, food and catering; Title 4 – Health protection, medical care, welfare and social security protection; and Title 5 – Compliance and enforcement.

One of the protected rights under the MLC 2006 is the right to rest, which is broadly protected under Title 2 (Conditions of employment). Regulation 2.4, in particular, deals with the seafarer's entitlement to an annual paid leave of a minimum of 2.5 calendar days per month of employment, as well as shore leave. With respect to shore leave, the MLC 2006 does not really provide any details or guidelines for its observance and leaves much room for discretion. Pertinent to the discussion on shore leave is the ILO's 2003 Seafarers Identity Documents Convention¹⁹ (SIDC), which entered into force on 9 February 2005. It was intended to facilitate the granting of shore leave, bearing in mind that "seafarers work and live on ships involved in international trade and that access to shore facilities and shore leave are vital elements of seafarers' general well-being and, therefore, to the achievement of safer shipping and cleaner oceans."²⁰ The SIDC requires Member States to issue to its seafarers a tamper-proof, machine-readable seafarer identity document that contains important personal information.²¹ The SIDC makes all of this information readily available so that port States can easily verify the seafarer's identity in the shortest possible time and with as few barriers to access as possible. In the context of shore leaves, this means that port States, unless there are clear grounds for doubting the authenticity of the seafarer identity document, should allow seafarers to temporarily come ashore while their ship is in port. Importantly, having a valid seafarer identity document means that the seafarer in question would no longer be required to hold a visa. Unfortunately, the SIDC has only been ratified by a handful of States so it currently has limited application.

Another important protection given to seafarers is the right to repatriation. Simply put, this repatriation refers to the right of seafarers to return home after their contract has ended and under certain other circumstances.²² This protection is not new.

¹⁹ Seafarers Identity Documents Convention (Revised) (adopted 19 June 2003, entered into force 9 February 2005) [ILO Convention No. 185, or SIDC].

²⁰ *Ibid.*, Preamble.

²¹ Art. 3 of the SIDC requires the following personal information to be contained in the seafarers identity document: (1) the name of the issuing authority, (2) the date and place of issue of the document, (3) the validity period of the document (which in no case shall exceed 10 years), (4) the full name of the seafarer, (5) sex, (6) date and place of birth, (7) nationality, (8) any special physical characteristics that may assist identification, (9) a digital or original photograph; and (10) the seafarer's signature.

²² Standard A.2.5.1 of Regulation 2.5 of the MLC provides that seafarers are entitled to repatriation under the following circumstances: a) If the seafarer's employment agreement expires while they are abroad; b) When the seafarer's employment agreement is terminated by the shipowner or by the seafarer for justified reasons; and also c) When the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances.

The MLC 2006 actually borrowed substantially from the defunct 1987 Repatriation of Seafarers Convention²³ as well as its predecessor, the 1926 Repatriation of Seamen Convention,²⁴ emphasizing the long-accepted nature of the right. The MLC 2006 highlights two important aspects of the right: that its exercise must be at no cost for the seafarers and that it must be done under specified conditions.

The absoluteness of the first of these aspects is clear from the fact that the MLC 2006 prohibits “shipowners from requiring that seafarers make an advance payment towards the cost of repatriation at the beginning of their employment, and also from recovering the cost of repatriation from the seafarers’ wages or other entitlements.”²⁵ The only exception to this is if the seafarer is found to be “in accordance with national laws or regulations or other measures or applicable collective bargaining agreements, to be in serious default of the seafarer’s employment obligations.”²⁶ Shipowners bear the ultimate responsibility for repatriation costs. Should they be unable to fulfill this responsibility, the MLC 2006 requires the flag State to step in and arrange for the repatriation of the seafarers concerned. Failing that, the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation and recover the cost from the flag State.²⁷ The flag State is then ultimately entitled to recover the costs incurred in repatriating seafarers from the shipowner.²⁸ The point made by the MLC 2006 in this accountability chain is simple: repatriation is an inherent right that cannot be denied on the basis of funding or lack thereof. Even port States are required to facilitate the repatriation of seafarers serving on ships which call at its ports or pass through its territorial or internal waters,²⁹ and furthermore may not refuse the right of repatriation to any seafarer because of the financial circumstances of a shipowner or because of the shipowner’s inability or unwillingness to replace a seafarer.³⁰ Thus, taken all together, it appears that the MLC 2006 treats the right of repatriation as absolute and unequivocal except if the seafarer is at fault.

²³ Repatriation of Seafarers Convention (Revised) (adopted on 9 October 1987, entered into force on 3 July 1991) 1644 UNTS 311 [ILO Convention No. 166].

²⁴ Repatriation of Seamen Convention (adopted 7 June 1926, entered into force 16 April 1928) [ILO Convention No. 23].

²⁵ See MLC 2006, *cit. supra note 9*, Standard A.2.5.1, para. 3, Regulation 2.5.

²⁶ *Ibid.*

²⁷ See MLC 2006, *cit. supra note 9*, Standard A.2.5.1, para. 5, Regulation 2.5.

²⁸ *Ibid.*

²⁹ See MLC 2006, *cit. supra note 9*, Standard A.2.5.1, para. 7, Regulation 2.5.

³⁰ See MLC 2006, *cit. supra note 9*, Standard A.2.5.1, para. 8, Regulation 2.5.

The MLC 2006 also contains mandatory provisions that are intended to mitigate the considerable financial implications of seafarer abandonment. Seafarers are considered abandoned where the shipowner “(a) fails to cover the cost of the seafarer’s repatriation; or (b) has left the seafarer without the necessary maintenance and support; or (c) has otherwise unilaterally severed their ties with the seafarer including failure to pay contractual wages for a period of at least two months.”³¹ Flag States are thus obliged to require ships flying its flag to have in place a financial security system that can “provide direct access, sufficient coverage and expedited financial assistance,³² in accordance with this Standard, to any abandoned seafarer on a ship flying its flag.”³³

Finally, the MLC 2006 provides clear rules regarding the maintenance of seafarer health and well-being. Regulation 4.1 under Title IV explicitly requires flag States to ensure that seafarers on its ships are “covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board.”³⁴ This standard of adequacy that is implied in this regulation is that it must be “as comparable as possible” to what is generally available to workers on shore.³⁵ For this purpose, the MLC 2006 requires Member States to enact national laws and regulations establishing minimum requirements for on-board hospital and medical care facilities and equipment and training on ships that fly its flag.³⁶ It also establishes a general obligation on Member States to ensure that ships flying their flag maintain shipboard environments that promote occupational safety and health.³⁷ This means that such ships have to take “reasonable

³¹ See MLC 2006, *cit. supra note 9*, Standard A.2.5.2, para. 2, Regulation 2.5.

³² According to Standard A.2.5.2, para. 9, Regulation 2.5, MLC, the assistance provided by the financial system should be sufficient to cover the following: a) outstanding wages and other entitlements due from the shipowner to the seafarer under their employment agreement, the relevant collective bargaining agreement or the national law of the flag State, limited to four months of any such outstanding wages and four months of any such outstanding entitlements; b) all expenses reasonably incurred by the seafarer, including the cost of repatriation referred to in paragraph 10; and c) the essential needs of the seafarer including such items as: adequate food, clothing where necessary, accommodation, drinking water supplies, essential fuel for survival on board the ship, necessary medical care and any other reasonable costs or charges from the act or omission constituting the abandonment until the seafarer’s arrival at home.

³³ See MLC 2006, *cit. supra note 9*, Standard A.2.5.2, para. 4, Regulation 2.5.

³⁴ See MLC 2006, *cit. supra note 9*, Regulation 4.1.1.

³⁵ *Ibid.*

³⁶ See MLC 2006, *cit. supra note 9*, Standard A4.1.3; *See also* MLC 2006, *cit. supra note 9*, Standard A4.1.4 for the minimum provisions of such national laws.

³⁷ See MLC 2006, *cit. supra note 9*, Regulation 4.3.

precautions to prevent occupational accidents, injuries and diseases on board ship.”³⁸ Seafarers are also given the “right of visit” to appropriate shore-based medical facilities in their ports of call. Port States are thus obliged to allow seafarers to come ashore in order to visit doctors or dentists in order to attend to their medical needs.³⁹

3. COVID-19 AS A *FORCE MAJEURE* EVENT?

May COVID-19 – a global pandemic of unprecedented scale – be considered a *force majeure* event that justifies non-compliance with a State’s obligations under the MLC and other relevant treaty obligations related to seafarer protection? Due to the far-reaching impact and ever-morphing character of the virus, States seemed to have an easy justification for their various policy choices and responses. The simple argument was that governments had to act decisively in order to protect their countries from a never-before-seen kind of threat. In fact, much of the decision-making seemed to hang on the argument that the rapid spread of COVID-19 forced their hands and left them with little choice in the matter.

In international law, *force majeure* is a circumstance that can preclude the wrongfulness of non-compliance or non-conformity with an international obligation.⁴⁰ The Permanent Court of International Justice (PCIJ) said as much in the *Serbian Loans* case⁴¹ and the *Brazilian Loans* case,⁴² when it unequivocally stated that the principle may be validly pleaded in international law. However, these same cases also suggest the extremely high bar that must be met before the plea can succeed. In the *Russian Indemnity* case,⁴³ the ad hoc tribunal constituted under the Permanent Court of Arbitration set aside Turkey’s plea of *force majeure* because it was not able to prove that the circumstances made it impossible to fulfill its obligation to Russia. In its commentary to the ARSIWA, the ILC emphasized that the plea of *force majeure* “involves a situation where the State in question is in effect *compelled* to act in a manner not in conformity with the requirements of an international obligation

³⁸ See MLC 2006, *cit. supra* note 9, Standard A4.3, MLC.

³⁹ See MLC 2006, *cit. supra* note 9, Regulation 4.1.3.

⁴⁰ Draft Article on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), Art. 23.

⁴¹ *Case concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of Serbs)*, PCIJ, Series A, No. 20, 1929, p.39.

⁴² *Case concerning the Payment in Gold of the Brazilian Federal Loans Issued in France (France v. Republic of United States of Brasil)*, PCIJ, Series A, No. 20, 1929, p. 120.

⁴³ *Russia v. Turkey*, UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

incumbent upon it.”⁴⁴ The ILC commentary then goes on to identify the three elements that must concur before *force majeure* can be successfully invoked: “(a) the act in question must be brought about by an irresistible force or an unforeseen event; (b) which is beyond the control of the State concerned; and (c) which makes it materially impossible in the circumstances to perform the obligation.”⁴⁵

The first and second linked elements refers to an “irresistible force” or an “unforeseen event” which is “beyond the control of the State”. The ILC explained these concepts in this manner:

“the adjective ‘irresistible’ qualifying the word ‘force’ emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been ‘unforeseen’ the event must have been neither foreseen nor of an easily foreseeable kind. Further the ‘irresistible force’ or ‘unforeseen event’ must be causally linked to the situation of material impossibility.”⁴⁶

The third element – the material impossibility of performance – is the most controversial as well as the most ambiguous. As such, it is the usual stumbling block of States who are trying to make a case for *force majeure*.

Insofar as the source or origin of the material impossibility is concerned, the ILC Commentary clarifies that the

“material impossibility of performance giving rise to force majeure may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State’s territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two.”⁴⁷

Although the ARSIWA fails to provide a straightforward definition of “material impossibility”, the ILC Commentary suggests that the degree of difficulty it connotes is less than what is required for an invocation of supervening impossibility for the purpose of terminating a treaty under Article 61 of the Vienna

⁴⁴ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two [2001 ILC Commentaries to ARSIWA], p.76.

⁴⁵ *Ibid.*

⁴⁶ ILC Commentaries, *cit. supra note 44*.

⁴⁷ *Ibid.*

Convention on the Law of Treaties (VCLT).⁴⁸ For this purpose, it recalled the pronouncement of the International Court of Justice in the *Gabčíkovo-Nagymaros Project*, wherein the Court required the “permanent disappearance or destruction of an object indispensable for the execution of the treaty to justify the termination of a treaty on grounds of impossibility of performance.”⁴⁹ In contrast, the Tribunal in the *Rainbow Warrior* arbitration⁵⁰ speaks of a circumstance where, as a result of the happening of one or some of the trigger events described in the previous paragraph, the element of choice is taken away from the State. Quoting a report of the ILC, the Tribunal noted that:

“The adverb ‘materially’ preceding the word ‘impossible’ is intended to show that, for the purposes of the article, it would not suffice for the ‘irresistible force’ or the ‘unforeseen external event’ to have made it very difficult for the State to act in conformity with the obligation . . . the Commission has sought to emphasize that the State must not have had any option in that regard.”⁵¹

The Tribunal further stated that “the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of force majeure.”⁵² Thus, “material impossibility” as a circumstance precluding wrongfulness in the ARSIWA appears to imply something less than the *Gabčíkovo* standard for supervening impossibility of performance under Art. 61 of the VLCT, but more than a mere increase in the difficulty of performing obligations.

Going back to the initial question of whether the COVID-19 pandemic is a *force majeure* event that would justify non-compliance or non-conformity with international legal obligations concerning the protection of seafarers, it seems quite clear that it is not.

Pandemics, in general, are not new occurrences. The COVID-19 pandemic that began in late 2019/early 2020 was just the latest in a string of high-profile, albeit unrelated, health crises that include the outbreak of the Severe Acute Respiratory Syndrome (SARS) in 2003, the Middle East Respiratory Syndrome (MERS) in 2010, the H1N1 Swine Flu in 2009, Ebola in 2014, and Zika in 2015. Some of these have

⁴⁸ See ILC Commentaries *cit. supra* note 44, p.77; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT].

⁴⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, p. 63, para. 102.

⁵⁰ France-New Zealand Arbitration Tribunal, *Rainbow Warrior (New Zealand v. France)*, 82 ILR, pp. 499, 551.

⁵¹ *Rainbow Warrior*, *ibid.*, p. 253, para. 277.

⁵² *Ibid.*

already been contained while others are still being dealt with by affected countries. The point is that viral outbreaks of the scale and scope of COVID-19 are not completely “unforeseen” within the meaning of the ARSIWA. Admittedly, there are difficulties in identifying the precise origin or location of the next outbreak. But there is consensus around the fact that “zoonotic health threats” will keep on happening and that fairly consistent patterns are emerging that could serve as the basis of prevention as well as containment measures.⁵³ This means that a pandemic is not necessarily an “irresistible force” if there were clear opportunities for a State to prevent or contain its spread within its borders. Furthermore, rapid scientific and medical advancement means that States have a range of policy options at their disposal for addressing outbreaks.

It is fair to say that in the early days of the pandemic, States might have been put in positions that satisfied the *Rainbow Warrior* standard of “absolute and material impossibility” of performance of obligations. The rapid spread of this extremely transmissible form of coronavirus paralyzed the governments of many countries as they tried to balance public health considerations (e.g. the need to impose border closures and public lockdowns) with the imperative of keeping their economies open. As a result, many international legal obligations were sidelined or put on hold while governments were busy calibrating their responses to COVID-19. One thing must be emphasized: this process of calibration meant that States had available options insofar as how they wanted to deal with the pandemic. At no point was the element of choice ever taken away, as was evident from the range of responses (and even non-responses) undertaken by governments all over the world. One clear example is the decision to close one’s borders and ports of entry. Decisions were taken insofar as the scale, scope, and duration of the closures. Exceptions and carve-outs were also identified based on need/compassion, nationality, and functionality. In light of this, it would not be accurate to say that States were forced into involuntary courses of action and thus absolutely could not perform certain international legal obligations that were affected as a result of voluntary closures and lockdowns. At best, the global pandemic only made compliance with international obligations more difficult when compared to “normal” times. This suggests that under international law, the plea of *force majeure* really cannot succeed given how strictly the concept was applied to cases where circumstances causing hardships in compliance were still not accepted by international courts and tribunals.

⁵³ MORSE et. al., “Prediction and prevention of the next pandemic zoonosis”, *The Lancet*, 2012, p. 1956 ff, available at: <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)61684-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)61684-5/fulltext)>.

According to the International Transport Workers' Federation (ITF), there are a rising number of cases where ship owners, flag and port States claim the excuse of *force majeure* as an excuse for their non-conformity or non-compliance with their MLC 2006 obligations.⁵⁴ The ILO has consistently adopted the position that the pandemic is not a *force majeure* event that would warrant States' failure to comply with their obligations under the MLC.⁵⁵ In this regard, the organization's Committee of Experts⁵⁶ unequivocally noted that "the MLC 2006 is a comprehensive labour instrument for the maritime industry applicable to all ratifying countries, and not a compilation of labour regulations to be applied selectively, if and to the extent that circumstances so permit."⁵⁷ At best, it makes the concession that the plea of *force majeure* could only have been made in the early days of the pandemic, when all countries were still trying to get their bearings.⁵⁸ However, it concludes that *force majeure* cannot be used as an excuse for continuing violations of MLC 2006 obligations months after the initial outbreak.⁵⁹ The ILO Committee of Experts further observed that the intervening period "constitutes (a) realistically sufficient time frame allowing for new modalities to be explored and applied, in conformity with international labour standards."⁶⁰ The crux of the ILO's logic is consistent with international legal interpretations of the *force majeure* concept and is centered around the idea that it may not be invoked "from the moment that options are available to comply with the provisions of MLC 2006, although more difficult or cumbersome."⁶¹

4. PRESSURE POINTS AND RESPONSES

⁵⁴ SUBASINGHE, BREESE, and WARRING, "Governments must protect trapped seafarers' human rights", *Business and Human Rights Journal of ITF Seafarers* (1 July 2020), available at: <<https://www.itfseafarers.org/en/news/governments-must-protect-trapped-seafarers-human-rights>>. See also OVCINA, "ITF: Enough is enough! Hundreds of seafarers to start leaving ships", *Offshore Energy* (16 June 2020), available at: <<https://www.offshore-energy.biz/itf-enough-is-enough-hundreds-of-seafarers-to-start-leaving-ships/>>.

⁵⁵ ILO Revised Version 3.0 of its "Information Note on Maritime Labour Issues and Coronavirus (COVID-19)".

⁵⁶ General Observations on matters arising from the application of the Maritime Labour Convention 2006, as amended (MLC 2006) during the COVID-19 pandemic, adopted by the Committee of Experts on the application of conventions and recommendations (CEACR) at its 91st session, November-December 2020.

⁵⁷ ILO Revised Version 3.0, *cit. supra* note 55, p. 3.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

As became clear quite early in 2020, it was essential that shipping be allowed to continue with as few disruptions as possible. The complex nature of the industry meant that this could only be achieved through massive coordination and cooperation at multiple levels. The challenge also lay in creating space for obvious practical considerations within the existing legal framework.

Three pressure points emerged as early as the first quarter of 2020: (1) the need to designate seafarers as “key workers” in order to minimize disruptions to seaborne trade and to deliveries of essential goods and services, (2) the need to expediently execute crew changes and repatriations, and (3) the need to find an acceptable workaround for expiring seafarer contracts and certifications.

To the credit of all stakeholders, there was a genuine effort to address these pressure points as soon as they became apparent. The clearest example of this could be seen in the joint efforts of the IMO, the ILO, and the International Civil Aviation Organization (ICAO). Although these three specialized United Nations agencies operate within very different spheres of work, COVID-19 brought them together in addressing the unique challenges and obstacles faced by seafarers. On 22 May 2020, they issued a joint statement which called on governments to take decisive action in facilitating “crew changes, operations essential to maintain the global cargo supply chains and operations related to humanitarian aid, medical and relief flights.”⁶² To this end, the statement also makes a number of specific recommendations which are largely based on earlier guidelines and circulars issued by each agency. These include requests to designate seafarers as “key workers” providing an essential service; to grant them necessary and appropriate exemptions from any travel or health-related restrictions so that they can expediently join or leave ships and aircrafts; to accept official seafarer identity documents as evidence of being a seafarer for purposes of crew changes; and to permit seafarers to transit through countries for the purpose of crew changes and repatriation.⁶³

⁶² IMO, ILO, ICAO, “A Joint Statement on designation of seafarers, marine personnel, fishing vessel personnel, offshore energy sector personnel, air cargo supply chain personnel, and service provider personnel at airports and ports as key workers, and on facilitation of crew changes in ports and airports in the context of the COVID-19 pandemic”, 26 May 2020, C.L. No. 4204/Add.18, available at: <<https://www.imo.org/en/MediaCentre/PressBriefings/Pages/16-IMO-ICAO-ILO-joint-statement.aspx>>.

⁶³ *Ibid.*

A few months later, the UN General Assembly unanimously issued a Resolution⁶⁴ that substantially echoed the Joint Statement in urging Member States to designate seafarers as key workers and in asking them to facilitate safe crew changes and travel. It should be noted that there is no formal international legal meaning to the term “key worker”. However, it has come to refer to “frontline workers”, “critical workers”, or workers providing essential public services. Many countries use the term to identify certain occupation classes that are granted exemptions (e.g. travel and movement restrictions) so that they can continue rendering services which are essential to the functioning of society.⁶⁵ It should be emphasized that the IMO-ILO-ICAO Joint Statement as well as the UNGA Resolution are both non-binding. There is no compulsion to comply other than a recognition of the human rights issues that will be exacerbated by a failure to address the problem. As of 2020, at least 45 countries⁶⁶ have heeded the call to action and designated seafarers as key workers. As a function of their sovereignty, these countries have broad discretion to determine the practical manifestations of such designation.

⁶⁴ “International cooperation to address challenges faced by seafarers as a result of the COVID-19 pandemic to support global supply chains”, UNGA Resolution A/75/L.37, 24 November 2020.

⁶⁵ In the United Kingdom, for example, the formal list of key workers include, but are not limited to the following critical sectors: (1) *Health and social care*: such as doctors, nurses, midwives, paramedics and social workers; (2) *Education and childcare*: such as those in the social care sector, teachers, and specialist education professionals; (3) *Key public services*: such as journalists, those working in the justice system, religious staff or charity staff; (4) *Local and national government*: such as those working in the payment of benefits, the delivery of and response to the EU transition, and certification of goods; (5) *Food and goods provisions*: such as workers in the food production and distribution supply chain, as well as those in sales and delivery. This also includes those who work in the production of hygiene and medical goods; (6) *Public safety and national security*: such as the police, Ministry of Defence civilians, armed forces, fire service employees, security, prison and probation staff; (7) *Transport*: such as workers in the air, water, road and rail transport systems; and (8) *Utilities, communications and key financial services*: such as workers needed for essential finance provisions, telecommunications, oil, gas or electricity suppliers, postal and delivery services, waste disposal and more.

⁶⁶ The following countries have designated seafarers as key workers: Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Brazil, Canada, Chile, Cyprus, Denmark, France, Gabon, Georgia, Germany, Ghana, Greece, Indonesia, Iran (Islamic Republic of), Jamaica, Japan, Kenya, Kiribati, Liberia, Marshall Islands, Moldova, Montenegro, Myanmar, Netherlands, New Zealand, Nigeria, Norway, Panama, Philippines, Republic of Korea, Romania, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Thailand, United Arab Emirates, United Kingdom, United States, Yemen.

4.1. The Philippine example

The Philippines had a lot riding on the early resolution of pandemic-related challenges to seafaring. It is a well-known fact that the country has “the single largest number of seafarers serving the world’s merchant and cruise fleets.”⁶⁷ The country’s prompt implementation of the various protocols recommended by relevant international organisations is therefore practical and necessary.

Even before the issuance of the IMO-ILO-ICAO Joint Statement, the Maritime Industry Authority (MARINA) of the Philippines already adopted a binding Resolution⁶⁸ to officially designate seafarers as key workers. It also heeded the various IMO circulars providing guidance to Member States and issued counterpart regulations that formally operationalized these pragmatic recommendations. One example is a Joint Circular which was signed by relevant agencies of the Philippine government.⁶⁹ According to the Philippines’ official communication of the Joint Circular to the IMO, the issuance

“provides guidelines and process flows for the following six identified scenarios in crew change and repatriation: (1) Filipino seafarers joining a ship docked in the Philippines or overseas (outbound); (2) Filipino seafarers leaving a ship (inbound); (3) Filipino seafarers transiting in the Philippines (airport/terminal to airport/terminal); (4) Foreign seafarers joining a ship docked in a Philippine seaport from the airport (airport to ship); (5) Foreign seafarers leaving a ship docked in a Philippine seaport to an airport (ship to airport), and; (6) Foreign seafarers transiting in the Philippines (airport/terminal to airport/terminal).”⁷⁰

By virtue of the key worker designation, seafarers (whether Filipino or foreign) are entitled to avail of a controlled travel corridor that would allow hassle-free disembarkation/embarkation for crew changes. Both the key worker designation as well as the establishment of Green Lanes signal the Philippines’ willingness to

⁶⁷ See IMO Circular Letter No. 4237/Add.10 (24 July 2020), Annex.

⁶⁸ MARINA Board Resolution No. 2020-04-04 (23 April 2020).

⁶⁹ Joint Circular No. 1, series of 2020, entitled “Guidelines for the Establishment of the Philippine Green Lane to Facilitate the Speedy and Safe Travel of Seafarers, Including their Safe and Swift Disembarkation, and Crew Change during the COVID-19 Pandemic”.

⁷⁰ *Ibid.*

adopt a pragmatic approach to the problem and to take comprehensive measures to facilitate safe and speedy crew changes.

Another notable measure that the Philippines took was the voluntary extension of the validity of International Convention on Standards of Training, Certification, and Watchkeeping (STCW) for Seafarers certificates of Filipino seafarers currently onboard ships. In a letter to the IMO, the Philippine government noted that maritime administrations like MARINA are facing serious challenges “in the facilitation and continuance of activities pertaining to seafarers’ education and training, certification including medical certification, endorsement and revalidation of certificates in accordance with the STCW Convention.”⁷¹ It also specifically emphasized that it would be taking a “pragmatic and practical approach” in dealing with this matter. Thus, the Philippines became one of a dozen or so countries that formally declared the automatic extension of the validity STCW certificates for a fixed period of time from March 2020 so as to ensure the least amount of disruption to normal ship operations. It also directed ship owners to coordinate with the flag and port States for the recognition of this order. The seafarers themselves are asked to present a copy of the order as well as the communications of the IMO Secretary-General to port State authorities during ship audits/inspections. MARINA thereafter made the Philippines’ automatic extension policy for STCW certificates apply to three additional extension periods.⁷²

5. REMAINING PROTECTION GAPS

Despite the various recommendations and guidance documents issued by ILO, IMO, and ICAO, a number of glaring protection gaps still remain.

5.1. *Gap 1: Denial of shore leaves*

Even before the outbreak of COVID-19, there were already criticisms of how easily the right to shore leave could be denied. It may be recalled that while Regulation 2.4 of the MLC 2006 requires ship owners to grant their seafarers shore leaves in order “to benefit their health and well-being and consistent with the operational requirements of their positions”, nothing actually compels them to

⁷¹ IMO Circular Letter No. 4237, 25 March 2020.

⁷² See also IMO Circular Letter No. CL.4237/Add.1, 16 April 2020; IMO Circular Letter No. CL.4237/Add.13, 20 October 2020; IMO Circular Letter No. CL.4237/Add.17, 22 December 2020.

facilitate the enjoyment of this right. The issue comes into sharp relief when overlaid with the fact that the final say in the grant or denial of such right actually lies with the port State. The language of MLC 2006 must be contrasted with the wording of the Annex to the Convention on Facilitation of Maritime Traffic (FAL Convention).⁷³ Section 1(A) of the latter defines shore leave as “permission for a crew member to be ashore during the ship's stay in port within such geographical or time limits, if any, as may be decided by the public authorities.” This is clearly demonstrated by the fact that before COVID-19, shore leave was most often denied due to the restrictive visa requirements of many port States. From the perspective of the ship owners, it can be said that they are not obligated to facilitate or assume the costs of their seafarers’ visa applications. From the perspective of port States, the imposition of visa requirements is connected to their sovereign right of control over its territory. Visa-related denials of shore leaves persisted despite the fact that the Annex to the FAL Convention explicitly prohibits Contracting States from requiring visas for the purpose of shore leave.⁷⁴ In relation to this, it should also be noted that less than 40 States have ratified the Seafarers Identity Documents Convention,⁷⁵ an instrument which establishes an international and uniform system of seafarer identification which in theory, should facilitate the grant of shore leaves.

This gap became particularly evident when most countries locked their borders, creating a blanket seal to all ports of entry. Additionally, many of these same countries also suspended active visas or temporarily stopped issuing new ones. This meant that port States with these policies could effectively deny seafarers the right to shore leave and access any shore-based facilities needed for their health and well-being. Even port States who ordinarily didn't require visas also began invoking the public health exception provided in the FAL Convention⁷⁶ in order to prevent seafarers from leaving their ships. This was based on the unfounded fear that such seafarers are COVID-19 vectors who could “bring in the virus”.

5.2. Gap 2: Continuing difficulties in repatriation; Involuntary extension of work contracts

⁷³ Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967), 591 UNTS 8564 [FAL Convention].

⁷⁴ See *ibid.*, Standard 3.19.1, Annex to the FAL Convention.

⁷⁵ See ILO Convention No. 185, *cit. supra* note 19.

⁷⁶ See *supra* note 73, Standard. 3.19, Annex to the FAL Convention.

The complex challenges involved in moving people over closed or restricted borders during the global pandemic means that many ship owners and flag States have been unable to or have had significant difficulties in repatriating qualified seafarers. There are also still some States who outright refuse or impose extremely onerous conditions for territorial access, jeopardizing the ability of seafarers to sign-off from ships and transit through these territories for the purpose of catching flights to their home countries.⁷⁷

As a result, thousands of seafarers being forced by the circumstances to work beyond their contracts (in some cases, up to 17 months) until suitable arrangements can be made for their repatriation.⁷⁸ It may be recalled that under MLC 2006, a seafarer may continuously serve on board a vessel for a maximum period of 11 months. After this period, the seafarer is entitled to immediate repatriation, unless he/she consents to a short extension period. However, the present situation betrays the apparent flexibility of this rule.

Due to the pandemic, the repatriation process currently carries no certainty nor does it adhere to a strict timeline, potentially causing “higher levels of stress and fatigue.”⁷⁹ This is because the grant of exceptions to COVID-19 border closures and travel restrictions are entirely up to the States that impose them.⁸⁰ There appears to be very little cooperation and coordination among States with respect to such policies, let alone establishing a consistent system of exceptions that could facilitate the complex logistics involved in seafarer repatriation.

The bottom line is that seafarers are left with very little choice in the matter. They are effectively forced to continue working well beyond their physical, emotional, and psychological abilities, and indeed, even well beyond their willingness to do so in the first place. The seafarers’ specific hardship circumstances during the pandemic have been characterized by the ILO as amounting to “forced

⁷⁷ BOCKMANN and WALIA, “Global crew changes paralyzed by pandemic chaos”, *Lloyd’s List*, 5 May 2021, available at: <<https://lloydlist.maritimeintelligence.informa.com/LL1136682/Global-crew-changes-paralysed-by-pandemic-chaos>>

⁷⁸ ILO, “Information Note on maritime labour issues and coronavirus (COVID-19) Revised Version 3.0”, 3 February 2021, para. 1, p. 3.

⁷⁹ “Problems Faced by Seafarers in the Wake of COVID-19”, World Maritime University, 25 June 2020, available at: <<https://www.wmu.se/news/problemsfaced-by-seafarers-in-the-wake-of-covid-19>>.

⁸⁰ International Maritime Organization, “Supporting Seafarers on the Frontline of COVID-19”, Available at: <<https://www.imo.org/en/MediaCentre/HotTopics/Pages/Support-for-seafarers-during-COVID-19.aspx>>

labour”.⁸¹ This was also the collective conclusion of a group of Special Rapporteurs of the UN Human Rights Council, when they issued a statement calling for the recognition of protections for vulnerable workers under circumstances of forced labour.⁸² In relation to this, it is also relevant to recall that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families likewise prohibits anyone from requiring a migrant worker to perform forced or compulsory labour.⁸³

5.3. Gap 3: Seafarer abandonment

The 2001 IMO/ILO Guidelines on abandoned seafarers⁸⁴ note that a case of abandonment is characterized by “the severance of ties between the shipowner and seafarer”. This was further elaborated in MLC 2006, when it identified specific circumstances of abandonment, including a shipowner’s failure to remunerate the costs of repatriation or even provide for the seafarer’s basic needs such as food and shelter. In an abandonment, a seafarer is effectively stranded on his/her ship: they cannot “abandon ship” since doing so might result in them forfeiting their claims to unpaid salaries. International law also frowns upon leaving a ship unattended since “ghost ships” are maritime hazards.⁸⁵ Nor can they come ashore as they usually do not have the correct documents to do so. Seafarers in such situations usually rely on the charity of non-governmental organizations for even the supply of food and water. Assuming they do manage to find their way off their vessels, there remains to problem of paying for flights home and other associated costs.

⁸¹ International Labour Organization, “General Observations on Matters Arising From the Application of the Maritime Labour Convention, 2006, As Amended (MLC, 2006) During the COVID-19 Pandemic, November 2020, available at < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--normes/documents/genericdocument/wcms_741024.pdf>

⁸² OHCHR, “Every worker is essential and must be protected from COVID-19, no matter what”, 18 May 2020, available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25892&LangID=E>>.

⁸³ ICMW, *cit. supra* note 4, Art. 11(2).

⁸⁴ Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers, IMO A22/Res.930, 17 December 2001.

⁸⁵ HA and STANLEY, “What happens when tycoons abandon their giant cargo ships?”, Bloomberg, 18 December 2020, available at: < <https://www.bloomberg.com/news/features/2020-12-17/what-happens-when-tycoons-abandon-their-own-giant-cargo-ships>>.

According to an IMO-ILO Joint Database,⁸⁶ there were at least 65 cases of seafarer abandonment in 2020.⁸⁷ Of these, only 18 have been resolved.⁸⁸ Many of them were related to COVID-19 related pressures on the business of the shipowner.⁸⁹ Perhaps the number is actually higher due to non-reporting of cases.

Seafarer abandonment is a long-recognized human rights problem of the maritime industry despite the fact that primary responsibility is clearly given to the flag State of the vessel involved in the abandonment, while the home State of the abandoned seafarers bear subsidiary responsibility. The global pandemic only served to exacerbate this problem as it drove more ship owners into the dire financial straits that often precede abandonment. In the past, the abandonments are usually resolved by the shipowner's sale of the vessel.⁹⁰ The proceeds are then used to pay off the company's debts, including to the crew. Unfortunately, the pandemic brought a grim outlook to the industry, complicating potential sale-based solutions. Other stakeholders – primarily the flag and port States – have also been reluctant to assume responsibility for abandoned seafarers for various reasons.⁹¹ The countries of which seafarers are nationals are also often unable to arrange their repatriations due to lack of resources and facilitating travel around the lockdowns and closed borders imposed by other States.

5.4. Gap 4: Denial of health and medical care

There were numerous reported cases of seafarers with non-COVID related illnesses (including those with life-threatening conditions) being prevented from going ashore to seek medical treatment, in violation of their rights under the MLC 2006 and other rights instruments for migrant workers.⁹² The IMO earlier issued guidance

⁸⁶ The database is available at <<http://www.ilo.org/dyn/seafarers/seafarersbrowse.home>>.

⁸⁷ The data is available at <<https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LEG-107th-session.aspx>>.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ MWANGI, “Kenya: Come and buy our ship, abandoned Syrian sailors plead”, AllAfrica.com, 24 January 2021, available at: <<https://allafrica.com/stories/202101250018.html>>.

⁹¹ OVCINA, “ITF: 19 Abandoned Seafarers Set to be Repatriated After Two-Year-Long Ordeal”, Offshore Energy, available at: <<https://www.offshore-energy.biz/itf-19-abandoned-seafarers-set-to-be-repatriated-after-two-year-long-ordeal/>>

⁹² DE BEUKELAER, “Stranded at sea: the humanitarian crisis that's left 400,000 seafarers stuck on cargo ships”, The Conversation, 8 December 2020, available at: <<https://theconversation.com/stranded-at-sea-the-humanitarian-crisis-thats-left-400-000-seafarers-stuck-on-cargo-ships-150446>>.

documents⁹³ for port and coastal States regarding this matter. The gist of the recommendations is that seafarers should be allowed immediate access to appropriate shore-based medical care. Port and coastal State authorities should thus minimize or eliminate any barriers to their prompt disembarkation. The continuing problem is that these documents only establish recommendations, not rules. Thus, some States still persist in restricting access to ill seafarers or in imposing impractical measures (e.g., observance of strict and lengthy quarantine procedures) based on fears that they might “bring in” the virus.

5.5. Gap 5: Lack of an effective compliance mechanism

Many Contracting States have been remiss in complying with their obligations under the MLC 2006. In such instances, inevitable issues concerning enforcement and accountability come under scrutiny. Compliance is self-policing under the Convention. This much is clear from Article V of the MLC 2006, which notes that each Member shall bear the responsibility for implementing and enforcing the laws, regulations, or other measures it has adopted to fulfill its commitments (whether as a flag State, port State, or labour-supplying State) under the Convention with respect to ships and seafarers under its jurisdiction. However, very little can be done at the international level in the event of non-compliance or derogation by a Contracting State. There appears to be a glaring lack of an external accountability mechanism under the MLC 2006. It is true that Article VII provides that derogations, exemption, or other flexible application of the Convention may be reviewed by the Tripartite Committee established in Article XIII. However, the Committee really does not have any enforcement power and its authority is limited to consultation and recommendations.⁹⁴ The practical impact of this is that there is no real redress of seafarer grievances.

6. CONCLUSION

⁹³ See for example IMO Circular Letter No. 4204/Add.23 (1 July 2020).

⁹⁴ According to the “2012 Standing Orders of the Special Tripartite Committee Established for the Maritime Labour Convention 2006”, the Tripartite Committee’s mandate is limited to keeping the working of the MLC 2006 under continuous review, providing advice to the Governing Body or the International Labour Conference, and carrying out consultations with stakeholders. It does not have any quasi-judicial functions, nor can it settle disputes arising out of any complaint submitted by any individual or entity.

The COVID-19 pandemic triggered a global public health and economic crisis of unprecedented proportions. Amidst all of these issues, the sorry plight of seafarers became heartbreakingly clear: they seem to be protected by international law only for as long as it is convenient or practical for stakeholders. There are too many other competing interests at play for them to be top priority. This is reflected in the way that instruments like MLC 2006 are drawn. These instruments leave little room for absoluteness and all too often, States and ship owners are able to avail of exceptions and flexibilities in the law in order to undermine the spirit of the law.

A number of more specific observations and recommendations can also be made. First, there remains a need to require States to grant seafarers “key worker” status as well as a further need to clarify the precise meaning and import of this designation in the first place. Although a good number of States have complied with the requests of international organizations, there are still some holdouts who can negatively affect the movement of seafarers. A single bottleneck in a crew change, for example, can have a knock on effect on so many others.

Second, more MLC 2006 Member States should hasten to implement counterpart national pandemic-specific rules and regulations that will not only reflect that instrument’s provisions, but also the more recent protocols jointly recommended by the ILO, IMO, and ICAO. One example of this is the recommendation regarding the acceptance of seafarer identity documents to facilitate repatriations, crew changes, and shore leaves. The outbreak of this pandemic has demonstrated that the practice of still requiring visas from seafarers is unnecessarily onerous and is often the reason for the denial of basic rights. Widespread acceptance of the more relaxed guidance of accepting even private documents like employment agreements or letters of appointment as a substitute for a seafarer identity document or visa is unlikely. But seafarer identity documents, being an internationally-recognized document under the Seafarers Identity Documents Convention that carries safeguard features like biometrics, should already be sufficient.

Finally, although cooperation at the level of international organizations is evident from their various joint statements, protocols, and recommendations, there does not seem to be a counterpart effort among flag States, port States, and labour-supplying States. Despite the industry consultation requirement in the MLC 2006, there doesn’t seem to be effective communication between ship owners, industry bodies, and governments at a broader international level. This lack of productive discourse has led to the continued occurrence of problems like seafarer abandonment.

Like all migrant workers, seafarers have been disproportionately affected by COVID-19. Workplace-based challenges aggravated by pandemic-caused disruptions, the stress caused by being away from home, and even the anxiety triggered by fear of virus contagion, all contribute to their hardship. The continuing challenge for all stakeholders is to recognize the vital role of seafarers in keeping supply chains functioning and in ensuring that critical goods like medicine and food reach their destinations. Ultimately, recognition should translate to actual protection.

THE IMPACT OF THE COVID-19 PANDEMIC ON POSTED WORKERS: EXPOSING THE TENSION BETWEEN STRONG MARKET IMPERATIVES AND FRAGILE WORKER PROTECTIONS

*Zoe Nutter**

1. CAUGHT BETWEEN TWO STATES OR FALLING BETWEEN THE CRACKS?

In March 2020, the European Union (EU) was at the epicentre of the global COVID-19 pandemic. Case numbers of the novel virus were rising in many Member States at an alarming rate, overwhelming even the public health infrastructures of more developed States assumed better equipped to handle such threats. Simultaneously, lockdowns imposed by individual Member States to stem transmission meant acute labour shortages in key economic sectors. These included shortages in social and medical care, agriculture, industry, construction and transport, compounding difficulties in providing services to prevent and treat the spread of the virus. In the face of a mounting struggle to recruit local workers, many EU Member States decided that the most effective measure to ensure the continued provision of services in these sectors was to lift the temporary internal and external border controls imposed to curb the spread of the virus.¹

The easing of travel restrictions to allow temporary workers to continue ‘essential’ activities not only laid bare the exploitative conditions these workers too often endure,² but also reinvigorated debate about the EU’s conflicting common

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¹ “Germany eases border rules to allow in harvest workers amid coronavirus crisis”, Deutsche Welle, 2 April 2020, available at: <<https://www.dw.com/en/germany-eases-border-rules-to-allow-in-harvest-workers-amid-coronavirus-crisis/a-53000322>>.

² Guidelines Concerning the Exercise of the Free Movement of Workers During COVID-19 Outbreak, OJ 2020/C 102 I/03; FANA et al., “The COVID Confinement Measures and EU Labour Markets”, European Commission JRC Technical Reports: COVID & Empl Working Group, 2020, pp. 1-32 (noting that the COVID-19 pandemic saw the burden of the public health and economic crises

market and social policy ambitions.³ Within this broad group, posted workers are unique. These are ‘temporarily mobile’ workers – predominantly EU citizens – who are posted by their employers to a host State for an average duration of four months.⁴ Rather than falling under the EU regulatory regime governing the free movement of labour, these workers are legally treated under the free movement of services. As such, a different set of worker rights is activated.⁵ As explained in Section Two, the general theory is that these workers largely maintain the rights provided by their home country when they are sent on assignment to another EU Member State. Although certain discretion is given to host States vis-à-vis posted workers in establishing certain aspects of working time, minimum annual holidays and rates of minimum pay, posted workers are more often than not barred from the typically higher standards in the host State. It is at this point that the workers can lose out. In a regulatory sense, they find themselves with a foot in two or more countries at risk of the worst of both worlds.

Adding to these challenges, posted workers face several structural barriers that impinge on their access to justice and make them more vulnerable than other workers. These include language barriers, lack of expert knowledge, limited accessible information about their labour and social rights, lack of occupational safety and health training, inaccessibility of support services and minimal oversight and monitoring of worksites.⁶ In light of the pandemic, these vulnerabilities are made worse by the risk

shouldered most keenly by the most vulnerable segments of the working population); TIMMERMAN, “COVID-19 Exposes the Realities of Europe’s Neglected Essential Workers”, *Border Criminologies Blog*, 2 December 2020, available at: <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/12/covid-19-exposes>>.

³ LILLIE, “The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework”, *Theoretical Inquiries in Law*, 2016, pp. 39-62. Given that European integration is ideologically based on market ideas, so too is the conception of EU citizenship, enabling individuals as autonomous market actors. EU regulatory frameworks seek to enable mobile workers as individual market actors, while constraining and repressing them as collective ones, because of the presumed negative effects their collectivism has on labour-market functioning and free movement. See also VISSER, “From Keynesianism to the Third Way: Labour Relations and Social Policy in Postwar Western Europe”, *Economic and Industrial Democracy*, 2000, p. 426; and MOSLEY, “The Social Dimension of European Integration”, *International Labour Review*, 1990, p. 147-163.

⁴ Wigand and Soumillion, “European Commission – Fact Sheet: Revision on the Posting Workers Directive – Frequently Asked Questions”, *European Parliament MEMO/16/467*, October 2017, available at: <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_467>.

⁵ EVJU, “Revisiting The Posted Workers Directive: Conflict of Laws and Laws in Contrast”, *Cambridge Y.B. Eur. Legal Stud.*, 2010, p. 151 ff.

⁶ HOLLAN and DANAJ, “POOSH – Occupational Safety and Health of Posted Workers: Depicting the Existing and Future Challenges in Assuring Decent Working Conditions and Wellbeing of Workers in

of contracting coronavirus as posted workers travel through packed airport terminals between hotspots.⁷ They can be expected to cover the costs of quarantine and endure cramped living conditions without access to basic hygiene, to work in low-wage, labour-intensive industries that do not accommodate social distancing measures.⁸

I have chosen to examine the situation of posted workers in this Chapter because I consider that they represent a cohort of temporary workers who are often undervalued and indeed are often not seen in the labour migration discourse. I will argue that posted workers have experienced significant restrictions on their labour rights because of the primacy of the free movement of services under EU constitutional law. My aim is to both examine the problems that these workers face and to explore the structural, socio-political and legal factors that might be causing or exacerbating the abuse that they experience. The story is a classic illustration of the divide that exists between theory and practice.

I begin in Section Two by outlining posted worker rights in theory. I define what constitutes a posted worker in Community law and specify the home and host State protections to which they are entitled. In Section Three, I lay out the known problems and risks concerning the posting of workers. I focus on the substantial lack of comparative data on both the number and distribution of posted workers in the EU as well as the qualitative elements of posted workers' employment and working conditions. Sections Four and Five focus on the structural issues, examining how posting shapes and is shaped by both the industry-specific environment as well as the interaction of International, EU, home and host State regulatory environments. First, I include a case study of the German meat industry, outlining the ways in which national industrial relations impact posted workers. Section Five then turns to patterns in cross-border labour law decision making at the CJEU in the context of posting of workers. I narrow in on judgements concerning the efficacy of collective

Hazardous Sectors (Project Number VS/2016/0224; 2017-2018)", POOSH Country Report in Austria, Work Package 4: Comparative Research Study, 2018; Bernaciak and Rasnača, "Not as Simple as it Should Be? Why the Judicial Enforcement of Posted Workers' Rights Needs Improvement", LSE Blog, 5 March 2020, available at: <<https://blogs.lse.ac.uk/europpblog/2020/03/05/not-as-simple-as-it-should-be-why-the-judicial-enforcement-of-posted-workers-rights-needs-improvement/>>.

⁷ For example, in April and May of 2020, the German Farmers' Association started working with the Lufthansa subsidiary Eurowings to operate flights from Romania to Germany, bringing tens of thousands of cross-border seasonal workers to harvest asparagus. EU seasonal workers employed in one Member State and sent by their employer to work in another Member State are considered posted workers within the meaning of Directive 96/71/EC. See European Commission Guidelines on Seasonal Workers in the EU in the Context of the COVID-19 Outbreak, 16 July 2020, C 4813.

⁸ KRAKOVSKY, "Growing Intra-EU Migrations in the Era of Coronavirus?", Institut Montaigne, 18 May 2020, available at: <<https://www.institutmontaigne.org/en/blog/growing-intra-eu-migrations-era-coronavirus>>.

agreements and discuss the implications for industrial relations more broadly. I conclude in Section Six with reflections on the way forward.

2. RIGHTS ON PAPER

According to Article 2 of the Posted Workers Directive (Council Directive 96/71/EC; hereinafter referred to as the PWD), the term ‘posted worker’ refers to “a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works”.⁹ Crucially, the PWD only takes employees into consideration. A posting occurs whenever a worker employed by a company in one Member State is assigned to temporarily work at a location in another Member State. This definition assumes that posted workers stay in the host State only temporarily and should not integrate into the labour market of the host State.¹⁰

Different regulations apply to individuals moving across Europe who do not meet the Directive’s criteria for posted workers, such as migrant workers and the self-employed. Still, posted workers are not necessarily EU citizens. Third-country nationals that legally reside and work in one Member State may be posted by an employer to another Member State under the same conditions as a Union citizen.

The posting of workers occurs in the context of cross-border provision of services. This form of mobility is covered under the regime of free movement of services, not of people.¹¹ The fundamental right of “freedom of movement for workers”, established in Article 45 of the Treaty on the Functioning of the European Union (TFEU), does not explicitly apply to posted workers, as they are not availing themselves of their free movement rights.¹² Instead, it is employers who are making use of their “freedom to provide services” under Article 56 TFEU (ex Article 49

⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 96/71, Art. 2.

¹⁰ STEFANOVA-BEHLERT and MENGHI, “The Impact of Covid-19 on Posted Workers: The New ‘Posting Framework’”, Foundation Robert Schuman Policy Paper, European Issues No. 591, 2021, pp. 1-2.

¹¹ BIFFL and SKRIVANEK, “The Distinction Between Temporary Labour Migration and Posted Work in Austria”, in HOWE and OWENS (eds.), *Temporary Labour Migration in the Global Era*, London, 2016, p. 104 (making the distinction between national immigration regulations and GATS rules. The former applies to migrant workers from non-EU countries who are employed directly by the local framer, while the latter applies to the case of services provision by a posted worker from a foreign company. In the case of the posting of workers within the EU, that is from one EU country to another EU country, relevant European directives apply, which broadly incorporate the same trade law approach).

¹² Treaty on the Functioning of the European Union (9 May 2008), OJ 115, Art. 45.

TEC), in order to send workers abroad on a temporary basis.¹³ Moreover, the PWD should apply to the extent that the posting takes place in the context of a contract of services, an intra-group posting or a hiring out through a temporary agency.¹⁴

Directive 96/71/EC requires that workers posted by an employer in one EU Member State to temporarily work on a project in another Member State should be guaranteed the minimum terms of employment and working conditions of the latter.¹⁵ Whatever the law applicable to the employment relationship, Member States are to ensure that ‘undertakings’¹⁶ guarantee workers posted to their territory the terms and conditions laid down “by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable”.¹⁷

This concerns maximum work periods; minimum rest periods; minimum paid annual holidays; minimum rates of pay¹⁸ (including overtime rates); the conditions of hiring-out workers; health, safety and hygiene at work; protective measures for pregnant women, women who have recently given birth, children and young people; and equality of treatment between men and women as well as other provisions of non-discrimination.¹⁹ All must be respected in accordance with the host State principle.²⁰

For the rest of the employment relationship, the labour law rules (from working time to parental leave and industrial disputes) of the sending country (i.e. where their official employer is based) continue to apply.²¹ In general, the term ‘posted worker’ implies that the base of their employment relationship remains in the Member State from which they have been posted or sent, rather than in the Member State where they are in fact carrying out the service.

¹³ *Ibid*, Art. 56.

¹⁴ See STEFANOVA-BEHLERT and MENGHI, *cit. supra* note 10, p. 2; see *supra* note 9, Art. 1 (put simply these are either companies that send abroad their own employees to provide services directly to their customers, possibly on-site; companies that post employees to their foreign branches or subsidiaries; or temporary work agencies that provide workers to foreign user companies to work on their premises).

¹⁵ RUHS, *The Price of Rights: Regulating International Labour Migration*, Princeton, 2013, p. 147.

¹⁶ SCHIEK, FORDE and ALBERTI (eds.), *EU Social and Labour Rights and EU Internal Market Law*, European Parliament, Directorate General for Internal Policies, 2015, p. 41 (defining ‘undertakings’ as the EU term for corporate economic actor).

¹⁷ See *supra* note 9, Art. 3(1).

¹⁸ Directive EU 2018/957 (later referred to as the ‘Amending Directive’) substitutes the term ‘minimum rates of pay’ with that of ‘remuneration’ but does not attempt to determine the notion of remuneration nor define any of its constituent elements.

¹⁹ See *supra* note 9, Art. 3(1).

²⁰ *Ibid*, Art. 3.

²¹ BENTON and PATUZZI, “Free Movement in the European Union: An Audit”, *Reminder: Role of European Mobility and Its Impacts in Narratives, Debates and EU Reforms*, 2020, pp. 13-14.

This is observed with regard to social security and taxation. Directive 96/71/EC specifies that posted workers remain insured in the social security system of their home State, provided the posting lasts – in general – for less than two years.²² This is governed by Article 12 of Regulation 883/2004,²³ concerning the coordination of social security systems with relevance for the European Economic Area (EEA) and Switzerland. Put simply, it exempts the payment of insurance contributions in the State of employment whenever the worker concerned is sent by an undertaking to another Member State for a period which from the outset is limited.²⁴ In terms of taxation, the right to levy income tax remains with the sending country for 183 days, only moving to the receiving country after said period.

The length and purpose of postings may significantly vary. The purpose may range from a two-week long equipment installation or maintenance to a longer-term management position. Within the category of posted workers there are both upper management staff and workers in low-wage, labour-intensive roles, such as meat processing, agriculture and construction.²⁵ Still, posting operations are generally of a short-term nature and involve the movement of workers from poorer to richer EU Member States.²⁶

3. THE KNOWN RISKS FACING POSTED WORKERS IN THE EU

Posted workers have historically been at the centre of lively debate at the European level addressing both legal and political questions. Given the East-West gap in prices and labour costs, the relationship between the free movement of services in the EU/EEA and national labour market regulations has become an increasingly salient issue.²⁷ Still, there remains a substantial lack of information about the extent of the phenomenon. While several academic studies have focused on posting flows²⁸ and the

²² KONLE-SEIDL, “Fact Sheets on the European Union: Posting of Workers”, European Parliament, May 2021, p. 3, available at: <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.1.13.pdf>.

²³ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 116.

²⁴ Practical Guide on The Applicable Legislation in the European Union, the European Economic Area and in Switzerland, European Commission Doc., 2013, pp. 1-53.

²⁵ BOGOESKI, “The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe”, *Global Perspectives*, 2021.

²⁶ See WIGAND and SOUMILLION, *cit. supra* note 4.

²⁷ This has intensified after Eastward enlargements in 2004 and 2007.

²⁸ See among others DE WISPELAERE and PACOLET, “Posting of Workers: Report on A1 Portable Documents Issued in 2016”, European Commission, 2018; PACOLET and DE WISPELAERE, “The Size and Impact of Intra-EU Posting on the Belgian Economy”, Research Institute for Work and Society

examination of rule-circumventing practices and working conditions in specific market segments,²⁹ not nearly enough attention has been paid to the general lack of both comparative data on the number and the distribution of posted workers in the EU as well as the qualitative elements of posted workers' employment and working conditions.

In response to a monitoring exercise conducted in 2006, the European Commission admitted that "there are no precise figures or estimates of posted workers in the EU".³⁰ They asserted that "the economic importance of posting exceeds by far its quantitative size, as it can play a crucial role in filling temporary shortfalls in the labour supply".³¹ This begs an important question: how is this 'economic importance' defined? The lack of data on posted workers limits our understanding of the economic benefits this form of mobility is said to offer. Without adequate data, the reality of the phenomenon will continue to escape us, limiting our capacity to weigh these economic benefits against regulatory challenges.³² Ensuring posted workers are protected during a pandemic requires knowing who they are, where they are working and under what conditions. Since the enactment of the PWD, serious worker protection problems have emerged, which in many ways confirm the view that it has become a method by which to avoid national labour regulations.³³

(HIVA), 2017; MUSSCHE, CORLUY and MARX, "The Rise of the Free Movements: How Posting Shapes a Hybrid Single European Labour Market", IZA Discussion Paper No. 10365, 2016.

²⁹ See among others WAGNER, *Workers Without Borders: Posted Work and Precarity in the EU*, Ithaca, 2018; VAH JEVŠNIK and ROGELJA, "Occupational Safety and Health in Transnational Workplaces: The Case of Posted Workers", *Dvedomovini/Two Homelands*, 2018, pp. 23-36; ALBERTI and DANAJ, "Posting and Agency Work in British Construction and Hospitality: The Role of Regulation in Differentiating the Experiences of Migrants", *International Journal of Human Resource Management*, 2017, pp. 3059-3082; BERNSTEN and LILLIE, "Breaking the Law? Varieties of Social Dumping in a Pan-European Labour Market", in BERNACIAK (ed.), *Market Expansion and Social Dumping in Europe*, Abingdon, 2015, pp. 43-60.

³⁰ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions: Posting of Workers in the Framework of the Provision of Services – Maximising its Benefit and Potential While Guaranteeing the Protection of Workers, COM, 2007, pp. 1-12 (noting that the most reliable and up-to-date statistical data presently available are based on the number of portable documents A1, previously E101 certificates, delivered by the social security institutions of the sending countries for every posting not exceeding 12 months).

³¹ *Ibid*, p. 3.

³² ALSOS and ØDEGÅRD, "Improving Data Collection About Posting and Information Provisions on Conditions Applicable for Posted Workers", *Protecting Mobility Through Improving Labour Rights Enforcement in Europe (PROMO)*, VS/2016/0222, 2018, p. 14.

³³ See discussion of 'regulatory arbitrage' in LILLIE and WAGNER, "Subcontracting, Insecurity and Posted Work: Evidence from Construction, Meat Processing and Ship Building", in DRAHOKOUPIL (ed.), *The Outsourcing Challenge: Organising Workers Across Fragmented Production Networks*, The European Trade Union Institute (ETUI), 2020.

Before outlining the challenges of collecting data on posted workers, I will lay out what we broadly do know. In 2017 it was estimated that there were approximately 2.8 million posted workers in the EU, marking an increase of 83 per cent between 2010 and 2017.³⁴ Posting has become an increasingly common vehicle for labour mobility for millions of workers around the EU, and a standard way in which sectors like construction, manufacturing and services recruit labour. Even so, posted workers are only equivalent to about 0.4 per cent of the total EU employment figure.³⁵

In 2010, the European Foundation for the Improvement of Living and Working Conditions (Eurofound) released an updated study compiled on the basis of individual national reports regarding the extent of the phenomenon of the posting of workers.³⁶ It found that a system for collecting administrative data was present in only a handful of countries and that no information was available on the employment and working conditions of posted workers, even in countries where data collection was more developed.

Given that the posting of workers may be conducted through a variety of employment relationships – (sub)contracting, temporary agency work or intracompany transfers – it is difficult to track contractual agreements. While some arrangements require a specific contract for the provision of services, others may not (i.e. in the case of a subsidiary set up for the sole purpose of receiving posted workers for assigned contracts).³⁷ Complex employment relationships make it difficult to monitor employment status, let alone determine accountability. An increase in labour market intermediaries (i.e. temporary work agencies), most notably in the agri-food industry,³⁸ has further complicated subcontracting-chains and made it increasingly difficult to identify legally responsible parties to workplace disputes.³⁹

While Article 12 of the Enforcement Directive 2014/67/EU (ED)⁴⁰ establishes that Member States may take measures on a proportionate basis to ensure liability in

³⁴ KONLE-SEIDL, *cit. supra* note 22, p. 3.

³⁵ See DE WISPELAERE and PACOLET, *cit. supra* note 28.

³⁶ Posted Workers in the European Union, Eurofound Doc., 2010, p. 6, available at: <https://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn0908038s/tn0908038s.pdf>.

³⁷ *Ibid.*

³⁸ SCHNEIDER and GÖTTE, “Germany”, in PALUMBO and CORRADO (eds.), *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, The Netherlands, And Sweden*, Open Society, 2020.

³⁹ HEINEN, MÜLLER and KESSLER, “Liability in Subcontracting Chains: National Rules and the Need for a European Framework”, European Parliament Doc., Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, 2007, p. 10, available at: <[https://www.europarl.europa.eu/regdata/etudes/STUD/2017/596798/IPOL_STU\(2017\)596798_EN.Pdf](https://www.europarl.europa.eu/regdata/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.Pdf)>.

⁴⁰ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the

subcontracting chains, it is of limited scope and widely considered an insufficient compromise.⁴¹ Subcontracting liability is limited to the construction sector and to the contractor “one up the supply chain” from the posted worker’s direct employer.⁴² In a study requested by the European Parliament’s Committee on Legal Affairs and released in 2017, concerning liability in subcontracting chains and the protection of workers involved in subcontracting chains, Heinen, Müller and Kessler stress in its policy recommendations that “(t)he European Legislator should figure out concrete numbers on posted workers”.⁴³

The only EU-wide registration system is the portable document A1 (hereinafter referred to as PD A1)⁴⁴ that employers are advised to submit to the relevant national authorities of the host State to certify that a worker already pays social security contributions in their home State and are therefore exempt from paying it in the host State.⁴⁵ This applies for every posting not exceeding 12 months. Although this data is the most widely cited, it is not readily available in several countries and has significant limitations. Mainly, it is unclear to what extent the number of PD A1s recorded by countries is a precise proxy for the actual number of postings taking place.⁴⁶ Firstly, a PD A1 is not a mandatory requirement for posting; it is not a condition under the posting rules.⁴⁷ Secondly, most data collected on postings fails to distinguish posted workers according to the ‘posting’ definition of Directive 96/71/EC. The conditions which must be fulfilled to qualify as a posted worker according to EU rules on the coordination of social security systems are

provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ 159/11.

⁴¹ SEELIGER and WAGNER, “Workers United? How Trade Union Organisations at the European Level Form Political Positions on the Freedom of Services”, Max Planck Institute for the Study of Societies, 2016, p. 16 (a representative of the European Transport Workers’ Federation said in response to the ED that “in this, as in other situations” the “ETUC prefers a bad deal over no deal; “representatives of ETUC are ready to compromise on levels which are not really acceptable, but just for the sake of an agreement”); BOGOESKI, “Chain Liability as a Mechanism for Strengthening the Rights of Posted Workers”, Project Mobility through Improving Labour Rights Enforcement in Europe Doc., 2016, p. 6.

⁴² See HEINEN, MÜLLER and KESSLER, *cit. supra* note 39, p. 94.

⁴³ *Ibid*, p. 116.

⁴⁴ PD A1 replaced E101 certificates from 2010.

⁴⁵ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149; Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74.

⁴⁶ “Posting of Workers in the European Union and EFTA countries: Report on A1 portable documents issued in 2010 and 2011”, European Commission Doc., 2016, pp. 1-32.

⁴⁷ ALSOS and ØDEGÅRD, *cit. supra* note 32, p. 6.

fundamentally different to those under Directive 96/71/EC.⁴⁸ Consequently – persons may be ‘posted’ under Regulation 883/2004,⁴⁹ which coordinates social security, but not in the meaning of the PWD. For instance, self-employed persons falling under Article 12(2) of Regulation 883/2004 are not covered by the PWD.⁵⁰ Finally, several PD A1s may be issued to the same person during the reference year.⁵¹

These limitations are heightened by the fact that collecting data is considered “a possible infringement of the free movement rights of firms”.⁵² For instance – Belgium has required all foreign undertakings to report their activities and use of posted workers through the Limosa⁵³ system since 2007. While this system has proved to be the most accurate source of data collection on postings to date, the CJEU ruled to limit the amount of information Belgium was accumulating because it was said to restrict the free movement of services.⁵⁴ Similarly – with regard to postings from third countries which has become increasingly widespread,⁵⁵ third country nationals must only obtain a work permit from the country they are posted from, and not from the host country in which they are actually performing their work. While this latter requirement may assist in tracking their movements, CJEU case law stipulates that host Member States may not impose administrative formalities or additional conditions on lawfully employed third-country nationals posted by a service provider established in another Member State.⁵⁶ Both of these examples clearly implicate the primacy of the freedom to provide services in Community law

⁴⁸ See European Commission Doc., *cit. supra* note 46, p. 25.

⁴⁹ See *supra* note 23.

⁵⁰ DE WISPELAERE, DE SMEDT and PACOLET, “Posting of Workers: Report on A1 Portable Documents issued in 2018”, European Commission Doc., 2020, pp. 1-55.

⁵¹ ALSOS and ØDEGÅRD, *cit. supra* note 32, p. 6.

⁵² *Ibid.*, p. 2; see also KALL and LILLIE, “Protection of Posted Workers in the European Union: Findings and Policy Recommendations Based on Existing Research”, Protecting Mobility Through Improving Labour Rights Enforcement in Europe (PROMO), VS/2016/0222, 2017.

⁵³ Information regarding Limosa-1 declarations is available at: <https://www.international.socialsecurity.be/working_in_belgium/en/limosa.html>.

⁵⁴ See MUSSCHE, CORLUY and MARX, *cit. supra* note 28.

⁵⁵ European Migration Network, “Intra-EU Mobility of Third-Country Nationals”, 2013, available at: <https://ec.europa.eu/home-affairs/sites/default/files/doc_centre/immigration/docs/studies/emn-synthesis_report_intra_eu_mobility_final_july_2013.pdf>.

⁵⁶ See Case C-91/13, *Essent Energie Productie BV v. Minister van Sociale Zaken en Werkgelegenheid*, ECR, 2014. In this case the CJEU held that Articles 56 and 57 TFEU must be interpreted as precluding national legislation (i.e. a work permit requirement) which impedes the freedom to provide services where an alternate measure (i.e. a preliminary report to Dutch authorities) would be “just as effective and less restrictive”.

as an impediment to develop better methods of data collection capable of enhancing the protection of posted workers.

Despite initiatives like the ED,⁵⁷ discussed above, and the establishment of the European Labour Authority (ELA)⁵⁸ in 2019, tasked with coordinating and supporting the enforcement of EU law on labour mobility,⁵⁹ more needs to be done to address concerns with data collection, monitoring and enforcement. Challenges and unsolved issues with both raise questions about their efficacy.⁶⁰ Greater involvement of social partners with worker protection central to their operating objective may prove to be a key strategy. Trade unions can play a crucial role when it comes to enforcement.⁶¹ The first study to be done on the topic of judicial enforcement of posted workers was released in 2020 by Rasnača and Bernaciak.⁶² Drawing from national reports submitted by States across the EU, the authors highlight the involvement of trade unions in detecting irregularities related to inbound posting and even assisting migrant and posted workers.⁶³ To this end, Lillie insists that “labour rights must be problematized not only in terms of states and territoriality, but also in terms of organizational membership”.⁶⁴ Still, there are several obstacles that exclude posted workers from realising this right. Posted workers often live in isolated areas, do not communicate much with domestic workers and are typically unaware of local rules and regulations. Plus, there is the issue of trade union

⁵⁷ See *supra* note 39 (which includes a framework for improving access to information relevant to for posting).

⁵⁸ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, OJL 186.

⁵⁹ CREMERS, “Towards a European Labour Authority: Mandate, Main Tasks and Open Questions”, Politik Für Europa, 2018.

⁶⁰ See discussion above at note 41ff; and CREMERS, “The European Labour Authority and Rights-Based Labour Mobility”, ERA Forum, 2020, p. 31-32.

⁶¹ See ALSOS and ØDEGÅRD, *cit. supra* note 32. The authors note that the Austrian union BauHolz (Construction Workers Union) has played a key role in pushing for better access to data gathered by public authorities. In instances where fraud or underpayment are suspected, the union has worked in close cooperation with the Construction Workers’ Holiday and Severance Payment Fund (BUAK) on behalf of posted workers, examining registration, wages and employers’ contributions to the fund. They also examine time sheets, construction sites and regional social security institutions. Their research typically lasts between two and six weeks, after which – in some cases – authorities initiate proceedings against the firm.

⁶² RASNAČA and BERNACIAK (eds.), *Posting of Workers Before National Courts*, ETUI, 2020.

⁶³ *Ibid*, p. 245. Still, the authors note that these organisations rarely initiate litigation on behalf of the disadvantaged groups.

⁶⁴ LILLIE, *cit. supra* note 3, p. 44 (arguing that unions are the primary vehicles for industrial citizenship: that is – the exercise of voice in the workplace and the respect for labour rights, relying on the structural power derived through class-based collectivism).

affiliation. A posted worker may already be a member of their relevant home State union and not wish to join another one in the host State. What is more, they may be satisfied with their situation as it may be far better – in terms of pay and conditions – than what is available in their home country.⁶⁵ This is where employers capitalise.⁶⁶

4. THE INDUSTRY-SPECIFIC ENVIRONMENT: POSTED WORKERS IN THE GERMAN MEAT INDUSTRY

Posted workers typically come from host countries where wage levels are lower, worker representation is weaker and informal work relations are more common.⁶⁷ The 2004 and 2007 Eastern enlargements of the European Union have put the issue of ‘regulatory arbitrage’ under heightened scrutiny. This term simply refers to employer strategies over the regulatory treatment of a transaction. Employers benefit from the flexibility of determining a regulatory regime from among two (or more) alternatives.⁶⁸ They may physically move transactions from one country to another by (1) establishing an office or factory, or (2) incorporating a new company, with the sole intention of transacting business under the laws of this new territory. For example, a company may wish to manage employment contracts from a State entirely different to the one in which the actual activity takes place. They may also move between different forms of regulation in the same geographic space, such as between labour laws governing temporary agency work or between metalworking and construction collective agreements.⁶⁹ The situation of posted workers is directly linked to these mechanisms of subcontracting and agency work, and to employer strategies for ‘regime shopping’.⁷⁰ The problem of regulatory arbitrage is particularly widespread in the sectors in which posting is most prevalent: construction,

⁶⁵ See ALSOS and ØDEGÅRD, *cit. supra* note 32, p. 6.

⁶⁶ VISSER, “Learning to Play: The Europeanisation of Trade Unions”, European Union Studies Association, 1997, pp. 1-40 (arguing that industrial relations in Europe are characterised by persistent national diversity in industrial relations and state involvement, offering the possibility of regime competition between states; citing a widely held belief that unions must either co-operate across national borders, or else become ineffective, unable to defend current wage levels and standards of social protection).

⁶⁷ See LILLIE, *cit. supra* note 3, p. 51.

⁶⁸ See LILLIE and WAGNER, *cit. supra* note 33, p. 157.

⁶⁹ *Ibid*, p. 158.

⁷⁰ DE CASTRO, “EU Law on Posting of Workers and the Attempt to Revitalise Equal Treatment”, Italian Labour Law e-Journal, 2019, p. 150 (used to describe when an employer moving from a less regulative state to a more regulative one is entitled to the protection of the weak standards and rules applied in the country of origin).

shipbuilding and agri-food. The purpose of this section is to highlight industry practices in the German meat sector that shape the posted worker labour market.

Based on available data, Germany is said to receive the highest number of posted workers in the EU (roughly 28 per cent of the European total). In 2015, 418,908 workers were posted to Germany from other EU Member States – Poland being the main country of origin, accounting for 31.7 per cent of that total. Data collected by the European Commission indicates that the main sectors of employment of workers posted to Germany in 2015 are construction (44.5 per cent), industry (25.4 per cent), personal (15.3 per cent), business (5.5 per cent) and agriculture (1.3 per cent).⁷¹ Given the concentration of COVID-19 outbreaks in the German meat industry in particular,⁷² it is useful to assess the features of this sector that contribute to worker exploitation. The broader term ‘meat industry’ includes primary (agriculture) and secondary (industry) activity.⁷³ It is used as a case study to give rise to reflection of market segmentation and the segregation of disadvantaged social groups linked to the presence of migrant and posted workers who are committed to work under conditions widely unacceptable to domestic workers.

At the height of the crisis in March 2020 the German government closed its borders and capped the number of frontier, posted and seasonal workers allowed to enter the country. Heated political debate flared up around Eastern European workers in the agricultural and meat processing industries, central to EU-wide food security.⁷⁴ Since the 1980s, both sectors have become more dependent on foreign labour.⁷⁵ Trade unions estimate that up to 80 per cent of Germany’s 128,000 workers employed in slaughterhouses and meat packing facilities are non-natives, from predominantly Eastern and Southern European countries and employed through subcontractors.⁷⁶ In particular, survey information collected by Germany’s Food, Beverages and Catering

⁷¹ Posted Workers: Germany, European Commission Doc., 2015, available at: <GERMANYec.europa.eu › social › BlobServlet>.

⁷² NACK, “Europe’s Meat Industry is a Coronavirus Hot Spot”, Deutsche Welle, 26 June 2020, available at: <<https://www.dw.com/en/europes-meat-industry-is-a-coronavirus-hot-spot/a-53961438>>.

⁷³ HANSEN, “Future of Manufacturing – Meat Processing Workers: Occupational Report”, European Foundation for the Improvement of Living and Working Conditions, 2018.

