PROTECTING DOMESTIC WORKERS IN A GLOBALIZED WORLD: A MULTILEVEL INQUIRY WITH SPECIAL REFERENCE TO FEMALE MIGRANT DOMESTIC WORKERS

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Executive Summary

The present thesis seeks to assess the level of legal protection afforded to domestic workers through a multi-level inquiry. Domestic workers are particularly vulnerable because of the status of their work – often gendered and undervalued – their invisibility and isolation, their migration status, and their exclusion from labour law protection. Taking into account the fact that a large number of domestic workers are female migrants in a particularly vulnerable situation, this research pays special attention to the protection of female migrant domestic workers. A key international legal instruments dedicated to the protection of domestic workers is the ILO Domestic Workers Convention. In light of the low number of ratifications, however, the research seeks to find what other legal frameworks provide protection for this category of workers, examining other relevant ILO standards, international human rights standards, and CoE standards. The analysis is complemented by the study of domestic workers' rights in the United Kingdom which is not party to the ILO Domestic Workers Convention.

The research reveals that the fullest protection is clearly offered by the interplay of a wide range of legal instruments as there is a strong complementarity between the different levels of protection at the international and regional levels. While the ILO focuses on labour law, its humanitarian approach allows it to address the human rights of workers. There is thus a considerable overlap between ILO standards for domestic worker and standards set by other human rights bodies and instruments. The ICRMW and CEDAW committees' comments, and the PACE recommendations on modern slavery were all adopted before the ILO Domestic Workers Convention, but are reflected in it. On the other hand, human rights bodies are increasingly being inspired by ILO standards themselves. For instance, the CoE makes reference to ILO standards in its case-law on forced labour, and the UN refers closely to the

ILO on issues concerning migrant workers. Thus, while the ILO Domestic Workers Convention is significant and unique for the protection of domestic workers and cannot be replaced by other instruments, the importance of other documents to protect special categories, such as female domestic workers or migrant domestic workers, illustrate how the most effective protection is achieved through the interplay of a wide array of rights protection mechanisms at different levels. Indeed, labour rights and human rights are interconnected and are both needed to protect domestic workers.

The case study of the UK helps to show that in countries such as the UK, that have not ratified and implemented the ILO Domestic Workers Convention, domestic workers – and especially migrant domestic workers – are likely to remain insufficiently protected. Thus, ratification and implementation of the Domestic Workers Convention is imperative to give domestic workers access to their rights, but the ratification of other instruments specifically designed for migrant workers can help complement this protection, as the scope of the Domestic Workers Convention is limited on this topic. In all countries that have not ratified the Domestic Workers Convention, it is therefore essential to ratify not only the ILO Domestic Workers Convention, but also complementary instruments at the international and regional levels to protect fully all domestic workers.

Acknowledgments

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Abbreviations

CEDAW – Convention on the Elimination of all Forms of Discrimination Against Women

CMW – Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

CoE – Council of Europe

CRC – Convention on the Rights of the Child

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms

ECOSOC – United Nations Economic and Social Council

ECRI – European Commission against Racism and Intolerance

ECtHR – European Court of Human Rights

ESC – European Social Charter

ESCR – European Committee on Social Rights

GRETA – Group of Experts on Action against Trafficking in Human Beings

IALL – International Association for Labour Legislation

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICRMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ILO – International Labour Organization

NMW – National Minimum Wage

PACE – Parliamentary Assembly of the Council of Europe

UDHR – Universal Declaration of Human Rights

UKBA – United Kingdom Border Agency

UN – United Nations

UPR – Universal Periodic Review

Introduction

The International Labour Organization (ILO) estimates that there are 53 million domestic workers in the world, 83 percent of which are female workers.[1] Domestic workers are thus clearly not a marginal phenomenon but, in fact, "comprise a significant part of the global workforce in informal employment".[2] Domestic workers may have different terms of employment, thus the term is understood to cover workers working fulltime and part-time, working for one or several employers, in their own country or abroad.[3] Domestic workers perform a variety of tasks, such as "cleaning the house, cooking, washing and ironing clothes, taking care of children, or elderly or sick members of a family, gardening, guarding the house, driving for the family, and even taking care of household pets".[4]

Domestic workers are extremely vulnerable workers lacking protection and often facing "deplorable working conditions, labour exploitation, and abuses of human rights".[5] As we will see, these risks are severe for migrant domestic workers. At the same time, "migrants are over-represented among domestic workers", as women are increasingly moving as independent workers and looking for better employment opportunities abroad, often as domestic workers.[6] The thesis will therefore place a particular focus on the protection of female migrant domestic workers.

[1] International Labour Organization (ILO), 'Who Are Domestic Workers?' (*ILO*, 2015) <http://www.ilo.org/global/topics/domestic-workers/WCMS_209773/lang--en/index.htm> accessed 9 October 2015
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] International Labour Office, 'Migrant Domestic Workers' (2015) Labour Migration Highlight no. 3, 1 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_384860.pdf > accessed 10 December 2015

Women domestic workers – including female migrant workers - are amongst the most vulnerable group of workers for several reasons. First, domestic work is often undervalued. This is because it is gendered, and consists of tasks "such as cleaning, gardening, and caring for children or elderly people"[7] that were "traditionally performed by women without a wage"[8] and often require low skills.[9] Despite the fact that domestic workers contribute significantly to the world economy through remittances[10], domestic work is often "perceived as lacking in value and exogenous to the "productive" economy".[11] The fact that domestic workers are often women also puts them at risk of gender discrimination, and gender-based violence. Moreover, migrant women domestic workers in particular face discrimination when they are pregnant.[12] In addition, the fact that many domestic workers are also migrants creates issues of discrimination based on nationality or ethnic origin.[13]

Second, this work is performed inside households, which means it is often invisible and isolated.[14] This creates challenges because labour regulations of the private sphere of the home, or labour inspections, are difficult.[15] Furthermore, the isolation and risks of abuse are greater for migrant domestic workers who often live in the household where they work, "do not speak

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[7] Einat Albin, Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (March 2012) 41 [1] Industrial Law Journal 67, 68
[8] International Labour Office, 'Decent Work for Domestic Workers' (April 2010) 68 World of Work - The Magazine of the ILO, 6 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_126576.pdf> accessed 7 July 2016
[9] Einat Albin, Virginia Mantouvalou (n 7) 68
[10] Human Rights Watch, 'The ILO Domestic Workers Convention, New Standards to Fight Discrimination, Exploitation, and Abuse' (HRW, 2013) 1 <https://www.hrw.org/sites/default/files/related_material/2013ilo_dw_convention_brochure.pdf> accessed 14 July 2016
[11] International Labour Office, 'Decent Work for Domestic Workers' (n 8) 6
[12] UN Human Rights Council (26th Session) 'Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau - Labour Exploitation of Migrants' (3 April 2014) A/HRC/26/35, 13 para 54
[13] Bridget Anderson, 'A Very Private Business – Exploring the Demand for Migrant Domestic Workers' (SAGE Publications 2007) 14 [3] European Journal of Women's Studies 247, pp 251-256
[14] Human Rights Watch (n 10) 1
[15] Ibid, 5; Sandra Fredman, 'Home from Home, Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers', in Cathryn Costello and Mark Freedland QC (Hon) FBA (eds), *Migrants at Work: Immigration and Vunerability in Labour Law* (Oxford University Press 2014) 399

the local language, do not have local support networks", and do not know their rights and the law of the country in which they work.[16] Labour legal protection often does not apply to the privacy of the home, or is difficult to enforce there,[17] which means that live-in domestic workers face less autonomy and privacy, limited control over their working hours, and little protection against abuse and exploitation, as well as difficulties to organize in trade unions.[18]The employment relationship between domestic workers and their employers is also complicated, as domestic workers may "seem like a family member - not a worker".[19] Domestic workers can also be recruited by private agencies that need regulation.[20] The ILO reported abuses from such agencies, for example, relating to conditions of work, fees, or the retention of passports.[21]

Third, with regard to migrant domestic workers, immigration status can also have an impact on the vulnerability of domestic workers. Many migrant domestic workers are in an irregular situation "leaving them exposed to poor working conditions, exploitation and abuse", [22] while their irregular status prevents them from seeking protection by fear of deportation or criminal proceedings.[23] In addition, migrant domestic workers may depend on their employers for migration status, as visas are sometimes tied to their employers.[24] This system means that migrant domestic workers have no possibility to leave an abusive employer without facing

[16] Maria Gallotti, 'Domestic Work Policy Brief no. 9: Making Decent Work a Reality for Migrant Domestic Workers' (17 December 2015) 1 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_436974.pdf> accessed 7 July 2016
[17] Judy Fudge, Kendra Strauss, 'Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude – Migrant Domestic Workers in the UK', in Cathryn Costello and Mark Freedland QC (Hon) FBA (eds), *Migrants at Work: Immigration and Vunerability in Labour Law* (Oxford University Press 2014) 165
[18] Sandra Fredman (n 15) 399
[19] Einat Albin, Virginia Mantouvalou (n 7) 68
[20] Maria Gallotti (n 16) 4; Sandra Fredman (n 15) 405
[21] Maria Gallotti (n 16) 4
[22] Ibid, 3
[23] Sandra Fredman (n 15) 400
[24] Maria Gallotti (n 16) 4

deportation, and abuse may go unreported.[25] Another issue for migrant domestic workers is that employers sometimes confiscate their identity or travel documents, in order to "trap [them] in exploitative jobs", and also "reinforce[ing] isolation and dependence and restrict[ing] the freedom of movement of the migrant".[26]

Finally, domestic workers – in particular migrants - are often excluded from legal protection in national labour laws.[27] Albin and Mantouvalou describe it as 'legislative precariousness', meaning "their exclusion from protective laws or the lower degrees of legal protection they receive in comparison to other workers".[28] Domestic workers are afforded lower or even no protection regarding for example hours of work, rest, minimum wage,[29] maternity leave, and occupational safety.[30] Again, migrants are specifically vulnerable, as even if national domestic workers are protected, migrant domestic workers might still be excluded.[31]

All of these factors create "serious decent work deficits" for domestic workers and put in particular migrant domestic workers at high risk of human rights and labour rights violations,[32] due to the intersectionality of gender, ethnicity, migration status and employment.

The year 2013 marked the entry into force of the 'ILO Convention 189 concerning Decent Work for Domestic Workers', or the Domestic Workers Convention, aimed at protecting the

[25] Maria Gallotti (n 16) 1
[26] UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants' (n12) 8-9 para 37
[27] HRW (n 10) 1
[28] Einat Albin, Virginia Mantouvalou (n 7) 69
[29] HRW (n 10) 1 ; Einat Albin, Virginia Mantouvalou (n 7) 69
[30] ILO, 'Decent Work for Domestic Workers' (n 8) 4-5
[31] Maria Gallotti (n 16) 4
[32] Maria Gallotti (n 16) 1; International Labour Office, 'In Search of Decent Work – Migrant Workers' Rights: A Manual for Trade Unionists' (ILO Bureau for Workers' Activities (ACTRAV) 2008) 79 <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_115035.pdf> accessed 15 July 2016

rights of domestic workers and promoting the adoption of measures by States.[33] To this date, only 22 countries have ratified the Domestic Workers Convention, and it is currently in force in only 15 countries.[34] In the European Union, only six countries have ratified it[35], although the demand for domestic services has increased steadily[36] and the number of migrant domestic workers represents 5.2 million women in Europe.[37] The low number of ratifications of the Domestic Workers Convention raises the question to what extent the protection of domestic workers is ensured through other legal frameworks at the global, regional and domestic level.

Hence the thesis aims to make a multi-level inquiry into the protection of domestic workers by diverse legal instruments and mechanisms. In doing so the thesis will first present a background on the ILO, the Domestic Workers Convention, and other relevant ILO instruments for the protection of domestic workers. At the international level, it will also look at United Nations instruments that are of relevance to the protection of domestic workers. At the regional level, it will focus on Europe and regional human rights instruments. Finally, at the national level, it will examine the case study of the United Kingdom, assessing the interplay of diverse layers of domestic worker rights protection.

[33] International Labour Office, "Convention No. 189 Decent Work for Domestic Workers" (10 August 2011) <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_161104.pdf> accessed 7 July 2016

[34] International Labour Organization Normlex, 'Ratifications of C189 - Domestic Workers Convention, 2011 (No. 189)' (*ILO* 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 8 November 2016

[35] Ibid.

[36] Barbara Specht, 'Women's Economic Migration in the Context of Globalisation' (WIDE 2010) 7 <http://genet.csic.es/sites/default/files/documentos/biblioteca/WIDE_Women's%20Economic%20Migration.pdf> accessed 10 December 2015

[37] International Labour Office, 'Migrant Domestic Workers' (n 6) 1

Chapter 1: The International Labour Organization Framework and Domestic Workers

This chapter focuses on the protection offered to domestic workers through ILO standards. It will begin by providing a brief historical account of the ILO's founding and by presenting its current objectives, before moving to relevant ILO instruments with a particular emphasis placed on the ILO Domestic Workers Convention.

Section 1.1 ILO – Understanding the Historical Background

The Industrial Revolution in Europe brought about new technologies and new methods of work that transformed the world of labour[38] and "brought about miserable living [and working] conditions for the working class".[39] As a result, in the 1800s, before the creation of the ILO, there were already initiatives in different countries and at an intergovernmental level to regulate labour standards.[40] Daniel Le Grand and Robert Owen, two manufacturers, are at the origin of the idea of an international labour organization that would develop international labour standards.[41] They had been advocating for the regulation of working conditions through common labour legislation among states; Le Grand in particular believed that the prosperity of a state depended on the well-being of workers, and he advocated for intergovernmental agreements between industrial countries.[42] Already at the time, the justification he offered contained a humanitarian element. His three main arguments were that first, there was a

[38] Antony Alcock, *History of the International Labour Organisation* (Macmillan Press Ltd 1971) pt 1, 1
[39] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (*Oxford Public International Law*, 2016) para A (1) <www.mpepil.com> accessed December 2015
[40] Victor-Yves Ghebali, 'The International Labour Organisation: A Case Study on the Evolution of U.N. Specialised Agencies' in Roberto Ago and Nicolas Valticos (eds), *International Organization and the Evolution of World Society*, vol 3 (Kluwer Academic Publishers 1989) ch 1
[41] International Labour Office, *International Labour Standards: A Workers' Education Manual* (4th rev edn, International Labour Organisation 1998) 3; Victor-Yves Ghebali (n 40) 2
[42] Antony Alcock (n 38) 6

humanitarian need to improve the life of workers "from both the moral and the material point of view"; second, from a political standpoint, the protection of workers would prevent social unrest and preserve peace; third, economically, promoting international standards rather than national ones meant that there would be no competitive disadvantage from developing social policies.[43] Thus, at the very basis of the idea of the ILO, there seems to have been a human rights element.

There were also several events and attempts to create international organizations, more or less successfully, which underpinned the creation of the ILO. First, in 1864, Marx and Engels founded the First International in London, which was meant to be an international organization of workers.[44] However, it failed, because strong national organizations for workers had not been developed yet to participate as members of the organization, and because there was also a division concerning the method of promoting better conditions for workers.[45] Switzerland was one of the main countries involved in defending the cause of workers. On its initiative, European countries agreed to organize a conference on labour, which eventually took place in Berlin.[46] The Berlin Conference of 1890 gathered governments for the first time with the aim to discuss labour standards, and even though it did not produce binding results or any formal commitments from the participating states, several recommendations were made on issues such as child labour or mine labour.[47] A few years later, in 1900, still mostly on the initiative of Switzerland, the International Association for Labour Legislation (IALL) was founded, which can be considered the precursor of the ILO.[48] Since governments had rejected the creation of a supranational powerful body, the task of the IALL focused on research on labour legislation

[43] Victor-Yves Ghebali (n 40) 2-3
[44] Antony Alcock (n 38) 7
[45] Ibid.
[46] Ibid, 10
[47] Victor-Yves Ghebali (n 40) 4
[48] ILO, *A Workers' Education Manual* (n 41) 5

and conditions of work, hoping to educate and influence governments' action and policies in the field of labour.[49] The IALL produced two international treaties: one limiting night-work for women, and another prohibiting the use of white phosphorus.[50] However, this success was short-lived, as the organization's activities were stopped with the outbreak of World War I.[51]

The effects of World War I on the world of labour and on the creation of the ILO are significant. First, the war demanded a lot from the working class, as there was a great pressure for the production of military and civilian necessities and participation in the war effort.[52] The war put additional strain on workers with long working hours, Sunday work and the prohibition to strike, while at the same time, governments had to take into consideration workers' conditions if they wanted to maintain their productivity and health.[53] Some governments chose the path of reform and adopted social measures such as minimum wage laws in France and Germany, and the creation of Whitley Councils in the UK.[54] The October 1917 Revolution in Russia showed the consequences of a rigid social policy[55], and also motivated governments in other countries to accept more reforms by fear of similar upheavals in their own states.[56] One important event during the war was a trade union conference in Leeds, in the UK, where labour movements from different European states came together and drafted a list of rights that they asked to be included in the peace treaty.[57] The list included, inter alia:

> "Freedom of association; the regulation of emigration and immigration […]; social insurance […]; a ten-hour day […] and a five and a half day week with a

[49] Antony Alcock (n 38) 11
[50] ILO, *A Workers' Education Manual* (n 41) 5
[51] Ibid, 6
[52] Victor-Yves Ghebali (n 40) 6; Antony Alcock (n 38) 14
[53] Antony Alcock (n 38) 14
[54] Victor-Yves Ghebali (n 40) 6
[55] Ibid.
[56] Jean- Michel Servais, *International Labour Organization (ILO)* (Kluwer Law International 2011) 15
[57] Antony Alcock (n 38) 16

> minimum age of fourteen; no night-work for women and children under eighteen; legislation regarding safety, health and factory inspection."[58]

Participants of the Leeds conference also advocated the creation of an international commission to supervise the implementation of these standards, and to organize future conferences to expand them.[59] Moreover, the Conference called for the establishment of an international labour office whose role would be to study the evolution of labour legislation.[60]

At the end of World War I, all sides recognized the contribution of workers and their sacrifices to the war effort: "just as the war could not have been won without their wholehearted co-operation, so was it unreasonable to expect to build peace without their help".[61] Countries such as France and Britain accepted to include labour provisions in the peace treaties, both under the fear of revolutions similar to that of Russia, and following their own commitments to improve the condition of workers at the end of the conflict.[62] Thus, in 1919, the Peace Conference appointed a Commission on International Labour Legislation, consisting of representatives from governments, trade unions and employers, and charged with drafting proposals to be included in the Peace Treaty.[63]

The final draft became part XIII of the Versailles Peace Treaty, creating the ILO.[64] Section I consisted of the rules of functioning of the organization, known as its Constitution,[65] which later became independent from the Peace Treaty.[66] The Preamble lays down the main purpose

