

## Challenges in the protection of migrant workers' rights: the Italian case

### *Desafios na protecção dos direitos dos trabalhadores migrantes: o caso italiano*

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#### Resumo

Este artigo destaca algumas das principais questões relativas à protecção dos direitos dos trabalhadores migrantes, abordando o emprego irregular de imigrantes e as abordagens jurídicas adoptadas em Itália. Este artigo procura destacar o papel que as medidas nacionais legais devem desempenhar para garantir que todos os trabalhadores migrantes – tanto em situação regular como irregular – tenham acesso a direitos humanos básicos. Na primeira parte examina-se o debate actual acerca da definição de padrões internacionais e regionais comuns relevantes à migração laboral, em particular as convenções da OIT, os instrumentos da ONU e o quadro jurídico da UE, abordando brevemente os diferentes mecanismos de execução disponíveis e o acesso a mecanismos de correcção. A segunda parte chama a atenção para a protecção e a aplicação efectiva realizada a nível nacional - em Itália - procurando identificar que restrições estes instrumentos internacionais impõem aos Estados e os desafios que a Itália está a enfrentar para implementar disposições específicas.

#### Palavras-chave

migração irregular, protecção dos Direitos Humanos, mobilidade laboral

#### Abstract

This paper highlights some of the key issues relative to the protection of migrant workers' rights, addressing the irregular employment of immigrants and the legal approaches adopted in Italy. This paper would like to explicitly highlight the role that national legal measures should play to ensure that all migrant workers-whether in regular and irregular status-enjoy basic human rights. The first part examines the actual debate on the identification of international and regional standards relevant to labour migration, in particular ILO Conventions, UN instruments and EU legal framework, addressing briefly the different enforcement mechanisms available and the access to redress mechanisms. The second part then draws the attention to the protection and the effective implementation realized at national level - in Italy - seeking to identify which restrictions these international instruments impose on States and the challenges that Italy is facing to implement specific provisions.

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## Introduction

Irregular migration becomes a relevant topic on the agenda of international community. Irregular migration was considered pertaining to an internal matter of states. However, this attitude has been changing in the last years, in which it has moved gradually from being treated as a domestic matter to a human rights issue debated at international level.<sup>1</sup>

The precarious legal condition of migrant in irregular status enlarge their vulnerability to human rights abuses, and may be subjected to hostility and exploitation. Additionally, irregular migration is often perceived negatively by host governments and local communities alike and such perceptions provoke mistreatment of migrants which in some cases culminates in the denial of their human rights (ICHRP, 2010).

The theme of this paper considers key issues pertaining to the protection of a particularly vulnerable group of migrants, migrants workers in irregular status. It also addresses the irregular employment of immigrants and the adopted legal approaches in the case of Italy. Concern about irregular immigration has gained increasing attention in the Italian media. Political debate and national legal provisions have been discussed and recently adopted in parallel with the global crisis to "combat" this phenomenon (Zorzella and Bari, 2009).

As affirms Wickramasekara (2008) regular and irregular migration are closely related, since the lack of so-called regular (i.e. legal) opportunities "in a context of strong demand for migrant labour is a major cause of irregular inflows". This would explicitly highlights the role that national policies and legal measures could play to ensure that all migrant workers - whether in regular and irregular status - enjoy basic human rights. This paper emphasizes a rights-based approach to address irregular migration in line with international norms (ILO, 2010a).

This analysis will be twofold. The first part examines the debate on the identification of international and regional standards relevant to labour migration, emphasizing the plurality of legal norms conditioning the status of irregular migrants workers. This study will argue that a human rights approach to migration law serves the purpose of grounding the legal analysis of migrant workers rights and corresponding State's duties under international law. The second part draws attention to the protection and the effective implementation realized at national level - in Italy - identifies which restrictions these international norms impose on State, and discusses the challenges Italy faces in implementing those instruments. Italy provides a useful case study of the existing tension between migrants' economic need and contribution as well as to the increasing push to criminalize and punish irregular migrant workers. Some features of the effects of the recent changes in the protection regime of migrants

workers' brought by the adoption of new national legal provision, will be discussed, with a specific review of the recent decision adopted by national courts to highlight the relevant role of national jurisprudence in the ongoing process to enforce migrant workers rights.

## INTERNATIONAL LEGAL FRAMEWORK AND IRREGULAR MIGRATION

### Terminology

At the international law there are practically no binding definition of this phenomenon of irregular migration (Guild, 2009). The terminology adopted by governments, journalists and in the literature differs substantially (clandestine, undocumented, illegal, irregular migrant etc.) and it is inconsistent and rarely based on a substantive definition.

For the purpose of this paper, the following terms are defined: "*Migrant Workers*" is "a person who is to be engaged, in engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".<sup>2</sup> Within the category of "migrant workers" irregular or undocumented migrants must be recognized.<sup>3</sup>

In literature there are several terms that describe irregular migration, including "illegal migrant", "undocumented migrant" and "clandestine migrant". Reyneri (2001) argues that it may be possible to make a distinction between employment status and residence status. To this end, he highlights the need for new terminology that makes a clear distinction between the two dimensions: he suggests the use of "authorized" versus "unauthorized" for indication of residence status and "irregular" versus "irregular" in reference to employment status (Reyneri, 2001). In this case, it is relevant to combine the proposed two dimensions with the legal framework and administrative guidelines adopted at national level.<sup>4</sup>

This study adopts the term "irregular migrant" and "migrant in irregular status", to avoid the risk to limit the protection of their human rights, by considering them as outside the protection granted by law and in a situation of inferiority (Wickramasekara, 2008).