⁷⁴ See SCHNEIDER and GÖTTE, *cit. supra* note 38, pp. 4-12 (noting that Germany is one of the world’s top agri-food exporting nations, ranking third after the United States and the Netherlands); KRAKOVSKY, *cit. supra* note 6.

⁷⁵ SCHNEIDER and GÖTTE, *ibid.*, p. 4.

⁷⁶ Domagala-Pereira, “Help for Eastern Europeans in Germany’s Meat Industry”, Deutsche Welle, 20 March 2017, available at: <<https://www.dw.com/en/help-for-eastern-europeans-in-germanys-meat-industry/a-38036330>>; Staudenmaier, “Germany’s Meat Industry Under Fire After COVID-19 Outbreaks”, Deutsche Welle, 19 May 2020, available at: <<https://www.dw.com/en/germanys-meat-industry-under-fire-after-covid-19-outbreaks/a-53502751>>.

Union (NGG) and works councils from the four main slaughterhouses suggests that posted workers have at one point made up to 50 to 90 per cent of factory workers.⁷⁷

There are two key points to make about the overall regulatory framework concerning the posting of workers before elaborating on the issue of malpractice. First – in the years following the adoption of the first PRD, the implementation, legal interpretation and regulation of the special case of posted workers instilled “(a) lack of clarity in the established standards and weaknesses in the cooperation between authorities, both within Member States and across borders, creating problems for enforcement bodies”.⁷⁸ Second – there is the issue of the transposition of the PWD into the German Posting Law.⁷⁹ Lillie and Wagner note that the particularity of the regulatory framework for posting workers to Germany is that this law only applies to a narrow list of sectors – and until mid-2014, the meat sector was not one of them. This resulted in a regulatory gap, where posted workers in unlisted sectors could work according to the conditions and pay of their home country.⁸⁰

Increasing wage gaps and divergence in labour costs make it more attractive for businesses to use posted workers; and efforts to keep costs low encourage an environment conducive to malpractice.⁸¹ According to Harvey, the model of ‘competitive subcontracting’ involves lowering costs through the leveraging of differences in the market power of participating agents.⁸² This strategy, like regulatory arbitrage, is widespread in posting operations – as is the use of opportunistic recruiters.⁸³ Increasingly, German meat producers subcontract slaughtering and meat packaging operations to Eastern European subcontractors “as a cloak to prevent

⁷⁷ WAGNER, “Changing Regulations, Changing Practices? The Case of the German Meat Industry”, Institute for Social Research, 2017.

⁷⁸ KONLE-SEIDL, *cit. supra* note 22, p. 2.

⁷⁹ Posted Workers Act of 20 April 2009 (Federal Law Gazette I, p. 799), as last amended by Article 1 of the Act of 10 July 2020 (Federal Law Gazette I, p. 1657), available at: <https://www.gesetze-im-internet.de/englisch_aentg/englisch_aentg.html>.

⁸⁰ See LILLIE and WAGNER, *cit. supra* note 33, p. 168.

⁸¹ See Konle-Seidl, *cit. supra* note 22, p. 2 (using rotational posting or the practices of ‘letter-box companies’ to exploit loopholes in the directive to circumvent employment and social security legislation and engage in operations in other Member States).

⁸² HARVEY, “Privatisation, Fragmentation, and Inflexible Flexibilization in the UK Construction Industry”, in BOSCH and PHILIPS (eds.), *Building Chaos: An International Comparison of Deregulation in the Construction Industry*, London, 2003, p. 197.

⁸³ See SCHNEIDER and GÖTTE, *cit. supra* note 38, p. 8 (citing a case in 2016, where the Federal Criminal Police uncovered a highly professional organised criminal system in which an agency recruited Ukrainian citizens with false promises and sent them via Poland to work in exploitative conditions in various German businesses, including agri-food firms, with forged Romanian passports).

monitoring and enforcement”.⁸⁴ This has various knock-on effects. Workers employed by subcontractors typically experience poorer working conditions: lower wages, longer working times, higher work intensity, poorer quality accommodation, lower union density rates, increased job insecurity and a higher reliance on non-standard employment contracts.⁸⁵ Non-standard employment relations have played a crucial role in the growth of the meat processing industry in Germany.

This has serious distributive consequences, affecting the ability of workers to take individual or collective action to redefine this bargain.⁸⁶ Germany’s model of strong union and employer associations negotiating industry-wide collective agreements does not apply in the meat processing industry. Industrial relations in this sector are characterised by “fragmentation of negotiations and collective agreements”.⁸⁷ Collective agreements that would otherwise cover working time and overtime payments, providing protection and leading to good working conditions, are uncommon.⁸⁸ Plus, the German food retail market is characterised by strong competition and oligopolistic tendencies. In recent years, they have obtained unprecedented market power, operating in cross-border alliances that bundle procurement, enabling them to drive down prices by up to 10 per cent.⁸⁹

⁸⁴ See LILLIE and WAGNER, *cit. supra* note 33, p. 164, 168; see also discussion of passing off liability for workforces through the use of subcontractors in HANSEN, *cit. supra* note 73, pp. 13-14.

⁸⁵ See for instance WAGNER, *cit. supra* note 77 (referencing their categorisation as conditions deplored as criminal practices of modern slavery); SCHNEIDER and GÖTTE, *cit. supra* note 38, p. 7 (it is not uncommon, for instance, to find these workers living in containers or makeshift housing; substandard living conditions for seasonal agricultural workers can be considered a structural feature in Germany, as they are all around Europe); GRIMSHAW and RUBERY, “Inter-Capital Relations and the Network Organisation: Redefining the Work and Employment Nexus”, *Cambridge Journal of Economics*, 2005, p. 1027 ff; WILLS, “Subcontracted Employment and its Challenge to Labour”, *Labour Studies Journal*, 2009, p. 441 ff; FLECKER and MEIL, “Organisational Restructuring and Emerging Service Value Chains: Implications for Work and Employment”, *Work, Employment and Society*, 2010, p. 680 ff; and GAUTIÉ and SCHMITT (eds.), *Low-Wage Work in the Wealthy World*, New York, 2010.

⁸⁶ See GRIMSHAW and RUBERY, *ibid*; WILLS, *ibid*.

⁸⁷ See HANSEN, *cit. supra* note 73, pp. 6-7.

⁸⁸ *Ibid*, pp. 12-13.

⁸⁹ See SCHNEIDER and GÖTTE, *cit. supra* note 38, p. 7 (listing four retailers: EDEKA, REWE, Aldi and the Schwarz group, that make up more than 85 per cent of the food retail market; and noting that the price levels for food and beverages in 2018, that is – purchasing power parities, in Germany ranked 13th with a value of 102 among the indexed member states); KATE and VAN DER WAL, “Eyes on the Price: International Supermarket Buying Groups in Europe”, *The Centre for Research on Multinational Corporations*, 2017, pp. 1-15 (explaining that the growing imbalance of bargaining power within food supply chains in relation to concerns over negative economic and social impacts on producers and processors has led to intensified debate at the EU level; most notably, the issue of unfair trading practices in food supply chains has attracted a lot of attention from EU regulators).

The European Commission has recognised that posted workers in the agri-food sector are particularly vulnerable given the regularity of fraudulent practices.⁹⁰ As the COVID-19 pandemic continues to expose the rights abuses and poor conditions suffered by workers, the NGG,⁹¹ in affiliation with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF), succeeded in passing a new law through the German parliament: the Occupational Safety and Health Control Act.⁹² Some of its main items include prohibiting subcontracting as of 1 January 2021, allowing companies to employ temporary workers up to a maximum of eight per cent as long as this is regulated through a collective bargaining agreement, ensuring equal pay and equal treatment for temporary and permanent employees alike and guaranteeing minimum standards for workers' accommodations.⁹³ While this new legal framework is a crucial precondition for improving conditions, critics warn that on its own the framework will not be sufficient to ensure decent conditions across the sector, as companies are only obliged to provide the legal minimum requirements, such as the statutory minimum wage.⁹⁴ As I explore below, effective change will require – at minimum – sectoral level collective bargaining, to determine binding standards throughout the sector.⁹⁵

5. THE INTERACTION OF INTERNATIONAL, EU, HOME AND HOST STATE REGULATORY ENVIRONMENTS

Understanding the heterogeneity of industrial relations and prevalence of collective agreements among Member States and within sectors where posted workers are concentrated is of crucial importance when assessing the impact of cross-border

⁹⁰ COVID-19: Guidelines of the Commission on Seasonal Workers in the EU – Factsheet on Practical Examples and Best Practices, European Commission Doc., 2020, p. 8.

⁹¹ See discussion above at note 77ff.

⁹² “New Law Ends Subcontracting in German Meat Sector”, International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association, 15 December 2020, available at: <<https://www.iuf.org/news/new-law-ends-subcontracting-in-german-meat-sector/>>.

⁹³ “Germany: New Law Ends Subcontracting in Pandemic-Stricken Meat Industry”, Business and Human Rights Resource Centre, 20 January 2021, available at: <<https://www.business-humanrights.org/en/latest-news/germany-new-law-ends-subcontracting-in-pandemic-stricken-meat-industry/>>.

⁹⁴ “Germany: Academics Welcome New Legislation to Protect Meat Workers & Call For Industry-Level Collective Bargaining”, Business and Human Rights Resource Centre, 26 January 2021, available at: <<https://www.business-humanrights.org/en/latest-news/germany-academics-welcome-new-legislation-to-protect-meat-workers/>>.

⁹⁵ See also HAIDINGER et al., “Enhancing Economic Democracy for Posted Workers”, Protecting Mobility Through Improving Labour Rights Enforcement in Europe (PROMO), VS/2016/0222, 2018, p. 5.

labour law decision making at the CJEU. This section will examine one pre-PWD case (*Rush Portuguesa*)⁹⁶ and two pivotal cases included in the ‘Laval quartet’,⁹⁷ most notably the *Laval* case itself and *Rüffert*. The aim is to highlight the “radical U turn” that took place within the Court’s case-law since 2008, where their approach based on worker protection shifted to one based on the freedom to provide services.⁹⁸ Each approach involves the relationship between the PWD and Article 56 TFEU (the freedom to provide services).⁹⁹ What changes is their construction of justification for the imposition of host State rules (including employment law rules) on cross-border service providers as a restriction on the freedom to provide services under Article 56 TFEU.¹⁰⁰

Rush Portuguesa set the tone for the Court’s strong worker protection approach. It concerned the undertaking *Rush Portuguesa*, established in Portugal and specialising in construction, and the French Office national d’immigration. *Rush* entered a subcontract with a French undertaking for carrying out works on a railway line, bringing in Portuguese employees for said purpose. However, the Office national d’immigration established that *Rush* had not complied with requirements of the French Labour Code relating to activities carried out in France by nationals of non-member countries and held *Rush* liable to pay a special contribution. Although the CJEU ruled that the French authorities may not impose conditions relating to the recruitment of manpower,¹⁰¹ it stipulated that:

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered in by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.¹⁰²

⁹⁶ Case C-113/89, *Rush Portuguesa Ld v. Office national d’immigration*, ECR, 1990.

⁹⁷ This refers to the following cases: Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, ECR, 2007; Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, ECR, 2007; Case C-346/06, *Dirk Rüffert v. Land Niedersachsen*, ECR, 2008; Case C-319/06, *Commission of the European Communities v. Grand Duchy of Luxembourg*, ECR, 2008.

⁹⁸ KILPATRICK, “The ECJ and Labour Law: A 2008 Retrospective”, *Industrial Law Journal*, 2009, p. 180 ff.

⁹⁹ See discussion above at note 11 ff.

¹⁰⁰ See KILPATRICK, *cit. supra* note 98; the author identifies and explores three approaches, but I only narrow in on two to exemplify the shift.

¹⁰¹ See *supra* note 96, para. 19.

¹⁰² *Ibid*, para. 18.

This statement created firm assumptions surrounding the adoption and meaning of the PWD, establishing the conceptual, legal and practical determinants of the strong worker protection approach.

This approach is defined by a high justification ceiling for Article 56 TFEU. Here, the PWD (passed in 1996) is considered a floor of minimum rights for posted workers, covering a “nucleus of mandatory rules”¹⁰³ on matters of minimum pay, rest and holidays.¹⁰⁴ It offers a “supra-nationally coordinated set of *non-exhaustive rules* for host states and service providers”.¹⁰⁵ This means that terms and conditions of employment in the host State which are more favourable to workers, those that go beyond the minimum set in the PWD, shall not be prevented.¹⁰⁶ Article 3(10) PWD offers two options for additional host State standards, provided this is on the basis of equality of treatment between foreign and national undertakings. That is, the application of terms and conditions of employment beyond the minimum (1) in the case of public policy provisions and agreed in (2) certain kinds of broadly applicable collective agreements.¹⁰⁷ The building sector receives particular attention given its high concentration of posted workers. Article 3(8) PWD provides that the minimum rules in the building sector can also derive from “universally applicable”¹⁰⁸ collective agreements, not just legislative or executive action as is otherwise the case.¹⁰⁹ Anything outside this specified scope will be tested with Article 56 TFEU.

CJEU rulings in *Laval* and *Rüffert* largely encapsulate the current approach: where the PWD serves the function of facilitating the freedom to provide services under Article 56 TFEU. The former involved a Latvian company, Laval un Partneri, awarded a public tender in Sweden to renovate a school near Stockholm. A subsidiary¹¹⁰ of Laval employed posted workers to complete this task. When they arrived, negotiations began between the subsidiary and the Swedish building and

¹⁰³ See KILPATRICK, *cit. supra* note 98, p. 197.

¹⁰⁴ See discussion above at note 19ff.

¹⁰⁵ See KILPATRICK, *cit. supra* note 98, p. 197.

¹⁰⁶ See *supra* note 9, Art. 3(7).

¹⁰⁷ *Ibid*, Art. 3(10).

¹⁰⁸ “Universally applicable” collective agreements refer to collective agreements which are observed by all undertakings in the geographical area and in the profession or industry concerned.

¹⁰⁹ See KILPATRICK, *cit. supra* note 98, p. 197 (adding that where a State has no facility for declaring collective agreements universally applicable, certain other broadly applicable collective agreements – such as national, territorial or industry-wide – are allowed to set the host State standards applicable to the posted worker).

¹¹⁰ L&P Baltic Bygg AB.

public workers trade union¹¹¹ to (1) determine the rates of pay for the posted workers and (2) discuss Laval signing the collective agreement for the building sector.¹¹²

Nevertheless, these negotiations broke down and Laval later signed collective agreements with the Latvian building sector trade union, to which 65 per cent of the posted workers were affiliated. In response, the Swedish union took collective action with support of the Swedish electricians' trade union, blockading all of Laval's sites in Sweden – even though none of the members of either trade union were employed by Laval. The result was that the subsidiary went bankrupt, the posted workers returned to Latvia and Laval brought proceedings before the Swedish courts. They sought a declaration that the union action was unlawful, conflicting with the freedom to provide services under Article 56 TFEU. When the case was later brought to the CJEU, they ruled that while collective action is a fundamental right and can be justified under Community law to protect against “social dumping”,¹¹³ it cannot be justified with the aim of obtaining terms and conditions which go beyond the minimum established by law, making it less attractive or more difficult for undertakings to carry out business in other Member States. Hence, the fundamental nature of said right is “not such as to render Community law inapplicable”¹¹⁴ – not such as to constitute a restriction on the freedom to provide services.

While Article 3 PWD provided the right to minimum terms and conditions, these rights had to be underpinned either by law or universally applicable collective agreements. This was not the case in Sweden. There was neither a statutory minimum wage nor a system for declaring collective agreements universally applicable. What is more, the Court stressed that the collective action to ensure terms and conditions were in line with those generally applicable in Sweden did not amount to a public policy, security or health requirement. In their view, failure to take account of the collective agreement reached by Laval and the Latvian trade union amounted to discrimination.

¹¹¹ Svenska Byggnadsarbetareförbundet.

¹¹² CVRIA, Press Release No 98/07, Judgment of the Court of Justice in Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, 18 December 2007, available at: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp070098en.pdf>>.

¹¹³ See ASHIAGBOR, “Collective Labor Rights and the European Social Model”, *Law & Ethics of Human Rights*, 2009, p. 222 ff (the term “social dumping” refers to a dynamic particularly prominent in the EU: where a Member State unilaterally lowers its social standards in an attempt to attract business from other States; this is made possible by the logic of the common market, which allows for free movement of capital, for instance, while preserving a certain level of autonomy for Member States to regulate areas relating to labour and social standards, environmental standards, et cetera).

¹¹⁴ See CVRIA, *cit. supra* note 112.

While the Court left open the potential of the first option in Article 3(10) PWD: to permit higher host State standards on “public policy” grounds,¹¹⁵ this was later closed by the restrictive interpretation in *Commission v. Luxembourg*.¹¹⁶ *Laval* marks the characteristics of the more liberalised approach because the supposed ‘floor of minimum rights’¹¹⁷ did not in fact authorise the application of higher host State standards.

In *Rüffert*,¹¹⁸ the Court confirmed this approach through an even more restrictive interpretation of Article 3(1) PWD,¹¹⁹ solidifying the supposed ‘floor of minimum rights’ as an exhaustive list. As such, this ‘floor’ could more aptly be considered a ceiling – marking the maximum set of rights available to posted workers. *Rüffert* involved a German company that engaged a Polish subcontractor to fulfill a public contract for building work in Niedersachsen. Although the subcontractor was to comply with wage rates already in force on the site through collective agreement,¹²⁰ it was later discovered that the 53 posted workers were only earning 46.57 per cent of the applicable minimum wage for the construction sector. As such, the authorities withdrew the contract, and the case was referred to the CJEU to determine whether public procurement rules in Niedersachsen are incompatible with the freedom to provide services in the EU. The CJEU found that the rate of pay established by the law of Niedersachsen cannot be considered as a law implementing the PWD since it does not itself fix any minimum rates of pay. Although the German transposition of the PWD contains a reference to collective agreements which have been declared ‘universally applicable’, the collective agreement at stake in the proceedings has not been taken this way.¹²¹ The Court determined that the collective agreement in question was not generally applicable because only a part (i.e. the public part) of the construction sector was covered. The combined effect of law and a local collective agreement did not fall within the definition of “minimum wage” setting for the purposes of Article 3(1) PWD.

¹¹⁵ See *supra* note 9.

¹¹⁶ See *supra* note 97.

¹¹⁷ See *supra* note 9, Art. 3(7) (referring to the fact that the terms and conditions of employment outlined in Article 3(1) shall not prevent application of terms and conditions of employment which are more favourable).

¹¹⁸ See *supra* note 97.

¹¹⁹ See *supra* note 9 (that is, the terms and conditions of employment); again, see discussion above at note 18 ff.

¹²⁰ In Niedersachsen, the award of public contracts obliges tenders to public contracts to undertake in writing to pay their employees at least the remuneration prescribed by the collective agreement at the place where services are performed.

¹²¹ See *supra* note 9 (crucially, the CJEU considers that the implementation methods contained in Article 3(1), universally applicable collective agreements, and 3(8), generally applicable collective agreements, are mutually exclusive).

Laval and *Rüffert* reveal patterns in CJEU decision making that pose worker protection as an obstacle to the freedom to provide services. While strong assumptions surrounding the meaning of the PWD were developed in *Rush Portuguesa*, giving certain discretion to host states vis-à-vis posted workers in establishing minimum wages, working time and equal treatment,¹²² decision making in the *Laval* quartet signalled an increasingly uncompromising opposition to strong worker protections that impinge on the functioning of the European Single Market.¹²³ In sectors widely defined by fragmentation of negotiations and collective agreements, the German meat industry for instance, the likelihood of claiming higher standards under the PWD is diminished. National measures liable to hinder the exercise of said freedom are permitted only if they are justified by imperative requirements in the general interest, suitable for attaining the desired objective and do not go beyond what is necessary to that end.¹²⁴

This elaboration by the Court is made although the PWD clearly states that the “promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers”.¹²⁵ The protection of national undertakings against competition from foreign ones does not happen in *Rüffert*. Moreover, the Court omits any reference to European law on public contracts that recognises the possibility for the contracting authority to lay down special conditions relating to performance of the contract – in particular, concerning social considerations.¹²⁶ It also disregards the Services Directive which safeguards the possibility of the host State to apply, “in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements”.¹²⁷ By fixing a distinction between provisions that impose minimum rates of pay in collective agreements and those stating a minimum rate of pay, the

¹²² BELAVUSAU, “The Case of *Laval* in the Context of the Post-Enlargement EC Law Development”, German Law Journal, 2008, p. 2279 ff; BARNARD, *EU Employment Law*, Oxford, 2007, p. 278.

¹²³ See for example LILLIE, *cit. supra* note 3, p. 42 (stressing that promoting ‘equal treatment’ of posted workers potentially violates the free movement rights of employers, by making the employer less labor-cost competitive).

¹²⁴ BORELLI, “Social clauses in public contracts, the Posted Workers Directive and Article 49 EC: the *Rüffert* Case”, Transfer, 2008, p. 358 ff.

¹²⁵ See *supra* note 9, Recital 5.

¹²⁶ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public contracts, OJ L 199, Art. 23; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts, OJ L 134, Art. 26.

¹²⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376.

Court narrows the mandatory rules for minimum protection to be observed in the host State. When the Court qualifies the former as a restriction on freedom of services, it limits the efficacy of collective agreements. In doing so, the extension of collective agreements through the insertion of a social clause in public contracts is made incompatible with European law.¹²⁸

Among States in which there is no statutory minimum wage, one is often established by collective agreements. Given that they are not always effective, techniques have been developed to indirectly extend the efficacy of collective agreements – for example, the insertion of a social clause in public contracts (i.e. *Rüffert*). By qualifying such techniques as a restriction on the freedom to provide services, the Court not only limits the efficacy of said agreements, but also weakens collective bargaining more broadly, transferring risk from groups or collectives of workers to individual workers alone. In *Rüffert* the insertion of a social clause concerns public contracts. As Borelli notes, this “provides that where the public authority intervenes to regulate an economic activity a minimum standard of social protection will be ensured”.¹²⁹ State intervention to guarantee that, in public contracts, working conditions are “not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried [out]”, is foreseen by Article 2 of ILO Convention No 94 of 1949 – the Labour Clauses (Public Contracts) Convention.¹³⁰ Therefore, State intervention in the market, even if limited by Community law, cannot be excluded *tout court*.

This highlights the incompatibility of certain ILO instruments with EU *acquis*.¹³¹ A study released in 2014, intended to inform the Commission which of the ILO Conventions (and Protocols) fall under the competence of the EU and which fall

¹²⁸ See BORELLI, *cit. supra* note 124, p. 359; Joosje Hamilton, “Minimum wage special conditions in public procurement tender processes: Regiopost v Stadt Landau (Case C-115/14)”, Norton Rose Fulbright, February 2016, available at: <<https://www.nortonrosefulbright.com/en/knowledge/publications/6a55b0c3/minimum-wage-special-conditions-in-public-procurement-tender-processes-regiopost-v-stadt-landau-case-c-11514>> (discussing the more recent case Regiopost (C-115/14); the effect of the case appears to be that it is permissible for social- and employment-related “special conditions” to be imposed on tenders of public procurements and their subcontractors, provided the conditions sought to be imposed are either part of the national or regional law in that location, or they reflect the terms of a collective agreement which has been declared universally applicable. Still, this then invites the problem that employees in the same firm carrying out the same work might be paid differently if one is working on a public contract and the other on a private contract).

¹²⁹ See BORELLI, *ibid*, p. 362.

¹³⁰ Labour Clauses (Public Contracts) Convention (1949), No. 94, Art. 2.

¹³¹ Analysis: In the Light of the European Union Acquis of ILO Up to Date Conventions, European Commission Doc., 2014, p. 9 (EU *acquis* refers to the body of common rights and obligations that are binding on all EU Member States).

under the subsidiarity principle, reveals that there is external competence, and compatibility with the *acquis*, in relation to 72 up-to-date ILO Conventions and Protocols.¹³² One of the few outliers is the Labour Clauses (Public Contracts) Convention, wherein Article 2(1)(a)¹³³ is considered potentially incompatible with Article 3(1)¹³⁴ of the PWD in view of Case C-346/06 Ruffert.

6. THE WAY FORWARD

Posted workers occupy a position of “partial statelessness”.¹³⁵ As I have indicated throughout this Chapter, Community law provides “a cloak behind which employers can hide labor violations and only rarely be taken to task”¹³⁶ – where the primacy of the free movement of services is privileged over worker protections. By instilling division between the ‘core’ benefits to be attached to posted workers, EU law *de facto* endorses the “bifurcation of labour markets”,¹³⁷ where those posted workers in the bottom tiers – still typically EU citizens – are subject to substandard wages and working conditions.¹³⁸

¹³² *Ibid*, pp. 3-15 (specifying that the majority – 56 per cent – of the up-to-date ILO Instruments fall under Union and Member State shared competence, with a significant minority – 35 per cent – engaging Union implied exclusive external competence).

¹³³ See *supra* note 130 (including “clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on -- (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned”).

¹³⁴ See *supra* note 9, Art. 3(1).

¹³⁵ See LILLIE, *cit. supra* note 3, p. 41. The author uses this term to refer to the fact that (1) posted workers are legally only entitled to the same standards of employment as domestically recruited workers in a limited number of areas; and (2) EU institutions have constructed a rule system that does not allow for effective enforcement of national labour regulations in all but a small minority of cases.

¹³⁶ *Ibid*.

¹³⁷ MENZ, “Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market”, in COSTELLO and FREEDLAND (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford, 2014, pp. 44-59 (explaining that European labour markets have undergone a “epochal transformation” over the last two decades; in continental Europe, the dynamics that promoted unified and regulated labour markets – strong unions, organisational coherence amongst employers and sophisticated juridical regulations – and resulted in low degrees of wage dispersal, have been superseded by the transnationalisation of production strategies, neoliberal policy reform and changing commitments amongst employers).

¹³⁸ Community law has been criticised on this point, in its treatment of migrant workers; see for example MACDONALD and CHOLEWINSKI, “The Migrant Workers Convention in Europe: Obstacles to Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives”, UNESCO, 2007.

Although the Charter of Fundamental Rights of the European Union guarantees the right to fair and just working conditions (Article 31),¹³⁹ this is not mentioned by the European judges in the *Rüffert* case, for instance. Posted workers are entirely dependent on employers who are making use of their “freedom to provide services” under Article 56 TFEU. Such cross-border situations offer choices as to the applicable regulatory environment, affording multiple chances for opportunistic behaviour by those given worker protection responsibilities. Moreover, as we have seen from the approach taken in *Laval* and *Rüffert*, the justification of the rights to be granted most often remains an economic one. Refusal to confront this issue alone puts EU law at odds with the human rights philosophy underpinning international instruments, like the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW),¹⁴⁰ intended to fortify workers’ rights.

In light of this fact, it is unsurprising that measures to address the problem of posted workers have been piecemeal. This includes Directive (EU) 2018/957 (or the Amending Directive),¹⁴¹ as it is far from certain whether it will prove enough to avoid, or at least significantly reduce, the recourse to posting as a tool of unfair regulatory competition.¹⁴²

Given the confluence of challenges Europe currently faces, most notably the COVID-19 pandemic, increasing income inequality and climate change, it is both timely and essential to rescue the EU social profile, which has entered a period of crisis. The terms “Social Europe” and “European Social Model” are used to refer to supranational social regulation or common social policy across Member States.¹⁴³ They can be understood as “an aspiration towards sustainable economic growth, competitiveness and a dynamic knowledge-based economy” in conjunction with

¹³⁹ Charter of Fundamental Rights of the European Union, OJ 2012/C 326/02, Art. 31.

¹⁴⁰ See MACDONALD and CHOLEWINSKI, *cit. supra* note 138, p. 15; UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158; see also ASHIAGBOR, *cit. supra* note 113, pp. 235-236 (discussing the right to resort to collective action as a fundamental human right).

¹⁴¹ Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 173/16.

¹⁴² See for example HAIDINGER et al., *cit. supra* note 95, p. 32; DE CASTRO, *cit. supra* note 70; COSTAMAGNA, “The Revision of the Posted Workers Directive as a Meaningful Way to Curb Regulatory Competition in the Social Domain?”, *Sant’Anna Legal Studies*, 2019, p. 3 ff.

¹⁴³ COUNTOURIS and FREEDLAND (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, 2013; VISSER and KAMINSKA, “Europe’s Industrial Relations in a Global Perspective”, in *Industrial Relations in Europe 2008*, Luxembourg, 2009, p. 19 (recognising the achievements of the EU in constructing the “social dimension” of the European integration process and the possibility for further development).

“social cohesion and social protection”.¹⁴⁴ Crucially, there is growing literature exploring the various issues at stake and the options moving forward.¹⁴⁵ For example, Ashiagbor explores the prospects for a “formalisation or constitutionalization of the balance between social rights and market rights in the context of the recent European Union Reform Treaty and the codification of the EU Charter of Fundamental Rights”.¹⁴⁶ Fana, Perez and Fernandez-Macias have boldly suggested that in response to the evolving pandemic, the EU adopt a longer-term vision to confront some of the longstanding structural and institutional challenges facing many EU Member States, such as the severe effects of deindustrialisation and the recent narrowing of social welfare. The authors argue that this vision should foster alternative sources of economic growth at a properly large scale (i.e. “European Green Deal”) and set the foundations for a future “European Welfare State”.¹⁴⁷ Suggestions like these point to the pressing need to confront the glaring tensions between strong market imperatives and fragile workers protections that exist beyond the isolated case of posted workers.

The status of Europe’s efforts to implement supranational social policy remains an enriching point for consideration. While it deserves deeper analysis than is possible in this relatively short piece, these brief comments are intended to reignite the conversation. A proposed future research agenda concerns the related issues of transnational worker solidarity¹⁴⁸ and coordinated enforcement action.¹⁴⁹

¹⁴⁴ See ASHIAGBOR, *cit. supra* note 113, p. 228-239. These terms are often used in contrast to discussion of common EU economic policy, represented by the European Single Market, which critics argue signifies an extension of the scope of internal market law through negative integration. Ashiagbor defines negative integration as the integration of disparate national markets into a single European market by judicial activism to eliminate national restrictions on or barriers to trade, which have the effect of partitioning markets. In contrast, positive integration involves the proactive enactment of Community rules by the political institutions to harmonise the laws of Member States.

¹⁴⁵ LÓPEZ, “Solidarity and The Resocialisation of Risk: Analysing ETUC Strategies to Face the Crisis”, in COUNTOURIS and FREEDLAND (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, 2013, pp. 353-372; HYMAN and GUMBRELL-MCCORMIK, “Trade Unions, Politics and Parties: Is a New Configuration Possible?”, *Transfer: European Review of Labour and Research*, 2010, p. 315.

¹⁴⁶ See ASHIAGBOR, *cit. supra* note 113, p. 223.

¹⁴⁷ FANA, PEREZ and FERNANDEZ-MACIAS, “Employment Impact of COVID-19 Crisis: From Short Term Effects to Long Term Prospects”, *Journal of Industrial and Business Economics*, 2020, p. 391 ff; see also FANA et al., *cit. supra* note 2.

¹⁴⁸ See for example HAIDINGER et al., *cit. supra* note 95, p. 5 (suggesting that sending and receiving country unions establish transnational membership based on bi- or multilateral agreements); GREER, CIUPIUS and LILLIE, “The European Migrant Workers Union and The Barriers to Transnational Industrial Citizenship”, *European Journal of Industrial Relations*, 2013, p. 5 ff; LÓPEZ, *cit. supra* note 145; HYMAN and GUMBRELL-MCCORMIK, *cit. supra* note 145; FREEMAN And MEDOFF, *What do unions do?*, New York, 1984.

¹⁴⁹ See for example Chaudhuri and Boucher, *The Future of Enforcement for Migrant Workers in Australia*, Sydney Policy Lab, 2021, p. 18-19 (while this example refers to the Australian context, the issue of renewed union involvement in enforcement is common among OCED countries); Blanchard and

Philippon, “The quality of labor relations and unemployment”, Massachusetts Institute of Technology Department of Economics Working Paper Series, 2004 (noting that cooperative industrial relations has the potential for positive labour market performance, most notably alleviating unemployment).

6.

**THE “PANDEMIC COMPROMISE”:
THE BREAKING DOWN OF BARRIERS FOR MIGRANT FARM WORKERS
IN ORDER NOT TO DAMAGE THE AGRICULTURAL SECTOR.
WHAT EFFECTS ON THE PROTECTION OF MIGRANT WORKERS?**

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1. INTRODUCTION

The COVID-19 virus, initially developed in the Hubei province of the People's Republic of China in late 2019, has quickly reached all continents, leading the World Health Organisation (WHO) to officially declare the disease a pandemic on 11 March 2020. In one of the recent reports on the development of the virus, the WHO confirmed about 114 million cases and more than 2,500,00 deaths (data as of 28 February 2020).¹ The spread of COVID-19 has had, and is still having, considerable consequences not only on people's health and the health systems of countries, but also on the economic, social, and political spheres of states. With the intention of curbing the development of the virus, many Countries have taken measures to restrict international mobility. While the emergency actions identified by States to counter the virulence of the disease have caused discomfort and hardship to their citizens, they have also increased the challenges for migrant populations, exacerbating the vulnerabilities that existed before the crisis. Actions such as border closures and imposed lockdowns have limited the mobility of economic migrants, and the ability of those already present in the host country to work and access healthcare. Inevitably, the limitation of movements has strongly affected the migrant population. Especially, the essential contribution of migrant workers in the agri-food sector² in many countries of the Global North has quickly been recognised. These

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¹ WHO, “WHO Coronavirus (COVID-19) Dashboard”, 2021, available at: <<https://covid19.who.int/>>.

² ILO, “Seasonal Migrant Workers’ Schemes: Rethinking Fundamental Principles and Mechanisms in light of COVID-19”, ILO Brief, 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/---protrav/---migrant/documents/publication/wcms_745481.pdf>.

migrants normally considered less attractive than highly skilled migrant workers,³ have progressively proven to be essential to overcome labour shortages in agricultural sector.⁴ To ensure an adequate supply in the agri-food chain, several countries have excluded seasonal migrant workers from movement restrictions.⁵

The purpose of this paper is to analyze the measures implemented by the European Union and its Member States to promote the mobility and employment of migrant agricultural workers, focusing on the protection of their rights under EU law.⁶ This without forgetting that in the agricultural sector the dimension of irregular seasonal workers represents an important share of the workforce that deserves to be considered, especially in understanding the phenomenon of exploitation and the violation of their rights.

Firstly, the approach identified at EU level to address the shortage of seasonal workers will be analysed (Section 2). Secondly, the political and legal measures defined by Member States to secure harvests and the supply of agri-food goods (Section 3). Thirdly, EU legislation on seasonal workers from third countries will be discussed (subsection 3.3). Fourth, the protection of seasonal workers (regular and irregular) and the impact COVID-19 is having on them (Section 4). Hence, the questions that arise are as follows: has the opening of EU countries to migrant farm workers been matched by greater protection of their rights? What measures have been taken to ensure the health and safety at work of migrant farm workers? Has the

³ Among others: TRIANDAFYLLIDOU and NALBANDIAN, “COVID-19 and the transformation of migration and mobility globally – ‘Disposable’ and ‘essential’: Changes in the global hierarchies of migrant workers after COVID-19”, IOM Publication, Geneva, August 2020; MARTIN, “Migrant workers in commercial agriculture”, International Labour Office, Sectoral Policies Department, Conditions of Work and Equality Department, Geneva, 2016.

⁴ See TRIANDAFYLLIDOU AND NALBANDIAN, *supra* note 3; FRA Agency, “Protecting migrant workers from exploitation in the EU: workers’ perspectives”, Luxembourg, 2019.

⁵ In the European union: EU Commission, COVID-19: “Guidelines for border management measures to protect health and ensure the availability of goods and essential services”, C(2020) 1753 final, Brussels, 2020; EU Commission, “COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy”, C(2020) 2050 final, Brussels, 2020. In other countries in the world: Canadian Honey Council (CHC), “COVID-19 temporary foreign workers”, 15 June 2020, available at: <<https://honeycouncil.ca/COVID-19-temporary-foreign-workers/>>; U.S. Citizenship and Immigration Services, “Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency”, 2020, available at: <<https://www.federalregister.gov/documents/2020/04/20/2020-08356/temporary-changes-to-requirements-affecting-h-2a-nonimmigrants-due-to-the-COVID-19-national>>.

⁶ See MITARITONNA and RAGOT, “After COVID-19, will seasonal migrant agricultural workers in Europe be replaced by robots”, CEPII Research Center: Paris, 2020, available at: <http://www.cepii.fr/PDF_PUB/pb/2020/pb2020-33.pdf>.

need for their workforce contributed to improving their working conditions or have the problems already present been exacerbated?⁷ Is it time to learn from the present to encourage regular and safe channels of entry?

2. EU RESPONSE TO COVID-19: ENSURING THE MOBILITY OF MIGRANT WORKERS IN ESSENTIAL SECTORS TO GUARANTEE THE SUPPLY OF ESSENTIAL GOODS AND SERVICES

From the earliest stages of the development of COVID-19, the EU indicated the need to protect the health of its citizens without hindering the free movement of people and the delivery of essential goods and services within Europe. The strategy of balancing actions to contain the spread of the virus by States, with measures to ensure the availability of essential goods and services, has emerged as one of the central challenges for the European Union. On 16 March 2020, the EU Commission published two soft-law instruments: the Communication on “COVID-19. Guidelines on border management measures to protect health and ensure the availability of goods and essential services”⁸ and another on “Temporary Restriction on Non-Essential Travel to the EU”.⁹ In the first one, the EU Commission provided the States with principles and guidelines for effective border management, focusing on health protection and maintaining the integrity of the single market. The guidelines have covered the area of transportation of goods and services, for which a series of guiding elements have been indicated for its management, the specification of sanitary measures necessary to ensure the safety and health of citizens, and the management of internal and external borders. Regarding the transport of goods and services, the actions have been indicated to ensure the functioning of supply chains, especially for food and medical supplies. To this end, several principles have been confirmed about the control and the limitation of movement. In fact, if restrictions were established on the transport of goods and passengers, countries would have to justify the limitations by providing valid reasons related to the spread of the virus, promote transparent communication, and ensure proportionality and non-discrimination of the measures to slow the spread of the disease.¹⁰ Equally important were the sanitary

⁷ For example: job insecurity, language barriers, lack of health and social protections.

⁸ See EU Commission, *cit. supra* note 5.

⁹ See EU Commission, “COVID-19: Temporary Restriction on Non-Essential Travel to the EU”, 16 March 2020, COM(2020)115 final, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1600950786921&uri=CELEX:52020DC0115>>.

¹⁰ See, among others: MITARITONNA and RAGOT, *supra* note 6, p. 2 ff.; EMN and OECD, “Maintaining labour migration in essential sectors in times of pandemic– EMN-OECD Inform”,

measures to monitor the trend of infections and reduce with the necessary controls the spread of the COVID-19 on cross-border workers through the entry screening measures; the assessment of the symptoms related to the virus on individuals (entering or leaving the external borders) and the provision of isolation places to wait for results. About internal borders, the EU Commission has confirmed the possibility for States to reintroduce temporary internal controls if justified by reasons of public policy and internal security. The reintroduction of border controls, in accordance with the Schengen Borders Code, had to be proportionate. Member States could not deny access to EU citizens or third-country nationals residing on their territory. Appropriate measures could only be developed to verify the presence of the COVID-19 infection, favoring isolation or quarantine modalities to ensure the negativisation of the swab in the territory of a State. Also interesting was the indication of the treatment of cross-border workers: in the guidelines, the EU Commission confirmed the need to facilitate the crossing of the subjects mentioned, especially but not only, if they work in sectors such as health and food.¹¹

The second document dated 16 March 2020 concerned the temporary restriction of non-essential travel to the EU to reduce COVID-19 infections. In the Communication, the EU Commission confirmed this measure as an urgent response to the rapid spread of the virus on EU territory, although it knew the WHO's position on the only partial effectiveness of travel restriction in reducing infections. The EU Commission has also highlighted the need to respond in a coordinated and unique way in the provision of travel restrictions at the external borders of the EU. In fact, as stated in the document under review: “a temporary travel restriction could only be effective if decided and implemented by Schengen States for all external borders at the same time and in a uniform manner”.¹²

On 30 March 2020, the EU Commission published two additional Communications: The “Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak”¹³ and the “Guidance on the implementation of

October 2020, Brussels, p. 1 ff., available at: <https://ec.europa.eu/home-affairs/sites/default/files/00_eu_inform3_labour_migration_2020_en.pdf>; CARRERA and LUK, “Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area”, CEPS Paper in Liberty and Security in Europe, No. 4/2020, April 2020, p. 5 ff., available at: <http://aeci.pitt.edu/102710/1/LSE2020-04_Love-thy-neighbour.pdf>.

¹¹ EU Commission, *cit. supra* note 5, point 23.

¹² *Ibid.*

¹³ EU Commission, “Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak”, C(2020)2051, 30 march 2020, available at: <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0330\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0330(03))>.

the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy”.¹⁴ Central to our investigation in the last document was the inclusion of seasonal workers in the agricultural sector among the list of third-country nationals who may be allowed to enter the EU, despite the closure of its external border. As can be seen from point 2 of the guidance: “The temporary restriction of non-essential travel should not apply to [...] seasonal workers in agriculture”. In the same guide, the EU Commission also provided practical measures for Member State authorities to promote a coordinated management of external border controls on travellers allowed to cross borders, by strictly applying the Schengen Borders Code. These measures ranged from systematic checks through consultation of the Schengen Information System (SIS), to health checks of travelers in relation to COVID-19 with thermal scanning and/or symptom screening. Member States and Schengen associated countries were able to limit the number of border crossing points that remained open to “essential workers”. And based on national decisions, each Country applied the most appropriate control measures to trace and limit the spread of COVID-19, e.g., quarantine for anyone entering their Country (including their own citizens) for 14 days of isolation.¹⁵

The need to ensure the cross-border mobility of the “essential workers” was reaffirmed in the “Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak”. In this Communication the EU Commission highlighted the importance of workers, in particular seasonal workers, as the agricultural sector is highly dependent on nationals of other Member States and non-EU countries.¹⁶ In fact, the EU Commission recalled the crucial role played by seasonal migrant workers, especially during the period of greatest demand for labour (spring and summer). The relevance of the migrant labour force in the agricultural sector becomes even greater if one also considers undeclared workers employed for mere business convenience or to conceal the migrant's irregular presence in the host Member State.

¹⁴ See EU Commission, *cit. supra* note 5.

¹⁵ *Ibid.*

¹⁶ See EU Commission, *cit. supra* note 9. Also KALANTARYAN, MAZZA and SCIPIONI, “Meeting labour demand in agriculture in times of COVID 19 pandemic”, Publications Office of the European Union, Luxembourg, 2020, p.8 ff., available at: <<https://ec.europa.eu/jrc/en/publication/annual-reports/meeting-labour-demand-agriculture-times-COVID-19-pandemic>>. To highlight the size of non-EU seasonal workers, this EU publication confirmed that: “in total for 2018 and only for a subset of Member States, about 68.3 thousand non-EU born seasonal workers entered the agricultural sector, out of approximately 84.7 thousand authorisations for non-EU born seasonal workers”.

In June 2020, the EU Commission produced its third assessment on the application of temporary restrictions on non-essential travel in the EU, recommending that Member States remove internal border controls by 15 June 2020, and gradually open their external borders with a view to opening them on 1 July 2020. Thus, removing non-essential travel restrictions for several third countries and categories of persons.¹⁷

As we have seen from the brief overview given so far, from the early stages of managing the pandemic crisis the European Union has tried to identify, within the scope of its competences, common tools, and actions to stem the rapid spread of the virus. This was evidently to mitigate not only the power of the virus, but above all to plan and coordinate a shared and common response among the EU Member States. As will be seen later, the responses have often not been coordinated: perhaps due to a lack of clarity, perhaps due to a lack of strong European leadership, but probably also due to a desire to manage the emergency more autonomously at national level (failing therefore to understand the need for a coordinated response to the "COVID-19 challenge").

2.1 The importance of the seasonal migrant worker during the COVID-19

Beyond the restrictions on mobility, we have said that certain categories of workers (cross-border and seasonal) have been included in the list of "essential workers" to ensure the provision of central goods and services in economic sectors - such as agriculture and food production, transport, food processing and packaging, fishing, and forestry. However, as the EU Parliament has pointed out, in some sectors the way for recruitments replicated patterns of precariousness and undervaluing of the workforce, often leading to violations of labour rights, especially when migrants are involved.

Short-term employment contracts and poor or non-existent social security coverage further increase the dimension of uncertainty and precariousness of seasonal migrant workers, leading many to accept undesirable working conditions. They are often led to submit to such practices because they sometimes enter the territory of the host Member State irregularly. The irregularity often amplifies the

¹⁷ EU Commission, "Communication from the Commission to the European Parliament, the European Council and the Council On the third assessment of the application of the temporary restriction on non-essential travel to the EU", COM (2020)399 final, 11 June 2020, p. 1 ff, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1600955240950&uri=CELEX:52020DC0399>>. In the same month, the Council of the EU adopted a "Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction", 30 June 2020, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H0912&from=EN>>. The Council in this document reaffirmed the suggestions made by the EU Commission on 11 June 2020.

fragility of the workers. For fear of being returned and losing the opportunity to earn a living, they give in to blackmail and accept inadequate working conditions.¹⁸

About the assessment of the specific context and conditions of cross-border and seasonal workers, the EU Parliament adopted an *ad hoc* resolution to draw attention to the need to protect the rights and safety of these workers. In the Resolution, the Institution welcomed the approach indicated by the EU Commission on the importance of not disregarding the principles of equal treatment and non-discrimination for the movement of workers. The EU Parliament also stressed the need to ensure equal treatment in employment, and the social dimension of third-country seasonal workers in accordance with Directive 2014/36/EU.¹⁹ It also referred to several rights that are part of the protection dimension of these workers, such as equal pay for equal work. Among other initiatives, the EU Parliament asked to EU Commission to revising the guidelines for cross-border and seasonal workers and all actors involved in the pandemic crisis context.²⁰

On 16 July 2020, the EU Commission developed another soft-law instrument: “Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak”, incorporating some of the elements provided in its previous guidance of March 2020. In the July guidelines, the EU Commission clarified that: “Cross-border *seasonal workers enjoy a broad set of rights, which may differ depending on whether they are Union citizens or third-country nationals. Nevertheless, [...], they can be more vulnerable to precarious working and living conditions*”. Indeed, the structure of the document confirms the approach of differentiating between EU national seasonal workers, workers from third countries and posted workers. For each of these categories, the European Commission has confirmed not only the EU legislation of reference, but also the need to strengthen the protection dimension of these subjects: for instance, the health and safety of workers; the accommodation and transport aspects in the workplace, as well as the social security aspects.²¹ The EU Commission initially referred to the relevant EU legislation, namely Directive

¹⁸ EU Parliament, “Resolution of 19 June 2020 on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis”, (2020/2664(RSP)), 2020, points e-g.

¹⁹ See Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. On the analysis of the act: see *infra* subsection 3.3.

²⁰ See the EU Parliament, *cit. supra* note 18, para 6, p. 8.

²¹ EU Commission, “Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak”, C(2020) 4813 final, 16 July 2020, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1342>.

2014/36/EU, adopted on the basis of Article 79(2)(a-b) TFEU, which regulated temporary seasonal migration and standards of living and working conditions for non-EU seasonal workers.²² Nonetheless, the EU Commission highlighted different issues that were exacerbated by the development of the pandemic. The transitory nature of employment relationships, the circumstances under which some activities are carried out (e.g., farm workers in the agricultural sector), have not only created uncertainty for these individuals, but have also amplified the difficulties in containing the spread of COVID-19.

From the analysis of the July 2020 guidelines, after recalling the shortcomings in the areas mentioned above, the EU Commission provided a few recommendations. Firstly, in relation to occupational health and safety, secondly, on access to housing and transport to work. While the latter are formally provided for workers from third countries under Article 20 of Directive 2014/36/EU, they are not elements for other seasonal workers for whom the Commission has requested provision. If, on the one hand, the provision contained in the article 20 is appreciable, on the other, the motivation behind the establishment of accommodation is visible. In fact, to be admitted to the State the seasonal migrant worker must provide information and proof of the employment contract and access to suitable accommodation (pursuant to Article 5(1)(c)). Thirdly, on social security aspects, the EU Commission emphasized that third-country seasonal workers are also entitled to equal treatment with nationals of the host Member State under Article 3 of Regulation (EC) No 883/2004.²³ However, due to the temporary nature of the stay of seasonal workers, Member States may derogate from the principle of equal treatment for certain family, unemployment, and tax benefits.²⁴ Fourthly, the Institution called on Member States to strengthen and expand information campaigns aimed at employers and seasonal workers on the applicable rules and rights of seasonal workers. These were intended to help not only with information related to COVID-19 infection but also as a push to improve the already existing reference legislation on the obligation to inform seasonal migrant workers of their rights and obligations.²⁵ Finally, at the end of the July guidelines, the Commission gave assurances that it would assess the implementation of the Directive 2014/36/EU by Member States with a view to presenting a report to the EU Parliament and the Council in 2021.

²² See Directive 2014/36/EU, *cit. supra* note 19, para 7.

²³ See Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, art. 3.

²⁴ See Directive 2014/36/EU, *cit. supra* note 19, Art. 23 (2).

²⁵ See Directive 2014/36/EU, *cit. supra* note 19, Art. 27.

We will return to Directive 2014/36/EU later, focusing briefly on its structure and implementation by EU States. In the next section, however, the perspective of the investigation narrows, focusing on individual national contexts and assessing the measures identified to ensure an adequate presence of seasonal workers (especially in the agricultural sector). Based on the guidance provided at EU level, how have Member States addressed the pandemic crisis and the consequent difficulty in finding seasonal workers in the agri-food sector?

3. MEMBER COUNTRIES' MEASURES TO ADDRESS SEASONAL LABOUR SHORTAGES IN THE AGRICULTURAL SECTOR

3.1 The dimension of seasonal migrant workers in the agricultural sector in EU countries: a brief overview

The pandemic highlighted the role of migrant workers in the agricultural sector and their essential contribution to host economies such as those of EU countries. Measures taken to mitigate the spread of COVID-19 have put a strain on Member States historically dependent in the agricultural and horticultural sectors on seasonal workers from third countries. The restriction of movement initially created great concern about securing the harvest and the agri-food chain. For these reasons, agricultural workers were defined as “essential workers” and therefore exempted from the bans on free movement and other emergency measures.

Seasonal migrant workers, as reported by the European Migration Network, come from neighbouring regions of the European Union.²⁶ This is because the specific characteristics of the agricultural sector, such as the limited duration of contracts, low remuneration, physical effort and working hours, keep EU citizens away from this type of work.²⁷ These characteristics, as we will see later, have had a strong impact on some of the measures implemented by EU countries to attract domestic labour to the agricultural sector in 2020.

Although there are variations in the presence and admission of seasonal migrant workers across Member States, there is no doubt that migrants play a key role in the agriculture sector. To illustrate this point, it can be recalled that between 2011 and 2017, the loss of national seasonal workers was partially offset by both

²⁶ See European Migration Network, “Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report”, December 2020, Brussels, p. 9 ff.

²⁷ See MITARITONNA, *cit. supra* note 6, p. 3; MARTIN, *cit. supra* note 3, p. 7 ff.

intra-EU and extra-EU migration flows.²⁸ The Member States with the highest number of non-EU migrants employed in the agricultural sector were Spain, Italy, and Denmark. In Spain, for example, with a share of foreign workers employed in the agricultural sector of 25%, 14% came from North Africa and Central and Latin America. In Italy too, between 2011 and 2017, the share of foreign workers increased from 10% to 15%. Of the latter, 7% came from Asia and North Africa.²⁹

In 2019, the Member States with the highest number of permits accepted for seasonal work were: Poland, Finland, Spain, Bulgaria, Croatia, Estonia, and Italy. Beyond the countries of the European continent, a few seasonal labour migrants arrived from countries outside the European Region such as Africa and Asia. For example, in Finland and Sweden most of the seasonal workers from Thailand are cyclically recruited for berry picking. In France, many workers came from Morocco, Mali, Guinea, Ivory Coast and Tunisia. Also, in Spain and Italy most seasonal migrant workers employed in the agricultural sector come from Morocco and other African countries.³⁰

Looking at further qualifying elements of the migrant workers in the agricultural sector, most of them are male, except for Spain where there is a large female presence.³¹ Regarding the level of professionalism and tasks occupied, it is interesting to highlight that there are great differences between natives and immigrants employed in the sector. In fact, while on the one hand a higher percentage of natives are employed in the classification “skilled agriculture, forestry, and fishery workers”, on the other, migrant workers from third countries are employed and classified at a lower level, i.e., “elementary occupations”.³² This last element helps us to understand the role played by non-EU migrant workers in agriculture. EU citizens have no interest in performing the most strenuous work, both because of the type of activities involved and because of the lack of adequate economic compensation. The need to maintain a residence permit in the host country push non-EU migrant workers to accept precarious working conditions, bordering on legality.

²⁸ See European Migration Network, *cit. supra* note 26.

²⁹ See SCHUH et al., “The EU farming employment: current challenges and future prospects”, Research for AGRI Committee. Brussels, Belgium: European Parliament, Policy Department for Structural and Cohesion Policies, p. 22 ff., available at: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629209/IPOL_STU\(2019\)629209_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/629209/IPOL_STU(2019)629209_EN.pdf)>.

³⁰ See European Migration Network, *cit. supra* note 26, p. 18 ff.

³¹ Regarding the presence of woman, see PALUMBO and SCIURBA, “The vulnerability to exploitation of women migrant workers in agriculture in the EU: The need for a human rights and gender based approach”, Brussels, 2018.

³² See NATALE et al., “Migration in EU Rural Areas”, Publications Office of the European Union, Luxembourg, 2019, p. 32 ff., available at: <<https://publications.jrc.ec.europa.eu/repository/handle/JRC116919>>.

However, data provided by official national authorities often do not give a complete picture of the reality. Indeed, official data underestimate the role of third-country seasonal migrants, especially when it comes to irregular workers. The latter are difficult to detect because they are not registered and reside and work illegally in their host countries.³³

3.2 The reaction of EU countries: measures to prevent the paralysis of the agricultural sector

Most of the EU countries in need of seasonal labour in the agricultural sector had to find solutions in a short period of time to ensure useful labour for the cultivation and harvesting of agricultural products. Four actions were identified by Member States to reduce the shock created by the pandemic and the shortage of migrant workers from other States: a) drawing labour from the domestic workforce; b) derogating from labour laws (e.g., extending the working hours); c) regularising irregular migrants within the country; and d) organising the arrival of seasonal migrant workers by setting up anti-contamination measures.

The first measure was attempted by many EU countries, including France, Germany, Spain, Italy, UK, and Switzerland. Involvement of national citizens has developed in different ways at EU level: from France, which created a website to quickly attract labour supply and demand, to Germany and the UK, which similarly promoted the development of platforms to recruit labour at national level. These were followed by Italy, Spain, and Austria trying to find benefits to attract more people for recruitment in a short time.³⁴ The demand for workers was around 250,000 workers for Italy, 300,000 workers for Germany, around 200,000 for France and around 80,000 for the UK. However, the difference between the rate of registration and the rate of subsequent recruitment proved not to achieve the desired results. In fact, after an initial significant expression of interest on the part of unemployed persons or part-time workers, it became apparent that it was difficult to encourage

³³ See MITARITONNA and RAGOT, *cit. supra* note 6, p. 4. Also HOOPER and LE COZ, “Seasonal Worker Programs in Europe Promising practices and ongoing challenges”, MPIE, Policy brief, February 2020, available at: <<https://www.migrationpolicy.org/research/seasonal-worker-programs-europe>>; PERNA, “Legal Migration for Work and Training: Mobility Options to Europe for Those Not in Need of Protection. Italy Case Study”, Working Paper, FIERI, July 2019, available at: <<https://digital.csic.es/handle/10261/212188>>.

³⁴ See Eurofound, “COVID-19: Policy responses across Europe”, Publications Office of the European Union, Luxembourg, 2020, p. 25 ff.

their recruitment. This was both because they were considered unable to perform the work of experienced seasonal workers and because the registered subjects themselves indicated periods of reduced availability, leading to their rejection by the farmers³⁵. For example, farmers in Germany and Switzerland showed how the lack of experience of the national workers involved led to the ruin of more than half of the asparagus harvest. While, to provide a snapshot of the difficulty of matching supply and demand it is worth recalling one figure among many: on 28 April, i.e., during the crucial months for labour recruitment in the agricultural sector, of the 50,000 British registered, about 200 had completed the recruitment procedure.³⁶

The second measure, i.e. derogating from certain rules on working arrangements, allowed some EU countries to increase the number of working hours to cover part of the labour gap created in the first months of the pandemic's spread. These derogations could be implemented with the support of other measures to balance the undesirable effects of the overload of working hours, such as wage increases.

The third measure, namely the regularisation of seasonal migrant workers – as Mitaritonna well pointed out – proved to be an appropriate strategy for economic and health reasons and speeded up the time it took to deploy the subjects made available within the national territory. However, while this measure could rationalise the migrant labour force already present on the territory of member states, it raised several political implications to the “securitization approaches” of some EU States.³⁷ Particularly decisive was Portugal's decision of 29 March 2020 to grant a residence permit to all immigrants who had already applied for one until 1 July 2020. With this decision, other countries have considered similar initiatives: from Italy, which has opted to approve a measure to regularise migrant workers present on its territory, justifying it with the need to respond to the demand for work; the fight against illegal work and “*caporalato*” (illegal gangmaster system); the guarantee of public health of the entire population.³⁸ The Italian government has provided for a two-channel regularisation

³⁵ See MITARITONNA and RAGOT, *cit. supra* note 6, p. 5; ILO, *cit. supra* note 3, p. 2 ff.

³⁶ *Ibid.*

³⁷ In recent years, various political parties, usually of the extreme right, have created the idea that migrants and their uncontrolled arrivals should be considered as threats to the integrity of the national territory. Based on these beliefs, they have developed nationalist policies, increasing xenophobic attitudes and favouring purely securitarian approaches to migration, criminalising irregular arrivals indiscriminately and reducing approaches more aimed at humanitarian reception of migrants. Among others, see MORENO-LAX, “The EU Humanitarian Border and the Securitization of Human Rights: The ‘Rescue-Through-Interdiction/Rescue-Without Protection’ Paradigm”, *JCMS*, Vol. 56, no. 1, pp. 119–140.

³⁸ See CAPRIOGLIO and RIGO, “Lavoro, politiche immigratorie e sfruttamento: la condizione dei braccianti migranti in agricoltura”, *Diritto, immigrazione e cittadinanza*, Vol. 3/2020, available at:

mechanism. Firstly, with the issuance of a residence permit for work reasons, subordinating it to an offer of new employment or by declaring the pre-existing irregular relationship. Secondly, by issuing a temporary work permit for six months to non-EU citizens holding an expired residence permit. Based on the data provided by the Ministry of the Interior as of 15 August 2020, approximately 220,000 people were involved in regularisation applications, and as regards nationalities, there was a greater presence of citizens from Albania, India, Pakistan, Bangladesh, and Morocco.³⁹

Belgium, to address labour shortages, has decreed three measures to facilitate seasonal work in agriculture. The first measure allowed the renewal of seasonal work permits, thus doubling their duration. The second action of the Belgian government concerned the extension of work permits in agricultural sub-sectors. The third measure concerned the acceptance of a derogation on the hiring of workers who had been employed during the previous 180 days, thus facilitating the influx of retired workers, temporarily unemployed, recently dismissed by the same or another employer.⁴⁰

In Finland, the legislation on foreigners and seasonal workers was amended on 9 April 2020 to allow third-country nationals already present on the territory with a work permit to change employers or sectors, without applying for a new work permit.⁴¹ It extends this derogation to 31 October 2020, thus avoiding shortages in key sectors such as agriculture. The changes and the extension of work permits were also granted to those who would have entered Finland after the change in the law was passed. Clearly, the entry of new workers had to follow strict safety rules to ensure entry into the country without leading to a worsening of the spread of COVID-19.

In Spain, the government approved on 7 April 2020 the extension of all work permits for seasonal workers until 30 June 2020. This allowed most of those remaining on Spanish territory to continue working and to have economic security at such a sensitive time. Morocco, the country of origin of many seasonal workers,

<<https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-3-2020-1/650-lavoro-politiche-migratorie-e-sfruttamento-la-condizione-dei-braccianti-migranti-in-agricoltura>>.

³⁹ See Ministry of Interior, “Emersione dei rapporti di lavoro 2020. Analisi statistica delle domande – dati aggiornati alle ore 24.00 del 15 agosto 2020”, p. 10 ff., available at: <https://www.interno.gov.it/sites/default/files/2020-08/dlci_-_analisi_dati_emersione_15082020_ore_24.pdf>.

⁴⁰ European Trade Union Confederation (ETUC), “COVID-19 Watch. National measures targeting seasonal workers to address labour shortages (particularly in the agricultural sector)”, ETUC Briefing Note, May 2020.

⁴¹ Finland, Act No. 214/2020 (laki työttömyysturvalain väliaikaisesta muuttamisesta/lag om temporär ändring lagen om utkomstskydd för arbetslösa), 9 April 2020; See also FRA Agency, “Coronavirus pandemic in the EU – Fundamental Rights Implications - Finland”, 4 May 2020, p. 5 ff.

had closed its borders, which for the Spanish government meant that seasonal workers in Spain risked losing their accommodation, being illegal and living in very precarious conditions. It is also true that the pre-crisis conditions for seasonal workers in the agricultural sector were already very difficult and precarious, so the concern for the working and living conditions of seasonal migrant workers emerged because it was necessary for the supply of Spain.⁴²

The fourth measure identified by the EU countries to address labour shortages in the agricultural sector was to organise the transport and arrival of seasonal migrant workers on their territory. Finland welcomed 1,500 workers with charter flights from Ukraine. Germany, Austria, Ireland, and The Netherlands also organised the safe transport of seasonal workers but using Romanian and Bulgarian labour. Thus, in the latter case, the EU Member States promoted intra-EU mobility.

3.3 The EU legal framework for seasonal farm workers: The Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal worker

As seen above, third-country workers are an essential and relevant component within the EU economic market. This relevance became even more evident during the pandemic crisis because, although they were usually identified and classified as low-skilled workers, they were recognised as essential during the imposition of restrictions on mobility within and outside the EU territory. Seasonal workers from third countries suddenly found themselves at the centre of policy debates and emergency measures during the pandemic. These workers are covered by Directive 2014/36/EU, which became necessary a few years ago to address a wide range of issues: a) to contribute to the effective management of migration flows related to temporary seasonal migration; b) to ensure decent living and working conditions with fair admission and residence rules; c) to define the rights of seasonal workers; d) to introduce incentives to prevent temporary stay from becoming permanent and non-authorised.⁴³

The above-mentioned aims reveal the predominant logic of the directive: the approach that would emerge from an analysis of the legislation is essentially securitarian. Indeed, among the purposes identified in paragraph 7 of the Preamble, the dimension of protection and guarantee of decent living and working conditions for seasonal workers is " diluted " by two aims: the effective management of migration

⁴² See Human Rights Watch (HRW), "World Report 2021 (events of 2020)", 2021, p. 628 ff.

⁴³ See Directive 2014/36/EU, *cit. supra* note 19, para 7, p. 1.

flows and the introduction of incentives to prevent exceeding the terms of the work permit in the EU territory. This is obviously to assure countries of their position with respect to the rules governing the migration of non-EU seasonal workers.

According to Article 2(1), the application of the directive is intended to “third-country nationals who reside outside the territory of the Member States and who apply to be admitted, or who have been admitted under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers”. On the contrary, the legislation does not cover third-country nationals who are on EU territory on the basis of the other titles of entry (e.g. asylum seekers and refugees)⁴⁴ But during the pandemic crisis, these categories of persons already present on EU territory were given the opportunity to be employed in the agricultural sector as workers to reduce labour shortages.⁴⁵

Furthermore, it is interesting to note that Directive 2014/36/EU is closely related to the rhythm of the seasons.⁴⁶ This would mean that access to work is closely linked to the seasonal-climatic factor and that, therefore, other cases not linked to climatic factors do not seem to fall within the scope of the directive. However, several Member States have extended by national legislation the applicability of the directive to factors that do not directly imply a link to climatic elements.

Then, under Art. 2(2), there is provision for Member States to draw up a list of employment sectors to be included in the seasonal sectors. This is also because each country may have different fields to be included in the "seasonal" category than others. On the one hand, this provision considers the natural differences between the various countries, leaving the determination of the lists to the individual states, and on the other hand, it strengthens their discretion. This, of course, may lead to less harmonisation of the discipline, encouraging differentiation between one country and another.

The Directive subsequently regulates the length of stay of seasonal workers. According to Article 5, for stays not exceeding 90 days, the application for admission must be accompanied by: a valid work contract or a binding job offer; and a set of other information such as weekly working hours, remuneration, proof that the

⁴⁴ See WIESBROCK, JÖST and DESMOND, “Seasonal Workers Directive 2014/36/UE”, HAILBRONNER and THYM (eds.), *Eu Immigration and Asylum Law. A Commentary*, II ed, München, 2016, 939 ff.; EVOLA, “I lavoratori di Stati terzi nel diritto dell’Unione europea”, Torino, 2018, p. 252 ff.

⁴⁵ Among the others: Germany and France. See European Trade Union Confederation (ETUC), note 40, p. 4 ff.

⁴⁶ Under art. 3(c): « ‘activity dependent on the passing of the seasons’ means an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations», Directive 2014/36/EU.

seasonal worker will have adequate accommodation, and health insurance. On the definition of adequate accommodation, it is pertinent to refer to Article 20 which states that the adequacy of accommodation must be assessed by national law or practice. This provision, although important because it sought to ensure an adequate standard of living for seasonal workers, has left wide discretion to national regulation on the adequacy and suitability of accommodation.

In contrast, for stays of more than 90 days, the application for admission requires, in addition to the elements listed above, other conditions in accordance with Article 6(3) and (4): “that the seasonal worker will have sufficient resources during his or her stay to maintain him/herself”, and he should not be considered as a threat “to public policy, public security or public health shall not be admitted”.

As soon as the worker is present in the territory of the Member State, the extension of the residence permit can take place. In fact, for our analysis, it is necessary to highlight the faculty recognised to States to authorise the extension to seasonal workers with the same or a different employer and the faculty to renew the permit more than once.⁴⁷

As can be seen, the legislation is more attentive to the prerogatives of Member States, and further elements that support this thesis can be seen in the right to determine the volume of entries by countries. This has a few effects, such as the right to declare applications for admission of seasonal workers inadmissible or rejected (under Article 7). Among the grounds for rejecting an application there is also the possibility of using the principle of preference for EU citizens when there are vacancies that can be filled by them.⁴⁸ This principle is tempered by Article 8(5), which states the need to examine the application on a case-by-case basis, paying attention to the circumstances and interests of the individual applicant.⁴⁹

Finally, it is worth mentioning the principle of equal treatment enshrined in Directive 2014/36/EU. Equal treatment is mandatory in the following areas: minimum age for access to employment, working conditions, pay and dismissal, holidays, working time, right to strike, and payment of arrears. However, Member States may restrict equal treatment between EU citizens and third-country nationals in the areas of social assistance, access to education, vocational training, and tax

⁴⁷ See Directive 2014/36/EU, *cit. supra* note 19, Art. 15.

⁴⁸ See Directive 2014/36/EU, *cit. supra* note 19, para 9 of the Preamble and Art. 8(3).

⁴⁹ This provision incorporates a principle that has emerged from the activity of the Court of Justice of the EU: Joined Cases C-356/11 and C-357/11, *O. and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L.*, December 2012, ECLI: ECLI:EU:C:2012:776.

benefits.⁵⁰ Again, while we have a recognition of equal treatment on specific elements, at the same time, there is a wide discretion for Member States on other important aspects. Especially for a category such as seasonal workers, who in themselves embrace aspects of precariousness not only with respect to the length of stay in the host country, but also to the certification of skills and experience. The possibility of precluding access to vocational training was not in line with the objective identified in the 2009 Stockholm Programme: optimising the link between migration and development.⁵¹ Beyond the indications in the programme, most Member States did not follow the approach, probably also due to the non-compulsory nature of the instrument. The motivation – as pointed out by Zoetewij-Turhan – could be found in the will to limit the acquisition of new skills for third-country nationals, preventing them from accessing the EU market in other sectors.⁵² Thus, reinforcing the principle of market access preference for EU citizens and, indirectly, the perception of seasonal labour migrants as “unwanted”.⁵³

Thus, the central aim of Directive 2014/36/EU has been to attract labour from third countries to perform seasonal work that is unattractive to EU citizens⁵⁴ and to maintain the low skill profile of the former. The pandemic has highlighted the centrality of seasonal migrant workers in agricultural sector. The poor response of EU citizens to the demand for labour in the sector and the difficulty of sustaining cultivation and harvests has, among other things, highlighted the lack of expertise of EU citizens compared to the experience gained over the years by seasonal migrant workers.

4. THE IMPACT OF THE PANDEMIC ON THE PROTECTION OF SEASONAL MIGRANT WORKERS' RIGHTS: CHRONIC AND CURRENT WEAKNESSES

Seasonal agricultural workers, particularly those from third countries, are often subject to exploitation and inadequate working and living conditions. As mentioned earlier, seasonal agricultural workers perform work that is most often

⁵⁰ See Directive 2014/36/EU, *cit. supra* note 19, Art. 23.

⁵¹ See Directive 2014/36/EU, *cit. supra* note 19, para 6.

⁵² ZOETEWIJ-TURHAN, "The Seasonal Workers Directive: ...but some are more equal than others", *European Labour Law Journal*, 2017, p. 28 ff.

⁵³ CASTLES, "Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?", *International Migration Institute, University of Oxford, Working Paper No. 1/ 2006*, p. 3.

⁵⁴ BRICKENSTEIN, "Social Protection of Foreign Seasonal Workers: from State to Best Practice", *Comparative Migration Studies*, 2015, p. 1 ff.

avoided by the native population. This is because work in the agricultural sector is usually characterised by low wages, long working hours, short-term contracts, intensive physical labour, exposure to chemicals used to fertilise the land, and constant accidents due to the lack of safety measures for the health of workers. These elements become even more dangerous for those who are recruited without work permits that legalise the presence of these seasonal workers. Clearly, the irregularity of admission creates even more subjugation and dependence on the “employer”.⁵⁵

The FRA Agency, in a recent report,⁵⁶ analysing the exploitation of migrant workers highlighted several critical aspects about the protection of these individuals (regular and irregular). Based on the data from interviews with migrant workers, the most common problems were found in relation to working conditions and remuneration. For the agricultural sector, violations and combinations of several problematic elements were found, which led to increased exploitation and lack of rights protection. Illegal behaviour was often found about how the costs of food, accommodation, and other work-related expenses such as transport were deducted from wages. According to Article 20(2)(a) of Directive 2014/36/EU, if accommodation is arranged by the employer, seasonal workers are obliged to pay rent, but the cost of which must not be excessive in relation to his/her salary and the quality of the accommodation. It is also made clear that the rent cannot be automatically deducted from the seasonal worker's salary. However, the automatic withholding of the cost of accommodation was mentioned by several seasonal migrant workers interviewed, in violation of the above-mentioned provisions.

About the working and living conditions of the interviewees, it must be said that seasonal migrant workers often find themselves living on farms in isolated, rural areas, in places that are usually overcrowded, lacking basic rules of hygiene and safety for the health of the people living there.⁵⁷ However, exploitation has not only involved seasonal workers from third countries but also workers from EU countries: the most obvious example is the exploitation of Romanian women in countries such as Spain and Italy.⁵⁸

Looking at the latter two countries, several reports and studies highlight the presence of exploitation of seasonal migrant workers. The UNHRHC has indicated the

⁵⁵ See VAN NIEROP et al., “Counteracting undeclared work and labour exploitation of third country national workers”, European Platform tackling undeclared work, January 2021.

⁵⁶ FRA Agency, “Protecting migrant workers from exploitation in the EU: workers’ perspectives”, Luxembourg, 2019, p. 41 ff.

⁵⁷ AUGÈRE-GRANIER, “Migrant seasonal workers in the European agricultural sector”, EPRS-European Parliamentary Research Service, February 2021, p. 6 ff.

