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Decent Work for Domestic Workers

The case of Migrant Domestic Workers from Romania to Italy: a gender approach as a strategy fostering human rights protection.

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‘Și dacă stele bat în lac

Adâncu-i luminându-l,

E ca durerea mea s-o-mpac

Înseninându-mi gândul’

Mihai Eminescu

Table of Contents

List of Acronyms

ANITP – Agenția Națională împotriva Traficului de Persoane

ACHR – American Convention on Human Rights

C189 – Domestic Workers Convention no. 189

CAHTEH – Ad Hoc Committee of Experts

Co29 – Forced Labour Convention no. 29

CoE – Council of Europe

GRETA – Group of Experts on action against trafficking in human beings

CEDAW – Convention on the Elimination of All Forms of Discrimination

CRC – Convention on the Rights of the Child

DEO - Department of Equal Opportunities

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EPRS – European Parliamentary Research Service

IDWF – International Domestic Workers Federation

IDWN – International Domestic Workers Network

IACHR – Inter-American Commission of Human Rights

IACtHR – Inter-American Court of Human Rights

ICTY – International Criminal Tribunal for the Former Yugoslavia

ILC – International Labour Conference

ILO – International Labour Organization

ITUC – International Trade Union Confederation

IUF – International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association

OAS – Organization of the American States

OHCHR – Office of the High Commissioner for Human Rights

UNODC – United Nations Office on Drugs and Crime

WIEGO – Women in Informal Employment: Globalizing and Organizing

Abstract

Il focus di questo elaborato è sulla condizione di grave sfruttamento lavorativo delle donne romene emigrate in Italia impiegate nel settore domestico e sull'efficacia del sistema legislativo nella prevenzione, protezione e criminalizzazione di queste gravi violazioni dei diritti umani. In particolare, si è cercato di rispondere ai seguenti quesiti: il sistema legale italiano può definirsi efficace nel contrasto al grave sfruttamento lavorativo e al fenomeno della tratta di esseri umani delle donne romene migranti? Quale è il ruolo dell'approccio di genere nel sistema di contrasto di questi fenomeni, soprattutto nel processo di identificazione delle vittime e nella produzione di misure ad hoc destinate a garantire protezione alle vittime? Nel dare una risposta al primo quesito si è ritenuto di fondamentale importanza indagare il ruolo dell'inclusione della prospettiva di genere nella definizione delle politiche di prevenzione e protezione delle vittime.

Per poter rispondere adeguatamente al presente quesito di ricerca è essenziale analizzare il quadro giuridico esistente e la giurisprudenza internazionale a tale proposito, per individuare la collocazione dell'oggetto di studio sullo sfondo più ampio del diritto internazionale. Verranno quindi discussi i principali strumenti internazionali a disposizione per chiarire il quadro giuridico relativo ai lavoratori domestici e ai crimini che rientrano all'interno della definizione non legale di schiavitù moderna, ossia la schiavitù, la servitù, il lavoro forzato e la tratta di esseri umani. Considerata l'ampiezza dell'argomento, la discussione si focalizza in particolar modo su due delle forme che maggiormente colpiscono coloro che sono impiegati nel lavoro domestico: il lavoro forzato e la tratta di esseri umani.

I dati mondiali relativi al lavoro domestico mostrano che nel 2019 circa 75.6 milioni di persone erano impiegate nel settore domestico di cui una stragrande percentuale (il 76.2%) era rappresentata da lavoratrici donne. Questo settore è particolarmente afflitto da alti tassi di informalità che sono indicativi del basso livello di protezione e diritti che vengono garantiti a questi lavoratori. La situazione sembra essere ulteriormente aggravata nel caso dei lavoratori migranti, i quali sono maggiormente esposti a condizioni di lavoro particolarmente degradanti e a sfruttamento. Non a caso sono molte le situazioni documentate di casi di lavoro forzato e tratta in questo ambito. A questo riguardo la comunità internazionale ha cercato di definire degli standard sul lavoro domestico per garantire condizioni di lavoro dignitose anche a questa categoria di

lavoratori e ha senza ombra di dubbio contribuito alla definizione e alla proibizione di crimini e importanti violazioni dei diritti umani come il lavoro forzato e la tratta. Tuttavia, sia per quanto riguarda il primo tipo di intervento che il secondo, gli stati hanno incontrato difficoltà nell'attuare efficacemente queste normative. Il caso dell'Italia è esemplare, soprattutto per il grande numero di lavoratori domestici, circa 2 milioni di cui però va evidenziato che quasi il 70% è rappresentato da migranti. La principale collettività nazionale impiegata in questo settore è quella romena. Nonostante questo alto numero di lavoratrici domestiche romene, il focus della maggior parte delle ricerche sulla tratta riguarda lo sfruttamento sessuale. Ben poco invece si ha invece sullo sfruttamento e la tratta di questo donne nell'ambito lavorativo e soprattutto nel settore domestico, benché numerose testimonianze indichino il contrario. Questa ricerca, quindi, cerca di inserirsi in questo gap e di indagare il tipo di protezione e assistenza che le donne romene in questo settore ricevono e soprattutto cosa fa il governo per prevenire. Per studiare a fondo la questione, questo elaborato è suddiviso in 4 capitoli i quali analizzano il quadro giuridico internazionale, la giurisprudenza delle corti regionali, il caso delle donne romene e il quadro legislativo italiano.

Il primo capitolo ha l'obiettivo di tracciare il quadro internazionale relativo alla regolamentazione del lavoro domestico e alle condotte associate con la schiavitù moderna, in particolare il lavoro forzato e la tratta di esseri umani. Il capitolo si apre con l'analisi dei processi interni al movimento sociale globale dei lavoratori domestici che hanno portato all'adozione della prima Convenzione internazionale sui loro diritti. Importante in questo senso è stata la partecipazione delle stesse lavoratrici al processo di negoziazione del contenuto della Convenzione, che come viene sottolineato in questo studio non mirava al semplice riconoscimento di diritti lavorativi ma piuttosto al contrasto dell'immagine stereotipata di questo settore lavorativo, che vede ancora una forte associazione del lavoro domestico con il lavoro non retribuito svolto dalle donne in casa, portando ad una scarsa considerazione di questo lavoro come 'vero lavoro'. Ma la parte centrale del capitolo si occupa del quadro giuridico internazionale riguardante il lavoro forzato e la tratta, partendo dall'analisi degli strumenti dell'Organizzazione Mondiale del Lavoro e delle Nazioni Unite, per poi rivolgersi al lavoro svolto dal Consiglio d'Europa e infine a quello dell'Unione Europea. In particolare, si mettono in evidenza i tre strumenti più rilevanti allo scopo di combattere la tratta di essere umani, ossia il Protocollo di Palermo delle Nazioni Unite del 2000, la Convezione del Consiglio d'Europa sulla lotta contro la tratta di esseri umani del 2005 e la Direttiva 2011/36/EU contro la tratta dell'Unione Europea del 2011. Mentre il Protocollo di Palermo è

rilevante per aver fornito per la prima volta una definizione di tratta che riguardasse tutti gli esseri umani e un quadro generale sul contrasto del fenomeno, gli altri due strumenti sono stati fondamentali per l'introduzione di un approccio fondato sui diritti umani che ha integrato quello del Protocollo di Palermo basato principalmente sulla criminalizzazione e meno attento alla protezione delle vittime e alla prevenzione del fenomeno. A livello delle Nazioni Unite però vanno menzionate anche la Convenzione per l'eliminazione di ogni forma di discriminazione nei confronti delle donne (CEDAW) e la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza (CRC). Questi strumenti, tuttavia, non sono sufficienti, soprattutto per la mancanza o per la debolezza dei sistemi giudiziari di controllo dell'applicazione delle norme esaminate. Per questa ragione, di grande rilievo sono i due trattati di diritto umano che stabiliscono la creazione di avanzati meccanismi giudiziari: la Corte Europea dei Diritti Umani (CEDU) e la Corte Inter-Americana dei Diritti Umani (CIDU).

A questo si lega il secondo capitolo, il quale si pone l'obiettivo di analizzare l'evoluzione della giurisprudenza delle due Corti dei diritti umani. Gran parte del capitolo è dedicata alla giurisprudenza della CEDU, dove si evidenzia come essa abbia incluso la proibizione della tratta nell'articolo 4 della Convezione Europea sui Diritti dell'Uomo, dove ad essere menzionate sono solo le condotte relative alla schiavitù, servitù e lavoro forzato. Si guarda alla difficoltà della corte nello stabilire un collegamento tra queste condotte, mantenendo però allo stesso tempo una chiara distinzione tra esse. Una particolare attenzione è rivolta al primo caso deciso sotto l'articolo 4, ovvero al caso *Siliadin vs Francia*[1] ma anche al ragguardevole caso di *Rantsev vs Cipro e Russia*[2] dove nonostante alcune limitazioni, la corte ha incluso per la prima volta nell'articolo 4 delle Convezione la proibizione della tratta. Vengono quindi evidenziati sia i punti più salienti del ragionamento della Corte che alcune debolezze. Il ragionamento della CEDU è rilevante anche in merito alla definizione degli obblighi positivi in capo agli Stati, individuando in particolare l'obbligo di istituire un quadro legislativo e amministrativo appropriato, l'obbligo di adottare misure protettive e infine l'obbligo di indagare e perseguire. Questa stessa struttura viene seguita in questo elaborato guardando all'evoluzione del ragionamento della Corte nei vari casi pertinenti. Infine, l'ultima parte del capitolo è dedicata alla giurisprudenza della CIDU, la quale anche se non direttamente rilevante per il caso delle lavoratrici domestiche romene in Italia, ha avuto un ruolo

[1] Sentenza del 26 luglio 2005, Appl. no. 73316/01, *Siliadin vs. Francia* (CEDU).
[2] Sentenza del 7 gennaio 2010, Appl. no. 25965/04, *Rantsev vs. Cipro e Russia* (CEDU).

fondamentale nella individuazione del carattere distintivo della tratta. Infatti, nel caso *Hacieda Brasil Verde*[3], ben prima della CEDU, la CIDU individua nell'elemento dell'azione e del movimento il tratto che essenzialmente differenzia le situazioni di lavoro forzato, servitù e schiavitù da quelle della tratta per lo scopo di lavoro forzato, servitù e schiavitù. Inoltre, la giurisprudenza della CIDU è importante anche per l'identificazione di un ulteriore obbligo per gli stati, ossia quello di affrontare le cause strutturali dello sfruttamento.

Su questo quadro generale viene analizzato il caso delle donne romene impiegate nel settore domestico in Italia. Il terzo capitolo si divide in due parti: una prima dedita all'analisi del contesto economico e politico nazionale, nonché ai fattori strutturali e personali che influiscono sulla creazione di vulnerabilità allo sfruttamento e alla tratta, e una seconda che si concentra sulle condizioni lavorative di queste donne in Italia. Rispetto alla prima, nell'elaborato si evidenzia come il fattore economico assieme all'instabilità politica abbiano contribuito alla scelta del percorso migratorio da parte di molti cittadini romeni. Tuttavia, questi fattori, benché spieghino la migrazione, non sono sufficienti per comprendere le vulnerabilità che portano le donne romene a diventare facili vittime della tratta e dello sfruttamento lavorativo. Per questa ragione, si indagano anche i fattori strutturali della società di partenza, come ad esempio la discriminazione di genere, e i fattori più prettamente personali che incidono sulla vulnerabilità delle lavoratrici migranti, come il livello dell'educazione, le gravidanze in età adolescenziale oppure le relazioni interpersonali con i parenti e il coniuge. Va comunque detto che a loro volta questi elementi personali sono in realtà il risultato di fattori strutturali che spingono le donne romene ad abbandonare la scuola o a sposarsi ad una giovane età. La seconda parte invece ha l'obiettivo di gettare luce sulle reali situazioni di sfruttamento che queste donne vivono quando impiegate nel settore domestico in Italia, partendo dalla descrizione del funzionamento del mercato del lavoro che intersecandosi con i fattori indagati sopra, inaspriscono ulteriormente le condizioni di vulnerabilità portando alla segregazione delle donne romene nel settore domestico. Dalle storie analizzate emergono situazioni di discriminazione e umiliazioni, oltre a quelle di violenza fisica, psicologica e sessuale. Allo stesso tempo l'ultima parte di questo capitolo, guarda anche alle esperienze positive di progetti locali

[3] Sentenza del 20 ottobre 2016, Serie C no. 318, *Hacienda Brasil Verde Workers v. Brasile* (CIDU) (versione inglese).

implementati per proteggere e aiutare le lavoratrici domestiche sottoposte a gravi forme di sfruttamento.

Con in mente il quadro generale dei *push factors* che spingono queste donne a migrare e che contribuiscono alle loro vulnerabilità, il quarto capitolo, sulla base di quanto detto sopra, tenta di dare una riposta alla domanda di ricerca analizzando l'adeguatezza del quadro legislativo italiano nei processi di criminalizzazione, prevenzione e protezione attraverso l'implementazione degli standard internazionali. Prima di esaminare l'efficacia, questo ultimo capitolo evidenzia come la regolamentazione del lavoro domestico in Italia, il sistema di welfare familista e le politiche migratorie contribuiscano a rendere i lavoratori migranti più vulnerabili e precari. Per quanto riguarda invece la trasposizione nell'ordinamento domestico delle disposizioni internazionali relative alla tratta, lavoro forzato e schiavitù si osservano alcune problematicità. Anche laddove il sistema italiano vanti un livello piuttosto elevato, ovvero nell'ambito delle misure di protezione e assistenza alle vittime di tratta, si osserva un'applicazione irregolare e inefficace. Quando si guarda all'efficacia del sistema legislativo lo si fa proponendo un approccio di genere, il quale può incentivare una corretta identificazione delle vittime e l'adozione di misure adatte alle necessità e ai bisogni delle vittime. In tal modo si mostra come l'approccio di genere, basandosi su queste differenze sia in grado di prevenire ed eliminare situazioni di sfruttamento e di stimolare la protezione dei diritti umani. L'elaborato si chiude con una riflessione sulle nuove sfide degli anni a venire, dove si suggerisce che un approccio di giustizia sociale fondato sulla prospettiva di genere e sulla protezione dei diritti umani deve necessariamente integrare quello penale.

Le conclusioni di questa ricerca sono molteplici. Innanzitutto, si rende evidente che c'è da fare ancora molto per prevenire queste condotte, offrire protezione e assistenza alle vittime e perseguire adeguatamente i presunti colpevoli. In più la ricerca mostra come nonostante l'importanza attribuita all'approccio di genere, nei fatti questo non viene applicato, soprattutto nel caso dei lavoro domestico e delle donne romene. Una serie di motivazioni, tra cui l'adesione all'Unione Europea, hanno deviato l'attenzione dalla migrazione femminile romena, se non quella per lo scopo di sfruttamento sessuale.

Introduction

In 2019, almost 75.6 million people were employed in the domestic work sector, with a percentage of female workers amounting to 76.2%.[4] According to the definition provided by the Domestic Workers Convention, domestic work is the 'work performed in or for a one or more households'.[5] The share of these workers in informal employment is extremely high, a factor that is indicative of the low rates of protection and rights that these workers enjoy.[6]This situation is further aggravated when it comes to migrant domestic workers, who are more vulnerable to poor working conditions and to exploitation. Domestic workers are indeed often exposed to forced labour and to trafficking for the purpose of labour exploitation. The nature of the job combined with the fact that workers are mainly migrant women significantly expose them to violations of human rights. The international community have responded to these violations through the adoption of a series of international instruments aimed at combatting these phenomena and at fostering human rights protection. In 2011 the first international Convention devoted to the protection of domestic workers was adopted, establishing labour standards ensuring an effective recognition of domestic workers. However, the domestic work sector is still overlooked while states struggle with the process of implementation of these instruments.

In Italy, there are more than 2 million workers employed in domestic work of which 68.8% are migrants[7]. The first nationality employed in the sector, is represented by Romanians[8], who also make up the main foreign national collective living in Italy. However, despite the high share of Romanian women in this labour sector, research and studies have mainly focused on their sexual exploitation, while labour exploitation in the domestic work sector has not been significantly considered. Nonetheless, the high shares of informality and the extreme and multiple forms of violence that characterize this sector, are indicative of the fact that domestic workers still suffer from huge violations. Therefore, the idea of this dissertation comes from the belief that the existing literature needs to be expanded to include Romanian women's experiences of exploitation in

[4] ILO, *Making Decent Work a Reality for Domestic Workers: Progress and Prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189)*, (Geneva: International Labour Office, 2021), pp. 10-12.
[5] ILO, *Domestic Workers Convention*. No. 189, 2011, art. 1, para a.
[6] Ibid., p. 17.
[7] DOMINA National Observatory on Domestic Work, *Third Annual Report on Domestic Work*, (2021), p. 137.
[8] Ibid.

domestic work in Italy and to understand the reasons behind the persistence of these exploitative situations.

In order to do this, the research will try to answer the following questions: Is the Italian legal framework effective in addressing the severe exploitation and trafficking in human beings of Romanian Migrant Domestic Workers? What is the role of a gender approach in tackling with these issues, especially in the identification process and in tailoring measures aimed at protection?

The main focus of this study is the experience of Romanian women domestic workers in Italy. However, in order to answer to these questions, it is necessary to consider the broader international context, that regulates domestic work and the most relevant international instruments aimed at contrasting modern slavery. Giving the broad nature of these topics, a significant part of this study will be dedicated to the understanding of the international framework, looking both at specialized legal instruments and general human rights treaties, in addition to the jurisprudence of the European Court of Human Rights (ECtHR) and of the Inter-American Court of Human Rights (IACtHR).

With this in mind, the first chapter will explore the existing international instruments on domestic work and on two prevailing forms of modern slavery: forced labour and trafficking in human beings. The chapter introduces the notion of domestic work, and it looks at the global social movement that has led to the adoption of the International Labour Organization (ILO) Domestic Workers Convention, that provided an international regulatory framework on domestic work. A particular focus is placed on the three main instruments adopted in relation to trafficking in human beings, namely the United Nations Palermo Protocol of 2000, the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 and the European Union Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims of 2011. The Palermo Protocol provided the first definition of trafficking in human beings, while the other two instruments integrated the former criminal law approach with one based on the protection of human rights. Other international provisions are relevant for the purposes of this study, mainly in regard to the prohibition of trafficking: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 and the United Nations Convention on the Rights of the Child of 1989. At the regional level, a particular attention is devoted also to the generalist human rights treaties, namely the European Convention on Human Rights of 1950

and the American Convention on Human Rights of 1969. The latter was the first human rights instrument to mention trafficking, even if only in reference to women. Finally, within the European Union framework, it is explored the content of the Charter of the Fundamental Rights, proclaimed in 2000 and entered into force in 2009, which prohibits under the same provision (article 5) forced labour, slavery, servitude and trafficking.

The second chapter examines in detail the caselaw of the two most advanced international judicial bodies, namely the ECtHR and the IACtHR, which owing to the broad jurisdiction over violations of human rights and the binding nature of their judgments are able to effectively promote and protect human rights in their respective regions of competence. Thus, the offences of forced labour, slavery, servitude and trafficking in human beings are analyzed through the lenses of human rights law. The first part of this chapter deals with the ECtHR caselaw, in relation to the prohibited conducts under article 4 of the ECHR and on states positive obligations flowing from this provision. In the first paragraphs it is stressed the relevance of the *Siliadin*[9] case within the ECtHR's jurisprudence, underling the main findings and the limits of the Court's reasoning, in respect to the definition of the prohibited conducts under article 4 of the ECHR and the narrow understanding of states' positive obligations. A special focus is devoted to the landmark case of *Rantsev v Cyprus and Russia*[10], in which for the first time the ECtHR recognizes that trafficking in human beings is a violation of human rights, incompatible with democratic societies and that as such it falls within the meaning of article 4[11]. Starting from this case, this dissertation provides an examination of the ECtHR reasoning on the relation between the offence of trafficking and the prohibited conducts under article 4, highlighting the Court's main achievements as well as its limits. Furthermore, this is also the first case in which the Court identifies three main categories of positive obligations, namely the obligation to put in place an appropriate administrative and legal framework, the obligation to take operational measures to protect victims, and the procedural obligation to effectively investigate and prosecute. The analysis provided in the following paragraphs concerning positive obligations follows this structure and explores the evolution of each of these obligations throughout the most relevant cases of the ECtHR. Although, not pertinent to the case of Romanian women object of this study, the reasoning adopted by the IACtHR in its

[9] Judgement of 26 July 2005, Appl. no. 73316/01, *Siliadin v. France*, (ECtHR).
[10] Judgement of 7 January 2010, Appl. no. 25965/04, *Rantsev v Cyprus and Russia*, (ECtHR).
[11] Ibid., para 282.

landmark case of *Hacienda Brasil Verde*[12], is relevant for the significant contribution it made on the understanding of the offences of forced labour, slavery, servitude and trafficking and on the relative States' positive obligations. In particular, it is highlighted the IACtHR's emphasis on the action element as the distinguishing criterion of the offence of trafficking while establishing a connection with the other exploitative conducts.[13] In addition to this, the last paragraph of this chapter underlines also the contribution of the IACtHR to the identification of a further State obligation: the duty to address the structural causes of exploitation.

The aim of the first two chapters is to provide a comprehensive framework on the issue at hand. The third chapter draws attention to the case of Romanian women, examining the *push factors* leading these women to the decision to migrate to Italy. The first part of this chapter aims at framing the Romanian economic and political context following the end of the communist regime and after the entry of Romania in the European Union. It is underlined how against this background there has been an increasing number of people emigrating, including a huge percentage of women. While the role of the economic factors in determining the decision to migrate is put under sharp focus, other factors are considered . In particular, it is examined the link between migration and trafficking, highlighting Romanian women' s vulnerabilities to fall victims of trafficking in human beings. Relevant are the structural elements that lead women to the decision to migrate but that also represent factors of vulnerability to being trafficked. The second part of the chapter draws attention on the presence of Romanian women in Italy working as domestic workers. This final part first examines the specific dynamics of the Italian labour market and the intersection of different types of regimes that contributes to the segregation of Romanian women in domestic labour, then it explores the testimonies of cases of severe exploitation and trafficking involving Romanian women. This is done through the analysis of some newspapers articles and of the cases emerged from the fieldwork conducted by Letizia Palumbo[14] in Emilia Romagna and Tuscany,

[12] Judgment of 20 October 2016, Serie C no. 318, *Hacienda Brasil Verde Workers v. Brazil*, (IACtHR).
[13] V. Milano 'Human Trafficking by Regional Human Rights Courts: an analysis in light of Hacienda Brasil Verde, the first Inter-American Court's ruling in this area' *Revista Electrónica de Estudios Internacionales* 36, p. 18. DOI: 10.17103/reei.36.12.
[14] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy, (*Badia Fiesolana: European University Institute, 2016). DOI :10.2870/384097.

where in addition to the discussion of exploitative cases, a particular emphasis is placed on positive local initiatives aimed at protecting and helping migrant domestic workers.

With a picture of the conditions that contribute to the vulnerability of Romanian women to be exploited and having seen the highly exploitative situations that characterize some of these women's experiences in domestic labour in Italy, the fourth and last chapter deals with the assessment of the effectiveness of the Italian legal system in providing them protection, as well as in preventing such situations and in prosecuting offenders, through the simultaneous examination of the role of a gender approach when applied to these measures. In order to determine the adequacy and effectiveness of the Italian legislation, it is examined the broader Italian context that further exacerbates Romanian women's vulnerability to exploitation. As a matter of fact, a special focus is placed on the regulation of domestic work, on the Italian welfare system and on migration policies that act as *pull factors* and that increase migrant domestic workers vulnerability while make their conditions precarious. Then the chapter provides an overview of the legislation on severe exploitation and trafficking in human beings as well as on the assistance and protection measures provided to victims. To conclude, the final part of the chapter examines the transposition of the international provisions explored in the first two chapters into the domestic legal system, evaluating their effectiveness and looking at the role of gender in fostering human rights protection.

Chapter 1. The Protection of Domestic Workers in International Law

1. A global social movement: decent work for domestic workers

In November 2006 – when representatives of domestic workers' organizations from all over the world gathered in Amsterdam for the first time, with the support of labour organizations, in a joint effort to mobilize to set standards of decent work for domestic workers globally, demanding an international convention acknowledging formal legal rights to domestic workers[15] – domestic workers rights were still far from being recognized. While the achievement of international decent work standards for all workers was a clear objective of the International Labour Organization, domestic workers had nonetheless high rates of employment in the informal economy[16] compared to other workers' categories[17].

As revealed by the report prepared by the Human Rights Watch in co-production with the International Domestic Workers' Network and the International Trade Union Confederation, one of the issues relates to the fact that these workers, most of the times, are not regarded as employees empowered to have access to basic labour rights, but rather as 'helpers', owing to cultural norms that devalue the work performed (mainly) by women in the household[18]. Indeed, most of the employees in domestic labour are females, while the presence of men in this sector is less significant: of 75,6 million domestic workers worldwide, only a quarter of them are males[19]. Thereby, as a result of the huge source of employment among women in this sector (76.2%)[20] and the fact that domestic work relates to the labour performed in or for a private household[21], according to the definition provided by the ILO Convention n. 189, domestic workers are hardly

[15] IDWF, 'Ratify C189', 2011. Available at https://idwfed.org/en/campaigns/ratify-c189. [last accessed 30 October 2021].
[16] On the risks of informal employment sectors at being subjected to contemporary forms of slavery see OHCHR, *Report of the Special Rapporteur on contemporary forms of slavery in the informal economy,* 2022, A/77/163, GA 77th session.
[17] ILO, 'Who are domestic workers*'* available at https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm. [last accessed 4 November 2021].
[18] HRW, IDWN & ITUC, *Claiming rights. Domestic Workers' Movement and Global Advances for Labor Reform.* (United Sates of America: Human Rights Watch, 2013), pp. 12-13.
[19] ILO, 'Who are domestic workers', cit.
[20] Ibid.
[21] ILO, *Domestic Workers Convention.* No. 189, 2011, art 1. (hereinafter *Domestic Workers Convention).* Adopted in 2011, entered into force on 5 September 2013. Up to today has been ratified by 35 countries. See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460.

perceived as employees entitled with fundamental labour rights, leaving them at the mercy of their employer as far as it concerns their security, health and terms of employment[22]. As the report further explains, governments themselves often fail to acknowledge domestic work as work at all, excluding domestic workers from domestic labour policies and the formal protection granted to other workers[23]. Giulia Garofalo Geymonat, Sabrina Marchetti and Penelope Kyritsis in examining the boundaries of what can be considered work or not, analyze the difficulties faced by domestic workers in being included in labour movements – made predominantly of men that do not consider domestic work as "real work"[24].

Despite the indispensability of the services offered by domestic workers – taking care of the elderly or of the children of a family, cleaning the house, cooking, washing, ironing, and gardening – high rates of informality in this sector expose domestic workers to violence and harassment and several other forms of abuse, from physical to psychological mistreatments[25]. In this sense, it is noteworthy that children and migrant domestic workers are a particularly vulnerable category. According to the ILO estimates, included in the report on the progress made in ten years, following the adoption of the ILO C189, about 7.1 million of children aged 5 to 17 are employed in domestic work and 61% of them are girls. Being excluded from social and labour protection affects children, in ways that allow the proliferation of child labour[26]. As for migrant domestic workers, their peculiar situation allows too often employers to exploit them. This is especially true for irregular migrants, that are highly dependent on their employers for what it concerns their visa, which undermines their possibilities to refuse living in harsh conditions and to report abuses for fear of deportation[27].

In the decades prior to the emergence of a unified domestic workers movement, domestic workers were seen by many as an 'unorganizable' sector. Yet, they played a fundamental and active role in defining the global standards for an improvement in these workers' rights, demanding global

[22] HRW, IDWN & ITUC, op. cit., p. 13.
[23] Ibid.
[24] G. G. Geymonat, P. Kyritsis, S. Marchetti, (eds), *Domestic Workers Speak: a global fight for rights and recognition.* (London: Open Democracy, 2017), available at http://hdl.handle.net/10278/3687850. [last accessed 29 September 2021], p. 15.
[25] ILO, 'Who are domestic workers', cit.
[26] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit., p. 18.
[27] M. Gallotti, *Making Decent Work a Reality for Migrant Domestic Workers*, ILO Policy Brief, No. 9, 17 December 2015, available at https://www.ilo.org/global/topics/domestic-workers/publications/WCMS_436974/lang--en/index.htm. [last accessed 9 November 2021]. p. 1.

recognition and leading to the first convention covering domestic workers' rights. Indeed, in the words of Dan Gallin, former General Secretary of the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) 'there is no such thing as *unorganizable* workers'[28]. However, it must be argued that despite domestic workers' engagement in organizing locally in many places around the world, the support provided by the trade union federation IUF and the Women in Informal Employment: Globalizing and Organizing (WIEGO) global network was essential to the flourishing of an international network of domestic workers[29]. Undoubtedly, the formation of the International Domestic Workers Network (IDWN) was the result of the intense activism of domestic workers in the struggle for justice and recognition; nonetheless, the IUF and the WIEGO provided the IDWN with the necessary political and economic expertise that enabled domestic workers and their organizations to be part of the International Labour Conference[30]. Indeed, the 2008 decision of the International Labour Organization to put on their agenda the elaboration of a convention on domestic workers' rights, was a direct consequence of an increasingly well-organized and dynamic social movement[31].

It was not only about demanding labour rights: domestic workers activists were attempting to bring about a radical social and cultural transformation that could enhance domestic workers living conditions. Indeed, although the battle for a legal reform was paramount in the domestic workers organizations campaigns, it should not be overshadowed the importance of the simultaneous engagement in the elimination of the social stigma that surrounded this category of workers. Local groups' campaigns vindicating the use of a dignifying language when addressing domestic workers, can be taken as evidence of such engagement. The use of innovative words when referring to domestic workers – refusing terms that could recall a servile relationship or that could be perceived as derogatory – was an instrument in questioning deep-rooted internalized representations that deemed domestic work as an activity undertaken by the society's most marginalized groups of people[32]. Hence, in being a highly racialized and gendered segment of the

[28] D. Gallin,, 'The Future of the Domestic Workers Movement', 2013, available at http://www.wiego.org/sites/default/files/resources/files/Gallin_IDWF_Congress_Montevideo_Speech.pdf. [last accessed 19 October 2021].

[29] IDWF, 'About us', 2014, available at https://idwfed.org/en/about-us-1. [last accessed 4 November 2021].

[30] J. N. Fish, *Domestic Workers of the World Unite! A Global Movement for Dignity and Human Rights*, (New York, New York University Press, 2017). p. 31

[31] A. Blackett, *Everyday transgressions domestic workers' transnational challenge to international labour law*, (Ithaca, New York: London Cornell University Press, 2019), pp. 9-10.

[32] See D. Cherubini, G. G. Geymonat, and S. Marchetti, *Global domestic workers. Intersectional inequalities and struggles for rights*, (Bristol: Bristol University Press, 2021), pp. 86-91.

labour market, domestic work should be informed by feminist theories which argue that women's perspectives may bring about new insights that might as well engender a significant reviewal of dominant patriarchal structures.

These efforts, as anticipated, led to the first international convention on domestic work. Women's agency in negotiating the content of the convention, eventually shaped its final purpose, which was not the mere recognition of labour rights but that of the creation of a comprehensive legislation that could counter stereotypical depictions attached to these workers. In the following paragraph, it will be analyzed in detail the content of the Convention.

2. The International Labour Organization (ILO) Domestic Workers Convention No. 189

When the Governing Body decided to put the issue on the agenda of the future ILC in 2008, this decision was considered by many to be an historic moment[33]. And indeed it was. In fact, despite the significant dependence of the entire global economy on domestic work, this category has been repeatedly excluded from the scope of national labour laws and people still had difficulties in recognizing its economic and social value.

The broadening of the scope of both national and international existing legislations could not be enough to ensure an effective recognition of domestic work. On the contrary, as highlighted in the 4th report on decent work for domestic workers – that presented a first draft of the core elements that would later be included in the C189 – domestic work is both 'work like any other' and 'work like no other'[34]. In fact, despite the existence of international labour standards that to a certain extent also covered domestic workers, they still needed a specific regulatory framework that could take into account the singularity of their work, while ensuring a substantive equality[35]. The Convention itself in the preamble acknowledges the fact that owing to the special conditions characterizing this type of work, it is 'desirable to supplement the general standards with standards specific to domestic workers so as to enable them to enjoy their rights fully'[36]. In the Convention, indeed, are addressed all those elements that particularly affect domestic workers, if compared to

[33] Ibid., p. 53.
[34] ILO, *Report IV(1): Decent work for domestic workers*. (Geneva: International Labour Office, 2010), p 13, para 47.
[35] A. Blackett, 'Introductory note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)', *International Legal Materials*, 53 (2014) 189, p. 251. DOI: https://doi.org/10.5305/intelegamate.53.1.0250.
[36] *Domestic Workers Convention*, Preamble.

other categories of workers. For instance, if one considers that domestic work is performed in the household, where labour inspections are more difficult to carry out, given the private nature of the working environment, and that women make the vast majority of these workers, art. 5 of the Convention focuses on securing effective protection 'against all forms of abuse, harassment and violence'[37]. Furthermore, art. 9 requires Member States to adopt all the measures that are necessary to guarantee domestic workers the rights to keep with them their travel and identity documents, as well as the possibility to leave the household or members of the household during their annual leave or daily and weekly rest[38]. This is extremely relevant in the case of migrant domestic workers, whose documents – as briefly mentioned above – are often detained, preventing these people to depart from the exploitative situation they live in. It is noteworthy that generally this issue arises when these workers are also victims of trafficking in human beings and forced labour[39]. Indeed, the new standards also establish norms related to the elimination of forced or compulsory labour[40], as a consequence of the huge share of adult domestic workers in forced labour. Of particular relevance in dealing with migrant labour, even if not specifically addressed by the Convention, are the standards introduced to protect effectively domestic workers from the abusive practices adopted by private employment agencies. For instance, states are demanded to guarantee the existence of fair mechanisms and procedures to investigate alleged offences, as well as the presence of adequate measures necessary to prevent and to protect domestic workers. This might be achieved by putting in place regulations that establish the obligations private employment agencies and the household must respect and by providing for the penalties to be imposed upon the offenders[41]. Moreover, given the fact that migrant domestic workers are often recruited in one country to work in another one, the Convention underlines how Member states are obliged to consider engaging in bilateral, regional, or multilateral cooperation to prevent either abuses or fraudulent conducts[42]. In the case of domestic workers there was also the necessity to stress that

[37] Ibid., art. 5.
[38] Ibid., art. 9.
[39] A. Blackett, 'Introductory note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)', cit., p. 251.
[40] *Domestic Workers Convention*, art. 3 para b.
[41] Ibid., art. 15, paras b, c.
[42] Ibid., art. 15, para d.

recruiters are not allowed to withhold, from domestic workers' wages, fees charged by private employment agencies[43]

Similarly, when dealing with the measures that states shall implement in order to provide equal treatment between domestic workers and workers generally concerning 'normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave'[44] the Convention mentions again that all the measures introduced must be tailored to domestic work, in light of the peculiarities of domestic work. This is closely related to the difficulty to distinguish clearly between working hours, standby time and rest periods, particularly for what concerns live-in domestic workers[45]. Hence, the Convention points out to the necessity of considering as working hours the time in which domestic workers are required to be at the disposal of their employers[46]. Furthermore, notwithstanding the reiterated need to ensure equality of treatment between workers, the ILO constituents decided to set a minimum benchmark of at least 24 consecutive hours of weekly rest[47]. As stated by Adelle Blackett[48] this provision on working hours challenges the idea that domestic workers are always at the full disposal of their employers.

Even more significant is the provision that requires ratifying Member States to set a minimum wage coverage for domestic workers, with no distinction based on sex with regard to remunerations[49]. The provision's wording is not random. The continuous social undervaluation of domestic work and its association with women's household unpaid work resulted in low wages[50]. As it can be seen, social stigma can heavily impact on domestic workers possibilities to effectively enjoy their rights.

Another relevant provision relates to social security systems. It is stated that Member States are obligated 'to ensure that domestic workers enjoy conditions that are not less favorable than those applicable to workers generally in respect of social security protection, including with respect to

[43] Ibid., art. 15, para e.
[44] Ibid., art. 10, para 1.
[45] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit., p. 71.
[46] *Domestic Workers Convention*, art. 10 para 3.
[47] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit. p. 71.
[48] A. Blackett, 'Introductory note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)', cit. p. 251.
[49] *Domestic Workers Convention*, art. 11.
[50] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit. p. 96.

maternity'[51]. Having considered the huge number of women involved in the sector, many of whom of childbearing age, maternity protection, whether in terms of maternity leaves or cash benefits, represents a crucial instrument in enabling female domestic workers to enjoy their right to a dignifying life. Yet, this group of people is repeatedly excluded from such protection, owing to their association with the most vulnerable and marginalized social groups and their relevant share in the informal economy[52]. The increasingly high participation of women in the labour market combined with the shortcomings of welfare policies, led to a growing tendency towards employing domestic workers. Altman and Pannell[53] speak of the dependency existing between the apparent societal upward movement of some women and the invisibility and exploitation of other female workers, mainly migrants. However, this self-reinforcing process not only delays changes in terms of gender roles within the household, but also discourages policymakers from engaging in transformative polices in support of women's occupational choices[54]. Low wages and the lack of appropriate social protection instruments does not only have a detrimental effect on the most disadvantaged groups but also on the society as a whole. Hence, change is desirable for anyone, even for those that appear not to be directly affected by the lack of effective protection.

With due regard to the special conditions of domestic workers, the Convention provides also norms related to enforcement mechanisms, stating that:

> 'Each member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations… [as well as] … develop and implement measures for labour inspections, enforcement and penalties.'[55]

[51] *Domestic Workers Convention*, art. 14, para 1.
[52] See ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit., pp. 118-142.
[53] See M. Altman, and K. Pannell, 2012. Policy Gaps and Theory Gaps: Women and Migrant Domestic Labor. *Feminist Economics,* 18 (2012) 2, p. 300. DOI: 10.1080/13545701.2012.704149. In particular, it is argued that the increasing welfare and social status of women in host countries is dependent on the maintenance of migrant women in a position of vulnerability and invisibility. This is due to the gendered dimension of this labour sector that associates domestic work with the labour naturally performed by women. Thus, if women are to enter the paid labour market, some other women have to 'replace' them in doing domestic labour.
[54] Ibid., p. 306.
[55] *Domestic Workers Convention*, art. 17, paras 1-2.

Finally, giving the relevance attributed to the instrument of social dialogue in promoting the formalization of domestic work, the Convention addressed the need to guarantee the fundamental principles of freedom of association and the right to exercise effectively collective bargaining[56].

The Convention and the accompanying Recommendation No. 201 providing non-binding measures complementing the Convention's provisions, were adopted in 2011. Ultimately, the Domestic Workers Convention entered into force in 2013 following the ratification by the Philippines and Uruguay.[57] Since then, progress has been made in legal coverage, giving the growing tendency to extend general labour laws to domestic workers, to adopt specific labour laws or to introduce subordinate regulations. However, the ILO report[58] on the progress made by states in making decent work a reality for domestic workers clearly shows that even when employees are afforded legal coverage, gaps in compliance and implementation limit the extent to which they enjoy effective protection. Huge efforts are still required to overcome such deficits.

3. Modern slavery and domestic work in International Law

Some of the employees in the domestic work sector still face grave human rights violations, including slavery and slavery like practices, forced labour, debt bondage and human trafficking. Modern slavery is considered to be an umbrella term – not defined in law – that covers this set of legal notions, putting under sharp focus the commonalities across them. It essentially refers to highly exploitative environments that a person cannot leave or refuse owing to threats, coercion, deception, violence and abuse of power[59].

[56] Ibid., Art. 3, para a.
[57] Italy has been the fourth ILO Member State and the first EU country to ratify the Domestic Workers Convention in 2013. By ratifying this instrument, the Italian government became bound by its provisions. In order to supervise the implementation of the Convention's provisions, ILO has developed two types of supervisory mechanisms: a regular system made of the 'Committee of Experts on the Application of Conventions and Recommendations' and the 'Conference Committee on the Application of Standards' and a special procedure that is based on the submission of a complaint or of a representation. On this see ILO, 'Applying and promoting International Labour Standards', available at https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm, [last accessed 15 February 2023].
[58] See ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit. pp. 242-244. See also Part III dedicated to the implementation of the measures contained in laws.
[59] ILO and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, (*Geneva: International Labour Office, 2017), p. 16.

The prohibition of slavery is a jus cogens norm, to which no derogation is admissible. Still, it continues to be among the most serious violations of human rights in the global economy[60]. According to the definition provided by the Slavery Convention of 1926, as supplemented by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery of 1956, slavery refers to 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'[61]. Even if this definition still applies today, the concept of legal right to ownership has been now replaced by some other forms of coercion and control[62]. In fact, nowadays it is not legally possible to own a human being; nonetheless, the practice of enslavement keeps subsisting[63].

Modern slavery is indeed all around us, even if often out of sight. Despite the commitment of the global community to the ending of modern slavery among children by 2025 and universally by 2030, through the adoption of the Sustainable Development Goals (Target 8.7), the situation does not seem to be improving[64]. On the contrary, the newly released ILO[65] report, related to the global estimates of modern slavery, underscores the challenges to be faced in meeting these targets. The Covid-19 pandemic, the armed conflicts and the climate change crisis have led to an increase in extreme poverty, to disruption in education and employment as well as to an upsurge in forced and unsafe migration and gender-based violence. All these elements heighten the risk of modern slavery. In fact, it is well documented that those who are already in a vulnerable position, including the poor and the socially excluded, workers in the informal economy that might as well be irregular or otherwise unprotected migrants and people subjected to discrimination are the most affected[66].

Along these compounding crises, should not be underestimated the key role that States had in creating inequalities as a result of the neoliberal policies that led to a reconfiguration of the state –

[60] OHCHR, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Ms. Urmila Bhoola. Thematic report on the impact of slavery and servitude on marginalized migrant women workers in the global domestic economy,* A/HRC/39/52, HRC 39th Session, 2018, p. 4, para 12.
[61] UN, *Slavery Convention*, 1926, art 1, para 1.
[62] A/HRC/39/52, p. 4, para 12.
[63] R. Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations', *International Journal of Refugee Law,* 24 (2012) 2, p. 183, DOI:10.1093/ijrl/ees023.
[64] ILO, IOM and Walk Free, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage. (*Geneva: International Labour Office, 2022), p. 1.
[65] Ibid.
[66] Ibid.

from welfare to warfare state[67]. Neoliberalism strengthened the ever-widening gap between and within the North and the South of the world, enlarging existing inequalities. Perocco[68] argues that the transformation of the role of the State along the authoritarian drifts affecting several states and societies in the world have contributed to the acceptance of torture, might it be political or judicial. In such an environment where torture and racism seem to be tacitly approved, modern slavery proliferates.

According to the latest global estimates[69] about 50 million people were engaged in modern slavery[70] on any given day and among them 27.6 million were exploited in forced labour practices. A comparison with the 2016 global estimates[71] indicates that there has been a growth in the number of people in modern slavery, witnessing an increase of almost 10 million people. Women and girls accounted for the majority of people affected by modern slavery, representing 54% of the overall total[72]. As of the 17.3 million people in a privately imposed forced labour situation in sectors other than commercial sexual exploitation, more than 1.4 million adults are in domestic work. Workers in this sector are particularly vulnerable to forced labour owing to the fact that they are isolated and because of the deep power imbalances with their employers, not to mention their limited possibilities to organize and to access complaint mechanisms. In spite of the fact that overall men outnumber women in forced labour exploitation, there are some differences across categories. Indeed, domestic work makes up for 17% of the total of females in forced labour exploitation.[73]

In some cases, forced labour may be the result of trafficking in human beings. Women represent the majority of people trafficked for the purpose of domestic servitude. As the 2020 UN report on trafficking[74] suggests, victims of domestic servitude seem to be exposed to high levels of sexual, psychological, and physical abuse. The percentage of domestic workers reporting sexual harassment is higher than the one related to female workers in other categories. One pattern characterizing trafficking for the purpose of domestic servitude is the fact that violence,

[67] See F. Perocco, 'Tortura e Migrazioni'. In: F. Perocco, (ed) *Tortura e Migrazioni/ Torture and Migration. (*Venice: Edizioni Ca' Foscari, 2019) pp. 18-19.
[68] Ibid.
[69] ILO, IOM and Walk Free, op. cit. p. 19.
[70] In order to make measurable the set of legal concepts covered by the term 'modern slavery', the 2021 Global Estimates focus only on two key forms of modern slavery: forced labour and forced marriage.
[71] These estimates are as well calculated by focusing only on forced labour and forced marriage.
[72] ILO, IOM and Walk Free, op. cit. p. 19.
[73] Ibid., pp. 32-34.
[74] UNODC, *Global report on Trafficking in Persons 2020, (*New York: United Nations Publications, 2021), p. 100.

exploitation and abuse are carried out by members of the household rather than some professional criminals. Consequently, in some instances, the crime of trafficking for the purpose of domestic servitude appears to be more similar to a gender-based and domestic violence, rather than a typical form of organized criminal activity[75]. Domestic workers represent a category of employees at high risk of being trafficked, owing to the fact that often this type of work is conducted by people who are members of disadvantaged communities that are discriminated against in terms of working conditions. The very fact that often domestic workers are migrant workers exacerbates their vulnerability to being trafficked and exploited[76].

