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Not Walls of Fear, but Firewalls

Ensuring the human rights of undocumented migrants

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ABSTRACT

Since the Arab Spring, new waves of migration have forced immigration issues into the international spotlight. In relation to irregular migration, the majority of attention remains focused on border control, screening, detection of irregular status and expulsion. Thereupon, the human rights debate surrounding irregular migration primarily focuses on protecting human rights in this context. Yet, there is a significant number of irregular migrants who live undetected in EU countries, and whose irregular migration status forces them into the shadows. They are particularly vulnerable people who face several obstacles on a daily basis to the access of their fundamental rights. This thesis investigates the obstacles that confront irregular migrants when accessing healthcare, justice and victims' rights. These obstacles stem from the fear of detection resulting from the fact that service providers are often co-opted into performing immigration control tasks. The thesis also addresses the utility of releasing services providers from immigration control tasks in order to improve EU Member States' capacity to deliver fundamental human rights to irregular migrants, which is possible by creating a clear separation between services and immigration enforcement, namely the creation of Firewalls.

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TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FRA	European Union Agency for Fundamental Rights
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organisation
IOM	International Organisation for Migration
NGO	Non-governmental Organisation

TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

Introduction

I. The Context

Since the Arab Spring, new waves of migration have forced immigration issues into the spotlight. However, migratory flows have never lost international political concern among major receiving countries. Since 1999, when the Amsterdam Treaty conferred law-making powers to the European Union in the field of immigration, the European Council began formulating a common EU migration policy.¹ In relation to irregular migration, the EU migration policy focuses on preventing new arrivals of irregular migrants and deporting those who have entered, once detected. At the domestic level, major European political parties adopted a restrictive policy on migration reception, with a tendency to close State boundaries, criminalise irregular migration, and facilitate the detection and expulsion of irregular migrants. The general attention remains on border control, screening, detection of irregular status and expulsion. Thereupon, the human rights debate surrounding irregular migration primarily focuses on protecting human rights within this context, while it overlooks the situation of many migrants whose daily lives are affected by their irregular status in their host country.² Indeed, despite multiple efforts to prevent irregular migration and combat irregular presence, the significant volume of irregular migrants in EU countries cannot be underestimated. In 2017, 618,775 people were found to be illegally residing in the EU.³ However, this data reveals only those migrants whose presence was, in some way, detected by the authorities.⁴ There is still a significant number of irregular migrants whose presence remains undetected by the relevant authorities. The estimation of this number is more difficult to ascertain. The most recent aggregate data available on irregular and undetected migrants in the EU dates back to the

¹ Treaty of Amsterdam amending the treaty on European Union [1997] OJ C340/1 ; European Union: Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, [1999] (Tampere Conclusions); Currently, the EU competence in elaborating a common migration policy is legally grounded in articles 79 and 80 of the TFUE. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

² François Crépeau and Bethany Hastie ‘The Case for ‘Firewall’ Protections for Irregular Migrants: Safeguarding Fundamental Rights’ (2015), 2-3 *European Journal of Migration & Law* 157-183, 158.

³ Data has been rounded to the nearest 5.

Eurostat, ‘Third country nationals found to be illegally present - annual data (rounded)’ (Statistical Office of the European Union 2019) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en> accessed 1 June 2019.

⁴ The data refers to: third country nationals refused entry at the external border; third country nationals found to be illegally present; third country nationals ordered to leave; third country nationals returned following an order to leave. Ibid, Explanatory text metadata.

‘Clandestino’ project of 2009 that estimated between 1.9 and 3.8 million people were irregularly present in EU in 2008.⁵

The European Commission recognises that many of the numerous irregular migrants will never return to their country of origin.⁶ The provision of human rights to these migrants is therefore vital, especially because of their vulnerability. Their status of irregularity, and the necessity to maintain a hidden life, often results in social marginalisation and in a lack of access to essential services. The situation of irregularity in which they live can hamper the enjoyment of their rights. Indeed, although irregular migrants are present in the territory of the state against the law of that country, it is undisputed that they are entitled to certain rights. “Unlike medieval regimes, modern democratic states do not make criminals into outlaws-people entirely outside the pale of the law’s protection.”⁷ Those rights are first and foremost basic human rights that international human rights law recognises as applicable to everyone because they are ‘human beings’, independently of their citizenship or regular residence. Thus, irregular migrants are entitled to such rights as well. The European Agency for Fundamental Rights (FRA) pointed out that

International human rights instruments and the European Convention on Human Rights (ECHR) enshrine and enforce rights which are of general application. Unless individuals are expressly excluded from their scope of application, rights and freedoms are applicable to everyone, within the jurisdiction of the contracting parties, including migrants in an irregular situation. Non-compliance with the conditions for entry, stay or residence in a European Union (EU) Member State cannot deprive migrants in an irregular situation of certain basic rights shared by all human beings.⁸

In addition to the basic human rights that are ensured by international law, some states maintain a higher level of protection for undocumented migrants, with a broader recognition of rights. Notwithstanding, the situation of irregularity all too often is an impediment to the effectiveness of these rights. Consequently, “it is necessary to question beforehand whether illegal migrants can

⁵ Clandestino, *Project ‘Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe’*, (2007-2009) <<http://irregular-migration.net/index.php?id=217>> accessed 1 May 2019.

⁶ “The Assembly is deeply concerned by the large number of irregular migrants living in Europe and recognises that many of these persons will never return to their countries of origin.” Council of Europe Parliamentary Assembly, Recommendation no. 1807 on Regularisation programmes for irregular migrants (adopted 1 October 2007), Recital 2.

⁷ Joseph H. Carens, ‘The Rights of Irregular Migrants’ (2008) 22 (2) *Ethics and International Affairs* 163, 165.

⁸ European Union Agency for Fundamental Rights, *Report ‘Fundamental Rights Of Migrants In An Irregular Situation In The European Union’* (2011), 7.

actually enjoy the entitlements that all those laws are currently providing for (or in other words, whether those provisions can actually reach the Illegal Migrants).”⁹

Among the barriers that undocumented migrants face, the fear of being detected and deported plays an important role in preventing them from approaching crucial services, for example healthcare or justice.¹⁰ As analysed in depth by Bosniak, the possession of rights is nullified by the fear that exercising such rights will draw the immigration authorities’ attention to their irregular status.¹¹

This situation is aggravated by the devolution of immigration control and enforcement from immigration authorities to service providers. In fact, in order to facilitate the detection of irregular migrants, states are progressively allocating migration control tasks to service providers.¹² Indeed, domestic law often requires service providers to refuse to provide services to undocumented migrants, to share users’ data with immigration authorities or to report irregular migrants who they come into contact with. For example, in the Netherlands, persons who are sheltering migrants that they know or they can assume to be irregular are obliged to inform the police immediately.¹³ In Sweden there is an obligation to provide the police with personal data (including the full name, date of birth, nationality and home address) of foreign students the first time that they are enrolled in compulsory education, or admitted into secondary school.¹⁴ As a result of this situation, irregular migrants are not formally excluded from shelter in the Netherlands or education in Sweden, however, they could suffer consequences related to their migration status because of these conditions. Hence, these national laws can affect irregular migrants’ enjoyment of their fundamental rights, respectively the right to shelter and the right to education.

The fear of coming to the attention of the immigration authorities creates a virtual ‘wall’ that prevents migrants from claiming their rights. Rather than risking deportation, migrants frequently prefer to renounce their rights.¹⁵ Consequently, although migrants are formally entitled to certain rights under international or domestic law, they are *de facto* deprived of their enjoyment. As Carens

⁹ Román Romero-Ortuño, ‘Access to health care for illegal immigrants in the EU: should we be concerned?’ (2004) 11 *European Journal of Health Law* 245, 263.

¹⁰ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation no. 16 on safeguarding irregularly present migrants from discrimination (adopted 16 March 2016) CRI 16, 13; Romero-Ortuño (n.9) 263; Carens (n 7) 167.

¹¹ Linda S. Bosniak, ‘The Citizen and the Alien: Dilemmas of Contemporary Membership’ (Princeton University Press 2006), 68-71.

¹² Virginie Guiraudon and Gallya Lahav, ‘A Reappraisal of the State Sovereignty Debate: The Case of Migration Control’ (2000) 33 *Comparative Political Studies* 163, 184; James Hampshire, ‘The Politics of Immigration: contradictors of the Liberal State’ (Polity, 2013), 184.

¹³ Aliens Decree (Vreemdelingenbesluit) 2000 art 4.40.

¹⁴ Aliens Ordinance 2006 s 1(4) chapter 7.

¹⁵ Carens (n.7) 167.

notes, “this creates a serious normative problem for democratic states. It makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively.”¹⁶

In addition, some authors suggested that this implicit exclusion of irregular migrants from certain rights has a negative impact not only on the migrants themselves, but also on the hosting community.¹⁷ For example, the limited access to healthcare has a twofold effect on the hosting community. First, it increases the risk of a health crisis, as it reduces public control over emerging pathologies.¹⁸ Second, for many illnesses, prevention or treatment at an early stage is less costly than treating them once they have progressed to become severe.¹⁹ These additional costs that are produced when the individual is forced to emergency care will be mostly funded by the wider society. Consequently, the final cost of the medical treatment will be higher, as migrants will attempt to avoid healthcare until the injury or illness becomes severe.²⁰

Similar consequences can be seen with relation to reporting crimes. The reluctance of undocumented migrants to report a crime of which they have been either victims or witnesses, due to fear of the consequences such as detection of their irregularity and deportation, reduces the possibility of the police successfully investigating the crime. When such crimes go unreported the consequent impunity of the perpetrators is not only damaging to the victim but can also put the wider society at risk.

A final example of how irregular migrants being denied full access to their rights can have a negative effect on the hosting community is the lack of a ‘safe’ complaint system for labour exploitation. The practical obstacle for migrants to report exploitative conditions of work within the informal labour market is likely to produce a protective barrier for employers and therefore perpetrate the *status quo*. This situation “can contribute to an overall decrease in the standards and conditions of work in a community, in turn producing negative economic consequences in a much broader way.”²¹ In fact, undeclared work in a state of underpayment and exploitation creates a

¹⁶ Ibid.

¹⁷ Crèpeau and Hastie (n.2) 176; Shari B. Fallek, ‘Health Care for Illegal Aliens: Why It Is a Necessity’ (1997) 19 *Houston Journal of International Law* 951, 977.

¹⁸ Romero-Ortuño (n.9), 254; Julianne Zuber, ‘Healthcare for the Undocumented: Solving a Public Health Crisis in the U.S.’ (2012) 28 *Journal of Contemporary Health Law & Policy* 350, 369; See also n. 135.

¹⁹ “Timely treatment in a primary health care setting entails potential cost savings of at least 49 and up to 100% of direct medical and non-medical costs, and between 4 and up to 100% of indirect costs incurred in a hospital setting for treatment of more severe medical conditions.” Ursula Trummer, Sonja Novak-Zezula, Anna-Theresa Renner, Ina Wilczewska, *Report ‘Thematic study: Cost analysis of health care provision for irregular migrants and EU citizens without insurance’* (IOM UN Migration 2016), 10; Paola Pace and Sam Shapiro, *Background Paper ‘Migration And The Right To Health In Europe’* (2019) 370.

²⁰ Crèpeau and Hastie (n.2) 176.

²¹ Ibid.

twofold negative effect on the destination country: first, as the work is illegal the state treasury does not benefit from work-related contributions; and second, as undeclared work is generally remunerated far less than the average salary received from regular employment, there is an overall depressive effect on wage levels and work conditions in general.²²

II. The Firewall Proposal

With regards to this context, in 2008 Carens proposed the concept of ‘Firewalls’. A Firewall is a mechanism in which a legal prohibition prevents the reporting or sharing of data between service providers and immigration authorities, for immigration enforcement purposes.²³ Subsequently, other authors have supported the adoption of Firewalls, and PICUM²⁴ has recently started an advocacy campaign supporting their implementation.²⁵ In March 2016, the European Commission against Racism and Intolerance (ECRI) recognised the adoption of Firewalls as key-measure to ensure human rights to undocumented migrants.²⁶ A Firewall denies the public authority charged with migration enforcement tasks to have access to data related to the migration status of the migrants seeking access to services. In other words, Firewalls prevent service providers from inquiring and sharing data related to their user’s migration status. The name ‘Firewall’ is taken from digital jargon, in which a firewall refers to a network security system that creates a barrier to prevent the sharing of digital information and data between a trusted internal network and a non-trustworthy external network.²⁷ ECRI adopted an interesting description of a Firewall. It called for “the creation of effective measures (hereafter “Firewalls”) to prevent public and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data, or other information about, persons suspected of irregular presence or work, with the immigration authorities for purposes of immigration control and enforcement”.²⁸ The ECRI description is interesting because it connects sharing data with the ‘effective’ denial of human rights of irregularly present migrants, remarking that the formal recognition of a right does not correspond to its effective recognition where the right holders consider the consequences of accessing the right

²² Fabio Tittarelli, ‘il mercato del lavoro nell’era della globalizzazione’ [The labour market in the era of globalisation] (2011) *Tramontana Rivista Online* 1, 5.

²³ ‘We ought to establish as a firm legal principle that no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes.’ Carens (n.7) 167.

²⁴ The Platform for International Cooperation on Undocumented Migrants (PICUM) is an NGO with the aim of promoting the rights of undocumented migrants. <<https://picum.org/>> accessed 18 June 2019.

²⁵ Crépeau and Hastie (n.2); PICUM, *Advocacy Campaign ‘Firewalls’* (PICUM 2019) <<https://picum.org/firewall-3/>> accessed 5 June 2019.

²⁶ ECRI, ‘Recommendation no.16’ (n.10).

²⁷ Crépeau and Hastie (n.2) 166.

²⁸ ECRI (n.10) 3.

too costly. As previously mentioned, the irregular migrants' concern of coming to the attention of the authorities while accessing essential services creates a wall of fear which prevents them from accessing rights they are formally entitled to, including basic human rights.²⁹ Consequently, in order to guarantee migrants' effective access to the rights they are entitled to, scholars and advocates in the field suggest that it is necessary to break down this barrier of fear, moving from 'walls of fear' to Firewalls.³⁰

III. Objectives and Research questions

The guiding research question of the thesis is: *to what extent should EU Member States create a clear separation between services and immigration enforcement authority, in order to better protect irregular migrants' rights?*

In order to answer this primary question, the following sub-questions will also be researched and addressed:

1. What is the minimum guarantee of rights that states must provide to irregular migrants pursuant to international law?
2. Does the lack of separation between services and immigration enforcement authorities violate internationally recognised rights?
3. Does the lack of separation between services and immigration enforcement authorities void domestically recognised rights?
4. Is EU legislation open to a broader protection of human rights of irregular migrants?
5. Does EU legislation leave room for the promotion of adopting Firewalls in EU Member States?

The underlying hypothesis of this thesis is as follows: *the adoption of Firewalls plays a positive role in the protection of irregular migrants' human rights and benefits the whole hosting community.*

²⁹ Carens (n.7) 167; Bosniak (n.11).

³⁰ PICUM (n.25), Crèpau and Hastie (n.16), Carens (n.7).

The objectives of this paper are as follows:

1. to describe the political and legal context in which international and domestic legislation on migration develops;
2. to stimulate discussion concerning the human rights of migrants living irregularly in EU countries;
3. to identify EU Member States international obligations towards irregular migrants living within their country;
4. to evaluate the role of Firewalls in giving effect to irregular migrants' recognised rights;
5. to consider the impact of Firewalls on the hosting community;
6. to assess the role of EU legislation in promoting the adoption of Firewalls, and the role of Firewalls in achieving the ultimate goal of the relevant EU legislation.

IV. Terminology

For the purpose of this work, the terms “irregular” and “undocumented” migrants refer to migrants whose legal status in the country they inhabit does not comply with the domestic law on regular entrance and/or stay. The author purposely refuses to use the term “illegal migrant,” embracing the campaign “Words Matter,” launched by PICUM in 2014.³¹ The dismissal of the ‘language of illegality’ when talking about irregular migrants has also been upheld by Resolution 2059 of the Council of Europe.³²

In the text, the reader will find reference to ‘law enforcement service providers’ (or authorities) as distinguished from ‘immigration enforcement authority’. Whilst it is true that immigration enforcement is indeed part of law enforcement, adopting these distinct concepts is necessary to ensure clarity. The reason for this distinction is to demonstrate the contrast between law enforcement acts that relate solely to immigration enforcement and all other tasks of law enforcement (such as crime investigation or labour inspection). The clear separation of tasks can be easily identified in those countries where there is a specific body charged with immigration enforcement, generally the immigration authority. However, in countries where immigration

³¹ The campaign advocated for a more informed use of the terminology, both in official documents and in ordinary language, upholding that the term “illegal” is not attributable to any person, whilst, in the field of migration, correct terminology includes the terms “irregular” or “undocumented” in reference to migrants with irregular migration status. PICUM, *Awareness Campaign 'Words Matter'* (PICUM 2014) <<https://picum.org/words-matter/>> accessed 6 May 2019.

³² Council of Europe, Parliamentary Assembly, Resolution no. 2059 on criminalisation of irregular migrants: a crime without a victim (adopted 22 May 2015), para 4.

enforcement tasks are handled by a law enforcement agency that is also charged with the responsibility of several other law enforcement tasks (usually the police), the separation is less clear.

V. The scope

This thesis will address irregular migrants' access to healthcare, victims' rights and labour rights protection. Originally, the scope of the thesis was wider. I was intending to include within the research the right to education and the right to shelter in addition to the aforementioned rights. However, I deemed it necessary to narrow the scope of the thesis as the original scope was too broad in relation to the time available.

This thesis will address the rights of irregular migrants within EU countries. EU Member States were chosen both because of the relevance of the influx of migration to EU Member States following the Arab Spring and in order to evaluate the potentiality of the EU to respond to human rights necessity. The investigation will take into account all of the relevant international obligations that apply to EU Member States. Therefore, it will not be limited to EU legislation. As the thesis will focus on irregular migrants, it is therefore necessary to adopt a definition of 'irregular migrant.' Here, I have adopted the definition provided in the European Migrant Network Glossary:

In the global context, a person who, owing to irregular entry, breach of a condition of entry or the expiry of their legal basis for entering and residing, lacks legal status in a transit or host country.

In the EU context, a third-country national present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Regulation (EU) 2016/399 (Schengen Borders Code) or other conditions for entry, stay or residence in that EU Member State.³³

However, a further clarification of the personal scope is necessary. Migrants can be in an irregular situation for a multitude of reasons. Whilst usually the focus of irregular migration is on irregular border crossings, the sources of irregular migration are actually numerous, and can be broken down into eight categories:

³³ European Union, 'Irregular Migrant (Migration and Home Affairs – Glossary) (Europa.eu 2019) <https://ec.europa.eu/home-affairs/content/irregular-migrant-0_en> accessed 3 June 2019.

1. Illegal entry (illegal border crossing).
2. Overstaying a visa-free travel period or temporary residence permit.
3. Loss of status because of non-renewal of permit for failing to meet residence requirements or breaching conditions of residence.
4. Being born into irregularity.
5. Absconding during the asylum procedure or failing to leave a host state after a negative decision.
6. Entry using false documents.
7. Entry using legal documents but providing false information in those documents.
8. A state's failure to enforce a return decision for legal or practical reasons (toleration).³⁴

Regarding the last three categories, a clarification is required. Persons who fit within the sixth and seventh categories who enter and reside with undetected forged documents are treated as regular migrants, and therefore they are outside of the scope of this work. In the eighth category, in which a state fails to enforce a return decision for legal or practical reasons, the state is aware of the presence of such migrants but does not accord them a residence permit. The position of these migrants differs from the one of undocumented migrants, as they are not hiding from state authorities. FRA refers to them as 'non-removed' persons.³⁵ Additionally, a minimum level of rights is guaranteed to them by article 14 of the Return Directive. Consequently, they are also outside of the scope of this work. Nonetheless, the weakness of the position of non-removed persons can also affect their access to human rights and they too could benefit from the strengthening of access to human rights for irregular migrants.

VI. Methodology

The research method applied in this thesis is normative in character, with the aim of establishing how the protection of the rights of irregular migrants should be improved. However, descriptive elements are widely present in the thesis at the beginning of each chapter in order to outline the legal framework for the considered rights, followed by an evaluation on the efficiency of the current Member State legislation.

³⁴ Christal Mo Michael and Michael Blomfield, *Report 'Irregular Migration In Europe'* (Migration Policy Institute 2011), 4.

³⁵ FRA, 'Fundamental Rights Of Migrants' (n.8) 2-7.

The thesis results from qualitative research, mainly based on a study of literature, legal documents and reports. The use of data and information collected through a questionnaire completed by 13 migrants (who are currently, or have been, undocumented), along with semi-structured interviews with undocumented migrants and legal professionals has complemented the desk research.³⁶ Moreover, an exchange of views with experts in the field, such as PICUM advocacy officer Alyna Smith and volunteers of the association Csa Ex Canapificio³⁷ dealing with migrants gave me insight which helped me shape my thesis.

Research material comprises of legal sources, including international treaties, domestic law, EU legislation, case-law; and non-legal sources, including academic literature; statistics; reports of European monitor bodies, EU agencies and NGOs; mass media and the Internet sources, along with newspaper articles.

The selection of legal sources was connected to the considered rights as applicable to irregular migrants, within the EU Member States, in accordance with the scope of the thesis. Particular attention has been paid to EU legislation, in order to investigate whether there is room to find human rights protection for irregular migrants in pre-existing legislation. In addition, reference to some domestic law has been utilised in order to consider whether states have fulfilled their basic international human rights obligations, and also whether domestic law has provided a higher level of protection. The use of non-legal sources was aimed to investigate the effectiveness of vested rights of irregular migrants, and to put potential gaps in the spotlight. Finally, treaties such as the International Convention on Migrants Workers have been excluded. Indeed, although expressly recognising certain rights to irregular migrants, the Convention has not been ratified by any EU Member States, and it is therefore not applicable.

VII. Structure

The thesis is divided into an introduction, four chapters and a conclusion. The introduction outlines the political and legal context and presents the main argument of the thesis by describing the research questions. The first chapter is a contextualisation unit aimed to explore the relevant features of the migration policy of the EU and EU Member States. The second, third and fourth

³⁶ The results of the questionnaire are provided in the annexes, along with the implemented methodology. The transcriptions of the interviews can be found within the annexes. The annexes also include a brief description of the interview.