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[58] Antony Alcock (n 38) 16
[59] ILO, *A Workers' Education Manual* (n 41) 6
[60] Antony Alcock (n 38) 16
[61] Victor-Yves Ghebali (n 40) 7
[62] Jean- Michel Servais (n 56) 15
[63] ILO, *A Workers' Education Manual* (n 41) 7
[64] Ibid.
[65] Antony Alcock (n 38) 35
[66] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) para A (3)

of the organization, which is to promote social justice and an improvement of working conditions as a way to maintain peace.[67] Section II was a 'Labour Charter' that was drafted "to guide the social policy of the League's members" and which would be developed through conventions and recommendations.[68] It comprised 9 principles; first, labour should not be regarded only as a commodity, second, there should be a right of association for workers, third, workers' wages should be adequate as to allow a "reasonable standard of living", fourth, it established an 8-hour day or 48-hours of work per week, fifth, workers are entitled to a weekly rest of 24 hours, sixth, child labour should be abolished, seventh, workers should receive "equal pay for equal work", eight, national and immigrant workers should receive an "equitable economic treatment", and finally, an inspection system should be established "to ensure the enforcement of the laws for worker protection".[69] During World War II, the Declaration of Philadelphia further defined the organization's goals and the role it would have after the war, and was added as an annex to the Constitution.[70]

New goals include, for example, full and satisfying employment, the right to collective bargaining, "child welfare and maternity protection; the provision of adequate nutrition, housing and facilities for recreation and culture; the assurance of equality of educational and vocational opportunity".[71] The Declaration also states as a fundamental objective that:

> "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity,

[67] International Labour Organization Constitution (adopted 1 April 1919, entered into force 28 June 1919) 15 UNTS 40 (ILO Constitution) Preamble
[68] Antony Alcock (n 38) 35
[69] Ibid.
[70] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) para A (4)
[71] International Labour Organization Constitution (n 67) Annex 'Declaration concerning the Aims and Purposes of the International Labour Organisation - Declaration of Philadelphia' (10 May 1944) III

of economic security and equal opportunity"[72]

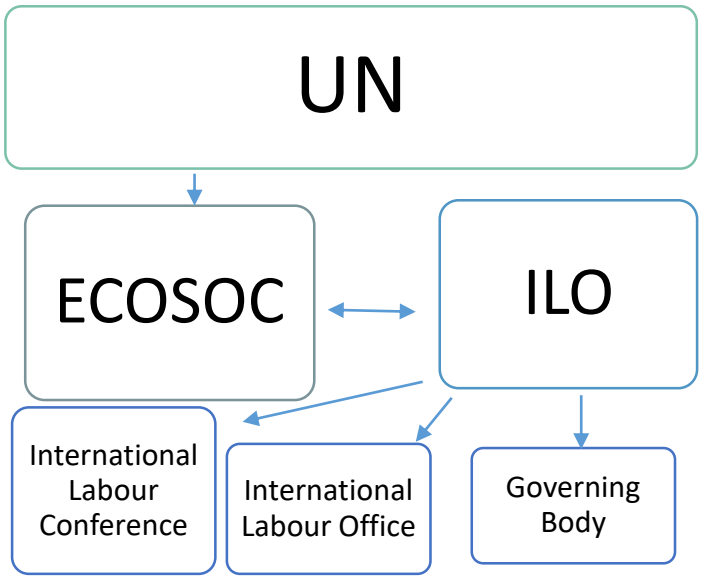
This sentence clearly resembles the formulation of other and subsequent human rights declarations and conventions, although the Philadelphia Declaration was drafted two years before the establishment of the United Nations and four years before the Universal Declaration of Human Rights. It gives the work of the ILO a human rights perspective as a guide for policy.

Another result of World War II which contributes to seeing the ILO as an actor of relevance to modern human rights protection is its integration to the United Nations in 1946 as a specialized agency.[73] The ILO is thus in contact and working with other UN agencies which are directly involved in human rights, on issues such as gender equality, or children's rights (through the prohibition of child labour).

Section 1.2. The Current ILO Framework

The ILO currently functions as a specialized agency of the United Nations. The ILO is still an relationship agreement with the UN, established through the UN General Assembly Resolution 50(I) of 14 December 1946 and the General Assembly Draft Agreement A/72 of 30 September 1946.[74] The United Nations Economic and Social Council (ECOSOC) is the UN body that helps to coordinate ILO's work with the UN and other specialized agencies and actors, at the intergovernmental level but also between secretariats.[75] ECOSOC is one of the main organ of the United Nations is charge of questions of sustainable development – which is mainly broken

[72] International Labour Organization Constitution (n 67) Annex 'Declaration of Philadelphia', II (a)
[73] ILO, *A Workers' Education Manual* (n 41) 10
[74] Chief Executives Board Secretariat, 'Directory of United Nations System Organizations' (*UN System Chief Executives Board for Coordination (CEB)*, 2015) <http://www.unsceb.org/directory> accessed 21 March 2016; Chief Executives Board Secretariat, 'International Labour Organization' (*UN System Chief Executives Board for Coordination (CEB)*, 2015) <http://www.unsceb.org/content/international-labour-organization-0> accessed 15 July 2016
[75] Chief Executives Board Secretariat, 'Directory of United Nations System Organizations' (n 74)



Basic ILO Structure

down into economic, social, and environmental issues.[76] It interacts with UN specialized agencies such as ILO on these issues in order to foster dialogue, conduct review, emit recommendations, and coordinate the work of different agencies and other actors in the field.[77] The ILO itself has 185 member states, and is made up of three main bodies. One is the International Labour Office, which is the permanent secretariat based in Geneva. It is in charge of research and documentation, and of assisting governments with technical cooperation and drafting laws according to ILO standards.[78] This body works closely with the Governing Body, the executive body of the ILO, which takes decisions, and drafts the agenda and programs.[79] The current director-general of the ILO, presiding the Governing Body, is Guy Ryder since 2012.[80] The third body is the International Labour Conference. The Conference meets annually in June in order to adopt labour standards, for example through conventions and recommendations, and discuss labour and social questions.[81] A notable feature of these three bodies and of the ILO in general is that they are tripartite: they

[76] United Nations Economic and Social Council (ECOSOC), 'About Us' (*ECOSOC70*) <https://www.un.org/ecosoc/en/about-us> accessed 21 March 2016
[77] United Nations Economic and Social Council (ECOSOC), 'About ECOSOC' (*ECOSOC*) <http://www.un.org/en/ecosoc/about/index.shtml> accessed 21 March 2016
[78] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) para B (2)(b)(iii)11
[79] ILO, 'Governing Body' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/governing-body/lang--en/index.htm> accessed 21 March 2016
[80] ILO, 'ILO Director-General' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/about-the-ilo/who-we-are/ilo-director-general/lang--en/index.htm> accessed 21 March 2016
[81] ILO, 'International Labour Conference' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang--en/index.htm> accessed 21 March 2016

all have representatives from governments, employers, and workers – usually represented by trade unions –, working together with equal weight to establish labour standards.[82] The advantage of this approach is that it facilitates social dialogue between the three parties, taking into consideration as much as possible all sides.[83] This might make decision-making slower, but it ensures that the standards resulting from these dialogues receive "an exceptional authority and higher democratic legitimacy", and might lead to more willingness from all sides to comply with them.[84]

ILO conventions and recommendations lay down international labour standards that help to harmonize national laws and practices.[85] Conventions are binding on those States that have ratified them but also have significance for non-ratifying ILO member states, which, according to the ILO Constitution, are required to report "the position of [their] law and practice in regard to the matters dealt with in the convention".[86] Beyond national laws and policies, these standards can also be of use to industries in the formulation of their codes of conduct, as they are aimed at all three types of stakeholders in the ILO. Moreover, it can also influence other international institutions, NGOs, and advocacy groups working with human rights or seeking to influence policy-making.[87]

Since its inception, the ILO has created 399 international instruments, which are divided

[82] International Labour Organization, 'Tripartite Constituents' (*ILO*, 2016) <http://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> accessed 15 July 2016
[83] International Labour Organization, 'International Labour Standards on Tripartite Consultation' (*ILO*, 2016) <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang--en/index.htm> accessed 15 July 2016
[84] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) B (2) (a) 7
[85] ILO, 'How International Labour Standards Are Used' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> accessed 1 April 2016
[86] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) B (3) (a) (ii) 14
[87] ILO, 'How International Labour Standards Are Used' (n 85)

between 189 conventions, 6 protocols, and 204 recommendations.[88] Conventions can be grouped under different categories, for example, working time, employment security, migrant workers, or, for domestic workers, "other specific categories of workers".[89] Moreover, the ILO distinguishes eight fundamental conventions that set out the "fundamental principles and rights at work".[90] They cover the following human rights: freedom of association, the right to collective bargaining, forced labour, child labour, and discrimination and equality.[91] In 1998, the ILO also adopted a Declaration on Fundamental Principles and Rights at Work that includes these topics.[92] The conventions, once ratified, are binding, and their implementation is overseen through member states reporting to a standard supervisory system composed by the Committee of Experts on the Application of Conventions and Recommendations, and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations.[93] The ILO member states report regularly on the implementation of conventions they have ratified, as well as on their law and practice regarding issues addressed by conventions they have not ratified.[94] These reports also receive comments from employers' and workers' organizations.[95] Furthermore, there are special procedures to verify proper implementation: the procedure for representation, a procedure for complaints, and a special

[88] ILO, 'NORMLEX Information System on International Labour Standards' (*International Labour Organisation*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0> accessed 21 March 2016
[89] ILO, 'NORMLEX Information System on International Labour Standards: List of Instruments by Subject and Status' (*International Labour Organisation*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO:::> accessed 21 March 2016
[90] ILO, 'Conventions and Recommendations' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 21 March 2016
[91] Ibid.
[92] Ibid.
[93] ILO, 'ILO Supervisory System/Mechanism' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> accessed 21 March 2016
[94] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) B (4) (a) 19
[95] Ibid.

committee for freedom of association.[96]

Section 1.3. The ILO Mandate and Domestic Workers

Today, the ILO continues to work with the mandate established in 1919, namely the promotion of peace through social justice, and the creation of "a harmonious balance between social progress and economic development",[97] although it now has to deal with new issues related to technological, social and economic changes.[98] The ILO declares itself "devoted to promoting social justice and internationally recognized human and labour rights",[99] and since 1999, works on these objectives through its 'Decent Work Agenda'.[100] This section of the chapter will look at the ILO Decent Work Agenda and the ILO mandate on domestic workers and migrant domestic workers.

As noted previously, the creation of ILO standards has primarily followed, since the beginning of the ILO, a humanitarian motivation.[101] The International Labour Office stresses that "The ILO has always attached particular importance to certain basic human rights which constitute an essential element in all action designed to improve the conditions of workers".[102] The 1998 ILO Declaration on Fundamental Principles and Rights at Work illustrates this commitment. This Declaration applies to all member states and reaffirms the goals of the ILO's Constitution (including the Philadelphia Declaration), and urges member states to:

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[96] ILO, 'Supervisory System' (n 93)
[97] Heiko Sauer, 'International Labour Organization (ILO)' in *Max Planck Encyclopedia of Public International Law* (n 39) (B) (1) 5
[98] ILO, *A Workers' Education Manual* (n 41) 10
[99] ILO, 'Mission and Objectives' (*International Labour Organisation*, 2016) <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> accessed 21 March 2016
[100] International Labour Conference (87th Session) Report of the Director General: Decent Work (Geneva June 1999) <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#Global adjustment> accessed 1 April 2016
[101] ILO, 'The ILO: What It Is, What It Does' (International Labour Organisation, n.d.) 4 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082364.pdf> accessed 1 April 2016
[102] ILO, *A Workers' Education Manual* (n 41) 47

> "Respect, promote and realize in good faith the principles and rights relating to: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation".[103]

Moreover, at the 87th International Labour Conference in 1999, the Director-General submitted a report on decent work that defined ILO's mission as "to improve the situation of human beings in the world of work".[104] The ILO thus adopted as its primary tasks a 'Decent Work Agenda', aiming "to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".[105] The goal is to promote "decent work for all" and jobs of quality through four main objectives: full employment, ensuring social protection, guaranteeing respect for fundamental principles and rights at work, and encouraging social dialogue.[106] This new Decent Work Agenda marks a renewed focus on dignity, social justice and human rights. Indeed, one of the main strategic focus of the agenda is on promoting rights and particularly those contained in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[107] The four main human rights – also called 'core labour standards' – of the Declaration on Fundamental Principles and Rights at Work are also contained in what the ILO distinguishes as eight 'fundamental conventions'. The ILO aims to achieve universal ratification of these conventions.[108] This really confirms the importance the ILO attaches to these rights, and reaffirms the organization's central humanitarian motive. The 'Convention

[103] International Labour Conference (87th Session) Report of the Director General: Decent Work (n 100)
[104] Ibid.
[105] Ibid.
[106] Gary S. Fields, 'Decent Work and Development Policies' (2003) 142 Intemational Labour Review 239, 239
[107] Ibid, 239
[108] ILO, 'Conventions and Recommendations' (n 90)

189 Concerning Decent Work for Domestic Workers' (the Domestic Workers Convention) is clearly part of the Decent Work Agenda, and recalls in its preamble ILO's commitment to "decent work for all".[109]

Before the adoption of the Domestic Workers Convention in 2011, the ILO had already expressed concern about the situation and working conditions of domestic workers. A resolution on their conditions of employment was adopted during the International Labour Conference of 1965.[110] This resolution highlighted "the 'urgent need' to establish minimum living standards 'compatible with the self-respect and human dignity which are essential to social justice' for domestic workers in both developed and developing countries".[111] Research by the ILO also showed the lack of protection and the risks faced by domestic workers, and the organization insisted that domestic workers should have decent working conditions and fell under the protection of the Fundamental Principles and Rights at Work, as well as other labour standards.[112] Despite this, however, domestic worker were often excluded from ILO conventions through a flexibility clause.[113] They remained mostly invisible and excluded from domestic labour legislation, and their work was still not considered as real work.[114] It took almost 50 years between this resolution and the Domestic Workers Convention, which finally recognized domestic work and afforded specific protection to domestic workers.

[109] ILO Convention C189: Domestic Workers Convention (Convention concerning decent work for domestic workers) (100th Conference Session Geneva 16 June 2011) Preamble
[110] International Labour Conference (99th Session) Report IV (1): Decent Work for Domestic Workers (Geneva 2010) 11-12 <http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf> Accessed 16 July 2016
[111] International Labour Conference (99th Session) Report IV (1): Decent Work for Domestic Workers (n 110) 12
[112] Ibid.
[113] Claire Hobden, 'Reversing a History of Exclusion through International Labour Law' (Global Labour Column, February 2011) <http://column.global-labour-university.org/2011/01/reversing-history-of-exclusion-through.html> accessed 15 July 2016
[114] International Labour Conference (99th Session) Report IV (1): Decent Work for Domestic Workers (n 110) 12

Regarding domestic workers who are migrants, the ILO has worked on the protection of migrants since its inception, as the ILO Constitution states in its preamble that migrant workers' interests should be protected.[115] The ILO Declaration on Fundamental Principles and Rights at Work also expresses concern for the protection of migrant workers.[116] In principle, "all ILO Conventions, unless otherwise stated, apply to migrant workers",[117] and the ILO has also adopted two key conventions specifically protecting migrant workers: the Migration for Employment Convention C97 and the Migrant Workers Convention C143. Both these conventions take a rights-based approach to migrant workers' protection, notably through provisions on non-discrimination.[118] Thus, migrant domestic workers were partially protected in the ILO before the Domestic Workers Convention, but this protection addressed migration issues more than the nature of their employment.

Section 1.4. ILO Conventions of Relevance to Domestic Workers and Domestic Migrant Workers

As Claire Hobden notes, before the adoption of the Domestic Workers Convention in 2011, there were already "provisions in existing human rights instruments and ILO conventions that address[ed] some of their concerns",[119] including a 1965 ILO Resolution calling for the creation of global standards for domestic workers.[120] However, the ILO Governing Body agreed with domestic workers' organization on the need to establish a new and specific

[115] ILO Constitution (n 67) Preamble
[116] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (86th Conference Session Geneva 18 June 1998 - Annex revised 15 June 2010)
[117] International Labour Office, 'In Search of Decent Work – Migrant Workers' Rights: A Manual for Trade Unionists' (n 32) 3
[118] International Labour Organization, 'Convention 097 and International Youth Day' (*ILO*, 2016) <http://www.ilo.org/century/history/iloandyou/WCMS_219720/lang--en/index.htm> accessed 18 July 2016
[119] Claire Hobden (n 113)
[120] International Labour Conference (99th Session) Report IV (1): Decent Work for Domestic Workers (n 110) 11-12

convention.[121] First, we will see what other ILO standards are relevant for domestic workers . Then, we will see in what ways the ILO Domestic Workers Convention is different and important for the protection of domestic workers.

In its Preamble, the Domestic Workers Convention mentions eight other relevant ILO documents for the protection of domestic workers. First is the ILO Declaration on Fundamental Principles and Rights at Work of 1998. Interestingly, the Preamble of the Domestic Workers Convention does not mention the eight conventions that compose the fundamental principles and rights at work, but only refers to the non-binding Declaration. However, the Declaration states that States, not because they have ratified a convention but simply by virtue of their membership in ILO, have an obligation to respect and protect the principles and fundamental rights at work.[122] These are freedom of association, prohibition of forced labour and child labour, and the prohibition of discrimination in employment and occupation.[123] The second document mentioned is the ILO Declaration on Social Justice for a Fair Globalization. This declaration is from 2008 and "expresses the contemporary vision of the ILO's mandate in the era of globalization".[124] It is based on and reaffirms the Declaration on Fundamental Principles and Rights at Work, while also presenting the Decent Work concept as central to achieving ILO's objectives.[125] Its Preamble starts by stating that globalization has changed the world of work, and thus the ILO needs to adjust to new phenomena and challenges. Relevant for domestic workers is the mention of the movement of workers and new challenges such as "the growth of unprotected work and the informal economy, which impact on the employment

[121] Jo Becker, 'Organizing for Decent Work for Domestic Workers - the ILO Convention', in Jo Becker (ed), *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford University Press 2013) 44
[122] ILO Declaration on Fundamental Principles and Rights at Work (n 116) paras 1-2
[123] Ibid, para 2
[124] ILO Declaration on Social Justice for a Fair Globalization (97th Conference Session Geneva 10 June 2008) Preface, 1
[125] Ibid.

relationship and the protections it can offer".[126] The provision on social protection, including social security and labour protection, is also of primary importance for domestic workers. This covers in particular the provision of social security to all, taking into account special needs, "healthy and safe working conditions", and protection for other conditions of work such as wages and hours of work.[127] Nevertheless, as central to reaffirming the aims of the ILO as these two declarations may be, they are non-binding and formulated in vague terms that require further specification. Their impact on the protection of domestic workers is therefore extremely limited and rests upon the good faith of States members of the ILO who implement policies aimed at fulfilling the Decent Work Agenda.