Migrant job seekers are indeed highly vulnerable to both human trafficking and forced labour. Their willingness to accept even very low substandard working conditions, owing to economic difficulties, expose them to significant risks of exploitation. It is widely known that traffickers target people experiencing some sort of adversities, that might also be exacerbated by the recent coronavirus pandemic. The pandemic raised unemployment rates, particularly in low-income countries, forcing people to migrate and to be willing to take some risks if this means improving one's opportunities[77].

In order to better understand modern slavery, the extent to which it affects domestic workers and where they can seek protection against these offences, it is crucial to understand the international context relating to the prevention, protection and criminalization of these crimes. Because of the broad variety of forms that modern slavery may take, it is necessary to limit the discussion to the most important international legal instruments related to two of its most extreme forms: forced labour and trafficking in human beings.

3.1 The ILO Forced Labour Convention No. 29

Forced labour was firstly defined by the ILO Forced Labour Convention[78] as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person

[75] Ibid., p. 101.
[76] Ibid., p. 98.
[77] Ibid., p. 9.
[78] The Convention entered into force on 1 May 1932 and it has been ratified by 180 countries. See https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174. Italy ratified it on June 18, 1934: consequently, the provisions of the Convention are binding on the Italian government. For the supervisory procedure see *supra* note 57.

has not offered himself voluntarily'[79]. When the question of forced labour was placed on the agenda of the International Labour Conference for 1929, the experts' attention was devoted to labour conditions in the colonial territories. Indeed, despite the disposition of the Treaty of Versailles that made compulsory for Member States the application of all the Conventions to their colonies, protectorates, and possessions not fully self-governing – where applicable – these instruments were not adapted to the peculiar conditions of those countries, that were dealing with much more urgent questions, already solved by the Western nations. Among these problems, emerged the question of forced labour[80]. When the International Labour Office approached the issue of forced labour, faced by the difficulty arising from the great variety of different conceptions and definitions of the term *forced labour,* it opted for the adoption of a broad and comprehensive[81] definition, comprising the three elements of *work or service*, *menace of any penalty* and *involuntariness*[82].

A forced labour situation is not defined by the type of activity performed nor by its legality or illegality, but rather by the nature of the relationship between a person and the employer[83]. In fact, for a situation to be regarded as forced labour, the work must be imposed upon the person against his/her will through coercion. *Menace of any penalty* refers indeed to the means of coercion used to force someone to perform an activity, while *involuntariness* relates to any work that is performed without the free and informed consent of the worker. Coercion may be used during the recruitment process in order to make a person accept a job or once accepted the job, to force that person to perform tasks that were not agreed upon initially[84]. *Menace of any penalty* should be interpreted in a very broad sense, covering different forms of coercion, such as physical and psychological violence, retention of identity documents, penal sanctions or other penalties that could interfere

[79] ILO, *Forced Labour Convention,* No. 29. 1930, art. 2, para 1. Hereinafter *Forced Labour Convention.*
[80] J. Goudal, 'The Question of Forced Labour before the International Labour Conference', *International Labour Review,* 19 (1929) 5, pp. 621-622, available at https://www.ilo.org/public/libdoc/ilo/P/09602/09602(1929-19-5)621-638.pdf. [last accessed 3 October 2022].
[81] Ibid., p. 624.
[82] ILO Fundamental Principles and Rights at Work Branch, *ILO Standards on Forced Labour. The New Protocol and Recommendation at a glance*, (Geneva: International Labour Office, 2016), p. 5. available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_508317.pdf. [last accessed 3 October 2022].
[83] ILO and Walk Free Foundation, op. cit., p. 16.
[84] ILO, IOM and Walk Free, op. cit., p. 14.

with the normal enjoyment of rights, including the loss of some privileges[85]. Thus, for a situation to qualify as forced or compulsory labour, there must be present both criteria – embedded in the Convention – of lack of free and informed consent and coercion.

The provisions of the Convention are of general application, intended to guarantee the respect of fundamental rights of all the population of the ratifying States. It follows from the wording *all work or service* that all categories of workers should be covered by the scope of the Convention, regardless of their sector or industry of employment, even the informal sector[86]. Moreover, the reference to *any person* reinforces this claim, making clear that the Convention was designed to protect the rights of all human beings, adults or children, regular or irregular migrants, nationals or non-nationals.[87] The ILO Committee of Experts on the Application of Conventions and Recommendations has repeatedly emphasized that the Convention is applicable to 'all workers in the public and private sectors, migrant workers, domestic workers and workers in the informal economy'[88].

The fact that ILO constituents opted for a broad definition of forced labour enabled the ILO supervisory bodies to address both traditional practices and new emerging forms of forced labour, such as trafficking in human beings.[89] In fact, in light of Article 1(1) of the Convention that requires ratifying States to eliminate all forms of forced or compulsory labour within the shortest period possible, and of Article 25 that obligates States to make the illegal exaction of forced or compulsory labour punishable as a penal offence and considering the definition of human trafficking provided by the Palermo Protocol[90], the Committee of Experts made clear that Article 2 (1) of the Convention encompasses trafficking for the purpose of labour exploitation.[91] Furthermore, according to Article 25, States Parties to the Convention shall be obliged to ensure that penalties are adequate and strictly enforced.

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[85] ILC, 'Part III. Forced Labour'. In: ILC, *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. (*Geneva: International Labour Office, 2012) p. 111, para 270.
[86] Ibid., p. 107, para 262.
[87] Ibid.
[88] Ibid.
[89] Ibid. p. 112, para 272.
[90] For the definition of trafficking see UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000, art. 3. (referred hereinafter in short as Palermo Protocol).
[91] ILC, op. cit. p. 128, para 297.

For the purpose of the Convention, Article 2 (2) provides a list of a few cases of forced or compulsory labour that are excluded from its scope. These are compulsory military service, normal civic obligations, compulsory labour of convicted persons, work exacted in cases of emergencies and minor communal services[92]. The Convention did however establish some conditions that define the limits of these exceptions.[93]

The prohibition of the use of forced labour is a peremptory norm of international law on human rights, to which no derogation is admissible.[94] The Forced Labour Convention is indeed one of the fundamental ILO's instruments, pivotal to the achievement of social justice and decent work for all.

3.1.1 Protocol of 2014 to the Forced Labour Convention

In 2014 the ILO General Conference adopted a Protocol[95], supplementing the Forced Labour Convention No. 29 – cited in this paragraph as the Convention – and giving a renewed impetus to the suppression of forced labour, including trafficking in persons and slavery like practices.[96] The scope of the Protocol is to remedy to the gaps in the implementation of the Convention and the Abolition of Forced Labour Convention of 1957[97], by introducing additional measures necessary to achieve the effective and sustained elimination of compulsory labour.

The Protocol establishes a clear link between forced labour and trafficking in persons for labour exploitation. Not only does it reaffirm the definition of forced labour contained in the Convention, but also that the measures provided for in the Protocol must include specific action for contrasting human trafficking for the purpose of labour exploitation. The Protocol – recognizing that forced labour violates the dignity of millions of women and men and girls and boys, and that certain groups of workers have a higher risk of becoming victims of forced labour – points to the measures

[92] See *Forced Labour Convention*, art. 2, para 2.
[93] ILC, op. cit., p. 112, para 273.
[94] Ibid. p. 103, para 252.
[95] The Protocol entered into forced on 9 November 2016 and it has been ratified by 59 states. See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3174672. It is interesting to note that Italy has not ratified it yet, as well as Romania.
[96] See ILO, 'What is forced labour, modern slavery and human trafficking', available at https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm. [last accessed 07 October 2022].
[97] The Abolition of Forced Labour Convention No. 105, adopted in 1957, aimed at supplementing the Forced Labour Convention, addressing five practices that emerged in the aftermath of World War II. This legal instrument primarily concerns state-imposed forced labour. See ILO Fundamental Principles and Rights at Work Branch, op cit., p. 4.

of prevention, protection, and remedies for victims. Article 1 (1) recalls States' obligations 'to take effective measures to prevent and eliminate its use [forced labour], to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction perpetrators of forced or compulsory labour'.[98]

As for the prevention part, Article 2 provides for a set of measures that States shall adopt, including educating and informing people and employers; making efforts to ensure that the legislation relevant to the prevention of forced labour applies to all workers and to strengthen labour inspections; protecting persons from abusive practices during the recruitment process; supporting due diligence to both prevent and respond to risks of forced labour; and finally, addressing the root causes that heighten the risks of being trapped in a forced labour situation. Article 2 (a) (b) mentions two types of awareness-raising campaigns, designed to simultaneously target vulnerable people from being caught in a forced labour situation, while sensitizing the general public to the identification of victims and educate the employers on indicators of forced labour so that they will not be responsible for its arising in the first place[99]. Furthermore, while criminal law is relevant in deterring forced labour, extending coverage and enforcement of labour law to all workers may diminish vulnerabilities of employees in certain sectors. Article 2 (c)(i) requires indeed Member States to make sure that the coverage and the enforcement of relevant legislation, including labour law where appropriate, apply to all workers and sectors of the economy. Accordingly, in the following paragraph (Article 2 (c)(ii)), Member States are required to undertake efforts to strengthen labour inspections. Forced labour may involve several violations of labour law that labour inspectors can prevent from degenerating further into forced labour by taking immediate actions.[100]

Effective measures must be taken also for a set of actions – identification, release, protection, recovery and rehabilitation as well as other forms of assistance and support[101] – that might be crucial for the safety of the victim, first by releasing her/him from the exploitative situation and then by providing her/him with the necessary assistance to recover and by guaranteeing access to appropriate remedies. Furthermore, Article 4 (1) of the Protocol stresses the fact that access to

[98] ILO, *Protocol of 2014 to the Forced Labour Convention, 1930*, No. 29, 2014, art. 1, para 1. Hereinafter *Forced Labour Protocol*.
[99] ILO Fundamental Principles and Rights at Work Branch, op cit., p. 12.
[100] Ibid., p. 13.
[101] *Forced Labour Protocol*, art. 3.

remedy should be granted, irrespective of the legal or illegal presence of the victim in the national territory. Article 4 (2) goes further on by requiring Member States not to impose any penalties on the victims of forced labour, when they have performed illegal activities as a result of being subjected to forced labour. This is of extreme importance in order not to deter victims from denouncing, out of fear of the consequences for their participation in these activities.

Additional measures that States may implement in order to prevent forced labour are provided by the Forced Labour (Supplementary Measures) Recommendation 2014 No. 203. The Recommendation is not binding. Yet, it provides a practical guidance for States to establish or to strengthen national policies and plans of actions. In fact, the development of a comprehensive and coherent national policy on forced labour, resulting from the consultation and the exchange of information between representatives of the government, workers organizations and employers as well as other stakeholders, can significantly impact on the effectiveness of the measures to contrast forced labour.[102] Under Article 2 (2) of the Protocol, Member States are indeed required to 'develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers and workers' organizations …'[103]. Relatedly, national policies and plans of action must '… involve systematic action by the competent authorities and … in coordination with employers and workers' organizations, as well as with other groups concerned'[104]. In establishing national policies and plans of action, Member States should adopt time-bound measures using a gender and child sensitive approach as to achieve the sustained and effective suppression of forced labour[105].

The provisions of both the Protocol and the Recommendation acknowledged the existence of deep root causes that account for the exposure of certain groups of people to forced labour, which may as well include domestic work. The Protocol, read in conjunction with the Convention and the Recommendation No. 203 is a fundamental instrument in contrasting forced labour addressing the factors that produce vulnerabilities and providing measures useful in achieving decent work for all.

[102] ILO Fundamental Principles and Rights at Work Branch, op cit., p. 10.
[103] *Forced Labour Protocol*, art. 2, para 2.
[104] Ibid.
[105] ILO, *Forced Labour (Supplementary Measures) Recommendation*, No. 203, 2014, para 1 (a).

3.2 The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol)

Until the adoption of the Convention against Organized Crime and the Protocols Thereto in December 2000, the term 'human trafficking' was non defined in international law. Despite its incorporation in several other legal instruments, major differences of opinion concerning the ultimate end result of trafficking, its constitutive acts and their relative significance as well as the characteristics that distinguish trafficking from other offences, led to a failure in developing an agreed definition of trafficking in persons. Yet, it was widely accepted that the achievement of an agreement upon the definition of trafficking was the first step in articulating a common understanding of the nature of the problem and in developing a foundation that could foster the necessary cooperation among States[106]. Leaving the concept of trafficking undefined, made it virtually impossible to elaborate substantive obligations and to hold States accountable for violations.[107] When finally in 2000 – after just one year of negotiations and debates, to which participated States representatives, international organizations, and NGOs – was proclaimed the adoption of the Convention against Organized Crime and the Protocols Thereto, it was a breakthrough. The Convention was accompanied by three supplementing Protocols: one on smuggling of migrants, another on trafficking of firearms and one on trafficking in persons. The Protocol to Prevent, Suppress and Punish Trafficking in Persons[108], especially Women and Children (Palermo Protocol) sets out the very first international definition of trafficking in persons, providing the necessary prerequisite for the elaboration of a meaningful normative framework.[109]

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[106] UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised. Issue Paper. (*Vienna: United Nations, 2018), p. 2.

[107] A. T. Gallagher, 'Two Cheers for the Trafficking Protocol', *Anti-Trafficking Review,* 4 (2015), p. 16. DOI: 10. 14197/atr.20121542.

[108] It entered into force on 25 December 2003. It has 117 signatories and 180 parties that are categorized based upon the status of ratification, acceptance, approval, accession and succession. Italy has ratified the Protocol on 2 August 2006 and thus the Protocol's provisions are binding on the Italian government. See the status of the Protocol at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en, [last accessed 15 February 2023].

[109] Ibid. On this topic see also, among others, A. T. Gallagher, *The International Law of Human Trafficking. (*New York: Cambridge University Press, 2010); S. Scarpa, *Trafficking in Human Beings: Modern Slavery.* (New York: Oxford University Press, 2008); V. Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*, (New York: Cambridge University press, 2017).

Being a Protocol supplementing a Convention, it must be interpreted in light of the provisons contained in the Convention itself.

Under article 3 of the Palermo Protocol,

> '*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.'[110]

According to this definition, the offence of trafficking in persons comprises three elements: the *action*, the *means*, and the *purpose*.[111] In order for an offence to qualify as human trafficking, all three elements must be present. The only exception concerns children – to be intended as any person under eighteen years old – where the *means* element is not required to recognize a crime as human trafficking.[112] Concerning the *action* element, the Protocol refers to the 'recruitment, transportation, transfer, harbouring or receipt of persons'.[113] The act of trafficking is secured by the use of *means* that are defined as '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'.[114]

The concept of abuse of a position of vulnerability[115] (APOV) raised many questions owing to its open-ended quality. Beyond reflecting a general desire to ensure that the definition was able to encompass all means, including the more subtle ones, drafters' intentions are unclear. Moreover,

[110] *Palermo Protocol*, art 3, para a.
[111] A. T. Gallagher, *The International Law of Human Trafficking*, cit. p. 78 and pp. 29-42.
[112] See *Palermo Protocol*, art 3, paras c, d.
[113] Ibid., art. 3, para a.
[114] Ibid.
[115] On this topic see the study of F. Ippolito, *Understanding vulnerability in international human rights law*, (Napoli: Editoriale scientifica, 2020).

the explanation provided by the interpretative note to Article 3 in the *Travaux Préparatoires*, where the concept of abuse of a position of vulnerability is understood as 'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'[116], raises even more questions, including for instance, what real or acceptable alternative means or what makes an alternative acceptable. But even more importantly, by only focusing on the existence of a vulnerability, it makes it secondary if the alleged perpetrator actually abused or intended to abuse the vulnerability of the alleged victim.[117] A further clarification was provided by the UNODC Guidance note[118], where it was ascertained that abuse of a position of vulnerability occurs when the perpetrator intentionally takes advantage of one's personal, situational, or circumstantial vulnerability to perform any of the *acts* listed in paragraph a of Article 3 of the Protocol with the purpose of exploitation 'such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her'. Whether the victim's belief of having no alternative is reasonable, it is to be determined upon the victim's situation, meaning that it should be assessed on a case-by-case basis[119]. Furthermore, the Guidance Note, albeit recognizing that establishing the existence of vulnerability may be a critical element in identifying victims, asserts that both the existence and the abuse of vulnerability must be established by credible evidence in order to support the alleged use of abuse of a position of vulnerability as the means by which a specific act was carried out[120].

Regarding the third element, the *purpose* of trafficking in human beings is exploitation and it is widely considered to be a key element of the offence. Yet, Article 3 of the Palermo Protocol does not define exploitation[121] but rather it provides an open-ended list of types of exploitation. Such list includes some concepts that have not been defined in international law, namely exploitation of the prostitution of others and organ removal, leaving room for uncertainty. The same issue arises

[116] UNODC, 'Part Two. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime', In: *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto. (*New York: United Nations, 2006), p. 347.
[117] UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised. Issue Paper,* cit. pp. 7-8.
[118] UNODC, *Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,* 2012, p. 2, para 2.5.
[119] Ibid.
[120] Ibid. p. 2, para 4.2.
[121] For a review of the literature dealing with the definition of exploitation both in the criminal law and other legal contexts see V. Stoyanova, op. cit., pp. 68-72.

in presence of concepts defined in law[122]. The absence of a clear legal definition of both exploitation and stipulated forms of exploitation opens the road to interpretative discretion that may lead to inconsistency[123]. Even when legal definitions appear to be in place, distinguishing trafficking from other crimes remains a difficult task[124]. Nonetheless, flexibility provided through an open-ended list continue to be important.

Some questions have arisen also in relations to the principle of the irrelevance of consent, where the *means* set forth in Article 3 have been used. The issue of consent was debated at length during the negotiation process of the Trafficking Protocol, particularly in relation to prostitution; thereby the final text of the Protocol was a compromise between divergent positions.[125] In straightforward trafficking cases, when consent is obtained through coercion or fraud, the invalidity of the consent has been widely accepted by all major legal systems.[126] However, issues arise in respect to softer forms of coercion, where the consent appears to be the element allowing to discriminate between trafficking and other offences.[127] National insights revealed that consent can operate as a double-edge sword. On one side, taking victim's consent as an indicator of whether exploitation occurred may mean that victims of trafficking are not accurately identified and protected; while an overly rigid attachment to the strict definition of irrelevance of consent has been criticised as leading to violations of both the perpetrator's and the victim's rights, particularly for what concerns victims' agency and freedom to make decisions.[128]

The asserted purposes of the Palermo Protocol are the prevention of and the fight against trafficking; the protection of victims; and the promotion of cooperation between States (Article 2, paras a, b, c). However, for an offence to fall within the scope of the Protocol, it must be transnational in nature and involve an organized criminal group (Article 4). Hence, according to this provision, those instances – where the offence of trafficking, such as in the case of domestic

[122] For a further analysis on the 'exploitation' purpose of trafficking see UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised. Issue Paper,* cit. pp. 14-19.
[123] UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised. Issue Paper,* cit. p. 17.
[124] Ibid.
[125] S. Scarpa, op. cit., pp. 59-60.
[126] UNODC, *The International Legal Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised. Issue Paper,* cit. p. 10
[127] Ibid. p. 12.
[128] Ibid. pp. 12-13.

servitude, seems to be more associated to a gender-based and domestic violence instead of being the result of an organized criminal activity – should not be covered by the Protocol. With this regard, the UNODC Legislative Guides for the implementation of the United Nations Convention against Transnational Crime and the Protocols Thereto provided a clarification, stating that 'the Trafficking in Persons Protocol also applies to the protection of victims regardless of transnationality and involvement of an organized criminal group'[129], asserting thus the universality of the minimum standards provided by Trafficking Protocol.

The main weakness of the Trafficking Protocol is perhaps the lack of hard obligations on States, as far as it concerns assistance to and protection of victims as well as its compliance mechanism. The Protocol's week implementation machinery, which cannot be compared in any respect to a human rights treaty body, consists of a Working Group of States Parties, attached to the broader Conference of the Parties (COP) established by the UN Convention against Transnational Crime and the Protocols Thereto, whose aim is to support and to advise the COP with regard to the Palermo Protocol, for example, by making recommendations on the measures that States Parties can adopt to better implement the Protocol's provisions.[130]

The Protocol has been criticized for its focus on the repressive aspects of trafficking rather than on victims' human rights. Particularly, human rights scholars and advocates, were offended by the fact that the UN Trafficking Protocol was developed outside the human rights system.[131] While this is true, it must also be considered that the Protocol is a supplementing instrument to a Convention against organized crime; thus, it should be no surprize that detection, punishment and prosecution are the focal point of it.[132] Nevertheless, the Palermo Protocol triggered change, paving the way for the subsequent evolution of an international legal framework on combatting human trafficking.[133] In spite of its shortcomings, the UN Trafficking Protocol represented a

[129] UNODC, *Legislative Guides for the Implementation of the Convention against Transnational Crime and the Protocols Thereto.* (New York: United Nations, 2004), p. 259, para 25.
[130] See A. T. Gallagher, *The International Law of Human Trafficking*, cit. p. 469 and A. T. Gallagher, 'Two Cheers for the Trafficking Protocol', p. 22.
[131] A. T. Gallagher, 'Two Cheers for the Trafficking Protocol', p. 19.
[132]L. Gaspari, 'The International and European Legal Framework on Human Trafficking: An Overall View', *Deportate, esuli, profughe: Rivista telematica di studi sulla memoria femminile,* 40 (2019), p. 54, available at https://www.unive.it/pag/fileadmin/user_upload/dipartimenti/DSLCC/documenti/DEP/numeri/n40/05_Gaspari.pdf. [last accessed 8th April 2021].
[133] A. T. Gallagher, 'Two Cheers for the Trafficking Protocol', p. 21.

milestone, being able to bring on the international political agenda human exploitation and to provide the foundation from which change could depart.

3.3 Other UN instruments on combatting trafficking in human beings (THB)

When dealing with human trafficking, besides the Palermo Protocol, there are also other international legal instruments to be considered. One of these is the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others, adopted in 1949.[134] It was the first international instrument to employ the wording *traffic in persons*. Indeed, prior to this Convention, international legal instruments concerned especially women and girls involved in prostitution, with the exception of the 1921 International Convention for the Suppression of the Traffic in Women and Children, where boys were included together with women and girls. Whereas the first international treaties signed under the League of the Nations related to trafficking, referred to *white slave traffic* rather that trafficking[135]. The United Nations Convention of 1949 is still in force today in relation to trafficking for sexual exploitation of women, men and children; yet it was heavily criticized as outdated for not properly covering all forms of trafficking and not protecting and granting victims' rights.[136] Former UN Special Rapporteur on violence against women referred that the Convention 'does not regard women as independent actors endowed with rights and reason; [but] rather … as vulnerable beings in need of protection from the 'evils of prostitution'.[137]

Other instruments are not specialized treaties, but they contain provisions relevant to addressing in a more comprehensive manner the issue of trafficking. Beyond the already mentioned Forced Labour Convention and its supplementing Protocol that acknowledges the necessity of specific action to combat human trafficking for the purpose of forced labour, establishing thus a connection between the two offences, there are two other international treaties that, even if not specifically

[134] It entered into force on 25 July 1951. Italy has accessed it, becoming a party to the Convention. Accession has the same legal effect of the ratification. See the ratification status at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=VII-11-a&chapter=7&clang=_en, [last accessed 15 February 2023].
[135] On the history of the legal framework on trafficking before the adoption of the Palermo Protocol see A. T. Gallagher, *The International Law of Human Trafficking*, cit. pp. 55-64 and S. Scarpa, op. cit. p. 50-55. With regard to 'white slave traffic' see also J. Allain, 'White Slave Traffic in International Law', *Journal of Trafficking and Human Exploitation* 1 (2017) 1, pp. 1-40. DOI10.7590/24522775111.
[136] L. Gaspari, op. cit., p. 52
[137] Radhika Coomaraswamy cited in L. Gaspari, op. cit., p. 52.

designed to combat human trafficking, are relevant in addressing the special issues related to the trafficking of women, girls and children and in framing the trafficking in a human rights context: the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the United Nations Convention on the Rights of the Child (CRC).

3.3.1 The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

Article 6 of the Convention on the Elimination of all Forms of Discrimination Against Women[138] enshrines States Parties' obligation to adopt 'all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women', introducing the concept of trafficking in a Convention that deals with gender discrimination and that addresses a specific category of people: women. CEDAW is a human rights treaty: as a result, States have a duty to respect, protect and fulfil the human rights of people. Indeed, in order to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality, States Parties undertake to address all aspects of their legal obligations under the CEDAW Convention. Consequently, this means that States have a duty not to interfere with women's equal enjoyment of civil, political, economic, social and cultural rights; to ensure that women's rights are not jeopardized by third parties; and to take the necessary steps to ensure that women and men enjoy equal rights *de jure* and *de facto.*[139]

Regarding this Article, the CEDAW Committee recently issued a General Recommendation No. 38 that acknowledges that trafficking is a gender-based violence 'rooted in structural sex-based discrimination'.[140] While the term *sex* refers to biological differences existing between men and

[138] The Convention was adopted in 1979 and it entered into force on 3 September 1981. Up to today it has been ratified by 189 states. Italy ratified this instrument on 10 June 1985. It also ratified the Optional Protocol to the CEDAW Convention on 22 September 2000 that allows the CEDAW Committee to receive individual complaints and to initiate inquiries into situations of serious violations of women's rights. Thus, an Italian individual may report a violation to the CEDAW Committee. However, the decisions of the Committee are not binding on States, as they only contain recommendations. On the ratification status see https://indicators.ohchr.org/, [last accessed 15 February 2023]. For further information on the function of the Committee see https://www.ohchr.org/en/treaty-bodies/cedaw/introduction-committee, [last accessed 15 February 2023].

[139] CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*. 16 December 2010, CEDAW/C/GC/28, p. 3, para 9. In short 'CEDAW Committee GR No. 28'.

[140] CEDAW Committee, *General Recommendation No. 38 (2020) on Trafficking in Women and Girls in the Context of Global Migration.* 20 November 2020, CEDAW/C/GC/38, p. 3, para 10. In short 'CEDAW Committee GR No. 38'.

women, *gender* relates to the 'socially constructed identities, attributes and roles for women and men and social and cultural meanings for these biological differences resulting in hierarchical relationships between women and men … that [disadvantage] women'.[141] In fact, trafficking has been identified as a form of violence against women, which is contrary to the international prohibition of discrimination on the basis of sex.[142] While the CEDAW Convention does not directly address violence against women, the General Recommendation No. 19 on violence against women issued by the CEDAW Committee, establishes a link between discrimination and gender-based violence, defining the latter as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'[143]. Thus, gender-based violence is considered to be a form of discrimination within the meaning of Article 1 of the CEDAW Convention 'which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions'.[144] Within the view of the CEDAW Committee the persisting situation of trafficking in women and girls is the result of a lack of appreciation of the gender dimension of trafficking.[145] With the purpose of dismantling the structural and system practices that enhance women's vulnerabilities, the General Recommendation No. 38 suggests the adoption of a *gender-transformative approach.*[146]

Discrimination against women is simultaneously a push factor and the result of trafficking. To include trafficking within the CEDAW Convention, that imposes on States Parties a set of positive obligations related to the measures to be adopted so that women's status in societies can be fully improved, have significant consequences in terms of States responsibilities and obligations to prevent trafficking, prosecute traffickers and provide assistance and protection to victims.[147] Bearing in mind that trafficking in persons disproportionately affects women and girls, the

[141] CEDAW Committee GR No. 28, cit. para 5.
[142] See A. T. Gallagher, *The International Law of Human Trafficking,* cit. p. 191.
[143] CEDAW Committee, *General Recommendation No.19: Violence against Women.* Eleventh Session, 1992, A/47/38, para 6. In short 'CEDAW Committee GR No. 19'.
[144] Ibid.
[145] CEDAW Committee GR No. 38, cit., para 2.
[146] Ibid., para 49. On this topic see also S. De Vido, 'La General Recommendation N. 38 del Comitato per l'eliminazione di Ogni Forma di Discriminazione nei Confronti delle Donne sulla Tratta di Donne e Bambine nel Contesto delle Migrazioni Globali', *Ordine Internazionale e Diritti Umani* 1 (2021), p. 164.
[147]N. Bistra, and I. Zejneli, 'CEDAW Right of non-discrimination and State Obligations in connection to Trafficking in Women', *Advances in Social Sciences Research Journal,* 3 (2016) 1, p. 201 and p. 203. DOI: 10.14738/assrj.31.1698.

provisions of the CEDAW Convention and the subsequent stemming obligations, and the work performed by its Committee appear to be fundamental in combating trafficking.

3.3.2 The United Nations Convention on the Rights of the Child (CRC)

Beyond the CEDAW Convention, the United Nations Convention on the Rights of the Child (CRC), adopted by the General Assembly in 1989 and entered into force in 1990[148], is the only international human rights instrument to address explicitly trafficking. CRC deals with the promotion and the safeguard of the rights of the child, providing a comprehensive legal framework within which trafficking in children can be addressed. In the view of a UNICEF-sponsored report, the possibility of being used as a framework in understanding and combatting trafficking in children and related commercial sexual exploitation is one of the major strengths of the CRC.[149] According to the definition provided by the CRC in Article 1, a *child* is any person below the age of 18, if not otherwise specified under domestic law, where majority may be attained earlier.

Article 35 of the CRC is the provision dealing explicitly with trafficking, requiring States Parties to adopt all the 'appropriate national, bilateral or multilateral measures [in order] to prevent the abduction of, the sale of or traffic in children for any purpose or in any form'.[150] It is a wide measure that acknowledges that children may be subjected to various forms of exploitation and not only to prostitution.[151] Moreover, as briefly anticipated above, the scope of Article 35 is broadened by other provisions of the CRC, including the fight against illicit transfer and non-return of children[152]; the protection of children from 'physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment and exploitation, including sexual abuse when under the care of parents, legal guardians or any other person who has the care of the child'[153]; the obligation of states to provide special assistance and protection to children deprived of their family

[148] Italy ratified it on 5 September 1991. It also ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure on 4 February 2016, enabling Italian citizens to submit a complaint on the violation of the rights enshrined in the CRC Convention and its protocols to the CRC Committee. For further information on the working of the CRC Committee see https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee, [last accessed 15 February 2023].
[149] UNICEF sponsored report by J. Ennew, K. Gopal, J. Heeran and H. Montgomery cited in A. T. Gallagher, *The International Law of Human Trafficking*, cit., p. 65, footnote no. 65.
[150] UN General Assembly, *Convention on the Rights of the Child*, resolution 44/25, 1989, art. 35. In brief: CRC
[151] S. Scarpa, op. cit., p. 100.
[152] CRC, cit., art. 11.
[153] Ibid., art. 19.

environment[154]; the prevention of the engagement of children in the illicit production and trafficking of narcotic drugs and psychotropic substances[155]; the protection of children from all forms of exploitation[156] as well as from sexual exploitation and sexual abuse[157]; and the obligation on part of the States to take all the necessary measures to promote the physical and mental recovery as well as social integration of children victims of exploitation or any form of abuse[158].

The scope of Article 35 was further broadened by the adoption of the Protocol to the Convention on the Rights of the Child on the sale of Children, Child Prostitution and Child Pornography in 2000[159]. The Protocol, if compared to the CRC, adopts a criminal justice approach to the issues addressed, detailing States obligations accordingly[160]. Even if the Protocol does not deal with the issue of trafficking, it is relevant to the extent that the definition of sale of child, contained in it, encompasses the majority of the instances in which children are trafficked.[161] However, the CRC Committee in the Guidelines on the implementation of the Protocol, underscored the distinction between the two offences, reminding States that the two international definitions are not identical. For example, while exploitation is the constitutive element of trafficking, it is not a requirement in the sale of children, albeit exploitation may be the result of the sale.[162]

In its General Comment No. 6, the CRC Committee[163] has drawn a particular attention to the situation of unaccompanied and separated children owing to the increasing number of children in such situation as a result of, *inter alia*, trafficking. The CRC Committee[164] noted that unaccompanied or separated children are particularly vulnerable to exploitation and abuse, especially girls that are at particular risk of being trafficking for sexual exploitation. Thereby, trafficking is one of the causes of the situation of unaccompanied and separated children: but this

[154] Ibid., art. 20.
[155] Ibid., art. 33.
[156] Ibid., art. 36.
[157] Ibid., art. 34.
[158] Ibid., art. 39.
[159] It entered into force on 18 January 2002, and it has been ratified by 178 Member States (data updated to 27 January 2023). See https://indicators.ohchr.org/, [last accessed 6 February 2023].
[160] A. T. Gallagher, *The International Law of Human Trafficking*, cit., p. 67.
[161] Ibid.
[162] CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography,* 10 September 2019, CRC/C/156, para 15.
[163] CRC Committee, *General Comment No. 6 (2005). Treatment of unaccompanied and separated children outside their country of origin*, 2005. CRC/GC/2005/6, para 2.
[164] Ibid., para 50. See also para 52.

resulting situation represents a factor that further increases children's vulnerability to being trafficked or re-trafficked.

The CRC Convention has been ratified by 196 States, representing the Convention with the highest number of ratifications. The only one State in the world that have not yet ratified it, albeit signed it, is the United States[165]. The CRC Convention enshrines in its provisions important positive and negative obligations on part of States Parties, relative to the protection and the respect of fundamental human rights of the children. Thus, the fact that it was almost universally accepted makes this human rights treaty a central instrument in combatting trafficking in children, also thanks to its supervisory mechanism of implementation.

The international instruments so far analyzed in relation to both forced labour and trafficking, either lack or have a week enforcement mechanism. Specialized treaties devoted to these practices are not equipped with a judicial or quasi-judicial body that can receive individual complaints. The above-mentioned UN human rights treaties, on the contrary, established their own treaty body mechanisms – the Committees – that can take decisions in relation to the violation of the provisions contained in their respective Conventions. Nonetheless, neither the CEDAW Committee nor the CRC Committee have so far adopted a decision establishing a violation of Article 6 of the CEDAW Convention or of Article 35 of the CRC Convention.[166] For these reasons, it is relevant to investigate the role of generalist regional human rights instruments that are equipped with much more advanced judicial bodies. In the following paragraphs, it will be analyzed the content of the two relevant Conventions establishing the Inter-American Court of Human Rights and the European Court of Human Rights.

3.4 The American Convention on Human Rights

The inter-American human rights system is one of the most advanced systems of protection of human rights, that was born with the adoption of the American Declaration of the Rights and Duties of the Man in 1948. The Declaration was the very first human rights instrument, that preceded of 7 months the UN Declaration of Human Rights. However, the Declaration was a mere non-binding statement of moral obligations. Concerned with the widespread disregard of

[165] Data updated to September 2022. See https://indicators.ohchr.org/, [last accessed on 23 September 2022].
[166] V. Milano 'Human Trafficking by Regional Human Rights Courts: an analysis in light of Hacienda Brasil Verde, the first Inter-American Court's ruling in this area', cit., p. 5.

fundamental liberties in many American States, the Organization of the American States (OAS) supported the adoption of an instrument that made the moral obligations legally binding.[167] Consequently, in 1969, during a Special Inter-American Conference held in San Jose, the American Convention on Human Rights (ACHR)[168] was adopted. Its coming into force effectively established a dual system for defending human rights throughout the hemisphere. The American Declaration and OAS Charter remained to specify the human rights obligations of those States not party to the ACHR, while the ACHR became the primary source for the human rights obligations of States Parties thereto.[169] As a result, only the Inter-American Commission of Human Rights (IACHR) and the States Parties that have agreed to the Court's jurisdiction may refer cases to the Inter-American Court of Human Rights (IACtHR), although all OAS members may submit individual or interstate complaints to the IACHR. Another distinction between the two bodies lies in the fact that the IACHR issues recommendations, whereas the Court issues judgments that are binding on States.

The ACHR in the Preamble acknowledges that the fundamental rights of man are founded on characteristics of the human personality and not upon one's nationality of a particular state. In fact, Resolution 04/19 on the human rights of migrants, refugees, stateless persons and victims of human trafficking, underscores that everyone needs to be treated with the utmost respect for their human rights, regardless of their immigration status, while emphasizing the universality, indivisibility, interdependence, interrelationship, progressivity and non-regression of all human rights and fundamental freedoms.[170]

The ACHR enshrines fundamental human rights, including the right to life, right to human treatment, right to personal liberty, right to a name, the rights of the child and of the family and so

[167] R. K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' *Human Rights Quarterly,* 31(2009) 4, p. 863 available at https://www.jstor.org/stable/40389979, [last accessed 31 October 2021].
[168] The ACHR entered into force on 18 July 1978 and to this date has been ratified by 25 American nations. See https://www.corteidh.or.cr/historia.cfm?lang=en#:~:text=In%20November%201969%20the%20Inter,a%20member%20State%20deposited%20the, [last accessed 6 February 2023]. Italy is not part of this Convention and neither of the OAS. Nonetheless, the IACtHR jurisprudence is also relevant for the focus of this thesis as the jurisprudence of the Court can contribute to the development of a consistent body of international human rights law by exchanging ideas and information with the ECtHR. Moreover, its judgments can be taken into account by National Courts.
[169] R. K. Goldman, op. cit., p. 866.
[170] IACHR, *Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Human Trafficking,* 7 December 2019, Commission Resolution: 04/2019, p. 1 and General Provision.

forth. However, for the purpose of the present study, the most relevant provision is Article 6 which upholds the fundamental right to be free from slavery. The ACHR clearly forbids trafficking: Paragraph 1 of Article 6 prohibits slavery and servitude in all their forms, including 'slave trade and traffic in women', while Paragraph 2 condemns forced and compulsory labour[171]. In the following Chapter of this study, the IACtHR's pertinent caselaw will be examined, along with its formulation of States' positive obligations and its understanding of the relationship between forced labour, servitude and slavery and trafficking in human beings.

3.5 The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR)[172], adopted in 1950 within the framework of the Council of Europe (CoE), was the first instrument to codify and give binding effect to the rights outlined in the Universal Declaration of Human Rights. *Human rights* is one of the three pillars on which the CoE is founded, along *democracy* and the *rule of law*. Thus, prior to entering the CoE, states must ratify the ECHR, while, as discussed above, in the American system States can decide not to ratify the ACHR and still be part of the OAS. The ECHR establishes fundamental human rights that can never be derogated, such as the right to life and the prohibition of torture as well as rights and freedoms that may be limited in times of war or public emergency that can threaten the existence of a nation. However, as specified in Article 15, paragraph 1 measures adopted to derogate must be taken 'to the extent strictly required by the exigencies of the situation' and provided that they do not conflict with the obligations placed on States by international law.[173] To ensure the observance of the engagements undertaken by States Parties, the Convention set up the European Court of Human Rights (ECtHR). In addition to deciding the issues brought before it, the decisions and the judgement of the Court serve, more generally, to clarifying, defending and advancing the standards established by the Convention.[174] The ECtHR is competent to receive

[171] OAS, *American Convention on Human Rights*. Pact of San Jose, 1969, art. 6, paras 1 and 2. In short ACHR.
[172] It entered into force on 3 September 1953 and it has been ratified by 46 States. Italy has ratified it on 26 October 1955, see https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005, [last accessed 6 February 2023]. Following the aggression against Ukraine, the Russian Federation has been excluded from the Council of Europe.
[173] CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, 1950, art. 15, para 1. In short ECHR.
[174] Judgment of 20 March 2018, Appl. No. 5310/71, *Ireland v. The United Kingdom*, (ECtHR), para 154 and Judgement of 5 July 2016, Appl. No. 44898/10, *Jeronovičs v. Latvia*, (ECtHR), para 109 cited in ECtHR, *Guide on Article 4 of the European Convention on Human Rights. Prohibition of Slavery and Forced Labour.* 2021.

both inter-state and individual complaints regarding the violations of the ECHR. Concerning individual applications, however, applicants have some requirements to respect prior to submitting a case to the Court, including the exhaustion of domestic remedies.[175]

The ECHR is a 'living instrument which must be interpreted in light of present day-conditions'.[176] It has long been a principle of the Court that it does not apply the provisions of the ECHR in a vacuum. Since the Convention is an international agreement, it must be interpreted in accordance with the principles of interpretation outlined in the Vienna Convention of 1969 on the Law of Treaties. Under this Convention, the Court is required to determine the ordinary meaning that should be given to the words in their context and in light of the object and purpose of the provision from which they are drawn.[177] The interpretation of the Court is fundamental, especially for those provisions whose scope need to be broaden in order to cover rights and obligations not explicitly included in the Convention. This is the case of Article 4 of the Convention that prohibits slavery and forced labour. As it can be seen, while forced and compulsory labour are included, trafficking is not mentioned. Indeed, Paragraph 1 cites that 'no one shall be held in slavery or servitude' while Paragraph 2 enshrines the prohibition of requiring someone to 'perform forced or compulsory labour'.[178] However, the Court is required to take into account that Article 4's context is a treaty for the effective protection of human rights and that the Convention must be read in its entirety and interpreted in a way that encourages internal consistency and harmony between its various provisions.[179] As a result, in *Rantsev v. Cyprus and Russia*[180], the Court asserted that being human trafficking an offence that imperils the fundamental rights and human dignity of its victims and that is incompatible with a democratic society and the principles outlined in the Convention, it falls within the scope of Article 4 of the Convention, although there is no reference to it. This was the first case in which the Court recognized that human trafficking is prohibited under Article 4 of the Convention, broadening its scope of application. However, the Court failed to explain how trafficking is related to the prohibited conducts under article 4, namely forced labour, servitude and slavery and to determine how the factual circumstances of the case are related to trafficking

[175] S. Scarpa, op. cit., p. 138.
[176] *Siliadin v France*, para 121.
[177] *Rantsev v Cyprus and Russia*, para 273.
[178] *ECHR*, art. 4.
[179] *Rantsev v Cyprus and Russia*, para 274.
[180] Ibid., para 282.

in persons.[181] Moreover, although the Court determined that trafficking as defined in the Trafficking Protocol falls within the scope of article 4, practically it ends up associating trafficking with slavery.[182] This pronouncement has several consequences, not least the fact that it only considers the *purpose* element of trafficking while limiting it to slavery.[183] An interpretation of trafficking in persons in light of its international legal definition is provided in the case of *S.M. v Croatia*, decided by the Grand Chamber in 2020.[184] The Court's jurisprudence has been fundamental also for the definition of States' positive obligations flowing from the violation of Article 4 of the Convention. In *Rantsev* the Court expanded the scope of positive obligations, embracing prevention, protection and punishment of perpetrators.[185] The Court's holistic approach, in line with that required by the Convention on Action against Trafficking in Human Beings, adopted by the Council of Europe, has underwent a process of regression in subsequent cases[186], that affects all the categories of positive obligations identified in *Rantsev*.[187] The ECtHR jurisprudence will be analysed in detail in the next chapter. However, it must be pointed out that compared to the specialist treaties, the ECHR – although it does not provide a broad legal basis for the establishment of States' obligation concerning trafficking in human beings – it is equipped with an advanced judicial mechanism that is the ECtHR and whose judgments are binding on States. The Court's caselaw on trafficking and its evolutive interpretation of Article 4 has led to the identification of a comprehensive set of states' positive obligations.[188]

3.6 Council of Europe Convention on Action against Trafficking in Human Beings

The Palermo Protocol, as well as the UN Trafficking Principles and Guidelines[189], paved the way to the evolution of a comprehensive international law of human trafficking that integrates transnational criminal law with human rights. This is evident in the framework of the Council of

[181] On this see among others V. Stoyanova, op. cit., pp. 294-301.
[182] Ibid., p. 298. See also J. Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery'. *Human Rights Law Review,* 10 (2010) 3, pp. 553-554, doi:10.1093/hrlr/ngq025.
[183] J. Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery', cit., pp. 553-554.
[184] Judgment of 25 June 2020, Appl. No. 60561/14, Grand Chamber, *S.M. v Croatia*, (ECtHR).
[185] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 12.
[186] On this see below Chapter 2, paras 1.2.2.1, 1.2.2.2 and 1.2.2.3.
[187] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 13
[188] Ibid., p. 7.
[189]The United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking were issued in 2002 by the then UN High Commissioner for Human Rights Mary Robinson, as an addendum to the report to the Economic and Social Council. The main goal of the Trafficking Principles and Guidelines was to incorporate a human rights approach into national, regional and international anti-trafficking laws, policies and interventions. See OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002, E/2002/68/Add.1.