³⁷ The Csa Ex Canapificio is a local association part of the Italian Protection System for Asylum Seekers and Refugees (SPRAR). It offers several services to migrants, including a weekly free service of legal counselling.

chapters address the entitlement and effective access to three categories of rights for irregular migrants, namely healthcare, victims' rights and labour rights. Each chapter provides an evaluation of the potential for Firewalls to enhance the access to the considered right of that chapter. Finally, the conclusion will summarise the findings from the previous chapters and provide an answer to the research question.

1.

Migration Policy

In addressing the issue of the rights of irregular migrants within the EU Member States, it is important to consider the general context. A brief overview of the migration policy of both the EU and Member States is useful to understand the limits and potential of a European policy on irregular migration that necessarily affects individual rights of migrants in practice. Considering both what and how much attention is paid to the situation of irregular migrants who live within EU countries, as well as the Member States' domestic approach to the issue, it is useful in order to define the general tendency on the matter with the view of evaluating whether there is room for improvement. With this aim, this chapter will outline EU migration policy and the approach of the Member States' to irregular migration.

1.1. EU migration policy

In 1999, the Amsterdam Treaty conferred law-making powers to the EU in the field of immigration and, along with the 'Tampere Conclusions', the European Council began formulating a common EU migration policy.³⁸ In relation to irregular migration, the EU migration policy focused on preventing the arrival of irregular migrants and deporting those who entered, once detected. The prevention of arrival is dedicated, primarily, to both border-crossing control and the eradication of supposed migration pull-factors. The attention that is given to border control is exemplified by the progressive reinforcement of Frontex (the EU Agency which is devoted to external border control).³⁹ Whilst, in order to address the pull-factor of finding a job (although within the informal job market), the EU issued the Employers' Sanctions Directive aimed at deterring employers from hiring irregular migrants.⁴⁰ Finally, the Return Directive aims to create a common EU framework for the deportation of irregular migrants.⁴¹ According to some authors, a deep analysis of EU

³⁸ Treaty of Amsterdam (n.1); Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, [1999] (Tampere Conclusions); Currently, the EU competence in elaborating a common migration policy is legally grounded in articles 79 and 80 of the Treaty on the Functioning of the European Union (TFEU).

³⁹ European Parliament and Council Regulation (EC) 2016/1624 of 14 September 2016 on the European Border and Coast Guard [2016] OJ L251/1 (Frontex).

⁴⁰ European Parliament and Council Directive (EC) 2009/52 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 (Employers' Sanctions Directive).

⁴¹ European Parliament and Council Directive (EC) 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ 348/98 (Return Directive), art.1.

migration policy reveals a tendency to treat migration as a law enforcement and security issue, whilst overlooking the humanitarian dimension of the matter.⁴²

The connection between irregular migration and security issues has been expressed by the Commission in 2008, when it stated that “from a security perspective, illegal immigration may be linked with terrorism, trafficking in human beings, drug smuggling, smuggling of weapons, exploitation, slavery-like working conditions and other serious crimes which therefore pose a major threat to European societies.”⁴³

The tendency to securitise irregular migration is further exemplified by the Eurodac regulation that compels Member States to apprehend and share the fingerprints of migrants above the age of 14 who are connected with irregular external border crossing (article 14) or found to be unlawfully present within the Member State (article 17).⁴⁴ Indeed, although the purpose of Eurodac is to facilitate the application of Regulation (EU) No 604/2013 (also known as the Dublin Regulation), which determines the Member State responsible for examining an application for international protection by a third-country national or a stateless person, under certain conditions the data collected for this purpose can also be used for a secondary purpose of law enforcement.⁴⁵ What is noteworthy is that, for the purpose of the Directive, “‘law enforcement’ means the prevention, detection or investigation of terrorist offences or of other serious criminal offences”.⁴⁶ The resulting connection between the apprehension of migrants’ fingerprints and law enforcement purposes further reveals the attitude of the EU to securitise migration. Another element of this approach is the progressive connection between border control and security assignments, exemplified by the tasks of Frontex progressively including more security assignments and broader collaboration with Europol.⁴⁷ According to a study conducted by the Center of European and Policy study,

The approach of the European Commission and other EU agencies such as Frontex (European Border and Coast Guard Agency) and Europol (European Police Office) has served to reinforce the perception of irregular immigration as a threat to Europe’s security and as a

⁴² Sergio Carrera and Joanna Parkin, *Report ‘Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union’* (The Centre for European Policy Studies 2011), 5; Alan Desmond, ‘The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?’ (2016) 16 *Human Rights Law Review* 247, 248; Jef Huysmans, ‘The European Union and the Securitisation of Migration’ (2010) 38(5) *Journal of Common Market studies* 751, 756.

⁴³ Commission, Staff Working Document Accompanying the communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a common Immigration Policy for Europe: Principles, actions and tools, Impact Assessment [2008] SEC 2026, para 2.4.1.

⁴⁴ European Parliament and the Council (EU) Regulation 603/2013 of the 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints [2003] OJ L.180/1.

⁴⁵ *Ibid* chapter VI.

⁴⁶ *Ibid*. Art. 2, letter i.

⁴⁷ Frontex regulation (n.39) Recital 19, art.18, art.52.

phenomenon to ‘fight against’, lending force to a policy stance which prioritises migration control and security issues over a fundamental rights agenda.⁴⁸

The same securitisation approach can be detected in the provision of the Return Directive that allows Member States to detain irregular migrants who are involved in a return proceedings, when less coercive measures are insufficient.⁴⁹ In this case, migrants are deprived of their liberty not because of the enforcement of a judicial conviction, but because of their migration status, raising several issues from a human rights perspective.⁵⁰

Whilst security issues connected with migration need to be addressed, the challenge is to not overlook the humanitarian dimension of irregular migration. Overlooking this dimension carries the risk of erroneously reducing migration flows merely to a source of insecurity for European societies. The risk is that lawmakers perceive the individual migrant merely as a security threat, rather than as a particularly vulnerable person, and consequently does not give enough attention to the protection of their human rights.

1.1.1. Room for a Human Rights Approach

As noted, EU migration policy focuses on the prevention of migrants’ arrival and on their expulsion. Crépeau considers that “little attention is paid to the situation of irregular migrants already settled in the destination country”.⁵¹ Desmond notes “awareness that irregular migrants have rights [is] overshadowed by pre-occupation with preventing irregular migration and deporting irregular migrants.”⁵² Nonetheless, a closer examination of EU legislative activities reveals that there is some openness to the recognition of rights for irregular migrants who live within Member States. For example, express recognition of rights for irregular migrants is present in the EU Employers’ Sanctions Directive. In addition, the EU Victims’ Directive explicitly includes irregular migrants within its protection. Each directive will be further analysed respectively in chapters 3 and 4. As signified by Desmond, the presence of such protection within existing EU legislation suggests that

⁴⁸ Carrera and Parkin (n.42) 2.

⁴⁹ Return Directive (n.41) para 16.

⁵⁰ Alan Desmond raised the connection between Eurodac, the Return Directive and securitisation of migration. Alan Desmond (n.42) 251.

⁵¹ Crépeau and Hastie (n.2) 158.

⁵² Desmond (n.42), 248.

there is ‘raw material’ for the creation of a common EU migration policy, which respects and supports the rights of irregular migrants.⁵³

1.2. Member States’ approach to migration

Due to its complexity and high politicisation, the Member States’ approach to the issues of migration is not a linear narrative. At the domestic level some contradictions are exacerbated. On the one hand, the necessity to deal with the semi-stable presence of irregular migrants in their territory has led to the recognition of a certain amount of rights for irregular migrants. These rights are partially imposed by international obligations, and partially result from domestic evaluation. Consequently, some Member States have a legal recognition of some of these rights that is even broader than the minimum threshold required by international human rights obligations. On the other hand, the approach by EU Member States to migration reflects the general securitisation approach, which perceives and treats irregular migrants as a threat to eradicate. As this chapter will show, this results in minimising the recognition, *de jure* or *de facto*, of rights for irregular migrants. In particular, in order to increase detection pathways some states have allocated migration control tasks to service providers jeopardising the effective access to those services and migrants’ exercise of their entitlements.⁵⁴

1.2.1. *The securitisation approach and the hostile environment*

The Member State’s securitisation of migration is exemplified by the punitive attitude of many states, which is demonstrated by the criminalisation of irregular migration. The vast majority of EU Member States criminalised unauthorised entry or residence in the state territory (although there are some differences among state provisions).⁵⁵ The aforementioned tendency to treat migration from the perspective of security, rather than the humanitarian one, leads states to continuously seek new pathways to prevent the new arrival of migrants and to adopt a developed network for detecting

⁵³ Desmond (n.42), 254-259.

⁵⁴ See n 12.

⁵⁵ The EU Agency for Fundamental Rights in 2014 reported that “all the country in EU criminalise migrants for irregular cross boarding, with the exception of three (Spain, Portugal and Malta). Whilst only Portugal, France, and Malta do not penalise the irregular staying within the country, the others Member States impose a range of measured including fines or imprisonment and/or fines”. European Union Agency for Fundamental Rights (FRA), *Report 'Criminalisation Of Migrants In An Irregular Situation And Of Persons Engaging With Them'* (EU publication office 2014).

irregular migrants that are already present within the country. Both purposes can enter in contradiction with irregular migrants' human rights, in more than one way.

In relation to the deterrence of new arrivals, some Member States have addressed the issue *inter alia* by creating a hostile environment which excludes migrants from many public or private services.⁵⁶

The creation of a hostile environment for irregular migrants is aimed to counter potential pull-factors for new arrivals, in order to push migrants to voluntarily abandon the country and to facilitate the detection of undocumented ones. As Theresa May affirmed in an interview to The Daily Telegraph:

the aim is to create here in Britain a really hostile environment for illegal migration... What we don't want is a situation where people think that they can come here and overstay because they're able to access everything they need.⁵⁷

Within this context, the UK Government issued the Immigration Act 2014, which was last amended in 2016, imposing several sanctions on landlords who rent houses to irregular migrants, impeding irregular migrants from gaining registered bank accounts or from obtaining a driving license.⁵⁸ When the services that are being impeded are related to the human rights recognised by international law that must be given to irregular migrants, making the access dependent on regular residential status is inconsistent with international human rights law.

1.2.2. Multiplying the pathways for detection

In relation to the efforts of states to improve the detection of irregular migrants, in the past decade there has been a trend of delocalising migration control beyond immigration authorities and allocating them to service providers.⁵⁹

For example, within the context of a 'hostile environment', the British Government concluded several bulk-data sharing agreements between services providers and the Home Office.⁶⁰ The

⁵⁶ Liz Fekete, 'Europe's Fault Lines: Racism and the Rise of the Right' (Verso, 2017), chapter 6.

⁵⁷ James Kirkup and Robert Winnett, 'Theresa May interview: We're going to give illegal migrants a really hostile reception' The Telegraph (London 25 May 2012).

<<https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>> accessed 2/05/2019.

⁵⁸ UK Immigration Act 2016, Part II 'Access to Services' and Explanatory notes to the Immigration Act 2016.

⁵⁹ Crépeau and Hastie (n.2), 159.

⁶⁰ Liberty, 'Care, Don't Share' (Liberty House 2018), 12.

resulting data has been used by the Home Office for immigration enforcement purposes. The recent report of Liberty (2018) reveals that

known bulk data-sharing schemes currently operate, or have until recently operated, between:

- the Home Office, the Department for Health and Social Care (DHSC) and NHS Digital with respect to patient medical records, (withdrawn November 2018);
- the Home Office and the Department for Education (DfE) with respect to children's school records;
- the Home Office and Cifas (an anti-fraud agency) with respect to bank accounts;
- the Home Office and the DVLA with respect to driving licences.⁶¹

In addition, in 2017, it was revealed that the Home Office also used data shared by charity outreach centres for immigration enforcement purposes.⁶² This testifies to the government's willingness to leave no safe place for irregular migrants, by even going as far as to include humanitarian actors in their detection system. According to the report, this link between the Home Office and service providers created a significant obstacle for undocumented migrants in accessing these services, due to fear of the consequences.⁶³

In Germany, all public bodies have a duty to inform the competent authorities of any irregular status they become aware of through their position, with the exception of educational institutions and healthcare providers.⁶⁴ A further example is the obligation for educational institutes in Sweden to provide the police with personal data (full name, date of birth, nationality and home address) of foreign students the first time they are enrolled in compulsory education, or admitted into secondary school.⁶⁵ This duty to share data with the police also includes the data of undocumented children, which, as noted by FRA, has a major impact on their access to the right to education.⁶⁶

In conclusion, although migrants are not formally or explicitly excluded from these services, the fear that the data collected surrounding their irregular status whilst in the act of accessing these rights will be shared with immigration authorities for immigration enforcement purposes creates a

<<https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%20%27Care%20Don%27t%20Share%27%20Report%20280119%20RGB.pdf>> accessed 4 April 2019.

⁶¹ Ibid.

⁶² Mark Townsend, 'Home Office used charity data map to deport rough sleepers' *The Guardian* (London, Sat 19 Aug 2017) < <https://www.theguardian.com/uk-news/2017/aug/19/home-office-secret-emails-data-homeless-eu-nationals> >

⁶³ Liberty report (n.60) 81.

⁶⁴ PICUM, *Report 'Cities of rights: ensuring health care for undocumented residents'* (PICUM 2017), 18-19.

⁶⁵ Aliens Ordinance 2006 s 1(4) chapter 7

⁶⁶ FRA, 'Fundamental Rights' (n.8) 94.

practical barrier to the access of such services.⁶⁷ The resulting situation can empty the rights of irregular migrants recognised by domestic law of their true value and meaning and violate international human rights law when it prevents migrants from practically accessing their human rights. Indeed, as many authors have pointed out, migrants are led to renounce even their basic human rights because of the fear of being deported.⁶⁸

1.3. A progressive narrative

The EU line on irregular migration tends to promote a securitisation approach to the issue, overlooking the humanitarian dimension. Furthermore, the EU is particularly focused on preventing the arrival of migrants and creating common standards for deportation, with little attention to the situation of the numerous irregular migrants already within the Member States. In this context, the approach of EU Member States to fight irregular migration tends to focus on creating a hostile environment for irregular migrants, by criminalising irregular migrants, policing humanitarian actions, and multiplying detection pathways. In order to create such hostile environments, Member States have allocated migration controls and/or enforcement tasks to private and/or public service providers.

Whilst detecting irregular migrants in order to deport them is a prerogative of the state, it is necessary to consider the side effects of the methods that are employed to do so. The allocation of immigration control tasks to state actors beyond immigration authorities raises doubts, both of a legal and social nature. Irregular migrants have certain rights, recognised both at international and domestic level. The allocation of migration control tasks to service providers, and of the services linked with these rights, creates a practical barrier that empties the right of its true meaning and purpose.

As for the social impact, according to different authors the lack of possibility for migrants to meaningfully access these services results in the further marginalisation of irregular migrants and limits both the ability of services to provide facilities to a significant part of the community, and of civil society to freely express solidarity.⁶⁹

However, in the last decade EU legislative activity has left some room for a broader recognition of rights for irregular migrants. This perhaps testifies to a progressive humanitarian approach to

⁶⁷ Carens (n.7) 167.

⁶⁸ *Ibid.*; Fallek (n.17) 973.

⁶⁹ Crèpau and Hastie (n.2) 167; Sergio Carrera, *Report 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update'* (PETI Committee 2018), 88.

irregular migration that could encourage a balanced approach between the fight against irregular migration and the protection of rights of irregular migrants.

As the allocation of migration enforcement's tasks on service providers is likely to affect migrants' rights, it is useful to consider the suitability of a clear separation between immigration enforcement activities and service provision, with a view of finding a fair balance between immigration controls claims and rights' protection. This could be a step towards the creation of a migration policy that gives space for the "universal values of human dignity, freedom, equality and solidarity" that the European Union is based on.⁷⁰

⁷⁰ Charter of Fundamental Rights of the European Union (CFR) [2012] OJ 2012/C 326/02 (Nice Charter).

2.

The access to healthcare for irregular migrants

The right to healthcare is a fundamental right.⁷¹ Its protection is enshrined within several international human rights' treaties. Nonetheless, healthcare is usually considered as a costly right for States. Consequently, each state regulates its enjoyment differently, depending on its political choices. This chapter will investigate what is the minimum level of healthcare that European states are obliged to guarantee to irregular migrants in accordance with international human rights law. In order to do so, it will outline the related international and regional legal framework and investigate the potential extension of this 'minimum level.' Finally, this chapter will address how lack of residence status can be a practical limit to migrants' enjoyment of this right and how the implementation of a Firewall can be a step towards its effectiveness.

2.1. The scope of the right at the international level

2.1.1. *The International Human Rights instruments*

At the international level, in order to define the legal recognition of irregular migrants' right to healthcare it is useful to consider relevant provisions of international human rights instruments. Thus, this subchapter will address: the Universal Declaration of Human Rights; the International Covenant of Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all Forms of Discrimination Against Women.

2.1.1.1. *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (UDHR) provides for the right to healthcare in article 25(1), which explicitly states that “**everyone** has the right to a standard of living adequate for the **health** and well-being of himself and of his family, including... **medical care** and necessary social services”.⁷² This, therefore, leaves no room for exclusions based on migration status.⁷³

⁷¹ Bridgit C.A. Toebes, 'The right to health as a human right in international law' (Antwerpen: Intersetia/Hart 1999).

⁷² Emphasis added.

Notwithstanding this, it must be bore in mind that the legal binding force of the UDHR is still discussed, and that theories which suggest certain provisions are peremptory norms under international law do not include article 25.⁷⁴ Consequently, the right to healthcare cannot find its immediate legal binding force pursuant to the UDHR. Nonetheless, independently of its (non-) binding nature, the UDHR sets “a common standard of achievement for all people and all nations.”⁷⁵ For its moral status and political importance alone, it can be affirmed that there is an expectation for Member States to adapt their practices in order to respect the Declaration.⁷⁶

2.1.1.2. *The International Covenant of Economic, Social and Cultural Rights*

The International Covenant of Economic, Social and Cultural Rights (ICESCR) recognises the right for everyone to have access to “the highest attainable standard of physical and mental health.” (article12(1)).⁷⁷ It can be deduced from article 2 ICESCR that the Convention sets out a number of aspirational rights, requiring Member States to take progressive steps in order to achieve the maximum realisation of these rights. Nonetheless, as it is clarified by the Committee on Economic Social and Cultural Rights (CESCR) in its General Comment No. 3, states have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”⁷⁸ Therefore, states have the essential obligation of ensuring a minimum level of healthcare. For the purpose of this work, the following questions should be investigated in relation to the objective and personal scope of this right, namely, what is the level of healthcare that states are obliged to guarantee and to whom do they have to ensure it?

The personal scope of article 12(1) is defined by the text of the article read in conjunction with article 2(2). Whilst article 12(1) uses the word “everyone”, article 2(2) explicitly states that “the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property,

⁷³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR). Noteworthy, art.2 UDHR states the impossibility to exclude someone from the enjoyment of rights and freedoms on the base of any status.

⁷⁴ For more details on the issue of the UDHR legal value see: Jaime Oraà Oraà, 'The Universal Declaration Of Human Rights', in Felipe Gómez Isa and Koen de Feyter (eds.) *International Protection of Human Rights: achievements and challenges* (University of Deusto 2006), 117-133.

⁷⁵ Universal Declaration of Human Rights, Preamble.

⁷⁶ Jaime Oraà Oraà (n.74) 117.

⁷⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁷⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, UN Doc. E/1991/23, para 10.

birth or **other status**.”⁷⁹ Additionally article 2(3) can help to outline the personal scope, as it allows the exclusion of non-nationals only for developing countries, a notion that excludes EU Member States. In any case, the CESCR further clarified the issue in its General Comment No. 14 asserting that:

In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting **equal access for all persons**, including prisoners or detainees, minorities, asylum-seekers and **illegal immigrants**, to preventive, curative and palliative health services.⁸⁰

This excerpt suggests two elements that should be considered. First, irregular migrants are clearly included within the scope of the Covenant in relation to healthcare. Second, Member States’ obligation towards irregular migrants does not seem limited to a ‘minimum essential level’ of healthcare, in which every State is immediately obliged to provide pursuant to the ICESCR, but it arguably embraces the level of access that the State must ensure to all persons (“equal access for all persons”), namely that the right to healthcare for irregular migrants should be on equal footing with nationals.

2.1.1.3. *The International Covenant on Civil and Political Rights*

In principle, no article of the International Covenant on Civil and Political Rights (ICCPR) is expressly dedicated to the recognition of the right to healthcare. However, recent ground-breaking views of the UN Human Rights Committee in *Toussaint v. Canada*, has opened up the possibility of recognition of this right for undocumented migrants as included within the scope of the right to life, which is protected by article 6 of the ICCPR.⁸¹ Indeed, the Committee found that Canada violated the right to life by denying essential healthcare services to the applicant for the reason of her irregular migration status. The Committee recalls that the right to life cannot be narrowly interpreted and that it includes the right to healthcare, “when lack of access to the health care would

⁷⁹ Emphasis added.

⁸⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, UN.Doc. E/C.12/2000/4, para 34 (emphasis added).

⁸¹ *Toussaint v. Canada* [2018] Human Rights Committee (CCPR) Communication No. 2348/2014, CCPR/C/123/D/2348/2014; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

expose a person to a reasonably foreseeable risk that can result in loss of life”.⁸² Its views affirmed that States have a positive obligation to ensure that everyone has access to a level of essential healthcare necessary to prevent foreseeable risks to life, regardless of their migration status.⁸³ Finally, the Committee stated that the right to healthcare is not limited to emergency healthcare (to which the applicant was entitled), but furthermore includes “the access to essential health care to **prevent** a reasonably foreseeable risk that can result in loss of life”.⁸⁴ Thus, according to the Committee emergency care alone is not sufficient to satisfy the level of healthcare human rights legislation recognises to all people.

2.1.1.4. The Convention on the Elimination of all Forms of Discrimination Against Women

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) recognises certain rights that are extended to irregular migrant women. Article 12 (2) of the Convention, holds that “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.” According to FRA, “such rights can be considered as part of those basic human rights that the Committee established by the CEDAW considers must be guaranteed to all, including **undocumented migrant women**.”⁸⁵

In its General Recommendation No. 24 the CEDAW Committee stated that: “states parties should ensure, without prejudice or discrimination, the right to **sexual health information, education and services** for all women and girls, including those who have been trafficked, **even if they are not legally resident in the country**.”⁸⁶ Thus, the CEDAW Committee does not allow discrimination based on the migration status to affect the enjoyment of the healthcare rights listed within the Convention, and recognises the particular vulnerability of undocumented women when accessing their rights.⁸⁷

⁸² Ibid, para 11.3. For a more detailed position of the Committee about the scope of the right to life, see UN Human Rights Committee, General Comment No. 6: Article 6 (Right to Life), 30 April 1982.

