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A HUMAN RIGHTS PERSPECTIVE ON UNDOCUMENTED MIGRANT WORKERS

Assessment of legal frameworks and analysis of the Italian case study

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Abstract

Irregular migration has gained increased attention at International, European and national levels. These arenas are characterized by different approaches towards undocumented migrants. While international organizations encourage to adopt a person-centered and human rights-based approach, regional and national institutions are dominated by a “security” perspective which often neglects irregular migrants’ fundamental rights. The aim of this research is to investigate different legal frameworks towards undocumented migrant workers from a critical angle and to examine whether and to what extent their right to work and to just and favourable working conditions are respected, protected and fulfilled. As case study, the Italian legislation is assessed to evaluate its compliance with the International and European human rights standards. The implementation of the national norms is assessed as well in order to shed light on concrete hurdles faced by irregular migrant workers in labour rights enjoyment. Building on the findings, the research outlines possible areas of improvement in view of Italy’s progressive compliance with relevant labour standards at the international and regional level. In order to address irregular migrant workers’ human rights violations, the research assumes that a need for a comprehensive approach which acknowledges the labour dimension of migration exists. Moreover, it suggests to consider putting a firewall system in place and to enable undocumented migrant workers to enter the formal economy in order to address their current irreversible marginalization in the informal economy.

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List of acronyms

ASGI, *Associazione per gli Studi Giuridici sull'Immigrazione*

CESCR, Committee on Economic, Social and Cultural Rights

CGIL, *Confederazione Generale Italiana del Lavoro*

CoE, Council of Europe

ECHR, European Convention on Human Rights

EMN, European Migration Network

ESC, European Social Charter

ETUC, European Trade Union Organization

EU Charter, Charter of Fundamental Rights of the European Union

EU, European Union

FRA, European Union Agency for Fundamental Rights

GDP, Gross Domestic Product

ICCPR, International Covenant on Civil and Political Rights

ICESCR, International Covenant on Economic, Social and Cultural Rights

ICRMW, International Convention of the Rights of All Migrant Workers and Members of Their Families

ILC, International Labour Conference

ILO, International Labour Organization

IOM, International Organization for Migration

ISFOL, *Istituto per lo sviluppo della formazione delle politiche sociali e del lavoro*

ISMU, *Iniziativa e studi sulla multi etnicità*

ISTAT, *Istituto Nazionale di Statistica*

MEDU, *Medici per i diritti umani*

MS, Member State

NGO, Non-governmental Organization

PACE, Parliamentary Assembly of the Council of Europe

PICUM, Platform for International Cooperation on Undocumented Migrants

TCN, Third-country National

UDHR, Universal Declaration of Human Rights

UN, United Nations

UNGA, United Nations General Assembly

1. Introduction

Irregular migration represents one of the major areas today to carefully understand, study and manage from a human rights perspective. Indeed, the impact this approach can have on governmental and inter-governmental policymaking and on the full compliance to existing international and European legislative standards can be compelling. The relationship between irregular migration, the informal economy¹ and the need of migrant labour in destination countries² raises serious concerns about human rights compliance as regards irregular migrants' rights, who are mainly performing "dirty, difficult and dangerous" jobs.³ The human rights perspective this research suggests aims at unveiling and addressing the exclusion of irregular migrant workers from human rights enjoyment.⁴

Despite the fact that there is no universally accepted definition of irregular migration, the one provided by the International Organization for Migration (IOM) is widely accepted and defines the status of irregular migrants as the status of persons 'who entered a country, reside, or are employed without the necessary authorization or documents required under immigration regulations'.⁵ When referring to irregular migration and to irregular migrants, European Union (EU) institutions and Member States (MSs) tend to depict the matter as "illegal migration".⁶

¹ 'All economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements.' International Labour Organization (ILO), 'Resolution concerning decent work and the informal economy' (General Conference of the International Labour Organization 90th Session, 2002) para 3.

² Michael Bommers, Giuseppe Sciortino (eds.), *Foggy social structure. Irregular migration, European labour markets and the welfare state* (Amsterdam University Press 2011) 15. See also Wayne Cornelius, Philip Martin, James Franck Hollifield, *Controlling Immigration. A Global Perspective* (Stanford University Press 1994); Martin Baldwin Edwards, 'Southern European Labour Markets and Immigration. A Structural and Functional Analysis' (2001) MMO Working Paper <mmo.gr/pdf/publications/mmo_working_papers/MMO_WP5.pdf> accessed 11 April 2019; Maurizio Ambrosini, 'Irregular immigration in Southern Europe. Actors, dynamics and governance' in Robin Cohen, Zig Layton-Henry (eds), *Migration, diasporas and citizenship* (Palgrave Macmillan 2018) 44.

³ UNCHR, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau. Regional study: management of the external borders of the European Union and its impact on the human rights of migrants' (23 April 2013) UN Doc A/HRC/23/46, para 74. See also Philip Marfleet, David Blustein, "'Needed not wanted": an interdisciplinary examination of the work-related challenges faced by irregular migrants' 78 [2011] *Journal of Vocational Behavior* 381, 384.

⁴ Ivi, xiv.

⁵ Richard Perruchoud, Jillyanne Redpath-Cross (eds), 'Glossary on Migration' 25 (2011) *International Migration Law* <https://publications.iom.int/system/files/pdf/iml25_1.pdf> accessed 2 April 2019.

⁶ See Council Directive 2008/115/EC of 16 December 2008 on common standards and procedure in Member States for returning illegally staying third-country nationals [2008] OJ L348/98.

The term “illegal” and its connotations are problematic to the extent that they contribute to the construction of unauthorized stay as a criminal offence and the portrayal of the migrants as “illegal human beings”.⁷ As a result, the United Nations (UN) General Assembly in 1975 requested its organs and agencies to utilize in all official documents the term “non-documented” or “irregular migrant workers” to define those workers that ‘illegally and/or surreptitiously enter another country to obtain work’.⁸ More recently, at the regional level, the Council of Europe (CoE) Parliamentary Assembly pointed out that it prefers to use the term “irregular migrant”, clarifying that the term is more neutral and does not carry the stigmatization of the term “illegal”.⁹ In line with these positions,¹⁰ the research uses the terms irregular migrant and undocumented migrant to refer to people who lack the required documentation to reside in a country.

Before addressing merits and aims of the present research, it is worth determining irregular migration flows¹¹ or stocks.¹² Although it is challenging because of the phenomenon hidden nature, estimates consider that in 2015 between around 1 million¹³ and 2 million migrants and asylum seekers entered Europe irregularly.¹⁴ In Italy, the number of irregulars living within the national territory is expected to exceed 670.000 people by December 2020.¹⁵ According to the last report issued by *Iniziativa e studi sulla multiethnicità* (ISMU) the January 2018, foreigners residing in Italy are over 6 million,¹⁶ among them 533.000 (8,7%) of foreigners are

⁷ Anna Błuś, ‘Beyond the Walls of Paper: Undocumented Migrants, the Border and Human Rights’ 15 [2013] *European Journal of Migration and Law* 413.

⁸ United Nations General Assembly (UNGA) ‘Measures to improve the situation and ensure the human rights and dignity of all migrant workers’ (adopted 16 December 1976) A/RES/31/127.

⁹ Council of Europe Parliamentary Assembly (PACE) ‘Human rights of irregular migrants’ (adopted 27 June 2006) Resolution 1509/2006, para 7.

¹⁰ See also International Organization for Migration (IOM), ‘Data bulletin: informing the implementation of the Global Compact for Migration: irregular migration and migrant smuggling’ [2018] IOM; Bridget Anderson, Martin Ruhs, ‘Guest editorial researching illegality and labour migration’ 16 [2010] *Population, space and place* 175.

¹¹ Migration flows are the ‘number of migrants entering or leaving a country or region during a specific period of time’. David Bartram, Martisa Poros, Pierre Monforte, *Key concepts in migration* (SAGE publications 2014) 99. For disaggregated data see Frontex <<https://frontex.europa.eu/along-eu-borders/migratory-map>> accessed 10 April 2019.

¹² Migration stocks are the ‘numbers of migrants living in a country or region at a given point in time’. *Ibidem*.

¹³ Solon Arditis, Frank Laczko, ‘Measuring irregular migration: innovative data practices’ [2017] *Migration Policy Practice* 1.

¹⁴ Christof Baron, ‘Illegal entry between border-crossing points (BCPs) detected in the European Union (EU) from 2009 to 2018 (in 1,000 people)’ (2019) *The Statistics Portal* <statista.com/statistics/454775/number-of-illegal-entries-between-bcps-to-the-eu> accessed 7 April 2019.

¹⁵ Matteo Villa, ‘The new irregulars in Italy’ (2018) *Italian Institute for International Political Studies* <ispionline.it/en/publicazione/new-irregulars-italy-21813> accessed 7 April 2019.

¹⁶ Italy has a population of almost 60.5 million people. *Iniziativa e studi sulla multi etnicità* (ISMU), *XXIV Rapporto ISMU sulle migrazioni 2018* (Università degli studi di Milano 2018).

irregular.¹⁷ The same report underlines that the immigrant population had increased in number due to the augment of irregular migrants (+8,6% compared with the previous year).¹⁸

Understanding the heterogeneity¹⁹ of the irregular status is equally important. Irregular status might be not permanent: there are various pathways into and out of irregularity which can occur in one's life multiple times. For instance, one can enter a country without authorization, regularize his/her status thanks to an amnesty²⁰ and fall into irregularity again after having accepted a job without a regular contract that will prevent one to renew the permit of stay. As the Clandestino Project revealed, overstaying regular visas and rejected asylum requests may lead into irregularity.²¹ Considering the case of Italy, 58% and 67% of asylum requests examined were rejected in 2017 and 2018 respectively.²² Those who receive a denial typically do not leave the country, becoming irregular migrants. As pathways into irregularity are beyond the scope of this research, they are not addressed in depth. By contrast, the irregular situation is the starting point of the analysis and its consequences are examined with a focus on the working dimension.

Although international human rights instruments establish minimum labour rights standards, due to the invisibility of undocumented migrant workers the related rights are not always guaranteed and respected. This research pays attention to human rights violations undocumented, notably as irregular workers, might face. Specifically, the contradiction between human rights standards States are bound to – after the ratification of human rights instruments – and the gap in rights' enjoyment when it comes to irregular migrants is the *fil rouge* of the present dissertation.

¹⁷ Ibidem.

¹⁸ Ibidem.

¹⁹ For a better understanding of the term, see Amnesty International, 'Exploited labour. Migrant workers in Italy's agricultural sector' (2012) Amnesty International <amnesty.org/download/Documents/20000/eur300202012en.pdf> accessed 10 April 2019. A similar idea is given by the term 'transient' used to describe the condition of irregularity, see Maurizio Ambrosini, 'Surviving underground: irregular migrants, Italian families, invisible welfare' [2011] International Journal of Social Welfare. It has also been argued that 'undocumentedness should not be considered as a homogeneous and undifferentiated experience', Nando Sigona, 'I have too much baggage: the impacts of legal status on the social worlds of irregular migrants' [2012] Social Anthropology 50, 51.

²⁰ Since 1986 more than 1.5 million people have been regularized by this mean in Italy, Gabriele Abbondanza, 'Italy's migration policies combating irregular immigration: from the early days to the present times' [2017] The International Spectator 52, 76.

²¹ Clandestino Project, 'Pathways into irregularity: the social construction of irregular migration' (Comparative Policy Brief – Pathways and Policies 2009).

²² Ministero dell'Interno, 'Dati asilo 2017-2018' (2019) Dati e statistiche della Commissione Nazionale per il diritto di asilo <libertaciviliimmigrazione.dlci.interno.gov.it/documentazione/statistica/i-numeri-dellasilo> accessed 2 April 2019.

As established in the Vienna Convention, human rights are universal and belong to every human being.²³ Nevertheless, irregular migrants' enjoyment of human rights is often neglected in destination countries for different reasons, which vary from ideologies closely linked with the necessity to give country nationals priority when defining national policies,²⁴ to the absence of the needed capabilities to detect those in need and to the inability to strike a balance between immigration law enforcement and human rights standards.²⁵ As a consequence, the progressive consolidation of disparities between EU citizens and undocumented migrants, in particular concerning their access to work and to just working conditions, is an unfair reality that needs to be addressed. This research suggests the adoption of a human rights-based approach to consider undocumented migrants in light of their vulnerabilities in order to enable a deeper understanding of the urgent need for greater protection for undocumented migrants' rights.

1.1. Research question

Building on the above, the present work has the following key research question:

- Are the right to work and the right to just and favourable working conditions – enshrined in articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights²⁶ (ICESCR) – enjoyed by irregular migrants in Italy?²⁷

In order to provide a better answer, the following sub-questions are going to be examined:

- whether undocumented migrants' human rights are ensured in the Italian national law;
- whether undocumented migrants' human rights are respected in practice in Italy.

The focus will lie on the human rights enshrined in articles 6 and 7 of the ICESCR and on whether irregular migrant workers are within the scope of these articles and if so, whether they enjoy in practice the human rights therein listed.

²³ Vienna Declaration and Programme of Action, 'Human rights are universal, indivisible and interdependent and interrelated' (World Conference on Human Rights 25 June 1993) para 5.

²⁴ A major slogan of the current Interior Minister during and in the aftermaths of the electoral campaign was "Italians first". See Salvini Premier <salvinipremier.it/t_galleria.asp?l2=1965> accessed 18 April 2019.

²⁵ Elaine Dewhurst, 'The right of irregular immigrants to back pay. The spectrum of protection in international, regional and national legal systems' in Cathryn Costello, Mark Freedland (eds), *Migrants at work. Immigration and vulnerability in labour law* (Oxford University Press 2014) 216.

²⁶ These rights are going to be discussed below.

²⁷ Italy represents the case study of the research as explained in the methodology.

Assessing the respect of undocumented workers' human rights at compliance and practical levels in Italy, might play a role in raising awareness about potential unfair situations that would be in contradiction with the States' obligations under ratified international human rights conventions and with the idea of "community of values" the EU has shaped.²⁸

1.2. Methodology

In order to fully answer the research questions introduced above, the work will focus both on legal and compliance frameworks and on a practical case study (Italy).

As far as legislation is concerned, both international, regional and national levels are addressed to clarify the human rights protection standards towards undocumented workers concerning their right to work and to fair working conditions. On the international level, both legislative primary sources (e.g. United Nations conventions) and secondary sources (e.g. General Comments issued by the Committee on Economic, Social and Cultural Rights – CESCR) are considered. ILO's Conventions and IOM's papers contribute in the analysis, too.

Concerning the regional legal framework, EU fundamental conventions on labour rights, and relevant European Directives on work and migration issues are assessed. Additionally, the work of the CoE receives particular attention. Notably, country and thematic reports issued by the Commissioner for Human Rights are considered when discussing regional human rights standards.

While assessing the Italian legal framework, the research undertakes an evaluative approach to point out whether the national legislation is coherent with the international and regional ones and to identify potential shortfalls as well as areas of amelioration. The Italian Constitution, labour law and migration law are assessed through critical lens in order to detect potential lacks in the legislation to be addressed. National laws that are transpositions of European directives are given particular attention, specifically in regards to those provisions which leave a certain margin of appreciation to MSs in order to better understand the national position towards undocumented migrants.

As the research focuses also on norms implementation, relevant previous academic research and meaningful report issued by major organizations dealing with human rights, workers'

²⁸ Mathilde Duhaâ, 'The EU migration crisis and the human rights implications of the externalization of border control' in Wolfgang Benedek and others (eds), *European Yearbook on human rights* (Intersentia 2017) 16.

rights and migrants' rights are considered. Among others, the European Union Agency for Fundamental Rights (FRA) and the Platform for International Cooperation on Undocumented Migrants (PICUM) reports and position papers are key. Similarly, the work carried out by European and national trade unions, notably the European Trade Union Organization (ETUC) and the *Confederazione Generale Italiana del Lavoro* (CGIL), is largely taken into consideration. Building on trade unions and non-governmental organizations' (NGOs) work, the research pays particular attention to the agricultural sector, where the presence of undocumented migrants is significant.²⁹ Domestic work register high rates of irregular migrants employed too, but the majority are women, while the target of this research are adult men. Acknowledging that women are disproportionately represented in the informal economy and often experience human rights' violations,³⁰ the research focuses on adult men in light of their higher presence in Italy in absolute numbers.³¹ Moreover, women immigrant workers are often victims of human trafficking and/or sexual exploitation in work places. Therefore, this target would require different human rights instruments to be discussed as well as a different approach, which are beyond the scope of this research.

Italy has been chosen as case study primarily for the relevant presence of irregular work, which includes forms of "grey work", "black work" as well as tax payment evasion.³² Although seizing the informal sector is hard, the Italian national bureau of statistics estimated the informal economy to constitute up to 12,4% of the Italian GDP in 2016.³³ This is relevant in the sense that several studies ties informal economy with irregular flows.^{34,35} Italy was chosen not only for the prominence of the informal economy, but also because irregular workers were estimated to represent 15,9% of the total workers in 2015³⁶ and irregular migrants were the 8,7% of the foreign residents in 2018.³⁷ Additionally, Italy has ratified

²⁹ Estimates show that in the agricultural sector 17,6% of employees are irregular workers. Istituto Nazionale di Statistica (ISTAT), 'Anni 2012-2015. L'economia non osservata nei conti nazionali' (2017) ISTAT <istat.it/it/files2017/Economia-non-osservata_2017.pfd> accessed 10 April 2019.

³⁰ International Labour Organization, ILO, *The informal economy and decent work: a policy resource guide* (ILO 2013) 7.

³¹ Eurostat, 'Statistics explained' (2019) Eurostat <<https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf>> accessed 10 April 2019. See also European Institute for Gender Equality, 'Gender statistic database' (2016) Eurostat <https://eige.europa.eu/gender-statistics/dgs/indicator/ta_popdem_migr_stock__lfs_14pcob/hbar> accessed 10 April 2019.

³² Claudio Tagliaferro, *Il lavoro sommerso e irregolare degli stranieri in Italia* (ISFOL 2014).

³³ ISTAT 'Economia non osservata nei conti nazionali' (2018) ISTAT <istat.it/it/archivio/222223> accessed 10 April 2019.

³⁴ See (n 2).

³⁵ See also Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] OJ L 168/24.

³⁶ ISTAT 'Anni 2012-2015' (n 29).

³⁷ ISMU (n 16).

many of the most relevant international human rights protection instruments issued by the UN and by the ILO. Notably, Italy is among the few States which have ratified the ILO Convention No. 143 on migrant workers.³⁸ Finally, it has also been chosen due to the pre-existing knowledge of the author of the Italian legislation system and the facility in accessing national legal sources.

A potential limit of the present research is the absence of field work and direct interviews collection. The main reason for this limitation is to be found in the lack of links between the author and undocumented workers at the current stage of the inquiry. Although personal narratives are meaningful, they are difficult to collect without any relationship based on mutual trust. This fact, coupled with time constraints that hamper the possibility to start this relationship, led to the use of already existing and available interviews, field research and reports of NGOs and trade unions. However, the possibility of deepening the research focusing on a given geographical area or on an economic activity conducting field work can represent a further development stream of this research.

Regarding the thesis structure, the second chapter clarifies the international and regional normative frameworks dealing with irregular migrants, with a focus on the working sphere. The third chapter assesses the Italian legal framework dealing with migration and irregular migrants, providing a historical perspective and unveiling major legislative gaps. The fourth chapter explores the implementation of the aforementioned standards building on relevant reports. The concrete situation of irregular workers in Italy is going to shed light on the extent that the rights enshrined in articles 6 and 7 of the ICESCR are respected. In light of the findings, the fifth chapter contains the answer to the research question, whether human rights enshrined in articles 6 and 7 of ICESCR are enjoyed by irregular migrants in Italy. The conclusion has a focus on identifying priorities in order to provide better human rights protection to irregular migrants.

³⁸ ILO Convention C143: Migrant Workers (Supplementary Provisions) Convention (60th ILC Session 24 June 1975) <ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143> accessed 10 April 2019.

2. Human rights standards: international and European frameworks

This chapter aims at understanding whether and to what extent irregular migrant workers' human rights are protected under international and European human rights instruments. The standards set out in human rights instruments not always refer specifically to undocumented migrants, nevertheless some conventions' wording provide for room for their inclusion, or at least not exclusion.

