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LABOUR MIGRATION IN THE EUROPEAN UNION: CURRENT CHALLENGES AND WAYS FORWARD

Edited by

Giulia Ciliberto
Fulvio Maria Palombino

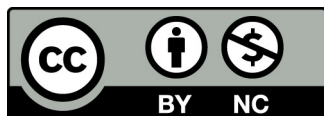


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Edited by Giulia Ciliberto

Fulvio M. Palombino

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Table of Contents

List of contributors.....	i
Preface	v
GIULIA CILIBERTO, FULVIO M. PALOMBINO	

PART I. Challenges and the ways forward at the EU level

1. The development of the EU policy of social rights	3
FLAVIA ROLANDO	
2. Demographic challenge and deterrence: the EU migration policy paradigm	19
MARGUERITE ARNOUX BELLAVITIS	
3. Trafficking for the purpose of labour exploitation: testing the new EU strategy in the context of the poly-crisis	45
VITTORIO CAMA	
4. Free movement of persons providing services in the EU and ASEAN: a comparative view.....	73
BUI THI NGOC LAN, HANG THUY TRAN	

PART II. Challenges and the way forward at the international level

5. International and regional human rights law in crisis?	107
CHRISTINA BINDER	
6. The blurred line between forced labour and trafficking in human beings for labour purposes: insights from a multi-layered international and European legal framework	137
FRANCESCA TAMMONE	

7. Forced labour and irregular migrant workers: what protections under international labour law?	161
MATTEO BORZAGA, MICHELE MAZZETTI	

PART III. Challenges and the way forward at the national and local level

8. Migrants in the gig economy: an exploration of non-standard work and grey areas of social protection schemes	189
CARLO CALDARINI, GRAZIA MOFFA	

9. “Here it’s good but it’s bad, there it’s bad but it’s good”: experiences of precarious work and life among Brazilian migrants in rural Ireland	213
PILAR LUZ RODRIGUES, HAZEL O’BRIEN, TOM BOLAND	

10. The role of service design in the public sector	237
LUCIA ORSINI	

11. Migrations, perceptions and segregations in the agricultural regions of Southern Italy	261
NADIA MATARAZZO	

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PREFACE

Topics such as security and EU borders, or the management of asylum seekers and refugees flow, have often overshadowed the matter of labour migration *to* and *within* the European Union. The importance of migrant workers' actual enjoyment of socio-economic rights on the Union territory, alongside their everyday reality, has come under the spotlight during the COVID-19 pandemic: this global health crisis, on the one hand, has exacerbated pre-existing sources of vulnerability and structural inequalities and, on the other, has highlighted the crucial contribution of migrant workers to the economies and societies of EU countries.¹

The current “poly-crisis” has further aggravated the previous situation of marginalization, labour exploitation, and obstacles in accessing social security services. scholars use the term “poly-crisis” to identify “simultaneous occurrence of multiple, overlapping crises, which interact so that the whole of their impact is greater than the sum of their parts”.² The ongoing war in Ukraine is fueling human displacement and a so-called “cost-of-living crisis”, which, according to a recent report of the International Labour Organization, mostly affects the poorest workers.³ This category certainly includes low-skilled migrants and those employed in informal sectors of the economy. Moreover, the Russian invasion of Ukraine has hard-hitting consequences on those EU States which had not yet fully recovered from the global financial crisis and the COVID-19 pandemic and that, thus, struggles in adopting timely social protection measures to the benefit of the most vulnerable sections of the population, including documented and undocumented labour migrants.

Against this backdrop, the collected volume gathered contributions authored by scholars and practitioners with an interest in migration studies from a variety of backgrounds, such as international law, EU law, sociology and service design. Each

¹ On the impact of COVID-19 on migrant workers, see the contributions collected in F. STAIANO, G. CILIBERTO (eds), *Labour Migration in the Time of Covid-19: Inequalities and Perspectives for Change*, 2021, CNR Edizioni.

² A. NOLAN, *Human rights and the cost-of living crisis*, in *Netherlands Quarterly of Human Rights*, 2023, p. 1 ff., p. 3.

³ *Global Wage Report 2022–23: The impact of inflation and COVID-19 on wages and purchasing power*, Geneva: International Labour Office, 2022, p. 111 ff; *The Future of Jobs Report 2023*, Geneva: World Economic Forum, 2022, p. 14.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. v-vii.

piece examines the gaps affecting the protection of labour migrants, both from a normative and practical perspective.

The collected volume is divided into three parts. Part I adopts mostly an EU law perspective. The chapter authored by Flavia Rolando provides an overview of the development of the EU policy on social rights, with particular regard to the measures implementing the EU Pillar on Social Rights. Marguerite Arnoux Bellavitis, for her part, highlights the contradiction between the demographic challenge experienced in several EU countries, on the one hand, and the deterrence-based approach of the EU migration policy towards non-EU citizens, on the other. The contribution by Vittorio Cama analyses the international and EU framework on preventing and fighting trafficking for the purpose of labour exploitation, with a focus on the recently adopted EU Strategy on Combatting Trafficking in Human Beings 2021- 2025 and the Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine. In the last contribution of the first part, Bui Thi Ngoc Lan and Hang Thuy Tran compare the framework governing the free movement of persons providing services in the EU and in ASEAN by pointing out similarities and differences, and what one system might learn from the other.

Part II gathers chapters dealing with labour migration issues from the standpoint of international law. In her piece, Christina Binder explores the crisis affecting the human rights regime: following the analysis of the various symptoms and the diagnosis of the pathologies, Christina Binder proposes different therapies to treat the identified diseases. Subsequently, the two following chapters address the topics of forced labour, trafficking, and the vulnerable position of irregular migrant workers. For her part, Francesca Tammone underlines the blurred line between forced labour and trafficking for the purpose of labour exploitation through the analysis of the normative framework and the relevant case-law. Matteo Borzaga and Michele Mazzetti focus on whether (ir)regular migrant workers victims of forced labour may enjoy a reinforced protection under international labour law, and specifically through the application of the core labour standards developed by the International Labour Organization.

Part III is devoted to the analysis of the national and local challenges faced by migrant workers and their family. The first three chapters adopt a sociological perspective. The contribution authored by Carlo Caldarini and Grazia Moffa examines non-standard work of migrants and the grey areas of national social protection schemes in the gig economy era. Pilar Luz Rodrigues, Hazel O'Brien and Tom Boland describe the experience of precarious work and life among Brazilian migrants employed in different sectors of the labour market in rural Ireland. Last but not least, Lucia Orsini

highlights the obstacles faced by migrant workers and their family in accessing social security services and other social benefits provided by National Social Security Institute of Italy. Nadia Matarazzo focuses on the perceptions and segregations of migrant workers in the agricultural regions of Southern Italy.

The editors would like to thank the authors for the 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 editors are also grateful to Daniele Amoroso, Paola Giacalone, Donato Greco, Giuliana Lampo, Loris Marotti, Gustavo Minervini, Domenico Pauciulo, Pierfrancesco Rossi, Fulvia Staiano and Alessandro Stiano for their kind assistance in seeing this edited volume to completion.

Last but not least, this volume marks the end of the EULab Summer School on Labour Migration in the European Union, a Jean Monnet Module which has been funded with the support of the Erasmus+ Programme of the European Union.

Giulia Ciliberto and Fulvio M. Palombino

Part I

Challenges and the ways forward at the EU level

1. THE DEVELOPMENT OF THE EU POLICY OF SOCIAL RIGHTS

Flavia Rolando

SUMMARY: 1. Introduction; – 2. The EU Competence in Social Rights Policy; – 3. The Legal Background of Social Rights in the EU; – 4. The European Pillar of Social Rights; – 5. The Perspectives of EU Action in the Realization of Social Rights and Concluding Remarks

1. INTRODUCTION

The evolution and the integration process of the European Union (“EU”) has led to the development of the European Union’s social dimension. According to Art. 3, para. 3 of the Treaty on the European Union (“TEU”), after the modifications made by the Lisbon Treaty, the goal of establishing an internal market has been enriched with a stronger link to the social aspects of the economic growth. Nowadays, the internal market “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”. The concept of social market economy introduced in the Treaty, therefore, underlines the effort in balancing the economic core of the European Union with the social values enhancing the solidarity and the equality.¹ In accordance with the principles that

¹ TRIGGIANI, “La complessa vicenda dei diritti sociali fondamentali nell’Unione europea”, Studi sull’Integrazione europea, 2014, p. 9 ff., p. 23; DE PASQUALE, “L’economia sociale di mercato nell’Unione europea”, Studi sull’integrazione europea, 2014, p. 265 ff., p. 269. Both the authors underline the removal, from the article devoted to objectives, of the reference to a regime designed to ensure that competition is not distorted in the internal market and its relocation to Protocol No. 27. See also CRAIG, *The Lisbon Treaty*.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 3-17.

inspire the social economy,² and pandering the social needs arising from the effects of the economic crisis and the pandemic, the development of social rights policy is required in order to provide mechanisms aimed at correcting market failures and achieving sustainability of economic development. To this end, the European social law shall not be perceived as ancillary to market integration.³

These expectations, however, have to reckon with the powers the Member States have conferred to the European Union in this field and the political will of the Member States to adopt legal acts.

The definition of the boundaries of the competences conferred to the EU for the development of a social policy is thus the subject of the analysis of the second paragraph. Thereafter, an attempt will be made to draw the legal background on the topic, essentially composed of the first legal binding acts adopted in the field and the judgments of the Court of Justice. This background will be necessary to grasp the innovation brought by the social pillar and the recently adopted action plan. Therefore, this paper aims at understanding the status of the plan's implementation and the prospects for the realization of social rights.

2. THE EU COMPETENCE IN EU SOCIAL RIGHTS POLICY

The Treaty on the Functioning of the European Union ("TFEU") dedicates an entire title to the social policy, namely from Art. 151 to Art. 161. Some of these provisions are not new since they were already present in the Treaty on the European Community ("TEC"). However, with the Single European Act, the Maastricht Treaty and especially the Treaty of Amsterdam these provisions were enriched over time, thus

Law, politics and treaty reform, Oxford New York, 2010 and FUMAGALLI, "Art. 3 TUE", in TIZZANO (ed.), *Trattati dell'Unione europea*, Milano, 2014, p. 278 ff., p. 269.

² About the social economy, among a broad literature, PIGOU, *The Economics of Welfare*, London, 1932; VON MISES, *Liberalism in the Classical Tradition*, San Francisco, 1985; RIETER, SCHMOLZ, "The Ideas of German Ordoliberalism 1938-1945: Pointing the Way to a New Economic Order", *The European Journal of the History of Economic Thought*, 1993, pp. 87-114; FLAVIO, *L'economia sociale di mercato*, Soveria Mannelli (CZ), 2008; GLOSSNER, *The Making of the German Post-War Economy – Political Communication and Public Reception of the Social Market Economy after World War II*, London, 2010; STAUDACHER, *L'economia sociale di mercato: un modello per il futuro?*, 2010, available at: <www.kas.de>; SCHALLENBERG BERENZ, "Social Market Economy in Europe?", in *Church and Society*, 2012, p. 371 ff.; SEGRE, *Il mito dell'economia sociale di mercato*, 2013, available at: <www.readability.com>. For a more recent analysis DE PASQUALE, "L'economia sociale di mercato dell'Unione europea", *Studi sull'integrazione europea*, p. 265.

³ SCIARRA, "Il diritto sociale europeo al tempo della crisi", *Diritto dell'Unione europea*, 2014, p. 657 ff.

marking progress in the development of social policy.⁴

According to Art. 151 TFEU, the EU and the Member States shall pursue several objectives in the achievement of the social policy: the promotion of employment, the improvement of living and working conditions, so as to make possible their harmonisation; the reach of a proper social protection, the maintenance of a dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion. For this purpose, both the EU institutions and the Member States must *have in mind* the respect for fundamental social rights, as set out in the European Social Charter signed in Turin on 18 October 1961⁵ and in the 1989 Community Charter of the Fundamental Social Rights of Workers. The wording of Art. 151 TFEU gives evidence that these two Charters shall be qualified as soft law acts, thus not mandatory. Nonetheless, the principles established therein have influenced the EU law as they have played a role in the interpretation of the principles and of the EU directives concerning the social policy.⁶

In this regard, it is therefore important to make a difference with the Charter of Fundamental Rights of the European Union (“CFR”), which has binding effect. However, the effectiveness of the CFR has been partly overwhelmed by the difference between principles and rights, and thus by the fact that only the latter can be invoked by individuals.⁷ The principles, on the other side, in order to be judicially enforceable, must be implemented in European or national legislative or executive

⁴ About the evolution of the relevant Articles of the Treaty see FORTUNATO, “Art. 151 TFEU”, in TIZZANO (ed.), *cit. supra* note 1, p. 1429 ff.; GUIZZI, *La dimensione sociale dell’Unione europea e la sua evoluzione*, in *Scritti in onore di Giuseppe Tesaro*, Napoli, 2014, p. 1859 ff.; ADINOLFI, “Le innovazioni previste dal Trattato di Amsterdam in tema di politica sociale”, *Diritto dell’Unione europea*, 1998, p. 563 ff; BAYLOS *et al* (eds.), *Dizionario di diritto del lavoro comunitario*, Bologna, 1996; BALODIMOS, “Le Traité de Maastricht et l’éducation, la formation professionnelle et la culture”, *RMUE*, 1993, p. 99 ff; BERCUSSON, “The Lisbon Treaty and Social Europe”, *ERA-Forum*, 2009, p. 87 ff; BETTEN, “The Amsterdam Treaty: Some general comments on the new social dimension”, *International Journal of Comparative Labour Law and Industrial Relations*, 1997, p. 188 ff; MAGNO, “Diritti sociali nell’ordinamento dell’Unione europea dopo Amsterdam”, *Diritto e lavoro*, 1998, I, p. 17 ff.; ID, *La tutela del lavoro nel diritto comunitario*, Padova, 2000; ROCCELLA, TREU, *Diritto del lavoro della Comunità europea*, Padova, 2002; SIWECK, “Le dialogue social au niveau communautaire: d’où vient-on, où en est on”, *RMC*, 1999, p. 238 ff; VILLANI, “La politica sociale nel Trattato di Lisbona”, *Rivista giuridica del lavoro e della previdenza sociale*, 2012, p. 25 ff.

⁵ The European Social Charter has been revised in 1996. More information available at: <www.coe.int/en/web/european-social-charter>.

⁶ See, as an example, Opinion of the Advocate General Tizzano on C-173/99, *BECTU*, 8 February 2001.

⁷ According to Art. 52, para. 5, CFR: “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”.

acts. More in general, according to its Art. 51, the CFR is to be applied only when the EU institutions and the Member States are implementing EU law, respecting the limits of the powers conferred in the Treaties.⁸

Therefore, it is appropriate to outline the EU's competence in this area. The social policy is a shared competence for the aspect defined in the Treaty,⁹ while, for those that are not, the EU may only take initiatives to ensure coordination of Member States' social policies.¹⁰

The legal basis defining the EU institutions' power to act is set out in Art. 153 TFEU, that establishes eleven field for achieving the objectives of the policy here examined:

“(a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c)”.

Thus, first of all, the EU can adopt measures to encourage cooperation between States, for instance to facilitate the exchange of information and best practices in all these fields. Moreover, the EU can adopt directives in the matters listed from lett. a) to lett. i) in order to introduce minimum requirements for gradual implementation, having regard to the conditions and technical rules of each of the Member States. In any case, such directives “shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings”.¹¹

⁸ According the second paragraph of Art. 51 CFR, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union. About the protection of the social rights by the CEDU see TRIGGIANI, *cit. supra* note 1, pp. 17 ff.

⁹ See Art. 4, para 2, lett. b), TFEU.

¹⁰ Art. 5, para 3, TFEU.

¹¹ See Art. 153, para 2, lett. b), TFEU. Moreover, according to Art. 153, para. 4, “The provisions adopted pursuant to this Article: — shall not affect the right of Member States to define the fundamental

In order to implement social policy, the Treaty recognises a special role to the social partners, who are essential in achieving the goals and realizing representative and participatory democracy.¹² A special role is also conferred to the European Parliament.

As a final remark, it is interesting to underline that Art. 9 TFEU establishes a horizontal clause with regard to social rights: the Union shall take into account the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health in defining and implementing all its policies and activities. The social rights described, in this way, beyond addressing a specific EU policy, rise to a horizontal criterion that can influence all EU actions and thus achieve broader results. Regrettably, the enforceability of this principle is quite weak, considering the discretionary power in the hands of the EU institutions.¹³

3. THE LEGAL BACKGROUND OF SOCIAL RIGHTS IN THE EU

As mentioned above, the legal framework of the social rights has developed overtime and has been primarily built upon the free movement of workers. Even today the core of social rights still revolves around the implementation of this fundamental freedom of the European Union.

All institutions have cooperated in the development of this policy, but the contribution of the European Court of Justice (ECJ) should be highlighted. In fact, ECJ's judges have been emphasizing the importance of social policy objectives, initially as a limitation on the economic objectives that characterized the European community. In *Albany*,¹⁴ for instance, some limits in the application of competition law have been established in order to avoid undermining the social policy objectives that are pursued by collective agreements which are concluded between

principles of their social security systems and must not significantly affect the financial equilibrium thereof, — shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties". Moreover, according to para 5, the provisions shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

¹² See Art. 152 TFEU and Art. 154, according to which the Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties. See SCIARRA, *cit. supra* note 3, p. 766 and ADAM, TIZZANO, *Manuale di diritto dell'Unione europea*, Milano, p. 719.

¹³ See, *mutatis mutandis* ROLANDO, *L'integrazione delle esigenze ambientali nelle altre politiche dell'Unione europea*, Napoli, 2021.

¹⁴ Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999, para. 59.

organizations representing employers and employees. Then, in *Schröder*, the Court stated that the elimination of distortions of competition between undertakings established in different Member States “is secondary to the social aim pursued [...], which constitutes the expression of a fundamental human right”.¹⁵

The ECJ has also qualified the social protection of workers as an overriding requirement relating to the public interest that could limit the freedom to provide services.¹⁶ In *Schmidberger*, the Court was asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption is a restriction of the free movement of goods and affirmed that “an action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion” and “the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under [...] the free movement of goods”.¹⁷ Thus, the ECJ stated that the principle of non-discrimination of workers must be regarded as a general principle of EU law.¹⁸

The recalled evolution of the relevant Articles of the Treaties and the development of a European competence in the field, together with the shift from unanimity to the qualified majority required in the Council to adopt acts, led to the adoption of many directives. For instance, the Directive on the certain aspects of working time,¹⁹ the Directive on parental leave,²⁰ the Employment Information Directive²¹ and the Directive about the fixed-time workers, especially as interpreted by the judgement *Angelidaki*.²²

¹⁵ Case C-50/96, *Deutsche Telekom AG v Lilli Schröder*, 10 February 2000, para 57.

¹⁶ Joined Cases C-369/96 and C-376/96, *Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*, 23 November 1999.

¹⁷ Case C-112/00, *Eugen Schmidberger v. Austria*, 12 June 2003, para 74 and 91.

¹⁸ Case C-144/04, *Werner Mangold contro Rüdiger Helm*, 22 November 2005, para 75.

¹⁹ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time. About the legal basis of this Directive see Case C-84/94, *United Kingdom v Council*, 12 November 1996. The Directive 93/104 has been repealed by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

²⁰ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave repealed by Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC.

²¹ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship recently repealed by Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

²² See Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work and the Joined Cases C-378/07 to C-380/07, *Angelidaki and ors v. Dimos Geropotamou*, 23 April 2009. In the *Angedidaki* case, the ECJ was asked to interpret the measures to prevent misuse of

Obviously, the approval of the Charter and its raising to the status of treaties determined a further significant step in the protection of the social rights. An innovative aspect is the positioning of social rights in the Charter: most of these are included in the title devoted to solidarity,²³ and this demonstrates the strengthening of these rights. Furthermore, other social rights are included in other titles,²⁴ reflecting the intertwining of these with other civil and political rights.²⁵ Here, of course, we can only outline a few features of a richly articulated and copious discipline. We will therefore try to focus on a few rights that have found their completion in the European Pillar of Social Rights and in the subsequent development of the social right policy.

With regard to the non-discrimination principle, Art. 21 CFR prohibits any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The non-discrimination principle is completed by other specific prohibition such as the prohibition of discrimination on grounds of nationality.

The non-discrimination principle can be considered as a component of the principle of equality.²⁶ Indeed, the equality principle in the CFR is developed by the respect of cultural, religious and linguistic diversities (Art. 22) and by specific forms of protection of certain vulnerable groups such as child, (Art. 24), elderly (Art. 25) or person with disabilities (Art. 26).

With specific reference to the protection and integration of people with disabilities, it is interesting to underline the particular influence of the UN Convention on the Rights of Persons with Disabilities on the EU social policy (CRPD). This UN Convention has been approved by EU and Member States as a

successive fixed-term employment contracts as established in clause 5 (1) of the Framework Agreement on fixed-term work concluded on 18 March 1999. The Court stated that the renewal of successive fixed-term employment contracts in the public sector is deemed to be justified by 'objective reasons' and that the national rules introduced to protect workers from the misuse of this kind of contracts must be sufficiently effective and a sufficient deterrent.

²³ Art. 27 - Workers' right to information and consultation within the undertaking; Art. 28 - Right of collective bargaining and action; Art. 29 - Right of access to placement services; Art. 30 - Protection in the event of unjustified dismissal; Art. 31 - Fair and just working conditions; Art. 32 - Prohibition of child labour and protection of young people at work; Art. 33 - Family and professional life; Art. 34 - Social security and social assistance; Art. 35 - Health care.

²⁴ See, for instance, in the Title devoted to Freedom, Art. 11 - Freedom of expression and information; Art. 12 - Freedom of assembly and of association; Art. 15 - Freedom to choose an occupation and right to engage in work; Art. 16 - Freedom to conduct a business.

²⁵ See TRIGGIANI, *cit. supra* note 1, p. 16.

²⁶ See, among a large literature, MORRONE, CARUSO, "Art. 20", and FAVILLI, GUARRIELLO, "Art. 21", both in MASTROIANNI *et al.* (eds), *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, p. 386 ff.

mixed agreement²⁷ but, considering the programmatic nature of its provisions, they were not worded in a sufficiently precise and unconditional manner so as to have direct effect. Therefore, the same cannot be a parameter to ascertain the validity of an EU legal act like the Employment Equality Directive (2000/78/EC). Nonetheless, the ECJ has interpreted the notion of disability in the Employment Equality Directive to reflect Article 1 of the CRPD.²⁸

A particular attention should also be dedicated to the equality between women and men that, according to Art. 23, “must be ensured in all areas, including employment, work and pay”. As we will see, in addition to equal pay, equity between men and women comes through effectively enabling women to work under the same conditions as men.

More in general the CFR states that “every worker has the right to working conditions which respect his or her health, safety and dignity” (Art. 31) and to “reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child” (Art. 33).

4. THE EUROPEAN PILLAR OF SOCIAL RIGHTS

On 17 November 2017, during the Social Summit held in Gothenburg, the European Pillar of Social Rights (“EPSR”) was officially proclaimed by the EU leaders Jean-Claude Juncker (President of the European Commission), Antonio Tajani (President of the European Parliament) and Prime Minister Jüri Ratas (on behalf of the Presidency of the Council of the EU).²⁹

In 2014, the President of the European Commission announced the establishment of a European Pillar of Social Rights,³⁰ and thus the Commission has been engaging

²⁷ The EU has concluded the cited convention by the decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, DEC 2010/48/EC.

²⁸ See C-356/12, *Glatzel v Bayern*, 22 May 2014, In literature see BRODERICK, FERRI, *International and European Disability Law and Policy. Text, Cases and Materials*, CUP, 2019, especially Chap. 10 and BRODERICK, FERRI, *Research Handbook on EU Disability Law*, Cheltenham, 2020, spec. Chap. 3 and 4.

²⁹ See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights, COM/2017/0250 final.

³⁰ See Political Guidelines for the next European Commission, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”, 15 July 2014.

actively with all relevant stakeholders in a broad public consultation.³¹ The EPSR rises from the results of this public consultation and introduces a number of key principles and rights to support fair and well-functioning labour markets and welfare systems.

More in detail, the EPSR sets out 20 principles in three main areas: equal opportunities and access to the labour market (4 principles), fair working conditions (6 principles) and social protection and inclusion (10 principles). In the first chapter there are: the right to education, training and life-long learning, the right to equality of treatment and opportunities between women and men (also to an equal pay for work of equal value), the right to equal opportunities regardless of gender, ethnic origin, religion disabilities, age or sexual orientation and right to receive support to employment. The second chapter includes in the fair working condition, rights related to the secure and adaptable employment; wages; information about employment conditions and protections in case of dismissal; social dialogue and involvement of workers; work-life balance and healthy, safe and well-adapted work environment and data protection. Lastly, the third chapter is dedicated to the childcare and support of children; social protection; unemployment benefits; minimum income; old age income and pensions; health care; inclusion of people with disabilities; long-term care; housing and assistance for the homeless and access to essential services.

The EPSR reaffirms some of the rights already present in the Union *acquis*. In doing so, the Pillar does not modify the legal value of the rights or principles recalled but it makes them more visible and more explicit for citizens. This result is mainly due to the inclusion of all the social rights in the same and unique document. It recalls all the principles and rights stated by the different articles of the Treaty and the ECFR and even some significant provisions of the directives adopted by the EU institutions.

Moreover, the EPSR adds new principles and introduces new challenges to reach a fair and well-functioning labour market and welfare systems and, in doing so, a more equal and fair society. This purpose will require more specific measures or legislation to be adopted. Therefore, the improvement of the legal framework is a task of the EU and of the Member States, depending on the allocation of the competence.

As mentioned above, we will focus on few principles which will allow us to see the added value of the EPSR, its implementation by EU and Member States and the

³¹ In March 2016, the European Commission presented a preliminary outline of the European Pillar of Social Rights and launched a to gather feedback, see COM(2016) 127 final of 8 March 2016. In January 2017, building on stakeholders' events and input from across Europe, a high-level conference was organised to conclude the consultation. The results from the public consultation are reported in the accompanying document SWD(2017) 206 of 26 April 2017.

recent developments. Firstly, we will analyse the principles dedicated to the gender equality. According to Principle 2:

“equality of treatment and opportunities between women and men must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression. Women and men have the right to equal pay for work of equal value”.

We can see that this provision recalls the principles established in Artt. 23 and 33 of the CFR. In doing so, as already noted, the EPSR does not modify the rights and principles already stated in the Charter, but it relies on the Union *aquis* in order to enhance the visibility and foster its application.

At EU level, according to Art. 19 TFEU the EU is empowered to take actions to combat discriminations based on sex and Art. 153 TFEU confers the power to adopt measures including directives setting minimum requirements to support and complement the activity of Member States to establish the equality between men and women with regard to labour market opportunities and treatment at work. Moreover, Art. 157 TFEU, after stating that each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied, confers to the European Parliament and to the Council the competence to adopt measures to ensure the application of this principle acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee.³²

In the current legal framework, the EU has adopted a Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation³³ and a Directive encouraging improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.³⁴ Moreover, it has been adopted a Directive providing an equal treatment of man and woman in matters of social

³² According to para 4 of Art. 157 TFEU “the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

³³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

³⁴ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, see the consolidated version with the recent modifications.

security,³⁵ in access to and supply of goods and services³⁶ and about the rights of self-employed workers.³⁷ We can see that in this field the EU has introduced minimum standards as well as new rights for workers. Nonetheless, Member States are in charge to transpose and enforce these rules, going beyond the minimum rules and giving effects to the principle.

Moving to the second chapter of the EPSR, it is interesting to connect the Principle here examined with the Principle dedicated to the work-life balance. This is strictly related to the effective equal access to the labour market and to the progress in career for women. According to Principle 9:

“Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way”.

This principle goes beyond the existing EU legal framework by introducing the right to access childcare and long-term care and providing these rights to all people caring responsibilities. In doing so, this principle includes people caring for elderly or person with disabilities.

Principle 2 of the EPSR is completed by the principle dedicated to the equal treatment. According to Principle 3 of the EPSR:

“Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered”.

This principle is strictly linked to Art. 21 CFR as well as to Art. 19 TFEU. In the current legal framework, thanks to the enhanced competence of the EU, we can notice

³⁵ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

³⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

³⁷ Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

the Racial Equality Directive³⁸ and the Employment Equality directive.³⁹ Nonetheless Principle 3 is innovative in extending the equality principle in social protection.

Secondly, we will analyse the Principle dedicated to the wages. According to Principle 6:

“Workers have the right to fair wages that provide for a decent standard of living. Adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his / her family in the light of national economic and social conditions, whilst safeguarding access to employment and incentives to seek work. In-work poverty shall be prevented. All wages shall be set in a transparent and predictable way according to national practices and respecting the autonomy of the social partners”.

We mentioned above that according to Art. 31 CFR every worker has the right to working condition which respect his safety, health and dignity. This does not confer a competence to the EU in this field, thus Art. 153 explicitly states that the provision does not apply to pay. Thus, until very recently the EU have only commissioned monitoring studies about the working conditions across Member States.⁴⁰ The added value of Principle 6 is the introduction of the relation between the fair wages and the standard of living. Moreover, it introduces some criteria in establishing the fair wage, that is a transparent and predictable way. We will see later on the effects of this Principles.

The principles here examined, as the other stated by the EPSR, are based on the EU acquis and move a step forward. In doing so, those principles go beyond the competences conferred to the EU and therefore, they need national legislations to be improved. The EPSR plays a proactive role in the development of national policies, establishing a common ground by defining common principles and targets.

³⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁴⁰ See, for instance, the minimum wage statistics available at: <www.ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics>.

5. THE PERSPECTIVES OF EU ACTION IN THE REALIZATION OF SOCIAL RIGHTS AND CONCLUDING REMARKS

In March 2021, the European Commission launched its proposal for a European Pillar of Social Rights Action Plan.⁴¹ The Action Plan is designed to organise the actions to be taken by the Commission in order to effectively implement the principles of the Pillar.

Even if the consultation of the stakeholders started in 2019, the Commission's Action plan has been adopted after the first dramatical phase of the pandemic generated by the Covid-19. The effect of the pandemic in EU citizens' jobs, education, economy, welfare systems and social life has been drastic and low-skilled, low-paid workers, and temporary workers were the first to be laid-off due to the Covid-19 outbreak. Therefore, in the context of actions planned to react to the economic impact moving forward the climate neutrality and the digitalization, the Action Plan establishes an interaction between the enhancing of social rights and the strengthening of a socially fair and just transition. According to the Commission, the EPSR' 20 Principles are the beacon guiding us a strong societal Europe and they are essential for a fair and well-functioning labour market and welfare systems.

The Commission proposes three EU headline targets to be achieved by 2030 in the areas of employment, skills, and social protection, consistent with the UN Sustainable Development Goals.⁴² The targets are that at least 78% of the population aged 20 to 64 should be in employment,⁴³ at least 60% of all adults should participate in training every year⁴⁴ and the number of people at risk of poverty or social exclusion should be reduced by at least 15 million.

The Action Plan outlines the areas in which further attention is needed both for the immediate recovery and for long-terms results. Firstly, the European Commission aims at creating job opportunities in the real economy and, to do so, combines the use of temporary support to mitigate unemployment risks in an emergency like SURE⁴⁵ with policy measures and available funding to promote job creation and job-to-job transitions towards expanding sectors, notably digital and

⁴¹ COM(2021) 102 final.

⁴² United Nations, 21 October 2015, A/RES/70/1 - Transforming our world: the 2030 Agenda for Sustainable Development.

⁴³ More in detail, at least halve the gender employment gap compared to 2019, increase the provision of formal early childhood education and care, decrease the rate of young NEETs (aged 15-29) from 12.6% (2019) to 9%.

⁴⁴ More in detail, at least 80% of those aged 16-74 should have basic digital skills and early school leaving should be further reduced and participation in upper secondary education increased.

⁴⁵ Council Regulation (EU) 2020/672 of 19 May 2020.

green.⁴⁶ The Action Plan includes measures to make work standards fit for the future of work, improve occupational safety and health standards and enhance a fair labour mobility. The Action Plan is also composed by concrete purposes aimed at improving skills for the expected new labour market as well as measures for a greater social protection and inclusion.

As results effectively achieved to date, we can refer to the new work-life balance for parents and carers Directive and to the new Directive on the minimum wages. The first one⁴⁷ repeals the Council Directive 2010/18 implementing the revised Framework Agreement on parental leave and lays down minimum requirements related to paternity leave, parental leave and carers' leave, and to flexible working arrangements for workers who are parents, or carers. The new minimum standards framework, by facilitating the reconciliation of work and family life for such parents and carers, should contribute to the realization of principle of equality between men and women with regard to labour market opportunities and equal treatment at work. Regarding the paternity leave, the Directive introduces the minimum right to take paternity leave of 10 working days on the birth of a child that is paid at the national sick pay level. Moreover, the new legal act introduces the right to 4 months paid parental leave and establishes that at least 2 months of parental leave per parent need to be paid at an adequate level. Indeed, EU countries must ensure that workers have the right to request that they take parental leave in a flexible way, such as on a part-time basis, or in alternating periods of leave separated by periods of work. Finally, the Directive introduces minimum standards about flexible working arrangements: workers with children up to 8 years old and carers have the right to request flexible working arrangements for caring purposes such as the use of remote working arrangements, flexible working schedules, or a reduction in working hours. Also in this case, establishing a minimum-standard set of rights for workers leads to a common progression in the enforcement of social rights and allows - perhaps encourages - member states to maintain or introduce measures that go beyond the minimum. The relevance of these measures is clear when considering, for example, that limited incentives for men (or of the other worker in the family) to assume an equal share of caring responsibilities.

Moving to Directive on adequate minimum wage in the European Union, in 2020 the Commission presented a proposal⁴⁸ and, on 19 October 2022, the European

⁴⁶ See the Recommendation for Effective Active Support to Employment (EASE), C(2021) 1372 of 4 March 2021.

⁴⁷ Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers.

⁴⁸ COM(2020)682 of 28 October 2020.

Parliament and the Council - with Sweden and Denmark voting against - adopted Directive 2022/2401. The EU legislator does not intend to harmonise national wage laws, nor could it do so, given the limits of his competence. The directive aims to promote fair minimum wages by introducing clear criteria on the adequacy of the legal minimum wage, supporting collective bargaining and strengthening protection and monitoring mechanisms.⁴⁹

The new legal act also promotes the collective bargaining on wage-setting and the involvement of social partners in doing so. However, it should be noted that the Directive defines the minimum wage as the minimum remuneration set by law or collective agreements that an employer, including in the public sector, is required to pay to workers for the work performed during a given period. The same does not, however, precisely establish the exact notion of an adequate minimum wage, but merely indicates some criteria of adequacy. Nor does it require the use of specific indicators.⁵⁰ This means that third Directive moves a step forward the definition of minimum wages by Member States.

Moving to a more general point of view, the Action Plan obviously does not modify the allocation of competences between EU and Member States. It only points out a number of EU response for further develop the legal framework of minimum standards Directives and making the best use of allocated resources to achieve a just, equitable and environmentally sustainable transition. For this reason, the effective implementation of the European Pillar of Social Rights continues to greatly depends on the resolve and action of Member States. Thus, the EU targets reflect a common ambition by 2030 and calls on the Member States to define their own national targets, as a contribution to this common endeavour. At date, more than ever the realization of the principles enshrined in the EPSR represents an opportunity to realize a social market economy and develop European solidarity through joint action by the EU and Member States.

⁴⁹ For different opinion see PANTANO, *Il quadro europeo sul salario minimo legale. La proposta di direttiva dell'UE*, in CORTI (ed.), *Il Pilastro europeo dei diritti sociali e il rilancio della politica sociale dell'UE*, Milano, 2022, p. 81; MENEGATTI, "Much ado about little: The Commission proposal for a Directive on adequate wages", *Italian Labour Law e-Journal*, 2021, p. 23 ff.

⁵⁰ See MANFREDI, "La direttiva sui salari minimi e i limiti delle competenze dell'Unione europea in materia di retribuzioni", available at: <www.aisdue.eu>, p. 54 ff.

DEMOGRAPHIC CHALLENGE AND DETERRENCE: THE EU MIGRATION POLICY PARADIGM

Marguerite Arnoux Bellavitis

SUMMARY: 1. Introduction; – 2. Returns and irregular migration; – 2.1. The fight against irregular migration: a priority for the EU; – 2.1.1. Migration as a threat; – 2.1.2. Irregular migration and legal migration, an interdependent legal framework; 2.2 The centrality of returns; – 2.2.1. The situation of non-removable migrants; 3. Demographic challenge and labour migration; – 3.1. Demographic change in EU's discourse; – 3.2. Labour shortage and sectors more at risk; – 3.2.1. Labour shortage and the informal economy; – 4. Reform of the EU migration policy: big ambitions and disappointing proposals; – 4.1. The New Pact on Migration and Asylum: starting point for a Reform of the EU migration policy; – 4.1.1. A permanent focus on the fight against irregular migration; – 4.1.2. A shy reform of the labour migration acquis; – 5. Conclusion.

1. INTRODUCTION

According to the United Nations World Population Project of 2022,¹ the global population is projected to decline in the upcoming decades. Population growth will vary across countries and regions around the world. Europe's population for example, along with Eastern and South-Eastern Asia, Central and Southern Asia, Latin America, the Caribbean and Northern America will begin to decline before 2100. Regarding the European Union (EU), Eurostat projects that its population will drop by 6% and lose

¹ UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, Population Division, "World Population Prospects 2022: Summary of Results", 2022, available at: <https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022_summary_of_results.pdf>.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 19-43.

27 million from its current 447 million.² Italy in particular will make up for more than a third of this population loss.³ At the same time, the population from Sub-Sahara African countries, despite also undertaking demographic transition, will continue to grow rapidly through 2100.⁴ Europe is an ageing continent and its population is shrinking, with the decline of fertility leading to the increase of older persons. Some Member States are particularly at risk due to intra-EU emigration.⁵

These demographic trends come with their share of challenges, particularly in welfare States, such as the need to improve the sustainability of social security and pension systems. In some high-income countries, including EU Member States, “the contribution of international migration to population growth (net inflow of 80.5 million) exceeded the balance of births over deaths (66.2 million)”.⁶ At the same time, in low and lower-middle-income countries, population increase is still driven by an exceeded balance of births over deaths. Immigration is thus so far, the only reason why the EU’s population is not declining. The share of people born outside of the EU is however quite small compared to most high-income countries, with only 8.4% of the population being foreign-born.⁷ International migration could address and solve the labour shortage in specific sectors, impacted by the declining workforce. The current situation puts the EU in a position of weakness on several layers: the EU might lose its weight and influence in global governance, both in terms of population and in terms of wealth with a decreasing workforce.⁸ Despite that evidence, policy actions at the EU level are mostly aimed at preventing migration rather than attracting migrants.⁹

The political discourses on demographic challenges, labour and skills shortage and its policy-making, and the discourse on irregular migration follow two parallel tracks, which very rarely cross. The fight against irregular migration is a priority at

² Eurostat, “EU’s Population Projected to Drop by 6% by 2100 - Eurostat News”, 30 March 2023, available at: <<https://ec.europa.eu/eurostat/web/products-eurostat-news/w/DDN-20230330-1>>

³ Eurostat, “Statistics | Population Projection”, 30 March 2023, available at: <<https://ec.europa.eu/eurostat/databrowser/view/tps00002/default/table?lang=en>>

⁴ United Nations Department of Economic and Social Affairs, *cit. supra* note 1, p. 27.

⁵ EUROPEAN COMMISSION, JOINT RESEARCH CENTRE, STONAWSKI, SABOURIN, BÉLANGER, ET AL., *Demographic scenarios for the EU – Migration, population and education*, Lutz (ed.), Publications Office, 2019, p. 45, available at: <<https://data.europa.eu/doi/10.2760/590301>>

⁶ UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *cit. supra* note 1, p. 20.

⁷ EUROPEAN COMMISSION, “Statistics on Migration to Europe”, available at: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en>.

⁸ FARGUES, “International Migration and Europe’s Demographic Challenge”, EU-US Immigration Systems, Robert Schuman Centre for Advanced Studies, 2011, p.9.

⁹ SPIJKERBOER, “The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control”, *European Journal of Migration and Law*, 2018, p.461.

the EU level and its implementation is realized in various ways, such as the externalisation of policies through partnerships with third countries and a focus on the return of irregularly staying migrants.¹⁰ This political priority is addressed in the majority of the policies adopted in both migration and asylum areas and receives considerable political and mediatic attention. However, as the Commission itself says, “irregular migration to the EU remains limited despite receiving widespread media coverage”,¹¹ and the number of third-country nationals legally residing in the EU is far greater than those staying irregularly.¹² Existing evidence on demography and the labour market in the EU shows how much migrants are needed, and should be attracted and valued, not only from a migrants’ rights point of view but also for the EU’s interests. So far, labour migration has been based on an instrumental approach aimed at maximizing the economic benefits of migration, while protecting the employment of the native workers.¹³

There is an opportunity to shift the political discourse on migration, from an instrumental and securitized approach to a rights-based one. Most of the policies adopted at the EU level however seem to aim at the prevention of irregular migration to Europe in general, even when adopting labour migration tools. In fact, in the communication on “Attracting skills and talents to the EU”,¹⁴ the Commission presents the operational pillar of its labour migration strategy as a way to reduce irregular migration. At the national level, this focus on irregular migration can be explained by electoral instrumentalisation, and the rise of the nativist populists,¹⁵ but the Commission could change its discourse and the political agenda and adapt the course of the policy-making to the current needs. It remains however very shy in its proposals and suggestions and maintains the focus on the usual securitized discourse.

Research largely shows that an open and rights-based approach aiming to attract more third-country nationals would benefit both the EU and the incoming migrants.

¹⁰ STRIK, “Migration Deals and Responsibility Sharing: Can the Two Go Together?”, in CARRERA, SANTOS VARA, AND STRIK (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham, UK, 2019, p. 57 ff., pp. 58-63.

¹¹ EUROPEAN COMMISSION, “Communication to the European Parliament, the Council, the European Economic and Social Committee of the Regions. Attracting Skills and Talents to the EU.”, 27 April 2022, COM (2022) 657 final, p.1.

¹² *Ibid.*

¹³ FOX-RUHS and RUHS, “The Fundamental Rights of Irregular Migrant Workers in the EU”, European Parliament, 2022, PE 702.670, p. 64.

¹⁴ EUROPEAN COMMISSION, *cit. supra* note 11, p. 10.

¹⁵ CASTELLI GATTINARA and MORALES, “The Politicization and Securitization of Migration in Western Europe: Public Opinion, Political Parties and the Immigration Issue”, in BOURBEAU (ed.), *Handbook on Migration and Security*, Cheltenham, UK, 2017, p. 273 ff., p.278.

Building on this, this article analyses how despite everything, the EU and its Member States neglect evidence-based policy-making, and privilege symbolic and political decisions.¹⁶ By doing so, the EU maintains a strict migration policy focused on irregular migrants at the expense of their human rights, and against its own interests, instead of prioritizing long-term sustainable objectives. The paper focuses particularly on two categories of migrants whose situation should be better addressed and acknowledged at the EU level: non-removable irregular migrants, and irregular migrants working in the informal economy in lawful areas, and thus contributing informally to the EU economy, for the most part in labour market shortages. The paper addresses first the monolithic discourse on migration creating the irregularity of migrants (Section 2), and then the discourse on demographic challenges at the EU level (Section 3). The last part of the paper tackles the current reform of the EU migration acquis to assess to what extent the need to attract migrants has been integrated into policy-making (Section 4).

2. RETURNS AND IRREGULAR MIGRATION

2.1. *The fight against irregular migration: a priority for the EU*

The fight against irregular migration was one of the first objectives in the establishment of an EU migration policy and was already mentioned in the Schengen Convention of 1985.¹⁷ The European Commission defines it as one of the layers of migration management policies, which aims at regulating the entry, admission, residence, integration and returns of both EU citizens and third-country nationals.¹⁸ According to EU migration scholars, however, the main objective of migration management policies is to prevent unwanted migration to the EU.¹⁹ This objective is particularly visible when you look at the migration policy as a whole: the tools to fight and prevent irregular migration are far more numerous than those regulating legal migration and providing safe and regular pathways.

¹⁶ VOLLMER, “Policy Discourses on Irregular Migration in the EU – ‘Number Games’ and ‘Political Games’”, *European Journal of Migration and Law*, 2011, p. 317, p. 331.

¹⁷ The Schengen Acquis - Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, OJ L 239 (2000).

¹⁸ EUROPEAN COMMISSION, “Migration Management”, Migration and Home Affairs, available at: <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/migration-management_en>.

¹⁹ GUIRAUDON, “The Constitution of a European Immigration Policy Domain: A Political Sociology Approach”, *Journal of European Public Policy*, 2003, p.263 ff., p.266.

2.1.1. *Migration as a threat*

Extensive research analyses political discourses on migration. The securitisation of migration has been the predominant trend in the last decades.²⁰ The security prism is aimed at convincing the audience that an immediate policy is required to alleviate the threat.²¹ Migration is regularly presented as a menace and a security issue for European society. In the political discourse, it is presented as threatening to the economy, the labour market and social welfare with fictional examples of migrants stealing jobs, living off unemployment subsidies,²² or as a risk to the public order, with improper links to terrorism and women's safety. Migration is easy to instrumentalize, particularly in times of uncertainty and financial crisis, when people easily believe that migrant workers put the economy at risk and will make it more difficult for native workers to access and stay in the job market. There are also common beliefs that salaries and working conditions will decline due to the presence of migrants. Those assumptions are not factually true: in times of crisis, migrant workers are the first category affected by job losses and suffer higher unemployment, however, this blame-shifting is a simple argument to use for political purposes, both for nativist populists and for mainstream political parties and governments to appeal to anti-immigration voters.²³

Those discourses then develop into symbolic and restrictive policy responses²⁴ but do not seem to reduce irregular migration, and could even have the opposite effect by deflecting documented migrants into irregularity.²⁵ Irregular migration policies are an easy target for symbolic policy-making²⁶ to demonstrate efficient governance to the national electorate by presenting numbers of irregular migrants or effective returns,

²⁰ BIGO, "Security and Immigration: Toward a Critique of the Governmentality of Unease", *Alternatives: Global, Local, Political*, 2002, p. 63 ff., p.63-92.

²¹ BALZACQ, "The Three Faces of Securitization: Political Agency, Audience and Context", *European Journal of International Relations*, 2005, p.171 ff., p. 172.

²² VOLLMER, *cit. supra* note 16, p. 320-325.

²³ MEGYESIOVÁ and HAJDUOVÁ, "Demographic Challenges across the European Union Member States", *Workplace Health & Safety*, 2012, p.321 ff., p. 323 ; KUSTOV, "Do Anti-Immigration Voters Care More? Documenting the Issue Importance Asymmetry of Immigration Attitudes", *British Journal of Political Science*, 2023, p.796 ff., p. 796.

²⁴ CEYHAN and TSOUKALA, "The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies", *Alternatives: Global, Local, Political*, 2002, p. 21 ff., p. 22.

²⁵ CZAICA and HOBOLTH, "Do Restrictive Asylum and Visa Policies Increase Irregular Migration into Europe?", *European Union Politics*, 2016, p.345 ff., pp. 345-365.

²⁶ SLAVEN and BOSWELL, "Why Symbolise Control? Irregular Migration to the UK and Symbolic Policy-Making in the 1960s", *Journal of Ethnic and Migration Studies*, 2019, p. 1477 ff., p. 1478.

and statistics increasing or decreasing.²⁷ In times of perceived challenges and crisis, the policy response needs to be immediate and to release short-term pressure, before considering medium to long-term perspectives. This type of approach has been presented in the European Agenda on Migration during the so-called 2015 “refugee crisis”.²⁸ The document included immediate actions to be taken to support the Member States under pressure and show solidarity, alongside four pillars to be implemented in the medium term, to address the structural limitations of EU migration policy: improving the fight against irregular migration, securing the external borders of the EU, building a strong common asylum policy and adopt a new legal migration policy.²⁹ Out of those four pillars, two are focused on the prevention of irregular migration, which has become a central element in the reform of the EU asylum and migration acquis since 2015. Legal migration however has seen little progress, and the narrative surrounding it remains that of preventing irregular arrivals, rather than a rights-based approach towards migrants and a policy that would benefit Europe in the long term. Policy-making in the fight against irregular migration and particularly returns, which is a very concrete measure, remains the priority and the best tool to demonstrate efficient governance based on numbers and short-term political successes, instead of long-term visions and investment in legal migration.

2.1.2. Irregular migration and legal migration, an interdependent legal framework

At the EU level, asylum and irregular migration legislations are highly harmonized policies,³⁰ while legal migration on the other hand is a less integrated and more fragmented policy area. The regularity of a migrant’s stay is determined by the framework of legal migration and residence. Admission and asylum laws are increasingly restrictive,³¹ and the lack of legal means of access pushes migrants to opt for other solutions to enter and stay in the EU, thus falling outside of the scope of legal and labour migration laws and becoming irregular on the EU’s territory.

²⁷ VOLLMER, *cit. supra* note 16, p. 325-331.

²⁸ EUROPEAN COMMISSION, “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Agenda on Migration”, 13 May 2015, COM(2015) 240 final, p. 3.

²⁹ *Ibid*, p. 2.

³⁰ WALTERS, “Anti-Illegal Immigration Policy: The Case of the European Union”, in GABRIEL AND PELLERIN (eds.), *Governing International Labour Migration Current Issues, Challenges and Dilemmas*, London, 2010.

³¹ CZAICA and HOBOLTH, *cit. supra* note 25, p. 345.

This lack of regular migration channels goes hand-in-hand with a stronger control of the external borders, which has been tightened up since the so-called 2015 refugee crisis.³² Irregular migration policies only succeed in limiting regular migration channels and regular stay and their correlated benefits, including access to the formal labour market, housing and healthcare.³³ On the contrary, they directly produce the irregularity of migration in different ways. Depending on the definitions in the national legislation, irregularity can result from various scenarios such as the rejection of an asylum application or the irregular crossing of the border. The main path to irregularity is to fall into it by overstaying following the expiration of the visa or the residence permits, or by working in violation of the immigration laws.³⁴ The focus of the EU migration and asylum policy on preventing migration at the expense of human rights has been repeatedly denounced since the adoption of the first legislative package in the field following the adoption of the Treaty of Amsterdam,³⁵ however, no change has been seen, and on the opposite, irregular migration policies have become harsher and harsher.

Up until 2015, the distinction between irregular migrants and asylum seekers could easily be determined. The refugee crisis of 2015 was characterized by an increase in arrivals of asylum seekers from Syria, but also of irregular arrivals of migrants originating from elsewhere and taking the same routes, due to the impossibility of using legal channels. The policies adopted during and after the refugee crisis seek to address these so-called mixed migration flows, referring to cross-border movements in which asylum seekers fleeing persecution and conflicts, victims of trafficking and people in search of opportunities (or so-called economic migrants) travel alongside, often irregularly and resorting to smugglers to reach their destination.³⁶ The number of irregular migrants, including rejected asylum seekers, seems to have increased since 2015 with an estimated number calculated in 2019 between 3.9 to 4.8 million.³⁷ The previous estimations from 2008 were between 1.9

³² BOSILCA, "The Refugee Crisis and the EU Border Security Policies", in RIDDERVOLD, TRONDAL, AND NEWSOME (eds.), *The Palgrave Handbook of EU Crises*, Cham: Springer International Publishing, Switzerland, 2021, p. 469 ff., p. 469-483.

³³ DÜVELL, "Paths into Irregularity: The Legal and Political Construction of Irregular Migration", *European Journal of Migration and Law*, 2011, p. 275 ff., p. 294.

³⁴ *Ibid*, p. 288.

³⁵ SAMERS, "An Emerging Geopolitics of 'Illegal' Migration in the European Union", *European Journal of Migration and Law*, 2004, p. 27 ff., p. 27.

³⁶ Migration Data Portal, Mixed Migration, 2022, available at: <<https://www.migrationdataportal.org/themes/mixed-migration>>.

³⁷ GREENWOOD, "Europe's Unauthorized Immigrant Population Peaks in 2016, Then Levels Off" Pew Research Center, 13 November 2019, available at:

to 3.8 million.³⁸ Policy elements to fight irregular migration were thus integrated into asylum law reforms and action plans. One of the most important irregular migration policies is the return of irregular migrants.

2.2. *The centrality of returns*

The return of irregular migrants is central to the EU migration policy, and a recurrent topic in the Commission's communications and the European Council's conclusions.³⁹ Those institutional documents usually concern the need to issue more return decisions, increase return rates and enforce the implementation of return and readmission agreements with third countries. At the EU level, the procedures for the returns of irregular migrants are regulated by the Return Directive, adopted in 2008.⁴⁰ Under this directive, Member States are not allowed to tolerate irregular migrants on their territory and have to either grant them a valid residence permit or order a return decision.⁴¹ The directive's objective was to lay down standard procedures aimed at facilitating returns and removing obstacles that might delay or even prevent the process. The directive lacks from a migrants' rights perspective and was widely criticized by NGOs, as well as leaders from Latin America and experts from the United Nations Human Rights Council.⁴²

The returns of irregular migrants depend on the existence of return and readmission agreements between the EU or Member States and third countries. Most Member States however struggle to effectively return migrants to their countries of origin or transit. According to Eurostat, in 2022, only 21% of the migrants who were ordered to

<<https://www.pewresearch.org/global/2019/11/13/europes-unauthorized-immigrant-population-peaks-in-2016-then-levels-off/>>

³⁸ CLANDESTINO RESEARCH PROJECT, "Size and Development of Irregular Migration to the EU. Counting the Uncountable: Data and Trends across Europe", 2009, available at: <https://irregular-migration.net/wp-content/uploads/2021/06/ComparativePolicyBrief_SizeOfIrregularMigration_Clandestino_Nov09_2.pdf>.

³⁹ EUROPEAN COMMISSION, "Communication to the European Parliament and the Council. Enhancing Cooperation on Return and Readmission as Part of a Fair, Effective and Comprehensive EU Migration Policy", 10 February 2021; EUROPEAN COUNCIL, "Special Meeting of the European Council (9 February 2023) – Conclusions", 9 February 2023, para. 20, available at: <<https://data.consilium.europa.eu/doc/document/ST-1-2023-INIT/en/pdf>>.

⁴⁰ Directive 2008/115/EC of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ L 348/98.

⁴¹ *Ibid*, art. 6.

⁴² BALDACCINI, "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive", *European Journal of Migration and Law*, 2009, p. 1 ff., p. 2 ; ACOSTA, "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)", *European Journal of Migration and Law*, 2009, p. 19 ff., p. 22.

leave were effectively returned.⁴³ This gap shows that Member States are unable to achieve this goal, either due to the absence of identity documents of the migrants, the non-compliance of the readmission agreements by third countries, the illegality of the return decision, in case of violation of human rights such as the principle of non-refoulement, or the right to health or family life, or because of procedural issues. The Commission attempted to address this gap with several instruments aimed at increasing the return rate, such as the Return handbook, before presenting a recast of the Directive in 2018.⁴⁴ The importance of this policy for the EU migration and asylum policy is particularly visible in the New Pact on Migration and Asylum where returns are streamlined in every legislative proposal of the package. Although the Commission and the European Council keep urging Member States to implement and increase the rate of returns, there is no actual evidence that this will have an impact on the irregular migration flows and that this will have an overall effect. The recast Return Directive proposal, like many other legislative proposals in the field of migration and asylum since 2015, has been presented without the required impact assessment report and thus lacks evidence-based preparatory work.⁴⁵

2.2.1. The situation of non-removable migrants

Despite the tools aimed at implementing returns from a technical perspective, EU law fails to regulate the situation and rights of non-removable migrants. Non-removability can be defined as the “absence of realistic prospect that removal can be carried away within the foreseeable future”.⁴⁶ The number of non-removable migrants is difficult to establish, but it can be estimated to be an average of 300 000 migrants per year.⁴⁷ The impossibility to return a person does not come with a valid residence permit, which puts the non-removable migrant in legal limbo. Member States’ approach to the situation of non-removable migrants differs according to their national legislations, and ranges from formal toleration, de facto toleration, granting of

⁴³ Eurostat, “Returns of Irregular Migrants - Quarterly Statistics”, March 2023, available at: <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics>.

⁴⁴ EUROPEAN COMMISSION, “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast). A Contribution from the European Commission to the Leaders’ Meeting in Salzburg on 19-20 September 2018.”, COM(2018) 634 final.

⁴⁵ MAJCHER and STRIK, “Legislating without Evidence: The Recast of the EU Return Directive”, *European Journal of Migration and Law*, 2021, p.103 ff., p. 108.

⁴⁶ LUTZ, “Non-Removable Returnees under Union Law: Status Quo and Possible Developments”, *European Journal of Migration and Law*, 2018, p.28 ff., p. 31.

⁴⁷ *Ibid*, p. 30.

residence permits or inaction.⁴⁸ This approach to the situation of non-removable migrants is usually taken on an individual basis. The consensus among Member States agreed during the European Council of 2008 in its European Pact on Immigration and Asylum, is to use only case-by-case and not generalized regularization.⁴⁹

The Commission addressed the situation of non-removable migrants with the Member States, attempting to open the debate for a possible legal harmonization on the topic. The Commission suggested offering the possibility for regularization after a certain period for “cooperating non-removable returnees”,⁵⁰ which is already a solution applied in some Member States.⁵¹ Regularization is an effective fight against irregular migration as it terminates the irregular stay of third-country nationals, and provides them with the associated rights and obligations coming with a regular status. The Commission’s proposal was aimed at establishing common discipline and thus removing potential incentives for secondary movement based on more favourable conditions of stay in other Member States, which could be a “potential stimulus for further irregular migration to the EU as a whole”.⁵² The Commission argues in its fitness check on legal migration that granting more rights, such as the right to work, to non-removable migrants who would otherwise have limited resources to sustain themselves, might contribute to alleviating the negative public perception of migration and of the EU migration policy.⁵³

Member States refused to discuss further harmonization on this topic, arguing that the increase of the return rate should be the objective and that the addition of rights for irregular migrants and possible regularization would “send a wrong policy signal and might even encourage irregular migration”.⁵⁴ The “pull factor” argument however, dismisses the social costs coming from irregularity starting from fallout to criminality, missing tax revenues,⁵⁵ and the violation of international obligations such as the best interests of children and access to healthcare. Non-removability and irregular stay in the EU put the migrants in a very vulnerable economic and social situation. This deterrence approach is the most important one promoted by the EU

⁴⁸ *Ibid*, p. 30.

⁴⁹ EUROPEAN COMMISSION, “Staff Working Document. Fitness Check on EU Legislation on Legal Migration, Part 2.”, 29 March 2019, SWD(2019) 1055 final, p. 86.

⁵⁰ *Ibid*.

⁵¹ KRALER, “Regularisation: A Misguided Option or Part and Parcel of a Comprehensive Policy Response to Irregular Migration?”, IMISCOE Working Paper, 2009, p. 16.

⁵² EUROPEAN COMMISSION, *cit. supra* note 49, p. 85.

⁵³ *Ibid*, p. 89.

⁵⁴ *Ibid*, p. 86.

⁵⁵ HINTERBERGER, “An EU Regularization Directive. An Effective Solution to the Enforcement Deficit in Returning Irregularly Staying Migrants”, *Maastricht Journal of European and Comparative Law*, 2019, p. 736 ff., p. 764.

and by the Member States, and it clashes with the values promoted by the EU, and its existing long-term needs to cope with the demographic change it is undergoing.

3. DEMOGRAPHIC CHALLENGE AND LABOUR MIGRATION

3.1. *Demographic change in EU's discourse*

Demographic change can be defined as a variation in the population's age structure due to the adaptation to living conditions.⁵⁶ Europe is currently faced with a double demographic challenge with the ageing population and the decline of fertility.⁵⁷ The only factor currently contributing to the growth of the European population is international migration. The threat of demographic change combined with international migration has been instrumentalized by populist governments and right-wing parties⁵⁸ as an incentive to increase natality among the European native population, while at the same time still enforcing a strict immigration policy.⁵⁹

Despite those attempts to spread far-right conspiracy theories, the discourse at the EU level acknowledges the necessity of migration to address the current challenges, but also the existing dilemmas in finding the most suitable way to do it.

In 2019, when Ursula von der Leyen was nominated President of the European Commission, she chose to appoint Dubravka Šuica as Vice-President for Democracy and Demography, thus inaugurating a new portfolio.⁶⁰ By appointing a Commission Vice-President to this political priority, Ursula von der Leyen shows how important

⁵⁶ LINZ and STULA, "Demographic Change in Europe - An Overview", Observatory for Sociopolitical Developments in Europe, 2010, available at: <<https://www.beobachtungsstelle-gesellschaftspolitik.de/f/4784b0430d.pdf>>.

⁵⁷ VAN NIMWEGEN and VAN DER ERF, "Europe at the Crossroads: Demographic Challenges and International Migration", *Journal of Ethnic and Migration Studies*, 2010, p. 1359 ff., p. 1359.

⁵⁸ GARRAUD, "Motion for a Resolution on the Demographic Decline, the Falling Birth Rate and Immigration in the European Union | B9-0421/2021 | European Parliament", accessed 27 April 2023, available at: <https://www.europarl.europa.eu/doceo/document/B-9-2021-0421_EN.html>; PROCACCINI, "Motion for a Resolution on an EU Strategy for Demography | B9-0060/2022 | European Parliament", accessed 27 April 2023, available at: <https://www.europarl.europa.eu/doceo/document/B-9-2022-0060_EN.html>.

⁵⁹ GOMEZ, "Poland's Plummeting Birth Rate: Why Women Think Twice about Motherhood", *Euronews*, 9 February 2023, available at: <<https://www.euronews.com/2023/02/09/polands-plummeting-birth-rate-why-are-women-thinking-twice-about-motherhood>>; "Cos'è la 'sostituzione etnica'", *Il Post*, 19 April 2023, available at <<https://www.ilpost.it/2023/04/19/sostituzione-etnica-lollobrigida/>>.

⁶⁰ VON DER LEYEN, 'Mission Letter. Dubravka Šuica Vice-President for Democracy and Demography', 1 December 2019, available at: <https://commissioners.ec.europa.eu/system/files/2022-11/mission-letter-dubravka-suica_en.pdf>.

this issue is for her Commission and that the EU is ready to take a stance and position itself to address it. Within the first 6 months of her mandate, Vice-President Šuica was tasked to produce a report to identify actions to pursue to tackle the underlying challenge of demographic change, as well as the interplay with green and digital transitions. This report, presented in June 2020,⁶¹ came at the height of the COVID-19 health crisis, at a moment where, besides health, crucial challenges had presented themselves such as the need for solidarity between generations, and the necessity to build a fairer and more equal society to recover from the crisis.

Demographic challenge impacts a variety of social and political questions, such as health care, labour market or rural living. Among other things, the report calls for the EU to act in a united and strategic way, particularly when it comes to strengthening partnerships with other regions of the world, particularly Africa given the “complementary demographic challenges”⁶² that the two continents are facing. The EU’s share of the global population is declining much faster than other regions of the world and is projected to continue decreasing in the next decades,⁶³ whereas overall, the population of Africa will continue to grow through the end of the century with the Sub-Saharan countries experiencing a faster pace than Northern Africa.⁶⁴ The report does not exclusively focus on migration and also explores alternative options. Indeed, studies show that even with a higher fertility scenario and a high immigration scenario, the ageing of the population will not be stopped, as this is a global trend. The demographic challenge needs to be addressed by a multidimensional policy response aiming at incentivizing those two factors through social and economic policies, and by increasing the current labour-force participation, particularly of women.⁶⁵ The European Commission and its Joint Research Centre dedicated several studies and communications on the topic, showing the level of concern at the EU level on an issue that will present far more challenges in the long term than irregular migration. Most of the studies and staff working documents reach the same conclusions and share the same worries. In particular, they show that the decrease in net migration during the COVID-19 pandemic did not compensate for the decline of the population, thus empirically

⁶¹ EUROPEAN COMMISSION, “Report on the Impact of Demographic Change”, 17 June 2020, available at: <https://commission.europa.eu/system/files/2020-06/demography_report_2020_n.pdf>.

⁶² *Ibid*, p. 28.

⁶³ EUROPEAN COMMISSION, “Commission Staff Working Document. The Impact of Demographic Change – in a Changing Environment”, 17 January 2023, SWD(2023) 21 final, p. 10.

⁶⁴ UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *cit. supra* note 1, p. 5.

⁶⁵ EUROPEAN COMMISSION, JOINT RESEARCH CENTRE, *cit. supra* note 5, p. 25.

demonstrating how much Europe relies on migration for its population growth.⁶⁶

Demographic challenge has been repeatedly addressed by the Commission in the last few years, particularly in relation to migration.⁶⁷ In its communications on migration, the Commission insists on the need to plan beyond the emergencies and the crises requiring an immediate policy response. One of the long-term priorities is to keep the EU an attractive destination for migrants,⁶⁸ to contribute to addressing demographic challenges and skills shortages,⁶⁹ and to “keep these talents”.⁷⁰ As Eurostat predicts that by 2050 the EU working age population aged 20-64 will decline by 10%,⁷¹ one of the most alarming and current consequences of demographic change is the workforce shortage in some critical sectors of the labour market.⁷²

3.2. *Labour shortage and sectors more at risk*

Whether it is because of emigration, lower fertility, or an ageing population, demographic change is resulting in the decline of the workforce. Studies find that in 2020, a total of 28 occupations were classified as shortages, and 19 of them as shortages of high magnitude.⁷³ Among those, healthcare-related occupations and software professionals were the skills groups lacking more workers, with construction and engineering as the other main categories reporting shortages. Those shortages are likely to increase or change with the opening of new job areas to address climate change and green objectives, particularly in the construction field. 56% of those occupations require medium-skilled workers, which is more than the EU average for all occupations, on the contrary, the share of highly qualified workers and lowly qualified workers needed is below the EU average for all occupations. Half of the listed occupations only require craft-level skills, thus explaining the low

⁶⁶ EUROPEAN COMMISSION, *cit. supra* note 63, p. 4.

⁶⁷ EUROPEAN COMMISSION, “Communication to the European Parliament and the Council. Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe.”, 6 April 2016, COM(2016) 197 final, p. 14.

⁶⁸ EUROPEAN COMMISSION, *cit. supra* note 28, p. 14.

⁶⁹ EUROPEAN COMMISSION, *cit. supra* note 67, p. 14.

⁷⁰ EUROPEAN COMMISSION, “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience”, 1 July 2020, COM(2020) 274 final.

⁷¹ Eurostat, *cit. supra* note 3.

⁷² STEHRER and LEITNER, “Demographic Challenges for Labour Supply and Growth”, The Vienna Institute for International Economic Studies, March 2019.

⁷³ EUROPEAN LABOUR AUTHORITY, *Report on Labour Shortages and Surpluses: November 2021*. Publications Office, Luxembourg, 2021, p. 8, available at: <<https://data.europa.eu/doi/10.2883/746322>>.

need for workers with a high level of education.⁷⁴

Apart from international migration, several strategies can be implemented to address labour shortages, such as the promotion of higher labour force participation by addressing gender disparity to favour the inclusion of women in the labour market. Automation of tasks, artificial intelligence and digitalization in general, will also have a great effect on the labour market. They need however to be implemented in conjunction with the opening of labour to migrants.⁷⁵ All EU Member States do not report shortages in the same labour areas or the same needs in terms of workers. Member States with a higher share of migrant workers reported fewer shortages in the most critical skills groups than those with low shares of migrants working, hence suggesting that migration indeed contributes to alleviating those shortages. In fact, among the Member States that did not report shortages in healthcare, software professionals, construction and engineering, analyses show that one in three migrants were working in one of those categories, whereas the employed populations including natives and migrants reported one in four working in those skills groups.⁷⁶

The use of migration to address labour shortage is a practice implemented for a long time already. Legal migration, including labour migration, is a shared competence between the EU and the Member States and its legal basis is laid down in Article 79(2) of the Treaty on the Functioning of the European Union establishing that the EU can establish the conditions and standards of admission of third-country nationals. The legislative tools for labour migration at the EU level have a sectoral approach and focus on highly-skilled workers, with the Blue Card Directive, the Researchers' Directive, or the intra-corporate transfer Directive aiming at making the EU more competitive on the global scene,⁷⁷ while the Single Permit Directive guarantees a framework of rights for migrant workers already admitted in a Member State. The EU is however currently suffering from a lack of low to medium-skilled workers, which are barely covered by the EU economic and labour migration policies. The only EU legislative instrument that could cover these categories of workers is the Seasonal Workers Directive for a few sectors, which however does not allow the third-country nationals to extend their stay and remain in the EU to have a permanent position in the EU labour market.

This gap is addressed at the national level, where Member States resort to their migration channels to fill in the demands. The procedures and policy approaches to meet labour demands through migration are diverse, resulting in a fragmented

⁷⁴ *Ibid.*

⁷⁵ EUROPEAN COMMISSION, JOINT RESEARCH CENTRE, *cit. supra* note 5, p.37.

⁷⁶ EUROPEAN LABOUR AUTHORITY, *cit. supra* note 73, p. 25.

⁷⁷ EUROPEAN COMMISSION, *cit. supra* note 67, p. 17.

system.⁷⁸ Most EU Member States issue working permits, usually temporary for different areas of the labour market, and often non-renewable and seasonal, while some others such as Austria, Greece, Spain and Italy apply quota systems.⁷⁹

There is a political consensus on the benefits of labour migration to address the challenges of demographic changes, but Member States and business organisations have a preference for keeping the regulation of the conditions of admission of low to medium-skilled workers at the national level. However, national migration channels are often not enough to fill the demands, and visas and permits are limited, resulting in a mismatch between the employers' demands and the legal reality, which opens the door to informal employment.⁸⁰

3.2.1. *Labour shortage and the informal economy*

As mentioned before, the majority of irregular migrants who are ordered to leave will not be returned, either because of legal proceedings or because of the non-enforcement of the agreement by third countries. The failure of the return procedure does not account for a residence permit and the non-removable migrants often fall back into irregularity but are often unable to access regular residence in the EU, even though they are known by the public authorities and thus tolerated on the territory.⁸¹ This group is only a small share of the irregular migrant population, forced to turn to the informal economy and informal labour market, which becomes a social safety net.⁸² Data estimates that there are 3.9 to 4.8 million migrants irregularly staying in the EU.⁸³ We can safely assume that in the absence of any type of social protection, most of them work to sustain themselves, and the risk of deportation makes them even more vulnerable to abuse by employers.⁸⁴ To this category, we can also add migrants who are regularly staying in the EU, but whose migration status does not entail the right to work or include limitation to this right, thus forcing the migrant to

⁷⁸ EUROPEAN COMMISSION, *cit. supra* note 49, p. 59.

⁷⁹ *Ibid.*

⁸⁰ DÜVELL, *cit. supra* note 33, p. 293.

⁸¹ , "Irregular Migration and Irregular Work: A Chicken and Egg Dilemma", in SPENCER AND TRIANDAFYLIDOU (eds), *Migrants with Irregular Status in Europe*, Cham: Springer International Publishing, Switzerland, 2020, p. 139 ff., pp. 145-147.

⁸² KELMANSON ET AL., "Explaining the Shadow Economy in Europe: Size, Causes and Policy Options", International Monetary Fund, November 2019, WP/19/278.

⁸³ GREENWOOD, *cit. supra* note 37.

⁸⁴ FOX-RUHS and RUHS, *cit. supra* note 13, p. 57.

turn to the informal economy thus risking falling into irregularity.⁸⁵

The informal economy is a concept encompassing both the informal sector and informal employment. In its resolution on Decent work and the informal economy, the International Labour Organisation defines it as “all economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements.”⁸⁶ In this paper, informal employment concerns only lawful paid activities which have not been declared to public authorities. People who enter the informal economy, native citizens and migrants regularly or irregularly residing, usually do so to survive. In this case, migrants who find themselves in a situation of irregularity are bound to rely on informal employment.

Informal economy exists in every country, often in plain daylight and with full knowledge of the governments and public authorities.⁸⁷ The demand for a cheap and flexible workforce is usually not fulfilled by the native population and third-country nationals have limited access to it because of the restrictive migration and labour policies. The rate of employment of irregular migrants in the informal economy depends on the interplay between migration flows and compliance with norms and irregular activities.⁸⁸ Within the EU, most irregular migrants are concentrated in the Southern European countries, which are frontline Member States and thus receive more irregular migration flows. Those countries have also a higher percentage of undeclared work than the EU average.⁸⁹ However, with the ageing of the population, the low birth rate and the lack of accessible legal migration channels, the demand is increasing in Northern European Member States.⁹⁰

The sectors in which there is an overrepresentation of the informal economy are the ones most affected by labour shortages, particularly in the care and cleaning sector and in seasonal and intensive labour. In most cases, shortages can be found in sectors that are not considered attractive any longer to the domestic population⁹¹ such as

⁸⁵ TRIANDAFYLLIDOU and BARTOLINI, “Understanding Irregularity”, in SPENCER AND TRIANDAFYLLIDOU (eds), *Migrants with Irregular Status in Europe*, Cham: Springer International Publishing, Switzerland, 2020, p.11 ff., p. 17.

⁸⁶ INTERNATIONAL LABOUR ORGANIZATION, “Resolution Concerning Decent Work and the Informal Economy Adopted by the General Conference in Its 90th Session.”, 2002, para. 3.

⁸⁷ AGGARWAL, LA CHINA, and VACULOVA, “Irregular Migration, Refugees and Informal Labour Markets in the EU: The Rise of European Sweatshops?”, European Institute for Asian Studies, available at: <https://www.eias.org/wp-content/uploads/2016/04/Irregular_Migration_Website-1.pdf>, p. 1.

⁸⁸ TRIANDAFYLLIDOU and BARTOLINI, *cit. supra* note 81, p. 148.

⁸⁹ EUROPEAN COMMISSION. DIRECTORATE GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND INCLUSION., *An Evaluation of the Scale of Undeclared Work in the European Union and Its Structural Determinants: Estimates Using the Labour Input Method*, Luxembourg, Publications Office, 2017, p. 13, available at: <<https://data.europa.eu/doi/10.2767/98169>>.

⁹⁰ AGGARWAL, LA CHINA, and VACULOVA, *cit. supra* note 87, p. 8.