⁸³ Ibid, para 11.7 - 11.8.

⁸⁴ Ibid, para 13 (emphasis added).

⁸⁵ FRA, ‘Fundamental rights of Migrants’ (n.8), 72n4 (emphasis added).

⁸⁶ CEDAW, UN Committee on the Elimination of Discrimination against Women, General Recommendation No.24 on article 12 of the Convention (Women and Health), 1999, UN Doc A/54/38/Rev.1, chap. I, para 18 (emphasis added).

⁸⁷ CEDAW, UN Committee on the Elimination of Discrimination against Women, General recommendation No. 26 on women migrant workers, 5 December 2008, UN Doc. CEDAW/C/2009/WP.1/R , para 17.

2.1.2. *The European level*

At the European Level, in order to investigate the legal recognition of the right to healthcare for irregular migrants it is necessary to analyse the European Social Charter, the European Convention on Human Rights and the law of the European Union.⁸⁸

2.1.2.1. *The European Social Charter*

With regard to the European Social Charter (ESC), reference to healthcare provisions can be found in articles 11 and 13. Article 11 (1) states that state parties undertake “to take adequate measures designed *inter alia* to remove as far as possible the causes of ill-health”. In *DCI v. Belgium* the Committee clarified that this provision imposes on states the obligation to guarantee individual access to healthcare.⁸⁹ Article 13 (1) states that “with a view to ensuring the effective exercise of the right to social and medical assistance”, state parties to the Charter must undertake measures that enable people without adequate resources to receive the social and medical assistance they need. Article 13(4) extends the provision to nationals of other states who are lawfully present in the territory, stating that they have to benefit from the same measures equally with nationals.

At this point, some considerations are necessary to better understand the applicability of the mentioned provisions for irregular migrants. First, the European Social Charter adopted an ‘*à la carte*’ system, which allows State Parties to select the provisions that they will be bound by. Consequently, the first necessary step is verifying which Member States are bound by the provisions of interest.⁹⁰ Second, the Appendix of the Charter provides for a limitation of the personal scope of the ESC. It excludes foreigners unlawfully resident or irregularly working within the territory of the state concerned from enjoying the relevant rights of the Charter.⁹¹ Furthermore,

⁸⁸ The reference is to both the European Charter of 1961 and the European Social Charter (*Revised*) of 1996; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

⁸⁹ *Defence for Children International (DCI) v. Belgium* (2012) European Committee of Social Rights (ESCR) Collective Complaint No. 69/2011, Decision on the Merits, para 100.

⁹⁰ Currently, all the EU countries agreed to be bound by article 11 (1), whilst the acceptance of art 13 (1) concerns all EU Member States, except Cyprus, Slovenia, Poland. Regarding art. 13 (4), it concerns all EU Member States, except Bulgaria, Cyprus, Lithuania, Poland, Romania, Slovakia and Slovenia.

The table of provisions ratified by State Parties can be consulted at the Council of Europe website, European Social Charter section <<http://rm.coe.int/doc/0900001680630742>> accessed 6 May 2019.

⁹¹ Appendix to the European Social Charter, first paragraph: “Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include ***foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned***, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.” (emphasis added).

the wording of article 13 (4) is equally discriminatory in that it does not include those living or working irregularly in the state. As such, these provisions appear to not apply to irregular migrants. However, the limited personal scope of the Charter seems to have been overcome in relation to essential human rights, such as healthcare.

Indeed, the European Committee of Social Rights (ECSR) expressed a contrary opinion to this limitation, defining it as “a sort of anomaly”:

The fact that under the Charter system only nationals of the States Parties can invoke and obtain respect for their social rights, turns out to be a **substantial discrimination**, making the Charter system at odds with the *universal nature of human rights*, and with the fundamental values underpinning the Charter.⁹²

In addition, the case-law departs from this limitation. In the case *FIDH v. France*, the ECSR held that “legislation or practice which denies entitlement to medical assistance to foreign nationals, with the territory of a State Party, **even if they are there illegally**, is contrary to the Charter.”⁹³ Furthermore, in *DCI v. Belgium* the Committee stated that

the restriction of the personal scope included in the Appendix should not be read in such a way as to deprive foreigners coming within the category of unlawfully present migrants of the protection of the most basic rights enshrined in the Charter or to impair their fundamental rights such as the right to life or to physical integrity or the right to human dignity.⁹⁴

Similarly, in *CEC v. Netherlands*, the Committee confirmed that:

When human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity.⁹⁵

⁹² European Committee of Social Rights, ‘European Social Charter (revised) Conclusions 2011’, (Council of Europe 2013) Personal Scope of the Charter, 16, Recital 21 (emphasis added).

⁹³ *International Federation of Human Rights Leagues (FIDH) v. France* (2004) European Committee of Social Rights (ECSR) Complaint No. 14/2003, Decision on the Merit, para 32 (emphasis added).

⁹⁴ *DCI v. Belgium* (n.89) para 28.

⁹⁵ *Confederation of European Churches (CEC) v. the Netherlands* [2014] European Committee of Social Rights (ECSR), Complaint No. 90/2013, Decision on the Merit, para 66.

Additionally, in *CEC v. Netherlands* the Committee expressly recognised that article 13(4) applies to irregular migrants.⁹⁶ Finally, in *Médecins du Monde – International v. France* the Committee stated that the States Party to the Charter have positive obligations in terms of access to healthcare for migrants, regardless their residence status.⁹⁷

The updated Digest of Decisions and Conclusions of the European Committee of Social Rights summarises the current interpretation of the articles of the European Social Charter by the European Committee of Social Rights.⁹⁸ The most recent version is dated 2018. In the section related to article 11, the Digest reports:

the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity... Legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.⁹⁹

In the section dedicated to article 13, the Digest reports:

Article 13§1 also provides for the right to emergency social and medical assistance to foreigners in an irregular situation. It is the same type of emergency social and medical assistance applicable, under Article 13§4, to foreigners who are not resident.¹⁰⁰

Finally, article 11(3) of the Charter urges States “to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.” As it has already been observed in the previous chapter, limiting access to healthcare for undocumented migrants poses a risk for the hosting community as a whole, in terms of lack of general control of emerging pathologies.¹⁰¹ With regards to this, the Council of Europe has considered the direct link between migrants and hosting community health, highlighting that “given the inevitable interdependence between the health of migrants and their host countries’ populations, this issue is of general concern and should be given high

⁹⁶ Ibid para 75.

⁹⁷ *Médecins du Monde – International v. France*, (2012) European Committee of Social Rights (ECSR) Complaint No. 67/2011, Decision on the Merit, para 144.

⁹⁸ European Committee of Social rights, ‘Digest of the case law of the European Committee of Social Rights’ (Council of Europe, 2018), 130.

⁹⁹ Ibid 130.

¹⁰⁰ Ibid 149.

¹⁰¹ See n. 18.

importance.”¹⁰² Arguably, Member States bound by this provision should not limit access to healthcare of people within their jurisdiction.

In brief, the interpretation of the European Committee of Social Rights of the articles of the European Social Charter demonstrates the Committee’s recognition that the right to healthcare for irregular migrants is within the scope of the Charter.

2.1.2.2. *The Convention for the Protection of Human Rights and Fundamental Freedoms*

With regards to the European Convention on Human Rights (ECHR), the European Court of Human Rights interpreted the right to life (article 2) to include the access to health, in line with the Human Rights Committee.¹⁰³ Therefore, the Court “might find a violation of the Convention where there has been a failure to provide basic medical care, leading to death or serious injury”.¹⁰⁴ Nonetheless, the Court has always adopted a cautious approach to the inclusion of socio-economic rights within the scope of the ECHR, affirming that “the Convention does not guarantee, as such, socioeconomic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living.”¹⁰⁵ Moreover, unlike the ESCR, so far the European Court has not provided in its case law obligations for states relating to access to healthcare for irregular migrants under article 2 ECHR.¹⁰⁶ However, the cited openness of the Court towards the potential inclusion of the right to access healthcare within the scope of the right to life, suggests the possibility for the Court to follow the same pathway as the ESCR, extending the scope of article 2.

¹⁰² Council of Europe Parliamentary Assembly, Recommendation no. 1503 on health conditions of migrants and refugees in Europe (adopted 14 March 2001), para 5.

¹⁰³ For example in *Cyprus v. Turkey*, the Court observed that “an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.”

Cyprus v. Turkey [2001] ECHR (GC), Application no. 25781/94, Decision on the Merit, para 219.

¹⁰⁴ Luke Clements and Alan Simmons, “European Court of Human Rights” in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009), 418.

¹⁰⁵ *Pancenko v. Latvia* [1999] ECHR, Application no. 40772/98, Decision as to the admissibility, 6. See also, Sylvie De Lomba, “The ECHR, Health Care, and Irregular Migrants” in Michael Freeman and others., *Law and Global Health: Current Legal Issues Volume 16*, (Oxford University Press 2014) 149, 151.

¹⁰⁶ Sylvie De Lomba (n. 105) 164.

2.1.2.3. *European Union law*

In order to address the right to healthcare for irregular migrants in EU Member States, a focus on EU legislation is indispensable. The Charter of Fundamental Rights of the European Union (CFR) provides for the right to healthcare in article 35: “**Everyone** has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.”¹⁰⁷ In addition, according to article 168 TFEU, the action of the EU shall be complementary to the national policy and be aimed at protecting human health and improving public health.¹⁰⁸ The wording of the article does not specify a difference between nationals and non-nationals, neither between nationals of an EU Member State and third-country nationals. Arguably, the personal scope of the right to health is universal. However, the field of application of the Charter, namely its applicability only to “institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law,”¹⁰⁹ does not allow for the implementation of the Charter outside the EU competence. Consequently, individual EU citizens will not be able to challenge decisions made by Member States in relation to health services and medical care, because healthcare escapes EU competence. However, the recognition of this right in the Charter has a symbolic importance. It testifies to what level the EU opens to a universal recognition of healthcare and has a practical impact in cases to which the Charter applies (article 51 CFR).

In summary, the scope of the right to healthcare of irregular migrants is still debated. There is a general agreement on the state obligation to provide some basic level of health care. In this regard, it can be recalled that the Parliamentary Assembly of the CoE stated that “emergency health care should be available to irregular migrants and states should seek to provide more holistic health care.” However, the recent view of the Human Rights Committee in *Toussaint v. Canada* that states that essential healthcare is necessary to prevent a reasonably foreseeable risk that can result in loss of life. In addition, the CEDAW ensures that undocumented migrant women have a number of healthcare rights, particularly in connection with pregnancy and sexual health. According to the previously mentioned international bodies’ declarations and decisions, and considering State practice,¹¹⁰ one can say that there is a general accord on recognising emergency, essential and

¹⁰⁷ Emphasis added.

¹⁰⁸ TFEU (n.1).

¹⁰⁹ Charter of Fundamental Rights of the European Union art.51.

¹¹⁰ FRA, ‘Fundamental rights of Migrants’ (n.8) 74.

sexual-related healthcare as the ‘minimum level’ to which international law compels states to provide to everyone, including irregular migrants.

2.1.3. Recognising healthcare beyond emergency care.

I posit that a broad interpretation of the right to healthcare for irregular migrants is now required by law. Indeed, the wording of the ICESCR article 12(2), as clarified by its General Comment No.14, compels states to ensure that everyone, regardless of their migration status, has equal access to healthcare. Therefore, for irregular migrants, access should not be limited to ‘emergency care’, but should be guaranteed on an equal footing with nationals. If this were not the case, then states’ laws would be contrary to the particularly strong non-discrimination principle enshrined in article 2 of the ICESCR. Indeed, as already mentioned, article 2 specifically lists ‘other status’ among the prohibited grounds of discrimination. Arguably, the attempt to exclude irregular migrants from the enjoyment of the Convention is inconsistent with this non-discrimination principle. In support of this, in its concluding observation on Spain in 2012 the CESCR expressed concern for the Royal Decree-Law No. 16/2012, which restricted the access to healthcare for irregular migrants,¹¹¹ and recommended that the state party ensure that “the reforms adopted **do not limit** the access of persons residing in the State Party to health services, **regardless of their legal situation**”.¹¹² Another argument in favour of the recognition of undocumented migrants’ access to healthcare beyond emergency and essential care is the position adopted by the European Social Committee on the aforementioned Spanish Royal Decree. Indeed, in its conclusions of November 2014 on Spain, the ESC affirmed that the amendment present in article 1 of the Royal Decree, which had the effect of excluding foreign adults who were irregularly present in Spain from access to healthcare, with the exception of ‘special situations’ (emergency resulting from serious illness or accident; care of pregnant women, both prenatal and postnatal; and foreign minors aged under 18 years), is contrary to article 11 of the European Social Charter.¹¹³ Therefore, the Committee held that the recognition of basic access to healthcare for irregular migrants alone was not sufficient to respect international obligations. The European Committee of Social Rights further affirmed that article 11 paragraph 1

¹¹¹ The Royal Decree limits undocumented migrants’ access to healthcare to ‘special situations’: emergency resulting from serious illness or accident; care of pregnant women, both prenatal and postnatal; and foreign minors aged under 18 years. Royal Decree Law 16/2012, ‘Urgent measures to guarantee the sustainability of the National Health System and improve the quality of its services’ of 20 April BOE no 98, 24 April 2012, art. 1.

¹¹²; UN Committee on Economic, Social and Cultural Rights, Concluding Observations on Spain, 6 June 2012, UN Doc. E/C.12/ESP/CO/5, 5 (emphasis added); Royal Decree Law 16/2012 (n.110).

¹¹³ European Committee of Social Rights ‘Conclusions XX-2 (ESPAGNE) Articles 3, 11, 12, 13 and 14 of the 1961 Charter,’ November 2014, 13.

of the Charter requires states to ensure that all individuals have the right of access to healthcare and that the health system must be accessible to the entire population and also recalled the ESCR General Comment 14, where it is stated that health facilities, goods and services must be accessible to everyone without discrimination.¹¹⁴

In conclusion, Member States only accept that international law compels them to provide a minimal level of healthcare undocumented migrants, whereas a closer examination of recent decisions of different international monitoring bodies points suggest that states are to provide broader access to healthcare for irregular migrants.

2.1.3.1. The economic argument

It is often argued that allowing indiscriminate healthcare access that includes irregular migrants would lead to unsustainable costs for the health system, because of the economic impact of migrants as *free-riders*, namely those who benefits from a service without contributing to its funding (e.g. through contributions or taxes).¹¹⁵ Hereinafter, this argument will be referred to as ‘the economic argument’. Although at first sight the economic argument is convincing, a closer examination highlights its weaknesses. Without exhaustively examining the economic issue, this sub-chapter aims to provide some insight into the economic cost to the state of broader access of irregular migrants to healthcare.

Some objections to the economic argument will be expressed in the following 3 sub-chapters.

2.1.3.1.1. Accessible, not necessarily free.

Access to healthcare beyond emergency care is not necessarily costly for the state, since it does not have to be necessarily free.¹¹⁶ Indeed, there are several options that could be considered in order to include irregular migrants in the funding of healthcare, such as providing paid healthcare services, enabling irregular migrants to have health insurance or to pay contributions to healthcare financing. From a theoretical point of view, migrants may have the economic means to pay for a service, to

¹¹⁴ Ibid.

¹¹⁵ Bradford H. Gray and Ewout van Ginneken, ‘Health Care for Undocumented Migrants: European Approaches’ 33 *Commonwealth fund*, 3; Trummer and others. ‘Costs analysis’ (n.19) 13.

¹¹⁶ This sub-paragraph aims to list some alternatives to free access to healthcare for migrants or for their exclusion from the service. However, this does not necessarily correspond to the personal ideas of the author regarding health financing systems and the connected access to the service.

pay for health insurance or to contribute to a healthcare financing system, and consequently benefit from it.

Nonetheless, some undocumented migrants live in such economic conditions that they would be excluded from the aforementioned proposals, because they do not have the financial resources to pay for healthcare. This problem cannot be ignored without falling between the gap of recognising formal rights, without means to effectively enjoy them. As such, the inclusion of migrants in a healthcare funding system is only a partial solution.

It is, therefore, necessary to counter the economic argument on the point of ensuring healthcare to irregular migrants who do not (and who would not) contribute to healthcare spending (neither through direct payment nor through contributions). The next two sub-chapters will address this issue.

2.1.3.1.2. Irregular migrants are not necessarily free riders

Romero-Ortuño pointed out that the concept of *free-riders* does not entirely apply to irregular migrants.¹¹⁷ Indeed, undocumented migrants are *indirect tax payers*. Where financing for healthcare systems is tax-based, indirect tax payers contribute to the healthcare funding. According to Romero-Ortuño, this “could have significant entitlement implications in those cases where the public health care system receives a significant proportion of its funding from this kind of revenue.”¹¹⁸ However, this reasoning is not applicable to all Member States, as it depends on the elected healthcare funding system. It is, therefore, necessary to evaluate other arguments of a more general application. The next sub-chapter will introduce the result of studies, which investigate the costs analysis for Member States with regards to allowing irregular migrants access to healthcare.

2.1.3.1.3. Giving migrants broader healthcare access is cost saving.

In December 2016, a thematic study was published regarding the costs of healthcare provision for irregular migrants.¹¹⁹ The aim of this study was to evaluate the economic impact of excluding irregular migrants’ access to healthcare beyond emergency care (towards primary and secondary

¹¹⁷ Romero-Ortuño (n.9) 252.

¹¹⁸ Ibid.

¹¹⁹ Trummer and others ‘Cost Analysis’ (n.19).

care).¹²⁰ The study was aimed at complementing the pre-existing research on the issue, particularly three studies that took an economics-based approach to the topic,¹²¹ which had already suggested that excluding this group from mainstream healthcare systems results in greater public costs, but additionally pointed out the need for more robust data.

The 2016 study confirmed the results of the previous research. Accordingly, irregular migrants' "exclusion from health care leads to costs not only from a humanitarian perspective, but also to unnecessary economic costs due to postponed treatment processes resulting in 'forced emergencies'".¹²² It determined that "timely treatment in a primary health care setting entails potential cost savings of at least 49 and up to 100% of direct medical and non-medical costs, and between 4 and up to 100% of indirect costs incurred in a hospital setting for treatment of more severe medical conditions."¹²³ The study therefore concludes with recommendations for states, such as to "provide access to primary health care for all persons, irrespective of legal status (and) provide access to (highly) specialised care based on case-by-case decisions."¹²⁴

In summary, several studies have suggested that limiting the access of irregular migrants' healthcare to only emergency care is economically inefficient.¹²⁵ States, instead, could promote a policy aimed at including irregular migrants in the healthcare financing system, without excluding migrants without sufficient means from the enjoyment of healthcare, thereby deriving more funds for healthcare to benefit the overall hosting society. However, the inclusion of migrants in a broad healthcare system and/or the inclusion of migrants in the health financing system is not possible without establishing a clear separation between the public services and the immigration authority. Irregular migrants will avoid being involved in the healthcare financing system when this poses any risk of data sharing with immigration authorities, as well as the fear of being detected can be an obstacle to their access to healthcare services, as will be further addressed in sub-chapter 2.3.: 'The relevance of Firewall'.

¹²⁰ Ibid 12.

¹²¹ European Union Agency (FRA), *Report 'Cost of exclusion from healthcare'* (EU publications office 2015); Bozorgmehr and Razum 'Effect of Restricting Access to Health Care on Health Expenditures among Asylum Seekers and Refugees: A Quasi-Experimental Study in Germany, 1994-2013' (2015) 10(7) *PLoS ONE*; Ursula Trummer and others. *Study 'Migrants and Healthcare. Social and Economic Approaches'* (ASEF 2014).

¹²² Trummer and others. 'Cost Analysis' (n.19) 14.

¹²³ Ibid 10.

¹²⁴ Ibid 83.

¹²⁵ See n. 109.

2.2. The Member States' level of protection

The fact that international human rights instruments define a minimum level of human rights to be ensured by Member States does not prevent Member States from maintaining or introducing a higher level of protection for individuals. Currently, according to FRA, all EU Member States provide at least access to emergency healthcare for migrants, in which emergency care means “life-saving measures as well as medical treatment necessary to prevent serious damage to a person’s health” free of charge.¹²⁶ Furthermore, some states go beyond this, such as by providing access to emergency, primary and secondary care either free of charge or for a fee.¹²⁷ Although in principle the law does not exclude undocumented migrants from a certain level of care, as has been previously mentioned in the chapter 1.2, practical issues can be a barrier. For example, national Italian law guarantees access to urgent and essential healthcare to irregular migrants, including preventive medical treatment.¹²⁸ Nonetheless, due to certain regional autonomy, some regions guarantee access to healthcare that includes primary and secondary care.¹²⁹ However, a lack of residency permit prevents irregular migrants from effectively accessing secondary care, as they cannot register with a General Practitioner (due to their lack of regular migration status), whose referral is necessary to accede to secondary care. In Germany, undocumented migrants are formally entitled to access healthcare on an equal footing with asylum seekers. Nonetheless, any non-emergency care must be approved by the welfare office, which is obliged by law to share patients’ data with the authorities, rendering the entitlement of non-emergency medical care meaningless.¹³⁰ These are examples of how the allocation of migration control and enforcement tasks on service providers can be expected to create a gap between the formal recognition of rights and their effectiveness.

¹²⁶ FRA ‘Fundamental rights of Migrants’ (n.8) 74.

¹²⁷ For an overview of the healthcare entitlements of migrants in an irregular situation in the 28 EU Member States, see European Union Agency for Fundamental Rights (FRA), ‘Healthcare entitlements of migrants in an irregular situation in the EU-28’ (EU publication office 2015).

¹²⁸ Decree-law 25 July 1998, n.286, Immigration single text, art. 35, Official Gazette n.191 of 18 August 1998 - Suppl. Ordinario n. 139).

¹²⁹ PICUM, ‘Cities of rights’ (n.64) 22-23.

¹³⁰ Ibid 19.