⁵⁸ *Ibid.* See also: IOSSA et al., “Are Agri-Food Workers Only Exploited in Southern Europe? Case Study on Migrant Labour in Germany, The Netherlands and, Sweden”, Open Society Foundation, 2020.

presence of about 40% of irregular migrant workers among all seasonal workers in Italy.⁵⁹ Often these individuals are placed in rural settings through the “*Caporalato*” system. This is strongly rooted in southern Italy and exploits the vulnerability of irregular migrants, gaining maximum profit at the cost of workers' living conditions. The most common pressures are loss of employment, physical and psychological violence, and women also suffer the possibility of being abused and sexually exploited.⁶⁰ As we have seen, the pandemic crisis has partly uncovered these problems, leading the Italian government to identify emergency measures, including the proposal to regularise the status of seasonal workers already present in Italy but irregular. This measure, however, as has recently emerged, seems to have flopped. Of the more than 207,000 applications submitted by employers (85% related to domestic work and 15% to agriculture) only 1,480 work permits were issued, representing 0.71% of the total number of applications submitted.⁶¹ Exploitation and slavery conditions among seasonal migrant workers were also recorded in Spain, especially in the province of Huelva where strawberries are mostly grown. In this country too, the presence of irregular migrant workers, mainly from sub-Saharan Africa, was detected, with various problems of rights violations, labour abuse and exploitation.⁶²

The violation of the rights of seasonal migrant workers and their exploitation in the agricultural sector did not only concern the countries of the south of the EU, but also countries such as the Netherlands, Sweden, and Germany, where irregular behaviour and exploitation of workers were detected.⁶³

The shortcomings in the implementation of existing international, European, and

⁵⁹ UNHRHC, “Italy: Food system exploits smallholder farmers and workers - UN food expert, January 2020, available at: <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25514&LangID=E>>; ID., “Statement by Ms. Hilal Elver, United Nations Special Rapporteur on the right to food, on her visit to Italy”, January 2020, available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25512&LangID=E>>.

⁶⁰ CORRADO, “Migrant crop pickers in Italy and Spain”, Heinrich Böll Foundation, Berlin, June 2017, p. 4 ff.

⁶¹ MAGNANO, “Regolarizzazione degli stranieri “radicati” a rischio flop: in 6 mesi solo lo 0,71% delle domande”, *IlSole24Ore*, 4 march 2021, available at: <https://www.ilsole24ore.com/art/regolarizzazione-stranieri-radicati-rischio-flop-6-mesi-solo-071percento-domande-AD9xjeNB?refresh_ce=1>.

⁶² UNHRHC, “Statement by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, on his visit to Spain”, February 2020, available at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25524>>; see also Palumbo, *supra* note 20.

⁶³ See IOSSA, *supra* note 56.

national legislation on legal migration have widened and partly become perpetuated.⁶⁴ The pandemic has highlighted the exploitative conditions under which these workers must work. Typically, poor hygiene and safety conditions have led to several outbreaks of COVID-19 in various countries such as Spain, in the regions of Catalonia and Andalusia, but also in Germany. For the former country, outbreaks have occurred among fruit growers and in Germany in both the agricultural and food sectors.⁶⁵ As highlighted by the European Coordination Via Campesina (ECVC), the need to work during the pandemic in agricultural activities was not followed by containment measures to ensure safety for seasonal workers: from the lack of protective equipment to COVID-19 control measures at work, up to the lack of distancing.⁶⁶ These failures and pre-pandemic deficiencies were compounded by: heavy pressure on seasonal workers because they are essential in ensuring the supply of agri-food goods; reduced labour inspections, deteriorating the precarious working conditions of essential workers.⁶⁷

5. CONCLUSION

The spread of COVID-19 has thrown not only EU countries into crisis, but the whole world in the face of an unexpected and virulent event that can affect all aspects of life. Almost immediately, the EU realised that dealing with the virus and restrictions on international and internal mobility would have ruinous effects on the population. In addition to the difficulties and fears related to the spread of COVID-19, the need to ensure the cultivation and harvesting of agricultural products became evident. As we have seen, from March 2020 onwards there have been indications and recommendations to ensure that “essential workers” are able to move and work. Essential workers included seasonal workers (EU and non-EU) because most of them were involved in the agri-food sector. Although, as already shown, the extent of seasonal workers' involvement in the agricultural sector is not fully representative of reality, there is a significant amount of undeclared work and irregular migrant workers widely used in this sector.

⁶⁴ CHETAİL, “COVID-19 and human rights of migrants: more protection for the benefit of all”, IOM Publications, Geneva, 2020, p. 3 ff.

⁶⁵ See AUGÈRE-GRANIER, *supra* note 56, p. 9 ff.

⁶⁶ See European Coordination Via Campesina (ECVC), “ECVC: demands urgent measures for rural workers in the face of escalating COVID-19 difficulties”, Press Release, Brussels, 2020, available at: <<https://www.eurovia.org/ecvc-demands-urgent-measures-for-rural-workers-in-the-face-of-escalating-COVID-19-difficulties/>>.

⁶⁷ See PALUMBO et al., “COVID-19, Agri-Food Systems, and Migrant Labour. The Situation in Germany, Italy, the Netherlands, Spain, and Sweden”, Open Society Foundations, July 2020.

The measures promoted by various EU countries, such as the temporary regularisation of migrant workers; the organisation of labour arrivals with charter flights; the extension of work permits already granted and the attempted recruitment of national labour, have turned out to be emergency measures. The urgency and temporariness of the actions introduced, however, have been greatly affected by the lack of resources to tackle the health emergency and, consequently, the economic and social crisis on several fronts. The lack of resources and support for the measures not only produced partial results but also increased pre-existing weaknesses in the agricultural sector.⁶⁸

Almost a year has passed, and we are still “hostage” to the virus despite having acquired tools to combat it effectively. The measures promoted during the second half of 2020 to address labour shortages in the agricultural sector have proven to be insufficient to meet the challenges posed; specially to combat the exploitation of seasonal migrant workers. The European Parliament on 19 June 2020 called on the European Commission and the Member States to ensure, in the pandemic context, equal treatment of third-country seasonal workers with EU nationals, in accordance with Directive 2014/36/EU. The EU Parliament also confirmed the need to correctly implement existing EU legislation on the rights of cross-border and seasonal migrant workers, with a focus on countering the negative image of the latter.

On 9 October 2020, the Council confirmed the need to improve the working and living conditions of seasonal workers, recognising the worsening of their protection measures and rights during the pandemic.⁶⁹ In the conclusions, the Council also invited the European Commission to conduct a study on seasonal work to identify the main challenges faced and to be overcome.

Having said that, the challenges for the immediate future are several: firstly, to verify at European level the implementation of Directive 2014/36/EU by Member States; secondly, to highlight the critical elements found so far in the system of rules defined in the “Seasonal Workers Directive”. As is well known, the Directive is a type of legislative act that allows a partial harmonisation of the legislation of EU countries, unlike the regulation, which offers a more stringent level of harmonisation. For this reason, although heterogeneity in the regulation of countries is normal, the elements of the directive should be supported with further actions to counteract the

⁶⁸ Among others: AUGÈRE-GRANIER, *supra* note 56, p. 8 ff; RUXANDRA, “Europe’s essential workers: Migration and pandemic politics in Central and Eastern Europe during COVID-19”, *European Policy Analysis*, 2020, p. 258 ff.

⁶⁹ Council of the EU, “Conclusions on improving the working and living conditions of seasonal and other mobile workers”, Doc. No. 11726/2/20, Brussels, 9 October 2020, available at: <<https://www.consilium.europa.eu/media/46080/11726-re02-en20.pdf>>.

work of individuals illegally present on the territory of member states. The size of irregular seasonal workers represents an important share that should not be hidden, especially since understanding the phenomenon can help counter the system of exploitation and violation of their rights. Thirdly, Member States should be encouraged to implement measures to improve the working conditions of seasonal workers through EU recovery funds, the promotion of actions in the strategic framework “A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system” and the review of the “Common Agricultural Policy”.⁷⁰ It is expected that the pandemic will have made us realise the importance of seasonal workers in the agricultural sector, commonly referred to as “low-skilled” workers. The main challenge in the medium-long term will be to understand what has failed, and to direct efforts towards improving the employment and working conditions of seasonal workers, particularly those from third countries⁷¹. The potential risk could be to forget the essential role of these workers once the pandemic crisis has passed.

⁷⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system”, COM(2020) 381 final, Brussels, 20 May 2020, p. 11 ff.

⁷¹ EMN and OECD, *supra* note 10, p. 9 ff.

Part III - Regional and national perspectives

**MANAGING MIGRANT WORKERS IN PLIGHT
OF THE PANDEMIC COVID-19:
COMPARING REGIONAL INTEGRATION CHALLENGES, RIGHTS AND
LEGAL PROTECTION IN ASEAN AND THE EUROPEAN UNION**

*Saidatul Nadia Abd Aziz, Usanee Aimsiranun**

1. INTRODUCTION

The sudden attack of the pandemic COVID-19 had severely affected jobs and workers' welfare all around the globe. Retail, wholesale trade, hospitality, recreation, manufacturing, and, of course, not forgetting the accommodation and food service industries, which are clearly non-essential services that require frequent face-to-face interaction. In relation to the above, migrant and informal workers are among those facing grave impacts, as they normally have lack of regular contracts and weak bargaining power. Migrant workers are more vulnerable from layoffs once prolonged lockdowns and production breaks drive companies out of business. Also, uncertainty looms about the timing of full recovery, even as lockdowns are lifted, with concerns about persistent weak demand in some economic sectors.¹

In the purview of a receiving country that receives millions of migrants, the migrant population became the central point of this pandemic attack. For instance, while active COVID-19 cases among citizens of Kuwait, United Arab Emirates (UAE) and Bahrain ran in the single digits in early May 2020, thousands of migrant workers were still ill and locked down. In Singapore, as of the end of May 2020, the vast majority of 30,000 infected persons were among migrant workers largely living in employer-sponsored dormitories. Existing reports and studies indicate that poor living and working conditions, including cramped workers' dormitories and unsanitary conditions, had led to the rapid transmission

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¹ ADB Briefs, COVID-19 Impact on International Migration, Remittances, and Recipient Households in Developing Asia, 2020, available at <<https://www.adb.org/sites/default/files/publication/622796/covid-19-impact-migration-remittances-asia.pdf>>.

of infection of COVID-19 among migrant workers.² In these situations, it is hardly that social distancing and good hygiene are practised among the workers. Prior to COVID-19 outbreak, many migrant workers were already facing poor access to healthcare, including lack of access to health insurance, administrative hurdles and language barriers.³

Freedom of movement of workers has been the foundational principle of the European Union and one of the cornerstones of the European internal market. Established since the creation of the European Economic Community by the Treaty of Rome in 1957, freedom of movement of workers has been strengthened throughout the development of the European Union by the EU treaties and secondary legislations, as well as and, actively, by the case-law of the European Court of Justice. EU citizens are entitled to look for a job in another EU country, work and reside for the purpose of work without requirement of a work permit and enjoy equal treatment with nationals regarding access to employment, working conditions and other social and tax advantages.⁴ Moreover, inside the Schengen area, which comprises 26 Member States,⁵ free movement of people is guaranteed enabling EU citizen to travel, work and live in an EU country without special formalities and without being subject to border controls. In 2019, an estimated 3.3 million EU citizens of working age (20-64) reside in an EU Member State other than that of their citizenship, mainly for the purpose of work. Romanian citizens of working age represent the largest national group among EU mobile citizens (about 2,280,000 persons) followed by Polish (1,079,000 persons), Italian (965,500 persons) and Portuguese (655,600 persons).⁶

The spread of COVID-19 or Corona virus to Europe from January 2020 has had a major impact on two of the fundamental principles of the EU concerning free movement of the people. On the one hand, the pandemic has impacted the Schengen area through

² World Bank Group, Potential Responses to the COVID-19 Outbreak in Support of Migrant Workers, 2020, available at < <http://documents1.worldbank.org/curated/en/428451587390154689/pdf/Potential-Responses-to-the-COVID-19-Outbreak-in-Support-of-Migrant-Workers-June-19-2020.pdf> >

³ WAHAB, "The outbreak of Covid-19 in Malaysia: Pushing migrant workers at the margin", Social Science and Humanity Open, 2020, p. 1.

⁴ Art. 3(2) of the Treaty on European Union (TEU); Arts. 4(2)(a), 20, 26 and 45-48 of the Treaty on the Functioning of the European Union (TFEU), Directive 2004/38/EC on the right of movement and residence, Regulation (EU) No 492/2011 on the right of EU workers to move within the EU, Regulation 2019/1149 establishing a European Labour Authority.

⁵ Schengen area covers most EU countries, except for Bulgaria, Croatia, Cyprus, Ireland and Romania. It also includes non-EU States, Iceland, Norway, Switzerland and Liechtenstein.

⁶ Eurostat, EU citizens living in another Member State - statistical overview, Data extracted in June 2020, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview&oldid=386051#Who_are_the_most_mobile_EU_citizens.3F>.

closure of EU external borders and reintroduction of border control at internal borders. On the other hand, national measures taken to counter the spread of the virus have had major implication for movement of workers across and within the EU, restricting one of the fundamental freedoms of the European internal market. Different categories of workers who move inside the EU are affected in different ways by national restrictive measures.

In addition to that, ASEAN, with a combined population of 649 million and GDP of US\$ 2.8 trillion, have been badly hit by COVID-19. Key sectors that have been affected by lockdown and other measures include travel, tourism, retail, supply chain, manufacturing sectors and other services. Employment and livelihood people of the region are also significantly affected. In ASEAN, the uncertainties brought about by the pandemic also triggered a swift outflow of capital, causing a dive in the markets and a rapid depreciation of the exchange rates across the region. Despite the disruption in the economic sector, the ADB has forecast the economic growth of Southeast Asia will be around 1%.⁷

In referring to a recent survey done by ILO, in countries of destination, currently employed respondents said they faced employment challenges or abuses related to COVID-19. Among destination respondents who are no longer employed, the number of reported problems increased as expected, as did the number of respondents who encountered employment difficulties and abuses related to COVID-19.

Foreign workers have been left in the blind spot of policymakers in many countries during the COVID-19 pandemic. For example, Thailand, home to more than three million foreign workers, has been criticised for the government's lack of inclusiveness in its measures to alleviate the impact of the pandemic on the workers, leading many of them into situations of extreme precarity.⁸

This paper aims to study the impact of the coronavirus pandemic (COVID-19) to the migrant workers in regional integration focusing on EU and ASEAN. As both regional integrations are different in nature, i.e., EU is a supranational power, and ASEAN is more to an economic integration, both of the integrations deals with Migrant workers. This paper will look at both of the integration practices, challenges, policies and measures as well as framework adopted throughout the COVID-19 attack and will at the end suggest some policy measures.

⁷ Asian Development Bank, *The Economic Impact of the COVID-19 Outbreak on Developing Asia*, 2020.

⁸ THENG THENG, NOOR and ROMADAN KHALIDI, "Covid-19: We Must Protect Foreign Workers", Khazanah Research Institute, 2020, available at: <http://www.krinstitute.org/assets/contentMS/img/template/editor/20200607_Discussion%20Paper_Covid-19_We%20Must%20Protect%20Foreign%20Workers_Rev.pdf>.

2. MIGRANT WORKERS IN PANDEMIC ATTACK, CURRENT SITUATION AND CHALLENGES FACED

Migrant workers frequently live in precarious conditions, often in crowded urban environments or slums, that do not enable them to comply with recommendations about social distancing. This is true of poor households throughout the world whose living conditions often do not permit compliance.⁹

However, even migrant workers who are provided with housing by their employers as is common practice are unlikely to be able to follow these guidelines. To better understand the challenge of complying with social distancing recommendations in developing countries, Brown and van de Walle propose six conditions that indicate whether it is possible to follow the WHO's recommendations for household protection from COVID-19.¹⁰ These conditions are: 1) access to internet, a phone, TV, or radio; 2) no more than two people per sleeping room; 3) access to a toilet that is not shared with another household; 4) the dwelling can be adequately closed (e.g., there are walls and a ceiling); 5) access to piped water in the dwelling or yard; and 6) the household has a place for handwashing with soap. The conditions of sleeping with no more than two people per room and access to a toilet that is not shared are unlikely to be met by dormitories for migrants.¹¹

Major migration destinations have closed their borders to international travellers. At the same time, international and domestic travel options have dwindled. This has left migrants in a variety of challenging situations. Migrants who work in or were planning to work in another location cannot access their job, cannot travel home even if they have lost their job (as is occurring with migrants from Cambodia, Lao PDR, and Myanmar in Thailand), or are stuck in transit. Due to the closure of borders and also fear of contracting the COVID-19 virus, there are significant labour shortages in some sectors.¹² Migrants account for a large share of the workforce in the sectors that are most likely to be affected by the severe job loss resulting from the crisis. The UN estimates that nearly 30 percent of the workforce in highly affected sectors in

⁹ BROWN ET AL, "Can the World's Poor Protect Themselves from the New Coronavirus", Working Paper 27200, National Bureau of Economic Research, 2020, Cambridge, MA.

¹⁰ *Ibid.*

¹¹ World Bank Group., Potential Responses to the COVID-19 Outbreak in Support of Migrant Workers, 2020, available at: <<http://documents1.worldbank.org/curated/en/428451587390154689/pdf/Potential-Responses-to-the-COVID-19-Outbreak-in-Support-of-Migrant-Workers-June-19-2020.pdf>>.

¹² *Ibid.*

OECD countries is foreign-born.¹³

There are certain important factors that need to be taken into consideration if the situation is persistent. A continued depressed economic condition could mean lower demand for migrant workers and less support for permissive migration policies. Prolonged travel restrictions may induce additional technological progress in sectors like agriculture where shortages do arise, also lowering demand for migrant workers.¹⁴ On the other hand, technological progress is unlikely to be able to completely automate away the need for migrant workers, and a sustained recovery is likely to rely on this labour to fill shortages that arise as economies recover. Negative attitudes have already been expressed towards internal migrants in some settings, which could have implications for movements within countries in the future.¹⁵ Greater focus may also need to be placed on the often-dense working and living conditions of migrants.¹⁶

Although every party concerned including but not limited to national governments as well as migrants themselves are being proactive as they possibly could, there are certain areas which contributed to negative impressions. As there are many types of migrants, including temporary, informal, permanent, internal, and returning migrants, there are some unique challenges that specific types of migrants actually face. Each type of migrant faces different challenges on their own. Examples of challenges faced by migrants according to migration status will be discussed below. It is a well-known fact that an immigration status is normally linked with maintaining a job with the same employer. Many of the workers which fall under this category are low skilled and remit large shares of their income. It is good enough if these workers receive social protection, nevertheless, if any, social protection does not cover unemployment assistance. Job loss as a result of the COVID-19 outbreak means loss of income for consumption, to remit home, and to repay the often-large loans taken out to finance migration. Job loss may even result in loss of housing, as accommodations are often provided by employers.

Temporary international migrants, the majority of whom are from Gulf Cooperation Council (GCC) countries and Malaysia, benefited from bilateral migration agreements with a number of countries in South and Southeast Asia, including Korea's Employment Permit System and the United States, Australia, and

¹³ UN, "Shared Responsibility, Global Solidarity: Responding to the Socioeconomic Impacts of COVID-19." UN, Washington D.C., 2020.

¹⁴ CLEMENS, LEWIS, and POSTEL, "Immigration Restrictions as Active Labor Market Policy: Evidence from the Mexican Bracero Exclusion." *American Economic Review*, 2018, p. 68 ff.

¹⁵ IOM, "Migrants and the COVID-19 Pandemic: An Initial Analysis", 2020.

¹⁶ *Ibid.*

New Zealand's guest and seasonal worker programmes. Job loss for this group of migrants results in economic hardship, the cessation of remittances to the migrant's family, the inability to repay debt accumulated to finance migration, the cessation of employer-provided housing, and the loss of legal status. Additionally, they lack social protection and are at a significant risk of illness exposure and transmission because of their living and working situations. Due to a lack of resources and travel restrictions, these workers may get stranded and may not receive final pay if they lose their employment.

Secondly, informal international migrants come from countries with long, porous borders (India, Malaysia, Russia, South Africa, Thailand, and the United States), as well as high-income countries where migrants may overstay their visas (Europe, United States). This type of migrants encountered many of the same difficulties as temporary foreign migrants, but they often lacked contracts and any form of social security.

Next is the Long-terms international migrants. These migrants come from nations with a high standard of living (Australia, Canada, European Union, United Kingdom, United States). The challenges faced by them includes job loss that may threaten their legal position and may preclude them from receiving certain sorts of social aid. Additionally, job losses may result in a decrease in remittances.

Internal migrants are another category of migrants that encountered difficulties. These migrants originate from a variety of developing countries. They suffer the same difficulties as temporary foreign migrants, but without the risk of losing their legal status. They may also have difficulty getting benefits if they are location- or jurisdiction-based. Additionally, return migrants, the majority of whom are from developing countries, confront problems, such as health concerns associated with migration in large groups and for host populations. When they return home, they face a dearth of economic possibilities, limited access to social safety nets, enormous debts incurred to cover relocation fees, and families that have ceased receiving remittances.

Estimates suggest that up to 20 percent of all migrants could be irregular.¹⁷ Regional migration hubs like India, Malaysia, Russia, South Africa, Thailand, Russia host more than 25 million migrants and are the origin of more than 5 percent of global remittances.¹⁸ Long, porous borders with lower income neighbours mean that many

¹⁷ UNDESA, *The Report on the World Social Situation*, 2018. New York: UNDESA.

¹⁸ UNDESA, *The Report on the World Social Situation* 2019. New York: UNDESA; World Bank Group, *Potential Responses to the COVID-19 Outbreak in Support of Migrant Workers*, 2020,

of these migrants move without the necessary legal documents. Overstay is more common in high-income countries like the United States. Most informal migrants are employed in jobs without social protection benefits, contracts, and workplace protections, or are ineligible for these benefits because they lack migration documents. Due to this, it is obviously very easy for many employers to terminate these migrants during economic downturns and they become more vulnerable once they have lost their jobs.

2.1. Mobility of critical workers as exception in EU

Europe was officially affected by the coronavirus in January 2020. In response to the COVID-19 pandemic, EU Member States had, from March 2020, unilaterally and in an uncoordinated manner, adopted measures including travel restriction, suspension of passenger transportations (air, rail, and bus) as well as travel ban (ban on entry and exit of persons to and from national territories and ban passage of cross border workers).¹⁹ By mid-July 2020, 17 Schengen States had reintroduced internal border controls on their intra-Schengen borders. It is an unprecedented generalized intra-Schengen reintroduction of border control while previously border closure was exceptionally decided case by case such as in 2015 as a result of mass attack in France and mass arrival of migrants.²⁰

On 16 March 2020, the European Commission adopted the Communication on Temporary restriction on non-essential travel to the EU. The restriction first affected Schengen external borders since non-essential travel from third countries into the EU area was initially banned for 30 days, and further extended to June 2020. EU citizens and their family are reserved the right to be repatriated, allowed entry into the EU area and facilitated transit. Third country nationals holding a residence permits and their dependents are also recognised the right to return to their Member States of nationality or residence.

Concerning internal borders, the Schengen Borders Code, in its Articles 25 and 28, allows Member States to temporarily reintroduce border control at the

available at: < <http://documents1.worldbank.org/curated/en/428451587390154689/pdf/Potential-Responses-to-the-COVID-19-Outbreak-in-Support-of-Migrant-Workers-June-19-2020.pdf> >.

¹⁹ For detail of measures adopted by Member States, see European Commission, "Coronavirus response", available at: <https://ec.europa.eu/transport/coronavirus-response_en>, European Union, "Re-open EU", 27 July 2021, available at: <<https://reopen.europa.eu/en>>.

²⁰ MAURICE, BESNIER and LAZAROVICI, "Restoring free movement in the Union", *European Issue*, June 2020, p. 562 ff, available at: <<https://www.robert-schuman.eu/en/european-issues/0562-restoring-free-movement-in-the-union>>.

internal borders in the event of a serious threat to public policy or internal security,²¹ The Schengen Borders Code does not expressly foresee the event of a serious threat to public health as a justifying reason for reintroduction of the control at internal borders, such interpretation has nonetheless been accepted by the Commission due to the severity of the COVID-19 pandemic.

In its Guideline of 16 March 2020, the European Commission stresses that it has limited competence to issue opinion concerning the necessity and the proportionality of the reintroduction of border control but is not entitled to veto Member States' decision on the matter. Nonetheless, the Commission emphasizes that the reintroduction of border control at the internal borders should be measure of last resort and its scope and duration should be limited to what is necessary to respond to such threat.

Concerning restrictive measures regarding workers mobility intra-EU, article 45(3) of the Treaty on the Functioning of the EU (TFEU) recognizes the possibility of the EU Members States to restrict freedom of movement of workers intra-EU on public health grounds (together with public policy and public security).²² Nonetheless, EU legislation as well as the case law of the European Court of Justice subject such restrictions of freedom of movement of workers to the conditions that they are applied indiscriminately to all EU citizens independent of their nationality and proportionately.

The main challenge regarding the assessment of proportionality, whether a restrictive measure is proportionate to the level of protection of public health, lies in fact that there remains a high degree of scientific uncertainty concerning COVID-19.²³ In this context, it is difficult to evaluate whether the travel ban, and travel restriction satisfies the proportionality test *stricto sensu* because even if they can contribute to minimize human contact and transmission, less restrictive measure such as mass screening, testing at all border control points, contact tracing, might allow to protect public health as effectively.²⁴ The Commission has not initiated a lawsuit against a Member State and the European Court of Justice has not had yet the occasion to rule regarding such question. The effort from the EU institutions especially from the EU

²¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.

²² The Treaty also allows Member States to adopt special regime for foreign nationals on grounds of public health concerning freedom of establishment (Art. 52(1) TFEU) and freedom to provide services (Art. 62 TFEU).

²³ RAMJI-NOGALES and LANG, "Freedom of movement, migration, and borders", *Journal of Human Rights*, 2020, p. 593 ff.

²⁴ *Ibid.*

Commission reside in the effort of coordination of Member States' actions through various soft law instruments.²⁵

Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic represents an EU effort to coordinate and set up common criteria and thresholds concerning the introduction of restriction to free movement of persons. The European Centre for Disease Prevention and Control publishes a map of EU Member States indicating the pandemic situation.²⁶ Member States have the obligation to admit their own nationals and Union citizens and their family members who are resident in their territory and should not restrict free movement of persons travelling to or from "green" Member States. For other areas, restriction should respect the principle of proportionality: proportionate action to different epidemiological situations, limited in scope and time (should be lifted as soon as the epidemiological situation allows). Restriction should conform to principle of non-discrimination: no different treatment on the basis of nationality, same treatment of

²⁵ Commission Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 86I, 16.3.2020, p. 1), Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ C 102I, 30.3.2020, p. 12), 'Joint European Roadmap towards lifting COVID-19 containment measures' of the President of the European Commission and the President of the European Council, Commission Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures (OJ C 156, 8.5.2020, p. 1), Commission Communication towards a phased an coordinated approach for restoring freedom of movement and lifting internal border controls (OJ C 169, 15.5.2020, p. 30), Commission Communication on the third assessment of the application of the temporary restriction on non-essential travel to the EU COM(2020) 399 final, Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak (OJ C 235I, 17.7.2020, p. 1), Commission Communication on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 96I, 24.3.2020, p. 1), Commission Guidelines on Facilitating Air Cargo Operations during COVID-19 outbreak (OJ C 100I, 27.3.2020, p. 1), and Commission Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships (OJ C 119, 14.4.2020, p. 1).

²⁶ Point 10 of the Recommendation 2020/1475:

- (a) green, if the 14-day cumulative COVID-19 case notification rate is less than 25 and the test positivity rate of tests for COVID-19 infection is less than 4%;
- (b) orange, if the 14-day cumulative COVID-19 case notification rate is less than 50 but the test positivity rate of tests for COVID-19 infection is 4% or more, or, if the 14-day cumulative COVID-19 case notification rate ranges from 25 to 150 but the test positivity rate of tests for COVID-19 infection is less than 4%;
- (c) red, if the 14-day cumulative COVID-19 case notification rate is 50 or more and the test positivity rate of tests for COVID-19 infection is 4% or more, or if the 14-day cumulative COVID-19 case notification rate is more than 150 per 100 000 population;
- (d) grey, if not sufficient information is available to assess the criteria in points (a) to (c) or if the testing rate is 300 or less COVID-19 tests for infection per 100 000 population.

persons arriving from an area classified as ‘red’, ‘orange’ or ‘grey’ with returning nationals of the Member States concerned. On 2 February 2021, the Council has adopted a recommendation amending the recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction to set up epidemiological criteria to determine the countries for which the restriction on non-essential travel should be lifted.²⁷

The mobility of different categories of workers in the EU has been affected by national restrictive measures to counter the spread of coronavirus. It is estimated that there are about 1.5 million cross-border workers (persons who exercise their right of free movement to work in one EU Member State while remaining resident in another in the EU).²⁸ During the pandemic, cross-border workers faced many difficulties. The measures at the border control evolved rapidly. They faced delay for daily check in crossing the borders due to multiplication of border control as well as limited border crossing points. Moreover, for some countries, cross-border workers were required to provide negative Covid-test on a daily basis, rendering the crossing almost impossible. Some employers provided the accommodation for the cross-border workers in the receiving countries but this was not the case for everyone and some workers were afraid to be separate from their family in their country of origin.²⁹

In the context where the movement of persons is in general restricted, the EU institutions try to manage movement of certain categories of “critical and essential” workers to guarantee the availability of goods and services essential to prevent disruption of human health and of internal market. On 30 March 2020, the Commission issued guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak,³⁰

²⁷ Council Recommendation amending Council Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction.

²⁸ Frontier workers work in one EU country but reside in a neighbouring country of which they are nationals and return there daily or at least once a week. Seasonal workers travel to a country to temporarily live and carry out cyclical work (for example: tourism, agriculture).

EU Parliament, COVID-19: No free movement of critical workers without adequate protection, 25 May 2020, available at: <<https://www.europarl.europa.eu/news/en/press-room/20200520IPR79515/covid-19-no-free-movement-of-critical-workers-without-adequate-protection>, accessed on 12 February 2021>.

²⁹ European Union, The effects of COVID-19 induced border closures on cross-border regions: An empirical report covering the period March to June 2020, 2021, Luxembourg: Publications Office of the European Union.

³⁰ EU Commission, Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (2020/C 102 I/03), 30 March 2020.

supplemented by further guidelines on the free movement of health professionals³¹ and of seasonal workers.³²

Member States are asked to authorize and facilitate the travel and transit of workers who work in health and food sectors as well as other essential services such as children or elder care. The movement of transport workers should be enabled and facilitated as essential factor to guarantee adequate movement of goods and essential staff to protect public health. Member States are urged to establish specific burden-free and fast procedures for border crossings for frontier and posted workers exercising critical functions.

While recognizing the possibility of Member States to require persons travelling from higher-risk area to undergo quarantine/self-isolation; and/or undergo a test for COVID-19 infection after arrival, the Recommendation (EU) 2020/1475 calls for exemption of quarantine for certain categories of workers and self-employed persons exercising critical occupation/essential function, frontier and posted workers as well as seasonal workers, transport workers.³³

2.2. *Migrant Workers in ASEAN*

In 2019 there were an estimated 10 million international migrants in ASEAN, of whom nearly 50 per cent were women.³⁴ The COVID-19 pandemic is disrupting

³¹ EU Commission, Guidance on free movement of health professionals and minimum harmonisation of training in relation to COVID-19 emergency measures – recommendations regarding Directive 2005/36/EC, C(2020) 3072, 7 May 2020.

³² EU Commission, Guidelines on Seasonal Workers in the EU in the Context of the Covid-19 Outbreak, C(2020) 4813 final, 16 July 2020.

³³ Point 19 Travellers with an essential function or need should not be required to undergo quarantine while exercising this essential function, in particular: (a) Workers or self-employed persons exercising critical occupations including health care workers, frontier and posted workers as well as seasonal workers as referred to in the Guidelines concerning the exercise of the free movement of workers during the COVID-19 outbreak(5); (b) transport workers or transport service providers, including drivers of freight vehicles carrying goods for use in the territory as well as those merely transiting; (c) patients travelling for imperative medical reasons; (d) pupils, students and trainees who travel abroad on a daily basis; (e) persons travelling for imperative family or business reasons; (f) diplomats, staff of international organisations and people invited by international organisations whose physical presence is required for the well-functioning of these organisations, military personnel and police officers, and humanitarian aid workers and civil protection personnel in the exercise of their functions; (g) passengers in transit; (h) seafarers; (i) journalists, when performing their duties.

³⁴ Total migrant stock in ASEAN was 10.1 million in 2019, of which 47 percent women. UN DESA: International migrant stock 2019, 2019, available at <<https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates19.asp>>.

labour migration throughout the region and globally.³⁵ Women and men migrant workers in the region are striving to protect their livelihoods and their health through the crisis, yet many are disproportionately affected by COVID-19 and its economic and health impacts.

There has been numerous of immigration raids leading migrants in particularly referring to the undocumented ones to hide. Consequently, undocumented migrant workers mainly in critical sectors such as construction, manufacturing and plantation are not only unable to work for fear of being arrested, but they are also unable or unwilling to get COVID-19-tested should they have a symptom or significant travel history.³⁶

There have been issues concerning access to food among the migrant workers. The situation of lack of food suffered by migrant workers are pictured in three scenarios. First, for migrant who live in remote areas, the long journey to the city centre to get supplies and limited hours of business operations for grocery shops had limited their access to food supplies. While some migrant workers may be able to purchase food supplies near their workplace and accommodations, there was an increasing report indicating excessive prices were imposed by traders and local businesses against migrant workers.³⁷ Secondly, undocumented migrants especially are afraid to go outside though there are humanitarian assistance including basic food and daily supplies provided by NGOs to these particular undocumented migrant workers, it was simply inadequate.³⁸ Thirdly, SUHAKAM reported that some aid, including food assistance, were only channelled through community leaders or head of villagers—and that foods were only distributed to local people due to shortage of supplies.³⁹

Apart from that, migrants who have been, or still are, working during the pandemic described coercion, employers withholding passports, being unable to refuse

³⁵ ILO, Policy brief: Protecting migrant workers during the COVID-19 pandemic recommendations for policy-makers and constituents, 2020, available at <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-migrant/documents/publication/wcms_743268.pdf>.

³⁶ ALHADJRI, “MEF insists gov't must bear costs for foreign workers' Covid-19 tests”, in Malaysiakini, 5 May 2020, available at <<https://www.malaysiakini.com/news/524157>>.

³⁷ Human Rights Commission of Malaysia (SUHAKAM), Dialogue with vulnerable communities: An assessment of needs and next steps amid COVID-19 pandemic, 2020, available at: <<https://www.suhakam.org.my/dialogue-with-vulnerable-communities-an-assessment-of-needs-and-next-steps-amid-COVID-19-pandemic/>>.

³⁸ ILO, “COVID-19: Impact on migrant workers and country response in Malaysia International Labour Organization (ILO)” 2020, , available at: <http://www.ilo.org/wcmsp5/groups/public/-asia/-ro-bangkok/documents/briefingnote/wcms_741512.pdf>.

³⁹ Human Rights Commission of Malaysia (SUHAKAM), *cit. supra note 37*.

to work, and threats of retrenchment or violence.⁴⁰ The combination of the decline in economic activity, travel restrictions, and lack of social protection in many migrant hubs have already induced many migrants to seek to return home. As of late April 2020, more than 60,000 migrants had returned to Myanmar via official channels while total returns were likely more than 150,000 according to the Myanmar State Counselor.⁴¹ As well as from Thailand with similar numbers returning to Cambodia and Lao PDR. These movements create health risks for migrants moving in large groups and for populations back at home because of lack of screening at formal and informal border crossing and insufficient health care. When back home, returnees will continue to face challenges including lack of employment opportunities, limited access to social safety nets, large debts accumulated to finance migration costs that would have been paid with higher incomes earned at the destination, families that are no longer receiving remittances, and even discrimination by community members fearful that migrants may transmit COVID-19.⁴²

The global and regional position of labour migration has been uncertain. Migrant workers faced numerous of challenges especially in this unwanted situation, in which migrant workers status became vulnerable. There has been raids and detention of migrant workers and also lack of access to basic needs as well as job losses. Therefore, it is important to analyse the government's policy and response in this particular matter.

3. REGIONAL MIGRATION POLICIES IN TIMES OF PANDEMIC COVID-19

3.1 *Migration policies in the EU*

The COVID-19 crisis has highlighted the essential role of EU mobile workers and third countries migrant workers, especially low skilled workers, in keeping supply chains of goods and essential services running in the EU amidst periods of

⁴⁰ ILO, Policy brief: Protecting migrant workers during the COVID-19 pandemic recommendations for policy-makers and constituents, 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-migrant/documents/publication/wcms_743268.pdf>.

⁴¹ IOM, Covid Flash Report Update on 24 April 2020, 2020, available at: <<https://thailand.iom.int/sites/default/files/COVID19Response/24-04-2020%20IOM%20Flash%20Update%20on%20COVID-19%20for%20Migrant%20Workers%20in%20Thailand.pdf>>.

⁴² World Bank Group, Potential Responses to the COVID-19 Outbreak in Support of Migrant Workers, 2020, available at: <<http://documents1.worldbank.org/curated/en/428451587390154689/pdf/Potential-Responses-to-the-COVID-19-Outbreak-in-Support-of-Migrant-Workers-June-19-2020.pdf>>.

forced closure.⁴³ As previously discussed, the mobility of critical and essential workers has been encouraged as an exception to the general restriction of movement of persons. Nonetheless, the facilitated mobility for critical workers has not always been followed by sufficient protection, especially as far as seasonal workers, both EU nationals and Third-country nationals, are concerned.

As demonstrated by the situation of Romanian seasonal workers, EU mobile workers have faced many challenges during the crisis. Romanian citizens of working age (20-64) represent the largest group of mobile citizens who move to other EU Member States for the purpose of work (about 3 million).⁴⁴ With the spread of COVID-19 in the destination Member Countries, especially Italy, Spain, Germany, France, and the UK, almost 1.3 million Romanians lost the job and had to return to Romania. Despite the border closure, the Romanian authority had arranged the special corridors to allow its nationals to work as seasonal workers in agriculture and meat processing industry in other EU countries especially Germany and the Netherland.⁴⁵ However, the creation of special border corridor for seasonal workers did not come with sufficient protection for the workers from the national and the EU level.⁴⁶

As far as working conditions are concerned, EU seasonal workers are covered by Article 45 TFEU and Directive 2014/54⁴⁷ and must be treated equally with nationals of the host Member State regarding working conditions. Nonetheless, many incidents regarding precarious working conditions of seasonal migrant workers were reported such as wages below the legal minimum, exaggerated costs of meal and accommodation, lack of health insurance, poor and very crowded accommodation and transport.⁴⁸ The prohibition to discriminate EU mobile workers in comparison to national workers may find a certain limitation in the context of seasonal work

⁴³ FASANI and MAZZA, "Immigrant Key Workers: Their Contribution to Europe's COVID-19 Response", *IZA Policy Paper No. 155*, April 2020.

⁴⁴ Eurostat, EU Citizens Living in Another Member State - Statistical Overview. Eurostat, 2020, available at: <https://ec.europa.eu/eurostat/statisticsexplained/index.php/EU_citizens_living_in_another_Member_State_-_statistical_overview#Key_messages>; MANTU, "EU Citizenship, Free Movement, and Covid-19 in Romania", *Frontiers in Human Dynamics*, December 2020, p. 1 ff, available at: <<https://www.frontiersin.org/articles/10.3389/fhumd.2020.594987/full>, p.3>.

⁴⁵ DE LANGE, MANTU and MINDERHOUD, "Into the unknown: Covid-19 and the global mobility of migrant workers", *AJIL Unbound*, 2020, p. 332 ff.

⁴⁶ In April 2020, press revelation that almost 2000 Romanians were waiting in the airport parking lot for charter flights without any social distancing measures has raised an alarming question about the protection of migrant workers' health RAMJI-NOGALES and LANG, *cit. supra note 23*, p. 597

⁴⁷ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers.

⁴⁸ BEJAN, "COVID-19 and Disposable Migrant Workers", 16 April 2020, available at: <<https://verfassungsblog.de/covid-19-and-disposable-migrant-workers/>>.

since the whole sector (such as agricultural sector in Germany) is only occupied by non-nationals.⁴⁹

In principle, Directive 2014/36 (Seasonal Workers Directive)⁵⁰ grants equal treatment to third-country seasonal workers with regard to terms of employment and working conditions including occupational health and safety measures. The admission application of third-country seasonal workers has to include a valid work contract specifying the work conditions such as the place and the duration of work, the working hours, the remuneration and the amount of paid leave. The third-country seasonal workers should have a sickness insurance and adequate accommodation. Nonetheless the third-country workers appeared to be the least protected during the pandemic crisis since both host country and home country failed to provide adequate protection to them⁵¹ Seasonal workers in agricultural sector and food supply chain faced infection risk while working onsite instead of teleworking due to insufficient health and safety measures at their workplace.⁵² The limited possibility to return during the COVID-19 pandemic with the suspension of transportation restricted their choice and exacerbated the potential for abuse.⁵³

EU and third-country seasonal workers are in principle entitled to equal treatment with nationals of the host Member State regarding social security. Nonetheless, due to the temporary nature of the work, Directive 2014/36 allows the Member States to exclude third-country seasonal workers from family and unemployment benefits.⁵⁴ In addition, in certain Member State such as Germany, employers are exempted from paying contributions to social security for the period of 70 days (extended to 115 days during the pandemic) while most seasonal workers are on short term contracts (generally shorter than 70 days),⁵⁵ resulting in no coverage for seasonal workers.

In reaction to the resolution of 19 June 2020 of the EU Parliament addressing mobility, precarious working conditions, and a lack of safety measures for seasonal workers, the Commission has issued guidelines on seasonal workers in the EU in the

⁴⁹ RASNAČA, "Essential but unprotected: highly mobile workers in the EU during the Covid-19 pandemic", ETUI Policy Brief, 2020, p. 1 ff.

⁵⁰ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

⁵¹ RASNAČA, *cit. supra note 49*.

⁵² *Ibid.*, p.3

⁵³ *Ibid.*, p. 3

⁵⁴ EU commission, Guidelines on seasonal workers in the EU in the context of the covid-19 outbreak, C(2020) 4813 final, on 16 July 2020.

⁵⁵ BEJAN, *cit. supra note 48*.

context of the COVID-19 outbreak in July 2020. The guideline addresses both EU seasonal workers and third-country seasonal workers in the EU. It lays down guidance for national authorities, labour inspectorates and social partners on the rights of seasonal workers in the context of the COVID-19 pandemic. The Commission calls on Member States to monitor and enforce the EU rules on occupational safety and health, to ensure decent working and living conditions as well as information to workers.⁵⁶ However, these regulations have not yet shown to be sufficient in ensuring that equal treatment and the rights of migrant workers are fully respected in practice. The assessment of the transposition of the Directive 2014/36 should be undertaken to assess the protection of seasonal workers and the adoption of the legally binding measures to ensure the respect of decent working and living conditions for seasonal workers are welcomed.

3.2 *Migration Policies in ASEAN*

ASEAN, as a regional integration deals with migration. Each ASEAN Member States (AMS) acts as either sending countries, or receiving countries, or both. Undeniably, ASEAN have their own legal instrument in handling migrant workers, notably; the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers and ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers. Nevertheless, in focusing on the era of COVID-19 pandemic, the Ministers of AMS have reaffirmed their commitments to promote cooperation within the bloc and its partners after the 53rd ASEAN Foreign Ministers' Meeting in September 2020. Foreign ministers from the 10 Member States of the Association of South-East Asian Nations (ASEAN) have reaffirmed their commitments to promote cooperation both within the bloc and with its partners in response to COVID-19, according to a joint communique by the bloc. The document was published after the 53rd ASEAN Foreign Ministers' Meeting. The importance of whole-of-ASEAN approach was highlighted, and it will make possible through a holistic, comprehensive, inclusive and practical ASEAN Comprehensive Recovery Framework.⁵⁷

⁵⁶ EU commission, Guidelines on seasonal workers in the EU in the context of the covid-19 outbreak, C(2020) 4813 final, on 16 July 2020.

⁵⁷ ASEAN Foreign Ministers Pledge To Boost Cooperation In Covid-19 Response, The Star, 11 September 2020, available at: < <https://www.thestar.com.my/aseanplus/aseanplus-news/2020/09/11/asean-foreign-ministers-pledge-to-boost-cooperation-in-covid-19-response> >.

There are five strategies that comprise its own objectives and target and will allow cross sectoral and participation and contribution from the broader stakeholders, such as the private sector, dialogue partners and other external partners, including in terms of the provision of resource or technical support for implementation. Notable points on migration were mentioned in Broad Strategy 2: Strengthening Human Security, in reference to (i) subsection 2a on further strengthening and broadening of social protection and social welfare, especially for vulnerable groups which mentioned on the social security of migrant workers, (ii) subsection 2b Preparing labour policies for the new normal through social dialogues (including cross-border labour movement, work from home and other alternative work arrangements, occupational health and safety). This specifically discusses on labour migration policies that could effectively protect migrant workers in time of pandemic or other crises need to be pursued further. The implementation of the action plan for the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers is seen as an important step and adjustment to ‘new normal’ working conditions is essential in protecting the well-being of workers and maintaining productivity. ASEAN had made relevant steps in strengthening cooperation and coordination, further it is just a matter of implementation.

Apart from that, the 13th ASEAN Forum on Migrant Labour (AFML) held in Vietnam on November 2020 comes with the theme of “Supporting Migrant Workers during the Pandemic for a Cohesive and Responsive ASEAN Community”. Under this theme two subthemes were defined: Sub-theme 1. Impact of COVID-19 on Migrant Workers and Responses in ASEAN, and Sub-theme 2. Cohesive and Responsive Labour Migration Policy for Future Preparedness in ASEAN. Under the first sub-theme, notable points that can be pointed out are as follows:⁵⁸ i) migrant workers access to healthcare; ii) improve safety and health standards at the workplace and employer-provided housing for migrant workers; iii) decent wages of migrant workers and protect their wages in time of pandemic through effective complaint mechanisms and support services; iv) fees related to recruitment and redeployment, including additional costs for COVID-19 testing, quarantine and health insurance, should not be charged to migrant workers in accordance with the ILO General Principles and Operational Guidelines for Fair Recruitment; v) provide access of migrant workers, especially domestic migrant workers and laid-off migrant workers, to mental health support and services.

⁵⁸ ASEAN, The 13th ASEAN Forum on Migrant Labour (AFML) “Supporting Migrant Workers during the Pandemic for a Cohesive and Responsive ASEAN Community, 2020, available at: < https://asean.org/storage/2012/05/13th-AFML-Recommendations_FINAL.pdf >.

As for sub-theme 2, it is important to note on: i) information of COVID-19 related migration, labour, health and safety policies should be accessible to migrant workers in languages understood by them; ii) strengthen migrant workers' return and reintegration programmes with adequate resources; iii) integrate rights-based and gender responsive protection of migrant workers and their families into national and regional pandemic and emergency preparedness plans; iv) maximize digital technology in the online processing of migrant workers' immigration and employment documents, and ensure its accessibility to migrant workers to reduce physical contacts in time of pandemic; v) strengthen the employability of migrant workers who lost their jobs due to the pandemic through improving their access to available re-skilling and up-skilling programmes; vi) support the recovery of labour migration flows in the new normal by strengthening and sharing available disaggregated data; vii) increase cross-sectoral referral mechanisms and collaboration to strengthen national policy framework for protection of migrant workers in time of pandemic.

Looking at the initiative of ASEAN, it is fair to say that ASEAN is putting efforts and measures for migrant workers throughout the pandemic attack. Though at the beginning, challenges are visible, perhaps it is due to the fact that the situation faced is unprecedented and Member States have limited knowledge and guidelines to face it.

Nevertheless, throughout the period, we can see how ASEAN Member States are making progress for protection focusing on migrant workers in COVID-19 era. Though, it is not yet fair to the application of all the relevant frameworks, but it is at least in the consideration of the Member States. It is also important to note on the development gap of all AMS and putting into consideration of all the different legal practice. Subregional initiatives are particularly effective in addressing (i) development gaps, (ii) connectivity, and (iii) international cooperation within the context of ASEAN integration. How to close development gaps through increased connectivity is a major theme for ASEAN integration, one that the entire region and its subregions must pursue. Numerous sustainability challenges are subregional in scope, rather than national. The subregional method is an effective tool for examining the inclusivity and sustainability of ASEAN as a whole. A critical component of the method is the coordination of policies across national borders and the participation of international development partners.⁵⁹

⁵⁹ KIMURA, 'Main Report', in KIMURA, (ed.), *Subregional Development Strategy in ASEAN after COVID-19: Inclusiveness and Sustainability in the Mekong Subregion (Mekong 2030)*, Jakarta: ERIA, pp.1-21.

Due to the fact that AMS have distinct legal traditions, laws, and regulations, it is exceedingly difficult to address the COVID-19 situation as a region. This is the main development gap. As ASEAN's stated objective has always been to close/narrow development disparities between Member States, as each Member State has a unique level of development, including but not limited to the economy aspect. Within a geographical distance, there is a core and a periphery. The core is a concentrated area of economic activity and/or people, whereas the periphery is a less concentrated area. The core and periphery may symbolise mature and emerging economies, a newly developed country and a laggard one, or an urban or suburban area and a rural area, respectively.⁶⁰ Informal and migrant workers, particularly women and youth, have disproportionately borne the brunt of reduced employment possibilities and a lack of safety nets, resulting in greater poverty and a stalling of progress toward the UN Sustainable Development Goals by 2030.⁶¹ Thus, it is critical for ASEAN to establish a regional policy on this issue, rather than a national one. During COVID-19, initiatives must be intensified to ensure that no Member State is left behind.

This will make the application of the frameworks a challenge. Above all, the initiatives by AMS are a relief that there are at least attention and protections for migrant workers during COVID-19.

4. RECOMMENDATIONS AND LESSONS THAT CAN BE LEARNED FROM EU AND ASEAN

COVID-19 pandemic represents a significant test to regional integration. This section aims to provide comparison between the EU and ASEAN approaches in dealing with labour migration during the pandemic.

Firstly, in term of regional migration policy, COVID-19 crisis has become an unprecedented challenge to the principle of free movement of workers and equal treatment as foundational principle of the EU. During the crisis, restriction of freedom of movement of people has become principle, while relaxation of control has become an exception for the benefit of certain groups of people, mainly mobile, cross-border workers in essential sectors, seasonal workers – imperative to maintain the normal functioning of the internal market. In the case of ASEAN, management of labour migration remains principally under the sovereignty of the Member States.

⁶⁰ Ibid

⁶¹ RHEE and SVIRYDZENKA, "Policy Advice to Asia in the Covid-19 Era. International Monetary Fund. Asia and Pacific Department", 2020, International Monetary Fund.

The border control falls both in normal time and in time of pandemic under the auspice of the ASEAN Member States. COVID-19 pandemic has emphasized nonetheless the greater need in Member States cooperation on border management.

In the European Union, limitation of EU actions on management of the COVID-19 pandemic is structural. In accordance with article 168 TFEU, the EU only has complementary competence in the field of public health, and its action should be directed towards improvement of public health and prevention of illness and disease. The reintroduction of border control or restriction of movement of persons and workers to protect public health remain the prerogative of the Member States. It is thus impossible for the EU to impose unified reaction to the pandemic in the Member States. EU's effort focuses mainly on communication and coordination through various soft law instrument instruments. It is imperative to coordinate and align national regimes through the establishment of common criteria of measures to adopt to counter the spread of pandemic especially when such measures have significant impact on freedom of movement and normal functioning of the internal market. While the EU' Schengen area is built on the idea of abolition of internal borders to create the area of freedom, security and justice, the coronavirus crisis has the concept of borders as a fortress (re)emerged to reassure the population. The restriction of the freedom of movement of persons and workers touches directly on the principles which underlie European integration. Main challenge consists of limiting the restrictive measures to what is strictly necessary and sufficiently efficient to counter the threat to public health. Challenge resides in distinguishing necessary measures according to scientific proven data and measures to reassure the national public opinion and populism sentiment. In ASEAN, the Joint Statement of ASEAN Labour Ministers in Response to the Impact of Coronavirus Disease 2019 (COVID-19) on labour and employment have so much emphasised in providing all workers including migrant workers who are being laid off or furloughed by employers to be compensated by the employers and are eligible to receive social assistance or unemployment benefits as in accordance with the laws, regulations and policies of the AMS. Here, it is also stated on the implementation of ASEAN Consensus on the Protection and Promotion of the Rights of Migrants workers should be uphold

Secondly, concerning protection of migrant workers' rights in the time of crisis, both regions protection measures have been put into test. In the European Union, while highlighting the valuable contribution of mobile workers to the good functioning of internal market, the coronavirus crisis has revealed the vulnerability

of certain category of workers, despite their EU citizenship, vulnerability exacerbated by the economic and health crisis. Certain category of workers occupying critical functions, including seasonal workers, are entitled to facilitated movement. Nonetheless, they are not covered by sufficient protection in accordance with the Treaties and secondary legislations. It is imperative to strengthen the implementation of protective measures of mobile workers rights in practice. In this regard, it is recommended to ensure the rapid functioning of the European Labour Authority, established in 2019 to support Member States and the Commission regarding the effective enforcement of EU legislations regarding labour mobility and social security coordination. Another important study to be conducted is to assess whether existing EU laws are adequate to ensure sufficient protection to migrant workers who contribute at the frontline to the normal functioning of the internal market amidst the crisis. In ASEAN, a policy shift is needed for ASEAN Member States to ensure that migrant workers are managed well during the challenging period as the protection and management of migrant workers are of top priority. International and regional instruments exist to provide the legal foundation for a migration management framework. The fact that ASEAN is not a supranational entity comparable to the European Union complicates implementation for member nations. Nonetheless, it is likewise imperative for all AMS to collaborate and contribute political will to guarantee that the protection, rights, and management of migrant workers in ASEAN remain a priority during this trying time.

Therefore, some ad hoc strategy is very crucial. Thus, below are some recommendations on how to manage migrant workers for both regions.

4.1. Strategy 1: Step up job protection for all foreign workers

As the economy all over the world is very challenging, chances for migrant workers to be terminated from their employment is very high although the reliance of migrant workers for many companies are also high. Due to that, it is cost wasting if the migrant workers especially the newly recruited ones being laid off. Therefore, it is crucial to have employment retention policies to keep all workers, including migrant workers employed and employment promotion policies to help displaced migrant workers get back to work. there has been a proposal to lay off foreign workers and employ native workers to fill the gap as a way to resolve unemployment issue, at the same time encourage automation to wean off reliance on foreign workers. This is unlikely to be a viable option, simply because native and foreign workers generally do not occupy the same occupational space to begin with and the

transition to a capital-intensive business model, though laudable, is not a short-term affair.

4.2. Strategy 2: Strengthen regional cooperation and coordination

Countries in the region are reliant on each other's policies and goodwill to care for their people in the host countries. For example, when Malaysia first announced the implementation of Movement Control Order in March 2020, the livelihood of 300,000 Malaysian workers who commuted daily to work in Singapore were immediately affected. In an urgent response to the situation, the Singaporean government provided an allowance of SGD 50 per worker per night for 14 nights to companies to house Malaysian workers who chose to remain in Singapore. This was a crucial step taken by the Singaporean government to preserve the livelihood and viability of the workers and businesses, respectively.

4.2.1. Strategy 2.1: For governments and stakeholders in countries of origin

Develop, or expand existing, mechanisms to support women and men migrant workers who have lost their jobs due to the COVID-19 crisis, including assistance in finding new employment, skills recognition or reskilling/upskilling, livelihood support, and reintegration programs. It is also important to provide support for the citizens abroad who are stranded and facing all types of difficulties including loss of jobs and violations of multiple rights. Most importantly, social protection and stimulus measures should be extended to counter economic impacts of COVID-19 to cover all migrant workers, regardless their gender.

4.2.2. Strategy 2.2 For governments and stakeholders in countries of destination

To start with a management mechanism here is for the State to support migrants to find new jobs, if being laid off. This may include, changing of employment and visa extensions to a considerable period. Besides that, all migrant workers, including the irregulars should be given access to legal remedies and compensation for any mistreatment, including but not limited to unfair treatment, force labour and violence. On top of that, it is fair to provide humanitarian assistance including food, shelter and protective equipment such as masks for all types of migrant workers. The specific needs of women in these circumstances should be considered and responded to.

5. CONCLUSION

COVID-19 came uninvited. Everyone around the globe is impacted by it one way or another. Business and economy are an obvious example. Migrant workers are considered as vulnerable at this moment and perhaps need so much assistance. Nevertheless, it is actually not just the State's individual responsibility, it is about time for all Member States in regional integration to work together and ensure that these vulnerable groups of people are being protected just like how everyone else wanted to be assisted and protected in this most challenging time. After all, migrant workers do contribute to the development of a nation.

EU and ASEAN were chosen due to the fact that both regions are active in migrant workers movement. This paper had shown an overview of practices, and policies measures in regards to migrant workers during COVID-19 and had found that both regions have their own approach in handling migrant workers in this trying period. Nevertheless, based on the discussion above, it is fair to say that both regions had done their very best in providing protection and rights of migrant workers. Perhaps, due to uncertainties of situations, both regions are not well prepared to face the situation which leads to the limited rights and protection for migrant workers.

Perhaps a lot can be learned from both regions. These may include, but not limited to the non-inclusion of migrant workers on policies such as social security access and immediate assistance on health and economy. It is obvious that the non-accessible for migrant workers features to any assistance making it impossible to manage and provide protection for migrant workers.

Overall, international and regional instruments are available to act as a legal support for protection of migrant workers. Though differences between both region (i.e., EU and ASEAN) are highly visible, it is about time that regional integration can work together and share their practices and decide on the best practice to ensure protection and rights of migrant workers.

**LABOUR MIGRATION AND CHALLENGES AMIDST
THE COVID-19 OUTBREAK:
ANALYSING THE CASE OF VIETNAM**

*Nguyen Thi Hong Yen, Nguyen Phuong Dung**

1. INTRODUCTION

According to the World Migration Report 2020 prepared and published by the International Organization for Migration (IOM), by 2019, the total number of international migrants were recorded as around 272 million people, accounting for 3.5% of the global population.¹ In 2017, migrant worker numbers were approximately 164 million people, equating to two thirds of the total global population of international migrants of 258 million people.² There have been no official statistics on the number of undocumented or irregular migrant workers.

Migration for employment has been the major contributor to economic growth and poverty reduction thanks to remittances generated by migrant workers as “the most direct and obvious benefit of international migration, an important part of GDP, and an important source of foreign exchange income”.³ According to the World Migration Report 2020 of the International Organization for Migration (IOM), in 2018, Vietnam was one of the top countries receiving remittances generated by migrant workers, with the total amount of 15.93 USD billion.⁴

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¹ International Organization for Migration (IOM), “World Migration Report 2020”, 2019, p. 20, available at: https://publications.iom.int/system/files/pdf/wmr_2020.pdf.

² *Ibid* p. 33.

³ ZHANG, “Predicaments and Countermeasures of the Protection of Migrant Workers’ Human Rights”, *The Journal of Human Rights*, 2018, p. 223 ff., pp. 223 – 224.

⁴ “World Migration Report 2020”, *cit. supra* note 1, p. 36.

Nevertheless, the sudden eruption of the COVID-19 has engendered numerous serious repercussions on the world economy. All countries are in deep recession due to the COVID-19 crisis, adversely affecting income and employment of numerous workers. The COVID-19 pandemic has increased the vulnerability of migrant workers from any country including Vietnam whose living and working conditions are already susceptible. Even though, according to international human rights standards enshrined in numerous international treaties such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and core conventions of the International Labour Organization (ILO) such as the Migration for Employment Convention (No. 97) and the Convention concerning Migrations in Abusive Conditions (No. 143) and others, migrant workers are entitled to the legal protection and enjoyment of fundamental freedoms and rights in equality to other human beings. However, migrant workers have been left behind during COVID-19 and their rights always receive little attention.

The plight of Vietnamese migrant workers in foreign countries have been confronted with difficulties including earning reduction, job loss, lack of accessing to health care and support, travel restriction, discrimination, abuse and many others. In the face of these consequences of the COVID-19 epidemic on Vietnamese migrant workers abroad, based on international human rights standards and Vietnamese national policies and laws, there have been rapid policy responses deemed effective to best safeguard the rights and interests of Vietnamese migrant workers. In light of the above, the article will focus on addressing the following issues (i) the impacts of COVID-19 on Vietnamese workers working overseas; (ii) an overview of the framework of international human rights with respect to the rights of migrant workers; (iii) the compatibility between Vietnamese law and international human rights standards on the rights of migrant workers; and (iv) Vietnam's effective policy responses to ensuring the rights of Vietnamese migrant workers during the COVID-19 epidemic.

2. EFFECTS OF COVID-19 ON VIETNAMESE LABOURERS WORKING UNDER CONTRACTS ABROAD

From the end of December 2019 to now, the COVID-19 epidemic has spread around the world, seriously affecting socio-economic activities on a global scale. According to estimates from the "Asia-Pacific Employment and Social Outlook

2020: Navigating the Crisis Towards a Human -Centred Future of Work”, the economic consequences of the COVID-19 pandemic caused a loss of approximately 81 million jobs in 2020. The crisis has had a far-reaching impact, and underemployment is on the rise with millions of workers having their working hours partially or completely reduced. This report also gives the initial estimate of the regional unemployment rate, whereby the unemployment rate could increase from 4.4 per cent in 2019 to 5.2 per cent - 5.7 per cent in 2020. As a consequence of social exclusion orders and quarantine measures, many workers are unable to commute or do their jobs, greatly affecting their income level.⁵

For migrant workers, the COVID-19 epidemic largely froze migration. Workers in the dispatching countries have been limited in their ability to travel to their host countries due to social lockdowns and flight cessation orders. This has greatly affected production activities and the economic growth of both host and dispatching nations.

In Vietnam, according to the Report on “Labour and Social Trends in Vietnam 2012 – 2017” of the International Labour Organization (ILO) and the statistics announced and published by the Ministry of Labour - Invalids and Social Affairs (MOLISA) in the Vietnam’s Labour Market - Update Newsletters,⁶ during the 2012 – 2019 period, the total number of Vietnamese workers going abroad steeply increased. Specifically, from 2014 to 2019, this number has reached over 100,000 workers per year.⁷

⁵ International Labour Organization (ILO), “Asia-Pacific Employment and Social Outlook 2020: Navigating the Crisis Towards a Human -Centred Future of Work”, 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_764084.pdf>.

⁶ Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market Update Newsletters”, 2018 – 2019, available at: <<http://molisa.gov.vn/Pages/solieu/thitruonglaodong.aspx>>.

⁷ International Labour Organization (ILO), “Labour and Social Trends in Vietnam 2012 – 2017”, Hanoi, 2018, p. 29, available at: <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/--ilo-hanoi/documents/publication/wcms_626102.pdf>.



Figure 1: Number of Vietnamese workers going abroad under labour contracts for the 2012 – 2019 period.

In 2019, the country had 152,530 employees working abroad, mainly in Japan (82,703), Taiwan (54,480), South Korea (7,215), Romania (3,478) and other countries. Within the recent decade, Japan and Taiwan are major migration countries, receiving a majority of Vietnamese migrant workers.⁸ However, this figure does not include cases of undocumented labour, or cases where an individual's labour visa expires but those workers neglect to report their status to the relevant authority.

The increasing number of Vietnamese workers in recent years demonstrates the potential demand for Vietnamese workers in foreign markets. Vietnamese workers possess the capability to satisfy the criteria of the international labour market. However, more than a year since the first COVID-19 case was discovered, despite being thought of as one of the few countries in the world to continue to experience economic growth, by 2020, there is no denying the negative effects that the COVID-19 pandemic has brought on the Vietnamese economy, especially in employment opportunities and income. As a consequence, the number of Vietnamese workers going abroad has significantly decreased. Within the nine months of 2020, only 42,837 Vietnamese migrant workers went abroad under labour contracts.⁹ The final three

⁸ *Ibid*; Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2019, Volume 24, quarter 4, available at: <<http://molisa.gov.vn/Upload/ThiTruong/LMU-So24-Q42019-Eng-final.pdf>>.

⁹ Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2020, Volume 27, quarter 3, available at: <<http://molisa.gov.vn/Upload/ThiTruong/LMU-So27-Q32020-final.pdf>>.

months of 2020 recorded a figure amounting to 35,804 workers going to work overseas, contributing to the total number of 78,641 migrant workers.¹⁰ Meanwhile, this figure in 2018 and 2019 was 142,860¹¹ and 152,530¹² employees, respectively. The ongoing pandemic has caused some major labour receiving countries such as Japan and Taiwan to maintain closed borders, reducing the influx of Vietnamese migrant workers. In the first quarter of 2021, 29,541 Vietnamese migrant workers went to work overseas, in which 18,178 migrant workers arrived in Japan and 10,333 migrant workers arrived in Taiwan, respectively.¹³ Border enforcement measures and the entry ban on foreign nationals to prevent the spread and waves of infections adversely affected vocational programmes providing employment opportunities to migrant workers. One such example is the Technical Intern Training Programme in Japan, for which Vietnam provides the highest number of technical interns from various sectors including agriculture, construction and manufacturing.¹⁴

According to incomplete statistics from the Department of Overseas Labour (DoLAB - MOLISA), up to now, more than 5,000 overseas Vietnamese workers have had to return home due to the influence of the COVID-19 outbreak. Additionally, according to this agency's data, the COVID-19 epidemic has created a barrier to labour export activities in Vietnam. The declaration of a state of emergency and prolonged social restrictions has had a direct impact on the production and business activities of factories and enterprises. The total number of Vietnamese employees going to work abroad in 2020 as mentioned above only reached 60.5% of the plan assigned by the Government in 2020,¹⁵ which significantly reduced in

¹⁰ Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2020, Volume 28, quarter 4, available at: <<http://thongke.molisa.gov.vn/thu-vien/chitiet/b107c2fd-35b3-4e57-8645-76454109f105>>.

¹¹ Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2018, Volume 20, quarter 4, available at: <[http://molisa.gov.vn/Upload/ThiTruong/LMU-So20-Q42018-Final\(1\).pdf](http://molisa.gov.vn/Upload/ThiTruong/LMU-So20-Q42018-Final(1).pdf)>.

¹² Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2019, Volume 24, quarter 4, available at: <<http://molisa.gov.vn/Upload/ThiTruong/LMU-So24-Q42019-Eng-final.pdf>>.

¹³ Ministry of Labour – Invalids and Social Affairs (MOLISA), “Vietnam’s Labour Market – Update Newsletter”, 2021, Volume 29, quarter 1, available at: <<http://thongke.molisa.gov.vn/thu-vien/chitiet/a9633e7f-5b7e-4d8f-ae1c-d73dee039fef>>.

¹⁴ ONISHI, “Vietnamese Migrant Workers Fall Sharply amid COVID-19 Pandemic”, Nikkei Asia, 31 May 2021, available at: <<https://asia.nikkei.com/Spotlight/Japan-immigration/Vietnamese-migrant-workers-fall-sharply-amid-COVID-19-pandemic2>>.

¹⁵ DANG KHOA, “Vietnam strives to have 90,000 laborers working abroad this year”, VnExpress International, 9 April 2021, available at: <<https://e.vnexpress.net/news/news/vietnam-strives-to-have-90-000-laborers-working-abroad-this-year-4259257.html>>.

comparison to the 2020 plan to have 130,000 Vietnamese workers working abroad under contracts.¹⁶ The Vietnamese Government has set the target to send around 90,000 Vietnamese workers abroad in 2021. However, given the current situation of the COVID-19 pandemic, the success of the Government's target for 2021 remains doubtful.¹⁷ In addition to the decline in job opportunities, the COVID-19 epidemic has negatively impacted on groups considered vulnerable in society, including migrant workers.

2.1. COVID-19 Has Increased the Need to Safeguard the Lives and Health of Workers

The COVID-19 pandemic is considered to have created a once-in-a-hundred years' health crisis with effects that will last for decades.¹⁸ The consequences of the COVID-19 pandemic have put pressure on the health systems of countries around the world with many countries deploying testing on a large scale, the provision of treatment facilities and hospitals for patients with the disease, whilst ensuring the availability of important medical equipment such as breathing apparatus and masks. As of 26 February 2021, more than 112 million confirmed cases of COVID-19 have been recorded around the world, including over 2.5 million deaths.¹⁹

According to the International Labour Organization (ILO), social protection benefits for migrant workers are very narrow in scope. Their legal status, employment and residence period, nationality, and job type are contributors to their limited access to social protection benefits such as access to health care, sickness benefits, and paid sick leave. Women migrant workers and undocumented or irregular migrant workers engaged in the informal economy are susceptible to more vulnerabilities. Moreover, migrant workers are more exposed to COVID-19 infection as their working and living conditions lack adequate sanitation, hygiene and space which hinder effective observation and performance of preventative measures such as social distancing or self-isolation. With no access to sufficient information, language barriers and

¹⁶ DUNG HIEU, "Hụt Hàng Thị Trường Lao Động Nước Ngoài" ["Downturn in the Overseas Labour Markets"], VnEconomy, 12 January 2021, available at: <<https://vneconomy.vn/hut-hang-thi-truong-lao-dong-o-nuoc-ngoai-20210112000156553.htm>>.

¹⁷ DANG KHOA, *cit. supra* note 15.

¹⁸ UN News, "No End in Sight to COVID crisis, and its impact will last for 'decades to come'", 01 August 2020, available at: <<https://news.un.org/en/story/2020/08/1069392>>.

¹⁹ World Health Organization (WHO), "WHO Coronavirus Disease (COVID-19) Dashboard", available at: <<https://covid19.who.int/>>.

impediments inherent in administrative procedures related to health care services and benefits contributively put migrant worker's health and well-being in jeopardy.²⁰

In Vietnam, the total number of infections as of 27 February 2021 is 2,426, of which 1,839 have been cured, 548 cases are currently being treated, and 35 deaths.²¹ According to the Committee on Social Affairs, as health facilities are providing regular medical examination and treatment, while concurrently undertaking the prevention and control of the COVID-19 epidemic (implementing epidemic surveillance, provision of support to citizens, quarantining infected and suspected infected people, and treating infected people), they have experienced prolonged overload and potential risks, especially the risk of COVID-19 infection and cross-contamination. Many health facilities have increased work shifts to carry out medical examination and treatment, screening, quarantine, monitoring and treatment of infected and suspected COVID-19 patients. However, if the epidemic is prolonged, it will cause great pressure and difficulty in ensuring the continuity of the preventive medicine system, a lack of human resources for epidemiological investigation and taking samples for testing, and the organization of quarantine measures. In addition, a prolonged epidemic will cause difficulties in ordering medical equipment such as ventilators, test machines, X-ray machines and test kits to meet the current epidemic prevention and control as well as protecting the health of health workers and continuing prevention efforts after the end of the epidemic.²²

2.2. The COVID-19 Epidemic Has Increased Underemployment Rates and Reduced Income in Most Countries

According to the International Labour Organization (ILO), almost every country is going through austere times as the whole world faces this unprecedented crisis, the worst since the Second World War. With social lockdown measures and isolation being applied in different forms, the global health crisis is rapidly becoming a global socioeconomic crisis. According to the recent ILO estimates, partial or

²⁰ International Labour Organization (ILO), "Social Protection for Migrant Workers: A Necessary Response to the COVID-19 Crisis", 23 June 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_748979.pdf>.

²¹ Ministry of Health, "Vietnam: Coronavirus Disease (COVID-19) Dashboard", available at: <<https://ncov.moh.gov.vn/>> ; World Health Organization, "Viet Nam: WHO Coronavirus Disease (COVID-19) Dashboard", available at: <<https://covid19.who.int/region/wpro/country/vn>>.