2.1. International legal framework

As stated by the UN High Commissioner for Human Rights,

'the legal framework of international human rights law and related standards provides authoritative benchmarks for the development of meaningful and practical commitments for action. International law represents the foundation upon which policies and practices on migration and migrants should be built, providing practical guidance to States, and equipping them [...] with the tools that are needed to govern migration in a manner that upholds the rights of all involved'.³⁹

Accordingly, clarifying which benchmarks are used by the international human rights law is relevant in order to properly examine the case study of Italy in the following chapters. However, as noted by Chetail, there is no coherent international legal framework governing migration, but rather a 'plethora of different principles drawing on different branches of international law'.⁴⁰ In this vein, the international framework should not be seen as monolithic, and developments as well as limitations in the process of authoritative standards setting shall be acknowledged. Indeed, while high human rights benchmarks can be provided, they may not be accepted by States, which might refuse to ratify the convention, avoiding in this way commitment and the standards' implementation. In order to compensate for eventual gaps, other instruments can be deployed. As an example, considering the few ratifications the International Convention of the Rights of All Migrant Workers and Members of Their Families (ICRMW) has received, ILO conventions are usually recalled when seeking minimum labour rights for migrant workers.

³⁹ UNGA, Human Rights Council, 'Report on the compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law' [2017] A/HRC/36/42, para 11.

⁴⁰ Vincent Chetail, 'International legal protection of migrants and refugees: ghetto or incremental protection? Some preliminary comments' in Kona Padmaja (ed), *Law of refugees: Global perspectives* (The ICFAI University Press 2008) 33.

2.1.1. The United Nations

The International Bill of Human Rights⁴¹ is the starting point as it constitutes the ground of international human rights law. Understanding whether the international human rights law differentiates between nationals and non-nationals is key when discussing the human rights ensured for irregular migrants. This eventual differentiation shall be considered hand in hand with the concept according to which all human rights are universal.

The Universal Declaration of Human Rights (UDHR) states that ‘*everyone* is entitled to *all* the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*’.⁴² The declaration contains both civil and political rights as well as economic and social rights and it establishes *everyone* shall enjoy them. Indeed, it embraces the possibility for non-nationals to be entitled to the same rights and freedoms as nationals and it does not differentiate on the basis of legal status of people. Regarding economic rights, articles 23 and 24 define that *everyone* has the right to work, the right to just and favourable working conditions, to just remuneration and the right to rest.⁴³ Accordingly, migrant workers, undocumented ones included, should have access to the rights set out in the UDHR.

Even though the declaration position towards irregular migrants may seem clear, there is an ongoing discussion on the legal status of the UDHR. Positions vary from those considering the UDHR a non-legally binding treaty playing a pivotal role in influencing the formation of customary law,⁴⁴ to those stating that it is part of customary international law and is therefore legally binding.⁴⁵ This second position builds upon what stated at the International Conference on Human Rights in 1968, notably that the UDHR constitutes an ‘obligation for the members of the international community’.⁴⁶ The present research favors this last view, even though States’ refraining in UDHR enforcement should be borne in mind and not underestimated.

The International Covenant on Civil and Political Rights (ICCPR), which is part of the International Bill of Human Right, states in article 2(1), that each State party must ensure the Covenant rights to ‘*all* individuals within its territory and subject to its jurisdiction’ and that the rights are ensured ‘without

⁴¹ It includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

⁴² Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 2(1) (emphasis added).

⁴³ Ivi, artt 23, 24 (emphasis added).

⁴⁴ Joan Fitzpatrick, ‘The human rights of migrants’ in Alexander Aleinikoff, Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 172.

⁴⁵ Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented migrants have rights! An overview of the international human rights framework* (PICUM 2007) 7.

⁴⁶ Office of the High Commissioner for Human Rights (OHCHR) Fact Sheet No. 2 (Rev 1), The International Bill of Human Rights (1996) <unhchr.ch/html/menu6/2/fs2.htm> accessed 15 April 2019.

distinction of any kind, such as race, colour, sex, [...] *or other status*'.⁴⁷ Therefore, the human rights enshrined in the Covenant should be enjoyed by *every person* within the national territory, including non-nationals. The same open-ended formula is found in article 26, which states that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, [...] *or other status*'.⁴⁸ Nevertheless, article 4, which deals with derogations, does not prohibit distinctions against non-nationals⁴⁹ – even though derogations shall be proportional. Regarding labour rights, the ICCPR prohibits slavery, servitude, and forced or compulsory labour,⁵⁰ notably without distinguishing between nationals and non-nationals. Nevertheless, the ICCPR deals specifically with civil and political rights, hence labour rights are not further addressed.

The ICESCR stipulates that States parties shall guarantee that the rights 'will be exercised without discrimination *of any kind* as to race, colour, sex, [...] *or other status*'.⁵¹ It is worth mentioning that the Covenant provides only developing countries for the possibility of determining 'to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals',⁵² whereas developed countries are not mentioned. In this sense, developed countries are supposed not to differentiate between nationals and non-nationals. However, article 4 allows limitations for 'the purpose of promoting the general welfare in a democratic society'.⁵³ By contrast, the enjoyment of economic, social and cultural rights cannot be categorically denied to non-nationals, even though State parties can distinguish different levels of protection for different groups⁵⁴. In this vein, it can be argued that at least minimum standards of economic, social and cultural rights shall be guaranteed to non-nationals, and that Covenants' rights in general 'are applicable to all, except when differently specified'⁵⁵ even though the 'ICESCR affords less protection to aliens in comparison with the UDHR and the ICCPR'.⁵⁶

The ICESCR deals specifically with the right to work and the right to just and favourable working conditions, in articles 6 and 7 respectively. Article 6 stipulates that the right to work 'includes the right

⁴⁷ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966 UNGA Res 2200 A (XXI)) art 2(1) (emphasis added).

⁴⁸ *Ibidem*.

⁴⁹ Fitzpatrick (n 44) 173.

⁵⁰ ICCPR (n 47) art 8.

⁵¹ International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966 UNGA Res 2200 A (XXI) entry into force 3 January 1976) art 2 (emphasis added).

⁵² *Ibidem*.

⁵³ *Ivi*, art 4.

⁵⁴ Fitzpatrick (n 44) 176.

⁵⁵ European Union Agency for Fundamental Rights (FRA), *Fundamental rights of migrants in an irregular situation in the European Union* (FRA 2011) 21.

⁵⁶ Ryszard Cholewinski, *Migrants workers in international human rights law: Their protection in countries of employment* (Clarendon Press Oxford 1997) 56.

of *everyone* to the opportunity to gain his living by work which he freely chooses or accepts'.⁵⁷ The CESCR states that the right to work is a fundamental right, that '*every individual* has the right to be able to work, allowing him/her to live in dignity'⁵⁸ and that 'the right to work is an individual right that belongs to *each person*'⁵⁹. By not being excluded, it can be affirmed that undocumented migrant workers can be considered under the scope of article 6 of the ICESCR. Remarkably, the CESCR specifies the work 'must be *decent work*',⁶⁰ and that States parties have the obligation to prohibit forced or compulsory labour and refrain 'from denying or limiting equal access to decent work for all persons, especially disadvantage and marginalized individuals and groups, including [...] migrant workers'.⁶¹

The ICESCR recognizes the 'right of everyone to the enjoyment of just and favourable conditions of work',⁶² meaning, *inter alia*:

'(a) [r]emuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind [...]; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; [...] (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.⁶³

The CESCR also states that migrant workers,

'in particular if they are *undocumented*, are *vulnerable to exploitation*, long working hours, unfair wages and dangerous and unhealthy working environments. Such vulnerability increased by labour practices that give the employer control over the migrant worker's residence status or that tie migrant workers to a specific employer. [...] Undocumented workers often fear reprisals from employers and eventual expulsion if they seek complain about working conditions. Laws and policies should ensure that

⁵⁷ ICESCR (n 51) art 6(1) (emphasis added).

⁵⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 18. The right to work' (6 February 2006) UN Doc E/C.12/GC/18, para 1.

⁵⁹ Ivi, para 6.

⁶⁰ Ivi, para 7. Decent work is defined as 'work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration'. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. "Decent work" encompasses a wide spectrum of elements according to the ILO's Guidelines. ILO, 'Decent work indicators. Guidelines for producers and users of statistical and legal framework indicators' (2013) <ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_229374.pdf> accessed 18 April 2019.

⁶¹ Ivi, para 23.

⁶² ICESCR (n 51) art 7.

⁶³ Ibidem.

migrant workers enjoy *treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work*.⁶⁴

Importantly, the CESCR clarifies that discrimination in the enjoyment of economic, social and cultural rights is prohibited,⁶⁵ and that the wording “other status” used in the ICESCR indicates that the list provided in article 2(2) ‘is not exhaustive and other grounds may be incorporated in this category’.⁶⁶ In particular, when explaining discrimination on the ground of nationality, it makes clear that ‘the Covenant rights apply to *everyone* including non-nationals, [...], *regardless of legal status and documentation*’.⁶⁷

In 2017, the CESCR reaffirmed the non-discrimination principle stating that the enjoyment of the Covenant rights should not depend on the legal status of the persons concerned,⁶⁸ adding that undocumented migrants who are not seeking asylum cannot simply be ignored. Therefore, States have the obligation ‘to acknowledge their presence and the fact that they can claim rights from national authorities’.⁶⁹ It has to be noted that in this statement undocumented migrants’ specific vulnerabilities are taken into consideration and, in their light, States should adopt specific measures of protection for undocumented migrants in order to provide them the possibility to present a complaint before the competent authorities.⁷⁰

Finally, the CESCR requires States parties to establish a functioning system of labour inspectorates, that ‘should focus on monitoring the rights of workers and not be used for other purposes, such as checking the migration status of workers’,⁷¹ as well as to ensure access to remedy to irregular migrants.⁷² This is crucial because undocumented migrant workers’ rights are often superseded by immigration law enforcement,⁷³ also when it comes to labour inspectorate.

The ICRMW represents an important instrument for migrant workers’ rights protection, even though it is not largely ratified by destination countries – Italy being among them. The most relevant achievement brought by this convention is that it establishes the enjoyment of the rights enshrined

⁶⁴ CESCR, ‘General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (27 April 2016) UN Doc E/C.12/GC/23, para 47(e) (emphasis added).

⁶⁵ CESCR, ‘General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2 July 2009) UN Doc E/C.12/GC/20, para 5.

⁶⁶ *Ivi*, para 15.

⁶⁷ *Ivi*, para 30 (emphasis added).

⁶⁸ CESCR, ‘Statement by the Committee on Economic, Social and Cultural Rights. Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights’ (13 March 2017) UN Doc E/C.12/2017/1.

⁶⁹ *Ivi*, para 11.

⁷⁰ *Ivi*, para 13.

⁷¹ *Ivi*, para 54.

⁷² *Ivi*, para 57.

⁷³ Dewhurst (n 25).

irrespective of one's legal status. Specifically, Part III lists the rights which have to be enjoyed by all migrant workers, those "legal" and those "illegal". Notably, the right of equal access before the courts and tribunals,⁷⁴ and 'treatment not less favourable than that which applies to nationals of the State of employment' concerning remuneration, hours of work, weekly rest, holidays with pay, safety and health among others.⁷⁵ Even though this is the instrument for protection of irregular workers' rights *par excellence*, this Convention was contested since the drafting process by receiving countries,⁷⁶ so that to date the majority of the EU MSs have not yet ratified it beside various regional institutions tried to encourage them to do it.⁷⁷

Among more recent initiatives, the UN General Assembly adopted the New York Declaration for Refugees and Migrants which takes a people-centered approach to migration. One of the main commitments is the full respect and protection for refugees and migrants' human rights and fundamental freedoms.⁷⁸ Mentioning the UDHR, the Declaration reaffirms the full protection of the human rights 'of all refugees and migrants, *regardless of status*; [they] are *all* rights holder'.⁷⁹ This position is strengthened by the commitment 'to protecting the safety, dignity and human rights and fundamental freedoms of *all migrants, regardless of their migratory status*, at all times'.⁸⁰ In line with the principles of universality of human rights and non-discrimination, it states that particular attention should be paid 'to the *application of minimum labour standards for migrant workers regardless of their status*, as well as to recruitment'.⁸¹ The New York Declaration position is particularly relevant, and it reaffirms some ICRMW's provisions, enriching the international framework with a new instrument able to establish minimum standards for all.

The UN General Assembly adopted the Global Compact for Safe, Orderly and Regular Migration, too.⁸² It reaffirms the 'overarching obligation to respect, protect and fulfill the human rights of *all migrants, regardless of their migration status*'.⁸³ Head of States and Governments agreed on a framework consisting of 23 objectives, among them the one to facilitate fair and ethical recruitment

⁷⁴ CESCR 'Statement by the Committee' (n 68), art 18.

⁷⁵ Ivi, art 25.

⁷⁶ Luca Bicocchi, 'Rights of All Migrant Workers (Part III of the Convention) Travaux Préparatoires' <<http://ohchr.org/english/issues/migration/taskforce/docs/draftinghistoryrev1.doc>> accessed 15 April 2019.

⁷⁷ European Economic and Social Committee, Opinion of the European Economic and Social Committee on the International Convention on Migrants (2004) <ohchr.org/english/issues/migration/taskforce/docs/EESCsoc173_En.pdf> accessed 15 April 2019; PACE 'Resolution 1509/2006' (n 9). Concerning Italy, the government included the ratification of the ICRMW in its electoral program, 'Per il bene dell'Italia, Programma di Governo 2006-2011' <dsonline.it/allegatidef/programma_def_unione31326.pdf> accessed 15 April 2019, 251.

⁷⁸ New York Declaration for Refugees and Migrants (adopted 19 September 2016 UNGA Res 71/1 L1) para 22.

⁷⁹ Ivi, para 5 (emphasis added).

⁸⁰ Ivi, para 41 (emphasis added).

⁸¹ Ivi, para 57 (emphasis added).

⁸² Italy is not part of the Global Compact.

⁸³ Global Compact for Safe, Orderly and Regular Migration (endorsed 19 December 2018 UNGA) para 11 (emphasis added).

and safeguard conditions that ensure decent work.⁸⁴ The commitment is to protect ‘*all* migrant workers against all forms of exploitation and abuse in order to guarantee decent work’.⁸⁵ The need to ‘ensure migrants working in the informal economy [...] safe access to effective reporting, complaint, and redress mechanisms in cases of exploitation, abuse or violation of their rights in the workplace’⁸⁶ is among the actions listed to realize this commitment.

2.1.2. The International Labour Organization

The ILO was founded in 1919 and it seeks the promotion of social justice, human rights and labour rights through various instruments setting minimum standards of basic labour rights. Eight of its conventions are considered fundamental for the protection of human and labour rights of *all* workers,⁸⁷ concerning in particular freedom of association, freedom from forced labour, non-discrimination in employment and occupation. The international labour standards instruments, either conventions or protocols, are legally binding for the States which ratify them. Therefore, the inclusion of undocumented migrant workers in the scope of these instruments is significant because the standards need both the national law and practice to be harmonized with them.⁸⁸ Furthermore, the ILO Declaration of Fundamental Principles and Rights at Work extends the impact of the established fundamental rights to States which did not ratify certain conventions, stating that

‘all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership of the Organization, to respect and promote and to realize in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.’⁸⁹

Looking at labour rights ensured by the ILO instruments, undocumented migrant workers are identified as a vulnerable category who can face unfair working conditions and exploitation in light of the increased demand for labour – especially unskilled – by industrialized countries.⁹⁰ Thus, the ILO envisaged the need to adopt proper instruments in order to ensure adequate protection for migrant

⁸⁴ Ivi, para 22.

⁸⁵ Ibidem (emphasis added).

⁸⁶ Ivi, para 22(j).

⁸⁷ Fundamental ILO Conventions on human rights: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182) <ilo.org/public/english/about/index.htm> accessed 15 April 2019.

⁸⁸ ILO, *Rules of the game. An introduction to the standards-related work of the International Labour Organization* (ILO, 2019 Forth ed) 26.

⁸⁹ ILO, *Declaration of Fundamental Principles and Rights at Work* (ILO 1998) para 2.

⁹⁰ ILO ‘Rules of the game’ (n 88) 88.

workers. In general, the ILO provides for valuable labour standards for all but unfortunately it lacks mechanisms which would ensure the standards implementation.

It is worth noting that the Migration for Employment Convention (Revised) (No. 97) requires ratifying States to facilitate international migration and to apply treatment no less favorable than that which applies to nationals,⁹¹ including in respect of conditions of employment, freedom of association and social security.⁹² Similarly, the Migrant Workers (Supplementary Provisions) Convention (No. 143) states that contracting parties shall ‘respect the basic human rights of *all* migrant workers’.⁹³ This convention ensures irregular migrant workers a set of minimum labour rights, specifically equal treatment ‘with nationals in respect in particular of guarantees of security of employment’⁹⁴ as well as equal treatment between irregular and regular workers in respect of ‘rights arising out of past employment as regards remuneration, social security and other benefits.’⁹⁵

Together with the ILO’s legally binding conventions, there are other non-binding instruments that are worth mentioning. In particular, the Migrant Workers Recommendation (No. 151) reaffirms the need for equal treatment between ‘migrant workers whose position has not been or [can] not been regularized’ and those in a regular position ‘as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights.’⁹⁶ A similar perspective is given by the Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy, which clearly states that human rights of irregular migrant workers should be effectively protected.⁹⁷ Additionally, the ILO Multilateral Framework on Labour Migration developed the Decent Work Agenda having among its principles the protection of human rights of *all* migrant workers.⁹⁸

2.1.3. Conclusion

In light of the UN and ILO conventions and non-binding instruments presented, it is evident that there are several instruments dealing specifically with irregular migrant workers and others establishing minimum standards for all workers. The non-discrimination principle and the acknowledgment of irregular workers’ vulnerability are overarching elements through which MSs are encouraged to ensure human rights and basic labour rights for all. In general, at the international level the protection

⁹¹ ILO Convention C097: Migration for Employment Convention (Revised) (32nd ILC Session Geneva 1 July 1949) <ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312242> accessed 30 April 2019 art 6.

⁹² Ibidem.

⁹³ ILO Convention No. 143 (n 38) art 1 (emphasis added).

⁹⁴ Ivi, art 8(2).

⁹⁵ Ivi, art 9(1).

⁹⁶ ILO, *Migrant Workers Recommendation No. 151* (ILO 1975) para 8(3).

⁹⁷ ILO (n 1) para 22

⁹⁸ ILO, *Non-binding principles and guidelines for a rights-based approach to labour migration* (Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration 2005) <ilo.org/public/english/protection/migrant/download/multilat_fw_k_en.pdf> accessed 16 April 2019.

of irregular migrant workers' rights is warmly promoted. However, some of these instruments are particularly weak because they are not largely ratified (e.g. the ICRMW).

Considering the instruments presented, with exception of the ICRMW which was not ratified by Italy, it can be assumed that the following human rights should be enjoyed by undocumented migrant workers:

- according to art 23 of the UDHR and to art 6 of the ICESCR: right to work and right to free choice of employment;
- according to art 23 of the UDHR and to art 7 of the ICESCR: right to just and favourable conditions of work, right to equal pay for equal work, right to just and favourable remuneration and right to rest and leisure;
- according to art 7 of the ICESCR: right to safe and healthy working conditions;
- according to the ILO Convention No. 143 and to art 8 of the ILO Recommendation No. 151: right to equal treatment as regards remuneration and social security.

For the scope of this research these rights are those taken into consideration in the assessment of the Italian legal framework and in the analysis of law enforcement conducted in the following chapters.

2.2. European legal framework

At the regional level, the CoE and the EU are providing the instruments to protect human rights. These two entities, the former a regional organization and the latter an inter-governmental union, are going to be discussed separately.