2.3. The relevance of Firewalls

Although a certain level of healthcare is formally recognised or not denied to irregular migrants, “it is necessary to question beforehand whether Illegal migrants can actually enjoy the entitlements that all those laws are currently providing for (or in other words, whether those provisions can actually reach the Illegal Migrants).”¹³¹ Romero-Ortuño indicated that the fear of being reported to immigration authorities by their healthcare providers is among the main barriers that impede access to healthcare for irregular migrants.¹³² The risk of being reported is considered a price too high to pay, with the result that irregular migrants tend to not access services that they are entitled to, renouncing their most basic human rights.¹³³

The issue was discussed in Italy in 2009 during the political debate concerning the adoption of the security decree. The political party ‘Lega Nord’ proposed an amendment intended to abolish the prohibition for medical personnel to report irregular migrants seeking healthcare.¹³⁴ In this case, the duty to provide medical care to migrants remained intact and the proposal did not impose an obligation to report the patient’s irregular status, leaving the medical personnel free to decide whether they would report such status or not. Hence, the right to receive healthcare for migrants was formally guaranteed. Yet several NGOs and professional organisations pointed out that the risk of being reported would have had an important impact on migrants’ effective access to healthcare. According to these organisations, the reform would have led migrants to avoid public healthcare, resulting in the creation of an underground route, which would remove control of potential emerging pathologies, that could represent a serious danger for the individual and society, from public healthcare.¹³⁵ Large civil society protests led to the rejection of the proposal.¹³⁶ Currently,

¹³¹ Romero-Ortuño (n.9) 263.

¹³² Ibid 265.

¹³³ Carens (n.7) 167.

¹³⁴ Lega amendment n. 39.306 (Atto Senato n.733, XVI Legislative period), <<http://leg16.senato.it/japp/bgt/showdoc/16/Emend/413875/348266/index.html>>; The Lega amendment at the Security Decree 2009 provided the abolition of art. 35 (5) of the decree-law 25 July 1998, n.286 that states: “Access to health facilities by foreigners who do not comply with the rules on residence may not involve any type of report to the authority, except where the report is mandatory, under equal conditions with the Italian citizen” Official Gazette n.191 of 18 August 1998 - Suppl. Ordinario n. 139).

¹³⁵ The National Council of the Italian National Federation of the Orders of Surgeons and Dentists expressed its contrary opinion to the amendment highlighting *inter alia* that the possibility of reporting will create an underground route, taking away emerging pathologies from public control and monitoring, therefore representing a serious danger for the individual and the whole society. National Federation of the Orders of Surgeons and Dentists, ‘Documento del Consiglio -Nazionale sul Ddl Sicurezza’ [Document Of The National Council On Ddl “Sicurezza] (2009).

¹³⁶ Doctors without Borders (MSF), Società Italiana di Medicina delle Migrazioni (SIMM), Associazione Studi Giuridici sull’Immigrazione (ASGI) and Osservatorio Italiano sulla Salute Globale (OISG) promoted the national campaign ‘Prohibition of report: we are doctors, not spies.’ The campaign has had huge success, collecting adhesions and being reported in television broadcasts. During April 2009, the chairmen of the Constitutional Affairs and Justice Committee agreed on a series of hearings to several groups of civil society, including Doctors without Borders, the Italian observatory on global health, and some doctors trade unions. On the 30 April Commission I and II of the

medical personnel are prohibited from reporting undocumented migrants accessing healthcare to the police.¹³⁷ This prohibition of reporting is a clear example of a Firewall.

All this considered, it can be argued that the adoption of Firewalls, which protect migrants from the consequences related to their immigration status when accessing healthcare services, would address an important factor that *de facto* deprives migrants of their rights.

At this point, clarification is necessary. According to the author, the purpose of a Firewall cannot be considered satisfied by partial measures that prohibit immigration control tasks only for one part of the service (for instance, only for emergency care). As suggested by former UN Special Rapporteur on the human rights of migrants, an efficient Firewall creates a complete and clear separation between service providers and immigration enforcement.¹³⁸ There is more than one reason to favour complete separation. First, as mentioned above, some EU Member States entitle migrants to a level of healthcare higher than simply emergency care, but without protection from migration-related consequences. As Carens notes, “this creates a serious normative problem for democratic states. It makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for them to exercise those rights effectively.”¹³⁹ Second, whether one assumes that guaranteeing emergency care satisfies the international human rights’ obligations on healthcare, the lack of a complete separation between services and immigration authorities makes this fulfilment formal rather than effective. Indeed, on more than one occasion the lack of clarity on service providers’ duties in relation to migration control has resulted in, on the one hand, service providers unduly refusing to serve irregular migrants or, on the other hand, the creation of an atmosphere of mistrust and fear that prevents migrants from accessing these services even though there is no real risk of being reported.¹⁴⁰ For example in Spain, after the reform on the matter made by the Royal Decree 16/2012, which excluded irregular migrants from non-emergency care, Médicos del Mundo España testified to several cases of service providers unduly denying healthcare services to irregular migrants seeking access to emergency care (which they were still entitled to).¹⁴¹ Arguably, a total halt of service providers having any controlling tasks of users’ immigration status would avoid these kind of issues and would allow service providers to “fully perform their missions towards the

Parliamentarian Chamber abrogated the amendment. For more details: Fondazione Ismu, *Report 'Quindicesimo Rapporto Sulle Migrazioni 2009'* [Fifteenth Report on Migrations] (Franco Angeli 2010).

¹³⁷ The prohibition to report is envisaged in art.35 (5) of the decree-law 25 July 1998, n.286, that has not been abrogated nor modified by following laws on the matter. In addition, the prohibition to report was confirmed by the Ministry of Interior, Immigration and civil freedom department, (2009) circular n.12/09 (protocol n.780/A7).

¹³⁸ UNCHR ‘Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants’ (2014) UN Doc. A/HRC/26/35, Recital 62.

¹³⁹ Carens (n.7) 167.

¹⁴⁰ Fallek (n.17) 973.

¹⁴¹ Medigos del Mundo, *Report 'Dos años de reforma sanitaria: más vidas humanas en riesgo'* (Medigos del Mundo 2014).

whole of the community they serve”¹⁴² and therefore “accomplish the public service mission of their trade”.¹⁴³

Regarding the creation of an atmosphere of mistrust and fear, during the debate in California in 1994 that concerned Proposition 187, which prohibited irregular immigrants from using *non-emergency* health care and compelling service providers to report them to immigration authorities, it clearly emerged that the fear of being reported produced an exclusion broader than expected.¹⁴⁴ Indeed, because of this fear, there was a sharp decrease of irregular migrants accessing even emergency healthcare despite the fact that they held the right to such urgent care.¹⁴⁵ Similarly, the recent report of the England Liberty organisation revealed how the bulk-data sharing agreement between the National Health Service and the Home Office in the UK, has led migrants to avoid accessing healthcare because of fear of deportation.¹⁴⁶ In addition, interviews conducted by Liberty revealed that the suspension (as is the current state), or even the withdrawal of the agreement are unlikely to reassure migrants.¹⁴⁷ Consequently, Liberty recommended the adoption of Firewalls.¹⁴⁸ Furthermore, a qualitative research study conducted in France in 2017 highlighted how irregular migration status is a continuous cause of concern for irregular migrants, and how it is an obstacle to make first contact with doctors.¹⁴⁹ One of the migrants interviewed affirmed: “*Même quand je marche j’ai peur... [...] Je [ne] sais pas comment... quand tu n’as pas de papier, tu as peur. [...] Même quand vous m’avez appelé... j’ai [eu] peur.*”¹⁵⁰ Similarly, the interviews conducted during this research suggest that the fear of detection leads irregular migrants to avoid governmental institutions, preferring informal settings.¹⁵¹ When answering questions related to his personal access to healthcare, a migrant answered: “I go to a friend. Before I went [to the hospital] because I had the permit. Now it expired. Now I go to friend.”¹⁵²

¹⁴² Crèpau and Hastie (n.2) 167.

¹⁴³ Ibid 159.

¹⁴⁴ Californian Proposition 187 (1994) (codified as Californian Education Code para 48215, 66010.8 (West Supp. 1996); Californian Government Code para 53069.65 (West Supp. 1996); Californian Health & Safety Code para 130 (West Supp. 1997); Californian Penal Code para 113, 114, 834b (West Supp. 1997); Californian Welfare & Institutions Code para 10001.5 (West Supp. 1997).

¹⁴⁵ Fallek (n.17) 973 and 975.

¹⁴⁶ Liberty (n.60) 61.

¹⁴⁷ Ibid, 62.

¹⁴⁸ Ibid, 67.

¹⁴⁹ Sebastien Vergan and others, ‘Représentations et expériences des soins premiers chez les migrants bénéficiaires de l’aide médicale de l’État.’ [Representations and experiences of primary care among migrants receiving state medical assistance] (2019) 154 *Exercer* 2, 3.

¹⁵⁰ Translation: Even when I walk I am scared... [...] I do not know how, when you are without papers, you are scared. [...] Even when you called me, I was scared. Ibid.

¹⁵¹ Interview with Mariarita Cardillo, legal professional for the Csa Ex Canapificio (Caserta, 26 June 2019).

Transcription of the interview is provided in Annex II.

¹⁵² Interview with an undocumented migrant (Caserta, 26 June 2019). Transcription of the interview is provided in Annex I, interview n.2.

According to Mariarita Cardillo, a legal professional who works in Italy for a local association dealing with migrants:¹⁵³

Irregular migrants usually prefer informal settings, such as medical clinics organised by 'Emergency'¹⁵⁴. The number of users of Emergency's clinics is way higher than the one that turns to state institutions. So those who have no documents...even pregnant women... prefers or to stay hom... or they refer to Emergency or even prefer to not have gynaecological examinations unless they are really running out of time... when they have to go to hospital to give birth. They fear of having problems.¹⁵⁵

Consequently, this situation leaves room for a compression, in practice, of migrants' healthcare human right, raising doubts of coherence with states' international obligations.

In conclusion, a complete separation between services and immigration enforcement would arguably have the positive outcome of dispelling any doubts about the duties of service providers, to the benefit of all parties involved. It would on the one hand solve the problem of this uncertainty by both reassuring migrants and clarifying the service providers' duties, and on the other hand it would allow migrants to effectively enjoy those rights that international and domestic law provide to them.

¹⁵³ The Csa Ex Canapificio is a local association part of the Italian Protection System for Asylum Seekers and Refugees (SPRAR). It offers several services to migrants, including a weekly free service of legal counselling.

¹⁵⁴ 'Emergency' is an Italian NGO with an international presence that provides free medical care to its users.

¹⁵⁵ Interview with Mariarita Cardillo (n.151).

3.

Irregular migrants and work exploitation

Many migrants who live irregularly in a country are undeclared workers in the informal economy.¹⁵⁶ The result is negative for both the individual and for the hosting community. “Undeclared work is undoubtedly a factor enabling employees’ labour exploitation”.¹⁵⁷ Being involved in the informal job market is to have no work-related rights, namely by not benefitting from the protections recognised to official workers of a certain country with regards to salary, work conditions and social security. This is often translated into exploitative work conditions for irregular migrants.¹⁵⁸ For example, as demonstrated by the questionnaire ‘The rights of undocumented migrants,’ implemented in the research for this thesis, none of the 13 migrants who answered got paid more than 4 euros per hour (only one migrant earned 4 euros), the average being around 3 euros per hour, with the minimum earning only 2 euros per hour (two migrants).¹⁵⁹ Moreover, 11 migrants answered that they used to work or currently work in terrible conditions and two reported average conditions.

At the same time, undeclared work influences the overall community, in terms of general work conditions, employment demand and state income. Indeed, undeclared work produces a loss of

¹⁵⁶ Fabio Tittarelli, ‘il mercato del lavoro nell’era della globalizzazione’ [The labour market in the era of globalisation] (2011) *Tramontana Rivista Online* 1, 5; Christina Boswell and Thomas Straubhaar, ‘The illegal employment of foreign workers: An overview’ (2004) 39(1) *Intereconomics* 4, 4.

However, irregular migration is not the cause of the underground economy, which, in fact, depends on other factors mostly related to economic policy. Indeed, irregular migrants join many national undeclared workers in the informal job market, and both migrants and national workers produce the negative outcomes for the wider community in terms of salary, state income and regular employment demand. Actually, Venturini highlighted that “the effect of the irregular natives on the regular labour is always larger than the effect of foreigners working irregularly.” In other words, the negative incidence on the labour market of national undeclared workers is higher than that caused by irregular migrant workers. This is probably due to the relatively small number of irregular migrants in a single country. Consequently, the idea that tackling irregular migration will tackle the entire informal labour market is erroneous. The fight against the informal economy needs a more comprehensive approach. Alessandra Venturini, ‘Do Illegal Migrants Compete with National Workers?’ (2004) 39(1) *Intereconomics* 11, 13; Geoges Tapinos, ‘Illegal immigrants and the labour market’ OECD Observers

<http://oecdobserver.org/news/archivestory.php/aid/190/Illegal_immigrants_and_the_labour_market.html> accessed 29 May 2019.

¹⁵⁷ Association for Legal Intervention, *Report ‘Unprotected: Migrant workers in an irregular situation in Central Europe’* (Epim 2014), 112-113 <<http://interwencjaprawna.pl/en/files/unprotected.pdf>> accessed 29 May 2019.

¹⁵⁸ Irina de Sancho Alonso, ‘Access to labour rights for undocumented workers’ in Sergio Carrera and Massimo Merlino (eds.) *Policy Paper ‘Assessing EU policy on irregular immigration under the Stockholm Programme’* (CEPS 2010), 10.

For a detailed overview on labour exploitation of migrants, see the Report of the Special Rapporteur on the human rights of migrants. UNHRC ‘Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants’ (2014) UN Doc. A/HRC/26/35.

¹⁵⁹ Questionnaire, ‘The rights of undocumented migrants’. Results of the questionnaire are provided in Annex III.

fiscal revenue for the state and competition with regular workers that can result in the lowering of work conditions or reducing the demand for regular employment.¹⁶⁰

The twofold negative impact of undeclared work has been clearly resumed by Ms. Louise Arbour, UN Special Representative for International Migration:

The severe restrictions on their ability to work legally means irregular migrants are often willing to accept poor wages and unsatisfactory labour conditions. Their fear of being detected, detained or deported may make them reluctant to report rights violations to the authorities. This can, as a corollary, result in unfair competition with and harm to national workers, effectively creating a second-tier labour market for migrant workers that prejudices their rights and undercuts established wages and decent working conditions.¹⁶¹

Therefore, irregular migrants are particularly likely to be exploited in the informal job market for several reasons, such as their economic needs,¹⁶² and reluctance to report work exploitation due to their irregular status.¹⁶³ Although irregular migrants are not legally entitled to work in the country that they live in, international law provides them with certain labour rights.¹⁶⁴ However, as mentioned, the fear of coming to the attention of the authorities often prevents irregular migrants from claiming their rights and thus exposing their employer/s, with the result of perpetrating the state of exploitation and protection of the exploiter and the informal market for employment.

Numerous labour rights are recognised for irregular migrants, however in order to focus on a normative discourse on the current legal protection of migrants from work exploitation and investigate new measures to better tackle work exploitation, the chapter will focus only on one right of particular interest for irregular migrants. This is the right to claim fair payment (which includes receiving outstanding pay). This right will be the guideline for building the discussion surrounding

¹⁶⁰ Boswell and Straubhaar (n.156) 4.

¹⁶¹ Statement by the UN Special Representative for International Migration, Sixth Informal Thematic Session on “Irregular migration and regular pathways, including decent work, labour mobility, recognition of skills and qualifications and other relevant measures” (12-13 October 2017) <https://refugeesmigrants.un.org/sites/default/files/statement_by_the_un_special_representative_for_international_migration_louise_arbour_at_the_sixth_thematic_session.pdf> accessed 6 June 2017.

¹⁶² Irregular migrants lack of any legal or personal support system they can rely on in order to find employments with better work conditions.

¹⁶³ UNHRC, ‘Labour exploitation’ (n.158) para 57.

¹⁶⁴ In 2007, a European Commission Staff Working Document reported that at least 26 of the then 27 EU Member States had in place sanctions for employers of irregular third-country nationals, and 19 of them provided for criminal sanctions. Since 2009, the EU Employers’ Sanctions Directive (art.1) compels all EU Member States (except Denmark, Ireland and the UK which have opted out) to prohibit the employment of illegally staying third-country nationals. Commission, Staff Working Document accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, Impact assessment [2007] SEC 603.

effective access to labour protection for irregular migrants. Therefore, this chapter will briefly highlight the international instruments that recognise the right of irregular migrants to claim fair payment. In the succeeding section, it will investigate whether the lack of a clear separation of service providers (in this case law enforcement providers, such as labour inspectors and police) and immigration enforcement authorities jeopardises the enforcement of the right, consequently maintaining the *status quo* and protecting the employer.

3.1. The legal framework

3.1.1. *International law instruments*

The right to fair remuneration is enshrined in several international legal instruments. This subchapter will analyse the relevant instruments, considering their applicability to irregular migrants. To this end, this section will address the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights, and selected International Labour Organisation Conventions.

3.1.1.1. *The Universal Declaration of Human Rights*

The right to fair payment is enshrined in the UDHR in article 23, which recognises everyone has “the right to just and favourable conditions of work (para 1),” “the right for equal pay for equal work (para 2),” “the right to just and favourable remuneration (para 3).”

As was mentioned in chapter 2, it has to be borne in mind that the legally binding force of the UDHR is discussed. Furthermore, the economic, social and cultural rights set out in articles 22 to 27 are rarely qualified by either doctrine or tribunals as customary law, although they may have wider recognition in other international legal instruments.¹⁶⁵ Although the UDHR does not create obligations for states in relation to labour rights, this does not mean that it is irrelevant. Further to this point, see the considerations previously discussed in sub-chapter 2.1.1.1.

¹⁶⁵ Oraà Oraà (n.74) 130.

3.1.1.2. *The International Convention on Economic, Social and Cultural Rights*

The right to fair payment finds recognition in article 7 of the ICESCR which provides that everyone has the right to “fair wages and equal remuneration for work of equal value without distinction of any kind.”¹⁶⁶ Several elements show that this provision is also applicable to irregular migrants. Firstly, article 2 of the ICESCR does not allow for discrimination on any ground or status. Moreover, in 2016 the Committee on Economic Social and Cultural Rights issued a General Comment on article 7 of the Convention, which states:

The right to just and favourable conditions of work is a right of everyone, without distinction of any kind. The reference to “everyone” highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the **informal sector, migrant workers**, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers. The reference to “everyone” reinforces the general prohibition on discrimination in article 2 (2) and the equality provision in article 3 of the Covenant, and is supplemented by the various references to equality and freedom from distinctions of any kind in sub-articles 7 (a) (i) and (c).¹⁶⁷

Finally and most importantly, in the same recommendation that the Committee explicitly addresses irregular migrants by recognising the right to access effective judicial or other appropriate remedies when they experience violations of the right to just and favourable conditions of work.¹⁶⁸

This reveals a tendency at the international level to prevent different treatment in work conditions from being affected by migration status. This tendency is further exemplified by the ILO Conventions and the EU Legislation addressed in the following sections.

¹⁶⁶ Art.7 ICESCR; The Belgium Government made an interpretative declaration with respect to art.2, paragraph 2 of the ICESCR interpreting “non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.” The text of the Declaration can be consulted online, at United Nations Treaty Collection (UNTC) (Treaties.un 2019)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en > accessed 7 June 2019.

¹⁶⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the Right to just and favourable conditions of work (art.7 of the Covenant), 27 April 2017, UN Doc. E/C.12/GC/23, para 5 (emphasis added).

¹⁶⁸ “Access to remedy should not be denied on the grounds that the affected person is an irregular migrant.” Ibid 57.

3.1.1.3. *The International Labour Organisation's Conventions*

Among the main legal instruments of interest which address the rights of workers there are the conventions of the International Labour Organisation (ILO). Regarding the right to fair remuneration, one can recall Convention No.143 (1975) that specifically provides for equality of treatment of migrant workers in an irregular situation and their family “in respect of rights arising out of past employment as regards remuneration, social security and other benefits”.¹⁶⁹ Of the EU Member States, only Cyprus, Italy, Portugal, Slovenia and Sweden have ratified the Convention.¹⁷⁰ Consequently, the cited provision only binds these states. However, in 2011, the ILO submitted a document to the FRA annual conference entitled ‘ILO note on the Dignity and Rights of Migrant Workers in an Irregular Situation.’¹⁷¹ In its note, the ILO recognised that “in principle, unless otherwise stated, all international labour standards cover all workers irrespective of their nationality or immigration status.”¹⁷² Moreover, it listed a number of Conventions that fix “international labour standard of relevance to the protection of migrant workers in an irregular situation.”¹⁷³ Among these listed Conventions, is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) that prohibits discriminatory “opportunity or treatment in employment or occupation”. Furthermore, the elimination of discrimination with respect to employment and occupation is one of the fundamental principles contained in the ‘ILO Declaration of Fundamental Principle and Rights at Work (1998).’¹⁷⁴ ILO Member States have an obligation “to respect, to promote and to realize” the principles contained in the mentioned ILO Declaration regardless of whether or not they have ratified the relevant Conventions.¹⁷⁵ The elimination of discrimination embodies “discrimination in hiring, assignment of tasks, working conditions, pay, benefits, promotions, lay-offs and termination of employment”.¹⁷⁶

¹⁶⁹ ILO no.143 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, entered into force 9 Dec 1978), art.9(1).

¹⁷⁰ The state of ratification can be verified on the related ILO, ‘Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)’ (ILO) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288> accessed 7 June 2019.

¹⁷¹ International Labour Organisation, ILO note on the Dignity and Rights of Migrant Workers in an Irregular Situation <http://www.ilo.int/brussels/WCMS_177275/lang--en/index.htm> accessed 2 June 2019.

¹⁷² Ibid 1.

¹⁷³ International Labour Organisations Conventions Nos. 29, 105, 138, 182, 87, 98, 100, 111, 81, 95, 122, 155, 183, 184, 19, 88, 102, 100, 118, 121, 157, 181, 200, 189, 201, 97, 152, 86, 151.

¹⁷⁴ ILO Declaration on Fundamental Principle and Rights at Work, International Labour Organisation, 18 June 1998, para 2.

¹⁷⁵ Ibid.

¹⁷⁶ ILO, ‘Elimination of discrimination in respect of employment and occupation’ <<http://www.ilo.org/declaration/principles/eliminationofdiscrimination/lang--en/index.htm>> accessed 2 June 2019.

It is noteworthy that the Inter-American Commission based its reasoning *inter alia* on the aforementioned note of the ILO¹⁷⁷ and Declaration¹⁷⁸ when the Commission issued a landmark decision on the topic of labour rights of undocumented migrants in 2016.¹⁷⁹ It considered that “the right of all workers to receive benefits arising from the employment relationship... is one of a group of economic and social rights that must accompany civil and political liberties for the full protection of human rights” and stated that the migration status is not a legitimate ground of discrimination in the recognition of labour rights. The Commission further recommended that states “once a person commences work as an employee, ensure all federal and state laws and policies, on their face and in practice, prohibit any and all distinctions in employment and labor rights based on immigration status and work authorization”.¹⁸⁰

In brief, irregular migrant workers are generally protected by ILO’s legislation, as it is their labour right to receive fair remuneration for the work that they do, on equal footing with regular workers.