Europe, which in 2005 adopted the Convention on Action against Trafficking in Human Beings.[190] The development of a Convention to combat human trafficking has been requested by the CoE Parliamentary Assembly since 1997. With this aim, the CoE Committee of Ministers established the Ad Hoc Committee of Experts (CAHTEH) that was charged with crafting the text of the Convention with a focus on victim protection and assistance.[191] After more than a year of preparation, the Ad Hoc Committee ultimately submitted the document to the Committee of the Ministers in December 2004. The Parliamentary Assembly was then asked for its opinion, and after reviewing the Report on the Draft Convention written by Mrs. Ruth-Gaby Vermot-Mangold – who did not hold back in her strong criticism – it issued Opinion 253.[192] Despite its welcoming to the reference made in the Preamble to trafficking as a 'violation of human rights and as an offence to the dignity and the integrity of the human being', and the 'extremely broad scope of the Convention, which covers all forms of trafficking, both national and transnational, and linked or not to organized crime', the Parliamentary Assembly regretted nevertheless, that contrary to the objective pursued, the draft convention's wording was 'far from guaranteeing effective and sufficient protection to victims'.[193] Furthermore, it added that while measures for the protection of victims should have been at the heart of the Convention, it seemed that the Committee parties were more preoccupied with illegal migration rather than acknowledging that trafficking in human beings is a criminal offence whose victims must be protected. Also, the Parliamentary Assembly was not satisfied with the low rate of participation of the civil society in formulating the text. Consequently, the Parliamentary Assembly proposed over 50 amendments to be made to the drafted text.[194] However, regrettably only one third of the amendments were adopted in the final text. Nonetheless, when comparing it with the draft initially provided by CAHTEH, it cannot be

[190] The Convention entered into force on 1 February 2008. Up to February 2023, 48 states have ratified it, including three Non-Members of the Council of Europe. Italy ratified the Convention on 29 November 2010, meaning that it is required to respond to the questionnaire issued by the Group of Experts on Action against Trafficking in Human Beings (GRETA) which will evaluate the implementation of the Convention's provisions. The ratification status is available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=197, [last accessed 15 February 2023].
[191] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, 17 January 2005, Doc No. 10397, *Explanatory Memorandum*, paras 1-2.
[192] S. Scarpa, op. cit., p. 145.
[193] CoE Parliamentary Assembly, *Opinion 253. Draft Council of Europe Convention on Action against Trafficking in Human Beings.* 26 January 2005, Opinion 253, paras 5, 6, 8. In short *Opinion 253*.
[194] Ibid., para 14.

denied that the approved amendments have at least improved the final text of the Trafficking Convention.[195]

Even if the Convention could have been a different treaty, taking a clear and effective stand in relation to the protection of the victims of trafficking, it proved to be innovative in several respects in relation to the other existing international legal instruments, particularly compared to the Palermo Protocol. First of all, as mentioned above, the Council of Europe Trafficking Convention's added value comes from its affirmation that human trafficking 'constitutes a violation of human rights and an offence to the dignity and the integrity of the human being'.[196] Indeed, in the Explanatory Report it is further stated that the main added value of the Trafficking Convention lies in its human rights perspective: combatting trafficking in human beings together with the protection and the respect of victims' rights are paramount objectives of the Convention.[197] Among the stated purposes of the Convention, besides preventing and combating trafficking, ensuring effective investigation and prosecution and promoting international cooperation, it is relevant the focus placed on the protection of the victims' human rights as well as on designing a comprehensive framework for the protection and assistance to victims and witnesses and on guaranteeing gender equality.[198]

Secondly, concerning its scope of application, the Trafficking Convention applies to all forms of trafficking and regardless of the fact that it is national or transnational or whether it is linked or not to organized crime.[199] Furthermore, in the instance of transnational trafficking, the Convention also applies to victims who arrived or resided in the territory of the receiving party lawfully as well as those who did so unlawfully.[200] In this context, it is also relevant the non-discrimination principle, included in Article 3 of the Trafficking Convention that, contrary to the one enshrined in the Palermo Protocol, makes reference to the different grounds of discrimination: sex, race,

[195] S. Scarpa, op. cit., p. 146.
[196] CoE, *Convention on Action against Trafficking in Human Beings*. ETS No. 197, 2005, preamble. In short *Trafficking Convention*. See also CoE, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings.* Council of Europe Treaty Series: No. 197, 2005, para 36. In short *Trafficking Convention Explanatory Report*.
[197] Trafficking Convention Explanatory Report, para 46.
[198] *Trafficking Convention*, art 1, para 1.
[199] Ibid., art. 2.
[200] Trafficking Convention Explanatory Report, para 62.

colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As far as it regards the definition of human trafficking, the one enshrined in Article 4 of the Trafficking Convention is identical to the one included in Article 3 of the Palermo Protocol. Using a definition on which there is international consensus can be pivotal in combatting trafficking more effectively and helping its victims.[201] In addition, the adoption of the same definition of trafficking in human beings must be read in conjunction with the provision on the relationship established between the Palermo Protocol and the Trafficking Convention, which asserts that the rights and obligations derived from the provisions of the Protocol are not to be affected by the ones contained in the Convention; the latter are to be intended to enhance the protection afforded by the Protocol and develop the standards it established.[202] The provisions contained in the Trafficking Convention are more precise and may be able to go beyond the minimum standards agreed upon in other international instruments, because of the more limited and uniform context of the Council of Europe.[203] However, even in the framework of a regional organization, it was not possible to tackle the primary concerns of the Parliamentary Assembly that desired to achieve an even greater protection and assistance to victims and witnesses, while putting a special focus on their human rights.[204]

With respect to the Palermo Protocol, the Trafficking Convention operates a shift from the traffickers' prosecution to victims' protection, promoting a 'human-rights based approach [and using a] *gender mainstreaming* and a child sensitive approach in the development, implementation and assessment of all the policies and programmes referred in paragraph 2 [of article 5]'.[205] Preventive measures, addressing the underlying causes of trafficking, are fundamental in combating trafficking in human beings. However, such measures must take into account the existence of gender inequality. *Gender mainstreaming* is a key strategy for achieving true equality between men and women.[206] *Gender mainstreaming* is a concept defined as the '(re)organization,

[201] Ibid., para 72.
[202] *Trafficking Convention,* art. 39.
[203] Trafficking Convention Explanatory Report, para 30.
[204] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 7.
[205] *Trafficking Convention,* art. 5, para 3. See also S. Scarpa, op. cit., p. 163.
[206] Trafficking Convention Explanatory Report, para 104.

improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making'.[207] Thus, policies and programmes must be informed by the *gender mainstreaming* approach in order to ensure that both men and women benefit from them and that they do not worsen inequality but rather advance it.

Preventive measures include also tackling the demand issue. Article 6 of the Trafficking Convention entails positive obligations for States Parties to adopt and reinforce measures aimed at discouraging the demand that fosters all forms of exploitation. While the Palermo Protocol dealt with the issue of demand only in a paragraph of Article 9, the Trafficking Convention devoted to the issue an entire article, thus stressing the relevance of demand in producing trafficking. In relation to this, the Trafficking Convention introduced a new criminal offence that was not contemplated in the Palermo Protocol. Article 19 indeed enshrines the possibility for States Parties to criminalize the use of services object of exploitation when there is full knowledge of the victim's status. The provision was harshly criticized by Mrs. Vermot-Mangold in her Report to the Parliamentary Assembly for the use of the words *shall consider adopting* which leave wide discretion to states on deciding whether or not to adopt measures criminalizing the use of services of a victim[208]. She suggested to amend the provision by using the words *shall adopt*, in order to make it binding on States Parties[209]; however, the amendment was not approved.

The Trafficking Convention's stated purpose of protecting the human rights of victims resulted in the elaboration of Chapter 3 that introduced the measures that States Parties shall adopt in order to protect and promote the rights of victims, while guaranteeing gender equality. Even if the result did not correspond to the initial, ambitious, goals of the Parliamentary Assembly, it cannot be denied that compared to its international equivalent, the provisions enshrined in articles 10-17 are – in terms of legal obligations to trafficking victims – stronger, more generous and significantly broader.[210] The most relevant provision is perhaps the one related to the identification of victims, which is of vital importance if they are to receive the benefits of the rights outlined in the Convention. An inaccurate identification of a trafficking victim will very certainly result in that

[207] Ibid.
[208] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 22.
[209] Ibid.
[210] A. T. Gallagher, *The International Law of Human Trafficking*, cit., p. 116.

victim's continued denial of fundamental rights[211], while identifying victims accurately have implications both in terms of victims' human rights protection and prosecution of traffickers.[212] Consequently, owing to the relevance attributed to the identification process, the Trafficking Convention established also that even when there are reasonable grounds to believe that a person may be a victim of trafficking, she or he shall not be removed from the territory of the state party concerned, until the identification is not completed (Article 10, para 2). Nonetheless, according to Mrs. Vermot-Mangold, in view, for example, of the inherent difficulties of identification, this provision should have been amended by granting the person who have been refused the status of victim and ordered to be deported, the right to appeal before an independent and impartial authority against the decision taken.[213] Even if this amendment was accordingly suggested also by the Parliamentary Assembly's Opinion 253, States Parties decided not to include the proposed change. Relevant is also the provision concerning assistance to victims (Article 12) which requires States Parties to provide basic assistance to all the individuals who are identified as victims of human trafficking within their jurisdiction, including potential victims. These measures, which are not to be made conditional on individual's 'willingness to act as a witness', are aimed at assisting victims 'in their physical, psychological and social recovery'.[214] However, once again Mrs. Vermot-Mangold found it regrettable that medical assistance and access to vocational training, labour market and education was to be made accessible only to victims lawfully residing within the territory of the State Party concerned.[215] The proposed amendment, which aimed at eliminating any distinction between lawful resident victims and unlawful ones, as for the right to appeal, was not accepted.

The next significant achievement of the Trafficking Convention is related to the obligation for States Parties to guarantee victims a recovery and reflection period of at least 30 days, during which the victim is allowed to recover both physically and psychologically and thus enabled to make an informed decision on whether or not to cooperate with the law-enforcement authorities

[211] Trafficking Convention Explanatory Report, para 127.
[212] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 16.
[213] Ibid.
[214] *Trafficking Convention*, art. 12, paras 1, 6.
[215] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 17.

for the prosecution of traffickers[216]. Indeed, it is essential that the victim is in a calm state of mind and aware of the protection and assistance measures available.[217] Of undeniable relevance is also article 14 concerning the issuing of a residence permit when the competent authority considered that an individual's stay is necessary owing to his/her personal situation or/and for the purpose of his/her cooperation with the authorities in the investigation and criminal proceedings. While both of these provisions have been welcomed in view of the protection of victims of human trafficking, the fact that, in deciding the length of the residence permit, the margin of discretionary power was left to States Parties was rather disappointing. In fact, both the CoE Parliamentary Assembly Report[218] and Opinion 253[219] suggested to grant victims a residence permit of at least 6 months. However, many European States' concern that provisions of special treatment to trafficked persons would have compromise national migration regimes[220] prevailed in drafting the final text of the Convention. Thereby, after granting victims or presumed victims a period of reflection and recovery for at least 30 days, during which the victim is given support and assistance and can decide whether or not to cooperate in criminal proceedings or investigations, States Parties can decide to extend victim's stay by issuing a renewable residence permit on the ground of the victim's personal situation or for the purpose of cooperation with the competent authorities.

The Trafficking Convention outlines also a number of provisions aimed at safeguarding the rights and dignity of trafficked persons during the repatriation process, for those who wish to return or that do not qualify for a residence permit.[221] It is, indeed, underlined that the return of a victim 'shall be with due regard for the rights, safety and dignity of the person … and shall preferably be voluntary'.[222] However, it was pointed out that owing to the fact that the return of a victim is never risk free, the return should take place after a risk and security assessment, which should not be granted only to children but from which also adults should benefit.[223]. While an assessment of the risk is required for child victims, who shall not be returned to a State when it is not in respect of

[216] See *Trafficking Convention*, art. 13.
[217] Trafficking Convention Explanatory Report, para 174.
[218] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 19.
[219] Opinion 253, para 14 (vii).
[220] A. T. Gallagher, *The International Law of Human Trafficking,* cit., p. 116.
[221] Ibid., p. 120.
[222] *Trafficking Convention*, art. 16, para 2.
[223] CoE Parliamentary Assembly, *Report on the Draft Council of Europe Convention on Action against Trafficking in Human Beings by Rapporteur Vermot-Mangold*, cit., *Explanatory Memorandum*, para 21.

the best interest of the child, such requirement does not apply to adult victims. As Anna Gallagher argued, by not requiring an assessment risk in the case of adult victims, States are ultimately refusing to recognize their legal and moral responsibility for the safety and security of returned victims[224]. Within the framework of protection, States Parties are required to enable victims to have access to compensation from the perpetrator. Even though the perpetrator is liable to compensation, the victim rarely manages to be fully compensated. For this reason, the Convention encourages states to set up a compensation fund or to establish measures or programmes for social integration or social assistance to victims.[225]

While it is true that the Trafficking Convention devotes more attention to the rights and needs of victims compared to its international equivalent, these provisions are obviously intended to offer criminal justice authorities the best opportunity to obtain prosecutions and convictions with the cooperation of victims. Without the acknowledgement of this dual role, it is quite doubtful that measures like the recovery and reflection period, or even those linked to urgent support and assistance, could have been made.[226] Although the criminalization provisions are almost identical to the ones of the Palermo Protocol, there are some additional elements that deserve a special mention, including the criminalization of the conducts for the purpose of enabling trafficking in human beings, such as forging travel or identity documents (Article 20) or the establishment of the liability of legal persons (Article 22) for a criminal offence under the Trafficking Convention. Besides trafficking in human beings, corporate liability and the criminal offences related to the travel or identity documents, the attempt, aiding or abetting[227], the most innovative criminal offence established under the Convention relates to the criminalization of the use of services of a victim. Its relevance lies in the fact that it can be used to prosecute owners of businesses that employ trafficked persons in those instances where it is difficult or impossible to demonstrate the required *action* and *means* for trafficking.[228] Concerning investigation and prosecution of the offences established under the Trafficking Convention, article 27 establishes that when such offences are committed in part or in whole on the territory of a State Party, the investigation and the prosecution shall be carried out regardless of the victim's report or accusation.

[224] A. T. Gallagher, *The International Law of Human Trafficking,* cit., p. 120.
[225] See *Trafficking Convention*, art 15 and Trafficking Convention Explanatory Report, para 198.
[226] See A. T. Gallagher, *The International Law of Human Trafficking,* cit., pp. 121-122.
[227] Trafficking Convention, articles 18-22.
[228] A. T. Gallagher, *The International Law of Human Trafficking,* cit., pp. 123.

Last but not least, the Trafficking Convention provided for the establishment of a monitoring mechanism for the supervision of the implementation of the Convention.[229] This is undoubtedly the most innovative aspect of the Trafficking Convention compared to the Palermo Protocol, being the very first legal instrument, in the international arena, dedicated entirely to the issue of trafficking in human beings to establish a supervisory mechanism.

3.6.1 GRETA monitoring mechanism

The monitoring system foreseen by the Trafficking Convention, which as stressed by the CoE Explanatory Report is one of the Convention's major strengths[230], is based upon two pillars. First of all, it provides for the establishment of a Group of Experts on action against trafficking in human beings (hereinafter referred to as GRETA); in other words, this is a technical supervisory body, made of professional experts of

> 'high moral character, known for their recognized competence in the field of Human Rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in the areas covered by the Convention'.[231]

Elected by the Committee of the Parties with due account to the gender and geographical balance, members of GRETA are required to exercise their functions in an independent and impartial manner as well as to sit in their individual capacity.[232] The main purpose of GRETA is to evaluate the implementation of the Trafficking Convention, following a procedure divided in rounds, whose length is to be determined by GRETA.[233] Each Round is in particular initiated by the submission of a questionnaire to the party concerned, which may serve as the basis from which GRETA will evaluate the implementation of the Trafficking Convention by the concerned party. All parties to the Trafficking Convention are entitled to receive a questionnaire and they are required to respond to it as well as to any other request GRETA may address to States Parties.[234] Based upon its

[229] *Trafficking Convention*, art. 36.
[230] Trafficking Convention Explanatory Report, para 354.
[231] *Trafficking Convention*, art. 36, para 3a.
[232] Ibid., art. 36, para 3b.
[233] Ibid., art. 38. See also GRETA, *Rules of procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the parties*, 21 November 2014, THB-GRETA(2014)52, Rule 1 and 2.
[234] *Trafficking Convention*, art. 38.

evaluation, GRETA issues a draft report containing the analysis related to the implementation of the Trafficking Convention and its suggestions and proposals on how to address the problem arisen during the evaluation phase. After the party, that undergoes the evaluation, has delivered its comments concerning the draft report, GRETA will take them into consideration in adopting its final report and conclusions. GRETA may as well organize country visits and request information to the civil society.[235]

The second pillar of the supervisory system is the establishment of the Committee of the Parties, which is more a political body. It is made up by representatives of the Committee of Ministers for the Parties to the Convention as well as representatives from Parties outside the Council of Europe, and it has the authority to adopt recommendations to a Party regarding the actions that should be taken to implement GRETA's findings based on its report and conclusions.[236] The paramount importance of the system cannot be undervalued, particularly if compared to the weak political follow up procedure established by the Palermo Protocol.[237] Nonetheless, the inclusion of the amendment of article 38 proposed by the Parliamentary Assembly concerning the possibility for INGOs and NGOs within the jurisdiction of the Contracting Parties to submit complaints alleging the unsatisfactory application of the Trafficking Convention[238] could have been revolutionary, making the Trafficking Convention a model convention providing a comprehensive framework on trafficking in human beings.

In conclusion, it must be said that while the Trafficking Convention's political significance is beyond question, its technical quality differs upon the point of reference. There is no doubt that the Convention definitely improved the minimum standards contained in the Palermo Protocol, particularly concerning human rights protection of victims and the established connection between the focus on human rights and criminal justice response to trafficking. However, when the term of reference is the UN Guidelines and Principles on Trafficking, it loses part of its force.[239] Yet, it should be remined that while the UN Guidelines and Principles are soft law, the Trafficking Convention is a binding instrument.

[235] Ibid.
[236] Trafficking Convention Explanatory Report, para 354.
[237] S. Scarpa., op. cit., p. 159.
[238] Opinion 253, para 14 (xxii).
[239] A. T. Gallagher, *The International Law of Human Trafficking*, cit., p. 126.

3.6.2 The Council of Europe Convention on preventing and combating violence against women and domestic violence

Another relevant legal instrument in combating trafficking in human beings is the Convention on preventing and combating violence against women and domestic violence, or Istanbul Convention, adopted by the Council of Europe in 2011.[240] Its development was the outcome of a long process that resulted in the recognition of the issue of violence against women in Europe, as well as at the international level.[241] As it was seen above, the main instrument devoted to the elimination of all forms of discrimination against women, namely the CEDAW Convention, does not contain any reference to violence against women, although it established a connection between discrimination and gender-based violence by issuing General Recommendation No. 19.[242] The Istanbul Convention fills an existing gap on the issue at the European level, providing a definition of violence against women and gender-based violence and acknowledging their structural and systemic nature. 'Gender-based violence' is defined as the 'violence that is directed against a woman because she is a woman or that affects women disproportionately',[243] while 'violence against women' is intended as 'a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'.[244] Accordingly, the Istanbul Convention acknowledges that violence against women is the result of 'historically unequal power relations between men and women', a process that have determined the domination by men over women as well as the discrimination against them, impeding women's advancement in the society.[245] In addition to this, the Convention recognizes the structural and

[240] The Istanbul Convention entered into force on 1 August 2014 and up to February 2023 it has been ratified by 37 States, including Italy that have ratified it on 10 September 2013. See ratification status at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210, [last accessed 15 February 2023]. As for the CoE Trafficking Convention, the Istanbul Convention provides for a mechanism of compliance (GREVIO) that assesses the implementation of the Convention's provisions in ratifying states.
[241] S. De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU: a Step Forward in the Protection of Women from Violence in the European Legal System', *European Journal of Legal Studies*, 9 (2017) 2, p. 72, available at http://hdl.handle.net/1814/46069, [last accessed 15 February 2023].
[242] CEDAW Committee GR No. 19, para 6.
[243] CoE, *Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, 2011, art. 3, para d.
[244] Ibid., art. 3, para a.
[245] Ibid., Preamble.

systemic nature of violence[246] meaning that it acknowledges that it is rooted in the society and that as such it must be eradicated.[247] The Convention operates a distinction between violence against women and domestic violence,[248]where the latter definition[249] is worded in a manner to include not only women but also children, men and elderly people.[250] However, as pointed out by Sara De Vido, in the view of some commentators, the choice of adopting a neutral definition of domestic violence that do not considers its gender dimension is indicative of the lack of understanding of the issue as it seems to represent the outcome of a political compromise.[251] Yet, it cannot be ignored the innovative character of the Convention, as it recognizes that domestic violence is a form of violence against women.[252]

In order to combat effectively violence against women, Chapter V – introducing substantive law provisions – provides for a different range of measures aimed at preventing, protecting and compensating victims and at introducing punitive measures against the perpetration of those forms of violence that require a criminal law response.[253] In particular, the Istanbul Convention criminalizes *inter alia* psychological violence (Article 33, forced marriage (Article 37), female genital mutilation (Article 38), forced abortion and forced sterilization (Article 39) and sexual harassment (Article 40). Furthermore, the Convention provides for a set of unacceptable justifications in order to ensure that when a proceeding is initiated against someone that has committed one of the prohibited conducts under the Convention these are not used as justifications by the alleged perpetrator for committing these acts. Are considered as unacceptable justifications for these acts 'culture, custom, religion, tradition or so-called "honour"'.[254]

Turning to the relevance of this Convention with regard to trafficking in human beings, two aspects deserve to be mentioned. First, as highlighted by the Explanatory Report, the aim of the

[246] Ibid.
[247] S. De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU …', cit., p. 75.
[248] See Istanbul Convention, art. 3, paras a and b.
[249] 'Domestic violence shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim', Istanbul Convention, art 3, para b.
[250] S. De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU …', cit., p. 75.
[251] Ibid., p. 76.
[252] Ibid.
[253] CoE, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, para 149.
[254] Istanbul Convention, art. 42, para 1.

Convention is to 'strengthen the protection and to ensure support for victims of violence against women and domestic violence'.[255] Hence the effect of these provisions is to complement those contained in the Trafficking Convention. In fact, as it was seen above concerning the CEDAW Convention, trafficking has been identified as a form of gender-based violence.[256] Consequently, the combined application of these two instruments can increases the effectiveness of the measures devoted to combating trafficking in human beings, especially those designed to prevention, as violence against women and gender-based discrimination increase women's vulnerability to being trafficked and exploited[257], as it will be discussed with regard to the case of Romanian women.

Finally, the Istanbul Convention provides for the establishment of a Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and of a Committee of the Parties. GREVIO has the goal of assessing compliance with the obligations of the treaty while the Committee of the Parties is a political body. GREVIO just as GRETA, publishes evaluation reports on the status of implementation of the Convention provisions by State Parties.[258]

3.7 EU framework on preventing trafficking in human beings

Following the creation of the Internal Market that provided for the suppression of internal frontiers guaranteeing the free movement of people, goods and services, the European Union (EU)[259] started to devote a greater attention to the issue of human trafficking.[260] Indeed, while the elimination of internal barriers had both a practical and symbolic value, it was becoming evident that taking action against transnational illegal activities had become more difficult. After the adoption of the Joint Action 97/154/JHA in relation to the fight against trafficking in human beings and the sexual exploitation of children, combatting human trafficking has become a priority for the EU by including it for the first time in Article 29 of the Treaty on the European Union (TEU), as amended by the Amsterdam Treaty.[261] The Amsterdam Treaty amending the TEU explicitly stated that

[255] Explanatory Report to the Istanbul Convention, para 364.
[256] CEDAW Committee GR No. 38, para 10.
[257] OSCE Office of the Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, *Applying gender-sensitive approaches in combating trafficking in human beings*, (Vienna: 2021), pp. 23-26.
[258] S. De Vido, 'The Ratification of the Council of Europe Istanbul Convention by the EU …', cit., p. 78.
[259] On the history of the European Union see A. Adinolfi, and G. Gaja, *Introduzione al Diritto dell'Unione Europea.* 2 ed., (Bari: Gius. Laterza & Figli, 2012), pp. 3-18. Italy is a EU Member State since 1 January 1958.
[260] Ibid., p. 96; See also S. Scarpa, op. cit., pp. 172-178.
[261] S. Scarpa, op. cit., pp. 174-175.

within an area of freedom, security and justice, the Union's objective is to guarantee citizens with high levels of safety and that such aim is to be achieved 'by preventing and combating crime, organized or otherwise, in particular … trafficking in persons' through closer cooperation between police forces, customs authorities and other authorities and between judicial and other competent authorities as well as through the assimilation of criminal offences norms within Member States.[262]

An important step forward in combatting trafficking in human beings was made in 2002 when – repealing the Joint Action 97/154/JHA in regard to human trafficking – the European Council adopted the Framework Decision 2002/629/JHA. Framework decisions, whose aim was the assimilation of laws and regulations of the Member States, were binding upon States Parties as far as it concerned the result to be achieved, but national authorities were free to decide the form and methods though which the pursued objective could be achieved. Furthermore, framework decisions did not entail direct effect.[263] This first provision, although it recognized that trafficking in human beings is a serious violation of human rights and human dignity[264] it only provided minimum standards of protection.[265] As noted by Gallagher, if possible, it represented a substantial retreat from previous commitments, such as the ones included in the repealed Joint Action of 1997[266]. The retreat on victim's rights was justified by a vague, though frequent promise that these matters would have been addressed in a subsequent instrument related to the short-term residency permits for the victims of human trafficking[267]. With this purpose, it was adopted the Council Directive 2004/81/EC, which however failed to address the weaknesses of the 2002 Framework Decision. The latter instrument deals with the issuing of a residency permit – which is conditional and provisional – to victims of trafficking in human beings or to those non-EU countries nationals who have been subjects of an action of illegal immigration that decide to collaborate with the

[262] Official Journal of the European Communities, 'Title VI. Provisions on Police and Judicial Cooperation in Criminal Matters', in *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts,* 1997, 97/C(340/01), art. K1.
[263] European Union, *Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community.* 2002, Official Journal of the European Communities, 2002/C 325/01, art. 34.
[264] Council of the European Union, *Council Framework Decision of July 2002 on Combatting Trafficking in Human Beings.* 19 July 2002, Official Journal of the European Communities, L 203, Preamble. In Short Framework Decision 2002/629/JHA.
[265] S. Scarpa, op. cit., p. 181.
[266] A. T. Gallagher, *The International Law of Human Trafficking,* cit., p. 99.
[267] Ibid.

competent authorities, while granting them assistance[268]. Hence, it is evident that assistance measures are linked to the willingness of victims to cooperate in the investigation and criminal proceedings necessary for the prosecution of traffickers. This is due to the fact that the objective of the Directive was not the protection of trafficking victims[269]. Moreover, the Council Directive 2004/81/EC does only provide assistance measures to third-country nationals, leaving completely out EU citizens, while it is acknowledged that some Central and Eastern European Member States of the European Union are countries of origin or transit of trafficked victims. While the Council Framework Decision 2002/629/JHA, as explored further below, has been replaced by the Council Directive 2011/36/EU (or Anti-Trafficking Directive), the Council Directive 2004/81/EC is still in force. With due regard to victim's rights, the European Parliament and the Council of Europe adopted Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, which complements the provisions contained in the Anti-Trafficking Directive, albeit these are not tailored to the needs of trafficking victims.

3.7.1 Charter of Fundamental Rights of the European Union

Before discussing Directive 2011/36/EU, at the European Union level trafficking in human beings is also expressly prohibited by article 5 of the Charter of Fundamental Rights of the European Union (hereinafter Charter). Proclaimed in December 2000, it entered into force in 2009: the Charter was part of a much more ambitious project whose aim was the establishment of a 'Constitution' of the European Union. However, owing to the negative results of the two referenda conducted in France and the Netherlands, the project was abandoned, while the Charter came into force along the Treaty of Lisbon signed in 2007.[270]

The relevance of Article 5 of the Charter lies in the fact that while it deals with the prohibition of slavery and forced labour, it also expressly prohibits trafficking in human beings in paragraph 3, reinforcing the connection between the offences of slavery, servitude and forced labour and

[268] Council of the European Union, *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.* 29 April 2004, Official Journal of the European Union: L 261/19, paras 9-10. In short Council Directive 2004/81/EC. It entered into force on August 6, 2004.
[269] S. Scarpa, op. cit., p. 188.
[270] A. Adinolfi, and G. Gaja, op. cit., pp. 5 and 168.

trafficking in persons. As a matter of fact, this is the first time that a human rights treaty addresses trafficking in human beings within the same provision concerning slavery and forced labour.[271]

Moreover, according to art. 51 the Charter's provisions are binding on all the institutions, offices, bodies and agencies of the European Union and on Member States[272], when they are implementing EU law. In case of infringement of fundamental rights by the EU institutions, the Court of Justice of the EU can intervene in order to review the legality of the act; whereas, when the violation is on behalf of Member States, it is up to the national judges (under the guidance of the Court of Justice of the EU) to ensure the respect of the rights as provided by the Charter.[273] Including trafficking in a binding instrument concerning human rights represents a fundamental step forward in the fight against trafficking and most importantly in the commitment of the EU to the protection of the human rights of the victims.

3.7.2 Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims

The adoption of Directive 2011/36/EU[274] led to a change in the scope and the focus of the EU legislation. Noticing the unsatisfactory results of legal instruments mainly focused on criminal law, in 2009 the European Commission presented a proposal for the adoption of a new Framework Decision on the matter replacing Framework Decision of 2002. However, with the entry into force of the Treaty of Lisbon, which put in place new decision-making processes, the Commission's proposal was suspended, until its content was used for advancing a new proposal for the adoption of a Directive on trafficking in human beings.[275] Based upon the policy options examined by the impact assessment report, the Commission convened that the best option would have been the adoption of a new legislation incorporating the existing provisions of Framework Decision 2002/629/JHA along with new ones, accompanied by non-legislative measures concerning –

[271] L. Gaspari, op. cit., p. 61.
[272] It is, indeed, binding on the Italian government as a Member State.
[273] European Commission, 'How to report a breach of your rights', available at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/how-report-breach-your-rights_en. [last accessed 19 11 2022].
[274] It entered into force the day it was published on the Official Journal of the European Union, namely on April 15, 2011. European Parliament and European Council, *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*, 5 April 2011, Official Journal of the European Union, L 101/1. In short Directive 2011/36/EU.
[275] A. T. Gallagher, *The International Law of Human Trafficking*, cit., p. 103.

starting with the most important – victims' support schemes, monitoring, prevention measures in countries of destination and of origin, training and law enforcement cooperation[276] This option would have proven to be particularly effective owing to the presence of both binding measures in relation to certain actions considered essential to the prevention and the fight against trafficking in human beings and non-binding provisions that would have supported Member States in the concrete adoption of such measures, contributing to the establishment of the highest quality standards.[277] Differently from the instrument foreseen in the first proposal, the Commission envisaged the adoption of a directive[278] as with the entry into force of the Lisbon Treaty, framework decisions were replaced by directives, or in rare cases by decisions.[279] The directive is binding on Member States as far as it is concerned the result to be achieved,[280] but it is up to them to design the laws needed to reach this purpose.[281]

Finally, following this proposal, the European Parliament and the Council of the European Union adopted Directive 2011/36/EU, replacing Framework Decision 2002/629/JHA, whose aim is to set minimum rules regarding the 'criminal offences and sanctions in the area of trafficking in human beings' and to introduce 'common provisions taking into account gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof'.[282] As stated in the Preamble (para 7), the Directive 2011/36/EU envisages the adoption of an 'integrated, holistic and human rights approach to the fight against trafficking in human beings'[283], stressing thus its effort to address the 3P: prevention, protection and prosecution. As a matter of fact, although the majority of the provisions remain concerned with punitive measures, the new legislative instrument against

[276] See European Commission, *Proposal for a Directive of the European Parliament and of the Council on preventing and combatting trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA*, Brussel, 29 March 2010, COM (2010) 95 final: 2010/0065 (COD), pp. 6-7 and Commission of the European Communities, *Commission Staff Working Document. Accompanying Document to the Proposal for a Council Framework Decision on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, repealing Framework Decision 2002/629/JHA. Impact assessment.* Brussels, 25 March 2009, SEC (2009) 358, pp. 30-35.
[277] SEC (2009) 358, p. 50.
[278] COM (2010) 95, p. 8. 29 March 2010.
[279] See EU Monitor, 'Framework Decisions' available at https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu. [last accessed 25 November 2022].
[280] According to article 22 of Directive 2011/36/EU, Member States were required to transpose the Directive by 6 April 2013. Italy implemented the provisions of the Directive almost a year later, through the adoption of Legislative Decree of 4 March 2014, no. 24.
[281] A. Adinolfi, and G. Gaja, op. cit., p. 178.
[282] Directive 2011/36/EU, art. 1.
[283] Ibid, Preamble, para 7.

trafficking in human beings adopts provisions related to the early identification of victims, to assistance and preventive measures.[284] As Marchetti and Palumbo point out, this decision relies on the idea that being human trafficking a complex phenomenon, it cannot be addressed only by focussing on criminalization; on the contrary, criminalization measures may not only have a negative impact on victims of human trafficking but may as well represent an obstacle to combating trafficking in human beings itself.[285] The Directive builds upon the CoE Trafficking Convention: yet, as underlined by the European Commission, there are some elements of added value.[286]

Starting from the definition, Directive 2011/36/EU broadens the concept of trafficking in human beings, adding among the action elements 'the exchange or transfer of control over other persons' and expanding bases of exploitation by including 'begging' within the concept of forced labour and 'exploitation of criminal activities'.[287] However, it is worth noting that the main relevant innovation of Article 2 concerns the definition of 'position of vulnerability'. As noted above, while included among the means used by traffickers for the purpose of exploitation in both the Palermo Protocol and the Trafficking Convention, its definition was only provided by the interpretative note to Article 3 in the *Travaux Préparatoires* and further clarified by the UNODC Guidance Note. Albeit vulnerability may be the result of the person's inherent characteristics, this definition includes also the circumstantial and structural factors that impact their vulnerability to abuse and exploitation, leaving them with no other option. [288] Furthermore, the Directive contains a provision which precisely defines the penalties to be applied to the offences referred to in article 2, adapting them to the severity of the offences. Indeed, while normally trafficking in human beings shall be 'punishable by a maximum penalty of at least five years of imprisonment'[289], in the presence of aggravating circumstances – i.e. it is committed against a child or within the framework of a criminal organization, it endangers the life of a victim, a serious violence is used or it caused a

[284] E. Symeonidou-Kastanidou, 'Directive 2011/36/EU on Combatting Trafficking in Human Beings. Fundamental Choices and Problems of Implementation', *New Journal of European Criminal Law*, 7 (2016) 4, p. 446. https://doi.org/10.1177/203228441600700406.
[285] S. Marchetti, and L. Palumbo, '10 Years After the Directive 2011/36/EU. Lights and shadows in addressing the vulnerability of trafficked and exploited migrants', *Population and Policy Brief* 33 (2022), Para 'The need of a Holistic Approach', available at https://population-europe.eu/files/documents/pb33_vulner_human-trafficking_final.pdf. [last accessed 10 November 2022].
[286] COM (2010) 95, p. 7. 29 March 2010.
[287] Directive 2011/36/EU, art. 2, paras 2-3.
[288] S. Marchetti, and L. Palumbo, op. cit., first paragraph.
[289] Directive 2011/36/EU, art. 4, para 1.

particularly serious harm to the victim and it is committed by a public official during the performance of its duties – the penalty is raised by at least another five years of imprisonment.[290] When the European Economic and Social Committee delivered its opinion on the European Commission's proposal, it suggested to revise upwards the penalties, considering five years of imprisonment not sufficiently reflecting the seriousness of the crime[291].

The Directive provided also for an extension of Members States jurisdiction over the offences referred to in the Directive. In particular, it is specified that a Member State is not only required to establish territorial jurisdiction (when the offence has been committed within its territory), but also when the offender is one of its nationals. However, the Directive provides for other cases in which a State may decide to establish its jurisdiction. For example, when the offence is committed: against one of its nationals; for the benefit of a legal person located in its territory; by a person that established his/her habitual residence in its territory.[292]

In view of the European Commission the Directive's provision on the non-prosecution or non-application of penalties to victims has a broader scope than the one contained in the CoE Trafficking Convention.[293] However, as noted by Symeonidou-Kastanidou, although one of the aims of this provision, enshrined in article 8, is to encourage victims to witness against the alleged perpetrators in criminal proceedings, it was not effective in achieving its goal.[294] Indeed, article 8 only requires Member States 'to take the necessary measures to ensure that competent national authorities are entitled not to prosecute … victims'.[295] Moreover Recital 14 of the Directive further states that the voluntary participation or commission of an offence does not exclude prosecution or the application of penalties.[296] Consequently, victims are certainly not encouraged to denounce, out of fear of being punished.[297]

[290] Ibid., paras 1-3.
[291] European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on preventing and combatting trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA'.* 21 October 2010, Official Journal of the European Union, 2011/C 51/10, para 3.11
[292] See art. 10 of Directive 20112/36/EU.
[293] COM (2010) 95, p. 7. 29 March 2010.
[294] E. Symeonidou-Kastanidou op. cit., pp. 469-470 and p. 475.
[295] See Directive 2011/36/EU, art. 8.
[296] Recital 14 cited in E. Symeonidou-Kastanidou op. cit., p. 475.
[297] Ibid.

The European Commission praised on the fact that, compared to the CoE Trafficking Convention, the Directive provides higher standard measures concerning assistance and support for victims of trafficking in human beings, in particular in relation to medical treatment.[298] Indeed, while the Trafficking Convention provides only lawfully resident victims with the necessary medical treatment, Directive 2011/36/EU makes assistance unconditional. However, it is worth noting the existing incongruence between Directive 2011/36/EU and Directive 2004/81/EU which, as noted above, envisages the issue of the resident permit and consequently of assistance, only to third country victims who cooperate with the national authorities.[299]

The Directive devotes many of its articles to the protection of victims, foreseeing particular measures for the needs of children. Undoubtedly, these measures represent the main added value compared to the previous framework decision and it definitely complements Directive 2004/81/EU on residence permits. It provides measures on the protection of victims of human trafficking in criminal investigations and proceedings. For example, Member States shall conduct individual risk assessments so as to identify the most appropriate protection measures to provide victims with. A different range of provisions are entirely dedicated to the protection of child victims, relating to the support they have to be granted in general and when involved in criminal investigations and proceedings.[300] Importantly, it is acknowledged that the Directive 2011/36/EU must be applied bearing in mind the child's best interest.[301] Concerning the issue of unaccompanied children, the Directive contains a provision dedicated to the assistance, support and protection they need to receive (art. 16).

Regarding preventive measures, they appear to be of lesser importance in the context of the EU. While the CoE Trafficking Convention contains a whole range of measures aimed at preventing trafficking in human beings, namely Chapter II, the Directive only contains a single article.[302] Recognizing the role played by demand in fostering human trafficking, Article 18[303] require Member States to implement measures aimed at educating and training in order to discourage demand and to 'promote regular training of officials' so to enable them to promptly identify

[298] COM (2010) 95, p. 7. 29 March 2010.
[299] S. Marchetti, and L. Palumbo, op. cit., para 'Assistance and Protection'.
[300] See Directive 2011/36/EU, 2011, arts. 13-15
[301] Ibid. art. 13.
[302] E. Symeonidou-Kastanidou op. cit., p. 480.
[303] Paras 1 and 3.

victims. Member States are also encouraged to adopt measures criminalizing the use of services of victims of trafficking in human beings.[304] As it can be seen, this provision is non-binding, as well as the one contained in the CoE Trafficking Convention, owing to the lack of agreement between the parties over the consequences of the introduction of such measure.

Finally, the Directive 2011/36/EU provides for the establishment of a net of national rapporteurs or of an equivalent mechanism whose task is to assess the trends in trafficking in human beings; analyse the results of the action put in place to combat trafficking; to gather statistics in collaboration with civil society organization; and to report.[305]

Although it cannot be undermined the fact that the Directive constituted a step forward in tackling human trafficking within the framework of the EU, its provisions, particularly the ones concerning identification, protection and assistance of victims, have not been implemented effectively at the national level[306] resulting eventually in an uncoordinated application of the law.

3.7.3 EU Soft Law Instruments

There are some other instruments that need to be mentioned, in order to have a comprehensive framework of the EU action in combatting trafficking in human beings, albeit not binding. First of all, the 2021-2025 EU strategy on Combatting Trafficking in Human Beings, which complements the legally binding instruments so far analyzed. The European Commission identifies a set of key priorities and propose a set of concrete actions to be put in motion. In particular, the Commission includes among its key actions the launch of a study for the evaluation of Directive 2011/36/EU which, based upon the results of the aforementioned evaluation will consider revising it.[307] However, the Commission has been encouraged by the European Parliament to take into consideration revising the Directive. In its Resolution of February 2021, the Parliament called on the Commission to

[304] See Directive 2011/36/EU, art. 18, para 4.
[305] Ibid., art 19.
[306] See European Parliament Research Study, *Implementation of Directive 2011/36/EU: Migration and gender issues*. 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654176/EPRS_STU(2020)654176_EN.pdf. [last accessed 27 January 2023], p. 10.
[307] European Commission, *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 Combatting Trafficking in Human Beings 2021-2025*. Brussels, 14 April 2021, COM (2021) 171 final, p. 6.

> ‘revise the Anti-Trafficking Directive after a thorough impact assessment in order to improve the measures for the prevention, tackling and prosecution of all forms of trafficking … ; to address the use of online technologies in both the proliferation and the prevention of THB; to improve measures for prevention and the early identification of victims and easy and unconditional access to assistance and protection, while strengthening a horizontal gender- and child-sensitive perspective across all forms of trafficking.’[308]

As a result, an initiative to review the Anti-Trafficking Directive has been launched. One of its main objectives will be to explore the possibility of designing minimum standards on the criminalization of the knowing use of services of exploited victims. As highlighted in the Strategy, while discouraging demand is part of the preventive measures, the final decision on whether to make the use of services of victims of trafficking a criminal offence remains in the hands of the Member States, resulting in the creation of a diverse landscape across EU. For this reason, the Commission includes among its key actions the assessment of the possibility of revising Article 18(4) of the Directive.[309] Once again, the Commission endorsed the Parliament’s recommendations, especially the one stressing that ‘the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence’.[310] As a result, the European Parliament suggests examining closer the level of knowledge required for this offence and, in particular to consider requiring the user to demonstrate that ‘all reasonable steps were taken to avoid the use of services provided by a victim’[311].

As trafficking in human beings is a complex and vast phenomenon, other EU instruments can be relevant in combating it, but also in addressing the so-called *push* and *pull* factors that exacerbate people’s vulnerabilities to trafficking. Among the push factors there is gender inequality[312] which is dealt at the EU level with the adoption for example of a Strategy on Gender Equality[313] whose

[308] European Parliament, *Resolution of 10 February 2021 on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI))*, 10 February 2021, P9_TA(2021)0041, para 67.
[309]COM (2021) 171 final, p. 8, 14 April 2021.
[310] P9_TA(2021)0041, para 68, 10 February 2021.
[311] Ibid.
[312] L. Gaspari, op. cit., p. 49.
[313] See European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025.* Brussels, 5 March 2020, COM (2020) 152 final.

aim is to relegate to the past gender-based violence, sex discrimination and the structural inequality between women and men, and one on Victims' Rights[314] for the period 2020-2025 including among its key objectives the promotion of an integrated and targeted support for victims of gender-based violence. Furthermore, the latter Strategy addresses victims of human trafficking as well, acknowledging that they need special assistance, support and protection. Gender inequality is heightened by gender stereotypes, according to which women and men are expected to assume a certain role within the society. For example, 44% of Europeans, which is almost half of the entire population, think that women's role is to take care of home and family.[315] As a consequence of this structural belief, women are expected not only to have domestic responsibilities within their own home, but it strengthens the perception that domestic work falls within the category of reproductive instead of productive labour. Indeed, as it was highlighted in the first paragraphs of this study, one of the main challenges for domestic work is to achieve recognition as paid work. In relation to this, it can be argued that the high demand for female workers in certain labour sectors, particularly in the domestic work sector[316] acts as a *pull factor* for human trafficking, of course this while keeping simultaneously in mind *push factors*, such as the lack of employment as Laura Gaspari[317] highlighted. The process of 'feminization of labour migration'[318] led to a greater vulnerability of women to trafficking in human beings considering that more generally migration is sensitive to human trafficking.[319] With this regard, it deserves to be mentioned Resolution of 5 July 2022 towards a common European action on care which acknowledges that:

> 'many care and domestic workers have an ethnic minority background or are migrants facing a highly precarious situation and experiencing intersectional discrimination due to their race or ethnicity, gender, socioeconomic status and nationality … ; whereas these workers are mostly women who do not have an

[314] European Commission, *EU Strategy on victims' rights (2020-2025).* Brussels, 24 June 2020, COM (2020) 258 final.
[315] See COM (2020) 152 final, p. 6, 5 March 2020.
[316] On this see among others Altman, and K. Pannell, op. cit., p. 293 and E. Kofman, E., 'Rethinking Care Through Social Reproduction: Articulating Circuits of Migration'. *Social Politics*, 19(2012) 1, pp. 142-162. DOI: 10.1093/sp/jxr030,
[317] L. Gaspari, op. cit., p. 49.
[318] On the feminization of labour migration see the work of M. Tognetti Bordogna, *Donne e Percorsi Migratori. Per una sociologia delle migrazioni. (*Milano: Franco Angeli, 2012). See in particular chapter 3.
[319] L. Gaspari, op. cit., p. 50.

official job contract, are thus more vulnerable to exploitation and often lack access to their rights in particular to decent work and social protection.'[320]

It is evident that, in spite of the non-compulsory character of these instruments, they are fundamental in providing the foundation from where new policies and legislative instruments can depart. To be sure there are still many difficulties to be overcome in order to achieve an agreement for binding measure that can more effectively address trafficking in human beings in all its facets. Moreover, all the reports and studies promoted by the European Commission as well as the resolutions adopted by the European Parliament, helped depicting a much broader and complex framework of all the elements that may contribute to exacerbating vulnerabilities to trafficking and shedding light on the existing gaps and on the actions to be taken in order to address them. Furthermore, while soft law measures are not binding, it does not mean that they are insignificant[321]: on the contrary, as the European Court of Justice explained with regard to recommendations, national courts are bound to take them into consideration when they are relevant in the interpretation of national measures adopted to implement the recommendations or when they are aimed at supplementing the binding measures of the Community.[322] Last but not least, the fact that these instruments lack in principle a binding force, does not mean they do not contain normative contents and that they do not entail practical effects.[323]

[320] European Parliament, *Towards a common European action on care. European Parliament resolution of 5 July 2022 towards a common European action on care (2021/2253(INI)).* 5 July 2022, P9_TA(2022)0278, para P.
[321] A. Adinolfi, and G. Gaja, op. cit., p. 189.
[322] Judgment of 13 December 1989, Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles*, (ECJ) cited in A. Adinolfi, and G. Gaja, op. cit., p. 189.
[323] D. Batta and S. Havrankova, *Better Regulation and the improvement of EU regulatory environment. Institutional and legal implications of the use of "soft law" instruments.* (Brussels: European Parliament, 2007), p. 3.