2.2.1. The Council of Europe

The CoE was established in 1949 by its Statute which states in its first article that the aim of the organization 'is to achieve a greater unity between its members [...] and [to facilitate] [...] their economic and social progress.'⁹⁹ This objective includes fighting against social exclusion and therefore, according to Cholewinski, does not leave irregular migrants out of the scope.¹⁰⁰ Notably, it requires their inclusion and the respect of minimum rights' standards.¹⁰¹ Since its inception, the CoE adopted a number of instruments to protect human rights in line with its aim of maintaining and further realizing human rights.¹⁰² The European Convention on Human Rights (ECHR) and the

⁹⁹ Statute of the Council of Europe (1949) European Treaty Series No. 1 <<https://rm.coe.int/1680306052>> accessed 16 April 2019.

¹⁰⁰ Ryszard Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights* (Council of Europe Publishing 2005) 17.

¹⁰¹ Ibidem.

¹⁰² Statute of the CoE (n 99) art 1.

European Social Charter (ESC) are the main instruments for human rights protection. The ECHR's provisions, unless otherwise specified, are applicable to *everyone* within the jurisdiction of the contracting parties.¹⁰³ However, the ECHR covers mostly civil and political rights, thus it does not directly deal with labour rights. In general, the Convention, if compared to international standards, is relatively weak concerning migrant workers' rights.

The main instrument protecting economic and social rights is the ESC which scope is limited by the Appendix, which states that the ESC applies to '[...] foreigners only in so far as they are nationals of other Parties lawfully residing or working regularly within the territory of the Party concerned.'¹⁰⁴ Even though the Appendix excludes undocumented migrants from the Charter scope, the European Committee on Social Rights in the complaint of the *International Federation for Human Rights (FIDH) v. France* stated that denying medical assistance to those in an irregular situation is contrary to the ESC. The Committee decision is often reported as a development in human rights protection,¹⁰⁵ albeit it refers to healthcare only.

The CoE Parliamentary Assembly Resolution 1509/2006 represents a turning point because it is more precise concerning irregular migrant workers, underling that the "issue" should be urgently clarified.¹⁰⁶ Moreover, it articulates that

'international human rights instruments are applicable to *all* persons *regardless of* their nationality or *status*. Irregular migrants, as they are often in a *vulnerable situation*, have a *particular need* for the protection of their human rights, including basic civil, political, *economic* and social rights.'¹⁰⁷

In particular, the Resolution 1509/2006 addresses undocumented migrants' economic rights, considering that social protection should not be denied and that irregular migrants should 'be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to form and to join a trade union.'¹⁰⁸ Finally, the Parliamentary Assembly invites MSs to guarantee the minimum civil, political, economic and social rights outlined in the resolution as well as making sure that those rights are enjoyed *in practice*.¹⁰⁹ In sum, this Resolution strongly outlines human rights standards for irregular migrant workers.

¹⁰³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (1950) art 1.

¹⁰⁴ European Social Charter (revised), 3 May 1996, ETS 163, Appendix <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cde4>> accessed 17 April 2019.

¹⁰⁵ FRA 'Fundamental rights of migrants in an irregular situation' (n 55) 24.

¹⁰⁶ PACE 'Resolution 1509/2006' (n 9) para 6.

¹⁰⁷ Ivi, para 5 (emphasis added).

¹⁰⁸ Ivi, para 13(5).

¹⁰⁹ Ivi, paras 15, 16 (emphasis added).

Equally important is the attention the European Commissioner for Human Rights gave to irregular migrants' rights. In 2007 the Commissioner for Human Rights issued a paper on 'The Human Rights of Irregular Migrants in Europe', acknowledging diverse hurdles faced by undocumented migrants, among them the fact that they are being 'subjected to unequal treatment and unequal opportunities at work.'¹¹⁰ In 2010, a position paper outlined minimum standards covering irregular migrants' economic and social rights. For instance, 'fair wages, reasonable working conditions, access to courts to defend rights, and participation in trade unions' are the rights which should be ensured to irregular migrants in virtue of the equal treatment principle.¹¹¹ Moreover, to strengthen these rights, the same paper states that States should rigorously pursue employers breaching the identified terms.¹¹² More recently, Mr. Hammarberg – the Commissioner for Human Rights from 2006 to 2012 – at the CoE conference on social cohesion in a multicultural Europe clearly affirmed that

'irregular migrants are easy victims for the black market and they will be deprived of social rights connected to employment. One alarming consequence is that we now have situations in Europe where migrants are exploited in forced labour. Access to minimum rights for migrants is limited by fear of denouncement. An irregular situation exacerbates exclusion and the risk of exploitation.'¹¹³

Despite the relevance of these recent developments, the CoE still lacks a dedicated instrument which protects migrants' rights and addresses, in particular, undocumented migrants' rights.

2.2.2. The European Union

Analyzing the EU law from a human rights perspective has its starting point in determining whether undocumented migrants' human rights are within Union law scope. Since the entry into force of the Amsterdam Treaty,¹¹⁴ the EU shares competences with the MSs in the field of visas, asylum and immigration, and it adopted numerous directives related to irregular migration. Looking at the type of legally binding measures, many of them concern expulsion or removal of irregulars and external borders' protection,¹¹⁵ showing that the EU's strategy towards irregular migrants focuses merely on

¹¹⁰ Commissioner for Human Rights (CHR), *The Human Rights of Irregular Migrants in Europe*, CommDH/IssuePaper(2007)1 (2007) 7, 10.

¹¹¹ CHR, *Positions on the Rights of Migrants in an irregular situation*, CommDH/PositionPaper(2010)5 (2010) 4.

¹¹² *Ibidem*.

¹¹³ CHR, 'Migrants have rights', Presentation by the Commissioner for Human Rights, Council of Europe conference on social cohesion in a multicultural Europe, CommDH/Speech (2006) 22 Original version, 9 November 2006, <<https://wcd.coe.int/ViewDoc.jsp?id=1064105&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>> accessed 17 April 2019.

¹¹⁴ Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997) OJ C340.

¹¹⁵ Massimo Merlino, Joanna Parkin, *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap* (Centre for European Policy Studies 2010) 6.

countering “illegal” migration. Indeed, as Cholewinski pointed out, the EU’s primary concern ‘with irregular migration focuses on preventing the phenomenon, detecting and punishing those who facilitate it, and returning irregular migrants.’¹¹⁶ Accordingly, when Voinikov classified EU legislation on irregular migration, he agreed on the relevance in EU’s approach of prevention, return or readmission and border control.¹¹⁷ In this vein, in 2001, the European Commission adopted a “comprehensive approach” towards “illegal” immigration with the publishing of the Communication on a Common Policy on Illegal Immigration.¹¹⁸ This was soon followed by a Council Comprehensive Action Plan to Combat Illegal Immigration and Trafficking of Human Beings in the EU,¹¹⁹ a clear example of the aforementioned limited approach to migration as fight against “illegal” immigration.¹²⁰ The so-called “comprehensive approach” is actually disregarding the human rights component, privileging a “security” view.¹²¹

An important step from a human rights perspective occurred in 2009 when the Charter of Fundamental Rights of the European Union (EU Charter) became legally binding – when MSs are implementing EU law – with the coming into force of the Lisbon Treaty.¹²² Many of its provisions state that rights shall be enjoyed by *everyone* and they should be accorded to third-country nationals (TCNs) as well, regardless of their migration status.¹²³ Among these rights the following are relevant for the scope of the present research: prohibition of slavery and forced labour,¹²⁴ freedom to choose an occupation,¹²⁵ protection in the event of unjustified dismissal,¹²⁶ right to an effective remedy and to a fair trial,¹²⁷ freedom of assembly and association.¹²⁸ Importantly, the EU Charter stipulates that the right to fair

¹¹⁶ Cholewinski ‘Study on obstacles’ (n 100).

¹¹⁷ Vadim Voinikov, ‘Legal aspects of EU policy on irregular migration’ [2015] Baltic region 55.

¹¹⁸ European Commission, Communication to the Council and the European Parliament on a Common Policy on Illegal Immigration, COM(2001) 672 final.

¹¹⁹ Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union (2002) OJ C142/23.

¹²⁰ Ivi, paras 2, 5, 11, 12, 14, 17, 69.

¹²¹ Ryszard Cholewinski, ‘European Union policy on irregular migration: human rights lost?’ in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, Erika Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* [2004] Immigration and Asylum Law and Policy in Europe 182.

¹²² Charter of Fundamental Rights of the European Union (hereinafter EU Charter) (26 October 2012) 2012/C 326/02 <europarl.europa.eu/charter/pdf/text_en.pdf> accessed 17 April 2019 art 51.

¹²³ For a complete list of rights applicable to everyone see United Nations Human Rights Office of the High Commissioner, Europe Regional Office, *Rights of migrant workers in Europe*, [2011] OHCHR 29-32. See also Cholewinski (n 56) 224.

¹²⁴ EU Charter (n 122) art 5.

¹²⁵ Ivi, art 15.

¹²⁶ Ivi, art 30.

¹²⁷ Ivi, art 47.

¹²⁸ Ivi, art 12.

and just working conditions apply to *every* worker¹²⁹ and the explanation of the concerned article does not distinguish between regular and irregular workers, thus enabling a broader interpretation.¹³⁰

Nevertheless, some human rights enshrined in the EU Charter are restricted to citizens or lawful residents only,¹³¹ such as social security benefits¹³² and access to the labour market.¹³³ These restrictions can be considered a consequence of the focus of the EU on migration management interpreted as flow control and repression of “illegal” migration rather than on migrants’ rights.¹³⁴ As Cholewinski stated, the restriction of rights enjoyment consists in a ‘clear discrepancy between the protection afforded irregular migrants by international human rights treaties and the making of laws and their implementation at the EU level’¹³⁵. In this context, the Stockholm programme¹³⁶ – a five-year plan concerning the protection of fundamental rights with a particular attention to people in need of special protection – was a missed opportunity to recognize undocumented migrant workers’ vulnerabilities, and regrettably there is no specific mention to irregular migrants with the exception of unaccompanied children. The focus on criminalization, return and readmission is the consequence of the programme’s control-oriented approach.¹³⁷

Besides the limits related to the EU’s approach to migration, minimum rights’ standards for migrants in an irregular situation may be found in different instruments. The Return Directive¹³⁸ enshrines basic human rights for irregular migrants pending return. By contrast, the situation of undetected migrants who have not received a return decision is not clear.¹³⁹ As noted by the FRA, articles 151 and 152 of the Treaty of Functioning of the European Union (TFEU),¹⁴⁰ dealing with social policy measures to combat exclusion and to protect the rights of workers, are not expressly limited to nationals or lawful residents only.¹⁴¹ Equally, the Directive on Safety and Health at Work when defining “workers” does

¹²⁹ Ivi, art 31.

¹³⁰ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

¹³¹ FRA ‘Fundamental rights of migrants in an irregular situation’ (n 55) 24.

¹³² EU Charter (n 122) art 34(2).

¹³³ Ivi, art 15.

¹³⁴ Ivi, 25. See also Ryszard Cholewinski, ‘Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit’ in Steve Peers, Nicola Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, (Martinus Nijhoff 2007) 899.

¹³⁵ Cholewinski ‘Study on obstacles’ (n 100) 21.

¹³⁶ The Stockholm Programme – An open and secure Europe serving and protecting citizens [2010] OJ C115.

¹³⁷ Merlino, Parkin (n 115) 10. See also Directorate-General for External Policies. Policy Department, *Migrants in the Mediterranean: Protecting human rights* (European Parliament 2015) 34.

¹³⁸ Council Directive 2008/115/EC (n 6).

¹³⁹ FRA ‘Fundamental rights of migrants in an irregular situation’ (n 55) 16.

¹⁴⁰ Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01, artt 151, 152.

¹⁴¹ FRA ‘Fundamental rights of migrants in an irregular situation’ (n 55) 25.

not restrict the definition to regular ones.¹⁴² This general wording could include irregular migrants within the directives' scope, thus establishing they are entitled to the rights enshrined therein.

A central component of the EU's migration policy is the Employers' Sanction Directive, an instrument providing minimum rights to undocumented migrants. The Directive aims at deterring irregular migration by tackling undeclared work, seen as a pull factor.¹⁴³ The Employers' Sanction Directive stipulates the obligation on employers to control the migration status of TCNs before starting a work relationship.¹⁴⁴ If due checks are not undertaken, employers can be liable to fines and other administrative measures – criminal penalties included – in case the worker is an irregular migrant. This approach raised concerns as to 'whether such measures are compliant with the proportionality test and when examining their implications on irregular migrants' access to rights.'¹⁴⁵ In this sense, the directive strikes a balance establishing measures to reinforce undocumented workers' rights, for example stating that the employer should be fined for the irregular employment, not workers.¹⁴⁶ Furthermore, the Directive establishes employers should repay any outstanding wages to workers and in case no evidence concerning the length of the work relationship is available, a minimum wage is fixed as well as a symbolic duration of three months.¹⁴⁷ Importantly, subcontractors are liable to pay financial sanctions and any back payments,¹⁴⁸ and Member States are required to provide undocumented workers procedures to present complaint in case of abuses by employers.¹⁴⁹

Even though the Directive provides some protections for irregular migrant workers, there are some weaknesses worth mentioning. First of all, it establishes inspections as a mean to detect employed "illegal" TCNs.¹⁵⁰ In general, labour inspections should focus on the respect and the enforcement of labour rights rather than on checking workers' migration status. Thus, this approach represents a crucial barrier to labour rights enforcement for undocumented workers and an hurdle to address exploitation.¹⁵¹ Additionally, sanctions established for employers are not as severe as repercussions undocumented workers may face, such as deportation. The disproportion reproduces the unbalanced power relationship between employer and worker, leaving the latter in a more vulnerable position. Finally, the requirement according to employers have to check workers' migration status neglect the intention employers might have to hire undocumented workers in light of economic gain which comes from lower wages and exploitation, and instead presumes that workers are willing to do a job no

¹⁴² Council Directive 89/391/ECC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183.

¹⁴³ Council Directive 2009/52/EC (n 35) Preamble (2).

¹⁴⁴ Ivi, art 4.

¹⁴⁵ Merlino, Parkin (n 115) 7.

¹⁴⁶ Council Directive 2009/52/EC (n 35) artt 1, 5.

¹⁴⁷ Ivi, art 6.

¹⁴⁸ Ivi, art 8.

¹⁴⁹ Ivi, art 13.

¹⁵⁰ Ivi, art 14.

¹⁵¹ PICUM 'Undocumented migrants have rights' (n 45) 11.

matter their legal permit to work. In this light and considering the difficulties related to the implementation of complaint procedures, the few rights established for undocumented workers seem particularly weak.

2.2.3. Conclusion

Building on the assessment of the Coe's and the EU's human rights instruments, the present work endorses the notion that there is a discrepancy between the protection for undocumented migrant workers' rights ensured by international instruments and the approach adopted at the European level. Indeed, the ECHR does not clearly address migrant workers' rights, and the overarching principle of non-discrimination in the Convention rights' enjoyment – mostly civil and political rights – is usually applied in conjunction of other articles. The ESC protects economic and social rights of those 'lawfully residing or working regularly', and this limitation is not yet overcome.

Though regional human rights instruments ensuring undocumented migrants' fundamental rights are not as strong as international ones, a set of minimum rights in line with the scope of the present research can be outlined:

- according to paragraph 13 of the 1509/2006 CoE Resolution, undocumented migrants should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to form and to join a trade union;¹⁵²
- in 2007 the Commissioner for Human Rights reaffirmed the same rights in employment – fair wages, reasonable working conditions, access to a court to defend their rights and trade activity – and clarified that MSs have a negative obligation to 'ensure that state officials do not abuse rights' and a positive one 'to take measures to ensure that private persons, including employers, do not ill treat those within their power';¹⁵³
- in 2010 the Commissioner for Human Rights recommended that the same set of rights should be guaranteed to irregular migrant workers;¹⁵⁴
- according to articles 151 and 152 of the TFEU, undocumented migrant workers may be entitled to improved living and working conditions and proper social protection;¹⁵⁵
- according to the Employers' Sanction Directive, undocumented migrant workers are entitled to be paid any outstanding wages in line with the minimum fixed wage¹⁵⁶ and have the right to file complaints against employers in case of abuses;¹⁵⁷
- according to article 5 of the EU Charter slavery and forced labour are prohibited;¹⁵⁸

¹⁵² PACE 'Resolution 1509/2006' (n 9) para 13.

¹⁵³ CHR 'The human rights of irregular migrants' (n 110).

¹⁵⁴ CHR 'Positions on the rights' (n 111) 4.

¹⁵⁵ Nevertheless, article 153(g) of the TFEU only refers to TCNs legally residing within the Union territory.

¹⁵⁶ Council Directive 2009/52/EC (n 35) art 6.

¹⁵⁷ Ivi, art 13.

- as the according EU Charter's provisions shall be enjoyed by everyone, undocumented migrant workers may be guaranteed:
 - according to article 15: freedom to choose an occupation;¹⁵⁹
 - according to article 30: protection in the event of unjustified dismissal;¹⁶⁰
 - according to article 31: right to fair and just working conditions;¹⁶¹
 - according to article 47: right to an effective remedy and to a fair trial.¹⁶²

¹⁵⁸ EU Charter (n 122) art 5.

¹⁵⁹ Ivi, art 15.

¹⁶⁰ Ivi, art 30.

¹⁶¹ Ivi, art 31.

¹⁶² Ivi, art 47.

3. Italy: which labour rights for undocumented migrant workers?

This chapter introduces the case study of the present research exploring the Italian normative framework concerning undocumented migrant workers. In doing so, the human rights standards set out at the international and regional levels, as outlined in the previous chapter, are taken into consideration. The aim of the analysis is to identify whether the international and European normative standards are respected and whether legal gaps occur at the national level. In order to carry out the evaluation, the instruments Italy is a party to are briefly listed first. Then, the Italian Constitution is assessed focusing on those articles dealing with migration and labour. Subsequently, the main migration management norms are discussed in a historical perspective with a focus on their labour dimension. The Italian migration law and labour law are going to be examined paying attention to positions adopted towards irregular migrants and irregular migrant workers. In general, this work takes into account how Italy, as a receiving State, regulates migration, acknowledging that migration law and migration itself might have impacts on labour law.

While shedding light on the intersection and interaction between migration law and labor law, Costello and Freedland's considerations on the divisive impacts migration law has upon labour law – in particular on worker protection and labour supply regulation – are taken into account.¹⁶³ They also point out that the division of objectives is more vivid in particular economic sectors in which the 'seasonality, unpredictability and hazardousness' of the work are relevant, such as agriculture.¹⁶⁴ Therefore, the focus is on determining whether undocumented migrant workers who are breaching the national immigration law are entitled to any protection provided by the Italian labour law and, if so, which rights are ensured.

Particular attention is paid in this chapter to the Employers' Sanction Directive which leaves margins of discretion to MSs whether to adopt a stricter approach or a broader one towards undocumented migrant workers. Specifically, the transposing legislation of the European Directive 2009/52/EC is evaluated in order to grasp the Italian approach towards undocumented migrant workers. Although regional and local legislators had in some cases

¹⁶³ Cathryn Costello, Mark Freedland (eds), *Migrants at work. Immigration and vulnerability in labour law* (Oxford University Press 2014) 9.

¹⁶⁴ Ivi, 14.

adopted measures targeting migrants – regardless of their status – in order to favour their inclusion and thus attenuating the national law impact, they are not addressed in the present work as the Italian case study is intended to be analyzed at the national level, whereas regional particularities are beyond its scope.¹⁶⁵

3.1. Normative framework

Italy is party to eight of the nine core international human rights treaties and their protocols.¹⁶⁶ The one it has not signed or ratified is however the main instrument for the protection of undocumented migrants, the ICRMW. Similarly, Italy is also not taking part in the Global Compact for Safe, Orderly and Regular Migration diminishing the importance of this commitment as well as its humane approach towards migration.

By contrast, Italy has ratified several instruments tackling human trafficking, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children¹⁶⁷ and the Protocol against the Smuggling of Migrants by Land, Sea and Air.¹⁶⁸ Though the research is not focused on labour exploitation, as the following chapter will show, some reported cases of lack of protection of undocumented migrant workers' rights result not only in poor conditions of work, but precisely in labour exploitation. Thus, it is worth mentioning that Italy has adopted relevant instruments in this field. For example, in 2016 Italy adopted the Law No. 199/2016 on countering undeclared work and labour exploitation in the agricultural sector,¹⁶⁹ introducing the so called “capolarato provision” in the Italian Criminal Code which better defines the illicit of intermediation and work exploitation.¹⁷⁰

¹⁶⁵ For an overview of different regional approaches see Tagliaferro (n 32) 32-39.