The Preamble of the Domestic Workers Convention further mentions specific binding conventions. One of these is Convention 156 on Workers with Family Responsibilities. This convention is relevant to domestic workers, and migrant domestic workers, as they often have children and families left behind. The convention targets the discrimination of men and women with families in employment, and seeks to provide them with free choice of employment and appropriate working conditions and social security, [128] taking into account their needs for specific services such as child-care,[129] and encouraging measures that protects workers with families from unemployment because of their responsibilities.[130] The other conventions mentioned can be grouped according to two topics: employment regulation and migration. Two of them concern employment: Convention 181 on Private Employment Agencies, and Recommendation 198 on Employment Relationship. Convention 181 seeks to protect workers who use private agencies from abuses, by

[126] ILO Declaration on Social Justice for a Fair Globalization (n 124) 5
[127] Ibid, 10 (ii)
[128] ILO Convention C156: Workers with Family Responsibilities Convention (Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities) (67th Conference Session Geneva 23 June 1981) artt 1, 3 and 4
[129] Ibid, art 5
[130] Ibid, artt 7, 8

ensuring their right for example to association and collective bargaining, minimum wages, working conditions, training, social security, occupational safety and health, maternity and parental protection and benefits.[131] It also promotes respect for the principle of non-discrimination[132], prohibition of child labour[133], and the responsibility of the state to protect migrant workers[134]. There should be mechanisms for complaints and private agencies should be controlled by the labour inspection service, which will ensure that this convention is implemented.[135] Abuses will be sanctioned by law.[136] Recommendation 198 seeks to create national policies to protect workers in an employment relationship, and to make sure that contractual arrangements do not deprive workers from protection.[137] It specifically seeks to protect vulnerable workers such as women and migrants.[138] This is extremely relevant to domestic workers who are often both women and migrants.

The last three documents concern migrant workers. In ILO Convention 97, the "Migration for Employment Convention", the ratifying ILO members commit to providing accurate information to migrants in order to assist them in employment, [139] and "facilitate the departure, journey and reception of migrant workers in their jurisdiction".[140] Importantly, States should provide migrant workers with the same treatment than their nationals, without discriminating, regarding remuneration, holidays, working hours, age of employment, training, the right to

131 ILO Convention C181: Private Employment Agencies Convention (Convention concerning Private Employment Agencies) (85th Conference Session Geneva 19 June 1997) art 11
132 Ibid, art 5
133 Ibid, art 9
134 Ibid, art 8
135 Ibid, artt 10 and 14
136 Ibid, art 14
137 ILO Recommendation R198: Employment Relationship Recommendation (Recommendation concerning the employment relationship) (95th Conference Session Geneva 15 June 2006) artt 1 and 4
138 Ibid, artt 6 (a) and 7
139 ILO Convention C97: Migration for Employment Convention (Revised) (Convention concerning Migration for Employment) (32nd Conference Session Geneva 1 July 1949) art 2
140 Ibid, art 4

association, housing, social security, and taxes.[141] This Convention, however, does not apply to irregular migrant workers.[142] The convention contains two annexes on "recruitment, placing and conditions of labour of migrants for employment recruited otherwise than under government-sponsored arrangements for group transfer"[143] or "recruited under government-sponsored arrangements".[144] They seeks to protect migrants from abusive recruitment, by regulating who is able to engage in recruitment activities - public bodies or bodies established out of international instruments,[145] or an employer and a private agency.[146] These annexes allow recruitment to be supervised by the authorities, providing more security to migrant workers.[147] Specifically, contracts should be supervised, be accessible by migrant workers before departure, and contain information on remuneration, and conditions of work and life.[148] Finally, article 6 annex 1 and article 4 annex 2 provide that public employment services provide free services on administrative formalities, interpretation, settlement, and a safe trip.[149] Article 8 annex 1 and article 13 annex 2 clearly states that a person encouraging illegal migration should be punished.[150] Annex 2, in the case of government-sponsored recruitment, adds that the competent authorities should assist migrants with their employment, and that if migrants fail to secure their employment or find it unsuitable, the authorities should assist them in finding a new employment or returning them to their country of origin.[151]

[141] ILO Convention C97 (n 139) art 6
[142] Ryszard Cholewinski, 'Labour Migration Management and the Rights of Migrant Workers', in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens* (Cambridge University Press 2010) 277
[143] ILO Convention C97 (n 139) Annex 1 'Recruitment, Placing and Conditions of Labour of Migrants for Employment Recruited Otherwise than Under Government-Sponsored Arrangements for Group Transfer'
[144] Ibid, Annex 2 'Recruitment, Placing and Conditions of Labour of Migrants for Employment Recruited Under Government-Sponsored Arrangements for Group Transfer'
[145] Ibid, Annex 1 and 2, art 3 (2)
[146] Ibid, Annex 1 and 2, art 3 (3)
[147] ILO Convention C97 (n 139) Annex 1 art 3 (4); Annex 2 art 3 (5)
[148] Ibid, Annex 1 art 5 (1 -2); Annex 2 art 6 (1-2)
[149] Ibid, Annex 1 art 6; Annex 2 art 4
[150] Ibid, Annex 1 art 8; Annex 2 art 13
[151] Ibid, Annex 2 artt 8, 9, 10

The next document is Convention 143 "concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers", also called the Migrant Workers' Convention. The first part is dedicated to fighting abusive conditions of irregular migrants and eliminate illegal migration by detecting and sanctioning organization, assistance of illegal migration, and employment of illegal migrants.[152] The convention calls states to "respect the basic human rights of all migrant workers",[153] and encourages cooperation between states but also with workers and employers.[154] It stipulates that migrant workers who lose their job do not automatically become illegal and lose their residence permit,[155] and that those who are illegal and cannot be regularized still enjoy rights regarding their past employment.[156] The second part of the convention 143 concerns 'equality of opportunity and treatment'. Article 10 commits member states to develop national policies that promote "equality of opportunity and treatment […] for persons who as migrant workers or as members of their families are lawfully within its territory".[157] The scope is thus limited to regular migrants. Finally, Convention 143 stipulates that member states should guarantee equal working conditions for all and make sure that migrants are aware of their rights and obligations.[158]The convention 143 also contains an article on reunification of families of migrant workers.[159]

The last document referred to in the Preamble of the Domestic Workers Convention is the 'ILO multilateral framework on labour migration: non-binding principles and guidelines for a rights-

[152] ILO Convention C143: Migrant Workers (Supplementary Provisions) Convention (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers) (60th Conference Session Geneva 24 June 1975) part 1, Article 6
[153] Ibid, part 1, art 1
[154] Ibid, artt 4 and 7
[155] Ibid, art 8
[156] Ibid, art 9
[157] Ibid, part 2, art 10
[158] Ibid, part 2, art 12
[159] Ibid, part 2, art 13

based approach to labour migration'. Recognizing the important global phenomenon of labour migration, this framework seeks to provide guidance for national labour migration policies, while addressing the risks facing migrant workers such as abuse and exploitation, trafficking, irregular migration, discrimination and women's issues in labour migration.[160] The Framework thus provides very broad guidelines on the management of labour migration, including decent work – access to employment free choice, recognition of rights, income and social protection -[161], cooperation between countries, employers' and workers' organization, and with international organizations for a coordinated approach to labour migration,[162] the collection and analysis of knowledge on labour migration policy and practice,[163] an effective management of labour migration: states taking into account international standards and frameworks in their national policies,[164] "expanding avenues for regular labor migration",[165] promotion of social dialogue with employer and workers,[166] and also consultation with civil society and migrants associations.[167] On the protection of migrant workers, the framework promotes the human rights and labour rights of all migrant workers, regardless of their status, and specifies that "all international labour standards apply to migrant workers",[168] including both international human rights instruments and ILO instruments.[169] The framework also provides guidelines on trafficking and irregular migration,[170] the migration process including the recruitment

[160] ILO Governing Body (295th Session) ILO Multilateral Framework on Labour Migration – Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (Geneva March 2006) Preface v-vi and 3 <http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@migrant/documents/publication/wcms_178672.pdf> accessed 17 July 2016
[161] Ibid, 5
[162] Ibid, 7
[163] Ibid, 9
[164] Ibid, 11
[165] Ibid, 12
[166] Ibid, 13
[167] Ibid, 14
[168] Ibid, 16 para 9(a)
[169] Ibid, 15-16
[170] Ibid, 21

process,[171] social interaction and inclusion,[172] and recognition of the benefits of labour migration.[173] Thus, this framework is important to migrant domestic workers because it seeks to help shape labour migration policy according to existing standards. Beyond the migration aspect of domestic work, it also addresses issues of recruitment, and insists that human rights and labour standards apply to all irrespective of migration status, and expanding opportunities for regular labour migration. However, this document is non-binding and insists on the "sovereign rights of states to develop their own labour and migration policies".[174]

All instruments mentioned in the preamble of the Domestic Workers Convention and deemed to be relevant for domestic workers place a strong focus on the Fundamental Principles and Rights at Work, migration issues and issues of employment. These are indeed major issues facing migrant domestic workers. However, some of these documents are non-binding. In addition to providing a binding legal framework, the Domestic Workers Convention provides a focal point for the issue of protecting the rights of domestic workers, comprising a range of rights which are of relevance to this category of workers.

In 2011, the ILO adopted Convention 189 Concerning Decent Work for Domestic Workers and Recommendation 201. This convention is often referred to as a landmark, as it both recognized for the first time domestic workers and the specificity of their work, as well as offered minimum standards of protection for universal coverage,[175] including not only labour standards but a human rights approach.[176] Even though there had been other human rights instruments and ILO standards that covered some aspects of domestic work, as seen above,

[171] ILO Multilateral Framework on Labour Migration (n 160) 23-24
[172] Ibid, 27
[173] Ibid, 29
[174] Ibid, 3 para 2
[175] Claire Hobden (n 113)
[176] Einat Albin, Virginia Mantouvalou (n 7) 67

Claire Hobden points out that this new and specific binding convention was necessary because domestic workers were excluded from labour legislation in many countries, "and excluded from many ILO conventions via a flexibility clause that allows governments to exclude certain limited categories of workers".[177] We have also seen that other instruments did not cover all the vulnerabilities of domestic workers.

Thus, after a conference of domestic worker organizations in Amsterdam in 2006, trade unions and the ILO started discussing the possibility of creating an ILO convention for domestic workers.[178] The adoption process of ILO Convention 189 Concerning Decent Work for Domestic Workers – hereby the Domestic Workers Convention - and its Recommendation followed the regular standard-setting procedure of the ILO. In 2008, at its 301st session, the ILO Governing Body, following a proposal from the International Trade Union Confederation to develop an international instrument on domestic workers,[179] included an item on decent work for domestic workers on the International Labour Conference's agenda for its 99th session, to take place in 2010.[180] This left time for the International Labour Office to draft a first report on law and practice in states regarding domestic workers, which was sent for comments to states, worker's organizations and employers' organizations in 2009.[181] Their comments were then compiled in a second report, and both these reports were presented at the 99th session of the International Labour Conference in Geneva in 2010.[182] The Domestic Workers Committee of the Conference drafted the conclusions of the discussion, including a convention and

[177] Claire Hobden (n 113)
[178] Jo Becker (n 121) 43-44
[179] Ibid, 44
[180] International Labour Organization (ILO), 'Decent Work for Domestic Workers' (ILO n.d.) <http://www.ilo.org/ilc/ILCSessions/100thSession/on-the-agenda/decent-work-for-domestic-workers/lang--en/index.htm> accessed 4 April 2016
[181] International Labour Organization (ILO), 'Development of Convention 189 and Recommendation 201' (ILO n.d.) <http://www.ilo.org/global/docs/WCMS_209804/lang--en/index.htm> accessed 4 April 2016
[182] Ibid.

recommendation.[183] These were again subjected to comments and led to a revision of the draft of the convention.[184] In 2011, at the 100th International Labour Conference, the convention and its recommendation were adopted by a majority[185] – the convention received 396 votes in favour, 16 against, and 63 abstentions, and the recommendation 434 in favour, 8 against and 42 abstentions.[186] The Domestic Workers Convention entered into force in 2013. The promotion of decent work for domestic workers fits within the ILO's Decent Work Agenda,[187] and the choice of a convention – a binding instrument – shows the importance the ILO attaches to the challenges of domestic work.[188] As noted before, the Domestic Workers Convention includes both a sectoral approach and a human rights approach.[189] The sectoral approach helps to recognize domestic work as a "work like any other" while addressing the specific vulnerabilities this type of employment creates through labour standards.[190] The ILO also recognizes the human rights issues that arise from domestic work, such as restrictions on freedom of association, the right to privacy, or forced labour, and this human rights approach helps to affirm "the moral weight and urgency of domestic workers' claims".[191]

The Domestic Workers Convention defines domestic work as "work performed in or for a household", and a domestic worker as "any person engaged in domestic work within an employment relationship".[192] In its Preamble, while insisting that domestic workers are

[183] International Labour Organization (ILO), 'Development of Convention 189 and Recommendation 201' (n 181)
[184] Ibid.
[185] Ibid.
[186] International Labour Organization, '100th ILO Annual Conference Decides to Bring an Estimated 53 to 100 Million Domestic Workers Worldwide Under the Realm of Labour Standards' (*ILO*, 16 June 2011) <http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS_157891/lang--en/index.htm> accessed 17 July 2016
[187] See ILO Convention C189 (n 109) Preamble
[188] Einat Albin, Virginia Mantouvalou (n 7) 71
[189] Ibid, 75
[190] Ibid.
[191] Ibid.
[192] ILO Convention C189 (n 109) art 1

workers like others and deserve the same protection, the Convention also recognizes specific aspects of domestic work, such as the fact that it is undervalued and invisible, and also points out to specific vulnerabilities of domestic workers as migrants and women.[193] It recalls that international labour standards of the ILO and other international human rights instruments apply to domestic workers, but due to the specificities of domestic work, the Domestic Workers Convention is aimed at "supplement[ing] the general standards with standards specific to domestic workers so as to enable them to enjoy their rights fully".[194] The Convention also seeks to emphasize the value of domestic work in particular through its "significant contribution to the global economy".[195]

The Domestic Workers Convention addresses several decent work deficits faced by domestic workers. First, it provides standards regarding recruitment and private employment agencies, whose practices towards domestic workers are sometimes abusive.[196] Like in the ILO Private Employment Agencies Convention C181, article 15 stipulates that states should regulate the operations of private agencies, prevent abuses and give adequate protection and adequate complaints procedures.[197] This article also protects migrant domestic workers who are often recruited through private agencies, by asking states to cooperate to prevent abuses by private agencies through, for example, bilateral or multilateral agreements that regulate such employment.[198]

In addition, migrant workers are protected through article 8, which provides, similarly to the Migration for Employment Convention C97, that:

[193] ILO Convention C189 (n 109) Preamble
[194] Ibid.
[195] Ibid.
[196] Maria Gallotti (n 16) 1
[197] ILO Convention C189 (n 109) art 15
[198] Ibid.

> "Migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies."[199]

Article 7 contains a list of terms and conditions, such as working hours, rest, remuneration, arrangements for food and accommodation, and terms of repatriation, which should be indicated in written contracts.[200] Article 8 also provides that States should cooperate to ensure the protection of migrant domestic workers.[201] These written detailed contracts are important for migrant domestic workers not to fall into an irregular or an abusive employment situation. In addition, as Fredman points out, the Domestic Workers Convention "applies to all domestic workers"[202] and thus in theory extends its protection to irregular migrants employed as domestic workers.[203] The ILO Migrant Workers' Convention C143 also provides protection to irregular migrants. But the protection of irregular migrant domestic workers is not made explicit in the Domestic Workers Convention, and article 2 provides that:

> "2. A Member which ratifies this Convention may […] exclude wholly or partly from its scope: (a) categories of workers who are otherwise provided with at least equivalent protection; (b) limited categories of workers in respect of which special problems of a substantial nature arise".[204]

[199] ILO Convention C189 (n 109) art 8
[200] Ibid, art 7
[201] Ibid.
[202] Ibid, art 2(1)
[203] Fredman (n 15) 414
[204] ILO Convention C189 (n 109) art 2 (2)

Thus, state parties have the possibility to exclude categories of domestic workers and limit the scope of the Domestic Workers Convention's protection, and this might very well concern irregular migrant domestic workers.[205]

Concerning issues related to the work place, the Domestic Workers Convention provides for the possibility of labour inspections.[206] However, inspection of private homes might reveal to be difficult because of the conflict between the rights of privacy in the household and the rights of domestic workers. Live-in domestic workers receive special protection: Article 6 states that they should have "decent living conditions that respect their privacy"[207], while article 10 regulates their stand-by hours and periods of rest.[208] In addition, Article 9 states that:

> "Each Member shall take measures to ensure that domestic workers: (a) are free to reach agreement with their employer or potential employer on whether to reside in the household; (b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and (c) are entitled to keep in their possession their travel and identity documents".[209]

These articles focusing on live-in domestic workers are important, because they face particular difficulties. One of them is that, living in the house, they tend to be on standby, and thus it is difficult to regulate their working hours and periods of rest. Moreover, live-in domestic workers are often also migrant domestic workers. The retention of travel and identity documents can be

[205] Siobhán Mullally, Clíodhna Murphy, 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights' (Johns Hopkins University Press 2014) 36 [2] Human Rights Quarterly 397, 403-404
[206] ILO Convention C189 (n 109) art 17(2)
[207] Ibid, art 6
[208] Ibid, art 10
[209] Ibid, art 9

used as a means of pressure on these workers – especially for those in an irregular situation.

Furthermore, the Domestic Workers Convention addresses domestic workers' exclusion from legal protection in national labour laws. Domestic workers should be informed about the terms and conditions of their employment[210] and "enjoy fair terms of employment as well as decent working conditions".[211] Member States should ensure normal working hours, periods of rest – including a weekly rest of 24hours, overtime compensations and paid annual leaves for domestic workers.[212] Concerning remuneration, domestic workers should have access to the minimum wage,[213] and the Convention regulates the payment of wages,[214] as well as states that private employment agencies should not deduct fees from the domestic workers' pay.[215] Notably, article 12 provides that states:

> "May provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favourable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable".[216]

Regulating payment in kind is particularly relevant for live-in domestic workers whose costs of accommodation and meals can be deducted from wages. In addition, domestic workers should receive equal treatment with other workers concerning access to social

[210] ILO Convention C189 (n 109) art 7
[211] Ibid, art 6
[212] Ibid, art 10
[213] Ibid, art 11
[214] Ibid, art 12
[215] Ibid, art 15
[216] Ibid, art 12

security, maternity protection,[217] and regarding occupational safety and health.[218] These articles set minimum standards of protection for domestic workers in basic areas of labour law from which they are often excluded. The inclusion of maternity protection is almost the only protection that targets directly women domestic workers in the Convention. The Convention also contains a provision against discrimination on the basis of sex for remuneration.[219]

Moreover, in addition to labour standards, the Domestic Workers Convention seeks to protect the human rights of domestic workers, in particular through the respect for the Fundamental Principles and Rights at Work. Article 3 thus reads:

> "1. Each Member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in this Convention. 2. Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation".[220]

Domestic workers are thus protected from abuse in the form of forced or compulsory labour, and article 5 adds that "each Member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence".[221] 'This can be

[217] ILO Convention C189 (n 109) art 14
[218] Ibid, art 13
[219] Ibid, art 11
[220] Ibid, art 3
[221] Ibid, art 5

understood to cover sexual abuse and violence that women domestic workers may face.