Chapter 2. Domestic workers, forced labour, slavery and trafficking in human beings: caselaw of the regional human rights courts

1 ECtHR caselaw

After having examined the most relevant international and regional instruments in relation to both forced labour and trafficking in human beings, now a particular attention will be devoted to the evolution of the jurisprudence of the regional human rights courts, namely the European Court of Human Rights and the Inter-American Court of Human Rights. As it was noted above, none of the specialized treaties that prohibit slavery, servitude, forced labour or trafficking in human beings is equipped with judicial or quasi-judicial bodies enabled to receive individual complaints: in this sense, the role of generalist human rights courts is fundamental in adjudicating cases of trafficking or slavery like practices under international law based upon the provisions included in their respective treaties. Such provisions are interpreted in a fashion that takes into consideration the content of specialized treaties.[324] Both the ECtHR and the IACtHR contributed to bring clarity on the concepts of slavery, servitude, forced labour and human trafficking and on the scope of States' positive obligations in relation to these offences. As a matter of fact, the jurisprudence of regional human rights courts led to the identification of a comprehensive set of States' obligations concerning the abovementioned offences prohibited in their respective human rights treaties.[325] Not all the cases that will be analysed below deal with severe exploitation amounting to forced labour, servitude, slavery or trafficking in the domestic work sector: yet the impact that human rights tribunal's decisions might have in fostering human rights protection relates to all categories of workers, especially to the most vulnerable groups.

After a long period of inaction, the ECtHR has been the first human rights court to deliver a judgement on these conducts. Nonetheless, it must be acknowledged that the growing interest

[324] V. Milano 'Human Trafficking by Regional Human Rights Courts ….', cit., p. 5.
[325] V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? Il contributo della Corte Europea e Interamericana dei diritti umani.' *Deportate, Esuli, Profughe: Rivista telematica di studi sulla memoria femminile*. 40 (2019), p. 19, available at https://www.unive.it/pag/fileadmin/user_upload/dipartimenti/DSLCC/documenti/DEP/numeri/n40/04_Milano.pdf [last accessed 8th April 2021].

towards slavery and trafficking is owed to international criminal law, which contributed to bring back into the limelight these offences. In fact, the decisions of the International Criminal Tribunal for the Former Jugoslavia (ICTY) on the *Kunarac* case[326] related to slavery and trafficking together with the inclusion of enslavement as a constitutive element of the 'crime against humanity' in the Rome Statute of the International Criminal Court acted as a catalyst for human rights courts.[327] Although these international tribunals deal with criminal law, nonetheless they shed light on the prohibition of slavery from a human rights perspective. Evidence of this is provided by the fact that the decisions of the ICTY have been explicitly taken into account by regional human rights courts, as a result of the ICTY's contribution to the elucidation of the meaning of contemporary slavery.[328] In the following paragraphs it will be analysed the evolution of the case law of the ECtHR, highlighting the Court's jurisprudence main focal points.

1.1 Forced Labour, Servitude and Slavery

After a few cases dealing with forced labour and servitude were declared inadmissible as manifestly ill-founded, the meaning and the scope of article 4 of the ECHR enshrining the prohibition of forced labor, servitude and slavery has been considered in the case of *Siliadin v France*. This was the first time that the ECtHR was called to address a case in which there was an allegation of treatment akin to trafficking.[329] Moreover, it was the first ruling of the ECtHR to provide a comprehensive analysis on the three conducts prohibited under this article[330], and to recognize that it imposes positive obligations on states.[331] The case concerned Ms Siliadin, a fifteen-year girl of Togolese origin that arrived in France in January 1994 accompanied by Mrs D. with the intention to study but that was instead put to work as an unpaid housemaid at Mrs D. home and then lent to Mr and Mrs B. where she became a general housemaid. Her passport was taken away upon her arrival. She worked seven days a week, for about 15 hours a day, starting from 7.30 a.m. to 10.30 p.m. During these hours she was required to prepare breakfast and dinner,

[326] Judgment of 22 February 2001, case IT-96-23-T & IT-96-23/1-T, Trial Chamber *Prosecutor v Kunarac* (ICTY) and Judgement of 12 June 2002, case IT-96-23 & IT-96-23/1-A, Appeal Chamber, *Prosecutor v Kunarac* (ICTY) cited in V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? …', cit. p. 19.
[327] Ibid., pp. 19-20.
[328] R. Piotrowicz, op. cit., p. 185.
[329] Ibid., p. 187.
[330] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 8.
[331] H. Cullen, '*Siliadin v France*: Positive Obligations under Article 4 of the European Convention on Human Rights',*Human Rights Law Review,* 6 (2006) 3, p. 585, Doi:10.1093/hrlr/ngl013.

to look after the children, to do the housework, to wash and iron clothes and to clean up Mr B's office located in the same building. She slept on a mattress on the floor in the baby's room. In December 1995 she managed to escape and to start to work for a different family where she was paid a salary. However, upon the request of her paternal uncle, she returned to Mr and Mrs B. with the promise to regularize her immigration status. Yet, the situation remained unchanged until she recovered her passport and managed to escape again. The neighbour she confided to, alerted the Committee against Modern Slavery which in turn filed a complaint with the prosecutor's office concerning the applicant's case.[332]

The case originated when Ms Siliadin lodged an application against the French Republic, alleging the violation of article 4 of the ECHR. In particular, the applicant complained that the French criminal law mechanism 'did not afford her sufficient and effective protection against the servitude in which she had been held [nor] against the forced or compulsory labour she had been required to perform'.[333] In 2005 the ECtHR issued its judgment, holding that there has been a violation of article 4 of the ECHR. With this regard, the Court essentially articulated its legal reasoning around two main aspects: the conducts prohibited under article 4 and the scope of states obligations in relation to the prohibited conducts.[334]

1.1.1 The limits of the ECtHR in referring to the concept of 'legal ownership'

With regard to the conducts prohibited in article 4, the Court found that the applicant had been subjected to forced labour and servitude but not to slavery. In order to ascertain whether the situation inquired fell within one or more of these categories prohibited under article 4[335], the Court interpreted the meaning and the scope of the prohibited acts in light of the international instruments that define these concepts, as the ECHR does not provide a definition of these terms in the text.[336] With regard to forced labour, the Court relied on the notion provided by the ILO Forced Labour Convention. Accordingly, in order to determine if the situation of the applicant amounted to forced labour, the Court considered the two elements of *menace of any penalty* and *involuntariness* and

[332] For the detailed facts of the case see *Siliadin v France*, paras 10-18.
[333] Ibid., para 3.
[334] V. Milano, 'The European Court of Human Rights' case law on human trafficking in light of L.E. v Greece: a disturbing setback?', *Human Rights Law Review*, 17 (2017) 4, p. 704, DOI: 10.1093/hrlr/ngx031.
[335] *Siliadin v France*, paras 113 and 121.
[336] H. Cullen, op. cit., p. 591.

established that the applicant had been subjected to forced labour within the meaning of art 4 of the ECHR.[337]

Concerning the concept of slavery, the Court relied on the 'classic' definition provided by the Slavery Convention of 1927, establishing that the applicant had not been held in slavery as Mr and Mrs B did not exercise a genuine right of 'legal ownership', thus reducing her to the status of an object.[338] Essentially, in doing so, the ECtHR limited the applicability of slavery, as intended under article 4, only to cases in which the rights of ownership are exercised. As suggested by Piotrowicz, not only is this finding of the Court narrow and wrong, but it also argues that since 'legal' slavery has been abolished, then no one can ever be enslaved.[339] The Court's reasoning is rather disappointing, especially because it failed to refer to the *Kunarac* case, in which the Appeals Chamber argued that the traditional notion of slavery or 'chattel slavery' evolved to include contemporary forms of slavery determined by control rather than ownership.[340] In fact, the relevance of the contemporary notion of slavery lies in the fact that it is applicable to *de facto* situations of slavery, where the control exercised over a person is tantamount to possession.[341]
Despite this negative finding, the Court agreed that Ms Siliadin had been held in servitude, as she was denied freedom of movement and was subject to coercion.[342] In this regard, the Court interpreted the notion of servitude in light of its caselaw and the Supplementary Slavery Convention.[343]
Although a broader interpretation of slavery would have been desirable, the Siliadin case makes a significant contribution in that it emphasizes the characteristics that distinguish the different conducts prohibited under article 4 of the ECHR, stating essentially that the distinction between them is a question of degree and it highlights that each of these acts must be considered in light of their definition in international law.[344]

[337] *Siliadin v France*, para 120.
[338] Ibid., para 122.
[339] R. Piotrowicz, op. cit., p. 189.
[340] *Prosecutor v Kunarac* (Appeal Chamber), paras 117-119.
[341] See V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 8 and V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? …', cit. p. 21.
[342] *Siliadin v France*, paras 126-129.
[343] Ibid., paras 123-125.
[344] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 9 and V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? …', cit. p. 21.

1.1.2 The narrow interpretation of States' positive obligations arising under Article 4 ECHR

The other major contribution of the Siliadin case concerns the acknowledgment of the positive obligations flowing from article 4 of ECHR. The Court found indeed that the French Republic failed to comply with its positive obligations under article 4 to put in place an effective criminal law mechanism.[345] As there were no previous judgments on the scope of positive obligations under article 4, the ECtHR proceeded by analogy with the caselaw under other provisions, particularly under articles 3 and 8 as argued by the applicant. The Court pointed out that for a State to comply with its obligations under Article 1 of the ECHR[346] does not suffice to refrain from infringing the guaranteed rights. On the contrary, the Court stated that, as noted by the Commission[347], the responsibility of a government 'was engaged to the extent that it was their duty to ensure that the rules adopted by a private association did not run contrary to the provisions of the Convention'.[348] Moreover, the Court underscored that to limit the compliance with article 4 of the ECHR only to direct action by the State would lead to inconsistency with the international instruments dealing with forced labour, servitude and slavery, rendering it ineffective. From this it follows that 'States have positive obligations … to adopt criminal-law provisions which penalise the practises referred to in Article 4 and to apply them in practice'.[349] The existence of positive obligations arising from the Convention rights has been increasingly recognized by the Court. Although the rationale behind this growth is unclear, it was argued that their use might 'compensate for the lack of social and economic rights in the Convention or to recognize a deeper concept of human rights'.[350] Returning to the case of *Siliadin*, the Court next considered whether the impugned legislation of the French Republic and its application afforded sufficient and effective protection to the applicant; thereby, the ECtHR had to establish whether the French Republic complied with its positive obligations to protect the applicant from the actions perpetrated not directly by states authorities but by private individuals. The Court found that whilst the applicant has been awarded with civil compensation, she did not manage to see those responsible for the wrongdoings convicted.

[345] *Siliadin v France*, paras 148-149.
[346] Article 1 of the ECHR states that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' CoE, 1950. *European Convention on Human Rights.*
[347] European Commission of Human Rights, dissolved in 1998.
[348] *Siliadin v France*, para 83.
[349] Ibid., para 89.
[350] H. Cullen, op. cit., p. 589.

According to the Court, civil compensation is not sufficient to achieve effective deterrence against serious breaches of personal integrity; criminal sanctions are required as well.[351] Moreover, giving that the French Criminal Code, namely articles 225-13[352] and 225-14[353], did not explicitly deal with forced labour and servitude, proving to be ineffective in protecting the applicant, the Court established that 'the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions' to which she was subjected.[354]

This finding of the Court provides for a rather narrow interpretation of the scope of positive obligations under article 4 of the ECHR, as it limits States obligations only to the establishment of an adequate criminal law framework, dismissing the relevance of preventive and protective measures in responding to serious breaches of human rights. In fact, this trend of the Court has raised concerns as placing excessive faith in the criminal law response to human rights violations, undermines the role of other obligations towards victims, with the risk that states may feel legitimated to ignore these other obligations.[355] As demonstrated by the case of *Siliadin*, the needs of exploited children go far beyond the mere obligation of having a robust criminal law; protection from deportation, the regularization of the immigration status and rehabilitation measures, including re-housing and education are also needed.[356] What is surprising is that the Court persisted with the adoption of this narrow approach also in two 2012 cases dealing with forced labour and servitude, namely *C.N. and V. v France* and *C.N. v United Kingdom*[357], although in the case of *Rantesv* of 2010 related to trafficking in human beings, it embraced a much broader approach

[351] *Siliadin v France*, paras 130-145.
[352] 'It shall be an offence punishable by five years' imprisonment and a fine of 150,000 euros to obtain from an individual whose vulnerability or state of dependence is apparent or of which the offender is aware, the performance of services without payment or in exchange for payment which is manifestly disproportionate to the amount of work carried out.' Ibid., para 47.
[353] 'It shall be an offence punishable by five years' imprisonment and a fine of 150,000 euros to subject an individual whose vulnerability or state of dependence is apparent or of which the offender is aware to working or living conditions which are incompatible with human dignity.' Ibid., para 47.
[354] *Siliadin v France*, para 148.
[355] Pitea cited in H. Cullen, op. cit., p. 590.
[356] H. Cullen, op. cit., p. 590.
[357] Judgement of 11 October 2012, Appl. No. 67724/09, *CN and V. v France* (ECtHR) and Judgment of 13 November 2012, Appl. No. 4239/08, *CN v United Kingdom* (ECtHR) cited in V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 9.

encompassing victim protection and preventive action.[358] In this manner, the Court narrowed the range of positive obligations for cases dealing with forced labour and servitude compared to the ones dealing with trafficking.[359]

1.2 Trafficking in Human Beings

The ECtHR has also been the first international human rights court to deliver a judgement on trafficking in human beings. In the case of *Siliadin*, the Court failed to categorize her situation as trafficking, although according to the international definition of trafficking provided by the Palermo Protocol (art. 3(a)) all the elements of *action*, *means* and *purpose* were present. Furthermore, given that she was a minor, the methods used by the perpetrators were not relevant in assessing whether Ms Siliadin had been trafficked.[360] Indeed, she was brought from Togo to France (action) for the purpose of exploitation (purpose) through the use of coercion (means), as she was tricked about her conditions in France.[361] Hence, in this case the ECtHR failed to establish a connection between the conducts prohibited in article 4 and trafficking in human beings, which as noted above, is not included in the ECHR. Since the *Siliadin* case, however, the ECtHR issued different judgments dealing with trafficking, starting from *Rantsev* until the more recent case of *Zoletic and Others*[362]. Concerning the ECtHR's legal reasoning, two aspects of the caselaw deserve to be examined: (a) the reasoning followed by the Court in establishing a trafficking offence and its link to the conducts prohibited under article 4 and (b) and the Court's consideration of the scope of positive obligations with regard to trafficking.

1.2.1 The relation between trafficking in human beings and the conducts prohibited under art. 4

In *Rantsev* the Court dealt for the first time with trafficking in persons.[363] The case regarded a Russian national woman, Oxana Rantseva, who entered Cyprus on an artiste visa to work in a cabaret, but instead was forced into prostitution. After she escaped, her employer informed the

[358] See V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 705; V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 9, and V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? …', cit. p. 21.
[359] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 9.
[360] See Palermo Protocol, art. 3, para c.
[361] R. Piotrowicz, op. cit., p. 190.
[362] Judgment of 7 October 2021, Appl. No. 20116/12, *Zoletic and Others v Azerbaijan*, (ECtHR).
[363] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 705.

Immigration Office in order to have her deported. Once she was found and brought to the police station, the two officers in duty, having established that Ms Rantseva was not to be detained, contacted her employer to pick her up. A few hours later, she was found dead on the street below the appartement where she was accompanied after her release.

The Court noted that in spite of the absence of an express reference to trafficking in the ECHR, the Convention is a living instrument that must be interpreted in light of present-day conditions, as it is increasingly required greater firmness in assessing breaches of the fundamental values of democratic societies.[364] As a matter of fact, the Court noted that the Palermo Protocol and the Trafficking Convention are evidence of the growth of the phenomenon of trafficking at the international level and of the need to combat it. After referring to the notion of slavery developed by the ICTY, the Court reached the conclusion that

> '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.'[365]

Accordingly, the Court assessed that as trafficking cannot be considered compatible with democratic societies and with the values of the ECHR, it was 'unnecessary to identify whether trafficking constitute[d] 'slavery,' 'servitude' or 'forced and compulsory labour'.[366] Instead, according to the ECtHR, trafficking within the meaning of the Palermo Protocol and the Trafficking Convention fells within the scope of article 4 of the ECHR.[367] While addressing trafficking as a human rights violation is what makes this judgement groundbreaking[368], the reasoning of the Court raises several concerns. In particular, the Court essentially based trafficking on slavery, as it refers to the exercise of powers attaching to the rights of ownership, which is the substance of the traditional definition of slavery. This first pronouncement has a few implications for the understanding of trafficking: it excludes both the *action* and the *means* elements of trafficking, and it limits the purpose of exploitation to slavery, excluding the other seven types of human exploitation.[369] Turning to the second pronouncement that trafficking falls within the scope

[364] *Rantsev v Cyprus and Russia*, para 277.
[365] Ibid., para 281.
[366] Ibid., para 282.
[367] Ibid.
[368] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 707.
[369] J. Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery', cit., pp. 553-554.

of article 4, without determining under which provision, the Court in a rather contradictory manner expanded the scope of article 4 in order to include other types of exploitation beyond forced labour, servitude and slavery. As a result of these contradictions, the content of article 4 is unclear.[370] Indeed, the Court instead of bringing clarity on the relation between trafficking and the prohibited conducts under article 4[371], it 'avoided the issue by declining to say precisely how trafficking in human beings is a violation of article 4'.[372]

In two subsequent cases related both to a trafficking situation, the Court kept relying on the reasoning adopted in *Rantsev*, thus avoiding again the issue. The first case *L.E. v Greece*[373] involved a Nigerian woman, trafficked in Greece and forced into prostitution by Mr K.A., who although entered in contact with the Greek authorities in many instances, was never identified as a victim of trafficking until she brought criminal charges against her traffickers.[374] The second case, *J and Others v Austria*[375] instead concerned three women, nationals of the Philippines, trafficked into domestic work. Two of them were recruited by an employment agency in Manila to work in the United Arab Emirates, while the third woman arrived in Dubai on the suggestion of one of the other women. Their employers took away their passports, exploited and ill-treated them and forced the three women to work long hours under the threat of further ill-treatment. During a three day' stay in Vienna, they managed to escape with the help of an employee of the hotel where they were staying. Although they filed a criminal complaint with the Austrian authorities, they interrupted the investigation of the events occurred in its territory, as the offences were committed abroad by non-nationals.[376] In this latter case, in particular, the Court failed to bring any clarity on the distinctive characteristics of forced labour, servitude and slavery and to establish a relationship with trafficking. On the contrary, the ECtHR assertion that the elements identifying trafficking (the ones recognized by the Court in Rantsev and not those coinciding with the international

[370] Ibid., p. 555.
[371] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 706.
[372] R. Piotrowicz, p. 196.
[373] Judgment of 21 January 2016, Appl. No. 71545/12, *L.E. c. Grèce*, (ECtHR) (official language French)
[374] For the details of the facts see paras 5-28.
[375] Judgement of 17 January 2017, Appl. No. 58216/12, *J. and Others v Austria*, (ECtHR).
[376] Ibid., paras 7, 24, 25, 27.

definition of trafficking) cut across the three categories of conducts prohibited in article 4, is even more misleading.[377]

The ECtHR made a step further in the case of *Chowdury and Others v Greece*[378], where it established a link between trafficking and forced labour. The case concerned a situation of trafficking in the agricultural sector, in which 42 Bangladeshi nationals, with no work permits, were recruited to pick strawberries in a farm in Greece. They lived in degrading conditions and worked for 12 hours a day without receiving their wages – although they were promised a payment of 22,00 euros for seven hours and three euros for each hour of overtime – under the supervision of armed guards. When they demanded the due payment, one of the armed guards opened fire against the workers, injuring 30 of them. After being charged with attempted murder and trafficking in human beings, the employers and the armed guard were acquitted from both charges, as the sentence to prison for injuring the workers was commuted to a financial penalty.[379] In this case, the ECtHR for the first time acknowledged that a situation of trafficking fells within one of the prohibited conducts under article 4. Nonetheless, the Court's reasoning lacks coherence.[380] In fact, while in the first part of its analysis the Court describes in great detail the conducts to which the workers were subjected, particularly concerning the features distinguishing forced labour from servitude,[381] it fails to assess the constitutive elements of trafficking.[382] Indeed, although it acknowledges that the facts of the case are consistent with the international definition of human trafficking,[383] regrettably, the Court does not provide an explanation supporting this conclusion, in contrast to what it did in order to establish the offence of forced labour.[384] As Valentina Milano highlighted, once the Court established that the facts of the case constituted forced labour, it gave the impression to refer to trafficking and forced labour interchangeably.[385] The result of this

[377] V. Milano, 'Uncovering Labour Exploitation: lights and shadows of the latest European Court of Human Rights' case law on human trafficking'. *The Spanish Yearbook of International Law*, 21 (2017), p. 87 DOI:10.17103/sybil.21.5.
[378] Judgment of 30 March 2017, Appl. No. 21884/15, *Chowdury and Others v Greece*, (ECtHR).
[379] See Ibid., paras 5,7,8, 10, 22.
[380] An in-depth analysis on this is provided by V. Milano, 'Uncovering Labour Exploitation …', cit., pp. 87-92.
[381] *Chowdury and Others v Greece,* paras 94-99.
[382] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 90.
[383] *Chowdury and Others v Greece,* para 100.
[384] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp. 11-12.
[385] V. Milano, 'Uncovering Labour Exploitation …', cit., pp. 90-91.

reasoning is that the Court ended up assimilating the two concepts of forced labour and trafficking, as it failed to identify the distinctive element between the two definitions.[386]

Finally, the Court brought clarity on the definition of trafficking in human beings in the case of *S.M. v Croatia*[387] of 2020. The case involved a Croatian woman forced physically and psychologically into prostitution by another Croatian national. The men contacted her through a social-network website and after having offered to help her to find a job as a waitress or a shop assistant, he started to drive the applicant to other men in order to provide sexual services in exchange of money. Whenever she refused to do so, the man assaulted her.[388]

The case was first allocated with the First Section of the Court, where a Chamber of that Section gave judgement, holding that there had been a violation of article 4.[389] Following the request of the Croatian Government, the case was referred to the Grand Chamber. In 2020 the Grand Chamber delivered its judgment.[390] The Grand Chamber's decision aligns the notion of trafficking under article 4 of the ECHR with the international definition.[391] In this connection, the Grand Chamber stated that:

> 'impugned conduct may give rise to an issue of human trafficking under Article 4 of the Convention only if all the constituent elements (action, means, purpose) of the international definition of human trafficking are present'.[392]

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[386] Ibid., pp. 91-92. See also V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 12.
[387] Judgment of 25 June 2020, Appl. No. 60561/14, Grand Chamber, *S.M. v Croatia*, (ECtHR). Although this case is analysed here for the definition of trafficking in human beings and the consequent flowing States' positive obligations, this case is also relevant for its reasoning on 'sexual exploitation' where it considers that sexual exploitation for the purpose of prostitution falls within the scope of article 4 either if linked to human trafficking or not. For an analysis on this see the contribution of S. De Vido, 'Della tratta di donne e ragazze nel diritto internazionale ed europeo: riflessioni sulla nozione giuridica di "sfruttamento sessuale" alla luce della sentenza S.M c. Croazia della Corte europea dei diritti umani', *GenIUS Rivista di Studi Giuridici sull'Orientamento Sessuale e l'Identità di Genere*, 2 (2020), pp. 1-19, available at https://iris.unive.it/retrieve/e4239dde-385d-7180-e053-3705fe0a3322/DeVido_Tratta.pdf, [last accessed 9 February 2023]. See also V. 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/, [last accessed 9 February 2023].
[388] *S.M. v Croatia* (Grand Chamber), paras 11-15.
[389] See judgment of 19 July 2018, Appl. No. 60561/14, First Section Chamber, *S.M. v Croatia*, (ECtHR).
[390] Ibid., paras 4-5.
[391] K. Hughes, 'Human Trafficking, *SM v Croatia* and the Conceptual Evolution of Article 4 ECHR', *Modern Law Review*, 85 (2022) 4, p. 1056, https://doi.org/10.1111/1468-2230.12703.
[392] *S.M. v Croatia* (Grand Chamber), para 290.

The Grand Chamber essentially embraced the definition of trafficking under the Palermo Protocol and the Trafficking Convention, stating that a conduct can be characterized as trafficking only if all the required elements of *action*, *means* and *purpose* are fulfilled. Further, in this connection, it added that both national and transnational trafficking, irrespective of whether it is linked to organized crime or not fall within the meaning of article 4[393]. This is important, particularly in this case, as the applicant was trafficked internally, while her trafficker was a single individual. Furthermore, the Grand Chamber assessed that including trafficking within the scope of article 4 does not exclude that in a certain circumstance the offence of human trafficking may give rise to an issue under another article of the ECHR[394]. Concerning the specific facts of the case, the Court found that the applicant belonged to a vulnerable group while it could be argued that the man, T.M., was in a position to abuse the vulnerability of the woman for the purpose of sexual exploitation. Furthermore, the fact that T.M. took care of the accommodation and other facilities where S.M. could provide sexual services could be interpreted as one of the constituent *actions* of trafficking (harboring) while the *means* element could be satisfied by the use of force against the applicant. Consequently, according to the Court there was *prima facie* evidence suggesting that the applicant had been subjected to trafficking in human beings and/or forced prostitution[395].

This reasoning of the Court was upheld in the most recent case of *Zoletic and Others v Azerbaijan.* The case concerned a group of people recruited from Bosnia and Herzegovina by Serbaz, a construction company, and taken to Azerbaijan.[396] In this case, the Court further elaborated on the distinct characteristics of forced labour and trafficking in human beings. Relying on the findings of *Chowdury*, the Court brough a step further its legal reasoning, as it pointed out how the facts of the case constituted trafficking, fulfilling the elements of the international trafficking definition.[397] Indeed, the Court, considered the allegations made by the applicants in light of the definition of forced labour provided by ILO and of the caselaw of the Court, especially concerning the notion of consent developed in *Chowdury*, and secondly in light of the international definition of

[393] Ibid., para 303 ii.
[394] Ibid., 303 i.
[395] See ibid., paras 329-330 and para 332.
[396] *Zoletic and Others v Azerbaijan*, para 5.
[397] See the Commentary of E. Adomako, 'Commentary. A precedent that finally clarifies the definitional ambiguities surrounding forced labour and human trafficking', *International Labor Rights Case Law*, 8 (2022), p. 286. Doi:10.1163/24056901-08030016.

trafficking in human beings verifying if all the elements of trafficking had been fulfilled.[398] As a result, the Court's approach to trafficking adopted by the Grand Chamber in the *S.M.* case was reinforced and further developed. Moreover, this is a clear indication of the Court's engagement in the development of a 'more solid and trustful jurisprudence under Article 4.[399]

1.2.2 Positive obligations arising under art. 4 with regard to trafficking

With regard to the scope of States' positive obligations flowing from article 4, compared to the *Silidian* case, the ECtHR clarified further the nature and the meaning of the positive obligations of states towards victims, especially towards victims of trafficking in human beings. In particular, the ECtHR caselaw expanded its initial limitation of states' obligations to the establishment of an adequate criminal law framework to include obligations to prevent and to protect victims of trafficking, in addition to just punish traffickers.[400] In other words, the Court went beyond the mere obligation to prosecute and penalize those engaging in forced labour, servitude and slavery; instead, it acknowledged the duty of states to actually prevent and protect victims of trafficking, as well as to properly investigate situations of potential trafficking.[401] Thus, the extent of positive obligations under article 4 are analyzed by the Court also in relation to trafficking in human beings. However, the Court's reasoning has not always been that straightforward: as it will be noted below, in some cases the Court made steps backwards with regard to some of these obligations. In *Rantsev*, the ECtHR identified three main categories of positive obligations: the obligation to put in place an appropriate administrative and legal framework; the obligation to take operational measures to protect victims; and the procedural obligation to effectively investigate and prosecute. While the first two obligations are substantive, the latter has a procedural nature. In the following paragraphs will be analyzed the evolution of the Court's reasoning in the cases previously mentioned following the three categories of positive obligations.

1.2.2.1 The obligation to put in place an appropriate administrative and legal framework

The first trafficking case in which the Court broadens the scope of states' positive obligations under article 4 is *Rantsev*. Established that it was a trafficking case and that as such it fell under

[398] *Zoletic and Others v Azerbaijan*, paras 166-168
[399] E. Adomako, op. cit., p. 286.
[400] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 12.
[401] R. Piotrowicz, op. cit., pp. 196-197.

the realm of article 4, the ECtHR examined the general principles of Article 4 so to understand the scope of positive obligations arising under those principles in relation to trafficking in human beings. The Court stated that while in *Siliadin* it confirmed that in order to comply with their positive obligations to penalize and prosecute the conducts prohibited in article 4, States are required 'to put in place an adequate legislative and administrative framework to prohibit and punish trafficking',[402] the provisions of the Palermo Protocol and of the Trafficking Convention, on the other side, indicate that only a combination of measures addressing prevention, protection and punishment can be effective in the fight against trafficking. Accordingly, the ECtHR underlines that 'the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking'.[403] In the application of these general principles to the case of *Rantsev*, the Court concluded that the Government of Cyprus violated its positive obligations under article 4, as 'the regime of artiste visas in Cyprus did not afford to Ms Rantseva practical and effective protection against trafficking and exploitation'.[404] To achieve this conclusion the Court relied on the assessment of other bodies, national and international, in order to complement its appraisal of Cyprus' regulatory framework.[405] In particular, in analyzing the Cypriot immigration regime, the ECtHR considered the reports prepared by these bodies, which had raised concerns on the role of the artiste regime visa in promoting the trafficking of foreign women in Cyprus, exploited by their employers and living in degrading conditions. Further the Court found it unacceptable, considering the broader context of concern regarding artistes in Cyprus, to foresee measure encouraging cabaret owners and managers to track down missing artistes or to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed.[406] Consequently, according to the Court such a framework allowed employers to exercise an excessive degree of control over artistes, promoting trafficking and exploitation.[407]

While in *Rantsev* the Court examined the appropriateness of the legal framework in a rather thorough manner, reviewing the threefold requirement of punishing traffickers, preventing

[402] *Rantsev v Cyprus and Russia*, para 285.
[403] Ibid.
[404] Ibid., para 293.
[405] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 712.
[406] See *Rantsev v Cyprus and Russia*, at paras 291-292.
[407] Ibid., para 292.

trafficking and protecting victims, in *L.E* it does it only superficially.[408] In this case, the Court simply reached the conclusion that the Greek legislative and administrative framework provided 'practical and effective protection' to the applicant, without considering the numerous reports of international bodies that raised concerns on the proliferation of trafficking in Greece and on how it was mishandled by national authorities. Although the ECtHR accepted the general principle developed in *Rantsev* that trafficking can only be effectively combatted through the adoption of a comprehensive legal framework directed at preventing trafficking, protecting victims and punishing traffickers, when it applied this principle to the case of *L.E*., it failed to analyze in quite some details the adequacy of the Greek legislative and administrative framework in terms of traffickers' punishment and victims' protection. Moreover, it essentially never investigated the existence and effectiveness of preventive anti trafficking measures in the Greek law, which is quite surprising if one compares this reasoning with the one adopted by the Court in *Rantsev* in relation to preventive measures, especially concerning the artiste visa in Cyprus.[409] As pointed out by Valentina Milano states have a preventative duty to create an environment where trafficking cannot flourish undisturbed.[410] In this case, giving the widely known phenomenon of trafficking of Nigerian women for the purpose of sexual exploitation, a legitimate question might have been what was Greece doing to prevent it or to investigate it properly.[411] Also, the fact that L.E. entered many times in contact with the national authorities and was identified by the NGO *Nea Zoi* as a trafficking victim, raises a question on the training of the police officers in Greece and on their cooperation with NGOs in order to fight trafficking as required by the Trafficking Convention and the Palermo Protocol, most importantly on the adequacy of the regulatory framework to promote this cooperation. These issues have never been looked at in the case of *L.E*: hence, the Court's conclusion remains highly questionable.[412]

In the cases of *Chowdury* and *J and Others*, the ECtHR's setback has been even more significant. In the first case, in fact the Court does not mention the necessity for a regulatory framework addressing prevention, protection and prosecution, while in the latter the legislative and administrative framework is not even included in the set of positive obligations reviewed by the

[408] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 713.
[409] For a more detailed analysis on this aspect see ibid., pp. 715 -716.
[410] Ibid., p. 715.
[411] Ibid.
[412] Ibid., p. 716.

ECtHR.[413] In *Chowdury*, the Court does not examine whether the Greek legislative and regulatory framework is adequate to prevent trafficking and to protect victims, as it only refers to the obligation of States to 'put in place a legislative and administrative framework to prohibit and punish forced or compulsory labour, servitude and slavery'.[414] Prevention and protection were only considered from the perspective of States duties to take operational measures in order to prevent the exploitation of the applicants and to protect them, but this does not deal with the adequacy of labour or immigration law in Greece that made possible the trafficking and the labour exploitation of irregular migrants.[415] As in *Rantsev*, the situation of migrant workers in strawberry plantations was a well-known structural problem that cannot be only addressed by protective measures adapted to a given case, but also through broad policy responses.[416] In this sense, the Court should have examined the legal framework in question.[417]

With regard to the criminal law framework, the Court finds that Greece complied with its positive obligations under article 4 of the ECHR.[418] Yet, also in this case the Court reviewed the Greek criminal law only summarily, failing to identify some important shortcomings.[419] First of all, the definition of trafficking contained in article 323A of the Greek Penal Code is not sufficiently comprehensive,[420] as it only identifies among the purposes of trafficking the extraction of 'cells, tissues or organs from [a] person' and exploitation of a 'person's work or begging'.[421] All the other purposes of exploitation, such as servitude, slavery and sexual exploitation are not included. While it may be argued that the concept of exploitation of labour may subsume the remaining forms of exploitation, this would be in contrast with the principle of legal certainty.[422] As also GRETA have underscored, States may have difficulties to comply with their obligations under article 4, if they fail to provide a definition of trafficking that expressly refer to all forms of exploitation.[423] In relation to this, on the contrary, the Court seemed to be satisfied with Greece's ratification of both

[413] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 97.
[414] *Chowdury and Others* v *Greece*, para 105.
[415] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 100.
[416] Ibid.
[417] Ibid., p. 102.
[418] *Chowdury and Others* v *Greece*, para 109.
[419] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 97.
[420] Ibid.
[421] *Chowdury and Others* v *Greece*, para 33, art 323A.
[422] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 97
[423] GRETA Fourth Annual Report of 2015 cited in V. Milano, 'Uncovering Labour Exploitation …', cit., p. 97.

the Palermo Protocol and the Trafficking Convention and the transposition of the Framework Decision 2002/629/JHA of the Council of the EU, later replaced by Directive 2011/36/EU instead of considering the substance of the definition of trafficking, which clearly was not complete.

Secondly, under the Greek penal code forced labour is not criminalized: this is clear evidence of the inadequacy of the Greek criminal framework.[424] The Court itself acknowledges the lack of any provision relating to forced labour in the Greek Criminal Code, but still it concludes that Greece's conduct was satisfactory,[425]failing to notice that in the Greek legislation forced labour is not considered as a separate conduct from trafficking.[426] But not being able to clearly distinguish between a case of trafficking, forced labour and slavery, confusing the concepts with one another 'can hamper proper identification, investigation and prosecution of cases'.[427]

In the subsequent case of *S.M.*, decided by the Chamber of the First Section in 2018, the ECtHR reaffirms the general principle that:

> 'States are under a positive obligation to put in place a legislative and administrative framework to prohibit and punish trafficking, as well as to take measures to protect victims, in order to ensure a comprehensive approach to the issue, as required by the Palermo Protocol and the Anti-Trafficking Convention'.[428]

Yet, as in *L.E.* the Court reviewed only summarily the adequacy of the Croatian legislative and regulatory framework, focusing mainly on criminal law and without examining in detail the content of such legislation.[429] In fact, protective and preventive measures are only briefly mentioned, while concerning the criminal framework, the Court was satisfied that Croatia criminalized exploitation of prostitution, including forced prostitution, the personal offering of sexual services, trafficking in human beings, forced labour, slavery and the offence of pandering.

[424] Ibid.
[425] *Chowdury and Others* v *Greece*, paras 107 and 109.
[426] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 98.
[427] M. Paavilainen, 'Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?', *Anti-Trafficking Review*, 5 (2015), p. 159. DOI: 10.14197/atr.201215511.
[428] S.M. v Croatia (First Section Chamber), para 58.
[429] V. Milano, 'Un approccio integrale per combattere la tratta degli esseri umani? …', cit., p. 26.

Accordingly, the Court reached the conclusion that the framework in relation to trafficking, forced prostitution and exploitation of prostitution was satisfactory.[430]

The judgment issued in 2020 by the Grand Chamber does not depart much from the one decided by the first section Chamber. First, the Grand Chamber recognizes that the set of positive obligations identified in *Rantsev* are the 'central tenets of the existing case-law' and that they 'represent the relevant Convention framework within which cases of, or related to, human trafficking are examined'.[431] Following that statement, the Grand Chamber recalls the fundamental principles developed in Rantsev, especially the ones concerning the need for a holistic approach to trafficking that includes measures for the prevention of trafficking and for the protection of victims, in addition to punishment of traffickers.[432] However, from the Court's reasoning in *Rantsev*, the Grand Chamber only derives 'the duty to put in place a legislative and administrative framework to prohibit and punish trafficking',[433] an obligation that it does not apply to the specific case, reviewing further the existence and content of the Croatian legislative and regulatory framework. In fact, the Grand Chamber only focused on the procedural obligation to investigate alleged situations of trafficking, being it the issue of the case.[434]

In the last case of *Zoletic and Others* the Court only briefly explored the legal and regulatory framework of Azerbaijan, as the complaints made by the applicants were of a procedural nature rather than substantive.[435] In this connection, examining the scope of the case, the Court noted that the set of positive obligations under article 4 included, *inter alia*, 'the duty to put in place a legislative and administrative framework to prohibit and punish treatment contrary to that provision'.[436] However, having regard to the complaints submitted by the applicants, the Court observed that although the duty of setting an appropriate administrative and legislative framework had been referred to, there was no allegation on the shortcoming of such framework. Accordingly, the Court reached the conclusion that the applicants allegations concerned only the failure of

[430] See *S.M. v Croatia* (First Section Chamber), paras 65 and 67-68.
[431] *S.M. v Croatia* (Grand Chamber), para 305.
[432] Ibid.
[433] Ibid., para 306.
[434] Ibid., paras 306-307.
[435] *Zoletic and Others v Azerbaijan*, para 192.
[436] Ibid., para 132.

Azerbaijan to comply with the procedural obligation to investigate an alleged situation of trafficking and forced labour.[437]

In its short review of the legal and regulatory framework, the Court noted that the 'domestic legal system provided for the criminal law mechanisms protecting individuals from human trafficking and forced labour' and that Azerbaijan put in place a legal framework useful in 'regulating businesses that could potentially be used as a cover for human trafficking' and adopted immigration laws contrasting the flourishing of trafficking.[438] However, in a more in-depth analysis, based upon the reports prepared by international bodies the Court might have found that there had been raised some concerns in respect to the legislative and regulatory framework, especially with regard to immigration rules. For example, GRETA noted that the Law on Trafficking in Human Beings did not consider migrant workers as a vulnerable group to trafficking, while it was acknowledged that as a result of the strict rules of the Migration Code, this category of workers was vulnerable to abuse and exploitation. In particular, GRETA referred to the strict quotas of work permits, their high costs and the long awaiting time to obtain or to renew them. GRETA highlighted as well the need to remove migrant workers dependency on their employers, as workers could not apply for a work permit on their own.[439] Some of these issues were also underscored by the European Commission against Racism and Intolerance (ECRI), which noted that although the system is clear and makes employers responsible for their acts, in practice there are problems because of the high costs of the work permits and due to the waiting time that lead employers to resort to the recruitment of illegal migrant workers.[440] These deficiencies in migration policies were evidence of systemic issues that needed a comprehensive approach in order to be addressed 'at their root through major social, economic, and cultural reforms and awareness raising'.[441]

[437] Ibid., paras 132-133.
[438] Ibid., para 192.
[439] Ibid., para 118 (101 and 106).
[440] Ibid., para 119 (77).
[441] R. Plant, 'Forced Labour, Slavery and Human Trafficking: When do definitions matter?', *Anti-Trafficking Review,* 5 (2015), p. 156, DOI: 10.14197/atr.201215511.

1.2.2.2 The obligation to take operational measures to protect victims

Adapting the Osman test to the case of trafficking in human beings,[442] in *Rantsev* the Court noted that in certain circumstances under article 4 of the ECHR States may be required to take protective operational measures towards victims or potential victims of trafficking. With this regard, the Court stated that for such obligation to arise it must be demonstrated that:

> 'State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited …'.[443]

Accordingly, a violation of article 4 of the ECHR occurs when a State fails to adopt the necessary measures within the scope of their powers to remove the individual from a situation or risk. Furthermore, bearing in mind that the duty to take operational measures must not burden disproportionally on the authorities, the Court identifies some obligations that need to be considered in order to assess the proportionality of any positive obligation, including the duty as required by the Palermo Protocol to 'provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking' in addition to the obligation to adequately train 'law enforcement and immigration officials'.[444] Some of these operational measures may require a proactive action in order to identify victims as well as a reactive one that follows the identification process.[445]

With regard to Cyprus, first the Court relied on the Ombudsman's report of 2003 and on the Council of Europe's Commissioner of Human Rights 2005 report, in both of which it was highlighted that the Cyprus immigration authorities tolerated trafficking allowing it to flourish and that they knew that many foreign women coming in Cyprus with an artiste visa ended up working in prostitution. Therefore, according to the Court the Cyprus authorities were certainly aware that many foreign women, particularly the ones coming from the former Soviet Union, were trafficked in Cyprus with the artiste visas and exploited sexually by cabaret owners and managers.[446]

[442] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 102.
[443] *Rantsev v Cyprus and Russia*, para 286.
[444] Ibid., para 287.
[445] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 103.
[446] *Rantsev v Cyprus and Russia*, para 294.

Secondly, the Court observed that under the Palermo Protocol and the Trafficking Convention, Cyprus undertook the obligation to adequately train those working in the relevant fields so that they were able to identify potential trafficking victims in an effort to prevent trafficking. In this context, the Court noted that although there were sufficient indicators available to the police authorities pointing to the real and immediate risk of Ms Rantseva to be a victim of trafficking and exploitation, they failed to take the appropriate measures to protect her and to make immediate further inquiries into the background facts in order to establish whether she had been trafficked.[447] With regard to Russia, on the contrary, the Court found that there was no obligation to take operational measures to protect Ms Rantseva as the Russian authorities took steps to raise awareness on trafficking risks.[448]

In the next case of *L.E.*, as for the duty of setting up an adequate legislative and regulatory framework, the Court failed again to follow the same reasoning developed in *Rantsev*. In this case, noting that the applicant L.E. informed the authorities that she was a victim of human trafficking in November 2006, the ECtHR considered that it had to examine whether the Greek relevant authorities, prior to the aforementioned date, could have reasonably be aware of the applicant's situation as a victim of trafficking in persons and whether from that date onward, they took the necessary measures to provide the applicant with adequate protection.[449] Concerning the period prior to November 2006, the Court concluded that the authorities could not have suspected that the applicant was a victim of trafficking, as in spite of entering in contact with the domestic authorities on several occasions, L.E. never informed them of her condition.[450] Here, the Court fails to relate to the international standards on trafficking victims' identification which require an active approach from the relevant authorities. In fact, as established by the Trafficking Convention and Directive 2011/36/EU, the identification of victims cannot be a passive process but an active one where 'authorities have the positive obligation to, at least, have staff that are sufficiently trained and qualified in identifying and helping victims, adopt legislative and other measures in order to establish adequate identification procedures and protocols' and also to collaborate with all the relevant governmental authorities and non-governmental organizations that have the expertise in

[447] Ibid., paras 296 and 298.
[448] Ibid., para 305.
[449] *L.E. c. Grèce*, para 74.
[450] Ibid., para 75.

the field.[451] Moreover, it is well established that cases in which victims report to the authorities their situation are rare, especially because they are afraid of their traffickers or embarrassed and traumatized by the humiliation and the violence they experienced, in addition to the fact that they may distrust police forces. Also the Court never referred to the reports of international bodies concerning the difficulties to identify victims of trafficking among irregular migrants and asylum seekers, category to which the applicant belonged.[452] In this context, the Court fails to acknowledge States' duty to proactively identify victims and to protect them, regardless of their denunciation, as stated in *Rantsev*.