¹⁶⁶ The International Convention on the Elimination of All Forms of Racial Discrimination, the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.

¹⁶⁷ UNGA, ‘Protocol to prevent, suppress and punish trafficking in persons especially women and children, supplementing the United Nations Convention against Transnational Organized Crime’ (adopted 15 November 2000) UNGA Res 55/25.

¹⁶⁸ UNGA, ‘Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations convention against transnational organized crime’ (adopted 15 November 2000) UNGA Res 55/25.

¹⁶⁹ Italian Parliament, Law Decree 29 October 2016 No. 199, ‘Disposizioni in materia di contrasto ai fenomeni del lavoro nero, dello sfruttamento del lavoro in agricoltura e di riallineamento retributivo nel settore agricolo’, GU SG 257 <gazzettaufficiale.it/eli/id/2016/11/3/16G00213/sg> accessed 29 April 2019.

¹⁷⁰ Ivi, art 1.

Regarding the instruments issued by the ILO, Italy has ratified the Convention No. 97, the Migration for Employment Convention (Revised);¹⁷¹ the ILO Convention No. 143, the Migrant Workers (Supplementary Provisions) Convention¹⁷² besides other fundamental conventions.¹⁷³

At the regional level, as Italy is a EU member State, the EU *acquis* on migration and asylum is applicable, and Italy has an obligation to respect the EU Charter when implementing EU law.¹⁷⁴ As a MS, Italy transposes EU Directives into the national legislation. Since its inception, Italy is a member of the CoE and it is a party to the ECHR and to the ESC. Italy has also ratified the European Convention on the Legal Status of Migrant Workers.¹⁷⁵

3.2. Italian legal framework

Italy has historically been a sending country, and became only recently a destination for migrants.¹⁷⁶ As a consequence, the legal apparatus dealing with immigration has been inadequate and has developed mainly during the last two decades.¹⁷⁷ The need for recurrent initiatives aiming at regularizing irregular migrants living and working within the Italian territory is the symptom of ineffective policies which historically have failed to regulate labour immigration.¹⁷⁸ This contradiction, which is further elaborated in the following paragraphs, is still a present trait in migration management.

¹⁷¹ ILO Convention No. 97 (n 91).

¹⁷² ILO Convention No. 143 (n 38).

¹⁷³ See ILO NORMLEX, 'Ratifications for Italy' (ILO 2017) <ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102709> accessed 29 April 2019.

¹⁷⁴ EU Charter (n 122) art 51.

¹⁷⁵ Council of Europe, European Convention on the legal status of migrant workers (24 November 1977) ETS 93 <<https://rm.coe.int/1680077323>> accessed 30 April 2019.

¹⁷⁶ See, *inter alia*, Silvana Sciarra, William Chiaromonte, 'Migration status in labour and social security law. Between inclusion and exclusion in Italy' in Costello, Freedland (n 163) 121; Amanda Levinson, *The regularization of unauthorized migrants: literature survey and country case studies* (Centre on Migration, Policy and Society University of Oxford 2005) 38; Ambrosini, 'Irregular Immigration in Southern Europe' (n 2) 79; Massimo D'Antona, 'Undocumented work (by foreigners) and sanctions. The situation in Italy' [2017] Centre for the Study of European Labour Law 2; Paola Pannia, Veronica Federico, Silvia D'Amato, *Italy – Country Report. Legal & Policy Framework of Migration Governance* (Respond Multilevel Governance of Migration and Beyond 2018) 15.

¹⁷⁷ Clandestino Project, 'Irregular migration in Italy, Counting the uncountable: Data and trends across Europe' (Comparative Policy Brief – Pathways and Policies 2009).

¹⁷⁸ Sciarra, Chiaromonte (n 176) 121.

3.2.1. The Italian Constitution

The historical propensity to emigrate is mirrored in the Italian Constitutional provisions. The Constitution proclaims that ‘every citizen is free to leave the territory of the Republic and return to it except for obligations defined by law’¹⁷⁹ and that ‘it recognizes the freedom to emigrate.’¹⁸⁰ By contrast, only few articles deal with the legal status of foreigners. Notably, article 10 states that ‘legal regulation of the status of foreigners conforms to international provisions and treaties.’¹⁸¹ In 2001 a Constitutional reform has occurred stipulating that the State legislates on immigration, right of asylum and legal status of non-EU citizens,¹⁸² while other policy areas affecting the management of migration (e.g. housing, healthcare) and the legal status of foreigners can be regulated by regions.¹⁸³ This system prevent migration to be managed by a single organ, opening the door to further distinctions and spreading the legislation on immigration to different Ministries.

Focusing on the labour dimension, the fundamental principles of the Constitution establish that Italy is a democratic republic founded on work,¹⁸⁴ and it recognizes and guarantees the inviolable rights of the person.¹⁸⁵ These premises suggest that the right to work and related labour rights are universally guaranteed as they are at the basis of a democratic State and because the term person – and not citizen – is used to identify rights holders. Nevertheless, when looking specifically into labour rights, the right to work and the right to just working conditions only refer to citizens.¹⁸⁶ In this light, TCNs and undocumented migrants fall out of the scope of the article. Although article 4 of the Constitution makes reference to citizens only, when the respect of fundamental rights is concerned the Constitutional Court has played a role in applying the principle of equality to foreigners as well,¹⁸⁷ and it ‘has represented a

¹⁷⁹ Senato della Repubblica, ‘Costituzione della Repubblica Italiana’ (1947) art 16(2). English official version <senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 29 Aprile 2019.

¹⁸⁰ Ivi, art 35.

¹⁸¹ Ivi, art 10.

¹⁸² Ivi, art 117.

¹⁸³ Ibidem.

¹⁸⁴ Ivi, art 1.

¹⁸⁵ Ivi, art 2.

¹⁸⁶ Ivi, art 4.

¹⁸⁷ Cecilia Corsi, ‘Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte Costituzionale’ [2014] *Federalismi* 3; Cecilia Corsi, ‘Peripezie di un cammino verso l’integrazione giuridica degli stranieri. Alcuni elementi sintomatici’ [2018] *Osservatorio costituzionale*; Paolo Carrozza ‘Diritti degli stranieri e politiche regionali e locali’ in Claudio Panzera, Alessio Rauti, Carmela Salazar, Antonio Spadaro (eds), *Metamorfosi della cittadinanza e diritti degli stranieri* (Editoriale Scientifica 2016) 57; Francesca Biondi Dal Monte, *Dai diritti sociali alla cittadinanza. La condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali* (Giappichelli 2013). See, among others, the decision of the Constitutional Court No. 187/2010.

fundamental anchor in promoting the legal entitlements of foreigners and in preventing the downgrading of standards.’¹⁸⁸ Indeed, the Constitution entails fundamental principles such as non-discrimination, human dignity, minimum labour standards and conformity to international law as regards foreigners, even though it does not specifically address neither regular nor irregular migrants’ rights.¹⁸⁹

In the Constitutional section dedicated to “Economic rights and duties” the narrow scope adopted in article 4 appears less evident due to the general reference to *workers* and to the statement according to which ‘the Republic protects work in all its forms and practices.’¹⁹⁰ In this vein, both formal and informal economies are embraced, and minimum labour rights are ensured without being clearly restricted to citizens or to legally residing TCNs. Similarly, it is stated that the right to a ‘remuneration commensurate to the quantity and quality’ of one’s work is guaranteed to *workers*¹⁹¹ and that the remuneration shall ensure ‘*workers* and their families a free and dignified existence.’¹⁹² The same article stipulates that maximum daily working hours are established by law and that *workers* have the right to a weekly rest day and paid annual holidays.¹⁹³ Using the general word *workers* without mentioning workers’ status or restricting it to citizens or legally residing TCNs, the article leaves the possibility for undocumented migrant workers to fall under the scope of these provisions. Even though the Constitution provides for considerable room for interpretation as regards undocumented migrant workers’ rights protection, their inclusion cannot be taken for granted on the basis of the aforementioned provisions.

3.2.2. The Italian migration framework: historical perspective and interaction with labour law

Historically, the Italian legal framework concerning migration was essentially composed by the Public Security Code (*Testo Unico delle Leggi sulla Pubblica Sicurezza*)¹⁹⁴ approved for the first time in 1931. Being mainly a sending country, this was for decades the sole instrument dealing with migration in Italy and it was characterized by a “security” approach,

¹⁸⁸ Pannia, Federico, D’Amato (n 176) 23.

¹⁸⁹ Ivi, 15. Ivi, 64 ‘The country has put into question the very same principles of respect and protection of human rights enshrined in the Constitution and international standards’.

¹⁹⁰ Costituzione della Repubblica Italiana (n 179) art 35.

¹⁹¹ Ivi, art 36.

¹⁹² Ibidem (emphasis added).

¹⁹³ Ibidem.

¹⁹⁴ Regio decreto 18 giugno 1931, ‘Approvazione del testo unico delle leggi di pubblica sicurezza’ GU SG 146 <gazzettaufficiale.it/eli/id/1931/06/26/031U0773/sg%20target=> accessed 30 April 2019.

as it treated immigration as a matter of public security.¹⁹⁵ The Public Security Code was followed by numerous amendments which, in general, lacked a comprehensive vision of migration and of irregular migration in particular, as they dealt with the issue merely holding ad hoc amnesties for those undocumented migrants already living within national borders without putting in place a structured system tackling positively irregular migration.¹⁹⁶ The common denominator of these norms is a progressively and stronger closure of national borders, neglecting the internal demand for labour migration as well as lacking the establishment of legal ways for low-skilled workers to migrate to Italy – and undermining long-term solutions to irregularity.¹⁹⁷ As immigration heading to Italy has a considerable component of labour migration,¹⁹⁸ Italy was repetitiously called to provide answers entailing both migration and its ‘labour dimension’.¹⁹⁹

The first Italian migration law dealing with irregular migration, Law No. 943 of 1986, also called “Foschi Law”, contains an explicit reference to counter irregular immigration.²⁰⁰ The law acknowledged three different elements which needed to be addressed: illicit flows, hiring irregular migrants with the intention of exploiting them and hiring irregular migrants in general. Despite this understanding, the “Foschi Law” did not provide legal means to enter the territory, nor provide protection for those exploited, nor encouraged employers to regularly hire migrant workers. By contrast, a hard approach was taken, imposing sanctions on employers hiring irregular migrant workers²⁰¹ while holding the first amnesty, which regularized almost 120.000 undocumented immigrants.²⁰²

In order to sign the Schengen Agreement, in 1990 Italy approved the Law No. 39, or “Martelli Law”, which adopted an even harder line towards irregular immigration and ameliorated

¹⁹⁵ Abbondanza (n 20) 77.

¹⁹⁶ Ambrosini, ‘Irregular migration in Southern Europe’ (n 2). See also Franck Düvell, ‘Paths into irregularity: the legal and political construction of irregular migration’ 13 [2011] *European Journal of Migration and Law* 275. Sciarra, Chiaromonte (n 176) 122-124.

¹⁹⁷ Less TCNs are entering Italy legally as workers, and ‘regular migration of low-skilled labour is progressively being substituted with irregular migration’ Leila Simona Talani, ‘Assessing the relation between the underground economy and irregular migration in Italy’ [2018] *The International Spectator* 1751.

¹⁹⁸ D’Antona (n 176) 2.

¹⁹⁹ Emilio Reyneri, *Migrants’ involvement in irregular employment in the Mediterranean countries of the European Union* (University of Milan Bicocca 2001).

²⁰⁰ Italian Parliament, Legislative Decree No. 943 of 30 December 1986, ‘Norme in materia di collocamento e di trattamento dei lavoratori extracomunitari immigrati e contro le immigrazioni clandestine’ GU SG 8 (1986) art 12 <gazzettaufficiale.it/eli/id/1987/01/12/086U0943/sg> accessed 26 April 2019.

²⁰¹ *Ibidem*. In case of violation of the norm, employers were subjected to financial sanctions and reclusion for maximum one year.

²⁰² Abbondanza (n 20).

expulsion procedures.²⁰³ Although more stringent regulations were put in place, it included an amnesty which regularized 222.000 irregular immigrants.²⁰⁴ It was followed by the “Dini Decree”, the Law Decree No. 489 of 1995,²⁰⁵ which included a renewed amnesty as well, regularizing the status of about 250.000 undocumented immigrants.²⁰⁶ Shortly after, it was followed by the “Turco-Napolitano Law” which further regularized almost other 220.000 people.²⁰⁷ Nevertheless, in April 1998 an assessment was carried out demonstrating that, despite the amnesty having been approved one month earlier, there were still more than 230.000 undocumented migrants estimated to live in Italy.²⁰⁸

In 1998 the Consolidated Act on Immigration (*Testo Unico sull’Immigrazione*)²⁰⁹ was adopted and then amended in 2002 by the “Bossi-Fini Law”.²¹⁰ Three main directives can be outlined from the laws. The introduction of the regulation of entry flows (*decreto flussi*) establishes maximum entry quotas per types of workers. The second innovation is the issuing of a resident permit in relation to the existence of a written regular contract of employment. These two elements reinforced ties between immigration and labour law. Indeed, under this law workers need to hold a regular contract issued by employers in order to receive the authorization from the Italian authorities to enter the country but also to receive a residence permit. When the employment contract expires, the worker needs to find a new job within six months to avoid becoming an “illegal”.²¹¹ This system boosted the unbalanced dependence of migrant workers to employers, producing deviant effects in the labour market.²¹² The last element the law introduced, was a strengthened system of administrative detention in order to

²⁰³ Italian Parliament, Legislative Decree No. 416 of 30 December 1989, ‘Norme urgenti in materia di asilo politico, di ingresso e soggiorno dei cittadini extracomunitari e di regolarizzazione dei cittadini extracomunitari ed apolidi già presenti nel territorio dello Stato’ GU SG 303 (1989) <gazzettaufficiale.it/eli/id/1990/02/28/090G0075/sg> accessed 27 April 2019.

²⁰⁴ Sara Castellazzi, ‘Le implicazioni legislative del fenomeno sociale migratorio. L’evoluzione normativa in Italia’, in Giovanni Cordini, Vittorio Gasparini Cesari, *Il diritto dell’immigrazione*, 2 [2010] Mucchi Editore 93.

²⁰⁵ The law failed to be passed, nevertheless the amnesty was implemented within two months.

²⁰⁶ Angela Papanusso, Tineke Fokkema, Elena Ambrosetti, ‘Immigration policies in Italy; their impact on the lives of first-generation Moroccan and Egyptian migrants’ [2017] *Journal of International Migration and Integration* 499.

²⁰⁷ Abbonanza (n 20) 81.

²⁰⁸ Massimo di Bello, ‘La devianza degli immigrati. Il ruolo delle organizzazioni criminali’ (2000) *L’Altro Diritto*, Documentation Center of the University of Florence <adir.unifi.it/rivista/2000/dibello/cap1.htm#h6> accessed 29 April 2019.

²⁰⁹ Italian Parliament, Legislative Decree No. 286 of 25 July 1998, ‘Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero’ GU SG 191 (1998) (hereinafter Consolidated Act on Immigration) <refworld.org/docid/54a2c23a4.html> accessed 29 April 2019.

²¹⁰ Italian Parliament, Legislative Decree no. 189 of 30 July 2002, ‘Modifica alla normative in materia di immigrazione e di asilo’ GU SG 199 (2002) <unhcr.it/wp-content/uploads/2015/12/legge_bossi_fini.pdf> accessed 29 April 2019.

²¹¹ The “tolerated period of unemployment” was prolonged to one year in 2012 with the adoption of the Law No. 92, ‘Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita’, art 4.

²¹² The effects are going to be discussed in the following chapter.

implement expulsion orders.²¹³ Finally, the “Bossi-Fini” contained an amnesty provision which regularized more than 645.000 immigrants.²¹⁴

As regards the quota model established on the basis of the Italian labour market needs (*decreto flussi*), the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr Diène, has pointed out that

‘[the flow decree] is challenged by the reality of an important number of migrants working in the illegal sector. Fundamental questions need to be raised in this context. Are the quotas wrongly established, or are the needs of the labour market incorrectly assessed? Are the lengthy and costly procedures an excessive burden for employers, who resort to hiring migrants illegally? Are the repressive norms in place pushing migrants into illegality?’²¹⁵

The entire set of questions is legitimate; nevertheless, they were never addressed by the legislator. Studies endorsed Mr Diène’s considerations, showing the contradiction between the labour market demand for migrant workers and the restrictive approach which undermined the possibility of legal entry precisely for low-skilled workers.²¹⁶ In Ambrosini’s view, the mismatch between labour demand and labour supply was repeatedly bridged by large regularization programmes as ‘the main solution for managing the incorporation of immigrants into [...] labour markets.’²¹⁷ In this sense, migration policies played a limited role, adapting legal rules in order to fit economic practices.²¹⁸ The same position is taken by Sciarra and Chiaromonte, who pointed out the inconsistency of the Italian immigration policy which introduced elements of legality only through *ex post* regularization measures.²¹⁹ Indeed, between 1986 and 2002 about 4 out of 5 work permits were issued through regularizations.²²⁰ Moreover, further restrictive measures were annually taken through the so called “security

²¹³ Consolidated Act on Immigration (n 209) artt 13, 14.

²¹⁴ *Abbondanza* (n 20) 90.

²¹⁵ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report on his mission to Italy (9-13 October 2006), UN Doc. A/HRC/4/19/Add.4, para 62.

²¹⁶ UNCHR, UN Doc A/HRC/23/46 (n 3) para 17. See also Ambrosini ‘Irregular immigration in Southern Europe’ (n 2) 64.

²¹⁷ Ambrosini, ‘Irregular immigration in Southern Europe’ (n 2) 83.

²¹⁸ *Ibidem*.

²¹⁹ Sciarra, Chiaromonte (n 176) 123.

²²⁰ Maria Chiara Locchi, ‘On the implementation of Directive 2009/52. Italian perspectives’ [2011] *Migration, Sanctions & Business* 3.

packages” which omitted labour rights in favour of ‘a strong emphasis on national security and public order.’²²¹

The gradual legislative evolution resulted in the contested Law No. 94 of 2009, which introduced the crime of clandestine immigration.²²² The criminalization of illegal entry and stay has been interpreted by several studies as the intention to shape migrants’ social construction as “deviants”.²²³ Being criminalized coupled with the absence of adequate legal means to enter Italy were indirectly requiring irregular migrants to become invisible and silent.²²⁴ The more evident consequence of this forced exclusion is identified in the possibility for employers to enforce unfair working conditions without fearing any repercussion and to have access to ‘a laxer, more flexible and exploitable workforce.’²²⁵ Although some studies support the idea that the contradiction between labour market demands for cheap labour and the hurdles for low-skilled workers to entry legally is a condition fostering unprotected work,²²⁶ as Ambrosini highlighted, migrant workers themselves perform their agency and take decisions in light of their personal aspirations.²²⁷ Nevertheless, their deliberate acceptance of certain working conditions does not make labour rights violations they face less serious.

The law 94/2009 fostered a binary approach towards migration, considering “legal” and “illegal” dimensions as the only possible applicable categories, understating complexity and fluidity of migration. Refusing this dichotomy and considering migrant workers’ agency would help in avoiding treating irregular migrant workers as a monolithic and an homogeneous category, as well as seeing them only as victims, inevitably exploited, or as

²²¹ Ibidem. For “security packages” see Legislative Decree No. 241/2004; Law No. 125/2008; Law No. 94/2009; Law No. 217/2010.

²²² Italian Parliament, Law No. 94 of 15 July 2009 ‘Disposizioni in materia di sicurezza pubblica’ GU SG 107 (2009) <parlamento.it/parlam/leggi/09094l.htm> accessed 29 April 2019.

²²³ See Emilio Santoro, *Carcere e società liberale* (Giappichelli 2004) 120; Alessandro Dal Lago, *Lo straniero e il nemico. Materiali per l’etnografia contemporanea* (Costa & Nolan 1998); Dario Melossi, ‘Il giurista, il sociologo e la ‘criminalizzazione’ dei migranti: cosa significa ‘etichettamento’ oggi?’ [2008] *Studi sulla questione criminale* 9.