Finally, the Convention requires access to complaints and dispute resolution mechanisms, and the creation of compliance mechanisms to monitor the implementation of the Convention, such as labour inspection measures, "having due respect for privacy".[222] As mentioned before, labour inspections may be difficult because domestic work is performed in private homes. In addition, access to courts or other complaints mechanisms might be difficult for migrant domestic workers – especially if they are in an irregular status. Article 16 nevertheless provides that this access should be granted to "all domestic workers".[223]

Recommendation 201 complements the Domestic Workers Convention. Besides giving details on the provisions of the Domestic Workers Convention, the Recommendation also mentions protection from forced labour, trafficking, and policies to prevent abuse by diplomatic personnel who receive immunity.[224] These three issues are important for domestic workers, and their inclusion in the Recommendation only – a non-binding document- is significant. The Recommendation addresses more in details freedom of association, mainly requiring states to eliminate obstacles for the exercise of this right.[225] The Recommendation also specifies that freedom from discriminations concerns mostly work-related medical testing, and requires states to "ensure that no domestic worker is required to undertake HIV or pregnancy testing, or to disclose HIV or pregnancy status".[226] Finally, the Recommendation recommends further measures to regulate working hours, standby, periods of rest and leave, measures concerning payments, and additional measures to protect migrant domestic workers.[227] The

[222] ILO Convention C189 (n 109) artt 16-17
[223] Ibid, art 16
[224] ILO Recommendation R201: Domestic Workers Recommendation (Recommendation concerning Decent Work for Domestic Workers) (100th Conference Session Geneva 16 June 2011) art 26(2) and (4)
[225] Ibid, 2(a)
[226] Ibid, 3(c)
[227] Ibid.

Recommendation aims to guide states for the implementation of the Domestic Workers Convention, but it is not binding.

In sum, the ILO Domestic Workers Convention thus constitutes a significant achievement, setting out highly relevant standards of protection. However, the impact of the Domestic Workers Convention is severely reduced by the low number of ratifications. In 2016 only 23 member states of the ILO have ratified it.[228]

Section 1.5. Conclusion

Since its inception, the ILO has mixed labour rights with human rights for the protection and well-being of workers worldwide. The main human rights protected by the ILO are found in the eight conventions that constitute the 'Fundamental Principles and Rights at Work'. These are freedom of association, the prohibition of forced labour and child labour, and non-discrimination. The Decent Work Agenda of the ILO seeks to further promote these rights. These standards of protection are of high significance for domestic workers, including migrant domestic workers. Domestic workers are further protected through several instruments of the ILO: the Declaration on Fundamental principles and Rights at Work, the Declaration on Social Justice for a Fair Globalization, the Convention on Workers with Family Responsibilities, the Convention on Private Employment Agencies and Recommendation 198 on Employment Relationship, Convention 97 on Migration for Employment, the Migrant Workers Convention, and the ILO Multilateral Framework on Labour Migration. These instruments address specific aspects and challenges of domestic work, such as migration, non-discrimination, freedom of association, forced labour, recruitment, and employment through private agencies. In 2011, the adoption of the Domestic Workers Convention constitutes a significant step for the specific

[228] ILO Normlex, 'Ratifications of C189' (n 34)

protection of domestic workers, mixing labour standards and human rights targeted to the specificities of domestic work, thus including unique provisions such as payments in kind or protection for live-in domestic workers. Creating a convention for domestic workers allows for the recognition of that work as "work like any other, work like no other".[229] At the same time, the other ILO instruments retain their relevance for domestic workers, as they may provide more detailed protection on the particular labour issues they address. In addition, due to the low level of ratification of the Domestic Worker Convention, these other instruments might be in some countries the only protection at the ILO level that domestic workers receive.

[229] International Labour Conference (99th Session) Report IV (1): Decent Work for Domestic Workers (n 110) 12

Chapter 2: The Protection of Domestic Workers through UN Instruments

While the ILO is the main international body protecting labour rights, domestic workers also benefit from additional protection though UN human rights instruments. The Domestic Workers Convention expressly mentions a number of international human rights conventions of the UN relevant for the rights of domestic workers. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Convention on the Rights of the Child (CRC), and the International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW).[230]These instruments are part of the UN Human Rights system, and they are core human rights conventions of the United Nations. They are important as they are meant to apply to human beings without regard for migration status or type of employment. Moreover, all of these treaties have a separate treaty body to monitor state implementation and respect for human rights. The chapter will start by highlighting the significance of general UN treaty-based international human rights instruments, before examining the protection offered by specialized conventions protecting the rights of particular groups. This is followed by an analysis of other UN human rights initiatives which are not based on treaties. The section will in particular look at the work of the Special Rapporteur for the Human Rights of Migrants.

Section 2.1. UN Treaty-based International Human Rights Instruments

The UDHR of 1948 is the basis of the UN human rights system and it contains many articles

[230] ILO Convention C189 (n 109) Preamble

relevant for domestic workers, for example on non-discrimination, the prohibition of slavery and servitude, or the right to privacy and social security. However, it is a non-binding instrument. Nevertheless, its provisions were later incorporated into binding instruments such as the two international covenants, the ICCPR and the ICESCR, in 1966. As we have seen before, the Domestic Workers Convention contains both civil and political rights and social and economic rights. The Fundamental Rights and Principles at Work included in the Domestic Workers Convention consists of civil and political rights such as freedom of association, the prohibition of forced labour, non-discrimination, and the right to privacy, which are all in the ICCPR respectively in articles 22, article 8, articles 2 and 3, and article 17.[231] The rights contained in the ICCPR are applicable immediately. The Domestic Workers Convention also contains economic and social rights: the right to social security, health and safety at work, the regulation of hours of work, rest, and remuneration. These rights are also guaranteed by the ICESCR, which promotes "just and favorable conditions of work", through fair and equal wages, a decent living for workers, safety and health at work, rest and holidays and the regulation of working hours.[232] It also contains a provision for the right to form trade unions,[233] and for the right to social security and social insurance.[234] However, unlike civil and political rights, they are – with the exception of immediate obligations, such as non-discrimination - progressively applicable, according to each state's ability.[235] It is also important to point out that most provisions of the Domestic Workers Convention are more detailed, for example concerning the regulation of working hours and rest periods,[236] remuneration,[237] or even access

[231] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[232] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 7 a(i-ii), b and d
[233] Ibid, art 8
[234] Ibid, art 9
[235] Ibid, art 2(1)
[236] Compare ILO Convention C189 (n 109) art 10 with ICESCR (n 232) art 7 (d)
[237] Compare ILO Convention C189 (n 109) art 11 with ICESCR (n 232) art 7 (a)

to social security which includes specifically maternity benefits.[238]

Moreover, like all other core treaties of the UN, the implementation of the International Covenants is monitored by a committee of independent experts. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights regularly receive reports on implementation from State Parties and issue concluding observations, as well as produce General Comments.[239] The Committees' work is not binding, but provides authoritative standard-setting and standard interpretation of provisions of specific treaties in General Comments, as well as play a monitoring and fact-finding role through state reporting. Committees can also receive communications, which are complaints for violations of the rights contained in their respective Conventions, for the State who have recognize their competence to do so.[240] The General Comments and jurisprudence of the Human Rights Committee (for the ICCPR) and the Committee on Economic, Social and Cultural Rights (for the ICESCR) do not address issues directly related to domestic workers. As will be seen further in this chapter, other treaty Committees do so at times, even though their mandate is not targeted to this group of individuals.

Section 2.2. Specialized Conventions Protecting the Rights of Particular Groups

The three next UN documents, the ICERD, CEDAW, and CRC, are thematically more focused instruments. The CRC covers the provisions of the Domestic Workers Convention concerning child labour. The ICERD concerns in particular racial discrimination which can be of particular relevance for the protection of migrant domestic workers. The Domestic Workers Convention

[238] Compare ILO Convention C189 (n 109) art 14 with ICESCR (n 232) art 9
[239] UN Human Rights Office of the High Commissioner, 'The United Nations Human Rights Treaty System Fact Sheet No. 30/Rev.1' (United Nations 2012) 21 <http://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> accessed 12 October 2016
[240] OHCHR, 'Monitoring the Core International Human Rights Treaties' (*United Nations Human Rights Office of the High Commissioner*, 2016) <http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> accessed 12 October 2016

does not address specifically the discrimination of migrant workers because of their ethnicity, but only provides a broad clause of non-discrimination. The ICERD provides thus additional protection against ethnic and racial discrimination at work.[241]

CEDAW is a specialized instrument dealing with women's rights and gender discrimination. It is thus important for domestic workers who are in majority women. The Domestic Workers Convention takes into account that domestic work is highly gendered and needs specific gender protection. It thus protects women domestic workers from discrimination based on sex through its article 3 on non-discrimination at work, article 11 on non-discrimination on the basis of gender for remuneration, and it also provides that women domestic workers should have access to maternity benefits. CEDAW also offers protection from discrimination based on gender at work. Its article 11 provides a broader protection than the Domestic Workers Convention, as it covers not only general non-discrimination in employment, equal remuneration, and access to maternity benefits, but also specifically mentions non-discrimination regarding access to social security, health and safety, choice of work, and paid leave. Its clause on discrimination on the grounds of maternity is also broader than that of the Domestic Workers Convention. It prohibits "dismissal on the grounds of pregnancy or of maternity leave",[242] and asks states to ensure maternity leave with pay or benefits, social services to support workers' in their responsibilities at work and to their families, and special protection for pregnant women at work.[243] Therefore, while the Domestic Workers Convention recognizes the need for gender protection, CEDAW, as a specialized instrument, goes further and adds to this protection.

In addition, the Committee on the Elimination of Discrimination against Women (CEDAW

[241] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5
[242] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 79, enter into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 11 (2)(a)
[243] Ibid, art 11 (2) (b)(c)(d)

Committee) has addressed the rights of women migrant domestic workers in its General Recommendation n° 26.[244] This Recommendation addresses issues faced specifically by female migrant domestic workers, often relating to gender discrimination, such as lower wages compared to male counterparts,[245] and sex-discriminatory testing (pregnancy or HIV).[246] In addition, the Recommendation notes that "women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate. Domestic workers are particularly vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers".[247] The CEDAW Committee asks countries to ensure that "occupations dominated by women migrant workers, such as domestic work […] are protected by labour laws, including wage and hour regulations, health and safety codes and holiday and vacation leave regulations", [248] as well as to grant the right to organize and access remedies, echoing parts of the ILO Domestic Workers Convention. The CEDAW Committee also recommends that migrant domestic workers should be able to keep their identity and travel documents with them, as well as be granted independent residency permits so that domestic workers visas are not tied to their employer.[249] Thus, this General Comment, adopted in 2008, addresses directly the overlapping vulnerabilities of being a woman, a migrant, and a domestic worker. This approach is important as this combination of characteristics creates specific problems. The ILO Domestic Workers Convention, adopted 3 years later, recognizes in its Preamble that women migrant domestic workers are specifically vulnerable, and it provides similar protection than what is recommended in this General Comment by addressing issue specific to women, migrant, and domestic workers, as separate

[244] UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General Recommendation No 26 on Women Migrant Workers' (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R
[245] Ibid, 6 para 15
[246] Ibid, 6-7 paras 17-18
[247] CEDAW Committee, 'General Recommendation No 26 on Women Migrant Workers' (n 244) 7 para 20
[248] Ibid, 11 para 26(b)
[249] Ibid, 11-12 para 26 (d)(f)

or combined characteristics. This can illustrate the coherence between ILO and other UN standards and the cooperation between these bodies in formulating these standards.

Concerning migrant domestic workers, one of the most significant human rights instruments of the UN is the International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW). In 1979, the UN General Assembly adopted Resolution 34/172 on 'Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers'.[250] This resolution expresses concern for migrant workers and their families whose rights are often not respected, and highlights that the employment relationship creates rights and obligations.[251] The resolution also mentions the work of the ILO with migrant workers, the ILO Migrant Workers Convention 143, and the cooperation between the UN and the ILO, among other organizations, on the protection of migrant workers.[252] Finally, the Resolution establishes a working group in charge of drafting a convention to protect the rights of migrant workers.[253] The UN Migrant Workers Convention was adopted in 1990, 23 years before the ILO's Domestic Workers Convention. It is meant to apply its protection throughout the migration process.[254] While the ICRMW does not create new rights for migrant workers, it integrates existing human rights in the context of migration, and, most importantly, ensures that fundamental human rights are guaranteed for migrant workers irrespective of their migration status. Similarly to the ILO's Migrant Workers Convention (C143), an important part of the UN Migrant Workers Convention thus concerns rights that explicitly apply to all migrant workers, even those in an irregular situation. Its Preamble also recalls the importance

[250] UNGA Res 34/172 'Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers' (17 December 1979) UN Doc A/RES/34/172
[251] Ibid, Preamble
[252] Ibid.
[253] UN Human Rights Office of the High Commissioner, 'The International Convention on Migrant Workers and its Committee Fact Sheet No. 24 (Rev.1)' (United Nations 2005) 2
[254] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) UNGA A/RES/45/158 (ICRMW) art 1(2)

of the ILO in protecting migrant workers, through mentioning the different conventions of the ILO (C97, C143, and the Forced Labour Conventions C29 and C105) and its mandate.[255]

The provisions start by defining a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national".[256] As noted by the Migrant Workers Committee's General Comment No 1 on migrant domestic workers, this definition covers migrant domestic workers.[257] The ICRMW also defines what it considers to be documented and undocumented migrant workers, the difference being that a documented worker is authorized to enter, reside and work in the host state according to national laws and international agreements, while the undocumented worker does not comply with legal requirements.[258] Part III of the ICRMW applies to all migrant workers, including undocumented ones. As already noted, the convention does not create new right but adapt existing rights to the context of labour migration. Indeed, many articles of part III simply affirm that the rights contained in the international covenants and other UN core treaties do apply to migrant workers: the right to life (art 9), the prohibition of torture and inhumane or degrading treatment (art 10), the prohibition of slavery and forced labour (art 11), freedom of religion (art 12), and freedom of expression (art 13).[259]

Moreover, the ICRMW also contains rights that focus on the specific vulnerabilities of migrant workers. Thus, article 14 protects the right to privacy, which is very important for migrant domestic workers, in particular live-in workers.[260] Articles 15 and 21 protect against deprivation of property and in particular the confiscation and destruction of "identity

[255] ICRMW (n 254) Preamble
[256] Ibid, art 2 (1)
[257] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'General Comment No 1 on Migrant Domestic Workers' (23 February 2011) UN Doc CMW/C/GC/1, 2 para 6
[258] ICRMW (n 254) art 5
[259] Ibid, Part III, artt 9 to 13
[260] Ibid, art 14

documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits".[261] This is very important as the confiscation or destruction of these documents can be used as means of pressure on migrant domestic workers who find themselves in abusive employment relationships.[262] The ILO Domestic Workers Convention also allows migrant domestic workers to keep their documents with them, and protects the right to privacy.[263]

Moreover, all migrant workers are also protected from being expelled, and residence and work permit cannot be withdrawn, if they fail to comply with a contractual obligation unless that obligation is a requirement for obtaining these permits.[264] Article 25 seeks to ensure equal treatment with nationals regarding working conditions, including remuneration, hours of work, rest and holidays, occupational safety and health, and the termination of contracts.[265] It emphasizes that irregular migrant workers should also benefit from equal treatment.[266] Article 26 gives migrant workers the freedom of association, in particular in trade unions.[267] Migrant workers should have access to social security as long as they comply with legal requirements of the host country.[268] The UN Migrant Workers Convention also contains provisions aimed at protecting the family of the migrant worker, through the education of children and the respect for their cultural identity.[269] Migrant workers should be informed of their rights and obligations, and their conditions of admission in the host state.[270] Finally, part III concerning all migrant workers concludes that migrant workers as well have the obligation to comply with the laws of

[261] ICRMW (n 254) artt 15 and 21
[262] UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants' (n 12) 8 para 4
[263] ILO C189 (n 109) art 9 (c) and art 6
[264] ICRMW (n 254) art 20
[265] Ibid, art 25
[266] Ibid.
[267] Ibid, art 26
[268] Ibid, art 27
[269] Ibid, artt 30 and 31
[270] Ibid, art 33

the host state and that the convention does not create a right to be regularized.[271]

Part IV of the Migrant Workers Convention concerns documented migrant workers in a regular situation. They benefit from additional protection, such as the right to be informed about the condition of their stay and their work,[272] liberty of movement and residence,[273] Freedom of association,[274] and the right to take part in public affairs in the host state.[275] They also enjoy equal treatment regarding access to education, vocational guidance and training, access to housing and social and health services, participation in cultural life,[276] protection against dismissal and unemployment,[277] and in choosing and exercising their work.[278] The Migrant Workers Convention also provides a right to send remittances,[279] and seeks to facilitate these transfers as well as the import and export of personal effects.[280] Moreover, article 49 concerns residence and work permits. Those two documents should be provided for the same time, and the end of a work contract does not put migrant workers in an irregular situation, nor should they lose their residence permit.[281] Finally, article 56 protects against expulsion.[282] All these provisions give additional protection to documented migrant workers, as they also benefit from protection under Part III.