⁹¹ TRIANDAFYLLIDOU and BARTOLINI, *cit. supra* note 81, p. 158.

construction, hospitality (hotels and restaurants), retail, private cleaning and security industry, agriculture, transportation, and domestic work.⁹² The workforce for informal labour is very big among irregular migrants, but also among asylum seekers pending the assessment of their applications for international protection, or refugees who were just recognised as such and obtained their residency permit. Some employers resort to informal employment of migrants because of the lack of workers and labour migration channels, and some others, according to research, have a preference to recruit migrants instead of regular workers to have more control over them.⁹³

Among the categories listed above, the care sector, agriculture and construction rely greatly on the irregular employment of irregular migrant workers. This phenomenon is for example particularly true in the southern European Member States, but also elsewhere in Europe, where a proper “parallel welfare system” with migrant women employed in the domestic care sector exists and is tolerated by the public authorities.⁹⁴ Labour shortages in the care sector are now the object of a new European Care Strategy adopted by the Commission in September 2022, also addressing the situation of migrant care workers, including those working irregularly.⁹⁵ Their status is very precarious and irregular migrant workers do not benefit from the socio-economic rights coming with a regular stay and working contract, such as family reunification, social security or decent living wage and are at risk of ending into exploitation. This situation makes them even more vulnerable to abuse from employers, particularly domestic workers.

Those workers are covered by the Employer Sanction Directive,⁹⁶ and their rights are protected by the core national constitutional traditions and dispositions of the European Convention on Human Rights, and the Charter of Fundamental Rights,

⁹² AGGARWAL, LA CHINA, and VACULOVA, *cit. supra* note 87, p. 7.

⁹³ FOX-RUHS and RUHS, *cit. supra* note 13, p. 59.

⁹⁴ AMBROSINI, “From “Illegality” to Tolerance and Beyond: Irregular Immigration as a Selective and Dynamic Process”, *International Migration*, 2016, p.144 ff., p. 147.

⁹⁵ EUROPEAN COMMISSION, “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy”, 7 September 2022, COM(2022) 440 final, p. 14.

⁹⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168.

particularly in cases of trafficking of human beings⁹⁷ and access to justice.⁹⁸ Protection and implementation gaps of the Employers' Sanctions Directive⁹⁹ are however barely addressed both at the European and national levels, and the focus remains on detention and deportation rather than access to rights, regularization and recognition.¹⁰⁰ There is a need to address the presence of irregular migrants, and their informal contribution to sectors in need, by shifting to a rights-based approach and offering opportunities for those informal sectors to access formality. When mentioning the demographic challenge ahead of Europe, the Commission recognizes that the long-term priority for the EU is to attract the workers needed,¹⁰¹ but very little is done to acknowledge the workers that are already present in the EU. In its resolution on reversing demographic trends, the European Parliament called for Member States to ensure decent working and living conditions for seasonal workers who were filling shortages in certain areas.¹⁰² The political attention needs to shift to the categories of labour migration which are currently needed such as low and medium-skilled migration, but also facilitating migrants' entrepreneurship to contribute to social inclusion and alternative ways to access the labour market.¹⁰³ The early integration of migrants into the labour market is also part of the objectives of migration policy, particularly its integration angle, and the EU skills policy, aimed at addressing skills gaps and mismatches in the EU job market.¹⁰⁴

Despite the evidence, those objectives are barely translated into policy-making at the EU level because of the unwillingness of the Member States to harmonize the labour migration framework.

⁹⁷ Charter of Fundamental Rights of the European Union (14 December 2007, entry into force 1 December 2009) OJ C 326/1 [CFREU], Art. 5; European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR], Art. 4 ; see also European Court of Human Rights, *Chowdury and others v. Greece*, Application no. 21884/15, Judgement of 30 March 2017.

⁹⁸ CFREU, *cit. supra* note 97, art. 47.

⁹⁹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "Protecting migrants in an irregular situation from labour exploitation. Role of the Employers Sanctions Directive", 2021, available at: <http://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf> .

¹⁰⁰ FOX-RUHS and RUHS, *cit. supra* note 13, p. 73 ; "Employers' Sanctions: Will the EU Finally Take Steps to Protect Migrant Workers?", *PICUM* (blog), 24 June 2021, available at: <<https://picum.org/employers-sanctions-will-the-eu-finally-take-steps-to-protect-migrant-workers/>> .

¹⁰¹ EUROPEAN COMMISSION, *cit. supra* note 28, p. 14.

¹⁰² EUROPEAN PARLIAMENT, "Resolution on Reversing Demographic Trends in EU Regions Using Cohesion Policy Instruments", 20 May 2021, 2020/2039(INI), para. 7.

¹⁰³ EUROPEAN COMMISSION, *cit. supra* note 49, p. 172.

¹⁰⁴ EUROPEAN COMMISSION, *cit. supra* note 67, p. 17.

4. REFORM OF THE EU MIGRATION POLICY: BIG AMBITIONS AND DISAPPOINTING PROPOSALS

4.1. The New Pact on Migration and Asylum: starting point for a Reform of the EU migration policy

Most of the EU legislation in the field of migration has been adopted before the 2015 refugee crisis. Following this, there was an overall political consensus on the need to recast the EU migration acquis to address the shortcomings that led to the 2015 crisis, both to prevent irregular migration and to create new legal migration pathways. Irregular migration policies have been included in the reforms of the Common European Asylum System in 2016 as well as in the New Pact on Migration and Asylum of 2020, and a recast of the Return Directive was presented in 2018. When it comes to legal migration, a revised directive on the conditions of entry of third-country nationals for the purpose of activities such as research and studies was adopted in 2016, and the reform of the Blue Card directive was adopted following lengthy negotiations in 2021.

The legislative proposals of the New Pact on Migration and Asylum have a comprehensive approach to tackle both the fight against irregular migration and asylum. It includes proposals for a Regulation on asylum and migration management,¹⁰⁵ a Regulation introducing a screening of third-country nationals at the external borders,¹⁰⁶ an Asylum Procedures Regulation,¹⁰⁷ an amended Eurodac

¹⁰⁵ EUROPEAN COMMISSION, “Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]”, 23 September 2020, COM(2020) 610 final.

¹⁰⁶ EUROPEAN COMMISSION, “Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817”, 23 September 2020, COM(2020) 612 final.

¹⁰⁷ EUROPEAN COMMISSION, “Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU”, 23 September 2020, COM(2020) 611 final.

Regulation,¹⁰⁸ and a Crisis Regulation.¹⁰⁹ One of the main features of the Pact instruments is to identify and separate irregular migrants from asylum seekers at a very early stage,¹¹⁰ and channel those two categories into the dedicated procedures, either return for irregular migrants,¹¹¹ or an international protection application procedure.¹¹² Returns are a central policy element of the Pact, and for this reason, the Recast Return Directive, which links asylum and return is crucial to the implementation of some of the instruments, particularly the Asylum Procedure Regulation.¹¹³ The Communication accompanying the legislative package also emphasizes an increasing externalisation of the migration policy to tackle the root causes of migration and to prevent the departures of origin countries.¹¹⁴

In the Communication accompanying the New Pact on Migration and Asylum, the Commission also addressed legal migration among many other policy elements by saying that “more could be done to increase the impact of the EU legal migration framework on Europe’s demographic and migration challenges,”¹¹⁵ and announcing that it would present new measures to overcome the current shortcomings in the EU legal migration system. Among the objectives laid out in the Communication, the Commission announced a revision of the Long-Term Residents Directive providing more rights for third-country nationals to remain in the EU to work and move around freely. Besides this, the Commission presents elements for the recast of the Single Permit Directive. The Single Permit Directive, adopted in 2011, lays down a simplified application procedure for issuing a single permit for third-country nationals to reside in the EU territory for the purpose of work and provides rights to

¹⁰⁸ EUROPEAN COMMISSION, “Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818”, 23 September 2020, COM(2020) 614 final.

¹⁰⁹ EUROPEAN COMMISSION, “Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum”, 23 September 2020, COM/2020/613 final.

¹¹⁰ EUROPEAN COMMISSION, *cit. supra* note 108, article 14.

¹¹¹ EUROPEAN COMMISSION, *cit. supra* note 109, article 41a.

¹¹² EUROPEAN COMMISSION, *cit. supra* note 109, article 41.

¹¹³ EUROPEAN COMMISSION, “Communication on New Pact on Asylum and Migration”, 23 September 2020, COM(2020) 609 final, p. 9.

¹¹⁴ *Ibid*, p. 18.

¹¹⁵ *Ibid*, p. 25.

third-country nationals admitted through this permit.¹¹⁶ The Communication on the New Pact announced significant changes for the scope of the directive to include admission and residence conditions including for low and medium-skilled workers, which would have been a major reform.¹¹⁷ Besides those mentions of potential legislative reforms, an operational part in collaboration with third countries was announced with an EU-Talent Pool for third-country nationals to express their interests in migrating to the EU, and for migration authorities and potential employers to identify them based on existing needs.

4.1.1. A permanent focus on the fight against irregular migration

The New Pact on Migration and Asylum was supposedly a “fresh start” for the EU migration and asylum policy. President von der Leyen had announced in her 2020 State of the Union address, that the approach to migration would now be “human and humane”,¹¹⁸ by emphasising the humanitarian discourse and insisting on the issue of solidarity between Member States. The focus on the New Pact remains however the better management of external borders and returns, and one of the solidarity mechanisms proposed by the Commission is in fact “return sponsorships”, as part of the new Asylum and Migration Management Regulation. Under this proposed mechanism, a Member State commits to return irregular migrants from another Member State, directly from this Member State. While this proposal is unlikely to work in practice,¹¹⁹ return procedures are included in every legislative proposal of the Pact.¹²⁰

The European Commission presented a recast of the Return Directive in 2018 aiming at increasing the effectiveness of returns and increasing the return rates.¹²¹ The proposal linked asylum and returns by introducing a mandatory return border procedure and by requiring Member States to issue a common administrative document coupling the negative decision for the asylum application and the return

¹¹⁶ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a Single Application Procedure for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third-Country Workers Legally Residing in a Member State, Art. 1.

¹¹⁷ EUROPEAN COMMISSION, *cit. supra* note 113, p. 26.

¹¹⁸ EUROPEAN COMMISSION, “State of the Union Address 2020”, September 2020, p. 20, available at: <https://state-of-the-union.ec.europa.eu/system/files/2022-08/soteu_2020_en.pdf>.

¹¹⁹ SUNDBERG DIEZ, TRAUNER, and DE SOMER, “EU Return Sponsorships: High Stakes, Low Gains?”, *European Journal of Migration and Law*, 2021, p. 219 ff.

¹²⁰ MORARU, “The New Design of the EU’s Return System under the Pact on Asylum and Migration – EU Immigration and Asylum Law and Policy”, *EUmigrationlawblog* (blog), 14 January 2021, available at: <<https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/>>.

¹²¹ EUROPEAN COMMISSION, *cit. supra* note 44, p. 5.

decision.¹²² Returns are perceived as being on a continuum after the registration of asylum seekers.¹²³ The New Pact takes up this idea. The Screening Regulation¹²⁴ and the Asylum Procedures Regulation (“APR”) increase this common approach to asylum and returns and introduce a fiction of non-entry,¹²⁵ to implement the procedures before the regular entry of the migrant on the territory of the Member State. The Screening Regulation introduces a single procedure aiming at differentiating between potential asylum seekers and irregular migrants more efficiently, while the APR introduces a joint faster asylum and return procedure.¹²⁶ Among asylum seekers, the APR distinguishes those who could receive immediate protection and those who, based on a series of criteria such as coming from a safe country of origin or a country with a low recognition rate,¹²⁷ have to go through an accelerated examination and a border procedure.¹²⁸ Those identified as irregular migrants, or whose asylum applications are rejected in the pre-entry procedures are then supposedly immediately returned to their country of origin or a country of transit.¹²⁹

Far from being more humane, the New Pact blurs the distinction between asylum seekers and irregular migrants by putting them in the same categories¹³⁰ and seems unlikely to be implemented without the use of detention. This approach, as well as the fast-track procedures, might affect the rights and procedural guarantees of migrants and asylum seekers and risk enshrining in the EU legislation the shift from a rights-based to a securitized approach, which is already operationalized in practice, within the EU asylum law. The complexity of the procedures shows the extent to which the EU is going to fight irregular migration. Given the low return rate, and the refusal to address the situation of non-removable migrants, the New Pact risks creating even more irregular migrants, and undermining the fundamental rights of asylum

¹²² MORARU, “EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?”, in TSOURDI AND DE BUYCKER (eds.), *Research Handbook on EU Migration and Asylum Law*, Cheltenham, UK, 2022, p. 435 ff., p. 442.

¹²³ JAKULEVICIENE, “Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies? “, in THYM AND ODYSSEUS NETWORK (eds.), *Reforming the Common European Asylum System*, Baden-Baden, Germany, 2022, p.81 ff., p. 82.

¹²⁴ EUROPEAN COMMISSION, *cit. supra* note 108, article 14.

¹²⁵ EUROPEAN COMMISSION, *cit. supra* note 108, article 4.

¹²⁶ EUROPEAN COMMISSION, *cit. supra* note 109, article 41 and 41a.

¹²⁷ EUROPEAN COMMISSION, *cit. supra* note 109, article 40(1)(i).

¹²⁸ EUROPEAN COMMISSION, *cit. supra* note 109, article 41(2)(b).

¹²⁹ EUROPEAN COMMISSION, *cit. supra* note 109, article 41a.

¹³⁰ MOUZOURAKIS, “More Laws, Less Law: The European Union’s New Pact on Migration and Asylum and the Fragmentation of ‘Asylum Seeker’ Status”, *European Law Journal* 26,2020, p.1 ff., p. 3.

seekers,¹³¹ as the hotspot approach did.¹³² This focus on irregular migration is even more visible when it comes to the legal migration reform proposals, which are much less ambitious than what was announced.

4.1.2. *A shy reform of the labour migration acquis*

In April 2022, the Commission presented its proposals to reform the EU labour migration law, as part of the New Pact. The “Skills and Talent”¹³³ package includes proposals for the revision of the Single Permit Directive and of the Long-Term Residents Directive. The Single Permit Directive reform focuses on streamlining the single permit procedure and making it more effective and aims at making the status more attractive by allowing applications from third countries. This proposal also lays down better protection from labour exploitation. However, unlike what had been announced in the communication on the New Pact, it does not look into admission conditions of low and medium-skilled workers. Initially, the Commission,¹³⁴ as well as the Parliament,¹³⁵ perceived that there was a need to include admission conditions of low- and medium-skilled workers in the EU legal migration acquis and that the fragmentation of the national admission systems was an obstacle to attracting potential migrants and protecting their rights equally across the EU. This option was however discarded because of the differing views of other stakeholders, mainly arguing that establishing a level-playing field reconciling the different national systems would be too complicated and that the admission conditions of low and medium-skilled workers were sufficiently addressed at the national level. Acknowledging that migrant workers are more likely to be subject to labour exploitation, the Single-Permit Directive proposal provides more safeguards from labour exploitation and ensures that the permit is not linked to one employer to prevent migrants from falling into irregularity too easily in case of unemployment. This is however not sufficient, as there should be a possibility to apply for a permit

¹³¹ JAKULEVICIENE, *cit. supra* note 123, p. 87.

¹³² SCIURBA, “Hotspot System as a New Device of Clandestinisisation: View from Sicily”, *Opendemocracy.Net*, 2016.

¹³³ EUROPEAN COMMISSION, *cit. supra* note 11.

¹³⁴ EUROPEAN COMMISSION, “Staff Working Document. Impact Assessment Report Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on a Single Application Procedure for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common Set of Rights for Third-Country Workers Legally Residing in a Member State (Recast)”, 27 April 2022, SWD(2022) 656 final, p. 5.

¹³⁵ EUROPEAN PARLIAMENT, “Resolution on New Avenues for Legal Labour Migration”, 2020/2010(INI), para. 19.

from within the EU, even for undocumented migrants, wishing to regularize their situation.¹³⁶ Although it does provide more extensive rights for beneficiaries, it is unlikely that this reform will contribute to the attraction of migrants to the EU.

The labour migration acquis reform also includes an operational part. Within the “Skills and Talent” package, the Commission presented an external pillar with the Talent Partnerships. Talent Partnerships are cooperation frameworks between the EU, Member States and third countries concluded “to boost international labour mobility and development of talent in a mutually beneficial and circular way”¹³⁷ for all skill levels. They are supposed to be a comprehensive cooperation framework encompassing all areas of migration management, including return and readmission, and are as such designed to be tools to contribute to the fight against irregular migration. Talent partnerships are presented as a change compared to previous cooperation with third countries, as they aim at developing skills both in the country of origin, and to attract labour migration, thus contributing to local development and creating legal migration channels. Legal migration schemes were however already included in previously adopted Mobility Partnerships and Common Agendas on Migration and Mobility contained in the Global Approach to Migration and Mobility,¹³⁸ and it is unlikely that the Talent Partnerships will shift the political orientations.¹³⁹ Given the current EU political trends, the focus of the cooperation framework will likely be irregular migration policies, and in fact, there are growing concerns that those new agreements will include a conditionality component, and reward the third countries enforcing and complying with return and readmission and border control policies.¹⁴⁰

5. CONCLUSION

Scholars, scientists and international organisations are alerting about the challenge of changing demography for our societies, particularly for our European

¹³⁶ PICUM, “Designing Labour Migration Policies to Promote Decent Work. Policy Recommendations”, 2022, p. 3, available at: <https://picum.org/wp-content/uploads/2022/12/Designing-labour-migration-policies-to-promote-decent-work_Policy-recommendations_EN.pdf>.

¹³⁷ EUROPEAN COMMISSION, *cit. supra* note 11, p. 10.

¹³⁸ HAMPSHIRE, “Speaking with One Voice? The European Union’s Global Approach to Migration and Mobility and the Limits of International Migration Cooperation”, *Journal of Ethnic and Migration Studies*, 2016, p. 571 ff., p. 578.

¹³⁹ GARCÍA ANDRADE, ‘EU Cooperation on Migration with Partner Countries within the New Pact: New Instruments for a New Paradigm? —’, *EUMigrationlawblog*, 8 December 2020, available at: <<https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/>>.

¹⁴⁰ STRIK, “The Global Approach to Migration and Mobility”, *Groningen Journal of International Law* 5, no. 2, 2017, p.310 ff., p. 317.

welfare States' systems, while at the same time acknowledging that international migration is currently the only factor preventing the shrinking of the EU's population. Despite the Commission's statements on the necessity to address it, the translation into legislative and operational policy proposals does not seem to follow. The fight against irregular migration remains the Member States' political priority. This can be explained by the fact that anti-immigration voters are more vocal, care more about the topics, and are thus more sensitive to sensational and symbolic policies, even though they do not seem to have proper effects. At the national level, the contrasting discourse is even starker, with Member States returning irregular migrants while organizing recruiting campaigns in third countries to fill in labour shortages,¹⁴¹ thus emphasizing the dichotomy of the situation.

The Commission does not seem ready to take the lead and shift the political agenda, and despite announcing future policies on care workers, youth mobility, or attracting third-country entrepreneurs or start-up founders, the policy approach never seems to be ambitious enough for the challenge ahead. On the contrary, the instruments proposed feed into this vicious circle by promoting legal migration policy tools aimed at reducing irregular migration, even though there is little evidence that the opening of legal migration channels would have an effect in this sense.¹⁴² This externalisation approach is counter-productive, as collaboration with third countries creates unequal partnerships and risks harming the human rights of migrants, at the expense of the rights-based approach promoted by the EU.

Migration is a historical human habit. For millennia, people have moved in search of a better life, a safer environment, or to avoid conflicts, proving that migrants' agency is stronger than restrictive policies. Future challenges ahead, including conflicts and climate change will, and already do, have an inevitable impact on migratory flows. To face those challenges, the EU should open up safe and legal migratory routes and channels and learn to live with migration,¹⁴³ to ensure a right-based approach for migrants, and think of the benefits of international migration, rather than preventing it, thus inevitably creating irregularity.

¹⁴¹ WALLIS, "Germany Looks to Migrants and Foreigners to Fill Employment Opportunities", InfoMigrants, 30 January 2023, available at: <<https://www.infomigrants.net/en/post/46371/germany-looks-to-migrants-and-foreigners-to-fill-employment-opportunities>>.

¹⁴² EUROPEAN COMMISSION, *cit. supra* note 49, p. 88.

¹⁴³ MCNEVIN, "Learning to live with irregular migration: towards a more ambitious debate on the politics of 'the problem'", *Citizenship Studies*, 2017, p. 255 ff., p. 265.

3. TRAFFICKING FOR THE PURPOSE OF LABOUR EXPLOITATION: TESTING THE NEW EU STRATEGY IN THE CONTEXT OF THE POLY- CRISIS

Vittorio Cama

SUMMARY: 1. Introduction; – 2. States' Positive Obligations to Address Human Trafficking; – 2.1. The Universal Framework; – 2.1. Victim Protection and Prevention Obligations; – 2.2. The European Framework; – 3. Organized Crime: a Complex Theoretical and Legal Concept; – 3.1. International and European Instruments to Tackle Organized Crime; – 4. Human Trafficking in the Context of the Poly-crisis; – 4.1. Human Trafficking in Times of Pandemic and Climate Change; – 4.2. Human Trafficking in a Context of Armed Conflict; – 5. The EU Response to Trafficking in the Context of the Conflict in Ukraine; – 5.1. The Anti-Trafficking Plan to Protect People Fleeing the War in Ukraine; – 5.1.1. Exchange of Information and Judicial Cooperation; – 5.1.2. Information Dissemination and Prevention Measures; – 5.1.3. A First Assessment; – 5.2. The Activation of the Temporary Protection Directive: Praise and Criticisms; – 6. Conclusions.

1. INTRODUCTION

The 2022 Global Report on Trafficking in Persons¹ produced by UNODC highlights how the criminal justice response to the phenomenon is still to be considered insufficient. Not differently, Eurojust highlights how, from a European perspective,

¹ UNODC, Global Report on Trafficking in Persons 2022, United Nations publication, Sales no.: E.23.IV.1, available at: <<https://www.unodc.org/unodc/data-and-analysis/glotip.html>>.

the level of prosecutions and convictions for crimes related to human trafficking, and in particular those aimed at labour exploitation, remains far from satisfactory.²

From a structural perspective, the lack of efficiency in the response against the phenomenon is further aggravated by two factors: the exploitation of trafficking by criminal organizations and the effect of crises of various kinds.

As concerns the first factor, it bears noting that trafficking in human beings is rarely fuelled by the action of small groups, but, more often, and more violently, by large criminal organizations that have extensive territorial control.

Regarding the second aspect, it has been repeatedly emphasized how the phenomenon is further aggravated by conflict-related crises. As far as Europe is concerned, the 2022 invasion of Ukraine, adding to the vulnerabilities that have arisen since the beginning of the conflict in 2014, is likely to cause a noticeable increase in the number of victims of human trafficking, beyond a humanitarian crisis.³ In a context known as poly-crisis,⁴ further crises, such as the Covid-19 pandemic and climate change, jointly multiply the exacerbating effects of the conflict on pre-existing vulnerabilities.

This contribution aims, therefore, to offer an analysis of current international and EU law instruments related to human trafficking for the purpose of labour exploitation with a special focus on criminal justice-related responses. Firstly, it will investigate the process of consolidation of positive obligations arising in this field, from universal instruments such as the United Convention against Transnational Organized Crime of 2000 (“Palermo Convention”)⁵ and the Protocol to Prevent, Suppress and Punish

² See Eurojust, Focus group of prosecutors specialised in human trafficking meets for the first time, Press release, 14 June 2022, available at: <<https://www.eurojust.europa.eu/news/focus-group-prosecutors-specialised-human-trafficking-meets-first-time>>; More in general, see Eurojust, Report on Trafficking in Human Beings, February 2021, available at: <https://www.eurojust.europa.eu/sites/default/files/assets/2021_02_16_thb_casework_report.pdf>.

³ See, for instance, UNODC, Conflict in Ukraine: Key Evidence on Risks of Trafficking in Persons and Smuggling of Migrants, available at: <https://www.unodc.org/documents/data-and-analysis/tip/Conflict_Ukraine_TIP_2022.pdf>; See also European Solidarity Platform, A Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine, 11 May 2022, available at <https://home-affairs.ec.europa.eu/system/files/2022-05/Anti-Trafficking%20Plan_en.pdf>.

⁴ The notion of poly-crisis is due to Morin and Kern, who describe it as a set of “interwoven and overlapping crises” in a situation in which “[t]here is no single vital problem, but many vital problems, and it is this complex intersolidarity of problems, antagonisms, crises, uncontrolled processes, and the general crisis of the planet that constitutes the number one vital problem.” See MORIN and KERN, *Homeland Earth: a Manifesto for the New Millennium*. Cresskill, New Jersey, 1999, pp. 73-74.

⁵ United Nations Convention against Transnational Organized Crime, (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 190 [Palermo Convention].

Trafficking in Persons Especially Women and Children (“Palermo Protocol”),⁶ to regional instruments, such as the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (“CoE Anti-Trafficking Convention”)⁷ and the 2011 Directive on preventing and combating trafficking in human beings and protecting its victims (“Anti-Trafficking Directive”)⁸ (Section 2). Next, it will examine the difficulties encountered in identifying a notion of organized crime on a theoretical and legal level (Section 3). Subsequently, an overview of the relationship between multiple crises and human trafficking will be offered (Section 4).

The contribution will not, however, be limited to a state-of-the-art analysis but aims at testing the innovativeness and effectiveness of the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025,⁹ which promises to provide an effective response to the issues outlined through a multifaceted and not only criminal justice-based approach (Section 5).

In particular, it will investigate the ability of the newly implemented measures to respond to the two aforementioned structural elements of the phenomenon. Regarding links with conflict situations, the innovations carried out by the Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine (“Anti-Trafficking Plan”),¹⁰ prepared by the EU Anti-Trafficking Coordinator, are to be critically assessed. At the same time, as far as the influence of organized crime is concerned, the new EU Strategy to Tackle Organised Crime 2021-2025,¹¹ which well highlights the links with human trafficking, becomes a relevant object of scrutiny. The conclusions address whether these advances constitute mere *flatus vocis* or symptoms of a real change in

⁶ 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].

⁷ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197 (adopted 16 May 2005, entered into force 1 February 2008) [CoE Anti-Trafficking Convention].

⁸ 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 [Anti-Trafficking Directive].

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combating Trafficking in Human Beings 2021- 2025, COM/2021/171 final [EU Strategy on Combating Trafficking in Human Beings].

¹⁰ European Solidarity Platform, A Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine, 11 May 2022 [Anti-Trafficking Plan], available at <https://home-affairs.ec.europa.eu/system/files/2022-05/Anti-Trafficking%20Plan_en.pdf>.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to Tackle Organised Crime 2021-2025, COM/2021/170 final [EU Strategy to Tackle Organised Crime].

European strategy to tackle human trafficking in the context of the current poly-crisis.

2. STATES' POSITIVE OBLIGATIONS TO ADDRESS HUMAN TRAFFICKING

Before entering more deeply into the subject of measures adopted by the EU to combat trafficking in human beings in the context of the Ukraine war, it is necessary to proceed to a - as far as possible - concise analysis of positive obligations incumbent on States in this regard in the context of the universal and regional framework.¹²

2.1. *The Universal Framework*

The international community's attention to trafficking bears witness to the succession of different approaches.

During the slow early stages of defining human trafficking and the refinement of instruments intended to combat it, the prevailing idea supported the thesis according to which the phenomenon essentially concerned the sexual exploitation of women.¹³

Since the 1990s, and more specifically since the 1994 World Ministerial Conference on Organized Transnational Crime in Naples, a new perspective that emphasizes the relationship between human trafficking and transnational organized crime began to emerge.¹⁴ This approach reached its landfall with the Palermo Convention and the supplementing Protocol which represented a real turning point for the international discourse on human trafficking.¹⁵ On the one hand, the new criminal justice approach to human trafficking had the merit to accentuate its connection with organized crime. On the other hand, it seems to have indissolubly and often imprecisely linked the instruments to combat the phenomenon with the instruments and methodology of transnational criminal law.¹⁶

¹² For a concise analysis, see ANNONI, "Gli obblighi internazionali in materia di tratta degli esseri umani", in FORLATI (ed.), *La lotta alla tratta di esseri umani. Fra dimensione interanzionale e ordinamento interno*, Napoli, 2013. In the same volume, see also FORLATI, "I meccanismi internazionali di controllo" and VENTUROLI, "La direttiva 2011/36/UE: uno strumento 'completo' per contrastare la tratta degli esseri umani".

¹³ STOYANOVA, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*. Cambridge, 2018, p. 18 ff.

¹⁴ GALLAGHER, *The International Law of Human Trafficking*. New York, 2012, p. 68.

¹⁵ See GALLAGHER, "Human Rights and Human Trafficking", in NOLLEKAMPER and PLAKOKEFALOS (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, 2017, p.1. See also, for a detailed analysis, GALLAGHER, *cit. supra* note 14, Chapters 1 and 2.

¹⁶ McClean highlights the existence of a tension between the countries that would have preferred a specific and autonomous instrument dedicated to human trafficking in the negotiations and the countries

Indeed, as noted, although the protection of victims' rights played the role of the initial "impetus" driving the international discussion on combating human trafficking, the security concerns of States and the fight against organized criminal groups constituted the "true driving force" behind the process of "codifying" positive obligations in this field.¹⁷

Consistently with this perspective, the Palermo Convention and the Palermo Protocol provide for obligations to criminalize a number of offences, including participation in an organized criminal group and, indeed, trafficking of persons (also in the form, for example, of attempt).¹⁸ However, while some provisions touch on substantive criminal law, the main purpose of these instruments was to lay the foundations for effective cooperation based on mutual legal assistance between countries in investigations, prosecutions and judicial proceedings.¹⁹ Indeed, the relevant provisions in this area constitute to all intents and purposes a "mini-treaty".²⁰

2.1.1. Victim Protection and Prevention Obligations

Outside the realm of substantive and procedural criminal law, the Palermo Convention and the supplementing Protocol contain provisions on victim protection and prevention that are of particular relevance. These provisions are of interest because they shift the focus from the perpetrators to the victims and, more generally, to the need for a preventive approach that is not based solely on the criminal justice response. Indeed, it

that preferred to frame it in the broader context of transnational organized crime. MCCLEAN, *Transnational Organised Crime: A Commentary on the UN Convention and Its Protocols*, Oxford, 2007, p. 14. For an analysis of the concept of transnational crime, that also highlights the differences with international crimes, see STOYANOVA, *cit. supra* note 13, p. 25 ff.; MUELLER, "Transnational Crime: Definitions and Concepts", in WILLIAMS and VLASSIS (eds.), *Combating Transnational Crime: Concept, Activities, Responses*, London, 2001; JEBBERGER, "Corporate Involvement in Slavery and Criminal Responsibility under International Law", *Journal of International Criminal Justice*, 2016.

¹⁷ See GALLAGHER, *cit. supra* note 14, p. 71 and GALLAGHER, "Human Rights and Human Trafficking: Quagmire or Firm Ground?", *Virginia Journal of International Law*, 2009, pp. 833-841.

¹⁸ For an accurate analysis of criminalization obligations, see, *ex pluribus*, GALLAGHER, *cit. supra* note 14, p. 79 ff. Art. 3(a) of the Protocol defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

¹⁹ BOISTER, "The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A 'Toolbox' Rarely Used?", *International Criminal Law Review*, 2016, p. 39.

²⁰ GALLAGHER, *cit. supra* note 14, p. 76.

is often pointed out that a response based solely on criminal law diverts attention from protecting the rights of victims, and from the need for a complex of positive social and economic actions that address the root causes of the phenomenon.²¹

With respect to the protection of victims, Article 25 of the Palermo Convention places obligations on States: i) to provide assistance and protection, especially in cases of retaliation or intimidation; ii) to establish appropriate procedures to provide access to compensation and restitution; iii) and, finally, to enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.

The Additional Protocol also provides for obligations broader than mere criminalization and aimed at victim protection. However, as scholars pointed out,²² these additional provisions are not to be considered “obligatory”²³ in the light of the high cost that measures such as housing, counselling, medical and psychological and material assistance, employment, education and training opportunities, may have on state finances.²⁴ Therefore, States may decide to make this type of support conditional on cooperation from victims.²⁵

Regarding the prevention sphere, the provisions of Article 31 of the Palermo Convention address several aspects that may seem disparate. First of all, the need to reduce the opportunities for criminal organizations to infiltrate licit markets with the proceeds of criminal activities is emphasized. Furthermore, the information obligations to raise awareness “regarding the existence, causes and gravity of and the threat posed by transnational organized crime” are also important aspects in outlining a framework for an effective prevention.

Two more aspects (that are perhaps too often overlooked) are also taken in consideration. Firstly, Article 31(3) requires States to promote the reintegration of persons convicted of Convention offences. This is a particularly important point because it shifts the attention of States from a perspective that is completely

²¹ See ROSS, “A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol”, *Duke Journal of Gender Law & Policy*, 2014, p. 325 ff; TODRES, “The Importance of Realising ‘Other Rights’ to Prevent Sex Trafficking”, *Cardozo Journal of Law and Gender*, 2006, and PATEL, “Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking”, *Seattle Journal for Social Justice*, 2011.

²² GALLAGHER, *cit. supra* note 14, p. 81-83.

²³ *Ibid.*, p. 83 and there cited, SCARPA, *Trafficking in Human Beings: Modern Slavery*, Oxford, 2008, pp. 63-65; OBOKATA, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Leiden, 2006, p. 164.

²⁴ UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 288.

²⁵ GALLAGHER, *cit. supra* note 14, p. 83. For some criticism of this approach see Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, UN Doc. A/AC.254/27 (2000).

focused on criminalization and cooperation in criminal matters, to one that highlights profiles pertaining to the social function of penalty and, in particular, its necessary aim of reintegrating perpetrators.

This is all the more important considering that, in the presence of positive obligations of criminalization, there is always the risk of over-criminalization and thus a lowering of the guarantees and rights of “bad actors”, in favour of symbolic and robust responses in which prevention is achieved through deterrence.²⁶

Secondly, as a closing clause, Article 31(7) also emphasizes the need for closer cooperation between States, international and regional organizations for the implementation of preventive measures. By way of example, the need for States to work towards “alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime” is stated.

This closing provision is quite peculiar in that, while it is placed to safeguard the obligation of States to cooperate for the full realization of the provisions set forth in the preceding paragraphs, in the second part, it introduces an element of novelty that does not seem to be attributable purely to a means of implementation of this specific obligation. In particular, with the reference to the alleviation of the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime, the Convention seems to place obligations of an economic and social nature.²⁷

With regard to human trafficking, the Additional Protocol itemizes this kind of prevention obligation in Article 9. More specifically, Article 9(2) requires the adoption of information, social and economic measures stating that “States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons”.²⁸ In a provision quite similar to Article 31(7), Article 9(4) requires the adoption or the strengthening of “measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.²⁹

Notably, it has been argued that Article 31(7) of the Palermo Convention and Article 9(2) and (4) of the supplementing Protocol give substance to the prevention obligations contained in the Convention and,³⁰ read together, support the idea that States have “strong mandatory transnational prevention duties.”³¹

²⁶ In this regard, see HUSAK, *Overcriminalisation: The Limits of the Criminal Law*, New York, 2008.

²⁷ ROSS, *cit. supra* note 21, p. 339.

²⁸ Palermo Protocol, Art. 9(2).

²⁹ *Ibid.*, Art. 9(4).

³⁰ See *ibid.* and GALLAGHER, *cit. supra* note 14, p. 87.

³¹ ROSS, *cit. supra* note 21, p. 339.

This perspective is particularly fertile as it is consonant with the idea that recourse to criminal law should constitute the *extrema ratio* of state intervention in the freedoms of the individual. In fact, effective prevention can only be achieved through “a complex of normative responses”³² that give precedence to economic, social and cultural measures and other areas of law or other forms of social control.³³ Such a perspective is all the more essential in the fight against organized crime.³⁴

Interestingly, it has been argued that the complex of these obligations give support the existence of a “shared responsibility” in the context of human trafficking, i.e., a model that differentiates the traditional concept of unitary state responsibility and better reflects the “complexity of the legal relationships among actors and complexity of the interests promoted and protected by the law”.³⁵

In particular, the transnational dimension not only of the phenomenon of human trafficking, but also of the criminal groups that animate it, has driven the need for international cooperation and a coordinated response.³⁶ In this sense, therefore, positive obligations would be differentiated according to the position occupied by the State with regard to human trafficking activities.³⁷ However, it bears noting that, in the literature on the concept of shared responsibility, there is no unanimous consensus on the source of shared obligations with regard to the prevention of human trafficking. According to some authors, these obligations would derive from the interplay between human rights treaties and the 2000 Protocol.³⁸ According to others,

³² CAVALIERE, “Il diritto penale minimo in Alessandro Baratta: per un’alternativa alla ‘cultura del penale’”, *Archivio Penale*, 2018.

³³ In this respect, see JAREBORG, “Criminalisation as Last Resort (Ultima Ratio)”, *Ohio State Journal of Criminal Law*, 2004; ASHWORTH, *Principles of Criminal Law*, Oxford, 1995, p. 33 and ASHWORTH, *Positive Obligations in Criminal Law*, Oxford, 2013. Ashworth advances the idea of a “minimum criminal law”. The idea is also present in Italian scholarship and, in particular, in Ferrajoli and Baratta; see FERRAJOLI, *Diritto e ragione: teoria del garantismo penale*, Roma, 2011; FERRAJOLI, “Cos’è il garantismo?”, *Criminalia*, 2014, pp. 129-141; BARATTA, *Il diritto penale minimo. La questione criminale tra riduzionismo e abolizionismo*, Napoli, 1986, p. 443 ff; BARATTA, “Il Corpus Juris e la cultura giuridico-penale europea”, in MOCCIA (ed.), *Ambito e prospettive di uno spazio giuridico-penale europeo*, Napoli, 2004, pp. 35-36.

³⁴ MOCCIA, *Criminalità organizzata e risposte ordinamenti: tra efficienza e garanzia*, Napoli, 1999, pp. 153 and 173.

³⁵ NOLLKAEMPER and JACOBS, “Shared Responsibility in International Law: A Conceptual Framework”, *Michigan Journal of International Law*, 2013, p. 436.

³⁶ GALLAGHER, *cit. supra* note 14, p. 2 ff.

³⁷ *Ibid.* On the notion of shared responsibility in the context of the ECHR, see HEIJER, “Shared Responsibility before the European Court of Human Rights”, *Netherlands International Law Review*, 2013. See also ID., “Procedural Aspects of Shared Responsibility in the European Court of Human Rights”, *Journal of International Dispute Settlement*, 2013.

³⁸ According to Gallagher, this approach would be positively referenced in the preamble to the Trafficking Protocol which provides that “effective action to prevent and combat trafficking in persons ... requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such

these obligations would have the Protocol as their sole source and, indeed, any confusion with the human rights framework should be avoided, with the former, together with the Convention, placing stronger obligations on States.³⁹

2.2. *The European Framework*

Within the European regional framework, the standards of the Palermo Protocol are “reinforced” by the CoE Anti-Trafficking Convention.⁴⁰

The choice of adopting a regional instrument only five years after the approval of the Protocol of 2000 is explained by the will to strengthen the protection of victims of human trafficking and to decline the obligations of States in this field according to a human rights perspective.⁴¹ In this perspective, trafficking in human beings is considered a violation of human rights,⁴² and an offense to legal goods such as human dignity and integrity, which requires attention regardless of the form it takes in practice (national, transnational, linked or not to organized crime).⁴³ Hence, the Convention constitutes “the first legal instrument concerning trafficking in human beings that frames trafficking in human beings as a matter of human rights protection”.⁴⁴

In a nutshell,⁴⁵ it is possible to measure the contribution of the Convention in the definition of “victim” of human trafficking, and by the non-conditionality of protection and assistance for trafficked persons.⁴⁶ However, some critical issues remain especially regarding the soft obligation not to criminalize trafficking victims.⁴⁷

trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights”, and, recently, enjoyed recognition by the European Court of Human Rights in the *Rantsev* case that “has led the way towards transforming the Protocol’s aspiration of shared responsibility into reality”. GALLAGHER, *cit. supra* note 14, pp. 23-24.

³⁹ ROSS, *cit. supra* note 21, p. 326.

⁴⁰ Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 [European Trafficking Convention Explanatory Report], para. 371.

⁴¹ See PLANITZER and SAX, “Introduction”, in PLANITZER and SAX (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*, Cheltenham UK, 2020, p. 2.

⁴² For the “revolutionary” scope of this perspective, see GALLAGHER, “Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments”, *European Journal of Migration and Law*, 2006, pp. 163-190.

⁴³ European Trafficking Convention Explanatory Report, para. 36; See also GALLAGHER, *cit. supra* note 14, p. 110 ff.

⁴⁴ See PLANITZER and SAX, *cit. supra* note 41, p. 1.

⁴⁵ For a thorough analysis, please refer to *ibid.* and the section on the Convention in GALLAGHER, *cit. supra* note 14.

⁴⁶ GALLAGHER, *cit. supra* note 14, p. 116.

⁴⁷ *Ibid.*, pp. 117-118 and 285. For a comparative perspective, see DERENČINOVIĆ, “Comparative Perspectives on Non-Punishment of Victims of Trafficking in Human Beings”, *Annales de la Faculté de Droit d’Istanbul*, 2014, pp. 3-20. It bears noting that fear towards the authorities and possible criminal implications of the request for support are some of the main factors driving the non-detection of the crime of human trafficking. In this respect, see MCGAHA and EVANS, “Where Are The Victims? The Credibility

Furthermore, since the European Convention of Human Rights (“ECHR”)⁴⁸ contains no provisions directly concerning human trafficking, the European Court of Human Rights (“ECtHR”) scrutinizes cases under the lens of the prohibition of “forced labour” and thus through the flexibility of Article 4 of the Convention.⁴⁹ As part of their obligations under Article 4, States are required to implement criminalization measures to counter the practices set out in the Article,⁵⁰ in synergy with their obligations under the Palermo Protocol and the CoE Anti-Trafficking Convention, and to implement a legislative and administrative framework that is aimed at creating a comprehensive approach that covers all aspects of counter-trafficking and provides effective prevention and protection against forced labour.⁵¹

These demands of prevention, however, clash with a certain self-restraint of the Court with respect to the imposition of positive socio-economic obligations that may prove burdensome for States.⁵² The Court’s response to this particular tension does not always seem straightforward. On the one hand, there appears to be an emerging caselaw that recognizes the indissoluble link between civil and political rights stemming from the Convention and the protection of socio-economic rights; on the other hand, the Court is “requested” and seem to show a certain deference to sensitive political and budgetary choices.⁵³

These critical points are also reflected in the theorization of positive obligations

Gap in Human Trafficking Research”, *Intercultural Human Rights Law Review*, 2009, p. 244. For some other problems and obstacles linked to non-punishment, please see JOVANOVIĆ, “The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance”, *Journal of Trafficking and Human Exploitation*, 2017, pp. 41-76.

⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR].

⁴⁹ 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 v. Belgium*, 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; European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgement of 7 January 2010, paras. 272-282; European Court of Human Rights, *Chowdury and Others v. Greece*, Application no. 21884/15, Judgement of 30 March 2017, para. 93.

⁵⁰ *Siliadin*, *cit. supra* note 49. See also DALOMBA, “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.

⁵¹ *Rantsev*, *cit. supra* note 49, para. 285. In this perspective, “perhaps more than any other provision of the Convention, article 4 is essentially about positive, rather than negative, obligation.” See SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 206.

⁵² SCHABAS, *cit. supra* note 51, p. 206. See also European Court of Human Rights, *C.N. v. The United Kingdom*, Application no. 4239/08, Judgment of 13 November 2012, para. 68; *Rantsev*, *cit. supra* note 49, para. 287.

⁵³ For a careful analysis of these aspects, see LEIJTEN, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge, 2017, and, in particular, p. 291 ff.; see also SCHEININ, “Economic and Social Right as Legal Rights” in EIDE et al., *Economic, Social and Cultural Rights: a Textbook*, 2nd edition, The Hague, 2011.

under criminal law. In this case, an effective prevention should be associated with a certain focus on measures that address the socio-economic roots of crime (e.g., through the development of socio-economic conditions that make it less convenient to resort to crime and organized criminal networks). Notwithstanding, the ECtHR's caselaw predominantly relies on measures that are limited to the purely criminal sphere. In particular, the Court "imposes" criminalization obligations with a deterrent purpose and, from a procedural point of view, the adoption of operational mechanisms to anticipate the risk of harmful conduct (always with the limitation of the allocation of resources). However, this approach risks placing the focus solely on the moment of commission of the crime and thus on the injury to rights and, at the same time, leaves the effectiveness of preventive general policies in the socio-economic realm unexplored.⁵⁴

Finally, the last instrument in Europe to address trafficking (and that may soon be revised) is the 2011 Anti-Trafficking Directive under EU law.

The Directive which was adopted in implementation of Article 83(1) TFEU⁵⁵ is based on the paradigm of the three Ps: Prosecution, Protection and Prevention. Not unlike the other international instruments on the subject, prevention is entrusted to the provisions of a single article.⁵⁶ In fact, this perspective is in keeping with the nature of a harmonization instrument in criminal matters and thus with the necessary emphasis on prosecution rather than prevention (albeit entrusted with obligations to raise awareness and disseminate information).⁵⁷

Coherently with the CoE instruments, the Anti-Trafficking Directive explicitly espouses a human rights-based approach based on protection, support and

⁵⁴ The comparison between the apparent casualness with which the Court imposes criminalization obligations and its deference in establishing the existence of socio-economic obligations may lead to a paradoxical outcome. Considering that the latter stems from the need to preserve the sovereignty of States in this sphere, it seems strange that such a consideration does not also arise also in regard with the imposition of positive obligations in the sphere of criminal law which constitutes the subject matter that is perhaps most closely linked to state sovereignty.

⁵⁵ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012. It is worth noting that Article 83 TFEU provides for the possibility of adopting through the ordinary legislative procedure minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Among these areas where harmonization measures are legitimized, trafficking in human beings and sexual exploitation of women and children and, to close the list contained in the second part of Article 83(1), organized crime are prominent.

⁵⁶ For a thorough analysis of the implementation of the Directive within some national legal systems, see MILITELLO, "Traffico di migranti e tratta di esseri umani: studio comparato sull'implementazione degli strumenti dell'Unione Europea", 2018.

⁵⁷ BOSMA and RIJKEN, "Key Challenges in the Combat of Human Trafficking: Evaluating the Eu Trafficking Strategy and Eu Trafficking Directive", *New Journal of European Criminal Law*, 2016, pp. 315-330 and 317.

assistance to victims.⁵⁸

3. ORGANIZED CRIME: A COMPLEX THEORETICAL AND LEGAL CONCEPT

Given the constant reference to the phenomenon of organized crime, attempting to frame this notion is necessary before proceeding further.

The term organized crime is used to refer to a multiplicity of criminal phenomena. From a technical point of view, this notion is presented as “a fuzzy and contested umbrella concept”.⁵⁹ In particular, the notion has developed in parallel to identify also profoundly different concepts. On the one hand, it is customary to use the term to refer to criminal organizations of a certain size and stability, often organized in a hierarchical sense (with some exceptions, for instance, in Northern Europe where organizations are structured in network);⁶⁰ on the other hand, the term is used to refer to a series of activities organized on a large scale for monetary gains.⁶¹ In the context of armed conflicts, then, the complexity of the notion of organized crime is aggravated by the existence of a “very complex web of financial relationships between militias, organized crime groups and terrorist groups”.⁶²

In Europe, the focus on organized crime has been developing since the 1990s. However, with the exceptions of Italy and Spain, organized crime was studied from the perspective of activities within illegal market dynamics, without any reference to the existence of criminal organizations with a specific structure, pattern or model.⁶³

On the one hand, the “illegal enterprise paradigm” left the reference to criminal organizations unexplored, on the other hand, it allowed the term to be placed at the centre of the debate in Europe, even for those countries that had no experience with

⁵⁸ Anti-Trafficking Directive, Recital 7. See *Ibid.*

⁵⁹ PAOLI, “Introduction”, in PAOLI (ed.), *The Oxford Handbook of Organised Crime*, Oxford, 2018, p. 2.

⁶⁰ See MILITELLO, “La rilevanza della nozione di organizzazione criminale nell’Unione europea: percorsi di armonizzazione”, 2015, p. 5 and, cited there, KLEEMMANS, “Organised Crime, Transit Crime, and Racketeering”, *Crime & Justice*, 2007, p. 163 ff. Militello emphasises how the debate on the subject was ongoing in America even earlier. See SPAPENS, “Macro networks, collectives, and business processes: An integrated approach to organised crime”, *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, pp.185-215.

⁶¹ PAOLI, *cit. supra* note 59, p. 13 ff.

⁶² KOTECHEA, “Human Trafficking, Conflict and Money Flows”, in MURASZKIEWICZ et al. (eds.), *Human Trafficking in Conflict, Crime Prevention and Security Management*, Cham, 2020, p. 66.

⁶³ For a historical analysis on the evolution of this debate, see PAOLI and VANDER BEKEN, “Organised Crime. A Contested Concept”, in PAOLI (ed.), *The Oxford Handbook of Organised Crime*, Oxford, 2018, p. 20 ff.

organized crime phenomena such as the Mafia.⁶⁴

In the context of trafficking in human beings, the EU Serious and Organised Crime Assessment (SOCTA) of 2021 highlighted that trafficking in human beings not only is a “core activity of serious and organised crime in the EU”,⁶⁵ but is also destined to remain a “threat” in the future. Indeed, the sector will continue to be sustained by the continuous demand for cheap labour, especially in manual jobs. In this regard, trafficking for labour exploitation purposes is increasing markedly compared to other forms.⁶⁶

In this context, organized criminal groups take care of all aspects of the crime, from the online recruitment of victims, through the forging of identity documents and work permits, to the care of the final outputs, from sexual exploitation to forced labour, not forgetting other critical aspects such as forced crime or begging.⁶⁷

These aspects are well highlighted by the EU Strategy to Tackle Organised Crime for 2021-2025. However, taking note of the “specificities” of trafficking in human beings,⁶⁸ the Commission proposed a parallel EU Strategy on Combating Trafficking in Human Beings with dedicated actions and recommendations.

3.1. International and European Instruments to Tackle Organized Crime

Despite the complexity and multifaceted nature of the organized crime phenomenon, the adoption of international instruments aimed at providing a legal definition and, consequently, at establishing common ground for combating it has not been hindered.

The main reference can only be to the aforementioned 2000 Palermo Convention. In particular, Article 2(1) of the Convention defines an organized criminal group as “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit”. This is one of the three essential elements for the Convention to apply, whilst the other two are the “transnational” dimension of the offence and the need for it to constitute a “serious crime”.

⁶⁴ *Ibid.*, p. 21. For a complete analysis of the notion and its declinations in various legal systems in Europe, see FIJNAUT and PAOLI. *Organised Crime in Europe : Concepts Patterns and Control Policies in the European Union and Beyond*. Dordrecht, 2006.

⁶⁵ EU SOCTA, Serious and Organised Crime Assessment, 2021, available at: < <https://www.europol.europa.eu/publications-events/main-reports/socta-report>>, p. 70.

⁶⁶ *Ibid.*

⁶⁷ EU Strategy to Tackle Organised Crime, p. 13.

⁶⁸ *Ibid.*

These notions have been criticized for their vagueness and over-inclusiveness, and for the wide discretion left to States in defining them.⁶⁹ With some realism, however, it is also admitted that these criticisms are partly due to the need to find a common lowest denominator that would potentially fit the legal systems of all States of the international community.⁷⁰ At the same time, the breadth of the provisions allows States to address a broad spectrum of criminal activities, including human trafficking for labour exploitation, without the need to ratify the specific Protocol.⁷¹

As concerns the regional framework, it is worth noting the European Union's commitment in the fight against organized crime⁷² developed in "synergy" with the United Nations, but soon took on characteristics of its own both with reference to its ability to influence national choices and to the panoply of harmonization instruments implemented.⁷³

In this regard, a pivotal role was played by the 1997 Action Plan against Organised Crime. This instrument constituted the first real "manifesto of European criminal policy on the difficult terrain of organised crime".⁷⁴ To this day, the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime ("Framework Decision") and a 2013 European Parliament

⁶⁹ In this sense, for instance, see MITSILEGAS, "From National to Global, From Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime," in BEARE (ed.), *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption*, Toronto, 2003. Or the introduction to the same volume by BEARE. See also ORLOVA and MOORE, "'Umbrellas' or 'building blocks': defining international terrorism and transnational organised crime in international law", *Houston Journal of International Law*, 2005, pp. 282-287; FINCKENAUER, "Problems of definition: what is organised crime?", *Trends in Organised Crime*, 2005, p. 75. HAUCK and PETERKE, "Organised crime and gang violence in national and international law", *International Review of the Red Cross*, 2010, p. 421 ff.

⁷⁰ HAUCK and PETERKE, *cit. supra* note 69.

⁷¹ GALLAGHER, *cit. supra* note 14, p. 75.

⁷² On this topic, we recommend reading MILITELLO, *cit. supra* note 60. The report, albeit in Italian, traces the path of European interventions to harmonize the notion of criminal organization and related conducts, questions the indirect relevance of the notion of criminal organizations in secondary law, categorizes three models of normative relevance of criminal organization in EU States and, finally, assesses the effects of harmonization measures. For some updated considerations, please see MILITELLO, "L'armonizzazione dei reati in Europa fra 'parabola' e 'piano inclinato': il caso dell'incriminazione dell'organizzazione criminale, in GRANDI (ed.), *I volti attuali del diritto penale europeo. Atti della giornata di studi per Alessandro Bernardi*, Pisa, 2021. For a recent overview of the effects of the Framework Decision on national legal systems, *cum grano salis*, see Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of October 2008 on the fight against crime, COM/2016/448 final.

⁷³ MILITELLO, *cit. supra* note 60, p. 3.

⁷⁴ *Ibid.*, p. 5. See also MILITELLO, "Agli albori di un diritto penale comune in Europa: il contrasto al crimine organizzato", in MILITELLO, PAOLI and ARNOLD (eds.), *Il crimine organizzato come fenomeno transnazionale. Forme di manifestazione, prevenzione e repressione in Italia, Germania e Spagna*, Milano-Freiburg, 2000.

Resolution⁷⁵ constitute the last landing places of this path.⁷⁶

The Framework Decision, although not producing the same effects of a directive, remains today an essential instrument with reference to the phenomenon of trafficking in human beings. In fact, Article 4 of Directive 2011/36/EU makes direct reference to it, requiring Member States to take

“the necessary measures to ensure that the offences referred to in Article 2 are punishable by a maximum term of imprisonment of at least ten years where that offence: [...] (b) has been committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime”.⁷⁷

However, the definition of “criminal organization” offered by the Framework Decision does not add clarity to the debate since it almost slavishly reproduces the notion of “organized criminal group”. As some scholars have noted, the only differences concern the number of offences covered and the prediction of possible target offences.⁷⁸

Further perplexities concerning the definition are raised with specific regard to the clarity of the naturalistic and normative elements, as well as to its harmonization

⁷⁵ European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)).

⁷⁶ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime OJ L 300/42 [Framework Decision]. For the importance of the Joint Action and the subsequent Framework Decision, see CALDERONI, *Organised Crime Legislation in the European Union. Harmonisation and Approximation of Criminal Law National Legislations and the Eu Framework Decision on the Fight against Organised Crime*. Berlin Heidelberg, 2010, p. 21 ff.

⁷⁷ Anti-Trafficking Directive, Art. 4. For a closer review of the Directive at the time it was issued, see SICURELLA, “Prosegue l’azione dell’Unione Europea nella lotta alla tratta di esseri umani”, *Diritto Penale Contemporaneo*, 2011. For a critical review of the European instruments, see SANTORO, “La Tratta di esseri umani”, in CAVALIERE and MASARONE (eds.), *L’incidenza di decisioni quadro, direttive e convenzioni europee sul diritto penale italiano*, Napoli, 2018.

⁷⁸ MILITELLO, *cit. supra* note 60, p. 8. It should be noted, however, that the use of such a general notion as “organized criminal group” by the Palermo Convention, has contributed to a “second youth” of the instrument and the definition, allowing them to be adapted to a rapidly changing reality, in contrast to the definition contained in the Framework Decision. On this point see MILITELLO, *cit. supra* note 72, p. 93 ff; See also ACCILLI, SABBATINI, and ROMANO, “Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale. Dopo l’approvazione del Meccanismo di Riesame ad opera della Conferenza delle Parti”, *Diritto penale contemporaneo*, 2018, p. 114. On the vagueness of the Framework Decision’s provisions, see MITSILEGAS, *EU Criminal Law*, Oxford, 2009, p. 96 ff; FICHERA, *Organised crime: developments and challenges for an enlarged European Union*, in ECKES and CONSTANTIDINES (eds.), *Crime within the Area of Freedom, Security and Justice; A European Public Order*, Cambridge, 2011, p. 173 ff.

with Article 83 TFEU.⁷⁹ Moreover, although some authors emphasize its positive impact, other authors underline, from a practical viewpoint, its minimal effects on national legal systems.⁸⁰ Some authors also criticize the provision, which is the result of a political compromise, which offers national legislators the option of choosing between, on the one side, the “associative” model of criminalizing participation in an criminal organization and, on the other, the common law model of conspiracy.⁸¹ Finally, scholars have emphasized the failure to take into account certain elements such as the relevance of the concept of mafia-type organization and method, which are essential for domestic law and the European Parliament.⁸²

However, as was the case for the Palermo Convention, here too it is essential to assess the critical issues in the light of the difficulties of harmonizing the understanding of the phenomenon and its declinations in the Member States’ legal systems.

Nevertheless, the critical issues highlighted at the theoretical level in the identification of a common understanding and those at the technical level concerning the definitions offered by the Palermo Convention and the Framework Decision now lead to the statement that “one can barely speak of a clear understanding of the meaning of organised crime at the level of international law”.⁸³

⁷⁹ According to some authors, the concept of organized crime in Art. 83 should assume conceptual autonomy; according to others, it would perform the function of a “closing clause” with “criminological” content. For the first, see MILITELLO, *cit. supra* note 60, p. 21. For the second GRANDI, *Riserva di legge e legalità penale europea*, Milano, 2011; on the point see also, CALDERONI, “La Decisione Quadro dell’Unione Europea sul contrasto alla criminalità organizzata e il suo impatto sulla legislazione degli Stati membri”, in ALFANO and VARRICA (eds.) *Per un contrasto europeo al crimine organizzato e alle mafie*, Milano, 2012, p. 38. See also ID., *Organized crime legislation in the European Union*, Heidelberg, 2010.

⁸⁰ Some authors have defined the effects of the Framework Decision as “apparent harmonization” or “*trompe l’oeil*”, see FLORE, “Une Justice pénale européenne après Amsterdam”, *Journal des Tribunaux*, Droit Européen, 1999, p. 122; MILITELLO, *cit. supra* note 60, p. 21; BALSAMO and MATTARELLA, “Organised crime: the new perspectives of European legislation”, *Criminal Magazine*, 2021, p. 38 ff.

⁸¹ On this point, BALSAMO, “The delocalisation of mafia organisations and the construction of a European law against organised crime”, *Global Crime*, 2016, p. 40; MILITELLO, “Partecipazione all’organizzazione criminale e standard internazionali d’incriminazione”, *Rivista Italiana di Diritto e Procedura Penale*, 2003; CALDERONI, “A definition that Could not Work!”, *European Journal of Crime Criminal Law & Criminal Justice*, 2008. For further criticisms, see MASARONE, “Il ‘diritto penale europeo’ al vaglio dell’offensività: fondamento ed esiti”, *Archivio penale*, 2019; D’ANELLO, “Il contrasto della criminalità organizzata”, in MASARONE and CAVALIERE (eds.), *L’incidenza di decisioni quadro, direttive e convenzioni europee sul diritto penale italiano*, Napoli, 2018; and MASARONE, *Politica criminale e diritto penale nel contrasto al terrorismo internazionale*, Napoli, 2013.

⁸² See MILITELLO, *cit. supra* note 60. See also European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering.

⁸³ STOYANOVA, *cit. supra* note 13, p. 24 and there cited BOISTER, *Introduction to Transnational Criminal Law*, Oxford, 2012, p. 79; BAKER, “The Legal Nature of Transnational Organized Crime: Opportunities and Limitation”, in EDWARDS and GILL (eds.), *Transnational Organized Crime: Perspectives on Global Security*, New York, 2003, p. 83.

4. HUMAN TRAFFICKING IN THE CONTEXT OF THE POLY-CRISIS

Although the concept of poly-crisis had already been theorized since the 1990s,⁸⁴ it can be said to have taken on new life since Jean Claude Juncker's presidency of the European Commission. Juncker used it to define a situation in which multiple emergency situations, such as the financial crisis, mass migration, Brexit, terrorist threats, converge at the same time and "feed each other, creating a sense of doubt and uncertainty".⁸⁵

For a long time, the relationship between human trafficking and crises was ignored based on the erroneous assumption that trafficking was not a direct consequence of a crisis.⁸⁶ This conclusion risks jeopardizing an effective response to trafficking cases "not only in terms of documentation, reporting, identification and assistance to victims, but also in subsequent criminal investigations".⁸⁷

Recently, however, the United Nations started recognizing the relationship between trafficking and crisis situations. In Resolution 63/156 of 2008, the UN General Assembly emphasized the heightened vulnerability of women and girls to trafficking and exploitation during conflict and post-conflict, disaster and other emergency situations and the possible role that military, peacekeeping and humanitarian personnel deployed may play in this context.⁸⁸ Since then, general opinion has evolved and today, it is possible to affirm that there is a broad consensus on the relationship between crises of various kinds and human trafficking.

Although the crises may be due to very different situations such as armed conflicts or natural disasters, it has been observed that some similarities can be identified in relation to trafficking in human beings, such as: the erosion of the rule of law and the flourishing of criminal activities; a generalized absence of economic opportunities leading to an increase in the population at risk and its reliance on risky and illicit survival choices; the ability of criminal networks to adapt to new situations and find new opportunities in targeting refugees and internally displaced persons; the absence of protection and immediate solutions; and the persistence of gender, ethnic, social and religious discrimination.⁸⁹

⁸⁴ See *supra* note 4.

⁸⁵ Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV), 21 June 2016. Available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293>.

⁸⁶ IOM, Addressing Human Trafficking and Exploitation in times of Crisis, Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations, 2015, p. 3 ff.

⁸⁷ *Ibid.*, p. 3.

⁸⁸ UN, General Assembly, Resolution adopted by the General Assembly on 18 December 2008 [on the report of the Third Committee (A/63/425)] 63/156. Trafficking in women and girls, paras. 4 and 24.

⁸⁹ IOM, *cit. supra* note 86.

4.1. *Human Trafficking in Times of Pandemic and Climate Change*

With reference to the 2020 pandemic, it was argued that Covid-19 not only revealed pre-existing vulnerabilities, but further exacerbated them, e.g., due to the economic effects of the associated crisis on poverty and unemployment,⁹⁰ thus increasing the demand for trafficking⁹¹ and moving such illicit practices to the shadows.⁹²

According to the Special Rapporteur on trafficking in persons, especially women and children, the risks encountered by migrants during the Pandemic also include all vulnerabilities related to migration status, e.g., the loss of work for seasonal workers and thus the absence of regular permits or the impossibility to return home; the restrictive migration policies that have led to the total or partial closure of borders; the reduction if not total absence of services to protect and support trafficking victims; and the possible re-victimization that is associated with these policies.⁹³

In the current poly-crisis scenario, the role of climate change and other forms of environmental degradation cannot be ignored either. As noted,⁹⁴ various are the ways in which climate change can affect the flourishing of human trafficking. Environmental disasters, in addition to conflict, contribute to the displacement of people, to increased violence between groups for the exploitation of resources, and, in a two-way relationship, to enhanced resource exploitation through cheap labour and environmentally damaging activities.⁹⁵ At the same time, climate change has been shown to affect especially the most vulnerable parts of the population,⁹⁶ aggravating economic hardship, inequalities between rich and poor⁹⁷ and causing situations of

⁹⁰ See GIAMMARINARO, COVID-19 Position paper. The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons, 2020. See also TODRES and DIAZ, “COVID-19 and Human Trafficking-the Amplified Impact on Vulnerable Populations”, JAMA Pediatric, 2021, pp. 123-124.

⁹¹ EU SOCTA, *cit. supra* note 65, p. 34.

⁹² UNODC, *cit. supra* note 1.

⁹³ For an analysis, with some recommendations, see GIAMMARINARO, *cit. supra* note 90.

⁹⁴ See GERRARD, “Climate Change and Human Trafficking after the Paris Agreement”, University of Miami Law Review, 2018, pp. 345-368.

⁹⁵ GERRARD, “Climate Change and Human Trafficking after the Paris Agreement”, University of Miami Law Review, 2018, pp. 356-360. On the topic, see also BALES, *Blood and Earth: Modern Slavery, Ecocide, and the Secret to Saving the World*, New York, 2016; United States Department of State, “The intersection between environmental degradation and human trafficking”, in 2014 Trafficking in Persons Report, pp. 52-56. See also HILL, “Human Trafficking and Climate Change”, Fletcher Security Review, 2018, pp. 72-78.

⁹⁶ SHEU et al., “Potential Impact of Climate Change on Human Trafficking: A Narrative Review”, The Journal of Nervous and Mental Disease, 2021, pp. 324-329.

⁹⁷ STOTT, “Climate change, poverty and war”, Journal of the Royal Society of Medicine, 2007, pp. 399-402.

conflict and instability.⁹⁸ All these factors can lead to desperate solutions or situations of social unrest, constituting vulnerabilities and thus opportunities for traffickers.⁹⁹

Despite this evidence, the IOM reports that the impact of climate change on trafficking in human beings remains a “relatively underexplored” field.¹⁰⁰

4.2. *Human Trafficking in a Context of Armed Conflict*

In the context of an armed conflict, such as the one affecting Ukraine since February 2022,¹⁰¹ human trafficking becomes a tactic of war¹⁰² and an opportunity, not only for criminal organizations, but also for military personnel and state actors.¹⁰³

Furthermore, certain key locations constitute a fertile and ideal place for illicit practices. For instance, border areas, may be characterized by the difficulties in coordination between jurisdictions and law enforcement, especially in the case of humanitarian emergencies.¹⁰⁴ In fact, in conflict zones, local populations encounter precarious situations and a “perpetual state of fear”, while opportunities to work and thus earn money and access to basic necessities diminish. Risk factors related to the breakdown of the rule of law and law enforcement, as well as of the “traditional methods of deterrence and redress such as investigation, arrest and prosecution under domestic law”, are also magnified.¹⁰⁵

Consequently, it is reasonable to expect that the conflict in Ukraine could generate an accelerating effect on human trafficking.

In this regard, on the one hand, it has been noted that research on possible risks

⁹⁸ IOM, *The Climate Change-Human Trafficking Nexus*, 2016.

⁹⁹ See BALES, *Disposable People: New Slavery in the Global Economy*, 3rd edition, Berkeley, 2012.

¹⁰⁰ IOM, *The Climate Change-Human Trafficking Nexus*, 2016, p. 3. For a recent analysis see STEPHENS, “Climate Change and Human Trafficking”, Master Thesis Series in Environmental Studies and Sustainability Science, 2019.

¹⁰¹ For an analysis of the relationship between armed conflict and human trafficking, please refer to Part 1 of MURASZKIEWICZ, FENTON and WATSON, *Human Trafficking in Conflict : Context Causes and the Military*, Cham, 2020.

¹⁰² See MURASZKIEWICZ, FENTON and WATSON, “Introduction”, in MURASZKIEWICZ, FENTON and WATSON (eds.), *Human Trafficking in Conflict : Context Causes and the Military*, Cham, 2020, p. 5.

¹⁰³ Murasziewicz, Fenton and Watson describe human trafficking in times of conflict as a means of facilitating “the recruitment and retention of fighters, including child soldiers”, providing “rewards to combatants in the form of sex slaves”, generating “illicit revenues that can support conflict financing”, and contributing “to the social, psychological and economic breakdown of entire communities”. See *Ibid.* As far as armed groups are concerned, human trafficking serves as a “means to raise funds to advance their activities and/or as a tool to maintain control over the areas they occupy”. According to Kotecha, “[g]iven their income generating capacity it was no surprise when the first links were made between human trafficking and armed conflict, both profitable enterprises.” See KOTECHA, *cit. supra* note 62, pp. 62-63.

¹⁰⁴ EU SOCTA, *cit. supra* note 65, p. 34.

¹⁰⁵ KOTECHA, *cit. supra* note 62.

related to human trafficking in the Ukraine war is “understandably limited” and related either to the prevention of conflict-related sexual violence or to the analysis of the issue as a “public health concern”.¹⁰⁶ Despite this, on the other, both the EU, with the EU Anti-Trafficking Plan to respond to the crisis of 6 May 2022, and the UNODC, through the report “Conflict in Ukraine: Key Evidence on Risks of Trafficking in Persons and Smuggling of Migrants”, have acknowledged the trafficking risks related to the war in Ukraine.

In particular, UNODC argued that the risks are greater for certain groups, such as

“unaccompanied and separated children and children travelling with adults whose relationship with the children cannot be verified; people who were previously internally displaced within Ukraine; people who are unable to access temporary protection, because they are not eligible, or due to lack of information or incorrect information; non-Ukrainians, including undocumented and stateless people; Ukrainian Roma people; LGBTQI+ people; elderly people; and people with mental and physical disabilities.”¹⁰⁷

UNODC also placed a crucial emphasis on the possible role of criminal networks operating between Ukraine, Europe and Asia and the possibility that they take advantage of the separation of people from their support networks.¹⁰⁸

The problems posed by modern poly-crisis, therefore, combine with those arising from poly-crime. This term refers to those criminal groups that, starting from specialization in a certain criminal market, use the profits of a certain activity to finance the expansion of other crime sectors.¹⁰⁹ The additional problem posed by this particularly advanced criminality is that specific forms of crime require a specific response in all respects, from the legislative to the operational ones.¹¹⁰

¹⁰⁶ COCKBAIN and SIDEBOTTOM, “War, Displacement, and Human Trafficking and Exploitation: Findings from an evidence-gathering Roundtable in Response to the War in Ukraine”, *Journal of Human Trafficking*, 2022, p. 2 ff. See also, there cited, STARK et al., “Prevention of conflict-related sexual violence in Ukraine and globally”, *The Lancet*, 2022, pp. 2173-2175; KUMAR et al., “Meeting the health needs of displaced people fleeing Ukraine: Drawing on existing technical guidance and evidence”, *The Lancet Regional Health-Europe*, 2022.

¹⁰⁷ UNODC, *cit. supra* note 1, p. 5. See also HOFF and DE VOLDER, Preventing human trafficking of refugees from Ukraine: A rapid assessment of risks and gaps in the anti-trafficking response, La Strada International & Freedom Fund, 2022.

¹⁰⁸ UNODC, *cit. supra* note 1, p. 5.

¹⁰⁹ EU Strategy to Tackle Organised Crime, p. 12.

¹¹⁰ *Ibid.*

5. THE EU RESPONSE TO TRAFFICKING IN THE CONTEXT OF THE CONFLICT IN UKRAINE

Having examined the legal and theoretical background of the main topic of this contribution, it is finally possible to assess the European strategy against human trafficking in the context of the poly-crisis.

The Anti-Trafficking Plan constitutes the immediate response to the rapidly unfolding events in Ukraine as of February 2022. Prior to these events, however, the European Commission had already proceeded with the adoption of two other important instruments: the EU Strategy to Tackle Organised Crime 2021-2025 and the EU Strategy on Combating Trafficking in Human Beings 2021-2025. These are non-binding instruments through which the Commission explains its lines of action in various areas from a policy perspective.

In particular, as noted with regard to the previous EU Strategy on human trafficking,

“rather than providing a legally binding set of rules or state obligations, the goal of the strategy is to coordinate and tune the various policies, pieces of legislation and initiatives taken at EU level in different policy areas that are not necessarily, or primarily, adopted to combat human trafficking, but which do have an impact on or are part of the fight against human trafficking”.¹¹¹

Despite the recognition of the specificities of crimes such as migrant smuggling, and trafficking in human beings, the EU Strategy to Tackle Organised Crime does not contain specific provisions aimed at combating these phenomena. More appropriately, the Strategy refers to the dedicated EU Strategy on Combating Trafficking in Human Beings 2021-2025. This plan of action, adopted on 14 April 2021, aims at an all-encompassing response. Indeed, taking up the approach of the Anti-trafficking Directive, the EU Strategy on Combating Trafficking in Human Beings is based on the 3-p model and, in particular, on four areas of intervention: (i) reducing the demand that fosters trafficking in human beings, (ii) breaking the criminal business model to halt victims’ exploitation, (iii) protecting, supporting and empowering the victims, especially women and children, and (iv) the international dimension, which aims to advance international cooperation in relation to the three other strands.

¹¹¹ BOSMA and RIJKEN, *cit. supra* note 57, p. 318.

5.1. *The Anti-Trafficking Plan to Protect People Fleeing the War in Ukraine*

In close connection with the goals set out in the Strategy and the 10-Point Plan for stronger European coordination on welcoming people fleeing the war against Ukraine of 28 March,¹¹² the European Commission adopted a specific plan entitled Anti-Trafficking Plan to protect people fleeing the war in Ukraine.

The Anti-Trafficking Plan, which is to be implemented in cooperation with the National Rapporteurs and Equivalent Mechanisms of EU countries, EU Agencies and Civil society, in particular the EU Civil Society Platform against trafficking in human beings, is developed in five points concerning: i) strengthening awareness regarding risks of trafficking in human beings and setting up dedicated helplines; ii) reinforcing prevention against trafficking in human beings; iii) enhancing law enforcement and judicial response to trafficking in human beings; iv) improving early identification, support and protection of human trafficking victims; v) and addressing the risks of trafficking in human beings in non-EU countries, especially Ukraine and Moldova.¹¹³

5.1.1. *Exchange of Information and Judicial Cooperation*

The actions proposed in the Anti-Trafficking Plan focus on a plurality of spheres of action that appear to be fully consonant with the obligations arising from the international framework.

For example, a predominant role is played by actions aimed at ensuring an effective exchange of information between Member States, the European Commission, Europol, agencies such as the European Labour Authority, the EU Fundamental Rights Agency, and the EU Agency for Asylum in areas such as: the threat assessment of human trafficking in the conflict area;¹¹⁴ the risks, challenges and relevant policy tools for preventing undeclared work and labour exploitation among potential victims, through the cooperation of labour inspectorates or comparable authorities;¹¹⁵ the collection of information regarding the exploitation of victims; and the risks related to the use of the internet and other online platforms.¹¹⁶

Cooperation in the field of law enforcement and judicial response is also ensured

¹¹² Home Affairs Council, 10-Point Plan on stronger European coordination on welcoming people fleeing the war against Ukraine, 28 March 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2152>.

¹¹³ Anti-Trafficking Plan, p. 4 ff.

¹¹⁴ *Ibid.*, p. 7.

¹¹⁵ *Ibid.*, p. 8.