²² Trong Quynh, "Tác Động của Dịch Bệnh COVID-19 Đối Với Một Số Lĩnh Vực Xã Hội" ["Impacts of the COVID-19 Pandemic on Some Social Sectors"], National Assembly Portal, 24 March 2020, available at: <<http://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=44379>>.

comprehensive lockdown measures have affected 2.7 billion workers or 81 per cent of the global workforce.²³

In addition, according to this ILO's report (published in June 2020), about 93 per cent of workers worldwide have been affected by the epidemic to varying degrees. In the first quarter of 2020, countries lost a total of about 185 million jobs; and in the second quarter of 2020, lost about 480 million. About 38.7 per cent of the global workforce is working in sectors that are currently seeing a dramatic drop in output, accompanied by high risks of layoffs, reduced wages and hours. Among them are the hospitality and catering sectors, manufacturing, wholesale and retail trade, real estate and business operations, transportation and entertainment.²⁴

In the countries with the largest Vietnamese workforce, Taiwan, Japan, South Korea, and Malaysia the number of unemployed people has increased rapidly. Taiwan experienced the highest unemployment rate in 2020, reaching a peak of 4.07 per cent in May 2020.²⁵ In Japan, the number of unemployed people was 2.06 million (as of August 2020)²⁶ and the unemployment rate rising to 3 per cent in August 2020 was also recorded as the highest rate since 2017.²⁷ Likewise, South Korea also witnessed an unemployment rate soaring to the highest figure in the past decade in May 2020, steeply rising from 3.8 per cent in April 2020 to 4.5 per cent in May 2020.²⁸ In Malaysia, the unemployment rate reached 5.3 per cent in May 2020 which was recorded as the highest level in the past 30 years, steeply increasing by 2 per cent compared to 3.3 per cent (in January 2019).²⁹ In addition, for the period

²³ International Labour Organization (ILO), 'ILO Monitor: COVID-19 and the World of Work. Second edition – Update Estimates and Analysis, 7 April 2020, p. 1, available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf>.

²⁴ International Labour Organization, 'ILO Monitor: COVID-19 and the World of Work. Fifth edition – Update Estimates and Analysis, 30 June 2020, pp. 1, 6 and 9, available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_749399.pdf>.

²⁵ YANG AND KO, "Taiwan's Jobless Rate in 2020 Highest in 4 Years", Focus Taiwan – CNA English News, 22 January 2021, available at: <<https://focustaiwan.tw/business/202101220021>>.

²⁶ TAKEMOTO AND KANEKO, "Japan's Jobs Market Worsens in August as Coronavirus Damage Persists", Reuters, 2 October 2020, available at: <<https://www.reuters.com/article/uk-japan-economy-unemployment/japans-jobs-market-worsens-in-august-as-coronavirus-damage-persists-idUKKBN26N02N>>.

²⁷ Channel News Asia (CAN), 'COVID-19: Japan Unemployment Rises to Highest Rate since 2017', 2 October 2020, available at: <https://www.channelnewsasia.com/news/business/japan-unemployment-highest-rate-since-2017-covid-19-13177878>>.

²⁸ Nikkei Asia, "South Korea Unemployment Rate Surges to 10-year High in May, 10 June 2020, available at: <<https://asia.nikkei.com/Economy/South-Korea-unemployment-rate-surges-to-10-year-high-in-May>>.

²⁹ SURENDAN, "Surviving the Impact of Covid-19: A Trying Year for Job Holders", The Edge Malaysia, 11 January 2021, available at: <<https://www.theedgemarkets.com/article/surviving-impact>>.

from January to May 2020, the number of unemployed people in Malaysia was more than 3.2 million.³⁰ By November 2020, 764,400 people were jobless in Malaysia, causing Malaysia's unemployment rate to remain high (4.8 per cent).³¹

The world economy also witnessed significant working-hour losses amounting to 255 million full-time jobs that “were approximately four times greater than during the global financial crisis in 2009”. There was also a drop in the global labour income by 8.3 per cent, equivalent to USD 3.7 billion or 4.4 per cent of global gross domestic product (GDP). For 2021, significant losses in working hours and labour income are anticipated to continue. However, the global economy is expected to recover with the advent of the vaccination against COVID-19.³²

In Vietnam, statistics from the General Statistics Office as of September 2020 show that there are 31.8 million people aged 15 and over that have been negatively affected by the COVID-19 epidemic, including those who have lost their jobs, had to take time off or work according to alternate schedules, or have suffered reduced working hours and income. The average income of employees decreased by 1.5 per cent compared to the same period last year (corresponding to a decrease of 83 thousand VND). The average monthly income of informal workers in the first nine months of 2020 was 5.5 million VND, 1.5 times lower than the monthly average income of formal workers (8.4 million VND). Compared to the same period last year, the monthly average income of the official workers decreased by 1.9 per cent.³³

As for migrant workers, as of 30 March 2020, 560,000 Vietnamese people were working through official channels in 36 countries and territories. More than 90 per cent of these workers are working in Japan, Taiwan, South Korea. Most (about 80 per cent) work in manufacturing. According to the latest information from the MOLISA, the majority of migrant workers will remain in their host countries in the

covid19-trying-year-job-holders>; Malaymail, “Malaysia’s unemployment rate may go up to 5.5pc this year, says chief statistician”, 14 May 2020, available at: <<https://www.malaymail.com/news/malaysia/2020/05/14/malaysias-unemployment-rate-may-go-up-to-5.5pc-this-year-says-chief-statist/1866200>>.

³⁰ MALAYMAIL, *cit. supra* note 29.

³¹ BERNAMA, “Unemployment Rate Up Slightly to 4.8% in November 2020”, The Edge Malaysia, 11 January 2021, available at: <[³² International Labour Organization, ‘ILO Monitor: COVID-19 and the World of Work. Seventh edition – Update Estimates and Analysis, 25 January 2021, pp. 1-3, available at: <\[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_767028.pdf\]\(https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_767028.pdf\)>.](https://www.theedgemarkets.com/article/unemployment-rate-slightly-48-november-2020#:~:text=KUALA%20LUMPUR%20(Jan%2011)%3A,of%20Statistics%20Malaysia%20said%20today.>>.</p>
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³³ General Statistics Office, “Report on the Impact of COVID-19 on Labour and Employment of the Third Quarter of 2020”, 6 October 2020, available at: <<https://www.gso.gov.vn/en/data-and-statistics/2020/10/report-on-the-impact-of-covid-19-on-labour-and-employment-of-the-third-quarter-of-2020/>>.

first quarter of 2020. Migrant workers working through unofficial channels are particularly vulnerable to harm during this stage, depending on whether they have access to health care, social protection schemes, or other COVID-19 related policy regimes in their country of origin.³⁴ The pandemic situation in host countries is unpredictable with lockdowns and social distancing measures and increasing cases of COVID-related infection and deaths. The majority of Vietnamese migrant workers worked in small and medium-sized business in manufacturing, hospitality, retail and wholesale industries which were most heavily impacted by the pandemic. Business closures, salary reductions, redundancies, job losses, poor living conditions and health care are the main contributors to a higher disease burden to migrant workers. Welfare policies in some host countries give priority to their nationals, leaving migrant workers with little to no protection or support. A large number of Vietnamese migrant workers have found themselves stranded in destination countries without jobs or financial support as a result of travel restrictions and bans, awaiting the opportunity to return to Vietnam through repatriation flights organized upon the Government's decision.³⁵

In the aftermath of reduction and loss of earnings and jobs, remittances sent home by migrant workers has considerably declined, triggering negative impacts on migrant workers' families. In its recent reports on migration and development, the World Bank showed its prediction of a steep decrease in global remittances by 20 per cent, signifying the steepest drop in recent history, as a consequence of economic crisis and shut down by the COVID-19 outbreak. The remittance flows to low- and middle-income countries in 2019 were USD 548 billion. However, COVID-19 generated a significant gap between the remittance flows to low- and middle-income countries in 2019 and 2020 as the latter was predicted to see a drop by 7 per cent, to

³⁴ "More than 560,000 Vietnamese workers working abroad are still stable", Dan Sinh, 28 March 2020, available at: <<https://baodansinh.vn/hon-560000-lao-dong-viet-nam-dang-lam-viec-o-nuoc-ngoai-van-on-dinh-20200328105941245.htm>>.

³⁵ LONG NGUYEN, "Impoverished by Covid-19, stranded overseas Vietnamese yearn for home", VnExpress International, 7 August 2020, available at: <<https://e.vnexpress.net/news/life/trend/impoverished-by-covid-19-stranded-overseas-vietnamese-yearn-for-home-4142194.html>>; Nguyen, "Stranded Vietnamese face the brunt of resurgent Covid in Malaysia", VnExpress International, 11 June 2021, available at: <<https://e.vnexpress.net/news/life/trend/stranded-vietnamese-face-the-brunt-of-resurgent-covid-in-malaysia-4292350.html>>; LONG NGUYEN, "Vietnamese workers in Singapore stay strong amid havoc caused by Covid", VnExpress International, 18 June 2021, available at: <<https://e.vnexpress.net/news/life/trend/vietnamese-workers-in-singapore-stay-strong-amid-havoc-caused-by-covid-4295100.html>>; YOSHIKAWA, "Protecting Japan's foreign workers amid the COVID-19 pandemic", East Asia Forum, 3 July 2021, available at: <<https://www.eastasiaforum.org/2021/07/03/protecting-japans-foreign-workers-amid-the-covid-19-pandemic/>>.

USD 508 billion. It was also forecasted that remittance flows to low- and middle-income countries would continue to shrink by 7.5 per cent, to USD 470 billion in 2021.³⁶ Since 2009, Vietnam, for the first time within over a decade, saw a fall in remittances sent home to USD 15.7 billion (equivalent to 5.8 per cent of the GDP of the country) as a result of the COVID-19 pandemic, declining by 7.6 per cent in comparison to the previous year's remittances of around USD 17 billion (equivalent to 6.5 per cent of the GDP of the country).³⁷

2.3. The Epidemic of COVID-19 Raises Issues of Discrimination, Prejudice and Xenophobia

The COVID-19 pandemic induces feelings of fear and anxiety about the spread of the disease, leading to social stigma against certain groups, communities or nationalities. According to the Centers for Disease Control and Prevention (CDC), some groups of people who may experience stigma and discrimination during the COVID-19 pandemic include:

- Certain racial and ethnic minority groups, including Asian Americans, Pacific Islanders, and black or African Americans;
- People who tested positive for COVID-19, have recovered from being sick with COVID-19, or were released from COVID-19 quarantine;
- Emergency responders or health care providers;
- Other frontline workers, such as grocery store clerks, delivery drivers, or farm and food processing plant workers;
- People who have disabilities or developmental or behavioural disorders who may have difficulty following recommendations;
- People who have underlying diseases or health conditions which cause coughing;

³⁶ The World Bank, "COVID-19 Crisis Through a Migration Lens – Migration and Development Brief 32", April 2020, available at: <<http://documents1.worldbank.org/curated/en/989721587512418006/pdf/COVID-19-Crisis-Through-a-Migration-Lens.pdf>> ; The World Bank, "Phase II: COVID-19 Crisis Through a Migration Lens – Migration and Development Brief 33", October 2020, available at: <https://www.knomad.org/sites/default/files/2020-11/Migration%20%26%20Development_Brief%2033.pdf>.

³⁷ DAT NGUYEN, "Remittances to Fall for First Time in 11 Years", VnExpress International, 9 November 2020, available at: <<https://e.vnexpress.net/news/business/data-speaks/remittances-to-fall-for-first-time-in-11-years-4187983.html>>.

- People living in concentrated facilities such as homeless people, and others.³⁸

According to the epidemic prevention information, stigmatized groups may also be discriminated against. This discrimination can take the following forms:

- Other people avoiding or rejecting the aforementioned groups
- Being denied health care, education, housing or employment;
- Verbal abuse; or
- Physical violence.³⁹

This marginalization can negatively affect the physical, emotional and mental health of stigmatized groups and the communities in which they live. People who are discriminated against may feel isolated, depressed, anxious or be stigmatized in public when friends and many in the community shun them in fear of COVID-19. In addition, stigmatization harms these vulnerable groups in other ways. Stigmatized groups may often have limited access to essentials needed to care for themselves and their families during the pandemic. Thus, it is vital to combat this stigmatization to make all communities and community members safer and healthier. Everyone can unite to prevent COVID-19 related stigmatization by understanding the facts and sharing them with others in their community.⁴⁰

In addition, the COVID-19 pandemic hinders the prospect of improving Vietnamese migrant workers' livelihoods upon returning home. It is considerably challenging and competitive for this group to secure jobs in the local labour market with the pandemic situation in Vietnam worsening and the unemployment rate increasing within recent years. Migrant workers are no longer able to travel to work abroad again since travel restrictions have become increasingly more complicated and documentation processes significantly delayed. Considering the aforementioned circumstances, it is likely that repatriated migrant workers will be left unemployed.

³⁸ Centers for Disease Control and Prevention (CDC), "Reducing Stigma", 11 June 2020, available at: <https://www.cdc.gov/mentalhealth/stress-coping/reduce-stigma/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fdaily-life-coping%2FReducing-stigma.html>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

Migrant workers have also encountered difficulties in accessing and enjoying welfare and social security policies and financial assistance.⁴¹

3. INTERNATIONAL LEGAL FRAMEWORK FOR ENSURING THE RIGHTS OF INTERNATIONAL MIGRANT WORKERS

In the time before the advent of international human right treaties, legal protection for migrant workers was little and heavily depended on the availability of diplomatic services of their countries of origin. As human rights standards have been developed and elaborated, migrant workers have been furnished with more protection.⁴² An oft-cited sentiment expressed by human rights activists and explicitly or implicitly reflected in international human rights instruments is that “Migrant rights are human rights”.⁴³

3.1. The UN Human Rights Framework

Human rights treaties under the auspices of the United Nations (UN) are the crucial instruments in providing legal protection for international migrant workers regardless of their legal status. Owing to the universalism of human rights which means that “human rights apply everywhere and to everyone”,⁴⁴ migrant workers are entitled to enjoy the rights provided under therein. Other crucial principles of human rights standards that support the protection for migrant workers are “inalienability” meaning “human rights cannot be denied to any human being, nor can they be given up voluntarily”; and “equality and non-discrimination” defined as “all individuals equal as human beings”.⁴⁵ These principles have formed normative grounds for a human rights stance on migrant workers.

For general protection, like all human beings of the international community, migrant workers can enjoy human rights and other fundamental rights prescribed in

⁴¹ International Labour Organization (ILO), “Ensuring Fair Recruitment during the COVID-19 Pandemic”, June 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_748839.pdf>.

⁴² PECOUD and DE GUCHTENEIRE, “Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers’ Rights”, Windsor Yearbook of Access to Justice, 2006, p. 241 ff., p. 243.

⁴³ RUHS, “The Human Rights of Migrant Workers: Why Do So Few Countries Care?”, American Behavioral Scientist, 2012, p. 1277 ff., p. 1278.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁶ As being widely ratified and adopted by all States members, these core human rights instruments offer a comprehensive defence to all members of the human race including migrant workers irrespective of their citizenship or legal status with a set of rights including the right to life, liberty and security; the right to work and fair conditions of employment; freedom from slavery or servitude and forced or compulsory labour; freedom from torture and inhuman or degrading treatment; freedom from arbitrary arrest or detention; the right to move freely within a country; the right to marry and to found a family; access to justice; and many others.⁴⁷ Nevertheless, the universal human rights treaties have yet to provide a robust legal framework to protect migrant workers, particularly susceptible persons such as women migrant workers or children. It is a fact that core human rights treaties such as ICCPR or ICESCR only ensure minimum fundamental rights and freedoms for all citizens including migrant workers. However, considering the special status of migrant workers which is likely to cause them to be exposed and more vulnerable to exploitation, abuse and other mistreatment, it is necessary to provide them specific protection addressing their issues in conjunction with those under the universal international human rights treaties. This consequently provides the motivation for the elaboration of more specific international treaties.⁴⁸

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) indicates the strenuous effort of the international community, through the United Nations, in safeguarding the rights of migrant workers. This Convention signifies a major milestone for providing specific legal protection for migrant workers:

“The Convention opens a new chapter in the history of determining the rights of migrant workers and ensuring that those rights are protected and respected. It incorporates the results of over 30 years of discussion, including United Nations human rights studies, conclusion and recommendations of meeting

⁴⁶ NAGARWAL, “Analysing the Legal Framework of Human Rights of Migrant Workers”, *Indian Journal of Law and Justice*, 2014, p. 99 ff., pp. 100, 103–104.

⁴⁷ MARTIN and ABIMOURCHED, “Migrant Rights: International Law and National Action”, *International Migration*, 47(5) 2009, p. 115 ff., p. 119.

⁴⁸ PECOUD and DE GUCHTENEIRE, *cit. supra* note 42, p. 244.

experts, and debates and resolutions in the United Nations on migrant workers”.⁴⁹

The ICRMW aims to “establish minimum standards that States parties should apply to migrant workers and members of their families, irrespective of their migratory status” and further affords an extensive scope of application to undocumented or irregular migrant workers.⁵⁰ In light of the UN core human rights treaties and ILO conventions addressing labour issues analysed herein, this Convention acknowledges and strengthens the same numerous fundamental rights to migrant workers, including those in irregular status.

With the focus on migrant workers, this Convention additionally sets out some new rights for migrant workers, consisting of the right to equal treatment with regard to remuneration, other conditions and terms of employment, and social security⁵¹; the right to join and take part in meetings and activities of trade unions⁵²; the right to form associations and trade unions⁵³; the right to equal treatment with nationals in relation to access to education institutions, vocational training, housing (including social housing), and social health services⁵⁴; the right to seek alternative employment in case of termination of work contract prior to expiration of the work permit⁵⁵; the right to equality treatment with citizens in respect of protection against dismissal, employment benefits, and access to public work schemes intended to combat unemployment⁵⁶; and the right to redress in case of violation of the terms of employment contract.^{57,58} Throughout the contents of the rights provided in the ICRMW, all principles of human rights have been well-adopted. Moreover, the ICRMW emphasizes the State responsibility in conducting measures to ensure the enjoyment of the rights by migrant workers and dealing with violations of such rights.⁵⁹

⁴⁹ Office of the United Nations – High Commissioner for Human Rights, “The International Convention on Migrant Workers and its Committee”, 2005, Fact Sheet No. 24 (Rev. 1), p. 1, available at: <<https://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>>.

⁵⁰ *Ibid* p. 4.

⁵¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 01 July 2003) 2220 UNTS 03 [ICRMW], Arts. 25 and 27.

⁵² *Ibid* Art. 26.

⁵³ *Ibid* Art. 40.

⁵⁴ *Ibid* Art. 43.

⁵⁵ *Ibid* Art. 51.

⁵⁶ *Ibid* Art. 54.

⁵⁷ *Ibid* Art. 54.

⁵⁸ RUHS *cit. supra* note 43, p. 1280.

⁵⁹ ICRMW *cit. supra* note 51, Art. 83.

However, more than three decades since its adoption, the ICRMW has been ratified by only 56 countries – almost all of which are not high-income countries receiving high numbers of migrant workers.⁶⁰ States' unwillingness to participate in the ICRMW is due to the Convention's effort in safeguarding the rights of undocumented or irregular migrant workers.⁶¹

Since the outbreak of COVID-19, the UN has identified that poverty has been worsening and unemployment and inequality have both increased alarmingly. Pandemic response efforts to rebuild a sustainable and developed society need to be founded on the basis of respect for human rights recognized by states. Therefore, the UN has determined that the central content of activities to protect the rights of workers during the COVID-19 pandemic is to end discrimination of any form, address inequality, encourage participation and solidarity and promote sustainable development.⁶² For that reason, the theme of the International Human Rights Day (10 December), 2020 has been chosen as "Challenges and opportunities posed by the COVID-19 pandemic", to call on all nations to promote the protection of human rights and rebuilding a better, fairer and more resilient world after the pandemic.⁶³

3.2. Under the Auspices of the International Labour Organization (ILO)

The International Labour Organization (ILO) is the key actor in tackling labour issues and ensuring the rights of migrant workers by adopting numerous conventions and "codifying standards through non-binding guidelines in the form of "recommendations"". ⁶⁴ Since its establishment and operation, the ILO has been dedicated to provide legal protection to workers, regardless of their status, by developing eight "fundamental" conventions comprehensively encompassing fundamental principles and rights at work and addressing labour issues. These eight ILO core conventions were also the grounds for the ILO to proactively contribute to the formulation of the ICRMW, including:

⁶⁰ United Nations Treaty Collection (UNTC), "Status of Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families", 19 February 2021, available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en>.

⁶¹ NOLL, "Why Human Rights Fail to Protect Undocumented Migrants", *European Journal of Migration and Law*, 2010, p. 241 ff., p. 256.

⁶² United Nations (UN), "Human Rights Day 10 December", available at: <<https://www.un.org/en/observances/human-rights-day>>.

⁶³ *Ibid.*

⁶⁴ NAGARWAL, *cit. supra* n 46., p. 106.

- The 1930 Forced Labour Convention (No. 29);
- The 1948 Freedom of Association and Protection of the Rights to Organise Convention (No. 98);
- The 1949 Right to Organise and Collective Bargaining Convention (No. 98);
- The 1951 Equal Remuneration Convention (No. 100);
- The 1957 Abolition of Forced Labour Convention (No. 105);
- The 1958 Discrimination (Employment and Occupation) Convention (No. 111);
- The 1973 Minimum Age Convention (No. 138);
- The 1999 Worst Forms of Child Labour Convention (No. 182).⁶⁵

In light of its core conventions, the ILO further drew up the conventions specifically focusing on protecting migrant workers' rights which are the 1949 Migration for Employment Convention (No. 97) (ILO Convention 97) and the 1975 Convention concerning Migrants in Abusive Condition (No. 143) (ILO Convention 143). Under these Conventions, States members are required to recognise and respect human rights of migrant workers.⁶⁶

According to the ILO, during the three stages of labour migration process including pre-departure stage, the post-departure and work stage; and the return stage, countries of destination and origin are responsible for providing legal protection to migrant workers. Furthermore, it called for and promoted international cooperation and "shared responsibility" amongst States in protecting migrant workers' rights in each stage.⁶⁷ These are comprehensively reflected in ILO Convention 97. This Convention recognises and strengthens equal treatment between native-born workers and migrant workers in respect of remuneration, social security, payable employment contributions, and legal procedures related thereto.⁶⁸ In addition, under ILO Convention 97, migrant workers should have the right to access

⁶⁵ International Labour Organization (ILO), "Conventions and Recommendations", available at: <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>

⁶⁶ NAGARWAL, *cit. supra* n 46. pp. 106 - 107.

⁶⁷ *Ibid* p. 107.

⁶⁸ Convention Concerning Migration for Employment (Revised 1949) (adopted 01 July 1949, entry into force 22 January 1952), Art. 6; FUDGE, "Making Claims for Migration Workers: Human Rights and Citizenship", *Citizenship Studies*, 2014, p. 29 ff., p. 34.

to medical services⁶⁹ and free public employment services⁷⁰. However, only migrant workers in regular status can enjoy the rights prescribed in ILO Convention 97.

Whereas ILO Convention 97 affords legal protection to migrant workers in regular or documented status only, by highlighting dire consequences of irregular migration, ILO Convention 143 broadens its application to undocumented or irregular migrant workers. The purposes of ILO Convention 143 are to manage migration flows, abolish irregular migration and inhibit organized crimes and activities of illegal migration. ILO Convention 143 underlines that migrant workers and national workers should be treated equally and promotes “equality of opportunity in respect of “employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory”⁷¹. Articles 8 and 9 thereof ensure rights of migrant workers including those in irregular status in being protected in case of job loss and enjoying remuneration, social security, and other benefits⁷².

In ensuring workers’ right to health care and the safety of their lives in general, the ILO has introduced occupational safety guidelines through its 1981 Occupational Safety and Health Convention (No. 155), under which employers must bear full responsibility in ensuring the application of appropriate precautions and protections to minimize occupational risks, for providing workers with adequate clothing and protective equipment at no charge to workers when possible and appropriate. Employers have the responsibility to provide sufficient information and provide training on occupational health and safety; consult workers on occupational health and safety aspects relevant to their work; and to develop response measures in case of emergency and notify labour inspectors of cases of work-related diseases. In addition, employees have the right to stop working when they are faced with a situation where they have a good reason to believe that the situation poses a threat to their life or health. When exercising this right, workers will be protected against possible undue consequences.⁷³

⁶⁹ Convention Concerning Migration for Employment (Revised 1949) (adopted 01 July 1949, entry into force 22 January 1952), Art. 5.

⁷⁰ *Ibid* Art. 7.

⁷¹ Migrant Workers Convention (adopted 24 June 1975, entered into force 09 December 1978), Art. 10.

⁷² *Ibid* Arts. 8 and 9. RUHS *cit. supra* note 43, p. 1279.

⁷³ Convention Concerning Occupational Safety and Health and the Working Environment (adopted 22 June 1981, entered into force 11 August 1983), Art. 13.

In the context of the COVID-19 pandemic, the ILO has proactively shown its initiative and quickly respond to address challenges and difficulties to migrant workers. The ILO has provided numerous analyses, recommendations and measures to be taken by States members to safeguard migrant workers over the COVID-19 impacts.⁷⁴

4. COMPATIBILITY OF VIETNAMESE LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS STANDARDS ON ENSURING THE RIGHTS OF MIGRANT WORKERS

4.1. Legal and Policy Framework for Sending Vietnamese Workers to Work Abroad

The trend of sending workers abroad started in 1980 in Vietnam in the form of labour cooperation with other socialist countries to solve Vietnam's economic difficulties. The results have brought many benefits. Since the start of the "Doi Moi" initiative in 1986, overseas labour has increased significantly and expanded into many new labour markets.

Currently, sending workers abroad is considered an important economic activity related to remittances, increasing jobs, improving skills, reducing poverty, and promoting economic growth in Vietnam. Therefore, over the years, the Government has paid great attention to completing the legal framework related to the policies on overseas workers by issuing normative documents thereon. Initially, the policy of sending workers to work abroad was limited to the exchange of experts between socialist countries according to Directive No. 41/CT-TW on labour and foreign experts issued in 1998. It was only until the Eleventh National Party Congress, that the activity of sending workers abroad was more clearly directed with the aim of "improving the quality and efficiency of activities bringing Vietnamese workers to work abroad" according to the 2011-2020 socio-economic growth strategy.⁷⁵

According to the Resolution 36-NQ/TW dated 26 March 2004, the Politburo of the Communist Party of Vietnam affirmed that Vietnamese migrants are an integral part and resource of Vietnam. Protection of lawful rights and benefits of Vietnamese migrants in foreign countries is essential and is regarded as the State's

⁷⁴ International Labour Organization, "Protecting Migrant Workers During the COVID-19 Pandemic – Recommendations for Policy-makers and Constituents", April 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_743268.pdf>.

⁷⁵ Vietnam Government, "Vietnam's Socio-Economic Development Strategy for the Period of 2011-2020", available at: <<https://policy.asiapacificenergy.org/sites/default/files/VIETNAM%E2%80%99S%20SOCIO-ECONOMIC%20DEVELOPMENT%20STRATEGY.pdf>>.

responsibility.⁷⁶ The Constitution of Vietnam additionally states the State's responsibility to protect the rights and interests of employees and encourage and facilitate job creation and employment for employees.⁷⁷ In this spirit, the rights of Vietnamese workers abroad have been solidified in numerous legal documents such as the 2008 Law on Vietnamese Nationality (amended in 2014), the 2009 Law on Representative Offices of the Socialist Republic of Vietnam Abroad; the 2011 Law on Prevention and Combat of Trafficking in Persons, the 2015 Criminal Code 2015 (revised in 2017), and many others. The 2006 Law on Vietnamese Workers Working Abroad under Contracts (also known as the 2006 Law on Vietnamese Guest Workers)⁷⁸ is the main law amongst the legal documents directly addressing the rights of Vietnamese migrant workers.

Accordingly, the 2006 Law on Vietnamese Guest Workers provides four forms of sending Vietnamese workers to work abroad, three of which are through intermediaries. Workers can independently enter into contractual relations with foreign employers. These contracts must be registered with the government agency. However, for individual contracts, it is difficult to track the registration as it depends mainly on the initiative of the worker. These types of contracts are applicable to Vietnamese workers with different skill levels, including low-skilled and skilled workers.⁷⁹

Within recent times, the Vietnamese Government made efforts in reforming the national legislation regulating issues related to Vietnamese guest workers to address shortcomings arising from the implementation of the 2006 Law on Vietnamese Guest Workers and provide more effective legal protection for Vietnamese guest workers. On 13 November 2020, the National Assembly of Vietnam passed the Law on Contract-Based Vietnamese Overseas Workers⁸⁰ which will replace the former one and come into force from 01 January 2022. Compared to the applicable Law, the revised Law has 31 new points belonging to 8 major content

⁷⁶ Politburo of the Communist Party of Vietnam, Resolution No. 36/NQ-TW dated 26 March 2004 on Vietnamese migrants, available at: <<https://tulieuvankien.dangcongsan.vn/he-thong-van-ban/van-ban-cua-dang/nghi-quyet-so-36nq-tw-ngay-2632004-cua-bo-chinh-tri-ve-cong-tac-doi-voi-nguoi-viet-nam-o-nuoc-ngoai-2102>>.

⁷⁷ The Constitution of the Socialist Republic of Vietnam 2013, Art. 57, available at: <https://constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf>.

⁷⁸ Law No. 72/2006/QH11 on Vietnamese Guest Workers (adopted 29 November 2006, entered into force 01 July 2007), available at: <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91702/106491/F596859393/VNM91702%20Eng.pdf>>.

⁷⁹ *Ibid* Arts. 6, 7.7 18.1, and 36.

⁸⁰ Law No. 69/2020/QH14 on Contract-Based Vietnamese Overseas Workers (adopted 13 November 2020, entered into force 01 January 2021), available at: <<https://vanbanphapluat.co/law-69-2020-qh14-vietnamese-guest-workers>>.

groups. In addition to continuing to prescribe the State's policies towards Vietnamese workers working abroad under the contract, as well as the rights, obligations and responsibilities of foreign workers, businesses, public service providers and related agencies and organizations, the latter also promotes the protection of legitimate rights and interests of workers. In particular, Article 7 of the newly revised Law outlines 17 prohibited acts, such as seducing people through false advertising, providing false information and the use of other methods aimed at deceiving people, taking advantage of the activity of sending workers abroad to organize illegal exit, trading, exploitation, forced labour or other illegal acts. One significant development of this Law is that it prohibits the deployment of Vietnamese guest workers to geographical areas that are at war or will potentially enter into war, are polluted or suffer from particularly dangerous epidemics.⁸¹ Further, this Law, for the first time, officially sets out the obligations of recruitment agencies, labour export enterprises, enterprises awarded with overseas construction contracts, and other enterprises sending employees to work overseas under contracts or for skill improvement to coordinate with destination countries' authorities and conform to their instructions to address difficulties and problems caused to migrant workers in the context of pandemics.⁸² Under the new Law, the uses of the Fund for Overseas Employment Support are expanded to provide financial assistance to migrant workers who have to return to Vietnam due to the closure of businesses, the downsizing of production, bankruptcy of businesses in foreign countries leading to layoffs and job loss as a consequence of the pandemic. The broadened scope of spending from the Fund will facilitate the provision of financial support by the State authorities to migrant workers in the times of outbreaks.⁸³

4.2. The Rights of Vietnamese Workers Working Abroad

The rights of Vietnamese workers working abroad are a part of general human rights, so it is also guaranteed to be enforced and protected by the policies and laws of the State of Vietnam.

Article 44 of the 2006 Law on Vietnamese Guest Workers recognizes and guarantees the basic rights of Vietnamese workers working abroad, comprising (i) the right to require offshore investment companies, non-business organizations, organizations and individuals to provide information on policies and laws of

⁸¹ *Ibid* Art. 7.13(d).

⁸² *Ibid* Arts. 26.2(g), 31.2(b), 32.9, 34.2(b), 35.9, 41.2(m), and 43.2(h).

⁸³ *Ibid* Art. 67.1(b).

Vietnam towards guest workers; information on policies and laws related to customs and practices of the host country; rights and obligations of the parties involved in the employment process; (ii) right to wages, remuneration and other income, health care, social insurance and other benefits under contracts, treaties and agreements; (iii) having their legitimate rights and interests protected by an offshore investment company, business organization, organization, individual or representative agency in accordance with international law and practice, the laws of Vietnam and the host country during the working time; be consulted, supported in the implementation of rights and benefits under the labour or internship contract; (iv) receiving salaries, wages, income and other personal property to Vietnam in accordance with the laws of Vietnam and the host country; (v) enjoying benefits from the Overseas Labour Support Fund in accordance with the law; (vi) the right to lodge complaints, denunciations and initiate lawsuits against violations of the law on sending people to work abroad.⁸⁴ However, this Law attempts to develop extraterritorial application by extending its scope of application to other entities, organizations or individuals involved with the issues of Vietnamese guest workers. It indirectly regulates the obligations of foreign entities, organizations or individuals related to the overseas employment of Vietnamese guest workers through setting out requirements for Vietnamese recruitment agencies or labour export enterprises. In other words, recruitment agencies or labour export enterprises are required to work with their foreign partners to ensure the satisfaction and compliance with the statutory requirements. Nevertheless, this Law does not envisage corresponding obligations of host countries for the implementation of protective measures towards Vietnamese migrant workers. The Vietnamese Government will perform such measures through diplomatic channels and promote cooperation amongst the countries on the basis of bilateral or multilateral agreements.

While working abroad, Vietnamese workers are entitled to the following rights such as the right to request information about laws and policies of the host country; rights to wages, money transfers, protection of legal rights and interests when working abroad and so on.⁸⁵ However, in reality, Vietnamese workers, especially female workers, are vulnerable to harm and have difficulty in the employment process since the majority of Vietnamese workers go to work abroad due to financial difficulties, hoping to receive a higher income and support their families by looking for work abroad. In addition, the level of education and

⁸⁴ Law No. 72/2006/QH11 on Vietnamese Guest Workers, *cit. supra* note 79, Art. 44.

⁸⁵ *Ibid* Arts. 44-49.

professional skills of migrant workers are still limited. Most of the jobs that workers are working in the host country are low-skilled and unprofessional. Thereby, there are risks of poor working conditions, unfair treatment and labour exploitation. For these reasons, although the rights of Vietnamese workers while working abroad are recognized by law, they are difficult to guarantee.

In addition, Article 27 of the 2006 Law on Vietnamese Guest Workers also stipulates the responsibility to appoint a company to manage and protect the employees' legal rights and obligations; coordinate with relevant foreign agencies in handling problems arising when employees die, suffer from occupational accidents, occupational risks, illness, abuse, or damage to their lives, health, reputation, dignity, or property, and labour dispute resolution. In addition, enterprises appointing employees are responsible for reporting and coordinating with overseas diplomatic missions and consulates of Vietnam to manage and protect the legitimate rights and interests of employees during the process of work. Companies are responsible for compensating workers and their guarantors for damages arising due to their own faults.⁸⁶

On the other hand, Decree No. 95/2013/ND-CP dated 22 August 2013 issued by the Vietnamese Government⁸⁷ also stipulated a number of violations in sending people to work abroad not to the extent that they can be administratively handled. Detecting violations is assigned to the Labour Inspectorate in their professional activities. Under this Decree, the MOLISA was responsible for inspecting, monitoring, handling violations, settling disputes, complaints and denunciations about the sending of workers abroad. In particular, the Vietnamese diplomatic representative agency (the labour-management department) had the responsibility to protect the rights and interests of workers, handling violations of the employees while working abroad. Reflecting and strengthening the same, the successor of Decree 95/2013/ND-CP - Decree No. 28/2020/ND-CP dated 01 March 2020 of the Government further stipulates the sanctions of administrative violations in the field of labour social insurance related to the sending of Vietnamese workers to work abroad under contracts. In terms of criminal liability, organizations and individuals committing criminal violations in this field will be sanctioned in accordance with the 2015 Criminal Code (amended and supplemented in 2017) on the following crimes such as human trafficking (Article 150), and trafficking people under 16 years old

⁸⁶ *Ibid* Art. 27.

⁸⁷ Decree No. 95/2013/ND-CP on Penalties for Administrative Violations Against Regulations on Labour, Social Insurance and Overseas Manpower Supply (adopted 22 August 2013, entered into force 10 October 2013), available at: <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=97028&p_country=VNM&p_count=548>.

(Article 151). Accordingly, depending on the behaviour and the severity of the violation, the offender may be subject to a warning or a fine, in addition to one or more additional penalties.⁸⁸

In general, the above provisions of Vietnamese law on the rights of Vietnamese workers to work abroad are quite compatible with international human rights standards as well as international commitments on the rights of Vietnamese migrant workers. They show the continued efforts of the Government of Vietnam to ensure and promote basic human rights. Although encouraging results have been achieved, the Vietnamese legal framework related to this issue still has certain limitations, especially in recent times, with the outbreak of the COVID-19 pandemic. All over the world, migrant workers in general and Vietnamese migrant workers in particular face a series of difficulties (as mentioned in Part 1) in terms of both job opportunities, income and health, putting Vietnam and other countries in urgent need of having appropriate policies to safeguard migrant workers' rights in the best way possible.

5. POLICY RESPONSE AND EMERGENCY MEASURES APPLIED BY THE GOVERNMENT OF VIETNAM TO ENSURE SAFETY FOR VIETNAMESE WORKERS ABROAD DURING THE COVID-19 EPIDEMIC

In Vietnam, the State's socio-economic development strategies and plans always focus on implementing the 2030 Agenda to achieve the sustainable development goals, while at the same time fully safeguarding human rights with a commitment to leave no one behind. When the epidemic broke out, Vietnam reacted promptly to COVID-19. The incorporation of early measures - such as targeted testing and follow-up, as well as innovative information campaigns - was highly effective.

In preventing and fighting against the COVID-19 outbreak, the Vietnamese Government has adopted and applied drastic measures to mitigate adverse effects of the COVID-19 pandemic. The Government has stopped accepting foreign nationals to prevent widespread COVID-19 cases by entirely closing the borders. All Vietnamese citizens returning home are compulsorily required to undergo quarantine at centralized facilities for 14 days. The Government implemented stringent border management and control by setting up a system of more than 1,600 border

⁸⁸ Criminal Code No. 100/2015/QH13 (adopted 27 November 2015, entered into force 01 July 2016), available at:

<[https://www.policinglaw.info/assets/downloads/2015_Criminal_Code_of_Vietnam_\(English_translation\).pdf](https://www.policinglaw.info/assets/downloads/2015_Criminal_Code_of_Vietnam_(English_translation).pdf)>; Law No. 12/2017/QH14 on Amending and Supplementing some Article of Criminal Code No. 100/2015/QH13 (adopted 20 June 2017, entered into force 01 January 2018).

checkpoints along the country to detect and prevent illegal migration in light of Official Letter 3961/CV-BCD on 25 July 2020.⁸⁹ In addition, since the occurrence of the COVID-19 pandemic, the Vietnamese Government has made strenuous efforts in bringing Vietnamese citizens including migrant workers stranded in foreign countries home by organizing rescue flights. During the period from late March to 28 December 2020, according to the Minister of the Ministry of Foreign Affairs, more than 75,000 Vietnamese citizens returned home through around 260 repatriation flights organized by the Government.⁹⁰

The Government's post-pandemic economic recovery and response plans all promote the role of individuals, non-governmental organizations, grassroots community organizations and the Government in building a post-COVID-19 Vietnam which is better for the present and future generations. In particular, Vietnam introduced its policies and responses on the basis of consideration of specific groups of workers such as Vietnamese women, children, and overseas Vietnamese workers.⁹¹

For Vietnamese citizens working abroad, the provisions of international human rights law serve as effective guidelines in the context of countries responding to the crisis caused by the COVID-19 pandemic to ensure safety and health, social security and to maintain satisfactory employment.

In order to support enterprises, including those providing labour export services during the COVID-19 epidemic, the Government adopted a series of measures working in conjunction with enterprises that were seen as positive in overcoming the crisis such as:

- A 10 per cent reduction of the retail electricity price as prescribed in Decision 648/QĐ-BCT dated 20 March 2019 in the peak hours, normal hours and off-peak hours;

⁸⁹ DJALANTE et al., "COVID-19 and ASEAN Responses: Comparative Policy Analysis", *Progress in Disaster Science*, 2020, p. 1 ff., pp. 6 – 7.

⁹⁰ PHAN ANH, "75,000 Vietnamese Repatriated Amid Coronavirus Pandemic", *VnExpress International*, 28 December 2020, available at: <<https://e.vnexpress.net/news/news/75-000-vietnamese-repatriated-amid-coronavirus-pandemic-4213029.html>>.

⁹¹ MANH HUNG, "Ngày Nhân Quyền Quốc Tế Năm 2020: Thách Thức và Cơ Hội Đặt Ra Bởi Đại Dịch COVID-19" ["International Human Rights Day 2020: Challenges and Opportunities by the COVID-19 Pandemic"], *Communist Party of Vietnam Online Newspaper*, 11 December 2020, available at: <<https://dangcongsan.vn/thoi-su/ngay-nhan-quyen-quoc-te-nam-2020-thach-thuc-va-co-hoi-dat-ra-boi-dai-dich-covid-19-569691.html>>.

- Providing capital support to remove difficulties for production and business to cope with the COVID-19 epidemic under Directive 11/CT-TTg dated 04 March 2020 of the Prime Minister;
- Tax support by extending tax and land rental payment times and according to Decree 41/2020/ND-CP dated 08 April 2020 of the Vietnamese Government and Official Letter 897/TCT-QLN dated 03 March 2020 on extension tax, exemption of late payment interest due to the impact of the COVID-19 epidemic;
- Suspension of payment of social insurance premiums into the retirement and death fund according to Official Letter 1511/LĐTBXH-BHXX dated 04 May 2020 of the MOLISA;
- Delaying the deadline for payment of trade union fees according to Official Letter 245/TLĐ dated 18 March 2020. Following this, production and business enterprises affected by the COVID-19 epidemic were allowed to delay the deadline for payment of trade union fees in the first six months of 2020 to 30 June 2020. If after this point of time, the COVID-19 transmission rate has not decreased and enterprises continue to face difficulties, the time shall be delayed until 31 December 2020; and
- Requesting the DoLAB-MOLISA to develop an online public platform that recruitment agencies and labour export enterprises can register recruitment service contracts to alleviate paper-based application and registration and also support communications between the DoLAB-MOLISA with the stakeholders in order to provide support to Vietnamese guest workers sent to work by such stakeholders.⁹²

Those above are supportive policies indirectly targeted at migrant workers through supporting and maintaining the operation and business activities of recruitment agencies and enterprises sending their workers to work overseas.

More importantly, in respect of general assistance for all workers including migrant workers, the Government has also issued Resolution 42/NQ-CP dated 09 April 2020 and Decision 15/2020/QĐ-TTg dated 24 April 2020 on measures to

⁹² IOM's Corporate Responsibility in Eliminating Slavery and Trafficking (CREST) Initiative, "Overview of Government Response to Ensure Safety and Wellbeing of Migrant Workers Affected by the COVID-19 Outbreak – Last Updated: 01 July 2020", 01 July 2020, available at: <https://crest.iom.int/sites/crest/files/document/covid-19_-_government_response_overview_01july2020.pdf>.

support people facing financial difficulties caused by the COVID-19 pandemic. The aim of Resolution 42/NQ-CP and Decision 15/2020/QĐ-TTg is to disburse the financial package of VND 62,000 billion (equivalent to around USD 2.7 billion) to around 20 million workers from different groups, which are supposed to include migrant workers, whose contracts were postponed or terminated, who were made redundant or unemployed, or who are self-employed or informal workers ineligible for unemployment support due to the impacts of the pandemic from 1 April 2020 to 30 June 2020.⁹³ According to this, employers, who have faced financial difficulties and have paid at least 50 per cent of the work stoppage salary to the employee according to Article 98.3 of the 2012 Labour Code during the period from April to June 2020, can borrow without collateral up to 50 per cent of the regional minimum salary for each employee according to the actual salary payment period but not more than 3 months with 0 per cent interest rate, with the maximum loan term of 12 months at the Social Policy Bank to pay the rest of the salary and disburse monthly direct payments to staff who have been made redundant.⁹⁴

However, during the implementation of some policies, migrant workers seem to be excluded. For instance, recent research conducted by the National Economics University and the Japan International Cooperation Agency found that a small number of workers, mostly those working in some insured sectors or having disadvantaged family backgrounds, received the financial support provided by the State. The imposition of stringent regulations and guidelines to ensure the right beneficiaries receive the support, complicated application-for-support procedures with an absence of a united database on beneficiaries, and numerous requirements in terms of financial capability to be proved and satisfied on both the employers and employees' sides have hindered the majority of workers, including migrant workers, from approaching and enjoying wage subsidies and unemployment benefits. There still exists a large number of workers working in different sectors who are not covered by the protective scope of the legal documents and workers employed as freelancers or in the informal sector, who, unable to access to and enjoy social security, are left unprotected under such legal policies. These policies and other equivalent policies on providing financial assistance to workers should be formulated and revised to closely reflect the reality of workers. The scope of application should

⁹³ *Ibid.*

⁹⁴ HONG THUAN, "Chính Sách Hỗ Trợ Đối Với Doanh Nghiệp Bị Ảnh Hưởng COVID-19" ["Supportive Policies for Enterprises Affected by COVID-19"], *Thuvienphapluat*, 6 May 2020, available at: <<https://thuvienphapluat.vn/tintuc/vn/go-roi-phap-ly-phat-sinh-do-covid-19/28156/chinh-sach-ho-tro-doi-voi-doanh-nghiep-bi-anh-huong-covid-19>>.

be extended to cover workers in other sectors, especially those severely affected by and vulnerable to the impacts of the pandemic such as migrant workers, self-employed workers, and informal sector workers. Modern technology such as electronic wallets, mobile apps, or electronic records to determine and ensure the right beneficiaries should be employed to address complicated paperwork.⁹⁵

In respect of policies directly targeted at migrant workers, according to the provisions of Joint Circular 16/2007/TTLT-BLDTBXH-BTP dated 04 September 2007, the employee is reimbursed for the brokerage. In case the employee has to return home ahead of time due to force majeure (natural disaster, war, bankruptcy of the enterprise) or not due to the fault of the employee, the enterprise shall request the broker refund employees a part of the brokerage the employee has paid according to the principle: the employee who has worked less than 50 per cent of the time under the contract will receive 50 per cent of the paid brokerage. The employee who has worked 50 per cent of the time under the contract or more is not entitled to receive the brokerage fee.⁹⁶ Furthermore, in cooperation with the DoLAB-MOLISA, the Ministry of Finance (MOF) reduced the fees for the verification of documents by 50 per cent for until 31 December 2020 upon the issuance of Circular 54/2020/TT-BTC dated 12 June 2020.⁹⁷

In case the broker cannot be claimed, the enterprise shall reimburse the employee according to the above principle and record it into reasonable expenses when calculating taxable income in accordance with the Law on Corporate Income Tax. In addition, the employee is entitled to be reimbursed for service fees. This is the content specified in Clause 3, Section III of Joint Circular 16/2007/TTLT-BLDTBXH-BTP dated 04 September 2007. Specifically, in case the employee has to return home ahead of time due to force majeure or not due to the employee's fault, the enterprise is only allowed to collect the service fee according to the actual time (number of months) the employee has worked abroad. In addition, cases of employees working abroad in objectively risky circumstances will be decided upon by the MOLISA to be supported to a maximum level of 5 million VND per case. Depending on the epidemic situation

⁹⁵ National Economics University and Japan International Cooperation Agency, "NEU – JICA Report: Assessment of Policies to Cope with COVID-19 and Recommendations", December 2020, pp. 31-33, available at: <https://www.jica.go.jp/vietnam/english/office/topics/c8h0vm0000ecmc4u-att/210305_01_en.pdf>.

⁹⁶ TU GIANG, "Hỗ Trợ Lao Động Việt Nam Làm Việc ở Nước Ngoài Mất Việc vì COVID-19" ["Supporting Vietnamese Workers Abroad Losing Jobs Due to COVID-19"], Communist Party of Vietnam Online Newspaper, 01 April 2020, available at: <<https://dangcongsan.vn/xa-hoi/ho-tro-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-mat-viec-vi-covid-19-551614.html>>.

⁹⁷ HOANG OANH, "Support for Workers Abroad Affected by COVID-19", Vietnam Investment Review, 27 August 2020, available at: <<https://www.vir.com.vn/support-for-workers-abroad-affected-by-covid-19-78748.html>>.

and the extent and number of affected workers, the authorities shall support workers and enterprises when necessary.⁹⁸

Additionally, businesses operating in the field of sending workers to work abroad are also supported in terms of procedures. Accordingly, the Government has the policy to simplify administrative procedures for businesses, reduce pre-checking, increase post-checking; enhancing online settlement (online) for registration contracts and licensing for businesses and temporarily suspending periodic inspection of enterprises until the end of the second quarter of 2020. The DoLAB - MOLISA, the Inspector of the MOLISA only conduct irregular inspections upon receipt of complaints and questions from employees, employees' relatives and feedback from news agencies and newspapers. Furthermore, the DoLAB has been cooperating with the Overseas Employment Support Fund to discuss with functional units of the MOF, studying the delay in payment to contribute 1 per cent of the service fee of the business to join the Overseas Employment Support Fund under the provisions of Article 2 of Decision No. 144/2007/QĐ-TTg dated 31 August 2007 during the epidemic or the whole year of 2020.

Along with material support, from February 2020, Vietnam has carried out a review of Vietnamese workers working abroad under contract of COVID-19 infection and suspected infection.⁹⁹ In particular, the Government has also noted that, when it is necessary to depart from Vietnam for employment, Vietnamese workers must proactively adhere to measures to prevent COVID-19 disease, strictly comply with medical requirements of the authorities of Vietnam and the host countries.¹⁰⁰ Further, for supporting Vietnamese guest workers in some key receiving countries such as Japan, the Republic of Korea, and Taiwan, in conjunction with putting forward diplomatic communications and solutions to ensure the rights and protection for Vietnamese guest workers are not lower than the benchmarks of the international human rights laws, DoLAB-MOLISA developed and launched a mobile app called “COLAB SOS” to promote effectiveness of communications and timely support to

⁹⁸ TU GIANG, *cit. supra*, note 97.

⁹⁹ MOLISA, Telegram No. 01/CD-LDTBXH dated 05 February 2020 on Strengthening Measures to Prevent and Fight Respiratory Infection Caused by New Strains of Coronavirus, available at: <<http://www.molisa.gov.vn/Pages/tintuc/chitiet.aspx?tintucID=222250>>.

¹⁰⁰ NGAN ANH, “Chưa Có Lao Động Việt Nam Làm Việc ở Nước Ngoài Theo Hợp Đồng Bị Nhiễm COVID-19” [“No Vietnamese Workers Abroad Are Infected with COVID-19”], Nhan Dan Online, 13 February 2020, available at: <<https://nhandan.com.vn/tin-tuc-xa-hoi/chua-co-lao-dong-viet-nam-lam-viec-o-nuoc-ngoai-theo-hop-dong-bi-nhiem-covid-19-449451/>>.

respond to emergencies in favour of Vietnamese migrant workers.¹⁰¹

On 3 April 2020, the MOLISA issued and adopted telegrams on strengthening the implementation of urgent measures to prevent and control the COVID-19 epidemic during the peak phase, whereby the Minister directed the Vietnamese Overseas Labour Departments/Committees to perform the following activities:¹⁰²

- Advising and encouraging Vietnamese workers to stay in the host country to abide by the host country's regulations on COVID-19 epidemic prevention and control, not to move or to go to COVID-19 epidemic areas;
- Strengthening the management of the situation, ensuring the interests of employees in case of being affected by the COVID-19 epidemic.
- Setting up hotlines, information channels, and contact points in the Vietnamese working community in the localities to promptly grasp the situation of the employees;
- Working with the authorities of the host country to ensure that workers are examined, quarantined and treated in case of suspected or infected COVID-19 cases;
- Implementing the salary and living regimes of the employees under the signed contracts and regulations of the host country during the period of leave due to the effects of epidemic; work with local agencies, foreign partners and employers on the possibility of renewing the status of stay, extending the contract, and ensuring workers can legally and safely return to home in case of necessity and emergency.¹⁰³

¹⁰¹ IOM's Corporate Responsibility in Eliminating Slavery and Trafficking (CREST) Initiative, *cit. supra*, note 93; "COVID-19: Ministry works to support Vietnamese guest workers", Nhan Dan Online, 25 February 2020, available at: <<https://en.nhandan.vn/society/item/8435102-pm-orders-strict-countermeasures-against-covid-19-outbreak.html>>.

¹⁰² IOM's Corporate Responsibility in Eliminating Slavery and Trafficking (CREST) Initiative, *cit. supra*, note 93; DoLaB-MOLISA, "Yêu Cầu Doanh Nghiệp Tăng Cường Thực Hiện các Biện Pháp Cấp Bách Phòng, Chống Dịch Covid-19 trong Đợt Cao Điểm" ["Requesting Enterprises to Strengthen the Implementation of Urgent Measures to Prevent and Combat the COVID-19 in the Peak Period"], 6 April 2020, available at: <<http://www.dolab.gov.vn/New/View2.aspx?Key=5321>>; DoLAB-MOLISA, Official Letter No. 670/QLDNN-VP dated 3 April 2020 on strengthening the implementation of urgent measures to prevent and combat the COVID-19 pandemic in the peak period, available at: <<http://dolab.gov.vn/Uploads/New/20204616439351.pdf>>.

¹⁰³ Ministry of Labour – Invalids and Social Affairs (MOLISA), Telegram No. 02/CD-LDTBXH dated on Strengthening the Implementation of Urgent Measures to Prevent and Control the COVID-19 Epidemic during the Peak Phase and Official Letter No. 1945/LDTBXH-QLDNN dated 02 June 2020 on Continuing to Implement Prevention Measures against COVID-19 in the New Normal Context.

The MOLISA, as the State authority mainly in charge of labour, continuously pledges to safeguard Vietnamese migrant workers in the face of the COVID-19 outbreaks in host countries. The State authority requires recruitment agencies and labour export enterprise to cooperate with their foreign partners to provide sufficient and appropriate protection and treatment for Vietnamese guest workers in case of infections. Such stakeholders are also required to disseminate information on disease prevention measures adopted by the host countries to Vietnamese migrant workers and report cases to the host countries' authorities at an opportune time to ensure proper treatment is rapidly provided to the workers.¹⁰⁴

Thereby, in the complicated context of COVID-19 in many countries, the Vietnamese Government has, with very timely policies, proactively supported Vietnamese workers working abroad. This is an important basis on which to guide Vietnamese authorities to continue implementing activities to protect citizens in foreign countries.

6. CONCLUSION

Guy Ruder – ILO Director-General said that “We should not treat migrant workers any different from any other worker. They are as much entitled to have their livelihoods protected and they are entitled to have their health protected”.¹⁰⁵ Migrant workers are entitled to the same legal protection of their rights afforded to other human beings.

Nevertheless, in practice, migrant workers have not received sufficient protection due to weak enforcement and poor compliance of States. The COVID-19 pandemic has worsened the conditions of migrant workers, making them more susceptible with severe consequences such as unemployment and limited access to social security and benefits.

The core human rights instruments under the auspices of the UN and the ILO are the grounds for governments to making policies and taking measures to safeguard

¹⁰⁴ KIM ANH, “MOLISA protects Vietnamese guest workers during pandemic time”, The Socialist Republic of Vietnam – Online Newspaper of the Government, 11 May 2021, available at: <<http://news.chinhphu.vn/Home/MOLISA-protects-Vietnamese-guest-workers-during-pandemic-time/20215/43729.vgp>>.

¹⁰⁵ International Labour Organization (ILO), “Social Protection for Migrant Workers: A Necessary Response to the COVID-19 Crisis”, 23 June 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_748979.pdf>.

migrant workers. In the spirit of human rights standards and recognising the important role of migrant workers, Vietnamese Government has developed a comprehensive system of policies and laws safeguarding their rights. Besides, the Government has quickly responded to the COVID-19 by adopting measures to alleviate the impacts of COVID-19. At present, the Government has applied solutions for dealing with the on-going crisis. In preparation for the post-COVID-19 era and for recovery, the Government should develop a long-term plan and road map paving the way for migrant workers' employment and better protecting their rights.

Migrant workers, regardless of their status, whether documented or undocumented, are human beings and citizens of their home country. Therefore, in addition to fundamental human rights, it is necessary to develop additional standards specialized for migrant workers to reduce violation of their rights during the migration journey. For Vietnam, sending workers to work abroad is a significant undertaking and policy of the Communist Party and the State in the context of globalization and international labour mobility on the basis of equality, mutual benefit and national interests. Possessing the view that no one should be left behind, the Vietnamese Government has made strenuous efforts in providing support to Vietnamese migrant workers from reform of legislation on labour migration to implementation of practical and pragmatic measures. Those efforts will complement a complete, transparent and unified legal framework on migrant workers and contribute to effective enforcement thereof in the near future.

1. INTRODUCTION

In contemporary times migration has become a rampant phenomenon around the World. Whenever we talk about migrants and migration, it is mostly international migration that garners the most attention. However, the study of internal migration is important as the migratory movements helps in the redistribution of the population significant for social and economic factors.¹ Significantly, it is during a situation of crisis and distress that highlights the struggles of the vulnerable categories of subjects in a society. It is crucial to study the internal migration in India because of the impact the pandemic brought to the movement of internal migrant workers in the country. However, internal migration also plays a crucial role in impacting the socio-economic stability of any society. Therefore, this chapter explores the internal migration in India signifying the timeframe when the COVID-19 lockdown was announced in India and months after the lockdown was lifted. This phenomenon led to an irregular mass migration of internal labour migrants travelling from the urban city centres with the ultimate desperation to reach their native villages by any possible means.

Therefore, the plight of internal migration in India and the vulnerability of the labor migrants exposed during this time is taken as a case study to understand the problematics of menial migrants who migrants from rural to urban centers during situation of crisis, such as the pandemic. Thus, this chapter also enables us to re-think the lives and conditions of the labour migrants in other similar set-ups of modern nation-states in hours of crisis.

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¹ RELE, J. R. (1969). "Trends and Significance of Internal Migration in India", *Sankhyā: The Indian Journal of Statistics*, (1969), p. 501 ff.

With an enormous population and a growing economy, India withstands a large scale rural to urban migration in response to the demand for menial jobs in the sprouting cities and sub-cities. The uneducated and unskilled labourers migrate in clusters seeking jobs as construction workers, domestic servants, security guards, watchmen, chauffeurs, waiters and waitresses, delivery people, plumbers, construction workers, and so on. Thus, internal migration takes place to fulfil virtually every aspect of the socio-economic sphere. This chapter explores the impact on the internal migration of labourers in India that went through an unexpected and vulnerable turn with the onset of the coronavirus pandemic in the country. It explores the intense uncertainty brought in by the COVID-19 pandemic and the subsequent lockdown that changed livelihood for the menial labour migrants who have migrated to urban centres of India from rural areas.

The labour migrants form an inseparable and crucial fragment of the whole operating economic framework of the country. Although known as the informal working class, this labour category of workers can be regarded as the backbone of the Indian economy. In 2017, India's Economic Survey estimated that approximately 9 million inter-state migration took place between 2011-2016 (although the figure varies among various studies). A considerable large section of the movement consists of daily wage workers, i.e. the migrants who became most vulnerable during the lockdown. The BBC News on March 30, 2020, reported that around 100 million menial migrant workers reside in poor living conditions in the slum-like areas of the cities.² This is more likely a common scenario because the migrants have to meet the expenses of the city livelihood of essential conditions of food, shelter and clothing to themselves and their families. Moreover, the limited income of the labourers forces them to live in poor, vulnerable conditions and save more income from being sent as remittances to their families or relatives thriving for a better livelihood in the rural villages.

In India, the first case of the COVID-19 was reported at the end of January 2020, and it was only in March that the number of infections began to rise drastically.³ It marked a situation that by the end of 2020, India was among the countries to record the highest COVID-19 illnesses in the World.⁴ Also, the number of infected cases in the country remained substantially low compared to most other nations until the first week of March, when it began to increase significantly

² BISWAS, "Coronavirus: India's Pandemic lockdown turns into a human tragedy", BBC News, 30 March 2020, available at: <<https://www.bbc.com/news/world-asia-india-52086274>>.

³ "India Coronavirus Count, April 30: Cases surge past 33,000 deaths at 1074", The Economic Times, 30 April 2020, available at: <<https://economictimes.indiatimes.com/news/politics-and-nation/india-coronavirus-count-april-30-cases-surge-past-33000-deaths-at-1074/articleshow/75463112.cms>>.

⁴ *Ibid.*

afterwards. While the initial numbers of infected cases were considerably low in comparison with the massive population of the nation (1.35 billion), the adoption of measures to contain further spread of the disease was expected and necessary.⁵

Therefore, analysing the situation of the internal migrants and the sudden uncontrollable reverse migration during the lockdown, it is seen that the period brought an unexpected loss of financial sources due to the closure of working sites. Therefore, to further focus on the problematic of the subject, I will next briefly explain the internal migration in India, which will be followed by the situations faced by migrants during the COVID-19 imposed lockdown which led to the untimely reverse migration and the chaos that followed afterwards. Moreover, while focusing on the dilemma of migrants working as labourers and workers and highlighting the government aids and responses advanced in countering the problems of the migrants. This chapter argues that the pandemic and the lockdown will subsequently change India's internal migration patterns and perspectives in the future.

2. INTERNAL MIGRATION IN INDIA

This chapter would discuss the internal migration in India with the impact of COVID-19 from a general perspective. As of 2020, it is estimated that there are around 600 million migrants in India.⁶ Considering the enormous size of its population, millions of people in India internally migrate as inter-district or inter-state migrants. The urban spaces' vast opportunities dictate the rural to an urban pattern of migration rather than being vice-versa. While several factors act as push and pull factors for migration, 'internal migration' is mainly influenced by two factors, i.e., job and education. While marriage also remains a significant cause of migration among women,⁷ the challenges and exploitation countered by marriage migrants are different from the problems faced by labour migrants or rural migrants

⁵ VAISHNAVI, "1.3 billion people. A 21-day lockdown. Can India curb the coronavirus?", *Science*, 31 March 2020, available at: <<https://www.sciencemag.org/news/2020/03/13-billion-people-21-day-lockdown-can-india-curb-coronavirus>>.

⁶ MISRA, "Explainspeaking: What 2020 taught us about India's internal migration", *The Indian Express*, 18 February 2021, available at: <<https://indianexpress.com/article/explained/what-2020-taught-us-about-indias-internal-migration-explainspeaking-7189053/>>.

⁷ CENNY, JAYARAM, "Pandemic crisis: 'migrant home-based women workers work 8 hours/day for Rs 10–15'", *IndiaSpend*, 2020, available at: <<https://www.indiaspend.com/pandemic-crisis-migrant-home-based-women-workers-work-8-hours-day-for-rs-10-15/>>.

who are wandering the streets of the urban centres searching for petty jobs to feed themselves and their families.⁸

According to the census of 2011, the states of Uttar Pradesh, Bihar and Assam send the highest number of migrants to the metropolitan cities of Delhi, Kolkata, Mumbai, Chennai, Gujarat etc. At present, cities like Bangalore and Hyderabad have emerged as centres attracting many domestic labour migrants to comply with developing infrastructure and domestic helpers for the rising corporate middle class. Most of these migrants become part of the informal economy and continue to work as casual workers, without any formal employment contracts or rules that are guaranteed and supported by the referred legislation provided for the workers. Thus, this informality makes the worker migrants extremely vulnerable in any crisis during their working tenure. Therefore, the urban centres that attract millions of migrants do not provide them any securities and turn hauling grounds in situations where the migrants are the first to be thrown out whenever the problem arises.

According to the census reports of 2011, around 450 million people are circulating as internal migrants in India.⁹ This accounts for 37.7 per cent of the total Indian population.¹⁰ And based on the census records of 2011, it is further estimated that there are approximately 600 million migrants in 2020. A large section of this enormous migratory population comprises seasonal or temporary migrants, who migrant based on temporary opportunities and return to their homes once the situation under which they once migrated transforms. According to Keshri and Bhagat,¹¹ as per the reports of 2007~2008, 21 out of every 1000 moving migrants are categorized as temporary migrants. Hence, the conditions of migrants in India depicts a situation where migrants are continuously circulating between their villages to urban centres that do not provide them with the required financial, structural and healthy conditions. Even though migrants return to their native villages under challenging situations, the lack of opportunities and shortage of funds forces them to return to the cities to continue their earnings for a living.¹² What is to be pointed here is that a sizeable portion of these internal migrants (especially labour migrants) are workers in the informal sector. The absence of adequately defined and formal working laws and terms makes them the most vulnerable working groups. Due to

⁸ *Ibid.*

⁹ Registrar General of India, 2011. D Series. Office of the RGI and Census Commissioner. Government of India.

¹⁰ *Ibid.*

¹¹ KESHRI, BHAGAT, "Socioeconomic determinants of temporary labour migration in India: A regional analysis", *Asian Population Studies*, 2013, p. 175 ff.

¹² VAISHNAVI, *cit. supra* note 5.

this drawback, employers neglect the needs and requirements of the informal employees in times of crisis.¹³ Ironically, the migrants also do not care much about their rights and laws at the time of joining a job. The desperation to earn money enables them to agree to any working conditions. Thus, they become informal workers without any assured social rights and financial securities in the workplace and the cities they migrant to work in.¹⁴

Significantly, the number of female migrant workers migrating to urban centres has also rapidly increased in recent years. Women menial workers have also started to move out of the rural villages searching for employment and earn a better livelihood to improve their living standards. It is also pointed out that the migration of women is greatly influenced by social, economic and political factors, giving rise to vulnerable conditions for these women migrants.¹⁵

According to the census of 2011, more than two-thirds of the Indian population are rural dwellers.¹⁶ However, many urban centres are being turned into towns or sub-cities with rapid infrastructure development and opening up prospective opportunities for the country's labour market.¹⁷ A rapidly urbanizing India implies more demand for workers and menial labourers to comply with the human resources in the construction sites. Thus, the migration of labourers from rural areas form most of the labour market in the country. This labour-class is even considered as an inseparable informal 'backbone' of the Indian economy.¹⁸ While the demand for more labourers continues to increase, the rural-urban migration is mostly circular or semi-permanent. It causes varying challenges of survival and livelihood for the labour migrants migrating to the urban centres. Although at present the gap between the rural-urban population with the education gap has been gradually decreasing.¹⁹ Economic instability and lack of well-paid jobs for sustainable livelihood are some of the main reasons for rural-urban migration. It should be further noted that the reverse migration that has started during the lockdown can subsequently impact the dynamics of development in modern-day India, where a large market operates on the shoulders of these menial labour

¹³ *Ibid.*

¹⁴ SRIVASTAVA, SUTRADHAR. 2016. "Labour migration to the construction sector in India and its impact on rural poverty", *Indian Journal of Human Development*, 2016, p. 27 ff.

¹⁵ AGNIHOTRI *ET AL.*, . "Gender and migration: Negotiating rights, a women's movement perspective", Delhi: Centre for Women's Development Studies, 2012.

¹⁶ Registrar General of India, 2011. D Series. Office of the RGI and Census Commissioner. Government of India.

¹⁷ YADAV, KUMAR, "Migrant Workers and COVID-19: Listening to the Unheard Voices of Invisible India". *Journal of the Anthropological Survey of India*, 2020, available at: <<https://journals.sagepub.com/doi/full/10.1177/2277436X20968984>>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

migrants.²⁰ Migrants who are not highly educated, illiterate, and mostly work as informal employees in an informal set up are the most essential part of the whole economic and development mechanism in a contemporary capitalist set up. Nair stated that reverse migration and the loss of migrant's livelihood could move the economy 15 years back than the position it holds today.²¹

Moreover, the reverse migration that has erupted with the lockdown-shock could have impacted different states in India in various ways.²² The most impoverished states in India are sending the highest number of labour migrants to the urban centres. The migrants returning to these less well-off states would face the most elevated instability than those in the more well-off states. This is because the states with better funds and resources would provide better opportunities to jobless returning migrants and extend better public funds in times of a crisis like this one.²³ It should be mentioned that the Government has worked to provide social security provisions by providing rural employment schemes to uplift the crisis-driven migrants.²⁴ And, millions of these migrants have applied under the provided schemes for jobs in rural areas, it should be reconsidered if the schemes would be able to comply with the needs of millions of migrants stranded within the country.²⁵

3. THE STATE OF MIGRANTS DURING THE COVID-19 LOCKDOWN

The COVID-19 pandemic that originated in the city of Wuhan in China transformed and halted the entire modern world order from almost all perspectives. Although everyone has been impacted in one way or another, it is the powerless and the weaker sections of the society who faced the most tragic consequences during the pandemic. Simultaneously, the pandemic has depicted that even in the most

²⁰ *Ibid.*

²¹ NAIR, "Reverse migration to villages has set economy back by 15 years, says JNU professor", *The Hindu*, 2020.

²² DREZE, "Averting hunger during monsoon calls for bold food security measures", *The Indian Express*, 2020, available at: <<https://indianexpress.com/article/opinion/columns/nrega-funds-migrant-workers-monsoon-pds-scheme-6449293/>>.

²³ BIJOOR, "The migrant workers are the builders of the modern India. Time to take care of them", *The New Indian Express*, 28 April 2020, available at: <<https://www.newindianexpress.com/opinions/2020/apr/28/the-migrant-workers-are-the-builders-of-modern-india-time-to-take-care-of-them-2136230.html>>.

²⁴ *Ibid.*

²⁵ CHAUHAN, "3.5 million new enrolments under MGNREGA, as 'distressed' workers return to villages", *Hindustan Times*, 2020, available at: <<https://www.hindustantimes.com/india-news/3-5-million-new-enrolments-under-mgnrega-as-distressed-workers-return-to-villages/story-aDJHYz0vz1tSeLlelhVT7I.html>>.

liberal societies, a crisis can reflect rising inequalities between the powerful and the weaker groups in the social-economic sphere. For instance, in the USA,

“long-standing systemic health and social inequities have put some members of racial and ethnic minority groups at increased risk of getting COVID-19 or experiencing severe illness, regardless of age.”²⁶

The moving workers possessed the highest risks of emerging as mass spreaders.²⁷ While understanding the severity of the pandemic, the Government’s decision to initiate a nationwide lockdown as the response to the COVID-19 pandemic was swift. However, the mass migration of labour migrants appeared a bigger problem during the lockdown because the severity of cluster infection of the virus turned uncontrollable with a crowd of thousands struggling to reach their native villages without much prevention against the virus. Therefore, it can be said that the lockdown although played a crucial role in barring the rapid increase of COVID-19 infections in a densely populated country like India, later it began to increase drastically. By April, approximately 20,000 infected cases were reported in various states and union territories of the country.²⁸ The closing down of international borders and the adaption of a complete nationwide lockdown seemed expected and necessary to contain the further spreading of the disease. Therefore, on March 24 2020, Prime Minister Narendra Modi called for a three-week long lockdown in an official address to the nation.²⁹ The lockdown came after a 14-hour extended ‘Janta curfew’ (public curfew) was introduced on March 22. Obeying the general curfew was made mandatory to the entire nation, with only a few exceptions being granted to people seeking ‘emergency and essential’ services.³⁰ This was also followed by a series of regulations to control the COVID-19 affected regions in the country.³¹

²⁶ CDC, Health Equity Considerations and Racial and Ethnic Minority Group, 2020, available at: <<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>>.

²⁷ DESHPANDE, RAMACHANDRAN, “Is COVID-19 ‘The Great Leveler’? The Critical Role of Social Identity in Lockdown- induced Job Losses”, Ashoka University Working Papers, 2020, available at: <<https://www.ashoka.edu.in/page/CEDA-working-papers-389>>.

²⁸ KAPUR, “Charted: Lockdown is only the beginning of misery for India’s migrant labourers”, Quartz India, 6 April 2020, available at: <<https://qz.com/india/1833814/coronavirus-lockdown-hits-india-migrant-workers-pay-food-supply/>>.

²⁹ NEETA, 1 April 2020, “COVID -19 and India’s Nowhere People”, The Diplomat, available at: <<https://thediplomat.com/2020/04/COVID-19-and-indias-nowhere-people/>>.