Part VI of the Migrant Workers Convention establishes further provisions for State Parties. It focuses not only on the formulation of appropriate policies for international migration, but on

[271] ICRMW (n 254) artt 34 and 35
[272] Ibid, art 37
[273] Ibid, art 39
[274] Ibid, art 40
[275] Ibid, art 41
[276] Ibid, art 43
[277] Ibid, art 54
[278] Ibid, artt 52 and 55
[279] Ibid, art 47
[280] Ibid, art 46
[281] Ibid, art 49
[282] Ibid, art 56

cooperation, exchange of information and assistance between states.[283] This is true both for regular migration and the prevention of irregular migration.[284] The Migrant Workers Convention, as noted before, does not create a right to be regularized for irregular migrants, but article 69 encourages states to "consider the possibility of regularization" for undocumented workers.[285]

It is obvious that the ICRMW provides important additional provisions on the right of migrant domestic workers which are absent from the Domestic Workers Convention. Despite the proportion of domestic workers who are migrants, the Domestic Workers Convention is limited on this topic, and focuses more on problems linked directly with domestic work. This is perhaps because of the complexity of the issues of migration, and the benefits of a Domestic Workers Convention more focused on domestic work itself than on the characteristics of the workers, or because the Domestic Workers Convention was drafted after the ICRMW, and it was thus assumed that extensive protection already existed for migrant workers. Therefore, additional instruments such as the ICRMW, and ILO Conventions 97 and 143 are essential to protect domestic workers who are migrants. The ICRMW also contains a lot of provisions which can protect migrants who are domestic workers the same way as the Domestic Workers Convention, for example on the right to privacy, the retention of identity documents, but also on conditions of work such as, inter alia, working hours and remuneration. This is without a doubt because of the very close participation and the contribution of the ILO in the drafting process of the ICRMW. In fact, "before the drafting of the ICRMW began, the possibility was considered of elaborating it as an ILO convention rather than a UN human rights convention",

[283] ICRMW (n 254) art 65
[284] Ibid, art 68
[285] Ibid, art 69

because of the mandate of the ILO concerning the protection of migrant workers.[286] Nowadays, the ILO is involved in the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) which monitors the implementation of and respect for the ICRMW. The ILO receives copies of the state reports to the CMW, and it has representatives with a consultative status on the CMW that can share their experience, contribute written observations, and give input on concluding observations of the CMW.[287]

In addition to the ICRMW, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) produced its first General Comment on migrant domestic workers. This document was written before the adoption of ILO Convention 189, and it aims to guide states with implementing the ICRMW for migrant domestic workers.[288] The CMW specifies that the ICRMW protects domestic workers, and that "any distinction made to exclude migrant domestic workers from protection would constitute a prima facie violation of the Convention".[289] General Comment No 1 goes on to list the specific vulnerabilities that migrant domestic workers face, throughout their migration.[290] It then describes the legal gaps concerning protection in labour law, immigration law, contracts, and social security law.[291] Finally, it also looks at the lack of protection in practice.[292] General Comment No 1 makes a number of recommendations, based on the rights found in the ICRMW. As mentioned before, these include the right to be informed about rights and conditions of employment and stay,[293] the regulation of recruitment and private agencies,[294] access to

[286] Carla Edelenbos, 'Committee on Migrant Workers and Implementation of the ICRMW', in Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights – the United Nations Convention on Migrant Workers' Rights* (Cambridge University Press and UNESCO 2009) 115
[287] Carla Edelenbos (n 286) 115; see also ICRMW (n 251) art 74
[288] UN CMW, 'General Comment No 1 on Migrant Domestic Workers' (n 257) 1 para 2
[289] Ibid, 2 para 6
[290] Ibid, 2 para 7, and 3-4
[291] Ibid, 4-5
[292] Ibid, 5-6
[293] Ibid, 6-7 paras 28-30
[294] Ibid, 7-8 paras 33-36

remedies,[295] freedom of religion and expression,[296] and freedom of association,[297] and equal access to social security.[298] General Comment No 1 also recommends the extension of labour law protection to migrant domestic workers to ensure good conditions of work, including through proper regulation of the sector, written contracts, labour inspections, and freedom of residence.[299] General Comment No 1 also addresses the question of access to regular migration status for undocumented migrant domestic workers. It recommends to open channels for regular migration according to the demand for domestic workers.[300] States should take measures to limit vulnerabilities linked to an irregular migration status, considering the regularization of undocumented migrant domestic workers.[301] Moreover, the migration status should not be tied to an employer in order to prevent abuse.[302] Finally, General Comment No 1 advises states to adopt a gender-sensitive approach to migrant domestic workers, as they are mainly women.[303] This content also mirrors much of the content of the Domestic Workers Convention. Thus, the ICRMW, similarly to CEDAW, illustrates the close work between the ILO and the UN, as many of the standards set in these conventions and the work of their respective Committees on domestic workers have been incorporated into the ILO Domestic Workers Convention.

Section 2.3. UN Human Rights Council and Migrant Domestic Workers

Besides the treaty-based Committees mentioned previously, there are other fora in the UN that serve as human rights promotion and monitoring mechanisms, such as the Human Rights

[295] UN CMW, 'General Comment No 1 on Migrant Domestic Workers' (n 257) 9-10 paras 49-50
[296] Ibid, 9 paras 48
[297] Ibid, 9 paras 45-47
[298] Ibid, 9 para 42
[299] Ibid, 8 paras 37-41
[300] Ibid, 10 para 51
[301] Ibid, 10 para 52
[302] Ibid, 10 para 53
[303] Ibid, 11 paras 60-61

Council and its Universal Periodic Review, to which states have to report and from which they receive comments. Of particular interest for migrant domestic workers in the Human Rights Council system is the Special Rapporteur on the Human Rights of Migrants. The function of Special Rapporteur on the Human Rights of Migrants was created by resolution 1999/44 of the Commission on Human Rights in 1999.[304] It was then renewed every three years, most recently in 2014 by Resolution 26/19 of the Human Rights Council (replacing the Commission on Human Rights).[305] The Special Rapporteur is an independent expert, currently François Crépeau from Canada. His mandate puts him in charge of identifying ways to overcome obstacles to the enjoyment of rights of domestic workers, and measures to prevent, remedy, and eliminate violations.[306] He should promote the application of existing international standards and highlight best practices.[307] His mandate also insists on taking into account the vulnerabilities of undocumented migrants and integrating a gender perspective.[308] During his work, the Special Rapporteur will conduct country visits, attend events related to the theme of migrant workers, and react on alleged violations by communicating with governments.[309] The Special Rapporteur reports to the Human Rights Council and the General Assembly.[310]

The work of the Special Rapporteur under the form of reports with recommendations or communications is not binding, but provides useful guidance for the implementation of standards, and raises attention to non-compliance of countries with those standards through fact-finding missions. Moreover, the mandate covers all members of the UN, even if they have

[304] UN OHCHR, 'Special Rapporteur on the Human Rights of Migrants' (*UN OHCHR*, 2016) <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> accessed 15 August 2016
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid.

not ratified the Migrant Workers Convention,[311] and the work of the Special Rapporteur can also be based on other human right instruments. For example, the Special Rapporteur referred in its 2014 report on the labour exploitation of migrants to numerous ILO instruments protecting migrant domestic workers.[312] This broad mandate differentiates the work of the Special Rapporteur on the Human Rights of Migrants to that of the Committee on Migrant Workers which mainly focuses on the Migrant Workers Convention and State Parties.

The Special Rapporteur has worked on the situation of migrant domestic workers on several occasions. The report of 2014 highlights difficulties migrant domestic workers encounter regarding the lack of written contracts which leads to great vulnerability regarding conditions of work, and the problem of the confiscation of identity documents.[313] Part D of the report, entitled 'Groups of migrants specifically at risk of exploitation', contains a paragraph dedicated to migrant domestic workers. It mentions both the ILO Domestic Workers Convention and the Migrant Workers Committee's General Comment 1 on migrant domestic workers. The Special Rapporteur reports on meeting migrant domestic workers, and on the struggles and abuses they face. He also points out good practices, in this case, a special visa for migrant domestic workers that grants them labour rights and access to legal remedies against their employer.[314] Moreover, the report mentions issues related to women discrimination, irregular migration status, and access to remedies.

The recommendations insist on a gender sensitive and human rights based approach, and on the prevention of irregular migration.[315] It also encourages states to ratify ILO Conventions

[311] UN OHCHR, 'Special Rapporteur on the Human Rights of Migrants' (n 304)
[312] UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants' (n 12) 7 para 30
[313] Ibid, 8 paras 35 and 37
[314] Ibid, 12 para 52
[315] Ibid, 17 paras 70-71

and UN Conventions relevant for migrant workers (including migrant domestic workers).[316] The recommendation specifically directed at migrant domestic workers reflects closely the content of ILO Convention 189, as it encourages equal labour law protection, the regulation of contracts and employment practices, labour inspections, and access to remedies. [317] However, despite the importance of the Special Rapporteur's remarks, it should be highlighted again that these recommendations are not binding.

Section 2.4. Conclusion

As the ILO notes:

> "The links between domestic work and female international labour migration is well established. The growing demand of households for domestic services is considered to be one of the main triggers of the feminization of labour migration which we have witnessed in past decades".[318]

Thus, the protection of domestic workers necessarily entails a specific focus on female migrant domestic workers. While the ILO Domestic Workers Convention protection is limited on the topic of migration, the UN provides extensive protection for migrant workers, through the ICRMW and its committee, and the Special Rapporteur on the rights of migrants. The contribution of the ILO to the UN is also important in this area. Thus, the two organizations complement each other on the protection of migrant domestic workers. In addition, the rights of the two international covenants are universal and apply to domestic workers as human

[316] UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Migrants' (n 12) 18 paras 75 -76
[317] Ibid, 19-20 para 93
[318] International Labour Organization (ILO) 'Migrant Domestic Workers' (*ILO*, 2016) <http://www.ilo.org/global/topics/labour-migration/policy-areas/migrant-domestic-workers/lang--en/index.htm> accessed 10 October 2016

beings. Some of them, such as the freedom for forced labour, freedom of association, non-discrimination, the right to privacy, are already contained in the ILO Domestic Workers Convention. The complementarity of UN standards and ILO standards is further emphasized by the fact that the UN provides additional protection on matters of ethnic and gender discrimination through the ICERD and CEDAW. These are focuses that are limited in the ILO Domestic Workers convention, but nevertheless necessary for female migrant domestic workers, due to the intersectionality of these factors which makes them particularly vulnerable. Thus, human rights conventions of the UN, in particular the ICERD, CEDAW and the ICRMW, complement the protection already afforded by the ILO Domestic Workers Convention, and are also needed for the full protection of domestic workers. Other mechanisms such as the Special Rapporteur or the Treaties' Committees help to further define the rights and obligations contained in these instruments, although their work is not binding. It is important to highlight, however, that CEDAW and the ICRMW, despite their importance for domestic workers, are unpopular conventions among states. CEDAW suffers from numerous reservations (which, depending on each country, may or may not impact the protection of domestic workers), and the ICRMW only has 48 state parties, while 132 states have taken no action to ratify.[319]

[319] OHCHR, 'Status of Ratification Interactive Dashboard' (*UN Human Rights Office of the High Commissioner* 2014) <http://indicators.ohchr.org/> accessed 10 October 2016

Chapter 3: The Protection of Domestic Workers in the Council of Europe

Having examined global standards for the protection of domestic workers, the present chapter turns to the protection offered by Council of Europe instruments. This chapter will first look at Recommendations of the Parliamentary Assembly of the Council of Europe (PACE) concerning domestic workers, focusing on slavery and forced labour. It will then examine different instruments that can provide protections for domestic workers, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the European Social Charter (ESC). Finally, it will look at the case-law of the Council of Europe concerning domestic workers.

The Council of Europe (CoE) is the main human rights body in Europe. It focuses on the promotion and protection of Human Rights, Democracy, and the Rule of Law. It has 47 members from the European region, with 324 representatives sitting in the Parliamentary Assembly (PACE), where they monitor the situation of human rights in Member States and follow-up on their commitments.[320] The Human Rights system of the Council of Europe protects human rights through the European Court of Human Rights (ECtHR) and the ECHR, promotes human rights through different committees focused on themes such as Trafficking in Human Beings (GRETA) or Racism and Intolerance (ECRI), and also seeks to ensure social rights through the ESC.[321] The Council of Europe thus has the opportunity to complement and reinforce ILO and UN standards for domestic workers in Europe, both through the adoption and promotion of their rights and international and regional standards, and through its case-law.

[320] Council of Europe Parliamentary Assembly, 'In Brief – The Democratic Conscience of Greater Europe' (*PACE*, 2014) <http://website-pace.net/en_GB/web/apce/in-brief> accessed 16 October 2016
[321] Council of Europe, 'Human Rights' (*CoE*, 2016) <http://www.coe.int/en/web/portal/human-rights> accessed 16 October 2016

Section 3.1. PACE Recommendations for Domestic Workers

The Parliamentary Assembly of the Council of Europe (PACE) has in the past drafted two recommendations relevant for domestic workers: in 2001, Recommendation 1523 on Domestic Slavery,[322] and in 2004, Recommendation 1663 on Domestic Slavery: Servitude, Au Pairs and Mail-order Brides.[323] They were both written before the adoption of the ILO Domestic Workers Convention. Recommendation 1523 emphasizes that slavery has not disappeared, but has taken the new form of domestic slavery.[324] It refers specifically to article 3, 4, and 6 of the ECHR, respectively the prohibition of torture or inhuman or degrading treatment or punishment, the prohibition of slavery, servitude and forced labour, and the right to a fair trial. These are basic human rights of the ECtHR that protect domestic workers. The Recommendation highlights certain characteristics of domestic slavery, such as the confiscation of identity or travel documents, an illegal migration status, and a situation of isolation.[325] The Recommendation highlights that, at the time, "none of the Council of Europe member states expressly make domestic slavery an offence in their criminal code".[326] This was indeed an issue in all three cases concerning domestic slavery in the ECtHR in 2005 and 2012, which are discussed below. Thus, the Assembly recommends that the States Parties make slavery a criminal offence,[327] that they protect the victims through issuing residence permits, and provide assistance and assist their rehabilitation and reintegration.[328]

Recommendation 1663 also starts with mentioning that slavery still exists in Europe, and that

[322] Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1523 on Domestic Slavery (18th sitting, 26 June 2001)
[323] Parliamentary Assembly of the Council of Europe (PACE) Recommendation 1663 on Domestic Slavery: Servitude, Au Pairs and Mail-order Brides (19th sitting, 22 June 2004)
[324] PACE, Recommendation 1523 (n 322) para 1
[325] Ibid, paras 5, 6, 7
[326] Ibid, para 9
[327] Ibid, para 10.1
[328] Ibid, para 10.6

"modern slaves […] are forced to work (through mental or physical threat) with no or little financial reward. They are physically constrained or have other limits placed on their freedom of movement and are treated in a degrading and inhumane manner".[329]

Additionally, domestic slaves who are foreign nationals may lack knowledge of the language or laws of the country in which they work, fear deportation,[330] they may have been deceived, be debt-bonded or trafficked.[331] This prevents them from seeking help.[332] These are important remarks as they highlight indicators of forced labour that the ILO officially listed in 2012, and put domestic workers clearly under the protection of article 4 ECHR on the prohibition of slavery and forced labour.[333] Also importantly, the Recommendation identifies 'modern slaves' as female migrant domestic workers working in private households,[334] which can help develop targeted protection taking into account the specific characteristics of this group and of domestic work. The Parliamentary Assembly declares that the Council of Europe has "zero tolerance for slavery".[335] State parties should make slavery a criminal offence and investigate allegations, as well as prosecute those responsible.[336] States should also provide support for the victims and help their rehabilitation.[337] Regarding migrant domestic workers in particular, member states should consider granting victims temporary residence to regularize their status and allow them to access courts and file complaints.[338] The Recommendation also foresees a system of accreditation for agencies, with regular monitoring of their activities.[339]

[329] PACE, Recommendation 1663 (n 323) para 1
[330] Ibid, para 3
[331] Ibid, para 2
[332] Ibid, para 3
[333] ILO Special Action Programme to Combat Forced Labour (SAP-FL), 'ILO Indicators of Forced Labour' (ILO, 29 October 2013) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf> accessed 16 October 2016
[334] PACE, Recommendation 1663 (n 323) para 2
[335] Ibid, para 5
[336] Ibid, para 6.1 (a) (b) (c)
[337] Ibid, para 6.1 (e) (f)
[338] Ibid, para 6.1 (d)
[339] Ibid, para 6.2 (b) (c)

Both Recommendations encouraged the drafting of a Charter of Rights for Domestic Workers in the Council of Europe,[340] a proposal which has not been implemented so far. Recommendation 1663 specified that the Charter would recognize domestic work "as "real work""[341], "to which full employment rights and social protection apply, including the minimum wage (where it exists), sickness and maternity pay as well as pension rights".[342] In addition, domestic workers would have:

> "The right to a legally enforceable contract of employment setting out minimum wages, maximum hours and responsibilities; the right to health insurance; the right to family life, including health, education and social rights for the children of domestic workers; the right to leisure and personal time; and the right for migrant domestic workers to an immigration status independent of any employer, the right to change employer and to travel […] and the right to the recognition of qualifications, training and experience".[343]

These Recommendations were both formulated before the adoption of the ILO Domestic Workers Convention, and many paragraphs are remarkably close to the content of the ILO Domestic Workers Convention. If followed, they would provide a minimum protection for domestic workers, in particular in European countries who have not ratified the ILO Domestic Workers Convention. However, PACE Recommendations are not binding, they are proposals for the Committee of Ministers, the decision-making body of the Council of Europe.[344] As noted before, the proposal of a Charter of Rights for Domestic Workers has not been acted on

[340] PACE, Recommendation 1523 (n 322) para 11; PACE, Recommendation 1663 (n 323) para 6.2 (a)
[341] PACE, Recommendation 1663 (n 323) para 6.2 (a)
[342] Ibid.
[343] Ibid.
[344] Council of Europe Parliamentary Assembly, 'Documents' (*PACE*, 2014) <http://website-pace.net/en_GB/web/apce/documents> accessed 16 October 2016

by the Committee of Ministers. Nevertheless, the Recommendations serve as an authoritative source for ECHR cases, as we will see later, and thus are still a source of protection for the rights of domestic workers in the Council of Europe human rights system.