¹¹⁶ *Ibid.*

by the role of European Multidisciplinary Platform Against Criminal Threats (EMPACT) and the necessary strengthening of the Trafficking in Human Beings Operation Action Plan.¹¹⁷ Officers are then called upon to collect and assess information in order to detect crime in border countries, also through the use of all international and national databases, including the Schengen Information System (SIS) and those of Interpol and Europol.¹¹⁸

Overall, what emerges is a “multi-disciplinary, multi-agency approach of enforcement actions enabling the efficient detection, reporting and fight against trafficking in human beings for all forms of exploitation”.¹¹⁹

5.1.2. Information Dissemination and Prevention Measures

Similarly, in line with the information obligations and prevention measures mentioned above, the Anti-Trafficking Plan focuses on the need to strengthen awareness of the risk of trafficking, also through dedicated helplines and a website,¹²⁰ and on the implementation of security controls, through, for instance, the registration of entities and individuals wishing to provide accommodation, transport and other types of assistance.¹²¹

With regard to more general prevention obligations in economic and social matters, albeit in a more general manner, the Commission emphasizes the need to support the long-term needs of possible trafficking victims through their recovery and re-integration with health, psychological or legal specialized services, and a facilitated access to education and economic opportunities, including through the Asylum, Migration and Integration Fund and Internal Security Fund.¹²²

To find more marked references to organized crime, it is necessary to turn to the EU Strategy on Combating Trafficking in Human Beings 2021-2025. The role of organized crime is well highlighted in Point 4, where it is recognized that “[o]rganised crime groups that traffic people are well-structured and professional criminal networks, also operating internationally”.¹²³ Some emphasis is placed on the need to directly address the criminal business model, since specialized trafficking groups often

¹¹⁷ *Ibid.*, p. 9.

¹¹⁸ *Ibid.*, p. 10.

¹¹⁹ *Ibid.*, p. 11.

¹²⁰ *Ibid.*, pp. 4-5.

¹²¹ *Ibid.*, p. 6 ff.

¹²² *Ibid.*, p. 12 ff.

¹²³ EU Strategy on Combating Trafficking in Human Beings 2021-2025, point 4.

use legal markets in their operations.¹²⁴ Hence, the need to strengthen financial investigations and develop a framework to identify and confiscate criminal assets.¹²⁵ In the perspective of a robust criminal justice response, the strategy dovetails with the organized crime strategy in proposing appropriate training that takes place in a multi-stakeholder environment, including, among others, law enforcement, judicial authorities, civil society, social workers, child protection practitioners, education and health care providers, labour inspectors, police, etc.¹²⁶

5.1.3. *A First Assessment*

Clearly, any judgement on the Plan would be premature given the continuing hostilities at the time of writing. However, scholars have already pointed out certain criticalities in the implementation of the Anti-Trafficking Plan. In particular, the sub-optimal response in some countries due to a lack of pre-war capabilities or resources is highlighted.¹²⁷ Similarly, there seems to be a contrast between what the Plan and Strategy envisage, *in abstracto*, regarding dissemination of information and allocation of financial means for support and assistance to migrants and what is implemented in practice. La Strada's report highlights how migrants may encounter too much information, misinformation, or contradictory and fragmented information.¹²⁸ Similar problems are also reported with regard to helplines and hotlines. Furthermore, the registration of volunteers, on which emphasis was rightly placed, still seems to be too much left to the goodwill of organizations and not to state measures.¹²⁹ Finally, the absence of National Referral Mechanisms for all types of victims in some countries seems to hinder mechanisms for early identification, assistance and support for victims.¹³⁰ This specific obstacle is part of a broader problem related to the lack of resources for anti-trafficking action.¹³¹ At the same time, it is clear that the effectiveness of the EU response can only be assessed over the long term.¹³²

Currently, consensus on measures to protect the population fleeing Ukraine is

¹²⁴ *Ibid.*, point 4.1.

¹²⁵ *Ibid.*, see also Council conclusions on enhancing financial investigations to fight serious and organised crime, 17 June 2020.

¹²⁶ EU Strategy on Combating Trafficking in Human Beings 2021-2025, point 4.2.

¹²⁷ HOFF and DE VOLDER, *cit. supra* note 107.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, p. 18.

¹³⁰ *Ibid.*, pp. 16-17.

¹³¹ *Ibid.*, p. 3 ff.

¹³² See GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANISED CRIME, *The Vulnerable Millions. Organised Crime Risks in Ukraine's Mass Displacement*, pp. 27-30.

still high. However, the effective prevention of human trafficking attempts will be measured by the ability of the EU and States to maintain a high level of social and economic support primarily in the long term. This is all the more essential in the perspective that the Conflict may be destined to be prolonged and exceed the maximum duration of temporary protection measures of three years.¹³³ In this sense, there are several risks associated with an excessive reliance on humanitarian aid organizations over state actors and with the assumption that the current political predisposition towards reception can be maintained over time.¹³⁴

As attention to the issue wanes, what once served as a unifying factor of political may soon become a cause for confrontation, resulting in an increase in both material and “moral” uncertainties for refugees, and thus in the risks of being attracted by illicit prospects.

5.2. *The Activation of the Temporary Protection Directive: Praise and Criticisms*

As acknowledged by the Plan itself, the activation in March, for the first time, of the Temporary Protection Directive¹³⁵ has played an essential role in reducing migrants’ vulnerabilities to trafficking.

The Directive guarantees a series of rights for beneficiaries of temporary protection, including: a residence permit for the entire duration of protection (which can last from one year to three years);¹³⁶ information on protection; access to employment and suitable accommodation or housing; access to social welfare measures and medical care; access to education for minors; and the right to move to another EU country.

The extension of the protection offered by the activation of the Directive may indeed represent an important breakthrough. The benefits deriving from the acquisition of the status of beneficiaries of temporary protection constitute, perhaps, the most effective instrument to prevent them from falling into the “clutches” of

¹³³ *Ibid.*

¹³⁴ COCKBAIN and SIDEBOTTOM, *cit. supra* note 106, p. 41. And there cited AHMAD, “Europe’s Hospitality for Refugees Won’t Last Forever”, *Foreign Policy*, 2022.

¹³⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212. The activation of the Directive was proposed by the Commission on 2 March 2022, and unanimously approved on 4 March by the Council.

¹³⁶ At the moment, temporary protection is likely to be extended until, at least March 2024. The extension is automatic and does not require any specific act.

organized crime, alongside supporting their essential needs.

The swift activation of temporary protection for the first time since 2001, in contrast to the “political blockage” by EU Member States over proposals for reforming the EU asylum system,¹³⁷ nevertheless opened the door to some misgivings raised especially by those who had proposed its activation for the 2015-2016 migration crisis.¹³⁸ In this perspective, the EU’s “double standard” was critically highlighted.¹³⁹

Reasons for this differentiation certainly include *realpolitik* considerations, and above all the circumstance that the conflict in Ukraine is taking place in the heart of Europe. Without necessarily looking for an explanation in the fact that the Ukrainians are considered “European”,¹⁴⁰ one must consider that, in activating temporary protection, the EU is first and foremost protecting its own interests in the face of Russia’s expansion into Europe and the destabilization of European and global security and stability.¹⁴¹ This is also made clear by the preamble of the Council Implementing Decision 2022/382.¹⁴²

Beyond these more general considerations on “unequal solidarity” in the activation of the Directive, the most pressing critical issue remains the option, contained in the decision, for States not to apply the Directive’s guarantees to all third-country nationals and asylum seekers residing in Ukraine.¹⁴³ Despite the fact that the original proposal of the European Commission gave room for the extension of the protection to all “third-country nationals legally residing in Ukraine who have

¹³⁷ CARRERA et al., *The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy*, 2022, p. 1.

¹³⁸ INELI-CIGER, “Time to Activate the Temporary Protection Directive”, *European Journal of Migration and Law*, 2016, pp 1-33. The proposal was put forward also by the MEP Elisabetta Gardini in February 2015.

¹³⁹ INELI-CIGER, “Reasons for the activation of the temporary protection directive in 2022: A tale of double standards”, in CARRERA and INELI-CIGER (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, 2023, p. 59. In some cases, the criticisms have even gone so far as to speak of “racism” on the part of the European institutions. See ENAR, “Racist double-standards persist at EU/Ukraine borders and beyond”, Blog Post, 30 March 2022, available at: < <https://www.enar-eu.org/racism-borders-eu-ukraine/> >.

¹⁴⁰ *Ibid.*

¹⁴¹ SKORDAS, “Temporary Protection and European Racism”, in CARRERA and INELI-CIGER (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, 2023, pp. 428-429.

¹⁴² Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71/1.

¹⁴³ CARRERA et al., *cit. supra* note 137, p. 3 ff. For an updated analysis of the specific challenges and application of the Temporary Protection Directive in EU Member States, see ECRE, Information Sheet – Measures in response to the arrival of displaced people fleeing the war in Ukraine, 31 March 2023, available at: <<https://ecre.org/wp-content/uploads/2022/12/ECRE-Update-November-2022-Implementation-of-the-TPD.pdf>>.

been displaced as of 24 February 2022 and who are unable to return to their country or region of origin in safe and durable conditions because of the situation prevailing in that country”,¹⁴⁴ the extension was eliminated by the final decision. This amendment, in turn, introduced further and critical differentiations.¹⁴⁵

6. CONCLUSIONS

This contribution investigated the international framework on countering human trafficking and the risks associated with the poly-crisis and the current conflict in Ukraine. The Anti-Trafficking Plan adopted by the European Union certainly attempts to take a multifaceted approach to the problem. However, there are several issues that may have a counterproductive effect.

Firstly, organized crime plays a decisive role in the exploitation of human trafficking. In this sense, it seems that combating the phenomenon discounts a certain degree of uncertainty, both at a definitional and thus abstract level, given the uncertainties that emerge in the international framework, and, as a necessary reflection of this, at a concrete level, from an operational point of view.

The European Commission’s Strategies acknowledge the possible role of organized crime, but rely on greater coordination between authorities and agencies, without addressing the elephant in the room constituted by uncertainty at the definitional level. In this perspective, the invitation to follow, rather than organized crime, the money flows generated by these activities could be fertile.¹⁴⁶ The call for financial investigations would seem promising in this sense.

A second problem with the Anti-Trafficking Plan belongs to the sphere of general prevention measures. While the Plan appears to be fully in line with general prevention obligations, such as information and victim support and assistance, in practice, the lack of resources could hinder the effectiveness of these intentions.

At the same time, only time will tell whether, in the long term, the European Union will be able to guarantee continued support for the Ukrainian people, both in the case of a prolonged continuation of hostilities and in the case of the necessary reconstruction

¹⁴⁴ Proposal for a Council Implementing Decision, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection, Recital 11.

¹⁴⁵ For an in-depth analysis of the critical aspects of the activation of the Directive, see VITIELLO, “The Nansen Passport and the Eu Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe”, *European Papers*, 2022, pp. 15-30.

¹⁴⁶ KOTECHA, *cit. supra* note 62, p. 62 ff.

that will have to take place in Ukraine after the conflict. In the long term, in fact, it will be necessary to act with the aim of preventing the vulnerabilities that States are called upon to address with social and economic measures (Article 31 of Palermo Convention and Article 9(2) and (4) Palermo Protocol) from re-emerging or becoming stronger.

In the same perspective, if the greatest risks for human trafficking are nested in vulnerabilities and obstacles of economic and social nature, applying the protection measures aimed at combating them, only to certain subjects or groups risks creating dangerous gaps. In this perspective, it would be advisable to review the critical aspects of the implementation of the Temporary Protection Directive. In fact, the “cracks” created by the absence of support and assistance from state actors and too often exploited by organized crime, provide fertile ground for the development of illicit opportunities and criminal practices in relation to human trafficking.

FREE MOVEMENT OF PERSONS PROVIDING SERVICES IN THE EU AND ASEAN: A COMPARATIVE VIEW

Bui Thi Ngoc Lan, Hang Thuy Tran

SUMMARY: 1. Introduction; – 2. The Model of Free Movement of Persons Providing Services in the Eu and Asean; – 2.1. The model of persons providing services in the EU; – 2.2. The model of persons providing services in ASEAN; – 3. The Similarities and Differences of the Movement of Persons Providing Services between the EU and Asean; – 3.1. The Similarities; – 3.2. The differences 4. The EU and ASEAN: Lessons Learnt from Each Other; – 5. Conclusion

1. INTRODUCTION

There are various definitions of services proposed around the world. The World Trade Organization (“WTO”) defines services broadly as “any service in any sector except services supplied in the exercise of governmental authority”.¹ Services are further categorized into 12 sectors and 160 sub-sectors based on this definition.² Within the European Union (“EU”), service is defined as an economic activity that is provided for remuneration and is not subject to the provisions relating to the movement of goods, capital, and persons, consisting of activities of an industrial character, activities of

¹ The General Agreement on Trade in Services (15 April 1994, entry into force 1 January 1995), [GATS], Art. 3(b).

² The World Trade Organization, Services Sectoral Classification List, 7 July 2023, available at: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

CILIBERTO, PALOMBINO (eds.), Labour Migration in the European Union: Current Challenges and Ways Forward, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 73-103.

commercial character, activities of craftsmen, activities of the professions.³ The EU has a more detailed definition of services than the WTO. It is based on the economic nature of activities and excludes those governed by the free movement of goods, capital, and people. In contrast, the Association of Southeast Asian Nations (“ASEAN”) does not have a specific definition of service, but its classification of services adheres to the World Trade Organization’s Service Sectoral Classification List.

The free movement of people rendering services is necessary for economic integration. Services, along with goods, investments, and labour, services are among the most essential elements in the production process. However, until now, there has been a need for global awareness regarding the free migration of service-providing individuals. The provisions regulating the international movement of service providers can be found in the General Agreement on Trade in Services (“GATS”), and specific regional and bilateral agreements. At the regional level, either the EU or ASEAN acknowledges the mobility of service-providing individuals as the primary factor in economic integration. Due to the distinct objectives and integration strategies of the two regional organisations, the free movement of service providers from one regional organisation to the other has a unique structure and mode of operation.

Since the early 1990s, the legal framework⁴ governing the free movement of service-providing persons across ASEAN has been systematically developed. The ASEAN Framework Agreement on Services (“AFAS”) was signed on 15 December 1995, intending to enhance cooperation in services and remove substantial barriers to trade in services among ASEAN Member States. This agreement established the first fundamental rules governing the movement of service providers within ASEAN. Expressly, ASEAN Member States agreed to liberalise service trade by substantially eliminating all existing discriminatory measures and market access restrictions. The member states also agreed to negotiate trade-affecting measures for specific service sectors.⁵ In later agreements about the ASEAN Economic Community (“AEC”), such as the 2012 ASEAN Agreement on Movement of Natural Persons (“MNP”) governing the temporary movement of natural persons under the movement of natural persons (Mode 4),⁶ the eight Mutual Recognition Arrangements on Professional Services to

³ The Treaty on the Functioning of the European Union (13 December 2007, entry into force 1 December 2009), OJ C 202/1 [TFEU], Art. 57.

⁴ See Appendix 1 for the ASEAN legal framework governing the free movement of persons providing services.

⁵ ASEAN Framework Agreement on Services (15 December 1995, entry into force 12 August 1998), [AFAS], Art. 4(1).

⁶ According to the World Trade Organization, Mode 4 refers to services traded by individuals of one nation through their presence in the territory of another. Service suppliers on Mode 4 include self-employed services suppliers and employees of services firms, available at: <https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm>.

foster mutual recognition of qualifications in service professionals⁷ and, most recently the 2019 ASEAN Agreement on Trade in Services (“ATISA”), these rules continue to be accepted and developed to govern the flow of service suppliers in the region.

In the Declaration of Bali Concord II (“Bali Concord II”) on the establishment of the ASEAN Community, adopted on 7 October 2003, ASEAN Member States declared that the free flow of services is an essential element of the ASEAN single market and production base in the ASEAN Economic Community. A component of the free flow of services is the free flow of service providers. The AEC Blueprint 2015 identifies the free flow of trade in services as a critical component of the ASEAN Economic Community,⁸ with ASEAN service providers encountering minimal restrictions. However, the free movement of persons providing services is also considered as a part of the free flow of skilled labour in ASEAN. The implementation measures for the free movement of skilled labor in ASEAN apply to service providers. To facilitate the free flow of services, in particular, the completion and implementation of mutual recognition arrangements (“MRAs”) for certain professional services and the scheduling of commitments for the movement of natural persons in Mode 4 were cited as measures to facilitate the free flow of skilled labor.⁹ In other words, the mobility of service providers in ASEAN incorporates both the open flow of services and the free mobility of skilled labour. This unique model is rarely mentioned in relevant studies on ASEAN free movement of services and ASEAN free movement of service-providing persons. While suitable for ASEAN following the ASEAN Way, it has limitations that restrict the movement of service providers in the region.

Within the EU, the mobility of service providers is rooted in the freedom of movement of European citizens, which is one of the outstanding values and outcomes of interstate cooperation. The right was initially recognised in Article 69 of the Treaty of Paris, which established the European Coal and Steel Community in 1951. It required Member States to eliminate nationality-based restrictions on mobility for workers in coal mining and steel production. According to Article 69, Member States undertake to eliminate any nationality-based restrictions on the employment in the coal and steel industries of nationals of Member States with recognised qualifications in a coalmining or steelmaking occupation.¹⁰ The free movement of persons providing services has been recognised as a component of the European Internal Market, within which EU Member States are obligated to eradicate restrictions on the freedom to

⁷ For the precise title, date of signature, and validity of these documents see Appendix 1.

⁸ The AEC Blueprint 2015 (adopted 20 November 2007), Paragraph 9.

⁹ The AEC Blueprint 2025 (adopted 22 November 2015), Paragraph 19.

¹⁰ Treaty establishing the European Coal and Steel Community (18 April 1951, entry into force 23 July 1952), Art. 69(1).

provide services based on nationality. These obligations are referenced in Article 56 of the Treaty on the Functioning of EU (“TFEU”), a few pertinent directives,¹¹ and some case law of the Court of Justice of the European Union (“CJEU”) for further clarification. While there have been some positive outcomes from promoting service providers in the EU Member States, several limitations raise concerns. The free movement of services was considered the poor cousin the other freedoms.¹²

The study compares the mobility of service providers in the EU, and ASEAN is conducted to obtain a legal understanding of the free movement of service providers in these two organizations. By analyzing the similarities and differences between the free movement of persons providing services in the EU and ASEAN, recommendations are proposed to facilitate mutual learning and enhance the influx of service providers within their respective regions. These suggestions are particularly relevant in the aftermath of the Covid-19 pandemic, which has significantly impacted the movement of individuals, especially service providers. The focus of this study is the comparative examination of the movement of persons involved in the provision of services within ASEAN and the EU, intending to identifying valuable lessons that can be exchanged between the two organizations.

This study investigates the similarities and differences between ASEAN and the EU concerning the free movement of persons providing services under the mode of movement of natural persons (Mode 4). On this assumption, it also provides some lessons that ASEAN and the EU can share to encourage the migration of individuals delivering services within their respective regions. The paper is structured as follows: Section 2 describes the model of persons providing services in the EU and ASEAN. Section 3 analyses the similarities and differences in the movement of persons providing services between the EU and ASEAN. Section 4 highlights the lessons that the EU and ASEAN can learn from one another to promote the movement of persons providing services.

¹¹ Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market OJ L 376/36; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ L 255/22.

¹² HM GOVERNMENT, “Review of the Balance of competences between the United Kingdom and the European Union: The Single Market: Free Movement of Services”, 20 March 2023 available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/332668/bis-14-987-free-movement-of-services-balance-of-competencies-report.pdf>.

2. THE MODEL OF FREE MOVEMENT OF PERSONS PROVIDING SERVICES IN THE EU AND ASEAN

The free movement of persons providing services within the EU involves the elimination of nationality-based restrictions applied to service suppliers. ASEAN also clarifies the free movement of persons providing services, including facilitating the free movement of persons providing services under Mode 4 (natural movement of persons) and practitioners in certain service professions under Mutual Recognition Arrangements (MRAs). This paper explains the model of free movement of persons providing services in the EU and ASEAN, focusing on the subjects permitted to move into another Member State to provide services and the categories of restrictions removed to foster the movement of service providers (refer to Diagram 1).

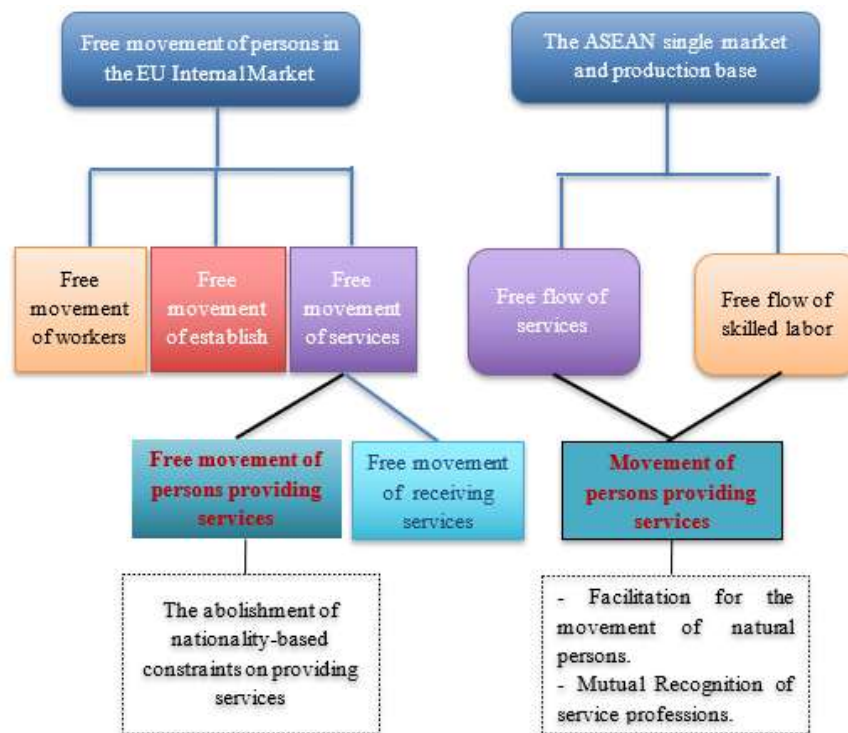


Diagram 1. The model of free movement of persons providing services in the EU and ASEAN
Source: Constructed by the authors

2.1. *The model of persons providing services in the EU*

As mentioned in Diagram 1, the free movement of persons providing services in the EU is a part of the free movement of services in the internal market. To allow service providers to move freely within the region, the Member States shall abolish nationality-based restrictions on freedom to provide services within the Union.¹³ Free movement of persons providing services in the EU is regulated by the treaties in primary source,¹⁴ legal acts in secondary source,¹⁵ and CJEU case law.¹⁶

Regarding subjects authorized to provide services within the EU, according to Article 56 of the TFEU, the following entities may be empowered to provide services within the EU: persons providing services who are nationals of an EU Member State and third-country nationals (TCNs) who are family members of EU nationals are established in a Member State. In the *Janko Rottman v Freistaat Bayern* case, the Court challenged the long-held view that the definition of a Member State's nationality is subject to national law. This traditional view was cited, for example, in the Declaration No. 2 on nationality of Member States¹⁷ and in *the Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervenor: Justice* case, in which the Court stated that:

“In paragraph 10 of *Micheletti and Others*, cited above, ‘[u]nder international law, it is for each Member States, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.’”¹⁸

In the *Janko Rottman v Freistaat Bayern* case, the CJEU took a different viewpoint and ruled that, “even when a matter fell within the jurisdiction of the Member States, ‘in situations covered by European Union law,’ national rules were required to have regard for EU law”¹⁹. The decision of the German authorities to

¹³ The Treaty on the Functioning of the European Union (13 December 2007, entry into force 1 December 2009), OJ C 202/1 [TFEU], Art. 56.

¹⁴ TFEU, Art. 56- 57 TFEU.

¹⁵ See also *supra* text at note 11.

¹⁶ Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* ECR, 1974, 1299; Case C-76/90, *Säger v. Dennemeyer*, ECR, 1991, I-4221; Case C-55/4 *Reinhard Gebbard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECR, 1995.

¹⁷ Pursuant to the Declaration No. 2 on nationality of Member States, the question whether an individual possesses the nationality of a Member States shall be determined exclusively by reference to the national law of the Member States concerned.

¹⁸ Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervenor: Justice*, 2001, I-1265, para. 19.

revoke Rottman's German naturalisation, thereby causing him to lose the status conferred by Article 20 TFEU (former Article 17 EC) and the rights attached thereto, fall within the scope of European Union Law. The Court held that:

“having regard to the importance which primary law attaches to the status of citizens of the Union’, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.”¹⁹

Notably, the broad understanding of who can rely on Article 56 is not limited to service providers but also includes service recipients. Although the freedom to receive services was not explicitly mentioned in the EC Treaty, it is referenced in the General Programme on the abolition of restrictions on the provision of services, Article 1(1) of former Directive 64/221/EEC, and Article 1(1)(b) of former Directive 73/148/EEC.²⁰ In the *Luisi and Carbone* case²¹, the CJEU clarified that the applicable EU Treaty provisions applied to both service recipients and service providers. The Court held that:

“It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions.”²²

With respect to categories of restrictions eliminated, Article 56 TFEU does not provide specific criteria for identifying discriminatory obstacles imposed on service providers that Member States are required to eliminate. However, in the *Van Binsbergen* case, the Court of Justice interpreted the barriers under Article 56 TFEU (formerly Article 59 EEC) and ruled that:

“The first paragraph of Article 59 EEC and the third paragraph of Article 60 EEC must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within that State,

¹⁹ Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, ECR, 2010, I-1490, para. 56.

²⁰ WEISS and WOOLDRIDGE, *Free movement of persons within the European Community*, 2nd ed., Alphen aan den Rijn, 2007, p. 133.

²¹ Joined Cases 286/83 and 26/83 *Luisi and Carbone*, ECR, 1984, 377.

²² *Ibid*, para. 16.

deny persons established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.”²³

The CJEU ruling mentioned above identifies two types of discrimination that EU Member States must eliminate to comply with the EU regime on the free movement of services: direct and indirect discrimination. Direct discrimination refers to nationality-based discrimination. Indirect discrimination refers to place-based discriminatory measures.²⁴

The term indirect discrimination can also be defined as measures that treat non-nationals and nationals equally, but prejudice non-nationals in practice.²⁵ In case *Säger v. Dennemeyer* of 1991²⁶ the Court concluded that:

“Article 59 of the EEC Treaty requires not only the elimination of all discrimination against a person providing services on the grounds of his nationality, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.”²⁷

Notably, the free movement of persons providing services does not infringe Article 56 TFEU if restrictions are applied for public policy, public security, or public health reasons. However, Member States do not have the unlimited power to restrict the free movement of services under the above exception:

“any measures taken on grounds of public policy, public security or public health must be justified by a real and sufficiently serious threat to a fundamental interest of society and must be in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the proportionality principle.”²⁸

²³ Case 33/74 *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*, 1310 , para. 17

²⁴ POSTNIKOVA, *The scope of the freedom to provide services: prohibited restrictions*, Working paper series: Law WP BRP 19/LAW/2013, 2013, p. 6.

²⁵ See HM Government, *cit. supra* note 4.

²⁶ Case C-76/90, *Säger v. Dennemeyer*, ECR, 1991, I-4221.

²⁷ *Ibid*, para. 12.

²⁸ The European Union, Limitations on the movement and residence which are justified on grounds of public policy, 6 July 2023, available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A123010>>.

2.2. *The model of persons providing services in ASEAN*

Compared to the EU, the free movement of persons providing services in ASEAN combines the free flow of services and the free flow of qualified labour in the ASEAN single market and production base (as shown in Diagram 1). To accomplish the goal of free movement of persons providing services in the region, ASEAN Member States facilitate the movement of natural persons (known as Mode 4) and recognise the qualifications of specific service providers. In other words, the free movement of persons providing services in ASEAN does not refer to the elimination of restrictions; instead, it refers to the facilitation of mobility of people in providing services through the scheduling of natural movement of persons commitments under the ASEAN Framework on Services, the ASEAN Agreement on Movement of Natural Persons, and professional recognition under Mutual Recognition Arrangements (MRAs) in certain occupations. This is specified in the AEC Blueprints.²⁹ Section A5 of the AEC Blueprint for 2015, titled “Free Flow of Skilled Labour” outlines the measures to be taken to manage mobility or facilitate entry for the movement of natural persons engaged in trade in commodities, services, and investments, as well as harmonisation and standardisation to facilitate the free flow of services. The AEC Blueprint 2025, adopted by the ASEAN Leaders at the 27th ASEAN Summit on 22 November 2015 in Kuala Lumpur, Malaysia, provides broad direction through strategic measures for the AEC from 2015 to 2025. Under Section A.5 of the AEC Blueprint 2025, in order to facilitate the movement of skilled labour in ASEAN, member states shall prioritise measures on participating in mutual recognition of qualifications by permitting practitioners in eight professions to practise in other member states,³⁰ implementing the ASEAN Qualification Reference Framework,³¹ and

²⁹ The ASEAN Economic Community Blueprint 2015 (The AEC Blueprint 2015), adopted in November 2007, has served as a comprehensive master plan to chart the region’s journey toward the formal establishment of the AEC on 31 December 2015.

The ASEAN Economic Community Blueprint 2025 (The AEC Blueprint 2025), adopted in November 2015 to provide broad directions for ASEAN economic integration from 2016 to 2025.

³⁰ Currently, ASEAN member states have signed mutual recognition arrangements (MRAs) in 08 professional services, including: MRA on Engineering Services 2005, MRA on Nursing Services 2006, MRA on Architectural Services 2007, MRA on Surveying Qualifications 2007, MRA on Medical Practitioners 2009, MRA on Dental Practitioners 2009, MRA on Tourism Professionals 2012 and MRA on Accountancy Services 2014, 19 April 2023, available at: <<https://asean.org/our-communities/economic-community/services/>>.

³¹ The ASEAN Qualification Reference Framework (AQRf), an initiative designed to facilitate the mobility of individuals, has neutral effect on the national qualifications framework. AQRf is a common framework for comparing qualifications throughout all education and training sectors across all ASEAN Member States.

implementing the ASEAN Agreement on Movement of Natural Persons.³²

Based on the earlier documents, subjects allowed to provide services in ASEAN include skilled labour. Skilled labour is generally characterized by having advanced education (college and higher), possessing knowledge and skills to perform complicated tasks, having the ability to adapt quickly to technological changes, and the creative application of knowledge and skills acquired through training in their work.³³ ASEAN does not provide a concrete definition of skilled labour in any documents. Based on the existing documents,³⁴ skilled labour in ASEAN is composed of two groups: 1) Natural persons engaged in the conduct of trade in goods, trade in services, and investment under the ASEAN Agreement on Movement of Natural Persons; and 2) professionals authorized, licensed, or certified within the MRAs in particular professional services. According to MNP, the agreement applies to measures influencing the temporary entry or stay of natural persons belonging to the following categories: business visitors, intra-cooperate transferees, contractual suppliers, and other categories specified in the schedules of commitments of the member states (Art. 2 MNP).³⁵ ³⁶ Like GATS Mode 4, the ASEAN MNP does not cover unskilled labour, which is considered its most significant limitation.³⁷ The actual commitments of ASEAN Member States are restricted compared to the four categories of natural persons specified in Article 2 of the ASEAN Agreement on MNP. According to ASEAN Member States' schedule of movement of natural persons commitments,³⁸ Brunei, Singapore, and Myanmar made commitments for intra-corporate transferees. Indonesia, Lao PDR, the Philippines, and Thailand have made commitments for two types of natural persons: business visitors and intra-corporate transferees. Cambodia has made commitments for intra-corporate

³² See also *supra* text at note 9, para. 19.

³³ ISSL and ILO (2015), *Skilled labour a determining factor for sustainable growth of the nation*, Policy Brief Vol 1, 2014, 1 September 2021, available at: <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_428969.pdf>.

³⁴ The documents are composed of both binding instruments and soft-law instruments: the former comprises the ASEAN Framework Agreement on Services, the ASEAN Agreement on Natural Movement of Persons, the ASEAN Trade in Services Agreement, the eight Mutual Recognition Arrangements on engineering services, nursing services, architectural services, surveying qualifications, medical practitioners, dental practitioners, and tourism professionals; soft-law instruments embrace the AEC Blueprint 2015, the AEC Blueprint 2025.

³⁵ The ASEAN Agreement on Movement of Natural Persons (19 November 2012, entry into force 14 June 2016), [MNP], Art. 2

³⁶ FUKANAGA and ISHIDO, "Values and limitations of the ASEAN Agreement on the Movement of Natural Persons", ERIA Discussion Paper Series, 2015, p. 6.

³⁷ *Ibid*, p. 31.

³⁸ ASEAN MNP Schedule, 2 July 2023, available at: <www.asean.org/our-communities/economic-community/services/>.

transferees, persons responsible for establishing a commercial establishment, and contractual services suppliers. Vietnam seems more receptive to commitments for intra-corporate transferees, persons responsible for setting up a retail presence, and contractual services suppliers.

Under MRAs, the movement of professionals authorised, licenced, or certified under eight MRAs concluded among ASEAN members is facilitated.³⁹ However, unlike the EU, ASEAN does not permit free mobility of people; as a result, MRAs are also constrained by immigration regulations adopted by Member States.⁴⁰

The modalities of ASEAN MRAs vary considerably,⁴¹ and there are four distinct groups of MRAs: 1) Group one (Establishment of the ASEAN regional registry): MRAs on engineering services, architectural services, and accountancy; 2) Group two (Exchange information and expertise, promote adoption of best practices, and provide opportunities for capacity building and training): MRAs on medical practitioners, nursing services, and dental practitioners; 3) Group three (Establishment of the basis for competent authorities of Member States to observe when negotiating bilateral or multilateral trade agreements): MRAs on medical practitioners, nursing services, and dental practitioners; 4) Group four (Provide a mechanism for agreement on the equivalence of tourism certification procedures and qualification across ASEAN): MRA on tourism professionals.

Regarding categories of restrictions eliminated, existing ASEAN documents mention the elimination of restrictions on the movement of persons providing services. They only address barriers related to service liberalisation, which include market access limitations and limitations on national treatment, and ASEAN Member States must eliminate these restrictions to trade in services.⁴² Market access restrictions include limitations on the total number of natural persons permitted to

³⁹ The Mutual Recognition Arrangement on engineering services (9 December 2005 entry into force 9 December 2005); The Mutual Recognition Arrangement nursing services (8 December 2006 entry into force 8 December 2006); The Mutual Recognition Arrangement surveying qualifications (19 November 2007 entry into force 19 February 2008); The Mutual Recognition Arrangement architectural services (19 November 2007 entry into force 19 November 2007); The Mutual Recognition Arrangement medical practitioners (26 January 2009 entry into force 26 August 2009); The Mutual Recognition Arrangement accountancy services (26 February 2009, entry into force 26 May 2009); The Mutual Recognition Arrangement dental practitioners (26 January 2009, entry into force 26 August 2009); The Mutual Recognition Arrangement tourism professionals (9 November 2012, entry into force 19 April 2016).

⁴⁰ FUKUNAGA, "Assessing the progress of ASEAN MRAs on professional services", ERIA Discussion Paper Series, 2015, p. 4.

⁴¹ HAMANAKA and JUSOH, "The emerging ASEAN approach to mutual recognition: A comparison with Europe, Trans-Tasmania, and North America", IDE Discussion Paper, 2016, No. 618, p. 11.

⁴² The ASEAN Framework Agreement on Services, (15 December 1995, entry into force 12 August 1998), [AFAS] Art. III.

enter, restrictions on the length of stay, an economic requirements test, and the transfer of technology.⁴³ National treatment by ASEAN Member States' national legislation includes the requirement of a work permit for foreign skilled employees, taxes and other financial obligations, requirements in accordance with the labour law, immigration regulations, educational credentials, and a technical standard certificate. ASEAN Member States' legislation also includes other restrictions, such as examinations to ascertain competence and language requirements.⁴⁴ For example, for preliminary registration to qualify as a Professional Engineer, one of the requirements which the applicant must meet is to pass the examination set by the Board of Engineers of Cambodia (BEC) in the subjects on the fundamental theory of the requested specialisation, Code of Ethics of Engineers, and the laws, regulations, and decisions of the BEC.⁴⁵

To remove the restrictions mentioned above, ASEAN Member States shall enter into negotiations measures that affect specific service sectors. The outcomes of negotiations are packages of commitments. As of 2022, there have been ten packages of commitments under the AFAS. For persons providing services under Mode 4, the schedule of commitments of ASEAN Member States under AFAS ranges from the first package of commitments to the seventh package of commitments. The signing of the ASEAN Agreement on Movement of Natural Persons in 2012 led to the schedule of commitments under the MNP overtaking the Mode 4 commitments of the preceding AFAS packages. Under MNP, the schedules of commitments for natural persons shall be outlined since the agreement entered into force. Compared to other modes of supply (Mode 1, Mode 2, and Mode 3), the extent and scope of commitments for subjects of movement are modest in AFAS and MNP. Specifically, ten Member States committed to intra-corporate transferees; seven nations committed to business visitors, except for Brunei, Myanmar, and Singapore; and three nations, including Cambodia, the Philippines, and Vietnam, committed to contractual service suppliers under

⁴³ ASEAN, "Agreement", 25 March 2023, available at: <<https://asean.org/our-communities/economic-community/services/>>.

⁴⁴ *Ibid.*

⁴⁵ The ASEAN Secretariat, *Handbook on liberalisation of professional services through mutual recognition in ASEAN: Engineering Services*, Jakarta, 2015, p. 31.

MNP.⁴⁶ The duration period varies considerably⁴⁷ from nation to nation,⁴⁸ ranging from 30 days to 10 years, depending on the commitments of each Member State. ASEAN Member States' prevalent barriers include entry restricted to skilled workers, numerical quotas, labour market/economic tests, pre-employment, transfer of technology, restriction on the purchase of real estate, a limited period of stay, commercial presence, linking to the creation of local employment, domestic regulations, and recognition of qualifications.⁴⁹

The implementation of Mutual Recognition Arrangements occurs through the creation of offices and bodies to implement their terms at regional and national levels, except for the MRA on surveying qualifications (see Table 1), and the incorporation or transposition of MRA principles into national legislation.

	MRAs	Regional level	National level
Group one	<i>MRA on engineering services</i>	- ASEAN Chartered Professional Engineer Coordinating Committee (ACPECC). - ASEAN Chartered Professional Engineers Register (ACPER).	- Professional Regulatory Authority. - Monitoring Committee.
	<i>MRA on architectural services</i>	- ASEAN Architect Council (AAC). - ASEAN Architect Register (AAR).	- Professional Regulatory Authority. - Monitoring Committee.
	<i>MRA on accountancy services</i>	- ASEAN Chartered Professional Accountant Coordinating Committee (ACPACC). - ASEAN Chartered Professional Accountants Register (ACPAR).	- Professional Regulatory Authority. - Monitoring Committee. - National Accountancy Board.
Group two	<i>MRA on medical practitioners</i>	The establishment of the ASEAN Joint Coordinating Committee on Medical Practitioners (AJCCM)	A Professional Medical Regulatory Authority (PMRA)

⁴⁶ FUKUNAGA, "Values and limitations of the ASEAN Agreement on the Movement of Natural Persons", ERIA Discussion Paper Series, 2015, p. 5-6

⁴⁷ MENDOZA and SUGIYARTO, *The long road ahead status report on the implementation of the ASEAN mutual recognition arrangements on professional services*, Manila, 2015, p. 6, available at: <<https://www.adb.org/publications/implementation-asean-mra-professional-services>>

⁴⁸ LA, "ASEAN Economic Integration on Services: An analysis of economic impacts and implications", World Economy Brief, 2021, p.1 ff., p. 4, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885438>

⁴⁹ IREDALE et al., *Free flow of skilled labour study*, ASEAN- Australia Development Cooperation Program Phase II, 2010, p. 9.

	<i>MRA on nursing services</i>	The establishment of ASEAN Joint Coordinating Committee on Nursing (AJCCN)	A Nursing Regulatory Authority (NRA)
	<i>MRA on dental practitioners</i>	The establishment of ASEAN Joint Coordinating Committee on Dental Practitioners (AJCCN)	A Professional Dental Regulatory Authority (PDRA)
Group three	<i>MRA on surveying qualifications</i>		Competent Authority in charge of regulating the practice of Surveying Services and Registered/Licensed Surveyors
Group four	<i>MRA on tourism professionals</i>	<ul style="list-style-type: none"> - ASEAN Tourism Professional Monitoring Committee (ATPMC). - Regional Secretariat for ASEAN Tourism Professionals. 	<ul style="list-style-type: none"> - National Tourism Organization. - National Tourism Professional Board. - Tourism Professional Certification Board.

Table 1. The implementation of MRAs in ASEAN

Source: Collected by the authors

As shown in Table 1, most regional bodies are established under MRAs, with the exception for the MRA on surveying qualifications. Generally, coordinating bodies are established under the majority of MRAs, while the functions and competencies of other bodies differ between MRAs. Concerning the ASEAN Mutual Recognition Arrangement on Tourism Professionals, for instance, the initial regional coordinating body is the ASEAN Tourism Professional Monitoring Committee (ATPMC), which is responsible for the monitoring of the MRA's on going performance.⁵⁰ The Regional Secretariat for ASEAN Tourism Professionals is the second body charged with promoting the implementation of ASEAN Mutual Recognition Arrangement on Tourism Professionals by providing support for its operations and management as well as the implementation of associated projects and activities. The MRA on engineering services requires to establish two bodies: the ASEAN Chartered Professional Engineer Coordinating Committee (ACPECC) and the ASEAN Chartered Professional Engineers Register (ACPER).

Regarding national bodies, the regulatory authority is established in most MRAs, excluding the MRA on tourism professionals. The MRA on tourism professionals

⁵⁰ The ASEAN Secretariat (2nd ed.), *Handbook ASEAN Mutual Recognition Arrangement on Tourism Professionals*, Jakarta, 2018, p. 51.

aims to ensure the equivalence of tourism certification procedures and qualifications across the ASEAN Member States. An ASEAN tourism professional may be recognised by other ASEAN Member States and be eligible to work in a host country, provided that he/she possesses a valid tourism competency certificate in a specific tourism job title specified in the ASEAN Common Competency Standards for Tourism Professionals (ACCSTP), issued by the Tourism Professional Certification Board (TPCB) in an ASEAN Member State. MRA for tourism professionals is regarded as an automatic acknowledgment of professional credentials.⁵¹ Consequently, its national bodies are distinct, requiring the participation of three national organizations: the National Tourism Organization, the National Tourism Professional Board, and the Tourism Professional Certification Board (TPCB).

3. THE SIMILARITIES AND DIFFERENCES OF THE MOVEMENT OF PERSONS PROVIDING SERVICES BETWEEN THE EU AND ASEAN

3.1. *The Similarities*

The EU and ASEAN are two organizations with distinct operational models. Specifically, ASEAN has been referred to as an intergovernmental organization.⁵² In contrast, the EU has been referred to as an intergovernmental and supranational organization.⁵³ Consequently, the EU and ASEAN have more differences than similarities regarding the free movement of service-providing individuals. Nonetheless, the similarities between the EU and ASEAN regarding the free movement of persons providing services concerns the objective of service provider mobility, the permitted duration, and implementing measures.

Regarding the *objective* of service providers' mobility, the EU and ASEAN promote regional economic integration by encouraging the free flow of goods, services, capital, and labour. According to Article 26 TFEU, the "internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of

⁵¹ MENDOZA et al., *Open windows, closed doors mutual recognition arrangements on professional services in the ASEAN region*, Manila, 2016, p. 4, available at: <<https://www.adb.org/sites/default/files/publication/217411/open-windows-closed-doors.pdf>>

⁵² ASEAN, The founding of ASEAN, 3 July 2023, available at: <<https://asean.org/the-founding-of-asean/>>.

⁵³ GOEBEL, "Supranational? Federal? Intergovernmental? The governmental structure of the European Union after the Treaty of Lisbon", *Columbia Journal of European Law*, 2013, p. 77 ff., p. 141, available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1576&context=faculty_scholarship>.

the Treaties”. Free movement of persons providing services is geared toward establishing a mechanism to facilitate market access and make it simpler for service providers to provide services in the markets of other Member States. In *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*⁵⁴, the CJEU held that:

“Within the scheme of the chapter relating to the provision of services, these directives are intended to accomplish different functions, the first being to abolish, during the transition period restrictions on freedom to provide services, the second being to introduce into the law of Member States a set of provisions intended to facilitate the effective exercise of this freedom, in particular by the mutual recognition of qualifications and the coordination of laws with regard to the pursuit of activities as self-employed persons.”⁵⁵

Some ASEAN documents, including hard law and soft law, mention the purpose of the movement of persons providing services. MNP, for example, as a binding legal agreement, aims to establish a mechanism to liberalize further and facilitate the movement of natural persons towards the free flow of skilled labour through close cooperation between relevant ASEAN bodies in the areas of trade in goods, trade in services, investment, immigration, and labour.⁵⁶ According to AEC Blueprint 2025,⁵⁷ which is a category of soft law, the primary goal of a highly integrated and cohesive economy is to “facilitate the seamless movement of goods, services, investment, capital, and skilled labour within ASEAN to enhance ASEAN’s trade and production networks, as well as to establish a more unified market for its firms and consumers”.

In a nutshell, the free movement of services in general and free movement for persons providing services in particular are an indispensable component of regional integration. Since goods, capital, and labour are production factors, the relationship between service and these factors is close. The EU and ASEAN must foster the mobility of individuals who provide services, thereby increasing the mobility of other factors.

Regarding the permitted *duration* of service providers’ mobility, persons are allowed to provide service across the EU and ASEAN on a temporary basis.

Article 57 TFEU and relevant CJEU case law use the term “temporary basis”. Article 57 TFEU states that service providers must do their business temporarily in

⁵⁴ Case 33/74 *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974, 1299.

⁵⁵ Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974, para. 21.

⁵⁶ The ASEAN Secretariat, *ASEAN Integration in Services*, 2021, Jakatap, p. 39.

⁵⁷ See also *supra* text at note 9, para. 7.

a Member State; however, it does not specify what constitutes a temporary base. The Court of Justice of the EU assessed the temporary nature of the activity taking into account its duration, regularity, periodicity, and continuity.⁵⁸ Chapter II of Directive 2005/36/EC on the recognition of professional qualification specifies the rules governing temporary mobility, which pertain to the temporary or occasional nature of self-employed or employee activities in another EU state:

“The host EU country assesses the temporary mobility on a case-by-case basis (duration of activity, frequency, regularity, continuity); may require a written declaration in advance (see the declaration system in various EU countries on the Scoreboard on the Professional Qualification Directive; may check the professional qualification before the professional can provide services for the first time. This applies when the profession in question has public health or safety implications and does not benefit from automatic recognition under Chapter III of the Directive; may provide for automatic temporary registration or pro forma membership on the basis of the declaration made in advance; may require the service provider to supply the recipient of the service with certain information; requires the professional to inform the public social security bodies in advance or, in an urgent case afterwards, of the services provided.”⁵⁹

The temporary nature is not thoroughly explained in ASEAN, either. The MNP Articles 1 and 2 regulate the parameters relevant to a natural person’s temporary stay. The agreement excludes measures pertaining to citizenship, residency, and full-time employment. A temporary basis involves giving a stay from thirty days to ten years following the commitment schedule established by the ASEAN Member States. Business visitors, for instance, are allowed to stay for an initial duration of fifty-nine days under the Philippines’ schedule of obligations for the movement of natural persons, whereas intra-corporate transferees are given one year.⁶⁰ For business visits, intra-corporate transferees, contractual service providers, and other natural people, Vietnam commits stay lengths of ninety days, three years, and ninety days,

⁵⁸ Case C-55/4, *Reinhard Gebbard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 1995, p. 27.

⁵⁹ European Commission, Temporary mobility, 3 July 2023 available at: <https://single-market-economy.ec.europa.eu/single-market/services/free-movement-professionals/recognition-professional-qualifications-practice/temporary-mobility_en>.

⁶⁰ *The Philippines’s schedule of movement of natural persons commitments*, 20 April 2023, available at: <<http://www.investasean.asean.org/files/upload/ASEAN%20MNP%20Schedule%20-%20Philippines.pdf>>.

respectively.⁶¹

Regarding MRAs, professionals in the eight MRAs also practise on a temporary basis. For instance, a foreign engineer who accepts a job in Malaysia as an engineer is required to register as a temporary engineer. For a short period of up to one year (which can be renewed every six months),⁶² foreign engineers are temporarily registered in Myanmar. In conclusion, the idea of a transitory basis is subject to Member States' obligations and domestic regulations.

Regarding *implementing measures*, one of these is mutual recognition is governed by pertinent EU and ASEAN documents. In the EU, mutual recognition, or professional recognition, is primarily outlined in Directive 2005/36/EC on the Recognition of Professional Qualifications. Three different levels of qualification recognition are provided under Directive 2005/36/EC, notably automatic recognition, general system of recognition, and recognition based on professional experience. Automatic recognition applies to seven occupations: doctors, nurses responsible for general care, dental practitioner, veterinary surgeon, midwife.⁶³ Automatic recognition for sectorial professions whose minimum training conditions are harmonized to a certain extent at the EU level. To qualify for automatic recognition, professionals must obtain a diploma that satisfies the Directive 2005/36/EC's minimum training requirements and is listed in Annex X of this Directive..⁶⁴ The general system of recognition for professions which are not covered by the automatic recognition system is based on the principle of mutual recognition of qualifications. In other words, the host recognition qualifications of the applicant if his/her qualifications are recognized in the home country.⁶⁵ Recognition based on professional experience is based on the required minimum of duration for a number of industrial, commercial and craft activities.⁶⁶

The EU model of mutual recognition may be categorized as managed recognition,

⁶¹ Vietnam's schedule of movement of natural persons commitments, 24 May 2023, available at: <<https://investasean.asean.org/files/upload/ASEAN%20MNP%20Schedule%20-%20Vietnam.pdf>>.

⁶² The ASEAN Secretariat, *Handbook on liberalisation of professional services through mutual recognition in ASEAN: Engineering services*, 2015, Jakarta, Indonesia.

⁶³ Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, para. 19.

⁶⁴ European Commission, Automatic recognition, 4 July 2023, available at: <www.single-market-economy.ec.europa.eu/single-market/services/free-movement-professionals/recognition-professional-qualifications-practice/automatic-recognition_en>.

⁶⁵ European Commission, General recognition, 4 July 2023, available at: <www.single-market-economy.ec.europa.eu/single-market/services/free-movement-professionals/recognition-professional-qualifications-practice/general-system_en>.

⁶⁶ See also *supra* text at note 62, para. 18.

which does not entail the extensive prior harmonisation of qualifications across Member States.⁶⁷ As a result, the system of recognition in the EU varies in scope, automaticity and reversibility to compensate for existing differences in the ways in which professions are regulated.⁶⁸ While automatic recognition of professional qualifications is available for seven professions, recognition based on professional experience is for professionals working in the craft, commerce or industry sectors. The general system of recognition is regulated for a wide range of professions.

ASEAN mutual recognition is professional recognition, and it varies amongst service sectors. Either the ASEAN Framework Agreement on Services or the ASEAN Trade in Services Agreement stipulate the right to recognise the education or experience obtained, requirements met, or licenses or certifications granted in the ASEAN Member States. Recognition can be based on agreements or arrangements or accorded autonomously. In addition, ATISA enables recognition through harmonization. Harmonization of qualifications is an optimal solution to regulatory problems that impede international trade of services.⁶⁹ There are two categories of harmonization of qualifications: unilaterally harmonization and mutual harmonization.⁷⁰ Article 5 (1) of the AFAS and Article 17 (1) of the ATISA are essentially identical to Article VII (1) of the GATS. The explanation is that AFAS adopts the fundamental structure and substantive provisions of GATS.⁷¹ According to the ASEAN Secretariat⁷², the GATS recognition mechanism is delegated to the relevant professional bodies and the countries to adopt. Article VII of the GATS stipulates the recognition of the education or experience obtained, requirements met, or licenses or certifications granted in WTO member states. As mentioned above, to date, there have been eight Mutual Recognition Arrangements concluded among ASEAN Member States. The rest of the MRAs pursue the semi-automatic method, with variations between the accounting, architecture, and engineering MRAs and the health-related MRAs⁷³, in contrast to the tourism MRA, which offers automatic recognition of professional credentials.⁷⁴

⁶⁷ See the ASEAN Secretariat, *cit. supra* note 61, p. 20.

⁶⁸ *Ibid.*

⁶⁹ HAMANAKA and JUSOH, *cit. supra* note 41, p. 3.

⁷⁰ *Ibid.*, p.4.

⁷¹ See the ASEAN Secretariat, *cit. supra* note 31, p. 10

⁷² Th ASEAN Secretariat, *ASEAN Integration in Services*, 2021, Jakarta, Indonesia.

⁷³ See MENDOZA et al., *cit. supra* note 51, p. 5.

⁷⁴ *Ibid.*, p. 4.

3.2. The differences

The movement of service providers in ASEAN and the EU differs significantly, despite certain similarities. The differences in the movement of providing services between the EU and ASEAN in terms of legal base, substance of movement for persons providing services, and implementation measures are shown in Table 2.

The criteria	The EU	ASEAN
1. Legal base	<ul style="list-style-type: none"> - Primary law: Article 56, 57 TFEU 2009. - Secondary law: Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the internal market, Directive 2005/36/EC on recognition of professional qualifications. - CJEU Case law: <i>Case 33/74 Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid</i>, 1974; <i>C-76/90 Säger v. Dennemeyer</i>, 1991 	<ul style="list-style-type: none"> - Hard law: AFAS 1995, MNP, eight MRAs on professional services; ATISA 2019. - Soft law: AEC Blueprints, ASEAN Community Vision 2025.
2. Substance of movement for persons providing services	The abolishment of restrictions without discrimination based on nationality or residence to all persons providing services.	Substantially remove the market access limitations, limitations on national treatments, and other limitations (Examination to determine competence, language etc.)
3. Implementation measures	<ul style="list-style-type: none"> - EU bodies shall promulgate Directives through the ordinary legislative procedure.⁷⁵ - The member states shall endeavour undertake the liberalization of services beyond the extent required by the Directives.⁷⁶ - In addition, the EU adopts measures facilitating persons to provide services, including the harmonisation of national access rules or their mutual recognition. 	Facilitate the movement of service supplier through scheduling of MNP commitments and recognition of professional qualification through MRAs in certain professional services.

Table 2. The differences in movement of persons providing services between the EU and ASEAN
Source: collected by the authors

⁷⁵ Treaty on the Functioning of the European Union (adopted on 13 December 2007, entered into force 1 December 2007) OJ C 202/1 2009 [TFEU]. Art. 59.

⁷⁶ Ibid, Art. 60.

In terms of *legal base*, whereas the movement of persons providing services in the EU is governed by three sources of EU law (primary law, secondary law, and CJEU case law), the movement of persons providing services in ASEAN is regulated by two sources (hard law and soft law). The TFEU provides the freedom to provide services within the Union from Article 56 to Article 62, with Article 56 establishing the main content of this freedom (former Article 49 Treaty Establishing the European Community (TEC)). Article 49 TEC provides as follows:

“Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.”

Article 56 TFEU reaffirms the former Article 49 TEC on prohibiting discrimination against foreign service providers in favour of nationals or residents of the host state.⁷⁷ According to Article 59 TFEU, the European Parliament and the Council shall issue Directives in accordance with the ordinary legislative procedure after consulting the Economic and Social Committee. On this basis, several pertinent Directives are adopted to further elucidate provisions that are not explicitly stated in the treaties of primary law. For instance, Directive 2006/123/EC on services in the internal market clarifies the principles related to freedom to provide services, such as non-discrimination, necessity, and proportionality. As previously mentioned, Directive 2005/36/EC on recognition of professional qualifications provides mutual recognition in the EU as the measure contributing to the facilitation of the movement of persons providing services. The CJEU, through its case law, interprets EU law and develops general principles of EU law.⁷⁸ Certain relevant concepts in the movement of persons providing services have their origins in CJEU case law.⁷⁹

Regarding ASEAN, the mobility of persons providing services is governed by either hard law or soft law. ASEAN Framework Agreement in Services 1995, ASEAN Agreement on Movement of Natural Persons, the eight Mutual Recognition Arrangements on professional services, and ASEAN Trade in Services Agreement

⁷⁷ POSTNIKOVA, *cit supra* note 24, p. 3.

⁷⁸ There are three sources of EU law: Primary law, general principles of EU law, and secondary law. Regarding to general principles of EU law, one of the way to form these principles is stemmed from unwritten sources of law developed by the case law of CJEU.

⁷⁹ In Case *Van Binsbergen*, C-76/90 *Säger v. Dennemeyer*, and *Reinhard Gebbard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, the nature of discriminatory measures and their temporary duration are displayed.

2019 are categorized as hard law instruments regulating the movement of persons providing services. These instruments concluded among ASEAN Member States or between ASEAN or ASEAN Member States and external parties are consenting to be bound by the signatures of the authorized representatives of the Parties, or the signatures are subject to ratification or acceptance in accordance with the internal procedures of the respective Parties.⁸⁰

Soft law⁸¹ governing the mobility of persons providing services is the AEC Blueprints, consisting of actions to implement measures to facilitate the migration of service providers throughout the region, which are categorized as soft law. Although the actions enumerated in the Blueprint are viewed as obligations by the ASEAN Member States, they are not legally binding and contingent on the state's capacity to carry them out. The provisions of the blueprint cannot be enforced, nor can non-compliance be penalized.⁸² The Blueprint exemplifies typical ASEAN soft law. Despite being unusual in that it is not a legal instrument, the liberalization commitments for services under AFAS are based on its objectives and timelines. Specifically, from 2007 to 2015, the 7th and 8th Packages of AFAS⁸³ commitments were completed in accordance with the AEC Blueprint's goals and timelines.⁸⁴

Thus, the sources of law governing the movement of persons providing services in the EU are more diverse and explicit than those in ASEAN law. Along with primary law treaties, the secondary law's Directives, and some CJEU case law contribute to a comprehensive legal base regulating the movement of persons providing services within the EU Internal Market. These sources of the EU law are mentioned in Article 6(3) of TEU, Article 216 of TFEU, and Article 288 of TFEU. The sources of ASEAN law governing the movement of persons providing services in the region do not include secondary law and case law like EU law, which consists of legal instruments of hard law and some soft law documents. Nevertheless, the

⁸⁰ ASEAN, Overview of *legal instruments database*, 4 July 2023, available at: <<https://asean.org/legal-instruments-database/>>.

⁸¹ Soft law refers to norms of conduct that are, in principle, not legally binding, as opposed to hard law, which refers to obligations that are legally binding for the parties involved, MAHASETH and KARTHIK, "Binding or Non-binding: Analysing the nature of the ASEAN Agreements", *International and Comparative Law Review*, 2021, vol. 21, pp. 100-123. DOI: 10.2478/iclr-2021-0004.

⁸² AMADOR, "ASEAN Socio-Cultural Community: An Assessment of its Institutional Prospects", 2011, p. 24, 09 May 2023 available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1803830>.

⁸³ Package of Schedule of Commiments under the AFAS provide for details of the liberalisation commitments made by an ASEAN Member State in services sectors and sub-sectors. There has been ten packages of commitments under AFAS concluded, in which the 7th package and the 8th package signed on 26 February 2009 in Thailand and on 19 November 2010 in Vietnam respectively.

⁸⁴ See the ASEAN Secretariat, *cit. supra* note 38, p. 11.

explanation of legal instruments is not always clear. Any differentiation and information about legal character are acquired by academics rather than the official ASEAN documents themselves by looking at ASEAN's existing practice.⁸⁵ There has also been a need for more explanation of soft law in ASEAN.

Regarding the *substance* of movement for persons providing services, the term "movement of persons providing services in the EU" refers to eliminating restrictions without nationality or residence-based discrimination for all persons providing services. Free movement of persons providing services across the EU is related to EU citizens' right to freely work and reside in another EU Member State and enjoy equal treatment in access to employment, working conditions, and other social and tax advantages.⁸⁶ EU freedom of movement in general and the free movement of persons providing services, in particular, are based on non-discriminatory rights and freedoms of movement. These are essential to the formation of a new, supranational European identity.⁸⁷ Article 18 of TFEU (formerly Article 12 TEC) governs the principle of non-discrimination enshrined in the Treaties establishing the European Union as one of the guiding principles of the economic liberalization process.⁸⁸ Article 18 stipulates that, within the scope of application of the Treaties and without prejudice to any specific provisions therein, discrimination based on nationality is prohibited.

Movement of persons providing services in ASEAN relates to substantially removing the market access limitations, limitations on national treatments, and other limitations (examination to determine competence, language, etc.).⁸⁹ Free movement of persons providing services is based on the ASEAN Way. The ASEAN Way refers to a set of diplomatic norms shared by the members of ASEAN,⁹⁰ such as the principle of non-interference, consultation, and consensus, etc. Additionally, the free movement of persons providing services can be explained by "Brain circulation". Brain circulation is a multifaceted phenomenon encompassing the movement of

⁸⁵ MAHASETH and Subramaniam, "Binding or non-binding: Analysing the nature of the ASEAN Agreements", ICLR Vol. 21 No. 1, 2021, p. 113.

⁸⁶ VASILOPOULOU and TALVING, "Opportunity or threat? Public attitudes towards EU freedom of movement", Journal of European Public Policy, available at: <<https://www.tandfonline.com/doi/full/10.1080/13501763.2018.1497075>>.

⁸⁷ See WEISS and WOOLDRIDGE, *cit supra* note 20, p. 2.

⁸⁸ See POSTNIKOVA, *cit. supra* note 24, p. 5.

⁸⁹ TULLAO and CORTERZ, "Enhancing the movement of natural persons in the ASEAN region: Opportunities and constraints", Asia-Pacific Research and Training Network on Trade Working Paper Series, No. 23, 2006, p. 10-12.

⁹⁰ KATSUMATA, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"", Contemporary Southeast Asia, p. 104, available at: <<https://www.jstor.org/stable/25798630?read-now=1&refreqid=excelsior%3Ac1b9ba9283ba8f9964627bb2b47ed00a&seq=1>>.

highly skilled persons between different nations, which is defined as the significant, vital pillar and process sustaining countries' knowledge-based economic development.⁹¹ ASEAN Member States under a brain circulation perspective entails the circulatory flows of knowledge, skills, and non-permanent outflows for the countries of origin.⁹² As indicated above, movement of persons providing services is for skilled labourers in temporary duration.

The movement of people rendering services in the EU is substantively broader than in ASEAN. The movement of persons providing services in the EU is open to all nationals of EU Member States and third-country nationals who are family members of EU nationals, regardless of their skill level. Regarding ASEAN, the mobility of service-providing individuals is restricted to nationals of ASEAN Member States; however, skilled labor is permitted. The EU removes discriminatory restrictions to enhance the movement of persons providing services. The explanation of discriminatory obstacles is based on the CJEU, as mentioned earlier's judgment. ASEAN admits the rules of principles in the liberalisation of trade in services of the GATS, so removing restrictions related to the movement of persons providing services is market access, national treatment, and other limitations referred to in the ASEAN Member State Schedule of Commitments. To increase the mobility of service providers, the EU eliminates discriminatory restrictions. The ASEAN Trade in Services Agreement's preface states that ASEAN accepts the GATS's rules and principles for liberalizing trade in services; as a result, the removal of restrictions on the movement of individuals who provide services is subject to market access, national treatment, and other limitations referred to in the ASEAN Member State Schedule of Commitments.

In terms of *implementation measures*, the free movement of services within the EU demonstrates the importance of directives as a secondary legislation category that supplements primary law and case law. Directive 2006/123/EC establishes a broad framework encompassing a wide range of services while considering the distinctive characteristics of particular activities and the regulatory system.⁹³ In addition, the EU continues to use measures to facilitate the movement of service-providing individuals, including mutual recognition of qualifications and

⁹¹ DAUGELIENE and MARCINKEVICIENE, "Brain circulation: Theoretical considerations", *Inzinerine Ekonomika-Engineering Economics*, available at: <https://www.researchgate.net/publication/228931144_Brain_circulation_Theoretical_considerations>.

⁹² SIAR, "Prospects and challenges of Brain Gain from ASEAN Integration", *The PIDS Discussion Paper Series*, 2014, p. 39.

⁹³ See HM GOVERNMENT *cit. supra* note 4, , p. 29.

harmonization of national access regulations.⁹⁴

The implementation measures for the movement of service-providing individuals within ASEAN generally conform to the WTO norms. As acknowledged by the WTO agenda and regional trade agreements such as the USMCA, the scheduling of MNP commitments and mutual recognition arrangements are crucial initiatives for facilitating the mobility of service providers. GATS Mode 4 governs the temporary cross-border mobility of professionals and qualified individuals as independent service providers or employees of foreign service-providing companies. Similarly, Mode 4 of the USMCA permits the temporary entry of businesspeople engaged in the trade of commodities, the provision of services, or the conduct of investment activities. Facilitation of transitory entry of business visitors by removing the need for domestic labour tests, resulting in the simplification of cross-border travel to the benefit of businesses seeking to mobilize resources within the member states.⁹⁵ Likewise, Article VII of the GATS stipulates the recognition of qualifications. Under the GATS, Member States merely recognized the education or experience obtained, requirements met, and licenses or certifications granted in certain WTO member states. In addition to engaging in arrangements or agreements, autonomous recognition, harmonization, or other means, member states recognize one another.

4. THE EU AND ASEAN: LESSONS LEARNT FROM EACH OTHER

The free mobility of individuals providing services within the EU and the ASEAN is a vital aspect of regional integration. However, it is crucial to acknowledge that the free movement of service-providing individuals within these regions has limitations. Service providers often face barriers when attempting to export their services to other Member States within the EU and ASEAN. Foreign service providers in the EU frequently face obstacles in the intra-EU service market, such as horizontal barriers, additional regulation compliance costs resulting from the non-recognition of a foreign firm's compliance with regulation in its home country, operational restrictions, etc.⁹⁶ For ASEAN service providers, there are restrictions on market access and national

⁹⁴ European Parliament, Freedom of establishment and freedom to provide services, 6 July 2023, available at: <www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services>.

⁹⁵ CRAWFORD *et al.*, , "Commentary on the United States - Mexico- Canada Agreement", Michigan International Lawyer Vol. 31 No.1, p.18, 2020, 30 May 2023, available at: <https://www.millercanfield.com/assets/htmldocuments/MIL_Spring20.pdf#page=18>.

⁹⁶ KOX *et al.*, "The free movement of services within the EU", 2004, p. 17-19, 17 May 2023, available at: <<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=38096c18f2c74082cce4f357a9b803871e28d5b7>>.

treatment. For instance, based on the MNP's schedule of the natural movement of commitments, the most prevalent barriers applied by the AMs included entry restricted to skilled workers, numerical quotas, labour market/economic tests, pre-employment, transfer of technology, restrictions on the purchase of the real estate, a limited period of stay, the commercial presence linked to the creation of local employment, domestic regulations, and recognition of qualifications.⁹⁷

To further promote the free movement of persons providing services in the EU and ASEAN, these two organizations could learn from each other the following lessons.

The approach based on market access underpins the free movement of people who provide services within the EU. Legal and economic critics of the market access strategy point out that the phrase "market access/restrictions" is ill-defined.⁹⁸ The enforcement of EU rules regulating the free movement of people who provide services is also restricted. Services and professions account for 11% of the sectors with the highest infringement cases.⁹⁹ As a result, the provisions on specific market access measures under the primary source agreements, similar to Article 8 of the ASEAN Trade in Services Agreement 2019, must be expanded. Before the ASEAN Trade in Services Agreement, the ASEAN Framework Agreement on Services 1995 served as the primary legal base governing persons providing services within the region, but with ambiguous related provisions. In terms of liberalisation, Article III of the AFAS mandates the abolition of significantly discriminatory policies and limitations on market access without going into detail about these limitations. Examining the Member States' schedule of commitments is necessary to comprehend the different sorts of restrictions. Until ATISA, there were detailed and specific articles on ASEAN service trade, including one on market access policies. Since many national policies are viewed as market access restrictions if they are justified using the current framework for market access, the EU can learn from ASEAN by adopting the applicable market access provisions. Every regulation imposes and includes compliance costs; hence, every regulation may be seen as a possible barrier to market entry.¹⁰⁰

ASEAN can learn from the EU how to define "the boundary" between the free movement of skilled labour and the free movement of services. The legal base governing the movement of service providers and skilled labour is equivalent. The free flow of skilled labour is one factor to consider alongside the free flow of goods,

⁹⁷ IREDALE *et al.*, Free flow of skilled labour study, ASEAN- Australia Development Cooperation Program Phase II, 2010, p. 9.

⁹⁸ BARNARD and PEERS, *European Union Law* (4th ed., 2023), Oxford, p. 431.

⁹⁹ European Commission, Infringements, 17 May 2023, available at: <https://single-market-scoreboard.ec.europa.eu/enforcement-tools/infringements_en>.

¹⁰⁰ See BARNARD and PEERS, *cit. supra* note 98, p. 429.

free flow of services, free flow of capital, and free flow of investment; however, most legal documents relating to trade in services regulate the implementing measures of the free flow of skilled labour in ASEAN. The ASEAN Framework Agreement on Services, the ASEAN Agreement on Movement of Natural Persons, and the Mutual Recognition Arrangements, and the ASEAN Trade in Services Agreement, crucial legal instruments governing the free flow of skilled labour in ASEAN, provide a legal foundation for the movement of service suppliers. The unclear legal basis leads to differences in the commitments of ASEAN member states under the relevant legal instruments. For instance, the Mutual Recognition Arrangements and the ASEAN Agreement on Movement of Natural Persons are complementary measures of fostering the free flow of skilled labour in ASEAN. Still, there is no apparent link between them. While MNP governs foreign service suppliers' access to the domestic market, the Mutual Recognition Arrangement articulates the recognition of foreign service suppliers' qualifications by authorities in other member states.¹⁰¹ Fukunaga pointed out that the MNP commitments in these sectors need to mention ASEAN Mutual Recognition Arrangements and the depth of commitments level is lower than the overall average liberalisation level.¹⁰² The ambiguous connection between the Mutual Recognition Arrangements and the ASEAN Agreement on Movement of Natural Persons is reflected in the ASEAN Member States' schedule of commitments. For instance, the Mutual Recognition Arrangement on engineering services is binding to Lao PDR from 27 February 2007. Still, according to Lao PDR's schedule of movement of natural persons, commitments for engineering services (CPC 8672)¹⁰³ are unbound, except as indicated in the horizontal section. Thailand's commitment to the movement of natural persons for engineering services is only demonstrated in the horizontal section and unbound for civil engineers.

Instead of regulating the free movement of persons providing services in different documents (legal instruments and other documents)¹⁰⁴, ASEAN should supplement an

¹⁰¹ See the ASEAN Secretariat, *cit. supra* note 38, p. 42.

¹⁰² See FUKUNAGA *cit. supra* note 16, p. 29.

¹⁰³ The Central Product Classification (CPC) constitutes a complete product classification covering all goods and services. Engineering service is categorised under Central Product Classification code 8672.

¹⁰⁴ Legal instruments under ASEAN's perspective is the ones concluded among and between ASEAN Member States are consent to be bound through the signature of the authorised representatives of the Member States, or the signature is subject to ratification or acceptance according to the respective Member States' internal procedures, available at: <<https://agreement.asean.org/explanatory/show.html>>. In this paper, we refer to legal instruments composing the 1995 ASEAN Framework Agreement on Services (AFAS 1995), the 2012 ASEAN Agreement on Movement of Natural Persons (MNP 2012), the 2019 ASEAN Agreement on Trade on Services (AFAS 2019), and 08 MRAs on Professional Services.

Other documents are a range of soft law types such as the AEC Blueprint 2015, and the AEC Blueprint 2025.

article in the ASEAN Trade in Services Agreement 2019 that specifically states the Member States' obligations in removing categories of restrictions on the freedom to supply services, similar to Article 56 of the TFEU. It would support the unified understanding of removing the restrictions on the movement of persons providing services. The current understanding of the free movement of persons delivering services in ASEAN is founded on some legal instruments and other soft law documents (as previously mentioned). Due to the lack of a unified understanding, Member States' commitments regarding the movement of persons providing services vary. For example, the categories of natural persons within ASEAN Member States' commitments diverge. Actual commitments are more limited than the four categories of natural persons specified in Article 2 of the ASEAN Agreement on Movement of Natural Persons.¹⁰⁵ Brunei, Singapore, and Myanmar made commitments for intra-corporate transferees. Indonesia, Lao PDR, the Philippines, and Thailand have made commitments for two types of natural persons: business visitors and intra-corporate transferees. Cambodia made commitments for intra-corporate transferees, persons responsible for establishing a commercial establishment, and contractual services suppliers. Vietnam seems more receptive to commitments for intra-corporate transferees, persons responsible for setting up a commercial presence, and contractual services suppliers. The duration period varies considerably from nation to nation.¹⁰⁶ The length ranges from 30 days to 10 years, depending on the commitments of each member state.

5. CONCLUSION

The models of free movement of service-providing individuals in the EU and ASEAN are notably distinct. The free movement of persons providing services in the EU is a component of the free movement of services in the internal markets, which entails the elimination of nationality-based restrictions for nationals of a Member State and third-country nationals who are family members of EU nationals who are established on the territory of a Member State. Free movement of persons providing services in ASEAN refers to the facilitation of free movement of persons supplying services under the movement of natural persons (Mode 4) and practitioners in accordance with existing Mutual Recognition Arrangements in professional services.

¹⁰⁵ See FUKUNAGA and ISHIDO, *cit. supra* note 21, p. 6.

¹⁰⁶ LA, "ASEAN Economic Integration on Services: An analysis of economic impacts and implications", KIEP Research Paper, World Economy Brief vol. 11 no. 29, 2021, 4, 30 May 2023, available at: <<http://dx.doi.org/10.2139/ssrn.3885438>>.

By the similarities in the objective of movement for service providers, the duration permitted to provide services, and the degree of mutual recognition, the main differences in the movement of persons providing services between the EU and ASEAN concern their legal base, their substance, and their implementing measures. Regarding *legal base*, there are three sources of EU law governing the free movement of persons providing services in the EU (primary law, secondary law, and CJEU case law). The sources of ASEAN law regulating the mobility of service providers consist of hard law and soft law. In terms of *substance*, the movement of persons providing services in the EU refers to eliminating restrictions without nationality or residence-based discrimination for all persons providing services. On non-discriminatory rights and freedoms of movement are founded the EU freedom of movement in general and the free movement of persons providing services in particular. The movement of persons providing services in ASEAN necessitates substantially eliminating market access restrictions, restrictions on national remedies, and other restrictions. The ASEAN Way supports the free movement of people offering services. The ASEAN Way is a set of diplomatic norms shared by ASEAN members, including – among others – the principles of non-interference, consultation, and consensus. In terms of *implementation measures*, under Article 59, of the TFEU the EU institutions shall issue pertinent Directives. Following Article 60 of the TFEU, the EU Member States shall endeavour to exceed the extent required by the Directives. Besides, the EU facilitates the movement of persons providing services by mutual recognition of qualifications. In the meantime, the implementation measures for the migration of service-providing individuals within ASEAN, for the most part, conforms to the WTO norms, including scheduling of MNP commitments and mutual recognition arrangements in professional services.