With regard to the period after she informed the authorities, the Court found that, although the police services immediately referred the applicant's case to the police unit dealing with trafficking in human beings, Greece failed to take the necessary measures to protect the applicant, as between her denunciation and the date she was officially recognized as a trafficking victim elapsed nine months. Moreover, the domestic authorities failed to include the statement of the NGO *Nea Zoi* into the case file, leading to a delay in the applicant's recognition as victim and had negative impacts on the personal situation of L.E., as she continued to be detained.[453] Although the reference of the ECtHR to the detention of the applicant with regard to states positive obligations to take protective operational measures was more than welcomed, a stronger stance of the Court would have been desirable.[454]

After *L.E.,* in *Chowdury* the Court returned to the approach adopted in *Rantsev*. In particular, relying on the CoE Trafficking Convention, the Court reviewed both the preventive and the protective measures, but as opposed to the previous case of *L.E*., with a major emphasis on the proactive duty of States to prevent and protect. In fact, concerning preventive measures, the Court adopted the same broad approach of *Rantsev* as it examined both whether the authorities were aware or ought to have been aware of the general situation and of the specific situation of the applicants. With regard to the first, the Court noted that the situation of migrant workers in the strawberry fields in Manolada was known to the Greek authorities well before the incident took place, as there were several reports presented in this respect as well as a mobilization at the

[451] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 719.
[452] Ibid., pp. 718-719.
[453] *L.E. c. Grèce*, paras 76-78.
[454] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., pp. 721-722.

governmental level led by three Ministers. However, no solution was provided to the general situation of migrant workers in Manolada, in spite of all the concerns raised.[455]

Concerning the awareness of the authorities of the specific situation of the migrant workers, the Court noted that the Police Station of Amaliada was aware of the fact that workers were retained wages as one of the police officers asserted that a certain number of workers complained about the employers' refusal to pay salaries. Consequently, the Court reached the conclusion that the operational measures adopted by Greece were not sufficient to prevent trafficking or to provide protection to the applicants.[456] While the Court assessed the failure of Greece with regard to preventive (proactive) measures, it failed to do the same in relation to the provision of protective (reactive) measures to the applicants. In fact, although the Court in principle referred to the measures needed to assist and support victims in their psychological, physical and social recovery,[457] it did not review whether Greece afforded such measures to the applicants, which beside revealing a low attention devoted to this measure, it is rather surprising especially because the applicants complained about the fact that they were denied psychological support by the Patras Court.[458]

In the other case of *J and Others*, the Court did not focus on the proactive measures to protect, giving that the applicant had only stayed in Austria for three days.[459] Yet, it completely changed the heading of these positive obligations into 'positive obligation to identify and support'.[460] Thus, in this case not only the Court does not consider the duty to set an appropriate legislative and administrative framework, but also changes the heading of the second obligation required under article 4. However, the case is relevant as in terms of reactive actions, the Court identifies a number of operational measures for which Austria was praised. First, the Court noted that the domestic authorities considered immediately the applicants as potential victims of trafficking. As a result, victims were interviewed by trained officials and granted residence and work permits, in addition to an imposed ban on personal data disclosure. Moreover, the applicants were supported by a government-funded NGO during the domestic proceedings, were giving legal representation,

[455] *Chowdury and Others v Greece*, paras 111-113.
[456] Ibid., paras 114-115.
[457] Ibid., para 110.
[458] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 106.
[459] Ibid., p. 104.
[460] *J and Others v Austria*, p. 27.

procedural guidance and assistance to facilitate their integration.[461] In this case, the Court was satisfied with the measures taken by Austria. Considering the positive impact it has on the consolidation of states obligations in this area, the emphasis on protection and assistance measures is undoubtedly welcomed as these measures are one of the core elements of the entire anti-trafficking framework.[462]

In *S.M.*, the Chamber of the First Section, in addition to the support and aid that *S.M.* was given, praised the Government on a number of rights to which the applicant was entitled, following her recognition as a victim of human trafficking. These included, for example, counselling from the Croatian Red Cross and free legal assistance.[463] As in *J and Others* the focus is on reactive measures adopted after the identification of the applicant as a victim. As far as the judgment of the Grand Chamber is concerned, besides reiterating under the general principles that when there is a credible suspicion that an individual is at real or immediate risk to be trafficked or exploited states have the duty to take operational measures,[464] no further review of such measures is provided. As pointed above, the Grand Chamber in considering States positive obligations in relation to the conducts prohibited under article 4 of the ECHR, only examined extensively the extent of states' procedural obligations concerning human trafficking and forced prostitution.

Finally, in the case of *Zoletic and Others* no examination of proactive or reactive measures is provided as the Court limited its analysis to the procedural obligations, giving that as noted above, the applicants' complaint only concerned the failure of the domestic authorities to investigate the allegations of trafficking and forced labour.

1.2.2.3 Procedural obligations to effectively investigate and prosecute

As opposed to the substantive obligations flowing from article 4 discussed in the previous paragraphs, the reasoning developed by the Court in regard to the procedural obligation to investigate and prosecute is more coherent throughout the Court's caselaw. As for the other States' duties, the first case that addressed comprehensively the extent of procedural obligations in relation to trafficking in human beings was *Rantsev*. The Court identified several requirements that must

[461] Ibid., paras 110-111.
[462] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 105.
[463] *S.M. v Croatia* (First Section Chamber), paras 69-72.
[464] *S.M. v Croatia* (Grand Chamber), para 305 (286).

be met in order for an investigation to be effective: authorities, once a matter has come to their attention, must act on their motion; the investigation must lead to the identification and the punishment of those responsible for committing the offence, although the requirement of investigating is 'an obligation not of result but of means';[465] the investigation must be conducted with promptness and in some cases with urgency when an individual has to be removed from a harmful situation; and the victim or next-of keen must be involved in the investigation.[466] Finally, the Court recalled that States, in addition to the obligation to conduct a domestic investigation, have the duty to cooperate with other states concerned in the investigation of the events. In fact, reiterating that trafficking is an offence confined not only to the domestic arena and that the Trafficking Convention explicitly requires member States to establish jurisdiction over the offences committed in their territories, the Court asserted that such a duty of cooperation is in line with the objectives included in the Palermo Protocol, to address trafficking in the countries of origin, transit and destination.[467]

Giving the circumstances of the case that led to the subsequent death of Ms Rantseva, the Court established that Cyprus' procedural obligation to investigate trafficking allegations was subsumed by the general obligation arising under article 2 to investigate into her death.[468] With this regard the Court found many anomalies in the investigations conducted by Cyprus authorities, including for example that although there was no clarity on the circumstances of the death of Ms Rantseva, authorities never questioned those who lived or worked with her. Moreover, while it was concluded that she fell off the balcony because she was trying to escape from the apartment, no further inquiry on the reasons why she was trying to escape or on whether she was kept in the apartment against her will was made.[469] Also, in addition to the failure to allow the participation of Ms Rantseva's father into the proceedings, the Cypriot authorities never investigated the reasons and the appropriateness of the fact that Ms Rantseva was handed to her employer.[470] However, perhaps the main relevant element for a trafficking case is the fact that Cyprus failed to collaborate with Russia in order to investigate both the stay of Ms Rantseva in Cyprus and her death. Although

[465] *Rantsev v. Cyprus and Russia*, para 288.
[466] Ibid.
[467] Ibid., para 289.
[468] Ibid., para 300.
[469] Ibid., para 237.
[470] Ibid., paras 238-239.

the Russian Government offered legal assistance to Cyprus in order to collect further evidence, no element points to the fact that Cyprus sought any assistance from Russia in their investigations.[471] Concerning Russia, instead, the Court asserted that Russian authorities have failed to conduct an investigation on how and where the recruitment of Ms Rantseva took place.[472] This is particularly relevant, since, as the Court stressed, 'the need for a full and effective investigation covering all aspects of trafficking allegations from recruitment to exploitation is indisputable'.[473]

In *L.E*. the reasoning followed by the Court is the same, except for the lack of any reference to the duty to cooperate with other States in cross-border cases. However, as pointed out by Valentina Milano, this may be due to the fact that Nigeria, the country where Ms L.E was recruited, is not part of the Council of Europe.[474] With regard to the effectiveness of the Greek authorities' investigation, the Court identified a series of flows. Firstly, the Court noted that the applicant's complaint was initially dismissed by the public prosecutor due to the missing witness statement of the NGO Nea Zoi, which as a result of the negligence of the police officers was not included in the casefile. However, even when the testimony was added to the casefile, the prosecutor did not reopen the case, acting on its own motion but it was the applicant who requested to restart the proceedings. Finally, although the request was made in January 2007, it was not until June 2007 that she was recognized as a victim of trafficking in human beings and the criminal proceedings were initiated. According to the Court, this period of time of inaction was crucial for the progress of the investigation.[475] Secondly, the Court identified a number of shortcomings in the preliminary investigation of the case. In fact, while the address of Mr K.A. was put under surveillance after the denunciation of the applicant, once established that he no longer lived there, the authorities never searched the other two addresses provided by the applicant nor did they try to collect other information by interviewing for example the employees of the hotel in front of which Ms L.E. was forced into prostitution. In this context, the Court noted that an intensification of the research would have been crucial for the investigative procedure.[476] In general, the Court indicated that there were considerable delays in both the preliminary proceedings and the investigation. Although

[471] Ibid., para 241.
[472] Ibid., para 308.
[473] Ibid., para 307.
[474] V. Milano, 'The European Court of Human Rights' case law on human trafficking …', cit., p. 723.
[475] *L.E. c. Grèce*, para 82.
[476] Ibid., para 83.

the Court admitted that a delay in the hearing of the case before the Assize Court was in part justified by the escape of Mr K.A, nonetheless there were several significant delays between the various stages of the proceedings.[477] Finally, the Court pointed that aside from entering Mr K.A. name into the police criminal investigation file, no further concrete action was taken with a view to locate him. In addition, it was also noted that there was no evidence that the Greek authorities tried to cooperate with Nigerian authorities in order to find him.[478]

This trend of the Court in regard to States' procedural obligations is consolidated in *Chowdury*, although the case of *J and Others*, decided a few months earlier, represented a major drawback in this respect. The ECtHR in addition to the requirements established in the previous cases, noted that the obligation to investigate effectively is binding on law enforcement and judicial authorities. In particular, the Court considered that:

> 'Where those authorities establish that an employer has had recourse to human trafficking and forced labour, they should act accordingly, within their respective spheres of competence, pursuant to the relevant criminal law provisions'.[479]

The Court identifies two sets of violations of the procedural obligations to investigate and prosecute situations of trafficking under article 4(2). The first one concerned the rejection by the Amaliada public prosecutor of the complaint made by a number of applicants regarding their presence during the shootings that took place in April 17, but that they have reported to the police only a few weeks later.[480] The Court stated that even though the public prosecutor had evidence which suggested that these workers had the same employers as the applicants that denounced the incident the day after it took place, and thus that they must have been submitted to same working conditions, he failed to ascertain whether the allegations were well-founded. Hence, the Court found that Greece violated its obligation to effectively investigate. Moreover, the Court noted that in dismissing the applicants' complaint on the grounds of being belated, the public prosecutor have shown scarce knowledge of the international framework on human trafficking, as he lacks to

[477] Ibid., para 84.
[478] Ibid., para 85.
[479] *Chowdury and Others v Greece*, para 116.
[480] Ibid., paras 117-118.

consider the provision on the 'recovery and reflection period' provided by the Trafficking Convention, whose aim is to allow victims to recover from the trauma and to make an informed decision on whether cooperating or not with the competent authorities.[481] In view of this, the Court concluded that there has been a violation under article 4(2) of the ECHR on the grounds of the failure of the domestic authorities to effectively investigate a situation of trafficking and forced labour.[482]

The second violation, on the other hand, concerned the other group of applicants that instead referred immediately to the police the event. The Court noted several shortcomings in this respect. First, the acquittal of the defendants on the charges of trafficking and the transformation of the prison sentences into the payment of a fine. Secondly, the refusal of the public prosecutor to appeal on points of law. Lastly, the inappropriateness of the compensation to victims, which amounted to 43 euros per applicant, especially in consideration of the State's obligation under the Trafficking Convention to entitle victims with the right to compensation and to establish a compensation fund.[483]

As opposed to these successful cases, *J and Others* represents a setback, especially as far as transnational cooperation is concerned. The Court has not found that Austria violated its obligations under the procedural limb of article 4 of the ECHR. To achieve this conclusion the Court examined whether Austria had a duty to investigate the events that occurred abroad and whether the investigation conducted in its territory was sufficient.[484] With regard to the first matter, the Court considered that under the ECHR there was no obligation on Austria to investigate the recruitment in the Philippines and the events that happened in the United Arab Emirates (UAE), as under the Trafficking Convention States are only required to establish jurisdiction over offences taken place in their own territory or committed by or against one of their nationals, while the Palermo Protocol is silent on the matter.[485] Concerning this latter statement, Valentina Milano argues that the provisions on the jurisdiction over trafficking offences are to be sought in the Convention on Transnational Organized Crime.[486] According to her, if the Court had recognized

[481] Ibid., paras 120-121.
[482] Ibid., para 122.
[483] See Ibid., paras 124-126.
[484] *J and Others v Austria*, para 113.
[485] Ibid., para 114.
[486] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 109.

this element, it would have reached another conclusion, since Austria could have sought cooperation with the UAE on the basis of the Palermo Protocol to which the latter state is a party. Otherwise, Austria could have at least informed UAE of the allegations that regarded two if its nationals.[487]

Concerning the second matter, the ECtHR concluded that the investigations conducted in Austria were sufficient. First, the Court noted that the Austrian authorities' conclusion that the treatment to which the applicants were subjected in Austria did not constitute trafficking, seemed to be reasonable.[488] Further, the Court considered that even if the events were to be examined as whole, the steps that the authorities could have taken 'does not appear that … albeit possible in theory, would have had any reasonable prospects of success'.[489] Moreover, the Court added that under the Austrian law domestic authorities have a margin of appreciation in deciding to discontinue a case.[490] Judge Albuquerque in his concurring opinion identified a few shortcomings. First, the Judge established that there were clear indicators that the applicants were subjected to trafficking on the Austrian soil. Secondly, it is stressed that the mere 'absence of a mutual legal assistance agreement with the United Arab States could not *per se* impede prosecution based on the facts which did occur in Austria'.[491] In fact, in case the authorities of the country of origin of trafficking lack the possibility or the willingness to cooperate with the authorities in the country of transit or destination of trafficking, there are other legal avenues available to the latter authorities, such as the EUROPOL, FRONTEX and INTERPOL.[492] What appears to be surprising is that the Court does not even refer to the obligation of Austria to cooperate with UAS while in *L.E.* the Court concluded that Greece was responsible for failing to seek cooperation with Nigeria, although a non-European country.[493]

However, this case was rather the exception than the norm, as in the following cases the Court sticked with the general trend initiated in *Rantsev*. In *S.M.*, once accepted that it was an Article 4 case, both the Chamber and the Great Chamber reached the same conclusion that there was a

[487] Ibid., see pp. 108-109.
[488] *J and Others v Austria*, para 116.
[489] Ibid., para 117.
[490] Ibid., para 117.
[491] Concurring Opinion of Judge Albuquerque in *J and Others v Austria*, at para 57.
[492] Ibid.
[493] V. Milano, 'Uncovering Labour Exploitation …', cit., p. 112.

violation of the procedural obligations flowing from article 4 on the basis that the prosecuting authorities had failed to 'effectively investigate all relevant circumstances of the case or follow some of the obvious lines of inquires in order to gather available evidence'.[494] In fact, both Courts found several flows in the way in which investigations were conducted by domestic authorities. For example, the Grand Chamber noted that the prosecuting authorities never sought to inspect the Facebook accounts of the applicant and of the defendant, in view of determining the nature of their relationship, in spite of the fact that S.M. was first contacted through Facebook and once she had left him, the available evidence suggested that he used Facebook to threaten her.[495] Moreover, both Courts pointed out that the prosecuting authorities failed to interview the applicant's mother as well as M.I.' boyfriend and mother to whom the applicant turned for help. In fact, during the proceedings the only witness to be interviewed and heard was M.I., the applicant's friend, while the applicant the day she left the apartment where she lived with T.M. spoked over the telephone with M.I.'s mother. Moreover, no further effort was made to identify and to question the clients of the victim or the owner of the flat where she lived with T.M. and the neighbours.[496] The Gran Chamber in particular noted that if the national authorities would have interviewed the flat owner and the neighbours, they might have clarified 'the applicant's allegations as regards the circumstances in which she was under T.M.'s control during their stay in in the flat'.[497] Failing to effectively investigate the circumstances of the case, the prosecuting authorities ended up relying heavily on the applicant's statement, while, as the Court rightly acknowledged, GRETA warned States on the overreliance on victims' testimony and encouraged them to take into account psychological trauma.[498] A major difference between the two judgements relates to the fact that the Grand Chamber lowered the trigger of procedural obligations. In fact, as opposed to the Chamber that followed the reasoning of *Rantsev* adopting the trigger of 'credible suspicion', the Grand Chamber endorsed the trigger of 'arguable case' or 'prima facie evidence', bringing the trigger under article 4 in line with that under article 2 and 3.[499] However, within the Court there was disagreement: in particular, Judges O'Leary and Ravarani opposed this shift as according to them while for articles 2 and 3 there is the element of physical evidence, as far as article 4 is

[494] *S.M. v Croatia* (Grand Chamber), para 343.
[495] Ibid., para 337.
[496] *S.M. v Croatia* (First Section Chamber), paras 77-78; *S.M. v Croatia* (Grand Chamber), paras 338-342.
[497] *S.M. v Croatia* (Grand Chamber), para 340.
[498] Ibid., paras 343-344.
[499] K. Hughes, op. cit., p. 1052.

concerned it remains to be determined what an arguable claim of being subjected to a conduct prohibited by article 4 looks like and in what consists prima facie evidence.[500]

Finally, the case of *Zoletic* embraced comprehensively the major relevant requirements identified by the Court in the previous cases. In this context, for example, the Court upheld the Grand Chamber's lowered trigger for procedural obligations. In fact, in reaching its conclusion, the Court argued that the applicants' submissions and declarations 'constituted an 'arguable claim' of treatment contrary to Article 4 of the Convention'.[501] More specifically, the Court first analyzed whether Azerbaijan had an obligation to investigate and found that since the allegations in question, which constituted an arguable claim, were sufficiently drawn to the attention of the authorities, Azerbaijan had a duty to act on its own motion and to conduct an investigation into the events of the case, even if the applicants formally never filed a criminal complaint.[502] Secondly, the Court examined whether there was an effective investigation. Noting that the Government have not demonstrated that an effective investigation was conducted, the Court relied on the documents submitted by third parties only to find that no criminal investigation was instituted. First, in a letter of the Anti-Trafficking Department, it was stated that it was not possible to investigate the offences as the workers had left the country. Then, the Azerbaijani authorities, in their submissions to GRETA, in a rather contradictory manner stated that after having interviewed a significant number of workers they dismissed the case as no signs of trafficking or forced labour were identified. Thirdly, in a letter of the Anti-Trafficking Department forwarded to the authorities of Bosnia and Herzegovina in response to the request of legal assistance, it was stated that some workers were questioned, and they denied of having been victims of trafficking and forced labour and that the case concerned some violations of the disciplinary rules.[503] The Court noted that since the Government was informed of the criminal proceedings initiated in Bosnia and Herzegovina, it could have cooperated under the Mutual Assistance Convention with the authorities of that country. According to the Court, from these facts emerges that the authorities have not made any attempt to investigate into the circumstances of the case and that it cannot be demonstrated that they have taken steps to identify its nationals involved in the case.[504] Thereby, the Court concludes

[500] Concurring opinion by Judges O'Leary and Ravarani in *S.M. v Croatia* (Grand Chamber), p. 100.
[501] *Zoletic and Others v Azerbaijan*, para 193.
[502] Ibid., para 200.
[503] Ibid., see paras 203-205.
[504] Ibid., paras 206-207.

that the Azerbaijan violated article 4 of the ECHR under its procedural limbs, as no effective investigation was instituted and conducted in presence of an arguable claim that instead required the authorities to do so.

2 The IACHR's caselaw

In this context where slavery, servitude, forced labour and trafficking persist all over the world, it cannot be undermined the significant contribution of the IACtHR on the understanding of these concepts and on States' positive obligations.[505] Specifically, the first ruling of the IACtHR, the *Hacienda Brasil Verde Workers v. Brazil*[506], added significantly to the case law of the ECtHR. As a matter of fact, although this study deals primarily with the European context, it cannot be denied the relevant influence that this case may have or had on the ECtHR jurisprudence. As the above-mentioned case of the IACtHR was decided in 2016, it is undeniably clear that it strongly impacted the latest cases of the ECtHR, especially the case of *S.M.* decided by the Grand Chamber which mentions the American Court's case among the relevant regional instruments.[507] The Grand Chamber case of 2020 was the first ruling in which the ECtHR finally identified the three distinct elements of the offence of trafficking distinguishing it from the conducts prohibited under article 4 of the ECHR, even if to a certain extent it failed to adequately refer to the relation existing between these offences: this decision has certainly been impacted by the IACtHR.

The facts of the case of *Hacienda Brasil Verde* regarded the slavery-like working conditions of more than 100 workers in the Hacienda Brasil Verde, a cattle ranch located in the State of Pará in Brazil. The IACtHR identified two groups of workers as victims, rescued at different moments by the Ministry of Labour: a group of 43 workers rescued during the inspection conducted in 1997, following a complaint filed by the Comisión Pastoral de la Tierra (CPT) and a second group of 85 workers released in 2000, after the Ministry's inspection following the complaints filed by two minor workers that managed to escape the ranch.[508] From both inspections it emerged that workers lived in extremely exploitative conditions. In the first report of the Ministry of Labour it was reported that workers lived in conditions of total lack of hygiene, where several of them had skin diseases and no access to medical care and the water they drank was not suitable to consumption.

[505] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 28.
[506] Judgment of 20 October 2016, Serie C no. 318, *Hacienda Brasil Verde Workers v. Brazil*, (IACtHR).
[507] *S.M. v Croatia* (Grand Chamber), para 190.
[508] *Hacienda Brasil Verde Workers v. Brazil,* paras 199 and 206.

Moreover, workers were unable to flee this situation as they were threatened to death, including with firearms.[509] Concerning the visit conducted to the ranch in 2000, it was found that the working day lasted 12 hours: workers were submitted to extremely abusive conditions with little time to rest and were prevented from leaving the ranch by the threat of death. As it emerged from the situation of the two young men that eventually escaped, even if ill, workers were still obligated to work.[510]. All these workers were recruited form poor areas of Brasil and deceit about the actual working conditions and the salaries they would have been paid. In spite of the many inspections conducted between 1988 and 2000, the company never underwent a criminal charge.[511] In this first case dealing with slavery, servitude, forced labour and trafficking in human beings, the IACtHR's reasoning should be praised mainly for three important aspects: (i) the clarification of the existing relation between the offence of trafficking and the three conducts of slavery, servitude and forced labour; (ii) the widening of States' positive obligations in order to apply to all types of conducts and not only to trafficking; (iii) and lastly the focus on structural and systemic causes at the basis of these exploitative offences.[512]

2.1 The important contribution on the relation between forced labour, servitude and slavery and the THB

The IACtHR states that the prohibition of slavery, servitude, forced labour, slave trade and traffic in women, enshrined in article 6(1)(2) of the ACHR, has an absolute nature, as the right not to be subjected to these practices is never derogable.[513] Further, being this the first case before the Court related to the content of article 6, the IACtHR clarifies how these concepts should be interpreted, recurring to the rules of interpretation provided in the Vienna Convention on the Law of the Treaties and departing from the rule of evolutive interpretation.[514] According to the latter, the interpretation of human rights instruments 'must evolve with the times and the current living conditions'.[515]

[509] Ibid., para 144.
[510] Ibid., paras 168, 169, 171, 174-177.
[511] Ibid., paras 145-161; 179-185.
[512] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp.-28-29.
[513] *Hacienda Brasil Verde Workers v. Brazil,* para 243.
[514] Ibid., paras 244-245.
[515] Ibid., para 245.

With regard to slavery, after reviewing the most relevant international instruments and the caselaw of other human rights courts as well as of criminal tribunals and quasi-judicial bodies, the IACtHR notes that the prohibition of slavery is absolute and universal, and that the notion of slavery as defined in the Slavery Convention of 1926 has not varied substantially over time.[516] However, concerning its meaning, the IACtHR acknowledges that having regard to the evolution of international law, the concept of slavery has evolved to include both *de jure* and *de facto* situations.[517] Moreover, the traditional concept of 'ownership' that defines slavery should be interpreted as 'possession' which is the demonstration of the control exercised over a person. Accordingly, the IACtHR notes that in light of present-day conditions, such exercise of the powers attaching to the right of ownership, should be understood as the exercise of control that considerably deprives or restricts an individual's liberty with the intent of exploitation through the use, management, profit, transfer or disposal of that person which is generally obtained by violent means, deception or coercion.[518] Finally, after having listed a series of elements needed to determine whether a situation of slavery exists, the IACtHR concludes that slavery, in its evolutive meaning, represents a situation in which 'there has been a substantial restriction of the juridical personality' of an individual.[519]

Concerning the concept of servitude, the IACtHR refers to the 1956 Supplementary Convention – confirming that servitude and practices similar to slavery are the same[520] – and to the caselaw of the ECtHR, particularly to the case of *Siliadin* embracing the ECtHR understanding of servitude as the obligation to provide specific services to others under coercion and to live on another person's property without any possibility of improving one's condition.[521]

In the next paragraph, as it did for the other offences, the IACtHR reviews the evolution of the concept of trafficking and slave trade within the international framework. Established that the prohibition of the slave trade has been associated with slavery since the 1926 Slavery Convention,

[516] Ibid., para 268.
[517] Ibid., para 270.
[518] Ibid., para 271.
[519] Ibid., paras 272-273.
[520] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 17. For an analysis of the reasons behind the identification of the concept of servitude with 'practices similar to slavery' in the Supplementary Convention see J. Allain, 'On the curious disappearance of human servitude from general International Law', *Journal of the History of International Law*, 11 (2009), pp. 303-332. DOI:10.1163/138819909X12468857001505.
[521] *Hacienda Brasil Verde Workers v. Brazil,* paras 275, 279-280.

the IACtHR draws particular attention to the notion of trafficking. After referring to the Palermo Protocol and to the Trafficking Convention, to the United Nations specialized agencies as well as to the caselaw of the ECtHR, especially to the reasoning developed in *Rantsev*, the IACtHR concludes that 'the concepts of the slave trade and traffic in women have transcended their literal meaning' leading to the assertion that they should be understood in a way to guarantee protection to all human beings and not only to women or to slaves.[522] As a result, both slave trade and traffic in women should be interpreted broadly to refer to 'trafficking in human beings'.[523]

Finally, the IACtHR examines the concept of forced or compulsory labour noting that as far as its meaning is concerned it already ruled on the matter in the case of *Ituango Massacres v. Colombia*[524], where it accepted the definition provided by the ILO Forced Labour Convention. Accordingly, the IACtHR identified the two criteria that define the concept of forced labour: the *threat of penalty* and the *involuntariness of the labour performed.*[525]

In applying these concepts to the facts of the case under examination, the Court found that workers rescued from the *Hacienda Brasil Verde* were subjected to forced labour and debt bondage, as they lived and worked in extremely abusive conditions, contracted debts with the employers, were deprived of their freedom of movement and kept under constant surveillance and were never paid their salaries. However, according to the IACtHR, the specific conditions to which workers were subjected go well beyond forced labour and debt bondage, reaching the higher threshold of slavery.[526] Furthermore, having consideration for the manner in which workers were recruited from the poorest regions of the Brasil, through the use of fraud, deception and false promises to bring them to the cattle ranch, the IACtHR acknowledges that workers have been also victims of trafficking in human beings.[527] The IACtHR emphasizes the action element in determining the distinguishing criterion of the offence of trafficking, which needs to be fulfilled in order to establish that trafficking occurred. At the same time, however, the IACtHR managed to establish the relation with the other exploitative conducts, by bringing clarity on the evolutive meaning of

[522] Ibid., para 288.
[523] Ibid., para 282. See also paras 284-289.
[524] Judgment of 1 July 2006, Appl. No. 148, Series C, *Ituango Massacres v Colombia* (IACtHR) cited in *Hacienda Brasil Verde Workers v. Brazil*, para 291.
[525] *Hacienda Brasil Verde Workers v. Brazil*, paras 291-292.
[526] Ibid. 297-304.
[527] Ibid., para 305.

each practice.[528] This certainly represents one of the major achievements of the IACtHR in relation to the content of Article 6 of the ACHR.

2.2 States' positive obligations related to protection, prevention, and prosecution

Turning to States' positive obligations, the most significant contribution of the IACtHR relates to preventative measures, especially in consideration of structural causes of exploitation. Before establishing the State responsibility, the IACtHR reiterated that States have a duty to adopt positive measures: in fact, to just refrain from the violation of rights is not sufficient.[529] Accordingly, the IACtHR noted that:

> 'Compliance with Article 6, in relation to Article 1(1) of the American Convention, not only supposes that no one may be subjected to slavery, servitude, trafficking or forced labor, but also requires States to adopt all appropriate measures to end such practices and prevent violations of the right not to be subjected to such conditions pursuant to the obligation to ensure the free and full exercise of their rights to every person subject to their jurisdiction'.[530]

In addition, in a context in which the number of victims of slavery, human trafficking, forced labour and servitude freed by the Brazilian authorities is significantly high, the IACtHR underscores the fundamental role of measures devoted to discouraging the demand that feeds workers exploitation.[531] Thus, according to the IACtHR, in order to ensure the right recognized in article 6 of the ACHR, States have a duty to prevent and investigate situation of slavery, trafficking and forced labour in addition to the obligation to:

> '(i) open, ex officio and immediately, an effective investigation that permits the identification, prosecution and punishment of those responsible, when a report has been filed or there is justified reason to believe that persons subject to their jurisdiction are subjected to one of the offenses established in Article 6(1) and 6(2) of the Convention; (ii) eliminate any laws that legalize or

[528] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 18.
[529] *Hacienda Brasil Verde Workers v. Brazil,* para 316.
[530] Ibid.
[531] Ibid., para 318.

> tolerate slavery and servitude; (iii) define such offenses under criminal law, with severe penalties; (iv) conduct inspections or other measures to detect such practices, and (v) adopt measure of protection and assistance for the victims'.[532]

In order to comply with the requirement of acting with due diligence, States must adopt an appropriate legal framework, including prevention policies and practices and to apply it effectively.[533]

Turning to the application of these principles to the circumstances of the case, with regard to preventive measures, the IACtHR concluded that Brazil failed to comply with its obligation to prevent the contemporary form of slavery, practice to which workers were subjected in this case, and to act as could reasonably be expected to end that type of violation.[534] In fact, the IACtHR identified some specific measures that are required within the general framework of an holistic approach, including the prevention of risk factors, the reinforcement of State's institutions in order to respond effectively to situations of contemporary slavery and the recognition of the necessity to adopt a set of specific preventive measures in cases in which there is evidence that a certain group of people is vulnerable to slavery or trafficking.[535] In this case, even though it was aware of the degrading, inhuman and abusive conditions of workers in the region of Pará, especially in the Hacienda Brasil Verde, Brazil had not demonstrated that the policies adopted between 1995 and 2000 as well as the inspections conducted by the Ministry of Labour were sufficient and effective to prevent slavery conditions to which workers were subjected. Moreover, also following the report of the two young men filed with the police, the State failed to act with the required due diligence.[536] Furthermore, the IACtHR found that Brazil was in breach of article 6 of the ACHR, in relation to article 1(1) of that instrument, as it failed to acknowledge the vulnerability of the workers owing to the structural discrimination based on the economic status.[537] However, this finding will be further discussed in the following paragraph.

[532] Ibid., para 319.
[533] Ibid., para 320.
[534] Ibid. para 342.
[535] Ibid., para 320.
[536] Ibid., para 328.
[537] Ibid., paras 341 and 343.

Concerning the duty to protect victims, except for being included within the list of comprehensive measures mentioned above, there is not a heading devoted to the matter: protection and assistance are only addressed from the perspective of prevention.[538] Indeed, while it is welcomed that the IACtHR is concerned with the so-called proactive measures, it is not clear why it fails to refer to reactive measures[539] especially considering that the applicants addressed the matter suggesting that Brazil should rescue and provide for the rehabilitation of the individuals subjected to slave labour, informing them on their rights and on the social programmes they might benefit from.[540] With regard to the actions implemented by Brazil in order to eradicate salve labour, the IACtHR acknowledged that the State increased its commitment to measures devoted to prevention and workers rehabilitation and that it enacted a law that secured workers rescued from a forced labour situation or slavery, with unemployment insurances.[541] As pointed out by Valentina Milano except for this latter measure on unemployment benefits, the Court seems to be unable to determine whether there are any general policies, laws, or mechanisms that adequately address the protection and assistance needs of victims, including safety, access to shelter and medical, psychological, social, and legal assistance, protection of their privacy, and access to reintegration programmes.[542] In terms of protection and assistance, the IACtHR only recognizes that in relation to the case of the minor escaped from the cattle ranch, who was subjected to child labour, Brazil should have adopted effective measures to end the situation of slavery and to secure him access to rehabilitation and social integration measures, as well as, to basic education and vocational training.[543]

Finally, turning to the alleged violations of the rights to judicial guarantees and to judicial protection, the IACtHR analyzed first whether the State acted with due diligence and with reasonable time in the criminal proceeding and whether it was provided effective judicial protection.[544] With regard to the first alleged violation, after reiterating that when States are aware of an act that constitutes a violation of article 6 of the ACHR they have an obligation to initiate an investigation *ex officio* in order to determine the individual responsibilities, and that in the particular circumstances of the case, owing to the vulnerability of the Hacienda Brasil Verde

[538] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 21.
[539] Ibid.
[540] See *Hacienda Brasil Verde Workers v. Brazil,* para 464.
[541] Ibid., paras 469 (b, c).
[542] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp. 21-22.
[543] *Hacienda Brasil Verde Workers v. Brazil,* para 333.
[544] Ibid., para 344.

workers and the gravity of the reported situation, an exceptional due diligence was required, the IACtHR concluded that Brazil failed to comply with its duty to act with due diligence as there were significant delays in the criminal proceedings.[545] Concerning the promptness of the proceedings, the IACtHR examined whether the time of the criminal proceedings that lasted almost 11 years, was reasonable and found that Brazil violated the judicial guarantee of a reasonable time, since in absence of impediments, there was no justification for the delay of the criminal proceedings, which eventually impacted on workers' rights to receive a compensation.[546] In relation to the violation of the right to judicial protection the IACtHR found that none of the proceedings opened in 1997, 2000 and 2001 led to the determination of any type of responsibility for the alleged conducts or to a reparation for the harm suffered as none of such proceedings have examined the merits of each issue.[547] In addition, according to the IACtHR the prescription of the criminal proceedings, besides being incompatible with international law, 'constituted an obstacle to the investigation of the facts, the determination and punishment of those responsible and reparation to the victims'.[548] The incompatibility of the prescription of criminal proceedings with international law is the result of the IACtHR understanding of slavery as an international crime[549] while for this conduct to be recognized as such the higher threshold of 'crimes against humanity' must be achieved, and this was not the case of the Hacienda Brasil Verde.[550]

Finally, in regard to reparations the IACtHR established that Brazil should reopen investigations and the criminal proceedings and to repay a sum of US$ 30,000.00 for each of the 43 workers rescued in 1997 and US$ 40,000.00 for each of the 85 workers found during the inspection conducted in 2000.[551]

Although the Court's reasoning in respect to prosecution is appropriate, a significant shortcoming needs to be highlighted.[552] Indeed, while the applicants complained about the fact that the definition of trafficking in human beings under domestic law was not in accordance with international standards, the IACtHR considered that such incompatibility had no consequences for

[545] Ibid., paras 362-364, 367-368.
[546] Ibid., paras 369-382.
[547] Ibid., paras 383, 404.
[548] Ibid., paras 412-413.
[549] Ibid., para 412.
[550] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., p. 25.
[551] *Hacienda Brasil Verde Workers v. Brazil,* paras 485, 487.
[552] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp. 25-26.

the impunity of the offences to which workers in the Hacienda Brasil Verde were subjected.[553] However, as argued by Valentina Milano this finding is highly questionable, first because the grounds on which the IACtHR dismisses the impact of criminalization are unclear and secondly because, regardless of the consequences of a flawed definition of trafficking, proper criminalization of the conducts prohibited under article 6 of the ACHR, must be determined *per se*.[554]

2.2.1 States' duty to address structural causes of exploitation

Within the context of States' positive obligations, the most significant contribution of the IACtHR relates to States' duty to combat structural causes of exploitative practices, especially those related to deep-rooted discrimination. In fact, giving States' duties to respect and ensure human rights, the IACtHR acknowledges that individuals in a position of vulnerability are entitled to special protection.[555] More specifically, it finds that a State may be in breach of international law when,

> 'faced with the existence of structural discrimination, it fails to adopt specific measures with regard to the particular situation of victimization that reveals the vulnerability of a universe of individualized persons.'[556]

Such exposed vulnerability calls for the adoption of specific protective actions that in this case were not adopted as Brazil failed to acknowledge the existence of workers condition of vulnerability.[557] Concerning the 85 workers rescued during the inspection conducted by the Ministry of Labour in 2000, the IACtHR noted that Brazil failed to address the historical causes of discrimination based upon their economic status and illiteracy. In fact, they were all poor, coming from the poorest regions of the country and with no or low rates of literacy.[558] Discrimination on the economic status of an individual is included among the grounds of discrimination prohibited by Article 1 of the ACHR.[559] Accordingly, the Court concluded that Brazil's failure to consider the well-known systemic causes of discrimination and the consequent

[553] *Hacienda Brasil Verde Workers v. Brazil,* paras 456, 458.
[554] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp. 26-27.
[555] *Hacienda Brasil Verde Workers v. Brazil,* para 337.
[556] Ibid., para 338.
[557] Ibid., para 338, 341.
[558] Ibid., para 339.
[559] Ibid., para 335.

vulnerability to trafficking and slavery constituted a violation of article 6 in conjunction with article 1 on discrimination.[560]

The relevance of such contribution lies in the fact that the root causes of trafficking, forced labour, slavery and servitude or more generally of exploitative practices are related to structural inequalities. For example, with reference to the case of domestic work, this means to acknowledge the intersectional basis of discrimination that are at play: gender, race and economic status. All these elements contribute to the creation of structural vulnerabilities to exploitative practices. This of course is not only true for domestic work, but for all those labour categories that like domestic work is particularly affected by high rates of informality, such as the agricultural sector. Thereby, the fact that the Court recognizes States' duty to address the root causes of exploitation is particularly relevant.

The IACtHR, however, fails to acknowledge among the intersectional grounds of discrimination the fact that workers were not only poor and illiterate but also afro descendants, a group of people that in Brazil and in other countries of the region are significantly and structurally discriminated against.[561]

[560] Ibid., para 341.
[561] V. Milano 'Human Trafficking by Regional Human Rights Courts …', cit., pp. 26-27. See also T. Gos, 'Hacienda Brasil Verde Workers v. Brazil: Slavery and Human Trafficking in the Inter-American Court of Human Rights', *Oxfords Human Rights Hub 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/.
[last accessed 12 December 2022].

Chapter 3. Migrant Domestic Workers (MDWs): the case of Romanian women

1 The political and economic context following the end of the dictatorial regime

Romania has a long history of emigration, with one of the largest shares of population living abroad, mainly in other European countries such as Italy, Germany and Spain.[562] In fact, according to the IOM world migration report, in 2020 20% of the people born in Romania were living elsewhere.[563]

Romania became a country of emigration following the profound political and economic transformation it experienced in the 1990s, after the end of the dictatorial regime of Nicolae Ceausescu. Although the transition to democracy and to the market-economy has proved difficult for all countries in the East and Central Europe, the situation of Romania was peculiar in the sense that while all the other countries of the region slowly underwent some reforms, in the last years of the communist regime Romania hardly experienced any change, but on the contrary, it became growingly isolated from the rest of the world.[564] After the Revolution, the newly installed government opted for a slow implementation of reforms, which seemed to be supported by the majority of the population, but in 1996 following the recommendations of the international bodies, new political forces come into power and changed the pace of reforms from low to high speed, recurring to the so-called 'shock therapy'.[565] The structural changes of the post-communist era resulted in a growing unemployment rate within cities and in general poverty.[566] Thus, the transition from the communist planned economy to the market economy led to radical economic,

[562] M. McAuliffe, and A. Triandafyllidou, (eds), *World Migration Report 2022*, (Geneva: International Organization for Migration, 2021), available at https://publications.iom.int/books/world-migration-report-2022. [last accessed 27 December 2022], pp. 88-89.
[563] Ibid., p. 89.
[564] On this see S. Lazaroiu, 'Post-communist transformations in Romania and their effects on migration behavior and ideology', In: W. Heller (ed). *Romania: Migration, Socio-economic Transformation and Perspectives of Regional Development*, (München: Südosteuropa-Gesellschaft, 1998) pp. 36-37. The rest of the chapter focuses on internal mobility processes. For a detailed analysis on the political transformation that took place after the 1989 see D. D. Neve, 'The Political Transformation in Romania since 1989', In: W. Heller (ed). *Romania: Migration, Socio-economic Transformation and Perspectives of Regional Development*, (München: Südosteuropa-Gesellschaft, 1998), pp. 23-35.
[565] S. Lazaroiu, op. cit., p. 37.
[566] D. Sandu, 'Dynamics of Romanian Emigration After 1989: From a Macro- to a Micro-Level Approach', *International Journal of Sociology*. 35 (2005) 3, p. 38 DOI: 10.1080/00207659.2005.11043153.

social and political transformations, which resulted in an unprecedent economic decline.[567] All these factors combined together led to an increasing tendency towards emigration. When the communist regime was overthrown in December 1989, the ethnic minorities living in Romania were the first to leave the country returning to their motherland, followed in the early 1990s by Romanian asylum seekers who emigrated to Canada, the United States, and to some Western European countries owing to the instability resulting from the economic restructuring and the power struggles between the political forces.[568] Although this first phase of migration was characterized mainly by permanent relocation, it was in these early years of the 1990s that many Romanians started to leave the country only temporarily, migrating towards Germany, Israel and Turkey, attracted by possibilities to gain money in the services and construction sectors. In the following years, although the domestic situation began to stabilize, temporary economic workers started migrating towards Western European countries, even if, compared to the previous years, traditional migration routes to Germany and Hungary shifted towards southern European states, such as Italy and Spain.[569] The closing of the many traditional industries in the late 1990s led to an increase in the number of migrants in search for new economic opportunities.[570] This series of elements acted as *push factors* for migration, leaving many Romanian people with no other alternative than migrating. And from what it was noted in the previous chapters, when no alternatives are available it is easier to become vulnerable to exploitative conditions, especially in the context of migration.

2 The EU enlargement process: the entry of Romania in the EU

At the dawning of the 21st century, Romania experienced significant changes in emigration patterns. While it sustained a steady increase in emigration flows between 2000 and 2006, it saw a peak in 2007 after emigration rates more than doubled in the one year-period from 2006 to

[567] M. Marchetti, '«Loro non sanno che pane mangio qui». La migrazione femminile dalla Romania: fattori disgregativi, "doppia presenza", disagi psichici,' *Rivista della Società italiana di antropologia medica*, 41-42 (2016), p, 120, available at https://www.amantropologiamedica.unipg.it/index.php/am/article/view/393/379. [last accessed 29 December 2022].
[568] C. M. Uccellini, ''Outsiders' after accession: the case of Romanian migrants in Italy, 1989-2009', *Political Perspectives*, 4 (2010) 2, p. 74, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a0965854c27ecefa437d58d487ce8d32fcaa93b3, [last accessed 10 February 2023].
[569] Ibid., pp. 74-75.
[570] Ibid., p. 75.