³⁰ *Ibid.*

³¹ *Ibid.*

Subsequently, the lockdown that was first introduced in March was extended till May, which initiated the lockdown into four consecutive phases considering the speedy rise of infected subjects in the country. It is believed that the lockdown proved helpful to slow down the rapid doubling or tripling of cases in the first few months of the pandemic. This was particularly because the lockdown was pronounced to be a strict one in many states. The infected districts were divided into red, orange, and green zones based on the severity of the area's cases.³²

Initially, it was seen through the media that the country's decision for a strict nationwide lockdown was applauded and supported by its population, but later it faced criticisms on humanitarian grounds.³³ However, to a nation of 1.35 billion people, with diverse economic, social and cultural backgrounds, a complete and sudden lockdown and shutdown of the economy brings innumerable challenges and queries to the upfront.

Therefore, the mass exodus of labour migrants that started in the form of reverse migration was the most important phenomenon that has changed the fate of internal migration and millions of migrants in India. The restrictions brought in by the pandemic, and the lockdown enabled thousands of worker migrants to lose their jobs, sources of income, houses and even family members. A situation where the migrants were hopelessly stranded without any economic and travelling options to depend on. Significantly, the restrictions brought in during this time has also widened the risks of livelihood for grief driven vulnerable children of these labour migrants. Not to mention that thousands of these children spent hungry nights without resources and shelter during their journeys with their parents. The lockdown also severely impacted the women migrant workers working in domestic household sectors, hotel industry and beauty salons. Most of these worker women have migrated with their husbands to make a living in the urban centres from rural villages and form an inseparable segment of the labour workforce for the upper-middle-class nuclear families sprawling up in the cities of India.³⁴ According to Rukmini, four out of every ten working women were

³² PANDEY, "Coronavirus in India: Desperate migrant workers trapped in lockdown", BBC News, 22 April 2020, available at: <<https://www.bbc.com/news/world-asia-india-52360757>>.

³³ MAHAPATRA, "Many more may fall into poverty trap and several may not escape it", DownToEarth, 10 April 2019, available at: <[https://www.downtoearth.org.in/blog/general-elections-2019/many-more-may-fall-into-poverty-trap-and-several-may-not-escape-it-63930#:~:text=According%20to%20the%202011%20Census,month%20\(for%20rural\)%20expenditure](https://www.downtoearth.org.in/blog/general-elections-2019/many-more-may-fall-into-poverty-trap-and-several-may-not-escape-it-63930#:~:text=According%20to%20the%202011%20Census,month%20(for%20rural)%20expenditure)>.

³⁴ RUKMINI, "How COVID-19 locked out women from jobs", Livemint, 2020, available at: <<https://www.livemint.com/news/india/how-COVID-19-locked-out-women-from-jobs-11591772350206.html>>.

unemployed during the first few months of the lockdown.³⁵ Talking about women migrants and their struggle during the pandemic, it should be pointed that the narratives of problematics for married and single women greatly varies in a society like India, where the traditional patriarchal social norms still form the basis for defining the identity and struggles of a person.³⁶ Therefore, single migrant workers who leave their native homes and migrate to cities searching for jobs are somewhat placed differently from the women cohabiting with their husbands and children. These women are also devalued to have challenged ‘the mainstream values and traditions’ and moved to unknown destinations searching for income.

Moreover, the lockdown brought in several light instances of racial bullying in India. Social media streamed many cases where migrant girls from the north-eastern states of India were tortured, bullied and accused by the neighbours and their landlords as coronavirus spreaders due to their Asian features. Those who chose to stay back had to face severe financial and social showdowns that were brought in during the pandemic. These instances also reveal the racial sensitivity in a culturally and ethnically diverse society where transforming situations can take a toll on a person’s identity formation and development.

According to the census of 2011, it is estimated that approximately twenty-two per cent of India’s population lives in poverty.³⁷ During the lockdown, the country came to a standstill, and all sorts of businesses and other daily operations came to a complete halt. Millions of people rely on small companies and daily wages that operates on a circular economic set-up. Although the lockdown and the ongoing pandemic has also impacted the jobs in corporate, businesses and airline industries, those who were hardest hit and were most severely affected were the poor labour class and the economically vulnerable groups.³⁸ These were the people who relied on daily wages for their economic sustainability. The lockdown also emerged as a topic of debate and discussion over the financial sustainability of the economically deprived categories.³⁹ Many also questioned the impact of this lockdown on the socio-economic sector of the country; some blamed it, while others supported the move of a nationwide lockdown.⁴⁰

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ MAHAPATRA, *cit. supra* note 32.

³⁸ CHAUDHARY, KOTOKY, “India’s next problem: Convincing frightened workers to return to the cities”, *The Print*, 6 April 16, available at: <<https://theprint.in/india/indias-next-problem-convincing-frightened-workers-to-return-to-the-cities/402629/>>.

³⁹ KAPUR, *cit. supra* note 28.

⁴⁰ *Ibid.*

Although the extreme measures of lockdown appeared necessary to restrict the coronavirus from killing millions of people in a highly-populated society like India, it could not prevent the disease from further spreading within the community. Simultaneously, the initial numbers of infected cases and deaths caused by the COVID-19 infections were considerably low compared with the surging cases reported from other countries around the World.⁴¹ The sudden and mass travelling of migrants made the virus spread even to the remotest rural areas, and those were alien to the virus before the lockdown.⁴² By now, it is very apparent that the lockdown in India heavily jeopardized the lives of the migrant workers and their families.⁴³ Thus, undermined in a way that has become unfortunate memories for hundreds and thousands of migrate families who have lost their families during the lockdown. An immediate lockdown in a country where a large part of its population was trying to survive in vulnerable conditions looked like a nightmare and hungry nights to millions of people. As part of the economic responsibility and support to the internal migrant's issue, the Indian Government also announced a financial package of 23 billion US Dollars to support the poor with their daily meals.⁴⁴ The COVID-19 lockdown once again reflected the fundamental problems of poverty and economic vulnerability in India. But meeting the needs and demands of millions of subjects amid a pandemic looked impossible and extremely problematic where the medical care of the country might become overburdened if millions of these migrants are moving spreaders of the virus.

On June 9, the Supreme Court of India directed the Central and State Governments to attend the unresolved issues concerning the stranded migrants in the country.⁴⁵ While the remaining migrants were directed to be transported to their required places, the relief measures were considered to be overlooked to facilitate the employment opportunities of the migrants.

The lockdown not only took away the jobs and financial income of migrants in India. For many it has ended their lives during the unfortunate journey back home. A survey conducted by a civil society organization on the labour migrants recorded that more than 80 per cent of the thousands approached migrant workers feared that they

⁴¹ ANDREWS *ET AL*, "First confirmed case of COVID-19 infection in India: A case report", *The Indian journal of medical research*, 2020, p. 490 ff.

⁴² BISWAS, *cit. supra* note 2.

⁴³ *Ibid*.

⁴⁴ NAIR, *cit supra* note 21.

⁴⁵ SHAH, "Supreme Court has let down migrant workers and the vulnerable: Justice A.P. Shah and I. Karan Thapar", *The Wire*, 5 May 2020, available at: <<https://www.youtube.com/watch?v=bmaSkJrxs0>>.

would be jobless even after the lockdown would be lifted.⁴⁶ Those who desperately started on foot and on small vehicles were accidentally rammed by heavier cars on the roads. The leading media houses reported hundreds of incidents where migrants died on their life-changing journeys towards their home and desperation to meet their families amid a lockdown. Most of the migrants who were from the migrant-sending states of Uttar-Pradesh and Bihar are the ones to have lost their lives during their journeys. The stories of these migrants are heart wrenching, traumatizing and perhaps an incident that has changed the lives of thousands of families forever. Thus, these instances will transform the pattern of migrations in the future. Certainly yes, but only to some extent because poverty and economic dependence will ultimately force the remaining migrants to venture into the years long working culture and migrate to urban spaces. At the same time, there is a probability that the lockdown will play an impact on the way migrants would consider the working conditions and rules while getting back even on the informal sector.

The lockdown that was initiated in a massive scale although helped contain the virus during the initial months, it could not control the large community transmission of the disease. It should be noted that the mass internal migration erupted was the result of lockdown, because the migrants could not afford the basic expenses due to the sudden shutting down of daily wages that served as their primary sources of livelihood. And, the migration of thousands of these migrants and subsequent gatherings led to the spread of the virus. Thus, India experienced massive increase in COVID-19 infections and was one of those countries with skyrocketing COVID-19 cases around the World. Subsequently, by the end of 2020, the number of infections in India began to drastically lower down, but a second wave of even deadlier COVID-19 devastation emerged in 2021. The second wave surpassed the first one and was considered more fatal and contagious, but this time the internal migration was not one of the primary reasons of its spread. As India began administering the vaccination drive rapidly, the second wave gradually subsided. But we still remember the migration and the harrowing stories of reverse migration that the public and the Government had never seen before this pandemic. Thus, my next section will underpin the ‘cacophony’ of migration and the migrants with their experiences and stories, digging more into the recently held migrant movement narratives in the country.

⁴⁶ *Ibid.*

4. THE MIGRANT CRISIS DURING REVERSE MIGRATION

The popular media headlined the situation of the migrants as a 'migrant crisis' and the migrants considered it as a mismanagement of lockdown. One lawyer-activist, has also filed a petition in the Supreme Court requesting the return of the migrants to their respective villages.⁴⁷ These criticisms surfaced as the stories of migrants began coming to the front during the lockdown.⁴⁸ The migrants echoed the line: 'if coronavirus does not kill us, we will be killed by hunger'.⁴⁹ This can be considered as particularly true because majority of the menial labour migrants earn their wages on a daily or weakly basis. And, no income for months means no food to eat and this would challenge the livelihood of these category of migrants.

The sudden lockdown turned thousands of workers jobless and caused them in a panicking position overnight.⁵⁰ This turned the financially unstable menial labour category of the population dwelling in cities of India become homeless in a matter of few hours.⁵¹ And this began the exodus of labour migrant's journey from the urban centers to their native villages.⁵² Suddenly the problems and barriers faced by the menial migrants in their work places and the treatment they are offered as menial labours began surfacing on media and social media platforms . While many blamed the ignorance of the migrants for not-understanding the seriousness of the virus and its consequences.⁵³ The migrants had their own stories and reasons to continue their journeys back home. Many human rights activists and liberals have blamed the policy makers of initiating the lockdown without considering the legit problems of the migrants.⁵⁴ And many support the fact that, although the migrants are called an inseparable part of the Indian economy, 'they form a part of an invisible India, a part that is unrecognized and dusted under the carpets most of the time, and this comprises of 126 million migrants, who remain silent as invisible beings'.⁵⁵

The lockdown prompted a 'cacaphony', a kind of confusion among the migrants and this led eruption to a mass inter-state migration of labour migrant workers from

⁴⁷ PANDEY, *cit. supra* note 32.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² BBC News. 2020, April 29. India Coronavirus lockdown: Stranded migrants can return home, available at: <<https://www.bbc.com/news/world-asia-india-52475387>>.

⁵³ BIJOOR, *cit. supra* note 23.

⁵⁴ KARAT, "For Modi government, migrant workers are not citizens", NDTV, 3 May 2020, available at: <<https://www.ndtv.com/opinion/opinion-pm-cares-fund-should-pay-for-migrants-trains-home-2222653>>.

⁵⁵ BIJOOR, *cit. supra* note 23.

urban cities to remote rural areas of India. Left with no other alternative and faced with hunger, tiredness, and uncertainty of their future, these migrants were forced to go back to their native hometowns. The migrant workers started walking hundreds of miles, which, within hours, became a piece of news both nationally and internationally. “We are doomed, and if we don’t die of this disease, we’ll die of hunger”, said Chandra Mohan, a 24-year-old plumber who worked in the suburbs of New Delhi. He and many of his friends started their journey on foot towards the eastern state of Bihar, which is around 910 kilometres away.⁵⁶

Even more, there was news of hundreds of instances of vulnerable migrants and their families who collapsed on their journeys. A 39-year-old migrant worker, while returning from New Delhi to his village in the state of Madhya Pradesh, collapsed and died on the way due to over-exhaustion and heart failure after walking around 200 kilometres. Several other people died in road accidents caused by heavily loaded vehicles while walking on the freeways. Hundreds were rammed by running trains and could never make it to their destinations.⁵⁷ Also, hundreds of migrants were turned back and held by the police at state borders to avoid the possibility of spreading the virus amid growing chaos. It should be mentioned that many of these migrants just started their journeys under the influence of other fellow migrants from the same village or by the colleagues they worked with. The growing chaos and lack of information held many to start a journey that caused them their lives and an experience that has brought them a nightmare of a lifetime. While the lockdown was problematic for majority of these migrants for legit financial reasons, the migrants did not consider the practical problems they would face on their journeys during the lockdown. During the period of lockdown i.e. between the months of May and June; 29, 415 deaths were reported in the roads and highways of India. However, the Government stated that their Ministry does not hold a separate data on the deaths of migrants died during the lockdown.⁵⁸

There are no exact figures on the number of migrants who moved back to their villages during the lockdown, but there are some figures on migrants travelling by buses and trains.⁵⁹ However, the figures greatly varies, while one estimation ranges

⁵⁶YADAV, KUMAR, *cit. supra* note 17.

⁵⁷ GUPTA, “29,415 road accident deaths during lockdown, but no separate data on migrants, govt says”, *The Print*, 26 September 2020, available at: <<https://theprint.in/india/29415-road-accident-deaths-during-lockdown-but-no-separate-data-on-migrants-govt-says/511043/>>.

⁵⁸ *Ibid.*

⁵⁹ PANDEY, “Coronavirus Lockdown: the Indian migrants dying to get home”, *BBC News*, 20 May 2020, available at: <<https://www.bbc.com/news/world-asia-india-52672764>>.

from 5 to 40 million.⁶⁰ Another, data by the labour Ministry quoted that more than 1.06 crore migrant workers, including those who travelled by foot were reported to have reached their villages.⁶¹ I would like to reflect that the migration of worker migrants during the lockdown of the pandemic is not an unique phenomenon that has not only happened in India. Similar events involving the vulnerability of the worker migrants has largely surfaced from different countries around the World.⁶² However, what makes the case of India a special one is the absolute large scale of migrants involved in the exodus. When millions of migrants set out together on the roads and highways, it is a herculean task to provide food, shelter and protection to such an enormous population. Therefore, the next section would explain the Government subsidies provided to protect the migrants from the impacts of lockdown and the reverse migration.

4.1. *Government Aid for the Migrants*

The uncontrollable state of reverse migration and the fear of rapidly spreading the virus, the Government authorities began providing allowances and subsidies for the needy groups and the migrants in this case. The Government (meaning the Central Government) decided to transport the walking and stranded migrants to their home states.⁶³ The state governments (government in-charge of administering each state under the federal form of government and shares political powers with the national or central government) were authorized to handle the transportation and quarantine facilities of migrants belonging to each state. The state governments retrieved funds from the State Disaster Response Fund to comply with the expenses for the facilities provided to the migrants.⁶⁴ Thus, even amid a nationwide lockdown, the Central Government in coordination with the state governments, operated specially assigned trains (Shramik trains) and buses to help the migrant's dilemma amid the lockdown.⁶⁵ Therefore, the special trains transported more than 6 million migrants and around 4 million were transported by roads between May 1 and June 3

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² DESHPANDE, RAMACHANDRAN, *cit. supra* note 27.

⁶³ "Coronavirus lockdown: India announces free food for fleeing migrants", BBC News, 14 May 2020, available at: <<https://www.bbc.com/news/world-asia-india-52665316>>.

⁶⁴ *Ibid.*

⁶⁵ Order No. 40-3/2020-DM-I (A), Ministry of Home Affairs, April 29 2020, available at: <https://prsindia.org/files/COVID-19/notifications/4233.IND_Movement_of_Persons_April_29.pdf>.

alone.⁶⁶ Therefore, the measures that the Government worked to support the migrant's are as follows. As for transport, thousands of Specially operated *Shramik* trains were served that transported millions of labour migrants to their states and villages. States and district authorities also arranged buses that transported the migrants from railway stations to their native districts where they had to undergo quarantine and medical inspection before re-uniting with their families. As for food aid, the migrant-receiving states, under the Ministry of Health and Family Affairs, initiated to hold relief camps with sanitary food and medical facilities.⁶⁷ In May 2020, the Finance Minister under the *Aatma Nirbhar Bharat Abhiyaan* announced that the Government would provide free food grains to support the migrants and their families for two months under the migrant supporting scheme. The same government scheme also announced affordable housing facilities to rural migrants who struggle to pay higher rent. Additionally, some state governments also announced financial aids to jobless migrants returning to their native places.⁶⁸

The central Government also announced a relief fund of 23 billion to support the livelihood of migrants.⁶⁹ However, practical and even distribution of the aids to all sections of the migrants is an extremely hard and complicated task for the administration. According to the migrants, many of them could not receive and apply for the subsidies announced for them. As explained by Kapur, the problem of documentation is a real cause, the migrants who could not provide the identity verifying documents also could not benefit from the subsidized schemes.⁷⁰ The local social organizations⁷¹ and NGOs have reported that a large proportion of workers are excluded from the facilities. On lower levels, the tendency of corruption caused misutilization of relief provisions. Foodgrains were detected to be allowed even to non-deserving groups (for example, people who did not belong to the below poverty and financially burdened during the pandemic). According to the Inter-State Migrant Workmen Act 1979, hired migrant workers are required to be registered by the

⁶⁶ IYER, "Migration in India and the impact of the lockdown on the migrants", PRS Legislative Research, 10 June 2020, available at: <<https://www.prsindia.org/theprsblog/migration-india-and-impact-lockdown-migrants>>.

⁶⁷ "Coronavirus lockdown: India announces free food for fleeing migrants", BBC News, 14 May 2020, available at: <<https://www.bbc.com/news/world-asia-india-52665316>>.

⁶⁸ For instance, in the northern state of Uttar-Pradesh, migrants who have produced during the lockdown were paid Rs.1000 to meet the quarantine costs. BISWAS, *cit. supra* note 2.

⁶⁹ "Coronavirus lockdown: India announces free food for fleeing migrants", BBC News, 14 May 2020, available at: <<https://www.bbc.com/news/world-asia-india-52665316>>.

⁷⁰ KAPUR, *cit. supra* note 28.

⁷¹ Jan Sahas is a civil society organization that works for the human rights of the socially marginalised communities. It surveyed 3,196 migrant workers across central and northern India, during the period of 27–29 March 2020.

contractors at the time of hiring. If registered in an official way, the migrants can apply for coverage and security under the Act.⁷² But, most of the migrants hired via contractors are not registered and thus do not fall under the Act. Today, most of the schemes and facilities are accessed through digital means, the truth is that majority of these migrants does not have access to smart phones or even any smart device for that matter. When many of these migrants are panicked with the burden of loans from their employers or acquaintances, having a smart device is still a luxury for them. Jobless and poor, these migrants will even struggle to repay those who helped them with their transportation while migrating to the cities. These migrants are left with no choice and can only rely on government subsidies for mere survival and livelihood during these hours of crisis. And, since many of these migrants could not access the provided subsidized funds and facilities. Practically it is difficult for them because many of these migrants do not have access to the digital version of these schemes, because of lack of money to buy expensive smart digital devices. Therefore, they have lost trust to return to the cities in the future.

Therefore, it might be challenging for the Government to motivate the migrant workers to return to the urban centers to comply with the demand after the pandemic subsides. As it is mentioned earlier many has decided never to return to the cities due to the treatment they have been offered in a critical time of need.⁷³ However, the truth remains that the growing capitalism will ultimately require these work-force and these are the shoulders who will help the skyscrapers to grow and become a renowned symbol of modern capitalism in the years to come.

5. WILL THE PATTERN OF MIGRATION CHANGE IN THE POST-PANDEMIC AGE?

In the present times, labour migrants throughout the World as a category of labourers faces and counters the dark side of the capitalist working environment. It is a fact that the menial workers, even in the significantly growing countries like Singapore, also brought out the whims and cries over the conditions of worker migrants in these places. In India, the pandemic and the lockdown has rubbed the already wounded poor migrants in a completely wrong way. A situation that enabled

⁷² It intends to regulate the employment of inter-state migrant workers and defines their conditions of service. Ministry of Labour and Employment, available at: <<https://clc.gov.in/clc/acts-rules/interstate-migrant-workmen-act>>.

⁷³ As one migrant worker from Uttar Pradesh claimed: 'Now, I would never return to Delhi, I will do farming and grow vegetables and I will survive by eating salt' (Pandey, 2020). These kind of statements reflects the whimpering experiences of millions of migrants who have returned to their rural villages in states of India. CHAUDHARY, KOTOKY, *cit. supra* note 38.

the whole nation to witness the jeopardizing conditions of these migrants in the most unfortunate times.⁷⁴ Here, I would like to highlight that the vulnerability of migrants and the internal migration in India will transform the perspective of rural to urban migration in the post-pandemic age.

In March 2020, the perspectives of viewing internal migration began to transform when a rare sight of thousands of labours gathered in the Anand Vihar Bus Terminal in Delhi.⁷⁵ Amid a nationwide lockdown, the migrants queued in crowded lines with the aspirations to have a chance to board a bus to their desired destinations. The media and human rights organizations have reported the words of many migrant workers who vowed to never again come to the cities to earn a living.⁷⁶ The media complained about the urban cities of Delhi and Mumbai as ‘death zones’ that swallows the lives of innocent villagers. The lockdown and the pandemic have brought an experience that the labour migrants did not imagine to be this harmful.⁷⁷ Critiques and human rights activists questioned the move of these migrants after the Government announced several relief aids and food distribution schemes to support the migrants.⁷⁸ However, in reality, only a section of these migrants could benefit from the provided plans and thus continued to travel to their native villages.⁷⁹

The privileged class or the present-day middle class that has dominated as the new powerful rarely talks about the rights of these migrants. In 2020, Shah⁸⁰ pointed out a gap between the perceptions of living rights between the middle/upper class and migrant workers that work under them. The workers are categorically considered in the lower socio-economic sphere by their employers and bosses. However, the changes of migrant roles and their long absence from the urban working sites might play a role to improve their service conditions in the post-pandemic era.

⁷⁴ HAAN, “Labour Migrants During the Pandemic: A Comparative Perspective”, *The Indian Journal of Labour Economics*, 2020, p. 885 ff.

⁷⁵ SINGH, “Migrant workers crowd Anand Vihar bus terminus to return to their villages”, *The Economic Times*, 28 March 2020, available at: <<https://economictimes.indiatimes.com/news/politics-and-nation/migrant-workers-crowd-anand-vihar-bus-terminus-to-return-to-their-villages/articleshow/74863940.cms>>.

⁷⁶ CHAUDHARY, KOTOKY, *cit. supra* note 38.

⁷⁷ The media released hurt wrenching images of migrants crying and dying on the roads and on railway tracks. BISWAS, *cit. supra* note 2.

⁷⁸ “I paid for my journey back home”, 5 May 2020, *Times of India*, available at: <<https://timesofindia.indiatimes.com/india/i-paid-for-my-journey-back-home/articleshow/75547676.cms>>

⁷⁹ For instance, a construction worker in Delhi stated: “I work as a labourer at construction sites, and the announcement of the countrywide lockdown made me unemployed. I know it would be not easy for me to survive in Delhi in the next 18 days of lockdown. I only have about ₹1000 as my savings, and I want to spend it on my journey from Delhi to my native place.” SINGH, *cit. supra*, note 75.

⁸⁰ SHAH, *cit. supra* note 45.

It cannot be denied that the lockdown affected all business operating sectors, but the lives of the labour migrants could not stand the week-long shutdown that turned them jobless and thriving. I argue that the migrant crisis that got highlighted during the pandemic will cause the transformation of internal migration in the future. According to Karat, the defined national rights of the migrant workers were denied as they are considered mere working subjects. These migrants, who are even beaten and tortured by their bosses, are devoid of fundamental rights in most cases.⁸¹ If the rights and conditions of these migrants were considered better, the lockdown would not have experienced the internal migrant crisis.

I would say that the agony and struggles of these migrant workers is not a new story to be heard off. But the pandemic has brought to the limelight and enabled the privileged ones to understand these people's lives closely. However, the migrant's experiences will also partially impact the patterns of migration in the future. Also, the worst sufferers might even never return owing to their traumatizing experiences. For instance, a labour migrant in Mumbai, who belongs to Uttar-Pradesh, stated that 'the migrants like him have to depend on charity for basic needs like food. They have no money, and there's no point living with such humility'.⁸² While, this is one perspective of post-pandemic migration. The lack of opportunities and urgency to earn for their families are major push factors behind this perspective.

Moreover, the migrants would also consider understanding the provisions they would receive for their service, such as living conditions, bonuses and financial support in times of emergency. If the authorities work to accommodate the migrants in the urban centres while considering the 'mandatory' role of these migrants in the economic sector, might positively influence the returning of these migrants to the urban hubs. The World Bank reported that 'the loss of employment and lockdowns have prompted a painful and chaotic exodus of mass returning of migrants not only in India but in many other countries in the world'.⁸³

Therefore, I argue that the pattern of migration in the post-pandemic age will change as it will depend on the experiences and treatments of migrants during the lockdown. While many have decided not to return to the urban hubs considering the

⁸¹ KARAT, *cit. supra* note 54.

⁸² PARTH, "Coronavirus lockdown: 'No dignity in living like this, it is humiliating' migrant workers from Uttar Pradesh on why they want to leave Mumbai", Firstpost, 8 May 2020, available at: <<https://www.firstpost.com/india/coronavirus-lockdown-no-dignity-in-living-like-this-it-is-humiliating-migrant-workers-from-uttar-pradesh-on-why-they-want-to-leave-mumbai-8345621.html>>.

⁸³ World Bank, "COVID-19 crisis through a migration lens. Migration and development brief, no. 32", 2020, available at: <<https://openknowledge.worldbank.org/handle/10986/33634>>.

treatment they have received during the lockdown, many would be forced to migrate to earn a living for the sake of their families.

6. CONCLUSION

The pandemic that has brought innumerable problems has also highlighted that vulnerable subjects like the labor migrants are the ones to be impacted during a crisis. The pandemic and the subsequent measures have left innumerable migrants jobless, distressed, poor, and helpless. While the COVID-19 pandemic continues to haunt the World, there is a similar saddening plight ongoing along with it, i.e. the story of the labour migrants. It has also highlighted the inner overshadowed conflict that exists between the labour migrants and the state. Similarly, it reflects the dilemma of invisible class of citizens i.e. the distressed and the poor. As, I have earlier pointed that although internal migrants are citizens of a nation, they are also the ones to struggle and thrive for the basic rights in a society. While India has also tried its best to attend and assist the dilemma of its migrants, over-population, chaos, mis-information and poverty has played significant drawbacks in this plight.

After more than a year of struggling with the pandemic, operations around the world are gradually beginning to get operated with precautionary guidelines to protect itself against a threatening wave of being swept by the virus. Not only in India, the pandemic has brought significant setbacks in all sectors of business operations. Since most internal migrants have moved back to their native villages, resuming work in the urban centres has countered a setback.⁸⁴ Countless businesses, including small, medium and large-scale industries, rely on domestic migrant workers.⁸⁵ Thus, I would like to point out that reverse migration will highly impact the manufacturing and construction industries relying on migrant workers and will be faced by labour shortages and high production cost margin. However, with reference to Chaudhary and Kotoky,⁸⁶ we can hope that this pandemic that has so strongly highlighted the problems of the labour migrants will eventually create a more comfortable and supportive space for the migrants in the future. The ability and scope for the migrants to bargain and negotiate with the employers will stabilize the situation of the migrants rather than exploiting the migrants. Thus, all these factors will impact the pattern of migration in the future, as migration in the post-pandemic times will depend on the experience of the migrants during the pandemic.

⁸⁴ NAIR, *cit. supra* note 21.

⁸⁵ *Ibid.*

⁸⁶ CHAUDHARY, KOTOKY, *cit. supra* note 38.

Moreover, I would signify that internal migration in India in the post-pandemic era will be directed by factors other than the 'money factor'. Because the migration that shook the entire nation significantly jolted the lives and mental thoughts of not only the migrants but also other categories in the society. Thus, the migrants will consider their experiences of the treatments they have received during the lockdown and their troubles towards their home journeys. However, for many, the lack of economic opportunities, haphazard of lives and urgency to earn income will ultimately lead them to migrate back to these urban centres.⁸⁷

After a year of the COVID-19 pandemic, many countries have started their vaccination drive around the World.⁸⁸ With two vaccinations acquiring green signals from the drug regulators, India has also launched its vaccination drive on 16th January, 2020. The country as a whole looks confident over the vaccination campaign as India is also echoed as a 'vaccine powerhouse'.⁸⁹ Housing some of the world's largest manufacturers and producing 60% of the World's vaccines, it has been working to herd immunize its population.⁹⁰ The country that has recorded more than 11 million cases since the pandemic has started have already vaccinated around 30 million of its people by March 2020.⁹¹ The Government aims to cover 250 million 'priority people' by July 2020.⁹² After two years of sailing through a deadly pandemic and witnessing two waves of COVID-19 infections, India is gradually beginning to normalize while vaccinating millions of its population. As the countries are trying its best to bring 'herd immunity' among its people, the pandemic is still an ongoing reality.

While the World together struggles to fight the global pandemic, India has also tried its best to cope with these uncertain times. While the World eagerly waits for this pandemic to subside with vaccination, economic stability is expected to hit rock bottom like never before. Lastly, the turmoil of internal migration, the deaths, and the harrowing stories of the migrants in India has showcased the never-ending battles of migrant labourers and jeopardizing conditions of vulnerable communities in the World.

⁸⁷ PATNAIK, "Why migrant workers are starting to return to cities and how this can revive economy faster", The Print, 2020, available at: <<https://theprint.in/ilanomics/why-migrant-workers-are-starting-to-return-to-cities-how-this-can-revive-economy-faster/435923/>>.

⁸⁸ For example: vaccinating in the United States and many other countries in the west started towards the end of 2020.

⁸⁹ "Covid Vaccine: How many people has India vaccinated?", BBC News, 14 March, 2020. Available at: <<https://www.bbc.com/news/world-asia-india-56345591>>.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

10.

**SIMILAR WORK, YET DIFFERENT RISKS?
EXAMINING LEGAL AND INSTITUTIONAL RESPONSES REGARDING
ESSENTIAL MIGRANT WORKERS IN BELGIUM AND THE NETHERLANDS
IN COVID-19 TIMES**

*Amy Weatherburn and Lisa Berntsen**

1. INTRODUCTION

The COVID-19 pandemic has plainly revealed the precarious position and conditions under which migrants perform essential labour in Europe today. Outbreaks among European Union (EU) migrants working in meat processing in Germany¹ and the Netherlands, and among seasonal workers in the UK,² have been reported in the media. The UK newspaper the Guardian even speaks about “the gruelling life in Dutch meat plants”.³ In Belgium, two similar outbreaks were reported in meat processing factories. In this chapter we explore how well-equipped the Belgian and Dutch legal and institutional responses to COVID-19 are to minimising the risk of workplace transmission for EU migrant workers in essential work sectors. We determine the extent to which factors such as the composition of the workforce, the regulation of working conditions through Collective Bargaining Agreements (CBAs) and the strength of social dialogue impact on the overall sector’s response to the risk of workplace transmission.

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¹ CONNOLLY, “Meat plant must be held to account for Covid-19 outbreak, says German minister”, Guardian News, 22 June 2020 available at: <<https://www.theguardian.com/world/2020/jun/22/meat-plant-must-be-held-to-account-Covid-19-outbreak-germany>>.

² “Coronavirus: Mathon farm workers isolating after 73 cases”, BBC News, 12 July 2020, available at: <<https://www.bbc.com/news/uk-england-hereford-worcester-53381802>>.

³ YOUNG, “‘I feel worthless’: workers tell of gruelling life in Dutch meat plants”, Guardian News, 10 August 2020, available at: <<https://www.theguardian.com/environment/2020/aug/10/i-feel-worthless-workers-tell-of-gruelling-life-in-dutch-meat-plants>>.

CILIBERTO, STAIANO (eds.), Labour Migration in the time of COVID-19: Inequalities and Perspectives for Change, Rome, CNR Edizioni, 2021, ISBN 978-88-8080-348-5, pp. 247-280.

We combine a legal and industrial relations perspective to look at the interaction between different regulatory contexts (international, EU, national) and institutional responses by public authorities and non-state actors, such as trade unions. COVID-related responses addressing the specifics of migrants as a group are rare; and therefore, we evaluate the measures and responses taken from the perspective of migrants: how does that change or improve their position or reduce COVID-related risks? Our material is based on legal and policy documents, news media items, public reports and academic publications.

All reasonable steps should be taken by employers to safeguard the physical and mental health of workers by complying with health and safety standards.⁴ This legal obligation has become even more apparent in the context of the COVID-19 pandemic where the possibility of person-to-person transmission in the workplace through respiratory droplets, close contact, and by touching surfaces or objects contaminated by the virus, has led to mandatory working from home for a large number of workers. Where home working is not possible, we have seen the implementation of measures in the workplace to ensure hand and respiratory hygiene, social distancing and early identification and isolation of infected employees.⁵

This chapter focuses on workplace transmission risks in the meat industry, a coined “essential” sector, where work during the pandemic continued and several COVID-19 outbreaks occurred. Workplace transmission is particularly a concern in sectors where existing environmental factors are conducive to a higher risk of infection: for instance, humidity in meat processing and packaging and agriculture or close proximity to patients in the care sector. Many countries have categorised in their emergency legislation such sectors as “essential”, meaning that they are not subject to restrictions on their business operations. Such sectors are also not conducive to teleworking requiring continued physical presence in the workplace.⁶ Of importance to this chapter, is that these essential sectors, where the risk of workplace transmission is high, are also predominantly reliant upon a migrant

⁴ SULLIVAN, “Workplace Welfare and State Coercion” in BOGG et al (eds.), *Criminality at Work*, Oxford, 2020, p.35 ff.

⁵ For detailed overview of interim guidelines for workplace in early phases of pandemic, see RAMESH, “Tackling Corona Virus Disease 2019 (COVID 19) in Workplaces”, *Indian Journal of Occupational and Environmental Medicine*, 2020, p.16 ff.

⁶ REID, “Migrant Workers, Essential Work, and COVID-19.” *American journal of industrial medicine*, 2021, 64(2), p. 73 ff.; see also GUADAGNO, *Migrants and the COVID-19 Pandemic an initial analysis*, International Organization for Migration (IOM), 2020, available at: <https://www.researchgate.net/profile/Lorenzo_Guadagno/publication/340844735_Migrants_and_the_COVID-19_pandemic_An_initial_analysis/links/5ea04e1892851c010577ecb0/Migrants-and-the-COVID-19-pandemic-An-initial-analysis.pdf>.

workforce subjected to conditions of precarious employment. As reported by Fassani and Mazza, essential migrant workers, in comparison with native workers, are not only more likely to be employed in low-skilled sectors, but also more likely to be employed on the basis of temporary contracts.⁷ In COVID-19 times, the precarity of the employment is also a risk factor in itself since many workers feel unable or pressured to return to work, even if they should be respecting quarantine or self-isolation rules.⁸ Such unequal treatment in sectors that employ a high number of migrant workers and the risk to the health and safety of migrant workers not only has an impact on the workers (micro level), but also on the customers (meso level) and public health more broadly (macro level).⁹

In this chapter, we will confront these aspects by situating the risk of workplace transmission in the context of “essential” sectors and demonstrate how such risks are particularly pertinent to migrant workers (Section 2). We will then present the characteristics of the meat sector in both Belgium and the Netherlands and describe the handling of outbreaks in 2020 (Section 3). Taking into account the prevalence of migrant workers in the meat sector, we will outline the implementation of migrant workers’ occupational health and safety derived from European Union labour law (Section 4) before then identifying the measures taken by State bodies and social partners in response to the outbreaks in 2020 and early 2021 (Section 5).

⁷ FASANI and MAZZA, *A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic*, Publications Office of the European Union, Luxembourg, 2020, available at: <<https://respect.international/wp-content/uploads/2020/07/a-vulnerable-workforce-migrant-workers-in-the-covid-19-pandemic.pdf>>.

⁸ On the constraints that exclude those in precarious employment from accessing COVID-19-related welfare programmes (e.g. unemployment insurance, housing assistance, food vouchers, rental subsidies) see GUADAGNO, *cit. supra* note 6. See also Royal Society for Arts, Manufacturers and Commerce (RSA) survey in the UK found that ‘one in 10 of those doing insecure work, such as zero-hours contracts and agency or gig economy jobs, said they had been to work within 10 days of a positive Covid test. SAVAGE, “Staff ‘pressured to go back to work’ in breach of UK Covid rules”, *Guardian News*, 16 January 2021, available at: <<https://www.theguardian.com/world/2021/jan/16/staff-pressured-back-to-work-breach-of-uk-covid-rules>>.

⁹ Borrowing from De Wispealere’s and Gillis’ assessment of the impact of Covid-19 on informal work in Belgium see DE WISPELAERE and GILLIS, “L’impact de la pandémie de COVID-19 sur l’évolution du travail au noir en Belgique et la lutte contre celui-ci”, *Revue Belge de Sécurité Sociale*, 2020, p. 227 ff., p. 235.

2. WORKPLACE TRANSMISSION RISKS IN “ESSENTIAL” JOBS AND FOR MIGRANTS SPECIFICALLY

Responses to minimising the transmission of the COVID-19 virus, emphasise social distancing rules, minimal social contacts and various hygiene related measures. The role of workplaces, besides hospitals, as points of transmission has, according to Vogel, however, been a blind spot in governmental initiatives. This has far reaching consequences on the overall effectiveness of restrictive measures.¹⁰ Indeed, social inequalities among workers and differences in the nature of work, receive scant attention in the fight to contain the spread of COVID-19.¹¹

The extent to which workplace transmission is a significant factor in infection rates is contested and is a complex area of discussion due to the lack of accurate data. International data collected on hospital admissions and deaths are not broken down by occupation nor pay attention to the socio-economic characteristics of affected individuals.¹² Even though early on in the COVID-19 pandemic, it was clear some jobs carried high risk (as we will see *infra*).¹³ While data on the occupational dimension emerged gradually, it differs between countries.

For instance, during the first and second wave in Belgium and the Netherlands, government sources revealed that the majority of transmissions occur with the home sphere (84 per cent in Wallonia, 54,91 per cent in Flanders and 74,8 per cent in the Netherlands)¹⁴ compared with the workplace (4 per cent in Wallonia,

¹⁰ VOGEL, “Work, a Blind Spot in the Covid-19 Crisis”, *HesaMag*, 22.Autumn, 2020), p. 4 ff.

¹¹ *Ibid.*

¹² The individual WHO data, for instance, does include sex, age, place of residence, comorbidity factors, admission to hospital, death.

¹³ HILMERSSON, “Covid-19: more action needed to secure workers’ safety”, *Social Europe*, 11 December 2020, available at: <<https://www.socialeurope.eu/covid-19-more-action-needed-to-secure-workers-safety>>.

¹⁴ For the Netherlands, this concerns cases reported since September 2020 based on contact tracing ; in 52.7 per cent of the cases, transmission occurred in the home sphere (house mates/partner); 22.1 via visits in the home sphere (of family/friends), see RIJKSINSTITUUT VOOR VOLKSGEZONDHEID EN MILIEU (RIVM), *Epidemiologische situatie van SARS-CoV-2 in Nederland*, 12 January 2021, available at: <https://www.rivm.nl/sites/default/files/2021-01/COVID-19_WebSite_rapport_wekelijks_20210112_1259_final.pdf>; for figures in Flanders for December 2020 see AGENTSCHAP ZORG EN GEZONDHEID, *Contactonderzoek in cijfers*, 12 February 2021, available at: <<https://www.zorg-en-gezondheid.be/contactonderzoek-in-cijfers>>; Figures in Wallonia from l’Agence pour une vie de qualité (AVIQ) were reported in the media, “Foyers de contamination au coronavirus en Belgique: la famille et l’école en Wallonie, la famille et les amis en Flandre”, RTBF, 15 October 2020, available at: <https://www.rtb.be/info/societe/detail_coronavirus-en-belgique-la-famille-et-l-ecole-sont-les-sources-principales-de-contamination-selon-l-aviq>.

11,54 per cent in Flanders and 14,2 per cent in the Netherlands).¹⁵ However, Médecine pour le Peuple – an NGO who conducted a survey on behalf of Workers' Party of Belgium (*Parti du Travail de Belgique (PTB) - Partij van de Arbeid van België (PVDA)*) - suggest that workplace transmission in Belgium may be higher than the reported data: their survey data points to the workplace as point of transmission in 20 per cent of the cases.¹⁶ Belgian trade unions called for more accurate data collection regarding the workplace as point of transmission.¹⁷

Notwithstanding the limited data, it is clear that there are jobs in the health and social care sectors, in the food industry and security industry where workers face a higher risk of contracting COVID-19. In many sectors that are coined 'essential' during the pandemic, options for working remotely are not always available, and physical distancing at the workplace can be problematic.¹⁸ According to a EUROFOUND survey conducted between April and July 2020, 44 per cent of employees in the EU 27 believe they are at risk of contracting the virus because of their job. This perceived risk of workplace infection is substantially higher if employees are in regular direct physical contact with people (such as colleagues, customers, passengers and pupils) during the course of their work.¹⁹ Fear of workplace contagion is also noted by the Dutch Labour Inspectorate (*Inspectie SZW*): the number of notifications received by the Inspectorate increased by 92 per cent in 2020 compared to the same period in 2019 and were primarily related to the inability to keep physical distance at the workplace, unhygienic work circumstances

¹⁵ RIVM, *cit. supra* note 14. It is important to note that in the Netherlands, the point of transmission is only recorded in 50 per cent of cases.

¹⁶ "Etude exclusive: une contamination sur cinq se produit dans le lieu de travail", PTB/PVDA, 29 October 2020, available at: <https://www.ptb.be/une_contamination_sur_cinq_se_produit_sur_le_lieu_de_travail_selon_une_tu_de_de_m_decine_pour_le_peuple>; MEDECINE DU PEUPLE, "Une contamination sur cinq se produit sur le lieu de travail: Étude de Médecine pour le Peuple sur les sources de contamination au Covid-19", October 2020, available at: <https://d3n8a8pro7vnmx.cloudfront.net/pvdapbtb/pages/1980/attachments/original/1603897506/E%CC%81tude_MPLP_de%CC%81tection_de_la_source_de_contamination.pdf?1603897506>.

¹⁷ Thierry Bodson, Secretary General of the FGVB, quoted in PAQUAY, "Une contamination sur cinq au travail", RTBF, 29 October 2020, available at: <https://www.rtf.be/info/economie/detail_coronavirus-en-belgique-une-contamination-sur-cinq-au-travail-vraiment?id=10620316>.

¹⁸ THE LANCET, "The plight of essential workers during the COVID-19 pandemic", *Lancet*, 2020, 395, p. 1587 ff; AGIUS et al, "Editorials: Covid-19 in the workplace", *BMJ*, 2020, 370, p. 19 ff.

¹⁹ AHRENDT ET AL, *Living, working and COVID-19*, EUROFOUND, COVID-19 series, 2020, Publications Office of the European Union, Luxembourg.

or the lack of personal protection equipment.²⁰ Similar findings came from a survey conducted by the Belgian trade union FGTB/ABVV during the first wave revealing that COVID-19 prevention measures were not followed in the workplace for 10 per cent of workers surveyed, leaving workers worried and in fear of an increase in stress and pressure in the workplace.²¹ The Dutch trade union FNV, based on a survey among 10.000 members in January 2021, showed that 65 per cent are afraid of COVID-19 infection in the workplace, and 45 per cent believes employers take insufficient measures to reduce workplace transmission risks.²²

In general, problems with minimising workplace transmission risks are related to poor enforcement and supervision capacity as well as with the organisation of work. The former comprises, for instance, deficient monitoring capacity or limited mandates of existing enforcement authorities in the areas of decent working conditions and health and safety at work; or to a lack of workplace supervision on compliance with COVID-19-related health and safety measures. The nature of work may further complicate the ability to keep 1.5 meters physical distance at the job; or environmental workplace factors, such as low temperatures, humidity, metallic surfaces and ventilation conditions, may allow the virus to be airborne and to spread over long distances.²³

While workplace transmission is clearly an important source of infection, there have been minimal examples of factories being closed down or being fined for not upholding health and safety standards. A prime exception here is the meat industry, where outbreaks across the globe have been reported resulting in temporary factory shutdowns. In other sectors, company shutdowns or fines are exceptional in the absence of large outbreak cases. Atypical are thus the developments at Amazon warehouses in France, where the trade union group *Solidaires Unitaires Démocratiques* (SUD) took Amazon to court, when Amazon failed to take sufficient health and safety precautions. The French courts ruled that Amazon was to limit sales

²⁰ INSPECTIE SZW, *Het Werk in Coronatijd* (The Hague: Dutch Labour Inspectorate, 2021).

²¹ Question parlementaire orale de Ludivine Dedonder à Sophie Wilmès (première ministre) sur “L’inquiétude des travailleurs face au COVID-19 et le sondage de la FGTB” (55000651P), 30 April 2020, available at: <https://www.beswic.be/sites/default/files/public/questions_parlementaire_document/vraag55000651p.pdf>.

²² KAGER, ‘Bijna Twee-Derde Werknemers Is Bang Om Corona Op de Werkvloer Op Te Lopen’, FNV, 5 February 2021, available at: <https://www.fnv.nl/nieuwsbericht/algemeen-nieuws/2021/02/bijna-twee-derde-werknemers-is-bang-om-corona-op-d?utm_source=email&utm_medium=email&utm_campaign=campaign-fnv-corona-nieuwsflits-6-10-2-2021>.

²³ WATTERSON, “Coronavirus is spreading rapidly through workplaces – here’s what is needed to make them safer” *The Conversation*, 3 November 2020, available at: <<https://theconversation.com/coronavirus-is-spreading-rapidly-through-workplaces-heres-what-is-needed-to-make-them-safer-149333>>. INSPECTIE SZW, *Rapport Arbeidsmigranten* (The Hague: Dutch Labour Inspectorate, 2021).

to essential products only, until they in consultation with the unions and works councils improved their health and safety standards.²⁴

When it comes to migrant workers, socio-economic factors additionally increase the risk of workplace transmission. First, information on health and safety measures related to COVID-19 may not be communicated in languages migrant workers speak or when migrants are not actively informed about those measures. Second, when employers (or contractors/temporary agency firms) pressure migrant workers to the extent that they feel unable to adhere to the COVID-19 related and general health and safety instructions. For instance, migrants may refrain from calling in sick out of fear of dismissal, thus increasing the risk of workplace transmission. The main COVID-19 related notifications received by the Dutch Labour Inspectorate in 2020 regarding migrant workers was related to illness (i.e. of migrants continuing work, when ill; or continuing work when house mates are ill).²⁵ On top of that, there is migrants' dependency on employers for accommodation and transport facilities: many work on temporary contracts, and rely on employer-arranged housing, where they share sanitary, kitchen facilities and possibly bedrooms as well. This limits distancing possibilities as well as minimisation of social contacts, especially when the household composition changes regularly. The same applies to transport facilities: where workers rely on employer-provided transport means, safe distances are not always upheld within buses or cars. An additional complicating factor is that when migrants on temporary contracts lose their jobs, many simultaneously lose a right to local health care access (tied to their working contract).

The particular work situation of migrants furthers the opaqueness of data on the impact of workplace transmission. Many migrants, for instance, face barriers to access state-sponsored COVID-19-tests; and therefore, often rely on employer-provided quick-tests. In the Netherlands, the standard way to make COVID-19 test appointments is via a Digital Identification Number, which migrants with temporary employment in the Netherlands usually do not possess; an alternative would be to call the public health services, yet migrants may then encounter a language barrier. Few migrants are able to book a test appointment via GPs, as many workers are not registered at a municipality due to their temporary stays, and therefore not registered with a Dutch GP. In larger cities, public health services offered in 2020 test possibilities via mobile test units in migrant-dense neighbourhoods. Yet, a large share of EU migrant workers live outside larger cities, and in rural areas. The

²⁴ KASSEM, "Amazon in the Time of Coronavirus", *HesaMag*, 22, Autumn 2020, p. 14 ff.

²⁵ INSPECTIE SZW, *Rapport Arbeidsmigranten*, (The Hague: Dutch Labour Inspectorate, 2021), p. 20.

alternative quick tests, often offered by employers, do not show up in the official statistics (which are solely based on the state-provided tests).

3. COVID OUTBREAKS IN THE BELGIAN AND DUTCH MEAT SECTOR AND THE ADVERSE IMPACT ON MIGRANT WORKERS

Cases of workplace transmissions of the coronavirus affecting migrant workers gained significant visibility at quite an early stage in the pandemic, with global coverage of the outbreaks in the media. A key factor that propelled such media attention and public scrutiny was the emergence of outbreaks in “essential” sectors. Pre-COVID, many consumers or end-users were unaware of globalisation’s impact on market competition and the subsequent race to the bottom on working conditions and wages.²⁶ However, that is not to say that the erosion of migrant workers’ labour rights and the impact that the changed composition of the workforce was having on health and safety levels in EU Member States had not been flagged.²⁷ Today, the adverse global impact of the pandemic on (already vulnerable) migrant workers is illustrated by the International Labour Organization who reported that:

“in many countries migrant workers represent a significantly larger share of the workforce making important contributions to societies and economies, and serving on the front lines carrying out essential jobs in health care, transport, services, construction, and agriculture and agro-food processing. Yet, most migrant workers are concentrated in sectors of the economy with high levels of temporary, informal or unprotected work, characterized by low wages and lack of social protection [...]”²⁸

The need to prioritise the safety of migrant workers who are likely to fall through the cracks is clear.²⁹ Whilst we recognise the role of essential migrant workers in health and social care, we focus on those who work in the food sector: notably meat

²⁶ For discussion on global market competition, working conditions and the place of the Belgian meat sector see ROCCA and VRIJSEN, “Climbing the Chain: the Belgian System of Joint Liability for the Payment of Wages” *Praca I Zabezpieczenie Spoleczne/Labour and Social Security Journal*, 2020, 1, p. 11 ff., p.12.

²⁷ See discussion in HOWES, “Who is Responsible for Health and Safety of Temporary Workers - EU and UK Perspectives” *EUR. LAB. L.J.*, 2011, 2, p. 379 ff., p. 380.

²⁸ ILO, “Protecting migrant workers during the COVID-19 pandemic: Recommendations for Policy-makers and Constituents”, ILO Policy Brief, April 2020.

²⁹ THE LANCET, *cit. supra* note 18.

processing and packaging.³⁰ This is a sector where the adverse impact on migrant workers is not only premised on its recognition as an “essential” sector but also, as we saw above, where the risk of workplace transmission is high. Again, it is important to emphasise that the additional risks posed by COVID-19 have exacerbated problematic working and living conditions that pre-existed the pandemic.³¹

The food industry is the largest employer in Belgium (18.2% of all industrial employment) and is continuing to grow (2.2.% increase in employment rate in 2019-2020).³² The meat sector represents 15% of the whole food sector. The latest figures from 2016, reveal that 12,995 workers were employed in the meat sector.³³ As we will see in the next section, the working conditions are outlined in CBAs. However, the nature of the work does mean that there is a labour shortage that has led to a reliance on sub-contracting. In 2019, 2% of all posted workers in Belgium were working in the agriculture and meat sector³⁴ with the majority of workers coming from Eastern European countries including Poland, Romania and Bulgaria.³⁵ It is to be noted that in Belgium, there has been a 22% increase in posted workers (in all sectors) between 2014-2019. In 2019, the majority of posted workers were from companies in the Netherlands (18%) with 16% from Poland, 11% from Portugal and 9% Romania. By contrast, 58% of all declarations made by self-employed posted workers were from Poland.³⁶ In Belgium, the impact of the pandemic on temporary migrant workers led to an overall reduction in the numbers of requests for seasonal

³⁰ REID, *cit. supra* note 6, p. 73 ff.

³¹ DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 238.

³² FEVIA, “Rapport économique annuel Fevia 2019-2020: pp. 22-25, available at: <<https://www.fevia.be/fr/publication/rapport-economique-annuel-fevia-2019-2020>>.

³³ CONSEIL CENTRAL DE L’ECONOMIE/CENTRAALE RAAD VOOR HET BEDRIJFSLEVEN, “L’emploi dans l’industrie alimentaire”, Mai 2016, available at: <<http://www.ccecrb.fgov.be/txt/fr/doc16-1296.pdf>>.

³⁴ MYRIA- FEDERAL MIGRATION CENTRE, “Cahier « Libre circulation, migration économique et étudiants »”, 2020, p. 9, available at: https://www.myria.be/files/2020_Migration_economique.pdf.

³⁵ ROCCA and VRIJSEN, “Pork value chain and industrial relations: the case of Belgium”, MEAT.UP.FFIRE Report, p. 11, available at: <<https://www.meatupffire.com/archive/meat-up-ffire-scientific-reports>>.

³⁶ MYRIA- FEDERAL MIGRATION CENTRE, *cit. supra* note 34, p. 7.

and posted workers³⁷ in the first few months (March – May 2020),³⁸ however by the end of May 2020, the numbers were the same as the levels in 2019.³⁹

As will be discussed further in the next section, EU legislation provides for the equal treatment of posted workers. In Belgium, the CBAs in the meat sectors provide for the same application of all working conditions regardless of employment status.⁴⁰ Rocca and Vrijssen highlight that the use of posted workers in Belgium has advantages for industry players, as it means that the social security contributions are paid according to the social security system of the sending country, as opposed to the requirements for Belgian employers to contribute around 32.7% of labour costs. Similarly, posted workers are likely to be attracted to the Belgian meat sector, as opposed to competitors in neighbouring countries, as the minimum wages are relatively high by comparison (13-14 euro per hour).⁴¹

The Dutch meat industry, with around 12,000 workers, is similar in size to the Belgian industry. With a sales volume of 15 billion in 2018, it is the largest food production industry in the Netherlands (followed by dairy with 13 billion).⁴² Most of the meat produce is exported. It is estimated that 7,500 migrants work in the Dutch meat industry. Yet, on the production floor, inspectorates, branch organisations and trade unionists, estimate that around 90 per cent are migrant workers, originating mainly from Poland and Romania. The majority of migrant workers are employed by specialised temporary agency firms, that only supply workers to the meat industry, and thus fall under the scope of the meat sector CBA, and not the temporary agency CBA. Compared to the posted employment contracts that are common in the Belgian meat industry, the contractual duration of agency work is less secure. Especially in the first phase of agency contracts, working hours are not guaranteed,

³⁷ Directive 2018/957 was transposed in Belgian law by Loi du 12 juin 2020 portant diverses dispositions concernant le détachement des travailleurs/ wet van 12 juni 2020 houdende diverse bepalingen inzake de detachering van werknemers transposed. Published in the Belgian Official Gazette 18 June 2020. NB posted workers are permitted the same health and safety protection as local workers, directive 89/391 was transposed in Belgian law by Loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail/ Wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk [Law of 04/08/1996 on the welfare of workers during the performance of their work]. Published in the Belgian Official Gazette 18 September 1996.

³⁸ DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 245. For posted workers, it is to be noted that there is no standardized system of registering postings across Europe, LENS et al, "Europe's ever expanding mobility patterns posting, third country nationals and the single European labour market", Document de travail CSB no. 19.08, Centrum voor Sociaal Beleid Herman Deleeck, 2019.

³⁹ MYRIA- FEDERAL MIGRATION CENTRE, *cit. supra* note 34, p. 9.

⁴⁰ ROCCA and VRIJSEN, *cit. supra* note 35, p. 12.

⁴¹ *Ibid*, p. 13.

⁴² Dutch Statistics, available at: <<https://opendata.cbs.nl/statline/#/CBS/nl/dataset/81156ned/table?dl=D4CA>>.

and contracts can be dissolved easily. The minimum wage for jobs in the meat sector that require limited expertise or skills is 10.68 euros an hour, so significantly lower than in Belgium.

As noted in the introduction, workplace transmission has taken place in both Dutch and Belgian meat sectors, however, there was an initial delay in such cases emerging in the latter. Outbreaks in the Netherlands were reported in May 2020, at the same time as perhaps the most widely known example, in Germany where more than 1500 of 7000 workers tested positive for COVID-19, and 640 000 residents were returned to lockdown conditions in Gütersloh, North Rhine-Westphalia. Outbreaks have also been reported in other European countries including Portugal and the UK.⁴³ The problem was not limited to Europe, with outbreaks also reported in the US⁴⁴ and Canada.⁴⁵ Furthermore, the ongoing nature of outbreaks in this sector towards the end of 2020 was considered to not be necessary as despite the knowledge of sectoral risks and the means to control them being widely available by May 2020.⁴⁶

In spite of the necessary measures to prevent workplace transmission in the meat sector being known, in May & June 2020, Dutch meat companies were forced to temporary shutdowns, because of COVID outbreaks among migrant workers, as well as lack of compliance with the government prevention measures, specifically related to transport facilities.⁴⁷ When 20 per cent workers from the Vion slaughterhouse in Groenlo tested positive for the COVID-virus, all 657 workers of the company were forced to quarantine for two weeks by the Safety Region North- and East Gelderland.⁴⁸ In this particular case, it was difficult to control whether workers actually quarantined themselves, because many lived in shared housing, and quite some workers were accommodated across the border in Germany. Two Dutch mayors asked the Dutch government in a letter how they could enforce the workers

⁴³ MIDDLETON et al, “Meat plants—a new front line in the Covid-19 pandemic” *BMJ* 2020, p. 370 ff; WATTERSON, *cit. supra* note 23.

⁴⁴ WATTERSON, *cit. supra* note 23.

⁴⁵ DURAND-MOREAU et al., “What explains the high rate of transmission of SARS-CoV-2 in meat and poultry facilities?”, Oxford Centre for Evidence Based Medicine, 4 June 2020.

⁴⁶ WATTERSON, *cit. supra* note 23.

⁴⁷ VNOG, “Updates on the situation of slaughterhouses by Safety Region”, available at: <<https://www.vnog.nl/coronavirus/nieuws-over-corona/2211-terrein-vion-apeldoorn-afgesloten-door-politie-op-last-van-vnog>>.

⁴⁸ HÖTSE SMIT, “147 besmettingen in één slachthuis: hoe heeft het zover kunnen komen?” *De Volkskrant*, 25 May 2020, available at: <<https://www.volkskrant.nl/nieuws-achtergrond/147-besmettingen-in-een-slachthuis-hoe-heeft-het-zover-kunnen-komen~bacf08e1/>>.

quarantine, without competence to oblige isolation on people.⁴⁹ The Safety region also closed down a Vion slaughterhouse in Apeldoorn, after the police reported that in 17 buses workers could not keep a safe distance from each other.⁵⁰

The majority of migrants that work in the Dutch meat industry are accommodated in shared housing arranged by their agency firm. Sharing kitchen and sanitary facilities is common, and shared bedrooms are no exception.⁵¹ An agency firm can deduct maximum 25 per cent of the income of a migrant for accommodation.

In Belgium, since the beginning of the pandemic, only two reported outbreaks have occurred in the meat processing industry, one in August 2020 in Westvlees where 94 workers out of 817 tested positive and another in a factory of the Lovenfosse Group where 70 workers out of 330 tested positive. In the context of Westvlees, the company cooperated with authorities and in consultation with social partners, implemented a number of additional measures. In the latter case, the factory was not closed and two workers lost their lives.⁵² In line with the risk factors identified above, in both instances, the housing conditions and the transportation of the posted and subcontracted workers was a significant factor in the spread of the virus amongst the workers.⁵³ Concerns about fraudulent employer practices that seek to minimise the cost of a posted worker were noted despite an obligation to reimburse the cost of accommodation.⁵⁴ Trade unions also raised concerns about the number of workers who were precariously employed in these businesses, particularly those on

⁴⁹ VAN STAALDUINE, “Niemand weet of de besmette werknemers van het slachthuis wel in quarantaine gaan”, Trouw, 23 May 2020, available at: <<https://www.trouw.nl/nieuws/niemand-weet-of-de-besmette-werknemers-van-het-slachthuis-wel-in-quarantaine-gaan~b5f9906c/>>.

⁵⁰ DE RUITER et al, Zeventien busjes van vleesbedrijf Vion, tjokvol arbeidsmigranten, De Volkskrant, 27 mei 2020, available at: <<https://www.volkskrant.nl/nieuws-achtergrond/zeventien-busjes-van-vleesbedrijf-vion-tjokvol-arbeidsmigranten~bd7b9311/>>.

⁵¹ *Ibid.*; INSPECTIE SZW, *cit. supra* note 25.

⁵² EUROPEAN FEDERATION OF FOOD, AGRICULTURE AND TOURISM TRADE UNIONS (EFFAT), “Covid-19 outbreaks in slaughterhouses and meat processing plants State of affairs and proposals for policy action at EU level”, 1 September 2020, pp. 14-15, available at: <<https://effat.org/wp-content/uploads/2020/06/Draft-EFFAT-Report-Covid-19-outbreaks-in-slaughterhouses-and-meat-packing-plants.pdf>>.

⁵³ *Ibid.*

⁵⁴ BARBIER, “Un travail écrit: “Le détachement de travailleurs: Analyse du régime et des conséquences de la réglementation européenne à l'aune des réformes et de la directive 2018/957””, 2019, p. 61. VANDERLINDEN, la grande illusion de la Directive 96/71/ce concernant le détachement des travailleurs – à l'ouest, rien de nouveau?” in Gosseries and Morsa (eds.) Droit pénal social - Questions spéciales et d'actualité (2018), p. 333 ff., p. 339.

daily contracts or posted workers. For instance, in the case of Westvlees, there were 39 different nationalities amongst the workforce.⁵⁵

4. MIGRANT WORKERS' RIGHT TO OCCUPATIONAL HEALTH AND SAFETY

Whilst the EU labour law framework is not harmonised,⁵⁶ the EU does have competence, by virtue of Article 153(1) TFEU to adopt minimum requirements in specific areas, including *inter alia*, improvement, in particular, of the working environment to protect workers' health and safety and working conditions. Principle 10 of the European Pillar of Social Rights seeks to reinforce the role of social and labour rights in the EU including the importance of "healthy, safe and well-adapted work environment and data protection reinforcing the right of workers to a high level of protection of their health and safety at work".⁵⁷ The right to health and safety in existing international,⁵⁸ regional⁵⁹ and, national⁶⁰ legal obligations provide for the legal protection of all workers in the workplace. Importantly, the Council of Europe Committee on Social Rights, drawing upon the European Social Charter, emphasised not only the impact of the global pandemic on the right to health (Article 11) but also crucially made reference to other rights where the pandemic poses a significant risk; identifying, in particular, the right of workers to safe and healthy working conditions (Article 3).⁶¹ Migrant workers are not excluded from the right to a safe working environment. Indeed, both regional and international instruments recognise the need

⁵⁵ PTB/PVDA, "L'abbatoir Westvlees a-t-il fermé les yeux sur la propagation du virus pour faire plus de profits?", 7 August 2020, available at: <https://www.ptb.be/l_abattoir_westvlees_a_t_il_ferm_les_yeux_sur_la_propagation_du_virus_pour_faire_plus_de_profits>.

⁵⁶ Consequently, the exact working conditions vary amongst national labour law frameworks see HENDRICKX, "Regulating working conditions through EU directives – EU employment law outlook and challenges" European Parliament, IPOL - Policy Department for Economic, Scientific and Quality of Life Policies, September 2019.

⁵⁷ EUROPEAN COMMISSION, "The European Pillar of Social Rights in 20 principles", 17 November 2017.

⁵⁸ ILO Occupational Safety and Health Convention, 1981 (No. 155) and its Protocol of 2002.

⁵⁹ Directive 89/391/EEC; Article 31(1), EU Charter of Fundamental Rights, 2000.

⁶⁰ Belgium: Loi Du 04 Août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail/ Wet Van 04 Augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk [Law of 04/08/1996 on the welfare of workers during the performance of their work]. Published in the Belgian Official Gazette 18 September 1996. The Netherlands: WET VAN 18 MAART 1999, houdende bepalingen ter verbetering van de arbeidsomstandigheden (Arbeidsomstandighedenwet 1998), Staatsblad van Het Koninkrijk Der Nederlanden, 184 (1999) [Act of 18 March 1999, containing provisions for the improvement of working conditions (Working Conditions Act 1998)].

⁶¹ COUNCIL OF EUROPE COMMITTEE OF SOCIAL RIGHTS, "Statement of interpretation", April 2020, available at: <<https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640>>.

to ensure the equal treatment of migrant workers and to ensure that working and living conditions are in compliance with standards of health and safety.⁶² This right was recently echoed in Objective 6 (para 22(i)) of the Resolution on Global Compact for Safe, Orderly and Regular Migration.⁶³

The protection of migrant workers' right to health and safety is important in the context of non-standard employment relationships. As we have seen in the previous section, these non-standard forms of employment are particularly prevalent amongst migrant workers in the meat sector, with the use of temporary agency workers in the Netherlands and posted workers in Belgium. The importance of focusing on the occupational health and safety of migrant workers is a long-standing issue. For instance, pre-COVID it was well-established that migrant workers and temporary workers are among the groups of workers who are at a high risk of occupational accidents and diseases than the EU average.⁶⁴

Even though posted work and temporary agency work are continuing to increase in prevalence as "new forms of employment",⁶⁵ it is important to note that the EU has proscribed duties to protect the rights of both groups of workers since the 1990's, with the Temporary Agency Work Directive 91/383/EEC (hereinafter: "TAWD") and the Posted Workers Directive 96/71/EC (hereinafter: "PWD") respectively.⁶⁶ The emphasis for both of these instruments has been on guaranteeing equal treatment. The TAWD sought to secure the health and safety for those workers with fixed-term contracts and temporary employment relationships (Article 2(1) and was further proscribed in the Directive 2008/104/ EC that seeks to ensure the protection of temporary agency workers and to improve the quality of temporary work by ensuring that the principle of equal treatment is applied to such workers.⁶⁷ Similarly,

⁶² Articles 25(1)(a) & 70 UN Migrant Workers Convention, 1990; Article 3, European Convention on the Legal Status of Migrant Workers, 1977.

⁶³ UNITED NATIONS, Global Compact for Safe, Orderly and Regular Migration, Resolution adopted by the General Assembly on 19 December 2018, UN Doc. A/RES/73/195.

⁶⁴ HOWES, *cit. supra* note 27.; MOYCE and SCHENKER, "Migrant Workers and Their Occupational Health and Safety", Annual Review of Public Health, 2018. p. 351 ff.

⁶⁵ MANDL, "New forms of employment in Europe – How new is new?", EUROFOUND, 15 December 2020.

⁶⁶ Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship OJ L 206, 29 July 1991; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997. Both Directives were transposed in Belgian Law by Book X, Title II, Code of Wellbeing at Work.

⁶⁷ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work OJ L 327, 5 December 2008.

although the legal framework on posted workers has been subjected to revisions and modification,⁶⁸ the original motivation of the PWD remains: to ensure a level playing field and the protection of worker's rights, including health, safety and hygiene at work.⁶⁹ Thus, whilst there is a clear framework of legal responsibility for the welfare and occupational health and safety of all workers, the prevalence of new forms of employment – characterised by atypical employment relationships – nevertheless raises the following question: to what extent do national legal frameworks provide for the health and safety of migrant workers who are posted or agency workers?

In Belgium, the labour law framework is known to offer significant protection to workers. However, the extent to which this protection is extended to migrant workers is lamented by civil society, as labour migration policy does not take into account of the specific vulnerability of migrant workers.⁷⁰ This sentiment is particularly the case for third country nationals but is also applicable to EU migrant workers. However, there are sectoral variations. For example, in the context of the meat sector, whilst there is still the possibility of informal working,⁷¹ significant efforts have been made to ensure equal treatment of all workers, including posted workers. The Joint Committee No118 establishes the working conditions and wages of those working in the food industry.⁷² Under Article 5(1) Law of 5 March 2002 an employer who employs a posted worker in Belgium is obliged to comply with the employment, wage and employment conditions that are determined by the legal and regulatory provisions of CBAs and the joint committees.⁷³ This includes health and safety obligations.

⁶⁸ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation No 1024/2012 on administrative cooperation through the Internal Market Information System OJ L 159, 28 May 2014; Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services OJ L 173, 9 July 2018.

⁶⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997.

⁷⁰ FAIRWORK BELGIUM, Rapport Annuel 2019/Jaarverslag 2019, p.21; MYRIA, *cit. supra* note 24, p. 31.

⁷¹ DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 238.

⁷² Two joint committees are of relevance in the context of the meat sector, Joint Committee No. 118, available at: <<https://www.cgslb.be/fr/cp-118-conditions-de-travail-et-de-remuneration>> and Joint Committee No. 322 for temporary work and agencies, available at: <<https://www.cgslb.be/fr/cp-322-conditions-de-travail-et-de-remuneration>>.

⁷³ Loi du 5 mars 2002 concernant les conditions de travail, de rémunération et d'emploi en cas de détachement de travailleurs en Belgique et le respect de celles-ci/ Wet van 5 maart 2002 betreffende de arbeids-, loon- en tewerkstellingsvoorwaarden in geval van detachering van werknemers in België en de naleving ervan [Law of 5 March 2002 concerning the conditions of work, remuneration and employment in the event of the posting of workers to Belgium and compliance therewith]. Published in Belgian Official Gazette on 13 March 2003.

Compared to Belgium, flexible forms of employment are more widespread in the Netherlands, also among non-migrants. Their conditions are regulated by a mix of public and private regulations. The working conditions of agency workers are laid down in the Netherlands in the Placement of Personnel by Intermediaries Act.⁷⁴ The employment conditions, such as pay, of agency workers need to equal those of employees of the main contractor. The main contractor is according to the Working Conditions Act 1998 responsible for the safety and health of their own directly employed as well as for agency workers within their company. The main contractor is obliged to inform agency workers on their work, employment-related risks and safety measures. Main contractors need to share their risk and safety measures policy with the temporary agency firm, who in turn should provide the agency worker with this policy and inform them of the work-related risks in the company. Although a private certification scheme, the SNA certification, exists for temporary agency firms, the role of the agency sector with regards to migrant employment has been subject to critique for years. There is also a private certification scheme for accommodation for migrant workers: Foundation for flexible housing standards, specifying minimum requirements such as at least at least 3.5 m² per person in the sleeping quarters.⁷⁵

The rise of bogus forms of employment, pertaining to EU migrant workers, resulted in the July 2015 Law Against Bogus Construction (*Wet Aanpak Schijnconstructies, WAS*). The WAS instated chain liability for wages, bans cash payments of minimum wages (only allowed via bank transfer), and restricts deductions on minimum wages to taxes, social contributions, and housing costs (up to a maximum of 25 per cent of the minimum wage) and health care insurance. This law also improved information sharing and collaboration between the Labour Inspectorate and trade unions, as we will discuss later in this chapter. Regarding the widespread use of flexible forms of employment, a government commission advised in early 2020 on ways to reduce flexible employment.⁷⁶ Since 1 March 2020, a notification requirement for employers of posted workers and self-employed cross-border workers is in place. In the Netherlands, no regulations were developed to improve working conditions of migrant workers specifically in the meat sector, as happened in Belgium.

⁷⁴ Wet van 1 juli 1998, houdende Allocatie Arbeidskrachten door Intermediairs (Wet allocatie arbeid door intermediairs 1998), Staatsblad van Het Koninkrijk Der Nederlanden, 306 (1998) [Act of 1 July 1998 concerning the allocation of workforce by intermediaries (Workforce Allocation Act 1998)].

⁷⁵ STICHTING NORMERING FLEXWONEN, “Information for residents”, available at: <<https://www.normeringflexwonen.nl/information-for-residents>>.

⁷⁶ COMMISSION REGULATION OF WORK, “In wat voor land willen wij werken?” Dutch Government, 23 January 2020, available at: <<https://www.rijksoverheid.nl/documenten/rapporten/2020/01/23/rapport-in-wat-voor-land-willen-wij-werken>>.