Although ASEAN and the EU take different approaches to integration, both organizations can learn from one another to improve the regime governing the movement of persons providing services in its region: ASEAN can learn from the EU how to clarify “the boundary” between the free movement of workers and free movement of services. Additionally, instead of regulating the free movement of persons providing services in different documents (legal instruments and other documents), ATISA 2019 should include provisions similar to Article 56 of the Treaty on the Functioning of the European Union, which explicitly mentions the Member States’ obligations to remove categories of restrictions on the freedom to provide services. The free movement of services in general and the free movement of persons providing services in particular within the EU are based on the market access approach, which has been criticized for being ambiguous and resulting in

many national regulations regarded as market access restrictions. Thus, the specific provision on market access measures in the EU agreements with primary sources, analogous to Article 8 of ATISA 2019, must be supplemented.

APPENDIX 1.
ASEAN legal framework governing free movement of persons providing services¹

Name of documents	Signature	Status
ASEAN Framework Agreement on Services (AFAS)	15 December 1995	In force 12 August 1998
The Declaration of Bali Concord II	7 October 2003	Not applicable
ASEAN Mutual Recognition Arrangement on Engineering Services	9 December 2005	In force 9 December 2005
ASEAN Mutual Recognition Arrangement on Nursing Services (MRA on Nursing Services)	8 December 2006	In force 8 December 2006
ASEAN Mutual Recognition Arrangement on Architectural Services (MRA on Architectural Services)	19 November 2007	In force 19 November 2007
ASEAN Framework Arrangement for the Mutual Recognition of Surveying Qualifications (MRA on Surveying Qualifications)	19 November 2007	In force 19 February 2008
ASEAN Mutual Recognition Arrangement Framework on Accountancy Services (MRA on Accountancy Services)	26 February 2009	In force 26 May 2009
ASEAN Mutual Recognition Arrangement on Dental Practitioners	26 January 2009	In force 26 August 2009
ASEAN Mutual Recognition Arrangement on Medical Practitioners	26 January 2009	In force 26 August 2009
ASEAN Mutual Recognition Arrangement on Tourism Professionals	9 November 2012	In force 19 April 2016
ASEAN Agreement on Movement of Natural Persons (MNP)	19 November 2012	In force 14 June 2016
ASEAN Trade in Services Agreement (ATISA)	7 October 2020	In force 5 April 2021
AEC Blueprint 2015	20 November 2007	Not applicable
AEC Blueprint 2025	22 November 2015	Not applicable

¹ The authors gathered information about these legal frameworks from the websites of ASEAN and CIL: <https://agreement.asean.org> and <https://cil.nus.edu.sg/database-cil/>.

Part II

Challenges and the way forward at the international level

5. INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW IN CRISIS?

Christina Binder*

SUMMARY: 1. Introduction; – 2. Symptoms; – 2.1. Populism and nationalist criticism; – 2.2. Growing hostility towards human rights institutions: backlash within institutional/organizational structures; – 2.3. Resistance to decisions and lack of implementation; – 3. Diagnosis; – 3.1. Nationalism and authoritarian regimes; – 3.2. Inefficiency of international human rights institutions; – 3.3. Lack of coordination between systems at the national, regional and international levels; – 4. Therapy; – 4.1. Improving the efficiency of human rights protection institutions; – 4.2. Better coordination of substantive standards at the three levels – national, regional, international; – 4.3. Better coordination of national, regional and international monitoring systems

1. INTRODUCTION

The development of the international system of human rights protection after the Second World War has generally been considered a success story. Since the 1948 Universal Declaration of Human Rights and the two Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 1966, numerous international human rights treaties have been adopted. They provide always more detailed standards, with focus on specific human rights problems (e.g., torture, enforced disappearances) and particularly marginalized groups (e.g., children, persons with disabilities). Also, the mechanisms for monitoring compliance have been

* This contribution is the revised and expanded English version of a presentation given at the Biannual Conference of the German Society of International Law in March 2022 in Heidelberg.

strengthened, with individual communications procedures adding to predominantly state reporting procedures at global level and the establishment of regional human rights courts in Europe, the Americas and Africa. In particular after the end of the Cold War in the 1990s the international human rights movement saw its high-days.

This success has however come under increasing pressure especially in the last decade. People speak of “limits”,¹ “twilight”² or “endtimes of human rights”,³ and ask “can human rights survive?”.⁴ There is a malaise in the human rights system and its institutions. It may be inscribed into a more general crisis of multilateralism as also witnessed in other contexts, as for example the World Trade Organisation. Against this background, this contribution undertakes to explore and analyse this human rights-malaise. In doing so, it first discusses the various symptoms, both, inside and outside the human rights regime (Section 2). Then, it turns to a diagnosis of the pathologies – quite different for the various regional and international human rights protection systems – behind these symptoms, that may be diagnosed (Section 3). Ultimately, this contribution recommends different therapies to treat the human rights diseases (Section 4).

2. SYMPTOMS

Various signs – “symptoms” – illustrate the increasing backlash against human rights institutions. It shows in raising populism and nationalist criticism of these institutions (Section 2.1); a growing hostility within institutional/organizational structures (Section 2.2) as well as the non-compliance with human rights bodies’ decisions (Section 2.3).

2.1. Populism and nationalist criticism

That human rights protection has come under increasing pressure around the world is visible first in the realm of political rhetoric. Populist governments in numerous states (Turkey, Hungary, Venezuela, Bolivia, Ecuador, Benin, Rwanda, Cote-d’Ivoire) criticize especially regional human rights tribunals, accusing them of illegitimate interference in domestic affairs.

¹ FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019.

² POSNER, *The Twilight of Human Rights Law*, Oxford, 2014.

³ HOPGOOD, *The Endtimes of Human Rights*, Ithaca, 2015.

⁴ GEARTY, *Can Human Rights Survive?*, Cambridge, 2006.

On the one hand, critics claim that the development of human rights standards is carried out by illegitimate institutions that pursue their own obscure interests. Hungary's Prime Minister Orbán, for example, declared that the Hungarian people should be protected against "foreign networks and institutions" and portrayed human rights protection institutions as "guided by dark forces" whose goal was to subvert national identities.⁵ Bolivia's ex-president Morales described Inter-American human rights institutions as "instruments of domination", and Venezuelan President Maduro accused them of not pursuing human rights concerns but rather seeking to harm the socialist state.⁶ The government of Benin accused the African Court of Human and Peoples' Rights of being "a source of legal uncertainty".⁷ The Rwandan government sees it as manipulated by the perpetrators of the genocide.⁸

Such narratives are often accompanied by accusations of a lack of democratic legitimacy of these institutions. Human rights protection institutions would protect the rights of "others" and not those of the respective state's own population and, in general, contradict democratic majority vote.⁹

Another reproach often made in this context is that human rights institutions ignore the security interests of states, especially in the fight against terrorism and migration: The "security argument" against human rights gained momentum especially after 11 September 2001. Human rights are portrayed as instruments from another era that would not be suitable for solving current problems; worse, they would prevent governments from effectively addressing those problems.¹⁰

Even in countries less suspect of populist rhetoric, such arguments are put forward against human rights protection institutions: For example, the Swiss "self-

⁵ For details, see BÍLKOVÁ, "Populism and Human Rights", in NIJMAN and WERNER (eds.), *Netherlands Yearbook of International Law. Populism and International Law*, Den Haag, Vol. 49, 2018, p. 143 ff., p. 143.

⁶ See Primera, "Venezuela abandona el sistema de derechos humanos interamericano", *El País*, 10 September 2013, available at: <https://elpais.com/internacional/2013/09/10/actualidad/1378780644_769381.html>.

⁷ See Statement by the Minister of Justice of Benin, Gouvernement de la République du Benin, "Retrait du Bénin de la CADHP - Déclaration du ministre de la Justice et de la Législation", 28 April 2020, available at: <<https://www.gouv.bj/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/>>.

⁸ International Justice Resource Center, "Rwanda Withdraws Access to African Court for Individuals and NGOs", 14 March 2016, available at: <<https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>>.

⁹ Hungary's Prime Minister Orbán, for example, stated that Hungary would opt for democracy when there was a choice between "international human rights and democracy". The Venezuelan government accuses Inter-American human rights institutions of being part of a conspiracy against the (Venezuelan) state. The government of Cote d'Ivoire stated that the African Court of Human and Peoples' Rights undermined state sovereignty and eroded the foundations of the rule of law. See also BÍLKOVÁ, *cit. supra* note 5, p. 145, 166ff; see further CALI, "Political Limits of International Human Rights: A Response", in FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019, p. 137 ff., p. 144.

¹⁰ Cf. e.g. BÍLKOVÁ, *cit. supra* note 5, p. 145.

determination initiative” claims a contradiction between popular sovereignty and human rights.¹¹ In the United Kingdom, a tension is construed between human rights and parliamentary sovereignty.¹² In Denmark, the European Court of Human Rights (ECtHR) is accused of acting in an over-centralist and interventionist manner.¹³ Outside Europe, the Dominican Republic opposed the Inter-American Court of Human Rights (IACtHR, Inter-American Court) for its intrusive attitude and intervention in domestic affairs.¹⁴

2.2. Growing hostility towards human rights institutions: backlash within institutional/organizational structures

In addition, there is backlash in the context of institutional/organizational structures, ranging from withdrawal over demands for a re-dimensioning, to lack of support from the respective regional organization; often directly related to the accusations referred to above. Venezuela, for example, withdrew from the American Convention on Human Rights (ACHR) in 2012;¹⁵ it followed Trinidad and Tobago, which had already left the Convention in 1998.¹⁶ Peru, Ecuador, and Bolivia at least

¹¹ If the initiative had been accepted, the Swiss Constitution would have taken precedence over, *inter alia*, the ECHR in case of conflict. KELLER and WALTHER, “Resistance in Switzerland: Populist Rather Than Principled”, in BREUER (ed.), *Principled Resistance to ECtHR Judgments - A New Paradigm?*, Berlin, 2019, p. 161 ff., p. 188.

¹² See, e.g., MADSEN, “From boom to backlash? The European Court of Human Rights and the transformation of Europe”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights. Current Challenges in Historical Perspective*, Cheltenham, 2021, p. 21 ff., pp. 37-38.

¹³ Hartmann, “A Danish Crusade for the Reform of the European Court of Human Rights”, EJIL: Talk!, 14 November 2017, available at: <<https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>>; see also MADSEN, *cit. supra* note 12, p. 41.

¹⁴ See for details *infra*, Section 2.2.

¹⁵ Gov’t of the Bolivarian Republic of Venezuela, Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, “Note 000125”, 6 September 2012, available at: <http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF>. See also Mejía-Lemos, “Venezuela’s Denunciation of the American Convention on Human Rights”, ASIL Insights, 9 January 2013, available at: <<https://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>>. Venezuela also withdrew from the OAS Charter in 2017. However, this was not accepted by the IACtHR. See IACtHR, “Advisory Opinion OC-26/20, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations”, 9 November 2020, available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_26_eng.pdf>. For details, see Steininger, “Don’t Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System”, EJIL: Talk!, 5 March 2021, available at: <<https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/>>.

¹⁶ See CERNA, “Denunciation of the American Convention on Human Rights: The Trinidad and Tobago Death Penalty Cases”, available at: <<https://www.corteidh.or.cr/tablas/r31601.pdf>>.

threatened with withdrawal;¹⁷ as did the Dominican Republic, which also publicly considered this option¹⁸ after the Dominican Constitutional Court had declared that the submission to the jurisdiction of the IACtHR was unconstitutional.¹⁹ In Europe, the United Kingdom threatened to withdraw from the European Convention on Human Rights (ECHR); such voices have also been heard in Denmark and Switzerland.²⁰ In 2022, after its war of aggression against Ukraine, Russia withdrew/was excluded from the Council of Europe (and, six months afterwards, from the ECHR),²¹ having already threatened with such withdrawal in 2017. Four African states – Rwanda, Benin, Cote d’Ivoire as well as Tanzania (the latter after all seat of the African Court of Human and Peoples’ Rights) – withdrew their consent to the Court’s jurisdiction to receive complaints directly from individuals and NGOs.²² The sub-regional tribunal of the South African Development Community (established in 2005) was ultimately even disbanded following its first (controversial) ruling against Zimbabwe in 2008 in which the expropriation of white landowners was at stake.²³

There have also been calls for a re-dimensioning, a pushing back of regional human rights protection systems. In Europe, this showed, for example, with the reform process initiated in Interlaken and the adoption of the – ultimately moderate – Protocol No. 15 to the ECHR, which entered into force in August 2021 and

¹⁷ See for details RAGONE, “The Inter-American System of Human Rights: Essential Features”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford, 2017, p. 279 ff., p. 300. Peru had withdrawn its recognition of the IACtHR’s jurisdiction on 9 July 1999. After Fujimori’s flight, the country’s relationship with the IACtHR normalized.

¹⁸ The withdrawal of the declaration of submission to the jurisdiction of the IACtHR was not recognized by the Inter-American Court. While the Dominican Republic has not formalized its withdrawal from the ACHR, it has ceased cooperation with the IACtHR. For details, see SOLEY and STEININGER, “Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights”, *International Journal of Law in Context* 14, 2018, p. 237 ff.

¹⁹ See, for example, IACtHR, *Case of expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 282. For details, SOLEY and STEININGER, *cit. supra* note 18.

²⁰ See MADSEN, *cit. supra* note 12.

²¹ Council of Europe Secretariat, “Notification of Russia”, DD(2022)101, 15 March 2022.

²² See African Court on Human and Peoples’ Rights, “Declarations”, available at: <<https://www.african-court.org/wpafc/declarations/>>. Among the reasons to explain the withdrawals were the establishment of an autocratic regime (Benin); or the flood of lawsuits (Tanzania). See generally De Silva and Plagis, “A Court in Crisis: African States’ Increasing Resistance to Africa’s Human Rights Court”, *OpinioJuris*, 19 May 2020, available at: <<http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-african-human-rights-court/>>. GERALD and WIEBUSCH, “The African Court on Human and Peoples’ Rights: Mapping Resistance against a Young Court”, *International Journal of Law in Context* 14, 2018, p. 294 ff.

²³ For Details COWEL, “The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction”, *Human Rights Law Review* 13, 2013, p.153 ff.

incorporated references to the subsidiarity principle and the margin of appreciation doctrine into the Convention text. Denmark has subsequently called for even more restrictive reforms.²⁴ Five Latin American states (Argentina, Brazil, Colombia, Paraguay and Chile) expressed similar concerns about the “autonomy” of Inter-American human rights protection institutions in 2019 and called for their curtailment, in reliance on the subsidiarity principle.²⁵

Another form of backlash is found in the lack of cooperation with international human rights protection institutions. An example would be the individual complaints and state reporting procedure under the International Covenant on Civil and Political Rights (ICCPR) in which states often ignore information requests from the Human Rights Committee (HRC).²⁶ The numerous late or undelivered state reports, in addition to domestic capacity problems, also suggest (at the very least) the low importance attached to treaty monitoring mechanisms.²⁷

A lack of support for the human rights institutions by the regional organization in question is also a factor here, which is particularly evident in the case of the African Union (AU) and can be observed, for example, in the weak follow-up to violation decisions by the African human rights institutions.²⁸

²⁴ Cf. HARTMANN, *cit. supra* note 13.

²⁵ República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay, “Declaración Sobre el Sistema Interamericano de Derechos Humanos”, 24 April 2019, available at: <<https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos>>.

²⁶ Cf. JOSEPH, “International Covenant on Civil and Political Rights”, in BINDER et al. (eds.), *Elgar Encyclopedia of Human Rights*, London, 2022, para. 53. See also JELIC and MÜHREL, “The Human Rights Committee - Challenges and Prospects for Enhanced Effectiveness and Integration”, *Journal of Human Rights Practice* 14, 2022, p. 17 ff. with further examples, e.g., Azerbaijan, Hungary, Laos.

²⁷ Notoriously, reports are late or not submitted at all in the African regional system (see the website of the African Commission on Human and Peoples’ Rights, available at: <<https://www.achpr.org/statistics>>). Reporting also leaves much to be desired under international human rights treaties in the framework of the UN: for example, about one third of states are late with their reports. See, e.g., SEIBERT-FOHR, “The UN Human Rights Committee”, in OBERLEITNER (ed.), *International Human Rights Institutions, Tribunals, and Courts*, Berlin, 2018, p. 117 ff., p. 124; JELIC and MÜHREL, *cit. supra* note 26.

²⁸ The African system to monitor execution is similar to the European system; it is effectuated through the AU Executive Council (and the AU Assembly). On the lack of political follow-up, see, e.g., VILJOEN, “Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: compliance at a crossroads”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *Research Handbook on Compliance in International Human Rights Law*, London, 2021, p. 362 ff., pp. 371-390.

2.3. Resistance to decisions and lack of implementation

Resistance to decisions, sometimes vehement criticism, or their delayed, only partial or entirely lacking implementation are other symptoms of the illness of human rights protection systems. True, the deficient implementation of individual decisions is not the sole and probably not the primary factor determining the “success” of human rights jurisprudence. After all, the impact and positive effects of the human rights institutions’ decisions regularly reach further than their immediate implementation.²⁹ Nevertheless, widespread non-implementation is a sign of the erosion of human rights protection.³⁰

Indeed, even statistically, the extent of implementation is sobering, especially at the international level and in the African region. Less than a quarter (24%) of the HRC’s decisions are implemented;³¹ in Africa, it is only 14% of the African Commission’s decisions and 7% of the Court’s judgments;³² at least partial implementation of the African Court’s judgments comes to a meagre 18%. While in Europe and in the Americas, the implementation rate is comparatively higher, there are specific problem areas: in Europe, implementation deficits are evident, for example, in post-conflict situations and domestic contexts with structural problems, such as deficient investigations in relation to abuse allegations against state authorities and poor prison conditions.³³ In the Inter-American region, implementation is specifically poor when it comes to concrete reparation measures, such as the obligation to prosecute and reopen cases.³⁴

²⁹ See e.g. VERA, “The Impact of Inter-American Judgments by Institutional Empowerment”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford, 2017, p. 357 ff. More generally, GROTE, MORALES ANTONIAZZI and PARIS, “Conclusion: moving beyond compliance without neglecting compliance in international human rights law”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 510 ff., pp. 520-522.

³⁰ Cf. *ibid.*, p. 521. To focus only on impact would diminish the normative expectations of states.

³¹ JOSEPH, *cit. supra* note 26.

³² At least partial implementation of court rulings comes to just a meagre 18%. See for details WIEBUSCH, “African Court on Human and Peoples’ Rights”, in BINDER et al. (eds.), *Elgar Encyclopedia on Human Rights*, London, 2022, para. 46; Cf. also the documentation of the African Court of Human and Peoples’ Rights, “Strategic Plan 2021-2025”, 2021, para. 97, available at: <<https://www.african-court.org/wpafc/african-court-on-human-and-peoples-rights-strategic-plan-2021-2025/>>.

³³ See Council of Europe, Committee of Ministers, “Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights”, 2020, available at: <<https://rm.coe.int/2020-cm-annual-report-eng/1680a1f4e8>>.

³⁴ See for instance CRUZ MARIN, “Compliance with the Judgments of the Inter-American Court of Human Rights”, Center for Justice and International Law, p. 1 ff., p. 26; BAILLIET, “Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America”, NJHR 31, 2013, p. 477 ff.

In addition to this statistically demonstrable general unwillingness to implement the findings of the respective bodies, there is specific resistance to certain decisions.³⁵ Thus, domestic courts across Europe criticize ECtHR rulings for overreach and intrusiveness, which has already led to the question as to whether “principled resistance” represents a new paradigm.³⁶ To give just a few examples: well-known are the (abstract) limits of the “last word of the German constitution”, which the German Federal Constitutional Court empathetically pointed out to the ECtHR in the *Görgülü* case.³⁷ In Austria, recent criticism by the Austrian Constitutional Court in relation to changes in the ECtHR’s case law (e.g., on the prohibition of double jeopardy/*ne bis in idem*, see *Zolothukin v. Russia* of 2009) seems particularly noteworthy.³⁸ In Switzerland, it is the resistance of the Swiss Federal Court in the *Schlumpf* case, in which the ECtHR was accused of not correctly assessing the Swiss legal situation and of acting *ultra vires*.³⁹ Even if the indicated limits were not relevant to the decision and the judgments were ultimately implemented, the criticism was loud and vehement. Still only partially or minimally implemented are the well-known judgments of the

³⁵ Not all cases of lacking implementation, however, are signs of resistance to human rights protection institutions. Reasons also lie in the domestic legal sphere, for instance in legal obstacles to implementation. See *infra*, Section 3.2.

³⁶ BREUER (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?*, Berlin, 2020.

³⁷ German Constitutional Court (BVerfG), *Görgülü*, Decision of the Second Senate of 14 October 2004, 2 BvR, para. 35. Cf. generally BREUER, “Principled Resistance to the European Court of Human Rights and its case law: a comparative assessment”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights, Current Challenges in Historical Perspective*, London, 2021, p. 43 ff. See also *Beamtenstreikrecht*, where the German Constitutional Court held that an ECtHR judgment against another state, in this case Turkey, did not prevent Germany from prohibiting professional civil servants from striking. BVerfG, *Beamtenstreikrecht*, Decision of the 2nd Senate of 12 June 2018, 2 BvR 1738/12 - - 2 BvR 1395/13 - - 2 BvR 1068/14 - - 2 BvR 646/15; see *infra*, Section 4.2.

³⁸ ECtHR, *Zolothukin v. Russia* (Grand Chamber), Application No. 14939, Judgment of 10 February 2009; Austrian Constitutional Court (VfGH), Decision of 2 July 2009, B559/08, StGB-StVO. For details, see KREPP, “Doppelbestrafungsverbot: VfGH verweigert dem EGMR die Gefolgschaft”, JAP 22, 2009/2010, p. 213 ff. FUCHS, “Ne bis in idem: Korrespondenzen zwischen Straßburg und Wien”, Jahrbuch Öffentliches Recht, 2010, p. 181 ff. In *A and B v. Norway*, the ECtHR confirms its line of jurisprudence on *ne bis in idem* advocated in *Zolothukin*. ECtHR (Grand Chamber), *A and B v. Norway*, Application No. 30254/18, Judgment of 15 November 2016. The Austrian Constitutional Court seems to – albeit implicitly – accept this. See generally STRUTH, “‘Principled Resistance’ to ECtHR Judgments in Austria”, in BREUER (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?*, Berlin, 2019, p. 89 ff., p. 124.

³⁹ Swiss Federal Court, *Schlumpf v. SWICA*, 7 July 2006, BGE 137 I 86; ECtHR, *Schlumpf v. Switzerland*, Application No. 29002/06, Judgment of 8 January 2009; the case concerned the reimbursement of costs for a sex change operation. See generally ALTWICKER, “Switzerland: The Substitute Constitution in Times of Popular Dissent”, in POPELIER, LAMBRECHT and LEMMENS (eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level*, Amsterdam, 2016, p. 388 ff. See further PFIFFNER and BOLLINGER, “Extension of Convention-Protected Rights by the ECtHR and Problems of Domestic Implementation”, Jusletter, 21 November 2011, pp. 9-10.

ECtHR on the right of prisoners to vote, which were heavily criticized by the United Kingdom.⁴⁰ In the similar case of *Anchugov and Gladkov*,⁴¹ the Russian Constitutional Court completely rejected the judgment's execution for being unconstitutional.⁴²

In the Inter-American sphere, especially the conventionality control developed by the IACtHR has been met with resistance in some states. Through the conventionality control, the Inter-American Court also obliges domestic courts of states that were not parties to the proceedings in the case at stake to not apply laws that violate the ACHR within the framework of a decentralized conventionality control (*erga omnes* effect of the conventionality control, as developed in the *Almonacid* case of 2006).⁴³ The Brazilian Supreme Court, for example, rejects the conventionality control, as does the Chilean Constitutional Court.⁴⁴ The Colombian Constitutional Court reserves the right to deviate from the IACtHR's jurisprudence for compelling reasons. Moreover, in the Inter-American system, concrete reparation measures are met with rejection: especially if they concern politically sensitive areas (*Castro Castro Prison v. Peru*),⁴⁵ exceed state finances (*Plan de Sanchez v. Guatemala*),⁴⁶ or if the requested measure is not feasible in light of domestic legislation (for instance as regards investigations concerning the criminal prosecution of perpetrators – as in *Bulacio v. Argentina*).⁴⁷ Likewise tribunals originally open to the IACtHR are becoming more critical: for example, the Argentine Supreme Court even accused it of exceeding its jurisdiction in

⁴⁰ ECtHR (Grand Chamber), *Hirst v. United Kingdom (no. 2)*, Application No. 74025/01, Judgment of 6 October 2005; ECtHR, *Greens and M.T. v. United Kingdom*, Applications Nos. 60041/08 and 60054/08, Judgment of 23 November 2010; See LEMMENS, "The European Court of Human Rights - Can There be Too Much Success?", *Journal of Human Rights Practice* 14, 2022, p. 169 ff., p. 169 for details. See generally KUNZ, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts", *EJIL* 30, 2020, p. 1129 ff., p. 1131.

⁴¹ ECtHR, *Anchugov and Gladkov v. Russia*, Judgment of 4 July 2013, Applications Nos. 11157/04 and 15162/05.

⁴² Russian Constitutional Court, Judgment of 19 April 2016, Case No. 12-P/2016. Also, the implementation of the *Yukos* judgment was rejected. ECtHR, *Oao Neftyanaya Kompaniya Yukos v. Russia*, Application No. 14902/04, Judgment of 31 July 2014 (just satisfaction).

⁴³ IACtHR, *Almonacid Arellano y otros v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Series C, No. 154.

⁴⁴ See BURGORGUE-LARSEN, "The Added Value of the Inter-American Human Rights System: Comparative Thoughts", in VON BOGDANDY *et al* (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*, Oxford University Press 2017, p. 377, p. 401ff.

⁴⁵ IACtHR, *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), Series C, No. 160.

⁴⁶ IACtHR, *Plan Sánchez v. Guatemala*, Judgment of 19 November 2004 (Reparations), Series C, No. 116.

⁴⁷ IACtHR, *Case of Bulacio v. Argentina*, Judgment of 18 September 2003 (Merits, Reparations and Costs), Series C, No. 100. The Argentine Supreme Court criticized the IACtHR, for example in its *Espósito* decision (2004), for failing to strike an appropriate balance in *Bulacio* between the state's duty to investigate and prosecute serious human rights violations and the rights of the accused (to defense and to be tried in a reasonable time), which would be contrary to domestic law. However, *Bulacio* was ultimately implemented, with reference to Art. 68 ACHR.

the *Fontevecchia d'Amico* decision of 2017.⁴⁸

However, despite the far-reaching and sometimes intrusive jurisprudence of the IACtHR, states' opposition is still comparatively moderate.⁴⁹ This can be explained, among others, by the implicit strengthening of domestic tribunals' position *vis-à-vis* the executive in the internal system of separation of powers and the traditionally strong ties between the Inter-American Court and civil society in the Latin American region.⁵⁰ As addressed below in more detail, this already points to a possible therapy.⁵¹

In the international human rights protection institutions, the resistance – apart from criticism against an overly broad (extra-)territorial applicability of human rights treaties according to General Comments, specifically the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵² – shows primarily in the lacking implementation; which is partly “justified” with the non-binding effect (and/or incorrect weighting or justification) of the decisions of

⁴⁸ The implementation of the IACtHR's *Fontevecchia y D'Amico* judgment (IACtHR, *Fontevecchia and D'Amico v. Argentina*, Judgment of 29 November 2011 (Merits, Reparations and Costs), Series C, No. 238) was rejected with the argument that the revocation of the conviction was not possible due to the separation of powers. Corte Suprema de Justicia de la Nación (Argentina), “Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso ‘Fontevecchia y D'Amico v. Argentina’ por la Corte Interamericana de Derechos Humanos”, 14 February 2017. See also the similarly restrictive position of the Argentine Supreme Court in the *Muiña Case*, 3 May 2017. See generally on opposition to the IACtHR, SOLEY and STEININGER, *cit. supra* note 18, p. 14; Abramovich, “Comentarios sobre el ‘caso Fontevecchia’”, Centro de Justicia y Derechos Humanos, 17 February 2017, available at: <<http://ijdh.unla.edu.ar/advf/documentos/2017/02/58ab010a10d4c.pdf>>; Contesse, “Judicial Backlash in Inter-American Human Rights Law?”, International Journal of Constitutional Law, Blog, 2 March 2017, available at: <<http://www.iconnectblog.com/2017/03/judicial-backlash-interamerican/>>.

⁴⁹ For example, the IACtHR's far-reaching jurisprudence in the area of economic and social rights has been criticized in individual dissenting opinions; as far as can be seen, however, not by the respective states (Chile, Brazil). See, for example, the criticism by Judge Eduardo Vio Grossi in Brazilian Constitutional Court, *Case of the Workers of the Fireks Factory in Santo Anonio de Jesus and their Families v. Brazil*, Judgment of 15 July 2020, Series C No 407, paras. 99-105, concerning the interpretation of Art. 26 in conjunction with Art. 24 (equal protection of the law) ACHR; For details see Saliba and Do Valle, “The Inter-American Court of Human Rights and the Quest for Equality: the Fireworks Factory case”, EJIL: Talk!, 20 January 2021.

⁵⁰ See also RAGONE, *cit. supra* note 17, p. 311, for details. The sometimes far-reaching interpretation of the IACtHR is also cushioned by the fact that it partly ties its judgments back to national law. See *infra*, Section 4.2.

⁵¹ See especially *infra*, Section 4.3.

⁵² The General Comment No 36 of the HRC on the right to life (2019) was criticized by numerous states (Australia, Canada, France, Germany, US) as too far-reaching, especially with regard to the comprehensive extraterritorial application of the right to life. HRC, “General Comment No 36: The Right to Life” (3 September 2019) UN Doc CCPR/C/GC/36, available at: <<https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>>; likewise, Norway, UK and France, among others, criticized the extraterritorial dimension of the Committee's on Economic, Social and Cultural Rights (ESCR-Committee) General Comment No 24. (ESCR-Committee, “General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (10 August 2017) UN Doc E/C.12/GC/24, available at: <<https://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf>>).

the treaty monitoring bodies.⁵³

So, resistance comes from different directions and is of varying strength. This leads to the diagnosis.

3. DIAGNOSIS

The symptoms of the illness of the systems of international human rights protection stem from various pathologies. In addition to reasons in a state's internal/domestic sphere, such as nationalism and the rise of authoritarian regimes (Section 3.1), there are also reasons that lie with the human rights protection institutions themselves (Section 3.2), or that suggest coordination problems (Section 3.3).

3.1. Nationalism and authoritarian regimes

First, criticism of human rights protection institutions is used by populist regimes in numerous states for their nationalist propaganda: The threat from outside – in the form of human rights protection institutions – is supposed to strengthen domestic/internal unity.⁵⁴

A related problem is the increasing departure from pluralistic democracy and the strengthening of authoritarian structures.⁵⁵ Current examples include Venezuela, Benin, Turkey, Hungary and Russia. The “autocratization” that can be observed this way regularly leads to shifts in the balance of separation of powers toward the executive branch, also as a result of restrictions of the independence of the judiciary.

⁵³ On the non-binding effect of the decisions and practice of UN treaty monitoring bodies, see International Law Association, *Final Report on the Domestic Implementation of Courts and Other International Bodies that Involve International Human Rights Law*, Part Two; The International Law Association, Report of the Seventy-Seventh Conference at Johannesburg, 2016, p. 284 ff. See also JELIC and MÜHREL, *cit. supra* note 26; KADELBACH, “The Human Rights Committee – Challenges and Prospects for Enhanced Effectiveness and Integration: A Comment”, *Journal of Human Rights Practice* 14, 2022, p. 44 ff.

⁵⁴ In terms of content, nationalist-populist discourse is collectivist, anti-pluralist, and exclusive: it focuses on “the people of the state” as a homogeneous group. Based on the logic of “us versus them”, it is directed against migrants, minorities, as well as opposition politicians, and is thus opposed to the pluralistic ideal of human rights. Human rights also set clear limits to the nationalist-populist agenda, for example regarding the treatment of migrants and minorities. This leads to the aforementioned portrayal of human rights protection institutions as anti-democratic and a danger to the rights of the majority population.

⁵⁵ On democratic regression in Europe, see, for example, MADSEN, “The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court”, *European Convention on Human Rights Law Review* 2, 2021, p. 180 ff., p.187, with further references.

Limitations of space for civic engagement and free media are likewise observable.⁵⁶ All this erodes key conditions and prerequisites for a functioning domestic human rights protection. After all, independent courts are the natural “allies” of international human rights protection institutions.

The resistance in democracies such as the United Kingdom, Denmark and Switzerland is somewhat different. Here, conflicts regularly arise over the proper allocation of powers, especially in politically sensitive areas such as security and migration. But here, too, criticism of ECtHR rulings by domestic courts is instrumentalized by certain political actors and used for populist-nationalist propaganda.⁵⁷

The backlash against human rights protection institutions thus has different political facets, but is regularly accompanied by a growing scepticism toward international cooperation and multilateralism and a greater prioritization of national concerns.

3.2. *Inefficiency of international human rights institutions*

In addition, the international/regional human rights protection institutions themselves have “their” share in the crisis and domestic resistance. True, the resistance can also be interpreted positively, as a reaction to a strengthening and the generally greater authority of human rights bodies, especially of regional courts.⁵⁸ However, (partly justified) criticism relates to the functioning of the institutions themselves, for example, with regard to efficiency deficits and length of proceedings, which also provides arguments for the critics of the human rights protection institutions.

To start with, there is a somehow unresolvable tension. The human rights bodies, which are supposed to monitor states and hold them accountable, depend on the very states in terms of their composition and functioning. States nominate and elect experts and judges and respectively have a role in monitoring implementation. The Council of Europe’s Committee of Ministers was aptly described as “foxes guarding chickens” and “foxes guarding foxes” accordingly, even if the “shadow” of the ECHR and the comparatively strong role of the Secretariat reduce the danger of political “deals” in

⁵⁶ Examples range from the arrest of journalists critical of the regime in Turkey or the banning of NGOs (e.g. Memorial) in Russia; to the elimination of independent media in, for example, Hungary, Benin, or Venezuela.

⁵⁷ Cf. BREUER, *cit. supra* note 37.

⁵⁸ The “regime costs” of human rights violations are rising. VINJAMURI, “Human Rights Backlash”, in HOPGOOD, SNYDER and VINJAMURI (eds.), *Human Rights Futures*, Cambridge, 2017, p. 114 ff. For backlash as indicators of success, see also RISSE, ROPP and SIKKINK, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge, 1999. More generally, VON BOGDANDY and VENZKE, “In whose name? An investigation of international courts’ public authority and its democratic justification”, *EJIL* 23, 2012, p. 7 ff.

the Committee.⁵⁹ It is even more evident in the (Executive) Council of the AU, which also specifically influences the activities of the African Commission on Human and Peoples' Rights. For example, the Council's pressure exercised on the African Commission resulted in the latter withdrawing observer status from an NGO that advocated for lesbian women's rights claiming that they violated "African values."⁶⁰ The human rights institutions also depend on funding from states or the (regional) organization concerned: this puts a strain on their activities, especially when – as in the African or Inter-American systems – the institutions are chronically underfunded and, moreover, a relevant part of their budget is not a permanent budget item but has to be raised through voluntary contributions.⁶¹

In fact, all human rights institutions – for different reasons – are operating at the brink of their institutional capacity. This is due, on the one hand, to the organizational framework and institutional constraints, the lack of funding and inadequate secretarial resources.⁶² Moreover, with the exception of the ECtHR, all human rights protection institutions do not work continuously but meet only for limited sessions, which reduces their efficiency.⁶³ Another "home-grown" problem, which is currently particularly evident in Africa,⁶⁴ is a rivalry between the Commission and the Court, which makes institutional cooperation in the two-stage procedure more difficult and reduces the effectiveness of human rights protection: the African Commission refers *de facto* no cases to the Court.⁶⁵

The ECtHR (and some UN treaty monitoring bodies, notably the HRC) face

⁵⁹ Cf. CALI and KOCH, "Foxes guarding the Foxes – The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe", *Human Rights Law Review* 14, 2014, p. 301 ff.

⁶⁰ For details, VILJOEN, "African Commission on Human and Peoples' Rights", in BINDER et al. (eds.), *Elgar Encyclopedia on Human Rights*, London, 2022, para. 9.

⁶¹ See on the inadequate funding of the African Human Rights Commission VILJOEN, *cit. supra* note 60, para. 7; VILJOEN, *International Human Rights Law in Africa*, 2nd ed., Oxford, 2012, p. 297 ff. On the inadequate funding of Inter-American human rights protection institutions, see BURGORGUE-LARSEN, "Les Systèmes Européen et Interaméricain à l'Heure des Défis", in SICILIANOS (ed.), *Les Droits de l'Homme Comparés*, Paris, 2019, p. 86 ff., pp. 94-108.

⁶² See, for instance, SEIBERT-FOHR, *Human Rights Committee*, *cit. supra* note 27, p. 134.

⁶³ The IACtHR usually meets for sessions six times a year; the African Human Rights Commission at least two times. There are general efficiency problems in the African system. For example, the African Commission on Human and Peoples' Rights has so far finalized only about 300 cases, and of these, only about 100 cases have received findings on the merits. In general, see VILJOEN, *Human Rights Law*, *cit. supra* note 28, p. 296 ff.

⁶⁴ In the Inter-American system, the similar problem of too few cases being referred to the IACtHR by the Commission was alleviated by a reform of the Commission's rules of procedure in 2001.

⁶⁵ Thus, of the – as of May 2023 – 332 contentious cases brought before the Court, only three have been referred by the African Commission. Even these did not concern the merits, but only the non-implementation of provisional measures. The remaining cases came from individuals (308) and NGOs (21). See African Court of Human Rights, "ACtHPR Cases, Statistics", available at: <<https://www.african-court.org/cpmt/statistic>>.

different problems: they are reaching quantitative limits. In particular, the ECtHR's load of applications is well known: 40,000 to 60,000 complaints are brought before the Court annually; currently, the backlog of unaddressed cases is more than 75,000.⁶⁶ Likewise the HRC is struggling with a backlog of complaints – over 1,500 in 2019.⁶⁷ The ECtHR and HRC are thus, as it were, the “victims” of their own success.

One of the problematic consequences of these capacity problems is the frequently long duration of proceedings. At the ECtHR, proceedings may exceed ten years;⁶⁸ in the two-stage procedure in the Inter-American system, they average 12 years.⁶⁹ For the international treaty monitoring bodies, it has been calculated that, in their current configuration, they would need over six years to deal with the backlog of complaints – and that is assuming that no new complaints are added.⁷⁰ All of this is problematic, first, from a rule of law perspective: with the long duration of proceedings, the institutions themselves violate the right to a fair trial that they are tasked to monitor. Moreover, the excessive length of proceedings makes access to the institutions more difficult and reduces confidence in their effectiveness. Justice delayed is justice denied. This causes a justifiable frustration even with those who generally support the human rights monitoring institutions. In addition, an excessive bureaucratization is criticized as a side effect of institutionalized human rights protection; as is the lack of self-criticism of international human rights institutions.⁷¹

The institutional critique that becomes visible this way may be embedded in the

⁶⁶ As of 31 May 2023. See ECtHR, “Pending Applications Allocated to a Judicial Formation”, available at: <www.echr.coe.int/Documents/Stats_pending_month_2023_BIL.PDF>.

⁶⁷ The HRC received an average of 130 reports annually between 2016 and 2019; 591 individual complaints in 2019; in general, 183 reports and 1,587 complaints were awaiting processing by UN treaty monitoring bodies as of October 2019. (Cf. JELIC and MÜHREL, *cit. supra* note 26).

⁶⁸ ECtHR, *Feldman and Slovayanskyy Bank v. Ukraine*, Application No 42758/05, Judgment of 21 December 2017: the case was brought in 2005 but decided only in 2017 – after 12 years. See NUSSBERGER, “From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?*, Oxford, 2019, p. 150 ff., p. 167.

⁶⁹ See Asociación Interamericana de Defensorías Públicas, “Procedimiento ante la Comisión Interamericana de Derechos Humanos”, available at: <https://www.anadep.org.br/wtksite/cms/conteudo/42066/Gu_a_DPI_Procedimiento_ante_la_CIDH_2017.pdf>; IACtHR, “ABC de la Corte Interamericana de Derechos Humanos 2019: el cómo, cuándo y porque de la Corte Interamericana de Derechos Humanos”, 2019, p. 16. Coming to even longer procedural durations, SOLEY, “The Transformative Dimension of Inter-American Jurisprudence”, in VON BOGDANDY et al. (eds.), *Transformative Constitutionalism in Latin America. The Emergence of a New Jus Commune*, Oxford, 2017, p. 337 ff., p. 351.

⁷⁰ JELIC and MÜHREL, *cit. supra* note 26.

⁷¹ TASIOLAS, “Saving Human Rights from Human Rights Law”, *Vanderbilt Journal of Transnational Law* 52/5, 2019, p. 1167 ff. See also KLABBERS, “Human Rights Bodies and the Structure of Institutional Obligation”, in FASSBENDER and TRAISBACH (eds.), *The Limits of Human Rights*, Oxford, 2019, p. 147 ff.; WUERTH, “International Law in the Post-Human Rights Era”, *Texaco Law Review* 96, 2017, p. 279 ff.

– broader – reproach of an alleged misuse of genuine human rights concerns for power-politics, i.e., in the critique of human rights protection as an (imperialist) instrument for the exercise of power in international relations. This points to a larger legitimacy crisis of human rights protection.⁷²

3.3. Lack of coordination between systems at the national, regional and international levels

Finally, concrete problems relate to the coordination between the various levels, the domestic and the regional/international. In particular, frictions arise when it comes to concretizing the necessarily broad human rights standards⁷³ and adapting them to current social problems. In this context, (domestic) political reasons often intermingle with and add to coordination problems in the (international) legal sphere.

The (legal) “coordination problems” are particularly evident in the European and Inter-American human rights systems. In both systems, the parties have largely “internalized” human rights standards and made them part of their national legal systems.⁷⁴ This may be seen as positive for the effectiveness of human rights protection, especially for Latin American states, where human rights treaties usually are incorporated with high rank in the national legal order.⁷⁵ However, in view of the ensuing relatively direct effect of the jurisprudence of the regional human rights courts at the national level, it also leads to coordination problems.⁷⁶

These are particularly evident in the jurisprudence of national tribunals and the way they deal with decisions of the regional human rights courts: at first place, there are implementation difficulties when the domestic legislative framework limits the possibilities to give effect to the decisions of regional human rights courts, as in the case of certain reparation measures ordered by the IACtHR (especially regarding the

⁷² In this sense, KADELBACH, *cit. supra* note 53.

⁷³ On the necessarily broad human rights standards to be concretized in application, see KADELBACH, “Die relative Universalität der Menschenrechte”, in FORST and GÜNTHER (eds.), *Normative Ordnungen*, Berlin, 2021, p. 278 ff.

⁷⁴ See e.g., for Europe, SPANO, “The Future of the European Court of Human Rights – Subsidiarity, Process Based Review and the Rule of Law”, *Human Rights Law Review* 18, 2018, p. 473 ff. For the inter-American system, see HUNEEUS, “Constitutional Lawyers and the Inter-American Court’s Varied Authority”, *Law and Contemporary Problems* 79, 2016, p. 179 ff., p. 182.

⁷⁵ *Ibid.*, p. 182.

⁷⁶ This is discussed in detail by KUNZ (*cit. supra* note 40), who points out that the greater frictions result from the more direct effect. For reasons of space, this contribution is limited to the judiciary; of course, there are also coordination problems in the executive and legislative branches. For these, see for instance GROTE, “A dialogue with the deaf? The political branches as compliance partners”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.) *cit. supra* note 28, p. 449 ff.

reopening of proceedings).⁷⁷

Coordination problems are especially evident in conflicts with the national constitution. A distinction must however be made between theoretical limits, as indicated by the German Federal Constitutional Court in *Görgülü* (of the “last word” of the German Constitution) and the blatant refusal to execute judgments, as done by the Russian Constitutional Court in *Anchugov and Gladkov* (and in *Yukos*).⁷⁸ In *Görgülü*, the German Federal Constitutional Court pointed out the possibility of an incompatibility and showed the limits of the ECtHR in the abstract (with the “last word” of the German Constitution), but did not refuse to comply with German treaty obligations under the ECHR.⁷⁹ Conversely, the Russian Constitutional Court in *Anchugov and Gladkov* (and in *Yukos*) refused to execute concrete judgments directed against Russia.⁸⁰ The Russian Constitutional Court, therewith, entered into fierce opposition to the ECtHR, resisting to comply with judgements against Russia. Accordingly, the latter’s position directly contradicts the *pacta sunt servanda* rule, viz. the obligation to perform treaties in good faith (Article 26 Vienna Convention on the Law of Treaties (VCLT)) and Article 46 ECHR.⁸¹

In general, coordination problems often involve issues of interpretation and balancing; i.e., when there are different rights/interests to be weighed and national tribunals and regional human rights courts reach different conclusions.⁸² Especially the far-reaching interpretations of the IACtHR lead to tensions here. This becomes visible when the Court recognizes, for example, a state duty to investigate and prosecute in case of most serious human rights violations, with according tensions with the rights of the accused (e.g., with the right to defense, notably with the right to criminal proceedings within a reasonable time)⁸³ or perpetrator (e.g., if impunity

⁷⁷ See, e.g., Argentine Supreme Court, *Fontevicchia and d’Amico*, Judgement of 29 November 2011, where the Court held that the implementation of the IACtHR judgment was not possible due to the domestic separation of powers.

⁷⁸ ECtHR, *Anchugov and Gladkov*, cit. supra note 41; ECtHR, *Yukos*, cit. supra note 42; BREUER, cit. supra note 36; see also PETERS, “Supremacy Lost: International Law Meets Domestic Constitutional Law”, Vienna Online Journal on International Constitutional Law 3, 2009, p. 170 ff.

⁷⁹ Indeed, such limited contestation may promote a “constructive dialogue” between national courts and the ECtHR. (See for further reference *infra*, Section 4.2).

⁸⁰ ECtHR, *Anchugov and Gladkov*, cit. supra note 41; ECtHR, *Yukos*, cit. supra note 42; BREUER, cit. supra note 36; see also PETERS, cit. supra note 78.

⁸¹ Art. 46 ECHR: “1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. [...]”.

⁸² See, for example, the von Hannover cases against Germany where the balance between freedom of expression and private and family life was at issue. (Dt BVerfG, Decision of February 26, 2008, 1 BvR 1602/-7 - von Hannover).

⁸³ The tension was raised e.g. in relation to the *Bulacio v. Argentina* case of 2004 (IACtHR, *Bulacio*, cit. supra note 47).

had previously been guaranteed or amnesties granted).⁸⁴

The appreciation of these coordination problems regularly leads to the question of the limits of the dynamic jurisprudence of the regional human rights courts and to what extent this is still covered by their mandate as guardians of the rights enshrined in the conventions. The mandate of the IACtHR is in principle broader than that of the ECtHR (see Article 2, Article 29(b) ACHR, *pro homine* interpretation) and gives the Court more room for manoeuvre.⁸⁵ Nevertheless, for both courts, the assessment in a specific case remains difficult.⁸⁶ It can also lead to the aforementioned tensions with the national level. In this context, domestic tribunals have a crucial role to play as “gateways,” “translators”, and intermediaries between the different levels. This will be discussed in more detail in the last section.

In Africa, the coordination and implementation problems lie elsewhere: they are caused by the frequent lack of “internalization” of regional human rights standards in numerous African states;⁸⁷ and the partly still deficient knowledge of domestic judges when it comes to regional African human rights standards. Although conflicts with the *pacta sunt servanda* principle/compliance with treaties also arise here, this coordination problem tends to be less obvious in view of the lacking vertical judicial dialogue.⁸⁸ It is simply not explicitly voiced.

In the case of the international human rights institutions, too, the problem lies

⁸⁴ For criticism, see in particular MALARINO, “Judicial Activism, Punitivism and Supranationalization: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights”, *International Criminal Law Review* 12, 2012, p. 665 ff. More nuanced: HUNEEUS, “International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts”, *AJIL* 107, 2013, p. 1 ff.

⁸⁵ See for details BURGORGUE-LARSEN, *cit. supra* note 44, pp. 385ff; NEGISHI, “The Pro Homine Principle’s Role in Regulating the Relationship between Conventionality Control and Constitutionality Control”, *EJIL* 28, 2017, p. 457 ff.

⁸⁶ For instance, with regard to the question of how far the mandate for progressive development of rights reaches. (Preamble ECHR: “[...] further realization of Human Rights and Fundamental Freedoms [...]”; cf. BREUER, *cit. supra* note 36).

⁸⁷ See generally VILJOEN, *cit. supra* note 28, p. 362. Note, however, that more recently, an increasing number of African states have been incorporating human rights catalogues into national constitutions. For details, LONG, “Compliance with international human rights decisions in Cameroon: mechanisms in place but a lack of transparency”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 391 ff; SOMÉ, “A pick and pay approach: Burkina Faso’s compliance with international human rights law”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 407 ff. On Kenya, see for instance ORAGO, “The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective”, *African Human Rights Law Journal* 13, 2013, p. 415 ff; UDOMBANA, “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies”, *African Human Rights Law Journal* 5, 2005, p. 47 ff.

⁸⁸ On the absence of vertical dialogue, see also BURGORGUE-LARSEN, *Les 3 Cours Regionales. Des Droits de L’Homme in Context*, Paris, 2020, p. 273.

primarily in the deficient domestic implementation of their decisions or practices.⁸⁹ The treaty monitoring bodies, for example, are in a comparatively weak position: Their decisions are regularly accorded functions of normative orientation and guidance, but no immediate binding effect at domestic level.⁹⁰ They are also lacking instruments for enforcement. However, as will be shown, the decisions of the international human rights institutions may have an effect that should not be underestimated, even apart from their concrete implementation.⁹¹ All of this raises the question of what therapeutic means might be sought.

4. THERAPY

In the following, possible “therapies” are considered from the perspective of a human rights “*Realpolitik*”⁹²: the difficult balancing act between effective human rights protection and the goal of keeping states “in the boat” as much as possible in times of criticism and backlash.

Accordingly, this contribution will first turn to selected improvements in the institutional sphere (Section 4.1), to then make suggestions for a better coordination of human rights standards (Section 4.2) and systems (Section 4.3).

4.1. Improving the efficiency of human rights protection institutions

Due to space constraints, the following discussion will restrict itself to improving the efficiency of human rights protection institutions; options for enhancing their legitimacy will be largely spared out.

As pending and ongoing reforms of the human rights protection systems show,

⁸⁹ See SEIBERT-FOHR and WENIGER, “Compliance monitoring under the International Covenant on Civil and Political Rights”, in GROTE, MORALES ANTONIAZZI and PARIS (eds.), *cit. supra* note 28, p. 425 ff., p. 439.

⁹⁰ The HRC, for example, enjoys a high degree of authority, with its decisions being considered as quasi-judicial, but ultimately non-binding. See, for example, the International Court of Justice (ICJ) in the *Diallo* case, which refers to the HRC’s practice in individual communications and General Comments as “interpretative case law” (ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 66). In general, SEIBERT-FOHR and WENIGER, *cit. supra* note 89, pp. 430-431; SEIBERT-FOHR, “Judicial Engagement in International Human Rights Comparativism”, in REINISCH, FOOTER and BINDER (eds.), *International Law and... Select Proceedings of the European Society of International Law*, Oxford/London, 2016, p. 7 ff., p. 9.

⁹¹ For details *infra*, Section 4.2.

⁹² NUSSBERGER, “From High Hopes to Scepticism? Human Rights Protection and Rule of Law in Europe in an Ever More Hostile Environment”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?* Oxford, 2019, p. 150 ff., p. 171.

reform initiatives are by their very nature limited and regularly involve trade-offs. For example, the reforms brought about by Protocol No. 14 to the ECHR have succeeded in somewhat reducing the backlog of cases before the ECtHR,⁹³ which shortened the unduly long duration of proceedings. At the same time, however, the stricter admissibility requirements, especially the restrictive handling of the necessary exhaustion of domestic remedies-rule, have made access to the ECtHR more difficult.⁹⁴ This can be seen, first, in complaints against Turkey after the failed *Coup d'état* of 2016, when the ECtHR initially rejected cases as inadmissible despite the generally non-functioning Turkish legal remedies. Second, the pilot judgment procedure increases the productivity of the ECtHR, but limits individuals' access to that very Court.⁹⁵ In these constellations, access to the ECtHR is made impossible.⁹⁶

Reform efforts concerning the UN treaty monitoring bodies also have limits and come with disadvantages.⁹⁷ A major reform of the state reporting procedures, among other things to reduce the reporting burden, has been awaiting implementation for some time (since 2014).⁹⁸ In the meantime, the HRC has succeeded in improving efficiency,⁹⁹ particularly through changes of its rules of procedure: states receive lists of issues in advance to enable a more focussed dialogue and the HRC meets in two chambers. Also, the follow-up for individual communications and concluding observations has been improved.¹⁰⁰ Similarly, the session time of the HRC in Geneva was moderately increased by the UN General Assembly; however, a further increase

⁹³ The single judge solution (in conjunction with limitations in the obligation to state reasons between 2010 and 2017) can, however, be criticized from the perspective of the rule of law (*Ibid*).

⁹⁴ More generally, MADSEN, *cit. supra* note 55, p. 203: "The operational logic of subsidiarity with regard to admissibility, and the proceduralism and formalism associated with it, is increasingly at odds with the actual functioning of human rights and rule of law in a number of member states and the traditional 'as if' logic appears to be becoming problematically restrictive."

⁹⁵ See *Burmych and others v. Ukraine* where *Burmych* was stalled, although the implementation of the pilot-judgment in Ukraine had been delayed. ECtHR, *Burmych and others v. Ukraine*, Application Nos. 46852/13 et al, Judgment of 12 October 2017 (striking out). Similarly, over 12,000 other cases have been put on hold. (MADSEN, *cit. supra* note 55, p. 204).

⁹⁶ For details, see Glas, "*Burmych v. Ukraine* Two Years Later: What about Restoral?", 17 September 2019, Strasbourg Observers, available at: <<https://strasbourgobservers.com/2019/09/17/burmych-v-ukraine-two-years-later-what-about-restoral/>>.

⁹⁷ SEIBERT-FOHR, *cit. supra* note 27.

⁹⁸ See UN General Assembly, "Strengthening and enhancing the effective functioning of the human rights treaty body system", UNGA Res 68/268, 2014, available at: <https://www.ohchr.org/sites/default/files/Documents/HRBodies/TB/HRTD/A-RES-68-268_E.pdf>. In general, see JELIC and MÜHREL *cit. supra* note 26.

⁹⁹ The HRC is authorized to do so under Art. 39(2) CCPR. See for details SEIBERT-FOHR, *cit. supra* note 27, p. 134. For example, the fact that the HRC now meets in two chambers entails that not all members of the committee decide on everything.

¹⁰⁰ Cf. SEIBERT-FOHR and WENIGER, *cit. supra* note 27, p. 430 f, esp. p. 436 f.

of the time-length of the HRC's sessions in Geneva meets institutional and arguably also the personal limits of the experts involved.¹⁰¹

To briefly turn to legitimacy: in addition to linking human rights protection institutions back to and opening them up to civil society, the further involvement of particularly affected persons was mentioned as a way of increasing legitimacy. The same applies to critical self-reflection on the part of human rights protection institutions. Dialogue forums, for example between members of the regional human rights courts and national constitutional judges, could be expanded, as could be the horizontal dialogue and exchange between the human rights institutions themselves.

In short, there is certainly potential in increasing efficiency (and legitimacy). Nevertheless, all these efforts have limitations or adverse effects. This raises the question whether a better coordination of substantive human rights standards as another, additional therapeutic means might help.

4.2. Better coordination of substantive standards at the three levels – national, regional, international

What seems necessary is a criteria-driven interlocking of the international or regional levels on the one hand and the national level on the other, especially for the concretization and dynamic development of the traditionally abstract/broad human rights standards.

As far as the respective human rights systems are concerned, quite different answers must be given to the question of such “ideal” interlocking of international human rights standards with national legal systems – and thus precisely to the question of how to uphold effective human rights protection in times of human rights *Realpolitik*¹⁰², including the management of states' sovereignty concerns.

To first turn to the regional human rights protection systems in the European and Inter-American regions. In relation to established pluralistic democracies, a stronger focus on the national level, for example through a principled margin of appreciation doctrine or self-restraint exercised by the regional human rights monitoring institution, appears to be a suitable means against backlash.¹⁰³ This holds true especially for relative rights (that can be restricted), provided that their essence is not

¹⁰¹ Accompanying measures are the increased use of new information technologies, for example in data management and administration.

¹⁰² See NUSSBERGER, *cit. supra* note 92.

¹⁰³ See also PAULUS, “From Implementation to Translation: Applying the ECtHR Judgments in the Domestic Legal Orders”, in SEIBERT-FOHR and VILLIGER (eds.), *Judgments of the European Court of Human Rights - Effects and Implementation*, Baden-Baden, 2014, p. 267 ff., p. 269.

impaired. A comprehensively understood cooperative subsidiarity principle may provide orientation here: it serves as a yardstick for the relation between the different (regional and national) levels and can help to normatively delimit and calibrate them.¹⁰⁴ More particularly, the regional human rights institution exercises self-restraint as long as the national level functions “good” but “kicks-in” (i.e., takes action) when domestic institutions fail.

On this basis, in Europe, the development of a procedural margin of appreciation, the “reasonable courts doctrine”, appears to be a viable means to give certain leeway of implementation to the domestic sphere; therewith mitigating frictions between the regional and national levels. As the *von Hannover v. Germany* cases in particular showed, the ECtHR grants more leeway, i.e. exercises greater restraint, when domestic institutions are functioning “well”: the Court then limits itself to reviewing the substance of the right at issue.¹⁰⁵ Therewith, a distinction between democratic states functioning under the rule of law and authoritarian regimes could bring the former “back on board”, while in the case of the latter, effective human rights protection is ensured through stricter monitoring. This is precisely what the ECtHR has demonstrated in the cases already decided against Turkey following the 2016 coup: the Court regularly established violations and, to that extent, applied a stricter standard in the face of poorly functioning national institutions (*Sahin Alpay v. Turkey* of 2018; *Mehmet Hasan Altan v. Turkey* of 2018).¹⁰⁶ So there is much potential here.

¹⁰⁴ Cf. VILA, “Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights”, *International Journal of Constitutional Law* 15, 2017, p. 393 ff; FOLLESDAL, “Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights - or Neither”, *Law and Contemporary Problems* 79, 2016, p. 147 ff; BINDER, “The Future of Human Rights Protection in Europe and America - Or Subsidiarity Revisited”, *Zeitschrift für Öffentliches Recht* 77, 2022, p. 5 ff.

¹⁰⁵ SPANO, *cit. supra* note 74, p. 473. Thus, if everything has been properly examined at the national level and elementary principles of the rule of law, checks and balances, etc. are sufficiently anchored domestically (“embeddedness” of the ECHR in Robert Spano’s sense), greater trust will be placed in national institutions. In such a jurisprudence, the functioning of national institutions is accounted for in the margin of appreciation left to the domestic level by the ECtHR. Cf. ECtHR, *von Hannover v. Germany* (No 2), Application Nos. 40660/08 and 60641/08, Judgment of 7 February 2012, para. 107: “[...] where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case law, the Court would require strong reasons to substitute its view for that of the domestic courts.” In this context, the ECtHR, noting that the German courts had taken its own case law (including *Hannover v. Germany No 1*) into account, exercised restraint and found no violation.

¹⁰⁶ See ECtHR, *Sahin Alpay v. Turkey*, Application No. 16538/17, Judgment of 20 March 2018; ECtHR, *Mehmet Hasan Altan v. Turkey*, Application No. 13237/17, Judgment of 20 March 2018, where the ECtHR found violations of Arts. 5(1) and 10 ECHR. See also ECtHR, *Matúz v. Hungary*, Application No. 73571/10, Judgment of 21 October 2014, where the ECtHR stated in the context of the dismissal of a journalist: “the fairness of proceedings and the procedural guarantees afforded [...] are factors to be taken into account when assessing the proportionality. [...] If the reasoning of the national court demonstrates a lack of sufficient

However, significant challenges remain in the operationalization of the procedural margin of appreciation doctrine: for example, what criteria are to be applied in assessing whether institutions such as national parliaments are functioning “well” with, accordingly, greater self-restraint by the ECtHR?¹⁰⁷ Assessment is more complex here, as compared to assessments of the independence of the judiciary.

In the Americas, in application of a “cooperative subsidiarity principle,” a somewhat more flexible attitude of the IACtHR and a stronger reference to domestic institutions, especially in case of relative rights in consolidated democracies,¹⁰⁸ as well as regards the often very detailed reparation orders,¹⁰⁹ seems warranted. In addition, the Inter-American Court could engage in a constructive dialogue with the state concerned when monitoring the execution process, for which the Court itself is responsible,¹¹⁰ unlike the ECtHR. Initial approaches in this regard can already be found in the IACtHR’s case law (see *Mémoli v. Argentina* on freedom of expression).¹¹¹ The Inter-American Court also starts to take national conditions into account when exercising the conventionality control; the same applies to reparations. This may contribute to a better coordination between the regional/Inter-American and domestic levels and should be further developed.

engagement with the general principles of the Court under Article 19 of the Convention, the degree of margin of appreciation afforded to the authorities will necessarily be narrower.” (ID., para. 35).

¹⁰⁷ See in this sense the interview with ECtHR President Robert Spano (MADSEN and SPANO, “Authority and Legitimacy of the European Court of Human Rights. Interview with Robert Spano, President of the European Court of Human Rights”, *The European Convention on Human Rights Law Review* 1, 2020, p. 165 p.168). The lack of clear criteria for the functioning of national parliaments - in contrast to the judiciary, where there are clear standards in human rights treaties (see, e.g., Art. 6 ECHR) - could fuel a “double-standards” debate. Interview with ECtHR President Robert Spano (ID., p. 168).

¹⁰⁸ Cf. BERTELSEN, “A Margin for the Margin of Appreciation: Deference in the Inter-American Court of Human Rights”, *International Journal of Constitutional Law* 19, 2021, p. 1 ff.

¹⁰⁹ As discussed, the IACtHR traditionally rejects an attitude of self-restraint, as the margin of appreciation, which is generally explained with the most serious human rights violations and democracies still in consolidation in the Latin American region. (TRINDADE, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, 2008, p. 390).

¹¹⁰ The IACtHR monitors itself the implementation of its judgments since 2001 through relevant resolutions. Since 2007, the Court has held case-specific hearings with parties to improve implementation. (See also BURGORGUE-LARSEN, *cit. supra* note 44, p. 396).

¹¹¹ In *Mémoli v. Argentina* (2013), the IACtHR ruled with respect to the legality of a criminal sanction imposed on the complainants for statements made in the media: “in strict observance of its subsidiary competence, the Court [...] must verify whether the State authorities made a reasonable and sufficient weighing up between the two rights in conflict, without necessarily making an autonomous and independent weighing, unless the specific circumstances of the case require this” (IACtHR, *Mémoli v. Argentina*, Judgment of 22 August 2013, Series C No 56, para. 140). The Int-American Court concluded that the national courts had “examined thoroughly the characteristics of the statements [at issue]” (para. 142) and granted according leeway by stating that “domestic judicial authorities were in a better position to assess which right suffered most harm” (para. 143) without finding a violation.

The determination of the applicable regional human rights standards ideally takes place through a vertical judicial dialogue or a dialectic review.¹¹² This way, domestic courts, especially supreme courts, may contribute – in “qualified cooperation”¹¹³ – to “translating” the decisions of regional human rights courts into national law (or provide more nuance for different lines of jurisprudence).¹¹⁴ National courts become gateways (“*Einfalltore*”) for regional human rights standards.¹¹⁵ This may help to soften domestic resistance.

Note, however, that these considerations apply only to constructive/good-faith dialogue; not to unqualified resistance, as practiced by the Russian Constitutional Court in *Anchugov and Gladkov* (and especially in *Yukos*).

A prerequisite for such a vertical dialogue are consistent lines of jurisprudence of the regional human rights courts. This is necessary to stabilize the normative expectations of domestic institutions. One possible technique to reach such stability/consistency, habitually practiced by the ECtHR, is to base its dynamic development of regional human rights standards on a comparison of national laws and identify a “European consensus”.¹¹⁶ Such technique may indeed be viewed as treaty interpretation with reference to “subsequent practice” in the sense of Article 31(3)(b) VCLT. Generally, an adequate method, such interpretation must however be carried out consistently.¹¹⁷ For example, it has been criticized that the ECtHR diverges in its references to the “European consensus” and is not systematic enough in its identification of a higher protection standard. Another means – mainly of the IACtHR – to improve the acceptability of judgments at domestic level, is to refer to

¹¹² Thus, as is well known, the ECtHR was satisfied to note in *von Hannover No 2* that the German Constitutional Court had considered its reasoning of *von Hannover No 1*. (See *cit. supra* note 105). Such a dialogue, according to Armin von Bogdandy, does not necessarily have to take place harmoniously between the parties involved, nor does it presuppose the primacy of international law. It may rather be understood as a contribution to a common project based on values, principles and rights as well as human dignity.

¹¹³ Cf. GROTE, MORALES ANTONIAZZI and PARIS, *cit. supra* note 29, p. 517.

¹¹⁴ See German Constitutional Court *Beamtenstreikrecht* (*cit. supra* note 37).

¹¹⁵ Indeed, for some national supreme courts, the misalignment with the ECtHR’s case law (see *supra*, Section 3.3) may be functional to promote an, as held by the Italian Constitutional Court, “constructive dialogue between the national courts and the European Court concerning the meaning to be given to human rights”. (Italian Constitutional Court, Judgment No. 49/2015, para. 7).

¹¹⁶ The IACtHR has also begun to do so, for example in *Artavia Murillo* (IACtHR, *Artavia Murillo v. Costa Rica*, Judgment of 28 November 2012, Series C No 257) and *Atala Riffo* (IACtHR, *Atala Riffo v. Chile*, Judgment of 24 February 2012, Series C No 239). For details, see CONTESE, “The final word? Constitutional dialogue and the Inter-American Court of Human Rights”, *International Journal of Constitutional Law* 15, 2017, p. 414 ff.

¹¹⁷ Cf. for instance ULFSTEIN, “How Should the European Court of Human Rights Respond to Criticism? Comment on Angelika Nussberger”, in KRIEGER, NOLTE and ZIMMERMANN (eds.), *The International Rule of Law. Rise or Decline?*, Oxford, 2019, p. 172 ff., p. 177 with further references.

national legislation in the state concerned in the judgment's motivation.¹¹⁸

In Europe, Protocol No. 16 could be used – and also further developed – as a means to strengthen the vertical judicial dialogue. Indeed, it establishes a right of the highest domestic courts and tribunals of the Council of Europe Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the ECHR.¹¹⁹

As regards international human rights protection institutions, possible approaches for a better coordination of standards differ. This, for one, is due to the fact that they have jurisdiction over very different states (democracies as well as totalitarian regimes); in many cases, international human rights standards are also insufficiently incorporated at the domestic level. Likewise, as is well known, the decisions of UN treaty monitoring bodies do not have binding effect.¹²⁰ Therefore, in addition to domestic courts, the main actors to improve the effective implementation of international human rights standards are ministerial officials involved in state reports, social movements, and NGOs. This has been aptly described as a form of “transnational experimentalist governance”.¹²¹ Indeed, effective domestic operationalisation and the invocation of international human rights standards enables advocacy for change and according improvements in the domestic human rights situation.¹²² International human rights standards, consequently,

¹¹⁸ See e.g., IACtHR, *Awas Tingni v. Nicaragua*, Judgment of 31 August 2001, Series C No. 79; IACtHR, *Acevedo Buendia v. Peru*, Judgment of 1 July 2009, Series C No. 198. For details, see LIXINSKI, “Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law”, EJIL 21, 2010, p. 585 ff.

¹¹⁹ However, there are numerous critical points about Protocol No. 16. See, e.g.: GERARDS, “Advisory Opinions, Preliminary Rulings and the New Protocol No 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal”, Maastricht Journal of European and Comparative Law 21, 2014, p. 630 ff., p. 648. DZEHTSIAROU and O'MEARA, “Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?”, Legal Studies 34, 2014, p. 444 ff., p. 459 and p. 462. Protocol No. 16 has moreover been ratified by only 19 states so far; as of May 2023, the procedure has been used only seven times in total. See ECtHR, Advisory Opinions under Protocol No 16 (ECtHR) available at: <www.echr.coe.int/Pages/home.aspx?p=caselaw/advisoryopinions&c=>>. Thus, the Protocol's concrete utility for judicial dialogue remains questionable. Indeed, some States, e.g., Italy, decided not to ratify Protocol No. 16 out of concerns of undermining the constitutional “primacy” of their own Supreme Courts; a reflection of the growing populist/nationalist hostility towards human rights systems, and international law in general, as discussed *supra*, Section 2.1.

¹²⁰ See *supra*, Section 3.3.

¹²¹ DE BURCA, “Human Rights Experimentalism”, AJIL 111, 2017, p. 277 ff.

¹²² Cf. SHANY, “Can Strasbourg be Replicated at a Global Level? A View from Geneva”, in AUST and DEMIR-GÜRSEL (eds.), *The European Court of Human Rights - Current Challenges in Historical and Comparative Perspective*, Cheltenham, 2021, p. 71 ff., p. 88. This is aptly described by Sikkink as the “boomerang effect.” See SIKKINK, “Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition”, in DELLA PORTA and TARROW (eds.) *Transnational Protest and Global Activism*, Lanham/Boulder/New York/Toronto/Oxford, 2004, p.151 ff.

are attributed orientation and mobilization function. They are invoked to criticise domestic human rights violations; independently of the fact whether the respective human rights standard or decision has been implemented domestically. Especially international/global human rights standards thus develop emancipatory potential.¹²³

This is precisely where the possibilities for improving the relation between international/global human rights standards and the national level reside. In addition to dialogue, it is above all the persuasive power that an international decision/the establishment of a specific standard radiates that should induce national actors to follow the jurisprudence of international treaty monitoring bodies.¹²⁴ Or at least unleashes sufficient potential to mobilize against human rights violations.¹²⁵ This also explains why in some cases – such as the prohibition of full-face veils in France (*Yaker* case) or the abortion ban in Ireland (*Mellet* case) – the HRC showed less restraint than the ECtHR and established corresponding violations.¹²⁶ It was a matter of convincingly defining the human rights standard at issue. The concretization of the human rights standards in question then takes place in form of exchange and dialogue (a “two-way cross-cultural translation”) involving various domestic actors (NGOs, social movements, state ministries, civil society).

Thus, different “methods” for an improved coordination of standards may be distinguished, depending on whether the international/global or the European or Inter-American human rights protection systems are concerned. In this context, the African human rights protection system has an intermediate position, as it were, given the little progress made in most African states as regards the domestic incorporation/”internalization” of regional human rights standards.

This leads to the final part of this contribution, broader questions of a better coordination between the different (domestic-regional/international) levels.

¹²³ In this sense. *Ibid.*

¹²⁴ Cf. SHANY, *cit. supra* note 122.

¹²⁵ With Shany: “HRC derives its legitimacy from other sources [than the ECtHR] – especially from the notion of universality of international human rights – a notion with powerful symbolic value, which exerts a considerable compliance pull on states.” (SHANY, *ID.*, p. 74).

¹²⁶ See HRC, *Hebbadj v. France* and *Yaker v. France*, Application No. 2807/2016, Decision, 17 October 2018; HRC, *Mellet v. Ireland*, Application No. 2324/2013, Decision of 31 March 2016. See, on the other hand, ECtHR, *SAS v. France*, Application No. 43835/11, Judgment of 1 July 2014 and ECtHR, *A B and C v. Ireland*, Application No. 25779/05, Judgment of 16 December 2010, where the Court did not establish violations. For further reference see Berry, “Freedom of Religion and Religious Symbols: Same Right – Different Interpretation?”, EJIL: Talk!, 10 October 2013.

4.3. *Better coordination of national, regional and international monitoring systems*

In the area of coordination of national, regional and international monitoring systems, there have already been large-scale projects. In addition to a human rights chamber at the International Court of Justice (ICJ), the idea of a worldwide human rights court that could be called upon in certain cases and adjudicate the most serious human rights violations has been raised.¹²⁷ However, such a court is hardly feasible at present;¹²⁸ moreover would it have disadvantages such as the lack of specialization in the different fields of human rights,¹²⁹ and also the problem of institutional backlash would not necessarily be solved.

Therefore, the following proposals will again be guided by human rights *Realpolitik*. This presupposes a solid anchoring of human rights protection at the national level.¹³⁰ As Louis Henkin aptly put it back in 1994:

“International Rights are rights within national society and the obligation to respect and ensure rights must fall on every society in the first instance. The international community can only observe, cajole, shame and otherwise induce governments and societies to respect and ensure those rights.”¹³¹

Indeed, in line with Henkin, effective human rights protection requires functioning domestic structures. It is based on a pluralistic democracy, the rule of law and independent courts. However, as shown, these very structures are undermined by the rise of nationalist-populist regimes. Human rights protection institutions have responded with an increased focus on domestic institutional structures.¹³² In particular the comparatively recent “bad faith jurisprudence” of the ECtHR in the context of Article 18 ECHR deserves mention:¹³³ in extreme cases, when basic rule of law principles are

¹²⁷ See KOZMA, NOWAK and SCHEININ (eds.), *A World Court of Human Rights - Consolidated Statute and Commentary*, Vienna, 2010.

¹²⁸ In particular, Philip Alston met the proposal with scepticism (ALSTON, “Against a World Court for Human Rights”, *Ethics & International Affairs* 28, 2014, p. 197 ff.).

¹²⁹ In this sense JELIC and MÜHREL, *cit. supra* note 26).

¹³⁰ Cf. CALI and KOCH, *cit. supra* note 59, p. 305 (citing Donnelly): “There is a widely held consensus in the political science literature that human rights treaty compliance is primarily driven by domestic political mechanisms.”

¹³¹ HENKIN and HARGROVE (eds.), *Human Rights: An Agenda for the Next Century*, Washington, 1994, p. xvii.