2007.[571] Such transformations were the result of the evolution of the relationship between Romania and the European Union.[572] Formally negotiations for the accession of Romania to the EU opened in 2000 and already in 2002 Romanian nationals were granted free movement within the Schengen area up to 90 days, as the EU decided to lift visa requirements for the entry of Romanian citizens in the EU countries.[573] However, while this agreement resulted in an increase of emigration, owing to the reduction of the migration financial expenses, the ease of movement led mainly to an upsurge in temporary and circular migration, particularly because of the temporal restriction of 90 days. In fact, this period witnessed a growing trend in migrating for a three-month period with the purpose of finding a job in illegal work, such as in the construction and the services sector and to make return by the end of the 90 days period.[574] However, it cannot be overshadowed the fact some people overstayed this period of time, residing illegally on the territory of the host country. As a matter of fact, this pattern was recognized as one of the main features of non-structuralized migration systems in Italy, involving preponderantly Eastern European countries.[575]

The year 2007 represented a turning point in Romanian emigration. In fact, in 2007 Romania entered the EU, a factor which significantly contributed to the peak in emigration rates experienced that year.[576] However, Romanian nationals did not have immediate access to full mobility across the territories of the EU member states, but on the contrary, many countries established a transitional period in order to limit Romanians' access to the labour market.[577] Transitional arrangements, which in any case could not last more than seven years, varied across EU. While a few countries opened their labour markets immediately to Romanian citizens, others only removed restrictions as late as 2014.[578] Moreover, whereas some countries required full work permit arrangements, other member states excluded certain sectors from work permits requirements.[579] Nevertheless, Romanian nationals' free movement within the EU was guaranteed: a factor that

[571] OECD, *Talent Abroad: A Review of Romanian Emigrants,* (Paris: OECD Publishing, 2019), pp. 26 and 74. https://doi.org/10.1787/bac53150-en,
[572] Ibid., p. 72.
[573] Ibid.
[574] C. M. Uccellini, op. cit., p. 75.
[575] G. Sciortino, 'Sistemi migratori irregolari e lavoro domestico', In: R. Catanzaro & A. Colombo (eds). *Badanti & Co. Il lavoro domestico straniero in Italia.* (Bologna: Il Mulino, 2009), pp. 178-180.
[576] OECD, *Talent Abroad …,* cit. p. 74.
[577] Ibid., pp. 72-73.
[578] Ibid., p. 73.
[579] Ibid.

contributed to the soar in the percentage of emigrating people.[580] Although following the financial crisis migration flows diminished by 40%, in the period going from 2009 to 2016 flows were resumed by a novel upward trend, experiencing a rise of nearly 60%.[581]

Overall, joining the EU increased the standards of living in Romania and brought about significant changes that affected a different range of areas, from politics to economics up to the judicial system.[582] An example of the substantial progress made by Romania since it entered the EU is provided by the fact that it met the Cooperation and Verification Mechanism (CVM) commitments. In fact, in the last report issued by the European Commission on the steps taken by Romania in the fight against corruption and on judicial reforms, it was acknowledged that the country implemented significantly all the recommendations directed at it and that owing to this Romania would have no longer been monitored under the CVM.[583] In particular, concerning justice law, Romania was praised[584] for its utmost regard of the opinions issued by the Venice Commission.[585] As rightly pointed out by its president emeritus Giovanni Buquicchio in a conference held in Venice in December 2022, although the Commission's opinions are soft law, conformity to their content is highly taken into account by the EU when considering the applications of the countries wanting to access the EU. Hence, the fact that Romania respected these opinions is certainly a sign of its effort to conduct effectively reforms.

Yet, Romania remains the second poorest country of the EU after Bulgaria, with labour productivity and competitiveness at the lowest.[586] Furthermore, the fact that they became EU citizens covered by most aspects of EU law, did not have an impact on their perception and portrayal by the public opinion, as underscored in the research of Cara Margaret Uccellini.[587] In

[580] Ibid., pp. 73-74.
[581] Ibid., p. 74.
[582] See C. Gherasim, '15 years on: How are Bulgaria and Romania doing in the EU*?', EUobserver,* 25 January 2022, available at https://euobserver.com/rule-of-law/154137, [last accessed 29 December 2022].
[583] European Commission, 'Romania: Benchmarks under the Cooperation and Verification Mechanism are satisfactorily met' *Press release*, 22 November 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7029, [last accessed 29 December 2022]. See also the actual report European Commission, *Report on the Progress in Romania under the Cooperation and Verification Mechanism*, Strasbourg, 22 November 2022, COM(2022) 664 final.
[584] COM(2022) 664 final, P. 7.
[585] The European Commission for Democracy through Law – better known as the Venice Commission, after the city in which it holds its plenary sessions – is an advisory body to the CoE that issues non-binding opinions upon a member state request.
[586] C. Gherasim, op. cit.
[587] See C. M. Uccellini, op. cit., pp. 79-82.

her study conducted on the media's representation of Romanian immigrants in Italy, she concluded that the negative image of Romanians increased after becoming EU citizens.[588] Although *legally* 'insidered' part of the EU community, as far as 2010 they were still treated by the public opinion as outsiders. Although the majority of Romanians emigrated to Italy were employed in the construction and domestic work sector, the Italian media depicted them mainly as criminals, thieves, kidnappers and prostitutes.[589] To this I would also add Romanian women's portrayal as domestic workers: as Perocco argued, in the Italian public discourse as well as in the common perception, female migrants are portrayed either as women within the family, a category that regrettably includes also women employed in domestic labour confirming the fact that this sector is not yet considered as real work (as argued in the first chapter) or as prostitutes.[590] In 2009 the European Parliament expressed its concern on the increasing xenophobia against Romanian citizens owing to the national media representation of Romanian nationals as criminals and considered it unacceptable that the Italian authorities perpetuated this situation, also through statements like 'Romanian citizens are criminals specialized in rape'.[591] This study was only related to Italy, but it can be easily extended to other countries, as it emerges from another study on the anti-migration discourse with regard to Romanians and Bulgarians in France and the Great Britain.[592] Thus, in spite of the fact that they are EU citizens, and as such legal migrants, these waves of xenophobia along the social stigma attached to them exacerbated their vulnerabilities in the host countries.

3 Migration and trafficking in human beings

Migration is intrinsically linked to trafficking in human beings, not least because it increases individuals' vulnerabilities. In fact, most of the identified victims of trafficking in human beings

[588] Ibid., p. 79.
[589] Ibid., p. 82.
[590] F. Perocco, 'L'appartheid italiano'. In: P. Basso and F. Perocco, (eds). *Gli immigrati in Europa. Diseguaglianze, razzismo, lotte.* (Milano: FrancoAngeli, 2003), pp. 224-226.
[591] See R. Weber, 'Increase in xenophobia against Romanian citizens in Italy', *European Parliament*, 9 February 2009, Parliamentary question E-1012/2009, available at https://www.europarl.europa.eu/doceo/document/E-6-2009-1012_EN.html, [last accessed 2 January 2023].
[592] See A. D. Călbează, 'The anti-migration discourse with regard to Romanian and Bulgarian citizens in France and Great Britain: between blame culture, negative stereotypes and prejudice' *Policy Brief* 32 (2014), available at https://silo.tips/download/andreea-doina-calbeaza, [last accessed 11 February 2023].

are migrants in almost all global regions.[593] There are different factors that drive people's decision to migrate, going from individual circumstances to a nation's economic conditions. From a micro-economic perspective, it can be seen that people that find themselves in poverty, unemployed or with low-income levels appear to be more susceptible to trafficking in human beings, as they are willing to accept risky labour conditions in order to improve their situation.[594] From a macro-perspective, instead, it appears that countries in economic distress are the main source of victims of trafficking in human beings. A rise in unemployment rates combined with GDP contractions and low-level incomes, heightens the risk of individuals to be trafficked.[595] However, it is never a single factor to impact victims' experiences: only a combination of both micro and macro factors can provide a comprehensive framework on the *push factors* that exacerbates people vulnerabilities to trafficking. Being a migrant worker as well as a woman are considered to be structural disadvantages that have a multiplier effect on socio-economic vulnerabilities.[596] In fact, although economic needs appear to be the main *push factors* leading individuals to migrate and to fall victims of traffickers, there are several other variables that heighten people's vulnerabilities: along the gender dimension, being part of a dysfunctional family or having mental disorders represent additional challenges.[597]

Romania is one of the principal source countries of victims of trafficking in people for the purpose of sexual and labour exploitation in Europe.[598] It was already seen that the country's economic situation contributed to a significant increase in the emigration rate, up the point that it became the fifth country with the largest share of emigrants living in OECD countries.[599] The collapse of the socialist regime, followed by the rise in unemployment rates and in the cost of living 'forced' Romanian workers to leave the country. Following the global financial crisis of 2008, emigration flows declined, but they were resumed soon after.[600] This might be explained by the fact that while

[593] UNODC, *Global report on Trafficking in Persons 2020, c*it., p. 10. According to these statistics, migrants make up 65% of detected victims in Western and Southern Europe and 60% in the Middle East region, while these percentages are lower in East Asia and the Pacific area (55%), Central and South Easter Europe (50%) and North America (25%).
[594] Ibid., see p. 9 and pp. 69-70.
[595] Ibid., pp. 73-75.
[596] Ibid., pp. 71-72.
[597] Ibid., pp. 70-71.
[598] USA Department of State, 'Romania,' In: *Trafficking in Persons Report*, July 2022, p. 464 available at https://www.state.gov/wp-content/uploads/2022/10/20221020-2022-TIP-Report.pdf, [last accessed 2 January 2023].
[599] OECD, *Talent Abroad* …, cit., p. 27.
[600] Ibid., pp. 74-75.

all countries were affected by global financial crisis, their recovery pace was uneven.[601] Romania was significantly hit by the 2008 economic downturn, resulting in a sharp decline of growth albeit Romania was one of the fastest growing economies in central and eastern Europe.[602] A further economic downturn was provided by the Coronavirus pandemic.[603] Overall, the country seems to have recovered fast enough from both crises, however poverty rates remain high[604], especially in rural areas confirming the growing global tendency to have different rates of growth between regions of the same country. The COVID-19 only aggravated this tendency, heightening the risk of poverty, especially among the most marginalized groups.[605]

Concerning the individual risk factors, that heightens vulnerability to being trafficked when migrating, it is relevant to look at the composition of the emigration flows. Although there are different percentages based upon the country of destination, more than half of Romanian nationals emigrating in OECD countries are women.[606] This gendered segmentation of emigration flows is the result of labour-market opportunities in the host countries.[607] While both men and women are employed in low-skilled occupations,[608] the majority of Romanian women find job opportunities in the domestic work sector,[609] especially in Southern European countries, such as Italy and Spain where the demand for migrant labour in domestic work is rather significant.[610] In addition to gender, which as noted above represents a structural disadvantage – not *per s*e but because of its social devaluation and stigmatization[611]– employment in the domestic work sector increases vulnerabilities to being exploited, as it is a sector highly undervalued, often invisible and informal, characterized by poor working conditions.[612] Moreover, domestic workers vulnerabilities are

[601] UNODC, *Global report on Trafficking in Persons 2020, c*it., p. 74.
[602] IMF, 'IMF Survey: Romania Receives Support from IMF to Counter Crisis', *IMF news*, 4 May 2009, available at https://www.imf.org/en/News/Articles/2015/09/28/04/53/soint050409a, [last accessed 2 January 2022].
[603] OECD, 'Executive summary', In: *OECD Economic Surveys: Romania 2022*, (Paris: OECD Publishing, 2022), available at https://doi.org/10.1787/56780783-en, p. 11.
[604] The poverty rate is around 17.4%. See OECD, 'Executive summary', cit., p. 12, table.
[605] Ibid.
[606] OECD, *Talent Abroad* …, cit., pp. 34-35.
[607] Ibid., pp. 137-141.
[608] Ibid., pp. 130-134.
[609] Ibid., p. 139.
[610] As it will be seen in the last chapter with regard to Italy, the Italian welfare system and the privatization of the care market boost demand for workers in this sector. See G. G. Geymonat, S. Marchetti and L. Palumbo, 'Sfruttamento e riproduzione sociale: donne migranti nel settore agricolo, del lavoro di cura e del lavoro sessuale', In: B. Coccia, G. Demaio and M. P. Nanni (eds) *Le migrazioni femminili in Italia. Percorsi di affermazione oltre le vulnerabilità,* (Roma: Centro Studi e Ricerche IDOS), pp. 151-158.
[611] UNODC, *Global report on Trafficking in Persons 2020, c*it., p. 72.
[612] A/HRC/39/52, para 28.

exacerbated by the fact that the work environment is characterized by deep-rooted power imbalances between employers and employees.[613] Power dynamics however can often be concealed and disguised by telling workers that they are 'part of a family', causing confusion and exploitation.[614] Furthermore, as rightly pointed out by Bridget Anderson, unequal power relations are evident from the fact that employing migrant domestic workers with a different ethnicity, race or religious background enables employers to reinforce the idea that other groups are meant to perform menial tasks for which they perceive themselves as too important to do.[615]

Along migration and its consequent risks and economic needs, several other personal, social and structural factors are to be considered as potentially fostering Romanian women's trafficking.[616] In the following paragraphs, an in-depth analysis of these specific factors of vulnerability will be provided.

3.1 Romanian women's vulnerability

The Romanian society is still full of gender stereotypes that attribute women specific traditional roles, primarily bearing children and taking care of the household.[617] Gender-based violence, especially domestic and sexual violence[618], together with discrimination are an issue in Romania: yet they seem to be tolerated by the society.[619] Although there is a widespread number of victims of domestic and sexual violence, the reported cases are very low, in part owing to the lack of trust in the criminal justice system.[620] In fact, the controversial definition of rape which strongly relies on physical resistance as the expression of lack of consent reveals the existing gender stereotypes concerning what is to be considered a sexual offence, a fact that is aggravated further by the idea that it is women's behavior to lead to sexual violence.[621] The roots of this perception of sexual

[613] ILO, *Making Decent Work a Reality for Domestic Workers …,* cit., p. 178.
[614] B. Anderson, 'Just Another Job? Paying for Domestic Work', *Gender and Development* 9 (2001) 1, p. 31, available at https://www.jstor.org/stable/4030666, [last accessed 11 February 2023].
[615] Ibid., p. 28.
[616] C. Costea, 'The Evolution of Romanian Law and Mechanism in the Fight against Trafficking in Human Beings. A focus on the Situation of Women', *Deportate, esuli, profughe: Rivista telematica di studi sulla memoria femminile*, 45 (2021), p. 86, available at https://www.unive.it/pag/fileadmin/user_upload/dipartimenti/DSLCC/documenti/DEP/numeri/n45/07_Costea.pdf, [last accessed 8th April 2021].
[617] OHCHR, *Visit to Romania. Report of the Working Group on discrimination against women and girls,* 2021, A/HRC/47/38/Add.1, HRC 47th session, paras 62-63.
[618] Ibid., para 68.
[619] C. Costea, op. cit., p. 86.
[620] A/HRC/47/38/Add.1, paras 69 and 74.
[621] Ibid., paras 74-75.

violence are to be traced back to the years in which rape was considered as a fact that could be managed through marriage.[622] Article 197 of the Criminal Code, in force until the year 2000, had the purpose to resolve the conflicts between the aggressor and the victim,[623] preserving in the meantime the possibility of the woman to get married. In fact, virginity was and still is considered one of the main assets that a girl owns in order to get married.[624] As a result, women are 'forced' to marry early and are imposed limitations to their freedom so to reduce the possibility they lose their virginity.[625] Romania is, as a matter of fact, the country with one of the highest numbers of early marriages in Europe, primarily as a result of an equally high number of teenage pregnancies.[626] The factors that contribute to such a high percentage of pregnancies among teenage girls are the lack of sexual education and the scarce access to sexual and reproductive health services.[627] However, this regards especially young girls and women in the rural areas of the country or belonging to marginalized social groups.[628] In most cases, there is an intersection of all these different factors that contribute increasing women's vulnerabilities.

Concerning education, although there has been a reduction in the level of girls' school dropout, it is still one of the highest in Europe, particularly in rural areas and among Roma girls.[629] Education is however considered an important factor that could counter trafficking, as low rates of education represent a factor of vulnerability.[630] In fact, higher levels of education and longer period spent in schools act as protective barriers against human trafficking,[631] and more generally against exploitation. Yet, often vulnerable girls do not perceive education as an asset to achieve success in life or a high status in Romania, owing to the fact that even with a university level education

[622] See C. Costea, op. cit., pp. 86-89.
[623] The last paragraph of article 197 stated that 'the acts provided for in paragraphs 1 and 2, letters a), c), and d) are not punished if before the decision becomes final, it occurs marriage between the perpetrator and the victim'. If the number of perpetrators was higher than one, the marriage between the victim and the perpetrator had the same effect in regard to the other participants. (Translated by the author of this thesis). Original text available at https://lege5.ro/Gratuit/he2demzw/codul-penal-din-1968, [last accessed 12 February 2023].
[624] C. Costea, op. cit., p. 87.
[625] Ibid.
[626] A/HRC/47/38/Add.1, para 77.
[627] Ibid., para 56.
[628] Ibid., paras 56 and 61.
[629] Ibid., paras 44 and 46.
[630] S. Lăzăroiu, 'Trafic de femei - o perspectivă sociologică', *Sociologie Românească* 2 (2000), p. 71, available at https://revistasociologieromaneasca.ro/sr/article/view/1243, [last accessed 29 December 2022].
[631] M. Alexandru, & S. Lăzăroiu, *Who is the Next Victim? Vulnerability of Young Romanian Women to Trafficking in Human Beings.* (Bucharest: IOM Mission in Romania, 2003), available at https://publications.iom.int/system/files/pdf/who_next_victim.pdf. [last accessed 12 December 2022], p. 27.

girls encounter difficulties in getting a job, due to the lack of experience and money or because they do not know the right person that could hire them or help them to be hired.[632] On the contrary, searching employment opportunities abroad is seen positively: listening to the stories of success of emancipated women who previously emigrated, women are pushed to search alternative ways of upgrading their social mobility.[633] To this end they appear to be willing to accept risk, especially the youngest ones, and job offers equally from trustworthy and non-trustworthy people.[634] This tendency is however reinforced also by the fact that these women do not feel close to their families or come from highly dysfunctional families where abuse was involved. From interviews with victims of human trafficking, it emerged that their experiences varied from traumatic events within the family to violence to which they were subjected as victims or witnesses; from the lack of emotional connection to the use and acceptance of corporal punishment as a parenting tool.[635] In particular, with regard to vulnerable girls, it appears that the percentage of physical violence is rather frequent.[636]

Women decide to migrate because of their need of independence from a family that exercise an excessive control on them, a family that include both the parents and the partner. In fact, not rarely Romanian women refer of having abusive husbands that make excessive use of alcohol.[637] Many of these women, however, in deciding to emigrate heavily rely on personal informal networks, which may increase the possibility that the job offers abroad may come from a trafficker.[638] Of course, this is not always the case: compared to men, women often rely on informal feminine networks in order to migrate. Usually, these networks are made of women bounded by some sort of relationship (relatives, friends, nationals) who provide guidance and facilitate the entry into the labour market of other women.[639] However, as it was already noted, combined with other factors, the significant reliance on informal migration networks can heighten the risk of being exploited.

[632] Ibid., pp., 22 and 27-28.
[633] Ibid., pp. 28-29 and 43. See also C. Costea, op. cit., p. 89.
[634] M. Alexandru, & S. Lăzăroiu, op. cit., pp. 17-18 and 22.
[635] L. Aninoșanu, L. Éva, M. D'Amico, and L. S. Gutiérrez, 'Chapter 2. National research reports: Romania.,', In: *Trafficking for sexual exploitation of Romanian Women. A qualitative Research in Romania, Italy and Spain.* (GIRL, 2016), p. 24, available at https://www.cpe.ro/wp-content/uploads/2016/03/Final-qualitative-research-report.pdf. [last accessed 2 January 2023]. For their stories see pp. 24-30.
[636] M. Alexandru, & S. Lăzăroiu, op. cit., pp. 37-38.
[637] M. Marchetti, op. cit., pp. 124-125.
[638] M. Alexandru, & S. Lăzăroiu, op. cit., p. 41.
[639] M. Tognetti Bordogna, op. cit., pp. 104-106.

Being a migrant represents a vulnerability factor *per se*. But when it is combined with other structural factors of gender-based violence, low levels of education, high numbers of early marriages and pregnancies among teenage girls and the presence of dysfunctional families as well as unhappy marriages, vulnerability is reinforced. First, the intersectionality of these factors represents the foundation of the decision to migrate, which in turn exposes women to a further vulnerability, as they might find themselves in a new context where they do not have the necessary instruments to navigate in different social situations.[640] Another element that deserves to be mentioned is the fact that many children are left behind in the country of origin when parents emigrate, exposing them significantly to several abuses, including trafficking.[641]

Against the broader background of Romania's economic situation, these other factors which pertain to the social, cultural, familial and individual levels play a fundamental role in making these women vulnerable to different forms of exploitation, from labour laws breaches to the higher threshold of human trafficking, forced labour, servitude and slavery.

3.2 The increasing number of Romanian traffickers

Another relevant element that contributed to the vulnerability of Romanian women is undoubtedly the general increase in human trafficking in Romania after the demise of the communist regime.[642] The resulting political instability, economic transition and the following progressive free movement across EU, especially after joining the EU provided the fertile ground for the proliferation of organized criminal groups. There is, in fact, evidence of operative mafia-style criminal organizations in Romania, notably the 'Tandarei' mafia – known mainly for trafficking in children – and other unnamed organizations that are involved in both smuggling and trafficking in human beings.[643] These criminal organizations developed widespread networks across the country, controlling entry and exit points and established connections with other foreign organized criminal groups.[644] According to the UNODC global report on trafficking, many of the convicted traffickers in Western and Southern Europe are foreigners, the majority of whom come from

[640] C. Costea, op. cit., p. 89.
[641] A/HRC/47/38/Add.1, paras 3, 68 and 78.
[642] C. Costea, pp. 80-81.
[643] Global Organized Crime Index, *Romania,* 2021, available at https://ocindex.net/assets/downloads/english/ocindex_profile_romania.pdf [last accessed 3 January 2023], pp. 3.
[644] Ibid., p. 4.

South-East Europe.[645] However, it must be noted, that while the region of Central and Eastern Europe is ranked first out of 4 regions in Europe per criminality score[646], Romania is 13th.[647] There are, for example, several others high income countries that present higher scores of criminality than Romania, namely Italy, which is the first out of eight countries in Southern Europe in terms of criminality scores.[648]

Usually, traffickers are Romanian nationals belonging to organized criminal groups based on family or ethnic ties.[649] However, not always traffickers belong to organized criminal groups, but they may act as single individuals, mainly through the use of the 'lover-boy method' to recruit women and girls. In this case, traffickers entice women in romantic relationships with the purpose of exploiting them.[650]

3.3 How are these women recruited?

Traffickers exploit these women's position of vulnerability in order to recruit and exploit them in a different range of abusive activities. The extensive use of informal networks to migrate and to find a job abroad explains partly the fact that most women are recruited by people known to them and not by strangers. According to the Romanian National Agency against Trafficking in Human Beings[651], 73% of the identified victims of trafficking were recruited by people that belonged to the victims' circle of acquaintances, while only 27% of them were recruited by strangers.[652] It appears in fact that women are recruited by friends, lovers, or people who know where to find vulnerable individuals. In some cases, recruiters may belong to the close circle of friends and sometimes be event a member of the family. Moreover, from victims' testimonies it emerged that the percentages of men and women involved were rather similar.[653]

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[645] UNODC, *Global report on Trafficking in Persons 2020,* cit., p. 135.
[646] Global Organized Crime Index, 'Central & Eastern Europe', available at https://ocindex.net/region/central_eastern_europe, [last accessed 12 February 2023].
[647] Global Organized Crime Index, *Romania,* cit., p. 1.
[648] Global Organized Crime Index, 'Romania close comparison with Italy', available at https://ocindex.net/country/romania/italy, [last accessed 3 January 2023].
[649] USA Department of State, 'Romania', cit., p. 464.
[650] UNODC, *Global report on Trafficking in Persons 2020,* cit., p. 44.
[651] Agenţia Naţională Împotriva Traficului de Persoane
[652] Agenţia Naţională Împotriva Traficului de Persoane (ANITP), 'Capitul 2. Descrierea populației victimelor*',* In*: Raport Anual privind fenomenul traficului de persoane în anul 2021, (*București: ANITP ROMÂNIA, 2022), p. 18, available at https://anitp.mai.gov.ro//ro/docs/studii/Raport%20anual%202021.pdf, [last accessed 3 January 2023].
[653] L. Aninoșanu, L. Éva, M. D'Amico, and L. S. Gutiérrez, op. cit., pp. 31-34.

The 'lover-boy' method appears to be increasingly used as a technic to entice victims.[654] It involves finding and approaching young girls, either through social media or by joining their group of friends, and then starting and growing emotional ties with them in order to make victims sentimentally dependent on the trafficker. To this end, traffickers claim their love for the victims and their desire to marry them, although most of the times they are already married. In both cases, they rely on the lack of material means either to marry the victims or to re-build a new life, for which they would need financial resources in a short time. After the victim falls in love with her trafficker, he exploits her emotional dependency on him in order to make her prostitute, manipulating her about the length of this activity.[655]

From the ANITP report, it also emerges that the inadequacy of the use of social networks contributes to the growing vulnerability of victims, as 21% of victims appear to be recruited through internet platforms,[656] confirming the general trend of traffickers to recruit, advertise and exploit victims through the use of digital platforms.[657]

However, while these strategies may apply for all types of exploitation, in trafficking for the purpose of exploitation in the domestic work sector a fundamental role is played by recruitment agencies. The latter, which may range from legal to illegal organizations, are reported to be fraudulent and to lead migrant workers to find job opportunities in extremely exploitative and abusive working situations.[658] The specific case of Romanian women employed and exploited in the domestic work sector will be however, analyzed in depth in the following two paragraphs, with regard to one of the main countries of destination of Romanian migrants, nonetheless one of the countries with the highest demand for migrant domestic workers: Italy.

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[654] ANITP, op. cit., p. 18.
[655] C. Mototolea, 'Research method of human traffic with the „Loverboy" recruitment method', *Acta Universitatis George Bacovia. Juridica*, 7 (2018) 2, pp. 1-2, available at https://www.ugb.ro/Juridica/Issue14ROEN/7._Metodica_cercetarii_traficului_de_fiinte_umane.Cornel_Mototolea.EN.pdf, [last accessed 5 January 2023].
[656] ANITP, op. cit., p. 18-19.
[657] See UNODC, *Global report on Trafficking in Persons 2020,* cit., pp. 119-122
[658] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy*, DemandAT, Country Study No. 5, 2016, available at https://www.demandat.eu/sites/default/files/DemandAT_CountryStudies_5_Italy_Palumbo.pdf, [last accessed 3 January 2023], p. 19.

4 Romanian domestic workers in Italy: a significant presence

The outsourcing of domestic work[659] and the growing significance of transnational migration in care work[660]are increasingly becoming features of the welfare states of European societies.[661] Italy is a case in point of the overall tendency to recruit migrant women workers for elderly care.[662] In fact, according to the estimates of the DOMINA National Observatory on Domestic Work[663], 68,8% of the total workforce in this sector in Italy is represented by migrant workers, predominantly women coming from Romania (24,8%), Ukraine (14,6%), Philippines (10,6%), Moldova (6,2%) and Peru (5,4%).[664] These estimates reveal the predominance of Romanian women working as *colf* or *badanti*[665] in Italy, partly a consequence of the fact that in Italy there is a well-established Romanian community, representing 20,8% of the total migrant population.[666] However, there are some other dynamics that equally contributed to such a significant percentage of migrant workers in domestic labour, pertaining to the structure of the Italian demographics and labour market[667] and to the intersection of different types of regimes: gender, care and migration.[668]

With regard to the first element, as revealed by the IDOS estimates on migration in Italy, migrant workers are segregated into a few labour niches, based upon nationality and gender, a dynamic that have characterized migrants' inclusion in the labour market for decades now.[669] This dynamic has led to scarce possibilities of occupational and social mobility, although many of these migrants have been employed for years. As a result, the rate of migrant workforce in some occupational sectors is particularly high: for example, while normally the average rate is around 10%, in the

[659] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', *Journal of Immigrant & Refugee Studies*, 15 (2017) 2, p. 171, https://doi.org/10.1080/15562948.2017.1305473.
[660] H. Lutz, and E. Palenga-Möllenbeck, 'Care, Gender and Migration: Towards a Theory of Transnational Domestic Work Migration in Europe', *Journal of Contemporary European Studies*, 19 (2011) 3, p. 349, DOI:10.1080/14782804.2011.610605.
[661] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p., 171.
[662] Ibid.
[663] DOMINA is the National Association of Domestic Employer Families.
[664] DOMINA National Observatory on Domestic Work, *Third Annual Report on Domestic Work*, 2021, available at https://www.osservatoriolavorodomestico.it/documenti/annual_report_2021.pdf, [last accessed 1 February 2023], p. 137.
[665] The term 'badante' refers to care assistants, especially those caring for elderly or disabled individuals. The term 'colf' is a more respectful alternative, whose adoption marked a cultural change towards the recognition of domestic work as a valuable profession. See G. G. Geymonat, P. Kyritsis, S. Marchetti, op. cit., pp 34-39.
[666] IDOS, *Dossier Statistico Immigrazione 2022. Scheda di sintesi.* Centro Studi e Ricerche IDOS, 2022, available at https://www.integrazionemigranti.gov.it/AnteprimaPDF.aspx?id=3622, [last accessed 28 December 2022], p. 5.
[667] Ibid., p. 9.
[668] On this see H. Lutz, and E. Palenga-Möllenbeck, op. cit., pp. 350-353.
[669] IDOS, op. cit., p. 9.

case of domestic labour this rate soars to 64,2%.[670] Also, the gendered and racialized stratification between workers, besides contributing to migrants' different inclusion in the labour market, it perpetuates the undervaluation of domestic work, associating it to a job 'naturally' performed by the most marginalized and stigmatized groups.[671] Employers in fact have preferences for certain nationalities based upon stereotypes that attribute to them specific national characteristics such as for example being caring or docile and being good with children.[672] Along this, there is also the general assumption that migrant workers are 'naturally' inclined to perform domestic work.[673] However, Anderson notes that the 'foreignness' of migrant domestic workers can be seen as a sort of strategy that enables employers to confront their discomfort with market relations within the household.[674] In addition to its highly racialized nature, the demand for migrant domestic workers is also deeply gendered, as there is a preference for women in performing these jobs,[675] as a result of the fact that they are considered better at doing it owing to their 'innate' social and emotional competencies.[676] Moreover, delegating domestic and care work to another woman leaves unaffected the gendered division of labour within the household.[677]

As per the second element, there are several factors that contribute to the growing demand of migrant domestic workers: the increasing aging of the European population; the emancipation and the inclusion of women in the labour market in industrialized countries; the cuts on social welfare services; and the migration policies dominated by the needs of the labour market.[678] Domestic work migration can only be explained by the analysis of the three intersected regimes of gender, care and migration. According to gendered cultural norms, women are attributed the responsibility for reproductive labour, but with the entry of women into the market labour in the industrialized countries there has been neither a redistribution of the domestic labour between the members of the household nor state intervention to facilitate this transition.[679] As women had to find ways to

[670] Ibid.
[671] D. Cherubini, G. G. Geymonat, and S. Marchetti, op. cit., p. 12.
[672] B. Anderson, 'A very private business. Exploring the demand for Migrant Domestic Workers' *European Journal of Women's Studies,* 14 (2007) 3, pp. 253, https://doi.org/10.1177/1350506807079013.
[673] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p. 180.
[674] B. Anderson, 'A very private business …', cit., p. 254.
[675] Ibid., p. 251.
[676] H. Lutz, and E. Palenga-Möllenbeck, op. cit., p. 357.
[677] Ibid., p. 353.
[678] Ibid., p. 349 and pp. 351-353. See also, L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p. 173.
[679] H. Lutz, and E. Palenga-Möllenbeck, op. cit., pp. 351-353.

reconcile their personal, work and family lives while the restructuring of the welfare state led increasingly to a market regulation of domestic services, the only available solution appeared to be the outsourcing of domestic work to migrant workers.[680] At the same time, the specific provisions of migration policies, such as the Flows Decree and the Quota system in Italy, have fostered women migration in the domestic work sector. More specifically, these policies combined with the labour market segmentation based on gender, nationality and class significantly impacted on migrant women's occupational possibilities in sectors different than domestic work: indeed, migrants that migrated through different channels than those devoted to domestic work, have found this to be the only available occupational option regardless of their skills.[681]

Within this framework of a gendered and racialized segmentation of the Italian labour market, Romanian migrant women find job opportunities mainly in the domestic work sector. As it was several times underlined, migrant domestic workers often live and work in unacceptable conditions.[682] But the number of cases involving trafficking and extreme exploitation in this sector that have been taken before courts remains low.[683] Yet, it is widely known that women, migrants and domestic workers are categories of people extremely vulnerable to a different range of abuses. Romanian domestic workers are not exempted from these practices, but on the contrary, it appears that most victims of trafficking in human beings for labour exploitation in Italy, are from Eastern Europe and especially from Romania. However, there is no precise data on the total number of victims of trafficking in the domestic work sector in Italy and the available data seem not to correspond to the reality.[684] There are several reasons for this fragmentary data on trafficking. Firstly, the absence of a uniform identification system and of national guidelines on the correct data collection prevents from having clear data on trafficking and hinders NGOs' possibilities to distinguish cases of labour exploitation in the services to the person sector from domestic servitude.[685] Secondly, the hidden nature of domestic work and the lack of inspections in the households makes it difficult to have a precise framework on the dimension of exploitation and

[680] Ibid., pp. 351-352.
[681] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p. 179.
[682] H. Lutz, and E. Palenga-Möllenbeck, op. cit., p. 353.
[683] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p. 172.
[684] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit., pp. 9-10.
[685] Ibid.

abuse that domestic workers have to endure.[686] Thirdly, the absence of occupational alternatives and the need of money to be sent back to their country of origin in order to sustain their families – especially the children they left behind – lead these women to tolerate even extreme exploitation in order not to lose their jobs[687] and thus not to report their situations to the authorities.

Romanian women employed in the domestic work sector are often in a condition of vulnerability. Many of these vulnerabilities, as it was explored above, are related to *push factors* that led them to the choice of migrating. However, these factors are intersected to the *pull factors* in the countries of destination, in which specific labour sectors are depended on migrant workers that are considered exploitable and cheaper. One might think that Romanian migrants, owing to their EU citizenship, would be less involved in informality and invisibility, but paradoxically as shown by the study of Letizia Palumbo and Alessandra Sciurba on Romanian women in the agricultural sector, the very fact that they are EU nationals makes them even more vulnerable to exploitation than non-EU citizens.[688] Indeed, for Romanian workers it is easier to end up working in informal and undeclared situations as in addition to the fact that it is not required a permit of stay linked to an employment contract and to the residency status, their employment is less risky, as employers avoid incurring in the offence of facilitation and exploitation of illegal migration.[689] These vulnerabilities are often aggravated by the fact that many of these women have family responsibilities. As the majority of those working in the domestic work sector are forced to leave their children behind, their priority is to make money to guarantee their children adequate standards of living in the country of origin, irrespective of the severe conditions in which they have to work.[690] In fact, cases of trafficking and labour exploitation in the domestic work sector rely on the abuse of a position of vulnerability.[691] As it emerges from Directive 2011/36 on trafficking in human beings (art. 2(2)) a position of vulnerability refers to 'a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved'.[692] There are

[686] Ibid., p. 18. See also L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit. p. 176.
[687] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit., p. 18.
[688] L. Palumbo, and A. Sciurba, 'Vulnerability to Forced Labour and Trafficking: the case of Romanian women in the agricultural sector in Sicily', *Anti-Traffcking Review,* 5 (2015), p. 100, https://doi.org/10.14197/atr.20121556.
[689] Ibid.
[690] Ibid., p. 101.
[691] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit., p. 2.
[692] Directive 2011/36/EU, art. 2, para 2.

different types of vulnerabilities: intrinsic to the human condition; extrinsic or context-specific vulnerabilities; and pathogenic vulnerability, meaning one that derives from other forms of vulnerability.[693]In this specific case under analysis it is opportune to speak of situational or context-specific vulnerability, as the susceptibility to being trafficked is increased by factors such as poverty, inequalities, discrimination and gender-based violence, but also by membership to a minority group.[694] Applying this to the specific case of Romanian women, it can be seen that their lack of alternatives due to the segregation of female migrant workers in certain market niches, combined with their need for financial resources, forces them to accept working in conditions far from being fair.[695] Also In many instances women working in the domestic work sector are subjected simultaneously to sexual and labour exploitation: indeed, they work excessive hours; they receive no payment or a salary that is below the minimum wages; they are deceived about the real working conditions which end out to be different from those agreed initially; and they are abused physically and sexually[696] as well as verbally and psychologically. These women are often humiliated and discriminated, as it emerges from the interviews with Romanian domestic workers, published on the Italian newspaper *Il Corriere della Sera*, who after having experienced depression, anxiety, panic attacks and insomnia – symptoms that have been linked to the so called 'Sindrome Italia', a social-medical phenomenon affecting migrant women employed in the care sector – returned to Romania.[697] The story of Elena Alexa, 60 years old, reveals the exploitative conditions to which care workers are often subjected. She worked in Verona, had no contract, received only little food and slept in a bed on the hallway with the dogs. She says that she was given only 6 half apples a week – the other halves were for the elder person she was taking care of – and that she was physically attacked and verbally insulted with racist words regarding her nationality. Moreover, although she was employed as a care worker, she was expected to cook, to

[693] F. Ippolito, op. cit., pp. 6-7.
[694] Ibid., p. 87.
[695] L. Palumbo, and A. Sciurba, op. cit., p. 101.
[696] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit., p. 10.
[697] See F. Battistini and F. Giusti, 'Sindrome Italia, nella clinica delle nostre badanti', *Corriere della Sera*, 100 giorni in Europa, available at https://www.corriere.it/elezioni-europee/100giorni/romania/, [last accessed 5 January 2023]. On this topic see also D. Cozzi, 'Legami in diaspora: madri, figli e genere nelle famiglie transnazionali. Alcune riflessioni sulla migrazione delle donne rumene in Italia', *EtnoAntropologia*, 7 (2019) 1, pp. 48-54, available at https://rivisteclueb.it/index.php/etnoantropologia/article/view/303/480, [last accessed 13 February 2023]; V. Redini, F. A. Vianello and F. Zaccagnini, *Il lavoro che usura. Migrazioni femminili e salute occupazionale*, (Milano: FrancoAngeli, 2020), p. 14; and M. Marchetti, op. cit., pp. 131-138.

clean the house, to take care of the children and so forth.[698] Another woman, Gabriela Neculai said that where she worked in Rome she felt like a servant: she was given 700,00 euro per month and never had a day off in ten years. Carmen, 58 years old, told that she could only shower once a week and that her employer checked the food she ate. Furthermore, she was only allowed to heat up water on the radiators.[699]

Looking at other cases reported by Italian newspapers[700], there is the story of a Romanian woman (A) recruited by a 75-year woman (B) as a care worker to be afterwards exploited, humiliated and assaulted because she was 'just a Romanian woman'. She could not receive visits, have a shower more than once a month or use hot water. A was only entitled to a little piece of soap which she had to use both for her hygiene and her clothes. In addition to all this, she was beaten and deprived of her privacy, as all the doors were left open so that B could control her through the cams she installed.[701] In another case, a Romanian woman that previously worked as a care worker for her persecutor's partner, was found by the Carabinieri police forces in a rough cabin, tied to a bed with her 3-year child crying and wearing a tank top. The 29-year woman had been sexually and physically abused for ten years and had two children from the men. The men beat her every day and stitched up her wounds with a fishing wire. The cabin where she was found lacked water and light and was invaded by rats and cockroaches while it appears that the woman was forced to eat expired food.[702]

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[698] F. Battistini and F. Giusti, 'Sindrome Italia, nella clinica delle nostre badanti', cit.
[699] Ibid.
[700] As it was said above, the number of reported cases on exploitation and abuse in the domestic work sector is quite low; this figure is even lower in the case of Romanian women. However, there are some interviews conducted with migrant domestic workers employed in Italy that to a certain extent confirm some of these stories emerged from newspapers. Not all of them amount to trafficking, but they are indicative of the difficulties inherent to the job and to being a migrant woman, as it can been seen from the research conducted by M. Marchetti, op. cit., pp. 131-149. The experiences of migrant domestic workers in Italy are also described by V. Redini, F. A. Vianello and F. Zaccagnini, op. cit., pp. 52-53, 61-62 and 65-69 (although the focus is mainly on Moldavian women working in domestic labour in Italy). Significant for this thesis is the research of L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy*, cit., pp. 9-14, that will be analysed in the following paragraph.
[701] 'Milano, pensionata schiavizza la sua badante romena', *Stranieri in Italia.it*, 24 maggio 2008, available at https://stranieriinitalia.it/attualita/milano-pensionata-schiavizza-la-sua-badante-romena/, [last accessed 5 January 2023].
[702] E. Montolli, 'La badante rumena segregata e schiava: l'incredibile storia di Gizzeria', *GQ ITALIA*. 24 November 2017, available at https://www.gqitalia.it/underground/2017/11/24/la-badante-rumena-segregata-e-schiava-lincredibile-storia-di-gizzeria, [last accessed 5 January 2023].

As these cases demonstrate, migrant domestic workers experience different types of exploitations, ranging from violations of the contract to severe violations of human rights. However, not all cases amount to trafficking. Albeit some of these situations involve serious violations and maltreatment, each case must be analyzed on its own merits, examining whether the three elements of *action*, *means* and *purpose* are present. Furthermore, the situations described above may as well amount to different types of human rights violations, including forced labour, servitude and slavery. Concerning the last case, it could be argued that the woman was held in slavery, as it appears that the conditions to which she was submitted met the criteria characterizing the offence of slavery, as well as those of inhuman and degrading treatment if not torture.[703] In fact, drawing from the interpretation of slavery embraced by the ECtHR in *Rantsev*[704], it appears that the men exercised 'control' over the woman, he *de facto* owned her. To make another example, the case of A exploited by B may amount to trafficking, as B recruited A in a center for unaccompanied migrant women (action), deceiving her about the activities she would have performed (means) for the purpose of exploitation (purpose). However, these are some conclusions that can be drawn from a newspaper article, but in order to identify the requirements of the offence of trafficking, a more in-depth examination is needed. Yet, these cases are relevant since they bring to the surface situations that would otherwise remain hidden.

4.1 An exploitative environment: trends emerging from a fieldwork conducted in Emilia Romagna and Tuscany

While in the previous paragraphs a few examples taken from Italian newspapers were provided, now the trends of exploitation and trafficking in domestic work will be presented, relying on the fieldwork conducted by Letizia Palumbo, between February 2015 and January 2016, in the two Italian regions of Emilia Romagna and Tuscany, where there is a high concentration of migrant domestic workers.[705] The fieldwork included also interviews with migrant domestic workers. Although, as stated by the author, Romanian women represent the largest share of both migrant domestic workers and of people trafficked and exploited in domestic labour, the fieldwork did not

[703] The prohibition of torture and inhuman and degrading treatment is enshrined in article 3 of the ECHR and it is absolute; no derogation to it is admissible. See ECtHR, *Guide on Article 3 of the European Convention on Human Rights. Prohibition of Torture*, 2022, para 2.
[704] *Rantsev v. Cyprus and Russia*, para 280. In this case, the Court updates its appraisal of the definition of slavery, bringing it in line with that provided by the ICTY. See above Chapter 2, paras 1.1.1 and 1.2.1.
[705] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy*, cit., p. 3

regard only Romania women, albeit of course were included, but concerned exploitative practices, including those amounting to trafficking, in the two regions mentioned above.

Concerning recruitment practices, it emerged that migrant domestic workers migrate to Italy either autonomously or through employment agencies. In the first case, they may find job opportunities through different channels, including through word of mouth or by recurring to recruitment agencies. The second circumstance, on the other hand, may lead migrants to find occupational opportunities in exploitative contexts and to incur in debts in order to pay for the fee asked by the agency, a circumstance that increases migrant domestic workers vulnerability. An example is provided by an illegal employment agency that, managed by an Italian man, with the help of some migrant men recruited domestic workers – mainly Romanian nationals – both in their country of origin and those already in Italy. From this study, it emerged that women were told they would have had better job opportunities if they provided sexual services and that they had to pay a fee of €100 for the agency to find them a job. Moreover, these women initially stayed for 15/20 days in the appartements provided by the agency, paying them €10,00 per day and indebting in this way with the agency. A similar case concerned a legal employment agency in Modena, which recruited domestic workers already in Italy. However, workers were paid very little and not consistently and threatened to be fired if they abandoned the situation in which they worked. This agency in a case also refused to pay workers their wages, albeit the families in which they were employed paid them.[706]

Regarding the working conditions, migrant domestic workers experienced different forms of abuse and exploitation, including working long hours, without a day off and with low wages. In some cases, these workers were not even paid a salary, but they only received payments in kind.[707] These women often need a place to stay, as explained by an NGO worker who referred to the case of a woman who was forced to accept having no salary because she had a child and could not find a job.[708] Moreover, as for the cases presented in the previous paragraph, also from this fieldwork it emerged that migrant domestic workers lacked adequate accommodation, as many of them slept

[706] Ibid., pp. 10-11
[707] Ibid., p. 11.
[708] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit., p. 176.

on the floor or in the same room with the person they looked after; could not eat the same food as the other members of the family; and faced constant humiliations. [709]

Particularly affected appear to be live-in domestic workers that, as pointed out above, are viewed at the constant disposal of their employer, as it is difficult to draw a boundary line between working and free time. Furthermore, the absence of inspections increases workers vulnerability due to the power imbalances, a situation that can lead to an escalation of violence and coercion. Other cases reveal situations that involve sexual abuse in addition to labour exploitation.[710]

Fortunately, to deal with the issues of severe exploitation[711] in domestic labour, at the local level were implemented several projects, aimed at protecting and helping domestic workers. Significant is the work done by the municipality of Cesena, which through the project '*Oltre la strada*' had assisted several migrant domestic workers severely exploited, especially from Romania. An interview with the coordinator of the project revealed that due the hidden nature of domestic work the process of identification of exploited victims is difficult and that for this reason the cooperation with different organizations, including Caritas and the Service Support for care work, which may discover cases of severe exploitation represent an extremely valuable resource.[712] However, this is rather the exception than the norm at the national level, which as the coordinator of the project pointed out, is regrettable since situations of exploitation tend to emerge when workers need help to find another job or support with bureaucratic issues.[713] Many of these service agencies, such as the Service Support for care work, however, do not provide assistance on contract issues or help with the selection of domestic workers. However, as the case of a project in the Tuscany region –

[709] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy*, cit., p. 11.
[710] Ibid., pp. 11-12.
[711] As underlined in the first chapter, exploitation is a concept not defined in international law. See *supra* note 121. It can be considered as a continuum along which exist slavery, human trafficking, forced labour, domestic and other forms of servitude as well as slavery like practices. At the other end of this continuum, there is decent work. On this see A/HRC/39/52, HRC, paras 15-16. Given these premises, in this study it is adopted the definition of severe exploitation developed by Maria Grazia Giammarinaro, who considers it 'as including various forms of serious exploitation, not necessarily amounting to a crime, characterized alternatively or cumulatively by harsh or even degrading working and living conditions, low wages, insufficient safety measures, and lack of basic social protections, especially involving migrant women workers.'. M. G. Giammarinaro, 'Understanding Severe Exploitation Requires a Human Rights and Gender-Sensitive Intersectional Approach'. *Frontiers in Human Dynamics* 4 (2022), p. 2, doi: 10.3389/fhumd.2022.861600. In other words, severe exploitation implies severe human rights violations.
[712] Interview with the coordinator of the project 'Oltre la Strada' of the Municipality of Cesena conducted by Letizia Palumbo in March 2015. See L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy*, cit., p. 13.
[713] Ibid.