In Belgium, in light of the composition of the workforce, the competition from the meat sector in neighbouring countries such as Germany, and in order to prevent social dumping and social fraud, a number of measures have been introduced.⁷⁷ For instance, since 2013 and amended in 2018, there is a specific collective agreement that regulates the use of temporary work, requiring social dialogue amongst the National Work Council and the joint committees at the sectoral level and works councils and trade union delegations in the workplace. Each trimester, the works council or the trade union delegation must receive a quarterly overview of the use of temporary agency workers in the company so that the employment of temporary agency workers can be assessed. And secondly, daily contracts are only possible after consultation with and the agreement of the trade union delegation.⁷⁸ Furthermore, in addition to general rules regarding the registration of posted workers, in 2012 a system of joint and several liability along the subcontracting chain was extended to the meat sector⁷⁹ and since 2015, posted workers in the meat sector are subject to a mandatory registration of attendance (checkinetwork).⁸⁰ Where inspectors identify

⁷⁷ KAHMANN, “La crise sanitaire sonne-t-elle la fin de la sous-traitance dans l’industrie de la viande?”, *Chronique internationale de l’IRES*, 2020, p. 45 ff., p. 46.

⁷⁸ Convention collective de travail n° 108 du 16 juillet 2013 relative au travail temporaire et au travail intérimaire, modifiée par la convention collective de travail n° 108/2 du 24 juillet 2018/ Collectieve arbeidsovereenkomst nr. 108 van 16 juli 2013, gesloten in de Nationale Arbeidsraad, betreffende de tijdelijke arbeid en uitzendarbeid, gewijzigd bij collectieve arbeidsovereenkomst nr. 108/2 van 24 juli 2018 [Collective labour agreement no. 108 of 16 July 2013 on temporary and agency work, amended by collective labour agreement no. 108/2 of 24 July 2018], available at: <<http://www.cnt-nar.be/CCT-COORD/cct-108.pdf>>.

⁷⁹ Arrêté royal du 22 octobre 2013 modifiant l’arrêté royal du 27 décembre 2007 portant exécution des articles 400, 403, 404 et 406 du Code des Impôts sur les revenus 1992 et des articles 12, 30bis et 30ter de la loi du 27 juin 1969 révisant l’arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs/Koninklijk besluit du 22 octobre 2013 tot wijziging van het koninklijk besluit van 27 december 2007 tot uitvoering van de artikelen 400, 403, 404 en 406 van het Wetboek van de inkomstenbelastingen 1992 en van de artikelen 12, 30bis en 30ter van de wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders [Royal Decree of 22 October 2013 amending the Royal Decree of 27 December 2007 implementing Articles 400, 403, 404 and 406 of the Income Tax Code 1992 and Articles 12, 30bis and 30ter of the law of 27 June 1969 revising the decree law of 28 December 1944 concerning social security for workers]. Published in Belgian Official Gazette on 29 October 2013. The joint liability scheme is applicable in 9 sectors: surveillance and/or supervisory services; construction; electrical works; upholstery and woodworking; metal, machine and electrical construction; cleaning services; horticultural activities; certain sectors in the food industry and food trade (such as the meat industry).

⁸⁰ Article 4, Loi-programme 10 août 2015/ Programmawet 10 augustus 2015 [Law Programme 10 August 2015], Published in Belgian Official Gazette on 18 August 2015. Article 30ter, Loi du 27 juin 1969 Loi révisant l’arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs/ Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid

illegal posting of workers in cross-border employment, they are able to impose sanctions and hold both the user and the employer collectively responsible for social debts in Belgium.⁸¹ In 2019, with a view to reinforcing the fight against social dumping, the scope of this competence was extended to Inspectors from the National Office of Social Security (*Office National de Sécurité Sociale/ Rijksdienst voor Sociale Zekerheid*) as well as the Inspection Service for the Control of Social Legislation (*Inspection du Contrôle des lois sociales/ Arbeidsinspectie op de Sociale Wetten*). In a review of the impact of COVID-19 on the meat sector, the Belgian legal framework has been identified as securing working conditions that are not comparable in other neighbouring countries.⁸² One feature that could account for this is the high union density in the food sector which is estimated at approximately 80% of employees,⁸³ however, a lack of official data means that there is no indication of the union membership of migrant workers.

The following section will compare the responses of government, labour inspectorates and social partners (including employers, employers' organisations and trade unions) to ensuring that the above-mentioned legal framework was respected and enforced during the pandemic.

5. RESPONSES TO WORKPLACE TRANSMISSION IN BELGIUM AND THE NETHERLANDS

In order to mitigate the factors that could increase the risk of workplace transmission for migrant workers in the meat sector that have been discussed earlier in this chapter, responses must focus on prevention and control.⁸⁴ However, in order to ensure the maximum protection of the occupational health and safety of migrant workers, it is also vital to keep in mind the impact that these measures have on protecting migrant workers. Prevention requires risk assessment and implementation of measures such as staggered shift patterns, screens between workers on the production line, fitness to work screening checks, mandatory wearing of facemasks, provision of information in health education and employment rights in multiple languages, and provision of adequate sick pay during work absence due to self-

der arbeiders [Law of 27 June 1969 Law revising the Decree-Law of 28 December 1944 concerning social security for workers]. Published in Belgian Official Gazette on 25 July 1969.

⁸¹ On implementation of the liability scheme in practice see, ROCCA and VRIJSEN, *cit. supra* note 26.

⁸² EFFAT, *cit. supra* note 52, p. 14-15.

⁸³ ROCCA and VRIJSEN, *cit. supra* note 35, p. 10.

⁸⁴ MIDDLETON et al, *cit. supra* note 43.

isolation and quarantine.⁸⁵ Control and early identification of outbreaks must be regulated by outbreak plans and effective testing, contact tracing and isolation systems and cooperation with public health authorities.⁸⁶ Finally, responses to workplace transmission should not only be speedy but also envisaged for long-term, sustainable improvement of working conditions for all,⁸⁷ including migrant workers. Before expanding upon this latter point in the discussion, we will first outline the responses to workplace transmission in Belgium and the Netherlands by governments, labour inspectorates and social partners (including employers, employers' organisations and trade unions).

5.1. Government

In both the Netherlands and Belgium, collaborative efforts saw the development of protocols and checklists that outlined the measures to be taken to reduce workplace transmission in those sectors or businesses where home working was not possible. In Belgium, a general guide for COVID-19 measures in the workplace was developed in April 2020 and has been supplemented with sectoral guides.⁸⁸ With regards to migrant workers, in addition to the general and sectoral guides, employers are advised to ensure that workers are informed of the measures in place in a language that they understand.⁸⁹ The Dutch Public Health Institute published in June 2020 an addendum to the general COVID-related prevention measures with specific guidelines for the food industry, agriculture and wholesale trade, where many migrants are employed that both work and live together. These concern more customised guidelines attuned to their specific situation.⁹⁰ Also, the Dutch Government published an information

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ SPF EMPLOI, TRAVAIL ET CONCERTATION SOCIALE/ FOD WERKGELEGENHEID, ARBEID EN SOCIAAL OVERLEG, "Guide générique pour lutter contre la propagation du COVID 19 au travail: version 3", 30 October 2020, available at: <<https://emploi.belgique.be/fr/actualites/version-adaptee-du-guide-generique-pour-lutter-contre-la-propagation-du-covid-19-au>>; SPF EMPLOI, TRAVAIL ET CONCERTATION SOCIALE/ FOD WERKGELEGENHEID, ARBEID EN SOCIAAL OVERLEG, "Coronavirus checklist prévention sur le lieu de travail", available at: <<https://www.beswic.be/fr/en-pratique/coronavirus-checklist-prevention-sur-le-lieu-de-travail>>.

⁸⁹ SPF EMPLOI, TRAVAIL ET CONCERTATION SOCIALE/ FOD WERKGELEGENHEID, ARBEID EN SOCIAAL OVERLEG, "Travailler avec des travailleurs salariés ou indépendants de l'étranger", 25 February 2021, available at: <<https://emploi.belgique.be/fr/actualites/travailler-avec-des-travailleurs-salaries-ou-independants-de-letranger>>.

⁹⁰ RIVM, "Handleiding COVID-19 in de voedingsindustrie, landbouw en groothandel", version 18 December 2020, available at: <<https://lci.rivm.nl/covid-19/voedingindustrie-landbouw-groothandel>>.

sheet for employers with attention points when working with migrants during the COVID pandemic.⁹¹ While COVID-related rules of conduct were published in Dutch, and various other languages, such as Polish or Romanian, the Dutch government's press conferences initially failed to be published in languages spoken by migrant workers. It is to be noted that the correct application of COVID-measures can be costly and thus increase production costs, which has been recognised as posing a threat to the increased risk of social fraud, where non-respect for health and safety regulations generates an improper competitive benefit/profit.⁹²

In Belgium, from 24 August 2020 until 1 March 2021, employers in the construction, cleaning, agriculture and horticulture, and meat sectors - and subsequently all sectors following extension in January 2021⁹³ - were required to keep a register of foreign workers, wherein the provision of a residence address was mandatory (except for workers who spent less than 48 hours in Belgium) and to ensure that the worker had completed a Passenger Locator Form.⁹⁴ For posted workers, there was already the obligation of the employer to register a residence address supplementary to the registration of posted workers and self-employed persons with a LIMOSA Declaration before commencing work activities in Belgium.⁹⁵ Employers are required to have the residence register and information

⁹¹ DUTCH GOVERNMENT, "Arbeidsmigranten in de coronacrisis - informatie voor werkgevers", 2 June 2020, available at: <<https://www.rijksoverheid.nl/onderwerpen/coronavirus-covid-19/documenten/publicaties/2020/06/02/arbeidsmigranten-in-de-coronacrisis>>.

⁹² DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 245.

⁹³ Arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, tel que modifié par l'arrêté ministériel du 19 décembre 2020, l'arrêté ministériel du 24 décembre 2020 et l'arrêté ministériel du 12 janvier 2021/ Ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial Order of 28 October 2020 on emergency measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Order of 19 December 2020, the Ministerial Order of 24 December 2020 and the Ministerial Order of 12 January 2021]. Published in Belgian Official Gazette on 12 January 2021.

⁹⁴ Arrêté ministériel du 22 août 2020 modifiant l'arrêté ministériel du 30 juin 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19/ - Ministerieel besluit van 22 augustus 2020 houdende wijziging van het ministerieel besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial Order of 22 August 2020 amending the Ministerial Order of 30 June 2020 on emergency measures to limit the spread of the coronavirus COVID-19]. Published in Belgian Official Gazette on 22 August 2020.

⁹⁵ Chapitre VIII du titre IV de la loi-programme du 27 décembre 2006 relatif aux affaires sociales; déclaration préalable pour les travailleurs salariés et indépendants détachés/ Hoofdstuk VIII du titel IV van de Programmawet van 27 december 2006; Voorafgaande melding voor gedetacheerde werknemers en zelfstandigen [Chapter VIII of Title IV of the Programme Law of 27 December 2006 on social affairs; prior declaration for posted employees and self-employed persons]. Published in Belgian Official Gazette on 28 December 2006.

available should they be subject to an inspection.⁹⁶ The data held by employers must be destroyed 14 days after the conclusion of the work placement in Belgium. The data for January to February 2021, in the four sectors mentioned above, demonstrates that compliance is low with on average, 65.98% of businesses in all sectors not in compliance with the residence register.⁹⁷

In the Netherlands, the limited residence registration of migrant workers is regarded as increasingly problematic to control the transmission of COVID-19.⁹⁸ When migrants intend to stay less than four months in the Netherlands, they are not required to register with a Dutch municipality. To work, and pay Dutch taxes, they register at one of the 19 RNI-offices (Registry non-residents), where they receive a tax number without registering a Dutch address. Since 2014, 2.3 million migrants have registered at the RNI, and it is unclear how many of them are still in the Netherlands or have left the country.⁹⁹ Migrants who work longer continuous periods in the Netherlands are required to register, though their municipal registration is not always up to date. Migrants, when housed by temporary agency firms, can switch between different accommodation sites on a regular basis. Calls have been made to improve the registration of migrants' contact details (email-addresses and phone numbers) in the existing RNI and municipal registries.¹⁰⁰ A notification requirement for employers of posted workers and self-employed cross-border workers is in place since 1 March 2020 in the Netherlands, so not as well established as the LIMOSA

⁹⁶ Arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, tel que modifié par l'arrêté ministériel du 19 décembre 2020, l'arrêté ministériel du 24 décembre 2020 et l'arrêté ministériel du 12 janvier 2021/ Ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial Order of 28 October 2020 on emergency measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerial Order of 19 December 2020, the Ministerial Order of 24 December 2020 and the Ministerial Order of 12 January 2021]. Published in Belgian Official Gazette on 12 January 2021.

⁹⁷ Compliance with Covid-19 measures in the following sectors: Meat 55,56 %; Construction 50%; Cleaning 80%; Agriculture 77,27%, see SIRS, Contrôle éclair: télétravail dans le secteur tertiaire (janvier et février 2021), available at: <<https://www.siod.belgie.be/fr/fraude-sociale/controle-eclair-teletravail-dans-le-secteur-tertiaire-janvier-2021>>.

⁹⁸ AANJAAGTEAM BESCHERMING ARBEIDSMIGRANTEN, "Geen tweederangsburgers. Aanbevelingen om misstanden bij arbeidsmigranten in Nederland tegen te gaan", 30 October 2020, available at: <<https://www.rijksoverheid.nl/documenten/rapporten/2020/10/30/tweede-advies-aanjaagteam-bescherming-arbeidsmigranten>>; INSPECTIE SZW, *cit. supra* note 23.

⁹⁹ VISSERS, 'Van 2,3 Miljoen Migranten Met Bsn Weet Nederland Niet Waar Ze Zijn', *Trouw*, 27 February 2020, available at: <<https://www.trouw.nl/nieuws/van-2-3-miljoen-migranten-met-bsn-weet-nederland-niet-waar-ze-zijn-b457e1da/>>.

¹⁰⁰ AANJAAGTEAM BESCHERMING ARBEIDSMIGRANTEN, *cit. supra* note 98.

system in Belgium. In the Dutch registry for posted workers, a residence address of posted workers in the Netherlands is not listed, only potentially an email address.¹⁰¹

Additional measures were imposed on workers from December 2020 to the end of July 2021, who had to provide proof of a negative test within 72 hours of arriving in Belgium (from 25 December 2020) and a mandatory quarantine for seven days that could only end following a negative test on the seventh day (from 31 December 2020).¹⁰² In Belgium these rules were initially applied to those working in certain sectors, including the meat sector, but were very swiftly extended to all workers (including self-employed workers) arriving in Belgium.¹⁰³ Similar rules applied in the Netherlands, though test and quarantine measures differ when travelling from high- or low-risk countries to the Netherlands. For migrants travelling across borders to start a new temporary agency job in an essential industry, this mandatory quarantine is generally not paid by the prospective employer.

Regarding the ‘social’ distancing rules related to accommodation and work-home travel arrangements, what qualifies as a household has been debated in the Netherlands. It is common that migrants’ employers arrange transportation between the accommodation and work sites in small buses, where keeping a physical distance is problematic. With the Temporary Law COVID-19-related measures (*‘Tijdelijke wet maatregelen COVID-19’*), everyone who lives at one address, forms one household, and within the household does not have to maintain a safe (1.5m)

¹⁰¹ MINISTERIE VAN SOCIALE ZAKEN EN WERKGELEGENHEID, “Posted Workers”, no date, available at: <<https://www.postedworkers.nl/werknemer>>.

¹⁰² Arrêté ministériel du 24 décembre 2020 modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19/ Ministerieel besluit van 24 december 2020 houdende wijziging van het ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial order of 24 December 2020 amending the ministerial order of 28 October 2020 on emergency measures to limit the spread of the coronavirus COVID-19]. Published in Belgian Official Gazette on 24 December 2020 ; Arrêté ministériel du 27 juillet 2021 modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19/ Ministerieel besluit van 27 Juli 2021 houdende wijziging van het ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial order of 27 July 2021 amending the ministerial order of 28 October 2020 on emergency measures to limit the spread of the coronavirus COVID-19] Published in Belgian Official Gazette on 28 July 2021.

¹⁰³ Arrêté ministériel du 12 janvier 2021 modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19/ Ministerieel besluit van 12 januari 2021 houdende wijziging van het ministerieel besluit van 28 oktober 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken [Ministerial order of 12 January 2021 amending the ministerial order of 28 October 2020 on emergency measures to limit the spread of the coronavirus COVID-19]. Published in Belgian Official Gazette on 20 January 2021.

distance.¹⁰⁴ This would imply that migrant workers who live together, regardless of the length of their co-habitation, do not have to keep a safe distance from each other.

In the Netherlands, a Migrant Worker Protection Taskforce was set up on 4 May 2020 to investigate the working and living conditions of migrant workers related to housing, employment, and recruitment which has resulted in a number of recommendations aimed at reducing the (multiple) dependencies migrant workers face vis-à-vis their temporary agency employer.¹⁰⁵ This resulted in a report in November 2020 with 50 recommendations to improve the protection of migrant workers: including a permit certificate for agency firms, better registration of migrants, and the advice to work towards private bedrooms for migrant workers of at least 15 m².¹⁰⁶ On 11 February 2021, Dutch parliament adopted a motion to implement the measure of private bedrooms for migrant workers. The Ministry of Social Affairs and Employment further stated to work towards decoupling of labour and accommodation contracts.¹⁰⁷

The large-scale COVID outbreaks in the meat industry in both Germany and the Netherlands, has initiated the establishment of a Dutch-German cross-border collaboration taskforce COVID-19 infections migrant workers to improve cross-border exchange of information.¹⁰⁸

Also, in Belgium, a taskforce for vulnerable groups was established in April 2020. The taskforce was mandated to identify the impact on vulnerable people of the epidemic, the containment measures and the socio-economic measures taken by the different levels of power, governments in the short and long term; identify people who do not fall within the scope of the socio-economic measures taken and make their problems visible; consult on proposals for additional concrete and justified COVID-19 measures in the short and long term; issue recommendations/policy

¹⁰⁴ Wet van 28 Oktober 2020, Houdende Tijdelijke Bepalingen in Verband Met Maatregelen Ter Bestrijding van de Epidemie van Covid-19 Voor de Langere Termijn (Tijdelijke Wet Maatregelen Covid-19), *Staatsblad van Het Koninkrijk Der Nederlanden*, 441 (2020) [Act of 28 October 2020 on Temporary Provisions Relating to Measures to Control the Covid-19 Epidemic for the Longer Term (Temporary Covid-19 Measures Act)].

¹⁰⁵ AANJAAGTEAM BESCHERMING ARBEIDSMIGRANTEN, *cit. supra* note 98; NATIONAL RAPPORTEUR ON TRAFFICKING IN HUMAN BEINGS AND SEXUAL VIOLENCE AGAINST CHILDREN, “Slachtoffermonitor mensenhandel 2015-2019”, 26 October 2020, p.37, available at: <<https://www.nationaalrapporteur.nl/publicaties/rapporten/2020/10/16/slachtoffermonitor-mensenhandel-2015-2019>>.

¹⁰⁶ AANJAAGTEAM BESCHERMING ARBEIDSMIGRANTEN, *cit. supra* note 98.

¹⁰⁷ VAN GRUIJTHUIJSEN, ‘Arbeidsmigrant Krijgt Eigen Woonruimte En Meer Rechten: “Historisch En Een Grote Overwinning”’, *Algemeen Dagblad*, 12 February 2021, available at: <<https://www.ad.nl/westland/arbeidsmigrant-krijgt-eigen-woonruimte-en-meer-rechten-historisch-en-een-grote-overwinning~a366d975/>>.

¹⁰⁸ VNOG, “updates situatie slachthuizen”, 2 June 2020, available at: <<https://www.vnog.nl/coronavirus/nieuws-over-corona/2211-terrein-vion-apeldoorn-afgesloten-door-politie-op-last-van-vnog>>.

proposals on the socio-economic measures to be taken; facilitate coordination with the federated entities for a better articulation of measures. Following consultation, the taskforce identified a wide range of vulnerable groups requiring additional assistance and in particular access to basic needs such as food, accommodation, financial assistance to counteract the increased cost of living etc.

The taskforce however is yet to tackle migrant workers who may be in a precarious work situation (e.g., flexi-jobs or short-term contracts), and are not entitled or eligible to access the traditional relief measures that have been introduced, such as those who are (bogusly) self-employed or working in the informal economy.¹⁰⁹ As a result, there is an increased risk of such workers being exploited, as they are left with no other options after losing their jobs and left in an even greater position of dependence upon their employers. As noted by De Wispealere and Gillis vulnerable workers are even more isolated, now more than ever, with very limited opportunities to accept work or to seek help and assistance.¹¹⁰ Unfortunately, following its renewed mandate by the Federal Government in November 2020,¹¹¹ the taskforce for vulnerable groups did not take into account the particular vulnerability of migrant workers in their subsequent evaluations of the long-term socio-economic effects of the pandemic.¹¹²

5.2. Social partners

Both Belgium and the Netherlands are countries with strong social dialogue mechanisms. Where communications and negotiations in the Netherlands intensified between government and social partners during the pandemic, the role of the Belgian social partners in national decision-making is less central than pre-COVID. In Belgium, the National Security Council has been central to most of the decision making and many COVID-related support measures. The social partners are not part of this council; they are included, however, in the government initiated Economic Risk Management Group, founded in March 2020, to curb the consequences of the pandemic for businesses, self-

¹⁰⁹ DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 202.

¹¹⁰ *Ibid*, p. 208.

¹¹¹ VLEMINCKX, “Monitoring Et Gestion De l’impact Socio-Economique De La Crise Covid-19 En Belgique”, *Revue Belge de Sécurité Sociale*, 2020, p.13 ff., p.18.

¹¹² See recommendation by UNIA – Interfederal Centre for Equal Opportunities for vulnerable groups to be defined by the taskforce and for migrants to be included. SPF INTEGRATION SOCIALE/ FOD MAATSCHAPPELIJKE INTEGRATIE, Task Force Groupes Vulnérables: Fiches groupes vulnérables: Deuxième vague Unia - Recommandations personnes vulnérables, 10 November 2020, available at: <<https://www.mi-is.be/fr/outils-cpas/fiches-groupes-vulnerables-deuxieme-vague>>.

employed workers and families.¹¹³ In the Netherlands, peak-level consultation and negotiation between government and social partners to develop and implement measures in response to the pandemic intensified, in both formal and informal settings.¹¹⁴

In general, social dialogue and trade union involvement in Belgium is strong and can be demonstrated with a few examples of sectoral level industrial action, within and outside the food industry.¹¹⁵ In the Belgian meat industry, the social partners agreed on clear instructions to be implemented at company level, including social distancing, provision of hygiene and personal protective equipment and regular disinfection of workplace.¹¹⁶ Sectoral guidelines paid specific attention to the work carried out by subcontractors and posted workers. These measures were particularly pertinent as the difficulty in respecting health and safety regulations had been raised pre-COVID, especially where temporary workers who frequently change their workplace require some time to become familiar with ‘the particular demands, culture, organisation, people and not least, health and safety’¹¹⁷ requirements of a new workplace. Furthermore, the diversity of the workforce may also create linguistic barriers.¹¹⁸ Therefore, the provision of informative posters in different languages (Arabic, Romanian, Bulgarian, Polish) was a necessity in order to inform workers of the risk of the pandemic and the precautionary measures to observe.¹¹⁹ There were also calls for additional measures such as social distancing guarantees, taking temperatures and specific induction that describes to all new employees, particularly temporary workers, the applicable health and safety measures that are in

¹¹³ VAN HERREWEGHE, “Highlights – Working life in 2020”, EUROFOUND, 15 March 2021, available at: <<https://www.eurofound.europa.eu/country/belgium>>.

¹¹⁴ VAN DER GRAAF, “Highlights – Working life in 2020”, EUROFOUND, 15 March 2021, available at: <<https://www.eurofound.europa.eu/country/netherlands>>.

¹¹⁵ On action taken by bus and tram drivers see WATTERSON, *cit. supra* note 23. On action taken by supermarket workers see PTB/PVDA, “Sécurité et prime, les héros du commerce alimentaire ont doublement remporté le match”, 6 November 2020, available at: <https://www.ptb.be/s_curit_et_prime_comment_les_h_ros_du_commerce_alimentaire_ont_doublement_rempoort_le_match>.

¹¹⁶ Secteur de l’industrie alimentaire (CP 118 et CP 220): guide sectorial, available at: <https://emploi.belgique.be/sites/default/files/content/guidesectorielalimentation_nouvelleversion.pdf>.

¹¹⁷ HOWES, *cit. supra* note 27.

¹¹⁸ ROCCA and VRIJSEN, *cit. supra* note 35.

¹¹⁹ EFFAT, *cit. supra* note 52, pp. 14-15; “Recommandation des partenaires sociaux dans l’industrie alimentaire”, CSC, 6 April 2020, available at: <<https://www.lacsc.be/la-csc/secteurs/alimentation-et-horeca/secteurs/118-00-industrie-alimentaire/actualites/2020/04/06/recommandation-des-partenaires-sociaux-dans-l-industrie-alimentaire>>; “NOUVEAU: indemnité complémentaire en raison de la crise du coronavirus”, CSC, 12 June 2020, available at: <<https://www.lacsc.be/la-csc/secteurs/alimentation-et-horeca/secteurs/118-00-industrie-alimentaire/actualites/2020/06/12/nouveau-indemnite-complementaire-en-raison-de-la-crise-du-coronavirus>>.

effect in the workplace (*la prévention et le bien-être sur le lieu de travail*).¹²⁰ The common factor in these movements is the concern to ensure that occupational health requirements dovetail with the needs of public health.¹²¹

In the Netherlands, similar preventive responses via sectoral consultation with trade unions and employers culminated in sectoral protocols. For the temporary agency branch, trade unions and employer organisations, established the ‘Protocol for continuing to work safely for the employment agency industry’, and the ABU drew up a special protocol for migrant workers.¹²² The protocol from the employers’ association for the meat industry, for instance includes the instatement of a Corona-supervisor per factory department to monitor health complaints of workers with the competence to issue official warnings to workers who do not comply with the factories’ COVID measures.¹²³ The Inspectorate points out that all employers they inspected in the meat industry in 2020 did take preventive measures to reduce workplace transmission risks and that they are well aware of the public eye on their industry since the several outbreak cases.¹²⁴

Where the mandate of the Belgian labour inspectorate extends to the enforcement of CBAs (see *infra*), in the Netherlands, the enforcement of CBAs is the responsibility of the signatory parties. Dutch trade unions, however, only have access to workplaces when granted permission by site management and cannot force companies to open their books to monitor compliance with CBAs (only the labour inspectorate has this authority). The opportunities to recover information from employers via the Labour Inspectorate have expanded though. Since 2014, as a result of the agreements of the 2013 Social Pact, social partners can initiate investigations by

¹²⁰ “Industrie alimentaire : les interlocuteurs sociaux appellent au respect de la distanciation sociale”, FGTB – Horval, 17 April 2020, available at: <<https://www.horval.be/fr/secteurs/industrie-alimentaire/actualites/industrie-alimentaire-les-interlocuteurs-sociaux-appellent-au-respect-de-la-distanciation-sociale>>; “Recommandations des interlocuteurs sociaux de l’industrie alimentaire belge - CP 118”, FGTB – HORVAL, 6 April 2020, available at: <<https://www.horval.be/fr/secteurs/industrie-alimentaire/actualites/recommandations-des-interlocuteurs-sociaux-de-lindustrie-alimentaire-belge-cp-118>>.

¹²¹ VOGEL, *cit. supra* note 10.

¹²² DOORZAAM, “Protocol for continuing to work safely for the employment agency industry”, available at: <https://www.doorzaam.nl/fileadmin/media/pdf/Protocol_veiligdoorwerken_COVID_engels_juli2020.pdf>; ABU, “Corona veiligheidsprotocol arbeidsmigranten”, available at: <<https://www.abu.nl/veiligheidsprotocol-arbeidsmigranten/>>.

¹²³ COV, “Modelprotocol voor beleid en naleving van coronarichtlijnen in de vleessector”, 12 June 2020, available at: <[https://assets.cov.nl/p/4227073/COV%20Protocol%20voor%20beleid%20en%20naleving%20van%20coronarichtlijnen%20in%20de%20Vleessector%2020_0%2012%20juni%202020\(1\).pdf](https://assets.cov.nl/p/4227073/COV%20Protocol%20voor%20beleid%20en%20naleving%20van%20coronarichtlijnen%20in%20de%20Vleessector%2020_0%2012%20juni%202020(1).pdf)>.

¹²⁴ INSPECTIE SZW, *cit. supra* note 20, p. 33.

the Dutch Labour Inspectorate that are related to collectively agreed pay and working conditions (art. 10 of the Act on Generally Binding Agreements and art. 8 of the Act on Temporary Agency Work). The Inspectorate only responds on the issues raised in the social partners' requests. Trade unions can use the information obtained by the Inspectorate to start negotiations with involved employer(s) or contractors on compensation, or provide input to conventional redress, legal action or judicial claims.¹²⁵ Since this in general is a time-consuming process, Dutch trade unions rely primarily on workers' input on their working conditions to monitor compliance with CBAs. The low degree of union members among migrant workers complicates this process. Especially in the Dutch meat industry, where the workforce on the production floors are mostly non-unionized Polish or Rumanian nationals, trade unions can only monitor working conditions by pro-actively approaching the migrant workforce. The fact that remote/home working has been the imperative also for Dutch trade union officials since the pandemic, made continued contact with the migrant workforce to monitor conditions more challenging than it already was. Nevertheless, through active outreach and monitoring activities, the Dutch trade union FNV signalled several problems faced by migrant workers, related to the inability to keep a safe distance, abominable housing conditions, or the lack of access to Dutch health care insurance cards.¹²⁶ The FNV's stance against the standing employer practice to arrange both work and accommodation for migrants, has been reiterated by the government migrant workers taskforce and the Minister in February 2021 confirmed, as mentioned above, to explore options for decoupling of this practice.

Continued payment of migrant workers during quarantine periods or temporary factory/workplace shutdowns is an issue in the Netherlands, especially concerning agency employment. The Labour Inspectorate noted that migrant workers (mostly employed by temporary agency firms) were not paid when meat factories closed because of a COVID-outbreak, whereas directly employed workers were.¹²⁷ Under the agency clause, in the first phase of temporary agency contracts, contracts can be dissolved any moment in time, leaving agency firms the opportunity to discontinue their work relation when a migrant needs to quarantine because of (a suspicion of) a COVID-infection of the migrant or of a co-worker, or co-habitant. With agency contracts

¹²⁵ CREMERS, "Market Integration, Cross-Border Recruitment, and Enforcement of Labour Standards - A Dutch Case", in ARNHOLTZ and LILLIE (eds.), *Posted Work in the European Union: The Political Economy of Free Movement*, Routledge, 2020, pp. 128–146.

¹²⁶ FNV, 'Tweederde Arbeidsmigranten Krijgt Eigen Zorgpas Niet van Werkgever', 22 June 2020, available at: <<https://www.fnv.nl/nieuwsbericht/algemeen-nieuws/2020/07/tweederde-arbeidsmigranten-krijgt-eigen-zorgpas-ni>>.

¹²⁷ INSPECTIE SZW, *cit. supra* note 20, p. 32.

without agency clause, the FAQs section on the temporary agency branch site mentions that in principle, continued payment applies, yet also states that there is no specific jurisprudence on quarantine because of circumstances of a pandemic nature.¹²⁸

5.3. Labour Inspectorates

Since March 2020, the main focus of Belgian social inspection services has been to inspect workplaces for compliance with the coronavirus regulations.¹²⁹ Across all sectors, inspections have been conducted either in person or through “telecontrols” to check compliance with sanitary measures in the workplace. Importantly, the inability to undertake inspections in at risk sectors e.g., meat sector, was partially due to a lack of access to the necessary personal protective equipment.¹³⁰ The majority of inspections resulted in warnings or deadlines to rectify working practices so as to be in compliance with COVID-measures. Very few businesses have been required to close, had fines imposed or had their cases pursued in the justice system.¹³¹ This enforcement strategy has been criticised¹³² and stands in stark contrast to the approach towards the general public where the imposition of criminal sanctions has been widespread.¹³³

¹²⁸ NBBU, “FAQs”, available at: <<https://www.nbbu.nl/nl/nieuws/veelgestelde-vragen-en-antwoorden-over-het-coronavirus>>.

¹²⁹ The Directorate General of Control of Social Legislation (*DG Contrôle des lois sociales/ Externe directies Toezicht op de Sociale Wetten*) is mandated to inspect compliance with collective labour agreements; compliance with the rules on temporary work, temporary agency work and secondment, protection and compliance of wages; working time regulation compliance; and discrimination in the workplace and the Directorate General of the Inspection of Wellbeing at Work (*DG Contrôle du bien-être au travail/ Externe directies Toezicht op het Welzijn op het Werk*) is mandated to inspect compliance with health and safety aspects in the workplace..

¹³⁰ DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 248.

¹³¹ A number of different sources are available, but the most recent data suggests that since March 17,633 inspections have been carried out, with the identification of 8170 violations. The most likely response was to issue a warning with only 31 formal charges and 92 business closures. See more in DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 244.

¹³² MOSCUFO Member of Parliament for PTB/PVDA quoted in BOVÉ, “Des milliers d’employeurs en défaut pour non-respect des règles sanitaires”, *L’Echo*, 28 October 2020, available at: <<https://www.lecho.be/entreprises/general/des-milliers-d-employeurs-en-defaut-pour-non-respect-des-regles-sanitaires/10260953.html>>; Note that De Wispealere and Gillis refer to the inability of all labour inspectors to impose sanctions for severe violations, suspicion of serious infringements must be referred to Wellbeing at Work Inspectorate (*Contrôle de Bien-Etre au travail*) who can only imposes sanctions after the fact. DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 251.

¹³³ See for instance, also in UK, JONES, “Operation ‘blame the public’ wilfully ignores Covid-unsafe workplaces”, *Guardian News*, 14 January 2021, available at: <https://www.theguardian.com/commentisfree/2021/jan/14/operation-blame-the-public-covid-unsafe->

In the meat sector, between 7 July and 8 September 2020, 40 preventative inspections were conducted.¹³⁴ Interestingly, the Westvlees meat factory discussed above, had in fact been inspected prior to the outbreak in August 2020, and has simply been given warnings for the violations identified in the course of the visit.¹³⁵ In addition, an action plan for transmission of COVID in the meat sector has been integrated into the existing agreement between meat sector and public authorities¹³⁶ and will include secondary inspections of migrant workers by the inspection for accommodation.¹³⁷

Despite the increased shift towards conducting more workplace inspections, concerns have also been raised about the capacity of the different labour inspection services to carry out the work necessary to ensure effective enforcement (current capacity is 141 social inspectors, with a need for at least 400 for effective inspections).¹³⁸ In addition, there are concerns that labour inspectors were not always aware of their new obligations when it comes to inspection of compliance with coronavirus guidelines, as outlined by this anonymous labour inspector:

“Given that all these services are already overburdened elsewhere, and that they are not at all familiar with workplace welfare legislation, it is not surprising that the implementation of the additional "coronavirus" controls has been slow and

workplaces-coronavirus-tories;_Wall,_“Covid: HSE refuses to close workplaces that are putting employees at risk”, Guardian News, 14 February 2021, available at: <<https://www.theguardian.com/world/2021/feb/14/hse-refuses-to-close-workplaces-that-are-putting-employees-at-risk>>.

¹³⁴ Question parlementaire no 644 de monsieur le député Steven de Vuyst du 26 août 2020 à la ministre de l’Emploi, Économie et Consommateurs, lors de la 2e session de la législature 8 septembre 2020, available at: <https://www.beswic.be/sites/default/files/public/questions_parlementaire_document/vraag644_bul26.pdf>.

¹³⁵ Dany Meirsschaut, labour auditor in East and West Flanders and president of the country's Labour Auditorate quoted in BOVE, “Des milliers d’employeurs en défaut pour non-respect des règles sanitaires”, L’Echo, 28 October 2020, available at: <<https://www.lecho.be/entreprises/general/des-milliers-d-employeurs-en-defaut-pour-non-respect-des-regles-sanitaires/10260953.html>>.

¹³⁶ SIRS, Accord de Cooperation dans le secteur de la viande, 12 April 2012, available at: https://www.siod.belgie.be/sites/default/files/content/download/files/ac_viande_17042012_fr.pdf.

¹³⁷ Question parlementaire no 644 de monsieur le député Steven de Vuyst du 26 août 2020 à la ministre de l’Emploi, Économie et Consommateurs, lors de la 2e session de la législature 8 septembre 2020, available at: <https://www.beswic.be/sites/default/files/public/questions_parlementaire_document/vraag644_bul26.pdf>.

¹³⁸ Questions parlementaires orales par Anja Vanrobaeys, Evita Willaert, Marc Goblet, Marie-Colline Leroy et Nadia Moscufo et la réponse de Nathalie Muylle, ministre de l’Emploi, Économie et Consommateurs, lors de la réunion du 8 mai 2020 de la commission des Affaires sociales, de l’Emploi et des Pension, available at: <https://www.beswic.be/sites/default/files/public/questions_parlementaire_document/chambre_-_debat_dactualite_le_8_mai_2020_sur_la_crise_du_coronavirus_-_le_controle_sur_le_respect_des_mesures_par_les_entreprises.pdf>.

complicated. And that these controls have been neglected or carried out in a rather rudimentary way. As an inspector, for example, I only learned at the beginning of September that I had also been responsible for monitoring coronavirus measures since the beginning of July..... Add to this the absence of criminal proceedings on the basis of the reports drawn up by the Workplace Welfare Inspectorate (a long-standing sticking point)... Prosecutions are limited to very serious cases, such as fatal accidents at work. It is easy to understand why almost all employers caught in the act get off with a warning, while five young people who eat a sandwich together on the street get a heavy fine under the municipal administrative sanctions.” (author’s translation).¹³⁹

The Dutch system is characterised by public-private enforcement authorities. The Dutch Labour Inspectorate enforces the Working Conditions Act, the Foreign Nationals Employment Act, the Minimum Wage and Minimum Holiday Allowance Act and the Placement of Personnel by Intermediaries Act; as well as the Terms of Employment Posted Workers in the European Union Act. Private compliance institutes have been established by the social partners in for instance the temporary agency branch (SNCU) to monitor and enforce compliance with the temporary agency CBA. While the Dutch Labour Inspectorate can take compliance measures when workplace transmission risks are present, the Inspectorate has no authority to enforce government COVID-19 related prevention measures, such as safe distancing. According to Article 3 of the Working Conditions Act, employers have a duty to care for the health and safety of employees and need to have a health and safety policy. Employers are obliged under article 5 of the Working Conditions Act to make a workplace risk assessment including the measures taken to reduce workplace risks. Exposure to COVID-19 can be a workplace risk that should be included in this risk assessment (art. 3) for which prevention measures need to be taken at the workplace (art.5). When employers fail to do so, the Labour Inspectorate can issue a warning, a demand, or a fine. Similar to the Belgian Inspectorates, issuing fines is rare, except for severe cases. A situation where an employer forces sick employees to come into the office, could be qualified as severe.¹⁴⁰ In 90 per cent of employers’ non-compliance with the provisions in the Working Conditions Act, the Inspectorate issues a warning or demand. In 5 per cent of the cases a temporary work shutdown is issued

¹³⁹ “La protection contre le coronavirus au travail: l’employeur se moque de nous”, PTB/PVDA, 13 November 2020, available at: <https://www.ptb.be/protection_contre_le_coronavirus_au_travail_l_employeur_se_moque_de_nous>.

¹⁴⁰ INSPECTIE SZW, *cit. supra* note 20, p. 39.

because of a dangerous situation, and in 3 per cent a fine is issued.¹⁴¹ With the emergency decree, that came into force in 1 December 2020, the enforcement capacity of the Labour Inspectorate is extended and enhanced in relation to COVID-19.¹⁴²

Similar to the Belgian inspectorates, the inspections conducted by the Dutch Labour Inspectorate were primarily done over the phone, especially in the first phase of the COVID pandemic. In essential industries, such as slaughterhouses, distribution centres and agricultural businesses, inspections at the worksites were continued more often, especially when it concerned working conditions and circumstances of migrants on flexible labour contracts.¹⁴³ From May 2020 onwards, labour inspectors also requested documented proof of the measures taken by employers, such as photos, work protocols or work instructions.

The Dutch Labour Inspectorate has no mandate concerning housing or transportation facilities, that is the responsibility of the municipal enforcement or police. Where the Inspectorate needs statements of migrant workers when complaints concern fair working conditions (concerning payments or working times), such statements are not necessary when it comes to the enforcement of COVID-19 related measures to prevent workplace transmission risks. Here, the Inspectorate's observations suffice.

Based on risk assessment and several complaints and outbreaks in the meat sector, the Dutch Labour Inspectorate intensified inspections in this industry in the summer of 2020. While the Inspectorate concluded that all companies inspected took COVID-19 related prevention measures, 65 transgressions were found among the 60 meat companies that were inspected. These were mainly related to failure to adjust the risk assessment and evaluation policy document; lack of sufficient prevention measures; insufficient information and supervision on (proper) use of personal protection equipment.¹⁴⁴ At the same time, the Inspectorate points to the difficulty to check fair working conditions of migrant workers, as they were hardly able to talk with migrant workers without a "chaperone" from the employers' side present. In one case where migrants could speak with a labour inspector without the presence of such a "chaperone", it turned out that people did not receive their wages when they had to quarantine because of a COVID outbreak. The agency firm contests this but

¹⁴¹ *Ibid*, p. 44.

¹⁴² With article 28 Working Conditions Decree, there is the possibility to shut down businesses when measures related to Covid-19 are not taken in a severe manner'; and article 3.2a Working Conditions Decree related to workplace measures related to Covid-19, observation of hygiene provisions, provision of efficient information, and adequate supervision. *Ibid*, pp. 39-40.

¹⁴³ *Ibid*, p. 43.

¹⁴⁴ *Ibid*, p. 33.

has not submitted proof of continuation of payment during this quarantine period.¹⁴⁵ This illustrates the limits of Dutch Labour Inspectorate's ability to inspect the actual working conditions of migrant workers.

6. FUTURE PERSPECTIVES

In this chapter we explore the Belgian and Dutch legal and institutional responses to minimise COVID-19 outbreaks in the workplace for migrant workers, with a specific focus on the meat sector. In Belgium, we noted that the impact of COVID-19 has not been as severe as in other neighbouring countries and more far afield. In particular, the regulation and monitoring of working conditions in the Belgian meat sector appears to have minimised the risk of transmission, as opposed to say the German and Dutch meat sector. However, when it comes to the protection of migrant workers, initiatives similar to the ban on subcontracted and temporary agency employment in the German meat industry may be followed in other countries alike. In order for such labour market regulation to succeed, they must also be accompanied by sector wide collective agreements and sufficient monitoring of their implementation in practice. Where temporary work is necessary (e.g., in seasonal peaks in demand) then the Belgian model of consultation and dialogue with trade union delegations and work councils should be replicated.

Our analysis shows that the government, labour inspectorate and trade union responses are in line with the restraints of the existing legal and industrial relations system in both Belgium and the Netherlands. While the broader mandate of the Belgian labour inspectorate clearly benefits monitoring and enforcement of decent, healthy and safe working conditions of migrant workers, authorities in both countries were equally unequipped for the instant digital inspection procedures in the early phases of the COVID pandemic and adapted their practices in time. Moreover, the existing registration practice and experience in Belgium, especially of posted workers, contributed to an easier extension of registration systems during the pandemic. Especially compared to the Netherlands, where registration systems of migrant workers are more limited and data sharing among (enforcement) authorities less developed, leaving migrants much less visible to Dutch authorities.

At the sectoral and workplace level, the well-developed social dialogue and workplace representation channels in Belgium have significantly facilitated the

¹⁴⁵ *Ibid*, p. 32.

limitation of the risk for all workers in the meat sector.¹⁴⁶ Where the Belgian meat sector is premised upon a concentration of Belgian companies and a relatively high density of unionisation,¹⁴⁷ trade union presence on the production floor is almost non-existent in Dutch meat companies, leaving Dutch trade unions with less monitoring opportunities. The dominant contractual status of migrants as agency workers in the Netherlands, compared to posted workers in Belgium, leaves migrants more vulnerable to instant dismissals and non-payment during quarantine periods in the Netherlands.

On the other hand, the impact of COVID on migrant workers specifically, is broadly acknowledged in the Netherlands, with government supported guideline addendums attuned to the combined work and housing situation of migrant workers in particular essential industries; the government initiated taskforce; the report by the Dutch labour inspectorate focusing on migrant workers; and the trade union FNV's campaign for separation of work and housing contracts. Whereas the Belgian approach is broader: with a taskforce that has not yet identified migrant workers as a specific vulnerable group; with less prominent engagement from Belgian trade unions' on the plight of migrant workers and thus far no specific emphasis on the everyday experiences of migrant workers in the work of inspections, although there has been the recognition of the need for continued due diligence and effective labour monitoring and enforcement for more severe forms of labour exploitation, including human trafficking.¹⁴⁸

Based on this analysis, we turn our attention to the future. First, we take into account the ambition of the EU to ensure the equal treatment and decent work for all workers. What emerges from the impact of COVID-19 on transnational labour migration is the need for cooperation amongst both national and regional actors. The newly established European Labour Authority (ELA), whilst being restricted in its role, could and should play a pivotal part in facilitating future cooperation between

¹⁴⁶ However, the Belgian social dialogue frame may not always work as well in other sectors. See for instance, the outbreak occurred in November 2020 among 84 Portuguese illegally employed construction workers in East Flanders where a cluster outbreak on irregularly employed workers led to loss of employment, rather than those workers who have the capacity to take collective action and to ensure that measures are implemented to ensure that their workplace is safe and secure. See STRUYS, "Eerst in quarantaine, dan het land uit", *De Standaard*, 3 November 2020, available at: <https://www.standaard.be/cnt/dmf20201102_97900690>.

¹⁴⁷ On the composition of the sector and social dialogue see ROCCA and VRIJSEN, *cit. supra* note 35.

¹⁴⁸ SPF INTEGRATION SOCIALE/ FOD MAATSCHAPPELIJKE INTEGRATIE, *Tableau de suivi des mesures de la TF Groupes vulnérables*, 1 July 2020, p. 22. See also MYRIA- FEDERAL MIGRATION CENTRE, *Plan de Relance, no date*, available at: <https://www.myria.be/files/Fiche_relance_Fr.Myria.20072022.pdf>.

member states.¹⁴⁹ This is especially pertinent when considering the restrained abilities of national industrial actors, such as labour authorities or trade unions, despite varying degrees in mandate, to enforce fines or enforce company shut-downs. An exception being the French union's success in litigating against non-compliance with health and safety standards in the Amazon warehouses.

Second, we must be mindful of the long-term effects of the COVID-19 pandemic on business practices and we echo calls for subsequent law and policy measures that “ [...] ensure that essential workers can do their jobs safely, and that they have adequate health care and paid sick leave to safeguard their health beyond extraordinary pandemics.”¹⁵⁰ Beyond the health and safety of migrant workers, we also need to ensure that there is no further widening of the chasm between the labour market differences of migrant workers and nationals. For instance, one issue that will require continued scrutiny is the migrant pay gap in high-income countries, that has risen in the last five years. In the Netherlands, the pay gap is 20 per cent compared to 16.5 per cent in 2015, and in Belgium 13 per cent compared to 10 per cent in 2015.¹⁵¹ To this end, we support calls for consideration of lessons learned from the 2008 economic crisis when operational choices are made by companies to minimise the impact of the economic recovery. The knock-on effect on workers' conditions may give rise to an increased likelihood for the precarity of migrant workers to be further exacerbated by recourse to seeking labour opportunities in the informal economy.¹⁵²

¹⁴⁹ SCHMIDT, Rapport d'Information, Section «Marché unique, production et consommation», Comité Économique et Social Européen, April 2019, INT/818 – EESC-2018-04470-00-00-RI-TRA (EN); DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 252.

¹⁵⁰ THE LANCET, *cit. supra* note 18.

¹⁵¹ AMO-AGYEI, “The migrant pay gap: Understanding wage differences between migrants and nationals”, International Labour Organization (ILO), January 2021, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_763803.pdf>.

¹⁵² DE WISPELAERE and GILLIS, *cit. supra* note 9, p. 233.

11.

THE PHENOMENON OF *CAPORALATO* IN THE CONTEXT OF THE COVID-19 PANDEMIC

Vittorio Cama*

1. INTRODUCTION

Caporalato is the Italian word commonly used to define an illegal form of recruiting and organising the workforce where intermediaries who are usually affiliated with organised crime (the so-called *caporali*) hire migrant workers without respecting labour and immigration policies, aiming at their illegal and low-cost exploitation in the agricultural sector.¹ The conduct has been criminalised in Italy only in 2011 when the Legislator has deemed it necessary to introduce the offence of “illegal intermediation and exploitation of workforce”.² The phenomenon mainly refers to agricultural workers who are generally non-EU undocumented migrants. Therefore, they are excluded from the access to socio-economic benefits and extended health care.³ In the context of a global pandemic, the precariousness of their living and legal conditions is further

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¹ Definition of *Caporalato* by Treccani, available at: <<https://www.treccani.it/vocabolario/caporalato/#:~:text=Forma%20illegale%20di%20reclutamento%20e,tariffe%20contrattuali%20sui%20minimi%20salariali.>>

² Art. 603-*bis* of the Italian Criminal Code. The provision appears to be a specification of the more general offence of human trafficking contained in Art. 601 of the Italian Criminal Code which reflects the broader notion of human trafficking entailed in the principal international legal instruments. A similar provision is contained in Art. 233 of the German Criminal Code under the terms of “exploitation of labour” and in Chapter VII of Title I of the special part of the Romanian Criminal Code (see Artt. 211 and 212).

³ See RAPOSO and VIOLANTE, “Access to Health Care by Migrants with Precarious Status During a health Crisis: Some Insights from Portugal”, *Human Rights Review*, 2021, pp. and also European Union Agency for Fundamental Rights, “Fundamental Rights of Refugees, asylum applicants and migrants at the European Borders”, available at: <https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf>; World Health Organization, “Health of Refugee and Migrant Children”, 2018, available at: <https://www.euro.who.int/__data/assets/pdf_file/0011/388361/tc-health-children-eng.pdf?ua=1&crazycache=1>; see also JACKSON and COURVOISIER and DUVOISIN et al., “Impact of Legal Status Change on Undocumented Migrants’ Health and Well-being (Parchemins): Protocol of a 4-year, Prospective, Mixed-methods Study”, *BMJ Open*, 2019.

exacerbated by the absence of any kind of social protection for them and their families rendering them potentially “invisible” to States and institutions.⁴

The purpose of the present contribution is to assess the protection offered to irregular migrants employed in the agricultural sector in the context of the COVID-19 Pandemic. We will first address the socio-economic background behind *caporalato* (Section 2). We will then proceed to ascertain whether or not the phenomenon may fall under the meaning of human trafficking and forced labour under the international and European legal framework (Section 3). In this regard, the relationship between human trafficking and forced labour will be clarified. As regards the protection offered to victims, it is important to ascertain to what extent a State is generally required to implement positive acts to protect irregular migrant workers. To this sense, the judgment of the European Court of Human Rights (“ECtHR”) in the *Chowdury* case⁵ represents a welcomed pronouncement in addressing the specific vulnerabilities presented by irregular migrants in the agricultural sector. These issues, however, only marginally impinge the implications of the pandemic to the pre-existing vulnerabilities faced by migrants. Therefore, we will address the possible adjudication of the right to access to health care to irregular migrant workers (Section 4). In doing so, a closer look will be taken to the international and European human rights regimes and, in particular, to the jurisprudence of the European Committee of Social Rights (“ECSR”) and the ECtHR. In this respect, while the former has adopted a very progressive interpretation of the European Social Charter (“ESC”),⁶ the latter has, since *C.N. v. United Kingdom*,⁷ preferred a self-restraining approach. Its judgment in *Paposhvili*⁸ may have now opened the door to a feeble recognition of health rights to

⁴ See OECD, “What is the impact of the COVID-19 pandemic on immigrants and their children?”, 2020, available at: <https://read.oecd-ilibrary.org/view/?ref=137_137245-8saheqv0k3&title=What-is-the-impact-of-the-COVID-19-pandemic-on-immigrants-and-their-children%3F&_ga=2.244270982.2002322536.1629394899-636808480.1629394899>

⁵ European Court of Human Rights, *Chowdury and Others v. Greece*, Application no. 21884/15, Judgment of 30 March 2017.

⁶ Council of Europe, European Social Charter (adopted 18 October 1961, entered into force 26 February 1965), ETS 35, [ESC]. As of the 12th of February, 47 States have signed the ESC, and 43 have ratified it.

⁷ European Court of Human Rights, *C.N. v. The United Kingdom*, Application no. 4239/08, Judgment of 13 November 2012.

⁸ European Court of Human Rights, *Paposhvili v. Belgium*, Application no. 41738/10, Judgment of 13 December 2016.

undocumented migrants and asylum seekers.⁹ Finally, we will evaluate the EU and EU Member States response to the COVID-19 with regard to undocumented migrants against the human rights background as delineated before (Section 5).

2. THE SOCIOECONOMIC BACKGROUND BEHIND *CAPORALATO*: A FOCUS ON MIGRANTS WORKING IN THE AGRICULTURAL SECTOR IN THE TIME OF COVID-19

Since its roots, *caporalato* has involved migrants. This is due to the fact that the precariousness of their living and social conditions makes it easier for them to fall into the trap of organised crime. In fact, social and economic vulnerability and social isolation due to the lack of knowledge of the local legal standards and protection instruments may facilitate their likelihood to be subject to these illicit practices.¹⁰ It must not be assumed however, that this form of exploitation only refers to non-EU migrants or foreign migrants. If on the one hand it is true that language and cultural obstacles may further the social isolation, on the other hand it is also true that the tendency to erect barriers and the difficulties faced in the process of integration are also to be detected in the case of internal migration.¹¹ *Caporalato* highly reflects this point of view.

The phenomenon is, indeed, deeply rooted in the socio-economic structures of a geographical region or a country. The migratory fluxes should not be seen as the “generative” force behind the *caporalato*, but as a “transformative” factor which leads pre-existing social and economic structures to adapt to the development of our societies.¹² This leads us to the conclusion that, hypothetically, where these conditions are met, various forms of *caporalato* may develop. Other than Italy and,

⁹ According to PERONI, the judgment moves the Court’s case-law closer to its underlying principles. See PERONI, “*Paposhvili v. Belgium*: Memorable Grand Chamber Judgment Reshapes Article 3 Case Law on Expulsion of Seriously Ill Persons”, Strasbourg Observers, available at: <<https://strasbourgobservers.com/2016/12/15/paposhvili-v-belgium-memorable-grand-chamber-judgment-reshapes-article-3-case-law-on-expulsion-of-seriously-ill-persons/>>.

¹⁰ BORRACCETTI, “Introduction to the Volume: Rights and Exploitation in the Labour Market” in BORRACCETTI et al. (eds.), in *Labour Migration in Europe Volume II, Exploitation and Legal Protection of Migrant Workers*, Palgrave Pivot, 2018, pp. 1-15.

¹¹ KING and SKELDON and VULLNETARI, *Internal and International Migration: Bridging the Theoretical Divide*, University of Sussex, 2008, p. 29 ff.

¹² LANEVE, “Dal caporalato «tradizionale» al nuovo caporalato (globalizzato) ‘degli immigrati’: la Regione Puglia davanti a una ‘grande mutazione antropologica’ e a una più atroce vulnerability dell’esistenza umana”, *Le Regioni*, Bimestrale di analisi giuridica e istituzionale 5-6/2019, p. 1309 ff; and as cited in note n. 9, ZANFRINI, “Il lavoro degli immigrati in Europa e in Italia: una sfida paradigmatica per la costruzione di un’economia inclusiva”, *Studi Emigrazione*, 2019, p. 213 ff.

in particular, Southern Italy, these forms seem to appear in Spain, where the so-called *caporali* are substituted by the *furgoneros*, in Portugal where the system is called *sistema de capataz*, in the UK where the term “gangmaster system” was coined, and which was one of the first countries in Europe to adopt specific measures to counter the practice,¹³ and, as we will see, in Greece.

Other countries like Germany, Sweden and the Netherlands face a similar type of challenges, even though, in these cases, the exploitation of labour seems less prone to result in the gross violations of human rights which agricultural workers face in other regions. In these three countries, the intermediation develops within the area of the “legally consented” and aims at taking advantages of grey zones and loopholes created by the legal framework in the labour market and by its deregulation.¹⁴ More generally, it must be highlighted that not all the exploited migrant workers are undocumented migrants. Indeed, they mainly have a residence permit, or are qualified as refugees, or asylum-seekers, or are simply migrants in disadvantaged economic conditions.¹⁵

Caporalato takes place mainly in the agricultural sector which highly depends on migrants. However, it would be wrong to assume that it constitutes a one-sided relationship. As the economy of a country grows, the employment of local workers in the agricultural sector and, more generally, internal migration declines.¹⁶ Better economic conditions tend to make local workers less likely to accept the

¹³ In 2004, the Parliament adopted The Gangmasters (Licensing) Act (2004 c 11) which “established the Gangmasters Licensing Authority (GLA) to set up and operate the licensing scheme for labour providers operating in the regulated sectors. It also created the offences of acting as an unlicensed gangmaster and using an unlicensed gangmaster.” Additionally, in 2016 the Parliament adopted a renewed Immigration Act with the purpose to broaden the powers of the GLA which was therefore renamed as the Gangmasters and Labour Abuse Authority (GLAA).

¹⁴ In this respect see PALUMBO et al., “Are agri-food workers only exploited in Southern Europe? Case studies on migrant labour in Germany, the Netherlands, and Sweden”, Open Society Foundation, 2020.

¹⁵ BORRACCETTI, *cit. supra* note 10, p. 2; PALUMBO, “Trafficking and Labour Exploitation in Domestic Work and the Agricultural Sector in Italy, Research Project Report” European University Institute, 2016. And Jesuit Refugee Service, “Rescued. What next? Protection Seekers Stranded in Sicily”, available at: <<https://en.jrs.net/assets/Publications/File/jrs-report-rescued-italy-what-next.pdf>>.; Osservatorio Placido Rizzotto (Ed.), “Agromafie e Caporalato. Secondo Rapporto”, Ediesse, 2014; LEWIS and WAITE, “Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour”, *Anti-Trafficking Review*, 5, 2015, p. 49 ff; PALUMBO and SCIURBA, “Vulnerability to Forced Labour and Trafficking: The case of Romanian women in the agricultural sector in Sicily”, *Anti-trafficking Review*, 5, 2015, p. 89 ff; BARBIERI et al., “Terraingiusta. Rapporto sulle condizioni di vita e di lavoro dei braccianti stranieri in agricoltura”, 2015.

¹⁶ MARTIN, “Migrant workers in commercial agriculture”, International Labour Office, Sectoral Policies Department, Conditions of Work and Equality Department. – Geneva: ILO, 2016, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538710.pdf>.

disadvantaged living and working conditions related to internal migration and to the agricultural sector which is usually based on fixed term contracts and though working conditions (especially when referring to the “difficult, dirty and dangerous” occupations, so-called 3D jobs).¹⁷ It would be intuitive that, as the demand for agricultural workers rises because of the gaps left by the local and domestic workers, the cost of the supply rises accordingly. This would be true in an aseptic market, left uninfluenced by international competition. The conclusion is inevitably different in a global context in which European firms have to compete with other international actors which can rely on lower production costs, in a context where the economic crisis of 2008 has led many companies to relocate production outside of the European Union borders. This is why, since the 1970s, the European producers have ever increasingly resorted to flexible migrant labour and informal labour arrangements.¹⁸ Therefore, the shortage left by locals in the demand for cheap labour was and is still filled by migrant workers, who, on the other hand, see the agro-food sector as a possible source of income.¹⁹ However, in the case of irregular migrant workers,²⁰ the acceptance of exploitative working conditions is often not the outcome of a choice, but the only way to pay off the debts incurred in their journey to Europe.²¹

During the COVID-19 pandemic, domestic and international movement restrictions have made the timely recruitment of seasonal workers more difficult, thus

¹⁷ MITARITONNA and RAGOT, “After Covid-19, will seasonal migrant agricultural workers in Europe be replaced by robots?”, CEPII, 2020, available at: <<https://econpapers.repec.org/paper/ciicepipb/2020-33.htm>>. See also LUCIFORA, “From old slavery to new forms of exploitation: A reflection on the conditions of irregular migrant labour after the Chowdury case”, *New Journal of European Criminal Law* 2019, p. 251 ff.

¹⁸ ANGIUONI, “Caporali And Gangmasters, a comparative study of informal labour intermediation and workforce reproduction practices in Italy and the U.K. A research in progress”, *Cartografie Sociali*, 2016.

¹⁹ CHOLEWINSKI, “International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization” in CRAIG and LYNK (eds.), *Globalization and the Future of Labour Law*, Cambridge University Press, 2006, p. 409 ff, pp. 409–444.

²⁰ The term “irregular migrant” entails all the migrants who enter the host State in violation of the legal norms, those who stay beyond the permitted period of residence or those who work without a permit and also to those who enter the State on false paper, rejected asylum seekers who have exhausted their appeal rights and regularised migrants who fall back into an irregular situation. See DA LOMBA, “Irregular Migrants and the Human Right to Health Care: a Case-study of Health-care Provision for Irregular Migrants in France and the UK”, *International Journal of Law in Context*, 2011, p. 357 ff; see also GUILD, “Who is an Irregular Migrant?”, in BOGUSZ and CHOLEWINSKI and CYGAN and SZYSZCZAK (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, 2004, p. 3.

²¹ Europol, “SOCTA 2013: EU Serious and Organised Crime Threat Assessment”, The Hague, (2013), p. 12.

leading to disfunctions in the supply chains.²² At the same time, agricultural workers are deprived of an important source of their income. Moreover, migrant workers' wages are usually lower than those of native workers; they cannot rely on accumulated savings; and have "shorter job tenure".²³ All these factors may lead to further precariousness.

Furthermore, the agricultural industry, hospitality and domestic sectors have been heavily hit by the pandemic. The International Labour Organization ("ILO") has highlighted that, in these sectors, migrant workers may be "among the first to lose their jobs and face significant barriers to re-entering the workforce" and that "those who continue to work may experience wage cuts, non-payment of wages and deteriorating working conditions". This has a dual additional consequence: their reduced income may raise an ulterior barrier to social protection and unemployment benefits and also on their migratory status since work and resident permits usually require the person to be employed. It goes without saying that they are thus pushed to accept informal, irregular labour.²⁴ This adds up to a scenario where non-EU citizens are already at risk of poverty and social exclusion.

The slight decline, between 2014 and 2019, of the percentage number of non-EU citizens workers facing these risks could be considered the result of a general trend and not an amelioration of the socio-economic conditions of migrant workers. In fact, the percentage of citizens at risk concurrently declined too.²⁵ At the international level, the International Organization for Migration ("IOM") has concluded that the COVID-19 pandemic has created new types of precarious

²² In this respect, International Organization for Migration (IOM), "Covid-19: Policies and Impact on Seasonal Agricultural Workers", 2020, available at: <https://www.iom.int/sites/default/files/documents/seasonal_agricultural_workers_27052020_0.pdf>.

²³ FASANI and MAZZA, "A Vulnerable Workforce: Migrant Workers in the COVID-19 Pandemic", EUR 30225 EN, Publications Office of the European Union, Ispra, 2020, available at: <<https://ec.europa.eu/jrc/en/publication/vulnerable-workforce-migrant-workers-covid-19-pandemic>>.

²⁴ ILO and ISSA, "Brief, Social Protection Spotlight: Social protection for Migrant Workers: a Necessary Response to the COVID-19 Crisis", 2020, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_748979.pdf>.

²⁵ Based on four indicators, the so-called Zaragoza indicators (employment, education, social inclusion and active citizenship), it is estimated that in 2014 (which was the peak year), 51.3% of non-EU citizens aged between 20 and 64 and constituting the workforce were at risk of social exclusion, while "only" 24.3% of national citizens faced the same risks (this percentage raised to 33.9% in the case of EU citizens). In 2019, these numbers slightly declined to 44.8% (for non-EU nationals) and to 26% for European citizens. However, in the same period of time the percentage of citizens at risk concurrently declined to 19.9%, maintaining as a constant a difference of 25-26%. Eurostat, "Migrant integration statistics - at risk of poverty and social exclusion" Data extracted in January 2021, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migrant_integration_statistics_-_at_risk_of_poverty_and_social_exclusion#cite_note-1>.

situations in which migrants may find themselves. In particular, major concerns rise in relation to the three categories of migrants: the first encompasses “stranded migrants”, individuals which are unable to return to their country because of mobility restrictions; the second include “destitute migrants”, who, having lost the sources of their income, are incapable of meeting their basic needs; the last is composed by “evicted migrants”, who cannot access safe shelter any longer.²⁶

3. *CAPORALATO* BETWEEN HUMAN TRAFFICKING AND FORCED LABOUR

Caporalato is a jargon, common term used to define a complex phenomenon, which appears to combine the main elements of human trafficking and forced labour. A closer look to the international and European law instruments addressing these two phenomena may reveal useful for clarifying the specific relationship between them. Furthermore, assessing the possibility to comprehend *caporalato* within the scope of their legal definition entails the possibility to extend to its victims the protection offered by international and European law.

3.1. *The Relationship between Caporalato and Human Trafficking for the Purpose of Labour Exploitation*

The notion of human trafficking is of a complex nature and is closely related to forced labour. This is because “contemporary forms of human trafficking would include virtually any form of forced labour”.²⁷ As regards the former, after decades of attempts to regulate the phenomenon,²⁸ a general definition can now be found in

²⁶ For a more detailed analysis, see IOM, “COVID-19 and Stranded Migrants”, 2020, available at: <https://www.iom.int/sites/default/files/documents/issue_brief_stranded_migrants.pdf> and IOM, Return Task Force, “Covid-19 impact on stranded migrants”, 2020, available at: <<https://reliefweb.int/report/world/covid-19-impact-stranded-migrants>>.

²⁷ CERONE, “Human Trafficking”, in *Max Planck Encyclopedias of International Law*, 2007.

²⁸ The first attempt was the International Agreement for the Suppression of the “White Slave Traffic” (adopted 18 May 1904, entered into force 18 July 1905), which focused mainly on the phenomenon of sex trade and was based on a “sexist” and “paternalistic” approach; see CERONE, *cit. supra* note 27, para. 15. The 1921 International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922), League of Nations, Treaty Series, vol. IX, p. 415, and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1933), League of Nations, Treaty Series, vol. 150, p. 431, and the two following protocols of 1947 and 1949 contributed to the regulatory framework and culminated in the Convention for the Suppression of the Traffic in Persons and of the exploitation of the Prostitution of Other of 1949-

the Article 3 of the Palermo Protocol²⁹ which, is one of the three annexes to the United Nations Convention against Transnational Organized Crime.³⁰ Under Article 3, trafficking in persons means:

“The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”³¹

As concerns the notion of human trafficking in international human rights law (“IHRL”), it bears noting that the issue is not explicitly referred to in both the International Covenant on Civil and Political Rights (“ICCPR”)³² and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)³³ and, accordingly, may only be implicated under Article 8 ICCPR which provides for the right to be free from slavery, servitude, and forced labour and under Articles 4 and 7 of ICESCR concerning the right to freely choose the work and to just and favourable conditions of work.

As regards the regional level, similar provisions are also to be found in the Council of Europe Anti-Trafficking Convention.³⁴ It establishes positive obligations

²⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 [Palermo Protocol].

³⁰ United Nations Convention against Transnational Organized Crime, (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 190 [UNTOC]; as of 28 January 2021, the Convention was signed by 117 States and ratified, accepted, approved or accessed to by 178 States.

³¹ It can be noted that, as confirmed by Art. 3 (b) of the Protocol, this definition has been constructed in a way to make the consent of the victim of human trafficking irrelevant.

³² See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (adopted 16 December 1966, entered into force 23 March 1976) [ICCPR].

³³ See UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (adopted 16 December 1966, entered into force 3 January 1976) [ICESCR].

³⁴ See the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197 (adopted 16 May 2005, entered into force 1 February 2008) [the Council of Europe Anti-Trafficking Convention], Art. 4(a) reads as follows “‘Trafficking in human beings’ shall mean the recruitment,

upon the States concerning the prevention of trafficking, the identification of victims, the granting of a recovery and reflection period, and the right to compensation and legal redress.³⁵ It bears noting that since the ECHR does not expressly refer to trafficking since it was inspired by the Universal Declaration of Human Rights which only covers, as we will see shortly, forced labour it.³⁶

As concerns forced labour, Article 2 of the ILO Convention n. 29³⁷ defines forced or compulsory labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

The suppression of forced labour has also been implemented through different international human rights law instruments.³⁸ The Universal Declaration of Human Rights of 1948,³⁹ although lacking a specific reference to forced labour, prohibits, at Article 4, any “new form of slavery or servitude” including, as the debate during its adoption clearly indicates, forced labour.⁴⁰ Furthermore, Article 8 of the ICCPR and Article 11 of the International Convention on the Protection of the Rights of all Migrants Workers and Members of Their Families (“ICRMW”)⁴¹ contain explicit prohibitions of forced labour. Finally, Article 6 of the ICESCR provides for the right

transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

³⁵ Arts. 5, 10 13 and 15 of the Convention. It also establishes a treaty-body, the GRETA, tasked with the role to monitor the implementation of the treaty.

³⁶ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgement of 7 January 2010, para 272. See also SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford University Press, 2015, p. 209.

³⁷ See International Labour Organization (ILO), Forced Labour Convention, C29, 28 June 1930, C29, (adopted 29 June 1930, entered into force 1 May 1932). The Convention No. 29 was later followed by the ILO Convention No. 105 concerning the Abolition of Forced Labour which binds the States to “to suppress and not to make use of any form of forced or compulsory labour” for certain purposes, and the ILO Convention No. 122 whose Art. 1 provides that each member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment

³⁸ Such as the Slavery Convention, League of Nations, Treaty Series, vol. 60, p. 254, (adopted 25 September 1926, entered into force 7 March 1927).

³⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁴⁰ VILLALPANDO, “Forced Labour/Slave Labour”, in *Max Planck Encyclopedias of International Law*, 2017, para. 11.

⁴¹ International Convention on the Protection of the rights of All Migrant Workers and Members of their Families, adopted by the General Assembly Resolution 45/158 (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3, Doc. A/RES/45/158.

to work, which includes the right to everyone to the opportunity to gain his living by work which he freely chooses or accepts.⁴²

As concerns the European regional human rights framework, Article 4 of the ECHR proclaims the prohibition of slavery and forced labour. However, it does not give a positive definition about these terms since it only specifies what types of work shall be necessarily excluded from the scope of the provision.⁴³ Moreover, as regards the ESC, the prohibition of forced labour may be inferred by the rights protected by the Charter, namely the right to work, the right to just conditions of work, the right to safe and healthy working conditions, and the right to a fair remuneration. Interestingly, Article 1(2) binds the contracting States “to protect effectively the right of the worker to earn his living in an occupation *freely* entered upon.”

As regards the European Union legislative framework, the 19 July 2002 the Council of the European Union adopted the Framework Decision 2002/629/JHA⁴⁴ with the declared purpose of “combating trafficking of human beings”. The Decision was later adjourned with the Directive 2011/36/EU (“the Anti-trafficking Directive”).⁴⁵ While the former urged the Member States to adopt the necessary measure in order to punish certain types of offences related to human trafficking,⁴⁶ the latter adopts a similar, but broader conception defining in the same exact terms of Article 3 of the Palermo Control, including “as a minimum, [...] forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.”

In the light of the conventions examined, it can be noted that, as also indicated by Article 3 of the Palermo Protocol, forced labour can be identified as one of the forms of exploitation and as one of the purposes of trafficking in persons.⁴⁷ This conclusion is upheld by the ECtHR according to which trafficking “by its very nature

⁴² A similar provision is contained in Art. 5 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969), 660 UNTS 195.

⁴³ In particular, detention work, military work, services exacted in case of an emergency, normal civic obligations.

⁴⁴ 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203, 1 August 2002, p. 1-4.

⁴⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15 April 2011, p. 1–11 [The Anti-trafficking Directive]

⁴⁶ In particular, “the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person [...] for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude”.