¹³² In addition to the aforementioned Art. 18 ECHR jurisprudence, the independence of national courts in particular is consistently called for. See for details BINDER, *cit. supra* note 104.

¹³³ Art. 18 ECHR: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

set aside domestically, the ECtHR establishes an abusive restriction and violation of Convention rights, as occurred in the *Demirtas v. Turkey No 2* case of 2020.¹³⁴ The IACtHR goes even further in its *Advisory Opinion OC-21/28* of June 2021,¹³⁵ when it considers the indefinite re-election of presidents in presidential systems with strong executive branches to be a violation of Inter-American human rights standards.¹³⁶ The constitutional/institutional design of states is thus increasingly under scrutiny by both regional human rights courts when serious violations of the rule of law are at stake.¹³⁷ This seems promising for a better vertical coordination between the levels.

At the same time, a tighter control by regional human rights courts comes with the risk of non-compliance by the state concerned: the regional court is now in constant use, so to speak, and with each of its rulings, they antagonize the state, which is drifting into authoritarianism. Likewise, the operationalization of international human rights by NGOs and social movements in the meaning of transnational experimental governance at the international level works primarily in pluralistic democratic regimes. A dilemma.

In these cases, only pressure from other states may help. In this sense, the consistent follow-up by the Committee of Ministers of the Council of Europe to Article 18 ECHR rulings of the ECtHR should be seen as a positive development.¹³⁸ Other types of political and economic pressure could also be considered, such as that currently being exerted by the European Union on Poland.¹³⁹

Likewise, the most comprehensive possible anchoring of human rights at the

¹³⁴ ECtHR, *Selahattin Demirtas v. Turkey (No 2)*, Application No. 14305/17, Judgment of 22 December 2020. The jurisprudence on Art. 18 ECHR dates back to ECtHR, *Gusinskiy v. Russia*, Application No. 70276/01, Judgment of 19 May 2004. On the development of jurisprudence, see CALI, "Proving Bad Faith in Int Law: Lessons from Art. 18 Case law of the ECtHR", in KAJTAR, CALI and MILANOVIC (eds.), *Secondary Rules of Primary Importance*, Oxford, 2022. See also TSAMPI, "The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all?", NQHR 38, 2020, p. 134 ff., p. 149.

¹³⁵ IACtHR, *La Figura de la Reección Presidencial Indefinida en Sistemas Presidenciales en el contexto del Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-28/21, 7 June 2021.

¹³⁶ The IACtHR thus takes the broader institutional guarantees of a representative democracy, the rule of law, and the separation of powers into account. (ID., paras. 43ff. and 65). In general, Binder and Morales Antoniazzi, "Towards Institutional Guarantees for Democratic Rotation. The Inter-American Court's Advisory Opinion OC-28/21 on Presidential Re-election", 6 October 2021, *Verfassungsblog*, available at: <verfassungsblog.de/towards-institutional-guarantees-for-democratic-rotation/>.

¹³⁷ Also, the African Court of Human and Peoples' Rights has pushed for according standards (e.g. against Benin). However, this led to limitations of the of access of individuals/NGOs to the Court on the part of Benin.

¹³⁸ Cf. CALI, "How Loud Do the Alarm Bells Toll? Execution of 'Article 18 Judgments' of the European Court of Human Rights", *European Convention on Human Rights Law Review* 2, 2021, p. 274 ff.

¹³⁹ See e.g., Buras and Piotr, "The final countdown: The EU, Poland and the rule of law", *European Council on Foreign Relations*, 14 December 2022, available at: <<https://ecfr.eu/article/the-final-countdown-the-eu-poland-and-the-rule-of-law/>>.

national and subnational levels should be striven for.¹⁴⁰ This precisely because human rights are not a purely legal project, but are also based on political, sociological-anthropological and other factors, which makes their embedding in society as a whole all the more necessary.¹⁴¹ In addition to organized civil society, this would include national human rights and ombudsman institutions as well as the media. Municipalities, cities and federal entities must also be involved in the realization of human rights: the local and regional level is particularly important for implementation. It is often also more directly in touch with the population. The goal is to develop a “human rights culture”¹⁴² (“vernacularization” of human rights).¹⁴³ This seems even more necessary since ultimately, there are clear limits to regional and international human rights institutions: If states persistently refuse to comply with their human rights obligations, even these institutions can do little. In the words of Karen Alters:

“The primary political question of the day is whether populations are willing to trade democracy, individual rights and the rule of law for nationalist glory or economic opportunity. [...] Should the constituent people collectively cede liberal democratic values, then it would be foolish to expect international law or domestic legal systems to survive in their current form.”¹⁴⁴

The development of a “human rights culture” at the national level moreover seems important because a human rights project that is supported by the population ideally also counters backlash tendencies: It reduces the danger of a populist turn against human rights institutions, since there is little or no political benefit for a government from such a position.¹⁴⁵ Anchoring human rights in the society as a whole could thus also help to counteract the populist-nationalist tendencies mentioned earlier. This, too,

¹⁴⁰ Cf. MCGREGOR, “Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law”, *Vanderbilt Journal of Transnational Law* 52, 2019, p. 1281 ff., pp. 1306-1314.

¹⁴¹ In this case, targeted outreach and communication strategies by human rights protection institutions may likewise be of help. See *supra*, Section 3.1.

¹⁴² On human rights culture see BINDER, “European Human Rights Protection in Crisis?: The COVID-19 Pandemic as Challenge and Opportunity”, *Die Friedens-Warte* 93, 2020, p. 299 ff.

¹⁴³ ENGLE MERRY and LEVITT, “The Vernacularization of Women’s Human Rights”, in HOPGOOD, SNYDER and VINJAMURI (eds.), *Human Rights Futures*, Cambridge, 2017, p. 213 ff; See generally for an anthropological perspective on human rights, GOODALE, “Human Rights”, in FASSIN (ed.), *A Companion to Moral Anthropology*, Malden/Oxford/West Sussex, 2012, p. 469 ff.

¹⁴⁴ ALTER, “Critical junctures and the future of international courts in a post-liberal word order”, in KENT, SKOUTARIS and TRINIDAD (eds.), *The Future of International Courts*, London, 2019, p. 9 ff., p. 33.

¹⁴⁵ Similarly, the “regime costs,” i.e., the domestic costs of realizing human rights protection, are reduced. SANDHOLTZ, BEI and CALDWELL, “Backlash and international human rights courts”, in BRYSK and STOHL (eds.), *Contracting Human Rights. Crisis, Accountability, and Opportunity*, London, 2019, p. 159 ff.

helps to avoid backlash and an overstretching of international human rights law.

Finally, to broaden the perspective: for sure, the global political situation is sobering. But human rights are also relied upon in relation to new challenges such as the climate crisis or transnational economic law, and international human rights protection institutions are used as a forum.¹⁴⁶ Even the criticism of human rights by populist regimes can be seen as a sign of success, confirming their relevance and importance. This gives rise to hope that human rights will remain the ultimate normative framework and guide the action of the international community.¹⁴⁷ So there are also positive signs, despite backlash tendencies.

¹⁴⁶ See, for example, the complaint brought before the ECtHR by six Portuguese youth in light of the climate crisis: ECtHR, *Duarte Agostinho and others v. Portugal and 32 other States*, Application No. 39371/20; cf. also ECtHR, *Verein Klimasenioren Schweiz and others v. Switzerland*, Application No. 53600/20; generally, EICKE, “Climate Change and the Convention: Beyond Admissibility”, *European Convention on Human Rights Law Review* 3, 2022, p. 8 ff. Regarding jurisprudence on human rights and corporate accountability, see IACtHR, *Buzos Miskitos (Lemeth Morris et al) v. Honduras*, Judgment of 31 August 2021, Series C No 432; for further reference see, Manteli, “Key take-aways from the Inter-American Court judgement on Miskito divers vs. Honduras”, *Business & Human Rights Centre*, 28 October 2021, available at: <www.business-humanrights.org/en/blog/aportes-de-la-sentencia-de-la-corte-idh-en-el-caso-de-buzos-miskitos/>.

¹⁴⁷ With regard to international organizations see, PETERS, “Constitutional Theories of International Organizations: Beyond the West”, *Chinese Journal of International Law* 20, 2021, p. 649 ff., pp. 677-698.

6. THE BLURRED LINE BETWEEN FORCED LABOUR AND TRAFFICKING IN HUMAN BEINGS FOR LABOUR PURPOSES: INSIGHTS FROM A MULTI- LAYERED INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

Francesca Tammone

SUMMARY: 1. Introduction; – 2. Human trafficking for labour purposes and forced labour in *ad hoc* international legislation; – 2.1. International legislation at the universal level. Issues around the international definition of “trafficking in human beings”; – 2.2. The European legal framework. – 3. Human trafficking for labour purposes and forced labour in human rights treaties...; – 3.1. ... and in the International Human Rights Courts’ case-law; – 3.1.1. The ECtHR’s case-law; – 3.1.2. The Inter-American Court of Human Rights’ ruling in the case *Hacienda Verde v. Brasil*. – 4. Conclusions.

1. INTRODUCTION

On the afternoon of 7 January 2010, in the countryside near Rosarno, in southern Italy, two African farm workers returning from their fields were wounded by gunfire from their employers.¹ In response, other migrant workers living in the area suddenly erupted into an uncontrolled rage, provoking clashes with residents in the streets. It was only after this escalation of violence – known in the media as the “Rosarno

¹ “Rosarno, immigrati in rivolta: centinaia di auto danneggiate”, La Repubblica, 7 January 2010, available at: <https://www.repubblica.it/cronaca/2010/01/07/news/rosarno_immigrati_in_rivolta_centinaia_di_auto_danneggiate-1872028/>.

protest” – that Italian institutions began to pay increasing attention to the conditions of agricultural labourers in the South of Italy, where *hundreds* of people worked 8-10 hours for a daily wage of 25 euros and lived in disused factories without running water, electricity or heating.² More than eight years later, the UN Special Rapporteur on contemporary forms of slavery estimated that an impressive number of labourers in the Italian agricultural system were illicitly recruited under exploitative and undignified conditions by intermediaries well-known as *caporali* (gangmasters),³ and then forced into slavery-like work practices.⁴ Moreover, she stressed structural deficiencies of other sectors of the country’s economy, like the construction and the textile industries, that exposed many workers to a concrete risk of severe exploitation.⁵

“Modern-day slavery”⁶ largely affecting workers’ conditions is not an Italian exclusivity. Worldwide, it is a serious widespread phenomenon that brings enormous profits to the exploiters. According to the last ILO’s Global Estimate, 2021 counted around 27.6 million forced labourers,⁷ many of whom were *also* victims of human trafficking, caught in the webs of traffickers due to their precarious and vulnerable conditions, often exacerbated by the absence of proper and effective legal migration

² Amnesty International, “Italy: Exploited labour two years on: The ‘Rosarno Law’ fails to protect migrants exploited in the agricultural sector in Italy”, 26 November 2014, p. 5, available at: <<https://www.amnesty.org/en/documents/eur30/007/2014/en/>>.

³ As reported by the Special Rapporteur on contemporary forms of slavery, including its causes and consequences [UN General Assembly, Visit to Italy. Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, UN Doc. A/HRC/42/44/Add.1, (2019), para. 20]: “*Caporalato* is the term used to refer to work in the informal economy and to labour exploitation of vulnerable workers, who are mostly irregular migrants from European Union countries and third countries of origin (mainly African and Asian). The Criminal Code punishes the recruitment of workers on behalf of third parties under exploitative conditions, taking advantage of the workers’ state of need and using, hiring or employing workers, including by the means of the intermediation activity of gangmasters or *caporali*”.

⁴ *Ibid.*, p. 7, para. 37, and para. 46.

⁵ GRETA (Group of Experts on Action Against Trafficking in Human Beings), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy, adopted 7 December 2018, published 25 January 2019, GRETA(2018)28, para. 79, available at: <<https://rm.coe.int/greta-2018-28-fgr-ita/168091f627>>.

⁶ One of the first authors that described some modern phenomena of exploitation by these words is Kevin BALES, in his well-known book, *Disposable People: New Slavery in the Global Economy*, Berkeley, 1999. Nowadays, there is large consensus on the fact that trafficking in human beings can be considered a form of “modern slavery” (among others, SCARPA, *Trafficking in Human Beings: Modern Slavery*, Oxford, 2008; ALLAIN, *Slavery in International Law: of Human Exploitation and Trafficking*, Leiden, 2013). However, the concept of “modern slaveries” in itself, and its scope as well, is still undefined. In this perspective, SCARPA, “Contemporary forms of slavery”, (study requested by the DROI committee), 20 December 2018, p. 6, available at: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU\(2018\)603470_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603470/EXPO_STU(2018)603470_EN.pdf)>.

⁷ Look at the ILO’s Global Estimate at: <<https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>>.

paths as an alternative to access work in foreign States.⁸

Given that the phenomenon of exploitation for labour purposes often involves organized crime cross-border dynamics, over the last thirty years the lawmakers addressed the fight against indecent work conditions through international cooperation, which plays a leading part in the harmonization of national legislations. Despite important goals have been reached so far, further efforts from a wide range of actors - including States, private entities, trade unions and international organizations⁹ - are still required to abolish these practices or at least weaken the exploiters' power.

Furthermore, one of the main challenges is that the international legal framework in this area is still rife with uncertainties and ambiguities. This is partly due to the coexistence of a multitude of relevant international obligations, elaborated at *different times* over the last century in response to *different needs* and *specific concerns*.¹⁰ As a result, a "multi-layered" regulation of labour exploitation has taken shape.

Human rights law can be certainly considered as an important part of such a legal framework. Indeed, both the prohibition of human trafficking and human rights provisions are aimed at safeguarding human dignity and inalienable values of humanity.¹¹ Not by chance, the legal concept of trafficking in human beings has gradually crept into the scope of human rights treaties that do not expressly deal with it, by means of a broad and teleological interpretation of the prohibition of slavery, servitude and forced labour.¹² On the one hand, such an intersection with the human rights legal regime has represented an important step in expanding protection for victims, which are now entitled to claim reparation for borderline-slavery work conditions before human rights treaty-bodies and Courts. On the other hand, however, human rights case-law contributed to confusion about the demarcation line between the legal concepts related to work exploitation.

⁸ PALUMBO, "Grave sfruttamento e tratta nel lavoro domestico e in agricoltura in Italia: un'analisi critica degli strumenti di contrasto, prevenzione e tutela delle vittime. Un'analisi critica degli strumenti di contrasto, prevenzione e tutela delle vittime", European University Institute, June 2016, p. 4, available at: <https://cadmus.eui.eu/bitstream/handle/1814/42405/GGP_TRAFFICKO_2016_IT.pdf?sequence=3&isAllowed=y>.

⁹ GRETA (Group of Experts on Action against Trafficking in Human Beings), "Human Trafficking for the purpose labour exploitation", Thematic Chapter of the 7th General Report on GRETA's Activities (covering the period from 1 January to 31 December 2017), 2019, p. 6 available at: <<https://rm.coe.int/labour-exploitation-thematic-chapter-7th-general-report-en/16809ce2e7#:~:text=Trafficking%20for%20the%20purpose%20of%20labour%20exploitation%20occurs%20in%20the,%2C%20construction%2C%20hospitality%20and%20fisheries>>.

¹⁰ About this specific issue, OLLUS, "Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective", *Crime, Law and Social Change*, 2015, p. 221 ff., pp. 221–246.

¹¹ DE SENA, "Slaveries and new slaveries: Which role for human dignity?", *QIL, Zoom-in*, 2019, p. 7 ff, p. 7.

¹² See *infra*, para. 3.1.

The lack of clarity about the interplay between such concepts is far from being unproblematic. Indeed, legal certainty about the scope of any juridical category may be critical to responding and taking legal action against modern-slavery practices.¹³ In particular, understanding the relationship between the two different concepts of “forced labour” and “human trafficking for the purpose of labour exploitation” may be especially overdue, given the debate on the *new slaveries* (like, e.g., trafficking) rarely addresses this issue.

From this perspective, this paper intends to analyse the contradictions, overlaps and practical application issues that arise in this field. To this aim, Section 2 will describe international *ad hoc* legislation on trafficking for the purpose of labour exploitation, both at the universal (Subsection 2.1.) and the European level (Subsection 2.2), to describe similarities and differences between the concepts of “trafficking in human beings” and “forced labour”. In Section 3, the same concepts will be examined in the context of human rights law, which complements specific anti-trafficking legislation. More specifically, Subsections 3.1. and 3.2. will explain how both the European Court of Human Rights (hereinafter, “ECtHR” or “the Strasbourg Court”) and the Inter-American Court of Human Rights (“IAAtCHR” or “San José Court”) contributed to the interpretation of these legal concepts. Finally, in Section 4, some conclusions will be drawn.

2. HUMAN TRAFFICKING FOR LABOUR PURPOSES AND FORCED LABOUR IN *AD HOC* INTERNATIONAL LEGISLATION

2.1. International legislation at the universal level. Issues around the international definition of “trafficking in human beings”

First and foremost, the severe exploitation of workers is addressed by international treaties specialized in this field. In this regard, the historical background has a leading role in explaining the scope and content of such treaties.

“Forced labour” is by far the longest-standing legal category. According to international law scholars, its definition finds its roots in European colonialism in

¹³ See PIPER, SEGRAVE and NAPIER-MOORE, “Editorial: What’s in a Name? Distinguishing forced labour, trafficking and slavery”, *Anti-Trafficking Review*, 2015, p. 1 ff., p. 1, available at: <www.antitraffickingreview.org>. From the same perspective, DAVIS, “Debate: When it Comes to Modern Slavery, do Definitions Matter?”, *ibid.*, p. 150 ff., pp. 150 – 153, and PLANT, “Debate: Forced Labour, Slavery and Human Trafficking: When do definitions matter?”, *ibid.*, p. 153 ff., pp. 153 – 157. See also DOTTRIDGE, “Trafficked and Exploited: The urgent need for coherence in International Law”, in KOTISWARAN (ed.), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery*, Cambridge, 2017, p. 59 ff., p. 59.

African countries in the first decade of the 20th century.¹⁴ More specifically, such a phenomenon referred to the demand for labour by colonialists, who forcibly recruited African workers to strengthen their economies in conquered territories. This differed from the slave trade, practiced by the natives in the African States in the same years, which involved the actual *trade* of people. In line with the paradigm of *chattel slavery*,¹⁵ this meant that buyers exercised their *right of ownership* over the slaves they bought.

Intending to morally justify the conquest of Africa,¹⁶ Europeans began to respond to slavery and the slave trade in the first decade of the '900. International law-making reflects these historical developments, since two separate international conventions were subsequently adopted at different times. In 1926, the League of Nations approved the Slavery Convention or the Convention to Suppress the Slave Trade and Slavery (hereinafter, "the Slavery Convention" or "the Geneva Convention"),¹⁷ aimed at preventing and suppressing the slave trade and abolishing slavery in all its forms. In this text, "forced labour" is distinguished by both the concepts of "slavery"¹⁸ and "slave trade",¹⁹ as it particularly stems from Article 5, which imposes Member States "to prevent compulsory or forced labour from developing into conditions analogous to slavery".²⁰ The demarcation line between forced labour and other contiguous phenomena also arises from the Convention concerning Forced or Compulsory Labour (Convention No. 29)²¹ and the Convention concerning the Abolition of Forced Labour (Convention No. 105),²² both adopted the International Labour Organization (ILO) respectively in 1930 and 1957.

¹⁴ For an international law perspective on the birth and historical evolution of these definitions, STOYANOVA, *Human Trafficking and Slavery reconsidered. Conceptual Limits and States' positive obligations in European Law*, Cambridge, 2017, pp. 189–217.

¹⁵ *Ibid.*, pp. 192–193.

¹⁶ *Ibid.*, p. 191.

¹⁷ Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 9 March 1927), 60 LNTS 253 [Slavery Convention]. See also the Protocol amending the Slavery Convention (adopted 23 October 1953, entered into force 7 December 1953) 182 UNTS 51, which amended the text originally adopted in 1926.

¹⁸ *Ibid.*, Art. 1 (1), which defines "Slavery" as "The status or conditions of a person over whom any or all of the powers attaching to the right of ownership are exercised".

¹⁹ *Ibid.*, Art. (2), which defines the "Slave trade" as "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 slave acquired with a view to being sold or exchanged, and, in general, every act of trade and transport in slaves".

²⁰ *Ibid.*, Art. 5.

²¹ Convention concerning Forced or Compulsory Labour (ILO No. 29), adopted 28 June 1930, entered into force 1 May 1932, 39 UNTS 55.

²² Convention concerning the Abolition of Forced Labour, (ILO No. 105), adopted 25 June 1957, entered into force 17 January 1959, 320 UNTS 291.

According to the definition provided by the ILO Convention of 1930:

“... 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.”²³

Such a concept of “forced labour”, historically elaborated in the context of colonialism, turned out to be inadequate to describe some peculiar forms of labour exploitation manifested as an “underside” of the modern global economy,²⁴ which, differently from the slave trade and forced labour, arose from activities of private individuals and entities. Such “new slaveries” looked much more akin to the phenomenon of sex trafficking, implying the abduction of European adult women and girls, their transportation abroad and their exploitation in brothels.²⁵ Parallel to the rise of awareness of human trafficking of white girls and women after the Second World War,²⁶ also labour exploitation by traffickers gained momentum. Such a circumstance reflected in the international response, since the idea began to spread that it was necessary to adopt a legal instrument aimed at fighting trafficking in human beings comprehensively, e.g., in *all forms* and *for all its purposes*.

As a result,²⁷ in 2000, in Palermo, the United Nations Convention on Transnational Organized Crime (hereinafter, the “UNTOC Convention”)²⁸ and the annexed Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially

²³ ILO Convention No. 29, cit. *supra* note 21, Art. 2. See also the Preamble of the ILO Convention no. 105, cit. *supra* note 22, which recalls to the ILO Convention No. 29.

²⁴ ILO, “Stopping Forced Labour. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, International Labour Conference, Report I (B), 89th session, Geneva, 2001, p. 47. On the strong connection between the global economy, migration, and trafficking in human beings, also OLLUS, cit. *supra* note 10, p. 224.

²⁵ SCARPA, “Contemporary forms of slavery”, cit. *supra* note 6, p. 26.

²⁶ DOTTRIDGE, cit. *supra* note 13, p. 61; OLLUS, cit. *supra* note 10, pp. 231-232. The rise of awareness about sex trafficking also stems from the adoption of several international treaties that address such phenomenon within the 20th century: the International Agreement for the suppression of the “White Slave Traffic” (adopted 18 May 1904, entered into force 18 July 1905, 1 LNTS 83; the International Convention for the Suppression of the Traffic in Women and Children (adopted 30 September 1921, entered into force 15 June 1922, 9 LNTS 415); the International Convention for the Suppression of the Traffic in Women of Full Age (adopted 11 October 1933, entered into force 24 August 1934, 150 LNTS 431); and the International Convention for the Suppression of the White Slave Traffic, adopted 4 May 1910, as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1949, entered into force 21 June 1951) 30 UNTS 23.

²⁷ On the history of the definition of trafficking in human beings, see GALLAGHER, *International Law of Human trafficking*, 1st Edition, Cambridge, 2010, pp. 12 – 25.

²⁸ United Nations Convention against Transnational Organized Crime, adopted by the UN General Assembly 15 November 2000 by resolution 55/25, entered into force 29 September 2003, 2225 UNTS 209 [UNTOC Convention].

Women and Children (hereinafter, the “Trafficking Protocol”)²⁹ were signed. The Trafficking Protocol promotes a comprehensive approach to the fight against human trafficking, combining obligations to *criminalize* it (Article 5), measures to *assist and protect* victims (Articles 6, 7 and 8) and *prevention* duties, including through international cooperation in criminal proceedings (Articles 9, 10, 11, 12 and 13).

Its most debated provision lies in Article 3, which provides the first internationally agreed-upon and overreaching definition of “trafficking in human beings”, which has been adopted by all subsequent important treaties and documents in this field. It states as following:

“(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 slavery, servitude or the removal of organs.”

Such a definition is based on three separated elements: *actions* (recruitment, transportation, transfer, harbouring or receipt of persons), *means* (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 persona) and *purpose*. The interpretation of all three elements is crucial in identifying trafficking in human beings and distinguishing it from distinct – although *connected* – phenomena.

In this regard, the relevant soft law provides useful guidelines. In particular, the Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto (hereinafter, “Legislative Guide”), elaborated by the United Nations Office on Drugs and Organized Crime (UNODC), aimed at explaining the context, content, meaning, and interpretation of the

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 [Trafficking Protocol].

provisions in the Trafficking Protocol, provides for significant clarifications.³⁰

First, the UNODC clarifies that the five “actions” listed in Article 3 (recruitment, transportation, transfer, harbouring or receipt of persons) are *disjunctive* or are *alternatives* to each other.³¹ Importantly, it further stated that “It is *not* an essential requirement of trafficking in persons that the victim be *physically moved*”.³²

Such a broad interpretation leads to the assumption that the phenomenon of trafficking in human beings should not be understood as being transnational *in nature*. The UNODC supports this view by stating that all the typical actions that characterise trafficking in human beings may apply in many circumstances that do not necessarily imply transboundary dynamics. For example, “recruitment” is generally defined as an act of drawing a person into a process that “can involve a multitude of methods”.³³ Even the “transfer” requirement, whose natural meaning immediately suggests *transboundary* traffic in persons, is interpreted to apply to internal dynamics as well: in particular, the UN Office noted that “[transfer] can also mean the handing over of effective control of a person to another”.³⁴ The same considerations apply to the interpretation of the other three actions listed in Article 3. More specifically, “transportation” may occur even over *short* distances, “within one country or across national borders”;³⁵ the meaning of “harbouring” can be understood as to holding or merely accommodating a person; and “receipt”, which is the correlative of “transfer” can be also intended as the act of gaining of control over a person. In this context, it is particularly meaningful that “receipt” may include “receiving persons into employment or for the purposes of employment, *including forced labour*”.³⁶ This is also in line with the wording of the definition of Article 3 Trafficking Protocol, where “forced labour” is mentioned as an example of exploitation, which embodies the “purpose element”.

Since “forced and compulsory labour” is not defined in the Protocol itself, the Legislative Guide clarifies that this concept must be read in conjunction with the above-mentioned ILO Conventions,³⁷ thus establishing a direct link to ILO activities. From this perspective, the ILO importantly supplements the Trafficking Protocol by

³⁰ UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, available at: <www.unodc.org>. For the purpose of this article, we will refer to the *Legislative Guide on the Trafficking in Persons Protocol only, 2020 update*, Wien, 2020 (hereinafter, “Legislative Guide”).

³¹ UNODC, *Legislative Guide*, *ibid.*, para. 90.

³² *Ibid.*

³³ *Ibid.*, para. 92.

³⁴ *Ibid.*, para. 94.

³⁵ *Ibid.*, para. 93.

³⁶ *Ibid.*, para. 96.

³⁷ *Ibid.*, para. 124.

continuously interpreting the definition of forced labour.³⁸

However, with specific regard to the difference between trafficking in human beings and forced labour, the ILO has failed in providing practical clarifications so far. The Protocol to the Forced Labour Convention (2014)³⁹ has not filled the definitional gaps on this subject,⁴⁰ since it confines itself to establishing that the scope of the Protocol includes specific measures against trafficking in persons for the purposes of forced or compulsory labour.⁴¹ Moreover, some of “The ILO indicators of Forced Labour” (2012),⁴² such as abuse of vulnerability, deception, intimidation and threats, withholding of wages, debt bondage, and abusive working and living conditions, may be symptomatic of episodes of forced labour and trafficking in human beings as well.

Compared to the ILO, the UNODC has then drawn a clearer demarcation line between the two legal categories, by stating that:

“trafficking in persons and forced labour are closely related, *but not identical phenomena*. There are forms of forced labour that may not be considered as trafficking in persons, such as forced prison labour and some instances of bonded labour. Similarly, there are forms of trafficking in persons, such as trafficking for the purpose of organ removal that do not amount to forced labour”.⁴³

Paraphrasing these words, one may argue that the offence of trafficking in human beings is broad, *but not as broad as* to encompass all forms of serious labour exploitation. At the same time, the UNODC’s interpretation pushes the boundaries of the definition of human trafficking as far as possible, thus confining the scope of “forced labour” only to a few cases.

The way to intend such a definition has weight, given that the regional legal framework specialized in this field accurately reflects the content of Article 3 Trafficking Protocol.

³⁸ Extensively, on this subject, SWEPSTON, “Trafficking and Forced Labour: Filling in the Gaps with the Adoption of the Supplementary ILO Standards”, in KOTISWARAN (ed.), cit. *supra* note 13, p. 395 ff., pp. 395–421.

³⁹ Protocol to the Forced Labour Convention of 1930 (adopted 11 June 2014, entered into force 9 November 2016), 53 ILM 1232.

⁴⁰ That, notwithstanding the ILO Protocol in 2014 had been adopted with the apparent attempt to fill definitional loopholes, see DOTTRIDGE, cit. *supra* note 13, p. 74.

⁴¹ Protocol to the Forced Labour Convention of 1930, Art. 3.

⁴² ILO, “ILO indicators of Forced Labour”, 1 October 2012, available at <https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang--en/index.htm>.

⁴³ UNODC, Legislative Guide, cit. *supra* note 30, para. 125.

2.2. The European legal framework

There is considerable continuity between the Trafficking Protocol and the EU *ad hoc* legislation on workers' exploitation.

At the EU level, the adoption of the Trafficking Protocol provided the impetus for several initiatives aimed at fighting human trafficking in the early years of 2000. In 2006, the EU itself became a party to the Trafficking Protocol,⁴⁴ whose content has been reproduced in specific secondary legislation in this regard. On 19 July 2002, the EU adopted the Council Framework Decision on combating trafficking in human beings 2002/629/JHA,⁴⁵ which was later replaced by the 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 (hereinafter, "Anti-trafficking Directive").⁴⁶ This Directive is the reference text on trafficking in human beings in the EU legal order and will remain so - at least - until its reform. Indeed, considering the "2021-2025 EU strategy on combatting trafficking in human beings",⁴⁷ the EU Commission has recently announced its proposal for a recast of the EU Anti-trafficking rules to strengthen the protection for victims.⁴⁸

The Anti-trafficking Directive, however, must be read in conjunction with other provisions that complement the EU legal framework aimed at fighting against trafficking in human beings. On the one side, Article 22 of the Directive 2012/29/EU establishes minimum standards on the rights, support and protection of victims of crime ("Victims' Rights Directive"), which obliges Member States to identify specific protection needs of victims of crime, including victims of human

⁴⁴ Council Decision 2006/618/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community, OJL 262/44.

⁴⁵ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJL 203/1.

⁴⁶ 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 [Anti-trafficking Directive].

⁴⁷ The strategy encourages Member States to cooperate with EU agencies, including Europol and the European Labour Authority (ELA), by carrying out joint inspections in high-risk sectors, and making use of the European platform to tackle undeclared work, run by the ELA. However, neither the strategy, nor the EU Anti-trafficking Directive, provide for an EU-level monitoring and evaluation mechanism.

⁴⁸ European Commission, "Trafficking in human beings: Commission proposes stronger rules to fight the evolving crime", 19 December 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7781>.

trafficking;⁴⁹ on the other side, Articles 5, 6 and 7 of Directive 2004/81/EC (“Residence Permit Directive”), set out the conditions for granting residence permits to trafficked persons who are willing to cooperate in criminal proceedings against their traffickers.⁵⁰ Additionally, Directive 2009/52/EC (known as “Employers’ Sanctions Directive”)⁵¹ specifically addresses labour exploitation, by introducing sanctions and measures against employers who use the work or services of illegally staying third-country nationals. Among its provisions, Article 9 is particularly relevant, as it obliges the Member States to criminalize employers that use work or services exacted from an illegally staying third-country national “with the knowledge that he or she is a victim of trafficking in human beings”.⁵²

It must be underlined that all the EU law Directives refer to the definition of trafficking in human beings as enshrined in the Trafficking Protocol, since it is reproduced by both the 2002/629/JHA decision and the Anti-trafficking Directive.⁵³ Furthermore, like the Trafficking Protocol, the Anti-trafficking Directive promotes the same “3p approach” (*protection, prevention, prosecution*) in combating human trafficking.

At the European level, both the definition and the approach of the Trafficking Protocol were also endorsed by the Council of Europe Convention on Action against Trafficking in Human Beings, signed in Warsaw in 2005 (hereinafter, the “CoE Convention” or “Warsaw Convention”),⁵⁴ which conceives “forced labour” as only *one of the possible purposes* of human trafficking in line with the Trafficking Protocol.

Other similarities must be highlighted. Like the Trafficking Protocol, the CoE Convention encompasses *all forms* of trafficking in human beings, including trafficking for forced labour or services.⁵⁵ Furthermore, in the Preamble of the Warsaw Convention, the Council of Europe Member States affirm that they wish to sign the regional convention precisely “with a view to improving the protection

⁴⁹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJL 315/57 [Victims’ Rights Directive].

⁵⁰ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJL 261/19 [Residence Permit Directive].

⁵¹ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJL 168/24 [Employers’ Sanctions Directive].

⁵² *Ibid.*, Article 9.

⁵³ See Decision 2002/629/JHA, cit. *supra* note 45, Art. 1; and Directive 2011/36/EU, cit. *supra* note 46, Art. 2.

⁵⁴ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008), CETS No. 197 [CoE Convention].

⁵⁵ CoE Convention, *ibid.*, Art. 4.

which they afford and developing the standards established by them”.⁵⁶ As a matter of fact, the main added value of the CoE Convention lies in its human-rights-based approach, according to which trafficking in human beings is explicitly considered a human rights offence and a violation of human dignity.⁵⁷ In line with such principles, the only meaningful difference that emerges from a comparison with the international legal framework at the universal level is that the regional convention provides for more extensive and detailed obligations measures to protect victims, such as the obligation to identify trafficked persons,⁵⁸ and the obligations related to residence permits for victims of human trafficking in the CoE Member States.⁵⁹

It is therefore clear that the overall regional legal framework on trafficking in human beings in no way diverges from the Trafficking Protocol, but it has rather *expanded* on its basis. From this perspective, the number of specialized acts on trafficking in human beings can be considered proof of a renewed responsiveness to the phenomenon of trafficking in human beings from the European States. Differently, only weak legal action has been specifically taken against forced labour so far. Indeed, it must be noted that the European-specific regulation on forced labour has not reached the same level of expansion compared to the one related to trafficking in human beings. Coherently, the recent EU Commission’s proposal for a regulation to prohibit products made using forced labour, including child labour, on the internal market of the EU⁶⁰ could be read as an attempt to increase the number of EU instruments that address decent work. However, such a proposal of regulation, eventually being approved, could also apply to goods and products made by victims of human trafficking for labour purposes, since the concrete outcome of labour exploitation (e.g., the production of goods made by forced labour) is *identical* both in human trafficking and forced labour cases.

From this brief overview, it then seems that human trafficking – as broadly defined both at the international and the regional level - can *include* the phenomena of forced labour, but not *vice versa*. This may be the reason why legal action against human

⁵⁶ *Ibid.*, Preamble.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, Art. 10.

⁵⁹ *Ibid.*, Arts 13-14.

⁶⁰ The proposal was presented on 14 September 2022 (see the Briefing of the European Parliament, “Proposal for a ban on goods made using forced labour”, 16 February 2023, available at <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)739356](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)739356)>. Here, it is reported that such regulation would apply to any kind of product, and that Member States would be responsible for the enforcement of the regulation’s provisions). On this topic, FRUSCIONE, “The European Commission Proposes a Regulation to Ban Products Made with Forced Labour”, *Global Trade and Customs Journal*, Vol. 18, 2023, p. 120 ff., pp. 120 – 124.

trafficking seems to have effectively encompassed the fight against other forms of labour exploitation. Such a circumstance also emerges from the practice on this subject in the context of human rights law, which is now particularly worth exploring.

3. HUMAN TRAFFICKING FOR LABOUR PURPOSES AND FORCED LABOUR IN HUMAN RIGHTS TREATIES...

As noted above, trafficking in human beings is a “multidimensional” concept, halfway between transnational criminal law and human rights law.

The rise of awareness over the years in this regard is reflected in the content of human rights treaties. Although the first comprehensive international legal definition of human trafficking was only adopted with the Trafficking Protocol in 2000, the most recent legislation had previously started to address some close phenomena, such as the trafficking of women for the purpose of sexual exploitation or the sale of children. As an example, the United Nations Convention on the Rights of the Child of 1989 (“CRC Convention”)⁶¹ explicitly prohibits “the sale and traffic in children for any purpose or in any form”. Moreover, it establishes the right of the child to be protected from economic exploitation and from performing any work that is likely to damage the child.⁶²

However, older international human rights treaties do not explicitly address trafficking in human beings. Both Article 8 of the International Covenant on Civil and Political Rights (ICCPR)⁶³ and Article 4 of the European Convention of Human Rights (ECHR)⁶⁴ - modelled on the Universal Declaration on Human Rights of 1948⁶⁵ – only prescribe the prohibition of slavery, servitude and forced labour. Similarly, Article 6 American Convention on Human Rights (ACHR)⁶⁶ and Article 5 African Charter of Human and Peoples’ Rights (ACHPR)⁶⁷ respectively provide that “No one shall be

⁶¹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 3 [CRC Convention].

⁶² CRC Convention, Arts. 32 and 35.

⁶³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR].

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), ETS 5 [ECHR].

⁶⁵ Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, UN Doc. A/RES/217(III) (1948), Art. 4.

⁶⁶ American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights in San José (Costa Rica) on 22 November 1969, entered into force 18 July 1978.

⁶⁷ African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 October 1986.

subject to *slavery* or to involuntary *servitude*, which are prohibited in all their forms, as are the *slave trade* and *traffic in women*” [emphasis added]; and that “[a] all forms of exploitation and degradation of man – particularly slavery, *slave trade*, torture and cruel, inhuman or degrading punishment shall be prohibited” [emphasis added].

It is now undisputed that these provisions’ scope should include contemporary forms of slavery, including human trafficking for labour purposes.⁶⁸ Expanding the boundaries of human rights treaties through their dynamic interpretation has resulted in pivotal to enhancing effective protection for victims. Indeed, unlike the specialized anti-trafficking treaties, the monitoring system of human rights treaties provides for judicial or quasi-judicial bodies to rule on individual complaints of human rights violations.⁶⁹ In addition, human rights treaty bodies impose *positive obligations* against which States’ responsibility can be assessed. These obligations, which are elaborated by international Courts and bodies on a case-by-case basis, complement other specialized treaties, which is valuable considering the criminal-law-focused approach of many international provisions in this field.

However, international jurisdictions have rarely addressed modern-slavery disputes so far.⁷⁰ Universal monitoring treaty-bodies have never ruled on cases of human trafficking for labour purposes, while the few judgments issued by the ECtHR and the IAtCHR have provided only little guidance on the concrete application of such provisions. Nonetheless, they are particularly worth reading to get an idea of the gaps in interpretation that can occur in practice.

3.1. ... and in the International Human Rights Courts’ case-law

3.1.1. The ECtHR’s case-law

The most relevant case-law on contemporary forms of slavery, including trafficking in human beings for labour purposes and forced labour, is provided by the ECtHR.

⁶⁸ This, considering the case-law of human rights Courts, on which *infra*.

⁶⁹ MILANO, “Human Trafficking by regional human rights courts: an analysis in light of Hacienda Brasil Verde, the first Inter-american Courts’ ruling in this area”, *Revista electronica de estudios internacionales*, 2018, p. 1 ff., pp. 1 – 29. On the monitoring systems provided by specialized treaties on trafficking in human beings, FORLATI, “I meccanismi internazionali di controllo”, in FORLATI (ed.) *La lotta alla tratta di esseri umani fra dimensione internazionale e ordinamento interno*, Napoli 2013, p. 29 ff., pp. 29 – 46.

⁷⁰ It is possible to verify the state of play of the case-law on trafficking in human beings, both at the national and the international level, on the UNODC’ database “Sherloc” (acronym of *Sharing electronic resources and laws on crime*), available at: <<https://sherloc.unodc.org/cld/en/v3/sherloc/cldb/index.html#/crime-type>>.

After a long time in which Article 4 was left largely unapplied,⁷¹ the ECtHR showed a renewed approach to serious exploitative working conditions starting from the *Siliadin* ruling in 2005.⁷² In this case, the Court recognized that the treatment of an eighteen-year-old Togolese domestic servant, who worked 15 hours a day for several years without a day off or pay, amounted to “servitude” under Article 4 ECHR. Despite the severe treatments Ms Siliadin was subjected to, the Strasbourg Court excluded that she was held in *slavery*, as there was no genuine right of legal ownership over her, according to a *literal* interpretation of the definition of the 1926 Geneva Convention.⁷³ Further, the ECtHR clarified the relationship between all the prohibitions enshrined in Article 4 ECHR, stating that they all encompass the submission of a human being with respect to another human being, but differ in *seriousness* and *intensity*. According to these principles, slavery embodies the most abusive and severe practice among the three offences, while servitude, which implies an obligation to provide services under a situation of coercion, can be interpreted as an aggravated form of forced labour.⁷⁴ Moreover, the ECtHR also gave further clarifications on Article 4 para. 2 ECHR, stating that the concept of “forced or compulsory labour”, left undefined by the ECHR, has to be interpreted in the light of the ILO Convention No. 29.⁷⁵ It follows that both ILO and ECtHR significantly contribute to the interpretation of the concept of forced labour, mutually influencing each other. On the one hand, the application of some definitional elements – such as “compulsory”⁷⁶ or “under any menace of penalty”⁷⁷ – to *concrete cases* decided by the ECtHR may be considered by ILO; on the other hand, the Court in itself referred to ILO’s standards to solve practical questions. As an example, the ECtHR has recently recalled ILO’s practice to examine whether forced prostitution can be qualified as forced labour.⁷⁸

However, the clarifications developed in the *Siliadin* judgment did not completely rule out the risk of overlaps between slavery, servitude and forced labour. Moreover, such implications became even more complex when the first case of human trafficking was brought before the Strasbourg Court in the landmark judgement *Rantsev v. Cyprus and*

⁷¹ BOSCHIERO, “Articolo 4”, in BARTOLE, DE SENA and ZAGREBELSKY (eds.), *Commentario alla convenzione europea per la tutela dei diritti dell’uomo e delle libertà fondamentali*, Padova, 2001, p. 77 ff., p. 105.

⁷² *Siliadin v. France*, Application No 73316/01, Judgment of 26 October 2005.

⁷³ *Ibid.*, para 122.

⁷⁴ SCARPA, “Contemporary forms of slavery”, cit. *supra* note 6, p. 24.

⁷⁵ *Van der Mussel v. Belgium*, Application No. 8919/80, Judgment of 23 November 1983, para. 32.

⁷⁶ *Ibid.*, para. 39; see also *C.N. and V. v. France*, Application no. 67724/09, Judgment of 11 October 2012, para. 74.

⁷⁷ In this regard, see, inter alia, the judgments *W., X., Y. and Z v. the United Kingdom* [GC], Application No. 21830/93, Judgment of 22 April 1997; *Chitos v. Greece*, Application No. 51637/12, Judgment of 4 June 2015.

⁷⁸ *S.M. v. Croatia* [GC], Application No. 60561/14, Judgment of 25 June 2020, para. 303.

*Russia*⁷⁹. In that case, the applicant claimed that his daughter, after her arrival in Cyprus with an artist's visa, had been recruited into the prostitution circuit and had lost her life in an attempt to escape from her exploiters. By addressing for the first time the lack of an explicit provision dealing with human trafficking in the ECHR, the Court concluded that human trafficking should be included under the scope of Article 4 ECHR based on an evolutive interpretation.⁸⁰ To this aim, the Court endorsed the definition of trafficking in human beings enshrined both in the Trafficking Protocol and the Warsaw Convention, thus concluding that human trafficking, "*falls in itself* in the scope of Article 4 ECHR",⁸¹ without the need to classify it as a form of slavery, servitude or forced labour.

Relying on principles set out in the *Rantsev* judgement, the ECtHR has applied Article 4 ECHR in several other rulings, thus elaborating specific positive obligations to apply to human trafficking cases. Importantly, in this case-law, the ECtHR explicitly referred both to the Trafficking Protocol and the CoE Convention to clarify the scope of Article 4 ECHR. The most relevant obligations include the duty to adopt an adequate legislation to criminalize and prevent such an offence, to prosecute traffickers through an effective investigation and to protect victims, that may also imply the obligation to adopt operational measures.⁸²

Of course, the *Rantsev* case, by bringing trafficking in human beings within the ECHR's scope, has become a milestone in the ECtHR's case-law. However, the *method* chosen by the Strasbourg judges raised much criticism among international law scholars.⁸³ Indeed, the decision to bring human trafficking *per se* within the scope of Article 4 ECHR, without classifying it as slavery, servitude or forced labour, has led to aporias in some subsequent judgements. In particular, the contradictions and overlaps between trafficking in human beings and forced labour are especially worth examining here.

Some interpretative issues are particularly pronounced in the first judgements issued after *Rantsev*. First, in *J. and others v. Austria*,⁸⁴ the ECtHR did not even

⁷⁹ *Rantsev v. Cyprus and Russia*, Application No 25965/04, Judgment of 7 January 2010.

⁸⁰ In this regard, STOYANOVA, "Dancing on the borders of article 4: human trafficking and the European court of human rights in the *Rantsev* case", *Netherlands Quarterly of Human Rights*, 2012, Vol. 30, issue 3, pp. 163-194.

⁸¹ *Rantsev v. Cyprus and Russia*, cit, supra note 78, para. 282.

⁸² *Ibid.*, paras. 285 ff.

⁸³ PIOTROWICZ, "States's Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations", *International Journal of Refugee Law*, Vol. 24, issue 2, 2012, p. 181 ff., p. 196; ALLAIN, "The European Court of Human Rights and Trafficking as Slavery", *Human Rights Law Review*, vol. 10, issue 3, 2010, p. 546 ff., p. 554; STOYANOVA, *Human Trafficking and Slavery Reconsidered, Conceptual Limits and States' Positive Obligations in European Law*, cit. supra note 14, pp. 298-299.

⁸⁴ *J. and others v. Austria*, Application No. 58216/12, judgment of 17 January 2017.

clarify if the applicants had been subjected to forced labour, human trafficking or both. This question – expressly invoked by the victims in their application⁸⁵ – was all but irrelevant in that case, in which three Filipino nationals claimed that they had been recruited as *maid au pairs*, transferred to Dubai and exploited by the same family. They further claimed they had submitted a criminal complaint before Austrian authorities only after their escape to Vienna, where they had unsuccessfully attempted to obtain reparation. However, the ECtHR found that it was sufficient that the applicants' allegations fell into the scope of Article 4 ECHR without any other specifications. Moreover, since the offences had taken place *abroad*, the ECtHR could not rule on working conditions, but it could rather only decide whether the Austrian authorities had complied with their positive obligation to identify and support the applicants as (potential) victims of human trafficking and whether they fulfilled their positive obligation to investigate the alleged crimes.⁸⁶

Similarly, a lack of clarity arises from *Chowdury v. Greece*,⁸⁷ regarding a group of irregular migrants working without wages, under the supervision of armed guards, in the strawberry-picking industry in the region of Manolada in Greece. Here, the ascertaining of a violation of Article 4 ECHR was not supported by consistent legal reasoning.⁸⁸ When the qualification of the applicants' treatment came to the fore, the ECtHR at first glance only underlined differences between servitude and forced labour,⁸⁹ but afterwards concluded that victims had been subjected to *human trafficking* and *forced labour*.⁹⁰ The legal arguments to reach such a conclusion appeared a little bit unclear, since the ECtHR avoided demonstrating that all the constitutive elements of human trafficking – namely *action, means, purpose* – were satisfied. By contrast, it did not even dwell on the question of whether “recruitment” with the meaning of the trafficking definition had taken place. As a consequence, these premises impacted the ECtHR's final

⁸⁵ See the text of the application in *J. and others v. Austria* at, available at: <www.hudoc.echr.coe.int>, in the Section “Communicated cases”. Specifically, this case was communicated on 10 June 2014.

⁸⁶ *J. and others v. Austria*, cit. *supra* note 84, para. 109. However, in this case, the ECtHR excluded that a violation of Article 4 ECHR had occurred, because Austria was found in compliance with its procedural obligations to investigate the applicants' claims. For comments on this case, STOYANOVA, “*J. and others v. Austria* and the strengthening of States' obligation to identify victims of human trafficking”, Strasbourg Observers, 7 February 2017, available at: <<https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/>>.

⁸⁷ *Chowdury and others v. Greece*, Application No. 21884/15, judgement of 30 March 2017.

⁸⁸ MILANO, cit. *supra* note 69, pp. 11 – 12; CORCIONE, “Nuove forme di schiavitù al vaglio della Corte Europea dei diritti umani: lo sfruttamento dei braccianti nel caso *Chowdury*”, *Diritti umani e diritto internazionale*, 2017, pp. 516 - 522.

⁸⁹ *Chowdury and others v. Greece*, cit. *supra* note 87, para. 99.

⁹⁰ *Ibid.*, para. 101.

verdict on the fulfilment of positive obligations by Greece: the Greek legislative legal framework against human trafficking was considered appropriate, without the need to investigate the adequateness of forced labour standards.⁹¹

In this scenario, the ECtHR tried to dispel the doubts arising in its jurisprudence only in 2020, when the Grand Chamber was called upon to clarify the scope of Article 4 ECHR in *S.M. v. Croatia*,⁹² concerning a case of forced prostitution. The ambiguous conclusion of the Chamber judgment, according to which the exploitation of prostitution fell *per se* into the scope of Article 4 ECHR, required a review of the judgment's reasoning.⁹³ First, with the aim of finding a way out of the "definitional quagmire" of the prohibition of slavery, servitude and forced labour,⁹⁴ the Grand Chamber *confirmed* that trafficking in human beings falls *per se* into the scope of Article 4 ECHR, but also pointed out that it only occurs when the specific requirements of the Trafficking Protocol's definition - namely acts, means and purpose - are met. Moreover, it reiterated that human trafficking may include all the other offences listed in Article 4 ECHR, that, notwithstanding, remain distinct legal concepts. Finally, in a specific line of the reasoning, it stressed that "forced prostitution" - as a form of serious exploitation - could be included in the notion of "forced or compulsory labour" under Article 4 of the Convention.⁹⁵

However, in applying these general principles to the specific circumstances alleged by Ms S.M., the qualification of the conduct was not considered decisive, in view of her main allegations concerning Croatia's compliance with procedural obligations. To assess that, the Court found that it was sufficient to verify that the offence suffered by the applicant could be covered by Article 4 ECHR.⁹⁶ So ruling, it left understood that both the notions of human trafficking for sexual purposes and forced labour could be relevant in the case under review.

These principles have been recently applied in the context of labour exploitation

⁹¹ CORCIONE, cit. *supra* note 88, p. 520.

⁹² *S.M. v. Croatia*, cit. *supra*, note 78.

⁹³ *S.M. v. Croatia*, First section, Application No. 60561/14, Judgment of 19 July 2018, para. 54. See also the Judge Koskelo's dissenting opinion that is annexed to the judgment.

⁹⁴ STOYANOVA, "The Grand Chamber judgment in *S.M. v. Croatia*: human trafficking, prostitution and the definitional scope of Article 4 ECHR", Strasbourg Observers, 3 July 2020, available at: <<https://strasbourgobservers.com/2020/07/03/the-grand-chamber-judgment-in-s-m-v-croatia-human-trafficking-prostitution-and-the-definitional-scope-of-article-4-echr/>>.

⁹⁵ *S.M. v. Croatia*, cit. *supra* note 78, para. 303.

⁹⁶ *Ibid.*, para. 321. See also para. 328.

in the cases *V.C.L. and A.N. v. United Kingdom*⁹⁷ and *Zoletic v. Azerbaijan*,⁹⁸ both decided in 2021. In both judgments, the applicants' claims mainly related to the respondents States' compliance with procedural obligations, such as the duty to conduct an effective investigation and to identify actual or *potential* victims of offences covered by Article 4 ECHR.⁹⁹

Specific circumstances reported by the applicants deserve a mention, as they immediately recall trafficking in human beings for the purpose of labour exploitation. In *V.C.L.*, the victims were two Vietnamese nationals, children at the relevant time, who had been recruited as gardeners in cannabis factories shortly after their arrival in the United Kingdom; once discovered, they had been convicted by the British authorities for drug production. *Zoletic*, instead, concerned 33 nationals from Bosnia and Herzegovina who had been recruited by a construction company and taken to Azerbaijan, where they had worked without receiving any contract, residence permit or wage for six months. They had attempted to recover unpaid wages and obtain compensation for non-pecuniary damages before the Azerbaijani courts, but their claim had been dismissed.

Despite the main value of both judgments lies in their connection with the right to a fair trial pursuant to Article 6 ECHR, they are here worth mentioning since they both converge to the principle already elaborated in *S.M.* ruling. In line with that, in both 2021 judgements the ECtHR assessed that all the requirements of human trafficking were satisfied.¹⁰⁰

Furthermore, some critical points in *Zoletic* must be underlined. Here, initially the applicants had not invoked Article 4 ECHR, which was rather applied considering the *iura novit curia* principle. Indeed, the ECtHR found that the applicants' treatment amounted, in substance, to "forced labour" under Article 4(2) of the ECHR,¹⁰¹ and that also trafficking in human beings was relevant for the case at stake.¹⁰²

Like *Chowdury*, the joint application of the concepts of forced labour and human trafficking is a little bit redundant here. Once again, the ECtHR does not convincingly justify why the offence of trafficking in human beings *cannot* attract

⁹⁷ *V.C.L. and A.N. v. United Kingdom*, Applications nos. 77587/12 and 74603/12, Judgment of 5 July 2021.

⁹⁸ *Zoletic v. Azerbaijan*, Application No. 20116/12, Judgement of 7 October 2021. For comments on this case, TRAJER, "Hidden in plain sight: failure to investigate allegations of abuse on public construction projects in *Zoletic and others v. Azerbaijan*", Strasbourg Observers, 18 November 2021, available at: <<https://strasbourgobservers.com/2021/11/18/hidden-in-plain-sight-failure-to-investigate-allegations-of-abuse-on-public-construction-projects-in-zoletic-and-others-v-azerbaijan/>>.

⁹⁹ *Zoletic v. Azerbaijan*, *ibid.*, para 192; *V.C.L. and A.N. v. United Kingdom*, *cit. supra* note 97, paras. 124-131.

¹⁰⁰ *Zoletic v. Azerbaijan*, *ibid.*, para 155; *V.C.L. and A.N. v. United Kingdom*, *ibid.*, para. 149.

¹⁰¹ *Zoletic v. Azerbaijan*, *ibid.*, para. 128.

¹⁰² *Ibid.*, paras. 155 – 157.

forced labour within its scope. Indeed, by referring to the *Rantsev* judgment, the ECtHR described human trafficking as a much *more serious* offence, that recalls actual *slavery* in some ways:

“[...] trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats 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. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described in the explanatory report accompanying the Council of Europe Convention on Action against Trafficking in Human Beings as the modern form of the old worldwide slave trade”.¹⁰³

The macroscopic violation of the human rights of the applicants in *Zoletic* could then be appropriately addressed by referring to the sole concept of human trafficking, which includes the purpose of forced labour under its definition. In other words, both legal concepts are *so close* that, in cases as the one under review, their combined application appears *unnecessary* and gives rise to doubts and aporias.

Although these conclusions did not impact as much on the assessment of procedural positive obligations in the specific case, it is problematic that the degree of severity of trafficking in human beings lacks clarity compared to other provisions. Moreover, it is self-evident that, despite the many attempts of systematization, trafficking in human beings is still a troubled concept in the ECtHR's practice.

3.1.2. *The Inter-American Court of Human Rights' ruling in the case Hacienda Brasil Verde v. Brasil*

In 2016, the Inter-American Court of Human Rights also issued its first judgment about contemporary forms of slavery¹⁰⁴ in the case of *Hacienda Brasil Verde Workers v. the Federative Republic of Brazil*,¹⁰⁵ regarding the slavery-like work

¹⁰³ *Ibid.*, para. 152.

¹⁰⁴ As reported by MILANO, (cit. *supra* note 69, p. 16, at note 78), Article 6 ACHR had already been invoked in other few cases, but the IAtCHR had not comprehensively addressed the issues of slavery and trafficking because they were not central to those cases.

¹⁰⁵ IAtCHR, *Trabajadores de la hacienda Brasil verde v. Brasil*, 20 October 2016. For some comments on this case, GOS, “*Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-*

conditions of hundreds of employees in a cattle ranch (what is called “*fazenda*” in Brazil). These circumstances were brought to the surface from several inspections at the ranch, which were conducted by the Brazilian Government from 1989 to 2000 following the complaints of labourers who had managed to flee. More than 300 labourers employed by the *Hacienda Brasil Verde* were reported to have been recruited as workers in the poorest areas of Brazil with the promise of a good salary, and then deprived of their work permits and obliged to sign blank documents immediately after their arrival at the *fazenda*. The victims also complained that they had been forced to work for 12 hours a day, with a break of half an hour for lunch and only one day off per week, under threats and armed surveillance. Furthermore, they alleged inadequateness of accommodations (which were without electricity, beds or sanitary facilities), insufficiency of food and isolation.¹⁰⁶

In this case, the IAtCHR concluded that Brazil was responsible for the violation of Article 6 ACHR, as it had failed the adoption of specific measures to *prevent* the victims’ treatment. The systemic violation of workers’ rights in the poorest regions of the country, including the recruitment of workers through fraud, deception and false promises as well,¹⁰⁷ had been brought to the attention of Brazilian institutions. In the judges’ view, Brazil had a knowledge of such a systematic practice and was required to act with *due diligence*. Such a conclusion was also supported by the absence of any reparation for victims even after the many raids at the cattle ranch.¹⁰⁸ Accordingly, the Brazilian State was condemned to restart investigations and criminal proceedings within a reasonable time; to identify, prosecute and punish those responsible; and, finally, to pay compensation to victims.¹⁰⁹

However, all the other concepts listed in Article 6 ACHR were also examined. Coming to the interpretation of “the slave trade” and “traffic in women”, the IAtCHR found that these concepts should be interpreted in light of the definition provided by Article 3 of the Trafficking Protocol, the other international tribunals’ case-law on human trafficking, and on the general international rules on the

American Court of Human Rights”, OxHRH Blog, 24 April 2017, available at: <<https://ohrh.law.ox.ac.uk/hacienda-brasil-verde-workers-v-brazil-slavery-and-human-trafficking-in-the-inter-american-court-of-human-rights/>> ; PLANT, “Workers of the Hacienda Brasil Verde v Brazil: Putting the Judgment in Perspective”, *International Labor Rights Case Law*, 2017, p. 387 ff., pp. 387–392.

¹⁰⁶ *Trabajadores de la Hacienda Brasil Verde v. Brasil*, cit. *supra* note 93, paras. 99 – 111.

¹⁰⁷ *Ibid.*, paras. 363 – 368.

¹⁰⁸ WEISER, “Inter-American Court Issues its First Decision on Modern Day Slavery: Case of Hacienda Brasil Verde”, PKI Global Justice Journal, 16 February 2018, available at: <<https://globaljustice.queenslaw.ca/news/case-comment-inter-american-court-issues-its-first-decision-on-modern-day-slavery-case-of-hacienda-brasil-verde>>.

¹⁰⁹ *Trabajadores de la Hacienda Brasil Verde v. Brasil*, cit. *supra* note 93, paras. 420 – 501.

interpretation of treaties.¹¹⁰ The IAtCHR's interpretation of "forced labour" was also in line with the ECtHR's case-law, since it endorsed the definition provided by the above-mentioned ILO Conventions.¹¹¹

In light of these clarifications, the San José Court importantly concluded that:

"[...] the workers rescued from Hacienda Brasil Verde were in a situation of *debt bondage* and subject to *forced labor*. Nevertheless, the Court considers that the specific characteristics of the situation to which the 85 workers rescued on March 15, 2000, were subjected *exceeds* the limits of debt bondage and forced labor, and meets the strictest criteria of the definition of slavery established by the Court (*supra* para. 272); in particular, the exercise of the powers attaching to the right of ownership. In this regard, the Court notes that: (i) the workers were subject to the control of the *gatos*, foremen, and armed guards of the hacienda and ultimately, of its owner; (ii) in a way that restricted their personal liberty and autonomy; (iii) without their free consent; (iv) by means of threats, and physical and psychological violence, (v) in order to exploit their forced labor in inhumane conditions. [...] Based on all the foregoing, the Court concludes that the situation verified in Hacienda Brasil Verde in March 2000 constituted a situation of *slavery*" [emphasis added].¹¹²

However, the IAtCHR found that the concept of slavery was not the only relevant one in the specific case. Indeed, the *capture* and the way of *recruitment* of workers from the poorest regions of the country proved that the workers had been *victims of human trafficking* as well.¹¹³ By such a decision, the San José Court probably intended to adopt a kind of "win-win solution": on the side, this ruling endorsed a modern view of the long-standing definition of slavery; on the other side, by also applying the definition of trafficking in human beings, it does not leave aside the strengthening of the positive obligations to protect victims, that currently need to expanding.

Some scholars welcomed such an approach, since it showed greater consistency and clarity in comparison to the ECtHR's rulings.¹¹⁴ Admittedly, the *Hacienda Brasil Verde* judgment is extremely clear in stating that "forced labour" is *less serious* than human trafficking, which rather equates to *slavery* in terms of seriousness. Moreover,

¹¹⁰ *Ibid.*, paras. 281 – 290. With specific regard to the international rules on the interpretation of treaties, the author mainly refers to the Arts. 31 – 33 of the Vienna Convention on the Law of the Treaties, (adopted 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331.

¹¹¹ *Ibid.*, paras 291 – 293.

¹¹² *Ibid.*, para. 304.

¹¹³ *Ibid.*, para. 343.

¹¹⁴ MILANO, cit. *supra* note 69, p. 19.

the San José judges manifestly identified the difference between forced labour and human trafficking in the “*action*” element – which includes *movement*. From that, it can be then assumed that the *recruitment* of the workers by fraud and deception, outside of the location in which the work had taken place, was the determinant factor to qualify these circumstances of the case as “human trafficking”.

From this perspective, the *Hacienda Brasil Verde* judgment can be certainly considered a landmark one. However, in the absence of subsequent case-law on analogous circumstances, it remains questionable how these principles will be applied in future disputes by the same Court. Meanwhile, as seen above, these principles have not been followed by the ECtHR, which has never applied the concept of “slavery” – as defined by the Geneva Convention – to any concrete case so far.

4. CONCLUSIONS

At the international level, the exploitation of labour is regulated by a multi-layered legal framework, including *ad hoc* international treaties, regional legislation (as, for example, the EU secondary legislation), soft law and human rights law. All these legal sources play an important role in establishing common minimum standards in the fight against “modern slavery” affecting work conditions. For this reason, clarity and legal certainty on the definitions and the scope of concepts in this context do matter, as they are functional in enhancing protection for victims.

This article explains that the interplay of different legal categories, adopted at different times for different concerns, has led to doubts and ambiguities in practice. In particular, the boundaries between the concepts of “forced labour” and “trafficking in human beings for the purpose of labour exploitation”, both aimed at addressing outrageous phenomena of workers’ exploitation, are still blurred. Indeed, these terms are often used interchangeably and even more frequently overlap in the case-law of human rights courts.

These contradictions may be due to the “troubled” interpretation of the definition of trafficking in human beings, enshrined in the 2000 Trafficking Protocol and then endorsed by all subsequent *ad hoc* treaties and international monitoring bodies as well. If adhering to the UNODC’s interpretation, such a definition is potentially so broad that “it is difficult to identify a ‘contemporary form of slavery’ that would not

fall within these generous parameters”.¹¹⁵ Notably, when adhering to such a broad reading of the *action* element, only a few cases of forced labour do not fit the wide scope of such an overreaching definition.

However, considering the case-law of human rights Courts, it is still dubious if trafficking in human beings could attract less serious but close phenomena of exploitation within its scope. This is particularly evident from the ECtHR’s case-law, where trafficking in human beings has often been applied *in conjunction* with forced labour. While this tendency may seem appropriate where a distinction between two offences is necessary, it seems redundant in many other cases.

The different approaches of the two Courts prove that the current legal regime is open to a wide range of interpretations, that may affect legal certainty and, thus, the adoption of further positive measures specifically aimed at combating different exploitative phenomena. In this scenario, the drafting of a treaty aimed at systematizing these legal categories and defining a unique line of interpretation could perhaps offer a way out of this legal “quagmire” at the international level.¹¹⁶ The proposal to sign a new international treaty on modern slavery was already elaborated some years ago by Professor Scarpa, one of the most prominent experts in this field¹¹⁷. She underlined that – at the state of the art – only a new human-rights-based treaty could align the international legal standards on all the relevant forms of exploitation and fill the existing gaps in this field.¹¹⁸ Despite such a proposal has not materialized yet, no one can doubt that the time has come for a common-agreed reappraisal on this subject through renewed and effective international cooperation.

¹¹⁵ GALLAGHER, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A response to James Hathaway”, *Virginia Law Journal of International Law*, 2009, p. 699 ff., p. 814.

¹¹⁶ STOYANOVA, “The Grand Chamber judgment in *S.M. v. Croatia*: human trafficking, prostitution and the definitional scope of Article 4 ECHR”, cit. *supra* note 90.

¹¹⁷ SCARPA, “Conceptual unclarity, human dignity and contemporary forms of slavery: An appraisal and some proposals”, *QIL, Zoom-in* 64 (2019), p. 19 ff., p. 41; and, of the same author, “Contemporary form of slavery”, cit. *supra* note 6, with specific regard to pp. 46 – 52.

¹¹⁸ *Ibid.*, specifically at p. 53.

7. **FORCED LABOUR AND IRREGULAR MIGRANT WORKERS: WHAT PROTECTIONS UNDER INTERNATIONAL LABOUR LAW?**

*Matteo Borzaga, Michele Mazzetti**

SUMMARY: 1. Introduction; – 2. Methodological remarks; – 3. Irregular migrant workers and their vulnerable status; – 4. The ILO and UN Conventions on migrant workers; – 5. The ILO Conventions against forced or compulsory labour; – 6. the fight against forced or compulsory labour within the core labour standards' policy: a possible effective way to protect irregular migrant workers?; – 7. Conclusion

1. INTRODUCTION

An extensive labour protection system has developed in Europe and worldwide due to labour movements. The International Labour Organisation (ILO) has been a crucial player in the spread of labour protection principles over the years through its Conventions and Recommendations. Despite these efforts, labour exploitation remains a scourge that afflicts workers in various forms, one of the worst being forced or compulsory labour. Although there is no longer a legal right of ownership over human beings, modern slavery still plagues our time. Among the most vulnerable individuals are irregular migrant workers.

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The vulnerability of irregular migrant workers has multiple causes: undocumented status, economic dependency, abuse by human smugglers, risk of retaliation and violence, and unfavourable migration legislation. This vulnerability has led to labour exploitation and forced or compulsory labour in many economic sectors.

To combat labour exploitation and protect migrant workers, the ILO adopted Conventions No. 97 of 1949 and No. 143 of 1975, which do not include irregular migrant workers. However, as partial protection for irregular migrant workers, Articles 1 and 9 of Convention No. 143 of 1975 state that all migrants enjoy fundamental human rights. The legal framework improved with the 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICPMW). Despite these significant developments, the protection of irregular migrant workers at the international level is still fragile, mainly because a small number of states have ratified the respective Conventions, the majority of which are countries of origin.

The limited legal framework protecting the rights of irregular migrant workers opens up scenarios to investigate how international standards can be applicable and appropriate to improve their situation. As Conventions No. 97 of 1949 and No. 143 of 1975 only partially cover irregular migrants and are mainly ineffective, this essay will consider the applicability of other labour standards to these workers, focusing on the Core Labour Standards (CLS) proclaimed by the 1998 Declaration on Fundamental Principles and Rights at Work and its follow-up (amended 2022) and reinforced by the so-called “Decent Work Agenda”. Notably this paper aims to show that international labour law offers more effective tools to counter exploitation and forced or compulsory labour that can also be applied to regular and irregular migrants, both adults and children. These instruments are the ILO Conventions against Forced or Compulsory Labour No. 29 of 1930 and No. 105 of 1957, as well as Convention No. 182 of 1999 prohibiting the Worst Forms of Child Labour. ILO Convention No. 29 is linked to the colonial era: while generally prohibiting forced or compulsory labour, it provides for a transitional period and numerous exceptions. ILO Convention No. 105 is more precise than ILO Convention No. 29 in requiring the abolition of forced or compulsory labour. Although these are relatively old Conventions, the ILO’s focus on forced or compulsory labour has steadily increased. A significant improvement came with the adoption of the 1999 Convention No. 182 on the Prohibition and Elimination of the Worst Forms of Child Labour and the 2014 Protocol to ILO Convention No. 29, which extended the application of the instrument to irregular migrant workers. These instruments are part of the CLS.

In short, our goal is to demonstrate that through the CLS, it is possible to overcome (at least partially) the current difficulties in safeguarding irregular migrant

workers, thus improving their legal protection.

Concretely, this research begins by discussing the vulnerable situation of irregular migrant workers and the violations of their rights (Section 3) on the basis of a sociological, economic and legal analysis. Building on this analysis, the research examines international instruments related to migrants (Section 4) and those against forced and compulsory labour (Section 5). Finally, the study argues how to extend the protections offered by CLS to irregular migrant workers against labour exploitation and forced or compulsory labour (Section 6).

2. METHODOLOGICAL REMARKS

According to Adams and Griffiths, all research is developed from a question “about the world we live in.”¹ Therefore, “questions go before methods, and until one has specified what the question is, no sensible discussion of methodology is possible.”² The research question concerns how the international labour law instruments aimed at combating exploitation and forced or compulsory labour can be applied to regular and irregular migrants, both adults and children.

The methodological approach adopted in this research is qualitative and precisely doctrinal. Doctrinal research is a consolidated and well-established research methodology in the field of law. The reflection around this methodology starts from the idea that “law is reasoned and not found”³ and is developed by constituting a methodological path that mediates “between the researcher’s subjective beliefs and opinions and the data and evidence that he or she produces through research.”⁴

Operationally, doctrinal methodology presupposes collecting and analysing primary sources (case law and legislation). More precisely, the doctrinal methodology is based on a precise identification and analysis of relevant legislation, cases and legal secondary sources. This analysis is analogous to that conducted in a literature review – typical of the social sciences – described by Fink as “a systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars and practitioners.”⁵

¹ ADAMS and GRIFFITHS, *Against ‘Comparative Method’: Explaining Similarities and Differences*, in ADAMS and BOMHOFF (eds.), *Practice and Theory in Comparative Law*, Cambridge, 2012, p. 279.

² *Ibid.*

³ DOBINSON and JOHNS, *Legal Research as Qualitative Research*, in MCCONVILLE and CHUI (eds.), *Research Methods for Law*, Edinburgh, 2017, p. 25.

⁴ LAYDER and O’CONNELL DAVIDSON, *Methods, Sex and Madness*, London, 1994, p. 35.

⁵ FINK, *Conducting Research Literature Reviews: From the Internet to Paper*, SAGE, 2005, p. 3.

The analytical perspective can be either diachronic or synchronic, depending on the research objectives. However, the prevailing choice is that of the historical perspective because it allows an understanding of the evolution of a normative datum and the possible divergent legislative options. As interpretative support tools, researchers combine primary sources with multiple secondary sources, such as journal articles or other written commentaries on case law and legislation. The two main objectives of doctrinal research are to describe a rule or legal system and to interpret it in light of fundamental legal principles.⁶

Building on the analysis and findings, the researcher answers the research questions by interpreting and evaluating the norm.

These are the general lines that govern the doctrinal legal research methodology. This study has been conducted along these same lines. Specifically, starting from the research question, the aim of the study was identified, which is to assess how international labour law can counteract the exploitation and forced or compulsory labour of irregular migrant workers. Thus, the field of analysis is international labour law and migration law. The target of the research is irregular migrant workers, as defined by the International Organisation for Migration (IOM):

A person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country. The definition covers inter alia those persons who have entered a transit or host country lawfully but have stayed for a longer period than authorized or subsequently taken up unauthorized employment (also called clandestine/undocumented migrant or migrant in an irregular situation). The term “irregular” is preferable to “illegal” because the latter carries a criminal connotation and is seen as denying migrants’ humanity.⁷

The study was based on primary and secondary sources. Primary sources are the international labour and migrant Conventions and the quasi-jurisprudence of international bodies interpreting these treaties. Primary sources include: a) 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998), as amended in 2022 (1998 Declaration); b) Forced Labour Convention, 1930 (No. 29) (ILO Convention No. 29) and the Protocol of 2014 to the Forced Labour Convention, 1930 (2014 Protocol); c) Abolition of Forced Labour Convention, 1957

⁶ DOBINSON and JOHNS, *cit. supra* note 3, p. 21.

⁷ PERRUCHOU and REDPATH-CROSS (eds.), *Glossary on Migration*, International Organization for Migration, Geneva, 2011, p. 54.

(No. 105) (ILO Convention No. 105); d) Worst Forms of Child Labour Convention, 1999 (No. 182) (ILO Convention No. 182); e) ILO Migration for Employment Convention (Revised), 1949 (No. 97) (ILO Convention No. 97); f) ILO Migration for Employment Recommendation (Revised), 1949 (No. 86) (ILO Recommendation No. 86); g) ILO Migrant Workers Convention, 1975 (No. 143) (ILO Convention No. 143); h) Migrant Workers Recommendation, 1975 (No. 151) (ILO Recommendation No. 151); i) UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW).

These Conventions were selected because they provided universal protection to workers, dealt specifically with migrant workers, and offered protection to all migrants, including irregular ones.

Secondary sources are the relevant legal literature, social and economic research and reports analysing the investigated issues and providing an understanding of them. Secondary sources have served as interpretative tools of primary law.

The analytical perspective is mainly synchronic, focusing on the interpretation of legal constructs. The diachronic perspective was employed in order to contextualise the legal instruments analysed.

The contribution of this research is to envisage and propose teleological and extensive interpretations of the existing regulatory instruments in order to protect those who, due to their irregular status, find themselves in a condition of vulnerability.

3. IRREGULAR MIGRANT WORKERS AND THEIR VULNERABLE STATUS

The world's population migrates: this is a historical fact dating back to the beginning of human history. People have always moved in search of a better place to live.⁸ The IOM and the Organisation for Economic Cooperation and Development (OECD) have pointed out that, despite the downturn due to the COVID-19 pandemic crisis,⁹ migration flows have resumed.¹⁰

According to the IOM, there were approximately 281 million international

⁸ Among others, see: LIVI-BACCI, *In cammino. Breve storia delle migrazioni*, Bologna, 2019; BAUDER, *Labor Movement: How Migration Regulates Labor Markets*, Oxford, 2006; MANNING, *Migration in World History*, London, 2005.