²²⁴ Emilio Santoro, ‘Diritti umani, lavoro, soggetti migranti: procedure e forme del ‘neo-schiavismo’’ in Thomas Casadei (ed), *Diritti umani e soggetti vulnerabili. Violazioni, trasformazioni, aporie* (Giappichelli Editore 2012) 227, 232. Engbersen and Broeders stated that ‘[I]t is crucial for irregular migrants to avoid identification and to satisfy their needs without being intercepted by government institutions’, Godfried Engbersen, Daniel Broeders, ‘The State versus the Alien: Immigration Control and Strategies of Irregular Immigrants’ [2009] *West European Politics* 867.

²²⁵ Ambrosini, ‘Irregular immigration in Southern Europe’ (n 2) 8.

²²⁶ See James Hollifield, Philip Martin, Pia Orrenious (eds), *Controlling immigration: a global perspective* (Stanford University Press 1994).

²²⁷ Ambrosini, ‘Irregular immigration in Southern Europe’ (n 2). See also Paola Bonizzoni, ‘The Shifting Boundaries of (Un)documentedness: A Gendered Understanding of Migrants’ Employment-Based Legalization Pathways in Italy’ [2016] *Ethnic and Racial Studies*, for the discussion on the role played by individuals and organizations.

criminals. Sadly, this binary perspective has been adopted by the Italian legislator, who reinforced this dichotomy through stricter regulations towards irregular migrants who for several years were seen as “illegal”.

A final remark concerning the criminalization of illegal entry and stay is reinforced by the void left by the Italian immigration legislation when it comes to low-skilled workers, whereas a sophisticated system is in place for highly-skilled workers, such as implementation of the Blue Card Directive.²²⁸ This discrepancy has made borders “selective”, stratifying people in terms of mobility rights. In this sense, as Faist stated, ‘the movement of persons is dichotomized in public debate into mobility and migration, with mobility connoting euphemistic expectations of gain for individuals and States and migration calling for social integration, control and the maintenance of national identity.’²²⁹ This duality is still characterizing the Italian discourse on migration, and it was reinforced with the advent of populist parties which identify migrants precisely as a “threat” to national identity.²³⁰

3.2.3. Precarious protection of vulnerable migrant workers

The aforementioned Consolidated Act on Immigration,²³¹ which is still in force, albeit after significant modifications, requires equal treatment between Italian and migrant workers. Indeed, article 2(1) states that ‘[T]he migrant present for any reason at the border or in the territory of the State is entitled to fundamental human rights provided by national law, international conventions and principles of international law generally recognized’.²³² The Consolidated Law on Immigration also stipulates that employers are required to pay even irregular migrant workers wages, and all the normal contributions and taxes normally due.²³³ This provision of the Italian legislation is in accordance to article 6 of the ICESCR which stipulates the right to every individual to decent work²³⁴ – and being paid is a prerequisite of decent work – and to article 7 of the ICESCR which clearly states that everyone shall enjoy

²²⁸ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17.

²²⁹ Thomas Faist, ‘The Mobility Turn: A New Paradigm for the Social Sciences?’ [2013] *Ethnic and Racial Studies* 1637, 1640. See also David Bacon, *Illegal People: How Globalization Creates Migration and Criminalizes Immigrants* (Beacon Press 2008).

²³⁰ Eva Garau, *Politics of National identity in Italy: immigration and ‘italianità’* (Routledge 2014); Tim Dixon, Stephen Hawkins, Lawrence Heijbroek, Míriam Juan-Torres, François-Xavier Demoures, *Attitudes towards national identity. Immigration and refugees in Italy* (IPSOS 2018).

²³¹ Consolidated Act on Immigration (n 209).

²³² Ivi, art 2(1).

²³³ Ivi, art 3.

²³⁴ ICESCR (n 51) art 6; CESCR General Comment No. 18 (n 58).

fair wages;²³⁵ additionally, it is in line with the ILO Conventions No. 97²³⁶ and No. 143, too.²³⁷

By contrast, as noted by Sciarra and Chiaromonte, in Italy the access to the labour market ‘has always been regulated differently for non-EU migrant workers’²³⁸ and this differentiation has repercussions on the equality of treatment in general. Notably, EU workers have easier access to the Italian labour market; by contrast, when it comes to TCNs there is a set of European and national legislation regulating migrants’ entrance differentiating on the type of workers. Highly-skilled workers should comply with the EU Blue Card Directive, while seasonal workers’ entrances are regulated by the Directive 2014/36/EU on the conditions of entry and stay of TCNs for the purpose of employment as seasonal workers.²³⁹ Moreover, in Italy TCNs workers are subjected to the flow decree, which establishes a maximum quota for migrant workers allowed to come to Italy. The crucial point to be considered here is that TCNs workers are allowed to enter only by virtue of employers’ online submission of a formal request to hire foreigners. Subsequently, the Italian authorities can authorize the procedure, after which TCNs can obtain a visa to enter Italy, where they have to apply for their residence permits.²⁴⁰ The procedure is long and bureaucratic and, more importantly, it gives enormous powers to employers over employees. Notably, employers are responsible for regular entry, legal employment and regular residence of TCNs, and this paternalistic approach often leads to abuses of employers over migrant workers.²⁴¹

The regulation of entry flows (*decreto flussi*) introduced in 2002 by the “Bossi-Fini Law” is still having impacts on labour migration. Concerning the current year, the “flow decree” stipulates that a maximum 30.850 TCNs are allowed to enter Italy in 2019 for work reasons.²⁴² The fact that the decree was issued in April for the ongoing year, leaves only few months to deal with the submission procedure that should enable employers to legally hire

²³⁵ ICESCR (n 51) art 7.

²³⁶ ILO Convention No. 97 (n 91) art 6.

²³⁷ ILO Convention No. 143 (n 38) art 8.

²³⁸ Sciarra, Chiaromonte (n 176) 124.

²³⁹ Parliament and Council Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L94/375 <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32014L0036>> accessed 30 April 2019.

²⁴⁰ Consolidated Act on Immigration (n 209) artt 5(3(bis)), 22(6).

²⁴¹ The effects of this system are in depth assessed in the following chapter.

²⁴² Decree of the President of the Council Of Ministers, ‘Programmazione transitoria dei flussi d’ingresso dei lavoratori non comunitari nel territorio dello Stato per l’anno 2019’ GU SG 84 (2019) <gazzettaufficiale.it/eli/id/2019/04/09/19A02411/sg> accessed 27 April 2019. It is worth mentioning that only 18.000 places are provided for subordinated seasonal workers in the agricultural and turistic sectors, Progetto Melting Pot Europa, Decreto flussi 2019 (2019) <meltingpot.org/Decreto-flussi-2019.html#.XNQZ8DAzbIU> accessed 30 April 2019.

migrant workers, and there is no doubt that agricultural and touristic seasonal peaks occur during summer time. Secondly, the decree does not include the three-year programme as required by the “Turco-Napolitano Law”, clearly showing how profound the lack of a comprehensive and medium term approach is in the Italian migration policy. Moreover, the established quotas are often below the real demand for workers.²⁴³ A further shortcoming is that the decree does not include irregular migrants already present in the national territory as potential workers.²⁴⁴ Depriving them the possibility to have access to regular job within the formal sector clearly goes against the ILO vision expressed in the Transition from the Informal to the Formal Economy Recommendation (No. 204)²⁴⁵ which aims at encouraging the expansion of the formal economy. Indeed, at present, irregular workers in Italy do not have any chance to access the formal economy due to this shortsighted approach based on “security” assumptions and, therefore, are confined within the informal economy. This barrier in accessing the formal economy might be considered in contrast with the article 15(1) of the EU Charter, which stipulates that ‘*everyone* has the right to engage in work’,²⁴⁶ and with the ICESCR’s principle of non-discrimination on the basis of nationality.²⁴⁷

Concerning social security, the Consolidated Law on Immigration provides for it for Italians and legally resident migrant workers only,²⁴⁸ even though the Italian Constitution’s general formulation on contributory social security benefits might leave some discretion in the interpretation and inclusion of undocumented migrant workers.²⁴⁹ Nevertheless, considering that due to legislative changes²⁵⁰ differences in access social security benefits have been established since 2001 between migrant workers holding short term residence permit and those holding long term residence permit, it is not surprising that these benefits are not provided

²⁴³ In 2011 employers submitted about 400,000 applications for contractual employment of migrant workers, nearly four times the number of available places under the quota set for that year (98,080). Rete Europea Migrazioni (EMN) Italia, *Quarto Rapporto EMN Italia: Canali Migratori, Visti e flussi irregolari*, (IDOS 2012) 89.

²⁴⁴ Amnesty International, ‘Exploited labour’ (n 19).

²⁴⁵ ILO, ‘Transition from the Informal to the Formal Economy Recommendation (No. 204)’ (2015) <ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_545928.pdf> accessed 27 April 2019; See also ILO ‘Resolution and conclusions concerning decent work and the informal economy’ ILC, 90th session 2002 <ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf> accessed 27 April 2019.

²⁴⁶ EU Charter (n 122) art 15 (emphasis added).

²⁴⁷ CESCR, General Comment No. 20 (n 65) para 30.

²⁴⁸ Consolidated Act on Immigration (n 209) artt 2, 3.

²⁴⁹ Costituzione della Repubblica Italiana (n 179) art 38(2) (emphasis added). By contrast, non-contributory social security benefits are established for citizens only, art 38(1).

²⁵⁰ Italian Parliament, Law Decree No. 388 of 23 December 2000, ‘Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2001)’ GU SG 219 (2000) art 80(19). ‘Per [...] servizi sociali l'equiparazione con i cittadini italiani e' consentita a favore degli stranieri che siano almeno titolari di permesso di soggiorno di durata non inferiore ad un anno’ <parlamento.it/parlam/leggi/003881.htm> accessed 1 May 2019.

for undocumented migrant workers. This lack in protection is in contradiction with the ILO Conventions No. 97²⁵¹ and No. 143²⁵² which establish equal treatment in respect of social security.²⁵³ Similarly, article 9 of the ICESCR stipulates that the right to social security shall be recognized to *everyone*.²⁵⁴ In this context, the absence of a granted migration status renders migrant workers more vulnerable and results in jeopardizing undocumented migrant workers' rights.²⁵⁵ Indeed, as the ILO stated, the informal economy is the sector having the most pronounced "decent work deficit",²⁵⁶ as well as being characterized by no social security which is identified as a 'critical aspect of the social exclusion of workers in the informal economy'.²⁵⁷

Even though Italy is party to the ICESCR it is not fully respecting, protecting and fulfilling the provisions entailed in articles 6 and 7 of the Covenant. The violation of the right to work of undocumented migrant workers can be found, as stated by the CESCR, in the sense that it is intended as decent work which allows one to live in dignity.²⁵⁸ The noted gaps in the normative framework are preventing undocumented migrant workers to access decent work. Additionally, at present, irregular migrants already living in Italy do not have any tool to regularize their administrative situation, nor to enter the formal economy under employer's initiative.²⁵⁹ This impossibility is the evident consequence of the political unwillingness to manage irregular migration recognizing its working dimension instead of only focusing on border security and expulsion. This trend can be found in the recently adopted Law Decree 113/2018,²⁶⁰ which reiterates the never surpassed connection between irregular status and

²⁵¹ ILO, Convention No. 97 (n 91) art 6(1(b)).

²⁵² ILO, Convention No. 143 (n 38) art 9.

²⁵³ See also ILO, Recommendation No. 151 (n 96) para 2(f); para 8(3) 'Migrant workers whose position has not been or could not be regularized should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits'; para 34 (ii) 'A migrant worker who leaves the country of employment should be entitled, *irrespective of the legality of his stay* therein to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements' (emphasis added).

²⁵⁴ ICESCR (n 51) art 9 (emphasis added).

²⁵⁵ Sciarra, Chiaromonte (n 176) 133.

²⁵⁶ ILO Recommendation No. 204 (n 245) para 9.

²⁵⁷ Ivi, para 10.

²⁵⁸ CESCR General Comment No. 18 (n 58) paras 1, 7.

²⁵⁹ The procedure is valid only for migrant workers living abroad. In practice the "flow decree" is used to regularize irregular workers in Italy, but through a non-fully legal way. 'Employers apply to obtain a *nulla osta* and a visa for migrant employees who are already in Italy, in many cases in exchange for money. If and when the employer receives the *nulla osta*, the migrants go back to their country of origin to collect their entry visa and re-enter Italy, this time regularly.' Amnesty International 'Exploited labour' (n 19) 16. Of course this method cannot be considered a real way to enter the formal economy, it is just a way around the problem, at the expenses of workers.

²⁶⁰ Italian Parliament, Law Decree No. 113 of 4 October 2018 'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e

criminalization of irregular migrants, and which does not address migrants' rights nor migrants' labour rights. Due to its formulation, it raises great concerns from a human rights perspective, as mentioned in the letter the Commissioner for Human Rights Dunja Mijatović addressed to the Italian Prime Minister.²⁶¹

The laws which have been discussed are useful to outline the national legislative framework and to illustrate the fluid interaction between migration law and labour law. Considering the relevance migration and migration law can have on labour law, it can be noted that the vast majority of Italian labour law was shaped in light of migration itself. Overall, it can be stated that the position of undocumented migrant workers in Italy is generally precarious, with only few rights granted in the Constitution and in the Consolidated Law on Immigration. Moreover, the last Law Decree poses several questions on the direction Italy is now taking in migration management.

3.2.4. EU law implementation: the Legislative Decree No. 109/2012

The European Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying TCNs²⁶² 'focuses on the irregular status of migrant workers rather than their labour rights and the possible abuses of these rights by the employer'.²⁶³ Hence, the transposition of the EU Directive into the national legislation through the Legislative Decree No. 109 of 2012, or "Rosarno Law",²⁶⁴ resulted in a law prioritizing the enforcement of immigration law while under looking irregular workers' rights and their risk to being exploited.

l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata' GU SG 231 (2018) <gazzettaufficiale.it/eli/id/2018/12/03/18G00161/sg> accessed 6 June 2019.

²⁶¹ CHR, 'Letter by the Council of Europe High Commissioner for Human Rights to the Italian Prime Minister Giuseppe Conte on the impact of amendments to the Law on International Protection on the human rights situation in the field of asylum and migration' CommHR/DM/sf 004-2019.

²⁶² Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014) 286.

²⁶³ ENAR, EWL, PICUM and SOLIDAR, 'Employers' Sanction Directive: Migrant workers, not employers, pay the price of their exploitation', Joint statement, 4 February 2009, <http://picum.org/picum.org/uploads/file/_Joint_Statement_Employer_Sanctions_Directive_4_Feb_2009.pdf> accessed 6 June 2019. Nicola Flamigni, 'Europa - Direttiva sanzioni: il prezzo più alto lo pagano i migranti' (2009) Melting Pot <meltingpot.org/Europa-Direttiva-sanzioni-il-prezzo-piu-alto-lo-pagano-i.html#.VD-GZ_1_sv5> accessed 6 June 2019.

²⁶⁴ Italian Parliament, Legislative Decree 109 of 16 July 2012, 'Attuazione della direttiva 2009/52/CE' GU SG 172 of 25 July 2012.

Before adopting the transposing legislation, the Italian Consolidated Act on Immigration already prohibited the employment of irregular migrants sanctioning employers with a fine of 5.000 euro per each irregular employee and with imprisonment (from 6 months to 3 years).²⁶⁵ According to the assessment conducted by the European Commission on the application of the Directive 2009/52/EC, Italy is among the European States which have increased financial sanctions with the adoption of the new legislation²⁶⁶ as well as criminal sanctions (as regards duration of imprisonment).²⁶⁷ Although the Directive establishes that precise circumstances shall ‘constitute a criminal offence when committed intentionally’,²⁶⁸ the Italian transposition identifies only some of them as aggravating elements. The aggravating factors under the “Rosarno Law” regard employment of more than three irregular workers, employment of minors and ‘particularly exploitative working conditions.’²⁶⁹ Considering this provision, it can be stated that the Italian law does not have the same strength the Directive has in protecting labour rights, as it reduces the cases related to criminal offence for employers and includes them only as aggravating factors.

Additionally, the Italian legislation stipulates that for the cases falling under particularly exploitative working conditions irregular migrant workers are entitled to be granted a residence permit for humanitarian reason if they report their employer, cooperate in the criminal proceedings against him/her and if the responsible Prosecutor agrees with the granting of a residence permit.²⁷⁰ These conditions are not set out in same terms by the Directive, which generally states that in order to grant residence permits, migrant workers shall be involved in the criminal proceedings.²⁷¹ As noted by Amnesty International, the Italian legislation has narrowed the scope of the Directive using the notion of particularly

²⁶⁵ Consolidated Act on Immigration (n 209) art 22(12).

²⁶⁶ Communication on the application of Directive 2009/52/EC (n 262) 4, Table 1.

²⁶⁷ Ivi, Table 2.

²⁶⁸ Council Directive 2009/52/EC (n 35) art 9(1). The circumstances are: (a) the infringement continues or is persistently repeated; (b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals; (c) the infringement is accompanied by particularly exploitative working conditions; (d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, third-country national with the knowledge that he or she is a victim of trafficking in human beings; (e) the infringement relates to the illegal employment of a minor.

²⁶⁹ Legislative Decree 109/2012 (n 264) art 1(1)(b)).

²⁷⁰ Ibidem.

²⁷¹ Council Directive 2009/52/EC (n 35) art 13(3).

exploitative working conditions, augmenting the risk to jeopardize the dubious protection system granted by the Directive towards undocumented migrant workers.²⁷²

Fixing these high requirements, the Italian legislation does not take into account the already existing hurdles faced by undocumented migrant workers in reporting employers. Indeed, it should be noted that when the “Rosarno Law” entered into force being an irregular consisted in a criminal offence according to the Law Decree 94/2009, thus reporting employers’ abuses could have lead to the real danger of being reported, charged with the offence of irregular entry or stay, detained and ultimately expelled.²⁷³ Several irregular migrant workers interviewed by Amnesty International reported the fear to report abuses and the difficulties in accessing justice.²⁷⁴ With the Decree Law 67/2014 the crime of illegal entry and stay lapsed and those situations were turned it into administrative offences.²⁷⁵ This change can be considered a great achievement, though it corresponds to a mere transition from “exclusion” to “stigmatization” as defined by Ambrosini.²⁷⁶

Further, the Directive establishes that employers shall be liable to pay any outstanding remuneration to the ‘illegally employed TCN’,²⁷⁷ as well as be liable to pay ‘an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed’²⁷⁸ and ‘any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.’²⁷⁹ In order to respond to cases of outstanding remuneration, MSs are required to establish that the working relation has lasted for at least three months. The Italian Law complies with this requirement; however, it does not provide precise indications on minimum wage²⁸⁰. In order to ensure the effective implementation of these provisions, it is specified that MSs shall enact mechanism to ensure TCNs may present a claim against the employer for any outstanding

²⁷² Amnesty International, *Exploited labour two years on. The ‘Rosarno Law’ fails to protect migrants exploited in the agricultural sector in Italy* (Amnesty International Publications, 2014) 10.

²⁷³ Ivi, 13.

²⁷⁴ Amnesty International, ‘Exploited labour’ (n 19) 28.

²⁷⁵ Italian Parliament, Law Decree No. 67 of 28 April 2014, ‘Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili’ GU SG 100 (2014) art 2(3(b)).

²⁷⁶ The condition of exclusion is characterized by no social recognition and by lack of formal authorization. While stigmatization means migrants still do not have social recognition but are provided with formal authorization. Ambrosini, ‘Irregular Immigration in Southern Europe’ (n 2) 17-18.

²⁷⁷ Council Directive 2009/52/EC (n 35) art 6(1(a)).

²⁷⁸ Ivi, art 6(1(b)).

²⁷⁹ Ivi, art 6(1(c)).