3.1.2. *European Law Instruments*

At the European Level, neither the European Charter of Human Rights nor the European Social Charter can be considered to provide the right to fair remuneration for irregular migrants. Indeed, although the right to fair remuneration is enshrined in the ESC (article 4), so far there is no sufficient legal ground to sustain that this right applies beyond the limited personal scope of the Charter, which excludes third-nationals who are unlawfully staying within the country or, of note for the purpose of this thesis, illegally working in the country. However, EU law does provide a law that addresses this issue: the Employers’ Sanctions Directive.

3.1.2.1. *The Employers’ Sanctions Directive*

In 2009, the EU issued a Directive (EU Directive 2009/51/CE) introducing provisions that targeted the employers of irregularly resident migrants. The declared purpose of the Directive is to deter new irregular migration either through arrivals or overstaying, by addressing one of the considered *pull*

¹⁷⁷ See n.171.

¹⁷⁸ See n.174.

¹⁷⁹ *Undocumented workers v. United States of America* [2016] Inter-American Commission (IACHR) Report No. 50/16, Case 12.834, OEA/Ser.L/V/II.159 Doc. 59, Report on Merits, para 120.

¹⁸⁰ *Ibid*, para 5.

factors, namely the possibility of finding a job.¹⁸¹ Accordingly, the Directive aims to prevent the employers' demand for irregular migrant workers by prohibiting the employment of irregular migrants¹⁸² and compelling Member States to adopt sanctions for the employers¹⁸³ and to criminalise the infringement of the prohibition under certain circumstances.¹⁸⁴ Moreover, according to the Directive, states should compel employers to ensure the payment of taxes and contributions to social security. With this in mind, the Directive includes penalty payments for delays and administrative fines that would ensure there would be no financial benefit had the third-country national been legally employed.¹⁸⁵

In addition to deterring measures against employers, the Directive focuses on workers' rights. It recognises rights for the employee migrants in relation to outstanding remuneration.¹⁸⁶ The Directive imposes a duty on employers to pay to the third-country nationals any outstanding remuneration for any work that they have undertaken. This is an important provision for safeguarding migrant workers' rights, which are generally exploited in terms of remuneration. Regarding the quantification, article 1 (a) of the Directive states:

The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages.

¹⁸¹ "The majority of irregular migrants remain undetected, and the possibility of finding work remains a significant incentive to irregular migration into the EU. Employment of third-country nationals who are illegally staying is the result of migrants seeking a better life meeting demand from employers who are willing to take advantage of workers ready to undertake low-skilled, low-paid jobs in labour-intensive sectors such as construction, agriculture, cleaning and hotels/catering... Directive 2009/52/EC2, adopted on 18 June 2009, seeks to counter **the pull factor of finding work**" (emphasis added). Commission, 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 [2014] COM 286 final, 2; [for more details on the genesis of the Directive, see also the proposal of the European Parliament and of the Council](#). European Parliament and Council Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals [2007] COM 249 final.

¹⁸² art.1: "This Directive prohibits the employment of illegally staying third-country nationals in order to fight illegal immigration. To this end, it lays down minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition" and art.3(1): "Member States shall prohibit the employment of illegally staying third-country nationals." Employers' Sanctions Directive.

¹⁸³ Art 5 of the Employers' Sanctions Directive.

¹⁸⁴ Art.9 of the Employers' Sanctions Directive imposes criminalisation when employing irregular migrants is accompanied by special aggravating circumstances, such as for example particularly exploitative working conditions (art.9 c).

¹⁸⁵ Art.6 (b).

¹⁸⁶ Art.6 Employers' Sanctions Directive.

In addition, the Directive addresses one of the problems generally faced by migrants in claiming their rights, namely proving the existence of the fact that there was a working relationship with the employer and/or the length of such a relationship.¹⁸⁷ This can prove to be a problem as by the nature of being informal workers there will be no formal or regular contract. Remarkably, the Directive states “Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise.”¹⁸⁸ In conclusion, the Directive protects the right to fair remuneration for irregular migrants and provides a duty to employers to pay any outstanding remuneration for the work that such workers have undertaken in accordance with applicable national laws or practice. Apart from protecting the human rights of irregular migrants, the further deterring role of these provisions cannot be ignored. Indeed, such a provision increases the economic risk for employers, who may be forced to pay back ‘regular’ remuneration they would otherwise have paid had the third-country national been legally employed. Interestingly, the same point was raised by the Inter-American Commission in the above-mentioned decision of 2016. In this case, the Commission stated that:

The IACHR would be remiss if it failed to reject here the [State’s] argument that discrimination against undocumented workers discourages them from seeking employment in contravention of U.S. law. Rather, the Commission considers that by requiring employers to provide equal redress to employees, undocumented or otherwise, would do more to achieve this goal. If undocumented workers must be paid the same, treated the same, and remedied the same under the law, the incentives for hiring undocumented workers are reduced.¹⁸⁹

Arguably, the widest possible enforcement of the right to receive outstanding remuneration would have a doubly positive result. It would not only respect the labour rights of undocumented migrants but also have a deterring effect on the demand for illegally present third-country nationals. Shortcomings of the possibility for migrants to enforce the discussed rights, and the potential pathways for improvement will be discussed in subchapters 3.2. and 3.3.

¹⁸⁷ FRA, ‘Fundamental rights of Migrants’ (n.8) 50.

¹⁸⁸ Art.6(3).

¹⁸⁹ *Undocumented workers v. United States of America* (n.179) note 110.

3.2. The possibility to claim labour rights in practice

The possibility for migrants to enforce their labour rights is directly connected to the possibility to access to justice. According to FRA report from 2011, there are no express prohibitions in EU Member States law that exclude migrants from accessing remedies for labour law violations.¹⁹⁰ However, several factors, including the fear of coming to the attention of migration authorities and therefore being detected as irregular migrants, “make it difficult for migrant workers in an irregular situation to claim their rights in court”.¹⁹¹ Indeed, civil society reports that there is a high risk that irregular migrants seeking access to courts may come to the attention of immigration law enforcement authority.¹⁹² As PICUM reports:

in EU member states, despite their increased exposure to ill-treatment, undocumented migrants are at significant risk of arrest and deportation if they seek assistance from the police and labour authorities, as their irregular status frequently supersedes their need for protection. Their irregular status also serves as a serious barrier when trying to access the justice system, be it for labour rights violations or criminal justice for acts of violence.¹⁹³

The EU Directive provides that Member States are obliged to “ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties.”¹⁹⁴

Nonetheless, this provision does not clearly impose a safe path for complaints for irregular migrants. Namely, it lacks the express provision of the possibility for irregular migrants to report a complaint without fear of detection by the immigration authority. A study carried out in 2014 on the implementation of the EU Employers’ Sanctions Directive in 5 Member States reported that in Romania “a claim may be lodged in court directly by the third-country national prior to voluntary or forced return to the country of origin or by a third-party (lawyer) based on his/her written consent obtained prior or after his/her departure from Romania.”¹⁹⁵ In Hungary, “if a case of a third-country national’s work relationship without the required work permit is reported to the labour inspectorate, they are obliged by law to report the case to the immigration police who may immediately order

¹⁹⁰ FRA, *Fundamental rights*’ (n.8) 54.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ PICUM, *Submission UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) Half Day General Discussion on ‘Workplace Exploitation and Workplace Protection’* of 7 April 2014, 3

¹⁹⁴ Art.13 EU Employers’ Sanctions Directive.

¹⁹⁵ Association For Legal Intervention (n.157) 9.

expulsion.”¹⁹⁶ Therefore, in both of these examples there is no path to submitting a complaint that does not include prior deportation.

François Crépeau, former UN Special Rapporteur for human rights and migrants, has observed the same problem. Crépeau reported that due to the criminalisation of irregular migration, in many countries there is a strict collaboration between “labour inspections and immigration enforcement and/or imposition of immigration control duties on labour inspectors,” with the result that irregular migrants are “very reluctant to report workplace violations to labour inspectors.”¹⁹⁷

The strict collaboration between these two entities has deeply modified the nature of workplace labour inspections, meaning that they are not limited to simply detecting violations of labour law, but often extend their scope to immigration enforcement. For example, in the Netherlands, although there is a formal separation between the police/immigration enforcement and labour inspectors, in practice, many times labour inspections are carried out in collaboration with the police (which has immigration enforcement tasks). In addition, labour inspectors have a duty to denounce undocumented workers.¹⁹⁸ In Belgium and Italy the criminalisation of irregular stay obliges public officials, including labour inspectors, to report all persons found without regular residence status to the immigration authorities.¹⁹⁹ In this way, labour inspections are no longer solely focused on labour law violations, but have diverse objectives. This situation could lead to shortcomings. As observed by FRA “when labour authorities prioritise checking workers’ immigration status, this diverts attention from working conditions,” and the irregular status of the workers could obscure their rights as victims of exploitation.²⁰⁰ Mariarita Cardillo, confirms that in her experience many times labour inspections end with a decree of expulsion for irregular migrant workers, without the public authority collecting information or reports from the workers.²⁰¹

Moreover, this situation prevents migrants from collaborating with labour inspectors during workplace inspections. Indeed, the fear of being detected as an irregular migrant has led workers to hide from the authority, which plays into the hands of the employer and undermines the efficiency of the inspection system.²⁰² In conclusion, the absence of a separation between labour inspection and immigration enforcement and the lack of ‘safe path’ for complaining without fear of being detected

¹⁹⁶ Ibid.

¹⁹⁷ UNHRC ‘Labour exploitation’ (n.158) 16

¹⁹⁸ PICUM, *Report ‘Employers’ sanctions: impacts on undocumented migrant workers’ rights in four EU countries’* (PICUM 2015), 7.

¹⁹⁹ Ibid 6.

²⁰⁰ European Agency for Fundamental Rights (FRA), *Report ‘Protecting migrant workers from exploitation in the EU: boosting workplace inspections,’* (EU publications office 2018), 7.

²⁰¹ Interview with Mariarita Cardillo (n.151).

²⁰² FRA, ‘boosting workplace inspections’ (n.200), 6.

prevents migrants from claiming their vested labour rights, eventually exposing them to labour exploitation, and precipitating many doubts about the consistency with human rights law.

3.3. The relevance of Firewalls

The fact that the EU Directive lacks a provision which introduces a ‘safe path’ for reporting is a missed opportunity to increase the opportunity to uncover cases of irregular migrants’ exploitation in the workplace. With regards to this point, PICUM questions the capacity of the Directive to achieve its objectives, both deterring employment of irregular migrants and protecting irregular migrants’ rights. Indeed, according to data collected by PICUM, employers still find it more advantageous to use irregular employment, “as the risk of being inspected combined with the financial sanction is in most cases much lower than the costs associated with fully declared and formalised work contracts.”²⁰³ Furthermore, data collected on the criminal conviction of employers related to work exploitation points in the same direction. In 2014, the very low number of detected criminal offences falling under the provisions of the Directive has led civil society to question the ability of the Directive to have a real impact on employers’ behaviour.²⁰⁴ Underreporting was considered to be among the causes of the low number of convictions.²⁰⁵

In brief, the lack of a safe complaint system that allows migrants to report labour exploitation without fear of deportation reduces the possibility for labour inspectors to discover illegal employment on the base of individual reports. At the same time, the high risk of deportation subsequent to workplace labour inspections boosts the collaboration between migrants and employers in avoiding the detection of irregular migrant workers. Indeed, as confirmed by FRA’s recent study on the issue, making workers hide was a common strategy adopted by employers:

Thirteen exploited workers (in Belgium, France, Italy, Poland and Portugal) reported that they had to hide during actual inspections – in the street, a toilet, a storage room, the garden and a basement. One worker (Portugal, irregular status) was forced to hide in a cold room for three hours and later needed medical attention. Another (Italy) was locked up in a warehouse by the employer. In a separate case in France, an interviewee’s co-worker tried to lock him in the cold room, but the labour inspector saw what was happening and he managed to escape.²⁰⁶

²⁰³ PICUM, ‘Employers’ sanctions’ (n.152) executive summary.

²⁰⁴ Association For Legal Intervention, ‘Unprotected’ (n.157) 107.

²⁰⁵ Ibid.

²⁰⁶ FRA, ‘boosting workplace inspections’ (n.200) 20.

Undocumented migrants generally collaborate with their employer in order to hide themselves from the authorities, because they fear consequences related to their migration status.²⁰⁷ As affirmed by an irregular migrant involved in informal work, in case of work-place inspections “I run away. I always run away. My friends too, everyone run away. Because there is no documents. I’ve already lost a friend. Because they say he is not Italian, without documents, he cannot work and they took him away.”²⁰⁸

This situation is perpetrated by the mistrust of migrants towards the labour inspection system. In an interview conducted by FRA in Belgium, the interviewee stated that:

Even when the labour inspection comes with the police, the undocumented immigrant will go to a closed centre and the boss will remain fraudulent, nothing will happen to the employer. That is the system, **it only goes after the undocumented immigrants...**²⁰⁹

This mistrust is often well-grounded. Indeed, FRA observed that when labour authorities carry out immigration status controls “even when third-country national workers in an irregular situation have been severely exploited, the fact of their irregular residence can obscure their status and rights as victims of crime”.²¹⁰

This information corresponds to what has been observed by Mariarita Cardillo, who reported that

often we collected testimony about raids of the Tax Agency [Italian: Guardia di Finanza] or of other authorities, [raids] carried out in the fields, industrial basements or factories... what happened is that only a few times the employer or company were sanctioned, and no one took testimonies or reports of who was irregularly working there, **but they proceeded directly to expulsion.**²¹¹

Arguably, releasing labour inspections from immigration enforcement tasks would improve the focus on work conditions and protection of the victims of exploitation, allowing victims to report to and collaborate with the authority.

The necessity of adopting Firewalls between immigration enforcement and public services, such as labour inspectors was pointed out in 2014 in a report on labour exploitation, by the UN Special

²⁰⁷ FRA, ‘boosting workplace inspections’ (n.200) 6

²⁰⁸ Interview with an undocumented migrant, (Caserta 26 June 2019). The transcription of the interview is provided in the Annex I, interview 3.

²⁰⁹ FRA, ‘boosting workplace inspections’ (n.200) 6.

²¹⁰ Ibid 7.

²¹¹ Interview with Mariarita Cardillo (n.151) (emphasis added).

Rapporteur on the Human Rights of Migrants in order to guarantee the possibility of reporting an exploitative situation to irregular migrants and give them the opportunity to fully collaborate with labour inspectors.²¹² The same point was upheld by ECRI in 2016.²¹³

In conclusion, combining the roles of labour inspectors and immigration authorities, leads, in practice, both to a collaboration between the exploiters and exploited which curbs the efficacy of the labour inspection system and to the deprivation of an effective remedy for migrants who have been victims of exploitation. As observed by Francois Crépau, “migrants will in many case choose to find a new job rather than confront an abusive employer: ‘moving on’ often appears to be best survival strategy”.²¹⁴

Arguably, the adoption of a Firewall ensures the possibility for irregular migrants of both safely reporting an exploitative situation and collaborating with labour inspectors during workplace inspections. This would be an important step forward in tackling illegal labour and could improve the effective protection of the rights of migrant workers. Accordingly, also in relation to the EU Employers’ Sanctions Directive, the adoption of a Firewall would be more efficient in achieving its primary aim of removing the pull-factor of potential employment for irregular migration, as it would increase the possibility of detecting those who employ irregular migrants. However, although the EU Employers’ Sanctions Directive missed this opportunity, the following EU Victims’ Directive explores new scenarios in terms of ‘safe’ complaint mechanisms. Indeed, as the next chapter will address, the EU Victims’ Directive provides for the adoption of measures ensuring and facilitating the reporting of a crime by irregular migrant victims without the fear of being detected. This also includes victims of serious labour exploitation. Consequently, the Directive could encourage the separation between service providers (such as labour inspectors or police) and immigration enforcement in order to prevent victims of labour exploitation from being detected by the immigration authority and suffering negative consequences. The next chapter will address the issue in more detail and will investigate whether the adoption of a Firewall between service providers and the immigration enforcement would be better placed to protect victims’ rights.

²¹² UNCHR, ‘Labour exploitation’ (n.158) para 62; of note, the UN Special Rapporteur affirmed also: “this “firewall” should apply not only to labour inspectors, but also to other public servants migrants may be in touch with, such as the police, social workers, school personnel and health care professionals, as well as courts, tribunals and national human rights institutions. Migrants should be able to report abuse without fear of repercussions regarding their migration status.” Ibid

²¹³ ECRI, (n.10) para 28-31.

²¹⁴ UNCHR, ‘Labour exploitation’ (n.158) para 60.

4.

The access to victims' rights for irregular migrants

The lack of a regular migration status can be a barrier to irregular migrants when accessing the public authority charged with law enforcement tasks, in order to file a report when they are the victim to or the witness of a crime. As a result, crimes can go unreported or their investigation may not have the full collaboration of all parties involved, which is often essential for the successful prosecution of the crime.²¹⁵ A “crime is a wrong against society as well as a violation of the individual rights of victims.”²¹⁶ When a crime goes unreported not only the victim, but the whole of society suffers as “the police are hindered in their ability to investigate crimes, and people who prey on the most vulnerable go unprosecuted,” putting the whole of society at risk.²¹⁷ “The decision of prosecutors to pursue criminal charges depends on everyone being able to give full and frank testimony in so far as it is relevant to proving the charges.”²¹⁸ It is therefore necessary to minimise every obstacle both for victims to report a criminal offence and to ensure witnesses have the opportunity to fully collaborate with the authorities.

This chapter will investigate the possibility, in both law and practice, for undocumented migrants to lodge a complaint for a crime of which they have been the victim and to enjoy the rights recognised to victims. In order to do so, it will briefly address the international discussion around ‘the right to petition’. The chapter will then assess the progressive change that occurred at international level in the perception of the role and rights of the victims of crime, with particular attention on the possibility of including undocumented victims. One particular focus of this chapter will be the recent EU Victims’ Directive. Finally, the chapter will analyse whether recognised victims’ rights are currently combined with measures that ensure their effectiveness, and whether the creation of Firewalls could improve the realization of those rights.

²¹⁵ European Parliament Resolution of 30 May 2018 on the implementation of the Directive 2012/29/EU, crime [2018] P8_TA(2018)0229, Recital Z

²¹⁶ European Parliament and the Council Directive (EC) 2012/29 of 25 October 2012 establishing minimum standards on the rights, support and protections of victims of crime [2012] OJ L.315/57 (EU Victims’ rights Directive).

²¹⁷ PICUM, *Explainer* ‘The Rights of Undocumented Victims: what to know if you are a police officer?’ (PICUM 2018), 1.

²¹⁸ ECRI, ‘Recommendation no.16’ (n.10) 28

4.1. International Law's new focus on victims.

The possibility to lodge a complaint for a wrong suffered, namely 'the right of petition', is an essential right of a victim. In some cases, it is the only way for the wheels of justice to start turning. Therefore, the right of petition is logically connected to the right to justice. Unsurprisingly, during the *travaux préparatoire* of the Universal Declaration of Human Rights, whether or not to include the right of petition was discussed at length. The proposition included the right of petition at both domestic and UN level. The first version recited: "everyone has the right either individually or in association with others, to petition or to communicate with the public authorities of the State of which he is national or in which he resides".²¹⁹ Cassin observed the right of petition "had been recognized throughout history because it permitted an appeal to the justice meted out by the authorities. The right had been mentioned in all the historical declarations of man; it has always been the equivalent of the right to justice itself."²²⁰ With the resolution that also adopted the Universal Declaration of Human Rights, the UN General Assembly considered that "the right of petition is an essential human right, as is recognized in the Constitutions of a great number of countries."²²¹ Nonetheless, the right to petition was not included in the UDHR. However, some authors point out that the acceptance of this right can be indirectly evinced from different human rights instruments, such as article 8 of the Universal Declaration of Human Rights, article 2(3) of the International Covenant of Civil and Political Rights and article 13 of the European Convention of Human Rights, each of which recognises a right to effective remedy before the national authority.²²² However, a stronger defence on the right of petition, and in particular on its effectiveness, was ensured at the international level in the past decade, along with the new international attention on victim's rights.

For a long time, victims' rights were overlooked, and judicial systems were traditionally structured around the rights of defendants.²²³ Victims' rights were not present in any international or regional binding instruments until the European Union issued the 'Framework Decision on the standing of

²¹⁹ The draft article on petition can be consulted in document A/C.3/306. For a further analysis on the discussion of the right to petition see Johannes Morsink, 'The Universal Declaration of Human Rights : Origins, Drafting, and Intent' (University of Pennsylvania Press 2000) Chapter 8.4

²²⁰ Quoted in *Ibid* 305.

²²¹ UN General Assembly Resolution on the right to petition (adopted 10 December 1948) UN Doc A/RES/217 B (III).

²²² Francesco Francioni, 'Access to Justice as a Human Right' (Oxford University Press, 2007) 4; Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35(1) *Netherlands Quarterly of Human Rights* 11, 13.

²²³ Bernt Bahr and Jenny Melum, 'EU's 'Victims' Directive' – a legal act for a cultural change?' (2017) 9(1) *International Journal for Court Administration* 16, 17.

victims in criminal proceedings' of 2001.²²⁴ Groenhuijsen considers it a milestone event, recalling that before this decision only a few *soft law* instruments addressed victims' rights, such as the 'UN Declaration of basic principles of Justice for Victims of Crime and Abuse of Power' of 1985.²²⁵ The international attention on victims' rights has recently been given importance, with the express introduction of victims' rights in international treaties, without excluding undocumented migrants from their scope of protection.

4.1.1. *The Istanbul Convention*

In 2011, the Istanbul Convention was adopted with the aim of promoting the protection and assistance of all victims of violence against women, with the ultimate aim of its eradication. The Convention contains the recognition of important victims' rights. As a matter of fact, it obliges states to adopt measures aimed to protect victims in all stages of proceedings, to provide support services to victims independently of their willingness to press charges or testify against any perpetrator,²²⁶ and to adopt measures to encourage witnesses of criminal acts, or persons who are informed about potential violations of the Convention, to report them.²²⁷ All the rights that are provided in the Convention are guaranteed to all women without discrimination. Article 4(3) of the Convention lists the prohibited grounds of discrimination in the recognition of the rights provided for in the Convention. The list is non-exhaustive and includes "other status". After investigating the *travaux préparatoires* of the Convention, Grans affirmed that arguably asylum seekers and undocumented women are included in the provision.²²⁸

²²⁴ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal [2001] OJ L 82

²²⁵ UN General Assembly, Resolution 40/34 (29 November 1985) UN Doc A/RES/40/34.; Marc Groenhuijsen and Antony Pemberton, 'The EU framework decision for victims of crime: Does hard law make a difference?' (2009) 17(1) *European Journal of Crime, Criminal Law and Criminal Justice* 43.