⁹ Organization for Economic Co-operation and Development, *International Migration Outlook 2020*, Paris, 2020.

¹⁰ MCAULIFFE and TRIANDAFYLIDOU (eds.), *World Migration Report 2022*, International Organization for Migration, Geneva, 2022, available at: <<https://publications.iom.int/books/world-migration-report-2022>>; MCAULIFFE and KHADRIA (eds.), *World Migration Report 2020*, International Organization for Migration, Geneva, 2020, available at: <<https://publications.iom.int/books/world-migration-report-2020>>.

migrants worldwide in 2020, representing 3.6% of the global population.¹¹ As revealed by the World Migration Report 2022, the largest destination for international migrants is Europe (30.9% of the international migrant population), followed closely by Asia (30.5% of the international migrant population). North America is the third destination with 20.9% of the international migrant population, followed by Africa (9%).

The IOM and the ILO estimate that there are 169 million migrant workers in the world. These people migrate to improve their and their families' well-being, moving mainly to neighbouring or more developed countries.¹² Most of the time, migrant workers are employed in occupations that national workers are no longer inclined to do, thus filling precarious and low-skilled jobs.¹³

Low-skilled jobs are only the tip of the iceberg of a much more complex phenomenon concerning the vulnerable condition of migrant workers and especially irregular migrant workers. Numerous studies have focused on the vulnerability of migrants. In 2014, the Lowy Institute for International Policy proved the relationship between the increase in the migration trend and the increase in labour exploitation.¹⁴ This relationship was also confirmed by other studies that showed the complex link between increasing migration and human trafficking, labour exploitation.¹⁵

¹¹ MCAULIFFE and TRIANDAFYLIDOU, *cit. supra* note 10, p. 21.

¹² MCAULIFFE and TRIANDAFYLIDOU, *cit. supra* note 10, p. 26; International Labour Organization, *ILO Global Estimates on International Migrant Workers. Results and Methodology*, Geneva, 2021, p. 21 available at: <https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_652001.pdf>; United Nations Department of Economic and Social Affairs, *International Migration Report 2015*, New York, 2016; ILO Committee of Experts on the Application of Conventions and Recommendations, *Promoting Fair Migration. General Survey Concerning the Migrant Workers Instruments*, Geneva, 2016, p. 3, available at: <http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_453898.pdf>.

¹³ SUYANTO and others, "Bargaining the Future: A Descriptive Study of the Lives of the Indonesian Illegal Migrant Workers", *Journal of International Migration and Integration*, 2020, pp. 185, 187; EINAUDI, *Le politiche dell'immigrazione in Italia dall'unità a oggi*, Bari, 2007, p. 123; REGINE, "How 'Low-Skilled' Migrant Workers Are Made Border-Drawing in Migration Policy", in RIJKEN and DE LANGE (eds.), *Towards a Decent Labour Market for Low-Waged Migrant Workers*, Amsterdam, 2018; BULAT, "High-Skilled Good, Low-Skilled Bad? British, Polish and Romanian Attitudes Towards Low-Skilled EU Migration", *National Institute Economic Review*, 2019, p. R49; GRUBEL and SCOTT, "The International Flow of Human Capital", *American Economic Review*, 1966, pp. 268 ff.; MARCHIORI, PIERETTI and ZOU, "Immigration, Occupational Choice and Public Employment", *Annals of Economics and Statistics*, 2018, p. 83; ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 12.

¹⁴ Lowy Institute for International Policy, *Migration and Transnational Crimes: A Glaring Picture of our Future*, Sydney, 2014.

¹⁵ KALDOR, *Human Security*, Oxford, 2013; The Heritage Foundation, *Asia on the Move: Migration, Crimes, and Terror*, 2014; BULLER, STOKLOSA and ZIMMERMAN, *Labour Exploitation, Trafficking and Migrant Health: Multi-Country Findings on the Health Risks and Consequences of Migrant and Trafficked Workers*, International Organization for Migration and London School of Hygiene and Tropical Medicine, Geneva, 2015, available at: <https://publications.iom.int/system/files/pdf/labour_exploitation_trafficking_en.pdf>; International Labour Organization, *Human Trafficking and Forced Labour Exploitation. Guidance for*

As data from the United Nations Development Programme (UNDP) already showed in 2015, the violation of protections and labour exploitation of workers plagues migrants and especially irregular migrants.¹⁶ This data correlates the increase in the number of irregular migrant workers from developing countries with the increase in cases of exploitation and mistreatment of these more vulnerable migrants.¹⁷

In support of these quantitative assessments, numerous studies in the social sciences have revealed how the condition of irregularity has a negative impact. Irregular migrants experience enormous social and psychological pressures that can lead to depression and chronic stress.¹⁸ Moreover, irregular status places individuals in a condition of dependency on the employer and results in exploitation with almost total employer impunity.¹⁹ Indeed, the absence of a legal status deprives migrants of adequate legal protection because they are afraid to turn to the authorities to report violations for fear of deportation.²⁰ The absence of regular status also causes a situation of insecurity and danger because the migrant is forced to turn to criminals, exploiters and intermediaries in order to be able to work. Aggravating this situation is the migrant workers' need to save to send money to their families and to repay

Legislation and Law Enforcement, Geneva, 2005; STRAEHLE, "Labor Migration, Vulnerability and Human Trafficking A Feminist Bioethical Analysis", in ROGERS and others (eds.), *The Routledge Handbook of Feminist Bioethics*, London, 2022; NE, "Human Trafficking: In the Shadows of the Law", NTS Insight, 2018; FORD, LYONS and VAN SCHENDEL, "Labour Migration and Human Trafficking", in FORD, LYONS and VAN SCHENDEL (eds.), *Labour migration and human trafficking in Southeast Asia: Critical perspectives*, London, 2012.

¹⁶ United Nations Development Program, *The Global Migration Reporting: Trends, Issues, and Projections*, New York, 2015.

¹⁷ *Ibid.*

¹⁸ WOODWARD, HOWARD and WOLFFERS, "Health and Access to Care for Undocumented Migrants Living in the European Union: A Scoping Review", *Health Policy and Planning*, 2014, p. 818, available at: <<https://academic.oup.com/heapol/Art.-lookup/doi/10.1093/heapol/czt061>>.

¹⁹ BORZAGA, *Contrasto Al Lavoro Infantile e Decent Work*. Napoli, 2018; BORZAGA and MAZZETTI, "Migrant Workers and the COVID-19 Pandemic: A Gap in Human Rights Protection?", in STAIANO and CILIBERTO (eds.), *Labour Migration in the Time of Covid-19: Inequalities and Perspectives for Change*, Roma, 2021, pp. 3–40; OBOKATA, *Trafficking of Human Beings: From a Human Rights towards a Holistic Approach*, Leiden, 2006; CONSTERDINE and SAMUK, "Temporary Migration Programmes: The Cause or Antidote of Migrant Worker Exploitation in UK Agriculture", *Journal of International Migration and Integration*, 2018, p. 1005; THORMANN and KOCH, *Circular and Temporary Migration. Empirical Evidence, Current Policy Practice and Future Options in Luxembourg*, Luxembourg, 2011; WICKRAMASEKARA, *Circular Migration: A Triple Win or a Dead End?*, Geneva, 2011; TUNGOHAN, "Living with Compromised Legal Status: Irregular Temporary Foreign Workers in Alberta and the Importance of Imagining, Strategizing, and Inter-Provincial Legal Consciousness", *International Migration*, 2018, pp. 207, 212; BORRACCETTI and others, *Labour Migration in Europe Volume II. Exploitation and Legal Protection of Migrant Workers*, Cham, 2018.

²⁰ AVDAN, "Human Trafficking and Migration Control Policy: Vicious or Virtuous Cycle?", *Journal of Public Policy*, 2012, p. 171.

huge debts,²¹ which forces many to endure abject working conditions and consequently increases the employers' power over them.²² An additional layer of gender-related vulnerability exists: irregular migrant women are at greater risk of personal violence and sexual assault.²³

The unfavourable working conditions and vulnerable situation of migrant workers, especially irregular migrant workers, are also reflected in the reports and surveys of international supervisory bodies: 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). CMW, CEACR and CAS unanimously agree that there are five types of large-scale violations of migrant workers' rights: "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."²⁴ Such violations particularly affect irregular migrant workers due to their status.

Studies on the condition of (irregular) migrant workers have not only focused on concrete manifestations, but have also investigated the cause of this vulnerability. The outcome of these analyses is that vulnerability is a product of the migration policies implemented by States. These policies have led to a criminalisation of the non-nationals resulting in a reduction of the possibilities of legal access to the State of destination. This is the phenomenon defined as "crimmigration", whereby legislators combine criminal law and immigration law and construct a legal and administrative system designed to exclude and expel the foreigner classified as undesirable.²⁵ Designated victims of this legislation policy are irregular migrant workers.

Over the past two decades, developed states' legislation has made extensive use of restrictive labour access legislation, making it virtually impossible. In parallel, states have adopted securitised policies that have made immigration a public security

²¹ MAHER and CAWLEY, "Short-Term Labour Migration: Brazilian Migrants in Ireland", *Population, Space and Place*, 2016, pp. 23, 27, available at: <<https://onlinelibrary.wiley.com/doi/10.1002/psp.1859>>.

²² TUNGOHAN, *cit. supra* note 19, p. 212.

²³ ASKOLA, "Violence against Women, Trafficking, and Migration in the European Union", *European Law Journal*, 2007, p. 204, available at: <<https://onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2007.00364.x>>; BRYSK and CHOI-FITZPATRICK, *From Human Security to Human Rights: Reframing Contemporary Slavery*, Philadelphia, 2012; BRAVO, "Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans", *Transnational law and contemporary problems*, 2009, p. 545.

²⁴ BORZAGA and MAZZETTI, *cit. supra* note 19, p. 31.

²⁵ GUIA, VAN DER LEUN and VAN DER WOUDE (eds.), *Social Control and Justice: Crimmigration in the Age of Fear*, The Netherlands, 2013; RISICATO, *Diritto alla sicurezza e sicurezza nei diritti: un ossimoro invincibile?*, Torino, 2019.

issue. An example of this approach is Italy. Since the introduction of Law No. 189 of 2002 (known as the Bossi-Fini Law), Italy has adopted an extremely complex mechanism that makes it practically impossible to enter Italian territory legally for work purposes. The limitation of access is matched by the repression of irregular presence on the national territory, which provides for detention and deportation procedures that pose problems in terms of fundamental rights protection.²⁶

This analysis shows how restrictive migration policies have produced a situation of legal vulnerability, from which derives a serious social vulnerability of the irregular migrant worker who is exposed to employer abuse.

4. THE ILO AND UN CONVENTIONS ON MIGRANT WORKERS

International labour law has been concerned with establishing protections for migrant workers in five legal texts, namely two ILO Conventions and two ILO Recommendations and one UN Convention. These instruments are: a) ILO Convention No. 97; b) ILO Recommendation No. 86; c) ILO Convention No. 143; d) ILO Recommendation No. 151; e) the UN ICPMW. Already from a first analysis, what stands out in these treaties is the progressive development and broadening of migrant workers protections. The aim of all these Conventions is to prohibit (or at least mitigate) discrimination and unfavourable treatment of non-national workers both in

²⁶ Briefly, the law stipulates that the employer, in order to hire a third-country national worker, must apply to the Immigration Office at the Police Headquarters, indicating the name of the foreigner that he or she intends to hire. The Police Headquarters issues a work permit and the Consulate of the third-country national worker's country of residence or origin issues an entry visa. After entering Italy, the third-country national worker signs the "contract of stay," which cannot exceed nine months for one or more seasonal jobs, one year for a fixed-term contract and two years for a permanent position. In the event that the worker loses the job for any reason, the worker may register as unemployed at the employment centre for a period that may not exceed the duration of the residency permit (Art. 22.11 Consolidation Act on Migration). The law does not provide for the possibility of obtaining a residency permit to actively seek work. See: SCIARRA and CHIAROMONTE, "Migration Status in Labour Law and Social Security Law", in COSTELLO and FREEDLAND (eds.), *Migrants at Work. Immigration and Vulnerability in Labour Law*, Oxford, 2014; CHIAROMONTE, "The Italian Regulation on Labour Migration and the Impact and Possible Impact of Three EU Directives on Labour Migration: Towards a Human Rights-Based Approach?", in BLANPAIN, HENDRICKX and HERZFELD OLSSON (eds.), *National Effects of the Implementation of EU Directives on Labour Migration from Third Countries*, Alphen an den Rijn, 2016; CHIAROMONTE, FERRARA and MALZANI, "The Migration Governance through Labour Law: The Italian Case", *Rivista del Diritto della Sicurezza Sociale*, 2019, p. 367; CHIAROMONTE, "L'ingresso per lavoro: l'irrazionalità del sistema e le sue conseguenze al tempo delle fake news e della retorica nazionalista", in GIOVANNETTI and ZORZELLA (eds.), *Ius migrandi: Trent'anni di politiche e legislazione sull'immigrazione in Italia*, Milano, 2020.

and outside the workplace.²⁷

Starting from the ILO Convention No. 97, this treaty identifies a series of rights for migrant workers:²⁸ a) the right to adequate and free assistance and information (Article 2); b) the right to have their journey facilitated and protected (Article 4); c) the right to have access to appropriate medical services (Article 5); d) the prohibition of discrimination and unequal treatment in remuneration, trade union membership, housing, access to social security, taxation and contributions, legal proceedings (Article 6) and combating misleading propaganda in relation to migration (Article 3).

These rights are counterbalanced by the definition in Article 11 of “migrant for employment”:

1. For the purpose of this Convention the term *migrant for employment* means 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.
2. This Convention does not apply to
 - (a) frontier workers;
 - (b) short-term entry of members of the liberal professions and artistes; and
 - (c) seamen.²⁹

The definition limits the personal scope – and thus also the protections – to regular migrant workers that have an employment relationship, excluding self-employed and irregular migrants. This limitation emerges from a literal and systematic interpretation of the Convention in light also of the Recommendation annexed to it (ILO Recommendation No. 86).³⁰

Moving to ILO Convention No. 143, this treaty is a step forward in the protections provided to migrant workers. In the preamble, the Convention recalls some fundamental principles contained in the ILO Constitution and the Philadelphia Declaration,³¹ namely the obligation to protect “the interests of workers when

²⁷ CHOLEWINSKY, “ILO Conventions 97 and 143”, in ALES and others (eds.), *International and European Labour Law*, Baden-Baden, 2018, pp. 848 ff.; BORZAGA and MAZZETTI, *cit. supra* note 19, p. 12.

²⁸ VALTICOS, *International Labour Law*, Berlin, 1979, p. 208 ff.

²⁹ Emphasis in the original text. Art. 11, ILO Convention No. 97.

³⁰ Art. I(1)(a), ILO Recommendation No. 86: “the term *migrant for employment* means 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 [...]”

³¹ Constitution of the International Labour Organization, available at: <https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0:NO:62:P62_LIST_ENTRIE_ID:2453907:NO>; Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia), available

employed in countries other than their own”³² and the principles that “labour is not a commodity,” and that “poverty anywhere constitutes a danger to prosperity everywhere.”³³ These principles shape the normative intervention, not by chance Article 1 of ILO Convention No. 143 commits the parties to respect the basic human rights of all migrant workers irrespective of their legal status.

Articles 2-9 of the ILO Convention No. 143 aim to improve techniques for the prevention of “illegal migration”, “illegal employment of migrants” and “trafficking in manpower” in order to prevent exploitative and irregular conditions. The clear intent of these eight articles is not to criminalise the migrant worker’s status, but to facilitate regular migration channels.

Part II of the Convention establishes the right to equality of opportunity and treatment with respect to “work and occupation, social security, trade union and cultural rights and individual and collective freedoms for migrant workers and members of their families legally residing in a territory” (Article 10). Like ILO Convention No. 97, ILO Convention No. 143 links rights to the status of a regular migrant worker as stipulated in Article 11:

1. 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.
2. This Part of this Convention does not apply to--
 - (a) frontier workers;
 - (b) artistes and members of the liberal professions who have entered the country on a short-term basis;
 - (c) seamen;
 - (d) persons coming specifically for purposes of training or education;
 - (e) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.³⁴

at:

<https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration>.

³² Preamble, Constitution of the International Labour Organization.

³³ Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia).

³⁴ Emphasis in the original text. Art. 11, ILO Convention No. 143.

Similarly to ILO Recommendation No. 86, ILO Recommendation No. 151 specifies the content of the rights granted to migrant workers, without giving a precise definition of what is meant by a migrant worker, but relying on the definition contained in Article 11 of ILO Convention No. 143.

Between the first and second ILO Conventions there are important similarities in structure, rights granted to migrants and scope. However, improvements have occurred in the 26 years separating the two treaties.³⁵ The personal scope of applicability of ILO Convention No. 97 and that of the annexed ILO Recommendation No. 86 is restricted to migrant workers who are engaged in an employment relationship and who are lawfully present on the territory of the State (i.e., who possess a work or residence permit).³⁶

ILO Convention No. 143 contains ‘complementary provisions’ to Convention No. 97 and employs a similar definition of a migrant centred on the existence of an employment relationship and the legal status of the persons involved. The only difference is that ILO Convention No. 143 refers to both a person who migrates and one who has already migrated, thus extending protections to any regular migrant who is not working for any reason (unemployment, retirement). A significant improvement comes from Article 1 of ILO Convention No. 143 which, as previously mentioned, commits each State party to respect the basic human rights of all migrant workers.³⁷

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 basic human rights. Therefore, it can be said that the personal scope of the Convention includes regular and irregular migrant workers, although the degree of protection granted to each of the two categories is very different.³⁸ This tendency to also include irregular migrant workers is even more evident in Article II(8)(3) of ILO Recommendation No. 151 which states:

Migrant workers whose position has not been or could not be regularised should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.³⁹

³⁵ 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, pp. 29–48.

³⁶ SERVAIS, *International Labour Law*, Deventer, 2011, p. 243.

³⁷ BORZAGA and MAZZETTI, *cit. supra* note 19, p. 11.

³⁸ CHOLEWINSKY, *cit. supra* note 27, pp. 856 ff.

³⁹ Art. II(8)(3), ILO Recommendation No. 151.

Turning to the ICPMW, despite acknowledging the distinction between regular and irregular migrant workers, this treaty does not guarantee all rights based solely on regularity and extends fundamental rights to all migrants.⁴⁰

Article 1 of the ICPMW deems the Convention applicable to all migrant workers and their families “without distinction of any kind such as 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.”⁴¹ This same Article provides that the ICPMW has to be applied throughout the entire migration process (i.e., preparation for migration, departure, transit, stay and eventual return to the state of origin or habitual residence).⁴²

Article 2 of the ICPMW defines the term migrant worker as: “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.” In other words, this Article removes any reference to the migrant’s regularity status. It also overcomes the limitation of applicability only to employees, because the ICPMW also applies to self-employed migrants.

Similarly to the ILO conventions, the focus of the ICPMW is on the principle of non-discrimination and respect for rights enshrined in 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.

Since Article 7 makes no reference to the regularity of the migrant worker’s status, the principle of non-discrimination applies to all regular or irregular migrant workers and their families.⁴³

Article 25 of the ICPMW guarantees all regular and irregular migrants fair working conditions and equal treatment with national workers regarding remuneration, “overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship, [...] minimum age of

⁴⁰ See Artt. 7-35, ICPMW.

⁴¹ Art. 2, ICPMW.

⁴² Art. 2, ICPMW.

⁴³ SERVAIS, *cit. supra* note 36, p. 241.

employment, restriction on work [...]” and all other working conditions.⁴⁴ Conversely, the ILO Conventions restrict equal treatment in working conditions to regular migrant workers only. The more restrictive of the two ILO Conventions is No. 97, Article 6 of which stipulates that parties undertake to apply treatment no less favourable than that applied to national workers only in “remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women’s work and the work of young persons; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation [...]”⁴⁵ Article 10 of ILO Convention No. 143, on the other hand, while limiting equal treatment to regular migrants, adopts a more favourable legislative technique because it uses general terms (such as ‘employment’ and ‘occupation’) and commits State parties to promote and guarantee equal opportunities and treatment in the employment relationship and living conditions.

As far as access to the labour market is concerned, the ICPMW is more protective than the ILO Conventions. Article 52 of the ICPMW, applicable only to regular migrant workers, on the one hand establishes their right to freely choose their paid activity,⁴⁶ and on the other hand allows for certain restrictions on the part of the host state.⁴⁷ These restrictions are of various kinds and concern, for example, the host State’s interest in reserving certain functions for its nationals or the host State’s difficulty in recognising professional qualifications acquired abroad. Similarly, the ILO Conventions provide for the right of migrants to have access to the labour market: provided that such migrants are regular, that they have been admitted to the territory of the State for employment purposes and that the State has not exercised its right to restrict access to certain professions.⁴⁸ The policy choice behind ILO Conventions is to not unduly prejudice the right of States to freely decide their

⁴⁴ Art. 25(1)(a)(b), ICPMW.

⁴⁵ Art. 6(1)(a), ILO Convention No. 97.

⁴⁶ Art. 52(1), ICPMW.

⁴⁷ Art. 52(2) and (3), ICPMW: “2. For any migrant worker a State of employment may: (a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation; (b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. [...] 3. For migrant workers whose permission to work is limited in time, a State of employment may also: (a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory [...] for a period of time prescribed in its national legislation that should not exceed two years; (b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. [...]”.

⁴⁸ Art. 14, ILO Convention No. 143.

migration policies,⁴⁹ in fact Article 14 of ILO Convention No. 143 identifies reasonable restrictions to the access to the labour market for migrant workers.⁵⁰

The ICPMW and the two ILO Conventions guarantee access to social security and adequate medical care. This right is an expression of the principle of solidarity and the principle of equal treatment. Between the ILO Conventions and the ICPMW there is a trend of improvement in terms of protection. Articles 27 and 54 of the ICPMW stipulate that migrant workers must be guaranteed the right to social security under the same conditions as nationals. However, these provisions have different scopes and contents. Article 27 of the ICPMW applies to all regular and irregular migrant workers and contains a very general reference to social security, without specifying what the benefits are and allowing for exceptions.⁵¹ Conversely, Article 54 of the ICPMW applies only to regular migrant workers and contains a list of benefits:

[...] migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

- (a) Protection against dismissal;
- (b) Unemployment benefits;
- (c) Access to public work schemes intended to combat unemployment;
- (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

Regarding ILO Conventions, the most restrictive is No. 97, which stipulates that social security, applicable only to regular migrant workers, can be subject to the following limitations:

⁴⁹ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 12, 119.

⁵⁰ Art. 14, ILO Convention No. 143: "A Member may – (a) [...] make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract; [...] (c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State."

⁵¹ Art. 27, ICPMW: "With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm. 2. 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."

- (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.⁵²

ILO Convention No. 143 has a much more general wording than ILO Convention No. 97 and is more comprehensive in that it fully extends social security to regular migrants.⁵³ The limitation, therefore, remains the condition of regular residence and entry into the State. Moreover, Article 8(2) of ILO Convention No. 143 extends equal treatment also to migrant workers who have lost their jobs. Consequently, unemployment cannot result in the automatic loss of regular migrant status; on the contrary, in the event of unemployment, the migrant worker is entitled to unemployment benefits under the same conditions as nationals.⁵⁴

Some evidence emerges from this analysis. The three Conventions and two Recommendations show an evolution towards extending the protections of migrant workers. However, within the ILO, irregular migrant workers still enjoy limited protections, essentially guaranteed by Article 1 of ILO Convention No. 143. The quantum leap in terms of protections came with the ICPMW, whose definition of migrant extended the personal scope to all migrant workers (employed, self-employed, regular and irregular).

On an interpretative level, it is possible to promote a coordination of these normative instruments through a systematic interpretation based on Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. Such an interpretation makes it possible to broaden the range of protections for irregular migrant workers by defining a minimal system of guarantees based on human rights, thus reinforcing international labour law in the broad sense (produced by both the ILO and other organisations). However, the same interpretation faces the limitation of being an elaboration not yet sanctioned by any of the international bodies designated to interpret these instruments (CEACR, CAS, CMW).

A further problem arises regarding the effectiveness of these instruments. The overall number of ratifications of the three conventions remains very low. Almost all

⁵² Art. 6(1)(b), ILO Convention No. 97.

⁵³ Art. 10, ILO Convention No. 143.

⁵⁴ BORZAGA, *cit. supra* note 35.

ratifications were made by developing countries, i.e. countries of origin and of transit. Very few developed and, in general, destination countries have ratified the treaties. ILO Convention No. 97 and, to a lesser extent, ILO Convention No. 143, have received some ratification from mainly European developed countries, which was not the case for the ICPMW. The low number of ratifications by developed and destination countries in general undermines the effectiveness of these treaties.⁵⁵

5. THE ILO CONVENTIONS AGAINST FORCED OR COMPULSORY LABOUR

From the legal point of view irregular migrant workers gained increasing protection over the decades, mainly through ILO Convention No. 143 and the ICPMW. However, these pieces of legislation are largely ineffective due to the very low number of ratifications and the fact that the countries that have ratified them are mostly countries of origin or transit.

⁵⁵ The ICPMW has been ratified by 58 states, and signed by 11 others; the Parties and signatories are: Albania, Algeria, Argentina, Armenia, Azerbaijan, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cabo Verde, Cambodia, Cameroon, Chad, Chile, Colombia, Comoros, Congo, Ecuador, Egypt, El Salvador, Fiji, Gabon, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mexico, Montenegro, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Palau, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Togo, Turkey, Uganda, Uruguay, Venezuela.

ILO Convention No. 97 has been ratified by 53 states; the Parties are: Albania, Algeria, Armenia, Bahamas, Barbados, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina, Cameroon, Comoros, 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, Sierra Leone, Slovenia, Somalia, Spain, Tajikistan, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, Zambia.

ILO Convention No. 143 has been ratified by 29 states; the Parties are: Albania, Armenia, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Comoros, Cyprus, Guinea, Italy, Kenya, Madagascar, Mauritania, Montenegro, Nigeria (The Convention will enter into force for Nigeria on 23/03/2024), North Macedonia, Norway, Philippines, Portugal, San Marino, Serbia, Sierra Leone, Slovenia, Somalia, Sweden, Tajikistan, Togo, Uganda, Venezuela.

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* (2023) <<https://indicators.ohchr.org/>> accessed 15 May 2023; International Labour Organization, *Ratifications of C097 - Migration for Employment Convention (Revised), 1949*, available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO>; International Labour Organization, *Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention*, available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO>.

The purpose of the analysis is to find additional international labor law norms that, despite not being expressly devoted to irregular migrant workers, can give them a better level of protection against this unfavorable background. Since the exploitation of irregular migrant workers is often due to forced or compulsory labour practices, the respective ILO Conventions must be considered first (and foremost).

The ILO began to pay attention to this phenomenon very early – in the 1920s – when the Governing Body appointed a group of experts in order to study its features with particular regard to the colonies. Following the conclusions of the panel, ILO Convention No. 29 (accompanied by Recommendations Nos. 35 and 36) was adopted.⁵⁶

Although this piece of legislation can be considered very advanced for that time, it also reveals a number of shortcomings and limits, which became increasingly evident over the years. The most important one certainly consists in the fact that ILO Convention No. 29 requires Member States to eliminate forced or compulsory labour, but at the same time provides for a transitional period and numerous exceptions, therefore allowing its use in many situations.⁵⁷

The ILO decided to regulate again on the subject after World War II, setting more modern and stringent criteria. Consequently, another group of experts (this time jointly by the ILO and the UN) was appointed to investigate the development of forced or compulsory labour in the preceding decades. The group of experts pointed out that the situation had significantly changed, both because of the ongoing decolonisation process and of the reasons why forced or compulsory labour was used, which were no more only economic, but also related to political and trade unions activities.⁵⁸

In the light of this considerations, ILO Convention No. 105 (accompanied by no Recommendation) was adopted. The complementarity of these instruments is probably the reason why both Conventions are still in force. In any case, ILO Convention No. 105 is more protective than ILO Convention No. 29: it commits ratifying Member States to immediately eliminate forced or compulsory labour and gives a more precise definition of the phenomenon.⁵⁹

Concerning this last point, it has to be generally highlighted that the concept of forced or compulsory labour falls within that of slavery, which has definitely changed over the decades but is still very widespread at global level and was

⁵⁶ BORZAGA, “Politiche di contrasto allo sfruttamento del lavoro: OIL e UE tra sanzioni e prevenzione”, *Lavoro e Diritto*, 2021, p. 217 ff.

⁵⁷ VALTICOS and VON POTOBSKY, *International Labour Law*, Deventer, Boston, 1995, p. 109.

⁵⁸ BORZAGA, *cit. supra* note 56, p. 218.

⁵⁹ VALTICOS and VON POTOBSKY, *cit. supra* note 57.

therefore renamed by the ILO as “modern slavery”. Moreover, the circumstance that, regarding the respective definition, the words “forced” and “compulsory” are always used together does not mean that they indicate two different situations. On the contrary, they simply describe a different intensity of the coercion, which is higher in the case of forced labour (physical or moral coercion) and lower in case of compulsory labour (lack of consent).⁶⁰

Forced or compulsory labour is defined by Article 2(1) of ILO Convention No. 29 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”.

According to both the CEACR and the legal doctrine, this definition is a complex one, composed of three different parts. The first part is related to the words “work or service”, which have to be intended in a broad way, but not that broad to include education and training, that can therefore be also compulsory.⁶¹ What is important to underline here is that this wide interpretation also refers to the informal economy (where numerous irregular migrant workers perform their working activity).⁶² The second part of the definition concerns the phrase “under menace of any penalty”, which bears a broad and general meaning. This phrase is to be understood as including not only criminal sanctions (when forced or compulsory labour is used by a state authority), but also any possible form of coercion, such as physical or moral violence and the withholding of identity documents (again a very common situation regarding irregular migrant workers).⁶³ The third part of the definition pertains to the concept of “non voluntary offer” to perform the respective working activity. In this regard, it is particularly important to verify on the one hand that the worker concerned has freely given his or her (informed) consent to enter into an employment relationship and on the other that he or she can leave it at any time (i.e., with a reasonable notice).⁶⁴

If forced or compulsory labour is illegally used, Article 25 of ILO Convention

⁶⁰ MOREAU, “ILO Convention 29. Forced Labour Convention, 1930 (No. 29)” in ALES *et al.* (eds.), *International and European Labour Law*, Baden-Baden, 2018, p. 1058.

⁶¹ ILO Committee of Experts on the Application of Conventions and Recommendations, *Giving Globalization a Human Face. General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008, 2012, p. 111 available at: <www.ilo.org>.

⁶² ILO Committee of Experts on the Application of Conventions and Recommendations, *Eradication of Forced Labour. General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, 2007, p. 18; MOREAU, *cit. supra* note 60, p. 1059.

⁶³ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 61, p. 111; ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 62, p. 20.

⁶⁴ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 61, p. 111.

No. 29 requires Member States to introduce adequate criminal sanctions to be applied to violators of the respective ban.

Although these provisions are strict, ILO Convention No. 29 at the same time introduces a transitional period and a wide range of exceptions (Articles 1(2) and (3), 2(2) and 3-24) clearly related to the situation in the colonies, which ultimately weaken the effectiveness of this piece of legislation.⁶⁵

ILO Convention No. 105 was adopted to complement and strengthen Convention No. 29. The instrument gives a more precise definition of the phenomenon – complementing that provided in Article 2 of ILO Convention No. 29 – and commits the ratifying Member States to “take effective measures to secure the immediate and complete abolition of forced or compulsory labour.”⁶⁶ Particularly, the obligation to “immediate and complete” abolition of forced or compulsory labour overcome all transitional periods provided for in ILO Convention No. 29.⁶⁷ Furthermore, Article 1 of ILO Convention No. 105 lists a number of prohibited categories of forced or compulsory labour, depending on their purpose.⁶⁸ Besides forced or compulsory labour for economic reasons (that was the only one recognised by ILO Convention No. 29), this article prohibits forced or compulsory labour of a political, disciplinary and discriminatory nature.⁶⁹

The adoption of ILO Convention No. 105 was crucial in relaunching ILO activities related to the fight against forced or compulsory labour because it introduced much more modern and restrictive standards. The relaunch of ILO activism occurred at a time when forced or compulsory labour changed significantly without diminishing. The economic and social transformations caused by decolonisation and globalisation contributed to the further spread of this scourge throughout the world, making the ILO’s renewed vigilance against it particularly important.

⁶⁵ MOREAU, *cit. supra* note 60, p. 1062 ff.

⁶⁶ Art. 2, ILO Convention No. 105.

⁶⁷ BORZAGA, *cit. supra* note 56, p. 221.

⁶⁸ Art. 1, ILO Convention No. 105: “Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour— (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination.”

⁶⁹ VALTICOS, *cit. supra* note 28, p. 97 ff.; ILO Committee of Experts on the Application of Conventions and Recommendations, , *cit. supra* note 61, p. 131 ff.

6. THE FIGHT AGAINST FORCED OR COMPULSORY LABOUR WITHIN THE CORE LABOUR STANDARDS' POLICY: A POSSIBLE EFFECTIVE WAY TO PROTECT IRREGULAR MIGRANT WORKERS?

The ILO Declaration on Fundamental Principles and Rights at Work of 1998 proclaims the elimination of forced or compulsory labour as one of the four core labour standards (CLS), alongside freedom of association and the right to collective bargaining as well as the fights against child labour and discrimination at the workplace.⁷⁰

The adoption of the 1998 Declaration and the prioritisation of some standards over others to encourage Member States to ratify and implement them has had significant (mostly positive) consequences.⁷¹

Despite the Declaration's inherent flaws and lack of legal force, it was immensely effective, notably in terms of ratifications, which sharply grew in a short amount of time.⁷² This happened about all the eight fundamental Conventions, i.e. also concerning ILO Convention No. 29 and ILO Convention No. 105. Nowadays, they have been ratified, respectively, by 180 and 178 Member States (out of a total of 187).⁷³ These numbers are very significant, showing an almost universal ratification of the two ILO Conventions regarding forced or compulsory labour. This does not mean that the respective standards are not violated but is a fundamental precondition for the functioning of the ILO monitoring system. In other words, thanks to this almost universal ratification, the supervision organs of the Organisation can properly work with regard to a very large number of Member States, making violations emerge and providing for recommendations in order to overcome them.⁷⁴

⁷⁰ In 2022 the Declaration was emended in order to include into it a fifth core labour standard, health and safety at work.

⁷¹ On this declaration see: LANGILLE, "The ILO and the New Economy: Recent Developments", *International Journal of Comparative Labour Law and Industrial Relations*, 1999, p. 229 ff.; BELLACE, "The ILO Declaration of Fundamental Principles and Rights at Work", *International Journal of Comparative Labour Law and Industrial Relations*, 2001, p. 269 ff.; 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.

⁷² BORZAGA and MAZZETTI, *cit. supra* note 19, p. 451.

⁷³ The countries that have not ratified ILO Convention No. 29 are: Afghanistan, Brunei Darussalam, Marshall Islands, Palau, Tonga, Tuvalu, United States of America.

The countries that have not ratified ILO Convention No. 105 are: Brunei Darussalam, Lao People's Democratic Republic, Marshall Islands, Myanmar, Palau, Republic of Korea, Timor-Leste, Tonga, Tuvalu.

⁷⁴ WISSKIRCHEN, "The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience", *International Labour Review*, 2005, p. 253 ff.; 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.

From this viewpoint, there is a big difference between the ILO Conventions on forced or compulsory labour and those specifically devoted to migrant workers, that are largely ineffective exactly because of the very low number of ratifications (mostly concerning countries of origin or transit) and the consequently limited role of the supervision system.

The fact that the ILO Conventions on forced or compulsory labour (and more generally, the CLS) are particularly ratified and therefore effective makes them adequate instruments to offer protection to irregular migrant workers against forms of “modern slavery”.

Irregular migrant workers are often exploited through the use of forced or compulsory labour. This situation has progressively worsened due to globalisation, while at the same time raising the awareness of the international community in general and of the ILO in particular on the issue. Accordingly, the ILO paid more attention to forced or compulsory labour in broad terms (e.g., including its elimination into the core labour standards) and started to create an increasing structural connection between it and the position of irregular migrant workers.⁷⁵

In this regard, neither ILO Convention No. 29 nor ILO Convention No. 105 define their personal scope: hence, the CEACR has always given a wide interpretation of it, affirming that these pieces of legislation also apply to irregular migrant workers.⁷⁶

However, the real breakthrough came with the 1998 Declaration, whose preamble states that the Organisation “should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers”, because of their vulnerability. From this statement it follows that the CLS also apply to both regular and irregular migrant workers.⁷⁷

The formal recognition by an ILO document of the connection between the CLS and the position of (irregular) migrant workers is crucial because it confirms the possibility of offering to them a stronger protection through Conventions No. 29 and 105, and because it opens up the opportunity to make use of other CLS Conventions in order to further reinforce this protection.

In this regard a very interesting instrument is ILO Convention No. 182, which is devoted to the elimination of the worst forms of child labour. Among the latter, it

⁷⁵ BORZAGA, *cit. supra* note 56, p. 225 ff.

⁷⁶ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 61, p. 112.

⁷⁷ As well as the fact that, even if less important for the protection of migrant workers, the subsequent decent work agenda (encompassed in the 2008 ILO Declaration on Social Justice for a Fair Globalisation) reinforces the core labour standards strategy from many viewpoints, also in terms of their application in the informal economy (where normally irregular migrant workers perform their activity. See: DE STEFANO, “L’ambito di applicazione soggettivo degli International Labour Standards dell’OIL”, *Lavoro e Diritto*, 2019, p. 429 ff.

also includes forced or compulsory labour extorted from children (i.e., persons under the age of 18). Since a significant number of irregular migrant workers are minors, it seems particularly important to have the chance to rely on a piece of legislation specifically devote to their protection, thus taking into account that Convention No. 182 is the only ILO Convention that has been universally ratified (in 2020).⁷⁸

The monitoring bodies of the ILO, in particular the CEACR, began to show serious concern for the condition of irregular migrants and intensified their supervisory activities within the framework of the Conventions on forced or compulsory labour.⁷⁹ Although the ILO monitoring system does not lead to actual sanctions, but rather to recommendations ('policy sanctions'), its bodies have gained more and more authority over the years. Thus, in a significant number of cases, member states decided to implement these recommendations, particularly with regard to CLS recommendations, including those on forced or compulsory labour.⁸⁰

Despite the promotional nature of the ILO's monitoring system, the protection offered to irregular migrant workers by Conventions No. 29 and No. 105 is consequently much stronger than that deriving from the international norms on migrant workers. A first reason for this situation lies in the low number of the ICPMW's ratifications. Moreover, only states of departure or transit have ratified this instrument, which consequently has a limited impact on migrants' rights. A second reason concerns the ILO's membership obligations. ILO Member States are subject to constant monitoring that results in recommendations and assistance aimed at aligning national norms with international standards.

The most recent legal developments concerning the fight against forced or compulsory labour show that the idea to offer protection to irregular migrant workers through the respective standards is increasingly attracting attention by the ILO also from the formal point of view. Since ILO Convention No. 29 needed to be updated, in 2014 the International Labour Conference adopted 2014 Protocol to the ILO Convention No. 29 (accompanied by ILO Recommendation No. 203), which on the one hand eliminated the provisions related to the transitional period (especially Articles 3-24) and on the other introduced new ones also recognizing that very often (irregular) migrant workers are victims of forced or compulsory labour, mainly

⁷⁸ BORZAGA, *cit. supra* note 19, p. 138 ff.

⁷⁹ ILO Committee of Experts on the Application of Conventions and Recommendations, *cit. supra* note 61, p. 129 ff.

⁸⁰ Two examples of this trend are Myanmar and Vietnam. Myanmar made considerable efforts in 2012-2015 to implement the international labour standards. However, these efforts were abruptly interrupted by the coup d'état of 2021. Vietnam reformed its labour code in 2018-2019 with the support of the ILO in order to bring it in line with international labour law. The new code entered into force on 1 January 2021.

because of their vulnerability.⁸¹

This formal inclusion of migrant workers into the ILO standards concerning forced or compulsory labour is not the only innovation introduced by 2014 Protocol. This instrument envisages a “paradigm shift” in the sector, stating that in order to effectively combat the phenomenon, sanctions remain fundamental, but at the same time it is important to focus on prevention. This means educating and informing people and employers as well as protecting (irregular) “migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process” (Article 2(1)(d)).

According to these considerations, 2014 Protocol could increasingly become a central legal instrument not only to protect irregular migrant workers, but also to tackle the phenomenon of forced or compulsory labour in a more comprehensive (and modern) way.⁸² At the moment, the most important obstacle to these desirable developments seems to be the slow ratification process regarding this treaty, which has been signed, so far, only by fifty-eight Member States (in almost ten years).⁸³

On an interpretative level, also the case law of the European Court of Human Rights (ECtHR) regarding Article 4 of the European Convention on Human Rights (ECHR) can contribute to the fight against forced and compulsory labour of irregular migrant workers. In *Seguin v. France* and *C.N. and V. v. France*, the ECtHR noted that servitude constitutes a specific form of forced or compulsory labour ‘aggravated’ by the psychological belief that the situation will not end. Even more significant in broadening the scope of ILO standards is the case of *Van der Mussele v. Belgium*. This decision employs Convention No. 29 definition of forced and compulsory labour to give content to the prohibitions contained in Article 4 ECHR. This precedent was confirmed in *Graziani-Weiss v. Austria*, *Stummer v. Austria* and *Adigüzel v. Turkey*. The interpretative principles on Article 4 ECHR can be employed to extend protections in European states for irregular migrant workers. However, the limitation is that these principles only apply in Europe.

⁸¹ As pointed out in the Preamble of the 2014 Protocol.

⁸² BORZAGA, *cit. supra* note 56, p. 228 ff.

⁸³ The countries that have ratified the 2014 Protocol are: Antigua and Barbuda, Argentina, Australia, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Canada, Chile, Comoros, Costa Rica, Cyprus, Czechia, Côte d’Ivoire, Denmark, Djibouti, Estonia, Finland, France, Germany, Iceland, Ireland, Israel, Jamaica, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mozambique, Namibia, Netherlands, New Zealand, Niger, Norway, Panama, Peru, Poland, Portugal, Russian Federation, Saudi Arabia, Sierra Leone, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Tajikistan, Thailand, United Kingdom of Great Britain and Northern Ireland, Uzbekistan, Zimbabwe.

7. CONCLUSION

Migrant workers, especially irregular ones, suffer a condition of legal vulnerability that reverberates in the economic and social spheres and has multiple causes: irregular status, economic dependency, abuse by human traffickers, risk of retaliation and violence and unfavourable migration legislation (i.e., crimmigration). Thus, irregular migrants live in a condition that exposes them to labour exploitation, forced or compulsory labour, which often materialise into real forms of “modern slavery.”

To combat labour exploitation and protect migrant workers, the ILO adopted Conventions No. 97 and No. 143, which do not include irregular migrant workers. However, to partially protect irregular migrant workers, Article 1 of ILO Convention No. 143 states that all migrants enjoy basic human rights. The legal framework improved with the 1990 ICPMW, which granted a list of fundamental rights to all migrant workers, including irregular ones.

Despite these developments, the protection of irregular migrant workers at the international level is still weak. One of the most significant causes, among many, is the low number of ratifications, which are mostly done by countries of origin and transit but not by countries of destination. The limited legal framework of protection and the low number of ratifications led this research to investigate how international standards can be applicable and appropriate to improve the situation of irregular migrant workers.

In international labour law, the instruments that can be used to guarantee forms of protection for irregular migrant workers are the CLS. Among the CLS, the most appropriate for the purpose of protection are ILO Conventions No. 29, No. 105, No. 182 and 2014 Protocol.

However, these instruments still pose some problems. ILO Convention No. 29 contains a number of exceptions that reduce its effectiveness. These exceptions are the result of its historical colonial background. ILO Convention No. 105 provides a first solution, which clearly expresses the obligation to abolish forced or compulsory labour. A significant improvement, however, came with the adoption of the 1999 ILO Convention No. 182 and the 2014 Protocol to ILO Convention No. 29. Indeed, ILO Convention No. 182 establishes a comprehensive scheme of protection against exploitation of child workers. Moreover, the 2014 Protocol extended the application of ILO Convention No. 29 to irregular migrant workers.

The CLS instruments have received a large number of ratifications covering countries of origin, transit and destination, thus contributing substantially to the improvement of the legal framework for the protection of workers. Moreover, this

diffusion has also strengthened the protections of migrant workers because the monitoring bodies have interpreted and promoted the correct application of CLS. Especially the CEACR has developed an extensive quasi-jurisprudence that has extended the scope of application of CLS to both regular and irregular migrant.

Part III

Challenges and the way forward at the national and local level

MIGRANTS IN THE GIG ECONOMY: AN EXPLORATION OF NON-STANDARD WORK AND GREY AREAS OF SOCIAL PROTECTION SCHEMES

*Carlo Caldarini, Grazia Moffa**

SUMMARY: 1. Introduction; – 2. The story of Mr Adhaa, working for a food delivery platform; – 3. It is above all the status of ‘worker’ that protects the social rights of migrants; – 4. The main problems posed by non-standard work to the social protection of migrant workers; – 4.1. Difficulties in claiming one’s periods of work; – 4.2. Difficulties in valuing one’s social contributions; – 4.3. Difficulties in exporting unemployment benefits; – 4.4. Obstacles to the right of residence and the status of foreigners; – 5. Conclusions.

1. INTRODUCTION

The rise of the digital platform economy has brought about a radical transformation in the global economic landscape, in Europe and globally. In today’s interconnected world, engaging in digital ecosystems has become indispensable for numerous businesses, unlocking unparalleled prospects for growth.¹ As a result, the number of online workers and those who rely on platforms for their livelihood has

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¹ KENNEY and ZYSMAN, “The rise of the platform economy”, *Issues in Science and Technology*, 2016, p. 61 ff; PARKER *et al.*, *Platform revolution: How networked markets are transforming the economy and how to make them work for you*, New York-London, 2016.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 189-212.

significantly increased.² The gig economy has fundamentally reshaped the way people work in the 21st century. Characterized by the provision of temporary services, often through digital platforms, this form of employment offers flexibility and earning opportunities but also raises a range of complex issues and challenges for workers and especially for migrant workers.³ At the same time, the scale of the phenomenon raises crucial questions regarding workers' rights, working conditions, and safety in this new employment model.⁴ It is also important to consider that digital platforms exhibit significant power imbalances in favour of those who own them, who have the ability to unilaterally modify competitive conditions on the platform.⁵

Within this landscape, one particularly relevant aspect is the impact of the gig economy on migrant workers, who constitute a less protected category. In more detail, a study conducted by Vosko *et al.*⁶ highlighted that migrant workers are often recruited for precarious and poorly paid jobs without adequate benefits or insurance coverage. This phenomenon is particularly widespread in the informal sector, which employs beyond half of migrant workers globally, according to a 2021 study by the International Labour Organization (ILO). A recent quantitative study conducted by López *et al.*⁷ revealed that migrant couriers represent a significant proportion of workers in the gig economy, and their experiences are often characterized by discrimination and exploitation. The experience of migrant workers in the gig economy is heavily influenced by their immigration status, which can restrict their rights and access to labor protections and safeguards.⁸ As an example, a 2019 report by the International Transport Workers' Federation (ITF) highlighted that the majority of bicycle couriers in European cities are migrants or come from

² KENNEY *et al.*, "The rise of the gig economy: An agenda for research and policy innovation", Cambridge Journal of Regions, Economy and Society, 2020, p. 3 ff; PLANAS and LEUZE, "Platform-mediated labor in the on-demand economy: The case of Uber", Research in the Sociology of Work, 2018, p. 105 ff.

³ KALLEBERG, *Precarious lives: Job insecurity and well-being in rich democracies*, Cambridge, 2018; KALLEBERG and DUNN, *Good jobs, bad jobs in the United States: Is job quality becoming more polarized?*, Princeton, 2016; KAPOOR and AGARWAL, "Platforms, governance and economic development", Oxford Review of Economic Policy, 2017, p. 602 ff; KENNEY and ZYSMAN, *cit. supra* note 1; KENNEY *et al.*, *idem.*

⁴ FUDGE, "The gig economy, labour law and the erosion of workers' rights", Comparative Labor Law & Policy Journal, p. 435 ff; FUDGE, "The platform economy and the challenges of work and social protection in the European Union", International Labour Review, 2018, p. 315 ff.

⁵ KAPOOR and AGARWAL, *cit. supra* note 3; WEN and ZHU, "Platform competition and governance: A study of online ride-hailing platforms", Information Systems Research, 2019, p. 68 ff.

⁶ VOSKO *et al.*, "Precarious employment, work, and migration", The Wiley Blackwell Companion to the Sociology of Work, John Wiley & Sons Ltd, 2016, p. 221 ff.

⁷ LÓPEZ *et al.*, "A fair future of work? Analysing working conditions in the digital platform economy. Work", Employment and Society, 2021, p. 142 ff.

⁸ LINDLEY *et al.*, "Migrant workers in the digital gig economy: A research agenda", Oxford Review of Economic Policy, 2018, p. 671 ff.

disadvantaged socio-economic backgrounds. The report emphasized that many of these workers earn extremely low wages, often below the minimum wage, and face precarious and dangerous working conditions.

The COVID-19 pandemic has not only further exacerbated the situation of migrant workers in the gig economy but also exposed critical issues. Lockdown measures and restrictions have resulted in a decrease in work opportunities for many of them, jeopardizing their economic security and increasing their vulnerability. Furthermore, the lack of insurance coverage and limited access to adequate healthcare have made migrant workers even more susceptible to health risks during the pandemic. The condition of migrant workers in the gig economy is often characterized by discrimination, exploitation, and limitations in access to justice. Several academic studies have highlighted these issues. A recent study conducted by Hargreaves *et al.*⁹ found that most migrant bicycle couriers in the United Kingdom work for digital platforms and often experience discrimination, such as a lack of access to promotions or inferior working conditions compared to their non-migrant colleagues. The report also highlighted that migrant couriers are more susceptible to exploitation and wage delays. Furthermore, access to justice and the protection of rights for migrant workers in the gig economy can be complex.¹⁰ Due to their immigration status, they may be reluctant to report abuses or seek legal assistance for fear of retaliation or jeopardizing their residence permit.¹¹ Another study¹² underscores how the legal and social vulnerability of migrant workers exposes them to forms of exploitation and discrimination, and how their immigration status can directly influence their bargaining power and their ability to protect their rights in the workplace. The report also points to how many migrant workers find themselves in a disadvantaged legal and social position, as their rights may be limited or inadequately protected due to restrictions related to their residency status. It also explains how the fear of retaliation from employers or immigration authorities may discourage migrant workers from initiating legal disputes or seeking union support.

The issue of access to justice for migrant workers in the gig economy has been the subject of numerous academic studies.¹³ Migrant workers in the gig economy

⁹ HARGREAVES *et al.*, "Delivering for Migrant Workers? The Exploitation of Migrant Bike Couriers in the Gig Economy", *Industrial Relations Journal*, 2022, p. 5 ff.

¹⁰ CURCI, "Navigating Legal Challenges in the Gig Economy: Migrant Workers' Access to Justice", *Labor Law Journal*, 2020, p. 123 ff.

¹¹ GHERARDI and MOLINARI, "Vulnerabilities in the Gig Economy: Migrant Workers and Legal Protection", *International Journal of Comparative Labour Law and Industrial Relations*, 2018, p. 289 ff.

¹² VOSKO *et al.*, *cit. supra* note 6.

¹³ CURCI, *cit. supra* note 10.

often face language and cultural barriers that limit their ability to understand their rights and access legal information and services.¹⁴ These barriers can worsen their vulnerability and make it difficult for them to exercise their labour rights.¹⁵ In addition, the fear of losing their residency permit can have a significant impact on the ability of migrant workers to seek justice.¹⁶ The fear of negative consequences, such as revocation of the residence permit or expulsion from the country, can discourage migrant workers from reporting abuses or exploitation.¹⁷ This fear is fuelled by the awareness that the legal system may not be able to offer them adequate protection or ensure fair treatment.¹⁸ It is crucial to address this challenge and ensure access to justice for all migrant workers in the gig economy.¹⁹ The implementation of policies and measures aimed at ensuring the protection of migrant workers' rights, such as promoting anonymous reporting channels, establishing independent monitoring bodies, and raising awareness of available legal protections, could help reduce barriers to access to justice and encourage migrant workers to assert their rights without fear of negative consequences.²⁰

In the following paragraphs, we will explore a range of different and complex issues related to this new type of work, highlighting how migrant workers find themselves in a particularly vulnerable position within this new digital platform economy. By vulnerability, we refer to a situation where individuals have no other viable and acceptable option but to endure the abuse inflicted upon them. As extensively illustrated by feminist literature and migration studies, the vulnerability of migrants has a situational, relational, and intersectional character. It depends on the convergence of multiple attributes of the individual that, in a given social context, are susceptible to discrimination and marginalization, such as gender, age, ethnicity, nationality, sexual orientation, beliefs, religious faith, health status, and, above all, socio-economic status.²¹ Through concrete examples, we will consider the dimensions and impact of this new work reality, focusing on the experiences of migrant workers involved in the gig economy across different European cities. They face distinctive challenges and often experience discrimination and exploitation,

¹⁴ *Ibidem.*

¹⁵ *Ibidem.*

¹⁶ GHERARDI and MOLINARI, *cit. supra* note 11.

¹⁷ *Ibidem.*

¹⁸ *Ibidem.*

¹⁹ HARGREAVES *et al.*, *cit. supra* note 9.

²⁰ *Ibidem.*

²¹ RIGO, "La vulnerabilità nella pratica del diritto d'asilo: una categoria di genere?", *Etica & Politica/Ethics & Politics*, 2019, p. 343 ff.

underscoring how the worker status of migrants, regardless of their citizenship (European Union or third countries), plays a vital role in the European and national legal framework to ensure the protection of their social rights. In the context of the gig economy, the worker status of migrants remains a crucial point as it can be called into question by employment contracts that do not comply with conventional norms, with significant consequences including reduced legal protection and a decrease in the social rights that migrant workers should normally have access to.

The discussion proceeds through four distinct sections, delving into non-standard work and grey areas of social protection schemes of migrants in the gig economy. The second section will analyse the story of Mr Adhaa as a migrant worker for a food delivery platform, the third it discusses the centrality of the status of “worker” that protects the social right of migrants. The fourth section extensively examines the primary challenges arising from non-standard work in relation to the social protection of migrant workers, encompassing issues such as asserting work periods, assessing social contributions, exporting unemployment benefits, and confronting barriers to residency rights and foreigner status. The conclusions reflect about the inadequacies of current social security systems and regulations in providing stable career paths for migrants in the gig economy.

2. THE STORY OF MR ADHAA, WORKING FOR A FOOD DELIVERY PLATFORM

HesaMag is the European Trade Union Institute’s (ETUI) magazine on health and safety at work. In issue 25 (2022), a short article by Mehmet Koksall, ‘Seven common misconceptions about digital work platforms’, tells the story of Mr Adhaa, a North African refugee in France who works for a food delivery platform.²²

Mr Adhaa’s dream is to have enough money to bring his family to Paris as soon as possible. But his boss, Mr Marcos, is systematically paying him late, withholding 50 per cent as commission.

“What a thief this Marcos is! He does nothing and earns as much as you,” complains Mr Adhaa’s wife Sanaa. Mr Adhaa is well aware of the problem, but he has no choice but to keep delivering quickly if he wants to get the income he needs for family reunification.

In the middle of this discussion, Mr Adhaa receives a notification on his phone

²² KOKSALL, “Seven common misconceptions about digital labour platforms”, HesaMag, 2022, p. 4 ff.

that he can now earn a 40-euro bonus if he can make 15 bicycle deliveries in less than three hours. There is not a second to lose to pocket this bonus, even if it means endangering his health and safety.

But beware, if an accident were to happen while he was working, Mr Adhaa would have no one to blame but himself. Officially, he is self-employed, he has no employer, only a client, and he has no social protection.

It is through this fictitious story, yet so representative of working conditions across platforms, that young French director Gauthier Monnet completed his short film entitled “À tout prix”, presented at the 12th Nikon Film Festival 2022.²³

The case of this migrant courier is not an isolated and insignificant example; in fact, one only has to observe the constant daily comings and goings of worker-cyclists in the European urban environment to realise the emergence of this new two-click economy, housed in an application residing on a mobile phone.

Contrary to popular belief, this type of work does not only affect a small number of people, such as students seeking occasional income. Its impact is much broader. A survey by the European Trade Union Institute (ETUI), conducted in 14 EU countries, estimated that there were around 47.5 million internet workers (17 per cent of the working-age population) in the EU-27 in 2021, including 12 million platform workers (these are thus a subset of internet workers as a whole).²⁴

In fact, this survey makes a distinction between, on the one hand, internet workers, i.e., people who provide services, sell products or rent accommodation through online digital platforms (47.5 million workers), and, on the other hand, platform workers in the strict sense (12 million), including also 3 million workers for whom platforms represent a ‘significant part’ of their working life.

Given that the median internet and platform worker devotes 5 hours per week to this type of work, this would correspond to 237.5 million hours per week devoted to online work in the EU as a whole, or 6.25 million full-time equivalents (FTEs), i.e., workers who perform full-time internet activities.

Based on estimates, 72 million hours per week dedicated to platform work is equivalent to an estimated minimum of 1.9 million full-time workers. We are, however, talking about estimates, since the number of workers who, in one way or another, work on the Internet and other digital platforms is very fluid and difficult to determine, as is the number of hours worked.

For instance, the 2021 Impact Assessment report accompanying the European

²³ The short film is available at: <www.youtube.com/watch?v=HJDID5SwLzk>.

²⁴ PIASNA *et al.*, “The Platform Economy in Europe: Results from the Second ETUI Internet and Platform Work Survey (IPWS)”, ETUI Research Paper, 2022, available at: <<http://dx.doi.org/10.2139/ssrn.4042629>>.

Commission's proposal for a Directive on improving working conditions in platform work estimates that 28 million people in Europe work through digital work platforms.²⁵

According to these estimates, most of these workers are truly self-employed, but there could be up to 5.5 million people who are 'false' self-employed. This means that while their contracts with the digital work platforms through which they work describe them as self-employed, in reality they are subject to the control and supervision that are characteristic of 'worker' status. These people may find themselves in a particularly precarious situation. If they want to challenge the classification of their employment status, they have to go to court and prove that the contractual description of their status is false. This is not an easy task, as it can be time-consuming and costly, and is particularly challenging for people who are in a weak position in the labour market, as immigrants are.

Although there may be variations in estimates regarding the extent of platform work in existing surveys, the findings on worker characteristics remain consistent. Platform workers are predominantly male, younger, more educated than the general population, and frequently immigrants.²⁶

Many immigrants work regularly in this way, for a number of reasons: firstly, because it is a relatively easy job with no special requirements, but mainly because they cannot find anything better. Many other immigrants 'choose' to work through an online platform because they do not have the necessary status to work legally.

Journalistic investigations in several European cities have shown that most drivers who deliver meals by bicycle, for example in Brussels, Milan, Paris and Nantes, are often undocumented immigrants.²⁷

This is because on digital platforms such as Deliveroo or Uber Eats, to become a delivery driver, one needs to have self-employed status, for which a work permit is required.

²⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work*, 9 December 2021, COM(2021) 761 final available at: eur-lex.europa.eu.

²⁶ BERNARD, *UberUsés, Le capitalisme racial de plateforme à Paris*, Londres- Montréal, 2023; GEBRIAL, "Racial platform capitalism: Empire, migration and the making of Uber in London", *Environment and Planning A: Economy and Space*, 2022, p. 1 ff; VAN DOORN *et al.*, "Migration and Migrant Labour in the Gig Economy: An Intervention", *Work Employ Soc*, 2020, p. 1099 ff; ILO, *Towards decent work for young refugees and host communities in the digital platform economy in Africa*, 2021, available at: www.ilo.org.

²⁷ "Food-Delivery Couriers Exploit Desperate Migrants in France", *The New York Times*, 16 June 2019, available at: www.nytimes.com; "Profession: coursier sans papiers", *Le Soir*, 11 octobre 2021, available at: www.lesoir.be; "55% des coursiers contrôlés par la justice sont sans papiers", *L'Echo*, 30 avril 2022, available at: www.lecho.be; "Caporalato sui rider, il tribunale di Milano commissaria Uber Italy", *Il Sole 24 Ore*, 29 maggio 2022, available at: www.ilsole24ore.com.

In practice, some precarious workers find ways to make money by taking advantage of those who are more precarious than they are. In this case, minors and undocumented workers. The process is quite simple. An adult and legal resident registers with the platform(s) of their choice. To do so, they must first register as 'self-employed' and prove their age by presenting an identity card. But once their account has been validated by the platform, there are no checks that prevent them from making their profile available to others who are unable to create their own. Contacts take place via Facebook or secure messaging, or even directly on the street. According to the NYT investigation, smugglers recover between 30% and 50% of the sums earned from their 'subcontractors'.

And even for those who do this work on their own and legally, it is not always clear to what extent platform workers are entitled to social protection and other labour rights. The situation of platform workers can vary significantly between countries and even over time, as labor courts occasionally interpret national legislation to provide greater rights for this specific category of worker.²⁸

In Belgium, the national statistics institute (Statbel) recently examined the extent to which platform workers are entitled to unemployment benefits, sick leave and compensation for accidents at work.²⁹

51% of platform workers are not insured against occupational accidents, 66% are not insured against illness and 73% are not protected in the event of unemployment. Those who claim unemployment benefits do so mainly through the platform itself, rather than through insurance. In contrast, sickness and work accident insurance is more often obtained through another job or supplementary insurance. When considering all three social protection measures together, 42% of platform workers lack any form of protection against unemployment, sickness, or work-related accidents. Additionally, 43% have one or two insurances, while only 15% have all three. Therefore, one thing Mr Adhaa may not know, or may not be thinking about at the moment, is that the work he is doing does not allow him to build up solid social security rights. Being tied to his online platform through a self-employment relationship (the platform is his only 'client'), Mr Adhaa, like his many colleagues,

²⁸ To date, there have been more than 100 court decisions concerning the employment status of people working through digital work platforms. In most cases, the rulings have confirmed that they were wrongly classified as self-employed and that they should actually be considered as workers. These took place in Belgium, Germany, Denmark, Spain, Finland, France, Ireland, Italy, the Netherlands and Sweden. See: HIEBL, "Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions", *Comparative Labour Law & Policy Journal* (forthcoming), available at: <www.ssrn.com/abstract=3839603>, or at: <[www.dx.doi.org/10.2139/ssrn.3839603](https://doi.org/10.2139/ssrn.3839603)>.

²⁹ Statbel, *Working through digital platforms*, 2023, available at: <www.statbel.fgov.be>.

does not pay mandatory social security contributions and is therefore not entitled to adequate insurance in case of illness or accident, let alone unemployment. Moreover, his status as a migrant, i.e., as a person in international mobility, makes these disadvantages even more obvious. Perhaps the meagre income he receives will not even allow him to reunite with his family, as he so much dreams of doing.

3. IT IS ABOVE ALL THE STATUS OF ‘WORKER’ THAT PROTECTS THE SOCIAL RIGHTS OF MIGRANTS

The issues we have outlined so far are just some of the problems that usually affect migrants when working in so-called atypical employment relationships.

To better contextualise the problem, we should consider that social protection systems, on the one hand, are very different across the European Union and, on the other hand, face similar challenges.

National social security systems in Western Europe were established during the Fordist era of mass production. In the past, employment relationships were often characterised by full-time, open-ended contracts between an employee and an employer. However, over the last two decades, the labour market has been profoundly changed: temporary, part-time and casual work has increased under the impetus of globalisation, technological change and demographic developments. Careers have become less linear, with more frequent transitions between labour market statuses (active/not active, working/unemployed, etc.) and combinations of statuses (self-employed, independent or a mixture of the two).³⁰

The advent of digitalization has further accelerated these changes by giving rise to highly flexible forms of work, including platform work. In most cases, the social protection systems of different EU countries follow these changes, rather than trying to govern and anticipate them. They adapt to the destructuring and restructuring of labour

³⁰ JESSOP, “The Welfare State in the Transition from Fordism to Post-Fordism”, in JESSOP *et al.* (eds), *The Politics of Flexibility: Restructuring State and Industry in Britain, Germany and Scandinavia*, Cheltenham, 1991, p. 82 ff. See also: ROBERTS, “A short history of social security coordination”, in JORENS, *50 years of social security coordination - Past, present, future*, available at: <www.op.europa.eu>; CALDARINI *et al.*, “The ‘place’ of atypical work in the European social security coordination: A transnational comparative analysis (Belgium, France, Germany, Italy, Slovenia, Spain, Sweden, United Kingdom)”, Centre for the Study of European Labour Law Massimo D’Antona (CSDLE), Working Paper, No. 2, 2014, available at: <www.csdle.lex.unict.it>; CALDARINI, “Les effets de l’emploi atypique sur la protection sociale des travailleurs migrants”, *Courrier hebdomadaire du CRISP*, 2021, available at: <www.cairn.info>; CALDARINI, “Atypical work and the social protection of migrants in Europe. An analysis based on real cases”, Policy Study, FEPS, July 2022, available at: <www.feps-europe.eu>.

markets and the multiplication of so-called atypical categories, introducing in many cases special social protection measures, reserved for certain categories of workers.³¹

Self-employment has also changed significantly in recent years, and today the term self-employment increasingly refers to forms of work in a subordinate relationship. This change makes migrants, who very often work in atypical employment relationships, particularly vulnerable, as it makes their very status as ‘workers’ opaque, fragile and subject to different interpretations.

Faced with increasingly heterogeneous national social security systems, these workers, characterised by high geographical mobility and low employment protection, are often confronted with two categories of obstacles at the same time: on the one hand, low wages and high income instability, and on the other hand, asymmetrical social rules which, instead of guaranteeing greater protection to the most precarious workers, in many cases exclude them from the benefits normally granted to other categories of mobile workers.³²

As we will see in the following pages, this can have deleterious effects on people’s social security, but also on other rights particularly related to their status as ‘foreigners’. This situation is hardly compatible with the idea of social protection for mobile workers, which is one of the fundamental pillars on which the EEC and then the current EU were founded.³³

To sum up, our basic thesis is that the social protection that should normally be guaranteed to every worker is weakened when it’s unclear whether the person in question is a ‘worker’ in the strict sense. In the case of migrant workers, whether they are EU or third-country nationals, their social rights are primarily protected by their status as ‘workers’ within the existing European and national legal frameworks. However, this very status is called into question when a migrant works under non-standard contracts.

4. THE MAIN PROBLEMS POSED BY NON-STANDARD WORK TO THE SOCIAL PROTECTION OF MIGRANT WORKERS

The extent of our social security entitlements hinges on the duration of our employment and the contributions we make in both our country of origin and our

³¹ FUDGE, “The gig economy”, *cit. supra* note 4; FUDGE, “The platform economy”, *cit. supra* note 4; HARGREAVES *et al.*, *cit. supra* note 9.

³² CALDARINI *et al.*, *cit. supra* note 30.

³³ CALDARINI, “Les effets”, *cit. supra* note 30.

current country of domicile. For other people, however, the situation can be much more complex. Over the course of their lives, many migrants live and work in more than one country: not only their country of origin and their current country of residence, but also other countries, both inside and outside the European Union.³⁴

Moreover, within the national social security systems of EU countries, only legal migrants are granted equal treatment. With the exception of primary and emergency health care in some countries, irregular migrants are thus deprived of basic social protection. Even if a migrant has legal residency in the country, access to social security is typically granted on the condition that they are employed with a regular labor contract.³⁵ This automatically excludes all those working in the informal economy, even if they have been working in the country for several years.

The EU regulations, which aim to coordinate the different national systems without harmonising them, reflect this same approach: the primary objective was therefore to protect permanent full-time workers, generally men with families to support, against the risks of illness, unemployment, accidents and old age.³⁶ This corresponds to a model of society in which the course of people's lives and the accidents that may occur are predictable and consequential, since they are determined by distinct social stages, roles and status: birth, study, work, inactivity and death. In such a context, there is little doubt that a worker is a worker.

Today this model represents only a part, though still an important one, of the world of work. In all countries, to varying degrees, new employment relationships have emerged that depart from the standard rules, and therefore from the social protection and insurance normally reserved for employees.

To compensate for this lack of social protection, national schemes have gradually made way for other forms of extraordinary, partial, hybrid, complementary - in one word, atypical - and above all less robust forms of protection.³⁷

³⁴ According to Eurostat data, in 2021 there were 3.7 million arrivals due to international immigration into the EU, of which 2.3 million entered the EU from non-EU countries and 1.4 million people were already resident in an EU Member State and emigrated to another Member State. In addition, around 1.1 million people emigrated in the same year from the EU to a country outside the EU. In total, around 2.5 million people left an EU Member State to emigrate to another EU Member State or to a country outside the EU. Eurostat data for the years prior to 2021 confirm the same trends. Data available at: <www.bitly.ws/JBEM>.

³⁵ VINTILA and LAFLEUR, "Migration and Access to Welfare Benefits in the EU: The Interplay between Residence and Nationality", in LAFLEUR and VINTILA (eds), *Migration and Social Protection in Europe and Beyond (Volume 1)*, Cham, 2020, pp. 1-32. See also: Agence des droits fondamentaux de l'Union européenne et Conseil de l'Europe, *Manuel de droit européen en matière d'asile, de frontières et d'immigration*, Office des publications de l'Union européenne, 2020, pp. 302-306, available at: <www.fra.europa.eu>.

³⁶ GIUBBONI *et al.*, *Coordination of Social Security Systems in Europe*, Luxembourg, 2017; CALDARINI *et al.*, cit *supra* note 30.

³⁷ CALDARINI *et al.*, cit *supra* note 30.

To make the framework even more complicated, a new wave of atypical employment relationships emerged at the turn of the 2010s, with the advent of so-called platform economies.³⁸ Companies operating in this new field push the logic of standardisation and outsourcing of tasks to the extreme. In this context, work becomes very ambiguous, unstable and uncertain, even more so than with the temporary workers or subcontractors of the 1980s and 1990s. The borders between wage labour and self-employment become permeable and the place of work in society is called into question. It may be that work now occupies only a very small part of a person's life, or that income from work is only an ancillary and complementary element of a person's resources. The very status of 'worker' then becomes fluid. It is no coincidence that the Court of Justice of the European Union (CJEU) is regularly called upon to pronounce on whether or not a person should be regarded, in their particular circumstances, as an employee, a self-employed person or an inactive person, within the meaning of existing European law.³⁹

At the same time, the nature of migration has changed. Until the early 1970s, the migrant was the male worker who took a full-time job and returned to his country of origin at the end of his working life. Today, cross-border mobility is more rapid and diversified. More people change jobs and countries within a few years, having to deal with different social protection schemes and labour law rules, which struggle to communicate with each other.⁴⁰

So, in concrete terms, the main questions concern what happens when people work with an atypical status while in an international mobility situation, and what risks they are exposed to during their migration journey.

As we will see in the following pages, the problems are diverse and complex. For the sake of brevity and clarity, we have divided them into four broad categories: Difficulties in claiming one's periods of work; Difficulties in valuing one's social contributions; Difficulties in exporting unemployment benefits; Obstacles to the right of residence and the status of foreigners. However, the issues do not arise one at a time. On the contrary, they often overlap, and the same person can easily be

³⁸ CURCI, *cit. supra* note 10; DE GROEN *et al.*, *Digital platforms and the future of work in Europe*, Luxembourg, 2022; VAN DOORN *et al.*, *cit. supra* note 26.

³⁹ See, as examples, the following CJEU judgments: Case C-483/17, *Tarola v Minister of Social Protection*, 11 April 2019; Case C-507/12, *Jessy Saint Prix v Secretary of State for Labour and Pensions*, 19 June 2014; Case C-282/11, *Salgado Gonzalez v Seguridad Social*, 21 February 2013; Case C-385/11, *Isabel Elbal Moreno v Seguridad Social*, 22 November 2012; Case C-232/09, *Danosa v LKB Līzings SIA*, 11 November 2010; Case C-85/96, *Martinez Sala v Freistaat Bayern*, 12 May 1998.

⁴⁰ JORENS *et al.*, *Think Tank Report 2008. Towards a New Framework for Applicable Legislation: New Forms of Mobility, Coordination Principles and Rules of Conflict*, Gent, 2008; ROBERTS, *cit. supra* note 30.

exposed to several risks at the same time.

To illustrate these problems, we will use one or two examples, namely situations of migrants, both EU and non-EU nationals, who have suffered a loss of their social rights, on the one hand because of the exercise of their right to free movement and on the other hand because they work as migrants in the grey areas of labour law.⁴¹

4.1. Difficulties in claiming one's periods of work

According to the European social security coordination rules,⁴² insurance bodies must, in order to calculate benefits (e.g., unemployment benefits), 'add up' all the periods of employment and insurance of the person concerned, including those completed in other EU countries or in third countries with which an agreement has been established.⁴³

This principle cannot be applied when the periods of work carried out in another country are not subject to compulsory social security contributions or the obligation only concerns certain areas of social security.

In such cases, if a person works for a period of time without any obligation to pay social security contributions in Member State A, where they may benefit from certain social advantages reserved for this type of employment, and then moves to member state B, they lose the benefits to which they were entitled in member state A, and does not acquire any new rights in Member State B.

The most well-known case is that of so-called marginal occupational activities, known mainly as 'mini-jobs' (*Geringfügige Beschäftigung*). Present in the German Social Security Code since the 1970s, this type of work was reorganised and strengthened in 2003, within the so-called Hartz reform.

Until 2012, workers whose mini-jobs did not exceed the salary threshold of €400 per

⁴¹ These are fictitious examples, but inspired by real situations, which we have actually observed and ascertained. A curiosity for the reader: having to invent fictitious names to guarantee anonymity, the people mentioned in our examples have names taken from Members of the European Parliament.

⁴² The coordination of social security systems within the EU aims at ensuring that each EU citizen and third country national residing in the EU has fair access to social security regardless of the country where they reside. Social security coordination law has been a fundamental pillar of the free movement of people since the inception of the European integration process. Envisaged by the 1951 Paris ECSC Treaty, a comprehensive regime of the coordination of national social security systems was established as early as 1958 by the foundational EEC regulations 3 and 4. Since then, EU social security coordination law has co-evolved in tune with the deepening of the integration process as well as with its expansion and the gradual accession of new Member States up to the enlargement in 2004-2007. Currently, coordination rules are provided for by the Regulation (EC) 883/2004 and its Implementing Regulation (EC) 987/2009.