²⁸⁰ PICUM, *Employers’ sanctions: impact on undocumented migrant workers’ rights in four EU countries* (PICUM 2015) 8.

remuneration²⁸¹ as well as that necessary mechanisms are in place to ensure that ‘illegally employed third-country nationals are able to receive any back payment of remuneration.’²⁸² Importantly, article 6 states that irregular migrant workers ‘shall be systematically and objectively informed about their right under this paragraph’ and, under article 13, that they shall be informed before the enforcement of any return decision’.²⁸³ Article 13 represents a crucial issue, because it aims at providing irregular migrant workers with the right to lodge complaints against their employers, ‘directly or through third parties’²⁸⁴ (notably trade unions or other civil society organizations). According to the Position Paper issued by PICUM, the Italian law does not facilitate the filing complaints by undocumented migrant workers.²⁸⁵ The same critique is moved by the *Associazione per gli Studi Giuridici sull’Immigrazione* (ASGI), which underlines that even though required by the EU Directive, the Italian Law does not facilitate complaints procedure for TCNs to receive back payment nor does it establish “safe channels” to lodge complaints against employers.²⁸⁶ Additionally, the Employers’ Sanction Directive establishes additional punitive measures to employers infringing the norm, such as exclusion from entitlement to public benefits, including EU funding.²⁸⁷ By contrast, the “Rosarno Law” does not include any additional measures.

Finally, the inspection mechanism enhanced by the Directive raised particular concerns among the civil society in the sense that it entails the prominence of the immigration law enforcement over irregular workers’ labour rights.²⁸⁸ Specifically, article 14 requires MSs to ensure that effective and adequate inspections are carried out in light of risk assessments drawn up by competent authorities in order to identify the sectors under major risks.²⁸⁹ However, the Italian Legislative Decree does not establish a clear obligation of inspections based on targeted areas and production sectors at greater risk of exploitation.²⁹⁰

A further aspect of the Legislative Decree 109/2012 was its attempt to foster the transition from the informal to the formal economy. Indeed, between September 15 and October 15 2012 it gave employers the possibility regularize irregular workers paying a fixed contribution

²⁸¹ Council Directive 2009/52/EC (n 35) art 6(2(a)).

²⁸² Ivi, art 6(4).

²⁸³ Ivi, art 6(2).

²⁸⁴ Ivi, art 13(1).

²⁸⁵ PICUM, ‘Employers’ sanctions’ (n 280) 7.

²⁸⁶ Associazione per gli studi giuridici sull’immigrazione (ASGI), *The Italian legal framework against labour exploitation. A legal assessment, specifically targeting undocumented migrants* (ASGI) 10.

²⁸⁷ Council Directive 2009/52/EC (n 35) art 7.

²⁸⁸ PICUM ‘Undocumented migrants have rights’ (n 45).

²⁸⁹ Directive 2009/52/EC (n 35) art 14.

²⁹⁰ ASGI, ‘The Italian legal framework’ (n 286) 10.

of 1.000 euro per each employee in order to avoid future sanctions. This initiative of regularization was left in the employers' hands, and for this reason was condemned as discriminatory by members of the civil society as it was favouring only one among the contracting parties of the working relationship.²⁹¹ Moreover, some provisions seemed to give more relevance to employers' benefits than irregular workers' rights. In fact, instead of easing the transition to the formal economy for irregular migrant workers – which would have result in a regularization of their administrative status, too – the Law 109/2012 posed strict requirements for employees to meet, such as being able to prove their presence within the Italian territory from the 31st of December 2011²⁹² and being employed full time.²⁹³ The rationale behind these provisions is quite dubious from a human rights perspective. Besides the fact that only employers could initiate the regularization procedure, the norm did not cover the possibility for changing the employer during the procedure. It means that undocumented migrant workers were prevented to change job and were risking the procedure to fail in case of fixed-term contracts. Though the regularization represents only one aspect of the Law 109/2012, this digression shows how weak the provisions aiming at protecting undocumented migrant workers are.

3.3. Conclusions

This chapter has outlined the Italian legal framework as regards undocumented migrant workers examining relevant immigration law and labour law. In respect to international and European human rights standards, some deficiencies were remarkable. First of all, the Italian legal apparatus towards irregular migrant workers 'is scattered among different institutional entities'²⁹⁴ which deal with different aspects of migration and which legislate at different levels, both national and local, creating further internal contradictions and grey areas.

In addition, some of the legal provisions are contradictory. The Italian Constitution guarantees the right to work and the right to just and favourable working conditions to citizens and legal residing foreigners only, whereas the protection of work in "all its forms and practices" embraces the informal economy and, indirectly, might embrace undocumented migrant

²⁹¹ ASGI, *L'emersione dei rapporti di lavoro irregolari degli stranieri extracomunitari (regolarizzazione ex d.lgs. 109/2012)* (ASGI 2012) 2.

²⁹² Legislative Decree 109/2012 (n 264) art 5.

²⁹³ ASGI, 'L'emersione dei rapporti di lavoro irregolari' (n 291) 8.

²⁹⁴ Pannia, Federico, D'Amato (n 176) 27. According to the Italian Constitution, art 117, regions can regulate specific areas, such as housing, affecting irregular migrants, too.

workers. Moreover, economic rights such as the right to a fair remuneration, the right to just working hours, the right to a weekly rest and the right to paid annual holidays are guaranteed for *workers*.

The Consolidated Law on Immigration is a pillar within the Italian legislative framework. It establishes equal treatment between Italians and migrant workers, and it mentions irregular migrant workers as regards the requirements for employers to pay them fair wages as well as normal contributions and taxes. By contrast, the right to work in its dimension of access to the labour market is not protected by any means. Additionally, according to the Consolidated Law on Immigration, social security is a right belonging to Italians and TCNs legally residing only.

It has already been said that the EU Sanction Directive itself ‘focuses on the irregular status of migrant workers rather than their labour rights’²⁹⁵ rising doubts about the enforcement of the rights set out at the international level. Looking at its national transposition, several shortcomings have been detected in the “Rosarno Law”. A general feature is that undocumented migrant workers’ labour rights are overshadowed by immigration policy enforcement.

Comparing the existing protections of the rights of migrant workers in an irregular status at the international level and their degree of implementation at the national level, a strong reluctance of Italy to accept significant limitations of sovereignty in this field emerges. Particularly, in relation to labour rights and socio-economic rights, the Italian immigration laws have appeared as not assuming positive obligations beyond the protection of migrant workers clearly identifiable as victims.²⁹⁶ Thus, the fear of encouraging the “illegal entry” of TCNs for the purpose of work by recognizing them with basic rights has led to a harder position in immigration regulations. As a result, irregular migrant workers’ rights are undermined, and only the most detrimental working conditions which lead to labour exploitation are contemplated as needing attention.

²⁹⁵ See ENAR, EWL, PICUM and SOLIDAR, ‘Employers’ Sanction Directive’ (n 263).

²⁹⁶ Fulvia Staiano, ‘The undesirable worker fiction: demand-based labour migration schemes and migrant workers’ socio-economic rights’ in Giovanni Carlo Bruno, Fulvio Maria Palombino, Daniele Amoroso (eds), *Migration and development: some reflections on current legal questions* (CNR Edizioni 2016) 97, 113.

4. Enforcement of labour rights by undocumented migrant workers

This chapter aims at bridging the legal framework outlined in the previous parts with real conditions of work experienced by undocumented migrant workers. In order to achieve this outcome, insights from relevant reports are considered. Despite the fact that there exist a considerable amount of research on the precarious conditions faced by irregular migrants at work in Italy, a facet of this phenomenon is often neglected: the violation of migrants' labour rights. Adopting this angle when discussing undocumented migrants' working conditions is pivotal because it might unveil major gaps in compliance with international human rights standards which provide for tools to significantly address shortcomings.

The following paragraphs assess widespread practices affecting undocumented migrant workers. It should be noted that the examined reports in some cases recounted situations which affect equally regular and irregular migrant workers, as both of them are seen as a sole vulnerable category. Even though labour standards are generally low and minimum labor rights often violated when it comes to migrant workers, undocumented migrants are those experiencing the most detrimental working conditions. In other words, 'undocumented migrants [carry] a greater risk burden than documented migrants, while both [carry] a greater risk burden than local workers'.²⁹⁷ In this vein, it can be said that precarious working conditions are common among migrant workers, especially in some sectors as agriculture,²⁹⁸ whereas they are even worse for those lacking regular permit of stay. As working conditions of undocumented migrant workers are more precarious, acknowledging their vulnerability is necessary when defending their labour rights. Indeed, authors like Ruhs demonstrated that irregular migration status render migrants more "flexible" workers,²⁹⁹ hence at high risk of labour rights violations and exploitation.³⁰⁰

Although historically poor working conditions were perceived as an endemic problem of the South of Italy only, during the last years this rhetoric has started to change. Nevertheless,

²⁹⁷ Sonia McKay, Eugenia Markova, Anna Paraskevopoulou, Tessa Wright, *The relationship between migration status and employment outcomes* (Working Lives Research Institute, 2009).

²⁹⁸ FRA, 'Fundamental rights of migrants in an irregular situation' (n 55) 47.

²⁹⁹ Martin Ruhs, 'Immigration and labour market protectionism: protecting local workers' preferential access to the labour market' in Costello, Freedland (n 163) 60.

³⁰⁰ FRA, 'Fundamental rights of migrants in an irregular situation' (n 55) 7. See also Virginia Mantouvalou, 'Organizing against abuse exclusion. The associational rights of undocumented workers' in Costello, Freedland (eds) (n 163) 381, 384.

several reports still focus on Southern areas and labour rights violations in the North are often unnoticed.³⁰¹ To overcome this limit, the following analysis includes examples from different parts of the country.

4.1. Right to work

The Committee on Economic, Social and Cultural Rights stated in the General Comment No. 18 on the right to work that the ‘work as specified in article 6 of the Covenant must be “decent work”’.³⁰² Moreover, the Committee on the Informal Employment of the ILO asserted that to increase ‘opportunities for decent work for all, it [is] opportune to focus attention again on those engaged in work that [is] unprotected, unregistered and unrepresented’.³⁰³ Taking these provisions into account, it can be argued that decent work shall be enjoyed by everyone within the scope of article 6 of the ICESCR, which is not restricted it on the basis of regularity of status.

Decent work is more common in the formal sector and is fostered by the presence of a regular job contract.³⁰⁴ Indeed, contracts set out obligations and include provisions about workers’ rights outlining a framework which enable decent work. By contrast, the informal economy, where undocumented migrant workers are employed,³⁰⁵ accounts for the majority of deregulated working relations and hardly meets decent work standards.³⁰⁶ In this light, the transition from informal to formal sector supported by the ILO is pivotal.³⁰⁷ Even though Italy is an ILO member and it has signed important ILO conventions, it is still affected by a considerably large informal sector,³⁰⁸ which has proved difficult to eradicate. As a consequence, decent work is far from being a condition experienced by irregular migrant workers as they can access only the informal sector.

³⁰¹ Caritas Italiana, *Nella terra di nessuno. Lo sfruttamento lavorativo in agricoltura. Rapporto Presidio 2015* (Tau Editrice Srl 2015) 45.

³⁰² CESCR General Comment 18 (n 58) para 7.

³⁰³ ILO, *Report of the Committee on the Informal Economy, International Labour Conference, Provisional Record*, 19th Session (ILO 2002) 2.

³⁰⁴ ILO, ‘Resolution concerning decent work’ (n 1) para 9. See also ILO, ‘The informal economy’ (n 30) 8.

³⁰⁵ Lack of regular administrative status prevents entering the formal economy.

³⁰⁶ ILO, ‘Resolution concerning decent work’ (n 1). See also Martha Alter Chen, Renana Jhabvala, Frances Lund, *Supporting workers in the informal economy: a policy framework* (ILO Task Force on the Informal Economy 2001) 17.

³⁰⁷ ILO, Recommendation No. 204 (n 245).

³⁰⁸ In 2016, the Italian national bureau of statistics estimated informal economy to constitute up to 12,4% of the Italian GDP. ISTAT ‘Economia non osservata’ (n 33).

As explained in the previous chapter, the transition from irregular to regular administrative status in Italy is unlikely to happen on the basis of work. In other words, irregular migrants cannot access the formal economy – as they lack a regular permit of stay and a work permit – and regularize their status through their regular job. Considering this legal hurdle, which derives from the assumption that creating regular working opportunities would encourage irregular migration,³⁰⁹ it can be argued that Italy has been proven unable to protect the right to work of undocumented migrant workers as defined in article 6 of the ICESCR.

Undocumented migrant workers' right to work is affected by the Italian legislation which has increased harshening sanctions for those undocumented,³¹⁰ as discussed in the previous chapter. The fact that the total immigrant population had increased in number due to the augment of irregular migrant³¹¹ and that the occupation rate among them has equally increased,³¹² open up to critiques on the Italian law, which seems ineffective to function as intended. As a consequence, it is likely to assume that more people were subjected to labour rights violations within the country, making breaches of the right to decent work more common. Indeed, the report published by the *Associazione volontaria di assistenza socio-sanitaria e per i diritti di cittadini stranieri, Rom e Sinti* (NAGA Association) shows that the percentage of undocumented workers stabled employed in irregular jobs had dropped from 51% in 2009-2013 to 25% in 2014-2017.³¹³ In other words, as the number of employed undocumented migrant workers has increased and the number of those having a stable job was halved, it can be argued that precariousness increased at the expenses of decent work.

Moreover, the CESCR specified that the right to work 'is essential for realizing other human rights and forms an inseparable and inherent part of human dignity'.³¹⁴ In this sense, it is worth mentioning that undocumented migrant workers' right to work and human dignity are under risk as unfair recruitment practices are widespread. According to the report issued by the *Medici per i diritti umani* (MEDU), cheap labour force is recruited in so called "kalifoo rounds".³¹⁵ Group of workers, among them undocumented migrant workers, gather in

³⁰⁹ Council Directive 2009/52/EC (n 35).

³¹⁰ With the adoption of the "Rosarno Law", see chapter 3.

³¹¹ ISMU (n 16).

³¹² Carlo Devillanova, Francesco Fasani, Tommaso Frattini (eds), *Cittadini senza diritti. Rapporto NAGA 2018. Immigrazione e (in)sicurezza: la casa, il lavoro e la salute* (NAGA 2018) 29.

³¹³ Ivi, 39 As the report recounts, occasional work includes being employed for daily jobs and/or for different employers only few hours per day.

³¹⁴ CESCR General Comment 18 (n 58) para 1.

³¹⁵ Medici per i diritti umani (hereinafter MEDU), *I dannati della terra. Rapporto sulle condizioni di vita e di lavoro dei braccianti stranieri nella Piana di Gioia Tauro* (MEDU 2018).

roundabouts in the early morning waiting for gang masters to come and select them for few days of work. This informal practice has different implications: firstly, due to the disproportion between the demand and the offer of labour, the latter results being incredibly cheap; secondly, as a consequence, the offered wages are far below national established standards; and thirdly, it makes it almost impossible for workers to claim unpaid wages as they hardly know who they are working for and they cannot prove any existing working relationship. Recruitment practices at “kalifoo rounds” represents a fluid system highly dangerous for workers’ rights protection, leaving them without any guarantees and violating article 6 of the ICESCR as well.

Spending few words on gang masters is necessary as the phenomenon is recurrent. They are generally part of illegal networks of work intermediation, called “caporalato”. Despite the fact that illicit intermediation was included in the Italian penal code and currently represents a criminal offence,³¹⁶ it still represents a staple of the informal sector. As clarified by the CGIL-FLAI, the “caporalato” is generally well structured in a pyramidal organization. “Senior gang masters” “oversee” other “caporali”, who organize the work for hundreds of workers,³¹⁷ and among them undocumented migrants are highly involved. Gang masters are not only Italians, rather participation of Romanians, Moroccans and Pakistanis, among others is attested too.³¹⁸ Far from being a phenomenon occurring only in the South of Italy as it is commonly argued, “caporali” are active at the national level and provide workforce trans-regionally, too. Notably, gang masters from the Veneto region are able to move convoys of workers to Emilia-Romagna and Tuscany in order to perform few days or one week of work.³¹⁹

It should be noted that this system tried to include some elements of legality through the use of cooperatives, which provide workers with job contracts – usually only for very few days of work – for employees who are harvesting or picking up products in the fields of bigger companies.³²⁰ In this way, “grey” and “black” work coexist and this system makes illicit practices harder to unveil. However under different forms, the involvement of gang masters worsen working conditions of labourers, as they sharply reduce the salary and in some cases involve blackmailing.³²¹ Finally, it should be noted that the “caporalato” is not a hidden

³¹⁶ Law 199/2016 (n 169).

³¹⁷ CGIL, FLAI, *Agromafie e Caporalato. Quarto Rapporto* (Bibliotheka Edizioni 2018) 141.

³¹⁸ Ivi, 164-165.

³¹⁹ Ivi, 161.

³²⁰ Ibidem.

³²¹ Ivi, 225.

phenomenon occurring in forgotten areas of Italy, rather it often has a place in the supply chain of companies having international businesses.³²²

4.2. Right to just and favourable working conditions

Unsurprisingly, the absence of job contracts is related to poor working conditions too. Indeed, the normative framework which regulates the relation between employers and employees, outlining rights and duties of both parts preventing abuses of power and/or exploitation, is missing. Hence, there exist room for breaches of the international human rights law, in particular of article 7 of the ICESCR and of article 31 of the EU Charter.

As discussed in chapter 3, undocumented migrant workers are not to be considered as helpless victims;³²³ rather in many cases, they decide to bear tough working conditions. This perspective is sustained by the findings of the survey conducted by ISFOL. It reported that almost 50% of interviewed irregular migrant workers would accept long working hours in order to work.³²⁴ The same percentage would work even without contract,³²⁵ and almost 40% would accept low wages.³²⁶ This inquiry demonstrates that to confront the necessity to make ends meet, a large number of irregular migrant workers may accept unfair working conditions.³²⁷ This propensity might be related to the impossibility to have access to different sources of income, such as social services, making low wages earned performing irregular jobs the only available means to live. Therefore, there is a real and urgent need for raising awareness about minimum labour standards everyone is entitled to enjoy.

As the right to just and favourable working conditions embraces different rights, their implementation or violations need to be discussed separately. In doing so, the ILO Committee of Experts on the Application of Conventions following statement is meaningful:

‘[W]hether or not [workers] situation is lawful, the workers covered by the Convention have rights in relation to conditions of work and should be able to benefit from the same protection in certain fields, such as wages, working time

³²² Ibidem.

³²³ Ambrosini, ‘Irregular immigration in Southern Europe’ (n 2).

³²⁴ Tagliaferro (n 32) 53.

³²⁵ Ibidem.

³²⁶ Ibidem.

³²⁷ Ibidem.

and health and safety at the workplace. Workers [...] should not hesitate to turn to inspectors by reason of any lack of clarity in their legal situation'.³²⁸

4.2.1. The right to fair wages

M. B. is an undocumented migrant from Burkina Faso interviewed by MEDU in the Gioia Tauro area, who reported to be working in the orange picking sector 8 hours per day for a daily wage of 27 Euros.³²⁹ This means less than 3.50 Euros per hour, whereas the minimum wage per hour in the agricultural sector is slightly more than 7 Euros.³³⁰ L. K. from Guinea reported he was paid only 25 Euros per day.³³¹ Similarly, ISFOL's survey found that 55% of irregular migrant workers did not receive fair wages and accounted cases in which workers were not able to claim the agreed wage.³³² Far from being exhaustive, further examples are provided in this section.

In Migrazione, which has conducted quantitative and qualitative surveys in the area of Latina since 2010, reported a critical situation concerning the Sikh community settled in this area. About 12.000 people are considered belonging to this community; however, as many migrants lack regular status, CGIL counted about 30.000 people.³³³ Harsh working conditions seem to be common among both regular and irregular Sikh migrant workers who are generally employed in the agricultural sector, being paid between 2 and 5 Euros per hour.³³⁴ Unsurprisingly, those experiencing more unfair wages are migrant workers lacking regular residence permit. Low wages are documented also by Blasetti, who conducted a survey in the same area in 2017³³⁵ which reported workers being paid between 2.5 and 4 Euros per hour.³³⁶ As similar working conditions were recounted in 2010 as well as in 2017, lack of improvements in migrant workers' rights is symptomatic of the poor enforcement of Italian

³²⁸ ILO Committee of Experts on the Application of Conventions and Recommendations, *Direct Request concerning the Labour Inspection Convention, 1947 (No. 81): Italy*, adopted 2004, published 93rd ILO session (2005).

³²⁹ MEDU (n 315) 20.