Pronto badante – demonstrates, even when employers receive some sort of help, as soon as they learn they have to regularize the worker, by registering her/him with the National Institute of Social Security (INPS)[714], they avoid using the service.[715]

Nationally, however, there have been relatively few cases filed before the courts in Italy that featured exploitation in domestic employment and human trafficking, and there have been no convictions for either of these crimes.[716] GRETA noted that statistics on convictions were neither disaggregated by type of exploitation nor included information on the number of convictions resulted in imprisonment and on its length.[717] Furthermore, it was found that many offences that were prosecuted under Article 603bis of the Criminal Code on illegal brokering and labour exploitation, which are easier to prosecute, concerned more serious offences, including placing or holding a person in condition of slavery or servitude (Article 600) or trafficking in persons (Article 601).[718]

5 Conclusion

In this chapter it was analysed the specific case of migrant Romanian women in Italy who for a compounded set of motivations, were able to find occupational possibilities in the domestic work sector. Motivations that result from the intersection of both *push* and *pull factors*. These women's decisions to migrate and to endure in some cases severe forms of exploitation are also linked to the combination of these factors. The aim of this chapter was to provide a comprehensive framework on the *push factors*. However, it is relevant to point that these women are not to be seen just as powerless victims who cannot have consented to their exploitation. In the debate related to trafficking for sexual exploitation emerged two different positions on the concept of consent: on one side it was argued that no woman could ever consent to prostitution; on the other it was promoted the idea that migrant women are provided with their own agency and that their choices and experiences are complex.[719] As Alessandra Sciurba noted, these women are perfectly

[714] Istituto Nazionale Previdenza Sociale.
[715] Ibid., p. 14.
[716] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit., p. 11.
[717] GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, 7 December 2018, GRETA(2018)28, available at https://rm.coe.int/greta-2018-28-fgr-ita/168091f627. [last accessed 25 May 2021], para 254.
[718] Ibid., paras 255-256.
[719] L. Palumbo, and A. Sciurba, op. cit., p. 102.

aware of both the unfairness and the consequences of their acceptance of exploitative conditions.[720] They are forced to make a choice between incomparable goods: on one hand, their choice to migrate is driven by their need to financially sustain their children and provide them with adequate standards of living; on the other hand, instead they are forced to work in domestic labour (as in Italy, even when migrating through different channels, domestic work represents the main occupational option) even in highly abusive and exploitative contexts.[721] This lack of real and concrete alternatives, which denotes a position of vulnerability, makes however irrelevant the consent of the victim to being exploited.[722]

[720] A. Sciurba, 'Vulnerabilità, consenso, responsabilità: alcuni casi di grave sfruttamento lavorativo e tratta delle donne migranti in Italia', *Cosmopolis. Rivista di filosofia e teoria politica. Sezione Schiavitù contemporanee,* 13 (2016) 2, available at https://www.cosmopolisonline.it/articolo.php?numero=XIII22016&id=4, [last accessed 8 January 2023].
[721]Eva Kittay, cited in L. Palumbo, and A. Sciurba, op. cit., p. 102.
[722] A. Sciurba, op. cit.

Chapter 4. The Evolution of the Italian Legislative Framework: an analysis of the effectiveness of the current legislation in combatting exploitation of DWs

1 How is domestic work regulated under national legislation?

In Italy, the first legislation entirely dedicated to the regulation of the domestic work sector was adopted in 1958. Law 339/1958 on the protection of domestic work (*Per la tutela del rapporto di lavoro domestico*) applies to workers whose domestic services are performed for at least 4 daily hours for the same employer. The essential feature of domestic work is that these activities are performed for the well-being of family life. This law is still in force today and it regulates fundamental labor issues such as work placement, employment, weekly rest, working time and rest, holidays, marital leave, seniority allowance, in addition to the establishment of the rights and the duties of both employers and employees. Although law 339/1958 essentially represents the main legal instrument for the protection and the recognition of domestic work, its reliance on the idea that domestic workers are different than other employees excludes them from the guarantee of some rights, including maternity provisions, illness and occupational safety and health[723]. This 'special' treatment that is accorded to domestic workers is related to the workplace where domestic services are performed: the household, a private and intimate sphere far from the tensions inherent to the functioning of 'public' businesses, a factor that contributed to the under-protection of domestic workers compared to that provided to other sectors' subordinated workers[724]. The inclusion of domestic work under the provisions of the Civil Code devoted to the regulation of 'subordinate labour in particular employment relations' is a clear sign of the diverse treatment that is afforded to domestic workers[725].

[723] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy.* cit. pp. 3-4; L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. pp. 3-4.
[724] F. Suardi, 'Il rapporto di lavoro domestico'. In: R. Maioni and G. Zucca (eds), *Viaggio nel lavoro di cura. Chi sono, cosa fanno e come vivono le badanti che lavorano nelle famiglie italiane. (*Roma: Ediesse, 2016), p.248.
[725] Ibid. p. 247.

Law 339/1958 has been integrated by the National Collective Agreement (CCNL), which was signed for the first time in 1974 and renegotiated several times in the years after, most recently in 2020[726]. The collective agreement rules both contractual norms related to workers remuneration, including holidays, minimum wage and the thirteenth month bonus and the legislation concerning the management of the subordinate employment relationship[727]. The most recently renewed collective agreement that covers almost 4 million people, including either employees and employers, sets hourly wages and overtime bonuses as well as night and holiday work; it stipulates a different range of work tasks, completed by the provision of the respective skills and pay levels; and ultimately, it provides for a specific minimum wage to be devoted to live-in domestic workers, from which cannot be detained in kind payments such as housing and board[728]. For example, the collective agreement provides for the maximum working hours: 40 hours per week for non-live-in workers and 54 for live in workers[729]. However, concerning the latter category, the effective working hours exceed the 54 hours per week, giving the difficulty to distinguish free time from working hours and considering that these workers are viewed as constantly at the disposal of their employers.[730]With regard to people in need of continuous assistance, the national collective agreement adopted in 2013 and renewed in 2016 provided for the possibility to employ another worker with restricted costs, in order to provide both adequate assistance to depended people and to cover the rest days of the full-time worker.[731] However, as the study conducted by Letizia Palumbo[732] revealed, this option has been rarely used by employers. On the other hand, concerning the employment of domestic workers on an occasional basis, it was introduced the voucher system, but the main risk of this instrument is that it is used to declare fewer hours than those actually worked, fostering labour irregularity in the domestic work sector[733]. Irregularity, however, seems to be the norm rather than the exception. Compared to the total amount, the average rate of

[726] See DOMINA, *CCNL sulla disciplina del rapporto domestico. Introduzione di Massimo De Luca*. (Oneira S.r.l., 2022), p. 9, available at https://associazionedomina.it/wp-content/uploads/2020/06/Lavoro-domestico-e-book.pdf. [last accessed 16 January 2023]
[727] F. Suardi, op cit. pp. 248-249.
[728] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit., p. 162.
[729] See DOMINA, *CCNL sulla disciplina del rapporto domestico. Introduzione di Massimo De Luca,* cit. art. 14.
[730] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy,* cit. pp. 3-4; L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. pp. 3-4.
[731] Ibid., ibid.
[732] Ibid., ibid.
[733] Ibid., ibid.

undeclared work in the domestic work sector reaches 52.3 points of percentage[734]. Even in presence of formalized labour relations, contracts of 25 hours per week are used to cover full-time labour activities or activities that are performed for a time exceeding the maximum working hours provided by the collective agreement. This form of employment is a structural phenomenon of the Italian society, especially if one considers that it is not limited to irregular migrants, but on the contrary, it also affects regular migrants, EU nationals and Italian citizens[735]. Moreover, the phenomenon of 'under-declared' work is even more difficult to be detected and monitored than 'undeclared' work, owing to the use of seemingly regular contracts[736].

The National Collective Agreement, albeit relevant, presents some limitations: first, in order for it to apply, it is required the adherence of the parties to the contract; in the second place, given the present of a different range of collective agreements, the employer is free to decide to which one to adhere[737].

The resulting general profile of the domestic worker must be viewed in light of the social and cultural context in which it first started to appear: a time in which this figure was strongly linked to care work, associated with the activities performed by women in the household. For this reason, most of the provisions that normally govern other labour sectors, in respect to domestic work seem to be softer if not to completely disappear[738]. In fact, while new provisions on workers' rights are adopted, domestic workers are excluded[739]. In particular, two main elements that pertain to domestic work deserve to be mentioned: the possibility for the employer to end the labour relation anytime and without a specific motivation, with due notice; and the inapplicability of the national

[734] See Osservatorio Nazionale DOMINA, 4° *Rapporto Annuale sul Lavoro Domestico. Analisi, statistiche, trend nazionali e locali*. (Osservatorio Nazionale DOMINA sul Lavoro Domestico, 2022). p. 32, available at https://www.osservatoriolavorodomestico.it/documenti/rapporto_annuale_2022.pdf. [last accessed 16 January 2023].
[735] M. Paggi, 'Lo sfruttamento nel lavoro domestico di cura: dall'invisibilità sociale all'invisibilità giuridica'. In A. Brambilla, P. Degani, M. Paggi and N. Zorzella (eds) *Donne straniere, diritti umani, questioni di genere. Riflessioni su legislazione e prassi.* (Padova: Centro di Ateneo per i Diritti Umani "Antonio Papisca" & Associazione per gli studi giuridici sull'immigrazione (ASGI), 2022). p. 57, availbale at https://www.asgi.it/wp-content/uploads/2022/10/Volume-Completo-Donne-straniere-del-17-10-22-CON-COPERTINA.pdf. [last accessed 16 January 2023].
[736] Osservatorio DOMINA, 4° *Rapporto Annuale sul Lavoro Domestico. Analisi, statistiche, trend nazionali e locali*, cit. p. 31.
[737] F. Suardi, op cit. p. 249.
[738] Ibid., p. 245.
[739] Ibid., p. 248.

legislation on maternal leave, except for those specific provisions that are included in the national collective agreement[740].

Italy is one of the few countries to have both a specific legislation regulating domestic work and a collective bargaining agreement[741]. In fact, several improvements have been made with respect to the legal status of domestic workers. Yet, they still represent a particularly disadvantaged category compared to other workers[742]. This can be seen also from the high rates of informality in the domestic sector, as noted above. The fact that migrant workers represent the vast majority of workers employed in this sector, aggravates further the juridical vulnerability that characterizes these workers conditions[743].

2 The Italian familialist welfare system

Estimates suggest that in Italy are employed 2 million domestic workers, a figure that includes both regular and irregular workers[744]. This high number of employees in domestic labour is indicative of the welfare system model prevailing in Italy, which has been defined as familialist, namely a model that promotes family values and that delegates to the family the duty to perform care work, to provide for the socialization of the children and to deal with the issue of youth unemployment[745]. This model essentially passes on families the responsibility of taking care of dependent family members that are in need of assistance[746]. As emerged from the interviews with Senator Guerra, domestic work is 'viewed as a private issue, even by the Left. There is the idea that once you put families in conditions of economic independency, ensuring them a job, the rest goes without saying. But this is not true because to have a job is not enough. Families need the support of the state in dealing with domestic work issues'[747].

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[740] Ibid., p. 250.
[741] ILO, *Making decent work a reality for domestic workers. Progress and prospects ten years after …,* cit. p. 162.
[742] L. Palumbo, *Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy.* cit, p. 4; L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy*. cit. p.4.
[743] Ibid., ibid.
[744] Osservatorio DOMINA, 4° *Rapporto Annuale sul Lavoro Domestico. Analisi, statistiche, trend nazionali e locali*, cit. p. 93.
[745] F. Scrinzi, 'Migrations and the Restructuring of the Welfare State in Italy: Change and Continuity in the Domestic Work Sector'. In: H. Lutz (ed) Migration *and Domestic Work. A European Perspective on a Global Theme*. (London: Routledge, 2008), p. 33.
[746] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 25.
[747] Ibid. Senator Maria Cecilia Guerra member of the Democratic Party has been Undersecretary of State of Economy and Finance under the Government of President of Council of Ministers Conte from 13 September 2019 to 12 February 2021 and from 25 February 2021 to 21 October 2022 under President Mario Draghi.

The Italian welfare system has always been based on the subsidiary role played by the family[748]. However, while in the 1970s this model was partially challenged in a universalistic way, during the 1980s the familialist component of the welfare system became even more significant[749]. Starting from the 1980s, in fact, owing to the pressure exercised by the international authorities to be competitive, European States were forced to reorganize their welfare systems and to cut public expenditures[750]. Consequently, public services have been privatized and invaded by the typical managerial modes of the private sector; the withdrawal of states from social and sanitary services, encouraged the private sector and non-profit organizations to replace it, while these are the services that should have contributed to the replacement of female free labour[751]. During the 1990s, this model based on the co-participation of the state, non-profit organization and private enterprises underwent some significant changes, that lead to the emergence of a new social market providing domestic services: it relies on limited public expenditure and on largely regulated forms of competition. Within this context, the government provides direct financial support in order to employ care workers, an element that is considered to have fostered the tendency of employers to turn to the informal market[752].

As it was argued in the previous chapter, women's emancipation and their inclusion into the labour market, according to gender-mainstreaming policies, was accompanied by efforts devoted to the elimination of the obstacles to women's reconciliation of work, personal and family lives. While care work is no longer seen as a job 'naturally' performed by women, the neoliberal restructuring of the state is currently leading to the decline of state-provided social services[753]. For example, in Italy the State provides for tax benefits for those employing a domestic worker[754]or cash benefits – including accompaniment allowance, care allowance and cash benefits for assistance services –

[748] DOMINA, *The Value of Domestic Work. The Economic and Social Role of Employer Families. Dossier 5. Welfare policies in support of employer families: a European comparison*. (Rome: DOMINA and FONDAZIONE LEONE MORESSA, 2017), p. 28, available at https://associazionedomina.it/wp-content/uploads/2017/12/Domestic-work-Associazione-DOMINA_05-EN.pdf. [last accessed 17 January 2023].
[749] F. Scrinzi, op cit. p. 33, note 9.
[750] Ibid, pp. 33-34.
[751] Ibid.
[752] Ibid.
[753] H. Lutz, 'Introduction: Migrant Domestic Workers in Europe'. In: Lutz, H. (ed) *Migration and Domestic Work. A European Perspective on a Global Theme*. (London: Routledge, 2008), p. 5.
[754] See for further information INPS, 'Contributi e agevolazioni fiscali per chi assume un lavoratore domestico', 2021, available at https://www.inps.it/prestazioni-servizi/contributi-e-agevolazioni-fiscali-per-chi-assume-un-lavoratore-domestico. [last accessed 18 January 2023].

for dependent elderly or people with disabilities or ultimately for the so-called real services, that next to domestic assistance services, residential services or semi residential services, provide support for informal care services, that go from relative caregivers to family assistants. [755] These initiatives encourage the development of home-based services, where assistance and domestic help can be bought thorough the market[756]. However, to employ a domestic worker is expensive for most people: for example, in Italy the cost of a domestic worker (level CS – assistant to dependent people – not trained) cost a family around 16 thousand euros per year, a cost that only 8% of pensioners can afford[757]. In this context of lack of efficient public interventions and the extreme reliance on the 'do it yourself welfare'[758], the role of low-cost migrant labour is increasingly significant. While there is an increasing need of assistance and care, many families cannot afford to legally employ a live in domestic worker; thus, migrants' cheap labour became more desirable[759]. It is evident that the economic element is pivotal in the decision to turn to cheap and exploitable migrant domestic workers. At the same, however, it must be noted that this decision has been fostered also by migration policies, that led to female migrant workers' segregation into domestic labour, providing the Italian familiastic system with cheap and exploitable migrant labour force.[760]

2.1 Migration policies and the quota system

Until 1990, when it was issued Law 39/90, Italy lacked a comprehensive body of legislation on migration, which continued to be regulated by the Single Text of the Laws of Public Safety of 1931 which was based on the assumption that 'foreigners' were internal enemies that needed to be controlled[761]. The cause of the absence of a general political line on migration can be attributed to the fact that until the mid-80s immigration was not seriously considered by the public debate. In fact, it was only in the 1990s, that the flow of migrants towards Italy started to become more visible

[755] DOMINA, *The Value of Domestic Work …,* cit. pp. 24-26.
[756] A. Gavanas and F. Williams, 'The Intersection of Childcare Regimes and Migration Regimes: a Three- Country Studies' In: H. Lutz (ed) *Migration and Domestic Work. A European Perspective on a Global Theme*. (London: Routledge, 2008), p. 14.
[757] DOMINA, *The Value of Domestic Work …,* cit. p. 28.
[758] Ibid. p. 30.
[759] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* p. 24. Interview with Senator Guerra.
[760] Ibid.
[761] F. Perocco, 'Racism and New Inequalities in Contemporary Italy'. In: D. Costantini, F. Perocco, L. Zagato (eds), *Trasformazioni e crisi della cittadinanza sociale*. (Venezia: Edizioni Ca' Foscari – Digital Publishing, 2014) pp. 295.

favoring the entry of immigration into the public debate and its consequent politicization[762]. Moreover, the increasing visibility of migrants was accompanied by growing episodes of intolerance and racism[763]. This discriminatory system that pervaded and pervades migrants' lives is the outcome of three different structures of social stratification, namely the labour market, the legislation on migration and the depiction of migrants by the mass media[764].

Concerning the legal system, Law 39/1990 designed the structure that in the following years would have been followed by subsequent regulations. These policies increasingly encouraged a circular migration, featured by scarce possibilities for migrants to integrate and to settle in the destination country, a factor that contributed to the availability on the labour market of cheap and exploitable migrant labour force. The outcome of these regulations on migration was the creation of subordinated workers.[765]In particular, Law 39/1990 introduced the periodical flow decrees, the existence of an employment relationship as a precondition for the entry into the country and the delegation to the employer of the initiation of the procedures for the authorization of entry into the country[766]. With regard to the Flow Decrees, their introduction essentially meant that these were the only available regular channels to enter Italy for work purposes. Giving that for many years these legislative instruments were never issued, or when they were, they only provided for a very low number of entries albeit the demand for migrant labour force was particularly high, it is clear that the outcome of the Flow Decrees was the mass production of irregular migrants. In fact, while the legal system closed the entrance door, migrants were forced to go through illegal channel. The only opportunity for irregular migrants to regularize their status was provided by the amnesty (*sanatoria*) or by the issue of a Flow Decree, which in reality turned out to be an amnesty in disguise.[767] As a matter of fact, when the Flow Decrees were issued, they were basically used to regularize the legal status of those migrants already on the territory of Italy, instead as opportunities to recruit other migrants in their country of origin. In fact, considering the Italian context made predominantly by small or medium size enterprises and governed by low-skilled services and the

[762] E. Salis, *Labour migration governance in contemporary Europe*. *The case of Italy*, (Turin: FIERI Working Papers, 2012), pp. 3-4.
[763] Ibid.
[764] F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit. p. 292.
[765] Ibid., p. 296.
[766] Ibid.
[767] Ibid.

underground economy, this nominal system of recruitment proved to be unfeasible[768]. Consequently, employers ultimately used the Flow Decrees and the amnesties to regularize the status of those migrant workers that were already providing services for them. Concerning the last novelty of this law, namely the authorization of the employer to request the residency permit for the entry of an immigrant, essentially deprived the migrant worker of its legal subjectivity.[769]

Although these first legislative attempts proved to be highly ineffective, their general principles inspired the subsequent legislation on labour migration[770]. In particular, the Consolidated Act 286/1998, based upon Law 40/1998, and known as law Turco-Napolitano was the first comprehensive legislation on the management of migration towards Italy. Most importantly, this was the first time that it was acknowledged and recognized the structural nature of immigration.[771] Although Law Turco-Napolitano introduced fundamental elements related to migrants' integration, it nonetheless created subordinated workers, whose inclusion based on illegalization and social and labour precariousness was ultimately institutionalized.[772] Indicative of this process of social subordination of migrant workers was the introduction of a bond between residency permit, employment relationship and housing[773] and the provisions of differentiated rights for documented and undocumented workers.[774] The tripartite structure of the residency permit, which will be further tightened by Law 89/2002, essentially resulted in the institutionalized precariousness of migrant workers lives: indeed, even if migrants held a residency permit for work purposes, once lost one of the other requirements, namely housing and work contract, automatically they fall back into the condition of undocumented workers, losing access to the rights they were entitled to before.

The legislative instruments adopted in the '90 paved the way to the anti-immigrant policies adopted in the years after and that still regulate migration matters in Italy. In this sense, it deserves

[768] Ibid.
[769] Ibid.
[770] E. Salis, op cit., p. 10.
[771] Ibid., pp. 10-11. See also F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit., p. 296.
[772] F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit., p. 296.
[773] Presidente della Repubblica, *Decreto Legislativo 25 luglio 1998, n. 286. Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, 18 agosto 1998, Gazzetta Ufficiale n. 191, Supplemento ordinario n. 139, 1998, Art. 5 bis.
[774] F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit., p. 296. From the text of the Consolidated Act, it can be determined that migrants are entitled with rights only to the extent they are 'regularly' residing in Italy or in the words of Perocco, if they are 'documented'.

a special mention Law 189/2002 better known as Law Bossi-Fini, which became a sort of model for anti-migration policies in Europe[775]. The overall strategy that served as the basis for this new law aimed, on the one hand, at increasing the effectiveness of the mechanisms devoted to the regulation and suppression of unauthorized and clandestine immigration while, on the other hand, at limiting opportunities for immigrants to enter Italy legally and to stably integrate[776].

Within this framework migrants are welcomed as long as they are functional to the economic needs of the country. The highly restrictive norms introduced by law Bossi-Fini, including ironing the bond between residency status, employment relationship and housing, had the effect of producing a mass of illegality. Under the slogan of 'zero immigration', the real outcome of these policies has been 'immigration with zero rights'[777]. That is because the rationale behind this policy was not to block definitely the entry of immigrants in Italy but to make this process more difficult[778].

The Flow Decrees and the establishment of annual quotas are procedures of quantitative selectivity, combined with some elements of qualitative selectivity, based on the annual determination of ceilings to new entries, according to the existing labour market shortages and to some specific characteristics related to the type of job and immigrants' personal features. With regard to the first element of selectivity, the government examines the demand for foreign labour and based upon the results, it determines the number of immigrants that are enabled to enter the country. However, it is worth pointing out that especially during the first years of the Flow Decrees, these estimates did not correspond to the actual demand of migrant labour force, because ultimately the final decision on the number of workers to be admitted was the outcome of a political choice, as a result of authorities' concern with the public opinion.[779]

Concerning the second element of selectivity based on qualitative elements, quotas are based on the type of employment, namely seasonal, non-seasonal and self-employment. Since 2005, a

[775] P. Basso and F. Perocco, 'Gli immigrati in Europa'. In: P. Basso, and F. Perocco (eds) *Gli immigrati in Europa. Diseguaglianze, razzismo, lotte. (*Milano: FrancoAngeli, 2003), p. 18.
[776] E. Salis, op cit., p.7.
[777] F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit. p. 297.
[778] For a more in-depth analysis of the process of institutionalized precariousness of immigrants in Italy see P. Basso and F. Perocco, 'Gli immigrati in Europa', cit. pp. 18-22; F. Perocco, 'L'apparthеid italiano'. In: P. Basso and F. Perocco, (eds). *Gli immigrati in Europa. Diseguaglianze, razzismo, lotte.* Milano: FrancoAngeli. pp. 211-233.
[779] E. Salis, op cit., p. 15. From the fieldwork conducted by the author, it emerged that in fact although the technical elements were considered in the definition of the quotas, the final decision was strongly influenced by the political concerns. One interviewee said that authorities are not really concerned with the actual impact of quotas but rather with the impact on the public opinion.

growing share of the non-seasonal quota has been devoted to the domestic work sector, up to the point of representing the main relevant quota in 2008. It went from 15.000 slots occupied in 2005 to 105.000 of 2008[780]. In the last decade however, there has been a general lowering of the maximum number of workers for non-seasonal employment, resulting in the necessity to regularize migrant workers *after* the Flow Decree has been issued. To be sure, this is a consequence of the fact that the quotas are far from corresponding to the actual demand: only in 2021 for a quota set at 69.700 slots, the actual demand amounted to 215.000[781]. Secondly, in addition to the type of employment, quotas are based on specific personal features, in particular nationality. Special quotas are in fact provided for the entry of a certain number of certain nationalities. While quotas may be the result of bilateral and international agreements, the fact that those nationalities are excluded from the general quotas in reality turns out to be a sort of penalty for them. In fact, these numbers in some cases were too narrow for some of the largest communities, such as Moroccans and Albanians[782]. Finally, another element of discrimination between migrants has been introduced by Law Bossi-Fini, which provided special quotas for descendants of former Italian emigrants[783]. With this regard, Council of Ministers' President Giorgia Meloni during the 2018 electoral campaign asserted that the demand for migrants can be satisfied with migrants coming from Venezuela giving the high rate of Italian descendants in the country and the cultural background that they share with Italians[784]. However as pointed out by Perocco, the principle behind these migration policies is the racial-cultural selection that considers that culture can be conveyed just by being a descendant of a certain nationality, as in the meantime both the emigrated population and the Italian context have not changed.[785]

Today, this procedure does not no longer regard Romanian migrants, following their accession to the EU. But it did for several years. However, the general tightening of migration policies does not impact only on the lives of undocumented migrants, instead it affects 'integrated' and 'acceptable'

[780] Ibid., p. 17.
[781] See IDOS, op. cit. p. 5.
[782] E. Salis, op cit., pp. 18-19.
[783] Presidente della Repubblica, *Legge 30 luglio 2002, n. 189. Modifica alla normativa in materia di immigrazione e di asilo,* 26 agosto 2002, Gazzetta Ufficiale n. 199, Supplemento Ordinario n. 173, Art. 17 (b). It is worth noting that this article has not been modified and it is still in force.
[784] See for example 'Giorgia Meloni e la proposta di prendere gli immigrati in Venezuela' *Stranieri in Italia.it,* 25 agosto 2022, available at https://stranieriinitalia.it/attualita/giorgia-meloni-e-la-proposta-di-prendere-gli-immigrati-in-venezuela-video/ [last accessed 21 January 2023].
[785] F. Perocco, 'L'appartheid italiano', cit. p. 216.

migrants as well. In fact, according to Perocco the social dynamics related to migration issues are in reality anticipatory of the wider dynamics that will include part of the Italian society in the future. With regard to Law Bossi-Fini, he argued that the desirable outcome of this policy is in reality the general lowering of the salaries to be achieved by making migrants precarious at most[786].

From the framework descripted above, a few elements need to be highlighted. Firstly, it must be noted that the adoption of restrictive policies – in spite of the open anti-immigration stance of the Centre-Right governments in office between 2001-2006 and 2008-2011 – was accompanied by two major regularization programs, one in the period after the enforcement of law 189/2002 and one in 2009. In particular, in 2002 there was a massive regularization opened to domestic and care workers, where most of the applications regarded Romanians (20.4%)[787]. The extended recurrence to the ex-post regularization practice was the result of a quota system that proved to be highly inadequate, especially because of the provisions concerning the recruitment of a worker in the country of origin, through the nominal call[788]. Employers had difficulties in employing a domestic worker that they have not met. Owing to this, employers often recruited illegal migrant workers already in Italy and then regularized them through the use of quotas. However, the situation has changed in the last years, as there have been no real quotas for migrant domestic workers in Italy, making it difficult both the process of migration through the channels devoted to domestic work and the regularization of those undocumented workers already living in Italy. This increased migrant workers vulnerability[789]. The second point that is worth to be mentioned is that the possibility of being charged with the offence of facilitation and exploitation of illegal migration led to the employers' preference to recruit EU nationals, mainly Romanian. There are different reasons for which Romanian nationals are more desirable, not least because of the general idea that they are 'naturally' good at performing domestic work, especially care work, as it was argued in the previous chapter. But the huge informality that affects the sector combined with employers' perception that as these workers come from situations of poverty, they should just be grateful to the employer for giving them a job, in spite of all the things they have to endure[790], increases

[786] Ibid., p. 223.
[787] E. Salis, op cit., pp. 30-31.
[788] See F. Perocco, 'Racism and New Inequalities in Contemporary Italy', cit. p. 296, with regard to the provisions introduced by Law 39/1990.
[789] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 6
[790] L. Palumbo, 'Exploiting for Care: Trafficking and Abuse in Domestic Work in Italy', cit., p. 181. This is what emerged from an interview with a Trade Union.

workers' vulnerability even if they are not irregular migrants. Interestingly, employers seem to adopt some techniques of neutralization of their responsibility, in order to justify their right to exploit domestic workers.[791] Finally, the decrease in the maximum number of entries for domestic work can be explained by the combined effect of different factors. First, the government's concern with the public opinion. In fact, the anti-migration campaign of the Centre-Right government relied heavily on reducing the number of migrants. Indicative of a further harshening of migration policies, which however proved to be ineffective in diminishing the number of arrivals in Italy, was the adoption of the Safety Decrees. The use of the term safety recalls the Single Text of the Laws of Public Safety of 1931 where foreigners were treated as enemies. Secondly, this decision might have been affected also by the presence of EU nationals, mainly Romanian, that can perform domestic work and that are as exploitable as non-documented workers. As a matter of fact, the employment of EU nationals in the domestic work sector did not diminish cases of severe exploitation but on the contrary, it allowed employers to refine their techniques adopting more sophisticated instruments, including the use of 'gray' area of work in order to reduce the possibilities of being sanctioned and workers' claims.[792]

3 Articles 600, 601 and 603-bis of the Criminal Code related to Trafficking and Labor Exploitation

Following the ratification of the United Nations Trafficking Protocol[793], the Italian government adopted Law No. 228/2003 on *Measures against trafficking in Human Begins* amending Articles 600 (placing or holding a person in a position of slavery), 601 (Trafficking in human beings) and 602 (purchase and sale of slaves) of the Criminal Code. In 2014 in order to implement the provisions of Directive 2011/36/EU, it was adopted the Legislative Decree 24/2014 on the *Prevention and Suppression of Trafficking in Human beings and Victims' Protection*, which amended further Articles 600 and 601 of the CC. Finally, Legislative Decree 21/2018 modified

[791] Ibid.
[792] P. Degani, 'Domestic/Care Work and Severe Exploitation. The Limits of Italian Migrant Regularization Schemes', *Frontiers in Human Dynamics* 4 (2022), p. 9. doi: 10.3389/fhumd.2022.818351.
[793] The Palermo Protocol was signed in 2000 and ratified in 2006. See the UN status of treaties available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18.

Article 601, by adding two paragraphs and Article 601-bis (trafficking of organs removed from living persons), which was introduced only in 2016.[794]

With regard to slavery, Article 600 of the CC reads as follows:

> 'Whoever exerts on any other person powers and rights corresponding to ownership; places or holds any other person in conditions of continuing subjection, sexually exploiting him/her, imposing coerced labour or forcing said person into begging, the performance of activities deemed unlawful or exploiting him/her in any other way, or to consent to organ removal shall be punished by imprisonment from eight to twenty years.
>
> Placement or maintenance in a position of slavery occurs when use is made of violence, threats, deceit, or abuse of power, or when anyone takes advantage of a situation of vulnerability, of physical or psychic inferiority and poverty, or when money is promised, payments are made or other kinds of benefits are promised to those who are responsible for the person in question.'[795]

Initially, the notion of 'taking advantage of a situation of vulnerability' did not include the terms 'of vulnerability', which have been introduced only following the amendments made by Legislative Decree 24/2014. However, it is worth noting that the latter Decree has not provided a definition of 'position of vulnerability' as it is instead required by the Trafficking Directive, a significant weakness of the implementation of the Trafficking Directive. Nonetheless, the most problematic issue related to this article concerns the difficulty in determining the meaning of 'continuing subjection' which heavily impacts on the possibility to convict alleged offenders under

[794] Trafficking for the purpose of organ removal is criminalized under article 601 of the CC. In 2016, however, Law 236/2016 added a second article, namely article 601-bis, criminalizing trafficking of organs removed from living persons.

[795] Unofficial translation provided by the Italian authorities to GRETA for the 2014 Report on the implementation of the Trafficking Convention by Italy. See GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, Strasbourg, 2014. GRETA(2014)18, p. 19, para 46 available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631cc1, [last accessed 22 January 2023].

Article 600.[796] As it emerges from the Court of Cassation caselaw, the requirement to be met in order for an offence to be identified as a breach of Article 600 of the CC is to significantly compromise an individual's ability of self-determination[797]. To prove the condition of continuous subjection is however quite difficult; consequently, several cases of serious exploitation have been prosecuted under different articles, such as Article 572 of the CC (Abuse in Family) or under Article 629 of the CC (Extortion)[798]. In addition, concerning cases of severe labour exploitation, in Italy there has been a tendency to prosecute these offences under the provisions related to the facilitation of irregular migration and those regarding the penalties to be imposed upon employers recruiting irregular migrant workers, namely Articles 12 and 22 of Law Turco-Napolitano, whose aim was to combat irregular migration.[799] In fact, these provisions for example are ineffective in dealing with cases of labour exploitation that involve EU nationals, especially Romanians or regular migrants. In these cases, in addition to Articles 600 on slavery and 601 on trafficking in human beings, the only available provision to address severe labour exploitation is Article 603-bis of the CC regarding 'illegal brokering and labour exploitation'[800], introduced in 2011 by Law 148/2011 with the aim of combatting labour exploitation of migrants and amended 2016 by Law 199/2016 devoted to the fight against undeclared employment, exploitative labour in the agriculture sector and to the realignment of the wages in the agricultural sectors[801]. Compared to the first version of this article – which albeit representing a positive development in combatting labour exploitation, was criticized for being directed only to the punishment of intermediaries but not to abusive employers[802]- the newly formulated provision criminalizes labour exploitation

[796] Ibid., para 47. See also L. 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*. (Badia Fiesolana: European University Institute, 2016), pp. 5-6.

[797] See Cassazione sez. penale, Sez. V, judgement of 18 November 2010, no. 2775. Merits, para 3; Cassazione sez. penale., Sez. V, judgement of 24 September 2013, no. 44385. Merits para. 3; Cassazione sez. penale., Sez. V, judgement of 16 May 2017, no. 42751. Merits, para 1.1. See also the analysis provided by L. 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*, cit. p. 6 and L. Palumbo, 'Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy', cit. p. 14.

[798] L. Palumbo, 'Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy', cit. p. 14.

[799] Ibid.

[800] GRETA's translation. GRETA(2018)28, cit. p. 9, para 22.

[801] Ibid.

[802] It was pointed out by civil society organizations that the so-called *caporalato* was only a form of labour exploitation, and that the risk was that with the emphasis on the *caporali* and intermediaries, there was not adequate punishment for the exploitative employers that recruited workers without the help of intermediaries. See Amnesty International, *Exploited Labour. Migrant workers in Italy's agricultural Sector*. (London: Amnesty International, 2012), p. 35.

regardless of the intermediation of a broker and makes it punishable by between one to six years of imprisonment in addition to a fine that may amount between 500 to 1000 euros. Furthermore, Article 603-bis as amended by the Legislative Decree 109/2012 (Rosarno Law) introduced three aggravating factors, including submitting the exploited workers to particularly dangerous situations. As it was already seen above, according to the last GRETA report offences under article 603-bis are easier to prosecute than under Article 601; the main issue is that however many of the offences that are prosecuted under Article 603-bis concern more serious offences that might amount to trafficking in persons or to slavery. For this reason, GRETA urged the Italian government to take measures to effectively investigate and prosecute trafficking in human beings.[803] It is worth noting that aside Article 603-bis, there is no provision criminalizing forced labour. However, concerning the employment of irregular migrant workers, Article 22 of Legislative Decree 286/1998 made it punishable by imprisonment the employment of irregular migrants. This article has been subsequently modified by Decree 109/2019 – transposing Directive 2009/52/EU related to the penalties to be applied to employers recruiting irregular migrants – by introducing aggravating circumstances, such as for example when the number of recruited irregular migrants is more than three. The main problem with this provision lies in the fact that it aims at combatting migration instead of protecting migrants from exploitation.[804] Furthermore, concerning the implementation of Directive 2009/52/EU, it was not adequately transposed: for example, for the offence to take place it was required a number of recruited workers higher than three, because otherwise many Italian families employing domestic workers would have risked imprisonment[805]. In this way – in addition to the dominant belief that migrant workers must be grateful to their employers for providing them with a job and to the fact that domestic workers' employers often do not perceive themselves as such – it was strengthened the sense of impunity of domestic workers employers[806].

With regard to trafficking in persons, Article 601 reads as follows:

> 'A term of imprisonment of from eight to twenty years shall be applied to whoever recruits, introduces into the territory of the State, transfers even

[803] GRETA(2018)28, cit. pp. 61-62, paras 255, 256, 259.
[804] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 35.
[805] Ibid., p. 26.
[806] Ibid., pp. 25-26.

> outside said territory, transports, yields authority over a person to another person, offers lodging to one or more persons who are in the conditions specified in Article 600, or performs the said conducts against one or more persons by deceit, violence, threats, abuse of authority or taking advantage of a situation of vulnerability, or of a weaker physical or psychic condition or a condition of need, or by promising or giving money or of any other advantage to the person having control over that person, for the purpose of inducing or forcing him/her to perform work, sex or to beg or, in any case, to perform unlawful activities entailing his/her exploitation or removal of organs.
>
> The same penalty shall apply to whoever, even without using the means provided for in the first paragraph, performs conducts set forth therein against a minor.'[807]

The Italian government has brought the definition of trafficking closer to the international one included in the Palermo Protocol, and thus in the Trafficking Convention and Directive 2011/36/EU. The definition provided in Article 601 as amended by Legislative Decree 24/2014 now includes the *action* (namely introducing someone in the territory, transfer, transport, yielding authority and offer lodging), the *means* (namely deceit, violence, threats, abuse of authority, taking advantage of a situation of vulnerability, or of a weaker physical or psychic condition or a condition of need, promising or giving money or of any other advantage to the person having control over that person) and the *purpose* (namely work, sex, begging, unlawful activities entailing exploitation or removal of organs)[808] as required by the international provisions and in accordance with the evolutionary interpretation of the ECtHR of the offence of trafficking. However, it is worth noting that the words 'receipt' and 'abduction' are not explicitly mentioned.[809] Although the Italian authorities justified this absence by stating that the term 'receipt' is translated into Italian with the term 'hospitality' – which includes a plurality of behaviors, including hosting or welcoming a person victim of trafficking, even if only for the purpose of transferring him or her under the dominion of someone else[810] – and that 'abduction'

[807] GRETA(2018)28, cit., p. 56, para 224. Unofficial translation.
[808] L. 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*, cit. p. 6.
[809] GRETA(2018)28, cit., p. 57, para 225.
[810] Ibid., Annex 1, pp. 2-3.

is covered by Article 601 as the actions included in the article imply the deprivation of the victim's personal liberty, GRETA still encouraged the Italian government to explicitly refer to these terms in Article 601 of the CC.

Another element not explicitly mentioned in Article 601 of the CC is the irrelevance of consent. Although the Italian authorities stated that the given consent of a victim has no legal validity, nonetheless GRETA observed that having it explicitly mentioned can improve its use by the investigators, prosecutors and judges and to promote a more consistent approach[811]. The Italian authorities' argument however seems to be in conflict with the decision of the Court of Appeal of Assizes of 2014[812]. The case involved a Roma girl from Kosovo who was arranged a marriage with a Roma boy living in Italy. Besides being illegally transferred to Italy and forced to have sexual intercourse with her spouse, she was also obligated to perform domestic activities for the family, in addition to being sexually abused by her father-in-law[813]. Both the Court of Assizes and the Court of Appeal rejected the allegations of trafficking in human being based on the fact that the girl consented to move to Italy in order to join her spouse. In doing so, it is evident that both Courts did not take into account the principle of irrelevance of consent and failed to consider that being she a minor the consent is never relevant[814]. Moreover, although it might be argued that at the time the decisions were adopted, Directive 2011/36/EU[815] has not yet been implemented, the irrelevance of consent is underlined in the CoE Trafficking Convention[816] as well. Finally, the last element that has not been included in Article 601 is the definition of position of vulnerability, as it was argued above.

The exclusion of these two fundamental notions from the meaning of trafficking in human being impacts significantly on the efficacy of Article 601 in dealing with cases involving new forms exploitation, where many of the exploited workers often have no alternatives than to subject to exploitation[817], as it was seen in the cases of Romanian women both employed in the domestic

[811] Ibid., p. 57, para 226.
[812] See L. Palumbo, 'Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy', cit. p. 12-13.
[813] Ibid.
[814] Ibid.
[815] It must be recalled that the Trafficking Directive suggest not to consider consent as valid whenever a child is concerned. See Directive 2011/36/EU, cit., para 11.
[816] See CoE *Trafficking Convention*, Art. 4, para b.
[817] L. 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*, cit., p. 7.

and in the agricultural sector that are forced to make a choice between incomparable goods, leading them to no other option that to accept their abusive condition.

3.1 Legal instruments for assistance and protection to victims

The governmental body responsible for the implementation of anti-trafficking polices, including for the national system of assistance to victims of trafficking in human beings is the Department for Equal Opportunities, subordinated to the Presidency of the Council of Ministers. Article 13 of Law 228/2003 and article 18 of the Consolidated Immigration Act (law 286/1998) represent the legislative basis for assisting victims of trafficking. Article 13 of law 228/2003 on the measures against trafficking foresees – in accordance with the Presidential Decree 237/2005 regulating the implementation of Article 13[818] – measures of short-term assistance that enable Italian, EU or foreign victims of the offences prohibited under Articles 600 and 601 to have access to temporary accommodation, health care, legal assistance and counseling in order to provide the victim with the necessary instruments to recover[819]. The victim can have access to the temporary program once reached the agreement of the *Questura* of competence.[820] This article is considered by the Italian authorities to provide for the recovery and reflection period required both under the CoE Trafficking Convention (Article 13) and the Anti-Trafficking Directive (Article 11, para 6). Moreover, Article 13 of law 228/2003 provides access to the above-mentioned program of assistance for a period of three months that can be extended for other three months[821].

Article 18 of Legislative Decree 289/1998 on the other hand regards long-term measures, aimed at providing victims of trafficking and severe labour exploitation with assistance and social integration for a six-month period which can be extended for another year, in addition to a residence permit for humanitarian reasons. The measures of social protection introduced by this article applies both to EU and non-EU nationals whenever a situation of abuse or severe exploitation of a foreign citizen is identified and the safety of a foreign citizen is endangered as a result of the attempt to escape for a criminal organization involved in the offences prohibited under

[818] In particular, see Presidente della Repubblica, *Decreto del Presidente della Repubblica 19 settembre 2005, n. 237. Regolamento di attuazione dell'articolo 13 della legge 11 agosto 2003, n. 228, recante misure contro la tratta di persone.* 19 novembre 2005, Gazzetta Ufficiale n. 270, Art 1.
[819] GRETA(2014)18, cit., p. 37, para 139. See also L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 8.
[820] Ibid.
[821] D.P.R. 237/2005, cit., Art. 1, para 4.

Article 600 or 601 of the CC, or because of his/her statements during the investigations or the court's proceedings[822]. The programme under Article 18 consists in interventions aiming at helping victims to receive social, health, psychological and legal assistance and to have access to a safe accommodation and to educational and work inclusion programmes[823].

The residence permit for humanitarian reasons, once the programme is terminated, can be converted into a work or study residence permit. In order to obtain it, victims have two available options[824]: a judicial path through which the residence permit is issued on the proposal made by the Public Prosecutor and that it is contingent on the cooperation of victims with law enforcement agencies and judicial authorities; and a social path where the request for a residence permit can be advanced by NGOs, associations or by public social services but without victims' reports or participation in the criminal proceedings[825]. With regard to the last point, in reality in both cases the issuing of a residence permit is not depended on the victim's participation in the criminal proceedings but rather on their inclusion into the assistance programme provided by Article 18.