⁴³ DE WISPELAERE *et al.*, *Aggregation of periods for unemployment benefits Report on UI Portable Documents for mobile workers*, Luxembourg, 2021.

month and the hourly limit of 15 hours per week were only insured against occupational accidents. Today, the salary threshold is set at €520, the 15-hour limit has been abolished, and exemption from social security contributions has been made ‘optional’ (i.e., the employer can propose to the worker to waive their social security rights).⁴⁴

Originally designed to provide a secondary income for married women whose social security is provided by their spouse, or to legalise casual work for employees already covered by social security in the general scheme, mini-jobs are now a mass phenomenon in Germany. For about 4.1 million workers (roughly 10 per cent of the total workforce) so-called mini-jobs represent their main job. Another 3.0 million workers hold a mini-job as a secondary job, alongside a main job.⁴⁵

Similarly, in the UK, earned income below a certain annual limit benefits from the *small earnings exception*, which exempts the worker from social security contributions and thus logically excludes them from any insurance scheme. This limit is £12,570 from 6 July 2022.⁴⁶

Let us take a concrete example, using fictional names and personal data to protect people’s identities.

Ms Bartolo, 26, Italian, and her partner Mr Chaibi, 28, a Tunisian national, both normally resident in Italy, settled in UK in 2019, looking for work. Finding nothing better, they initially take up occasional work for a delivery platform, benefiting from the *small earnings exception*.

With the arrival of the Covid-19 pandemic, the entire restaurant industry goes into crisis. As a result, Ms Bartolo and Mr Chaibi lose their jobs and decide to return to Italy.

If they had stayed in the UK, they would both have been entitled to *Income-based jobseeker’s allowance*, i.e., non-contributory unemployment benefits paid according to income. In Italy, however, unemployment benefit is contributory only and therefore the work they did in London does not open up any opportunities for entitlement.

The pair therefore apply for *Reddito di cittadinanza*, a non-contributory minimum income. However, their application is rejected by the Italian National Social Security Institute (INPS), as one of the conditions to access this benefit is to have resided in Italy for at least 10 years, the last two of which must have been continuous.

In short, if, instead of emigrating to London, they had remained in Italy, Ms Bartolo and Mr Chaibi would have been entitled to the *Reddito di cittadinanza*. If, once emigrated, they had maintained their residence in UK, they would have been

⁴⁴ Information available at: <www.deutsche-rentenversicherung.de>.

⁴⁵ KONLE-SEIDL, “Precarious but popular? The German mini-job scheme in comparative research on work and welfare”, *Journal of International and Comparative Social Policy*, 2021, p. 293 ff.

⁴⁶ See information available at: <www.taxaid.org.uk/guides>.

entitled to *Income-based jobseeker's allowance*.

*Contrary to the principles of the CJEU, the fact that these two people exercised their right to free movement means that their social benefits are reduced.*⁴⁷

Contracts without compulsory social security contributions, similar to those existing in Germany and the UK, can also be found in Austria, Slovenia and Switzerland.⁴⁸

In Spain, in August 2010 the socialist government of José Luis Rodríguez Zapatero received a letter from the European Central Bank suggesting the creation of 'mini-jobs' similar to the German ones, with wages of €400, significantly lower than the Spanish minimum wage, which was €541 at the time. This was one of the conditions for the European Central Bank to continue buying Spain's debt.⁴⁹

4.2. Difficulties in valuing one's social contributions

The vast majority of legal systems in the world provide for a 'binary division' between employment and self-employment, with employment serving as the basis for labour regulation. However, some employment relationships can be ambiguous if the rights and obligations of the parties involved are unclear, or if there are grey areas in the law.

In these cases, the ILO uses terms such as 'economically dependent work' or 'legally independent but economically dependent work' to refer to all relationships in which the worker provides services to an enterprise under a contract other than a salaried contract, while depending for their income on one or two clients/employers, from whom they receive instructions on how the work is to be performed. The worker is thus classified as self-employed, independent, when in fact they are in an employment relationship.⁵⁰

⁴⁷ According to the established case law of the Court of Justice of the European Union (CJEU), "Migrant workers must not lose any entitlement to social security benefits, or suffer any reduction in the amount of benefits, by reason of the fact that they have exercised their right to freedom of movement under the Treaty". See, for example, the following rulings: C-352/06, *Brigitte Bosmann v Bundesagentur für Arbeit - Familienkasse Aachen*, 20 May 2008; C-611/10, *Waldemar Hudziński v Agentur für Arbeit Wesel – Familienkasse*, 12 June 2012; C-612/10, *Jarosław Wawrzyniak v Agentur für Arbeit Mönchengladbach – Familienkasse*, 12 June 2012; C-515/14, *Commission v Cyprus*, 21 February 2016; C-134/18, *Maria Vester v Rijksinstituut voor ziekte- en invaliditeitsverzekering*, 14 March 2019. To find out more: Directory of European Union domestic policy case law, 4.04: "Free movement of persons and services", available at: <www.curia.europa.eu>.

⁴⁸ CALDARINI *et al.*, *cit. supra* note 30.

⁴⁹ The ECB letter did not push the Zapatero government to change labour legislation in this direction, but it was taken into account in a subsequent agreement reached between the Socialists and the Popular Party to enshrine the binding principle of fiscal discipline in the Spanish Constitution (El Pays, 'ECB asked Spain for wages cuts in return for bond purchases Madrid', December 07, 2011.

⁵⁰ ILO, Recommendation on Labour Relations No. 198, 15 June 2006.

As a result, workers do not enjoy the protection offered by labour law, particularly as regards minimum wages, social security and sick leave. Moreover, in many cases they risk being deprived of the full exercise of certain fundamental rights usually reserved for employees, such as freedom of association and the right to collective bargaining.

If the person working with one of these statuses is a migrant, or at least a person who is likely to migrate in the future, they are involuntarily exposed to further discrimination, which occurs when insurance periods acquired in one country are not recognised in another.

Indeed, European social security coordination rules states that periods of work completed under the legislation of one state are only taken into account in another state if those periods would also have been considered as periods of insurance under the legislation applicable there.⁵¹

The so-called ‘para-subordinate contracts’ introduced into Italian labour law in the 1990s are an example in this respect.⁵²

In short, under Italian law, the status of a ‘para-subordinate’ worker is equivalent to that of a self-employed person for tax purposes, while the nature of the employment relationship with the client/employer is comparable to that of an employee. As far as social security is concerned, these workers are affiliated to the self-employed scheme, with the addition of insurance in case of job loss, which does not offer the same level of protection as employees.⁵³

Since it is a hybrid form of social insurance, created specifically for the national labour market, social security institutions in other EU countries may consider periods of work carried out in the Italian para-subordinate employment scheme as equivalent to self-employment, and consequently not take them into account for unemployment benefits.

As we see in the example below, this type of problem does not only concern Italian workers. In fact, there are many workers from third countries who work in

⁵¹ Article 61 of the above-mentioned Regulation (EC) No 883/2004.

⁵² In most cases, these workers suffer low wages, frequent unemployment spells and are entitled to lower welfare guarantees than employees, with respect to both pension benefits and maternity, sickness, family and unemployment allowances (RAITANO, “Italy: Para-subordinate workers and their social protection: What Works for Non-standard Workers?”, in OCDE, *The Future of Social Protection : What Works for Non-standard Workers?*, 2018, p.145 ff; LAMINE and ROCCA, “Subordination and para-subordination in Italy, France and the United Kingdom. Aspects of comparative law”, in GILSON (ed.), *Subordination and Para-Subordination: Between Legal And Economic Dependence*, Louvain-la-Neuve, 2017, p. 83 ff).

⁵³ The unemployment benefit for para-subordinates, DIS-COLL, is payable for half of the months worked between 1 January of the previous year and the end of the contract, up to six months. The standard unemployment benefit is payable for half of the months worked over the previous 48 months, up to 24 months.

Italy with contracts of this type, and who in times of crisis migrate back to other European countries where the economic situation is more favourable.

Ms Kanko, 35, is a PhD student from a non-European country. She moved to Italy in 2016 to follow a six-month postgraduate course. To make ends meet, during this time she works through a domestic service platform, and her social security contributions are paid into the insurance fund for para-subordinate workers. In 2017, Ms Kanko obtained an eight-month fixed-term contract at a university in Belgium, after which she remained unemployed.

Currently, in Belgium, in order to be eligible for unemployment benefits, the claimant must prove a certain number of working days over a certain period of time. In Ms Kanko's case, she has to prove at least 316 days of work in the last 21 months.⁵⁴ This can also be done by adding up work periods from different European countries. However, according to the Belgian Labour Office, the contributions paid in Italy are the result of a period of insurance for self-employed persons, which does not entitle her to unemployment benefits in Belgium.

If she had remained in Italy, Ms Kanko would have been entitled to unemployment benefits specifically provided for para-subordinate workers (the so-called DIS-COLL).⁵⁵ Having moved to Belgium, where she continued to pay her social security contributions, she is not entitled to her benefits either in Belgium or in Italy.

As in the previous example, *the fact that this person has exercised their right to free movement leads to a reduction in their social security benefits, which would not have occurred if their status as a salaried worker had not been contested, and this is contrary to the principles of the CJEU*.⁵⁶

If, other things being equal, Ms Delli had worked in Spain rather than Italy, she would have been entitled to combine her six months of work in Spain with her eight months of work in Belgium, without the exercise of her right to free movement leading to the loss of her social security benefits. This is because in Spain, in order to achieve effective equality in terms of social protection between self-employment and dependent work, Law 20/2007 introduced the status of economically dependent self-employed worker (*Trabajador autonomo economicamente dependiente*). People working with this status pay compulsory contributions to the *Cese de actividad*, an insurance benefit equivalent to unemployment for employees.

Unlike in Italy, the working periods of Spanish economically dependent self-

⁵⁴ CALDARINI, "Dal patto sociale al contratto di solidarietà tra le generazioni. Origini e funzionamento del sistema di sicurezza sociale in Belgio", *Rivista Italiana di Politiche Pubbliche*, 2006, p. 133 ff.

⁵⁵ Decreto-legge 4 marzo 2015, n. 22 (GU 06/03/2015) [Decree-Law of 3 March 2015, No. 22].

⁵⁶ See footnote 47.

employed workers must be taken into account for unemployment purposes, in Spain and in the other EU countries.

4.3. *Difficulties in exporting unemployment benefits*

In the UK, *Jobseeker's Allowance* (JSA) is a benefit paid to people who are not working, or who are only working part-time, and who are actively seeking work. There are two types of JSA. *Contribution-based JSA* is a traditional contributory unemployment benefit, i.e., it is provided on the basis of a certain minimum period of work for which social security contributions have been paid. *Income-based JSA* is a non-contributory benefit; it is granted to jobseekers who are not entitled to contributory benefit: because they did not pay sufficient social security contributions, because their contribution-based JSA came to an end, or because they were 'self-employed'. For many people working with an atypical status, such as platform workers, income-based JSA is the only unemployment benefit they can hope for at best.

Under certain conditions, the beneficiary of a non-contributory JSA may also be entitled to financial assistance to pay part of their mortgage or rent. This is because non-contributory JSA is more like social assistance than a form of unemployment benefit.⁵⁷

Similarly, in an increasing number of countries, social protection for the most precarious workers has been progressively limited to palliative measures, more akin to social assistance than to social security. In most cases, these are job-loss allowances, but access to them is based on income verification rather than social contributions. Examples include the basic jobseeker's security in Germany (*Arbeitslosengeld II*, *Sozialgeld*), the jobseeker's allowance in Ireland, unemployment assistance in Estonia (*töötutoetus*), the so-called labour market support benefits introduced in Finland,⁵⁸ or non-contributory mixed benefits in case of unemployment under cantonal legislation in Switzerland.⁵⁹

In addition to the material impoverishment that these measures entail, the unpleasant surprise comes when, in order to find work in another country, the

⁵⁷ CALDARINI, *Atypical work and the social protection of migrants in Europe. An analysis based on real cases*, Brussels, 2022.

⁵⁸ Unemployment Benefits Act 1290/2002 (Soumen Säädoskokoelma, 2002-12-31, No. 1290, pp. 5303-5342)

⁵⁹ European Commission, ICF GHK, Milieu Ltd, A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence - Final Report, Luxembourg, 2013, available at: <www.op.europa.eu>; DE CORTAZAR and RENTOLA (eds.), *Coordination of Unemployment Benefits. Think Tank Report*, Gent, 2012).

jobseeker is forced to give up exporting their unemployment benefit. In fact, within the framework of European social security coordination, a person unemployed in one country can move to another country to look for work, keeping their benefits for up to three months.⁶⁰ This so-called export principle, however, only applies to contributory benefits.⁶¹ Among the non-exportable benefits, there are many that are formally means-tested and not contributory, but are in *fact* unemployment benefits.

Moreover, since it is a social assistance and not a real unemployment insurance, further restrictions can be imposed depending on the nationality and residence of the person. In Germany, for example, several categories of foreigners are not entitled to basic social assistance for jobseekers: those who have resided in the country for less than five years, those whose right of residence is based solely on job-seeking, those whose right of residence is directly or indirectly based on their children's right to attend school, and asylum seekers.⁶²

4.4. Obstacles to the right of residence and the status of foreigners

Due to the fluidity of their socio-economic status, the instability of their employment and the resulting low income, people working on non-standard contracts in countries of which they are not nationals find it more difficult to access certain rights linked to their foreign status. In the following we will examine three main aspects of the problem: family reunification, acquisition of citizenship and residence permit. We will take the case of Belgium as a reference, but similar situations can also be found in other EU countries.

In order to reunite their family, the applicant must generally prove a stable income of at least a certain amount, established in each country according to the income thresholds that would otherwise entitle them to social assistance. In other words, one must be able to support themselves and their family members so that the arrival of the family does not entail social costs for the host country.

In Belgium, this stable income must be equivalent to at least 120 per cent of the minimum income allowance. At the time of writing, the minimum income in

⁶⁰ The three-month period may be extended by the competent institution to a maximum of six months.

⁶¹ To be more precise, the regulations on social security coordination apply in principle to all social security legislation, both contributory and non-contributory (Article 3 of Regulation 883/2004 cited above). The mere fact that a benefit is not based on contributory criteria is not sufficient to exclude it from the objective scope of coordination. However, Regulation 883/2004 stipulates that some non-contributory benefits remain subject to the residence clause and therefore cannot be exported outside the Member State that establishes and grants them (Article 70 and Annex X).

⁶² Information available at: <www.stmas.bayern.de>.

Belgium for a person with a dependent family is €1,674 net/month (effective from 1 July 2023)⁶³: 120 per cent of this amount gives a monthly income of €2,008.

Only the income of the applicant is taken into account, not that of the family members to be reunited. Workers who do not have a proper employment contract and a fixed income are almost always unable to reach this minimum threshold. Moreover, not all employment income is equal before the law. Income from temporary employment is only taken into account if from continuous employment for at least one year or if it has been obtained after a period of unemployment. Income from a social integration contract is completely excluded, as if it were a type of social assistance instead of work.⁶⁴

Moreover, with regard to access to citizenship, in addition to the various conditions of residence and social integration, in each EU country the applicant must generally demonstrate that they have adequate financial resources to provide for themselves and for their family.

According to a recent report of the European Migration Network (EMN), the applicant's economic or financial situation or standard of living is taken into account in 14 EU Member States when deciding whether to grant citizenship.⁶⁵

To prove a sufficient level of financial independence, national authorities usually require regular payslips, employment contracts, or other proof that the applicant has sufficient assets. This information is requested by the authorities to assess whether the applicant is likely to have recourse to social assistance.

In the Belgian nationality code, one of the conditions laid down is to “economic participation [...] by having worked at least 468 days in the last five years as an employee”. Until 2016, days worked under a social integration contract were not taken into account, as if this type of work was not ‘real work’. In January 2017, the Hainaut Court rejected this interpretation, stating that days worked under such a contract are fully eligible for the purposes of obtaining citizenship.⁶⁶ Based on this case law, this obstacle should, in principle, have been removed. However, according to the testimonies gathered for the purposes of this publication, the Court's order only partially modified the practice of the Aliens Office. In *reality*, people who have worked under a socio-professional integration contract must prove 624 days of work, instead of the 468 normally required, as if one day of work of this type was equivalent

⁶³ Information available at: <www.primabook.mi-is.be/fr/droit-lintegration-sociale/montants-ris>.

⁶⁴ It is an employment contract established by article 60 of the Law of 8 July 1976, which allows Public Social Welfare Centres (CPAS) to provide work to a person in order to reintegrate them into the social security system and the labour market. The duration of the contract is established in accordance with the legislation on unemployment benefits (CALDARINI, “Les effets”, *cit. supra* note 30).

⁶⁵ European Migration Network, *Pathways to Citizenship for Third-Country Nationals in the EU*, 2022.

⁶⁶ Tribunal de première instance du Hainaut (division de Mons), order, 11 January 2017 (Wautelet, 2017).

to three quarters of a day under a standard contract.⁶⁷

In France, financial independence can be demonstrated through salaries, the return to employment benefit (ARE = *Allocation d'aide au retour à l'emploi*), commercial and non-commercial profits and income from land or movable property. However, any resources must be of French origin and derive from a stable profession in France. In Austria, lack of an adequately secure mean of subsistence is one of the most common reasons for refusing citizenship applications. In Ireland, while not set out in law, in practice it is a requirement to submit proof of means of income as well as information on social welfare payments. Finnish law requires applicants to prove they were in receipt of a reliable income stream during the period of residence.⁶⁸

It is clear that foreign workers without a standard employment contract and without a fixed income often face major obstacles.

Other restrictive interpretations may directly affect workers, going so far as to order their expulsion from the national territory if they are working under an atypical contract without a permanent residence permit.

Third-country nationals are not the only ones exposed to this risk - immigrants from other EU countries are exposed to the same threat. Between 2008 and 2019, almost 17,000 EU citizens, or family members of such a citizen, were deprived of their right of residence, and many of them received a removal order from Belgian territory. In short, they were expelled.⁶⁹

Several thousands of them were in Belgium as workers, whether employed or self-employed, or as recipients of unemployment benefits after short periods of work, or as casual workers, alternating between short periods of work and periods of social assistance. In short, the argument used is that these people have no 'real' economic activity and therefore cannot be considered as 'workers', or that they are considered as 'unreasonable burden' to the Belgian social assistance system.

In this respect, Articles 7(1) and 14(4) of EU Directive 2004/38 state that any EU citizen, or any family member accompanying or joining an EU citizen, has the right to reside in the territory of another Member State and may in no circumstances be

⁶⁷ CALDARINI, "Les effets", *cit. supra* note 30.

⁶⁸ European Migration Network, *Pathways to Citizenship*, *cit. supra* note 65.

⁶⁹ These expulsion orders concern people who have been resident in Belgium for more than three months but less than five years and who are considered to be a burden on the state because they do not have sufficient income to support themselves. Even if not materially expelled from the country, these people deprived of their residence permit cannot work legally, nor have access to social services such as housing or unemployment benefits (CALDARINI, "Belgique. Citoyenneté européenne: de la liberté de circulation à la liberté d'expulsion", *Chronique internationale de l'IRES*, 2016, p. 3 ff); NEVEN, "Citoyens européens, CPAS et expulsions : le mode d'emploi de l'Office de étrangers", *La Revue nouvelle*, 2014, p. 5 ff; VAN DEN BOGAARD et al., *Moving to Belgium as an EU citizen*, Brussels, 2021.

expelled “whether they are an employed or self-employed person”. However, as this is a directive and not a regulation, the implementation of this provision has to be done through an act of transposition into national law. This leaves member states a margin of appreciation, which can easily lead to arbitrary or even abusive decisions.

Thus, the Belgian authorities have systematically revoked the right of residence of hundreds of foreign workers whose professional status might suggest that they were not ‘real workers’: artists, intermittent workers, platform workers, small self-employed workers, and other forms of low-income workers alternating with periods of unemployment or compensated by supplementary allowances. The Belgian Aliens Office considers that these people are not “real workers” and are rather an “unreasonable burden” on the national social system.⁷⁰

In this regard, it should be recalled that, according to Article 7 of Directive 2004/38, an EU citizen who has involuntarily lost their job “retains the status of worker” and therefore “has the right of residence in the territory of another member state” if they have worked “for at least one year”. This means that an EU citizen exercising their right to free movement, or the family member of such a citizen, irrespective of nationality, acquires once and for all the status of ‘worker’, and with it a right of permanent residence, even if they subsequently become involuntarily unemployed.

5. CONCLUSIONS

This paper has discussed the deficiencies of national social security systems and the European coordination regulations in adequately including individuals, especially migrants, in a secure and stable career path. It has highlighted the restrictive nature of many national norms concerning foreigners, which limit their access to essential legal mechanisms of integration, such as family reunification, nationality, and residency permits. The legal status of immigrants in practice determines a “civic stratification” of the foreign population⁷¹ leaving migrant workers in the gig economy in a vulnerable position.⁷²

In light of this, it is necessary to reflect on the opportunities for protecting migrant workers in the gig economy, focusing on three emerging issues: labour regulation (trade union and organizational representation; and social integration and the fight

⁷⁰ CALDARINI, “Belgique. Citoyenneté européenne”, *ibidem*.

⁷¹ AMBROSINI, *Sociologia delle migrazioni*, Bologna, 2011.

⁷² RIGO, *cit. supra* note 21.

against discrimination).⁷³

With regard to the first topic, the developing of comprehensive policies and regulations that specifically address the unique challenges faced by migrant workers in the gig economy is crucial. These regulations should encompass various aspects such as minimum wages, fair working hours, and occupational health and safety standards. Additionally, they should consider the specific vulnerabilities faced by migrant workers, including language barriers, limited access to information, and potential exploitation. By implementing robust labor regulations, governments can establish a level playing field for all workers, regardless of their immigration status, and protect them from exploitation and unfair treatment.

On the second issue, promoting trade union and organizational representation among migrant workers in the gig economy is vital for improving their working conditions and amplifying their voices. Trade unions play a pivotal role in advocating for workers' rights, negotiating better employment terms, and providing legal support. It is important to create avenues for the formation of trade unions or alternative forms of worker representation that cater specifically to the needs and circumstances of migrant workers. Through collective bargaining and organized actions, these representative bodies can address the power imbalances inherent in the gig economy and work towards improving the overall well-being of migrant workers.

Last but not least, on the topic of social integration and the fight against discrimination, achieving social integration is a multi-faceted process...that requires efforts from both host societies and migrant workers themselves. Host societies can foster inclusivity by promoting intercultural understanding, combating xenophobia and discrimination, and creating opportunities for social interaction and integration. It is essential to challenge stereotypes and prejudices through educational initiatives, public awareness campaigns, and community-building activities. Simultaneously, migrant workers should be provided with support and resources to navigate the social landscape of their destination countries, including language and cultural training programs. By addressing the underlying causes of discrimination and exclusion, societies can foster environments that embrace diversity and promote equal treatment for all.

Therefore, this article has delved into the paradox surrounding the status of "worker" as a tool for protection and integration for immigrants. While being recognized as workers can grant migrants a range of rights and safeguards that promote their inclusion and security, it is paradoxical that this very status is often compromised when individuals

⁷³ DOOGAN, "New mobilities regimes in art", *Work, Employment and Society*, 2019, p. 613 ff.; KUEHN, "Organizing on-demand: Representation, voice, and collective bargaining in the gig economy", *Perspectives on Work*, 2018, p. 29 ff.

engage in the gig economy or other non-standard forms of employment.

At the same time, the article has discussed how protecting migrant workers in the gig economy requires a multifaceted approach that encompasses labor regulation, trade union and organizational representation, and social integration. Governments, platform companies, civil society organizations, and international institutions must collaborate to develop and enforce comprehensive policies that safeguard the rights and well-being of migrant workers. Only then can we aspire to a more equitable gig economy that upholds the dignity, fair treatment, and inclusion of all workers, regardless of their migration status.

9. “HERE IT’S GOOD BUT IT’S BAD, THERE IT’S BAD BUT IT’S GOOD”: EXPERIENCES OF PRECARIOUS WORK AND LIFE AMONG BRAZILIAN MIGRANTS IN RURAL IRELAND

Pilar Luz Rodrigues, Hazel O’Brien, and Tom Boland

SUMMARY: 1. Introduction; – 2. Understanding precarity of migrant workers in the EU and in Ireland; – 3. Research methods of this study; – 4. Commonalities and divergences amongst Brazilian migrants in Ireland; – 5. Brazilian migrant workers in the meat processing industry; – 6. The benefits and drawbacks of Brazilian migrant work in Ireland; – 7. The significance of European citizenship in reducing precarity; – 8. Language barriers; – 9. Conclusion.

1. INTRODUCTION

Along with other European countries, Ireland is expected to experience an increase in the number of migrants, and according to the Migrant Rights Centre Ireland (“MRCI”) “will continue to need migrant workers in the coming years to support an increasingly dependent population”.¹ However, migrants are one of the groups most prone to be engaged in precarious work.² This chapter explores the

¹ See Migrant Rights Centre Ireland, “Facts About Migrant Workers in Ireland”, Migrant Rights Centre Ireland, 2017a, available at: <https://ec.europa.eu/migrant-integration/sites/default/files/2011-03/doc1_19387_526400784.pdf>.

² See International Labour Organization, “Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects”, International Labour Organization, 2016, available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf>.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 213-235.

experiences of precarity with work and life of a specific group of migrant workers; Brazilian migrants living in rural Ireland, particularly in a town named Gort. The migration of Brazilian workers to Ireland's countryside, most of whom are specifically from the city of Anápolis, Goiás, has its origins in the recruitment by Irish meat plants in the 1990s of a group of workers from a closing plant in Brazil. Over the years, the number of Brazilians in rural Ireland has increased considerably, especially in the small town of Gort, known as "Ireland's Little Brazil".

The PhD research which this chapter is based upon³ incorporated 18 months of intermittent fieldwork which included participant observation and interviews. The sociological study aimed to investigate the everyday lived experiences of Brazilian migrant workers with precarity in rural Ireland and sought to understand how different factors contributed to shaping their overall experience as migrants. The research objectives were to examine the social conditions of precarity affecting Brazilian migrant workers and to analyse how they mitigate the challenges of living precarious lives. That study demonstrated that the State, its immigration policies, and the status which they produce create and compound vulnerabilities amongst the Brazilian migrant population in rural Ireland. It also illustrated the costs experienced by Brazilian migrant workers as a result of living in precarity.⁴ This chapter aims to offer an overview of the key challenges faced by Brazilian migrant workers in rural Ireland, informed by this study.⁵ The chapter probes the experience of meat industry workers with Ireland's work permit system, the difficulties faced by undocumented Brazilian workers, the significance of European citizenship in diminishing precarity, and the effects of language barriers on the Brazilians' experience with precarious work.

Section 2 of this chapter provides a review of the literature on precarity of migrant workers in the European Union ("EU") and in Ireland. Section 3 details the research methods used in the study. Section 4 discusses the commonalities and divergences found among Brazilian migrants in Ireland during fieldwork. Four sections of the paper, Sections 5 through 8, analyse the experiences of Brazilian migrant workers in rural Ireland, based on fieldwork. Section 5 addresses the experiences of Brazilian migrant workers specifically in the meat processing industry, Section 6 focuses on the benefits and drawbacks of work among Brazilian migrants in Ireland, Section 7 discusses the significance of European citizenship in reducing precarity, whereas Section 8 centres on language barriers. Finally, Section 9 concludes the chapter.

³ See RODRIGUES, *Mitigating the Effects of Precarity: Brazilian Migrant Workers and Place-Making in Rural Ireland*, PhD Thesis, South East Technological University, Waterford, 2022.

⁴ *Ibid.*

⁵ *Ibid.*

2. UNDERSTANDING PRECARIITY OF MIGRANT WORKERS IN THE EU AND IN IRELAND

For the International Labour Organization (“ILO”),⁶ precarious work is driven by a lack of required language skills and networks in the host country, as well as several other problems including, in some cases, their legal status which may preclude them from enjoying the same rights and benefits bestowed upon citizens. In addition to some sectors being commonly associated with precarious work, the ILO also highlights that:

“A defining characteristic of precariousness is that the worker bears the risks associated with the job, rather than the business that is hiring the worker. In addition, precariousness has been linked to certain demographic characteristics, so that specific attributes of the worker – their sex, ethnicity and place of origin – often predispose them to be channelled into precarious work.”⁷

The work of Pajnik⁸ has contributed to our understanding of the experience of non-EU migrant workers living with precarity in the European Union, and of the impacts that policies have on them. According to Pajnik,⁹ the flexibility of employment in the EU triggered by neoliberalism has simultaneously brought a reduction of the welfare state and an expansion of deregulation. This, in turn, has prompted an increase in the precariousness and vulnerability of workers with the potential for exploitation of workers by employers. This flexibility of employment in the European Union and the resulting precarity at work have impacted both national and third-country workers. However, non-EU migrants are placed in an even more vulnerable situation because of three key factors that shape their precariousness, namely, immigration status, migration or labour market policies, and the attributes of work in specific industries, such as agriculture, construction, and cleaning.¹⁰

Confirming the relevance of these factors for migrant workers in Europe, Pajnik and Bajt¹¹ focus on third country migrant workers in Slovenia. They find that migrant

⁶ See International Labour Organization, *cit. supra* note 2.

⁷ See International Labour Organization, *cit. supra* note 2, p. 18.

⁸ See PAJNIK, “‘Wasted precariat’: Migrant Work in European Societies”, *Progress in Development Studies*, 2016, p. 159 ff.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See PAJNIK and BAJT, “‘Third Country’ Migrant Workers as ‘Third Class Non-Citizens’ in Slovenia”, in PAJNIK and CAMPANI (eds.), *Precarious Migrant Labour Across Europe*, Ljubljana, 2011, p. 97 ff.

workers are faced with higher levels of unemployment or underemployment in comparison to nationals and that many migrant workers are not able to use their skills in the new host country which leads them to engage in low-skilled, temporary, or low paid work. The data show that migrants' experience with work depends substantially on their status, as well as type of work contract or permit, which impacts not only their experience with work but also their access to welfare. Research participants in Pajnik and Bajt's study reported working long hours, earning bad salaries, receiving unfair treatment or coping with a bad attitude of either the boss or co-workers.¹²

Multiple studies have confirmed that these common experiences occur all over Europe in many industries and occupations. For example, Pérez and other authors¹³ investigated the differences in working conditions of migrant workers and national workers in Europe by measuring the exposure of migrant and national workers to work-related health risks. They noted that "most migrants (documented and undocumented) are recruited for the most unqualified and flexible jobs, with unskilled occupations in the service sector currently representing the main source of employment for such movers".¹⁴ Agriculture, manufacturing, and construction are sectors which are common for migrant workers in many countries throughout Europe. The same scholars¹⁵ confirmed that migrants are more susceptible to poor employment conditions and contracts, which leads to a potential of higher health risks.

MacKenzie and Forde¹⁶ conducted a case study in an industry in the United Kingdom ("UK") that provides repackaging services to glass product industries, by interviewing both managers and EU migrant employees to elucidate their different perspectives regarding job roles. They observed:

"While migrant labour has been employed to meet shortages across a range of jobs, including skilled occupations, the reality of the labour market experience is that migrant workers are more likely to be working in lower paid jobs, for which they are overqualified in terms of education and experience and performing often monotonous or physically demanding work in hard conditions."¹⁷

¹² See PAJNIK and BAJT, *cit. supra* note 11.

¹³ See PÉREZ et al., "Differences in Working Conditions and Employment Arrangements Among Migrant and Non-Migrant Workers in Europe", *Ethnicity & Health*, 2012, p. 563 ff.

¹⁴ *Ibid.*, p. 564.

¹⁵ *Ibid.*

¹⁶ See MACKENZIE and FORDE, "The Rhetoric of the 'Good Worker' Versus the Realities of Employers' Use and the Experiences of Migrant Workers", *Work, Employment and Society*, 2009, p. 142 ff.

¹⁷ *Ibid.*, p. 143.

Importantly, MacKenzie and Forde argue that the reasons that these work characteristics have become so entrenched among migrants in Europe derive from processes and decisions made not only by employers, but also by employers' agents, and the State.¹⁸ Such processes are based on recruitment strategies and immigration policies.¹⁹ These actors generally attribute the preponderance of low-paying jobs among migrants to labour shortages and market needs, with migrants ending up holding jobs which have usually been rejected by national workers. In addition to filling the company's demands of long hours and low pay, there is a perception among employers that migrants are good workers.²⁰ The research found that "there was a celebration of perceived compliance and the opportunity to profit from the attributes of these workers at a rate of pay that had previously proved unattractive in the local labour market",²¹ and that employers lamented how migrant workers' attitudes changed over time as they became more familiar with their rights.

Two sets of studies have focused specifically on the experience of precarious migrant workers in Ireland. The first is a series of studies which examined migrant workers from the fishing industry in Ireland,²² and the second is a doctoral thesis which investigated the experience of precarious migrant workers in Ireland under the work permit system in the hospitality, cleaning, and care sectors.²³ The studies focusing on precarious migrant workers in the Irish fishing industry were conducted following an investigation and publication of an article by The Guardian²⁴ which resulted in significant media coverage and prompted action by the Irish government in establishing a Task Force and an Atypical Working Scheme for non-EU workers in the sector.²⁵ These publications denounced that non-EU workers who were

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, p. 150.

²² See MURPHY, DOYLE and THOMPSON, "Experiences of Non-EEA Migrant Workers in the Irish Fishing Industry: Working Conditions, Immigration Status and Enforcement", Maynooth University, 2021, available at: <<https://www.maynoothuniversity.ie/sites/default/files/assets/document/Experiences%20of%20Non%20EEA%20Workers%20in%20the%20Irish%20Fishing%20Industry.pdf>>; MURPHY, "Tackling Vulnerability to Labour Exploitation Through Regulation: The Case of Migrant Fishermen in Ireland", *Industrial Law Journal*, 2017, p. 427 ff.; See Migrant Rights Centre Ireland, "Left High and Dry: The Exploitation of Migrant Workers in the Irish Fishing Industry", Migrant Rights Centre Ireland, 2017b, available at: <<https://www.mrci.ie/app/uploads/2020/01/MRCI-FISHER-REPORT-Dec-2017-2KB.pdf>>.

²³ See COPPARI, *Liminal Lives: How Ireland's Labour Migration Regime Entraps Migrant Households in Hyper-Precarity*, PhD Thesis, National University of Ireland Maynooth, Maynooth, 2019.

²⁴ See Lawrence et al., "Revealed: Trafficked Migrant Workers Abused in Irish Fishing Industry", *The Guardian*, 2 November 2015, available at: <<https://www.theguardian.com/global-development/2015/nov/02/revealed-trafficked-migrant-workers-abused-in-irish-fishing-industry>>.

²⁵ See MURPHY, *cit. supra* note 22.

undocumented men mainly from Ghana, the Philippines, Egypt, and Indonesia²⁶ were in hyper-dependency and hyper-precarity.²⁷

Echoing patterns of employment from across Europe, these Irish-based workers were subject to long hours of work with little opportunity for breaks, sleep deprivation,²⁸ low pay below the minimum wage in Ireland, as well as racial and verbal abuse from employers.²⁹ Murphy³⁰ pointed out that such precarious working conditions and the hyper-dependency of workers in this case were due to the lack of immigration status as the migrant workers studied were undocumented nationals from outside the European Economic Area ("EEA"). As Murphy observes, "there was no legal route to migrate to Ireland for the purposes of working on a fishing vessel".³¹

Coppari³² has examined the experiences of precarious migrant workers in Ireland employed under the work permit system, especially those engaged with work in the hospitality (accommodation and food), and the domestic and the care sectors. Coppari³³ argued that labour migration policies in Ireland, and particularly Ireland's work permit system have led to an understanding of labour migration as a liminal Temporary Migration Regime ("TMR"). Features of the employment permit system, such as "temporariness, (im)mobility, and deportability",³⁴ play a significant role in shaping the experience of migrant workers with everyday precarious life and work. Coppari³⁵ observed a two-tier migration story in Ireland. On one hand there are highly skilled and well-paid labour migrants who are mostly white. On the other hand, there is a system which "largely constructs poorly paid racialised migrants in temporary, low-quality jobs".³⁶ The rigidity of the employment permit policy in Ireland places migrant workers in a vulnerable situation, which impacts them not only in their daily experiences with employment but in their everyday lives.³⁷ It also contributes to experiences of hyper-precarity and entrapment in precarity among migrant workers.³⁸

²⁶ See Migrant Rights Centre Ireland, *cit. supra* note 22.

²⁷ See MURPHY, *cit. supra* note 22.

²⁸ See Migrant Rights Centre Ireland, *cit. supra* note 22.

²⁹ See MURPHY, DOYLE and THOMPSON, *cit. supra* note 22.

³⁰ See MURPHY, *cit. supra* note 22.

³¹ *Ibid.*, p. 422.

³² See COPPARI, *cit. supra* note 23.

³³ *Ibid.*

³⁴ See *ibid.*, p. 19.

³⁵ See *ibid.*

³⁶ See *ibid.*, p. 209.

³⁷ See *ibid.*

³⁸ See *ibid.*

3. RESEARCH METHODS OF THIS STUDY

A qualitative research based on participant observation and semi-structured interviews was chosen as the primary means of investigation for the study which informs this chapter. As the aim of the research was to obtain an in-depth understanding of Brazilian migrant workers' everyday lived experiences and meanings related to their working lives in rural Ireland, the use of a qualitative approach was favoured due to its ability to generate a rapport with participants that develops trust, provides space for wide ranging discussions, and thus creates richer data.³⁹ This study relied on a year and a half of intermittent fieldwork⁴⁰ including participant observation and interviews. Intermittent fieldwork was conducted largely in Gort but also to a lesser extent in the towns of Roscommon, Ennis, and Waterford city. The focus on Brazilian migrant workers in the countryside of Ireland was justified for two reasons. First, a substantial number of Brazilians have opted to locate themselves in the rural areas studied. Second, the literature on migration has focused mostly on migration to cities and urban areas.⁴¹ This offers an opportunity for this study to add to our understanding of patterns and problems within migrant work amongst workers in rural areas.

All fieldwork was conducted between 2018 and 2020. A total of 21 participants were interviewed, which included male and female Brazilian migrant workers under different immigration status' and from different economic sectors. All participants were interviewed in Portuguese, with the exception of one former Irish outreach worker who worked with members of the Brazilian community in Gort and who was interviewed in English. An inductive approach was taken during data analysis⁴². By conducting participant observation with the Brazilian migrant community, the authors gained an insider view of their regular daily lives and struggles. Due to the qualitative approach of the research and the depth of data generated, the following sections of this chapter will incorporate some quotations from participants, to allow their typically-

³⁹ See OAKLEY, "Interviewing Women: A Contradiction in Terms", in SEALE (ed.), *Social Research Methods: A Reader*. London and New York, 2004, p. 261 ff.; See CAMERON et al. (eds.), *Studying Local Churches: A Handbook*, London, 2005.

⁴⁰ See JEFFREY and TROMAN, "Time for Ethnography", *British Educational Research Journal*, 2004, p. 535 ff.

⁴¹ See World Economic Forum, "Migration and Its Impact on Cities", World Economic Forum in collaboration with PwC, 2017, available at: <https://www3.weforum.org/docs/Migration_Impact_Cities_report_2017_HR.pdf>; See MORÉN-ALEGRET and WLADYKA (eds.), *International Immigration, Integration and Sustainability in Small Towns and Villages: Socio-Territorial Challenges in Rural and Semi-Rural Europe*, London, 2020, p. 1 ff.; See WOODS, "International Migration, Agency and Regional Development in Rural Europe", *Documents d'Anàlisi Geogràfica*, 2016, p. 569 ff.

⁴² See BRYMAN, *Social Research Methods*, 4th ed., Oxford, 2012, p. 3 ff.

marginalised voices to be heard and to illustrate their experiences. Pseudonyms have been used instead of participants' real names to assist with anonymity.

4. COMMONALITIES AND DIVERGENCES AMONGST BRAZILIAN MIGRANTS IN IRELAND

Most Brazilians in this study, though not all, shared the State of Goiás as their region of origin. The present research showed that despite this common origin, the Brazilians that migrated to rural Ireland are by no means composed of a homogeneous group. First, there is a gender dimension to the Brazilian labour migration, with men and women working in gendered jobs. Most of the men in the study worked in construction, as kitchen porters, and in the meat processing industry whereas many of the women worked in cleaning. Exceptions to this pattern were very few. Pajnik⁴³ has noted the prevalence of this gendered dimension of certain sectors and has cited cleaning and care as examples among them, highlighting that some of these jobs are considered to be “migrant professions”.

Second, fieldwork revealed that the social and economic conditions of Brazilian migrant workers appear to be significantly affected by their immigration status, as either documented or undocumented migrants. Among the participants in this study, there were those who were documented either by means of European citizenship or by holding work permits. Those Brazilian participants with European citizenship had obtained such status by either having fulfilled the requirements and years of employment with a work permit, marrying an Irish or EU citizen, parenting an Irish child, or through Italian or other EU ancestry, though Italian was the most common ancestry among Brazilians in this study. There were also Brazilian participants who were legally in Ireland as students, particularly as English language students, however this type of migration was not the focus of this study and these migrants accounted for a minority of the Brazilians encountered in the field. The sectors in Ireland that hire migrants under work permits varies each year depending on the shortages of workers for certain jobs and sectors.⁴⁴ A predominant sector hiring

⁴³ See PAJNIK, *cit. supra* note 8.

⁴⁴ The occupations lists for Employment Permits are “subject to twice-yearly evidence based review” to maintain its relevance to the needs of the Irish economy (See Government of Ireland, “Review of Occupations Lists for Employment Permits: Public Consultation Submission Form”, 2019, p. 3, available at: <https://www.mrci.ie/app/uploads/2022/05/mrci_submission_public_consultation_form_for_review_of_occupations_lists.pdf>).

Brazilian workers since the first wave of Brazilian migration in the 1990s and continuing to do so, is the meat processing industry.⁴⁵

Finally, there were those participants who were living and working undocumented in Ireland. Some of these Brazilians came to work or study legally in Ireland and remained in the country after their documents expired, losing their immigration status and becoming undocumented. Others arrived legally as tourists and remained in the country after their permission expired. Jobs held by undocumented migrants interviewed in the study included construction, cleaning (in private homes, businesses, or in the hospitality sector), hairdressing or other jobs in beauty salons, barber shops, as well as cook and kitchen porter in the hospitality sector. It is important to note that although the Brazilians in the study were mostly located in rural Ireland, they did not work with farming or in the agricultural sector. There was only one exception in the study, a participant whose first job in Ireland was on a farm.

Despite the Brazilian participants' diverse experiences of work in Ireland, it is clear that what unites the workers in commonality is that both documented and undocumented Brazilian migrants experience precarious work. The exceptions are those Brazilian participants who have obtained Irish or EU citizenship and who are thus able to live, work, and move around Europe with more ease. Unlike those migrants who are either undocumented or who hold work permits, they have access to social protection⁴⁶ and have less difficulties in obtaining or changing jobs as employment is often prioritised to

⁴⁵ See RODRIGUES, *cit. supra* note 3.

⁴⁶ For instance, for social protection claims in Ireland, a Habitual Residence Condition ("HRC") applies (QUINN et al., "Migrant Access to Social Security and Healthcare: Policies and Practice in Ireland", European Migration Network Ireland and the Economic and Social Research Institute, 2014, available at: <<https://cdn.thejournal.ie/media/2014/07/bkmnext261.pdf>>). Although "habitual residence" is not defined in Irish law, it is understood as a person that "has been here for some time, from a date in the past, and is intending to stay for a period into the foreseeable future" (*Ibid.*, p. 39). According to the European Migration Network Ireland and the Economic and Social Research Institute ("ESRI") some stamps (Irish immigration permissions) also require that non-EEA nationals not become a burden on the State, which "does not have an express legislative basis" and is not clearly defined. In addition, the access that non-EEA national workers on Stamp 1 (given to those on employment permits) have to Jobseekers Allowance is not clear (*ibid.*, p. 40). Furthermore, the "legality of an applicant's residence is fundamental" for accessing social protection, as under the "Social Welfare and Pensions (No.2) Act 2009 an individual must have a right to reside in the State in order to satisfy the HRC" (*ibid.*, pp. 39-40), impacting therefore undocumented migrant workers. Moreover, Pajnik noted that work permits, resident permit requirements, and immigration policies in the EU, "result in migrants' dominant experience of short-term, insecure labour relations that come with low incomes, poor labour conditions and hardly any or no entitlements to social security" (See PAJNIK, *cit. supra* note 8., p. 165). Hennebry also argues that in countries of destination, "migrant workers are often excluded from social protection systems designed for citizens" (See HENNEBRY, "Securing and Insuring Livelihoods: Migrant Workers and Protection Gaps", in MCAULIFFE and SOLOMON, (eds.) *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration*, International Organization for Migration, 2017, p. 1 ff., p. 3).

Irish and EU citizens.⁴⁷ In addition, migrants on work permits have their immigration permissions to live and work in Ireland tied to the employer's will, which precludes them from changing employment without losing such permissions.⁴⁸ These circumstances lead workers to become reluctant to speak out about adverse working conditions, including exploitation, or discrimination at the workplace.⁴⁹

As the fieldwork demonstrated, there are Brazilians with Irish/EU citizenship that also experience precarious work in Ireland. We found that one of the key reasons for this was their lack of command of the English language. The language barrier posed a challenge for most Brazilian migrants in the study irrespectively of their immigration status. It contributed to vulnerability and often led participants to work in precarious jobs. Without the skills in the language, Brazilian migrants may not be aware of or understand their rights in the country of destination and they become vulnerable to exploitation or discrimination at work. The fieldwork showed that because of insufficient or low level of English, Brazilian migrants tend to work in jobs which do not require much speaking or interaction with the public such as cleaning, construction, and as kitchen porters. This seemed to have been the case with many of the participants in the study, both documented and undocumented. However, we found that this problem was more pronounced among undocumented migrants and workers in the meat processing plants.

5. BRAZILIAN MIGRANT WORKERS IN THE MEAT PROCESSING INDUSTRY

It was among the Brazilian migrants in the meat industry that the impact of Irish immigration policies and legal status became most evident during the study. In the height of the first wave of the Covid-19 pandemic in Ireland in 2020 the meat

⁴⁷ Irish immigration policy for Employment Permits includes a "Labour Market Needs Test", which requires work opportunities, in the first instance, to "be offered to suitably skilled Irish and other EEA nationals, and should only be offered to non-EEA nationals where no suitable candidate emerges from within the EEA to fill the vacancy" (See Department of Enterprise, Trade and Employment, "Labour Market Needs Test", 29 June 2022, available at: <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/employment-permit-eligibility/labour-market-needs-test/>>).

⁴⁸ Work permits in Ireland are not transferrable and are tied to specific jobs (See LOYAL, *Understanding Immigration in Ireland: State, Capital and Labour in the Global Age*, Manchester, 2021). Although in cases of redundancy, migrant workers on employer permits are allowed 6 months of immigration permission to seek another employment under a work permit (See TOOMEY, "Employment Rights for Migrant Workers in Ireland: Towards a Human Rights Framework", *International Migration & Integration*, 2015), this may in practice be difficult, particularly for low-skilled non-EU migrant workers (*ibid.*).

⁴⁹ See RODRIGUES, *cit. supra* note 3.

processing industry made headlines and received media attention due to significant outbreaks in their midst.⁵⁰ The news about the high number of outbreaks in different meat processing plants sparked concern and outrage especially as it illuminated the precarious working conditions of these workers, many of whom were migrants.⁵¹ Though this brought media attention and public concern during the Coronavirus outbreak, these working conditions were already there, long before the Covid-19 pandemic hit.⁵² Four Brazilian migrant workers from meat processing plants in three different regions in Ireland spoke about their experiences in this study. These interviews took place between 2018 and 2019 before the pandemic, but their experiences fully resonate with the issues that came into light after the Covid-19 outbreaks in the sector in 2020.

One of the participants who spoke about his experience was Marcos, a meat worker in his 30's on a work permit. Marcos had worked in the meat industry in Brazil for several years before he was recruited in Brazil through an agency to come to Ireland. In Ireland, he worked as a "de-boner" in a plant comprised of a majority of Brazilian workers, a few European migrants, and managers who were all Irish nationals. When asked if the work at the Irish plant was similar to the work in Brazil, Marcos responded that "the thing here is that we are required to work way more". In Marcos' view, this happened because he was on an employment permit. As he described it: "because we are migrants...and the fact that these documents of ours, the visa that we have here, is through the company. So, they demand a lot from us because of that". In essence, the demand for harder work is incentivised by the threat of insecurity as well as by the promise of better pay or conditions.

Marcos was asked if he thought coming to work in Ireland was worth it in

⁵⁰ See Carswell, "Inside a Covid-19 Outbreak at a Meat Plant: 'It's a Miracle He is Alive'", Irish Times, 16 May 2020, available at: <<https://www.irishtimes.com/news/health/inside-a-covid-19-outbreak-at-a-meat-plant-it-is-a-miracle-he-is-alive-1.4254525?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fhealth%2Finside-a-covid-19-outbreak-at-a-meat-plant-it-is-a-miracle-he-is-alive-1.4254525>>; See Finn, "Nearly 1,500 Cases Linked to 28 Meat Factory Outbreaks Across the Country", The Journal, 30 August 2020, available at: <<https://www.thejournal.ie/1500-cases-linked-to-meat-plants-5189065-Aug2020/>>; See Mullooly, "Three Meat Plant Hit by Virus Will Not Reopen in Morning", RTE News, 10 August 2020, available at: <<https://www.rte.ie/news/2020/0809/1158126-covid-19-meat-plants-not-re-open/>>; See Walsh, "Shut Down Meat Plants with Major Covid Outbreaks – Siptu", Independent, 26 January 2021, available at: <<https://www.independent.ie/world-news/coronavirus/shut-down-meat-plants-with-major-covid-outbreaks-siptu-40012735.html>>.

⁵¹ See Migrant Rights Centre Ireland, "Working to the Bone: The Experiences of Migrant Workers in the Meat Sector in Ireland", Migrant Rights Centre Ireland, 2020, available at: <https://www.mrci.ie/app/uploads/2020/11/Report_Working-to-the-bone_final.pdf>; See CARSWELL, *cit. supra* note 50; FINN, *cit. supra* note 50; MULLOOLY, *cit. supra* note 50; WALSH, *cit. supra* note 50.

⁵² See RODRIGUES, *cit. supra* note 3.

comparison to staying in Brazil. He stated that having reflected on everything, he did not think migrating to work in Ireland was worth it and that he would have perhaps stayed in Brazil had it been explained to him exactly what his work would be like in Ireland. Marcos said “no, it didn’t compensate. But the fact of the matter is that you are already here, you know? You’re working...so now you have to stay”. Due to the immigration policies in place in Ireland and the requirements of the work permit, Marcos was living and working in Ireland on his own, having left behind a wife and child in Brazil. He mentioned that he wanted to remain on the job, despite unsatisfactory working conditions, to give his family more opportunities.

Marcos’ experiences in meat processing also evidence discrimination and bullying affecting Brazilian migrants at their work places. He emphasised that where he worked, Brazilians were targeted but European migrants were not. This was narrated by him as a common occurrence which highlights the everyday impact of immigration policies and immigration status on non-EU migrants. By not having the flexibility to change employers, non-EU migrants are placed in a vulnerable situation, exposed to exploitation, discrimination, and unfavourable working conditions.⁵³ Marcos’ experiences fully resonate with the literature on labour migration. For instance, according to Anderson:⁵⁴

“When asked why they employ migrants, employers have been found to refer frequently to retention as an advantage of migrant labour [...]. Other perceived

⁵³ Although the Employment Permit Act 2006 in Ireland brought positive changes, for instance, in granting employment permits to employees rather than employers, and permitting those on work permits that have been made redundant 6 months without losing immigration status to seek another employment permit, in practice this may be challenging for migrant workers (See TOOMEY, *cit. supra* note 48). According to Toomey, “an employment permit specifies the employer and the area of employment” in which, “a non-EEA/Swiss migrant worker on an employment permit who wishes to change jobs must submit a new application” (*ibid.*, p.255). Therefore, work permits are not transferrable and are tied to specific jobs (See LOYAL, *cit. supra* note 48). For this reason, “uncertainty regarding the outcome of a new application and the inter-relationship between the employment permit and residency rights puts migrant workers in a powerless situation where they are dependent on the employer for their permit and legal status” (See TOOMEY, *cit. supra* note 48, p.255). The situation is worse for “non-EEA/Swiss migrant workers in lower skilled, lower paid occupations [...] as employment permit applications are costly”, in addition to being required more time on a work permit before being allowed to reside in Ireland than those on high skilled employment permits (See TOOMEY, *cit. supra* note 48, pp. 255-256). This employer mobility which is limited by the State (See ANDERSON, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, *Work, Employment and Society*, 2010) contributes to experiences of hyper-precarity and entrapment in precarity (See COPPARI, *cit. supra* note 23). It is important to note that “the development of immigration-related legislation in Ireland has been rather limited, resulting in a system largely based on non-statutory administrative procedure” (*ibid.*).

⁵⁴ See ANDERSON, *cit. supra* note 53, p. 310.

advantages, often racialised by employers, such as reliability, honesty and work ethic must also be understood partly in terms of the level of dependence work permit holders have on their employers.”

A few observations can be made from Marcos’ account of his experience in the meat industry in Ireland. First, it illustrates the precarious working conditions affecting this sector, which was also highlighted by the MRCI⁵⁵ and the ILO.⁵⁶ Second, it demonstrates the failings of the work permit system in Ireland, which binds migrant workers to their employer as their immigration status is dependent on that employment and does not allow for mobility. Therefore, it places non-EU migrant workers in a vulnerable situation subjecting them to exploitation. Third, as Marcos demonstrated from his own experience in being recruited in Brazil, recruitment agencies, acting as intermediaries for the meat industry, may not fully make clear to the migrants what is entailed in the work and in the contract. They may only fully grasp this after arriving in Ireland. Fourth, and most importantly, it shows the adverse impacts that immigration status, produced by Irish immigration policy, may have on a migrant worker.

Other meat processing workers offered confirmation of Marcos’ experiences. Lourival was in his 20’s working in a meat processing plant. Though Lourival had not worked in the meat industry in Brazil prior to coming to Ireland, he had family members who worked in a meat plant in Ireland for many years and they helped him secure a job in the sector. Lourival had already filled the requirement to bring his family to Ireland⁵⁷, however he mentioned his wife and child had gone back to Brazil

⁵⁵ See Migrant Rights Centre Ireland, *cit. supra* note 51.

⁵⁶ See International Labour Organization, “COVID-19 and Its Impact on Working Conditions in the Meat Processing Sector”, International Labour Organization, 2021, available at: <https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_769864.pdf>.

⁵⁷ Although Critical Skills Employment Permit workers in Ireland are permitted to have family join them immediately, the family of General Employment Permit workers (such as meat industry workers) may only apply to join them after one year. Family members in this case refer to spouses or de facto partners, as well as dependent children (See Department of Justice, “Joining a Non-EEA/Non-Swiss National”, 27 May 2022, available at: <<https://www.irishimmigration.ie/coming-to-join-family-in-ireland/joining-a-non-eea-non-swiss-national/>>; See Citizens Information, “Employment Permits and Family Members”, 19 December 2022, available at: <<https://www.citizensinformation.ie/en/moving-country/working-in-ireland/employment-permits/spousal-work-permit-scheme/#:~:text=For%20General%20Employment%20Permits%20and,not%20married%20to%20each%20other.>>>). General Employment Permits in Ireland are aimed at attracting third-country nationals for occupations in which there are labour shortages, while Critical Skills Employment Permits are aimed at attracting highly skilled workers with the view of encouraging such workers to maintain in the State as permanent residents (See Department of Enterprise, Trade and Employment, “General Employment Permit”, 28 June 2022, available at: <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/general-employment-permit/>>; See Department of Enterprise, Trade and Employment,

after not adapting well to the country. In describing his work venue, Lourival mentioned that most of his co-workers, particularly on the plant floor, were Brazilian, with a minority of other nationalities, such as Polish and Czech. He mentioned the only workers who were Irish were the managers. A similar description was made by Cristiane a woman in her 20's, who also worked in the meat industry.

Asked if they were given time to rest at work, Lourival responded that tightly enforced time-schedules and heavy workloads form part of the everyday challenges faced by these workers. He described the work as heavy, tiring, and repetitive. Brazilian migrants also generally reported working conditions that were considerably more pressurised and unfulfilling than those of their Irish colleagues. The differential treatment towards Marcos and his fellow Brazilians seems to have stemmed from the fact that the managers were aware that the Brazilians, as non-EU workers, had their immigration status bound to their employers or businesses by means of a work permit and therefore were not allowed the possibility of changing employers in Ireland. This type of commitment does not apply to EU migrant workers who were, according to participants' accounts, bestowed a more respectful treatment. Thus, we suggest that immigration status is a significant factor that contributes to migrant workers' experiences of precarity.

An alternative analysis focuses on the role of institutional racism in creating these conditions. Immigration policies drafted by the Irish State reflect a preference for EU workers (who are predominantly white European), creating a hierarchical labour system which leaves non-EU workers (many of whom are not white European) exposed to high levels of bureaucracy, surveillance, and open to exploitation⁵⁸. Perhaps the most appropriate explanation for this condition of the migrant worker, derived from either immigration status or institutional discrimination, is the role of the State *vis-à-vis* immigration. It is the State which creates and maintains both.

"Critical Skills Employment Permits", 28 June 2022, available at: <<https://enterprise.gov.ie/en/what-we-do/workplace-and-skills/employment-permits/permit-types/critical-skills-employment-permit/>>).

⁵⁸ See JOSEPH, *Critical Race Theory and Inequality in the Labour Market: Racial Stratification in Ireland*, Manchester, 2020; JOSEPH, "Discrimination Against Credentials in Black Bodies: Counterstories of the Characteristic Labour Market Experiences of Migrants in Ireland", *British Journal of Guidance & Counselling*, 2019, p. 524 ff.; JOSEPH, "Whiteness and Racism: Examining the Racial Order in Ireland", *Irish Journal of Sociology*, 2017, p. 46 ff.; LOYAL, *cit. supra* note 48.

6. THE BENEFITS AND DRAWBACKS OF BRAZILIAN MIGRANT WORK IN IRELAND

Time spent in the field offered the opportunity to hear from documented and undocumented Brazilians who worked in sectors other than meat processing. The different responses given by Brazilian migrants have emphasised heavy, repetitive, and demanding work. Participants explained that Brazilians held a good reputation among the Irish as “good workers” but also highlighted that due to this they were asked to do more heavy work. According to Anderson, immigration controls produce status and “are not simply about conditions of entry across the border, but about conditions of stay”⁵⁹. The restrictions imposed on migrant workers not only produce, but they reinforce precarity⁶⁰. Paulo’s experiences in Gort serve as an example of Anderson’s arguments. He was an undocumented migrant in his 50’s working with construction and living in Gort. When asked about work in Ireland and the differences from when he worked in Brazil, he said that he thought work was a lot harder in Ireland:

“The undocumented migrants here, they are engaged in manual labour. They [migrants] do the work that they [Irish] don’t want to do. They [Irish] prefer to pay for it, you know? Anyway...it is harsh work, harsh work what the Brazilian migrants do here.”

As we have already mentioned, the intensity and conditions of work that Brazilians endure is harsher than average. Furthermore, the Irish appear here as consumers of hard labour, who hire others to do jobs “they don’t want to do”. The provision of cheap labour is one of the dividends of migration, clearly exploited by employers here. This hard-working quality is recognised by employers, according to Paulo. He mentioned:

“The [Brazilian] is seen as a worker, as a good worker. The boss that we have today...half of his employees are Brazilian...and he praises them a lot. The Brazilians are very good at service, are very good to work. Many bosses even prefer the Brazilian migrants over someone from here.”

Paradoxically, Brazilians are regarded as “good workers” by employers, while at

⁵⁹ See ANDERSON, *cit. supra* note 53, p. 309.

⁶⁰ *Ibid.*

the same time they are exploited. Perhaps this is what one participant during fieldwork meant when he mentioned, “here [in Ireland] it’s good but it’s bad, there [in Brazil] it’s bad but it’s good”. Paulo further explained that many employers set onerous targets for migrant workers, overloading them with work that can only be completed at a highly demanding pace.

Joelma had been living undocumented and working as a cleaner. In her interview she described working undocumented in Ireland as “too uncertain”, and that she remains in Ireland because she has gotten used to and likes living in Ireland. However, Joelma, herself, had thought about “throwing everything up in the air and leaving”. Clearly Joelma is caught in a bind; she must work under difficult conditions, but also becomes accustomed to Ireland, supported by the wider Brazilian community. Later Joelma was asked if she thought work in Ireland was better in comparison to Brazil. She explained that if her entire family had not left for Ireland, she would not have migrated. She had a stable job in Brazil, and even described her past employer as being “like a father in my life”. Growing up she enjoyed educational opportunities, but with her family having left she did not feel well or safe on her own in Brazil and left for Ireland to be reunited with them.

As previously noted, one of the findings of the research was that the Brazilian participants of the study worked in gendered jobs, with men working in the meat industry and in construction, for instance, whereas many of the women worked with cleaning. This characteristic of labour migration has also been highlighted by the literature⁶¹. Amrith and Sahraoui mention that certain sectors “are feminised and widely perceived as to be synonymous with female migrant labour” which is “seen as an extension of women’s traditional roles, and their labour is typically undervalued and poorly recognised”⁶². In the case of domestic work, not only is it gendered but also racialised, as “it is increasingly migrant women who do this work and who often face discrimination because of their nationality, class and gender, as well as exploitative working conditions”⁶³. As migrant women in this sector, they are at a higher risk of earning lower wages, facing exploitation and abuse because

⁶¹ See AMRITH and SAHRAOUI, “Introduction”, in AMRITH and SAHRAOUI (eds.), *Gender, Work and Migration: Agency in Gendered Labour Settings*, London and New York, 2018, p. 1 ff; FLEURY, “Understanding Women and Migration: A Literature Review, KNOMAD Working Paper 8, 2016, available at: <https://www.knomad.org/publication/understanding-women-and-migration-literature-review-annex-annotated-bibliography#:~:text=The%20report%20provides%20a%20comprehensive,in%20their%20families%20and%20communities.>; PAJNIK, *cit. supra* note 8.

⁶² See AMRITH and SAHRAOUI, *ibid.*, pp. 1-2.

⁶³ See AMRITH, “Dignity of Labour: Activism Among Filipina Domestic Workers in Singapore and Barcelona”, in AMRITH and SAHRAOUI (eds.), *cit. supra* note 61, p. 65 ff, p. 65.

domestic work is generally not covered by employment law and, one should add that domestic workers are also often hidden from the public.⁶⁴ Such "isolation makes it more difficult to become aware of their rights, or create or join unions".⁶⁵ This situation is further exacerbated for undocumented migrant women.⁶⁶ Although these conditions were not described, as such, by Joelma, we acknowledge that as an undocumented female migrant who worked with cleaning, she may have experienced compounded precarious conditions.

Another participant in Ennis was Nelson, a man in his 30's who had lived in Ireland for almost 11 years, eight of which he worked undocumented. Nelson now had European citizenship through his Italian ancestry and was living in Ireland with his wife and children. Nelson mentioned that he had a very difficult first year as a migrant in Ireland:

"It was really hard, all the...even with regards to food I had to...I had to borrow money from my cousins...so I could eat, because it was *very* hard. Because I came by plane on a loan paying high interest and it was all accumulating, accumulating...it was a really hard year. Then after this one year, I started to work in Galway...in a....construction company. Then it was really good. Double the salary, hours...less hours."

Nelson described how labour intensive and demanding his first job on a farm was, taking up a lot of hours. He even compared it to slave labour, and related how the low wages pushed him into taking on debts. Throughout his interview Nelson stressed several times that he did not know the English language. This led him to work in more precarious jobs and become vulnerable to exploitation, which was the case in his first job. He recalled that he worked from six o'clock in the morning until eight o'clock in the evening, being paid 50€ per day to work for almost 11 hours. According to him: "He [the boss] took advantage of the fact that I didn't know how to speak English...I didn't have an option". Over time Nelson's situation improved, as he moved from job to job, and gradually improved his English. Despite his negative early experiences, he was not bitter but stated that those who persevere can succeed, an Irish incarnation of the "American Dream".

Gleice from Ennis told us about her work experiences prior to giving birth to her child. Gleice made use of the word "*puxado*" in Portuguese which can be translated

⁶⁴ See FLEURY, *cit. supra* note 61.

⁶⁵ *Ibid.*, p. 28.

⁶⁶ *Ibid.*

as “tough” to describe her work, which often included cleaning five or six houses in a day. The same word was mentioned by other participants as well. In other interviews participants also made use of words such as “*pesado*” (heavy) and “*cobrado*” (demanded). Describing her work as a cleaner, she mentioned: “It’s really heavy [work]. The job...we wear out a lot, it causes a lot of pain on the arms. Because it is really repetitive. [...] I would get really tired”. Though Gleice’s child was still a toddler and she needed to mind her, Gleice explained that she had recently started to try working again. She told us about a recent work experience that did not work out as a kitchen porter. She mentioned that the job, cleaning the pans, was too much for her physically, and she hurt her arm. Gleice also highlighted that she was not paid well and stressed that she does not see the Irish doing this work, only migrants such as Brazilians, Polish, and Indian. Gleice is another example of a Brazilian migrant woman working with cleaning, a highly gendered occupation. However, unlike Joelma, Gleice was a fully documented migrant worker with Italian citizenship through her ancestry. As an EU citizen in Ireland, Gleice could access social protection, such as child benefit.⁶⁷ Therefore, although she was a migrant woman and a mother, Gleice was in a less precarious situation in comparison to Joelma.

It is noteworthy that some of the participants in the field research who worked in businesses owned by migrants, or who worked alongside migrants of other nationalities, mentioned enjoying their work and having a rapport with workmates. Sisi, a participant in Gort, for example, worked as a kitchen porter at a restaurant owned by a man from Eastern Europe and worked with workmates that were Brazilian as well as from different Eastern European countries. In nearly every encounter with Sisi in the field she would mention funny stories, jokes, and anecdotes based on her exchanges with her colleagues whom she considered friends. They taught each other words and slangs from their languages and invited each other to parties and barbecues. Jonatan, who worked undocumented as a kitchen porter in another restaurant, had a similar opinion. He mentioned that his co-workers were mostly European, specifically Irish, Polish, and Italian. When describing his work environment, Jonatan said that it did not feel like work. He mentioned it was “a place where we are like friends” in which “everyone helps everyone”.

Márcia, an undocumented migrant working in Roscommon as a cleaner, also described similar situations. Márcia had lived in Roscommon previously, before the economic downturn, and had recently made her way back to Roscommon. She

⁶⁷ See Citizens Information, “EU/EEA Citizens and Social Welfare Payments”, 4 October 2021, available at: <<https://www.citizensinformation.ie/en/moving-country/working-in-ireland/migrant-workers/eu-citizens-and-social-welfare//>>.

described working at a hotel as a cleaner the first time she migrated and having negative experiences then. The second time she migrated she found work as a cleaner at another hotel, one owned by migrants and with many workmates of migrant background. She spoke about having a good relationship with her colleagues and being happy with her job. When describing the work she had at a hotel in Roscommon the first time she migrated, she mentioned: "I would go in at nine [o'clock] in the morning and would leave at midnight. [...] And they skin the immigrant alive, add salt and leave it out to dry. It doesn't dry a lot because there isn't...there isn't any sun". This vivid metaphor of how employers used and exploited migrant workers might seem exaggerated, but it captures two important elements. Firstly, the effect of the work on the immigrant's body, feeling metaphorically skinned, salted and dried, and secondly the instrumentalist relation of simply using the immigrant as an object, a labourer, a means to an end. Yet Márcia also described her current role in comparison with the previous, mentioning that it was a completely different and positive experience. She described her employer as honest people, who never fail to pay her correctly, and who treat her well. What the participants seem to have described here is a shared sense of community among migrant workers in Ireland. Though those they described having a good relationship with were not Brazilian, but of different nationalities, it seems that they shared the experience of being migrant workers in Ireland leading them to have a better understanding of one another and to develop a sense of camaraderie or solidarity.

Alongside a stronger collective identity, community, and network among the Brazilians, it is possible that a similar sense of community has developed between Brazilians and migrant workers of different nationalities. Perhaps this is best described by Cohen in terms of community simultaneously consisting of "both similarity and difference".⁶⁸ Moreover, such sense of community may foster a sense of fellowship, belonging, mutual orientation, or identity.⁶⁹ The Brazilians and other migrant workers may be bonding not only due to their shared experience as migrants but also their shared difficult working conditions. This shared sense of community or bond may benefit them not only in relation to integration⁷⁰ but

⁶⁸ See COHEN, *The Symbolic Construction of Community*, London and New York, 1985.

⁶⁹ See BRUHN, *The Sociology of Community Connections*, New York, 2005; See DAY, *Community and Everyday Life*, London and New York, 2006; DJELIC and QUACK, "Transnational Communities and Governance", in DJELIC and QUACK, (eds.), *Transnational Communities: Shaping Global Economic Governance*, Cambridge, 2010, p. 3 ff.

⁷⁰ See PHILLIPS and ROBINSON, "Reflections on migration, community, and place", *Population, Space and Place*, 2015, p. 409 ff.

also with respect to their well-being.⁷¹

The above examples elucidate that the work of Brazilian migrant workers is tough, physically demanding, and involving long days for poor remuneration. It offers little opportunity to improve English language skills, or to gain friends amongst the wider Irish community. However, they also illustrate the capacity of such work to generate a sense of community that crosses national and cultural boundaries. Migrant workers bond with each other over their shared difficulties and so the marginalisation at the heart of their experiences can also inadvertently create positive experiences that help to support migrants in their precarious lives.

7. THE SIGNIFICANCE OF EUROPEAN CITIZENSHIP IN REDUCING PRECARITY

There are other routes to mitigate the worst effects of precarity aside from creating community. Renata was one of the very first Brazilian interviewed for the study. She was in her late 30's and had spent a few years living in Dublin studying English and working under a student permission along with her partner who was also Brazilian. She was now based in Waterford. After moving to Ireland, Renata began researching her Italian ancestry and was eventually able to obtain Italian citizenship. During her interview, she highlighted how contrasting were her experiences living and working in Ireland as a non-European on a student permission (which currently only allows for part-time work), and after obtaining European citizenship. For her, the two experiences were completely different especially with regards to work. Though Renata already had a university degree from Brazil she worked in different low-skilled jobs while she was on a student permission. After obtaining Italian citizenship, Renata had more work opportunities and was now working in her area of study. In the interview, she described the difference as going from "completely limited to everything is possible". For her, having European citizenship was "a completely different world" in which "everything changed" in relation to employment. Although Renata already had qualifications such as a university degree and a postgraduate course when she migrated to Ireland, her applications to work in her area were turned down because of her immigration status. She was given no other choice but to work in manual and low-skilled jobs such as cleaning and washing

⁷¹ See SALAMI et al., "Sense of Community Belonging Among Immigrants: Perspective of Immigrant Service Providers", *Public Health*, 2019, p. 28 ff.

dishes. However, as soon as she became an EU citizen and made this information available when applying to jobs, she obtained job offers in her area of study.

Nelson also obtained his Italian citizenship, through his ancestry, after several years working undocumented in Ireland. He explained that gaining EU citizenship did not make a difference to him with regards to work. However, he described having documents as having “peace” and “freedom”. In his words: “I think it’s more the feeling of peace. And the freedom to come and go, [...] *liberdade*...freedom”. In Gort, Rogério, who had entered the country on a student permission, was also interviewed. Soon after arriving in Ireland, Rogério was able to obtain a work permit to work as a stonemason. After working under a permit for the required years to apply for citizenship, Rogério was successful in obtaining Irish citizenship. When asked if there were any changes in his experiences after he obtained citizenship, he mentioned that: “it changed everything...today I have the doors open for everything”. These participant responses reinforce the influence of immigration status in the everyday lives of Brazilian migrants. Renata’s account of her own experience from before and after citizenship demonstrates how immigration status affects migrant workers, determining the level of precarity that migrants experience. As Rogério put it, having European citizenship corresponds to an “open door” of opportunities, and as Nelson described, as enjoying a feeling of “freedom” and “peace”.

8. LANGUAGE BARRIERS

The lack of the English language was repeatedly mentioned by participants in the field research as a factor which led Brazilians to engage in low-skilled and precarious work, as well as to be vulnerable to exploitation and discrimination. Healy⁷² argues that while Brazilian migrants in Gort have improved their English skills over the years, the language remained a challenge for new arrivals who consequently had difficulty in accessing health and education services. This perception was prevalent among Brazilians in general, regardless of their immigration status. Though worsened for those undocumented, Brazilians with work permits and European citizenship were also subject to vulnerability at work when they lacked command of the English language.

Some participants in Gort mentioned that English classes were offered but that they did not have the time to take such classes. Other participants mentioned that

⁷² See HEALY, “Carnaval do Galway: The Brazilian Community in Gort, 1999-2006”, *Irish Migration Studies in Latin America*, 2006, p. 1 ff.

they had gone to a few of the classes but fell behind in their study, that they were not learning or adequately motivated to learn, or that they were not learning the specific English skills that they needed for work and eventually stopped going. In Roscommon, Márcia mentioned that the times the English classes were offered were not compatible with her work schedule. Therefore, between choosing work or choosing to improve her English, Márcia had to prioritise work. Lourival, who worked in the meat industry, mentioned that he was aware of free English classes that were offered where he lived and that he had tried to attend. However, according to Lourival he gave up because the classes were very late and he would arrive late at home, after a full day of repetitive and tiring manual labour. Like Lourival, Cristiane also worked in the meat industry but unlike the other Brazilians, she was not on the plant floor. When asked if the Brazilian workers could communicate in English, she responded “very little”. Cristiane later described the linguistic barrier between workers and managers on the production line: “you need the interpreters in the middle to grant access...to the people that have just arrived”. The stonemason Rogério also highlighted the challenges with English, particularly in the beginning when he had started to work with his employer. He recalled his employer becoming stressed when explaining or teaching him, especially as he would make mistakes due to his lack of command in the English language.

What the responses of Rogério and others show is that although immigration status has a predominant impact on the level of precarity among the Brazilians, this often operates in tandem with language barriers to compound their marginalisation. Participants who had European citizenship, though less prone to precarity in comparison to undocumented workers or migrant workers on work permits, were also susceptible to precarious work when language was a challenge for them. These participants’ responses find resonance in the migration literature. According to Atak and Crépeau⁷³ legal status is one of the main contributors to migrants’ vulnerabilities in the workplace, as well as dependency on their employer in the case of those on work permits. However, they also note that other factors also contribute to vulnerability including unfamiliarity with the culture and language of the destination country, and lack of knowledge of their rights as workers. This is confirmed in the case of Brazilian migrant workers in an Irish context.