³³⁰ Contratto Collettivo Nazionale di lavoro (CCNL) per gli operai agricoli e florovivaisti <flai.it/wp-content/uploads/2018/10/CCNL_operai_agricoli_e_florovivaisti2014.pdf> accessed 10 June 2019.

³³¹ MEDU (n 315) 28.

³³² Tagliaferro (n 32) 56.

³³³ In *Migrazione*, *Doparsi per lavorare come schiavi. Un esercito di braccianti indiani sikh sfruttati e costretti a doparsi per sopportare la fatica dei campi e le violenze dei "padroni", a pochi chilometri dalla Capitale* (In *Migrazione* 2014) 2.

³³⁴ In *Migrazione*, *Punjab. Fotografia delle quotidiane difficoltà di una comunità migrante invisibile* (In *Migrazione*) 3.

³³⁵ Eugenia Blasetti, *Migrazioni e intermediazione del lavoro: il caso della comunità Sikh a Sabaudia* (Master Thesis 2017) 166.

³³⁶ Ivi, 168.

laws, which have proved being unable to tackle the informal sector and its poor working conditions.

As aforementioned, labour rights violations in the agricultural sector do not occur in forgotten areas. Instead, in many cases they take place within an international supply chain or affect prestigious companies. Indeed, undocumented migrant workers have been reported working in the Franciacorta area, where the homonymous prestigious wine is produced.³³⁷ As documented by the FLAI-CGIL, irregular workers are paid up to 4 Euros per hour less than what is established by the *Contratto Collettivo Nazionale di Lavoro* (CCNL).³³⁸ Additionally, the cost of facilities used to prevent accidents as well as working tools (e.g. scissors) are taken from workers' salaries,³³⁹ further reducing them.

The same province, Brescia, and the province of Bergamo together host 32% of domestic production of washed and packed salad. Although this sector belongs to the industrial one and workers should enjoy corresponding wages in line with this category, they have reported to receive salaries in line with the agricultural sector, even though they are not picking fruit nor harvesting.³⁴⁰ This practice is unfavourable for regular migrant workers as they are paid lower wages, and for undocumented migrant workers, as not only the wage is referred to agricultural standards, but it is lower because they lack legal status. Therefore, what they received is disproportionately low and in violation of the right to equal pay for equal work.

The right to fair wages is reported to be violated in many other regions of Italy. In the province of Forlì-Cesena undocumented migrant workers are hired seasonally, often through a “caporale” and are paid between 25 and 50 Euros per day of 10 hours, according to which different expenses gang masters decide to cut from their wages.³⁴¹ In this province workers have reported to be victims of threats and blackmail by gang masters who in some cases were using violence to intimidate them.³⁴² A similar situation was recounted by the Public Prosecutor of Cuneo province, who denounced the “capolarato” phenomenon in the Saluzzo

³³⁷ CGIL, FLAI (n 317) 138.

³³⁸ Ibidem.

³³⁹ Ivi, 142.

³⁴⁰ Ivi, 145-146.

³⁴¹ Ivi, 158.

³⁴² Ivi, 167.

area, where migrant agricultural workers reported to be paid less than 5 Euros per hour for fruit picking.³⁴³

Similarly, in the Siena and Grosseto provinces around 15.000 workers are estimated working in oil and wine sectors,³⁴⁴ and around 20% of workers are estimated being undocumented migrant workers.³⁴⁵ Notably, undocumented seasonal workers are those facing lower wages, which can vary from 40/45 Euros per 10 hours of work down to 20/25 Euros in cases workers are threatened to be reported to the police.³⁴⁶ In the Basilicata region, in 2017 the practice to informally hire labourers daily was still widespread.³⁴⁷ People willing to work, among them undocumented migrant workers, showed up in the early morning in precise points of the city, the so called “kalifoo rounds”.³⁴⁸ Gang masters arrive and pick randomly some of them who were subjected to the price offered by “caporali”.³⁴⁹ At the end of the day, it was commonly reported they received only part of the promised salary, as expenses such the transport and bottles of water were charged to workers.³⁵⁰ In the worst cases they received only 20 or 25 Euros for 8 to 10 hours of work.³⁵¹

The widespread practice of piecework should be mentioned too as it worsen working conditions. According to this system, workers are paid 0.50 Euros per crate of oranges and 1 Euro per crate of tangerines they fill in a working day.³⁵² Piecework has a two-fold effect: it reduces daily wages, and it requires workers to endure incredibly high pace of work. Indeed, almost 90% of the workers reported by MEDU being paid for piecework received a daily wage between 25 and 30 Euros,³⁵³ far below what prescribed by the CCNL. According to what interviewees asserted to FLAI-CGIL, daily wages can be around 15 or 20 Euros for 10 to 14 working hours.³⁵⁴

According to a worker interviewed in Sicily, ‘a crate weights around 20/22 kilos when it is filled with oranges or lemons. I can fill 50 to 60 crates per day, even though reaching 60 is

³⁴³ Redazione Saluzzo Migrante, ‘Il caporalato: realtà anche nel Saluzzese’, (2019) Saluzzo Migrante <saluzzomigrante.it/2019/05/22/caporalato-saluzzo/> accessed 10 June 2019. See also Caritas (n 301) 186.

³⁴⁴ CGIL, FLAI (n 317) 187.

³⁴⁵ Ivi, 179.

³⁴⁶ Ivi, 180-181.

³⁴⁷ Ivi, 270.

³⁴⁸ Ibidem.

³⁴⁹ Ibidem.

³⁵⁰ Ivi, 272-273.

³⁵¹ Ivi, 273.

³⁵² MEDU (n 315) 28.

³⁵³ Ibidem.

³⁵⁴ CGIL, FLAI (n 317) 241.

very hard. It means that I have only few minutes of break and I have to eat fast'.³⁵⁵ The unsustainable rhythm, longer working hours and lack of breaks are all results of this way of payment, and lead to the violation of minimum labour standards and the right to enjoy safe working conditions.

As these cases show, not only are the wages of undocumented migrant workers half of what is established in the CCNL,³⁵⁶ but workers also asserted they were not being paid monthly either. Rather, they receive 100 to 200 Euros occasionally instead of receiving what employers have promised them.³⁵⁷ The agreed wages sometimes were written in white papers with no indication of the company nor signature of the employer, making harder to claim unpaid wages.³⁵⁸ As *In Migrazione* pointed out, delays in payments are incredibly common and represent a tool to prevent irregular workers to leave as they would lose everything. In this way, undocumented migrant workers keep working hoping to receive back payments.³⁵⁹ As several Sikh members reported, after 4 to 7 years they were still waiting to be paid back wages.³⁶⁰ Considering the work they have performed and wages they have been paid, they are not only experiencing poor labour conditions, rather they are systematically exploited.³⁶¹

Similar violations have been reported by Moroccan workers to the FLAI-CGIL of the province of Forlì-Cesena. Despite having been promised a monthly wage of 1.000 Euros as well as a regular working permit,³⁶² they received only occasional payments of 100 or 200 Euros for their full time job.³⁶³ As noted by the FRA, the main hurdle to receive back payment is usually the 'difficulty in proving a work relationship'.³⁶⁴ Therefore, it can be concluded that the right to fair wages of irregular migrant workers is violated in several cases as well as their right to receive back payments.

³⁵⁵ Ivi, 274.

³⁵⁶ CCNL per gli operai agricoli e florovivaisti (n 330).

³⁵⁷ *In Migrazione* 'Punjab' (n 334) 3-4.

³⁵⁸ *In Migrazione*, 'Sfruttati a tempo indeterminato' (2014) <inmigrazione.it/UserFiles/File/Documents/109_SFRUTTATI%20A%20TEMPO%20INDETERMINATO.pdf> 6.

³⁵⁹ Ivi, 12.

³⁶⁰ Ivi, 7-10.

³⁶¹ Ivi, 10.

³⁶² CGIL, FLAI (n 317) 166.

³⁶³ *Ibidem*.

³⁶⁴ FRA, 'Fundamental rights of migrants in an irregular situation' (n 55) 50.

4.2.2. Right to rest and leisure, weekly rest and annual paid holidays

In parallel to low wages, the examples already provided show that undocumented migrant workers often are not entitled to enjoy breaks in order to rest. According to the CESCR, ‘rest during the day is important to the health and safety of workers and therefore legislation should identify and protect rest periods during the work day’.³⁶⁵ Although the Italian legislation regulates daily rest periods,³⁶⁶ these provisions are not properly enforced, resulting in lack of workers’ rights protection.

Not only are breaks not common for undocumented migrant workers, but daily hours of work are not in line with what is established by the Italian legislation. Notably, the CCNL establishes that agricultural workers shall work 39 hours per week, equal to 6.5 hours per day. Exceeding working hours should not surpass 3 hours per day and 18 hours per week and should be paid more than regular working hours.³⁶⁷ Nevertheless, interviews and surveys show that these standards are not taken into consideration when employing undocumented migrant workers.³⁶⁸ Moreover, the CCNL protecting agricultural workers clarifies that they are entitled to 24 hours of weekly rest that should preferably correspond with Sundays.³⁶⁹

Incredibly long working hours are performed by Sikhs in the Latina area, as explained by *In Migrazione*.³⁷⁰ Community members reported to be working 12 hours per day, and occasionally up to 15 hours, without any day dedicated to weekly rest.³⁷¹ In order to bear the activity of vegetable picking for so many hours, several workers have reported to use drugs to

³⁶⁵ CESCR General Comment No. 23 (n 64) para 38.

³⁶⁶ Italian Parliament, Legislative Decree No. 66 of 2003 ‘Attuazione delle direttive 93/104/CE e 2000/34/CE concernenti taluni aspetti dell’organizzazione dell’orario di lavoro’ entry into force 29 April 2003 <gazzettaufficiale.it/eli/id/2003/04/14/003G0091/sg> accessed 10 June 2019. This law provides for at least 10 minutes of rest every 6 hours.

³⁶⁷ CCNL per gli operai agricoli e florovivaisti (n 330) art 42. According to art 42 exceeding hours should be paid 25% more. Work on Sundays should be paid 35% more. Exceeding working hours on Sundays 40% more. For employees of cooperatives and agricultural consortium see CCNL per i lavoratori dipendenti delle cooperative e consorzi agricoli <flai.it/wp-content/uploads/2019/02/CCNL-Cooperative-e-consorzi-agricoli-2016-2019.pdf> accessed 10 June 2019, 52; for workers employed in fruit companies see CCNL per i dipendenti da aziende ortofrutticole ed agrumarie <flai.it/wp-content/uploads/2018/08/CCNL_Ortofrutta2019_FLAI.pdf> accessed 10 June 2019. Art 48 establishes that workers shall work 40 hours per week, 8 hours per day. Workers cannot work for longer than 10 hours per day. Exceeding hours shall be paid 35% more and 42% more if performed on Sundays.

³⁶⁸ MEDU (n 315) 29; Tagliaferro (n 32) 62.

³⁶⁹ CCNL per gli operai agricoli e florovivaisti (n 330) art 35.

³⁷⁰ In Migrazione ‘Sfruttati a tempo indeterminato’ (n 358) 3; In Migrazione ‘Doparsi per lavorare’ (n 333) 2.

³⁷¹ In Migrazione ‘Doparsi per lavorare’ (n 333) 4.

handle fatigue and pain.³⁷² More recently, Blasetti recounted that the Sikh working in Latina were working for an average of 10 to 12 hours per day, 7 days per week without weekly rest and without annual paid holidays.³⁷³ In 2018, in the Gioia Tauro area the situation was analogous, as MEDU reported that 34% of the interviewees were working 7 days per week, without having any weekly rest.³⁷⁴

Similar unsustainable long working hours are reported in several regions of Italy by the FLAI-CGIL inquiry. Indeed, spending 10 hours working in the field to pick up vegetable or fruit is sadly common,³⁷⁵ whereas according to the national legislation agricultural workers should work 6.5 hours per day.³⁷⁶ Numerous undocumented migrants reported to work 12, 14 or even up to 16 hours per day during the season peak.³⁷⁷ S., from Ivory Coast, who in the summer of 2017 was working in the Basilicata region, reported he was working from 5 a.m. to 4 p.m. with 20 minutes break for lunch.³⁷⁸ In Sicily, undocumented migrant workers are in the fields from 10 to 12 hours per day, and many of them work on Saturdays and on Sundays as well, without any day dedicated to weekly rest.³⁷⁹

4.2.3. Right to safe and healthy working conditions

The CESCR stated that ‘preventing occupational accidents and diseases is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health’.³⁸⁰ It also clarifies that employers are responsible to protect the health and safety of workers.³⁸¹ Looking at the national level, the Italian legislation is overall in line³⁸² with these

³⁷² Ivi. See also In Migrazione ‘Sfruttati a tempo indeterminato’ (n 358) 12; Angelo Mastrandrea, ‘Gli schiavi della Little India pontina’ *Internazionale.it* <internazionale.it/reportage/angelo-mastrandrea/2015/06/11/pontina-sikh> accessed 10 June 2019.

³⁷³ Blasetti (n 335) 167.

³⁷⁴ MEDU (n 315) 29.

³⁷⁵ FLAI, CGIL (n 317) 12, 139, 153, 157, 171, 176, 218, 238, 248, 255, 260.

³⁷⁶ CCNL per gli operai agricoli e florovivaisti (n 330) art 34.

³⁷⁷ FLAI, CGIL (n 317) 246.

³⁷⁸ *Ibidem*.

³⁷⁹ Ivi, 259.

³⁸⁰ CESCR, General Comment No. 23 (n 64) para 25.

³⁸¹ Ivi, para 28.

³⁸² Italian Parliament, Legislative Decree No. 626 of 19 September 1994, ‘Attuazione delle direttive 89/391/CEE, 89/654/CEE, 89/655/CEE, 89/656/CEE, 90/269/CEE, 90/270/CEE, 90/394/CEE, 90/679/CEE, 93/88/CEE, 95/63/CE, 97/42/CE, 98/24/CE, 99/38/CE, 99/92/CE, 2001/45/CE, 2003/10/CE, 2003/18/CE e 2004/40/CE riguardanti il miglioramento della sicurezza e della salute dei lavoratori durante il lavoro’ GU SG 265 (1994) <<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1994;626>> accessed 10 June 2019; and Italian Parliament, Legislative Decree No. 81 of 9 April 2008, ‘Attuazione dell’articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro’ GU SG 101

provisions and with the European directives regulating workers' safety. However, shortcomings in law enforcement are blatant.

As reported by doctors of the MEDU, several patients were affected by diseases which seem related to their work.³⁸³ For example, they recounted that 22% of the assisted migrant workers in the Gioia Tauro area suffered from respiratory problems and another 21% of them have osteoarticular diseases related to intense workload, according to doctors³⁸⁴. Dubious working conditions affected the health of migrant workers, especially in those cases where they lack safe equipments such as gloves and masks when entering into contact, for example, with chemicals used in agriculture.³⁸⁵ Similarly, the heavy fruit crates they are required to move from fields to lorries as well as the pace they need to sustain in order to satisfy the requirements of piecework can be hint to be at the basis of the oasteoarticular issues.³⁸⁶

As an example, in Tuscany, the FLAI-CGIL has reported that many groups of workers lack the proper outfit to perform their job in the fields. Indeed, many work without gloves, proper shoes or coveralls, being exposed to higher risk to enter into contact with chemicals or to be injured.³⁸⁷ Unfortunately this is not the only case; rather, it is common for undocumented migrant workers employed in the agricultural sector to enter into contact with pesticides and agrochemicals.³⁸⁸ As irregular workers are rarely provided with gloves and safety kits, respiratory distress and allergies are widespread.³⁸⁹ Working conditions are more serious when employees are working in greenhouses, where not wearing a mask can be extremely dangerous for their health.³⁹⁰

It should be noted that long working hours are often performed under scorching sun. An undocumented migrant worker interviewed by trade unions reported that in the month of August 2017 the sun seriously burned him. As a result, he fell sick, and the gang master dismissed him.³⁹¹ Serious burns which require few days of treatment affected several migrant

(2008) < [accessed 10 June 2019.](http://normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2008-04-09;81!vig=)

³⁸³ MEDU (n 315) 34.

³⁸⁴ Ivi, 7.

³⁸⁵ Ivi, 34.

³⁸⁶ In Migrazione 'Sfruttati a tempo indeterminato' (n 358) 15.

³⁸⁷ FLAI, CGIL (n 317) 187.

³⁸⁸ In Migrazione 'Sfruttati a tempo indeterminato' (n 358) 15.

³⁸⁹ MEDU (n 315) 34.

³⁹⁰ FLAI, CGIL (n 317) 279.

³⁹¹ Ivi, 246.

workers, compromising their ability to work.³⁹² Moreover, undocumented migrant workers, especially those working in greenhouses, have reported serious cases of dehydration.³⁹³ Unhealthy and unsafe working conditions are a violation of the article 7 of the ICESCR and put under serious risks migrants' lives.

4.3. Right to file complaints against employers in case of abuses

The previous chapter underlined the shortcomings of the Legislative Decree No. 109 of 2012 which jeopardizes the already low protection system of the European Employers' Sanction Directive due to its formulation. Because of the precarious conditions of work of undocumented migrants, characterized by daily work and high mobility, irregular migrant workers can hardly prove the existence of a working relationship and hardly know the name of their employer. As the requirements to file complaints of the "Rosarno Law" do not take into account these elements, it does not facilitate the filing complaints against employers for abuses, indirectly worsening working conditions and fostering labour exploitation.³⁹⁴ In this sense, the Italian legislation restricts the impact of the provisions of the Employer Sanction Directive which are 'intended to facilitate access to justice by victims of abusive or exploitative [labour] conditions'.³⁹⁵

The ISFOL's survey clearly shows that more than 43% of irregular migrant workers would not report labour rights violations.³⁹⁶ Additionally, a further 24% did not answer this question, and 18% said they would report them but did not know to whom.³⁹⁷ Interestingly, among those who gave a negative answer, almost 60% admitted the reason was that they fear to lose their job, and another 21% asserted that their rights were not protected in Italy.³⁹⁸ These findings unambiguously shed light on different aspects: mistrust towards Italian authorities, lack of knowledge about the possibility to file complaint against employers, low awareness about labour rights and serious subordination to employers who are often feared.

³⁹² Ibidem.

³⁹³ Ivi, 247-248.

³⁹⁴ Amnesty International 'Exploited labour two years on' (n 272) 15.

³⁹⁵ FRA 'Fundamental rights of migrants in an irregular situation' (n 55) 53.

³⁹⁶ Tagliaferro (n 32) 65.

³⁹⁷ Ivi, 51.

³⁹⁸ Ivi, 66.

Similar hurdles are outlined by the FRA as regards access to justice by undocumented migrant workers. Notably, fear of detection, especially when courts cooperate with immigration enforcement authorities, security of residence – even though in Italy irregular migrants should be provided with a temporary permission of stay for the duration of proceedings for labour disputes – low rights awareness and evidence requirements are factors that are impacting on irregular migrant workers ability to enjoy their right to file complaints.³⁹⁹

These factors unveil the reluctance to denounce poor working conditions and labour rights violations. As an example, trade unions of the areas of Ravenna and of Forlì-Cesena noted that beside the fact that only few workers do report violations, afterwards many of them refuse to formally file a complaint.⁴⁰⁰ The CGIL-FLAI articulates that as the work they perform is the only source of revenue allowing them to live,⁴⁰¹ a proceeding can hinder their sole income. For instance, during the last three years around 300 people reported detrimental working conditions, but only 15 have filed a formal complaint.⁴⁰² Moreover, attention is still focused on serious cases constituting exploitation, neglecting that minimum labour rights shall be enjoyed by every human being and that even less serious violations are human rights violations which need to be denounced. Indeed, really poor working conditions not related to exploitation are difficult to denounce,⁴⁰³ diminishing undocumented migrant workers' rights protection.

The same trend is found in the Siena and Grosseto provinces. Although trade unions were supporting undocumented workers in filing complaints, many irregular migrants had “cold feet” when it came to formalize the complaint.⁴⁰⁴ Undocumented migrant workers fear not being able to find another job because of the stigmatization of a complaint, in their opinion, would carry on.⁴⁰⁵ Moreover, as reported by the FRA, when workers try to access justice they also often face lack of sensitivity from authorities, and detention practices for immigration control are commonly enforced.⁴⁰⁶ Cases of victims being detained for immigration control

³⁹⁹ FRA ‘Fundamental rights of migrants in an irregular situation’ (n 55) 53-55.