⁴⁷ VILLALPANDO, *cit. supra* note 40, para. 1.

and aim of exploitation, is based on the exercise of powers attaching to the right of ownership”, treating “human beings as commodities to be bought and sold and put to *forced labour*, often for little or no payment, usually in the sex industry but also elsewhere.”⁴⁸ Notwithstanding, attention should be drawn when addressing trafficking for labour exploitation and forced labour under a comprehensive definition. In facts, even though related, not all forms of the former amount to the latter.⁴⁹

Considering this complex framework, it would appear that the phenomenon of *caporalato* can be classified as a specific form of human trafficking and, specifically as trafficking aiming at the exploitation of labour. As for the means, the phenomenon fulfils the requirement of the “abuse of vulnerability” provided in the Palermo Protocol and in Directive 2011/36/EU, which is characterised by the lack of real or acceptable alternative to the migrant but to submit to the abuse involved.⁵⁰ As we will see, the notion of the vulnerability and the individual conditions constitutes an essential element of the case-law of the ECtHR in relation with the adjudication of a wide range of rights to irregular migrant workers and the assessment of their violation.

As concerns the criminalisation of the two practises, it bears noting that the legislations of most of the Member States of the European Union, reflects the view that forced labour cannot be considered as an autonomous phenomenon from the “trafficking of human beings”. Two important, exceptions are Italy and Romania where trafficking in human beings and forced labour are penalised in separate provisions, and especially Italy where the offence of “illegal intermediation and exploitation of workforce”, explicitly meant to contrast *caporalato* stands autonomous from “human trafficking”.

Having considered this, it still remains difficult to give a clear-cut definition of *caporalato* due to the differences in the contexts in which it develops; In Italy, for instance, the thematic is strictly connected with the so-called *agromafie* and thus is considered to be “a fully-fledged system which is the core of the activity of organised

⁴⁸ *Rantsev, cit. supra* note 36, para. 281; see SCHABAS, *cit. supra* note 36, p. 210. The constant referral to prostitution and sex exploitation is influenced by the first approaches to human trafficking mainly based on a “sexist” or “paternalistic” approach; see also CERONE, *cit. supra* note 27.

⁴⁹ Inter-Agency Coordination Group Against Trafficking in Persons, “ICAT, “Preventing Trafficking in Persons by Addressing Demand”, ICAT, 2014, p. 2; ILO, “Global Estimate of Forced Labour”, 2012; see PALUMBO and SCIURBA, *cit. supra* note 15, p. 89 ff.

⁵⁰ See also see PALUMBO and SCIURBA, *cit. supra* note 15, p. 98

crime in the field of agriculture.”⁵¹ In conclusion, since the exploitation of labour may assume many different forms, a case-by-case analysis is required.⁵²

3.2. *Human Trafficking and Forced Labour in the Case-law of the ECtHR and its Potential Role in the Time of Covid-19.*

The ECtHR has discussed the possible application of the ECHR provisions to human trafficking. The absence of a rule prohibiting human trafficking results in the preference accorded by the Court to assess the individual cases under “forced labour”. In this regard, Article 4 allows for a certain flexibility. Indeed, the Court adopted a broader meaning of domestic servitude or slavery adapted to the modern-day conditions and thus accepted that human trafficking falls under Article 4.⁵³

As regards the core elements of forced labour, the Court concludes that forced or compulsory labour requires a physical or mental constraint that is to say the work has to be “exacted under the menace of a penalty” or to be characterised as a work for which the victim “has not offered himself voluntarily”.⁵⁴ As to the penalty, although in uncertain terms, the Court has also held that a penalty may consist in the threat of expulsion from the country.⁵⁵ Finally, as concerns more specifically human trafficking, the ECtHR has added that Member States are required to put in place a legislative and administrative framework aimed not only at prohibiting and punishing trafficking according to the Palermo Protocol and the Anti-Trafficking

⁵¹ PEROCCO. "Caporalato. An Authentic Agromafia", *Revista Interdisciplinar Da Mobilidade Humana* 27.56, 2019, pp. 253-255, available at: <https://www.scielo.br/scielo.php?script=sci_arttext&pid=S1980-85852019000200253>.

⁵² PALUMBO and SCIURBA, *cit. supra* note 15, p. 99; the Authors point out that trafficking and forced labour entail diverse human rights violations, such as labour rights violation, segregation or isolation, the constant threat, and ultimately the need to choose between incomparable goods put in concurrence like personal safety and the need to financially sustain their families and themselves.

⁵³ European Court of Human Rights, *Siliadin v. France*, Application no. 73316/01, Judgement of 26 October 2005, paras. 121-129. See also European Court of Human Rights, *Van der Mussele*, Application No. 8919/80, Judgement of 23 November 1983, para. 32; and European Court of Human Rights, *Guzzardi v. Italy*, Application No. 7367/76, Judgement of 6 November 1980, para. 95; *Rantsev*, *cit. supra* note 36, paras. 272-282; *Chowdury*, *cit. supra* note 5, para. 93.

⁵⁴ *Van der Mussele v. Belgium*, *cit. supra* note 53, para. 34.

⁵⁵ European Court of Human Rights, *C.N. and V. v. France*, Application no. 67724/09, Judgement of 11 October 2012, para. 78. In *Siliadin v. France* (*cit. supra* note 53, para. 118), the ECtHR concluded that “The Court notes that, in the instant case, although the applicant was not threatened by a ‘penalty’, the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present on French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised”. See also SCHABAS, *cit. supra* note 36, p. 212.

Convention but also at developing a comprehensive approach covering all aspects of the Member States' general undertaking to combat trafficking.⁵⁶

As concerns the obligations stemming from the Convention, the Court held that Article 4 ECHR prohibiting forced labour does not cover only "direct action by the State authorities" (such an approach would in fact render the provision "ineffective").⁵⁷ Instead, the Convention is to be interpreted in the sense that States have positive obligations similar to those stemming from Article 3, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to afford effective protection against forced labour.⁵⁸ To this sense, "perhaps more than any other provision of the Convention, article 4 is essentially about positive, rather than negative, obligation."⁵⁹ As in the cases involving Articles 2 or 3 of the ECHR, the Court however adopts a self-restraining approach that is to say the, potentially burdensome, positive obligations of a State shall always be considered against the State possibilities in terms of priorities and allocation of resources.⁶⁰

Against this background, *Chowdury* constitutes the first case in which the ECtHR has addressed the issue of human trafficking in the agricultural sector.

The case concerns 42 Bangladeshi nationals who worked in Greece and did not have work permits. In 2014, they were employed in the picking of strawberries with the promise of a low wage for 12 hour per day. They were under the constant supervision of armed guards and had to deal with poor hygienic conditions, as they lived in shafts without toilets and running water. Following the acquittal for the charge of trafficking of their employer and the guards and the subsequent dismissal of appeal by the Prosecutor, the workers referred to the ECtHR claiming for the violation of Article 4(2) of the ECHR. In particular, the applicants submitted that the working situations in which they were constrained amounted to "forced labour" within the meaning of Article 4. In the judgment the Court reiterates its conclusion in its previous case-law⁶¹ and additionally stresses that compulsory labour can also be found in the context of a "freely negotiated contract".⁶²

⁵⁶ *Rantsev*, *cit. supra* note 36, para. 285.

⁵⁷ See *Siliadin v. France*, *cit. supra* note 53, para. 89.

⁵⁸ *Siliadin*, *cit. supra* note 53. See also DA LOMBA, "The ECHR and the Protection of Irregular Migrants in the Social Sphere", *International Journal on Minority and Group Rights*, 2015, p 39 ff, p. 56.

⁵⁹ SCHABAS, *cit. supra* note 36, p. 206; *Rantsev*, *cit. supra* note 36, para. 286; European Court of Human Rights, *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgement of 28 March 2000; *C.N. v. the United Kingdom*, *cit. supra* note 7, para. 67.

⁶⁰ See SCHABAS, *cit. supra* note 36, p. 206. See also *C.N. v. the United Kingdom*, *cit. supra* note 7, para. 68; *Rantsev*, *cit. supra* note 36, para. 287.

⁶¹ In particular, *Rantsev* *cit. supra* note 36, and *Siliadin*, *cit. supra* note 53.

⁶² *Siliadin*, *cit. supra* note 53, para. 90.

One fundamental aspect of the judgment is the finding that the previous conditions of vulnerability of the workers as “irregular migrants without resources and at risk of being arrested, detained and deported” as well as the abuse of power carried out by the employer by taking advantage of these conditions made the previous consensus given by the workers irrelevant in the characterisation of work as forced labour.⁶³ All these elements were considered by the Court and deemed as indicative of a violation of Article 4 of the ECHR and a failure of the State to fulfil its positive obligations under that provision. These consists of the duties to prevent human trafficking, to protect the victims, to conduct an effective investigation into the offences and to punish those responsible for the trafficking.⁶⁴

Chowdury confirms the evolutive interpretation which has characterised the Court’s case-law on Art. 4. In this case, the Court assessment focused on the abuse of a position of vulnerability.⁶⁵ It has been noted that this notion is wide and could entail “any situation in which the person involved has no real and/or acceptable alternative to submitting to the abuse”.⁶⁶

These are certainly positive aspects of the judgement.⁶⁷ Also all the typical aspects of the phenomenon of *caporalato* are considered in the case.⁶⁸

4. LABOUR MIGRANTS’ RIGHT TO HEALTH AND SOCIAL SECURITY UNDER INTERNATIONAL AND EU LAW

So far *caporalato* has been discussed from an economical, historical, and definitional point of view. These aspects are certainly important to understand the phenomenon. Now a closer look must be taken at the conditions of irregular migrant workers during the pandemic. This analysis will start from the analysis of the main International and European Human Rights instruments to assess to what extent social

⁶³ *Ibid.*, paras. 94-97.

⁶⁴ *Ibid.*, para. 128.

⁶⁵ LUCIFORA, *cit. supra* note 17, p. 261.

⁶⁶ *Ibid.*

⁶⁷ For a comprehensive analysis of some critic aspects of the judgment, please refer to CORCIONE, “Nuove forme di schiavitù al vaglio della Corte europea dei diritti umani: lo sfruttamento dei braccianti nel caso *Chowdury*”, DUDI, 2017, p. 516 ff; LUCIFORA, *cit. supra* note 17, p. 262.

⁶⁸ The low salary promised to the workers which was never paid; the harsh working conditions related to the working hours; the precarious living arrangements offered by the employer such as makeshift shacks made of cardboard, nylon and bamboo without toilets or running water; the element of both physical and psychological coercion, due to the presence of armed guards and the menace of not paying wages if they had not continued to work; the lack of a residence or a work permit and the fear of deportation.

and economic rights such as the right to access to health care and social security are recognised to undocumented migrants.

4.1. *The International Regime*

As concerns IHRL, Article 9 of the ICESCR recognises to everyone the right to social security schemes. Similarly, article 12 recognises the right to access to health care. This right has been interpreted⁶⁹ to be granted also to “illegal immigrants”⁷⁰ and to pose a negative obligation upon States to refrain from “denying or limiting equal access” to health care to them.⁷¹ Furthermore, the ICRMW entitles migrants, regardless of their migratory status, with the rights to emergency medical care (Article 28) and to equality of treatment as concerns social and medical services (Article 34). The Convention offers basic social rights to irregular migrants, but only grants enhanced rights to regular migrants and their families.⁷² Additionally, the Convention has not so far been ratified by any European State or by any of the countries considered to be “net importer” of migrant workers.⁷³

As regards the regional framework, the ECHR is notably considered to be a civil and political document, yet this does not prevent it from requiring States to protect social and economic rights in a certain measure. Articles 2, 3, 4 and 8, at least in principle, apply to “both regular and irregular migrants”⁷⁴ thanks to the omnicomprehensive nature of Article 1 of the ECHR which provides that the ECHR shall apply to “everyone under the jurisdiction of State Parties”. We will see, however, that this difficultly holds true.

⁶⁹ CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, UN Doc E/C.12/2000/4.

⁷⁰ The use of the expression “illegal migrants” is not encouraged by the author.

⁷¹ BORRACCETTI, *cit. supra* note 10, p. 28.

⁷² BOSNIAK points out that the Convention repeatedly stresses that it does not infringe on State power to govern admission and exclusion of aliens. See BOSNIAK, “Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention”, in BOGUSZ and CHOLEWINSKI and CYGAN and SZYSZCZAK (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden 2004), p. 311 ff.

⁷³ O’ CINNEIDE, “The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism”, in SPENCER and TRIANDAFYLIDOU (eds.), *Migrants with Irregular Status in Europe*, Springer 2020, p. 59.

⁷⁴ BORRACCETTI, *cit. supra* note 10.

The counterpart of the ECHR in the social and economic sphere is the European Social Charter.⁷⁵ Article 11 of the ESC⁷⁶ provides the right to protection of health. In this respect the Contracting Parties of the Charter assume the obligation to directly or indirectly⁷⁷ to take appropriate measures to remove “the causes of ill-health” and “prevent as far as possible epidemic, endemic and other diseases” (Article 11(1)(1) and (2)).⁷⁸ It bears noting that the right to social security and medical assistance are part of the core rights of both the original and Revised Charter.⁷⁹

However, unlikely the ECHR, the Charter only apply to the nationals of the State concerned and to the nationals of other States Parties lawfully resident or working regularly in the State.⁸⁰ Notwithstanding, the ECSR has concluded that the implementation of certain provisions could require complete equality between nationals and foreigners irrespective of status and nationality: in *International Federation of Human Rights Leagues (FIDH) v. France*,⁸¹ the ECSR was called upon to decide on the alleged violation of Articles 13 and 17⁸² of the ESC by France and

⁷⁵ KHALIQ and CHURCHILL, “The European Committee of Social Rights, Putting Flesh on the Bare Bones of the European Social Charter” in LANGFORD (ed.), *Social Rights Jurisprudence, Emerging Trend in International and Comparative Law*, Cambridge University Press, 2008.

⁷⁶ Council of Europe, European Social Charter, *cit. supra* note 6. As of the 12th of February, 47 States have signed the ESC, and 43 have ratified it. Another instrument is the European Convention on the Legal status of Migrant Workers of 1977 whose protection is limited to migrants lawfully residing in the country of a Contracting Party. See also TONELLI, “Irregular Migration and Human Rights: a Council of Europe Perspective”, in BOGUSZ and CHOLEWINSKI and CYGAN and SZYSZCZAK (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden 2004), p. 193 ff.

⁷⁷ Through to the cooperation with public or private organisations.

⁷⁸ In the following Art. other social rights are recognised: the right to social security (Art. 12); the right to social and medical assistance (Art. 13); the right to benefit from social welfare services (Art. 14); the right of migrant workers (and also self-employed migrants but only insofar as the measures provided apply) and their families to protection and assistance (Art. 19). However, the same article specifically limits some of the provisions related to these rights to workers who are “lawfully” residing within the territories of the contracting States (Art. 19).

⁷⁹ The original European Social Charter was adopted in 1961 and dealt primarily with labour rights. In 1996, an attempt to revitalise the instrument, some of the Council of Europe Member States adopted the Revised European Social Charter expanding the rights set out in the original Charter. Both Charters provide for an “à la carte” system of ratification, requiring the Member States to accept a minimum of provisions contained in Part II and leaving them free to be bound by the remaining provisions.

⁸⁰ Para. 1 of the Appendix to the European Social Charter (Revised), European Treaty Series No. 163, 3 May 1996.

⁸¹ It bears noting that the ESCR had already adopted a similar approach in European Committee of Social Rights, *Autism-Europe v. France*, Complaint No. 13/2002, 29 September 2003, where it has interpreted Art. E. as to cover discrimination on grounds of disability. See also European Committee of Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 3 November 2004, para. 30.

⁸² Art. 17 entails the right of children and young persons to social, legal and economic protection.

has indicated that, due to their universality, indivisibility, interdependence and interrelation, the rights enshrined in the ESC are to be considered connected to the right to life.⁸³ Since they attain to the “very dignity” of the human being, it is possible to interpret the ESC as a “living instrument” and to depart, if necessary, from the text of the Charter. The Committee has thus concluded that denial to medical assistance to third-country nationals, even if irregularly staying, constitute a violation of the Charter.⁸⁴ This teleological approach appears to be the opposite of the cautious, self-restraint approach followed by the ECtHR – i.e., its civil and political rights counterpart. Thereby, States are free to make decisions on resource allocation. Notwithstanding, they are still required to justify their social policy within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources and to take into account the vulnerability of individuals.⁸⁵

The decision in the case *FIDH v. France* has raised several criticisms. The Parliamentary Assembly of the Council of Europe affirmed that the decision could not be intended to include all types of foreign nationals within the scope of the Charter and that only particular circumstance, linked with consequences incompatible with human dignity, allowed for an overriding of the provision.⁸⁶

⁸³ The Committee has found that France had breached Art. 17 because of the denial of immediate access to health care to irregular migrants’ children, while recognizing that France had not breached Art. 13 as irregular migrants could already access medical assistance. (para. 34) According to the Committee, Art. 13(4) who is applicable also to non-nationals, shall be interpreted in isolation from paras. 1 to 3. The appendix limiting the Charter provision to nationals and regularly staying migrant is only applicable to the latter.

⁸⁴ *International Federation for Human Rights (FIDH) v France*, *cit. supra* note 81, paras. 29-32. See also GEORGOPOULOU et al. “Putting Things into Perspective: The Added Value of the ICRMWs Substantive Provisions”, in DESMOND (ED), *Shining New Light on the UN Migrant Workers Convention*, Pretoria University Law Press, 2018.

⁸⁵ See GEORGOPOULOU, *ibid.*

⁸⁶ The Committee has upheld its position regarding the right of housing to children unlawfully present in the territory of the Netherlands. In this case, the Committee also explicitly took into consideration the immigration power. See European Committee of Social Rights, *Defence for Children International (DCI) v. The Netherland*, Complaint No. 47/2008, 20 October 2009.

Finally, as reported by the Council of Europe,⁸⁷ also Article 3 of the Oviedo Convention⁸⁸ could foster equitable access to health care to vulnerable groups.⁸⁹

4.2. *The EU legal framework*

As concerns the primary law of the European Union, a deeper look must be taken in regard to Article 31 and Article 35 of the Charter of Fundamental Rights of the European Union.⁹⁰ Article 31(1) requires the working conditions of “every worker” to respect his or her “health, safety and dignity”. The Charter does not distinguish between EU Citizens and third-country nationals. Furthermore, the rights entailed in Article 31 apply to individuals irrespective of their legal status. Not only “regular” migrant workers, but also undocumented migrants are entitled to healthy, safe and dignified working conditions.⁹¹

Similarly, Article 35 provides that “everyone” shall have the access to “preventive health care” and benefit from “medical treatment”. In this case, however, the provision is not absolute in nature but refers the implementation of these rights to the “conditions established by national laws and practices”.⁹² As concerns social security and social assistance, Article 34 of the Charter recognises protection in cases such as illness and loss of employment to everyone residing and moving legally

⁸⁷ Council of Europe, “Respecting democracy, rule of law and human rights in the framework of the Covid-19 sanitary crisis. A toolkit for Member States”, SG/Inf(2020)11, 7 April 2020, p. 5, available at: <<https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>>.

⁸⁸ Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Entered into force 1 December 1999), ETS No.164 [Oviedo Convention]. Art. 3 reads as follows “Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.”

⁸⁹ Before the Migrant Workers Convention, the only Convention to cover undocumented migrants was the ILO Convention no. 143 of 1975, which provides for the equality of treatment for the undocumented migrants in respect of rights arising from employment, social security included (Art. 9) and the protection of all basic human rights for all migrants (Art. 1). For a view on the Migrant Workers Convention, highlighting its ambivalent approach on irregular migration, see BOSNIAK, *cit. supra* note 72.

⁹⁰ Charter of Fundamental Rights of the European Union (14 December 2007, entry into force 1 December 2009) OJ C 326/1 [CFREU].

⁹¹ Other important provisions are Art. 1 which enshrines the principle of human dignity; Art. 20 and Art. 21 provide the right to equality and the prohibition of any type of discrimination. See also CELKIS and VENCKIENE, “Relationship Between the Right to Dignity and the Rights to Health Care”, *International Journal of Arts and Commerce* 2014, p. 166 ff.

⁹² See MCHALE, “Fundamental Rights and Health Care”, in MOSSIALOS and PERMANAND and BAETEN and HERVEY (eds.) *Health Systems Governance in Europe: The Role of European Union Law and Policy*, Cambridge University Press, 2010, pp. 282-314.

within the European Union. Hence, the prerequisite of “legal residence” does leave undocumented migrants outside the scope of the Article.

It follows that, at least in principle, the rights enshrined in the Charter apply to everyone, undocumented migrants included, unless otherwise explicitly stated as for the case of Article 34. However, this does not result in the direct recognition of rights to undocumented migrants at least for two reasons. Firstly, it bears keeping in mind that the Charter is a binding document for all Member States but only insofar as they are implementing European Union law as provided for by Article 51 of the Charter. Secondly, provisions like Article 35, as seen before, limit the implementation of the right to health care to the “conditions established by national laws and practices”, thus allowing for a leeway for the discretion of States. In this regard, due to the transfer of certain aspect of the immigration competence to the European Union, it is to be believed that it is bonded by the Charter.⁹³

Moving to the secondary EU law, the European Union had already acknowledged the risks faced by agricultural workers in 2014 when it adopted the Seasonal Workers Directive (2014/36/EU).⁹⁴ In particular the Seasonal Workers Directive reckons that there is a need to provide effective protection of the rights, also in the social security field of third-country nationals employed as seasonal workers because of their “specially vulnerable situation” and “the temporary nature of their assignment”. The Seasonal Workers Directive aimed at minimising the risk of economic and social exploitation of third-country seasonal workers, while limiting their chances to be accorded permanent residence status. However, since the Directive is designed to provide “a route for lawful economic immigration”,⁹⁵ and thus to encourage legal immigration, it leaves irregular migrant workers outside the scope of the rights entitled to regular seasonal workers.⁹⁶

⁹³ MERLINO and PARKIN, *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, Centre for European Policy Study (CEPS), 2011 and TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, Cambridge University Press, 2017, pp. 361-392.

⁹⁴ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94.

⁹⁵ See FUDGE and OLSSON, “The eu Seasonal Workers Directive: When Immigration Controls Meet Labour Rights”, *European Journal of Migration and Law*, 2014, p. 445 ff.

⁹⁶ For instance, Art. 20(2)(c) requires Member States to ensure that seasonal workers “will benefit from accommodation that ensures an adequate standard of living” and that where the employer arranges the accommodations, they shall meet “the general health and safety standards in force in the Member State concerned”.

As concerns social security, Regulation (EC) No. 883/2004⁹⁷ aims at coordinating the national social security systems. Article 2 defines the subjective scope of the regulation: “nationals of a Member States, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States”, and the members of their families and their survivors. Since not all undocumented migrants are stateless persons or are eligible for the status of refugee, doubts may rise concerning the application of the Regulation.

As regards specifically irregular migrants, the EU has adopted the Returns Directive (2008/115/EC) and the Directive on residence permits for trafficking victims (2004/81/EC). According to the two directives, primary health care, accommodation, education for children, legal aid are to be granted to undocumented migrants during their removing or during the “reflection period” for the victims of trafficking. However, generally speaking, the EU adopted a “security” approach⁹⁸ on irregular migration and have put aside the human rights component.⁹⁹ Accordingly, Member States still detain the power to define who is entitled to access health care with no obligation to provide it to everyone.¹⁰⁰

⁹⁷ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/47.

⁹⁸ Even though the European Parliament has called for a more universal recognition of health care access, European Parliament (2011) Resolution of 8 March 2011 on reducing health inequalities in the EU”, 2010/2089(INI); 2011.

⁹⁹ CHOLEWINSKI, “European Union Policy on Irregular Migration: Human Rights Lost?”, in BOGUSZ and CHOLEWINSKI and CYGAN and SZYSZCZAK (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, 2004, p.182.

¹⁰⁰ In *Stamatelaki* the Advocate-General has affirmed that the right to health care is perceived as a personal entitlement unconnected to a person’s relationship with social security and the Court of Justice cannot overlook this aspect”. See *Aikaterini Stamatelaki v. NPDD Organismos Asfaliaseos Eleftheron Epangelmaton*, case C-444/05, ECR I-3185, 11 January 2007, Opinion of Advocate-General Ruiz-Jarabo Colomer, para 64. See also RAPOSO and VIOLANTE, *cit. supra* note 3; LORENA and FOULVIA, “Towards European Modern Societies with Health Systems that are Able to add More Years to Life, but also to add more Life to Years”, in MANOLITZA, GRIGORODIS and MATSATSINIS YANNAKOPOULOS (eds.), *Effective Methods for Modern Healthcare Service Quality and Evaluation*, Idea Group, 2016, pp. 228-255; TERMINSK, *Economic Migrants in International Law and Policy: Selected Issues and Challenges*, Logos Verlag, 2018.

4.3. *The ECtHR case law on the recognition of socio-economic rights to irregular migrants*

We have already said that the ECHR mainly addresses civil and political rights.¹⁰¹ According to the Convention, States have the obligation to ensure the rights of all individuals which fall under their jurisdiction irrespective of their legal status. Therefore, *in abstracto*, all provisions enshrined in the ECHR should apply also to irregular migrants. However, this conclusion needs to be assessed against the “fair balance” approach and, thus, against the demands of the general interest of the community, resources concerns included.¹⁰²

The right to access health care is not directly provided by the Convention. Notwithstanding it may be inferred by other essential provision such as Article 2, Article 3, Article 4 and Article 8. The ECtHR case law on the matter reflects this view. Additionally, it is also useful in delineating the interplay between the conventional system of Human Rights and the EU law framework.

Since *Airey v. Ireland* and *Marckx v. Belgium*, the Court has tended towards the adjudication of certain socio-economic rights through the prism of the positive obligations pending upon States.¹⁰³ The absence of a water-tight distinction between the two types of rights therefore allows for interpretations that imply socio-economic rights obligations. As seen, Article 3 is particularly important to this respect. Under this perspective, the evolutive interpretation of the Convention,¹⁰⁴ through of the principle of “human Dignity”¹⁰⁵ and an effective and indivisible approach¹⁰⁶ may open the door for a more universal granting of socio-economical rights to third-country nationals irregular staying.¹⁰⁷

¹⁰¹ European Court of Human Rights, *Airey v. Ireland*, Application No. 6289/73, judgment of 9 October 1979, para. 26.

¹⁰² European Court of Human Rights, *Soering v. the United Kingdom*, Application No. no. 14038/88, judgment of 7 July 1989, para. 89.

¹⁰³ *Airey v. Ireland*, *cit. supra* note 101, and *Marckx v. Belgium*, Application No 6833/74, judgment of 13 June 1979. See LEIJTEN, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge University Press, 2017; see also SCHEININ, “Economic and Social Right as Legal Rights” in EIDE et al., *Economic, social and Cultural rights: a textbook*, 2nd edition, Martinus Nijhoff Publisher, 2011.

¹⁰⁴ See PREBENSEN, “Evolutive Interpretation of the European Convention on Human Rights” in MAHONEY (ed.), *Protecting Human Rights: The European Perspective. Studies in memory of Rolv Ryssdal*, Carl Heymanns Verlag, 2000.

¹⁰⁵ O’ CINNEIDE, *cit. supra* note 73.

¹⁰⁶ LEIJTEN, *cit. supra* note 103.

¹⁰⁷ According to O’ CINNEIDE, *N v. UK* demonstrates a formal adherence to the universalist approach to social and economic rights. O’ CINNEIDE, *cit. supra* note 73, p. 57.

As regards the right to access to health care and social protection, a useful guidance may be offered by the case *D. v. The United Kingdom* of 1997.¹⁰⁸ The case concerned an individual suffering from AIDS at a very advanced stage, who irregularly entered in the United Kingdom and was to be deported back to St Kitts. The Court concluded that such a repatriation would amount to a violation of Article 3 considering the critical stage of the illness and the “exposure to the health and sanitation problems which beset the population of St Kitts”.¹⁰⁹ The Court considered it a “very exceptional case” and took into account the compelling humanitarian grounds against the removal.¹¹⁰ The high standard established in *D. v. United Kingdom* was followed by other judgments in which the Court has upheld its restrictive interpretation of the obligation stemming from Article 3 as regards *non-refoulement*.¹¹¹ It is unsurprising that, apart from *D. v. United Kingdom*, only the applicant in *N. v. United Kingdom* has passed the test. Both judgements concerned migrants in terminal stages of disease.¹¹² In the latter the Court has explicitly recognised that the high threshold is required in order to grant the Court a “degree of flexibility to prevent expulsion in very exceptional cases” while not placing “an obligation on the Contracting State to alleviate the disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction” otherwise a “too great burden” would be imposed on the State.

In *Paposhvili* the Court has “overturned” its precedent approach¹¹³ and called for a deeper assessment by the domestic authorities of the health risks faced by the

¹⁰⁸ European Court of Human Rights, *D. v. The United Kingdom*, Application no. 30240/96, Judgement of 2 May 1997. See also PACE and SHAPIRO, “Migration and the Right to Health in Europe IOM Background Paper”, IOM International Migrant Law and Legal Affairs Department – Geneva, 2009, available at: <https://webgate.ec.europa.eu/chafea_pdb/assets/files/pdb/2006347/2006347_right_to_health_background_paper.pdf>.

¹⁰⁹ *Ibid.*, paras. 52-53.

¹¹⁰ *Ibid.*, paras. 53-54. See CILIBERTO, “Non-refoulement in the Eyes of the Strasbourg and Luxembourg Courts: What Room for Its Absoluteness?” in NATOLI and RICCARDI (eds.), *Borders, Legal Spaces and Territories in Contemporary International Law*, Springer and Giappichelli 2019, p. 59 ff.

¹¹¹ European Court of Human Rights, *N. v. The United Kingdom*, Application No. 26565/05, Judgment of 27 May 2008; European Court of Human Rights, *Yoh-Ekale Mwanje v. Belgium*, Application No. 10486/10, Judgment of 20 December 2011; European Court of Human Rights, *Samina v. Sweden*, Application No. 55463/09, Judgment of 20 October 2011; European Court of Human Rights, *Husseini v. Sweden*, Application no. 10611/09, 13 October 2011.

¹¹² See STOYANOVA, “How Exceptional Must ‘Very Exceptional’ Be. Non-Refoulement, Socio-Economic Deprivation and *Paposhvili v. Belgium*”, *International Journal of Refugee Law*, 2018, p. 2 and CILIBERTO, *cit. supra* note 109, p. 79.

¹¹³ CILIBERTO, *cit. supra* note 110, p. 79.

individual. This implies a “small opportunity for seriously ill migrants”¹¹⁴ which slightly departs from the previous interpretation given. From “risk of imminent death to risk of ‘a serious, rapid and irreversible decline’ in health upon removal”.¹¹⁵ Furthermore, the Court seems to refrain from adopting the fair balance test which had characterised its jurisprudence. The test is now substituted with a comparative analysis which takes into consideration how the applicant’s conditions would evolve after the transfer.¹¹⁶

Furthermore, in *M.S.S. v. Belgium and Greece*¹¹⁷ the Court ruled that the Greek authorities had a positive obligation under Article 3 to ensure that undocumented migrant’s situation of vulnerability would not be worsened.¹¹⁸ According to the ECtHR, the Greek authorities have not had due regard to the applicant’s vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.¹¹⁹ This situation, added to the prolonged uncertainty concerning his legal position and the total lack of any prospects of his situation improving met the threshold of severity required by Article 3. The “official indifference”¹²⁰ by the authorities is thus essential in finding the existence of socio-economic obligations stemming from Article 3.¹²¹ Moreover, the Court acknowledges that considerable importance should be attached to the belonging of the asylum-seeker to a “particularly underprivileged and vulnerable population group in need of a special protection.”¹²² Coherently, the Court highlights that the obligation for States to provide everyone within their jurisdiction with a home or to

¹¹⁴ See STOYANOVA, *supra* note 112, p. 1.

¹¹⁵ *Paposhvili*, *cit. supra* note 8, para. 205 and 199-202. See STOYANOVA, *cit. supra* note 112.

¹¹⁶ In *Paposhvili* the Grand Chamber explicitly states that “the issue is *not* one of any obligation for the returning State to alleviate the disparities between its health-care system and the level of treatment existing in the receiving State through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.” See STOYANOVA *cit. supra* note 111; and also MOLLER, *The Global Model of Constitutional Rights*, Oxford University Press, 2012, p. 33 and BARAK, *Proportionality: Constitutional Rights and Their Limitations*, Oxford University Press, 2021, p. 28.

¹¹⁷ European Court of Human Rights, *M.S.S. v. Belgium and Greece* (GC), Application no. 30696/09, Judgment of 21 January 2011.

¹¹⁸ See also KTISTAKIS, “Protecting Migrant under the European Convention on Human Rights and the European Social Charter, a handbook for legal practitioners”, Council of Europe Publishing, 2013, available at: < <https://rm.coe.int/168007ff59>>.

¹¹⁹ *M.S.S. V. Belgium and Greece*, *cit. supra* note 117, para. 263, (emphasis added).

¹²⁰ *Ibid.*, para. 253.

¹²¹ LEIJTEN, *cit. supra* note 103.

¹²² *M.S.S. V. Belgium and Greece*, *cit. supra* note 117, para. 215.

grant them a certain standard of living is not inherent to Article 3,¹²³ but also adds that the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and thus Greek authorities are bound to comply with their own legislation. This finding is based on legislative framework of the European Union and namely Directive 2003/9/CE, commonly known as the “reception Directive.” Two point can be highlighted. Firstly, it has been argued that the Court, when assessing a violation of Article 3, will now have to take into consideration the legislative framework pending upon each State. Therefore, States which are also part of the European Union will have to respect a higher threshold.¹²⁴ Secondly, it is worth noting that the Court does not explicitly limit the assessment undertaken to asylum seeker but to everyone under the jurisdiction of a State, irregular migrants included.

As concerns undocumented migrant workers in the agricultural sectors, the latest development of the ECtHR case-law, including the abandonment of the “fair balance” approach, indicates that States have a positive obligation to specifically address the vulnerable situation of certain categories in a comprehensive manner as well as a “duty to act” with respect of the conditions of individuals. This is particularly important when referred to the concrete situation of irregular migrant workers in the agricultural sector. In fact, as explained before, this specific group presents additional factors of vulnerability which should reveal object of a special protection by the States. Additionally, after *M.S.S. v. Belgium*, EU Member States will have to take into consideration the higher threshold required by the interplay of the Reception Directive and Article 3 of the ECHR when dealing with irregular migrant workers in the agricultural sector. This may, in part, compensate the lack of applicability of the rights that the Seasonal Workers Directive only grants to “lawfully” working third-country individuals.

¹²³ European Court of Human Rights, *Chapman v. United Kingdom*, Application no. 27238/95, judgment of 18 January 2001, para. 99, European Court of Human Rights, *Muslim v. Turkey* Application No. 53566/99, Judgment of 26 April 2005, para. 85.

¹²⁴ This is evident when confronting the finding of the Court in *M.S.S. v Belgium* to the findings in *Muslim v Turkey*. See MARCHEGGIANI, “Regolamento ‘Dublino II’ e Convenzione europea dei diritti umani: il caso M.S.S. c. Belgio e Grecia” *Studi sull’integrazione europea*, 2, 2011. According to some Authors this is disputable for two reasons. Firstly, it endangers the absolute nature of Art. 3 which should require a common standard of human rights. Secondly, the Court proposes itself as a sort of guarantor of the European Union law or as an Asylum Court. See CLAYTON, “Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*”, *Human Rights Law Review*, 2011, p. 758 ff; CILIBERTO, *cit. supra* note 110, p. 85; DA LOMBA, *cit. supra* note 58; BOSSUYT, “The Court of Strasbourg Acting as an Asylum Court”, *European Constitutional Law Review*, 2012, p. 203 ff.

Does this mean that irregular migrant workers enjoy a full right to access to health care and social security? This conclusion would require a more cautious approach. The ECHR is generally understood to only entail civil and political rights.

Apart from Article 3, also Article 2 and Article 8 have been discussed as posing positive obligation related to health care. In *LCB v. United Kingdom*, the ECtHR has interpreted Article 2(1) to require States to take the necessary and appropriate steps to safeguard the lives of those within their jurisdiction; in *Cyprus v. Turkey*, the Court found that Article 2 could be called into question if the life of an individual is put at risk through the denial of health care made available to the population generally.¹²⁵ At the same time, Article 8 has revealed insufficient because of concerns related to resources allocation. However, under certain circumstances it can be intended to require States to regularise the irregular stay of migrants.¹²⁶

Even though these pronounces allow for a more progressive approach, at the moment interpreting the Convention as to allow to all undocumented migrants, including those working in the agricultural sector, health care and social security would be too reckless. The Court has always adopted a self-restraining, “deferential” approach to socio-economic adjudications and as seen is hesitant to require States to provide health care beyond extreme circumstances.¹²⁷ Budgetary and political interests still make the social sphere a dimension where States want to ensure to hold full sovereignty.¹²⁸ Also, States are very reluctant to accept that courts may interfere with their power to regulate immigration. However, this power shall always be

¹²⁵ European Court of Human Rights, *LCB v. United Kingdom*, Application No. 23413/94, Judgment of 9 June 1998, para. 36; see also European Court of Human Rights, *Kontrovà v. Slovakia*, Application no. 7510/04, Judgment of 31 May 2001, para. 49; European Court of Human Rights, *Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001.

¹²⁶ European Court of Human Rights, *Pentiacova and Others v. Moldova*, Application No. 14462/03, 4 January 2005. See THYM, “Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a Human Rights to Regularize illegal Stay?”, *International and Comparative Law Quarterly*, 2008, p. 87 ff.

¹²⁷ DA LOMBA, *cit. supra* note 58, p. 53; CLEMENTS and SIMMONS, “European Court of Human Rights, Sympathetic Unease”, in LANGFORD (ed.), *Social Rights Jurisprudence, Emerging Trend in International and Comparative Law*, Cambridge University Press, 2008 p. 418.

¹²⁸ See also BOSSUYT, *cit. supra* note 124, pp. 232-233. According to DA LOMBA, this is because “the welfare state operates on the basis of membership rights.” See DA LOMBA, *cit. supra* note 20, p. 359. See also MANTOUVALOU, “In Support of Legalisation” in GEARTY and MANTOUVALOU, *Debating Social Rights*, Hart Publishing, 2011, pp. 85-171. The fear is opening up “the floodgates to medical immigration and make Europe vulnerable to becoming the “sick-bay” of the world”, European Court of Human Rights, *N. v. the United Kingdom*, *cit. supra* note 111, Joint Dissenting Opinion of Judges Tulken, Bonello and Spielmann, para. 8.

consistent with their IHRL obligations.¹²⁹ If, in this regard, the broad application of the Convention constitutes a “broken promise” may be open to debate.¹³⁰

5. THE EU AND THE NATIONAL RESPONSES TO COVID-19 IN RELATION TO LABOUR MIGRANTS

As we said before, undocumented migrants, including agricultural workers, face more challenges than other groups when trying to access social security systems and health care. The European Union Agency for Fundamental Rights has synthesised this condition in two different elements. In particular, they are not entitled to cost-free medical care, differently from nationals. Secondly, even if they were entitled to cost-free care, they should nonetheless satisfy administrative requirements (such as a fixed residence) that hinder the possibility, *de facto*, to access medical care.¹³¹ As concerns the risks related to COVID-19 faced by migrants employed as seasonal worker, the Commission has invited Member States to provide practical guidance to companies of all types to efficient measures to be taken to contain health and safety risks, especially those linked to COVID-19, together with information about incentives that have been put in place”.¹³² It has also called on a stronger cooperation between Member States and in particular through the Advisory Committee on Health and Safety at Work and the Senior Labour Inspectors Committee (“SLIC”).¹³³ The Commission additionally commits itself to conduct

¹²⁹ DA LOMBA, *cit. supra* note 58, p. 56; European Court of Human Rights, *Chahal v. United Kingdom*, Application No. no. 22414/93, Judgment of 15 November 1996, para. 73; European Court of Human Rights, *Boultif v. Switzerland*, Application No. 54273/00, Judgment of 2 August 2001 para 46; European Court of Human Rights, *Aswat v. United Kingdom*, Application No. 17299/12, Judgment of 10 April 2012, para. 49

¹³⁰ LEIJTEN, *cit. supra* note 103, p. 84. The Court approach is criticized for being too ad hoc and incremental and unclear on what exact circumstances the protection of socio-economic rights must be granted. And also for leaving States a too broad margin of appreciation, while finding the convention *prima facie* applicable. See also KRATOCHVIL, “The Inflation of the Margin of Appreciation by the European Court of Human Rights”, *Nehterlands Quaterly of Human Rights*, 2011, p 324 ff; PAMER, “Protecting Socio-economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights”, *Erasmus Law Review*, 2009, p. 397 ff; See also DA LOMBA, *cit. supra* note 58, p. 46.

¹³¹ European Union Agency for Fundamental Rights, “The fundamental rights of migrants in an irregular situation in the European Union”, available at: <https://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf>.

¹³² Communication from the Commission, Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak 2020/C, OJ CI 235/01, 16 July 2020.

¹³³ *Ibid.*, p. 5.

studies, hearings with European social partners, and sensibilisation campaigns, to continue working with the European Labour Authority and support the States through the European Platform tackling undeclared work.

5.1. The National Response: a comparison between Italy and other EU Member States

In the first phases of the pandemic, some countries have reportedly decided to follow the road of regularisation. The regularisation of undocumented migrants offers an important, although temporary protection to migrants. It grants them access to health care and other benefits. However, it must be stressed that in many European countries, undocumented migrants were already allowed for a limited access to basic health care. The question is not one of availability, but, as it will be discussed, of accessibility. Language barriers, administrative burdens and especially the fear to be reported to authorities may hinder the already limited enjoyment of healthcare rights. Furthermore, in the latest developments of the pandemic, the vaccination plans play an essential role. Apart from sporadic cases, irregular migrants are not neither explicitly excluded from vaccinations nor explicitly included. Notwithstanding, obstacles similar to those faced with regard to the access to basic health care arise.

In Italy the Government has adopted a decree pushing for the regularisation of an estimated number of 200.000 migrants out of a population of approximately 600-700 thousands of workers.¹³⁴

The system was based on a two-track mechanism: on the one hand employers could choose between concluding an employment contract with a foreign national or declaring a pre-existing irregular employment relationship; the worker would have therefore benefitted of a residence and work permit for the whole duration of the contract and the employer avoided the legal consequences of irregularly employing the workers. On the other hand, workers with an expired residence permit could apply for a temporary permit with the purpose of finding a job.¹³⁵ However, the regularisation was limited to third-country nationals who had declared their presence in the territory before 8 March 2020. Third-country nationals had the additional chance to ask for a temporary residence permit which could be converted in a work residence permit at certain conditions. Only 13.000 have requested this permit.

¹³⁴ Decree of the Ministry of the Interior, GU n.137 of 29 May 2020.

¹³⁵ The residence permit should have expired after 31st of October 2019 and the workers should have carried out the work before the same date.

It must be noted that the first track is certainly nothing new in the “fight” against undeclared work. It amounts to a voluntary disclosure scheme which aims at “encouraging enterprises and workers to come out of the shadows” in the exchange for the waiving of penalties and fines and sometimes incentives. Schemes of this nature have been used in the past by Belgium, Italy, France, and the UK.¹³⁶ The decree also aimed at countering the *caporalato* since the regularisation of migrants reduces the opportunity for their exploitation and should, at least in principle, eradicate the fear of deportation. The regularisation did not concern only agricultural workers, but also domestic and household workers.¹³⁷

As said before, there is a striking difference between the household and agricultural sector. This may be due to the fact that domestic workers are usually employed by individuals which are influenced by the demand for “cheap and exploitable workers”, while agricultural workers are subject to both the intermediaries and the agricultural company, thus making the whole supply chain rely “on a system of exploitation which involves diverse actors, with diverse responsibility, who tend to contain the costs of production and increase profit margins”; other factors of a political, legal and cultural nature, may influence this difference too (for instance the differences in the regulation of contracts between the two categories).¹³⁸ In this respect, the regularisation of a single work relationship may be more appealing than the regularisation of multiple contracts with a direct influence in the margins of profit. In other words, “employers which already employ undocumented workers have little incentive to regularise their status and to pay due wages, tax and social security contributions”.¹³⁹ This has also led to the ulterior,

¹³⁶ WILLIAMS and KAYAOGU, “COVID-19 and undeclared work: impacts and policy responses in Europe”, *The Service Industries Journal*, 2020, p. 914 ff.

¹³⁷ On the 1st of June (when the possibility to regularise has expired) out of 207.542 requests from third-country nationals, almost the 85% (176.800) came from the household sector. By contrast, only 30.700 requests came from the agricultural sector (corresponding to only 10% of the migrants employed in the sector). Only 1084 requests were presented by European citizens (only 44 in relation to the agricultural sector). See COLOMBO, “Lavoro Nero ai Tempi del Coronavirus, Braccianti e colf, regolarizzazione flop di italiani e comunitari: all’Inps arrivate solo 1.084 domande”, *Il Sole 24 Ore*, 16 September 2020 available at: <<https://www.ilsole24ore.com/art/braccianti-e-colf-regolarizzazione-flop-italiani-e-comunitari-all-inps-arrivate-solo-1084-domande-AD02Mhp>>; BALESTRERI, “La Sanatoria Bellanova per Colf e Braccianti è un Flop: all’Inps 1.084 Domande per Regolarizzare il Lavoro in ‘Nero’”, *Business Insider Italia*, 27 January 2021, available at: <<https://it.businessinsider.com/la-sanatoria-bellanova-per-colf-e-braccianti-e-un-flop-allinps-1-084-domande-per-regolarizzare-il-lavoro-in-nero/>>.

¹³⁸ PALUMBO, *cit. supra* note 15.

¹³⁹ PICUM, “Non-exhaustive overview of European government measures impacting undocumented migrants taken in the context of COVID-19”, March-August 2020.

negative consequence that some employers in the agricultural sectors have “sold” undocumented workers the contract by requesting between 5000 and 7000 euros (the procedure only costs 500 euros).¹⁴⁰ Additionally, it must be considered the intermediation between workers and employers in the agricultural sector is, as demonstrated by the phenomenon of *caporalato*, usually driven by organised crime, thus clearly not facilitating the contact between employers and institutions.

Portugal has followed the road of regularisation as well. The Government has decided to grant all the individuals with a pending residence application activated before 18 March 2020. Hence, access to healthcare welfare provisions were granted to them. However, the measure was valid only until the 1st of July when the pending application procedure was reopened. Out of 80.000-100.000 migrants only 20.000-30.000 could benefit from the measure.¹⁴¹

Much like Portugal and Italy, but with a stricter scope, Spain and the UK have adopted measures leading to the regularisation of precarious workers too.¹⁴²

As concerns the access to services and basic income, the Platform for International Cooperation on Undocumented Migrants (“PICUM”) reports that at least seven countries rendered food and nutrition schemes accessible to undocumented migrants, and at least eight emergency shelter. However, it is important to stress out that many of these benefits were pre-existing and do not correspond to a specific response to the pandemic.¹⁴³

The European Migration Network (“EMN”) and the Organisation for Economic Co-operation and Development (“OECD”) report that Member States, while primarily focusing on the management of residence permits and unemployment of third-country nationals who were regularly staying in their territories, also granted irregularly staying migrants access to emergency healthcare services. In many cases, such as France, Italy, Spain, Portugal these services were

¹⁴⁰ SIVIERO, “La Regularizzazione dei migranti non sta funzionando. I numeri sono piuttosto scarsi e mostrano che la procedura non sta riguardando il principale settore per cui era stata pensata, cioè l'agricoltura”, *Il Post*, 22 July 2020, available at: <<https://www.ilpost.it/2020/07/22/la-regularizzazione-dei-migranti-non-sta-funzionando/>>.

¹⁴¹ See also RAPOSO and VIOLANTE, *cit. supra* note 4, for a more specific description of Portugal Response in regard to irregular migrants.

¹⁴² UK granted to family members of people working for the NHS who died from Covid-19 an indefinite leave to remain irrespective of whether regularly residing in the country or not.

¹⁴³ PICUM, “Non-exhaustive overview of European government measures impacting undocumented migrants taken in the context of COVID-19”, available at: <<https://picum.org/wp-content/uploads/2020/10/Non-exhaustive-overview-of-European-government-measures-impacting-undocumented-migrants-taken-in-the-context-of-COVID-19.pdf>>

completely free to access.¹⁴⁴ Actually many countries already recognised migrants some forms of access to medical assistance. For instance, France recognises undocumented migrants *l'Aide Médical del'état* (AME), Italy allows them to apply for a temporary health card which grants them preventative care also against infectious diseases; Spain covers them with the full range of benefits as provided in the public system if they register as resident of the municipality. However, these means do not reveal as useful as they promise to be. In facts, requiring the registration to the municipality may hinder the willingness of migrants to access health care, fearing that any form of report to the authorities may lead to expulsion.¹⁴⁵ In other cases the migrants might have no information of their rights and nor does the health-care personnel; language barriers and convoluted procedures may also play a role in hindering undocumented migrants' access to health care.¹⁴⁶ In this regard, the Spanish Government response appears laudable. It has decided to temporarily suspend the obligation to have valid documents thus making it possible for undocumented migrants to receive health aid.¹⁴⁷ It also decided to release those migrants who were detained in immigration detention centres due to the poor hygienic conditions of the centres. It additionally halted deportation flights.¹⁴⁸

Finally, as regards vaccinations, undocumented migrants are explicitly included in a series of Countries¹⁴⁹ and explicitly excluded by Poland. In the majority of vaccination strategies, undocumented migrants are simply not considered or ignored.¹⁵⁰ In this regard it bears noting that the IOM has called all States to include migrants, regardless of their status, in the vaccination strategies.¹⁵¹ Similar

¹⁴⁴ EMN-OECD, "EU and OECD Member States responses to managing residence permits and migrant unemployment during the COVID-19 pandemic" European Migration Network, 2020, available at: <https://ec.europa.eu/home-affairs/content/first-joint-emn-oecd-inform-published-covid-19-and-migration_en>.

¹⁴⁵ BECK et al. "Medical Care for Undocumented Immigrants: National and International Issues", *Physician Assistant Clinics*, 2019, p.33 ff.

¹⁴⁶ DA LOMBA, *cit. supra* note 20, p. 370.

¹⁴⁷ DIMITRIADI, "The Future of European Migration and Asylum Policy Post Covid-19 Foundation for European Progressive Studies", FEPS Covid Response Papers, 7 July 2020, available at: <<https://www.feps-europe.eu/attachments/publications/feps%20covid%20response%20migration%20asylum.pdf>>.

¹⁴⁸ European Council on Refugees and Exiles, "Spain: Release of People in Immigration Detention but Rights still at Risk" ECRE Weekly Bulletin, 22 May 2020, available at: <<https://www.ecre.org/spain-release-of-people-in-immigration-detention-but-rights-still-at-risk/>>.

¹⁴⁹ Finland, UK, EIRE, France, Belgium, the Netherlands, Portugal, Spain, Italy.

¹⁵⁰ PICUM, "The COVID-19 vaccines and undocumented migrants: what are European Countries doing?", available at: <<https://picum.org/covid-19-vaccines-undocumented-migrants-europe/>>.

¹⁵¹ PICUM, "Undocumented People and the COVID-19. What is Europe Doing?", available at: <<https://picum.org/undocumented-people-and-the-covid-19-vaccines-what-is-europe-doing/>>.

recommendations have come from the European Centre for Disease Prevention and Control related to “migrants and refugees” and by European Commission, although focusing on the more general “vulnerable groups and individuals”.¹⁵²

6. CONCLUSION

The agricultural sector in Europe highly relies on the flexible work of migrant workers and, in particular, of undocumented migrants. Their precarious living conditions and the illicit practices related to their employment and especially *caporalato* render the sector and the migrant workers particularly exposed to the risks of social shocks. While international, regional and national legal frameworks offer an effective criminal response to these practises resulting in almost all the European countries criminalising human trafficking and forced labour, inconsistencies may rise with concern to their concrete definition. In this respect, exclusion from the access to healthcare and social protection further exacerbates their effective protection. The current COVID-19 pandemic has demonstrated that the vulnerabilities of irregular migrants require an effective response which goes beyond the simple criminalisation and protection offered to victims of these offences. Under this perspective, the adjudications of social and economic rights such as the access to health care and social security systems may reveal essential. *Chowdury* and *Paposhvili* demonstrates that, although timidly, the ECtHR is reconsidering its precedent case-law fossilised on the “fair-balance” approach. In particular, through the prism of “human dignity” and thanks to a certain attention towards the vulnerabilities of individuals and groups, the Court presents itself as more willing to require States to comply with positive obligations. In the context of the pandemic, for instance, *Paposhvili* indicates that States should refrain from repatriating irregular migrants to receiving States where, for example, the number of infections is high, or the sanitary system are congested.

As explained above, the judgment calls for a comparative analysis which takes into consideration how the applicant’s conditions would evolve after the transfer. In the example provided above the repatriation would probably amount to a violation of Article 3 since it would result in a worsening of the health conditions and in an increase of the health risks faced by the individual. At the same time, *M.S.S.* and *Chowdury* teach us that States have a positive obligation to specifically address the

¹⁵² *Ibid.* See Communication From the Commission to the European Parliament and the Council, Preparedness for COVID-19 vaccination strategies and vaccine deployment, Brussels, 15 October 2020, COM(2020) 680 final.

vulnerable situation of certain categories in a comprehensive manner as well as a “duty to act” with respect of the conditions of individuals. As said before, irregular migrant workers, including those employed in the agricultural sector, face additional challenges and vulnerabilities such as those linked to the lack of an adequate shelter and proper sanitary conditions, the subsequent impossibility to respect social distancing, the absence of a safe work environment, the inaccessibility of social security systems, etc.

In the context of a pandemic, where excluding certain categories risks also being counterproductive in tackling the spread of infections, it is possible to conclude that States have a positive obligation not only to adopt all means necessary to prevent, but also to respond effectively to the negative consequences related to the pandemic and to undocumented migrants. Otherwise, as suggested by the ECtHR in *M.S.S. v. Belgium*, the “indifferent” behaviour of State authorities refraining from adopting measures specifically designed to offer to this category a special protection, may amount to a violation of Article 3. Furthermore, an exclusion of undocumented migrants from access to health care and from vaccination risks jeopardising the effectiveness of the measure put in place to contrast the outspread of COVID-19.

It is clear that there is a tension between the universal premise of IHRL and the immigration power retained by governments. This hold true in regard with social and economic rights whose construction as membership rights limits them to those who are “regularly” member of a certain community.¹⁵³ In this respect, even though human rights cannot “regularise” the migrant legal status, they can “carve out a zone of protected personhood”¹⁵⁴ for irregular migrants as vulnerable categories. A “substantive integrated approach” which lays its foundations on the dialogue between international human rights covenants and treaties and the European regional instruments can be welcomed as an important novelty. For instance, in *Sidabras and Dziatutas v. Lithuania*,¹⁵⁵ the ECtHR refers to the ESC and to the interpretation given by the ECSR, interpreting the ECHR as a “part of a bigger whole.”¹⁵⁶ The interpretation of the ESC as a living instrument adopted by the ECSR, in order to entail categories of individuals expressively excluded by the textual content of the Charter, may open the door for a similar progressive approach by the ECtHR too.

¹⁵³ DA LOMBA, *cit. supra* note 58, pp. 46-47.

¹⁵⁴ *Ibid.*, p. 47.

¹⁵⁵ See also MANTOUVALOU, “Work and Private Life: *Sidabras and Dziatutas v. Lithuania*”, *European Law Review*, 2008, p. 573 ff.

¹⁵⁶ LEIJTEN, *cit. supra* note 103, pp. 75-77.

It bears noting that there have been numerous calls for the recognition of human rights to irregular migrants.¹⁵⁷ These calls have not been so far transposed to coherent measures. The response of the EU and its Member States has referred only occasionally to this category. The provisory regularisation or the sporadic access to emergency primary health care or vaccination are not sufficient. In fact, Migrants are reluctant to pursue legal protection both against human trafficking and against diseases for the fear of being exposed to the attention of the authorities.¹⁵⁸ To this matter, a “firewall” to protect migrant from the potential drawback of their exercise of the limited, although existing, rights may be essential in granting an effective protection.¹⁵⁹ Language or information barriers also constitute obstacles hindering the exercise of their right to health. Additionally, it is possible that migrants do not have a home where to “stay” which may create problems concerning the respect of confinement and the other measures or that they live in crowded places where it’s impossible to maintain social distancing.¹⁶⁰ Furthermore, it is clear that in the agricultural sector and in low-skilled jobs, any form of “smart working” is impossible to achieve. It is also difficult to imagine that *caporali* which, by definition rely on illegal recruitment of workforce, will consider respecting the regulation for protective equipment and other protective measures.¹⁶¹

¹⁵⁷ Council of Europe, Commissioner for Human Rights, *The human rights of irregular migrants in Europe* (CommDH/ IssuePaper (2007), 17 December 2007); Council of Europe, Parliamentary Assembly, *Human Rights of irregular migrants* (Doc. 10924, 4 May 2006).

¹⁵⁸ CARENS, “The Rights of Irregular Migrants”, *Ehtics and Interantional Affairs*, 2008, p. 167 ff. See also TRIANAFYLLIDOU and SPENCER, “Migrants with Irregular Status in Europe: A Multi-faceted and Dynamic Reality”, in SPENCER and TRIANAFYLLIDOU (eds.), *Migrants with Irregular Status in Europe*, Springer 2020, p. 1 ff.

¹⁵⁹ *Ibid.*; RAPOSO and VIOLANTE suggest granting access to healthcare without collecting information regarding the immigration status, see RAPOSO and VIOLANTE, *cit. supra* note 3; VAN DURME, “Firewall’: A Tool for Safeguarding Fundamental Rights of undocumented Migrants”, PICUM, 2017; PICUM, “Undocumented Migrants and the Europe 2020 Strategy: Making social Inclusion A Reality for All Migrants in Europe”, 2015, available at: <http://picum.org/wp-content/uploads/2017/11/UndocumentedMigrantsandEurope2020Strategy_EN.pdf>.

¹⁶⁰ See RAPOSO and VIOLANTE, *cit. supra* note 3, according to whom “Restricting social contact is a ‘luxury’ that not everyone can afford”; see also ACCORNERO and HARB and MAGALHAES et al., “Stay Home without a Home’: Report from a webinar on the Right to Housing in Covid-19 lockdown times”, *Radical Housing Journal*, 2020, p. 197 ff; see also GUADAGNO, “Migrants and the COVID-19 Pandemic: An Initial Analysis”, IOM, 2020, available at: < <https://publications.iom.int/books/mrs-no-60-migrants-and-covid-19-pandemic-initial-analysis>>; LIEM et al., “The Neglected health in international migrant workers in the COVID-19 epidemic”, *The Lancet*, 2020, available at: < <https://www.thelancet.com/action/showPdf?pii=S2215-0366%2820%2930076-6>>.

¹⁶¹ Great difficulties in respecting hygiene protection arise also in the detention centers where irregular migrants wait for their return. See IOM, “IML Information Note on International Standards on Immigration Detention and Non-Custodial Measures”, International Migration Law Unit (IML),

In conclusion, it would be naïve to consider that the ECHR case-law as granting effective protection to irregular migrants against the difficulties of a pandemic. Single, limited, sporadic judgements, often late with respect to the violation of human rights cannot be considered as effective and universal instruments to tackle the pandemic effects on this specific vulnerable group. The accent posed to the exceptionality of migrants' conditions makes it even less likely to eventual claims to provide an effective remedy also with regard to single cases. However, if on the hand temporary measures may dam the immediate negative effects on the pandemic on irregular migrants' health, it must be born in mind that, on the other hand, the pandemic has only exacerbated situations presenting a pre-existing vulnerability. In this respect, States have a positive obligation to act irrespective of the immigration status of individuals – and the ECtHR and the ECSR case-law in the sense delineated above certainly point in this direction.

MIGRANT WOMEN WORKERS AGAINST LABOUR EXPLOITATION IN SOUTHERN SPAIN IN TIMES OF COVID-19

*Anna Zapsi, Rocío Garrido, Juan Carlos Aceros, Armando Agüero Collins**

1. INTRODUCTION

Labour exploitation is a serious violation of human rights. Although it is considered to be associated with capitalism, it is regarded, however, as an inherent risk to the actual predominant economic system due to the constant drive for efficiency and profitability through cost reduction.¹ According to the European Union Agency for Fundamental Rights,² many workers experience severe forms of exploitation in Europe. This risk is experienced with greater intensity by those populations that, due to various reasons, exhibit a greater level of socioeconomic vulnerability. This is the case of migrant women in Spain and, particularly, in Andalusia.

The agricultural and construction sectors have always been drawing numerous migrants in the country since they offer low-cost labour in comparison to the national workforce. Even though Spain attracts significant immigration from its former colonies—Morocco, Equatorial Guinea, the Philippines, and Latin America—most migrants come from Europe and especially Eastern Europe.³

Specifically, the Southern Spanish region of Andalusia is of great importance, which is known to be the gateway from Africa and, also, an attractive place for many

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¹ See CHESNEY at al., “Understanding labour exploitation in the Spanish agricultural sector using an agent based approach”, *Journal of Cleaner Production*, 2019, p. 696 ff., p. 704.

² See European Union Agency for Fundamental Rights, *Severe labour exploitation Workers moving within or into the European Union*, FRA, 2015, p. 11, available at: <<https://op.europa.eu/en/publication-detail/-/publication/99177f9a-eff8-11e5-8529-01aa75ed71a1>>.

³ See GIL-ARAUJO, “Políticas migratorias y relaciones bilaterales España-América Latina”, in AYUSO and PINYOL (eds.), *Migración latinoamericana en España, El estado de la investigación, Inmigración latinoamericana en España: el estado de la investigación*, CIDOB, 2010, p.93 ff., p. 97.

migrants because of the high demand for jobs in agriculture and services.⁴ This autonomous community is traditionally an agricultural area where also the service sector (i.e., tourism and retail sales) is thriving.

An important part of the migrant population in Spain is made up of people who come in search of a job that will allow them to achieve better living standards.⁵ However, they often end up performing tasks that require poor skills and are associated with precariousness, job insecurity and low-paid wages.⁶ Many migrants who are settled in Southern Andalusia suffer the social implications of precarious work, such as poor access to services and facilities, higher discrimination and isolation.⁷

This situation is more alarming for women, who tend to experience higher levels of overqualification, unemployment or seasonal work, and present more possibilities to get involve in elementary occupations (i.e., cleaners, housekeepers, or agricultural workers) where their rights are frequently violated.⁸ However, there are still few studies that explain the migratory dynamics of women and the predictors of their well-being and integration, especially in transit or border countries such as Spain.⁹ In this line, according to Garrido and Cubero,¹⁰ it is necessary to point out the social inequities that make migrant women vulnerable, but also to identify their strengths and encourage them to engage in social participation and take action towards change.

⁴ See GARRIDO, GARCÍA-RAMÍREZ, and BALCAZAR, “Moving towards Community Cultural Competence”, *International Journal of Intercultural Relations*, 2019, p. 89, p. 99.

⁵ See AYUSO and PINYOL, *Inmigración latinoamericana en España. El estado de la investigación*, Fundació CIDOB, 2010, p. 9.

⁶ See TANDIAN and BERGH, “From temporary work in agriculture to irregular status in domestic service: the transition and experiences of Senegalese migrant women in Spain”, in THANH-DAM, GASPER, and HANDMAKER (eds.), *Migration, Gender and Social Justice: Perspectives on Human Security*, NY, 2014, p. 47 ff., pp 56- 57.

⁷ See PALOMA, GARCÍA-RAMÍREZ and CAMACHO, “Well-being and social justice among Moroccan migrants in southern Spain”, *American Journal of Community Psychology*, 2014, p. 1 ff., pp. 2, 4; See GARRIDO, GARCÍA-RAMÍREZ, and BALCAZAR, *cit. supra note 4*, p. 90, 99.

⁸ See AGÜERO-COLLINS, VILLALBA and FAVELA, “Visibilizar lo invisible. Mujeres migradas y empleo del hogar”, *Servicio Jesuita a Migrantes*, October 2018, available at: <<https://sjme.org/docs/informe-visibilizar-lo-invisible-mujeres-migradas-y-empleo-del-hogar/>>., p.10; See Cáritas, “Vulneraciones de derechos laborales en el sector agrícola, la hostelería y los empleos del hogar”, *Cáritas Española*, August 2020, p. 38, available at: <<https://www.caritas.es/producto/vulneraciones-de-derechos-laborales-en-el-sector-agricola-la-hosteleria-y-los-empleos-del-hogar/>>; See IGLESIAS, BOTELLA and RÚA, “Estudio sobre la situación laboral de la mujer inmigrante en España”, *Organización Internacional para las Migraciones e Instituto Universitario de Estudios sobre Migraciones*, 2015, p. 11 available at: <https://issuu.com/stoprumores/docs/estudio_sobre_la_situacion_laboral>.

⁹ See CASTILLA-VÁZQUEZ, “Mujeres en transición: La inmigración femenina africana en España”. *Migraciones internacionales*, 2017, p. 143 ff., p. 155.

¹⁰ See GARRIDO and CUBERO, “La participación socio-política de las mujeres negras africanas en Sevilla (España)”, *Odisea: Revista de Estudios Migratorios*, 2019, p. 1 ff., p. 20-26.

This paper aims to address systemic gender inequalities, focusing on the situation of migrant women in Andalusia in three sectors of economic activity that are particularly prone to exploitation: agricultural workers, hotel maids, and domestic and caregiving workers. In the following pages, this work will present the MICAELA Project, its objectives and its main results. This project was developed in times of COVID-19, which is why it is also pointed out how the pandemic has hardened the conditions in which these women work and survive in our host society. Finally, the main conclusions and recommendations derived from the Project MICAELA are discussed.

2. MIGRATION AND GENDER INEQUALITIES

The migrant population has been growing in Spain since the 1980s and, although it was downsized during the Great Recession in Spain (2004-2018), it began to raise once again (Figure 1).¹¹ By January 2021, there were more than five million foreigners registered in Spain, being 2.697.476 women,¹² excluding those with irregular immigration status.

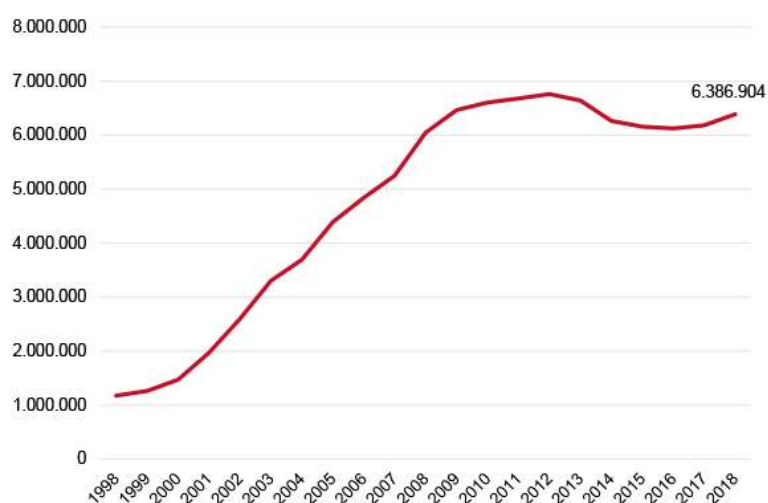


Figure 1 – Evolution of the number of immigrants living in Spain (1998-2018)

¹¹ See National Institute of Statistics, Continuous Register Statistics, 2018, available at <https://www.ine.es/dyngs/INEbase/es/categoria.htm?c=Estadistica_P&cid=1254734710984>.

¹² See Instituto Nacional de Estadística (INE), Población extranjera por nacionalidad y sexo, 2021, available at <<http://www.ine.es/jaxi/Tabla.htm?path=/t20/e245/p04/provi/10/&file=0ccaa002.px>>.

Andalusia has been a pole of attraction for a big number of migrants, representing 13.11% of the total number of immigrants in Spain.¹³ In 2012, the foreign population reached its highest number in the last 40 years with 747.000 registrations (Figure 2).¹⁴ Nowadays, more than 7% of the registered population in the autonomous community is of foreign origin.¹⁵

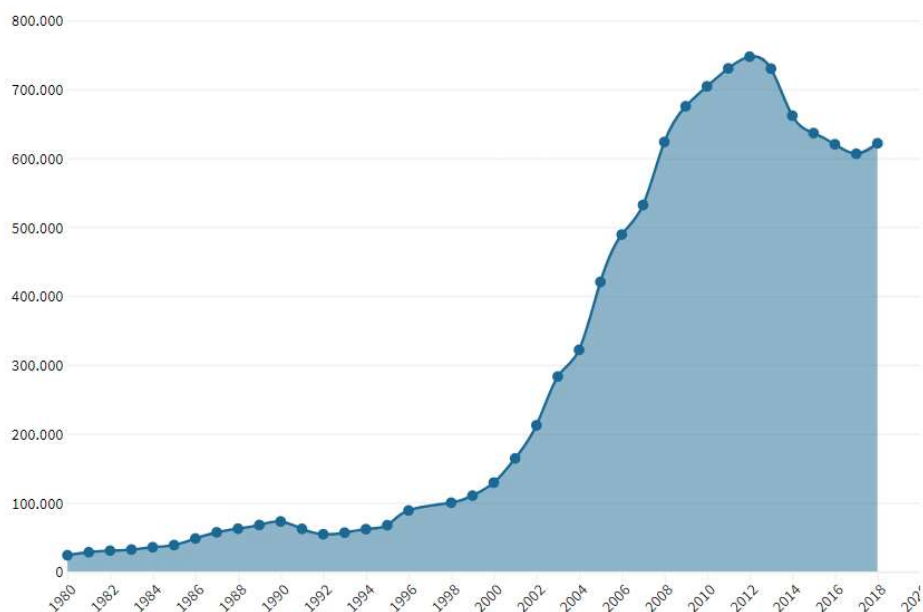


Figure 2 - Evolution of the number of immigrants living in Andalusia (1980-2018)

In the last few years, migratory flows have been transformed and women have acquired a leading role in them, often carrying out their migratory projects alone.¹⁶ Namely, in 2020, women comprised less than half of all international migrants

¹³ See Observatorio Permanente Andaluz de las Migraciones, “Informe Bienal. Andalucía e Inmigración, 2016-2017”. Junta de Andalucía, 2018, p. 4, available at <http://www.juntadeandalucia.es/justiciaeinterior/opam/es/informe_anual>.

¹⁴ See RTVE, “Diez gráficos para entender cómo ha evolucionado Andalucía en los últimos 40 años”, RTVE, 28 February 2020, available at: <<https://www.rtve.es/noticias/20200228/diez-graficos-para-entender-como-evolucionado-andalucia-ultimos-40-anos/2004782.shtml>>.

¹⁵ See Observatorio Permanente Andaluz de las Migraciones, “La evolución de la población extranjera en Andalucía en los últimos años”. Boletín OPAM, 2019, p. 4 ff., p. 5.

¹⁶ See DONATO and GABACCIA, *Gender and international migration*, New York, 2015.

worldwide, 48.1% or 135 million (Figure 3).¹⁷ At present, there are 305,808 women living in Andalusia.¹⁸

Women are typically the first to embark on a migration journey in order to contribute to the well-being of their families.¹⁹ However, their prominence is neglected, and they are seen as invisible secondary migrants.²⁰

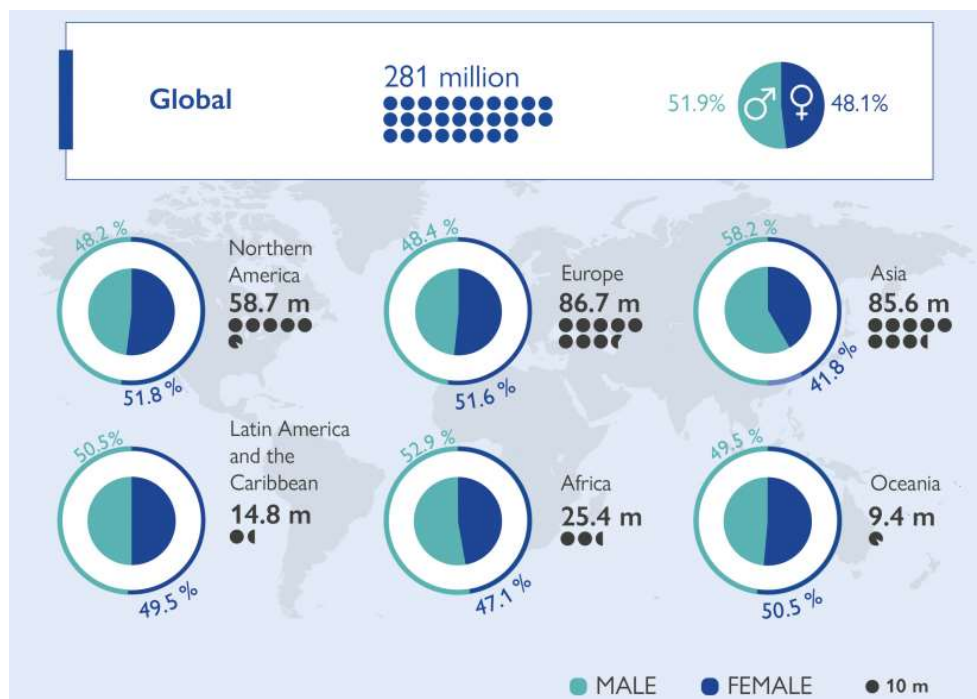


Figure 3 – Total International Migrant Stock by Region and Sex, mid- year 2020

Their invisibility can be explained through the inexistence and restricted use of a gender²¹ point of view—assumed both as a way of thinking about identity

¹⁷ See United Nations, Department of Economic and Social Affairs (UN DESA), Population division. International Migrant Stock 2020, United Nations, 2020, available at: <<https://www.un.org/development/desa/pd/content/international-migrant-stock>>.