Section 3.2. Binding Human Rights Instrument in the CoE: the ECHR, the ESC, and Domestic Workers

There are two binding instruments in the Council of Europe which also provide protection to domestic workers: the European Convention on Human Rights (ECHR) -that we will examine later- and the European Social Charter (ESC). While the ECHR focuses on civil and political rights, the European Social Charter covers social and economic rights, and is "the most detailed regional instrument on economic and social rights, including workers' rights, with a significant normative overlap with the corresponding UN and ILO instruments".[345] This is obvious for example with article 27 of the Revised Charter on "the right of workers with family responsibilities to equal opportunities and equal treatment", mirroring the title of ILO Convention 156, or article 19 of the Revised Charter on "the right of migrant workers and their families to protection and assistance", recalling the UN Migrant Workers Convention.[346] The overlap with the Domestic Worker Convention will be examined further below. The European Social Charter was adopted in 1961, and the Revised Charter in 1996.[347] The Revised European Social Charter adds a number of rights and elaborates on certain rights from the original ESC.[348]

Furthermore, the European Committee on Social Rights (ECSR) is in charge of the supervision of the implementation of the ESC by contracting states. An Additional Protocol of 1995 also

[345] Franz Christian Ebert, Martin Oelz, 'Bridging the Gap between Labour Rights and Human Rights: The Role of ILO Law in Regional Human Rights Courts' (ILO International Institute for Labour Studies, 2012) DP/212/2012, 3
[346] European Social Charter (Revised) (1996) CETS 163, art 27 and 19
[347] Colm O'Cinnéide, 'Migrant Rights Under the European Social Charter', in Cathryn Costello and Mark Freedland QC (Hon) FBA (eds), *Migrants at Work: Immigration and Vunerability in Labour Law* (Oxford University Press 2014) 282
[348] Ibid, 283

adds a collective complaints procedure, which allows NGOs, employers' organizations and trade unions federations to bring a collective complaint against a state for failure to comply with the ESC.[349] This supervision mechanism is added to the system of reporting and conclusions of the ECSR, which constitutes an authoritative source on how to interpret and apply the ESC.[350] However, as O'Cinnéide notes, "the profile and status of the Charter has never come close to equaling that of its sister instrument, the ECHR", and similarly, the ECSR "does not possess anything like the authority and status enjoyed by the European Court of Human Rights".[351] State parties to the (original) European Social Charter are still bound by its provisions, until they decide to ratify the corresponding provisions of the Revised Charter. States do not have to accept all provisions of either Charter. In the European Social Charter of 1961, states have accepted to be bound by at least 5 of the following articles: article 1(right to work), 5 (right to organize), 6 (right to bargain collectively), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection) and 19 (right of migrant workers and their families to protection and assistance), in addition to at least 10 other articles or at least 45 paragraphs.[352] In the Revised Charter, states are bound by at least 6 of the following articles: article 1, 5, 6, 7 (right of children and young persons to protection), 12, 13, 16, 19, 20 (right to equal opportunities an equal treatment in matters of employment and occupation without discrimination on the grounds of sex) , in addition to at least 16 other articles or 63 paragraphs.[353] This means that there is a great flexibility for states to pick and choose different provisions, and leads to unequal protection from one contracting party to another. However, both Charters emphasize that they do not undermine other domestic laws or international agreements, especially if they contain more

[349] Colm O'Cinnéide (n 347) 283
[350] Ibid, 285
[351] Ibid, 283
[352] European Social Charter (1961) ETS No.035, part III art 20 §1 (b) (c)
[353] European Social Charter (Revised) (n 346) pt III art A-Undertakings § 1 (b) (c)

favourable provisions.[354] Thus, through other international agreements, notably the UN ICESCR, and ILO instruments, a minimum standard of social and economic rights can be ensured.

The Domestic Workers Convention, as a specific instrument for domestic workers, may provide additional and more adapted rights and protection for domestic workers, despite the fact that some of these rights are included in the Revised European Social Charter and are also contained in the original Charter. The Revised Charter provides several rights in common with the ILO Domestic Workers Convention. Article 2 provides the right to just conditions of work, covering working hours and holidays, similarly to article 10 of the ILO Domestic Workers Convention.[355] Paragraph 6 of article 2 requires that workers receive a written contract specifying working conditions, which is the same than article 7 of the ILO Domestic Workers Convention.[356] Article 3 provides the right to safe and healthy working conditions, corresponding to article 13 of the ILO Domestic Workers Convention.[357] Article 5 and 6 of the Revised Charter concern the right to organize and to bargain collectively, covered by article 3 of the ILO Domestic Workers Convention.[358] Abuse, harassment and violence at work are addressed by article 26 of the Revised Charter and article 6 of the ILO Domestic Workers Convention.[359] Finally, both instruments offer protection to migrant workers, in similar terms. Article 19 of the Revised Charter requires states to assist workers, free of charge, and to provide them information about migrating and working on their territory, in addition to facilitating their travel and providing equal treatment regarding remuneration and other working conditions,

[354] European Social Charter (n 352) art 32; European Social Charter (Revised) (n 346) pt V art H
[355] European Social Charter (Revised) (n 346) art 2; ILO C189 (n 109) art 10
[356] European Social Charter (Revised) (n 346) art 2 para 6; ILO C189 (n 109) art 7
[357] European Social Charter (Revised) (n 346) art 3, ILO C189 (n 109) art 13
[358] European Social Charter (Revised) (n 346) artt 5-6, ILO C189 (n 109) art 3
[359] European Social Charter (Revised) (n 346) art 26, ILO C189 (n 109) art 6

freedom of association, and accommodation.[360] However, this protection only applies to migrant workers legally present on the contracting party's territory.[361]

There are, however, differences between the two instruments. Article 7 of the Revised Charter creates a right to fair remuneration, allowing for a decent living standard, whereas the ILO Domestic Workers Convention provides minimum wage coverage, without gender discrimination, in its article 11.[362] Discrimination on the grounds of sex is more elaborated in the Revised Charter, through article 20.[363] Article 8 of the Revised Charter is dedicated to the right of employed women to protection of maternity, including paid leave or social benefits, a 14 weeks leave, and a protection from dismissal.[364] This is more detailed than in the ILO Domestic Workers Convention, which only mentions maternity protection in its article 14 on equal treatment regarding social security.[365] Lastly, the right to social security is addressed in article 12 of the Revised Charter, however, equal treatment is reserved for nationals of contracting parties only.[366]

Another relevant instrument of the CoE is the European Convention for the Protection of Human Rights and Fundamental Freedoms, or European Convention on Human Rights (ECHR), which applies to all persons under the jurisdiction of States Parties.[367] As such, the rights contained in the ECHR also protect migrant domestic workers who are not nationals of state parties.[368] The human rights of domestic workers protected by ILO Domestic Workers Convention are also present in the ECHR. These include the right to respect for private and

[360] European Social Charter (Revised) (n 346) art 19
[361] Ibid.
[362] European Social Charter (Revised) (n 346) art 7; ILO C189 (n 109) art 11
[363] European Social Charter (Revised) (n 346) art 20
[364] Ibid, art 8
[365] Ibid, art 14
[366] Ibid, art 12
[367] Ryszard Cholewinski, 'Labour Migration Management and the Rights of Migrant Workers' (n 142) 282
[368] Ibid.

family life (art 8 ECHR), freedom of assembly and association (art 11 ECHR), the prohibition of discrimination (art 14 and protocol 12 art 1 ECHR), the prohibition of torture or inhuman or degrading treatment or punishment (art 3 ECHR), and the prohibition of slavery and forced labour (art 4 ECHR).[369]

Despite the overlap between some rights in the Revised Charter and the ECHR, and the ILO Domestic Workers Convention, there are significant differences. One of the biggest negative point of the Revised Charter for the protection of domestic workers, notably migrant domestic workers, is that its scope of protection is limited to nationals of contracting parties, lawfully present in the territory of a contracting party, as explained in the Appendix: **"**the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned".[370] One of the positive points is its article on maternity protection, which is more detailed than that of the ILO Domestic Workers Convention. It is obvious that the ILO Domestic Workers Convention is much more focused on the protection of domestic workers than the Revised Charter or the ECHR, which are broader document aiming to provide social and economic rights and civil and political rights protection to all, and not to a specific category of workers. The provisions of the ILO Domestic Workers Convention targeted to domestic workers such as provisions on live-in workers, the confiscation of documents, methods of payment and payments in kind, regulations of private employment agencies, and access to remedies, make the ratification of this unique document necessary to give full protection to domestic workers in CoE state parties.

[369] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950) ETS No. 5, artt 8, 11, 14, 2, 4; Protocol 12 ECHR (2000) ETS No. 177, art 1

[370] European Social Charter (Revised) (n 346) Appendix: Scope of the Revised European Social Charter in terms of persons protected, para 1

Section 3.3. Case-Law Concerning Domestic Workers

The European Committee on Social Rights (ECSR) has issued several conclusions on the exclusion of domestic workers from domestic labour law. Thus, it has held that "the complete exclusion of domestic workers from health and safety legislation is contrary to Article 3 of the Charter that protects health and safety at work".[371] Private homes should also be subject to labour inspection if they are workplaces, as is the case for domestic workers.[372] Women domestic workers are protected by article 8 of the Revised Charter, on 'the right of employed women to protection of maternity'.[373] The ECSR has ruled that the Dutch law was incompatible with the ESC because part-time domestic workers did not have access to social benefits and social insurance.[374] In Italy, domestic workers did not access maternity benefits when they were dismissed during their pregnancy, and this was also incompatible with article 8 of the ESC.[375] Moreover, the ECSR has issued conclusions related to the rights of migrant workers and article 19 of the ESC, which:

> "goes beyond merely guaranteeing equality of treatment as between foreign and national workers in the sense that, recognising that migrants are in fact handicapped, it provides for the institution by the Contracting States of measures which are more favourable and more positive in regard to this category of persons than in regard to the states' own nationals".[376]

Thus, the ECSR has consistently sought to show that domestic workers should be included in domestic labour law, taking into account the specificities of their work, and the fact that they

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[371] Virginia Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor' (2012) 34 [1] Comparative Labor Law and Policy Journal 133, 147-148
[372] Ibid, 148
[373] European Social Charter (Revised) (n 346) art 8
[374] Virginia Mantouvalou, 'Human Rights for Precarious Workers' (n 371) 148
[375] Ibid.
[376] Ibid, 149

are women and/or migrants.

Despite the relevance of the ESC and the Revised Charter for domestic workers, due to their complex and collective complaints mechanism, and its lower profile, it is not surprising that prominent cases on domestic work have rather been raised before the ECtHR. As has been seen before, the ECHR contains all the human rights mentioned in the ILO Domestic Workers Convention. However, all cases of the ECHR concerning domestic workers have been raised under article 4 and the prohibition of slavery, servitude and forced labour.

One of the main articles that protects domestic workers in Europe and has indeed been used for cases involving exploitation of domestic workers is ECHR article 4 on the prohibition of slavery, servitude and forced labour. The article provides that:

> "1. No one shall be held in slavery or servitude;
>
> 2. No one shall be required to perform forced or compulsory labour".[377]

This article excludes from forced labour work related to detention, military service or civic obligations, and times of emergency.

The first and most important case concerning domestic workers, and related to article 4, Siliadin v. France, was brought to the ECtHR in 2005. The case concerned a foreign national who was a minor, and who came to France to study but was forced to work as a domestic.[378] She arrived on a tourist visa, did not receive a work permit, and her immigration status was never regularized.[379] Her travel documents were confiscated and she worked as a housemaid 7 days per week for 15 hours, without days off, without privacy – as she was sleeping in the

[377] ECHR (n 369) art 4
[378] Siliadin v France (2005) 43 EHRR 16, paras 10-11
[379] Ibid, paras 10 and 17

family's baby's room – and she was not remunerated.[380]

Under French law, the family for whom she was working was charged under two articles of the Criminal Code. Under Article 225-13, it is an offence "to obtain from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence."[381] Under article 225-14, it is an offence "to subject an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence."[382] Being unsatisfied with the domestic judgment, the applicant brought the case to the ECtHR. She argued that there had been a violation of article 4 of the Convention on the prohibition of slavery, servitude and forced labour, because of the failure of the state to comply with the positive obligation to have adequate criminal law provisions to prevent and punish her situation.[383]

The ECtHR agreed that there was indeed a positive obligation for states to have such provisions covering the conditions of modern slavery, in accordance with ECHR and other international standards.[384] It thus went on to determine whether the situation of the applicant fell under article 4 ECHR. The Court found that the applicant had been working under conditions of forced labour[385] due to the fact that she felt a threat of arrest because of her irregular status,[386] and she was also not working from her free will.[387] She was also working under conditions of servitude, as a "particularly serious form of denial of freedom".[388] The Court noted that the applicant "

[380] Siliadin v France (n 378) paras 11 and 14-15
[381] Ibid, para 46
[382] Ibid.
[383] Ibid, para 65
[384] Ibid, para 89
[385] Ibid, para 120
[386] Ibid, para 118
[387] Ibid, para 119
[388] Ibid, para 123

had no freedom of movement and no free time" due to her long hours of work, her status as a minor making her specifically vulnerable ad dependent with no resources, and her employers and her immigration status restricting her freedom of movement.[389] She was not, however, a slave, because the family he worked for did not "exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"".[390]

The Court then decided that the criminal Code provisions 225-13 and 225-14 did not cover appropriately the situation of the applicant.[391] It referred to a report by the French National Assembly's joint taskforce on the various forms of modern slavery which qualified these two articles as "open to very differing interpretations from one court to the next"[392], and insisted that the Convention is a living instrument and that it "must be interpreted in the light of present-day conditions", and that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".[393]

The ECtHR found a "violation of the respondent State's positive obligations under Article 4".[394]

This case is significant for several reasons. First, the applicant's situation illustrates many challenges that domestic workers often face regarding the right to privacy, labour conditions such as hours of work, rest, pay, as well as issues with migration status and travel and identity documents. It creates the opportunity for the court to address these challenges and the protection of domestic workers. Second, the judgment makes several references to international instruments, both within the ILO and the UN, which concern slavery and forced labour and are

[389] Siliadin v France (n 378) paras 126 to 128
[390] Ibid, para 122
[391] Ibid, para 148
[392] Ibid, para 147
[393] Ibid, paras 121 and 148
[394] Ibid, para 149

relevant to domestic workers, namely, the ILO Forced Labour Convention of 1930 (C029) and the Slavery Convention of 1926 (a document of the League of Nations).[395] This helps to create coherence between standards at different levels, and to highlight their complementarity and the interconnectedness between human rights and labour rights. The Court's care in referring to international standards highlights the fact that the protection afforded is indeed multi-layered – as all instruments in concert strive towards the protection against slavery and forced labour. Finally, the judgment requires states to effectively address these challenges in their laws. Thus, international standards should be translated to the domestic level through an ECtHR judgment that explicitly refers to these standards. From the perspective of the ILO Convention on Domestic Workers, this judgment covers several aspects addressed by the Domestic Workers Convention, including appropriate remedies and the prohibition of slavery and forced labour. The positive obligation of states to enact laws criminalizing forced labour under the ECHR means that domestic workers should be protected from it and have access to remedies in CoE member states, even in those that have not ratified the ILO Domestic Workers Convention.

The second case, C.N. and V. v. France, was brought to the ECtHR in 2012. In this case, two minors, originally from Burundi but French Nationals, were put under the custody of Mr and Mrs M., for whom they had to perform housework, without pay and with no rest.[396] They lived in a basement, with limited access to a bathroom, had no leisure activities and were victims of physical and verbal harassment.[397] While one of the applicants went to school and did housework when she came home, the older applicant never went to school nor received any training, and was doing the housework all day.[398] Mr and Ms M. were charged under the same charges than in the case of *Siliadin* by the domestic court, namely Articles 225-13, 225-14 and

[395] Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253
[396] CN and V v France (App no 67724/09) ECHR 11 January 2013, paras 5 to 12
[397] Ibid, paras 10, 13, 20
[398] Ibid, paras 14 -15

225-15 of the French Criminal Code criminalizing the subjection of a vulnerable or dependent person, by taking advantage of that person's situation, to working conditions or living conditions incompatible with human dignity, and to make them work without payment.[399] There was also a charge of violence against a child, an offence under Article 222-13 of the Criminal Code.[400]

The applicants complained to the ECtHR under article 3 ECHR, but the ECtHR concluded that issues related to ill-treatment of the girls had been addressed by domestic courts.[401] On the other hand, applicants also complained of being subject to servitude and forced labour under article 4 ECHR, and argued that the state had failed in its positive obligations to protect persons from forced labour through appropriate legal provisions.[402] The ECtHR reiterated from the *Siliadin* judgment that states had a positive obligation to protect victims of forced labour, servitude and slavery.[403] Forced labour is defined as "work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned and for which the said person has not offered himself voluntarily".[404] The Court differentiated between the two applicants. The first applicant did not attend school, and worked without time off or time for leisure, without pay, all week and sometimes at night.[405] The second applicant went to school, and helped with the housework when she came back home.[406] Several factors help to distinguish between forced labour and work usually expected from a family member.[407] The Court thus considered that only the first applicant met the conditions of forced labour,[408] also

[399] CN and V v France (n 396) para 37
[400] Ibid.
[401] Ibid, para 55
[402] Ibid, para 57
[403] Ibid, para 69
[404] Ibid, para 71
[405] Ibid, para 73
[406] Ibid.
[407] Ibid, para 74
[408] Ibid, para 76

because she was working unwillingly and she had been under the threat of being sent back to Burundi. [409]

Concerning the allegation of servitude, the Court defined servitude as "an obligation to provide one's services that is imposed by the use of coercion" and is "a particularly serious form of denial of liberty".[410] The Court also referred to the Supplementary Convention on the Abolition of Slavery, the Salve Trade, and Institutions and Practices Similar to Slavery of 30 April 1956 in which servitude, in addition to what has been mentioned before, also encompasses "the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition".[411] The criteria that the person performing the work has the feeling that the situation is permanent, and the fact that this feeling is based on objective criteria or fostered by the 'employers', differentiates servitude from forced labour.[412] This was the case for the first applicant, but not for the second.[413]

Finally, the Court examined whether the state had failed in its positive obligations to penalize and prosecute actions mentioned above and falling under Article 4 ECHR, and to investigate such situations.[414] Referring to the *Siliadin* judgment, the Court found that, despite amendments in the law, the domestic law situation was identical to the one of *Siliadin*, meaning that there were no proper domestic legislation criminalizing forced labour and servitude.[415] The Court thus found a violation of article 4 ECHR.[416] However, there was no violation concerning the duty to investigate.[417]

[409] CN and V v France (n 396) paras 76-78-79
[410] Ibid, para 89
[411] Ibid, para 90
[412] Ibid, para 91
[413] Ibid, paras 92-93
[414] Ibid, para 104
[415] Ibid, para 107
[416] Ibid, para 108
[417] Ibid, para 111

This judgment, similarly to that of *Siliadin*, is a good example of the difficulties faced by domestic workers in terms of hours of work, rest, or abuse. The Court refers to the PACE Recommendation 1523 on Domestic Slavery, and Recommendation 1663 on Domestic Slavery: Servitude, Au Pairs and Mail-order Brides, and to international instruments from the ILO, such as ILO C029 on Forced Labour.[418] While it mentions the name of this Convention without further details, probably more as a support, the judgment also refers to specific ILO standards on forced labour adopted by the International Labour Conference (ILC). It looks in particular at the ILO definition of forced labour as defined by the ILC in "The cost of coercion: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work" in 1999:

> "24. The ILO's definition of forced labour comprises two basic elements: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily. The work of the ILO supervisory bodies has served to clarify both of these elements."[419]

Here, the ECtHR directly uses these findings in order to rule that the first applicant was subjected to forced labour. In Paragraph 71 of the judgment, the ECtHR also admits that:

> "In Van der Mussele v. Belgium […] and Siliadin […] the Court considered, in terms largely inspired by those of Article 2 § 1 of ILO Convention no. 29 of 1930 on forced labour, that forced or compulsory labour within the meaning of Article 4 § 2 of the European Convention means "work or service which is exacted from any person under the menace of any penalty, against the will of the person concerned

[418] CN and V v France (n 396) para 51
[419] Ibid, para 52

and for which the said person has not offered himself voluntarily"".[420]

Thus the ILO is used as an important source in the light of which ECHR articles need to be interpreted. ILO standards can thus have a direct impact on ECHR standards and indirectly find their way into ECHR state parties. This means that domestic workers receive protection up to ILO standards in ECHR with regards to the prohibition of forced labour, even in states that have not ratified the Domestic Workers Convention.