⁴⁰⁰ CGIL, FLAI (n 317) 168.

⁴⁰¹ Ibidem.

⁴⁰² Ivi, 169.

⁴⁰³ Ivi, 172.

⁴⁰⁴ Ivi, 192.

⁴⁰⁵ Ibidem.

⁴⁰⁶ FRA, *Severe labour exploitation: workers moving within or into the European Union. State's obligations and victims' rights* (FRA 2015) 84.

reasons and cases of authorities ‘failing to identify a situation of exploitation and assist the victim’⁴⁰⁷ have been documented in Italy.

The fact that undocumented migrant workers distrust Italian authorities in general is supported by cases of migrants running away from work places during labour inspections, fearing to be reported for their irregular administrative status.⁴⁰⁸ According to the ILO Labour Inspection Convention, which Italy ratified in 1952, labour inspections have three functions, among them monitoring the ‘enforcement of the legislation on conditions of work [and provide] technical advice and information on its application’.⁴⁰⁹ With respect to Italy, the ILO Committee of Experts clearly stated that ‘the primary duty of labour inspectors is to protect workers and not to enforce immigration law’.⁴¹⁰ Additionally, it articulates that: ‘[T]he role of the labour inspectorate [...] is not to control the lawfulness of the employment relationship, but the conditions under which the work is performed’.⁴¹¹ Nevertheless, according to Amnesty International ‘rather than focusing on monitoring working conditions, as prescribed under international law, labour inspections in Italy instead prioritize the detection of irregular migrant workers’.⁴¹² Similar concerns were raised by the ILO Committee, which critically reported that

‘systematically involving labour inspectors in coordinated operations to combat illegal employment does nothing to promote a climate of confidence, which is necessary if cooperation on the part of workers with an irregular status of residency is to be achieved [...]. On the contrary, it represents an obstacle to the opportunities for inspectors to obtain information regarding the conditions of work experienced by these workers.’⁴¹³

To conclude, it can be argued that accessing justice and filing complaints result difficult and risky for undocumented migrant workers, who often fear disproportionate consequences related to their administrative status and see their rights jeopardized.

⁴⁰⁷ Ivi, 84-85.

⁴⁰⁸ Amnesty International, ‘Exploited labour’ (n 19) 32.

⁴⁰⁹ ILO, *Labour Inspection Convention No. 81* (ILO 1947) art 3.

⁴¹⁰ ILO Committee of Experts on the Application of Conventions and Recommendations, *General Survey on Labour Inspection*, published 95th ILC session (2006), para 78.

⁴¹¹ ILO ‘Direct Request concerning the Labour Inspection Convention’ (n 328).

⁴¹² Amnesty International ‘Exploited labour’ (n 19) 33. This is reflected in official statistics: according to the Italian government, in 2011 more than 164.000 workers have been found to be unregistered, “of which 2.095 were foreigners in an residing irregularly”. Ministry of Labour and Social Policy, *Analisi di impatto della regolamentazione (AIR)*, annexed to the Draft Legislative Decree implementing Directive 2009/52/CE, submitted to the Senate on 17 April 2012. See also Caritas (n 301) 55.

⁴¹³ ILO ‘Direct Request concerning the Labour Inspection Convention’ (n 328) 516.

4.4. Conclusions

Undocumented migrant workers' minimum rights as regards the right to work and the right to just working conditions are proved to be systematically violated. Throughout the country different levels of breaches have been registered by trade unions, associations of doctors and NGOs. These witnesses unveil poor enforcement of the existing norms establishing minimum labour rights.

As the discussed reports documented, the most detrimental working conditions affect undocumented migrant workers precisely because of their vulnerable position which makes it difficult for them to enjoy basic labour rights. Indeed, low wages, long working hours, no reasonable breaks during working day, no weekly rest, inability to claim back payments and unhealthy working conditions are all too common. Moreover, distrust, social confinement and fear of being detected by and being denounced to authorities in general are factors which discourage undocumented migrant workers to report abuses of employers. Sadly, detrimental and sometimes exploitative working conditions were normalized by unscrupulous employers and their entourage, and were accepted by undocumented migrants as the informal economy is the only sector they can enter. These conditions are intolerable from a human rights perspective as they harm human dignity and undermine human rights, in the sense that their universality is neglected.

5. Conclusions

It is “relatively uncontroversial” that at the International level nationals and non-nationals are equally entitled to enjoy human rights.⁴¹⁴ Notably, non-discrimination is an overarching principle embedded in major UN human rights instruments, and *ad hoc* Conventions – such as the ICRMW – have been adopted in order to protect migrant workers, who are considered being at greater risk of poor working conditions and exploitative treatment,⁴¹⁵ especially if undocumented.⁴¹⁶ Additionally, more recent initiatives, such as the New York Declaration and the Global Compact for Safe, Orderly and Regular Migration, promote comprehensive policies in order to address migrant workers’ vulnerabilities,⁴¹⁷ and directly protect irregular migrants’ rights in certain provisions too.⁴¹⁸

In the same vein, the role of the ILO is pivotal as since its inception it has recognized that undocumented migrant workers are ‘particularly vulnerable to discrimination, exploitation and abuse. Those in an irregular situation are even more vulnerable’.⁴¹⁹ Accordingly, ILO Conventions and Recommendations do not differentiate between nationals and non-nationals, unless otherwise stated,⁴²⁰ and the ILO labour standards ‘are central to the dignity and rights of *all* migrant workers’.⁴²¹ This means that a ‘wide range of international labour standards, including fundamental Conventions [...] on employment policy, wages, private employment agencies [and] labour inspections’⁴²² represent clear universal benchmarks which should apply to *all* workers. For instance, at the international level there are numerous exhortations for the enforcement of the non-discrimination principle, and a strong acknowledgment of migrant workers precarious conditions⁴²³ and of irregular migrants vulnerable position. Nevertheless, the high standards set out still have weaknesses in norms enforcement.⁴²⁴

⁴¹⁴ Shauna Olney, Ryszard Cholewinski, ‘Migrant workers and the right to non-discrimination and equality’ in Costello, Freedland (n 163) 259.

⁴¹⁵ *Ibidem*.

⁴¹⁶ CESCR, ‘Duties of States’ (n **xx**) para 3

⁴¹⁷ Global Compact (n 83) para 23.

⁴¹⁸ New York Declaration (n 78).

⁴¹⁹ Olney, Cholewinski (n 414) 265.

⁴²⁰ International Labour Conference, Resolution concerning a fair deal for migrant workers in a global economy (92nd Session 2004) para 28.

⁴²¹ ILO Working Group on Labour Exploitation at FRA, *Note on the dignity and rights of migrant workers in an irregular situation*, Conference on dignity and right of irregular migrants (21-22 November 2011).

⁴²² Olney, Cholewinski (n 414) 265 (emphasis added).

⁴²³ UNHRC, ‘Report of the Special Rapporteur’ (n 3) para 74.

⁴²⁴ Olney, Cholewinski (n 414) 260.

As regards the regional framework, the CoE and the FRA aim at raising awareness and calling to both fill the lack of information on types of violations' migrant workers, undocumented included, are affected by,⁴²⁵ and to enforce international human rights standards.⁴²⁶ However, the latter is hardly met as the main instrument for the protection of economic rights, the ESC, has a narrow scope of application, and because the FRA performs monitoring tasks, therefore it cannot go beyond recommendations and raising awareness activities.

In parallel, the EU Charter protects a limited set of irregular migrant workers' rights, which ultimately are guaranteed essentially in abstract. In fact, the EU "security" approach focuses on border protection and expulsion of irregular migrants, favouring immigration law enforcement rather than human rights' compliance. Indeed, at a European regional level, 'it is more common for regional instruments to advocate for a "protection with consequences approach"'⁴²⁷ which 'lack of initiative and guidance so as to ensure the possibility of practical [...] enforcement of [human] rights'.⁴²⁸ Therefore, undocumented migrant workers are more exposed to labour rights violations as they are not provided with procedures which ensure their enjoyment of labour rights in practice.

Looking at the national legislation, it can be argued that the protection of undocumented migrant workers' rights is particularly weak. Firstly, the Italian Constitution only ensures the right to work and the right to just and favourable working conditions to citizens.⁴²⁹ However, economic rights are characterized by a general wording which might leave a considerable interpretative ground, potentially enabling undocumented migrant workers to fall under the scope of labour norms.

Secondly, immigration law adopted a "security" approach mirroring the European one. Therefore, legal pathways for TCNs to enter Italy are available for high-skilled workers mainly, whereas for other workers is difficult to obtain a regular entry visa and a work permit. In this sense, the Italian "flow decree" might fill this gap. Nevertheless, it has proved to be unable to face the internal labour demand. For instance, immigration law failed to acknowledge its labour dimension, especially concerning low-skill occupations, resulting in migration itself shaping migration and labour laws dealing with TCNs.

⁴²⁵ CHR, 'The human rights of irregular migrants in Europe' CommDH/IssuePaper(2007)1 (2007) 8.

⁴²⁶ Ivi, 9-10. PACE 'Resolution 1509/2006' (n 9) para 5.

⁴²⁷ Dewhurst (n 25) 228.

⁴²⁸ Ibidem.

⁴²⁹ Costituzione della Repubblica Italiana (n 179) art 4.

Thirdly, few economic rights regarding irregular migrant workers have been included in the Italian labour law. Notably, equality of treatment between Italians and migrant workers,⁴³⁰ the right for irregular workers to be paid,⁴³¹ and the right to file complaints against employers in case of abuses⁴³² shall be guaranteed for irregular migrant workers. Nevertheless, comparing the set of human rights undocumented migrant workers should enjoy according to the international law with the Italian framework highlights the limited set of protections they might access under the Italian legislation. The gap is primarily normative as numerous labour rights are set out in CCNLs, which differentiate per category of workers, and whether undocumented migrant workers fall under the scope of CCNLs is still controversial.

Overall, the evaluation of the Italian legislation providing for minimum human rights for undocumented migrant workers suggests that only certain standards have been established, and that lacks are evident as many aspects of the right to just and favourable conditions of work are enshrined in norms which are not yet unanimously claimed to apply to irregular migrants too. Moreover, when transposing the Employers' Sanction Directive the Italian legislator clearly favoured a narrow approach, restricting the already weak protections established at the European level. Restrictions are symptomatic of the persistent "security" angle Italy pursued and it might be considered the legacy of the criminalization of "illegal entry and stay".

The cases assessed in the previous chapter show that undocumented migrant workers are largely involved in the informal labour market. Their presence demonstrate that demand '[exists] in low wage occupation'.⁴³³ Nevertheless, Italy 'has met its demand in low skill occupations',⁴³⁴ through repeated mass regularizations of undocumented migrant workers.⁴³⁵ The *ex post* migration management and the inability in meeting labour demand have reinforced the links between irregular status and the informal economy, providing the latter with incredibly cheap and flexible labour as few minimum rights are established for undocumented migrant workers. Importantly, these few labour rights have been documented to be violated in numerous cases because of lack of human rights law enforcement, hampered

⁴³⁰ Consolidated Act on Immigration (n 209) art 2(1).

⁴³¹ *Ivi*, art 3.

⁴³² Council Directive 2009/52/EC (n 35).

⁴³³ PICUM, *Undocumented migrants and the Europe 2020 strategy: making social inclusion a reality for all migrants in Europe* (PICUM 2015) 5

⁴³⁴ Anna Triandafyllidou, Sabrina Marchetti, 'Europe 2020: addressing low skill labour migration at times of fragile recovery' [2014] Robert Schuman Centre for Advocacy Studies, 2.

⁴³⁵ *Ibidem*.

by different contingencies, varying from narrow formulations of the norms to a “protection with consequences approach” which discourage undocumented workers to claim their rights. Indeed, as Dewhurst explained, ‘the chilling effect of being exposed to the consequences of irregularity undermines the protective effect of the approach’⁴³⁶ and the ‘impact [of] this approach on irregular immigrants is not much different to the “non-protection approach”’.⁴³⁷

As regards human rights compliance, ETUC argues that ‘international [human rights] standards are intended to protect *all* migrants [...] but [...] in Europe [...] they are either not ratified or poorly enforced’.⁴³⁸ This statement is in line with the findings of the case study of this research: although Italy has ratified main UN Conventions and numerous ILO Conventions – No. 143 being among them – shortcomings in human rights enforcement have been found and even though few rights are guaranteed under the Italian legislation, they are often breached.

Main concerns regard the violation of the right to work enshrined in article 6 of the ICESCR. Decent work is not guaranteed to undocumented migrant workers, mainly because their administrative status prevent them to enter the formal economy. Irregular migrants are relegated within the informal economy where they work without any contract that would provide for minimum protections. Similarly, the right to fair working conditions enshrined in article 7 of the ICESCR is breached in many cases recounted by NGOs and trade unions in several parts of Italy.

How can be tolerated that minimum human rights standards do not apply to everyone, as stipulated by international instruments Italy has ratified? Does not correspond to discrimination on the basis of nationality differentiating between nationals and non-nationals in labour rights enjoyment? Should undocumented migrants’ human dignity not be respected? The reported cases of abuses suggest that undocumented migrant workers are facing labour rights violations precisely because of their vulnerable condition, which bars them to claim their rights as they fear the consequences related to their status. In order to address these serious human rights violations the following steps should be considered.

The high involvement of irregular migrant workers in working activities show that the Italian current framework regulating labour immigration is not properly disposing the needed means

⁴³⁶ Dewhurst (n 25) 219.

⁴³⁷ Ivi, 220.

⁴³⁸ ETUC, *ETUC final strategy on migration and inclusion* (ETUC 2016) (emphasis added).

to respond to labour demand in low-skill occupations. In order to answer the internal labour demand of low-skilled workers, both the EU and the national legislator should introduce additional sectorial directives to create more regular entry and stay opportunities for low-skilled workers.⁴³⁹

Not only potential irregular flows need to be prevented encouraging regular alternatives for migrant workers, but human – including labour – rights of undocumented migrants already in Italy must be established by law and then guaranteed in practice. In this sense, revising labour legislation ‘using ILO and UN standards as a framework’⁴⁴⁰ is key as well as ‘recognizing and building on the complementary nature of the various instruments [...] to [...] end abuse of migrants and ensure equality and non-discrimination of migrant workers’.⁴⁴¹ This angle would foster the transition from a “protection with consequences approach” to a “full protection approach”,⁴⁴² which would effectively protect undocumented migrants’ rights providing them for the possibility to claim their rights without facing the consequences – notably detection, detention and deportation – related to their irregular status.

In this context, the establishment of a “firewall” system is pivotal. According to Carens, human rights protection is likely to be hindered by immigration law enforcement unless firewalls are put in place.⁴⁴³ Indeed, Crépeau and Hastie asserted that ‘[w]here, or if, migrants would feel comfortable coming forward regarding labour law violations, this could contribute to a reduction in the overall downward trends in respect of wages and working conditions’.⁴⁴⁴ Firewalls are considered a win-win solution by the PICUM as well, as it suggested that ‘the more undocumented workers can safely report abuses and claim unpaid wages, the more effective the fight against abusive employers and unfair competition will be’.⁴⁴⁵

The establishment of “firewalls” is a solution which is likely to provide undocumented migrant workers certain protections immediately, as they can claim their rights without

⁴³⁹ PICUM, ‘Position paper on the European Commission communication on an EU strategic framework on health and safety at work 2014-2020’ 7 <picum.org/picum.org/uploads/publication/PICUM%20Position%20paper_EU%20Framework%20on%20OSH%202014_2020_November%202014.pdf> accessed 20 June 2019.

⁴⁴⁰ Olney, Cholewinski (n 414) 281.

⁴⁴¹ Ibidem.

⁴⁴² See Dewhurst (n 25).

⁴⁴³ Joseph Carens, ‘The rights of irregular migrants’ [2008] *Ethics and International Affairs* 163, 167.

⁴⁴⁴ François Crépeau, Bethany Hastie, ‘The case for “firewall” protections for irregular migrants. Safeguarding fundamental rights’ [2015] *European Journal of Migration and Law* 157, 167.

⁴⁴⁵ PICUM, ‘PICUM calls world governments to act on labour rights for undocumented migrants’, (2019) PICUM <<https://picum.org/picum-calls-world-governments-to-act-on-labour-rights-for-undocumented-migrants/>> accessed 12 June 2019.

fearing disproportionate consequences. The “firewall” system would facilitate irregular migrants in denouncing abuses and it would foster labour inspections carried out in compliance with ILO guidance, as workers’ rights enjoyment are going to be monitored effectively avoiding focusing on undocumented migrant workers’ immigration status. In other words, ‘the goal and function of firewalls is to create an environment in which migrants can feel safe in accessing and enjoy their basic rights and entitlements’.⁴⁴⁶ In parallel, however, it is important to launch information campaigns about undocumented migrants’ minimum labour rights. Being aware of their rights, undocumented migrant workers might claim them more easily. Additionally, irregular migrant workers should be able to join and form trade unions in order to strengthen their ability to claim their minimum rights.

Allowing every human being to have access to minimum human rights standards means that everyone should enjoy the right to work, intended as decent work. In Italy, undocumented migrant workers can only access the informal economy, where have been recounted ‘a vast decent work deficit with high levels of labour exploitation’,⁴⁴⁷ ‘work place accidents’,⁴⁴⁸ and ‘general worsening of working conditions’.⁴⁴⁹ Ultimately, labour rights violations are higher in the informal economy, and living outside the legal system means being under the constant risk of exploitation. As undocumented migrant workers cannot access decent work, their right to work can be considered breached. In this light, allowing undocumented migrant workers to access the formal economy might protect their right to decent work.

In the past, amnesties were held to address irregular work. To date, regularization campaigns are not an option anymore, but alternatives are not in place yet. Considering that undocumented migrants are estimated to exceed 650.000 people by 2020, the Italian legislator should decide whether Italy aims at being compliant with international human rights standards and adopting a person-centered approach, or whether it prefers to reinforce inequalities between “legal”-“illegal” persons, exposing the most vulnerable to human rights violations and exploitation.

In this context, allowing undocumented migrant workers to enter the formal economy might overcome their current irreversible marginalization and relegation within the informal economy. Hypothetically, entering the formal economy might represent a pathway into

⁴⁴⁶ Crépeau, Hastie (n 444) 166.

⁴⁴⁷ PICUM, ‘Undocumented migrants and the Europe 2020 strategy’ (n 433) 6.

⁴⁴⁸ PICUM, ‘Position paper on the European Commission communication’ (n 439).

⁴⁴⁹ International Labour Conference, Proposed recommendation concerning the transition from the informal to the formal economy (104th Session 2015).

regularity, reducing the number of people at higher risk of labour rights violations and exploitation. Indirectly, the informal economy would be affected too, as the basin of cheap and flexible labour it relies on would reduce. However, taking into account the skeptical and sometimes hostile approach Italy had and still has towards irregular migrants, perhaps this measure would require longer than establishing a “firewall” system. In this sense, it seems valuable to promote further in depth analysis of irregular status and of undocumented migrant workers’ working conditions in order to collect due information to adopt a comprehensive policy which might take into account that ‘empowerment of irregular migrant does not mean an ineffective immigration regime, but rather that irregular migrants can speak up against oppression, [strengthening] the struggle against black economies [...] and exploitation at work.’⁴⁵⁰

Finally, the ratification of the ICRMW and taking part in the Global Compact for Safe, Orderly and Regular Migration would represent a valuable shift from the Italian current approach towards migrants’ rights, and it would prove the commitment to protect all workers’ rights, irregular migrant workers included. This research highlights how the Italian legislator should endorse this shift because a State party to the EU (which defines itself as a “community of values”) and a founding member of the CoE (which aims at promoting human rights) cannot neglect the human dignity of more than half a million people living and working in its territory. Similar steps should be encouraged by the EU and taken by other MSs, too. Human rights are universal and belong to every human being: States must act accordingly.

⁴⁵⁰ Andreas Kiaby, *Do human rights know borders? A human rights critique of contemporary approaches to irregular migration* (University of Oslo 2008) 59.

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