⁷³ See ATAK and CRÉPEAU, “Legal Status and Vulnerabilities”, in BASARAN and GUILD (eds.), *Global Labour and the Migrant Premium: The Cost of Working Abroad*, London and New York, 2018, p. 10 ff.

9. CONCLUSION

Findings on Brazilian migrants' experience with precarious work in rural Ireland demonstrate that immigration status conditions the extent and intensity of precarity experienced by Brazilian migrant workers, and that work practices and subjectivity of Brazilian migrant workers are detrimentally impacted by immigration status. Various responses from the participants and observations during fieldwork demonstrate that immigration status has a significant impact on the scale or level of precarity experienced by the Brazilian workers. This impact tends to be inversely proportional, that is, the stronger the immigration status the migrant worker holds, the less precarity he or she experiences. Therefore, those on the lower end of the immigration status scale, undocumented migrant workers, are prone to be more intensely affected by precarity at work and in their daily lives than those on the higher end of the scale. Brazilian migrants on work permits and with European citizenship are prone to experience reduced levels of precarity in life and work.

This does not mean that those at the higher end of the scale do not experience precarity. Brazilian workers with European citizenship may also experience precarity despite their immigration status which guarantees employment mobility within European countries. This became evident when participants highlighted the role of language barriers in experiences of work. Therefore, even if a Brazilian migrant has European citizenship, if they do not have adequate knowledge of the language of the country of destination, he or she is all the same vulnerable to precarious work and to exploitation.

There is evidence that the precarious everyday lives and working conditions experienced by the Brazilian migrants are determined to a great extent by immigration status. It is salient to highlight however, the possibility that this may be in fact a reflection of how the State, as the creator of policy, views "outsiders", and/or constitute a form of institutional racism.⁷⁴ The role of the State in producing immigration status and therefore in determining precarity, has consequences for the migrant experience with work and with their everyday lives.

⁷⁴ See JOSEPH, *cit. supra* note 58.

THE ROLE OF SERVICE DESIGN IN THE PUBLIC SECTOR

Lucia Orsini

SUMMARY: 1. Preliminary remarks; – 2. Service design and public administration; – 2.1. Service design: definition; – 2.2. Service design: the principles; – 2.2.1. Service design is human-centred; – 2.2.2. Service design is co-creative; – 2.2.3. Service design is sequencing; – 2.2.4. Service design is evidencing; – 2.2.5. Service design is holistic; – 3. Prima-vera Campana – 3.1. The foreign citizen; – 3.2. The importance of empathy; – 3.3. The project; – 4. Design thinking; – 4.1. The methodology; – 4.2. The process; – 4.2.1. Research; – 4.2.2. Analysis; – 4.2.3. Ideas and prototyping; – 4.2.4. Implementation; – 5. The result – 5.1. The outputs and feedback from the Pozzuoli and Nola branches; – 5.2. Lessons we learned; – 6. Brief concluding remarks.

1. PRELIMINARY REMARKS

When I joined a project for INPS as a junior team member in 2018, I did so with many preconceptions: “The Public Administration does not want to change”, “the people who work in the Public Administration do not want to work”.

So many commonplaces on which I changed my mind after a few days of meetings.

The challenge launched in 2018 by the CNR within the Project “SIRC - intercultural services Campania Region” had four main objectives. First, it was meant to strengthening the intercultural skills of the operators of the Public Services of the Territory, who are in direct contact with immigrant citizens, with specific tasks of information, guidance and provision of services. The second aim was to encourage the innovation of organisational processes in terms of reception and integration, stimulating an intercultural reorganisation of the Public Entities and Services involved,

in order to facilitate access to services by immigrant citizens. The third goal was to promote networking and communication between the operators of the Services aimed at immigrant citizens to optimize public and private resources present in the territory and consolidate the quality of the services offered by focusing them on the needs and specificities of the users. The fourth and final goal was to incentivize the involvement of immigrant users in organisational and decision-making processes.

We involved the INPS branch in Pozzuoli and obtained highly appreciated results. However, it was the Manager and the officials who made this pilot project an incisive experience. My view of Public Administration has changed radically. It is not the people who are careless and immobile, but the processes imposed on them that are full of friction, do not consider the users and are self-referential. Strengthened by this experience, when in 2021 the CNR launched the pilot action of the project "Prima-Vera Campana: For a Labour Integration of Foreign Citizens in Campania" integrated into a project "FAMI – Asylum, Migration and Integration Fund", I took my chance and jumped into it.

This new project involved two branches: Pozzuoli and Nola. Officials did not disappoint the expectations I had set for myself years earlier. Participation was strong and wide.

The organized workshops allowed them to learn and make a new mindset. The meetings built following "Design Thinking", an approach based on creativity and the participation of people, opened their mind and immediately found brilliant feedback among the officials who built piece by piece the bases for a new service experience.

They put themselves to the test by listening to the criticism, writing down in an ad-hoc diary the sensations experienced by their foreign users, drawing cows and building towers of spaghetti. Yes, because they did that too.

Creativity gives birth to great ideas, but creativity must be trained. We cannot ask a public official, accustomed to his/her work routine, closed within the walls (often unwelcoming) of his/her public office, to think of new, different, innovative solutions. There is a need to change their point of view, to change their approach to work. We need to be creative, and to do that, we need to have fun.

Against this backdrop, the present paper addresses the role of service design in modelling the processes meant to ensure that citizens have effective access to (public) services. After providing an overview of the notion and principles underpinning service design (Section 2), it analyses the pilot-project "Prima-vera campana" as a case-study (Section 3 and 4) and in the end evaluate the pros and cons of the method applied to the public sector (Section 5 and 6).

2. SERVICE DESIGN AND PUBLIC ADMINISTRATION

Many public services do not function or function badly simply because they are not tailored to the person or the context: other objectives such as urgency or the logic of global organisation have prevailed in their design. The services provided by the public sector ensure the functioning of a country at all levels. They have an incredible impact on the general well-being and their malfunction as well as being a source of frustration is a brake on development.

All this is a double mockery: clearly, public services should simplify and not complicate the lives of citizens and should optimize and not waste their resources.

It is therefore essential that services respond to real needs and are delivered efficiently and effectively, but this is only possible if they are designed consciously and thoughtfully from the outset. Service design is a method to achieve these goals.

2.1. Service Design: Definition

In 1982, Lynn Shostack introduced Service Design to the scientific society as a Marketing topic and at the beginning of the 90s its growth is linked to that of the service sector in the most advanced economies.¹

The fact that it is so recent means that it is still evolving, and this can be seen from the fact that, as Stickdorn and Schneider state in their 2010 *"This Is Service Design Thinking"*, a common definition has not yet been agreed upon.

In order to deal with this topic, however, it is necessary to give a precise and shared definition. Professionals and agencies in the sector have collected and analysed proposals and identified key concepts. This made it possible to create as complete a definition as possible.

The definitions selected were analysed starting from the interpretations proposed by Fonteijn in his article *What Is Service Design: The Final Answer* published in 2020.

Fonteijn divides them into three categories according to the different approaches used: those that explain the object of service design, those that explain its values and those that express the design process.²

The first category introduces the object of service design, services. Obviously saying that "service design is the practice of designing services"³ is not enough to

¹ MERONI, A. & SANGIORGI, D., *Design for Services*, Gower, 2011.

² MARK FONTEIJN, *What Is Service Design: The Final Answer. Service Design Show*, 2020, available at: <<https://www.servicedesignshow.com/what-is-service-design/>>.

³ SERVICE DESIGN NETWORK, available at: <<https://www.service-design-network.org/about-service-design/>>.

understand its meaning. It is therefore necessary to identify a definition of the concept of service.

The Treccani dictionary defines the service as a “performance aimed at satisfying a human need, individual or collective, and susceptible of economic evaluation and sale” and adds that it is “organized, generally on a large scale, by the State, a public body or a concessionaire”. From this we get a first part of the definition of service design: “Service design is the practice of designing performances to meet a human need, whether individual or collective.”

Some of the definitions in the first category add additional elements to those already listed. For example, Moritz says: “Service design helps to innovate (create new) or improve (existing) services to make them more useful, easy to use, desirable for customers and efficient as well as effective for organizations.”⁴ His words introduce some key concepts to take into account: service design is not only concerned with designing new services, but also with improving existing ones and serves to create value for all the actors involved and not only for end users.

The second category is that which deals with explaining the values generated through service design. Most of these values can be found in the definition proposed by the Service Design Network that is the leading non-profit institution for expertise in service design and a driver of global growth, development and innovation within the practice, founded in 2004. It argues that service design is “a practice that uses a holistic and highly collaborative approach” and that uses “a human-centred perspective”. A final key value is proposed by Moritz in his article “*Service Design – Practical Access to an Evolving Field*” who explains that service design is “multidisciplinary”.

At this point it is possible to enrich the previously generated definition with the new elements, obtaining that:

“Service Design is a human-centred, multidisciplinary, holistic and collaborative practice that deals with designing performance aimed at satisfying a human need, individual or collective. It can create new ones or enhance existing ones, making them more useful, accessible and desirable for all users and more efficient for service providers.”

⁴ STEFAN MORITZ, *Service Design - Practical Access to an Evolving Field*, KISD, 2010.

The definition is not yet complete, the elements proposed by the third category are still missing, that is, the one that focuses on expressing the design process of service design.

The Service Design Network comes to the aid again with the second part of its definition: “In practice, service design helps to map the processes, technologies and interactions that guide the delivery of services”.⁵

This definition clearly explains the first part of the process, but it is not yet sufficient. Service Design generates new ideas, explores these ideas to find those solutions that create new value for users, clients and organizations.

By combining all the elements proposed by the different approaches we arrive at an extended and complete definition of service design:

“Service Design is a human-centred, multidisciplinary, holistic and collaborative practice that deals with designing performance aimed at satisfying a human need, individual or collective. It can create new ones or enhance existing ones, making them more useful, accessible and desirable for all users and more efficient for service providers.”⁶

Service design works by mapping the processes, technologies, and interactions that make up a service and gathering information about people’s experiences and behaviours, then generating ideas, testing them, and implementing them.

2.2. Service Design: The Principles

2.2.1. Service Design is Human-Centred

The services take shape thanks to the participation of different actors, who interact and collaborate with each other and with the different components of a service.

From this it is easy to deduce that without the involvement of people — be they users, suppliers or producers — services could not exist.

It is for this necessary and vital participation that the actors involved must be the main focus of the design⁷ and to do so it is necessary to “put the user at the centre of the design process”⁸.

⁵ See SERVICE DESIGN NETWORK, *cit. supra* note 3.

⁶ See MARK FONTEIJN, *cit. supra* note 2.

⁷ See MERONI, A. & SANGIORGI, D., *cit. supra* note 1.

⁸ STICKDORN AND SCHNEIDER, *This is Service Design Thinking*, Wiley, 2010, pp. 38.

Meroni and Sangiorgi explain in their book “*Design for Services*” that Service Design considers users as a resource rather than a burden or a problem. One can then look at them as a source of information which could be needs, desires, points of view or emotions, which are indispensable for the creation of working projects.

The service designer therefore has the task of using his/her own professional skills and knowledge to get to know all the stakeholders of a service in depth.

As explained by one of the most important design companies that by 2001 began to widen its focus on consumer experiences and services, called IDEO, in Zhang and Dong’s publication “Human-centred design: an emerging conceptual model”⁹ of 2008, all the people involved are important for a service. Not just its end users. Through the use of research methods and tools, the service designer is able to understand the point of view of the different actors, as well as their needs and desires.

2.2.2. *Service Design is Co-Creative*

In addition to being a source of information, the user is also considered an expert who can contribute to the design of the service thanks to his/her knowledge and skills¹⁰. In fact, very often the staff or users of a service know the structure and dynamics very well and the designer can take advantage of this knowledge through collaborative methods. The service designer uses methods that facilitate collaboration with the actors of the service (users, suppliers or producers) and that allow them to make a contribution to its creation. Several sources propose, in fact, not to look at the service designer as a designer with the task of inventing new services independently, but as an expert able to coordinate the knowledge and skills of other people in order to guide them in the creation of the service.

Collaborative elements can be introduced at every stage of the design and must include the point of view of all actors, from users to producers.

Collaboration can take place in three consecutive phases during a project: i) co-planning; ii) co-creation; iii) co-production.

Co-design takes place mainly in the first phase of the design process and consists of the involvement of users in research, generation and development of ideas.¹¹

⁹ ZHANG T. AND DONG H., *Human-centred design: an emerging conceptual model*, 2008, available at: <<http://www.hhc.rca.ac.uk/2084/all/1/proceedings.aspx>>.

¹⁰ EZIO MANZINI, Introduction, in MERONI, SANGIORGI, *Design for Services*, 2011, Gower, p. 1 ff.

¹¹ ALEJANDRO BLANCO, *Co-creazione, co-design e co-produzione, similarità nella loro definizione*, Co3project, 2020, available at: <<https://www.projectco3.eu/it/2020/10/26/co-creation-co-design-and-co-production-similarities-in-their-definition/>>.

Co-creation consists of involving users in the strategic planning phases of the service and in its implementation and experimentation.¹²

Finally, *co-production* involves the user's involvement in the implementation phase of the service, *i.e.*, the one following the tests.¹³

2.2.3. *Service Design is Sequencing*

"Services are dynamic processes that take place over a certain period of time. This service timeline is crucial to consider when designing services, since the rhythm of a service influences the mood of customers". So, Stickdorn and Schneider in their book present the third principle of Service Design.

Each service, in its use, follows a transition in three steps: i) "before", that is, coming into contact with the service; ii) "during", when the user actually lives the experience of a service; iii) "after", or the service follow-up.

Every step of a service is important, every link is essential. Experience takes shape in all three phases.

Just like in the making of a film, in which static images are used to build the story, Service Design studies the service in individual moments, individual touchpoints and interactions, and then build it.

Interactions with touchpoints take place human-human, human-machine and even machine-machine, but also indirectly through third parties such as reviews of other users or through media.

A service is not only what the user sees, what happens on stage, but includes a series of backstage processes that affect the experience of the service as much as the visible part. These also need to be displayed as on a timeline to be designed. Therefore, it is important that a good service, and every point of contact that the user has with it, constitutes a harmonious set in which the various phases follow one another in a logical succession.

2.2.4. *Service Design is Evidencing*

As already seen above, services are described as performance and not as objects, they in fact "cannot be perceived by the senses in the same way as objects are

¹² BRANDSEN, T. & HONINGH, M., *Co-Production and Co-Creation. Engaging Citizens in Public Services.*, 2018, Routledge, pp. 9-17.

¹³ See BRANDSEN, T. & HONINGH, M., *cit. supra* note 12.

perceived”.¹⁴ Although services include many tangible elements, “it is the intangible elements [...] that dominate the creation of value in the provision of services”.¹⁵

During each phase of the design and the provision of the service, the service designer has to interface with this feature and has to balance the tangible and intangible elements in different contexts.

In the design phase, the designer has the need to communicate the intangible elements that make up a service through the use of visual tools such as the *customer journey* or the *service blueprint*, to have a representation useful to his/her understanding.

During the delivery phase, the designer has the task of communicating the intangible elements of the service with the users who will interface with it. This occurs on two different levels: the *frontstage* in which all the possible interactions which the user can perceive occur, and the *backstage* in which all the interactions that the user does not notice occur¹⁶.

At the front stage level, the designer has the task of designing interfaces, physical or virtual, that not only help to give an identity to the service, but also have the task of explaining its operation to the user.

Instead, at the *backstage* level, the designer has the task of designing “*service tests*”,¹⁷ that is, tangible elements that prove to the customer what happened backstage. A simple example is the confirmation email to an online purchase to give a proof of service. As Moritz points out in his “Service Design - Practical Access to an Evolving Field” the amount of these tests must be carefully balanced to prevent them from becoming intrusive and annoying. The fact that most of the interactions that make up a service take place backstage, allows the customer not to be overwhelmed by information during the interaction and therefore to have a better experience.

2.2.5. Service Design is Holistic

The services are included within wide contexts and each element that makes up these contexts can modify their operation and result. These elements can be very different from each other. For example, the territorial context in which each service is developed with its climatic and geographical characteristics, or the cultural background of the people who interact with it. It can therefore be said that services

¹⁴ See MERONI, A. & SANGIORGI, D., *cit. supra* note 1.

¹⁵ LOVELOCK, C. & WIRTZ, J., *Services Marketing: People, Technology, Strategy*, seventh edition, Prentice Hall, 2011.

¹⁶ POLAINE, A., LØVLIE, L. & REASON, B., *Service Design: From Insight to Implementation*, Rosenfeld Media, 2013.

¹⁷ See STEFAN MORITZ, *cit. supra* note 4.

are influenced by factors of different kinds, namely social, cultural, economic, political, territorial, time-related and administrative. Consequently, the service designer has the task of studying and understanding the contexts in every detail, so as to always take into account, during the design process, every element that has an influence on the designed service.

Furthermore, Meroni and Sangiorgi point out that not only is the service influenced by the broader context in which it is inserted, but also that the individual interactions that take place during its delivery have a weight. Each user can interpret it differently. Depending on the context from which he/she comes and which determined his/her education, but also based on his/her previous experiences, disposition and mood. Therefore, the provision of services can vary for each individual performance according to the people who interact with them.

The service designer must take all these aspects into account during his/her design work. For this reason, some tools have been developed that help keep as many of the elements that influence a service under control as possible. One of these is the *service ecology*: a diagram that contains all the actors and their interactions, but also the necessary resources, feelings and people's point of view.¹⁸

3. PRIMA-VERA CAMPANA

3.1. *The Foreign Citizen*

Article 2 of Law no. 40 of 1998, "Discipline of immigration and rules on the condition of the foreigner", reads:

"The foreigner is recognized equal treatment with the citizen as regards jurisdictional protection of rights and legitimate interests, relationships with the public administration and the access to public services, within the limits and in the ways provided for by the law."

Equal treatment as regards access to public services, after 24 years of this law, has not yet been achieved.

¹⁸ See POLAINE, A., LØVLIE, L. & REASON, B., *cit. supra* note 16

The foreign citizen experiences the separation from the country of origin as a fracture in personal life, since the pain of exile is compounded by economic, linguistic and social integration problems.

Although all services are universally guaranteed, the fact that foreign citizens do not know or understand them constitutes an obstacle.

For instance, one may think of the fact that the sites of the public administration are only translated into at most two European languages, Italian and German, despite a strong presence of Moroccans, Chinese, Filipinos and Bengalis (data from the Observatory on Foreigners of the INPS, year 2020).

For all the people of the above nationalities, and for all the others who do not know the main European languages, knowledge and access to public administration services is frustrating and complicated.

3.2. The Importance of Empathy

Empathy is the basis of Service Design. The word comes from the Greek “*empatéia*” composed of “*en*”, meaning “within”, and “*pathos*”, meaning “suffering” or “feeling”. It was used to indicate the emotional relationship of participation that linked the author-singer to his/her audience. Empathy is the attitude of offering one’s attention to another person, putting aside one’s emotions and judgment. The relationship is based precisely on non-evaluative listening and focuses on understanding the feelings and basic needs of the other. The empathy phase is the work that is carried out to understand the people and the context of the project. It translates into the effort to understand the way of doing things and why, the physical and emotional needs, how the world is thought and what is meaningful to them.

With empathy we deduce the meaning of those experiences, we understand the motivations that move them and we eventually elaborate the intuitions that allow us to innovate. The most effective solutions are in fact born from intuitions about human behaviour, but learning to recognize them is not easy.

It is essential to see things with new eyes, those of the people for whom you are designing, and it is empathy that provides this new view.

Understanding people means entering their system of values, sometimes unknown to people themselves, and that can manifest themselves precisely through listening and exchange.

Collaborative design needs an empathetic attitude that suspends all judgments. Studying a scenario or people of reference, stopping the flow of preconceived ideas,

can be difficult as well as listening and understanding distant needs. Such needs can result in complex feelings such as boredom, annoyance, or anger.

If you overcome this obstacle by exercising the ability to reflect the complexity of the other, you understand his/her deep motivations. Empathy is a gift to be acquired and nurtured. A true understanding of the experience of others allows us to innovate and find tailor-made solutions. First, however, it is necessary to break down personal barriers through deep listening, by going out of oneself and through immersion in the world of the other.

3.3. The Project

The “Prima-Vera Campana” project aims to develop the intercultural skills of operators in the sector and, in particular, this pilot action, aims to redesign public administration services in an intercultural key through the methodology of Service Design.

This re-design action of the Public Administration involves the INPS branches in Nola and Pozzuoli as samples for the construction of a scalable and replicable model also at other INPS branches as well as at other bodies responsible for the provision of public services. It also aims to improve accessibility to services with particular attention to the services most useful to foreign nationals residing in the Campania Region.

A project was proposed to the Managers of the two INPS branches that would have included two phases: The first one was a phase of research and participatory design, with laboratories to encourage and facilitate the collaboration and involvement of interested stakeholders. The second one was a phase of training and coaching of staff, to add to the experience of service operators and their knowledge the basic skills for the application of “Design Thinking” and user-centred design.

The project has a twofold objective: i) to deepen the knowledge of the needs of foreign citizens to improve INPS services by optimizing and simplifying the staff’s work; ii) to enable the operators to be autonomous in their choices aimed at making the service functional and usable for the users as well as to make the operators capable of modifying and improving the “touchpoints” (the tangible components of the service) and the information flow.

4. DESIGN THINKING

4.1. The Methodology

Service design and Design Thinking are closely related concepts, and they often go hand in hand in the design process. While design thinking is a problem-solving approach that can be applied to various domains, service design specifically focuses on designing and improving services to enhance the user experience.

Service design encompasses the entire end-to-end experience of a service, including all the touchpoints and interactions between the service provider and the customer. It takes into consideration the needs, desires, and behaviours of the users, as well as the goals and constraints of the service provider. The aim is to create services that are efficient, effective, and enjoyable for both the customers and the service providers.

Design Thinking provides a framework and mindset for approaching Service Design challenges. It emphasizes empathy, collaboration, and iteration, which are crucial in understanding user needs, generating innovative ideas, and testing and refining solutions.

Service Design and Design Thinking are iterative processes, and multiple rounds of testing, refinement, and implementation are often conducted to create and improve services that meet user needs and deliver value to both the customers/users and the service providers.

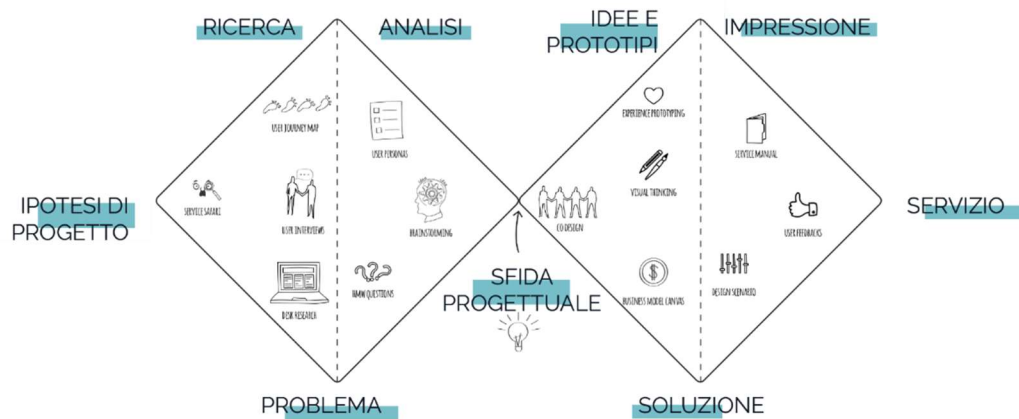
Overall, Service Design benefits from the human-centered and collaborative approach of Design Thinking, which helps ensure that services are designed with a deep understanding of user needs and are optimized for delivering a positive and seamless user experience.

The design process takes place in constant collaboration with users and the service providers. This not only allows to quickly reach further insights, but also allows to strengthen a user-oriented model.

In addition, citizens are constantly taken into account at various stages of the process from start to finish.

4.2. The Process

The most well-known design process used in the context of service design is the *Double Diamond*, developed by the Design Council in 2003.



The reason for its success is its linear representation that makes it highly understandable.¹⁹ Such a simple representation, however, does not communicate the true complexity of service design projects. The various phases do not take place in real succession, but tend to overlap and repeat themselves during the course of the design²⁰, which usually starts from a complex and chaotic situation and then reaches a situation of clarity only at the end.

The “Design squiggle” is a concept introduced by Damien Newman, a designer and entrepreneur. As the Double Diamond, it represents the creative process and the journey from the initial idea to the final design.

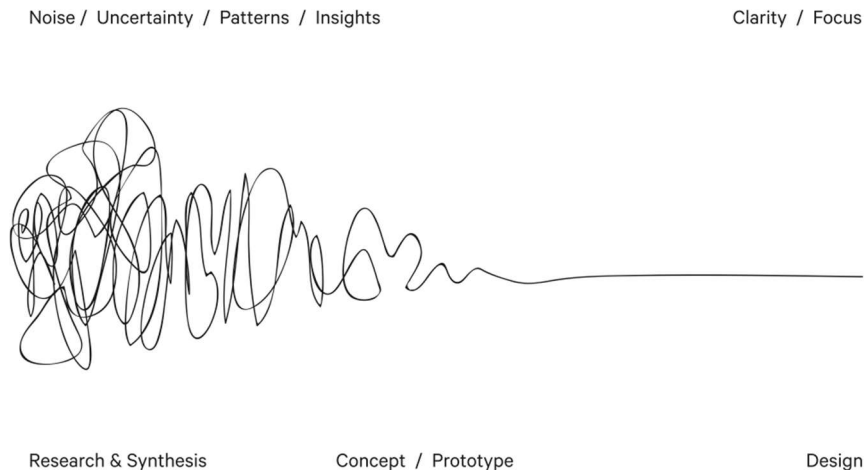
The squiggle begins with a starting point representing the first spark of inspiration or idea. From there, the line meanders and curves, symbolizing the exploration and experimentation that designers go through as they generate and refine concepts. The path of the squiggle is often unpredictable, as designers encounter challenges, setbacks, and new insights along the way.

As the process continues, the squiggle gradually straightens out and leads to the final design solution. This represents the convergence and refinement of ideas into a coherent and well-defined outcome.

¹⁹ BALL, J., *The Double Diamond: A universally accepted depiction of the design process*, Design Council, available at: <<https://www.designcouncil.org.uk/news-opinion/double-diamond-universally-accepted-depiction-design-process>>

²⁰ See STEFAN MORITZ, *cit. supra* note 4

The design squiggle serves as a reminder that design is not a linear process but rather a journey of discovery and iteration. It acknowledges that creativity involves uncertainty, experimentation, and the willingness to explore different possibilities before arriving at a successful design solution.



The method used for the project is the Double Diamond Method which involves the succession of four phases: research, analysis, ideas and prototyping, implementation.

4.2.1. Research

The project begins with a research phase in which in-depth information is collected about the operation of the service, the context in which it is inserted and all the people who are involved in it. It is defined as a phase of discovery and exploration that leads the designer to observe the problem and reality from different points of view.

The data obtained at this time constitute a rich bank of information and knowledge that lays the foundations of the project and guides the team throughout the work. It is therefore important that they are collected accurately and using appropriate tools.²¹

²¹ See POLAINE, A., LØVLIE, L. & REASON, B., *cit. supra* note 16

In this regard, Polaine, Løvlie and Reason in their book recall that it is essential to use collaborative tools to collect and have access to testimonies from all the actors of the service (co-design), as the point of view of each of them is important and useful.

Moreover, although the collection of quantitative data is important to define what is happening in the context of the analysed problem,²² it is above all necessary to use qualitative tools (e.g., interviews, service safari). Qualitative research allows us to approach the users of the service understanding their motivations, needs and desires, and returning useful information to implement a real transformation.

Our project therefore begins with the research phase aimed at gathering information, identifying the needs of users and understanding the context in which the two INPS branches work.

We have looked at the context in a new way, seeking inspiration and taking note of the suggestions and opinions of all the people concerned, paying particular attention to the recipients of the service and to all the subjects involved in its provision.

In this phase we have applied the qualitative and quantitative research methods useful to achieve an in-depth knowledge of the context and users, indispensable for the experience design process.

The observation days at the Nola and Pozzuoli branches allowed us to evaluate the new user journey made necessary by the pandemic situation, to get in touch with the first users who told us their stories and often their problems with the procedures.

An interview with a foreign user in one of the branches highlighted the difficulty that the user has in finding correct information for the procedures, very often rejected for reasons not attributable to the INPS but to other public entities. In addition, the notice boards are full of unreadable news and this often implies that users are not aware of the new INPS directives.

In one of the co-design sessions, we built the new user journey of the user and realized that the officials of both branches had a partial knowledge of the service.

The research phase deepened and became more engaging for the officials when we had the opportunity to interview several foreign users thanks to the collaboration with two cultural mediators. Foreign users have confirmed to us that finding the right information is always difficult and they go to INPS even for problems that cannot be solved by the public body. They have confirmed to us the importance of word of mouth, which is for them the greatest source of information and that language is not

²² KERSHAW, A., DAHL, S. & ROBERTS, I., *Designing for Public Services*, Nesta, IDEO & Design for Europe, available at: < <https://www.nesta.org.uk/toolkit/designing-for-public-services-a-practical-guide>>

always an obstacle, but certainly speaking in one's own language strengthens security and confidence in the public body providing the service.

Officials kept a diary in which to record each meeting with a foreign user, filling out the pages with ad hoc guidelines. They filled out a quantitative search form indicating the number of foreign users encountered and their nationality. They had the opportunity to interview, with the help of a mediator, foreign users to learn about the stories, needs and difficulties in using INPS services.

4.2.2. Analysis

The second phase of the design process consists of organizing the previously collected data to have a defined picture of the operation of the service, the challenges to be addressed and the needs of the producers, users and suppliers.²³

The information obtained through quantitative research is summarized in numerical data, while those obtained through qualitative research tools are transformed into "stories"²⁴ and are represented through visual methods (e.g., *storytelling*).

Organizing the information allows you to have a more orderly view of the various aspects of the project and helps the team to generate *insights*, that is, a series of synthetic sentences of in-depth analysis that define the most important and least obvious aspects that emerged from the research.

Kershaw, Dahl, and Roberts, in their book "*Designing for public services*" define insights as the "key to the creation of ideas that have not been previously considered", they are in fact used as a starting point to define opportunities and identify strategic directions for the project.

In the analysis phase we have identified all the critical issues and opportunities for improvement that emerged during the research, identifying among the most significant and important ones for the success of the project, those compatible with the intentions and resources of the public entity.

In this phase the interventions and possible solutions to be implemented have been identified and defined. During the workshops with the officials, the data of quantitative and qualitative research, the strengths and weaknesses highlighted by the creation of the User Journey Maps and the User Personas for the discovery of the target were studied.

²³ Technology Strategy Board, Design Council, *Design methods for developing services*, 2015, available at: <<https://www.designcouncil.org.uk/resources/guide/design-methods-developing-services>>

²⁴ See KERSHAW, A., DAHL, S. & ROBERTS, I., *cit. supra* note 22

The officials of the two INPS branches reached two different conclusions, imagining two solutions, both feasible.

For the Nola branch, the new Project Brief was reached, moving from the objective of redesigning public administration services in an intercultural key to the objective of designing a mediation service dedicated to foreigners to simplify access to and the use of INPS services.

For the Pozzuoli site, the new design challenge was to design a service card designed for foreigners, to simplify access to and the use of INPS services.

Both solutions are based on real needs and have more or less advantageous aspects. The solution proposed by the Pozzuoli site is an immediately scalable solution, adaptable to the entire Italian territory that does not need external stakeholders for being adopted.

On the contrary, the solution proposed by the Nola branch was possible thanks to the Municipality which, as a project partner, made the resources available for the mediation service.

4.2.3. *Ideas and Prototyping*

In the “Ideas and Prototyping” phase, the identified opportunities are transformed into new ideas and then the ideas are deepened up to the definition of real concepts.

There are numerous tools that help at this stage (e.g., *brainstorming*) that can be chosen based on the characteristics of the problem to be solved and the preferences of the project team. However, it is essential that all actors of the service are involved (*co-design / co-creation*). In fact, with their internal point of view, they look at the problem differently than the project team and are able to suggest alternative solutions or to help evaluate the quality of the ideas generated.

After generating a sufficient number of possible solutions, the best ideas are selected based on their feasibility and quality. From these, concepts are then developed. The concepts are more complete and better defined than the ideas, they represent real solutions to the problem, that will be and prototyped.

The prototyping activity makes the solutions identified up to this point tangible and allows you to understand and communicate them better and then test them by discovering the problems and improving them. Collaborative methods can also be applied at this stage, in particular users and service providers can take part in prototyping activities by providing feedback on their experience (*co-creation*).

It is the phase in which the idea takes shape, i.e., the one in which the identified solution is designed in every single aspect.

This phase is useful and necessary to evaluate the validity, efficiency and effectiveness of the proposed solution and to examine further forms of enhancement or implementation. As in the previous phases, the active involvement of all stakeholders will be essential for the collection of feedback.

Beginning to design our service with the officials of the Nola headquarters, the participants have used different tools learned during the meetings.

They have created a Stakeholder Map identifying the new actors of the service. They created a framework to understand and share the strengths, weaknesses, threats and opportunities of the service being designed. They built a user journey of the service and understood the roles of INPS staff within it. They made personas to validate the service.

The service envisaged involves the use by foreign users of a form translated into 4 languages (Arabic, Bengali, French and English), to be completed online, in which they indicate their personal data and the service requested.

The completed forms reach the Public Relations Office manager who sorts out the requests to the officials in charge of processing the different procedures.

The partnership with the Municipality of Nola has allowed the professional figure of the mediator to be involved, who will be present at the branch on established days and will contact, alongside the officials, foreign users to communicate the outcome of the procedure.

During the previous workshop on design, the officials used different tools of the Service Design methodology to fully understand the proposed service, while during this last workshop they designed the service in all its aspects.

The design of the service proposed by the Pozzuoli branch begins with the choice of the contents of our output. The participants, having made their own the results of the research, were very active and involved. Their growing interest was evident in this day of design, where everyone actively participated, in a very critical way, in the creation of the individual pages of the services contained in our “service card”.

Each service, chosen according to the frequency of request of our target audience, is explained and reworked following a clear and simple scheme: i) service name; ii) explanation of service; iii) how to submit the application; iv) the amount of the benefit; v) duration; vi) causes of forfeiture.

The comparison between the people within the groups who worked on the same service was useful to understand the different skills and to understand that it is the same officials who do not understand the services they do not deal with directly.

For the prototyping day, the officials, divided into six groups, created the product sheet using the terms and phrases that are most understandable to our target.

Once the creation has been completed, each group has passed the product card assigned to the next group for review and comparison. Each group was able to review the six sheets and express an opinion on the best way to communicate the product. They finally worked on the design of the cover, the back and an important content that concerns the solution of major problems encountered by foreign users with documents.

4.2.4. Implementation

Measuring the performance of services is very important throughout their existence. Just after the creation of the services, such measurement helps the service designer to improve the design process and the methodologies used, and the service producer to verify that the desired results have been achieved.

However, it is necessary to take into account that services are inserted in constantly evolving contexts and, consequently, are in turn constantly changing.²⁵ For this reason, it is important to continue to measure the impact of services regularly, so that they can be modified in step with the changes in the context in which they are inserted.

In the spirit of collaboration and transparency is important to show measurement results to staff. As direct participants they possess valuable knowledge and are able to suggest solutions for improvement.

The measurement can be based on several parameters, which can be very different from each other, for example: the money earned or saved, the improvement of the user experience, the social value created or the decreased environmental impact. The choice of the valuation index depends on the nature of the service to be measured and the objectives of the body producing such service. Consequently, there is no universal method applicable in every situation, but it must be chosen from among the many existing ones and adapted on the basis of the chosen parameters.

The main problem with measuring services is the collection of data. Producers are in fact accustomed to obtaining data using only quantitative methods.²⁶ As already mentioned above, quantitative data are useful to have a quick response that demonstrates whether the service works or not.

The data collected through qualitative methods, on the other hand, allow us to understand the how and why of what is happening and can provide the necessary material to trigger a new transformation.²⁷

²⁵ See STEFAN MORITZ, *cit. supra* note 4.

²⁶ See POLAINE, A., LØVLIE, L. & REASON, B., *cit. supra* note 16.

²⁷ MAFFEI, S., VILLARI, B. & FOGLIENI, F., *Evaluating services An exploratory approach beyond Service Design*. Politecnico di Milano. 2nd Cambridge Academic Design Management Conference, 2013.

The Service Design Network also suggests that the collection of qualitative data can be integrated into the project offer as it allows users to express their opinion and suggest changes.

In relation to my experience with the projects of Nola and Pozzuoli, the approved and “internally” tested intervention has been, in this phase, further tested by users.

Together with Ms. Ciliberto we have played a coordinating and supervisory role, monitoring the good performance of the testing.

The possibility of testing and observing the initiative designed with real users has offered the opportunity to evaluate further forms of implementation as well as to compare expected results and results obtained.

5. THE RESULT

5.1. The outputs and feedback from the Pozzuoli and Nola branches

The Pozzuoli branch developed a set of results, notably: i) a “Synthetic guide to the most demanded services”, with services in Italian, Arabic, Bengali, French and English. In addition to the instructions for resolving problems with documents, the guide contains a QR-code linked to “INPS responds - access without credentials” to send your request without the need for SPID; ii) a feedback sheet on the usefulness of the guide; iii) a “Discover INPS services” signs designed to indicate the presence of the guide and its position.

The feedback gathered was positive and the cards seemed clear and useful. Some users did not know they could access some of the services in the guide.

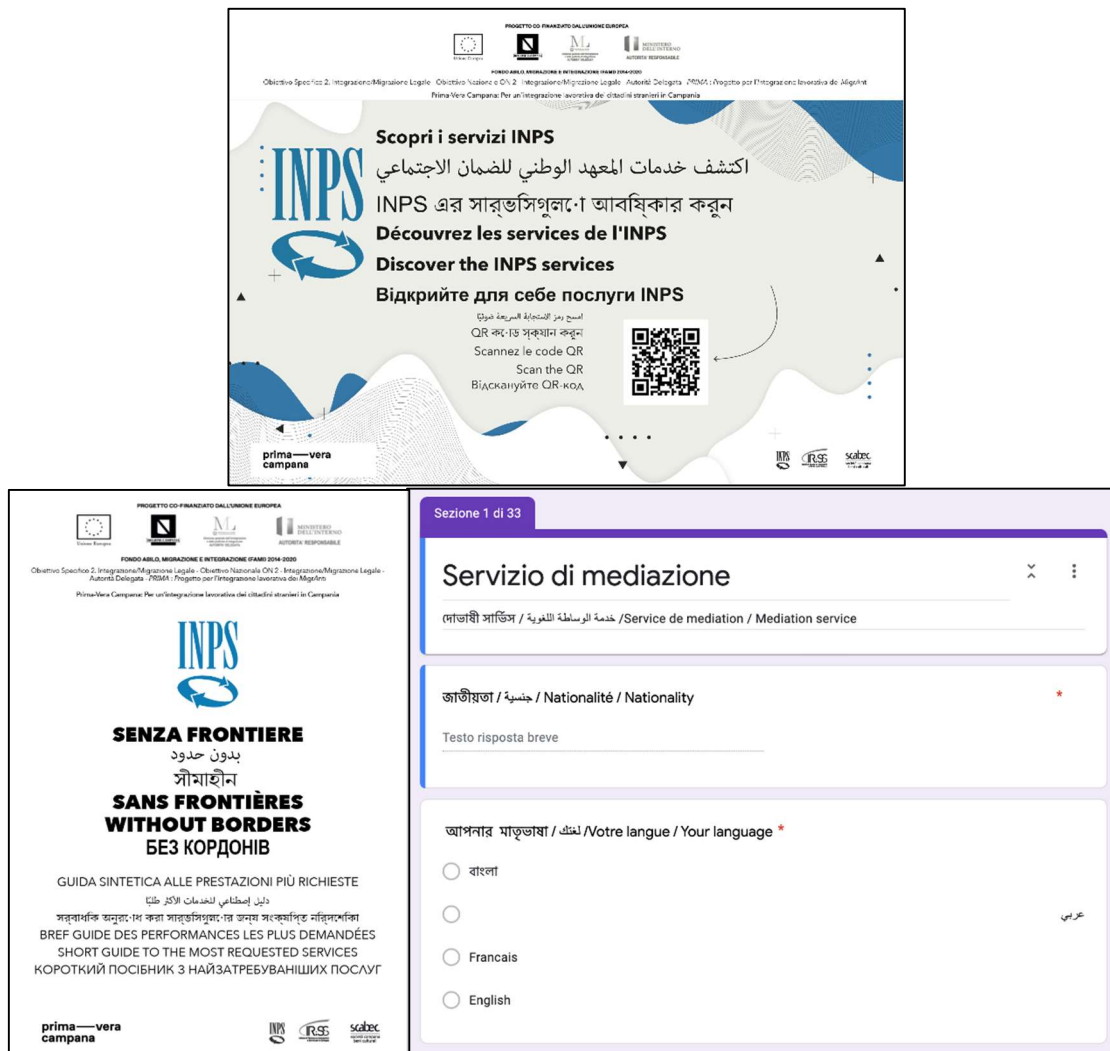
All the officials were proud of the result achieved and since they were receiving compliments at the desk from users, their enthusiasm was growing.

The Pozzuoli branch elaborated different outcomes, namely: i) an online form translated into 4 languages for sending your request for access to INPS services; ii) a feedback collection form on the usefulness of the form; iii) a signage “Do you want to communicate with INPS in your language?” with a QR-code connected directly to the online form.

Thanks to the presence of cultural mediators, the invited users filled out the form and received a response to their needs in their own language.

The online form allows officials to study the paperwork before meeting with the user and prepare the mediator to communicate the right information.

In addition, the presence of mediators has created a climate of tranquillity in users who have felt reassured by the greater understanding of the information and gave a lot of positive feedback to the designed service.



5.2. Lessons We Learned

The project of re-design of services has developed at a time of profound changes in the country, such as the pandemic with the consequent various restrictions, and

the new Government Decrees introducing imminent changes in the benefits provided by INPS.

During the prototyping day, the changes approved by the government in terms of support for families were discussed.

The Single Allowance will absorb: i) allowances for the family unit and family allowances; ii) deductions for dependent children; iii) the allowance of the Municipalities for families with at least 3 minor children; iv) the childbirth bonus and the baby bonus.

All this will make an implementation of the synthetic guide designed by INPS officials in Pozzuoli indispensable.

The observations made together with the officials in a last day of discussion have confirmed their involvement and the usefulness of the project.

The skills they acquired in Design Thinking will help them to face the climate of uncertainty and changes that they will live as well as to create small solutions and improve their and their users' experience within the public body.

We would add that, following the recent conflict in Ukraine and the consequent migratory flows from Eastern Europe, it was necessary to add to the created material a version of the synthetic guide in Ukrainian.

6. BRIEF CONCLUDING REMARKS

Public administration has always been accustomed to working with a “Top-Down” approach, that is, giving solutions from above, regardless of the context and the people for whom they are intended. This approach has proven to be clearly inefficient.

We need to move to a “Bottom-Up” approach, imagining and designing solutions from the bottom up, starting with the citizens, who are the ultimate users of PA services, and the officials who must implement those solutions.

At the beginning of our journey not all people were used to being involved in a change. On the one hand the officials did not think they could take part in the creation of a solution for their own public body, while on the other the citizens looked at us hesitantly, trying to discover something strange in our interest towards them.

Service projects are always influenced by their contexts and the contexts themselves depend on numerous variables, which in turn influence the outcome and the design process. In particular, in the public services sector in Italy, the situation is very complex.

The public sector works on a large and complex scale (because it is regulated by regulations and subjected to numerous bureaucratic procedures). For this reason, it is very difficult to apply changes that have a visible and immediate effect. It is much more common for changes to take place slowly and progressively, thus allowing innovative and radical results to be achieved, but through a process that moves in small steps.

The results obtained from this project are not so much the final outputs made and prototyped by the two branches, but a new mindset that can help officials with the new challenges they will face.

Listening to users is essential to meet their needs and requirements, and it is crucial to simplify the work of officials.

Concluding, the Service Design offers several benefits for public administration.

The Service Design places citizens at the centre of the design process. By understanding citizens' needs, preferences, and behaviours, public administrations can create services that are tailored to meet their expectations. This approach leads to improved citizen satisfaction and engagement.

This method focuses on creating seamless and intuitive experiences for citizens when interacting with public services. By mapping out the user journey, identifying pain points, and designing user-friendly interfaces, public administrations can provide services that are easier to access, navigate, and understand.

Through Service Design, public administrations can identify inefficiencies, redundancies, and bottlenecks in existing processes. By streamlining and optimizing service delivery, they can improve operational efficiency and reduce costs. This can be achieved by eliminating unnecessary steps, automating tasks, or integrating different services to provide a more cohesive and efficient experience.

Moreover, Service design encourages collaboration between different stakeholders, including citizens, public servants, and other relevant parties. By involving these stakeholders throughout the design process, public administrations can gain valuable insights, co-create solutions, and ensure that services are designed to meet the diverse needs of the community.

Encouraging a culture of innovation within public administration by embracing iterative and user-centered design principles, public administrations can continuously improve services based on feedback and changing needs. This flexibility and adaptability enable them to respond effectively to emerging challenges and evolving citizen expectations.

Overall, Service Design empowers public administrations to create citizen-centric, efficient, and effective services, leading to improved citizen satisfaction, increased trust, and better governance.

11.

MIGRATIONS, PERCEPTIONS AND SEGREGATIONS IN THE AGRICULTURAL REGIONS OF SOUTHERN ITALY

Nadia Matarazzo

SUMMARY: 1. Introduction; – 2. Migration; – 3. Perceptions; – 4. Segregation; – 5. Concluding Remarks.

1. INTRODUCTION

Making geography on migrants' settlements in the agricultural spaces of Southern Italy implies paying attention both to spatial and social phenomena. The so-called "Mediterranean model of migration", typical of agriculture in Southern Europe, is based in fact on irregular labour demand that attracts foreign migrant workers, whose housing is managed directly by the employer – with a deduction for overcrowded and unfurnished flats – or arranged with nationals, mainly in slums.¹ Employment in agriculture represents one of the main specificities of the Mediterranean model of immigration: even in Countries, like Spain, Italy and Greece, where unemployment rates are very high, migrant workers find growing job opportunities in agriculture, replacing the local workforce, because, on one side, depopulation is affecting these societies, and on the other side the national workers are highly skilled and avoid the so-called "3D" jobs (dirty, dangerous and difficult). However, the price paid by migrant workers is often very high: low wages,

¹ PUGLIESE (ed.), *Immigrazione e diritti violati. I lavoratori immigrati nell'agricoltura del Mezzogiorno*, Roma, 2013.

CILIBERTO, PALOMBINO (eds.), *Labour Migration in the European Union: Current Challenges and Ways Forward*, CNR Edizioni, 2023, ISBN 978-88-8080-578-6, pp. 261-276.

informality, discrimination, marginalization, and segregation.

On a regional scale, in Southern Italy migrants represent the absolute majority of agricultural workers: in particular, Southern Latium, coastal Campania, Northern Apulia, inner Basilicata, Southern Calabria and East and Southern Sicily share social landscapes, featured by residential concentration and housing discomfort and often explained like exceptions in the migratory scenario, in other words spaces following social and economic rules that are different from the common ones. This paper, on the contrary, will try to read these “spaces of exception” like the normal territorial effects of the agriculture industrialization that occurred in the Mediterranean since the 1970s. The analysis will focus in particular on some forms of widespread illegal brokerage and spatial segregation as respectively socioeconomic and territorial components of the supply chain in a globalized agriculture.

The field of observation will be Campania, which has such a strategic role in the agricultural system of Southern Italy, now managed with a circulation of workers among the mentioned regions – totally informal – because Campania works like a sponge of the incoming irregular flows. Migrants employed in agriculture are in-fact mostly irregular and this was strengthened since 2008, when the global crisis had strong territorial effects in Italy: afterwards, thousands of migrant workers were employed in the factories of the North, due to the job loss, moved to the South, where the usual informal employment in agriculture represented a strong pull factor.² The informality is a keyword because the job loss for lots of those migrants meant becoming irregular since the Italian law bordering regular and irregular conditions uses the employment contract as a parameter.³ Therefore, the informal job market opportunities got stronger the pull factors of the agricultural regions in Southern Italy, in particular where informality is strengthened by the social and economic rooting of organized crime: and Campania is part of these ones due to the wide networks of *camorra*.⁴ Who does not lose the job, usually looks for seasonal employment during the summertime. Other members of the labour crews come from the neighbouring regions of Southern Italy and move seasonally from one harvest to another, from one rural periphery to another.

Immigration in Campania is not recent: already in the Seventies, when Italy registered for the first time positive net migration rates as an effect of the 1973 oil

² MATARAZZO, “Flussi migratori e segregazione spaziale nelle regioni agricole del Mezzogiorno d’Italia: il Litorale domitio (Caserta)”, *Geotema*, 2019, p. 66 ff.

³ Legge 30 luglio 2022, n. 189 (G.U. 26/08/2022), well-known as the “Legge Bossi-Fini”.

⁴ The *camorra* is an Italian mafia-type criminal organization and criminal society originating in the region of Campania.

shock, this region was reached by thousands of citizens from Northern African Countries (mostly from Morocco). The more attractive areas were just the agricultural ones, where workers were usually employed in the tomatoes harvest especially in the province of Caserta (Northern Campania),⁵ which was one of the first Italian regions involved in immigration, after a long history of emigration.⁶

The migratory scenario of Campania was influenced by the different geographies of international migrations in the last decades of the Twentieth century and the first decades of the new millennium, since we can identify a South/North route, from Africa to Europe, in the Eighties; an East/West route, from Eastern to Western Europe, in the Nineties, and finally a new South/North route, involving not only Northern Africa as emigration land but also the Sub-Saharan Countries.

The role of Campania in a territorial vision of migrations is changed over the years, since till the end of the last century it was a transit land for migrant workers, whose stay was temporary because their destination was in other European Countries (first of all France and Germany) or, if anything, in industrial Northern Italy. On the contrary, in the new millennium, Campania registered more and more permits, family reunifications and humanitarian protections, meaning its increasing role as a settlement destination.

The next section (Section 2) will address the issue of migration in the main agricultural regions of Campania, where the industrialization of the primary sector has transformed the economic and social landscapes, making room for workers exploitation, discrimination, addressed in Section 3, and spatial segregation, addressed in Section 4.

2. MIGRATION

Migration is strongly polarised in Campania, like most of the social and economic phenomena, because of the overwhelming role of Naples, where more than half of the non-Italian regional population lives (Tab. 1). But the agricultural workers are concentrated in the provinces of Caserta and Salerno, where the foreign presence is growing continuously up since 2010 and the female presence is shrinking just due to the growing agricultural labour demand.

⁵ The widespread employment in tomatoes harvest gave birth to a visual identification between African agricultural workers and tomatoes themselves, even though nowadays this kind of crop is more typical of Northern Apulia, while in the province of Caserta it has been replaced mainly by tobacco.

⁶ AMATO and COPPOLA (eds.), *Da migranti ad abitanti. Gli spazi insediativi degli stranieri nell'area metropolitana di Napoli*, Napoli, 2009.

Province	Non-Italian citizens			Incidence on the regional foreign population		Incidence on the province total population	
	2010	2023	% change	2010	2023	2010	2023
Avellino	10.299	12.909	25,3	7	5,4	2,3	3,2
Benevento	5.496	8.415	53,1	3,7	3,5	1,9	3,2
Caserta	28.889	48.527	68	19,6	20,1	3,2	5,4
Naples	68.863	120.780	75,4	46,8	50,1	2,2	4,1
Salerno	33.510	50.377	50,3	22,8	20,9	3,0	4,8
Campania	147.057	241.008	63,9	100,0	100,0	2,5	4,1

Tab. 1 – Non-Italian citizens in Campania (2010-2023)

Source: <www.demo.istat.it>

To explain this, we need to mention also another factor involving the two principal agricultural regions of Campania: they are in fact engaged in the industrialization of agriculture, which has transformed wide spaces in agro-industrial landscapes, with the following effects on social local geographies and also on sustainability. Due to the arrival of the large agricultural companies, as Bonduelle in the province of Salerno, wide areas have been converted into the production of the so-called “fourth range” fruits and vegetables, which are all those varieties of fresh fruit and vegetables ready for consumption. The growing demand for ready products has enlarged the pull factors for workers because the productive chain speeds out the operations and needs more and more workforce, which is usually recruited among migrants, most of the time willing to do the 3D jobs, furthermore underpaid.

The industrial transformation of agriculture in Southern Italy is quite evident in some production like the canned tomato. Canned tomatoes to some extent can be regarded as an emblem of made-in-Italy agri-food production and in fact represent somehow “a quintessentially globalized commodity”.⁷ Since the early last century, the production of canned tomatoes has been predominantly based in the Campania region, where the traditional variety of San Marzano tomatoes used to grow in small plots in the hills and small plains in the province of Salerno. For several reasons, including the subsidies of the Common Agricultural Policy to canning factories since

⁷ PERROTTA and RAEYMAEKERS, “Caporalato capitalism. Labour brokerage and agrarian change in a Mediterranean society”, *The Journal of Peasant Studies*, 2022, p. 1 ff., p. 10.

1979, its production has increasingly become intensified. In the same period, the bulk of agricultural production was delocalized to the Capitanata plain in Apulia as well as to the neighbouring province of Potenza, in Basilicata, located approximately 200 km from Salerno, where most canning factories are still based today. Through this delocalization, the processing industry in the Campania region sought to increase and innovate agricultural production, hoping that growers in Apulia and Basilicata would soon follow suit and start mechanizing the operations of seeding and harvesting. However, while in the same period, the agricultural areas of Northern Italy hosted a complete mechanization of the harvest, in the South this process was prevented – or at least delayed – by the growing presence of the migrant workforce. The availability of such highly flexible stocks of labourers discourages enterprises from investing in large machinery, while, at the same time, the labourers' meagre wages compete with the costs of mechanized labour. Despite being illegal, wages based on piecework in the tomato harvest enable the strongest and fastest labourers to compete for better wages. Each 300 kg box is paid between 3 and 4 euros (depending on various elements, such as the conditions of the field and the tomatoes, and the bargaining process between the *caporale*⁸ and the farmer). The fastest workers can harvest up to 30 boxes a day, thus earning 80-100 euros (the *caporale*'s fee and the cost of the transport are deducted from the amount). On the other hand, the weakest and slowest among the workers manage to harvest no more than 5 or 10 boxes a day, thus earning no more than 20-25 euros. This economic coercion has the double function of disciplining and cutting the costs of an already precarious labour force. In the context of rapid delocalization and globalization of local production, *caporalato* as a mode of organizing the labour force retains its fundamental importance because the harvest needs large stocks of workers who can be mobilized and coerced on short notice, in sometimes quite distant and remote fields.⁹

Such an industrial approach to agriculture is not sustainable since it degrades natural resources, depletes human resources, and destroys economic opportunities. Such industrial agriculture is inherently incapable of maintaining its productivity and usefulness to society. It fails every test of sustainability also because it is a significant contributor to the depletion of social energy. Farm workers today are among the lowest-paid workers in Italy while working under dangerous and disagreeable conditions, most without adequate health care or other fringe benefits.

The growing reliance on migrant farm workers also creates cultural and political

⁸ The analysis will focus on this issue in the following section: *caporalato* means the illegal recruitment of workers, a phenomenon that is widespread in the agricultural regions of Southern Italy and the Mediterranean.

⁹ PERROTTA and RAEYMAEKERS, *cit. supra* note 7.

conflicts, particularly where good-paying jobs are few: the two principal agricultural regions of Campania presenting this scenario are the Domitian Coast, in the province of Caserta and the Sele Plain, in the province of Salerno. The economic and social elements that characterize both of them are different: in the former, agriculture is mostly seasonal, the ethnic concentration is strong (the largest groups are the African ones and in fact, Caserta is “the most African” province of Campania), it is well known – also on a national scale – as a land affected by organized crime, a place where the State is absent and so the recruitment of migrant workers in agriculture is widely managed by a sort of gang mastering called “caporalato”; in the latter, agriculture is not seasonal because of the conversion to the fourth range, so land is now covered by huge greenhouses where various types of salad are produced; here the migratory scenario is more diversified than the Domitian Coast one: the foreign presence is more plural and composed both by East-European groups and African ones (mainly from the Northern Countries).¹⁰

Figure 1 shows how the Domitian Coast is close to the Southern Latium and the Sele Plain to Basilicata: the spatial proximity is the key to realising how the mobility of agricultural workers creates such an interregional route with the common social landscape shaped by racial capitalism, discrimination, unsustainable consumption of natural resources and labour exploitation.

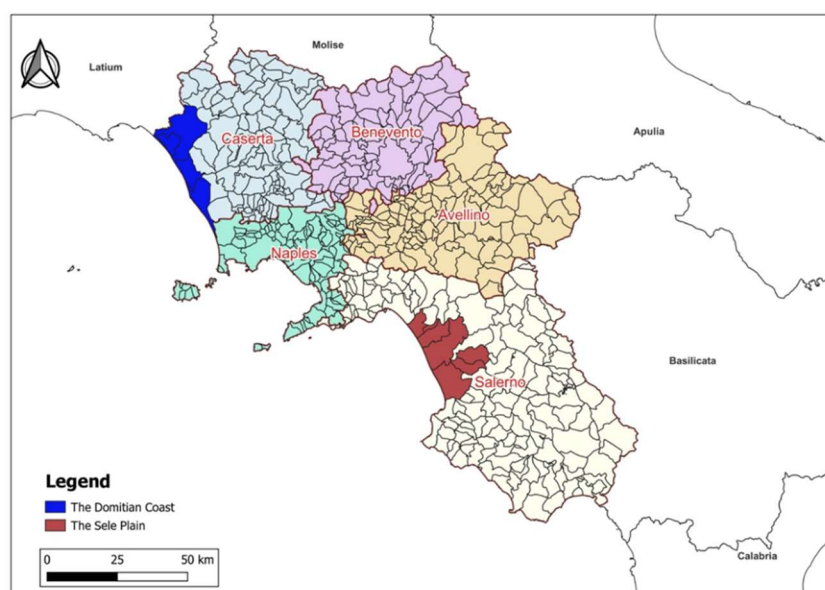


Figure 1 – The Domitian Coast and the Sele Plain in Campania

*Source:
elaboration by
the author.*

¹⁰ MATARAZZO, “Il disagio abitativo dei migranti in Campania. Evidenze dal caso di Eboli (SA)”, *Studi e Ricerche Socio-Territoriali*, 2017, p. 31 ff.

3. PERCEPTION

A research dossier registered the results of complex field work achieved in the agricultural basins of Campania: more than a thousand interviews were done with migrant farm workers about their perception of discrimination.¹¹

75% of the interviewed feel discriminated against: because of being a foreigner, black, irregular and also for gender, less for religion. 98% of them declare to have never or just sometimes had an employment contract, 97% to be underpaid and 95% declared that the employer usually holds back part of the salary.

If the declarations about discrimination and exploitation seemed somehow spontaneous, different was the approach to the questions about the perception of coercion: in fact, only 30% admitted to having suffered physical or psychological threats; less than 25% declared to have been threatened with the loss of accommodation or the report to police. 53% answered to have never been threatened. The threat of the loss of accommodation is connected with the topic of segregation because it deals with the settlement conditions.¹²

To deal with the segregation of migrant farm workers, we have to remember again the Mediterranean model of migration:¹³ the migrant workers' settlement in Campania is influenced in fact by a segmented real estate market, dominated by the push economic factors of the urban areas and the pull factors of the peripheral and rural ones, where accommodation availability is wide due to the depopulation trends and also to the building speculation following the industrialization policies of the Seventies or natural disasters, as the 1980 earthquake. Combined with the growing trends of immigration, it is easy to guess how concentrated is becoming the migrant settlement in the peripheral and rural areas of the region, first of all the most attractive ones for jobs, that are the agricultural spaces.

It is very difficult to divide the analysis when talking about the perception of discrimination and segregation, because the latter is a practice rooted in the former and, when perceived by the victim, in many cases can induce forms of self-segregation.¹⁴

We cannot deal with agricultural work and spatial segregation without dealing with *caporalato* brokerage. *Caporalato* is a black box to open to better grasp the fundamental role it plays in both agrarian production and labour reproduction.

¹¹ BRUNO (ed.), *Lavoratori stranieri in agricoltura. Una ricerca sui fenomeni discriminatori*, Roma, 2018.

¹² MATARAZZO, *cit. supra* note 10.

¹³ See PUGLIESE, *cit. supra* note 1, p. 1.

¹⁴ IHLANFELDT and SCAFIDI, "Black Self-Segregation as a Cause of Housing Segregation: Evidence from the Multi-City Study of Urban Inequality", *Journal of Urban Economics*, 2002, p. 366 ff.

As argued by Perrotta and Raeymaekers, over the last 30 years, *caporalato* has represented a central infrastructure in labour mediation, which simultaneously complements neoliberal State policies while embedding the cost of labour reproduction into migrant networks. Specifically in the context of export-driven plantation economies – like the Italian tomato production one – migrant labour infrastructures like *caporalato* represent the hidden undercurrents of extractive capitalist frontiers. Agricultural firms rely increasingly on such broker networks to guarantee their need for a flexible and disposable labour force while outsourcing the cost of labour reproduction to communities and their social networks, which are deliberately placed outside the realm of “formal” capitalist development.¹⁵

“In this context, the terminology of migrant labour infrastructures serves to unpack the systematically interlinked institutions, actors, and technologies, that facilitate and condition labour mobility. As socio-technical platforms for labour mobility that are at the same time immanent and relational, they may become at the same time self-perpetuating and self-serving, while also providing an alternative for withering State control over formal labour markets. Besides being conduits for human mobility, these infrastructures are also political, in the sense that they reflect the contested integration of workers into their local living environments, from which they remain formally excluded in terms of labour, accommodation and citizenship rights. Concretely speaking, they perform the role of incorporating informal workers into global supply chains under adverse conditions, or they serve to literally suck vital energy from mobile workers, while segregating their human presence from the societies that benefit from their labour”.¹⁶

In sum, we could identify *caporalato* not just as an illegal space within the formal labour market that can be dismantled exclusively through judiciary actions: rather this kind of brokerage is a structural component of contemporary agri-food production and reproduction in the sense that it allows for concentrating the means for capital accumulation in formal industrial firms while externalizing the cost of labour reproduction to informal workers who are increasingly caught in the web of illegality. Secondly, inspired by the extensive literature on brokerage in Southern Italy in a context of large-scale land properties, according to Raeymaekers and

¹⁵ See PERROTTA and RAEYMAEKERS, *cit. supra* note 7, p.1.

¹⁶ *Id.*, p. 2.

Perrotta, an analysis of labour brokerage in the contemporary, globalized agri-food production settings must necessarily involve the systemic relationships between the figure of the broker (*caporale*), the agrarian economy, politics and society and a labour force whose reproduction is contained through combined formal and informal governance. This is what the mentioned scientists call “caporalato capitalism”: understanding it as a mode of production and exploitation that thrives on the historical relation between labour, capital, and public authority in the domain of industrialized agriculture, and which continues to reproduce migrant labour as an adversely incorporated force that produces wealth.¹⁷

Since the Eighties and Nineties, when the tertiarization brought the replacement of Italian farmworkers by a foreign labour force, *caporalato* has gradually entered as a pivot the working and living conditions of migrant farmworkers in Southern Italy. Academic studies, reports in Italian and European mass media as well as NGOs and trade unions’ complaints have contributed to identify the *caporali* as mafiosi and slavedrivers, human traffickers, and sex work exploiters. Following a long strike in Apulia by African labourers in August 2011, a national law declared this form of mediation a criminal offence, punishable with a prison sentence. In 2016, a new law extended this criminal offence to agricultural and other enterprises that consciously make use of the *caporali*’s services.¹⁸ But even though this new legislation has been the basis for several judiciary investigations from 2016 on, it has not achieved much success in addressing the widespread labour exploitation to which migrant workers continue to be subjected.

The placement of the so-called employment centres in the rural districts explains the persistence of *caporalato* brokerage despite the fact that it has been made illegal because these centres replaced the public employment offices, that were the central nodes of formal mediation in the rural districts. Agricultural firms report the value of labour to the State administration to these centres through formal (mostly digital) statements, while in turn the State reserves the right to verify this value through occasional inspections and bureaucratic oversight. In this context, the *anti-caporalato* legislation may have pushed labour mediation to partially emerge out of the illegal sphere, but it also contributed to what experts now call a rise in “grey labour”: the underreporting of actual labour time to cream off or preclude the payment of social welfare contributions, such as unemployment and pension benefits.¹⁹ Rather than improving migrant labourers’ working and living conditions,

¹⁷ *Ibidem*.

¹⁸ Legge 29 ottobre 2016, n. 199 (G.U: 03/11/2016).

¹⁹ AVALLONE, *Sfruttamento e resistenze. Migrazioni e agricoltura in Europa, Italia, Piana del Sele*, Verona, 2017.

legislative reforms have essentially reformulated the question of agricultural labour around border security and humanitarian migration management, with the effect of increasing the latter's continued social and political segregation in Italian society. While some attention has been devoted to the social aspects of legislative reforms, a specific focus on migrant labour mediation and its social effects in the context of Europe's liberalizing agri-food industry today has not yet received much attention in Italy. Hence, the need to define more specifically the dark sides of supply chain capitalism and its spatial forms.

4. SEGREGATION

In order to understand the settlement scenario and the phenomena dealing with segregation needs paying attention to the housing conditions of migrants. The housing poverty in fact is particularly severe for the migrant population as well as ethnic minorities in general. In this case, in addition to economic-financial problems, access to housing is often hampered by forms of discrimination in the housing market that may be more or less accentuated, both on an urban and a rural scale.

Concerning the latter, on which this paper is focusing, a map of the Italian rural ghettos can be useful (Fig. 2):²⁰ for "rural ghetto" we intend an agricultural territory where the presence of migrant farm workers is highly concentrated, the *caporalato* brokerage manage their recruitment and in sum the Mediterranean model of migration is clearly visible also in the settlement conditions of workers. They live far from the urban centres in a sort of "free zones", where the State is somehow interrupted and the intensification of production is the only rule, to which all the others are subject.

²⁰ AVALONE and TORRE, "Dalla città ostile alla città bene comune. I migranti di fronte alla crisi dell'abitare in Italia", *Archivio di Studi Urbani e Regionali*, 2016, p. 51 ff, p. 61.



Figure 2 – The Italian rural ghettos

Source: Avallone and Torre, cit. supra note 20.

Except for the one located in the paddy field of the Piemonte Region (North of Italy), the map shows the increasing density of rural ghettos from Rome to the South, which is a marker of the value chain based on the rotation of migrant workers among the agricultural regions of Southern Italy: indeed, the agricultural calendar outlines the trajectories of mobility that are inscribed in the economic geography and society of the regions of Southern Italy such as an element of relevance and a contribution to territorial resignation. The work cycle starts in February in the province of Caserta, when the migrants arrive for tomato planting and stay up until the harvesting phase, then they move to the province of Foggia, where the harvest of the same crop is later; finally, they move towards the plain of Gioia Tauro and Sicily for the orange winter harvest.²¹

Segregation is in some ways an effect of the peripheralization of migrant workers and of their placement in the agricultural spaces, due, as mentioned, to the

²¹ See MATARAZZO, cit. supra note 10, p. 1.

industrialization of agricultural activities, whose supply chain is today entirely controlled by transnational agribusiness companies, which impose the organization of production in large farms with flexible workforce, to also face market fluctuations. Migrant workers respond to these needs for flexibility, from since the mass irregularity generated by the immigration legislation forces these workers to find black or grey work, often accepting, in addition to the piecework regime, housing conditions that are extremely uncomfortable.

The Domitian Coast and the Sele Plain host these processes and they emerged both as attractors of migrant agricultural workers and as gears of the revolving platform within the migratory system configured in the South based on agriculture.²²

The following images represent some accommodations in Eboli (Sele Plain), where the ghetto's distance from the urban centre explains why the farm workers' segregation can be somehow "invisible": migrants live near the greenhouses, sometimes in abandoned factories, in slums degenerated following the abandonment of building projects aimed to qualify this coastal zone as a touristic one. Houses do not have roofs, electricity or water. Some of them are accommodations for summer holidays but from October until May they become workers' dormitories, inhabited by five to ten persons, without heating because of their original function.



²² *Ibidem.*



Figg. 2-3 – Accommodations along the coastal road in Eboli (Sele Plain)

Source: photos by the author.

Here it seems there is no social perception of segregation simply because urban residents do not see it. As a matter of fact, the size of municipality space permits to separate the residents' spaces from those of farm workers.

Moving to the second case, the Domitian Coast is crossed throughout part of its length by the Domitiana road, which divides it into two distinct parts: a coastal area with tourist and commercial activities, and the other with an economy linked mainly to farming and breeding of buffalo cows, which is local excellence in the primary sector. The urban structure of the municipalities (Sessa Aurunca, Castelvoturno, Mondragone and Villa Literno) is very fragmented due to the presence of different locations.

The population growth is at a steady pace, but there is also a considerable increase in the percentage of resident immigrants, which in Castel Volturno was just over 9% of the total population in 2006 and reached 17% in 2023. This figure is more than three times the average provincial incidence of the immigrant population in the same period, which is between 5% and 6% of the total population.²³ It is also worth noting how the evolution of the officially registered population cannot consider the illegal immigrant population, which also resides along the Domitian Coast, and is employed

²³ The data are available at: <<https://demo.istat.it/>>.

mainly in the primary sector, even seasonally. Therefore, it is reasonable to assume that the overall incidence of immigrants on the total population is even higher and occupies the proportion of the most poor-quality building stock, in terms both of building quality and urban environments. From the housing characteristics, the quality of housing stock varies significantly from the historic centre to the Coast. In the historical centres, there are old and new buildings, while along the coast, the urban context is mostly residential, but nowadays in poor conditions and occupied illegally by economically disadvantaged families. The remaining part of poor-quality and abandoned buildings are empty. The “patchy” distribution of the population throughout the territory, its varied origins, the considerable mobility, internal and external of the population, the trouble and unsafety with which this appropriation took place, and the problems that triggered this condition has made the Domitian Coast a “difficult” area to study and manage, as various studies have highlighted.²⁴

In this territorial context, there are specific socio-economic conditions that over time have induced the local real estate market to be completely avulsed from macroeconomic dynamics. More in detail, the deep-rooted presence of organized crime, waste abandonment, the presence of toxic waste buried underground by organized crime, urban and environmental degradation, the extensive illegal buildings are all features that have encouraged the massive increase of immigrants in the Domitian Coast’s municipalities (regular and irregular).²⁵ For these reasons, the variable “immigrant population” could be understood somehow as a proxy of local economic and social conditions. This does not mean assuming a relationship between housing prices and immigration, so it is not possible to say whether this correlation depends on the perception that the Italian native population has of the migratory phenomenon, as is the case in the main Italian cities, in accordance with researchers for whom a large immigrant population tends to reduce prices or, conversely, because the less spending power of the immigrant population implies that they focus on urban areas that are less well-liked due to poor location characteristics and more degraded buildings.

²⁴ D’ASCENZO, *Antimondi delle migrazioni. L’Africa a Castelvoturno*, Milano, 2014; DE FILIPPO and STROZZA (eds.), *Vivere da immigrati nel Casertano. Profili variabili, condizioni difficili e relazioni in divenire*, Milano, 2012; GAFFURI, “Africani di Castel Volturno, se è permesso”, in PETRARCA (eds.), *Migranti africani di Castel Volturno*, Meridione. Sud e Nord del Mondo, 2016, p. 82 ff.

²⁵ See MATARAZZO, *cit. supra* note 10, p. 1.

5. CONCLUDING REMARKS

The issue investigated by this paper leave room for further insights into future research on the topic, which, as the analysis has shown here, will become increasingly important on both a local and national scale. What we can assume is that in “difficult” territories such as the Domitian Coast, the housing discomfort of migrants adds up to the natives one and it often generates social conflicts. So, discrimination makes room and we know, for example, that in this area 15% of migrants improve their housing condition ten years after their arrival on average.²⁶ In the Domitian Coast, different from the Sele Plain, hate speech is rooted among the Italian natives, due to the widespread poverty in the whole local communities and also to the concentration of ethnic groups – in these cases the African ones, as said before – which over the years have added their criminal networks to the local ones, in particular, to manage the drug trafficking and prostitution.²⁷

It is just from this perspective of territorial conflict that having a look at some social motions that took place in recent years is useful – underlying that everyone has involved migrant farm workers from African Countries: the rebellion of Castelvoturno in 2008, the one of Rosarno in 2010 and the rebellion of San Ferdinando (both in Calabria) in 2018, where violence, exploitation and segregation were reported.²⁸ We do not know if anything changed thanks to this outing, but after that, the local communities became aware of what the territory they live in hosts; after that solidarity networks among workers have empowered and a reaction to violence and exploitation took place, since – it is useful to remember it – the mentioned rebellions took place after some workers were killed by the local organized crime.

So, what is segregation? To answer, it is useful to borrow the words of the American geographer Michael Samers, who defines segregation as “the result of a social and spatial practice combined with a political and cultural speech”.²⁹

The discrimination and segregation landscapes of Southern Italy described in this

²⁶ See DE FILIPPO and STROZZA, *cit. supra* note 24, p. 10.

²⁷ See D’ASCENZO, *cit. supra* note 24, p. 10.

²⁸ Sardo, “Undici anni fa a Castelvoturno la strage dei Ghanesi”, La Repubblica Napoli, September 18th 2019, available at: <https://napoli.repubblica.it/cronaca/2019/09/18/foto/undici_anni_fa_a_castel_voltuno_la_strage_dei_ghanesi-236338447/1/>; “La rivolta nera di Rosarno”, La Stampa, January 8th 2010, available at: <<https://www.lastampa.it/cronaca/2010/01/08/news/la-rivolta-nera-di-rosarno-1.37028179/>>; “La tendopoli di San Ferdinando. Un’emergenza che dura da 11 anni”, May 18th 2021, Rainews, available at: <<https://www.rainews.it/archivio-rainews/media/La-tendopoli-di-San-Ferdinando-emergenza-che-dura-da-11-anni-migranti-calabria-68b7aa62-6eee-4273-aa55-78ae36d8f020.html#foto-1>>.

²⁹ SAMERS, *Migrazioni*, Roma, 2012, p. 245.

paper are often read as some exceptions, something extreme and different to rules and practices. We could, on the contrary, read these scenarios as the main point of view from which to read the global and the Italian economies, because it is the only way to understand their real rules and practices and to take over their contradictions.³⁰

³⁰ See MATARAZZO, *cit. supra* note 10, p. 1.

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