¹⁸ See INE, *cit. supra* note 12.

¹⁹ See BASTIA, “La feminización transnacional y su potencial emancipatorio”, *Papeles de relaciones ecosociales y cambio global*, 2008, p. 67 ff., p. 74.

²⁰ See CAMACHO, *Mujeres inmigrantes. Trayectoria laboral y perspectiva de desarrollo humano*, CLACSO, 2010.

²¹ Gender refers to the attitudes, feelings, and behaviours that a given culture associates with a person's biological sex. It implies the psychological, behavioural, social, and cultural aspects of being male or female (i.e., masculinity or femininity) although it may vary across different cultures and over time.

construction and as a political idea which addresses the distribution of power in society—taking into consideration their migratory venture.²² Women’s migration was disregarded and even though investigations and studies started to include them in reports, either gender differences were not addressed appropriately, or the dominance of masculine migratory pattern was in the spotlight.²³

On the premise of gender inequality and gender roles, their contribution to migratory flows is best explained from a gender perspective. Women’s migration process begins even before their departure from the country of origin, from the moment they start having expectations upon their relocation and it continues up to the experiences and outcomes in the countries of destination.²⁴

The term *Feminisation of Migration* began to raise awareness and highlight women migrant workers’ merit on the migration process. This phenomenon can be understood in

Gender norms and gender expectations are created by societies, which are learned and internalised by all members of the world at large. Gender expression is demonstrated by the way we dress or the way we interact with others. However, a person’s gender may or may not correspond to their biological sex, hence, is deeply personal. Additionally, gender intersects with other categories, such as class, skin colour, ethnicity, religion, or disability (See APA, “Guidelines for psychological practice with lesbian, gay, and bisexual clients”, *American Psychologist*, 2012, p. 10 ff., p. 40; See Center for Gender Sanity, “Diagram of Sex & Gender”, 2009, available at: <<http://www.gendersanity.com/diagram>>; See CISLAGHI and HEISE, “Gender norms and social norms: differences, similarities and why they matter in prevention science”, *Sociology of Health & Illness*, 2020, p. 407 ff., p. 422.

Sex refers to a person’s biological status and is typically categorized as male, female, or intersex. It is typically assigned at birth, and it concerns physical and biological traits (e.g., chromosomes, hormones, internal reproductive organs and external genitalia). Nonetheless, in the case of sex reassignment surgeries performed to transition individuals, sex can be changed (See APA, “Guidelines for psychological practice with lesbian, gay, and bisexual clients”, *American Psychologist*, 2012, p. 10 ff.; APA, “Guidelines for psychological practice with transgender and gender nonconforming people”, *American Psychologist*, 2015, p. 832 ff., p. 864; HILLE, SIMMONS and SANDERS, “‘Sex’ and the Ace Spectrum: Definitions of Sex, Behavioral Histories, and Future Interest for Individuals Who Identify as Asexual, Graysexual, or Demisexual”, *The Journal of Sex Research*, 2020, p. 813 ff).

²² See United Nations, *World Survey on the Role of Women in Development: Women and International Migration*, Department of Economic and Social Affairs Division for the Advancement of Women, 2004, available at: <<https://www.un.org/womenwatch/daw/public/WorldSurvey2004-Women&Migration.pdf>>.

²³ See BOYD and GRIECO, “Women and migration: incorporating gender into international migration theory”, *Migration Information Source*, 1 March 2003, available at: <<https://www.migrationpolicy.org/article/women-and-migration-incorporating-gender-international-migration-theory>>; MARTÍNEZ, ‘Feminización de las migraciones en América latina: discusiones y significados para políticas’, *Observatorio de Igualdad de Género de América Latina y el Caribe*, 2007, p. 125 ff, p. 130, available at: <https://oig.cepal.org/sites/default/files/jm_2007_feminizacionmigracionesal.pdf>.

²⁴ See JOLLY and REEVES, “Gender and migration: Overview Report”, *Institute of Development Studies*, 2005, available at: <<https://repositorio.unal.edu.co/bitstream/handle/unal/75185/1858648661%20%282%29.pdf?sequence=1&isAllowed=y>>.

a multidimensional way, both by quantitative and gender-focused data, analysing migrant women's increased number within migratory flows in addition to their migratory reality (i.e., the motives of their migration, the ways they are migrating and the roles they may perform being either independent migrants or primary economic providers).²⁵

Over the last few decades, mainly in the 20th century, the Feminisation of Migration is occurring within frameworks of increasingly gender-selective labour demand in host countries, recent "shifts" in women's roles or prominence in migrant populations, and growth for migrant women's labour in destination countries, notably in the sector of domestic and care work.²⁶

Albeit, the real change was the fact that women, over the years, have become more independent migrants rather than their past *dependent* figures travelling with their husbands or meeting them abroad. Furthermore, they have proven to be the primary economic providers for their families.²⁷ Another significant change is the growing attention that academics, stakeholders, and policy makers are paying to female migration, to the role of gender in migration processes and, notably, to the increasing participation of women in remittances.²⁸

All of the above-mentioned situations had progressively made women agents of change and protagonists in social changes.²⁹ Thus, Feminisation of Migration became a synonym of female migrant's visibility and put in value their participation by embedding fundamental changes in the migrants' profile.³⁰ Moreover, its degree

²⁵ See United Nations, World Survey on the Role of Women in Development, *cit. supra note 22*.

²⁶ See United Nations Department of Economic and Social Affairs (UN DESA), International migration and development: Measures to ensure respect for and protection of the human rights of all migrants, with particular reference to women and children, as well as to prevent and combat smuggling of migrants and trafficking in persons, and to ensure regular, orderly, and safe migration, Background paper Towards the 2013 High-level Dialogue on International Migration and Development, United Nations, 2013, available at: <<https://publications.iom.int/books/towards-2013-high-level-dialogue-international-migration-and-development>>; See Caritas, "The Female Face of Migration: Advocacy and best practices for women who migrate and the families they leave behind", February 2012, available at: <<https://www.caritas.org/wordpress/wp-content/uploads/2017/05/FFMCaritasPolicyDoc.pdf>>.

²⁷ See PETROZZIELLO, "Gender on the Move: Working on the Migration-Development Nexus from a Gender Perspective", UN Women for Gender Equality and the Empowerment of Women, 2013, p. 39, available at: <http://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2013/unwomen_migrationmanual_low4.pdf?vs=1502>.

²⁸ See ZLOTNIK, "The Global Dimensions of Female Migration", Migration Policy Institute, 1 March 2003, available at: <<http://www.migrationinformation.org/Feature/display.cfm?ID=109>>; See GIL-ARAUJO and GONZÁLEZ-FERNÁNDEZ, "International migration, public policies and domestic work: Latin American migrant women in the Spanish domestic work sector". Women's Studies International Forum, 2014, p. 13 ff., p. 15.

²⁹ See United Nations, World Survey on the Role of Women in Development, *cit. supra note 22*.

³⁰ See OROZCO, PÉREZ and PAIEWONSKY, *Cruzando fronteras II: Migración y desarrollo desde una*

varies according to the countries of origin and it depends on factors such as the socioeconomic position of women in each society, gender roles and family organisation, as well as the existence of networks in the host countries.³¹

Adopting an intersectional gender perspective,³² it is noted that, further to the high vulnerability they suffer during the migratory journey, both female and men migrant are exposed to racist, institutional, and normative violence in host societies, due to critical protection loopholes for migrants in transit.³³ Notwithstanding, female migrants are at severe risk of being raped or falling into human trafficking mafias³⁴ and are expected to suffer gender-based violence, too.³⁵ Furthermore, migrant women are over-represented in the statistics about victims of gender-based violence in Spain.³⁶

The sexual abuse that befalls migrant women has its roots in patriarchal oppression and gender inequality and it is reinforced by not only the absence of international human rights³⁷ but also, by the attainability of safe, regular, and affordable migration routes³⁸ and the lack of economic power and resources which prevent women from taking legal actions.³⁹

perspectiva de género, República Dominicana, 2008.

³¹ See PALACIOS, “Perspectiva de género en los fenómenos migratorios: estudio desde Europa y América Latina”, *Revista CES Derecho*, 2016, p. 145 ff., p. 151; See Centro Regional de Derechos Humanos, “Mujeres Migrantes”, 2011, available at: <https://www2.ohchr.org/english/bodies/cmw/docs/ngos/Corporaci%C3%B3n_Humanas_Chile_CMW15.pdf>.

³² See CRENSHAW, “Mapping the margins: Intersectionality, identity politics, and violence against women of color”, *Stanford Law Review*, 1991, p. 1241 ff., p. 1299.

³³ See DONATO and GABACCIA, *cit. supra note 16*; See Office of the United Nations High Commissioner for Human Rights, “Situation of migrants in transit”, 2015, p. 18 available at: <https://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/OHCHR_2016_Report-migrants-transit_SP.pdf>.

³⁴ See MOROKVASIC, “‘In and out’ of the labour market: Immigrant and minority women in Europe”, *New community*, 1993, p. 459 ff.

³⁵ See TYSZLER, “From controlling mobilities to control over women’s bodies: gendered effects of EU border externalization in Morocco”, *Comparative Migration Studies*, 2019, p. 1 ff., p. 8.

³⁶ See MONTEROS, “Mujeres migrantes víctimas de violencia de género en España”, *AIETI y la Red de Mujeres Latinoamericanas y del Caribe*, 2019, p. 4, available at: <https://aieti.es/wp-content/uploads/2019/02/Violencia_genero_mujeres_migrantes.pdf>.

³⁷ See UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) [UDHR].

³⁸ See Office of the United Nations High Commissioner for Human Rights, *cit. supra note 33*, p. 24; See BYLANDER, “Is Regular Migration Safer Migration? Insights from Thailand”, *Journal on Migration and Human Security*, 2019, p. 1 ff., p. 16.

³⁹ ZAPTSI and GARRIDO, “Análisis psicosocial del empoderamiento feminista en el ámbito audiovisual: propuesta de un instrumento para evaluar la equidad de género”, in PUIG, TORRES, and IGLESIAS (eds.), *Análisis y propuestas educativas sobre género y diversidad sexual: Sociedades y escrituras en continuas transformaciones*, Madrid, 2021, p. 73 ff., p. 77.

These breaches of fundamental rights⁴⁰ add to multiple inequalities linked to their different historically social identities—migrant, women, poor, among others—place them in a position of subalternity and under situations of high risk⁴¹. From an intersectional approach, Moane⁴² highlighted six mechanisms of control/inequalities as result of patriarchy and colonialism that migrant women may face in host societies like Spain: (1) violence, (2) economic exploitation, (3) sexual and reproductive control, (4) cultural control, (5) political exclusion, and (6) fragmentation. As this paper focuses on labour exploitation, in the following sections, we describe the term and how does it affect migrant women.

3. LABOUR EXPLOITATION OF MIGRANT WOMEN WORKERS

According to the report of the European Agency for Fundamental Rights,⁴³ in Spain and twelve other EU countries (i.e., Germany, France, Poland), cases of severe labour exploitation take place more frequently. Gender, irregular status, and prejudices against migrants, in addition to the absence of laws and sentences against

⁴⁰ The Charter of Fundamental Rights of the European Union enshrines certain political, social, and economic rights for European Union citizens and residents. Human dignity (Art. 1), the Prohibition of slavery and forced labour (Art. 5), the Right to Liberty and Security (Art. 6), the Freedom to choose an occupation and right to engage in work (Art. 15), non-discrimination (Art.21), Protection in the event of unjustified dismissal (Art. 30), Fair and just working conditions (Art. 31) are of particular relevance for workers moving within or into the EU. See Charter of Fundamental Rights of the European Union (14 December 2007, entry into force 1 December 2009) IJ C 326/1 [CFREU]. All the aforementioned violations of fundamental rights (i.e., racist, institutional, and normative violence, sexual abuse, human trafficking, gender-based violence, unsafe, irregular and unaffordable migration routes, and lack of resources for legal action) are considered to be breaches of fundamental rights since the rights to Human Dignity, Life, Liberty, and Security, Work, Migration, to a Standard of Living Adequate for the Health and one's Well-being, the Freedom of Movement, the Prohibition of Slavery, Inhuman or Degrading Treatment are all universally protected either by the CFREU or by UDHR, among series of international human rights treaties.

⁴¹ See CRENSHAW, *cit. supra note* 32.

⁴² See MOANE, "Bridging the personal and the political: Practices for a liberation psychology", *American journal of community psychology*, 2003, p. 91 ff., p. 94.

⁴³ See European Union Agency for Fundamental Rights, *Severe labour exploitation Workers moving within or into the European Union*, FRA, 2015, available at: <<https://op.europa.eu/en/publication-detail/-/publication/99177f9a-ef8-11e5-8529-01aa75ed71a1>>.

labour exploiters,⁴⁴ are major risk factors for women who migrate to Spain in the search for a better future.⁴⁵

Economic exploitation is one of the main obstacles for migrant women in Southern Europe, where changes in production forms and lifestyles have increased the demand for female labour.⁴⁶ The employment opportunities that migrant women are able to access are used to be linked to exploitative working conditions, such as agriculture, forestry, fishing, hospitality, and domestic work sectors.⁴⁷

It is common nowadays to refer to exploitative labour relations through the concept of modern slavery⁴⁸. This has placed crimes such as human trafficking on the public agenda. Nonetheless, the disregard of lesser abusive practices has been reinforced as well out.⁴⁹ In order to be responsive to both subtle exploitation practices

⁴⁴ Art. 311 of the Spanish Criminal Code criminalises working conditions that harm, suppress or restrict the workers' rights and Art. 312 criminalises trafficking in illegal labour, punishable with minor sentences of six months to three years and a fine (L.O 1/2015) [See Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Organic Law 10/1995, 23 November on the Criminal Code), Boletín Oficial del Estado (BOE), 281, 24 noviembre 1995 (entry into force 24 May 1996); Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (Organic Law 1/2015, 30 March, amending Organic Law 10/1995, of 23 November 1995, on the Criminal Code), Boletín Oficial del Estado (BOE), 77, 31 marzo 2015]. Similarly, Royal Decree 557/2011 provides a Framework Protocol for the Protection of Victims of Trafficking in Human Beings (See Royal Decree 557/2011).

In Spain, the penal laws on labour conditions have focused exclusively on human trafficking and sexual exploitation (See Organic Law 4/2000, Art. 318 bis).

Regarding labour exploitation of migrants, current laws are not properly enforced and have failed to include ongoing situations (See Organic Law 4/2000, Art. 318 bis CC). As a consequence, lots of violent labour incidents remain unreported, hence the labour exploiters are not regularly sentenced, leaving the issue of labour exploitation unaddressed (See ANSA, "Female seasonal workers exploited and raped in Spain", InfoMigrants, 28 Mayo 2018, p. 8 available at: <<https://www.infomigrants.net/en/post/9502/female-seasonal-workers-exploited-and-raped-in-spain>>; CORREA DA SILVA and CINGOLANI, "Labour Trafficking and Exploitation in Rural Andalusia", in Reeves (eds.), *Modern Slavery and Human Trafficking*, 2020, p. 352 ff.).

⁴⁵ See European Union Agency for Fundamental Rights, Severe labour exploitation, *cit. supra* note 43.

⁴⁶ See MOLPECERES-ÁLVAREZ, p. 93; See IBÁÑEZ PASCUAL, "La segregación ocupacional por sexo a examen. Características personales, de los puestos y de las empresas asociadas a las ocupaciones masculinas y femeninas", REIS: Revista Española de Investigaciones Sociológicas, 2008, p. 87 ff., p. p. 89; OSO and MARTÍNEZ, "Domésticas y cuidadoras: mujeres inmigrantes latinoamericanas y mercado de trabajo en España", L'Ordinaire des Amériques, 2008, p. 143 ff., p. 144.

⁴⁷ See European Union Agency for Fundamental Rights, Severe labour exploitation, *cit. supra* note 43, p.23.

⁴⁸ "The status or condition of a person over whom any or all of the powers of the right of ownership are exercised" (Art. 1 (1) of the League of Nations, 1926 Slavery Convention or the Convention to Suppress the Slave Trade and Slavery, (adopted 25 September 1926, entered into force 9 March 1927)). Art. 5 of the CFREU explicitly prohibits slavery and forced labour.

⁴⁹ See STRAUSS and MCGRATH, "Temporary migration, precarious employment and relations: Exploring the 'continuum of exploitation' in Canada's Temporary Foreign Worker Program", Geoforum, 2017, p. 199 ff., p. 200.

and over-exploitation, we employed a broad understanding of the phenomenon. We understood exploitation⁵⁰ as a type of labour relationship in which people work in exchange for inadequate pay⁵¹ under inappropriate conditions.⁵² The latter can imply that women workers are paid less than the current minimum wage or the established collective agreement, that their human capital, regular work or their overtime hours are not recognised financially and also that a part of their salary or all of it is withheld arbitrarily. In addition, the adequacy of the remuneration must take into account the conditions under which it takes place.⁵³

However, it is necessary to recognise that when women workers are exploited, they often experience work precariousness⁵⁴ and infringements of their freedom to choose an occupation and right to engage in work.⁵⁵ The main characteristic of precarious employment is uncertainty provided by low income, lack of social benefits, limited rights and unpredictable changes on the duration of the employment.⁵⁶ On the other hand, violations of the freedom to choose an occupation

⁵⁰ “Work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal instruments, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment, and which are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, severe labour exploitation includes as a minimum coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour, and trafficking prohibited by Art. 5 CFREU, as well as severe exploitation within the framework of an employment relationship, as covered by Art. 9 (1) of the Employers Sanctions Directive”. See European Union Agency for Fundamental Rights, Protecting migrant workers from exploitation in the EU: workers’ perspectives, FRA, 2019, p. 10 available at: <<https://fra.europa.eu/en/publication/2019/protecting-migrant-workers-exploitation-eu-workers-perspectives>>.

⁵¹ When the workers are paid less than what is established by law and/or collective bargaining agreement. Additionally, overtime working hours are not compensated, or are underpaid. See Ministerio de Trabajo y Economía Social (Ministry of Labour and Social Economy), “Labour Inspection”, Art. 13.1 -13.2, available at: <https://www.mites.gob.es/es/Guia/texto/guia_6/contenidos/guia_6_13_1.htm> and <https://www.mites.gob.es/es/Guia/texto/guia_6/contenidos/guia_6_13_2.htm>.

⁵² A proper working environment is defined by and a regular, direct and continuous employment relationship, usually on a full-time basis, associated with the entitlement to employment benefits and union representation. See STRAUSS and MCGRATH, *cit. supra note 49*.

⁵³ See Cáritas (2020), *cit. supra note 8*, p. 25.

⁵⁴ Women have to work 59 days more per year than men to earn the same amount of money. Migrant women are among the most exploited and marginalised collectives. One in three women, in Spain, is experiencing precariousness and is at high risk of in-work poverty. See Oxfam Intermón, “Voces contra la precariedad: mujeres y pobreza laboral en Europa”, 2018, available at: <<https://www.oxfam.org/es/informes/voces-contra-la-precariedad-mujeres-y-pobreza-laboral-en-europa>>.

⁵⁵ See European Union Agency for Fundamental Rights, Severe labour exploitation, *cit. supra note 43*; CFREU, Art. 15.

⁵⁶ See PORTHÉ, BENAVIDES and VÁZQUEZ, “La precariedad laboral en inmigrantes en situación irregular en España y su relación con la salud”, *Gaceta Sanitaria*, 2009, p. 107 ff., pp. 110-111; See VOSKO, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment*, Oxford, 2010.

and right to engage in work⁵⁷ involve the unlawful restriction of a person's ability to decide whether or not to work, for whom and under what kind of conditions. This may be linked to limitations of freedom of association and right to partake in trade unions and assemblies, and the right to collective bargaining.⁵⁸

Exploitation can be organized in a continuum whose extremes are decent work and forced labour. According to the former Director-General of the International Labour Organization (ILO) Juan Somavía,⁵⁹ decent work generates a fair income, workplace and social protection, and a full-time employment relationship, associated with access to employment benefits and collective representation. A situation like this contributes to the satisfaction of the needs of women workers and provides well-being in different aspects of their lives.⁶⁰

On the other hand, forced labour is a labour activity that is performed under the threat of a punishment or sanction.⁶¹ In its most extreme form, forced labour can be regarded as a form of slavery, in which not only labour rights are violated, but also individual freedom in broader terms, including human dignity.⁶² Human trafficking⁶³ is probably the most notorious form of modern slavery,⁶⁴ since it is

⁵⁷ See European Union Agency for Fundamental Rights, Severe labour exploitation, *cit. supra note* 43; CFREU, Art. 15.

⁵⁸ See INTERNATIONAL LABOUR ORGANIZATION (ILO), Thematic Area 8, 2018.

⁵⁹ See SOMAVIA, "Proceedings of the 87th Session, International Labour Conference. International Labour Organization", International Labour Organization, 1999, available at: <<https://www.ilo.org/public/english/standards/relm/ilc/ilc87/a-sen.htm>>.

⁶⁰ See SIRGY, EFRATY and SIEGEL, "A new measure of quality of work life (QWL) based on need satisfaction and spillover theories", *Social Indicators Research*, 2001, p. 241 ff; CIESLIK, "Where Do You Prefer to Work? How the work environment influences return migration decisions from the United Kingdom to Poland", *Journal of Ethnic and Migration Studies*, 2011, p. 1367 ff., p. 1383.

⁶¹ See OIL, Trabajo forzoso: Manual para los inspectores del trabajo de Perú, OIT- Oficina Regional para América Latina y el Caribe, 2014, available at <https://www.ilo.org/lima/publicaciones/WCMS_400228/lang-es/index.htm>.

⁶² See International Labour Organization (ILO), What is forced labour, modern slavery and human trafficking, para 11, available at: <<https://www.ilo.org/global/topics/forced-labour/definition/lang-en/index.htm>>.

⁶³ See "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000, entry into force 25 December 2003), 2237 UNTS 319, Art. 3.

⁶⁴ "The status or condition of a person over whom any or all of the powers of the right of ownership are exercised" (Art. 1 (1) of the 1926 Slavery Convention, *cit. supra note* 48). Art. 5 CFREU explicitly prohibits slavery and forced labour.

estimated that 40.3 million victims are exploited and enslaved by coercive and deceptive practices globally.⁶⁵

The most varied types of labour exploitation can be found between decent work⁶⁶ and forced labour.⁶⁷ They can be more or less severe depending on a series of conditions. We have considered four factors in our project: (1) Income Level, (2) Precariousness of Employment, (3) Voluntariness of the Employment Relationship, and (4) Compliance with the Prevailing Legal Framework. Table 1 presents some indicators of these conditions, which served as the basis for the questionnaire. The results are presented in the following section.

Table 1 – Dimensions of labour exploitation

	Decent work	Labour exploitation	Forced work
Income level	Salary established by the Law and/or the collective bargaining agreement. Overtime working hours a paid in accordance with the applicable standard.	Salary lower than the established by the Law and/or the established collective agreement. Overtime working hours are not paid, or they are paid at a lower rate than the established one.	Work is being done to pay debts induced by the employers. All or part of the wages are withheld for this purpose.
Precariousness	The employment relationship tends to be indefinite. Its type and duration are established by a	The employment relationship is temporary. No written contract and/or lack of transparency on tasks,	The duration of the employment relationship is unknown. No written contract and/or lack of

⁶⁵ See International Labour Organization (ILO), Forced labour, modern slavery and human trafficking, available at <<https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>>.

⁶⁶ “This term refers to fair and just working conditions, as protected under Article 31 of the EU Charter of Fundamental Rights”. See European Union Agency for Fundamental Rights, Protecting migrant workers, *cit. supra note 50*, p. 9, 2019.

⁶⁷ “All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily”. See European Union Agency for Fundamental Rights, Protecting migrant workers, *cit. supra note 50*, p. 9, 2019; International Labour Organization (ILO), Forced Labour Convention, C29 (28 June 1930, entry into force 1 May 1932), Art. 2 (1).

	contract. There is transparency regarding the tasks, schedules, salaries and forms of payment. Strict compliance with the agreed terms.	schedules, salary, etc. Working conditions may vary unpredictably. The job can be suddenly terminated without a valid reason. Precarious living conditions.	transparency on tasks, schedules, salary, etc. Working conditions may vary unpredictably. The job can be suddenly terminated without a valid reason. Precarious living conditions and, in the most severe cases, human rights violations.
Voluntariness	Respect for the freedom to choose an occupation and right to engage in work of workers.	One or more limitations on the worker's freedom to choose an occupation and right to engage in work. For example, limitation of labour mobility.	Serious limitations to freedom to choose an occupation and right to engage in work. The employers control different aspects of their worker's lives.
Compliance with the prevailing legal framework	Application of labour and immigration regulations, established collective agreements and employment contracts. Formal labour relationship. There is control by the State. Wage deductions are made to cover social benefits.	Violation of labour and/or immigration regulations, criminal code, established collective agreements and/or employment contracts (if available). Public or clandestine labour relationship. Although the work may be registered, the exploitation evades controls. There is limitation or elimination of social benefits.	Infringement of labour and/or immigration regulations, as well as of the criminal code (crimes against workers' rights) and human rights. Labour relationship is by necessity clandestine. Complete elimination of social benefits.

These inequities are suffered by migrant women because of inequalities derived from patriarchy and colonialism—between other oppressive forces as racism.⁶⁸ Therefore, it is needed to delve deeper into these oppressions from an intersectional approach and to stop perceiving migrant and racialized women as victims, but as active agents with the power to resist multiple oppressions and to promote social changes.⁶⁹ In response, the MICAELA Project have emerged to achieve a better understanding about labour exploitation of migrant women workers and to generate changes aimed to work equity.

4. THE MICAELA PROJECT: IMMIGRANT WOMEN FOR THE CHANGE AND WORK EQUITY

4.1 Presentation and goals

MICAELA is an acronym of *Mujeres Inmigrantes por el Cambio y la Equidad Laboral* (Immigrant Women for the Change and Work Equity). It is a joint initiative of the Jesuit Association Claver SJM in Seville, the domestic and care workers *Nosotras* (Us) in Granada and the Socio-intercultural Association *ASIA* in Seville, all of them located in Andalusia. Each of these organisations has provided its experience and knowledge within the migrant population in Andalusia, which has been essential for the successful development of the project. The MICAELA project was carried out with the grant support of the Regional Government of Andalucía, aimed at conducting projects in the area of migration policies.

The alliance of these three entities aimed to achieve three objectives. First, to detect possible cases of labour exploitation and violation of fundamental human rights on female migrant domestic and care workers, hotel maids and agricultural workers. Second, to shed light to these exploitative conditions so as to advocate for civic involvement, hence, better legislation policies. And third, to create meeting and dialogue spaces between the women and entities that defend their rights so as to join forces against labour exploitation in these contexts. In order to achieve these goals, the irreplaceable participation of the affected women and of the entities that they themselves have created or that provide them with guidance and support, was expected.

The MICAELA Project intended to lay the foundation for designing and implementing actions with the purpose of reshaping the harsh situations experienced by many migrant women in the Andalusian labour market. Thus, this project could

⁶⁸ See MOANE, *cit. supra* note 43, p. 93.

⁶⁹ See CRENSHAW, *cit. supra* note 32; See GARRIDO and CUBERO, *cit. supra* note 10, p. 24.

lead to new interventions, much more thoroughly informed, well contextualized, and enhanced with a participatory and empowering approach.

4.2. The development of the MICAELA Project

The project started up in February 2020, just one month before the COVID-19 pandemic, which altered drastically not only Spain's financial status but also the nature and methodology of the project. What is more, socioeconomic and structural inconsistencies upon specific fields of work, which are predominantly carried out by migrant workers, were revealed.

Firstly, the clarification of the concept of exploitation based on a literature review of was set in motion. Once a consensus was reached, the team agreed on the design of an online questionnaire and its application to a small number (adapting to social distancing) of domestic and care workers, hotel maids and seasonal agricultural workers in Seville, Granada, and Huelva.

Secondly, research of organisations whose main actions are related to the labour exploitation of migrant women in Andalusia was carried out and a database was created. After receiving information about the MICAELA project and its initiatives, the organisations were invited to meetings with the purpose of presenting their experiences with labour exploitation and migrant female workers.⁷⁰

These meetings led to the initiative of forming a platform that would undertake a continuous effort to raise awareness of the labour exploitation of migrant women workers and launch actions aimed at eradicating it. The people behind this initiative agreed to call it *Together for Change! (¡Juntas por el Cambio!)*. At present, the platform still holds virtual meetings and is open to new incorporations and proposals that contribute to the advocacy of better living and working conditions of migrant women in Andalusia.

⁷⁰ Since the progress of the project was affected by the State of Alarm that was declared in Spain as a COVID-19 restraining measure in March 2020, the possibility of organising the aforementioned meetings was severely affected. In April, contact with the organizations was resumed and between May and June the first meetings were scheduled and convened. In July, two meetings were held, one in Seville and the other in Granada, which brought together members of different entities. In these meetings the MICAELA project and the preliminary results of the application of the questionnaires were publicly presented. The attendees contributed with their comments to the initial diagnosis of the situation in the three sectors.

During July, the MICAELA project team was also present in rallies for the rights of migrant populations in Huelva and Seville. Finally, in October 2020, an Open Day⁷¹ was held to display the main results of the MICAELA project so as to raise awareness of labour exploitation conditions and advocate for human rights. The event was called *Together for Change!—honoring the name of the platform—and* was held in Seville.

At the end of the Open Day, the participants shared their thoughts on the possible actions that this collective could undertake on a short, medium, and long-term range, as well as on the material, financial and human resources it would require to fulfil its purposes. The meeting was characterized by a fraternal atmosphere and constructive dialogue in which the importance of the platform and its further implementation to enable better conditions for migrant women domestic and caregiver workers, hotel maids and agricultural workers was repeatedly stressed.

4.3. Participants

A total of 33 migrant women participated in our study. Among them, 13 were agricultural workers, 16 were domestic and caregiver workers and 4 were hotel maids. Table 2 presents a summary of the participants' characteristics by sector.

Table 2 – Information of the participants

	Agricultural workers (N=13)	Domestic and Caregiver workers (N=16)	Hotel maids (N=4)
Age range	25-50	25-63	25-52
Arrival in Spain	2006-2008	2006-2008	2002-2010
Ethnic majority	Moroccan	Latin- America	Latin-American
Predominant education level	Secondary (38,5%) or Higher education (30,8%).	Higher education (43.8%), Secondary (31.3%)	Secondary education (75%)

⁷¹ It was attended by members of several entities like *Jornaleras de Huelva en Lucha* (Female Labourers from Huelva Fighting), *Kellys Union Sevilla* (Hotel maids United Seville), *Asociación de Trabajadoras y Trabajadores del Hogar de Sevilla* (Association of Hotel maids of Seville), *Coordinadora Andaluza de Organizaciones de Mujeres Rurales (COAMUR)* [Andalusian Coordinator of Rural Women's Associations], Loyola University and the University of Seville.

Predominant Administrative status	Residence and work permit (61,5%)	Spanish nationality (50%), Irregular (37,5%)	Spanish nationality (75%) Regular (25%)
Employment status in 2019	Hourly pay (46,2%)	Live-in domestic employee (61,5%)	Hourly pay (75%)

The 16 domestic and care workers were between 25 to 63 years old, who arrived in Spain between 2006-2008. The majority was from Latin America (Bolivia, Brazil, Ecuador, Guatemala, Nicaragua, Paraguay and Peru), although one woman from Equatorial Guinea and two from Morocco also participated.

Agricultural female workers were between 25 to 50 years old and first arrived in Spain between 2006-2008. Most of them came from Morocco, albeit they were from Colombia and Senegal too.

Finally, four hotel maids, two from the Dominican Republic, one from Bolivia and another from Morocco, answered the questionnaire.

All participants were informed about the project and the conditions of their participation, signing an informed consent to authorize the use of their responses anonymously and confidential, only for research purposes. Each participant could choose the time and place where the questionnaire was to be completed (i.e., at the organisation or at home), without any incidents.

4.4. Instrument

An *ad hoc* questionnaire⁷² was designed in order to depict the situations of labour exploitation in the sectors of interest of the MICAELA Project. The 42 closed-ended questions were referring to the women's working conditions and the items to four dimensions: Formality, Precariousness, Social Protection and Voluntariness.

⁷² Its issuance was affected to a large extent due to the on-going pandemic of COVID-19. Hence, all potential participants, domestic and care workers, hotel maids and agricultural workers, were approached by e-mail except for those who completed the questionnaire in person at the participating organizations. As the information was collected, the items of the instrument were evaluated by the team and updates were made to facilitate the assessment of the collected data.

5. RESULTS AND DISCUSSION

The main results of the MICAELA project are presented below. Furthermore, we offer specific results for the three sectors (agricultural workers, domestic and care workers, and hotel maids), as well as some results regarding COVID-19 impact on them.

A comparison of the results obtained reveals some striking commonalities. In general, it is apparent that exploitation is not an alien to any of the examined sectors (Table 3), as Cáritas⁷³ had already pointed out.

Table 3 – Indicators of labour exploitation

	Agricultural workers (N=13)	Domestic and caregiver workers (N=16)	Hotel maids (N=4)
Not meeting their needs	76,9%	43,8%	75%
Non-compliance with minimum wage	38,5%	56,3%	0%
Inadequate overtime pay	92,3%	90%	25%
Fear of sudden job loss	100%	68,8%	50%
No contract	7,7%	31,3%	0%
Breaches of contract	46,2%	50%	25%
Working hours of more than 8 hours	53,9%	68,8%	0%
No rest during the day	30,8%	50%	100%
12 hours of rest or less between days	84,7%	81,4%	25%
36 hours of rest or less between weeks	84,7%	43,8%	25%
Working on public holidays as a normal day	61,5%	50%	75%
Working on holidays as a normal day	15,4%	18,7%	25%
No social security registration	30,8%	50%	0%

The remuneration received by a significant proportion of women workers is so low (in some cases, below the minimum wage) that it does not allow them to meet their needs. As Iglesias et al.⁷⁴ argued: “the vast majority of the female immigrant

⁷³ See Cáritas (2020), *cit. supra* note 8.

⁷⁴ See IGLESIAS, BOTELLA, and RÚA, “Estudio sobre la situación laboral de la mujer inmigrante en España”, Organización Internacional para las Migraciones e Instituto Universitario de Estudios sobre Migraciones,

population is in an absolute and relative situation of low wages and has thus become one of the central faces of the so-called precariat in the Spanish context”. This group forms part of the almost two and a half million workers in Spain (628,000 in Andalusia) whose income is insufficient to escape poverty,⁷⁵ which makes it seriously difficult for them to build their life and family projects.⁷⁶ What is more, women working in these sectors experience an economic situation that severely limits their ability to refuse or leave low-quality jobs.⁷⁷

The situations experienced by migrant women in their workplaces have in some cases materialised in the form of complaints filed with social organisations, especially among women agricultural workers. It is noticeable that in no case complaints were filed to the police or trade unions, and it has been hypothesised that this is due to the fact that migrant women’s main support network is to be found in the local associative fabric, of which many of them are users and in which they participate in a notorious proportion (Table 4).

Table 4 – Support received and participation in organisations

	Farmworkers (N=13)	Domestic workers (N=16)	Hotel maids (N=4)
Not reported	15,4%	60%	N/A
Users in migrant associations	46,2%	50%	0%
Users in associations and NGOs	53,8%	25%	0%
Participation in associations	46,2%	43,8%	25%
Participation in migrant organisations	30,8%	25%	0%
Participation in women’s spaces	30,8%	37,5%	0%

2015, p. 35, available at: <https://issuu.com/stoprumores/docs/estudio_sobre_la_situacion_laboral>.

⁷⁵ See Fundación FOESSA, “Vulneración de derechos: Trabajo decente”, FOESSA, 2020, available at: <<https://www.foessa.es/blog/un-nuevo-focus-sobre-trabajo-decente-alerta-de-que-casi-la-mitad-de-los-trabajadores-con-jornada-parcial-no-la-desean/>>.

⁷⁶ See IGLESIAS, BOTELLA, and RÚA, *cit. supra note* 74, p. 66.

⁷⁷ See GARRIDO, “Caracterización de las migraciones en Andalucía. Diagnóstico participativo desde Redes Interculturales 2018”. *Redes Interculturales*, 2018, p. 26, available at: <<https://www.redesinterculturales.org/wp-content/uploads/2019/06/Caracterizaci%C3%B3n-de-las-migraciones.pdf>>.

In particular, migrant associations, women's spaces and non-governmental organisations (and in the case of domestic workers, religious collectives) are the contexts in which women are most frequently involved. This last finding is encouraging, especially considering the many obstacles that limit public and community participation of migrant populations.⁷⁸

5.1. *Income level*

Regarding agricultural workers, it is striking that most of them could not cover their needs with their salary. This is not unusual, given that, in Spain, a migrant woman usually earns on average 47% less per year than a Spanish worker.⁷⁹ Almost the majority of the female agricultural workers consider that their employers failed to comply with the legal minimums in terms of salary during 2019.

The exploitation they are subjected is increased by the severity of their tasks. A significant proportion of them described their working conditions as hard or extremely hard. No one considered that their conditions were not hard. Furthermore, some of the women report that their employers withhold part of their wages deliberately, perhaps as a fee for accommodation and food expenses, when they offered shared spaces to seasonal female workers who worked far away from population centres.

With respect to domestic and care workers that participated in this study, they described their work activities as hard or extremely hard as well as inadequately paid. In the same vein, Ahonen et al.⁸⁰ conducted a study with 46 migrant women in different Spanish cities, found that due to its nature, this work was exhausting, in addition to being unfairly remunerated.

Last year, domestic workers were entitled to a gross monthly salary of 900€ (14 payments) and 1050€ (12 payments), 7.04€ hourly and 30€ daily⁸¹. According to the data, lots of employers did not respect these legal minimums—very similar to the data found by Iglesias et al.⁸² for all migrant women in Andalusia, and to the

⁷⁸ See GARRIDO, *cit. supra note 77*, p. 31.

⁷⁹ See IGLESIAS, BOTELLA, and RÚA, *cit. supra note 74*, p. 39.

⁸⁰ See AHONEN et al, "Invisible work, unseen hazards: The health of women immigrant household service workers in Spain", *American Journal of Industrial Medicine*, 2010, p. 405 ff., p. 416.

⁸¹ See Real Decreto 1462/2018, de 21 de diciembre, por el que se fija el salario mínimo interprofesional para 2019, Arts. 1-4 (Royal Decree-Law 1462/2018, 21 December, setting the minimum interprofessional wage for 2019), *Boletín Oficial del Estado (BOE)*, 312 (adopted 27 December 2018, entry into force 28 December 2018).

⁸² See IGLESIAS, BOTELLA, and RÚA, *cit. supra note 74*, p. 34.

53.8% in the domestic work sector by Agüero-Collins et al.⁸³ The FOESSA Foundation⁸⁴ reported that domestic workers earn 52% less than the average salary of Spanish women, similar to the data of the interviewed expressing that their salary did not provide for their needs.

With reference to the hotel maids, the majority stated that their salary did not allow them to satisfy their needs. Salaries in this sector are close to the current minimum wage, although in cases like being paid per room, it varies notably.⁸⁵ FOESSA Foundation⁸⁶ stated that the average contribution percentage in the hospitality industry is 40% lower than the average in the whole country. Only one woman reported receiving a salary according to the regulatory framework in force in 2019. Of the remaining three, one claimed having received a lower salary while the other two did not know if the law was followed. Cáritas⁸⁷ reported that 25.3% of hotel maids received less than what they were legally entitled to.

All four women were paid monthly. In two of the cases, it was unknown whether a part of the salary was withheld. Unlike the findings in the other sectors (or in studies such as Ferreira-Marante et al.)⁸⁸, the working conditions were not considered extremely hard. Although they all claimed to have no breaks during the day, none of them exceeded the limit of eight daily working hours in 2019.

5.2. Precariousness of employment and exploitation

The reported employment conditions on agricultural female workers, are characterized by a high degree of temporariness—mainly related to the seasonal nature of the work—depicting a very insecure working environment. Therefore, decent work is not ensured. Among the ones who had a contract, almost half of them experienced non-compliance on the part of the employer. In addition, a vast majority stated that their schedules changed unreasonably and reported that the same thing happened with their tasks. All this, in an environment in which the fear of losing their jobs was expressed by all of them.

⁸³ See AGÜERO-COLLINS, VILLALBA and FAVELA, *cit. supra* note 8, p. 12.

⁸⁴ See Fundación FOESSA, *cit. supra* note 75.

⁸⁵ See CAÑADA, “Externalización del trabajo en hoteles: impactos en los departamentos de pisos”, Alba Sud, November 2016, p. 90, available at: < <http://www.albasud.org/publ/docs/74.pdf>>.

⁸⁶ See Fundación FOESSA, *cit. supra* note 75.

⁸⁷ See Cáritas, *cit. supra* note 8, p. 26.

⁸⁸ See FERREIRA-MARANTE, RIVAS-QUARNETI and VIANA-MOLDES, “Aproximación inicial al impacto del trabajo en las ocupaciones y en la salud de las camareras de piso desde una perspectiva de la justicia ocupacional”, *Revista Electrónica de Terapia Ocupacional Galicia*, 2017, p. 444 ff., p. 456.

In addition, the participants experienced poor living conditions, since the majority of those who had accommodation provided by their employers, considered that it was neither intimate, nor clean, or safe, just like Barciela-Fernández⁸⁹ reported highlighting serious unsanitary conditions faced by seasonal workers, such as lacking bathrooms, showers, dining rooms or changing rooms.

Job insecurity on domestic and care workers is closely linked to seasonality and instability, thus, precariousness; most of the women were afraid of losing their jobs at any moment and they reported frequent changes in work and rest schedules. In a vast majority, they received their salary monthly. Notwithstanding, high informality of labour relations was observed; half of the interviewees who had an oral or written contract stated that their employers did not respect it.

Live-in domestic workers, in an overwhelming majority, considered that their rest area was clean and safe. Nonetheless, it is striking that not even the half of them said that they were guaranteed privacy. This is a common complaint reported in various parts of the world.⁹⁰

Precariousness has been identified as one of the principal problems for the hotel maids, due to the effect of seasonality⁹¹ and the practices of business flexibilisation and outsourcing.⁹² This aspect seems to be the least problematic among those assessed. However, all women described stable employment conditions, with formal contracts respected by their employers and performed tasks initially agreed upon. Nevertheless, half of them declared that they were afraid of losing their job at any moment.

⁸⁹ See BARCIELA-FERNANDEZ, “La situación de las personas temporeras agrícolas acompañadas por Cáritas”. Informe anual 2012, Cáritas, September 2013, p. 27, available at: <<http://www.nadiesinfuturo.org/03-temporeros-y-asentamientos/informe-la-situacion-social-de-las/>>.

⁹⁰ See CANEVARO, “Empleadas domésticas y empleadoras en la configuración del trabajo doméstico en la ciudad de Buenos Aires: entre la administración del tiempo, la organización del espacio y la gestión de las “maneras de hacer””, CAMPOS-Revista de Antropología Social, 2009, p. 63 ff., p. 86; LOVEBAND, “Positioning the product: Indonesian migrant women workers in Taiwan”, Journal of Contemporary Asia, 2004, p. 336 ff..

⁹¹ See FERREIRA-MARANTE, RIVAS-QUARNETI and VIANA-MOLDES, *cit. supra note* 88.

⁹² See CAÑADA, *cit. supra note* 85, p. 16.

5.3. *Voluntariness of the employment relationship*⁹³

A great majority of the interviewed agricultural workers accepted employment in poor conditions yielding to the pressure that they must provide to their families. It is possible that, for the same reason, more than half of them stated that they could not give up their jobs. Additionally, they claimed that it was impossible to work in two places at the same time.

On the other hand, a high percentage of the women reported that their employers tried to control their lives, in aspects such as communication with people outside the workplace, or their movement outside working hours. These data suggested that many women may be undergoing non-free labour conditions. According to Giménez-Salinas,⁹⁴ almost half of the victims of trafficking for labour exploitation identified in Spain are agricultural workers.

Another risk frequently faced by female migrant agricultural workers is being discriminated against. Despite the fact that equal treatment and equal gender opportunities, and working conditions is assured in provisional agreements, the participants indicated that they had suffered gender discrimination and class discrimination. A large proportion stated that they had reported the abuses they had suffered to entities or organisations.

However, a small percentage did not report the situations of violation they had experienced neither to the police nor to trade unions. Nevertheless, the women had resorted to various kinds of social organisations. This is probably because most of them have been members or beneficiaries of migrant associations or other associations and NGOs. A few said they had received support from State agencies in matters related to their labour situation, but nobody mentioned trade unions as a source of support in this regard, which coincides with some studies that mention the

⁹³ Lack of opportunities to give up or to change employment due to financial constraints, controlling behaviour by employers and discrimination on the workplace, are all imposed as liabilities of Voluntariness of the Employment relationship considering that healthy and safety working conditions (i.e., occupational health, physical health, well-being, and environmental health) it is the exact opposite of a hostile work environment which discriminates, intimidates and exploits its employees, leaving them incapable of having the faculty of free will. See CFREU; See BRAY, BUDD and MACNEIL, "The Many Meanings of Co-Operation in the Employment Relationship and Their Implications", *BJIR An International Journal of Employment Relations*, 2019, p. 114 ff., p. 141.

⁹⁴ See GIMÉNEZ-SALINAS, "Inmigración ilegal y tráfico de seres humanos", in Ministerio de Defensa & Instituto Español de Estudios Estratégicos (Eds.), *El Control de los Flujos Migratorios hacia España: Situación actual y propuestas de actuación*, Centro Superior de Estudios de la Defensa Nacional, 2006, p. 55 ff.

scarce attention that trade unions pay to the situation of migrant collectives.⁹⁵ Furthermore, a considerable proportion of participants said they had been actively involved in different types of organisations (i.e., associations, migrant organisations and women's groups).

Violations of freedom to choose an occupation and right to engage in work are likely to be found in the domestic sector. Indeed, half of the women could not reject the work they performed in 2019, more than half could not work in a different place, while some others could not quit.

More than half of the interviewed worked as live-in employees or had an irregular administrative situation. In the case of live-in employees, serious freedom limitations were reported; some of the women were controlled in their personal lives by their employers, half of them had restricted communication with people outside their workplace and others could not leave it during non-working hours.

Furthermore, more than the half of the participants experienced abuse or work, gender or class discrimination but did not report it. Only a small percentage tried to make the abuses they experienced public reporting them to NGOs. Farmworkers and domestic and care workers are members or beneficiaries of organisations; they participate in associations, women's groups, migrants' organisations, and in religious organizations. Migrant organisations have provided their support in half of the women whereas associations and NGOs helped a quarter of them. Municipal services have been a source of support in only a few cases. Once again, none of the women mentioned trade unions as a source of support in labour issues, nor as a participation area.

When describing the working conditions in terms of freedom to choose an occupation and right to engage in work, half of the hotel maids claimed that they had the option to quit their job and only one stated that she could not deny any job offers. Furthermore, none of them reported having suffered control of their personal lives neither any kind of discrimination although gender discrimination is very frequent in this sector.⁹⁶ A vast majority never requested support of entities or participated in associations.

This is startling considering that Spanish hotel maids (*Las Kellys*) are well known for fighting exploitation over the past years and they have succeeded in obtaining recognition of work-related health problems (e.g., carpal tunnel syndrome) and in better collective agreements to wages. Nowadays, *Las Kellys* continue fighting for fair pay and safer working conditions post pandemic and the

⁹⁵ See GARRIDO, *cit. supra note 77*, p. 26.

⁹⁶ See SIGÜENZA, "La mujer en el subsector del alojamiento. El caso de la Costa Blanca", *Investigaciones Turísticas*, 2011, p. 102 ff.

acknowledgement of other health impacts of their jobs such as anxiety, and back and spine injuries.

5.4. Compliance with the prevailing legal framework

Contractual breaches and poor living conditions that the female farmworkers have experienced suggested that in some cases compliance with the prevailing legal framework is, at the very least, lax. In this regard, a concerning aspect is the working day schedule. Current labour agreements limit it to between six and seven hours of effective work per day (about 39 hours of work per week), with the possibility of extending them to 12 hours in the case of presence work, though with limits per week.⁹⁷ This kind of a working day, given the considerable physical effort required, is already exhausting itself.

Moreover, this working day schedule is frequently exceeded; more than half claim to have worked eight or more hours a day. This seems to be close to what was found by Barciela-Fernández⁹⁸ reporting an average of 12 hours of work among seasonal workers in Spain. Additionally, excessive working hours were equal to a complete lack of rest. Some of them stated that no rest was taken during the day and some others rested for less than two hours. What is more, the majority worked overtime a few times a week during 2019.

In Spain, there are 14 public holidays and 30 calendar days of vacation per year⁹⁹ (31 in Andalusia according to labour agreements)¹⁰⁰, although this does not apply in the agricultural sector. In 2019, more than half of the women worked on public holidays and were paid as a normal working day. Additionally, a small

⁹⁷ See Boletín Oficial de la provincia de Sevilla, Convenio Colectivo del Sector de Faenas Agrícolas, Forestales y Ganaderas de la provincia de Sevilla (Official Gazette of Seville, Collective Agreement for the Agricultural, Forestry and Livestock Farming Sector in the province of Seville), available at: <<http://www.juntadeandalucia.es/empleo/mapaNegociacionColectiva/descargarDocumento?uuid=d093aafe-ec99-11e8-94d4-b70735927673>>.

⁹⁸ See BARCIELA-FERNÁNDEZ, *cit. supra* note 89, p. 27.

⁹⁹ See Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 38 (Royal Decree- Law 2/2015, of 23 October, approving the revised text of the Workers' Statute Law), Boletín Oficial del Estado (BOE), 225 (adopted 24 October 2015, entry into force 13 November 2015).

¹⁰⁰ See Boletín Oficial de la Junta de Andalucía (BOJA) [Official Gazette of The Regional Government of Andalusia], 139, de 28 de noviembre de 2002, VI Convenio colectivo del personal laboral al servicio de la Junta de Andalucía (6th Collective Bargaining Agreement of the Andalusian Regional Government's employment personnel). Resolución de 22 de Noviembre 2002, de la Dirección General de Trabajo y Seguridad Social por la que se ordena la inscripción, depósito y publicación del VI Convenio Colectivo del Personal Laboral de la Administración de la Junta de Andalucía, Art. 35, available at: <https://www.juntadeandalucia.es/export/drupaljda/cehap_cv_res-22-2002.pdf>.

percentage of them enjoyed public holidays, but without financial retribution whereas a bigger one did not receive any payment during their vacations.

A significant proportion of the participants have experienced violations in the payment of their salaries, as well as in the rest hours, including bank holidays and vacations. It is not uncommon for them to work several extra hours without being properly compensated. Other violations must be added, such as those derived from irregularities in their affiliation to Social Security. This situation can be explained, in part, by the fact that migrants in an irregular administration status, who work as farmworkers are not entitled to this right because they have no official documentation.

Participants of domestic and care female workers indicated extensive working hours: exactly half of them worked more than 12 hours daily and a smaller percentage worked between 8 and 12 hours. These results exceeded the 30-40 hours per week, the workweek reference established by current regulations¹⁰¹. Even though, domestic workers are entitled to two hours of intervals daily, 12 hours between one workday and another, and 36 hours between working weeks,¹⁰² half of the women had no daily breaks, whereas the rest responded that their intervals were no longer than 10 hours between workdays and did not reach the threshold on working weeks intervals. In the study developed by Agüero-Collins et al.,¹⁰³ 67% of the participants had less than 10 hours of rest between one workday and the next one.

Work overload is also reported in unpaid extra working hours and working schedules during holidays. Many women worked overtime without being paid and the vast majority of them were paid less than the minimum wage required by law. Regarding paid vacations, half of the women worked on public holidays receiving a normal working day payment, a quarter of them had those days off and only a small percentage enjoyed public holidays and their respective remuneration.

In Spain, domestic work is carried out under unprotected conditions. This is caused, mainly by three reasons: (1) Female employees are not covered by the Act on Prevention of Occupational Risks;¹⁰⁴ (2) Labour inspection controls do not take place on the premises; and (3) the workers are not entitled to unemployment benefits. As a result of the Royal Decree-Law 29/2012,¹⁰⁵ the workers in this sector are incorporated into the General Social Security System, but they do not have the same benefits as other workers.

¹⁰¹ See *Cáritas*, *cit. supra* note 8, p. 22.

¹⁰² See Real Decree 1620/2011, Art. 9.

¹⁰³ See AGÜERO-COLLINS, VILLALBA and FAVELA, *cit. supra* note 8, p.19.

¹⁰⁴ See Law 31/1995 Occupational Health and Safety, ACT 31 of 8th November 1995 on PREVENTION OF OCCUPATIONAL RISKS, published 10th November 1995 coming into force February 1996 (Published in the Official State Gazette (BOE) on Friday 10th November 1995. BOE Number 269).

¹⁰⁵ See Real Decreto-ley 29/2012, de 28 de diciembre, de mejora de gestión y protección social en el

Employers must register the workers in the Special System for Household Employees and pay the corresponding contributions—services for less than 60 monthly hours are considered a self-employed work. However, half of the interviewed reported that their employers did not register them in 2019. This may affect both their retirement pension and their health coverage (a worrying situation given that almost half of them claimed that they had to perform hazardous activities).

All of the interviewed hotel maids were registered in the Social Security System. Also, most of them had an 8-hour workday, 12 hours of intervals between one workday and the following one, and more than 36 hours between one week and the next. However, it is noteworthy that all of them claimed to not be able to rest at all during their workday. Regarding paid holidays and overtime working hours, only one performed extra working hours and had holidays their compensated while another worked overtime every day without being paid¹⁰⁶ whereas the others were paid as a normal working day.

6. THE IMPACT OF COVID-19 ON FEMALE MIGRANT WORKERS

The pandemic has highlighted health disparities among some vulnerable groups, the result of long-perpetuated structural inequalities.¹⁰⁷ The political, economic, and social repercussions caused by COVID-19 have been shown to disproportionately affect women and migrants,¹⁰⁸ who are often more exposed to the virus but less protected.¹⁰⁹ However, the specific needs and increased vulnerability

Sistema Especial para Empleados de Hogar y otras medidas de carácter económico y social, Art. I (Royal Decree-Law 29/2012, of 28 December to enhance the management and social protection of the Special System for Household Employees and other economic and social measures), Boletín Oficial del Estado (BOE), 314, (adopted 29 December 2012, entered into force 1 January 2013).

¹⁰⁶ See CAÑADA, *cit. supra note* 85, p. 105.

¹⁰⁷ See AL-ALI, “Covid-19 and feminism in the Global South: Challenges, initiatives and dilemmas”, *European Journal of Women’s Studies*, 2020, p. 333 ff., p. 334; See GREENWAY, HARGEAVES and BARKATI, “COVID-19: Exposing and addressing health disparities among ethnic minorities and migrants”, *Journal of travel medicine*, 2020, p.1 ff., p. 3. p. 2.

¹⁰⁸ See BURKI, “The indirect impact of COVID-19 on women”, *The Lancet Infectious Diseases*, 2020, p. 904 ff., p. 905; CASTELLANOS-TORRES, MATEOS and CHILET-ROSELL, “COVID-19 from a gender perspective”, *Gaceta sanitaria*, 2020, p. 419 ff., p. 421; See RYAN and EL AYADI, “A call for a gender-responsive, intersectional approach to address COVID-19”, *Global Public Health*, 2020, p. 1404 ff., p. 107; see Spanish Ministry of Health, “Equidad en Salud y COVID- 19. Análisis y propuestas para abordar la vulnerabilidad epidemiológica vinculada a las desigualdades sociales”, 29 October 2020, p. 5, available at: <https://www.msbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov/documentos/COVID19_Equidad_en_salud_y_COVID-19.pdf>.

¹⁰⁹ See ARANGO, GARCÉS and MAHÍA, *Inmigración en tiempos de Covid-19». Anuario CIDOB de la Inmigración 2020*, Barcelona, 2021; GREENWAY, HARGEAVES and BARKATI, *cit. supra note* 107, p. 1; See ORCUTT, PATEL and BURNS, “Global call to action for inclusion of migrants and refugees in

of those who sustain various forms of inequality (e.g., migrant women) are rarely considered. As a result, they remain invisible, especially in government institutional responses, which increases their risk factors.¹¹⁰

The MICAELA Project revealed also how COVID-19 has affected especially the essential jobs that are feminised and have a great presence of migrant women,¹¹¹ such as those included in this project.

For instance, due to the pandemic, agricultural female migrant workers were trapped in the European southern borders in Andalusia. Only 7.200 of these seasonal workers could return to their homeland after borders with Morocco were closed on March 13. They were left exposed at high-risk unhealthy conditions without proper accommodation, ventilation, toilets or running water. Several migrant associations called it a humanitarian crisis and a violation of human rights and tried to raise public awareness mostly through social media posts (e.g., *Jornaleras de Huelva en Lucha*).

Regarding domestic and care workers, the Domestic Service Association¹¹² denounced many rights' violations during the pandemic, which were also reported in our study. First, female workers lacked the protective equipment and safety guarantees necessary to care for and look after people infected with COVID-19. Second, several domestic workers could not accredit their commuting to the place of work in the police controls set up during the state of alarm or the ones who did have contracts. Third, the absence of any measures in this sector, mostly for migrant women, who were risking their own health and that of their families, entering unsafe environments and taking care of people vulnerable to contracting COVID-19. Due to the high vulnerability suffered by the women in this sector, the Spanish government announced a package of economic measures for them.¹¹³

the COVID-19 response", *The Lancet*, 2020, p. 1482 ff., p. 1482; See World Health Organization (WHO), "ApartTogether survey: preliminary overview of refugees and migrants self-reported impact of COVID-19", p. vi, available at <<https://apps.who.int/iris/handle/10665/337931>>.

¹¹⁰ See RYAN and EL AYADI, *cit. supra note* 108, p. 1409.

¹¹¹ See SPANISH MINISTRY OF HEALTH, *cit. supra note* 108, p 22.

¹¹² See Domestic Service Association (SEDOAC), "Las empleadas de hogar y cuidados: víctimas colaterales del coronavirus", AmecoPress, 12 March 2020, available at: <<https://amecopress.net/Las-empleadas-de-hogar-y-cuidados-victimas-colaterales-del-coronavirus>>.

¹¹³ See Real Decreto -ley 6/2020, de 10 de marzo, por el que se adoptan determinadas medidas urgentes en el ámbito económico y para la protección de la salud pública (Royal Decree-Law 6/2020 of 10 March adopting certain urgent measures in the economic field and for the protection of the public health), Boletín Oficial del Estado (BOE), 62, (adopted 10 March 2020, entered into force 11 March 2020); Real Decreto-ley 7/2020, de 12 de marzo, por el que se adoptan medidas urgentes para responder al impacto económico del COVID-19 (Royal Decree-Law 7/2020 of 12 March 2020 adopting urgent measures to respond to the economic impact of COVID-19), Boletín Oficial del Estado (BOE), 65; Royal Decree 463/2020 of 14 March declaring a state of emergency to address the COVID-19 health crisis, amended

Nevertheless, after six months, only 67% of the application for the Extraordinary Emergency Wage Subsidy¹¹⁴ have been approved by the Spanish State Public Employment Service (SEPE). Instead, many of them were dismissed and have lost their income. It was the same circumstances for hotel maids, who denounce the increment of exploitation and insecurity derived from the COVID-19.¹¹⁵

by Royal Decree 465/2020 of 17 March and Royal Decree 476/2020 of 27 March, Boletín Oficial del Estado (BOE), 67; See Royal Decree-Law 8/2020 of 17 March on urgent extraordinary measures to address the social and economic impact of COVID-19 (“RDL 8/2020), Boletín Oficial del Estado, 73; Real Decreto 465/2020, de 17 de marzo, por el que se modifica el Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19 (Royal Decree 465/2020 of 17 March amending Royal Decree 463/2020 of 14 March declaring a state of alarm for the management of the health crisis situation caused by COVID-19), Boletín Oficial del Estado (BOE), 73; Royal Decree-Law 9/2020 of 27 March adopting supplementary labour-related measures to mitigate the effects of the COVID-19 health crisis, Boletín Oficial del Estado (BOE), 86; Royal Decree-Law 10/2020 of 29 March on recoverable paid leave for employees who do not provide essential services, in order to reduce population mobility in the context of the fight against COVID-19, Boletín Oficial del Estado (BOE), 87.

¹¹⁴ In the context of the public health emergency and international pandemic caused by COVID-19, the Spanish government adopted several urgent measures in the areas of employment and economics to mitigate the economic consequences that arose and may arise in connection with COVID-19. These measures addressed health and the economy at large and aimed to relieve the financial difficulties faced by especially vulnerable citizens. Such a measure was an exceptional unemployment benefit, the Extraordinary Emergency Wage Subsidy for domestic and care workers, who have stopped working or have had their work hours reduced due to the Covid-19 health crisis, suspended or been fired since the country went into lockdown. Anyone who is or has been registered in the Special System of Household Employees before March 14, 2020, the date of entry into force of the state of alarm, may be a beneficiary of the subsidy. It was the first time that domestic and care workers could apply for any unemployment benefits. Nonetheless, until 25th of January of 2020, thousands of domestic workers were still pending approval. See DAVIES, “Spain starts subsidy for domestic workers hit by coronavirus”, REUTERS, 31 March 2020, available at: <<https://www.reuters.com/article/us-health-coronavirus-domestic-workers-idUSKBN2112Q9>>; see Ministry of Social Rights and 2030 Agenda, “Guide to Facilitating Measures”, available at: <<https://www.mscbs.gob.es/ssi/covid19/trabajadores/home.htm>>; See BAREA, “Fiasco con el subsidio extraordinario para las empleadas de hogar por el Covid”, Andalucía Información, 25 January 2020, para. 1, available at:< <https://andaluciainformacion.es/andalucia/946731/fiasco-con-el-subsidio-extraordinario-para-las-empleadas-de-hogar-por-el-covid/>>; OLÍAS, “Miles de empleadas del hogar siguen sin cobrar el subsidio de paro: se ha reconocido a 17.200 y otras 14.800 aún están a la espera”, EIDiario.es, 9 September 2020, para.1, para. 5, available at: < https://www.eldiario.es/economia/miles-empleadas-hogar-siguen-cobrar-subsidio-paro-reconocido-17-200-14-800-espera_1_6209854.html>.

¹¹⁵ See BADCOCK, Spain's hotel chambermaids 'Las Kellys' fight for fair pay, BBC, 18 October 2017, available at: < <https://www.bbc.com/news/world-europe-41650252> >; ROS REBOLLO, “We simply said ‘enough’: the story of Spain’s ‘Las Kellys’ hotel cleaners”, openDemocracy, 18 September 2018, available at: <<https://www.opendemocracy.net/en/5050/las-kellys-hotel-cleaners-spain-fight-back/>>; MARTÍNEZ, “Las ‘Kellys’ lanzan un SOS y reclaman al Gobierno que cumpla con lo prometido”, SUR, 22 Abril 2021, available at:< <https://www.diariosur.es/turismo/kellys-lanzan-sos-malaga-20210421205257-nt.html>>.

Additionally, migrant women workers reported an increment of racism and xenophobia in the host societies, especially against seasonal agricultural female workers.¹¹⁶ Numerous civil society organisations expressed their concern upon multiple expressions of discrimination during the pandemic, such as racist attacks, hate speech holding migrant workers accountable for spreading the virus, police stop for racial profiling and harassment at their workplaces.¹¹⁷ This is in line with other studies, that pointed out that migrants are often the scapegoat for the problems (including COVID-19), fuelled by the growing racist discourses of the far right.¹¹⁸

In consequence, the pandemic has placed them at high risk—more than even before. These women, in turn, have fewer resources and social protections, so their capacities to cope with emergency situations are weak.¹¹⁹ Therefore, the participants called for urgent help to tackle the pandemic in the short, medium, and long term.

7. PARTICIPATIVE PROPOSALS FOR CHANGE

It is of fundamental importance to advance towards a real equalisation of the labour rights of migrant workers with those of other workers in Spain, as well as the guarantee of the exercise of the rights already acquired. We present below the top-10 recommendations from the MICAELA project meetings, particularly from the open dialogue during the closing day. While some may be useful for individual organisations, many are aimed at strengthening the platform *Together for Change!*

Firstly, the promotion of the active involvement of migrant women, migrant organisations and NGOs in the revision and update of collective agreements in the three sectors of the MICAELA project, is recommended.

Secondly, raising awareness of labour rights among the migrant population is essential to fight against the violation of these rights. Such outreach work requires strategic use of social media and other publicity, and communication means. However, it is

¹¹⁶ See MAMADOU, OULED and MAMADOU, The COVID-19 health crisis: Racism and Xenophobia during the state of alarm in Spain, Rights International Spain and the Implementation Team of the International Decade for People of African Descent in Spain, 2020, available at: <<https://rightsinternationalspain.org/uploads/publicacion/1fcee36ba56ffc10aa328d7a342f7f8affdfab3d.pdf>>; ROS REBOLLO, “If you report abuse, you lose your job”: Spain’s labourers fight back”, openDemocracy, 6 July 2021, available at: <<https://www.opendemocracy.net/en/5050/las-kellys-hotel-cleaners-spain-fight-back/>>.

¹¹⁷ See CEAR, “Racismo y xenofobia en tiempos de Covid”, CEAR, December 2020, available at: <<https://www.cear.es/cear-pv-presenta-el-informe-racismo-y-xenofobia-en-tiempos-de-covid/>>.

¹¹⁸ See ARANGO, GARCÉS and MAHÍA, *cit. supra note* 109; ZAPTSI, “The extreme far-right in Greece: the case of Golden Dawn”, in GÓMEZ Y MÉNDEZ, TURÓN-PADIAL, And CARTES-BARROSO (eds.), *Más sobre Periodismo y Derechos Humanos Emergentes*, Seville, 2019, p. 337 ff., p. 353.

¹¹⁹ See BURKI, *cit. supra note* 108, p. 904; SPANISH MINISTRY OF HEALTH, *cit. supra note* 108, p. 15.

considered necessary to prioritise direct contact and prevent people who do not know the language or who are not literate from being excluded from information about their rights.

Thirdly, it is advocated to encourage the consensual elaboration of wage scales adjusted to the conditions under which domestic, agricultural and hospitality sectors are carried out. Such wage scales should recognise the harshness of the activities performed in these sectors and, in some cases, their hazardous nature.

Fourthly, it is suggested to insist on the need to strengthen labour inspection as an instrument ensuring proper compliance with the conditions established by law. Of particular importance is the regulation of the frequency and manner in which wages are paid, establishing transparency on the percentage that can be devoted to payments in kind. Greater control is also needed in relation to the payment of overtime working hours, as well as enjoying public holidays and paid leave.

Fifthly, the strong involvement in trade unions addressing the labour issues experienced by migrant women and the encouragement of the establishment of alliances between various actors in the public and private sectors and non-governmental organisations, is strongly advised.

Sixthly, fostering the collectives to have adequate legal advice so as to strengthen them in two ways, it is advisable. On the one hand, by offering technical support to the decisions and actions that are agreed upon to fight against labour exploitation. On the other hand, by providing legal advice to individual cases that require a legal approach. It is also important to offer psychological support to migrant women workers.

Seventhly, it is strongly advised to increase research about migrant women workers, with special interest on their health and social integration in host societies. Particular attention should be focused on particularly vulnerable groups. In this vein, it is recommended to create partnerships with universities and research centres.

Eighthly, broadening the social base of the *Together, for the Change!* platform and looking for strategies to integrate a greater number of allied organisations and groups, is promoted. Some participants consider that, among them, the feminist movement must necessarily be taken into account. In addition, it is necessary to consider the active involvement of citizens in general, opening possible lines of volunteering through which conscientious people could contribute to the fight against labour exploitation and support organisations.

Ninthly, establishing alliances with political authorities who can sympathise with the cause and who can advocate for migrant women's rights in decision-making centres, it is advisable. It also involves constant political lobbying, trying to place the issue on the agenda of governments at different levels, including the European one.

And tenthly, this paper strongly advises to find and achieve material and financial sources in order to keep these kinds of platforms alive and to develop actions for change. It is therefore a priority to be able to formulate projects that can be submitted to competitive calls for proposals.

8. CONCLUSION

We should be very cautious upon drawing definitive conclusions due to the small number of women who responded to the questionnaire, especially the ones from the hospitality sector. However, a comparison of the obtained results revealed some striking commonalities. These may be the subject of further investigations in future projects and academic papers.

In general, it is evident that exploitation is not uncommon in any of the examined sectors. The remuneration received by a significant proportion of female workers is so low (in some cases, below the minimum wage) that it does not allow them to cover their needs. In this vein, Iglesias *et al.* stated:

“the vast majority of the female immigrant population is in an absolute and relative situation of low wages, and has thus become one of the central faces of the so-called precarious workers in the Spanish market, i.e., that social group that must build their life and family projects under unstable and vulnerable economic, wage and working conditions”.¹²⁰

The existence of abusive practices related to overtime pay and, particularly in the agricultural sector, to the arbitrary withholding of part of women workers' wages seems particularly blatant. The precariousness experienced in the labour market niches examined is also evident, particularly in the segments of the labour market examined, where employers often arbitrarily modify previous arrangements (including those established by contracts), and where the fear of losing one's job at any moment is extremely widespread among women workers.

There are a number of conditions laid down by regulations or labour agreements that did often not comply with the analysed sectors. More concretely, long working hours occur, with little or no rest breaks. The data suggested that many women workers have little rest during the day, and limited night and weekend rest, too—especially the agricultural ones. It is astonishing that a significant group of

¹²⁰ See IGLESIAS, BOTELLA and RÚA, *cit. supra note 8*, p. 35.

women is working on public holidays (without adequate pay), but more importantly, that they work during the holidays. The lack of social security affiliation seems to be of particular concern in the domestic and care work sector. Moreover, it is striking that, although many women have an employment contract, this does not guarantee that they can expect decent working conditions.

It is likely that due to the high intensity of their work activities in the three examined sectors, female migrant workers may experience an economic situation that severely limits their ability to refuse or abandon low-quality occupations or some of them have more than one job. What is more, a significant proportion of employers seem to take advantage of this vulnerability, controlling personal aspects of workers' lives and, above all, limiting their mobility and communication with others. This may be indicative of labour relations analogous to forced labour. The latter situation should not be ruled out, especially considering that many women work as interns or work and live in remote rural contexts where labour inspections are unusual (and in some cases impossible).

The fight against labour exploitation of migrant women is not only about better payments. It is necessary to reduce the high level of precariousness that women experience by strengthening mechanisms to protect migrant employment, encouraging the establishment of stable and secure labour relations, accompanied by institutions that ensure compliance with agreements and to which the parties can turn in the event of abuse. Due to the high level of economic precariousness experienced by many migrant women, and their tendency to under-report the irregularities they experience, close follow-up by the authorities and civil society organisations is needed in this regard.

©Cnr Edizioni, 2021
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Graphic project : Angela Petrillo

ISBN 978-88-8080-348-5