²²⁶ EU Victims' rights Directive (n.116) art.18

²²⁷ *Ibid* art.27

²²⁸ Lisa Grans, 'The Istanbul Convention and the Positive Obligation to Prevent Violence' 18 *Human Rights Law Review* 133, 139.

4.1.2. *The Convention on the Elimination of All Forms of Discrimination Against Women*

In 2017, the CEDAW Committee issued its General Comment No. 35 on gender-based violence against women.²²⁹ In this document, it recommends that states ensure that victims of gender-based violence have access to justice, and to repeal “all laws that prevent or deter women from reporting gender-based violence, such as... restrictive immigration laws that discourage women... from reporting this violence”.²³⁰ This is proof of the growing attention paid on giving effect to the right to petition of the victim.

4.1.3. *The EU Legislation*

Recently, an important instrument that is expressly dedicated to the rights of victims was adopted at EU level: the EU Victim’s Directive (2012). The Directive defines the obligations of Member States related to the guarantee and facilitation of the right of petition, and a wide range of victims’ rights such as information, support, protection and participation in the criminal proceedings.²³¹ Consequently, the Directive is a leap forwards for the advancement of the victim as central rights holder in criminal proceedings, and it expressly recognises undocumented migrants as within its scope.

4.2. EU Victims’ Directive

4.2.1. *The right to petition*

The EU Victims’ Directive is a landmark event for the recognition of the rights of undocumented migrants in a multitude of ways. Firstly, the wording of the Directive reveals particular attention is paid towards the inclusion of irregular migrants. The “residence status” is listed on more than one occasion in the prohibited grounds of discrimination, starting from article 1(2) which states “the rights set out in this Directive shall apply to victims in a non-discriminatory manner, **including**

²²⁹ UN Committee on the Elimination of Discrimination against Women, General Recommendation no.35 on gender-based violence against women, 14 July 2017, UN Doc. CEDAW/C/GC/35.

²³⁰ Ibid, Recitals 30-31.

²³¹ EU Victims’ rights Directive (n.216) art.1

with respect to their residence status”.²³² The specific reference to the residence status of an individual reveals the EU’s willingness to highlight the inclusion of undocumented migrants within the personal scope of the Directive. Moreover, particular attention is paid to residence status is not a condition on the victims ability to report a crime.²³³ Accordingly, Member States are encouraged to take appropriate measures to facilitate the reporting of crimes in order to “increase victims’ confidence in the criminal justice system of Member States and reduce the number of unreported crimes”.²³⁴ The issue then becomes one of determining the ‘appropriate measures’ to be taken in order to facilitate victims’ reporting. For example, are States obliged to ensure safe paths for reporting, guaranteeing that undetected irregular migrants do not suffer consequences related to their migration status?

In 2015, the city of Amsterdam launched a pilot project guaranteeing persons without identification papers the possibility to safely report crimes without the fear of consequences.²³⁵ Explanatory cards in English were distributed to migrants with this statement:

‘Reporting a crime without worries.

I am a victim or witness of a crime and I wish to file a report. I am an illegal alien and therefore I cannot identify myself. I have the right to be protected by the police. I can leave the police station whenever I want to without being arrested. I can only be arrested when I am a suspect of a criminal act or convicted for a criminal act.’²³⁶

ECRI indicated that this is “good practice” in attempting to guarantee the ability of irregular migrants to report a crime to the police. This practice facilitates victims’ reporting, in line with the EU Directive requirement. In addition, the Directive requires States to cooperate with other Member States in order “to improve the access of victims to the rights set out in [the] Directive and under national law... at least [in] the exchange of best practices.”²³⁷ Consequently, it can be argued that this practice should be adopted by other Member States pursuant to the duty of exchanging best practices. Nonetheless, in order to have a stronger legal ground for the recognition of the right of ‘safe reporting’ for irregular migrants, it is necessary to investigate whether the Directive requires that irregular migrants have safe path for reporting.

²³² Ibid. Recital 9, 10, Recital 63 and art.1(2) (emphasis added).

²³³ “Member States should take the necessary measures to ensure that the rights set out in this Directive are not made conditional on the victim’s residence status.” Ibid Recital 10

²³⁴ Ibid Recital 63

²³⁵ ECRI ‘Recommendation no.16’ (n.10) 28.

²³⁶ Amsterdam Police Website <<http://paspoortamsterdam.nl/politie-en-aangifte-doen/>> accessed 3 June 2019.

²³⁷ EU Victims’ rights Directive (n.216) art. 26, para 1 (a).

4.2.1.1. *Safe paths for reporting*

A resolution of the European Parliament on the implementation of the Directive 2012/29/EU recently clarified the matter.²³⁸ The resolution recorded that by September 2017, only 23 out of 27 Member States had officially transposed the Directive, and most of them had only done this partially.²³⁹ In regard to the shortcomings in the transposition and implementation of the Directive, the European Parliament listed Member States' "failure to take measures to ensure the lack of or uncertain residence status poses no barrier to victim's ability to assert their right under [the] directive," whereas "most Member States have not put in place policies of processes to ensure that undocumented victims can **safely report**... without the risk of immigration penalties."²⁴⁰ Furthermore, the European Parliament reminds Member States that "victims in an irregular situation of residence should also have access to rights and services [recognised by the Directive]... without fear of being deported",²⁴¹ and calls for Member States "to set up confidential and anonymous procedures for reporting crimes ... ensuring that undocumented victims can lodge complaints without the risk of immigration-related consequences".²⁴²

In brief, the European Parliament affirmed the duty of Member States to adopt measures ensuring 'safe report' and defined 'safe report,' as the possibility to file a complaint without fear of being deported. Undoubtedly, this is an important step towards the effectiveness of irregular migrants' rights, which may be a ground-breaking approach to irregular immigration, able to combine immigration enforcement with a stronger protection of human rights' protection.

²³⁸ European Parliament Resolution (n.215) of 30 May 2018 on the implementation of the Directive 2012/29/EU, crime [2018] P8_TA(2018)0229

²³⁹ Ibid Recital B.; as of 2016 there are 16 pending infringement procedures for not fully complying with the Directive. The Commission sent reasoned opinions to Ireland, Romania and Slovenia in 2018 and to Austria, Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Latvia, Lithuania, Luxembourg, the Netherlands and Slovakia in 2019, urging them to properly and fully implement the EU rules. European Parliament, 'November Infringements Package: Key Decisions' (2018) <http://europa.eu/rapid/press-release_MEMO-18-6247_EN.htm> accessed 19 May 2019; European Parliament, 'March Infringements Package: Key Decisions' (2019) <http://europa.eu/rapid/press-release_MEMO-19-1472_EN.htm> accessed 19 May 2019.

²⁴⁰ European Parliament Resolution (n.215) Recitals P, 4, 12 (emphasis added).

²⁴¹ Ibid Recital 13.

²⁴² Ibid Recital 29.

4.2.2. *The access to victims' support services*

The EU Victims' rights Directive guarantees broad protection to victims, aimed at protecting and supporting them before, during and, for an appropriate period, after criminal proceedings.²⁴³ According to the Directive, in relation to particularly vulnerable victims Member States should ensure specialist support services which includes, at a minimum, “shelters or any other appropriate interim accommodation” where there is an imminent risk of secondary and repeated victimisation and other targeted and integrated support for victims with specific needs.²⁴⁴ The access to these services “is not dependent on a victim making a formal complaint with regard to a criminal offence to a competent authority”.²⁴⁵ Therefore, the access to these services is guaranteed independently from any formal recognition of the person as victim. As undocumented migrants are within the personal scope of the Directive, they have the right to access these services. In order to give effect to these rights, one can presume that their access to these services cannot comport with any negative consequences connected with their immigration status.

To support this conclusion, the “confidentiality” of the victim support is required by the Directive. Moreover, the resolution of the European Parliament

“reminds the Member State that victims in irregular situation of residence should have access to rights and services, including shelters and other specialised services under this directive, such as legal protection and psychosocial and financial support from the Member States, without fear of being deported.”²⁴⁶

4.3. The relevance of Firewalls

Once the scope of the Directive has been clearly defined, the challenge is to elaborate the most efficient measures to ensure the effectiveness to safely report and access their rights.

Arguably, the creation of a Firewall can have multiple positive outcomes. As suggested by PICUM, in order to ensure full access to justice for irregular migrants, it is recommended to have a clear separation and a prohibition of sharing data between services, such as law enforcement and immigration enforcement authorities.²⁴⁷ Where countries have separated law enforcement and

²⁴³ EU Victims' rights Directive (n.216) art.8 and 9.

²⁴⁴ Ibid art. 9

²⁴⁵ Ibid art.8, para 5

²⁴⁶ European Parliament Resolution (n.215), Recital 13.

²⁴⁷ PICUM, 'Justice' (PICUM 2019) <<https://picum.org/focus-area/justice/>> accessed 28 May 2019

immigration enforcement, such as the police and immigration authorities, it is easier to create a Firewall between the two bodies. It is more challenging to create a Firewall in a situation where the same authority has blended tasks, including both law enforcement and migration enforcement tasks. In the latter case, a Firewall can still be built by creating a virtual barrier that prevents the use for data collected when carrying out law enforcement tasks for migration purposes when this results in eroding the migrants' rights enshrined in the EU Directive. The creation of a clear separation is necessary as its absence could lead to contradictory practices. For example, the Italian law does not require a person to show their ID or regular residence permit when reporting a crime.²⁴⁸ Therefore, the lack of regular residence status is not *prima facie* a barrier to safely report a crime.²⁴⁹ However, in 2017, in Milan (Italy) a drunk man assaulted a migrant in a park, who suffered serious injury, losing an eye. The medical personnel were obliged by Italian law to report the event to the police, because of the nature of the crime.²⁵⁰ At the same time, the migrant had the right to file a complaint as a victim. Nonetheless, the police called to the scene started with investigating his migration status and issued a warrant for him to leave Italy. This is a clear example of how the lack of a clear separation of tasks can hamper the enjoyment of rights for irregular migrants. The police were carrying out their task of law enforcement in the prosecution of a crime, but at the same time, they carried out an immigration enforcement task by issuing the warrant. Consequently, the guarantee posed by the Italian state to ensure irregular migrants' capacity to access emergency healthcare, without the fear of being deported, was also voided in practice.²⁵¹ Neither the analysed right of the victim to safely report can be considered satisfied in this case. Arguably, the adoption of a Firewall that imposes a clear separation between the police's law enforcement tasks and their immigration enforcement ones would avoid the deterioration of migrants' rights in practice.

In relation to access to victim support services, again the provision of a Firewall can give effect to the recognised rights. This is clear regarding the recognition of the right to general and specialist support services for victims. As mentioned above, the Directive recognises that access to victims' support includes allowing access to undocumented migrants, without the fear of being deported. Therefore, these services should be accessible without the possibility of service providers sharing

²⁴⁸ Italian Penal Code art.120 and Italian Procedural Penal Code art. 333; PICUM, EU Victim's Directive Transposition Checklist (PICUM 2014).

²⁴⁹ Of note, there is no express legal prohibition to investigate the migration status of the victim by the police, and therefore the strength of the safe reporting could be questioned in practice. However, the author did not find any data for or against the effectiveness of safe reporting in Italy.

²⁵⁰ Art.365 Italian penal code provides for the obligation of medical personnel to report certain types of crimes that are included in a list to the police. It is noteworthy that article 365 para 3 provides an exception to this obligation in the case where the report would expose the person assisted to penal proceedings as the author of the crime. Supreme Court of Cassation Criminal section VI, 4 May 2001, n. 18052 Garziera EV219132. In the specific example given, the migrant was the victim of the crime. Consequently, this exception did not apply, imposing the duty to report.

²⁵¹ For more on the prohibition for medical personnel to report a migrant for his/her irregular status, and the political discussion on the issue see chapter 2.3 and n.135.

data to immigration authorities for immigration enforcement purposes. In this case, the creation of a Firewall that protects migrants seeking access to victims' support services from migration-related consequences is essential to guarantee the effectiveness of the Directive's provisions.

In conclusion, the victim's role has recently changed whereby the victim gained centrality as rights holder in international and regional instruments. The most comprehensive instrument that addresses the rights of victims is the EU Victim Directive of 2012. The Directive expressly recognises the right for irregular migrants to lodge a complaint, participate in the proceedings and have access to victim support services. The formal recognition of these rights would be meaningless without addressing the practical obstacle that undocumented migrants may face when seeking access to their rights as victims. Indeed, as clarified by the European Parliament, Member States should put in place measures ensuring these rights to irregular migrants without fear of being deported. The creation of a Firewall between service providers and immigration enforcement authorities could overcome shortcomings on the delivery of such rights to undocumented migrants that result from the allocation of migration control tasks to service providers or from the coexistence of migration enforcement tasks belonging to the same authority that receives victim complaints.

5.

Conclusion

This thesis investigated the legal entitlement and practical implementation of selected human rights of undocumented migrants, namely healthcare, labour rights and victims' rights. All of these rights share a common issue relating to their effectiveness, namely the fact that they are diminished by the fear of detection, which prevents migrants from approaching the relevant services and enforcing their rights. This situation is the result of a migration policy that perceives irregular immigration as a homogenous phenomenon that threatens the stability of EU countries. This results in the overlooking of the particular vulnerability of migrants who live irregularly within EU countries, giving greater support for immigration enforcement rather than to human rights protection. Member States' domestic migration policy focuses on fighting the presence of irregular migrants by creating a hostile environment for undocumented migrants and multiplying the means of detection. Whilst the State prerogative to control entry, detect and expel unauthorised migrants has not been questioned in this work, the impact of immigration enforcement activities on state capacity to deliver rights to undocumented migrants has been investigated. Service providers are often co-opted into performing immigration control tasks, resulting in a barrier that prevents migrants from accessing essential services. For example, the fear of detection or deportation can result in migrants avoiding needed healthcare, thereby effectively renouncing their rights. Accordingly, migrants are more likely to turn to informal settings that they perceive are separated from immigration authorities. Likewise, although international and domestic legislation recognises numerous labour rights to undocumented migrants, the widespread strict collaboration between labour inspectors and immigration authorities removes the ability of undocumented migrants to claim those rights without fear of deportation, thereby curbing the opportunities for migrants to enforce them. Finally, this thesis addressed the victims' rights of irregular migrants, with particular attention to the right to turn to a public authority in order to report a crime. Again, the widespread strict collaboration, or overlap of tasks, between law enforcement authorities charged with investigating and persecuting crimes (generally the police), and immigration authorities is likely to prevent undocumented migrant victims or witnesses of crime from reporting the crime or collaborating with the investigations, due to the fear of detection and deportation. In all these three cases, a clear separation between public service provisions and immigration enforcement activities, through the adoption of Firewalls, is an important step towards improving the effectiveness of those international and domestic legal rights that irregular migrants are entitled to. A Firewall is a mechanism in which a legal prohibition prevents the reporting or sharing of data between service

providers and immigration authorities for immigration enforcement purposes. It creates a total separation between public services and immigration enforcement authorities, which will improve the effectiveness of the rights of irregular migrants enabling them to utilise relevant services without the fear of detection, which is one of the main obstacles that undocumented migrants face. In order to achieve this objective, service providers need to be, and be perceived to be, separate and apart from immigration authorities. A further conclusion that resulted from this thesis is that ensuring more effective access to the aforementioned rights would benefit not only the migrant, but also the hosting community in terms of overall health and labour conditions and the prosecution of crime.

Although the allocation of immigration enforcement tasks to service providers is coherent with the overall migration policy adopted by EU Member States, which aims to multiply the pathways for the detection of irregular migrants, recent EU legislation supports a different approach that is more concerned with protecting the human rights of irregular migrants. For example, the EU Employer's Sanction Directive includes certain labour rights for irregular migrants, although it missed the opportunity to explicitly ensure a safe pathway to enforce those rights without fear of detection. The recent EU Victims' Rights Directive is ground-breaking in this sense. Not only does it recognise the victims' rights of undocumented migrants, but, as clarified by the 2018 resolution of the European Parliament on its implementation, it requires Member States to ensure that undocumented migrants can fully enjoy the rights and the services enshrined in the Directive without fear of detection. In this way, the Directive supports the adoption of a Firewall between the authority charged with receiving reports of crimes and the immigration authority. This also demonstrates the European Parliament's recognition of the utility of Firewalls for ensuring the effectiveness of recognised rights of irregular migrants. Thus, EU legislation is progressing towards a wider recognition of the rights of irregular migrants. Furthermore, EU legislation is beginning to focus on practical measures to guarantee the effectiveness of these rights. These Directives demonstrate the potential of the EU to develop a stronger human rights approach to irregular migration, and pay increasing attention to the human rights of undocumented migrants living within the EU. The development of such an approach at EU level is very important to realise a common standard of delivering rights to irregular migrants. However, due to the limited legislative competency of the EU, it is necessary that it is primarily Member States who realise the potential of a different approach to irregular migration. Member States should adopt a Firewall between services providers and immigration authorities. In this way, whilst the state immigration enforcement claims would be carried out by dedicated agencies, states will be able to effectively deliver the rights that irregular migrants are entitled to, but cannot enjoy, with positive outcomes for both the migrants and the hosting community.

Not Walls of Fear, but Firewalls

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Annex I – Interviews to irregular migrants

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Introduction

The following interviews were carried out in Caserta, a southern Italian city nearby Naples, with the collaboration of a local association that is part of the Italian Protection System for Asylum Seekers and Refugees (SPRAR). The association is named ‘Csa Ex Canapificio’. It offers several services to migrants, including a free weekly legal counselling service. The following interviews have been carried out with the migrants waiting to speak with a legal consultant of the association. Most of the migrants were there in order to renew a recently expired residence permit. Some of them had a regular residence permit. Eventually, three interviews were conducted with migrants who had been without ‘documentation’ for a significant period of time. All of the migrants present had been previously informed of the scope of the research and purpose of the interviews. One interview was carried out in English and two in Italian.

1.

Interview n.1

1.1.Notes

The interviewee is a 33 years old man, from Ghana. He does not have the second and third phalanges of the ring finger of his left hand. He told me that he had lost them during an accident at work. The accident occurred one and a half years before the interview. At that time, the interviewee was an irregular migrant and he was working without a contract in a garage in Foggia. When he says “at the time” he therefore refers to that experience. The interview has been carried out in English.

1.2.Transcription

Researcher: How old are you?

Interviewee 1: 33

R: Do you live here?

I1: No

R: Where do you live?

I1: Naples, but at the time lived in Foggia

R: Where are you from?

I1: Ghana

R: Do you have a residence permit?

I1: yes

R: Did you have a residence permit when you were working in Foggia?

I1: No, I did not

R: Why?

I1: It was expired

R: Were you working there without a contract?

I1: Yes, because I did not have the residence permit.

R: Ok, can you tell me the story of your accident at work?

I1: I had an injury in the shop (*the garage*)²⁵². At the time, I went to the hospital. The boss told me I should tell the doctor I had the injury at home, not at work. At that time, I was feeling so much pain, so I did not think about it... I told them that I had the injury at the house. After the treatment, after 3 months, I went to a lawyer... but then I had to move and the lawyer stopped following my case.... and I could not prove the work relationship because I did not have a contract.

R: Did you have to pay something at the hospital?

I1: No. at the hospital everything was free. I had only to buy the medicines outside the hospital, and I paid for them.

R: Did you lose the job afterwards?

I1: Oh, I got injured so I could not work. But anyway, the way he acted... I changed my job.

R: How much did you get paid?

I1: At the time he paid me 20 euros per day

R: And how many hours did you work per day?

I1: 9 hours per day.... I started at 8 o' clock... to 1 o' clock and then 3 o' clock to stop to 7 o' clock.

R: Why did you accept this situation?

I1: Because at the time I had no documents. So I used the job to buy some food... if I do not have job what can I eat?

R: Have you ever thought about reporting your employer to the police because of this exploitation?

I1: No, at that time I would never report to the police... I went to the lawyer... I had no idea... I do not know Italian law. So... I do not go to the police.

R: In the period that you did not have documentation, were you afraid to be detected as irregular?

I1: (*his tone of voice rises slightly*) That was the main problem! My employer told me that I had no document so he employed me as a black (*without contract*). He told me that if I got injury at the shop...if there is problem, I also have problem! Because I do not have document. At that time, I don't know anything about Italian law.

²⁵² The interviewee used to work in a garage in Foggia (Italy). He refers to it as "the shop" for the whole interview.

R: Has there ever been labour inspections at your workplace?

I1: once the police come to the shop but I didn't know. He [the employer] called me and send me to some place. But when I came back he told me that he send me away because of the controls.

R: If you had known about the control, what would have you done?

I1: eeeeh...I don't have document, I do not have contract, that's why he sent me away... I don't know the law.

2.

Interview n.2 and 3

2.1. Notes

The interview began with one migrant [hereinafter, Interviewee 2 (I.2)]. Another migrant was also present during the interview. At the beginning, only Interviewee A wanted to answer my questions, while the other one only listened. Afterwards he decided to intervene in the interview and agreed to answer some questions as well. Interviewee 2 is a 33-year old man, from Senegal. He did not have a residence permit because his temporary one had recently expired. He is seeking a renewal. However, he has lived and worked in Italy without a residence permit for a long time. The second interviewee [hereinafter, Interviewee 3 (I.3)] is 35-years old. He is from Senegal. He has no residence permit because it expired.

The interviews were carried out in Italian. However, both of the interviewees had problems conversing in Italian.

2.2. Transcription

Ricercatrice: Ciao, come ti chiami?

Intervistato 2: *****

R: Puoi ripetere?

Mi fornisce un documento di identità

R: Sei stato molti anni in Italia senza permesso di soggiorno?

I.2: Sì. Arrivato in Italia nel 2014.

R: Quanti anni hai?

I.2: Massimo Massimo 33

R: Non lo sai?

I.2: 33

R: Per quale motivo sei venuto in Italia?

I.2: Sono arrivato con la barca

R: Per quale motivo?

I.2: Mio padre...

Gesticola, mi fa capire che ci sono stati problemi di violenza familiare, legati al padre.