The further case of significance in the ECtHR's jurisprudence is C.N. v. the United Kingdom. In this case, the applicant arrived to the UK from Uganda, which she fled with false travel documents and the help of a relative, S. .[421] However, S. confiscated these documents and she started working in houses but never received a pay; payments were made to S. but she never received the money.[422] She escaped, and after spending some time at the hospital, she filed an asylum claim.[423] It was rejected, and she then asked the police to investigate her case, which was handed over to a human trafficking team.[424] While a government funded project on trafficking found that she had been subjected to forced labour,[425] the police found that English law did not cover the circumstances of this case.[426] Indeed, Section 4 of the Asylum and Immigration Act 2004 criminalized the trafficking of people for exploitation.[427] The case did not fit a case of trafficking according to UK law, and there was no independent legislation covering domestic servitude.[428] Once more, the judgment of the ECtHR refers to international instruments: the ILO Forced Labour Convention C029, the Slavery Convention of 1929, as

[420] CN and V v France (n 396) para 71
[421] CN v The United Kingdom (App no 4239/08) ECHR 13 February 2013, paras 5-6
[422] Ibid, paras 7-10
[423] Ibid, paras 12 to 14
[424] Ibid, paras 14-15
[425] Ibid, para 20
[426] Ibid, para 24
[427] Ibid, para 32
[428] Ibid, para 29

well as the two PACE Recommendations 1523 and 1663 on Domestic Slavery, which establish standards that inform the decision of the ECtHR.[429] In particular, the ECtHR looks this time at the ILO indicators of forced labour which, according to the Court, "provide a valuable benchmark in the identification of forced labour".[430]

The Applicants complained to the ECtHR that the UK government failed to penalize forced labour and servitude in its criminal law, despite its positive obligation to do so.[431] The Court reiterated that a positive obligation to penalize and prosecute acts aiming at creating situations of slavery, servitude or forced labour.[432] In addition, the state should take measures to protect victims when it is aware or should be aware that such a situation may exist or exists.[433] Follows then an obligation to investigate such situations.[434]

The Court found that while the authorities did investigate the complaints of the applicant, and while there were some criminal offences which covered some aspects of slavery, servitude and forced labour, the offences were not appropriate to effectively protect victims of treatment contrary to article 4 ECHR. [435] Victims of servitude, slavery or forced labour who were not also victims of trafficking were not protected by the UK law.[436] The court went on to determine if this lack of legal framework prevented the authorities from investigating, or if the investigation found no evidence to support the applicant's allegations.[437] The Court note that the investigating team focused on the offence of trafficking.[438] However the court emphasizes that domestic servitude is an offence in itself, distinct from trafficking, and that the lack of

[429] CN v The United Kingdom (n 421) paras 34 to 41
[430] Ibid, para 35
[431] Ibid, para 47
[432] Ibid, para 66
[433] Ibid, para 67
[434] Ibid, para 69
[435] Ibid, paras 73-76
[436] Ibid, para 76
[437] Ibid, para 78
[438] Ibid, para 80

legislation criminalizing domestic servitude made it impossible to focus on this particular offence.[439] Thus, the investigation took little consideration of factors characterizing of forced labour (as defined by the ILO), such as the fact that the applicant's passport was confiscated, that she was unpaid, and that her illegal migration status was used as a threat.[440]

Thus, the investigation did not address domestic servitude, and the ECtHR found that this was a violation of the state's positive obligations under article 4 ECHR.[441]

The conclusion of this case is similar that in the two previous ones. We find again a typical situation or domestic workers, this time concerning an adult, and the ECtHR takes into consideration ILO standards, not only as a support for legitimacy, but as a source to establish that the facts of the case did represent a situation of forced labour.

The last case that needs to be included in this analysis is that of Elizabeth Kawogo v. the UK. The applicant was a foreign national who claimed that she had been victim of servitude and forced labour, and that the domestic law did not provide her with an effective remedy.[442] However, this case was settled by a unilateral declaration. The UK Government showed that there were existing provisions in domestic law that covered some aspects of forced labour.[443] In addition, section 71 of the Coroners and Justice Act 2009 had created the offence of slavery, servitude, or forced labour, in accordance with article 4 ECHR.[444] The Court then decided to strike out the application, based on article 37§1(c) of the ECHR which stipulates that the court can do so if it considers that "it is no longer justified to continue the examination of the

[439] CN v The United Kingdom (n 421) para 80
[440] Ibid.
[441] Ibid, para 81
[442] Elizabeth Kawogo v United Kingdom (App no 56921/09) ECHR Fourth Section Decision 3 September 2013, 1-2
[443] Ibid, 2-3
[444] Ibid, 3

application".[445] The court considered in particular the government's admission of fault regarding its procedural obligations and the state of the law at the time of the applicant's complaint, as well as the new legislation covering slavery, servitude and forced labour, and the compensation offered.[446]

Section 3.4. Conclusion

This chapter has shown that there are a lot of similarities and overlap between the Council of Europe instruments such as the ECHR and the Revised Economic and Social Charter, and the ILO Domestic Workers Convention. The ECHR covers all civil and political rights contained in the ILO Domestic Workers Convention. The Revised Charter, however, shows some differences on certain provisions, and its scope is limited. Moreover, the Revised Charter and the ESC are difficult to enforce, lack popularity, and their complaint mechanism is restricted. Nevertheless, the ECSR has called for domestic laws to include domestic workers in several of its Conclusions. The Recommendations of the PACE, focusing on slavery and forced labour, reflect some of the content of the ILO Domestic Workers Convention. It should be noted that all of these documents were adopted before the ILO Domestic Workers Convention.

The Council of Europe, through the PACE Recommendations and the ECHR case-law, seem to focus on the issue of slavery and the prohibition of forced and compulsory labour when it comes to domestic workers. It is much less concerned with the issue of migration than the UN (which is rather addressed by anti-trafficking instruments, outside the scope of this thesis). The prohibition of slavery and forced labour is only addressed in the Domestic Workers Convention by reference, in article 3, to the Fundamental Principles and Rights at Work and "the

[445] Elizabeth Kawogo v United Kingdom (n 442) 5
[446] Ibid, 6

elimination of all forms of forced or compulsory labour".[447] Thus, the ECtHR, through referencing the ILO Forced Labour Convention C029 and other ILO standards on forced labour, offers a more detailed protection to domestic workers on that particular point. While *Siliadin* refers to ILO Convention 29 on Forced Labour, *CN and V v. France* and *CN v. the UK* go further in using ILO standards to interpret article 4 ECHR and to analyse the facts of the case. Ebert and Oelz note that these practices in the ECtHR "can be read as a signal that human rights courts are increasingly willing to open their analyses to considerations of the labour rights legal discourse of the ILO".[448]

[447] ILO C189 (n 109) art 3 (2) b
[448] Franz Christian Ebert and Martin Oelz (n 342) 13

Chapter 4: What Protection for Domestic Workers in the United Kingdom?

This chapter serves as a case study. After having studied all the different instruments, besides the ILO Domestic Workers Convention, that may provide protection to domestic workers, the aim is to assess the level of protection that domestic workers receive in countries that have not ratified the Domestic Workers Convention, either through these other international and regional instruments, or through national legislation. As a result, I hope to highlight the uniqueness of the Domestic Worker Convention as an essential instrument that protects both labour and human rights of domestic workers, and to emphasize the importance of its ratification by the United Kingdom. This chapter will first give a background on the UK's position toward the ILO Domestic Workers Convention, and examine how the UK law protects – or not - domestic workers compared to the Domestic Workers Convention. Given the previous analyses on the complementary protection for domestic workers at the UN level and in the Council of Europe, this chapter will also analyse to what extent these other instruments can impact the protection of domestic workers in the UK.

Section 4.1. The UK and the ILO Domestic Workers Convention

The ILO Domestic Workers Convention has a very low number of ratifications. Out of 187 member states to the ILO, only 22 have ratified it.[449] In Europe, only Finland, Switzerland, Portugal, Italy, Ireland, Germany, and Belgium have ratified.[450] The United Kingdom is thus one of the countries that have not ratified the Domestic Workers Convention, even though, like other European countries, "the UK has seen a steady increase in employment in all types of household services over recent years as a result of a complex interaction of demographic,

[449] ILO Normlex, 'Ratifications of C189' (n 34)
[450] Ibid.

labour market, social and economic changes".[451] The demand is stimulated by an aging population, "changing household structures, increasing female participation in the labor market, difficulties in reconciling paid employment and caring for dependants, and the availability of a flexible, low cost, female, and mainly migrant, work force".[452] In 2013, the UK counted around 138,000 migrant domestic workers on its territory, without counting nationals working as domestic workers.[453]

Nevertheless, along with 8 other countries, the UK abstained from the final vote to adopt the Domestic Workers Convention.[454] During the negotiations towards the adoption of the Domestic Workers Convention, the United Kingdom was very active,[455] trying to pass amendments that reduced the Domestic Workers Convention's protection of domestic workers.[456] The UK argued in an Explanatory Memorandum, presented to its national Parliament together with the ILO Domestic Workers Convention in Command Paper 8338 that it could not ratify the Domestic Workers Convention because:

> "Whilst the UK supports the principles behind the Domestic Workers Convention, it does not think that ratification of the Convention is appropriate for the UK because of the burdens that implementing the health and safety provisions would

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[451] Bridget Anderson, 'A Very Private Business' (n 13) 250
[452] Siobhán Mullally, Clíodhna Murphy, 'Migrant Domestic Workers in the UK' (n 205) 398
[453] International Labour Office, 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection' (ILO, 2013) 37 <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf> accessed 12 September 2016
[454] UK Government and Parliament, 'Petition: Ratify ILO Convention 189 on Domestic Workers' (*UK Government and Parliament*, 2013) <https://petition.parliament.uk/archived/petitions/32857> accessed 13 September 2016
[455] To see the record of all UK interventions: International Labour Conference (100th Session) Provisional Record 15 - Fourth Item on the Agenda: Decent Work for Domestic Workers (Geneva 2011) <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_157696.pdf> accessed 16 October 2016
[456] Paul Rainford, 'The UK Could Have Led the Way on Rights for Domestic Workers. Instead It Has Refused to Sign a New International Convention that Promotes Fair Pay, Health and Safety, and Labour Rights' (*LSE Blogs*, 16 June 2011) <http://eprints.lse.ac.uk/37250/1/blogs.lse.ac.uk-The_UK_could_have_led_the_way_on_rights_for_domestic_workers_Instead_it_has_refused_to_sign_a_new_int.pdf> accessed 13 September 2016

impose on UK business and citizens".[457]

Ever since, the UK has relied on this argument not to ratify the Domestic Workers Convention, for example in its UN UPR report in 2014.[458] The UK is thus emphasizing as main obstacle the safety and health regulation and the labour inspection of private homes, and it sees a conflict between the right to privacy of employers and the rights and protection of domestic workers. In fact, the UK's Health and Safety at Work Etc. Act 1974 explicitly excludes domestic workers in its section 51:

> "Exclusion of application to domestic employment. Nothing in this Part shall apply in relation to a person by reason only that he employs another, or is himself employed, as a domestic servant in a private household".[459]

In addition, the UK argues that it in fact already provides protection for domestic workers.[460] However, a look at relevant domestic legislation shows that the UK is far from consistently affording domestic workers the same level of protection than does the Domestic Workers Convention.

Section 4.2. UK Domestic Protection of Domestic Workers

Article 5 of the Domestic Workers Convention protects domestic workers from abuse,

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[457] Paul Whitehouse, Francesca Cooney, Marissa Begonia, Brendan Barber, 'Call for Ratification of ILO Domestic Workers Convention' (*Trades Union Congress*, 10 December 2012) <https://www.tuc.org.uk/international-issues/migration/call-ratification-ilo-domestic-workers-convention> accessed 15 September 2016

[458] Justice.gov.uk, 'United Nations Universal Periodic Review Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies' (Crown, 2014) <https://www.justice.gov.uk/downloads/human-rights/uk-upr-mid-term-report-2014.pdf> accessed 15 September 2016, Reference 110.27 2012&2014, 28-29

[459] Health and Safety at Work etc. Act 1974, s 51

[460] Justice.gov.uk, 'UN UPR Mid Term Report of the UK' (n 458) Reference 110.27 2014, 29

harassment and violence at work, as does the Equality Act 2010 of the United Kingdom that focuses on sexual harassment at work.[461] Moreover, domestic workers are not excluded from UK legislation protecting individuals from different forms of abuse and violence.[462]

Concerning access to social security benefits, the Social Security Contributions and Benefits Act 1992 requires employers to include income tax and national insurance contributions in the employee's salary.[463] As a result, domestic workers benefits from "job-seeker's allowance, incapacity benefits, retirement pension, widow's benefits and bereavement benefits, guardian's allowance, statutory maternity pay, maternity allowance, and contribution-relate allowance and support allowance",[464] in addition to the right to paid holidays, sick pay, and maternity leave.[465] Thus, UK law complies with the Domestic Workers Convention on these points.

Regarding article 16 of the Domestic Workers Convention on the access to justice, domestic workers have by law the same access to courts than any other person, including to employment tribunals.[466]

Concerning the protection from forced labour, found in the Domestic Workers Convention by reference to the ILO Forced Labour Convention C29, as the ECHR cases against the UK have shown, the country did not originally have criminal legislation that covered slavery, servitude and forced labour. However, following the cases in the ECtHR, it introduced Section 71 of the Coroner's Act 2009, "providing for the offences of holding a person in slavery, servitude or

[461] Trust Law, White & Case, Grasty Quintana Majlis & Cia, 'A Landscape Analysis of Domestic Workers' Rights and ILO Convention 189' (Thomson Reuters Foundation, November 2012) 12 <http://www.trust.org/contentAsset/raw-data/19d35414-86d5-4dea-b5f0-487dcdc8f0d0/file> accessed 16 October 2016
[462] Ibid, 13
[463] Ibid, 24
[464] Ibid.
[465] Ibid.
[466] Ibid, 31; see also Human Rights Act 1998, art 6 (right to a fair trial) and Tribunals, Courts and Enforcement Act 2007

forced labour", which should be " construed in accordance with Article 4 of the Human Rights Convention".[467] Section 1 of the Modern Slavery Act of 2015 provides a very similar protection, adding that the victim's vulnerability and the type of work should be taken into account when determining whether there is a situation of slavery or forced labour.[468] Additionally, consent does not mean that there is not a situation of slavery or forced labour.[469] Moreover, the totality of Article 4 of the ECHR was incorporated into English law through the Human Rights Act 1998, allowing victims to seek a remedy that they would get under the ECHR directly in domestic courts.[470] However, despite this positive point, Mantouvalou and Albin consider that Section 71 of the Coroner's Act 2009 only covers extreme situations of modern slavery, and thus "is not sufficient for domestic workers' protection",[471] as they face " 'lesser' forms of exploitation".[472]

However, other rights contained in the Domestic Workers Convention are absent or insufficiently protected by UK law. A case in point is the right to strike and to bargain collectively which is contained in the Domestic Workers Convention. This right faces strict limitations in the UK, and domestic workers, who do not have recognized trade unions to represent them in the UK, are unlikely to meet requirements for a protected 'lawful strike'.[473] Concerning the right to privacy, contained in article 6 of the Domestic Workers Convention, and relevant for live-in domestic workers, "there is no stand-alone cause of action for breach of privacy in UK law".[474] However, with the Human Rights Act 1998, the right to privacy of the ECHR was incorporated in UK law and national courts can follow the jurisprudence of the

[467] Clíodhna Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62 [3] International and Comparative Law Quarterly 599, 624-625
[468] Modern Slavery Act 2015, s 1
[469] Ibid, s 1 (5)
[470] Human Rights Act 1998, schedule 1 part 1 art 4
[471] Mantouvalou and Albin as cited in Clíodhna Murphy (n 467) 625
[472] Ibid.
[473] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 11
[474] Ibid, 13

ECtHR on the matter.[475] Other provisions of the Domestic Workers Convention covering live-in domestic workers, such as article 9 on the right to reside in the household or not, and to keep identity documents, find no equivalent in UK law.[476]

Another area that the Domestic Workers Convention seeks to regulate is employment law or labour law, to provide domestic workers with decent working conditions. In the UK, although domestic workers are covered by general labour and employment law, "there are a number of key exemptions from the scope of labour protections".[477] Domestic workers are in fact "excluded from a number of labour standards, including maximum weekly working time, restrictions on the duration of night work, occupational health and safety legislation, and, if they reside in their employer's home and are 'treated as a member of the family", the minimum wage".[478] All of these are covered in the Domestic Workers Convention.

As noted before, occupational safety and health is in fact the main point that the United Kingdom argues prevents them from ratifying the Domestic Workers Convention. As Mantouvalou points out, **"**Section 51 of the UK Health and Safety at Work Act 1974, which regulates working conditions, inspection and sanctions, excludes domestic workers from its scope altogether […] it is clear that the conflict between employers' privacy and domestic workers' decent working conditions, the former often prevails".[479] In addition, this exemption also applies to labour inspections - article 17 of the Domestic Workers Convention.[480]

Concerning working time, the Domestic Workers Convention foresees in its article 10 equal

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[475] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 14
[476] Ibid, 18
[477] Clíodhna Murphy (n 467) 609
[478] Judy Fudge, Kendra Strauss (n 17) 166
[479] Virginia Mantouvalou, 'What Is to Be Done for Migrant Domestic Workers?' (*Kalayaan*, 2014) 6 <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/MantouvalouIERDomesticWorkers.pdf> accessed 14 November 2016
[480] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 32

treatment with nationals. In the UK, working time is regulated by The Working Time Regulations 1998. This text expressly excludes domestic workers in regulation 19 on domestic service: "Regulations 4(1) and (2), 6(1), (2) and (7), 7(1), (2) and (6) and 8 do not apply in relation to a worker employed as a domestic servant in a private household".[481] This means that domestic workers are excluded from regulation 4, creating a maximum weekly working time of 48hours,[482] regulation 6 limiting night work to 8 hours for every 24hours,[483] regulation 7 concerning the health of night workers,[484] and regulation 8 which provides that workers who have a work pattern that put their health and safety at risk should be given "adequate rest breaks".[485] The regulation of working hours for domestic workers is however very important, especially for live-in domestic workers who, without such protection, may be required to stay on-call and work extremely long hours with little rest. Even though, in the case-law, UK Employment Tribunals have found that when a worker is on call and is required to remain available and to not leave their house, this counted as working time,[486] domestic workers are still excluded from most of the working time protection.