Pursuant to the Decree of the President of the Council of Ministers of 16 May 2016, the protection and assistance programmes provided by Articles 13 of Law 228/2003 and 18 of Legislative Decree 289/1998 have been merged into the 'Single Programme for the emergence, assistance and social integration of victims of trafficking and exploitation'[826], as a result of which organizations aiming at implementing assistance programmes do not have to fill separate applications for receiving

[822] See D.L. 286/1998, cit. art. 18, para 1, 6-bis. Paragraph 6-bis has been introduced later in order to include EU nationals and give all victims of trafficking and severe labour exploitation the possibility to have access to assistance programmes.
[823] GRETA(2014)18, cit., p. 37, para 139.
[824] See Presidente della Repubblica, *Decreto del Presidente della Repubblica 31 agosto 1999, n. 394. Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286*, 3 novembre 1999, Gazzetta Ufficiale, n. 258, supplemento ordinario n. 190. Art 27, paras a-b.
[825] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. pp. 8-9.
[826] Original title: 'Definizione del Programma unico di emersione, assistenza ed integrazione sociale a favore degli stranieri e dei cittadini di cui al comma 6 bis dell'art. 18 del decreto legislativo 25 luglio 1998, n. 286, vittime dei reati previsti dagli articoli 600 e 601 del codice penale, o che versano nelle ipotesi di cui al comma 1 dello stesso articolo 18', available at https://www.governo.it/it/articolo/programma-unico-di-emersione-assistenza-ed-integrazione-sociale/5363, [last accessed 17 February 2023].

fundings for the projects under Articles 13 and 18.[827] Also, it was extended the length of the funding period from 12 to 15 months.[828]

Turning to the effectiveness of these programmes[829], in its last report GRETA found that the majority of victims assisted were females trafficked for the purpose of sexual exploitation, while it acknowledged a shortage in the facilities aimed at assisting victims of labour exploitation[830]. The low number of assisted victims of trafficking for the purpose of labour exploitation is due partly to the fact that traditionally NGOs are much more involved with helping victims of sexual exploitation[831]. However, two other factors must be considered: labour exploitation is more invisible that other forms of trafficking exploitation; and secondly, in many cases, workers are not even aware of being exploited[832].

GRETA has also observed that while the number of shelters has increased, it is still not commensurate to the actual number of victims of trafficking[833]. Further with regard to the nationality, it appears that EU national victims, in particular Romanians and Bulgarians, cannot adequately access to assistance programmes and the shelters funded by DEO[834].

Overall, GRETA was satisfied with the fact that there has been an increase in the funding of the assistance programmes and in the available number of shelter places. However, it was concerned with the situation of asylum-seekers, that might be victims of human trafficking. Things seem to have worsened after the adoption of Law 113/2018[835], which entailed a significant reduction of the places in the SPRAR system, that used to have specific places for victims of trafficking in human beings. The shortage of places in the SPRAR system led to the accommodation of victims in the reception centers that are not adequately furnished to provide for the specific needs of trafficking

[827] GRETA(2018)28, cit., p. 41, para 160.
[828] Ibid.
[829] For a further analysis see S. Caneppele and M. Mancuso, 'Are Protection Policies for Human Trafficking Victims Effective? An Analysis of the Italian Case'. *Eur J Crim Policy Res* 19 (2013), pp. 259-273. DOI: 10.1007/s10610-012-9188-9. The authors of this paper conducted research on the effectiveness of the Italian protection policies in the period between 2000-2008, observing, aside from a concrete commitment to the fight in human trafficking, also a change in the ethnic composition of people assisted, with the incidence of Romanians and Bulgarians being inferior compared to the rates registered in the years prior to their entry into the EU.
[830] GRETA(2018)28, cit., p. 41, para 165.
[831] GRETA(2014)18, cit. p. 33, para 127.
[832] S. Caneppele and M. Mancuso, op. cit., p. 270.
[833] GRETA(2018)28, cit., p. 41, para 165.
[834] Ibid., p. 42, para 166.
[835] Better known as 'Decreto Sicurezza', Safety Decree.

victims. This situation may result in the exclusion of asylum seekers from assistance programmes[836].

4 The Italian government implementation of international provisions

In the paragraphs above it was explored the Italian legal system put in place to criminalize and to provide assistance and protection to victims of severe labour exploitation and trafficking in human beings, in addition to the domestic policies adopted to regulate domestic work and migration. At this point, it is necessary to assess the effectiveness of these polices in preventing trafficking and labour exploitation in the domestic work sector and in protecting victims, by looking at their coherence with the international provisions of the main relevant legal instruments. Therefore, a particular attention will be dedicated to preventative and protective measures, which will be analyzed by taking into account a gender perspective. When analyzing severe exploitation from a gender perspective, diverse life experiences associated with various people's genders are considered the primary lens through which understanding exploitation and its several connotations. In fact, a series of factors ranging from working and living conditions, wages, competencies and tasks to abuse and violence, can greatly vary based upon a person's gender[837]. Thus, being a man, a woman or a LGBTIQ+ person can have different implications. As a matter of fact, there is no such thing as an ideal victim as well as it does not exist a one size fits all response to trafficking[838]. For example, women and men in the agricultural sector, while both exposed to violence and trafficking, their experiences starting from the initial factors of vulnerability, can be widely different. The violence to which men are subjected is of a different nature than that suffered by women: while men are beaten because they do not obey to their employers, women experience quotidianly sexual harassment or violence[839]. Trafficking has a gender dimension especially when considered in relation to the purpose of sexual exploitation, where almost all victims are women and girls, with males representing only 4 points of percentage[840]. Although it is recognized that

[836] GRETA(2018)28, cit., p. 43, paras 171-172.
[837] M. G. Giammarinaro, 'Understanding Severe Exploitation …' cit., p. 4. For an in-depth analysis of the matter see OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, op. cit.; European Commission, *Study on the gender dimension of trafficking in human beings. Final report.* (Luxembourg, Publications Office of the European Union, 2016); and European Institute for Gender Equality, *Gender-specific measures in anti-trafficking actions.* (Luxembourg, Publications Office of the European Union, 2018).
[838] OSCE, op. cit., p. 19.
[839] M. G. Giammarinaro, 'Understanding Severe Exploitation …' cit., p. 4.
[840] European Commission, *Study on the gender dimension of trafficking in human beings. Final report,* cit., p. 13.

trafficking affects both women and men and that it is needed a gender approach in order to assess the gender dimension of vulnerability, meaning the difference between men and women's vulnerability to victimization and its impact on them[841], the main focus is on female gender dimension of sexual exploitation. Indeed, starting from 2008 trafficking for the purpose of sexual exploitation has been the most reported form of exploitation in the EU.[842] However, as it was noted above, sexual exploitation is not the only recognized form of trafficking, albeit the most identified one; but on the contrary, there are several other forms of exploitation which have been given little attention especially in assessing a female gender dimension. This is the case of labour exploitation, domestic servitude and forced marriage where women's exploitation has not been extensively analyzed. This is due to the stereotyped association of a gender with a specific form of exploitation: while women's trafficking is mostly linked to sexual exploitation, men's experiences are associated with labour exploitation[843]. However, to not consider the gender aspects of all forms of trafficking means not to be able to correctly identify victims and their relative vulnerabilities and needs, beyond hampering the effectiveness of assistance, protection and prevention[844], which according to a gender sensitive approach must be tailored to the victims' specific needs. The case of domestic work is indicative of the relevance of adopting a gender approach in order to identify victims' vulnerabilities in the first place and thus to prevent their exploitation, but also to provide adequate measures of protection. In fact, cases of sexual harassment and sexual violence with regard to female domestic workers have been often reported[845]. Consequently, tailored measures developed along gender and intersectional lines are needed in order to adequately respond to their needs. The factors rendering women employed in the domestic work sector vulnerable to exploitation have to be addressed from a gender perspective but by taking into account the intersectional factors fostering a 'situational vulnerability'[846], namely women's subordinate

[841] Ibid.
[842] OSCE, op. cit., p. 19.
[843] Ibid., p. 20.
[844] Ibid.
[845] M. G. Giammarinaro, 'Understanding Severe Exploitation …' cit., p. 8.
[846] The concept of situational vulnerability considers that what makes a person vulnerable to exploitation is the interplay of personal and structural factors, which do not exclude people's agency, but on the contrary, it recognizes the role of people in making decision against the background of structural injustices and inequalities. For further information see M. G. Giammarinaro and L. Palumbo, 'Situational Vulnerability in Supranational and Italian Legislation and Case Law on Labour Exploitation', *Vulner,* 7 April 2022, available at https://www.vulner.eu/99788/Situational-Vulnerability. [last accessed 24 January 2023].

position in the patriarchal hierarchy as well as other grounds of discrimination such as age, race, class, nationality etc.[847]

The requirement of a gender sensitive approach to trafficking in human beings has been recognized in several international treaties aimed at combatting trafficking: the Palermo Protocol (articles 6 and 10), the CoE Trafficking Convention (article 5 and 17) and Directive 2011/36/EU (Paras 3 and 25). In particular, the latter instrument explicitly 'recognizes the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes' and that 'for this reason, assistance and support measures should also be gender-specific where appropriate'.[848] The EU Trafficking Strategy for the period 2012-2016[849] explicitly recognized that trafficking in human beings is rooted in gender inequalities and violence against women. Important to the specific case is the recognition by the European Parliament[850] of the lack of an appropriate reference to the gender dimension of trafficking for the purpose of labour exploitation, in particular in the case of domestic workers. Ultimately, the principle of gender mainstreaming[851] has been incorporated in the newly released National Action Plan against Trafficking, in which an entire paragraph is dedicated to the application of a gender perspective to the issue of trafficking.

4.1 Prevention

Turning to the implementation of the international provisions, with regard to preventive measures adopted by the Italian government, it can be said that several steps are yet to be taken by Italy in order to effectively contrast trafficking and severe exploitation. In fact, in addition to a general lack of systematic training activities aimed at educating competent authorities on the current complexities of trafficking and labour exploitation, there are not enough structured campaigns to combat trafficking and serious exploitation[852]. This situation regards in great part domestic work, which is still overlooked owing to the fact that there is not the will to address exploitation in the

[847] Ibid.
[848] Directive 2011/36/EU, cit., para 3.
[849] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions. The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*. Brussels, 2012. COM(2012) 286 final, para 1.
[850] European Parliament, *Resolution of 21 January 2021 on the EU Strategy for Gender Equality*, Brussels, 21 January 2021, (2019/2169(INI)). Para 23.
[851] For a definition see above Chapter 1, para 3.6.
[852] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 34.

domestic work sector, as it is a complex social phenomenon that regards also the economic problems of many Italian families[853].

Concerning labour exploitation, while it is true that the adoption of article 603-bis against illegal brokering and labour exploitation and its amendment in 2016 were more than welcomed, the GRETA report highlighted the weakness of labour inspections, which beyond being organized on an ad hoc basis, they cannot be conducted on private properties that are not registered as workplaces[854]. In regard to domestic work, this represents a huge limitation which combined with the fact that often the gender dimension of trafficking for the purpose of labour exploitation is not particularly analysed can have important consequences on the identification process of victims. As a matter of fact, domestic work is an activity performed in or for the household. Moreover, as it was seen above, it is a sector with high rates of informality, thus it is unrealistic to expect finding private houses registered as workplaces. Consequently, labour inspectors are not allowed to enter these places and thus they are not able to identify in advance exploitative situations. In addition, also when inspections take place, often they are known in advance and thus are ineffective.[855]For this reason, GRETA encouraged Italian authorities to ensure that inspections involve private households as well, with the purpose of preventing abuse of domestic workers[856]. Adopting preventive measures, however, means to identify in advance the risk of an individual to be subjected to exploitation, might it amount to trafficking, slavery, servitude or forced labour. In fact, the ECtHR in *Rantsev* noted that for an obligation to take operational measures to arise under article 4 of the ECHR, it must be demonstrated that State authorities were or most importantly ought to have been aware of circumstances indicating that an individual was or had been at risk of being trafficked or exploited.[857] In that case, as it was examined above, the ECtHR focussed on the fact that Cyprus migration authorities deliberately allowed trafficking to flourish and on the fact that those working in the appropriate fields were not trained adequately to identify victims, in accordance with the requirements of the Palermo Protocol and the CoE Trafficking Convention. Following the ECtHR's reasoning, can it be established whether the Italian authorities are aware of the general situation of Romanian women employed in the domestic work sector? In order to

[853] Ibid.
[854] GRETA(2018)28, cit., p. 22, para 84.
[855] Ibid.
[856] Ibid. p. 26, para 101.
[857] *Rantsev v Cyprus and Russia*, para. 286.

provide an answer, it is necessary to start from the fact that the number of cases brought in front of courts related to violations of Articles 600 and 601 of the CC is small but there are several reasons that can explain such a low figure. First, the fear of domestic workers of employers' retaliation, especially if they were recruited through an organized network[858]. Secondly, there are difficulties related to the demonstration of the existence of an employment relationship[859]. Thirdly, the definition of trafficking before the implementation of Directive 2011/36/EU made it difficult the application of Article 601 of the CC, and therefore, many cases brought in front of the national courts were related to violations under Article 600 of the CC[860]. However, as it was seen above with regard to Article 600 of the CC, difficulties arise in the application of this article too, especially because of the vague formulation of the notion of 'continuing subjugation.[861] Furthermore, as underlined by the Giammarinaro in the interview with Letizia Palumbo, in addition to the factors examined above, there is also the issue of unproperly perceiving the severe exploitation of migrant workers on part of competent authorities, owing to the dominant ideology that normalizes migrant workers exploitation[862]. Thus, it can be said that although the number of cases is low, it does not certainly mean that trafficking and severe exploitation in the domestic work does not exist.

In fact, there are other elements to be considered: migration policies, the irregularity affecting the domestic work sector, the absence of a government-fixed guaranteed minimum wage, an invisible welfare system combined with a dominant perception of migrant workers as exploitable, a factor that is further exacerbated by the gender dimension of migration and of the domestic work sector. These are the *pull factors* that must be considered in combination with the *push factors* that contributed to the increasing of the situational vulnerability of migrant domestic workers. With regard to the specific case of Romanian women employed in the domestic work sector, it can be argued that there is knowledge of their peculiar situation, as official data[863] on migration in Italy and on migrant employment in the labour market clearly indicates a strong presence of Romanian women and especially their employment in the domestic sector. Moreover, the specific structure

[858] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 29.
[859] Ibid.
[860] Ibid., pp. 29-30.
[861] Ibid., p. 30.
[862] Ibid.
[863] See for example, IDOS, op. cit. and DOMINA National Observatory on Domestic Work, *Third Annual Report on Domestic Work*, cit.

of the Italian system, namely the familialist welfare system, migration policies and the labour market, encourages hiring external help, especially migrant domestic workers. On the other hand, in the previous chapter were examined the specific personal features and structural disadvantages that lead Romanian women to the choice of migration, and once employed in a condition of exploitation, to the decision not to report abuses. Overall, the policies adopted by the Italian Government, instead of preventing severe exploitation, it seems to encourage it, as it furnishes the elements necessary for increasing the risks of being trafficked and exploited, making migrants more vulnerable and precarious. Furthermore, it cannot be overlooked the role played by the media in enhancing Romanian migrants' vulnerabilities, depicting them as inferior, deemed to be criminals or 'badanti', as outlined above.

Preventive measures aimed at combating less visible forms of trafficking in human beings, including domestic work, are hindered by stereotypical and gender-biased constructs that impact on the notion of ideal victim[864]. As a matter of fact, established the difficulty in detecting cases of domestic servitude, exploitation in this sector is simply overlooked by government policies failing to provide the competent authorities with the necessary knowledge to develop adequate preventive measures.[865] Furthermore, gender biases in preventive work hinders the effectiveness of the measures aimed at the addressing gender-related vulnerabilities.[866] Concerning the latter, three main themes have been identified as crucial in understanding the role of gender in preventing trafficking in human beings: gender inequalities, intersectionality and patriarchy.[867] Preventative measures should be informed by the specific vulnerabilities that affect women and men, as well as by the different types of violence that involves the diverse purposes of exploitation and labour sectors. A multidimensional approach combined with gender sensitive perspective is indeed necessary. In the National Action Plan against Trafficking and Severe Exploitation for the period 2022-2025[868], it is highlighted the need for a multidisciplinary approach to preventative measures. In particular, the main relevant planned actions foreseen relate to the necessity to increase knowledge on trafficking in human beings and to provide competent authorities with continuous

[864] OSCE, op. cit., p. 27.
[865] Ibid.
[866] Ibid.
[867] Ibid., p. 23.
[868] Consiglio dei Ministri, *Piano Nazionale d'azione contro la tratta e il grave sfruttamento 2022-2025*, available at https://www.osservatoriointerventitratta.it/wp-content/uploads/2022/12/Piano-anti-tratta-2022-2025.pdf. [last accessed 25 January 2023]. pp. 39-55.

training on the matter; to raise awareness on the risks connected to migratory routes and encourage the process of sharing information between the country of origin and destination with the view to enhance cooperation with countries of origin; to conduct research on trafficking and severe forms of labour exploitation through awareness raising campaigns aimed at combatting gender stereotypes and to promote legal values; and ultimately to adopt a multi-agency approach in order to encourage cooperation between private and public entities with different skills and competencies. The action plan, in defining its strategies took into account the gender study promoted by the OSCE[869]; in this sense it can be said that the government is making efforts to adopt a comprehensive framework on preventative measures. Also, it is worth noting that the Italian government has been urged to adopt a national action plan against trafficking providing a definition of the objectives, the priorities to be tackled, the concrete activities to be put in place and of the stakeholders responsible for implementing them by GRETA.[870] Thus, it can be argued that it followed the monitoring mechanism's recommendations. With regard to trafficking, another element that is addressed by the action plan relates to the demand fostering trafficking and the need to discourage in order to deprive traffickers of their incomes[871]. However, while the strategies provided by the action plan might be functional to combatting trafficking and in respect with the general standards on the matter, other structural issues are not addressed correctly, but on the contrary, if possible, they are worsen. There are in fact several worrying prospects relating both to women and migrants' lives: the attempt to limit women's access to their health and reproductive rights, and the tightening of migration policies. In particular, the latest statements of the Italian ministers for the family, natality and equal opportunities – Eugenia Roccella – on the fact that it is an unfortunate event that women's have the right to abortion and the fact that[872] – in spite of all the declaration of the newly installed government not to abolish law 194 on the right to abortion – no effective action has been taken to eliminate the obstacles to the enjoyment of what is considered a fundamental human right are indicative of a regressive tendency in women's rights. The criminalization of abortion is a form of discrimination against women, as it was underlined by the

[869] Ibid., p. 23.
[870] GRETA(2014)18, cit., p. 13, para 19.
[871] Consiglio dei Ministri, *Piano Nazionale d'azione contro la tratta e il grave sfruttamento 2022-2025*, cit., p. 40
[872] See A. Cangemi, 'La ministra Roccella dice che l'aborto "fa parte purtroppo delle libertà delle donne"', *Fanpage*, 22 January 2023, available at https://www.fanpage.it/politica/la-ministra-roccella-dice-che-laborto-fa-parte-purtroppo-delle-liberta-delle-donne/https://www.fanpage.it/. [last accessed 26 January 2023].

CEDAW Committee on several occasions[873]. Thus, to force someone to carry on an unwanted pregnancy is a way of controlling women's bodies and of enhancing gender inequalities.

4.2 Protection

Concerning protection and assistance measures, the Italian legal system against trafficking and severe exploitation is viewed as one of the most advanced on the international arena. Yet, there are several issues related to the wrong application of the existing norms, particularly for what concerns Article 18 of the Legislative Decree 286/1998, the most relevant provision in regard to both the release of a residence permit and the victim's access to the programmes of social integration and assistance[874]. In fact, the norm appears to be applicated in an irregular and inadequate manner throughout the country[875].

The process of identification is crucial to the determination of the possibility to have access to assistance measures and to the recognition of a certain status that otherwise would not be accorded to the victim[876]. Following the recommendation made by GRETA[877], the Italian Government added to the National Action Plan for the period 2016-2018 a document laying down the National Referral Mechanism (NRM), in which were detailed all the measures and the recommendations needed to guide competent authorities through all the phases of the process of contrasting trafficking in human beings[878]. Furthermore, new guidelines for the rapid identification of victims of trafficking were introduced in order to provide support to stakeholders directly or indirectly

[873] See for example the CEDAW Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 26 July 2017, CEDAW/C/GC/35. Relevant is also CEDAW Committee GR No. 38, where it is highlighted how gender-based violence and discrimination are among the root factors causing trafficking in human beings. See also S. De Vido, Violence against women's health in international law, (Manchester: Manchester University Press, 2020), pp. 69-79.
[874] ASGI, 'La Tutela delle Vittime della Tratta e del Grave Sfruttamento: Il Punto della Situazione Oggi in Italia', 2015 available at http://www.asgi.it/wp-content/uploads/2015/04/Lookout_doc.conclusivo_editing_DEF.pdf. [last accessed 26 January 2023]. pp. 24-25.
[875] L. Palumbo, 'Exploited for Care: Trafficking and Abuse in Domestic Work in Italy', cit., p. 183.
[876] P. Degani and P. De Stefani, 'Capitolo 1. Il frame regolativo dei servizi e dei dispositivi a supporto delle persone straniere coinvolte in situazioni o a rischio di grave sfruttamento'. In: P. Degani (ed), *Lotta alla tratta di persone e diritti umani*, (2020), p. 22.
[877] See GRETA(2014)18, cit., p. 36, para 135
[878] See Annex 1, *Meccanismo Nazionale di Referral per le Persone Trafficate in Italia*, available at https://www.pariopportunita.gov.it/wp-content/uploads/2017/12/allegato-1-meccanismo-nazionale-referral.pdf. [last accessed 26 January 2023].

involved in the identification process.[879] While GRETA welcomed the inclusion of both the NRM and the Guidelines, it observed that the NRM is not implemented adequately[880].

The national toll-free anti-trafficking helpline, run by the city of Venice that accepts calls from presumed victims or people reporting suspicious conditions, has continued to receive funds from the Department of Equal Opportunities[881]. Moreover, in 2017 were published the guidelines on the identification of trafficking victims among applicants for international protection prepared by the Ministry of the Interior in collaboration with UNHCR[882]. However, as noted by GRETA, to the improvement in the identification process, owing to the adoption of the guidelines, did not follow any additional funding by the DEO, leading to an insufficient number of places available in the anti-trafficking project that was not able to meet the needs.[883] With regard to trafficking for the purpose of labour exploitation, it was observed that on the overall number of victims assisted, only a little part was related to labour exploitation, albeit it is known that the percentage of victims is higher than that identified, especially in sectors such as agriculture, construction, textile, manufacturing, domestic and care work.[884] GRETA in particular envisaged that all the mechanisms and guidelines introduced – albeit witnessing the efforts made by the Italian government – are not applied in an harmonized way and that the number of trafficking victims identified for the purpose of labour exploitation remains quite low[885].

Concerning assistance measures, according to data provided by GRETA, EU nationals victims of trafficking, especially from Romania and Bulgaria, have little access to the single programme, funded by the DEO[886]. The recovery and reflection period has not been addressed by the Italian law: the only reference to this principle is contained in the NRM annex. Although the inclusion of the recovery and reflection period principle in the NRM represents a positive development, GRETA was concerned with the fact that the absence of a legal framework would expose victims

[879] See Annex 2, *Linee guida per la definizione di un meccanismo di rapida identificazione delle vittime di tratta e grave sfruttamento*, available at https://www.pariopportunita.gov.it/wp-content/uploads/2017/12/allegato-2-linee-guida-rapida-identificazione.pdf. [last accessed 26 January 2023].
[880] GRETA(2018)28, cit., p. 36, para 145.
[881] Ibid., p. 37, para 146.
[882] See Ministero degli Interni and UNHCR, *Linee guida per l'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral*, (Roma: Digitalialab, 2017).
[883] GRETA(2018)28, cit., p. 39, para 152.
[884] Ibid., p. 40, para 155.
[885] Ibid., p. 40, para 157.
[886] Ibid., p. 42, para 166.

to the risk of being deported without having been given the possibility to make an informed decision on whether or not to start a cooperation with the authorities and to recover from the trauma they had experienced[887].

A fundamental principle introduced by Article 18 of the Legislative Decree 286/1998 is the provision of a double path of protection. In particular, the introduction of a social path, focusing on the protection of the victim, releases the issuing of the residence permit from the upcoming cooperation with the judicial authorities.[888] Nonetheless, it must be pointed out that contrary to what is provided by the law, in practice the social path is hardly applied[889]. Furthermore, it was noted that the threshold for the application of Article 18 in instances regarding labour exploitation is too high, owing to the fact that originally this article was aimed at the protection of victims of trafficking for the purpose of sexual exploitation whose situation is different from that of victims trafficked for labour exploitation[890].

The CoE Convention against Trafficking also requires member states to adopt a gender approach to the development, implementation and assessment of protective measures (Article 17). To include a gender approach in the protection of victims, means to take into account the different needs of victims based upon their gender. For example, with regard to female victims, owing to gender mis-considerations, they are often granted assistance related to sexual health although in many instances they need also several other types of support measures. As it emerges from an interview with an anti-trafficking expert in Italy:

> 'There is a belief that sexual trauma is stronger and takes precedence over other forms of traumas. In the case of domestic servitude, where the majority of victims are women, many of these women experience forms of extreme violence, even torture, which is one of the most traumatic experiences, and they are not often offered special assistance.[891]

[887] Ibid. p. 48, para 194
[888] P. Degani and P. De Stefani, op. cit., p. 23.
[889] L. Palumbo, 'Demand in the Context of Trafficking in Human Beings in the Domestic Work Sector in Italy', cit. p. 25.
[890] Amnesty International, op. cit., p. 34.
[891] OSCE, op. cit., p. 36.

Thus, it can be seen how important the adoption of tailored measures is, adapted to the exploitative situation of the victim as well as to the gender dimension.

4.3 Inadequate implementation of the EU directives addressing both trafficking and labor exploitation

Since its entry into force, the effective application of Directive 2011/36/EU still remains a subject of concern, although there are different degrees of implementation among EU member States[892]. Overall, it can be said that are absent appropriate tools aimed at the early identification of victims as well as adequate protection measures, even if it is worth noting that the general legislative approach seems to be beneficial and supportive of victims of human trafficking[893]. For example, the European Parliament stated that one of the main challenges to the implementation of the trafficking directive relates to the early identification of victims, which as outlined above represents a crucial element for the access of victims to their rights.[894]

With the view to implement the Anti-Trafficking Directive, in 2014 the Italian government adopted Legislative Decree 24/2014. Although the transposition of Directive 2011/36/EU could have represented an important opportunity to strengthen the Italian framework against trafficking[895], the Decree cannot be considered satisfying as some provisions have been transposed only partially while others have not been introduced at all[896]. In particular, the Decree modified the Criminal Code with regard to the definition of trafficking, the Penal Procedure Code and Law 228/03 and Legislative Decree 286/98 concerning the introduction of a single program devoted to the emersion, assistance and integration of trafficking victims[897]. However, several other provisions have not been introduced: for example, it does not consider adequately the gender dimension and the need for a gender approach to trafficking, but it only refers to gender violence in article 1. In addition to this, the Decree fails to address the irrelevance of the consent, the non-

[892] European Parliament Research Study, *Implementation of Directive 2011/36/EU: Migration and gender issues*. 2020, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654176/EPRS_STU(2020)654176_EN.pdf. [last accessed 27 January 2023], p. 10.
[893] Ibid.
[894] European Parliament, *Resolution of 10 February 2021 on the Implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, Brussels, 10 February 2021, (2020/2029(INI)). Para 8.
[895] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 33.
[896] ASGI, op. cit., p. 23.
[897] Ibid., pp. 23-24.

prosecution of victims or the non-application of penalties and the need for adequate and unconditional assistance.[898]

Another weakness of Decree 24/2014 regards the identification in article 1 of specific categories of vulnerable people, something that is indicative of the fact that the government overlooks the systemic character of the current forms of exploitation and most importantly that there are different elements interacting with one another in creating vulnerabilities to trafficking, including gender, race, the legal and the social dimension[899]. This approach to vulnerability impacted on the decision not to include a definition of position of vulnerability, as provided by the Anti-Trafficking Directive[900]. Finally, as discussed above, the Decree failed to introduce the provision related to the recovery and reflection period, required by article 11 of Directive 2011/36/EU.

Concerning the notion of trafficking, the penalty provided for in article 601 of the CC is higher than that required by the Anti-Trafficking Directive, making the application of this article more difficult. There are in fact some issues with the interpretation of this article: some point to the fact that given the severity of the penalties of the offence of trafficking, than for it to apply the victim must find him/her self in a condition of similar to that expressed in Article 600 of the CC regarding slavery, risking in this way to reinforce the link between trafficking and slavery, with all the difficulties that derive from the application of Article 600, as explained above.[901]

Overall, the objective of the Directive to introduce a holistic approach to trafficking has not been met. In order to fully consider all the elements contributing to the offence of trafficking, it needs to be developed a 'a coherent policy framework and coordinated initiative aimed at addressing the interplay of legal, economic and social factors that contribute to persons' situation of vulnerability'[902]. Domestic policies should aim at guaranteeing people with decent work opportunities and livelihoods, as well as reducing gender and racial inequalities while promoting safe and legal migration pathways[903].

[898] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 33.
[899] Ibid.
[900] Ibid.
[901] Ibid., p. 31.
[902] S. Marchetti and L Palumbo, op. cit., para 'The Need of a Holistic Approach'.
[903] Ibid.

5 Issues beyond legislation: how to tackle the new challenges of the 2020s?

Although significant steps have been taken, the transposition of international provisions on combating trafficking in human beings and serious labour exploitation is inadequate. In particular, what is missing is a comprehensive and holistic approach to the issue, as required both by the CoE Trafficking Convention and by Directive 2011/36/EU. In fact, as argued by Giammarinaro, severe exploitation, intended as gross violation of human rights, is a structured and systemic phenomenon, involving 'edge populations' targeted because of intersectional vulnerabilities[904]. An approach based upon the criminal justice response, besides being ineffective, it is also insufficient to address structural elements contributing to the creation of vulnerabilities. Thereby, criminal law must necessarily be combined with a social justice approach, based on the promotion of human rights and on gender mainstreaming, as exploitation and severe abuse are a large scale phenomenon, functional to developed economies, a conception that risks to be downplayed by the adoption of only repressive actions that contribute to the spreading idea that severe exploitation is the result of exceptional and contingent events, connected to backward production systems[905].

Considering the case of Romanian Domestic Workers, it was seen that several intersectional factors contribute to their vulnerability to severe exploitation and trafficking in human beings, ranging from the *push factors* leading them to the decision to migrate to the *pull factors* that make their situation in the country of destination precarious. First, being females, migrants and Romanians employed in the domestic work sector, are all intersecting elements that increase their vulnerability owing to a dominant perception that migrants and domestic workers are inferior, and as such exploitable. In the words of Letizia Palumbo[906], there is a sort of normalization of some forms of exploitation, for example by considering domestic workers as part of the family instead as workers. The risk is that familial relationships may be used to justify violations, by making feel the worker as part of the family and convincing her to perform domestic activities for longer hours in order to please the employer.[907] This process of normalization has serious consequences on the

[904] M. G. Giammarinaro, 'Understanding Severe Exploitation …' cit., pp. 3 and 9.
[905] Ibid., pp. 9-10. On the need to combine anti-trafficking efforts with measures aimed at challenging the system producing everyday abuses see also E. Cockbain, 'From Conflict to Common Ground: Why anti-trafficking can be compatible with challenging the systemic drivers of everyday abuses', *Anti-Trafficking Review* 15, (2020), pp. 155-161, https://doi.org/10.14197/atr.201220159.
[906] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 25.
[907] L. Palumbo, 'Exploiting for care: Trafficking and Abuse in Domestic Work in Italy', cit., p. 180.

effective application of the legal system because competent authorities in some circumstances are not able to identify exploitation as a violation of fundamental human rights[908]. The most relevant factor increasing vulnerability is the fact that these workers are women; the lines of race and nationality intersect with the gender dimension. As argued by Maria Grazia Giammarinaro, the understanding of the phenomenon as well as all the measures aimed at preventing and combatting huge violations of human rights and protecting them through a process that empowers these women and fosters their social inclusion must be informed by a gender perspective highlighting the specific differences that determine their condition.[909] In this sense, a gender approach to severe exploitation and human trafficking can serve as a strategy fostering human rights protection, because it allows to clearly understand the complex framework in which such violation take place in addition to providing fundamental insights on the types of exploitation and the relative victims' needs. In the case of Romanian women, a gender approach is necessary to understand their position in the society of origin, where – as described above – women are still subjected to severe violations; compared to other countries abandon school more often; and have pregnancies at an early age, owing to limited access to sexual education and health services. Moreover, giving the widespread phenomenon of alcoholism and patriarchal norms that still prevail in the society, women often experience sexual and physical violence, a factor that contributes to their decision to leave the country[910]. All these elements must be added to the general economic situation of the country, which although significantly improved through the years, remains poor especially in the remote areas of the country, less developed than the cities. Sometimes these women leave their abusive husbands, that often may have an issue with alcohol and for that reason may be violent and unable to provide economically for the family[911]; thus, women become the new breadwinners, affecting the traditional gendered roles within the family.[912] Their need to send money home to the children they left behind – especially in the case of domestic workers who due to the specific nature of the job are not able to bring their children with them – expose them to abusive situations as they are obliged to accept even exploitative situations in order to make a living and to sustain their children.

[908] Ibid., p. 29.
[909] M. G. Giammarinaro, *Analisi di genere delle politiche di prevenzione e contrasto dello sfruttamento lavorativo in agricoltura*, (Roma: Organizzazione Internazionale del Lavoro, 2021), p. 6.
[910] On the reasons of migration see the study of M. Marchetti, op. cit., pp. 120-126.
[911] Ibid.
[912] L. Palumbo, *Trafficking and Labor Exploitation in Domestic Work and the Agricultural Sector in Italy.* cit. p. 22-23.

In light of this complex situation, it must be considered the gendered and racialized segmentation of the labour market in Italy, which combined with the familialistic welfare system and the migration policies that attract a certain number of people in the domestic work sector – and most importantly belonging to specific nationalities – further exacerbates migrant women's vulnerabilities, due to the segregation of some nationalities in certain labour sectors, making it difficult for them to find job opportunities in other sectors, albeit they might have emigrated through different channels than those destined to domestic labour. Domestic work, as outlined above, besides having high shares of informality, is associated with the most stigmatized and marginalized social groups, resulting in the stigmatization of the job itself and on the labour conditions of those working in the sectors. Moreover, the fact that it is work performed in the household, by females and by migrants, only worsens the general framework making it permeable to severe exploitation. Due to the high percentage of Eastern European women in the sector, especially Romanians, these women are derogatorily called 'badanti'[913], while employed because they are perceived as 'naturally'[914] inclined to perform the job.

It is evident thus that this complexity cannot be framed only through the implementation of the legal system addressing trafficking in human beings and severe exploitation, which however as shown above, is not adequate. Also, anti-trafficking actions focusing on the criminal justice responses which measure success based upon the number of prosecuted offenders or assisted victims, albeit important it is not sufficient, especially because there is the risk of treating trafficking as an exceptional event, leading competent authorities to difficulties in identifying victims, as the criminals are considered 'bad apples' while there is an idealization of the victim[915]. All these circumstances do not make the system efficient in dealing with these problems. Therefore, attention must be drawn to the gendered dimension of trafficking in the domestic work sector, to migration policies pushing for the segregation of women and some nationalities in certain labour sectors, as well as to the welfare system that still heavily rely on the family as the key actor taking care of the depended people of the family. Of course, the responsibility of taking care of

[913] As highlighted by D. Cherubini, G. G. Geymonat and S. Marchetti, op. cit. p. 89, 'through the use of innovative words, these movements question the internalized representations of domestic workers as performing 'dirty' work, often associated with social stigma and shame.'
[914] On the gendered and racialized nature of demand for domestic workers see the work of B. Anderson, op. cit., pp. 251-256.
[915] E. Cockbain, op. cit., p. 156.

the members of the family in need of assistance falls on women, whose entry into the labour market did not correspond to the implementation of an adequate welfare system providing for those in need, but on the contrary allowed for the outsourcing of domestic work to other women, who in turn have left a 'care drain'[916] in their own countries.

Furthermore, the situation does not seem to be improving: the coronavirus pandemic combined with the outburst of new conflicts, only contribute to the exacerbation of existing vulnerabilities in addition to a general tendency to hamper attempts to foster human rights. In Italy in particular are worrying the growing number of episodes of racism and intolerance towards migrants[917], which is the reflection of an increasingly tighter immigration policy which significantly affects migrants right to a dignifying life. In addition to this, activities aimed at assisting migrants and refugees have been harshly suppressed through the use of both criminal and administrative measures.[918] Moreover, as already seen women's right to abortion is challenged while levels of violence against women are particularly high[919].

It is against this background, that the stories of exploitation of Romanian migrant domestic workers take place. In order to tackle the issues of severe exploitation and trafficking adequately, a social justice approach must be promoted: domestic workers labour rights should be recognized and enforced; labour inspection measures should be modified in order to identify in advance abusive and exploitative situations in the households; competent authorities should be adequately trained to recognized abuse and to prevent and protect victims upon this knowledge; there should not be an ideal victim, but competent authorities considering the intersecting factors contributing to the creation of vulnerability in the domestic work sector should be able to identify and protect victims, thus combating the dominant idea depicting women as mainly trafficked for sexual exploitation; it should be understand that women in the domestic work sector bear multiple forms of abuse. With regard to the last point, as it emerged from the case of Romanian women employed in the

[916] Concept introduced by A. R. Hochschild, 2000 cited in H. Lutz, 'Chapter 1. Introduction: Migrant Domestic Workers in Italy', cit. p. 3.
[917] See Human Rights Watch, *World Report 2021. Events of 2020*, (USA: Human Rights Watch, 2021) pp. 363-368 available at https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf. [last accessed 31 January 2023].
[918] Amnesty International, 'Italy 2021', available at https://www.amnesty.org/en/location/europe-and-central-asia/italy/report-italy/. [last accessed 31 January 2023].
[919] Ibid.

agricultural sector[920], the same happens in domestic work, especially because of the imbalance of power with the employer but also because of the fact that it is a job performed in the household where it is difficult to identify violence.

It is needed a transformation of the dominant ideology that promotes informality, which albeit particularly affecting domestic work, regards broader economic sectors of the Italian labour market. Certainly, reproductive labour is even more affected because of the several reasons outlined above and because associated with women's unpaid work. There should be a transformation of the migration policies, that should provide safe migration paths and guarantee migrants a dignifying treatment once arrived in Italy. Although, Romanian women are now EU nationals, the repressive nature of migration polices impact on their lives as well. There are hierarchies of marginalized populations, and Romanians are among them. Furthermore, albeit to a lesser extent compared to the past years, Romanian migrants still suffer from the depiction that the Italian media provided of them as well as from the 'anti-Romanian' discourses that contributed to their stigmatization, and consequently to their exploitation in certain sectors. As highlighted by the IACtHR in the *Hacienda Brasil* case, States have a duty to combat structural causes of exploitative practices, especially those related to deep-rooted discrimination and to entitle vulnerable people to special protection. Although it is true that the judgment of the IACtHR is not binding on Italy, this advanced position should inform at least national courts and policymakers. In this case, although, as it was shown, there are multiple factors contributing to vulnerability, ranging from economic inequalities, race and gender discrimination, the Italian government did not provide special protection to domestic workers or Romanian women, but on the contrary its policies seem to have only aggravated their situation.

[920] See the study of L. Palumbo and A. Sciurba, op. cit., pp. 89-108

Conclusions

This thesis has sought to attain a double objective: the first purpose was to analyze the effectiveness of the Italian legal system in addressing severe exploitation and trafficking in human beings in the domestic work sector drawing from the experience of Romanian women, while the second was to assess the role of the incorporation of a gender approach in the policies aimed at preventing these offences and protecting victims, in order to foster human rights protection.

With regard to the first research question, this thesis has demonstrated that although several steps have been taken by the Italian government, there is yet much to be done. Starting from the effectiveness of the legislation on domestic labour, even though Italy is one of the few countries to have both a specific legislation regulating domestic work and a collective bargaining agreement, this study has observed that domestic workers still represent a particularly disadvantaged category in Italy, as it is characterized by high rates of informality and a huge share of migrant labour force that further exacerbates domestic workers juridical vulnerability. The effectiveness of this legislation is hampered by the absence of formalized labour relations or by the rather structural phenomenon of 'under-declared work', which sees the use of seemingly regular contracts to cover activities performed for longer hours than those provided for by the national collective bargaining. Hence, there is an issue of implementation which should be addressed through the improvement of the system of labour inspections, which the domestic work sector escape owing to the place where this job is performed, namely the household.

However, as demonstrated by this study, labour law efforts to regularize this sector have been hindered also by the 'familialist' welfare system based upon the subsidiary role played by the family and by migration polices that have fostered the heavy reliance of Italian families on cheap migrant labour force and the segregation of female migrants in domestic labour. As a matter of fact, the quota system, defined on quantitative and qualitative criteria, restricted the availability of legal migration channels, resulting in the social subordination of migrant workers. Moreover, this study has shown that the fact that Romanian women are now EU nationals had not affected their exploitative conditions but rather it allowed employers to refine their techniques, adopting more sophisticated instruments.

Turning to the implementation of international provisions, this thesis has shown that the Italian legal system is not adequate, as several important aspects have been left out. What it emerged from this research, is that the definition of trafficking in human beings is incomplete, as the *action* element of 'receipt' has not been transposed as well as the term 'abduction' among the *means* adopted by traffickers. Moreover, it has not been introduced a definition of position of vulnerability, as required by Directive 2011/36/EU and the principle of the irrelevance of consent. Other fundamental elements not specifically mentioned in domestic legal instruments are the reflection and recovery principles and the non-punishment of victims. The articles of the Criminal Code dealing with the offence of slavery and trafficking are applied only in cases involving severe violations of human rights, with the risk that other cases are prosecuted under minor offences. Also, beside Article 603-bis of the Criminal Code dealing with illegal brokering and labour exploitation, aimed at combatting migrants' labour exploitation, there is not a provision dedicated to forced labour.

Concerning protection and assistance measures – although these are particularly advanced, especially Article 18 of the Legislative Decree 286/1998 which provides for a social path to obtain a residency permit along the judicial one – this thesis has demonstrated that their application is irregular and inadequate, especially in regard to the protection of migrants trafficked for the purpose of labour exploitation. As a matter of fact, the results of this research have shown that the majority of the assistance and protective measures have been destined to victims of sexual exploitation, revealing the lack of a gender approach to trafficking for labour exploitation. Owing to this huge limitation, competent authorities are not able to go beyond the stereotypical image of the ideal victim, that sees women only trafficked for the purpose of sexual exploitation, excluding other forms of exploitation. This study has indeed made evident that women are associated with sexual exploitation while men with labour exploitation.

This is linked to the second objective of this study, namely the assessment of the incorporation of a gender perspective in the policies aimed at preventing exploitation and trafficking and at protecting victims. In this regard, the results of this research have shown that a gender perspective – although it would contribute to the correct identification of victims and of their relative vulnerabilities and needs and would enhance the effectiveness of assistance, protection and prevention measures – is missing from the domestic policies: except for the National Action Plan

which incorporates a paragraph on the need to adopt a gender approach to trafficking, the only other reference is made to gender violence in the Legislative Decree 24/2004 transposing Directive 2011/36/EU. *Gender mainstreaming* it is not adequately used in fostering the protection of migrant women employed in the domestic work sector, in spite of the evidence that its inclusion along the consideration of other intersectional elements such as age, class, nationality, gender etc., would indeed integrate a criminal law approach with a social justice one.

Another issue that it has emerged from this research relates to the ineffectiveness of these measures in relation to Romanian migrant women employed in domestic labour. In fact, as this thesis has demonstrated, they have limited access to the protection and assistance programmes, although the law provides access also for EU nationals and in spite of the fact that they represent the principal national collective to be employed in this sector. What it emerges from this study is that in fact their condition is overlooked, a factor that is demonstrated also by the lack of data on the exploitation and trafficking of Romanian women in domestic work. Yet, this thesis shows that their situational vulnerability is not unknown to national authorities. In fact, by looking at the intersection between *push* and *pull factors* several elements pointing to their vulnerability to be exploited can be identified. For instance, examining migration policies, the labour market configuration and the welfare system, combined with the structural elements affecting the Romanian society and personal factors, it emerges that all together these elements contribute to creation of situational vulnerabilities that expose Romanian women to exploitation.

Based on these conclusions, it can be argued that a social justice approach based on human rights and on a gender perspective should be included in the policies aimed at tackling with the issue of severe exploitation and trafficking in human beings. In addition, further empirical research would be needed in order to better understand the forms of exploitation to which Romanian migrant domestic workers trafficked for labour exploitation are subjected to and to have more precises data on the number of Romanian women trafficked for the purpose of domestic servitude in Italy. Indeed, current research mainly focus on trafficking of Romanian women for the purpose of sexual exploitation. Moreover, owing to the fact that Romanian women are EU nationals it is more difficult to identify them when they are trafficked. At the same time, it is difficult to identify them also once they are employed, as they do not denounce their situation and labour inspections cannot

be conducted in households that are not registered as workplaces, as outlined above. Thus, more attention is needed to the experiences of exploitation of Romanian women.

In conclusion, in spite of the limited data on Romanian women trafficked for the purpose of labour exploitation in the domestic work sector, the main contribution of this study has been to examine the situation of Romanian Domestic Workers in Italy, in light of the vulnerabilities resulting from their situation in the country of origin and to determine the effectiveness of the legislative framework drawing from their exploitative experiences, while taking into account a gender perspective as a fundamental instrument in the elimination of exploitation and in fostering human rights protection.

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