R: Quindi... problemi con familiari?

I.2: Sì

R: Sei venuto da solo?

I.2: Sì

R: Hai mai avuto bisogno di andare in ospedale mentre non avevi documenti? Hai mai avuto bisogno di un medico?

I.2: Forse devo andare in ospedale, loro dicono devi avere documenti. Se non avere documenti non posso fare. Se andare in ospedale senza documenti loro dicono non possono fare niente.

R: Se hai bisogno di un medico come fai?

I.2: Io andare farmacia, parlare, loro dice prendi quella medicina, io compra, vai casa.

R: Non sei mai andato in ospedale?

I.2. Io andato ospedale, però prima (*quando aveva il permesso*)

A questo punto interviene Intervistato 3. Continuo a fare domande ad entrambi.

I.3: lui lavorato campagna tanti anni.

R: tu anche non hai il permesso di soggiorno?

I.3: no.

R: Tu hai mai avuto bisogno di un medico?

I.3: Vado da amico. Prima andato perchè avevo permesso. Adesso scaduto. Adesso vado da amico.

R: Perchè adesso non vai?

I.3: Perchè loro chiedono come ti chiami? Carta sanitaria. Io no documenti.

R: (domanda rivolta ad entrambi) Avete lavorato in Italia?

I.2: sì, lavorato campagna.

I.3: sì, sì.

R: Come considerate condizioni lavorative?

I.2: non pagare bene. Noi lavorare 7 ore-8 ore in campagna. Loro pagato 25 euro al giorno

I.3: perchè non c'è documenti. Loro non fare contratto.

R: È mai capitato che il padrone non vi pagasse?

I.2: pagare, pagato. Ma pagato poco.

R: Avete mai pensato di denunciare il datore di lavoro per il fatto che vi pagava poco.

Entrambi: No.

R: Vi è mai capitato di essere vittima di un crimine?

momento di confusione

R: Ad esempio qualcuno vi ha fatto qualcosa di male... Capito?

I.2: Io capito. Tu dici qualcuno ti ha fatto male per andare polizia denunciare. Ma se io andare polizia denunciare loro non fare niente. Se io fare denuncia loro dicono vai casa.

R: Ma tu sei mai andato alla polizia?

I.2: No mai, perché fatto paura. Perché andare là, denunciare. Loro dicono, documenti? Non c'è documenti, c'amma fare? (utilizza una forma dialettale napoletana, che significa 'che dobbiamo fare?')

R: (Rivolta a I.3.) tu vuoi rispondere ad alcune domande?

I.3: Io cercare fare saldatore. Cercare corso. Io cercare qua ma niente.

R: Posso farti la stessa domanda che ho fatto a lui? Ti è mai successo di essere vittima di un crimine?

L'intervistato ha molte difficoltà a capire la domanda

I.3: rubato me telefono.

R: Sei andato alla polizia?

I.3: No

R: Perché?

I.3: Perché io non posso andare. Non c'è permesso di soggiorno.

R: Quindi hai paura di avere problemi?

I.3: Sì perché io non avere permesso di soggiorno.

R: Quindi anche tu hai lavorato in campagna per molto tempo?

Annuisce.

R: Quando lavoravi, sono mai venuti dei controlli (ispezioni)?

I.3: sì, a volte sì

R: E cose è successo?

I.3: Io scappato. Io sempre scappa. Anche miei amici, scappa tutti. Perché non c'è documenti. Perché io già perso un amico. Perché loro dicono no era italiano, senza documenti, non puoi lavorare, polizia portato via.

R: E poi cosa è successo?

I.B: Loro fare verbale. Poi non lo so.

2.3.Translation

Researcher: Hello, what's your name?

Interviewee 2: *****

R: Can you repeat?

He gives me an Identification Document

R: How many years have you been in Italy without a residence permit?

I.2: Yes. Arrived in Italy 2014.

R: How old are you?

I.2: Maximum maximum 33.

R: Don't you know?

I.2: 33.

R: Why did you come to Italy?

The interviewee laughs nervously. He shows reluctance in answering.

I.2: why you ask me this?

R: It is just for the interview.

I.2: my dad... *he gestures with his hands, he let me understand that he has problem of violence in the family, something linked with the dad.*

R: so.... family problem?

I.2: yes

R: have you come alone?

I.2: yes

R: Have you ever needed healthcare while you were without documentation? Have you ever needed a doctor?

I.2: Maybe I have to go to the hospital, they say you need documents. If I no have documents I can't go. If go to hospital without documents they say they can't do anything.

R: What do you do if you need a doctor?

I.2: I go pharmacy, I talk, they say take these medicines, I buy, go home.

R: So have you never been to a hospital?

I.2: I went, but before [*when he had the permit*]

At this point, Interviewee 3 intervened. I continued asking questions of both of them.

Interviewee 3: He worked in the fields many years. *He talks about Interviewee A.*

R: Do you have a residence permit?

I.3: no.

R: Did you ever need a doctor?

I.3: I go to a friend. Before I went because I had the permit. Now it expired. Now I go to friend.

R: Why don't you go now?

I.3: because they ask you what is your name? health card. Me no documents.

R: (question for both interviewees) have you worked in Italy?

I.2: yes, in the fields

I.3: yes, yes.

R: How do you consider the work conditions?

I.2: no pay well. We worked 7 hours – 8 hours in the fields. They paid 25 euros per day.

I.3: because there is no documents. They not do contract.

R: Has the employer ever refused to pay you?

I.2: to pay, paid (*with the meaning that regarding the payment, the employer used to pay*). But paid little.

R: Have you ever been victim of a crime?

Moment of confusion

R: For example, did someone do something bad to you? Something that you would generally report to the police? Have you understood?

I.2: Me understood. You say someone did you something bad to go to police to report? But if I go to police to report, they (*referring to the police*) do anything. If I go report, they say 'go home'.

R: but... have you ever gone to the police?

I.2: no, never. Because scared me. Because I go there, to report. They say 'documents?' - There is not documents- 'what we have to do?'²⁵³

²⁵³ *the underlined part is expressed in Neapolitan dialectal: 'C'amma fa?'. The literal translation is "what we have to do?" However, there are different possible variations of meaning. In this case, the meaning is probably "we cannot do anything".

R: (*speaking with Interviewee B*) Do you want to answer some other questions?

I.3: I try to be a welder. Looking for classes. I seek but here [there's] nothing.

R: Can I ask you the same thing I asked him? Have you ever been victim of a crime?

The interviewed had important difficulties in understanding the question

I.3: They stole me mobile phone

R: Did you go to the police?

I.3: No

R: Why?

I.3: Because I can't. There is no residence permit.

R: So are you worried about having problems?

I.3: Yes, because I do not have residence permit!

R: You also worked in the fields for long time?

He nods.

R: While you were working, has there ever been a labour inspection?

I.3: Yes, sometimes.

R: What happened?

I.3: I run away. I always run away. My friends too, everyone run away. Because there is no documents. I've already lost a friend. Because they say he is not Italian, without documents, he cannot work and they took him away.

R: And what happened afterwards?

I.3: They filed a report. Then I don't know.

Annex II – Interview to a legal professional

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Introduction

Mariarita is a legal professional for the Csa ex Canapificio in Caserta (Italy).²⁵⁴ She has been working with the legal helpdesk service since 2013, but she started as a volunteer in 2010. Thanks to her work, Mariarita is deeply involved in legal questions related to immigration, and she has a plethora of experience with the issues that irregular migrants often face as a consequence of lacking a residence permit. She has been informed about the scope of the research and the purpose of the interview. The interview has been conducted in Italian and translated in English. The text in both languages is provided below.

1.

Interview

1.1. Transcription

Ricercatrice: Che ruolo gioca secondo te la paura e/o il rischio di essere scoperti come irregolari nella vita dei migranti nell'accesso al diritto alla salute, alla possibilità di rivendicare diritti sul lavoro e alla possibilità di denunciare di essere stati vittime di violenze?

Mariarita: Un ruolo fondamentale! Premettendo che l'immigrato in generale ha paura di rivolgersi alle autorità italiane perché non ha fiducia, anche chi ha un permesso di soggiorno o una qualche forma di protezione, chi è sfruttato nel mondo lavorativo, è rarissimo che sporga denuncia e che venga preso in considerazione. Ti lascio immaginare che quando questa regolarità non c'è è quasi

²⁵⁴ The Csa Ex Canapificio is a local association part of the Italian Protection System for Asylum Seekers and Refugees (SPRAR). It offers several services to migrants, including a weekly free service of legal counselling.

impossibile. Noi abbiamo avuto rarissime esperienze di immigrati che siano stati ascoltati per una denuncia, se non attraverso una nostra attività di mediazione. Anzi, spesso abbiamo avuto testimonianze di retate della guardia di finanza o di qualche altro ente, in campagna, capannoni industriali, fabbriche... succedeva che sanzionavano pochissime volte il datore di lavoro oppure la compagnia e che non si prendesse la denuncia di chi stava lavorando in maniera irregolare ma si procedeva molto semplicemente all'espulsione. Quindi la persona veniva accompagnata in questura, si procedeva all'espulsione... espulsione che poi in Italia non viene effettuata perché mancano gli accordi con gli altri Paesi... e non si procedeva per esempio nell'ascoltare il lavoratore sul tipo di lavoro che stava svolgendo, come mai stava senza contratto, come mai stava senza permesso di soggiorno... quindi ci si limitava a fare un decreto di espulsione, senza mai procedere a una denuncia al datore di lavoro. Quando poi si andava a fare denuncia, se i ragazzi andavano da soli, non venivano quasi mai ascoltati. Poi con la mediazione di associazioni, come noi, o con la Caritas, alcune denunce sono state prese in carico, ma sempre con molta difficoltà. Quindi in effetti il fatto di non avere un permesso di soggiorno è sicuramente un deterrente.

Per quanto riguarda l'accesso alla salute, anche. I migranti irregolari preferiscono sempre luoghi informali, come gli ambulatori organizzati da Emergency. L'utenza che si rivolge agli ambulatori di Emergency è molto più alta di quella che si rivolge alle istituzioni statali, e poi sono gli operatori di Emergency che li accompagnano negli ospedali e dove di dovere. Quindi chi non ha un documento... anche le donne incinta... preferisce o starsene a casa ... o rivolgersi a Emergency o comunque addirittura non andare a fare visite ginecologiche se non davvero quando sono agli sgoccioli... quando devono andare in ospedale per partorire. Hanno timore di avere problemi. Ci è capitato per esempio che in ospedale a una donna sia stato impedito di prendere il bambino, le è stato detto "come faccio a sapere che tu sei la madre"... perché non aveva i documenti... una cosa assurda. Quindi senza il permesso di soggiorno diventa tutto difficile.

Anche per esempio in relazione al diritto al matrimonio. Una persona irregolare ha il diritto di sposarsi, con un cittadino italiano o straniero che sia, eppure spesso e volentieri i comuni rifiutano di celebrare matrimoni civili se la persona è irregolare. Questo è un abuso.

Quindi se già gli immigrati in generale sono vulnerabili, quindi hanno timore di esporsi, quando poi sono irregolare questo timore è ancora maggiore. Infatti per questo negli anni Emergency ha aperto anche degli sportelli medici d'intesa con "malattie infettive" di Caserta o anche altri ospedali per far prendere in cura anche persone che non si curano perché non hanno un permesso di soggiorno.

R: Qual è il motivo per cui gli immigrati irregolari preferiscono rivolgersi agli sportelli di Emergency, o comunque a forme di servizi associativi, piuttosto che a quelli governativi?

M: perché hanno più fiducia dell'operatore di Emergency. Un po' c'è anche ignoranza di quelli che sono i servizi che il territorio offre, e quindi ci si rivolge ai luoghi che uno conosce, e quindi a Emergency o a informali percorsi informali. Altre volte anche perché in ospedale ad esempio spesso non c'è un interprete che possa garantire che ci sia una comprensione tra l'utente e l'operatore sanitario. Altre volte per il timore di essere denunciati. Per fortuna in Italia non è legge... ci hanno provato, in Italia nel 2009 con il pacchetto sicurezza si provò a chiedere ai medici, ai comuni, a chiunque fosse in quel momento a contatto con gli immigrati a denunciare. Poi, per fortuna, questa cosa non è mai diventata legge. Quindi per fortuna a livello normativo non c'è qualcosa di ostativo per cui il migrante non possa andare in ospedale, però il timore delle ripercussioni che spesso ci sono, fa sì che la mediazione diventa fondamentale per accedere ai servizi. Quindi non c'è quasi mai un rapporto diretto tra servizi e utenza, ma è sempre necessaria una mediazione che tranquillizzi i migranti da una parte e faccia pressione sugli operatori dei servizi dall'altra.

R: parliamo un po' dell'ambito lavorativo. Non avendo il permesso di soggiorno i migranti che lavorano lo fanno in maniera informale. In caso di sfruttamento lavorativo, quali sono le opzioni dei migranti?

M: in realtà in Italia c'è un permesso di soggiorno che ti dà diritti relativamente all'ambito lavorativo, ex art.18 del Testo Unico sull'Immigrazione. Ma il problema è accedere proprio alle denunce. Altro problema è che l'articolo 18 è a discrezione dei questori. Quindi dipende molto dai questori. Se trovi un questore attento alla tematica è una cosa... poi deve esserci sempre un'indagine della procura... una serie di prove... quindi se non c'è tutto questo prima, tu non denunci, non c'è l'indagine della procura etc, diventa impossibile che tu possa ottenere un permesso di soggiorno ex art. 18 T.U. Poi non esistono delle strutture idonee alla presa in carico di queste persone... magari vittime di tratta.

Poi c'è il problema che quando vanno a controllare determinati posti di lavoro, spesso e volentieri i datori di lavoro lo sanno in anticipo, e ciò che spesso ci raccontano i migranti è che vengono chiamati in anticipo e gli viene chiesto di restare a casa quel giorno. E comunque, Anche quando poi arriva l'ispettorato non si procede mai a denuncia, perché non vengono mai ascoltati i ragazzi e l'unica cosa che viene fatta è il decreto di espulsione.

Quindi di fatto in Italia c'è una buona legge in questo ambito, c'è una buona legge sul caporalato in Italia, ma in pratica questo procedimento non si mette in moto a meno che non ci sia una forte

pressioni da parte di associazioni. È necessario sempre un mediatore. Non è che la polizia automaticamente mette in modo tutte le procedure e la catena di protezioni che la legge magari fornisce.

R: sempre in ambito di tutela, qual è la capacità di un immigrato senza permesso di soggiorno di rivolgersi alla polizia per denunciare un crimine?

M: In provincia di Caserta è difficile perfino fare una denuncia di smarrimento di un documento quando sei immigrato. Proprio l'accesso alla denuncia è difficile. Noi abbiamo avuto casi di donne che hanno denunciato violenza domestica che hanno avuto accesso alla protezione, ma sempre perché c'era la mediazione dell'associazioni. Io ho visto immigrati che hanno denunciato, soprattutto donne che hanno denunciato compagni per violenza. Però in questi casi erano sempre regolari. È raro che un irregolare denunci per qualcosa, sempre perché c'è il timore di conseguenze perché sono irregolari. Però non potrei darti una statistica. Però rispetto al comportamento che le forze dell'ordine hanno almeno nel Sud Italia, è molto complicato che una persona irregolare si possa rivolgere a polizia o carabinieri per denunciare qualcosa. Ci sono tante barriere che impediscono agli immigrati di rivolgersi alla polizia. Ad esempio la barriera linguistica, e ovviamente la mancanza di permesso di soggiorno e la conseguente paura.

1.2. Translation

Researcher: according to you, what is the role played by the fear and/or risk of being detected as an irregular migrant in their life, in terms of access to healthcare, the ability to claim labour rights and the possibility to report a crime to the police?

Mariarita: A crucial role! Starting with the premise that generally, the migrant, is afraid of contacting the Italian authorities, because he doesn't trust them. Even for those who have a residence permit, or enjoy some kind of protection, where there is exploitation in the workplace, it is extremely rare that there is a report to the police, and that his report is taken into consideration. You can imagine that when this regular [migration] status does not exist it is nearly impossible. We [as an association] had very rare experiences of migrants that have been able to report other than through our mediation. Indeed, often we collected testimony about raids of the Tax Agency [Italian: Guardia di Finanza] or of other authorities, [raids] carried out in the fields, industrial basements or factories... what happened is that only a few times the employer or company were sanctioned, and no one took testimonies or reports of who was irregularly working there, but they proceeded

directly to expulsion. Thus, the person [the migrant] was conducted to the police station, and there was the expulsion... deportation that actually in Italy doesn't happen because there is a lack of agreements with other countries... and no one proceeded for example to listen to the worker about the kind of work he was involved in, why he didn't have a work contract, why he didn't have a residence permit... so everything was limited to issue a decree of expulsion, without ever proceeding to report the employer. When the migrants wanted to report their employer, if they went alone, they were almost never considered. Only with the mediation of an association, like us, or the Caritas, some reports have been assumed, but always with lots of difficulties. So the lack of a residence permit is actually a deterrent.

In relation to the access to healthcare, this is also true. Irregular migrants usually prefer informal settings, such as medical clinics organised by Emergency²⁵⁵. The number of users of Emergency's clinics is way higher than the one that turns to state institutions. So those who have no documents...even pregnant women... prefers or to stay hom... or they refer to Emergency or even prefer to not have gynaecological examinations unless they are really running out of time... when they have to go to hospital to give birth. They fear of having problems.²⁵⁶ For example it happened that in a hospital a woman was prevented from taking her baby, they told her "how can I know that you are the mother?"... because she didn't have a residence permit... it was insane. So without a residence permit everything becomes hard.

Also, for example in relation to the right to marry. An irregular migrant has the right to marry, either to marry an Italian or a foreigner. Yet, repeatedly and often, municipalities refuse to perform weddings if the person is [an] irregular [migrant]. This is an abuse.

So, if migrants are in general vulnerable [subjects], and they are afraid to expose themselves, when they are undocumented this fear is greater. Indeed, it is for this reason that Emergency opened medical clinics, in collaboration with "infective disease" in Caserta and other hospitals in order to also take on people that don't use the healthcare system because they don't have the residence permit.

R: Why do undocumented migrants prefer to turn to Emergency's services, or to associative settings, rather than government ones?

M: Because they trust the Emergency operator better. Indeed, there are several factors. Sometimes there is ignorance of the services offered by the territory. Other times the problem is the language

²⁵⁵ Emergency is an Italian NGO with an international presence that provides free medical care to its users.

²⁵⁶ Interview with Mariarita Cardillo (n.151).

barrier, because in hospital there is no interpreter who can guarantee that there is an understanding between the user and the healthcare professional. Sometimes it is the fear of being reported [to the immigration authority because of the irregular immigration status]. Fortunately, in Italy there is no such law... they tried, in Italy in 2009 with the Security Decree to compel doctors, municipalities, whoever was in contact with irregular migrants to deport them. Then, fortunately, the proposal was never turned into law. So, fortunately, at legal level there is nothing that prevents migrants going to hospital. However, the fear of consequences that often result, makes mediation [of associations] crucial to accessing services. So there is hardly ever a direct relationship between users and services, but it is always necessary for a mediation to reassure migrants on the one hand and pressure service providers on the other hand.

R: Let us talk about the working environment. As they do not have residence permits, irregular migrants cannot have regular contracts. In case of work exploitation, what are their options?

M: Actually, in Italy there is a resident permit that gives you rights in relation to labour rights, in art. 18 of the Immigration Single Text. The problem is that you need to report a violation. And the problem is to have the opportunity to report. Another problem is that art. 18 is at the discretion of the Chief of Police. So it really depends, if you find a chief sensitive to the issue... then it is necessary to have the prosecutor's office investigate... evidence... so if all this is missed because you don't even report, there cannot be legal procedures, and it is impossible to obtain the residence permit for art. 18. And also.. there are no appropriate structures that can take care of these people... victims..

Then there are problems related to workplace inspections... When they go to check a certain workplace, repeatedly and often the employers know in advance. What migrants often tell us, is that they are called in advance and they are asked to stay home that day. And anyway, when there are labour inspections, there are no reports against the employers because no one listen to the migrants, the only thing they do is issue a decree of expulsion.

In Italy there is a good law against work exploitation. But in practice the related proceeding is never implemented unless there is very strong pressure from the associations. It is always necessary to have a mediation. It does not happen that the police automatically implements all of the procedures and protections that the law prescribes.

R: Staying in the field of protection, what is the possibility for an undocumented migrant to turn to the police to report a crime?

M: In the province of Caserta it is even difficult to turn to the police when you have lost an identification document when you are a migrant. It is difficult to turn to the police. We had a few cases of women that reported domestic violence, and they actually had access to protection, but always through the mediation activity of the associations. I have experienced cases of women that reported, mostly cases of domestic violence. But they were always regular migrants. It is rare that an irregular migrant turn to the police for something, always because they have the fear of the consequences as they are irregulars. But I could not give you statistical data. Also, another reason, is the behaviour law enforcement agencies have [towards migrants], at least in the south of Italy, it is very difficult for an irregular migrant to turn to the police or carabinieri in order to report something. There are several barriers that prevent them to refer matters to the police. For example the language barrier, and of course the lack of residence permit and the consequent fear.

Annex III – Questionnaire

Introduction

The questionnaire was named ‘The rights of undocumented migrants.’ It was presented in three different languages: Italian, French and English. It had an explanatory introduction that states:

The following survey will be undertaken to help academic research and is intended to analyse the current status of the human rights of undocumented migrants guaranteed by European Union Member States. The survey is directed to irregular migrants, namely those without a residence permit. The survey is anonymous.

The target population were adult migrants who were at the time of completing the questionnaire, or had been for a relevant amount of time, without residence permit. The survey could be completed either in hard copy or through an online form. With regards to the distribution of the questionnaire, it was decided to collaborate with associations working with migrants in order to have wider access to irregular migrants. However, due to several factors, such as the timing and the limited capacity and availability of associations resulting from their already overwhelming workload, collaboration with associations was restricted. As such, only one association was available to collaborate in the questionnaire.²⁵⁷ Ultimately, as a result of this collaboration, 13 questionnaires were completed by migrants. For the aforementioned reasons, the results refer to irregular migrants’ experiences only in Italy, and mostly in the areas around Naples and Caserta. It can be also noted that all the migrants are from West/Sub-Saharan Africa, and they are male. A discussion with two legal professionals of the association Csa Ex Canapificio has provided some information to that explains this geographic and gender imbalance of respondents (see n.2), however, further investigation on this thematic issue is necessary.²⁵⁸

All the answers to the questionnaire were in Italian. The results have been translated in English, and they are presented below.