Another point that is noteworthy here concerns the minimum wage. According with regulation 2(2) of the national minimum wage regulations (National Minimum Wage Act 1998 and Regulations 1999), "the requirement to pay the national minimum wage is not applicable to domestic workers in situations where they live with their employer and are treated as a member of the family".[487] This means that "the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of

[481] The Working Time Regulations 1998, Regulation 19
[482] Ibid, Regulation 4(1)
[483] Ibid, Regulation 6
[484] Ibid, Regulation 7
[485] Ibid, Regulation 8
[486] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 19-20; see Davies and others v. London Borough of Harrow [2003] ET/3301124/02; McCartney v Oversley House Management [2006] IRLR 514 (EAT); Hughes v G and L Jones t/a Graylyns Residential Home [2008] UKEAT/0159/08
[487] Clíodhna Murphy (n 467) 609

tasks and leisure activities".[488] Although this does not specifically mentions domestic workers, "the provisions have been interpreted as applying to domestic workers",[489] especially live-in domestic workers. However, In the case *Julio v Jose UKEAT/0553/10 and other cases*,[490] the tribunal noted that whether a worker is treated as a member of the family "must be considered holistically", taking into account not only meals, accommodation and leisure activities, but also "the dignity with which the workers is treated, the degree of privacy and the autonomy they are afforded, and the extent to which (if at all) they are exploited".[491] Also related to wages, article 12 of the domestic workers convention regulates payments in kind. In UK Law, "accommodation is the only payment in kind that can count towards reaching the NMW"[492]; however, if workers are not covered by the National Minimum Wage legislation, then there is no limit as to how much of the salary can be paid in kind.[493]

Regarding the regulation of private employment agencies, several Acts and Regulations in the UK seeks to regulate the operations of private employment agencies, as well as complaint and remedies mechanisms.[494] However, there are still shortcomings concerning the fees that such agencies can charge, and no cooperation with countries of origin of domestic workers, or other countries, as recommended by article 15 of the Domestic Workers Convention.[495]

Migrant domestic workers in the UK are even less protected than other domestic workers. Article 8 of the Domestic Workers Convention stipulates that migrant domestic workers should receive a written contract before arrival, and that they are entitled to repatriation at the end of their contract. The UK Border Agency Immigration Rules do state that in order to get the right

[488] The National Minimum Wage Regulations 1999, regulation 2(2)
[489] Virginia Mantouvalou, 'What Is to Be Done for Migrant Domestic Workers?' (n 479) 5
[490] Julio v Jose UKEAT/0553/10 and other cases [2012] IRLR 180 (EAT)
[491] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 21
[492] Ibid, 23
[493] Ibid.
[494] Ibid, 28-29
[495] Ibid, 30-31

to entry and stay in the UK, domestic workers must have a written contract.[496] The UK also has certain measures of repatriation for asylum-seekers and irregular migrants that, arguably, migrant domestic workers may use, although this is not an ideal situation.[497]

In addition, the week of the adoption of the Domestic Workers Convention, in June 2011, the UK government announced that it would review the overseas domestic worker visa system.[498] The new system, adopted in 2012, permits migrant domestic workers to work in the UK for 6 months only, removes the right to change employer, and "the possibility of sponsoring dependants and seeking longer term settlement in the United Kingdom".[499] Mullally and Murphy argue that these reforms "significantly increase the precariousness of the migrant domestic worker's position",[500] notably because of the introduction the tied visa which can force domestic workers to remain with an abusive employer, and because of the temporary visa. This could force many domestic workers into illegal migration, which in turn affects greatly their access to rights.[501] The visa affects access to social security, as migrant domestic workers do not have recourse to public funds,[502] thus the domestic worker visa do not receive benefits from the state, including many social security benefits.[503] Concerning the right to access courts, tribunals, or other dispute settlement mechanisms, migrant domestic workers are also at a disadvantage because their visa is temporary and tied to their employer. If they leave their employer, they may find themselves in an irregular situation and be subject to deportation,

[496] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 17
[497] Ibid, 18
[498] Ruth Grove-White, 'One Step Forward but Two Steps Back for Migrant Domestic Workers' (*Migrants' Rights Network*, 13 June 2011) <http://www.migrantsrights.org.uk/blog/2011/06/one-step-forward-two-steps-back-migrant-domestic-workers> accessed 16 October 2016
[499] Siobhán Mullally, Clíodhna Murphy (n 205) 412
[500] Ibid.
[501] Ibid, 414
[502] Home Office, 'Immigration Rules' (*Gov.uk*, 14 July 2016) <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-5-working-in-the-uk> accessed 16 October 2016, part 5 para 159A (vii)
[503] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 26-27

they may be unable to find another job and afford living in the UK during their case, and might have to overstay their visa as it lasts only 6 months, again making their status irregular.[504]

In 2015, Barrister James Ewins was put in charge of investigating the ODW visa system in the UK.[505] He found that "the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK".[506] He also recommended that the visa length could be renewed up to two and a half years, to allow effective protection for migrant domestic workers and time for them to change employer.[507] The Ewin Report also recommended to create mandatory information meetings, in order for overseas domestic workers to "be given a real opportunity to receive information, advice and support concerning their rights while at work in the UK", which will empower them to seek help in case of abuse.[508]

The UK government has agreed that domestic workers should be able to change employers in the first 6 months visa to escape abuse, although it has refused to abolish the tied visa system.[509] However, Kalayaan points out that this measure will not help domestic workers who will struggle to find a new job in the UK, having little time left on their visa and no references.[510] Domestic workers may choose to remain in an abusive situation, instead of becoming homeless due to a lack of access to public funds and to new employment.[511] The government has also

[504] Trust Law, White & Case, Grasty Quintana Majlis & Cia (n 461) 31-32
[505] HC Deb 9 February 2015, cols 548-549
[506] James Ewins, 'Independent Review of the Overseas Domestic Workers Visa' (16 December 2015) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf> accessed 19 October 2016
[507] Ibid.
[508] Ibid, 6
[509] Kalayaan, 'Overseas Domestic Workers left in the dark by the Immigration Act 2016' (*Kalayaan*, 28 June 2016) <http://www.kalayaan.org.uk/campaign-posts/overseas-domestic-workers-left-in-the-dark-by-the-immigration-act-2016/> accessed 19 October 2016
[510] Ibid.
[511] Ibid.

accepted to lengthen the visa period to up to 2 years, when victims have been trafficked in the UK for the purpose of exploitation.[512] However, migrant domestic workers who are victims of abuse have not necessarily been trafficked in the UK.[513] The UK government has also accepted that domestic workers will be able to stay in the UK when a case of abuse is discovered within the 6 months of their initial visa.[514] When a case is discovered later, however, domestic workers "will need to wait until a decision is made whether the government conclusively accepts they are a victim before they can then apply for a visa". Kalayaan reports that this decision may take more than a year. Finally, the government has accepted to implement information meetings to inform migrant domestic workers of their rights, which is important for them to be able to recognize and report abuse as soon as possible.[515]

Thus, while the UK does protect domestic workers in some areas, this comparison of domestic legislation with the ILO Domestic Workers Convention shows that there are many areas, mainly in labour and employment legislation, where domestic workers do not receive protection in the UK to the level of the Domestic Workers Convention.

Section 4.3. Other International Instruments: ILO, UN and CoE

As has been noted before, while the ILO Domestic Workers Convention is obviously relevant and specific protection for domestic workers, other international or regional instruments provide protection covering some aspects of the ILO Domestic Workers Convention, as well as extra coverage in areas such as migration and slavery or forced labour.

However, each and every of these documents have to be ratified individually by the United

[512] Kalayaan (n 509)
[513] Ibid.
[514] Ibid.
[515] Ibid.

Kingdom. This part will look at whether these additional means of protection exist in the UK.

A – The Council of Europe

The UK was one of the founding members of the council of Europe, and it became a member state on 5 may 1949.[516] It is a state party of the ECHR and of the ESC. This means that domestic workers receive protection when it comes to civil and political rights such as freedom from slavery, servitude and forced labour. As we have seen before, the rights of the ECHR have been included in UK law through the Human Right Act 1998, and other laws such as the Modern Slavery Act 2015 can also protect domestic workers. The UK has only signed the revised version of the ESC, which means that newer articles are not yet binding in the country. Domestic Workers do not receive the same direct protection from the new articles of the Revised Charter relevant for them, such as a minimum of 4 weeks holidays with pay,[517] ensuring that workers receive a written contract with the essential details about their employment,[518] giving pregnant women a leave of 14 weeks[519] instead of 12 in the original ESC,[520] and the right to dignity at work[521] concerning sexual harassment in the workplace. Nevertheless, as seen above, the UK legislation already complies with the ILO Domestic Workers Convention on these points.

Thus, through its membership in the Council of Europe, and by being a state party to the ESC and the ECHR, the UK provides protection to domestic workers through the implementation of these instruments. Moreover, as we have seen through the ECHR case-law, the ECtHR was a main factor in creating a slavery and forced labour law in the UK that protects domestic

[516] Council of Europe, 'United Kingdom // 47 States, one Europe' (*Council of Europe*, 2016) <http://www.coe.int/en/web/portal/united-kingdom> accessed 20 September 2016
[517] European Social Charter (Revised) (n 346) art 2 para 3
[518] Ibid, art 2 para 6
[519] Ibid, art 8 para 1
[520] Ibid, art 8 para 1
[521] Ibid, art 26

workers. As the ECtHR made reference to ILO standards in its judgment, indirectly, the UK also complies with ILO standards on slavery and forced labour. Whether the same dynamic could happen with respect to the ILO Domestic Workers Convention remain to be seen.

B – The United Nations

The UK is also a founding member of the United Nations, and has ratified numerous UN instruments, such as the international covenants and the UDHR, CEDAW and ICERD.[522]. Thus, the minimum protection afforded by these instruments is accessible to domestic workers.

However, the UK has not ratified the International Convention on the Protection of All Migrant Workers and Members of their Families.[523] In the Universal Periodic Review, in September 2012, the UK was recommended by several states to ratify this convention; to which the UK answered that it did not support this ratification.[524] The justification for this is that "No EU Member State or major industrialised developed state has ratified the Convention".[525] Moreover, the UK argues that its domestic law already protects migrant workers, and that it has "struck the right balance between the need for a firm, fair and effective immigration system and protection of the interests and rights of migrant workers and their families".[526] In 2014, during the mid-term review, the UK reiterated that, for the same reasons than in 2012, "The UK Government remains unconvinced of the need to ratify the ICRMW".[527] In particular, it highlighted that "migrants who are legally working in the UK already enjoy the full protection of UK employment law".[528] However, after having looked at domestic legislation and employment law, we saw that migrant domestic workers working in the UK legally are often

[522] OHCHR, 'Status of Ratification Interactive Dashboard' (n 319)
[523] Ibid.
[524] Justice.gov.uk, 'UN UPR Mid Term Report of the UK' (n 458) Reference 110.14 2012, 22
[525] Ibid.
[526] Ibid.
[527] Ibid, Reference 110.14 2014, 22
[528] Ibid.

excluded from domestic labour law. Moreover, the ICRMW is significant for the protection if affords to irregular migrant workers.

C – ILO Instruments

In the ILO, the UK has ratified all 8 fundamental conventions. Domestic workers in the UK are thus protected against forced labour (as seen also through the ECHR and the Human Rights Act 1998), discrimination at work, and benefit from equal remuneration and the right of association and to organize. However, the study of UK legislation has revealed that the right of association, to organize and bargain collectively is limited, and domestic workers do not have recognized trade unions to represent them.

Of the other ILO conventions relevant for domestic workers, as seen in Chapter 1, the UK has only ratified one: the Migration for Employment Convention (C097, 1949).[529] This convention provides that states should treat migrant workers equally than their nationals in several domains. With regards to remuneration, working hours, and social security, the examination of the domestic legislation shows that the UK is far from complying on these standards with migrant domestic workers.

The UK has not ratified the Workers with Family Responsibilities Convention (C156), the Private Employment Agencies Convention (C181), and the Migrant Workers Convention 1975 (C143). [530] This lack of ratifications impacts most notably migrant domestic workers.

[529] ILO Normlex, 'Ratifications for United Kingdom' (*ILO*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102651> accessed 19 October 2016

[530] ILO Normlex, 'Up-to-Date Conventions and Protocols Not Ratified by United Kingdom' (*ILO*, 2016) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102651> accessed 19 October 2016

Section 4.4. Conclusion

The UK has refused and still refuses today to ratify the ILO Domestic Workers Convention, in particular because of the conflict between the privacy of the home and labour inspections. Despite some legislation covering domestic workers from abuses and providing them with social security benefits and access to courts, domestic workers remain excluded from most of the UK labour law. Migrant domestic workers are especially excluded, and their migratory status in the UK – in particular the system of tied visas – reinforces their vulnerability. The UK's membership in the Council of Europe, however, has afforded a significant layer of protection for domestic workers, as the ECHR and ESC standards demonstrate. Domestic workers are protected against forced labour and other violations of their human rights, and enjoy basic economic and social rights that overlap with the content of the ILO Domestic Workers Convention. By contrast, complementary protection offered through the UN Migrant Workers Convention is not applicable as the UK is not a party. The UK is also not party to the ILO's Workers with Family Responsibilities Convention (C156), the Private Employment Agencies Convention (C181), and the Migrant Workers Convention 1975 (C143). These are however important instruments targeting specific issues faced by domestic workers and complementing the ILO Domestic Workers Convention.

The ratification of the ILO Domestic Workers Convention is therefore highly desirable in order to bring all domestic workers under the protection of labour and employment law in the UK. Moreover, the ratification of the ICRMW and relevant ILO instruments is also highly recommended for the protection of migrant domestic workers, including irregular migrants.

Conclusion

The International Labour Organization's aim is to promote and improve workers' well-being. Since its inception, although it is not per se a human rights organization, the ILO has adopted a strong human rights approach and has mixed labour standard and human rights, as they are clearly interconnected and both are needed to protect workers fully. The original 9 principles found in the 1919 Labour Charter of the ILO Constitution have since been extended into numerous instruments protecting workers. The recent 'Decent Work Agenda' of the ILO promotes the Fundamental Principles and Rights at Work, and created a new impetus for the cause of domestic workers. While the ILO has since its early days aimed to protect domestic workers, it is only in 2011 that the Domestic Workers Convention was adopted. Along with this instrument, other ILO documents can also protect domestic workers, focusing on issues of employment and private agencies, and migration. But the Domestic Workers Convention is unique in that it finally recognizes domestic work and seeks to address specific issues linked to this activity, such as the situation of live-in domestic workers or payments in-kind.

The protection of domestic workers: a multi-layered approach

The ILO standards on protecting domestic workers are significantly strengthened and complemented by UN human rights instruments. The two international covenants. provide relevant protection standards of a general nature while specialized instruments target specific concerns. Domestic workers are vulnerable because of the intersectionality of gender, race, and migration status. These are addressed in the UN ICERD, CEDAW and ICRMW, complementing the protection of the Domestic

Workers Convention, which does not expand on these characteristics of domestic workers. The UN and the ILO, through close cooperation, show a strong coherence between their standards. This is beneficial, as a country who has not yet ratified the ILO Domestic Workers Convention might nonetheless provide some protection, especially to female migrant domestic workers. However, it should be clearly stated that the fullest protection is received through the interplay of ILO and human rights standards. In no way do these instruments fully replace the protection offered by the ILO Domestic Workers Convention.

At the regional level in the Council of Europe, the human rights of domestic workers are protected through the ECHR, and their labour rights through the ESC or the Revised Charter. The ESC and Revised Charter standards overlap with ILO standards, but these two instruments remain two general conventions on economic and social rights, lacking a focus on particular issues of domestic work. Nevertheless, the ECSR has taken into account domestic workers in several of its conclusions, calling for equal protection and non-exclusion in domestic law. However, the ESC and the Revised Charter are not strong documents and the ECSR is not as powerful as the ECtHR, so there is a limited pressure to enforce these standards. On the other hand, the ECHR as well as the Parliamentary Assembly have focused their attention on the issue of domestic slavery and forced labour with respect to domestic workers. The ECtHR, through its case law, has contributed to the adoption of national legislation creating the offence of slavery and forced labour, independent from trafficking. However, this does not cover all the issues that domestic workers face. Thus, the protection of the Council of Europe is helpful for domestic workers, but not extensive enough to replace that of the ILO

Domestic Workers Convention.

The significance of the ILO Domestic Workers Convention for an effective protection of domestic workers

Instruments described at the ILO, UN, and CoE levels, as complementing the ILO Domestic Workers Convention, or at least as covering some of its basic provisions, are not sufficient to protect domestic workers. Indeed, they were all adopted before the adoption of the Domestic Workers Convention, and the adoption of the Domestic Workers Convention shows that the ILO saw a gap of protection for domestic workers, despite the existence of these other conventions. The adoption of the Domestic Workers Convention is not only a success from civil society, but protection for domestic workers had also been called for by both the UN and the CoE, in particular through the CEDAW committee and it General Comment N°26 on the rights of female migrant domestic workers, and the Parliamentary Assembly of the Council of Europe Recommendations 1523 and 1663.

The continuing relevance of the ILO Domestic Workers Convention is well illustrated by the example of the UK who refuses to ratify the Domestic Workers Convention, in addition to many of the conventions at the ILO and UN level that provide additional protection to domestic workers, and in particular migrant workers. The national legislation provides very little protection and there are significant exclusions from labour and employment law, especially for migrant domestic workers, who also suffer from a tied-visa system that puts them at risk of abuse, as denounced by the NGO Kalayaan. The UK is a party to the ECHR and to the ESC, and thus there is a minimum protection to domestic workers. The human rights of the ECHR were directly

incorporated in the UK law though the Human Rights Act 1998. Thus, the human rights of domestic workers are guaranteed. But the ESC and the Revised Charter, also extremely relevant for domestic workers who do not benefit from the Domestic Workers Convention protection, are not directly applicable in the UK, and have weak mechanisms compared to the ECHR. Thus the reach of the Revised Charter or - in the case of the UK - the ESC is limited in the UK. In addition, a major negative aspect of these two documents is that migrant domestic workers who are not nationals of state parties of the Council of Europe do not receive most of their protection. Moreover, as noted before, the ESC and the Revised Charter are broad economic and social rights conventions that do not cover many of the specificities of domestic work.

Thus, it is unlikely that domestic workers, and in particular female migrant domestic workers, are protected adequately in countries that, like the UK, have not ratified and implemented the ILO Domestic Workers Convention. In the case of the UK, this is very clear, and the need for protection of domestic workers is ever-present. In addition to ratifying the ILO Domestic Workers Convention, the country should also strongly consider ratifying other international instruments protecting the right of migrant domestic workers, as they are particularly vulnerable in the UK. The UK will need to amend its domestic laws to be in line with international standards, especially regarding the system of tied-visas for domestic workers, labour inspections, but in general, it will need to include domestic workers, including female migrants, under the protection of labour and employment law. As no layer of protection is completely identical to another, the fullest protection of domestic workers can only be achieved if States ratify the full array of ILO and human rights conventions. Wider ratification of the ILO Domestic

Workers Convention is thus a matter of great urgency for the advancement of the protection of some of the most vulnerable members of our global workforce.

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