²⁵⁷ The association is the ‘Csa Ex Canapificio’. It is a local association active in Caserta, Italy. It is part of the Italian Protection System for Asylum Seekers and Refugees (SPRAR).

²⁵⁸ Gianpaolo Mosca, legal professional for the association, confirms that the users of the association is composed by 85% of male people and by 80% of migrants from West/Sub-Saharan Africa.²⁵⁸ He explained that this is a consequence of migration pattern that began in 2002 resulting from the civil wars that there were then underway in West Africa. Mariarita Cardillo, further explains that two other factors elements need to be considered, first, the geographic location of people from the same nationality already present in the country, and established over a long period of time; second, the different ability of these migrants in obtaining different type of permission, depending on their nationality, in order to move in other European countries.

Discussion with Mariarita Cardillo and Gianpaolo Mosca, legal professionals for Csa Ex Canapificio (Caserta, 12 July 2019). Transcriptions and record of the conversation are with the author, available on request.

The rights of undocumented migrants - Results

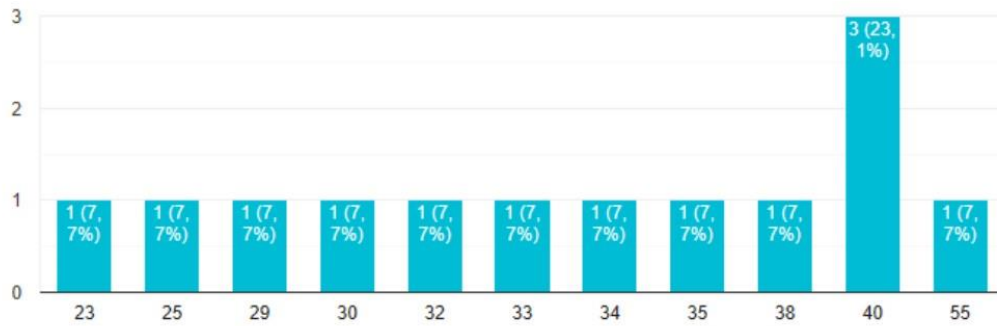
13 answers

Aggregate Individual

Accept answers

Età/Age

13 answers



Genere/Gendre/Gender

13 answers



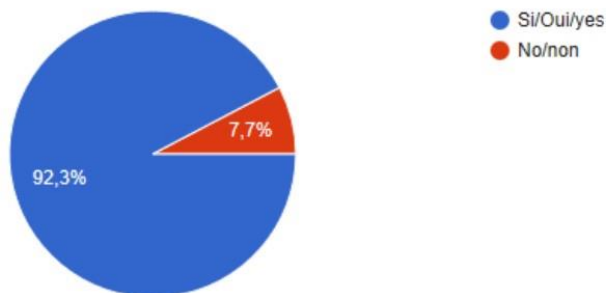
In quale città e Paese vivi? - De quel ville et pays venez-vous? - Where are you from (city and country)?

13 answers

Ghana
Ghana
Costa d'avorio
Afragola (NA), vengo da Liberia
Castel Volturno (CE), proveniente da Sierra Leone
Castel Volturno (CE), Sunyani (Ghana)
Casal di principe (CE), Burkina Faso
Castel Volturno (CE), Togo
Castel Volturno (CE), Ghana
Mondragone (CE), Ghana
Villa Literno (CE), Burkina Faso
Castel Volturno (CE), Liberia

Sei un migrante irregolare (senza permesso di soggiorno)? Etes-vous un migrant en situation irrégulière (sans titre de séjour)? Are you an undocumented migrant (without residence permit) ?

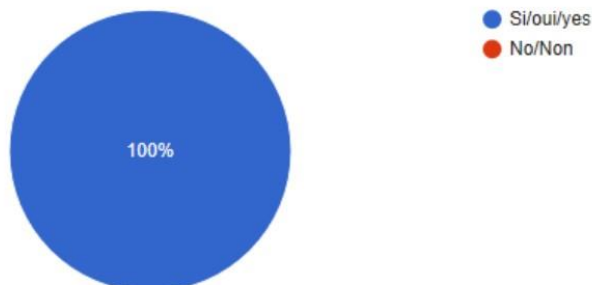
13 answers



*One migrant answered “no” to this question, as he had a residence permit when he completed the questionnaire. However, he was an irregular migrant in the past (see next pie chart). Therefore, he was able to answer the questionnaire according to his experience as undocumented migrant.

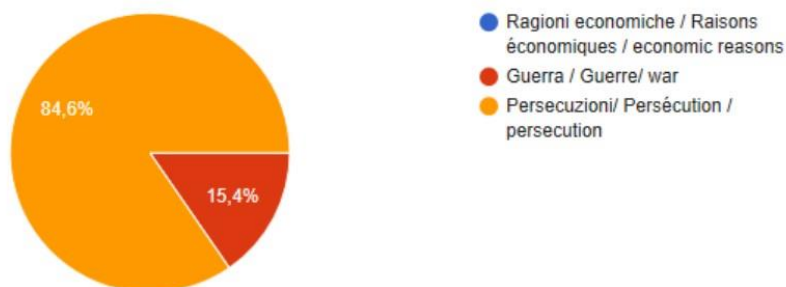
Sei mai stato un migrante irregolare (senza permesso di soggiorno)? Avez-vous déjà été en situation irrégulière ? Have you ever been an irregular migrant (without papers)?

1 answer



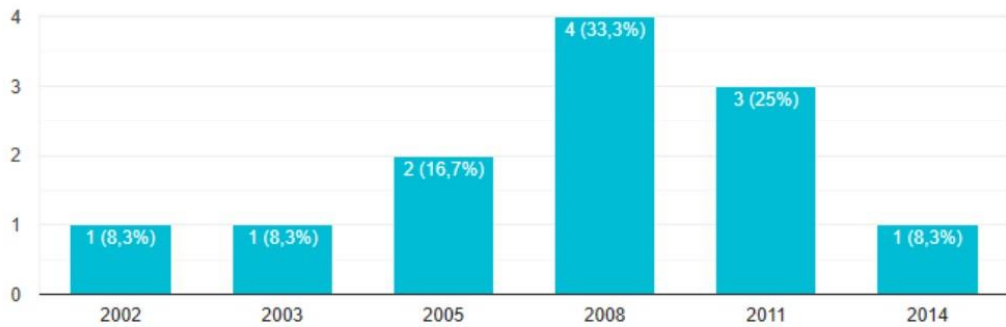
Perché sei migrato? Pourquoi avez-vous immigré? Why did you migrate?

13 answers

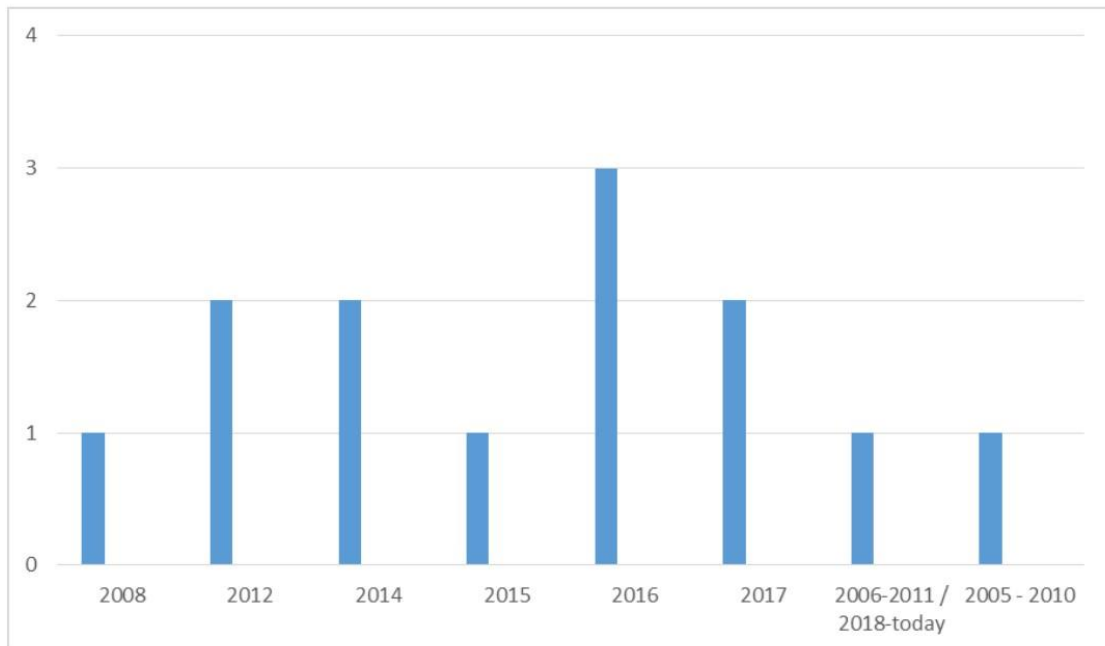


Da quanto tempo siete in Unione Europea? Depuis combien de temps êtes-vous dans la zone de l'Union européenne? How long have you been living in EU?

12 answers

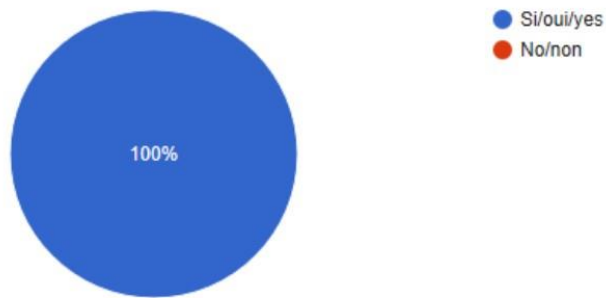


Da quanto tempo vivi in UE senza permesso di soggiorno? Depuis combien de temps vivez-vous dans le territoire de l'UE sans titre de séjour? How long have you been living in EU without residence permit?



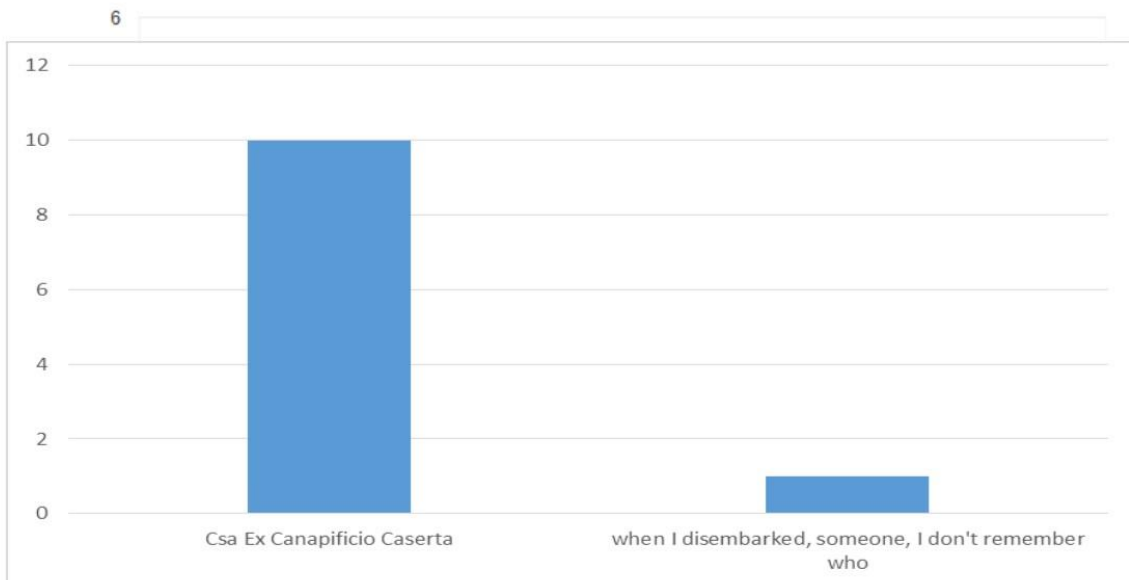
Siete stati informati dei vostri diritti? (salute, educazione, abitazione, lavoro,...)? Avez-vous déjà été informé de vos droits (santé, éducation, logement, travail,..)? Have you been informed about your rights as an irregular migrant? (healthcare, education, shelter, work,...)?

13 answers



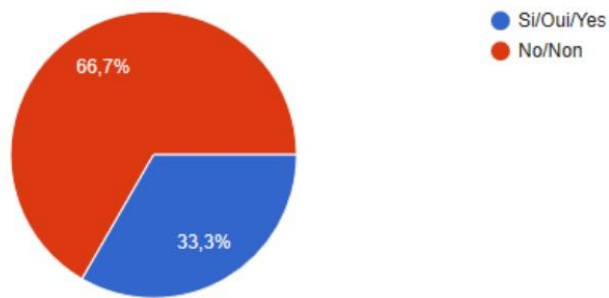
Se sì, da chi? Si oui, par qui? If yes, by whom?

11 answers



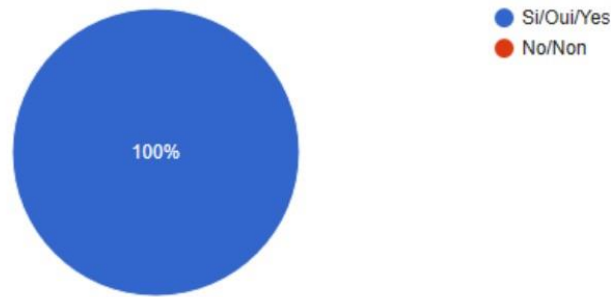
Temi che il medico o altro personale medico possa segnalare alla polizia il vostro status di irregolare? Craignez-vous que si vous cherchez d'avoir soins médicaux quelq'un (médecin, infirmier, autres) pourraient signaler à la police votre situation irrégulière ? Are you afraid that the doctor (or other staff) will report to the police your migration status?

9 answers



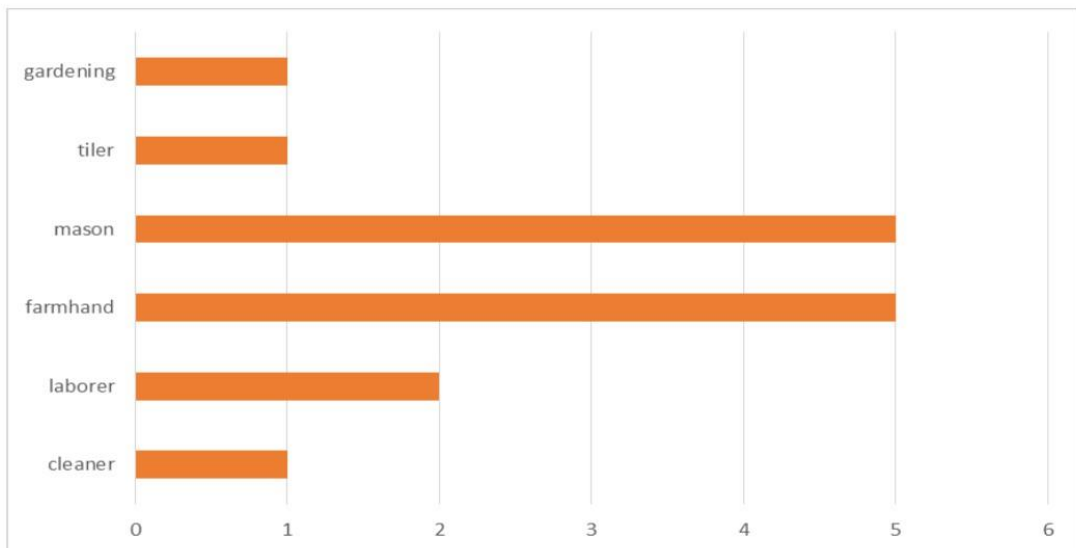
Hai o hai mai avuto un lavoro irregolare? Avez-vous ou avez-vous déjà eu un travail non déclaré? Do you have or have you ever had an undeclared work?

13 answers



Che lavoro? Quel travail? Which Job?

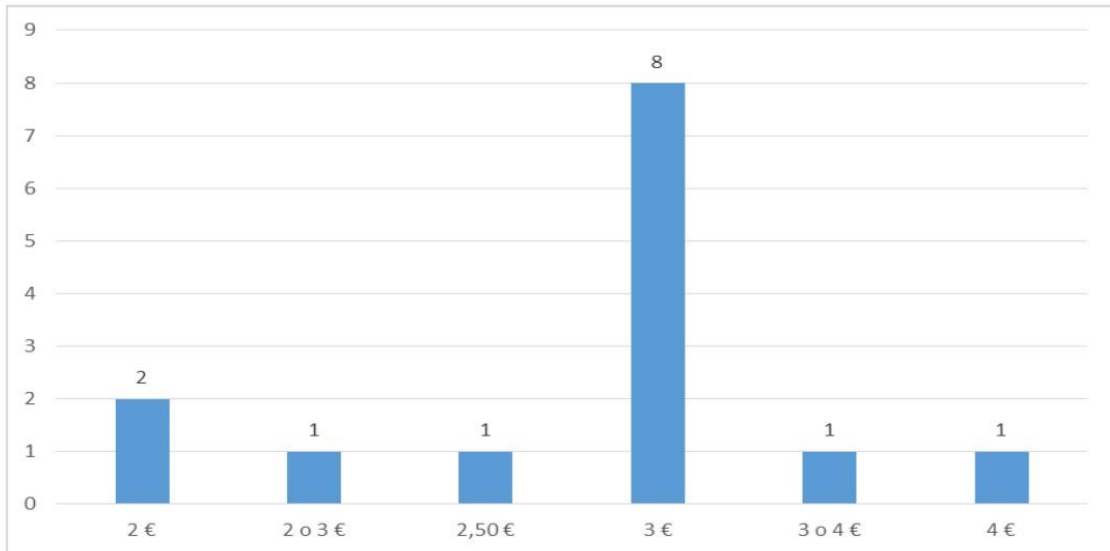
13 answers



* It is useful to take into account that some migrants did more than one job among the listed.

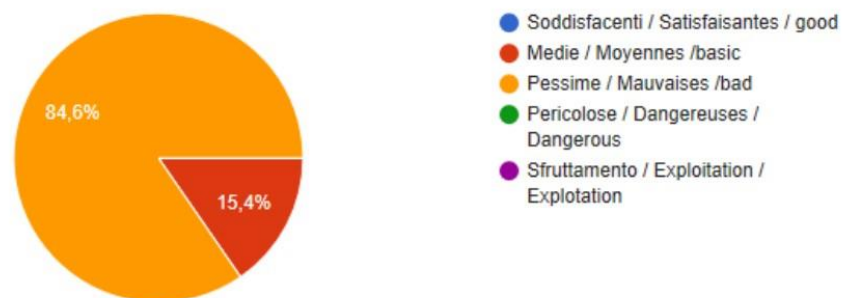
Quanto vieni pagato all'ora? Combien êtes-vous payés pour une heure de travail ? How much do you get paid per hour?

13 answers



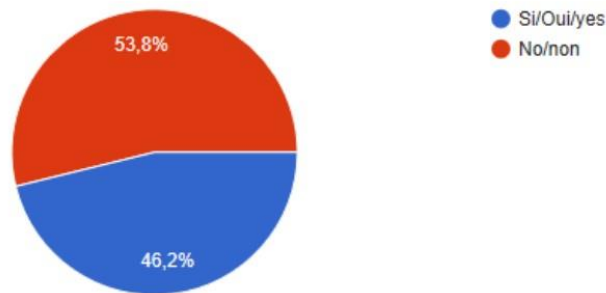
Come consideri le condizioni di lavoro? Comment considérez-vous les conditions de travail ? How do you consider your work conditions ?

13 answers



Hai mai pensato di denunciare il tuo datore di lavoro? Avez-vous déjà pensé à porter plainte contre votre employeur? Have you ever considered to report your employer?

13 answers



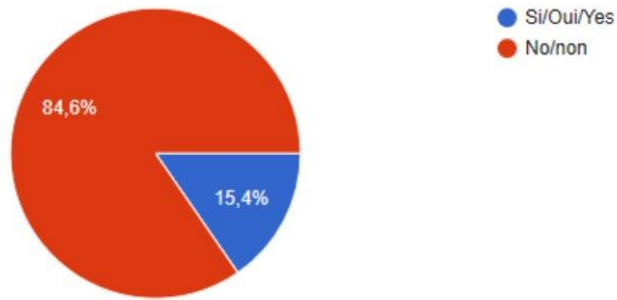
Se la risposta è sì, ma non lo avete fatto, perché? Si oui, mais que vous ne l'avez pas fait, pourquoi? If the answer is yes, but you did not report your employer, why did not you report her/him?

6 answers

I am scared about repercussions and about losing my job
I am afraid of repercussions
I am afraid of losing the job and have no alternatives
I am afraid of losing my job, although exploited it allows me to gain some money
I am afraid of repercussions and not finding any other job
I am afraid of losing the job and do not find other jobs

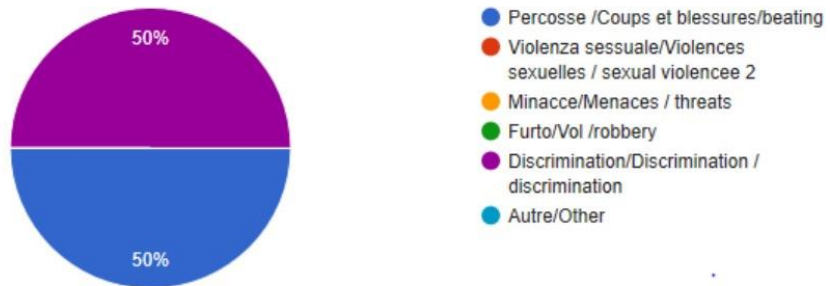
Sei mai stato vittima di un crimine? Avez-vous déjà été victime d'un crime ?
Have you ever been a victim of crime?

13 answers



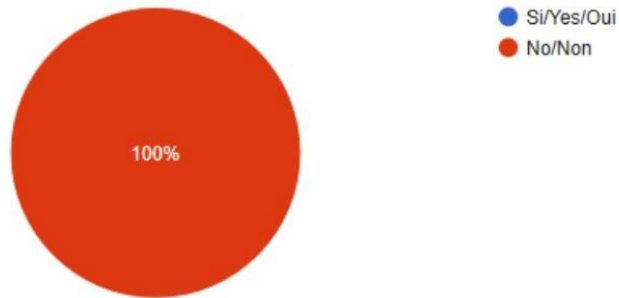
Che crimine? Quel crime? Which Crime?

2 answers



Avete denunciato il crimine? Avez-vous signalé le crime? Did you report the crime?

2 answers



Se no, perché? Si non, pourquoi? If not, why?

2 answers