At international level migration semantics have evolved and the use of the term "irregular migration" is increasing to avoid in particular the imputation of criminality to those in this situation.<sup>5</sup> This reflects a view that to try to move to another country to escape underdevelopment or poverty, and to better oneself, is not in itself a motive to see migrants as criminals; and that to do so outside the rules laid down should remain "administrative" in nature. This was recently affirmed by the Commissioner on Human Rights (Hammerberg, 2009), which pointed out the need to use a "*fairly neutral terminology*", highlighting that: "*The choice of language is very important to the image which the authorities project to their population and the world. [...] Illegal immigration as a concept has the effect of rendering suspicious in the eyes of the population (including public officials) the movement of persons across international*

*borders. The suspicious is linked to criminal law – the measure of legality as opposed to illegality”. Also the Special Rapporteur on the Human Rights of Migrants, J.Bustamante, stated that “The term “illegal” is a negative term, reflecting the current tendency on the part of host governments for criminalization of irregular migration” (UNHCR, 2008).*

The need to pay a specific attention to the terminology adopted was invoked recently by the Committee on Migrant Workers:<sup>6</sup> *«The Committee is generally concerned about the association of irregular migration with criminality and the use of the term “illegal migrants” rather than migrants in a “non-documented” or an “irregular situation”, which is the terminology used in the Convention. In this regard, the Committee is concerned that a considerable number of migrant workers in the State party are non-documented and that their irregular migration status is considered a criminal offence punishable by imprisonment and/or fines under Law No. 08-11 of 25 June 2008».*<sup>7</sup>

### **The protection of migrant workers in irregular status and the international human rights framework**

Migrant worker in irregular status may easily be subject to exploitation and it is mainly for this reason that international law started looking into their working and living conditions. In this context, the ILO has “*pioneered the development of labour standards for migrant workers since 1930s*” (ILO, 2010a). The Preamble of the Constitution of the International Labour Organization includes among the aims of the Organization “*the protection of the interests of workers when employed in countries other than their own*” and the International Labour Organization developed a number of legal instruments, such as conventions and recommendations, composing the relevant international legal framework for protection of migrant workers.<sup>8</sup> Because of the ILO’s tripartite structure, it is particularly aware of the problems faced by diverse groups of migrants (Bertinetto, 1983). Most Conventions and Recommendations are formulated in general terms, covering all workers.

Two ILO Conventions and two Recommendations specifically contain provisions particularly relevant to migrant workers protection: the Migration for Employment Convention (Revised), 1949 (n.97) and the Migration for Employment Recommendation (Revised), 1949 (n. 86); and the Migrant Workers (Supplementary Provisions) Convention, 1975 (n. 143).

The Convention n. 97 and its recommendation n. 86 cover only migrant in regular status, affirming the principle of non-discrimination between regular migrants workers and nationals in labour-related issues (art. 6). The affirmation of the principle of equal treatment reflects the definitions found in other human rights conventions: the Universal Declaration of Human Rights of 1948 affirms a range of principles - including the rights to life, freedom from torture, freedom from slavery and forced labour, freedom of movement, right to work and right to form and join trade unions - which applies to all persons, as well as the principle of non-discrimination (art. 2);

the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965) states the respect of the principle of equality for everyone and the obligation for States parties to condemn discrimination “*in all its forms*” (art. 5), even if limited different treatments are allowed. In this regard, the Committee on the Elimination of Racial Discrimination makes clear that “*differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim*”. The Committee further clarifies that “*all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated*” (CERD, 2004). The International Covenant on Economic, Social, and Cultural Rights, which came later in 1966, establishes that the Governments shall take progressive measures to the extent of available resources to protect the rights of everyone (art. 2, para. 3). The Committee on Economic, Social and Cultural Rights has affirmed that the Covenant’s Preamble highlights the “*equal and inalienable rights of all*” and the Covenant recognizes the rights of “everyone” to the various Covenant rights. Finally, the Committee has noted that Covenant rights are available without discrimination to all non-nationals, regardless of their legal status (ICHRP). Also the articles 2 of the International Covenant on Civil and Political Rights affirm that each State party undertakes to respect and ensure to all individuals within its jurisdiction the rights recognized in the Covenant “*without distinction of any kind*”. In this regard, the General Comment n. 15, adopted in April 1986 by the Human Rights Committee, makes specific recommendations to States parties to guarantee all the rights listed in the Covenant without discrimination between nationals and non-nationals.<sup>9</sup>

The Convention (n. 143)<sup>10</sup> was the first international instrument to address the issues raised irregular migration or migration under abusive conditions, covering all migrant workers and granting specific rights to migrants in regular status.<sup>11</sup> The Convention consists of two parts: the first dealt with all migrant workers and in particular those non-nationals who are in an irregular situation as regards their entry, stay or economic activity; and the second - applying to “legal” workers - with “Equality of opportunity and treatment”. The Convention aims are (1) to avoid clandestine and uncontrolled movements of migrants and their illegal employment and (2) to adopt measures against the organizers of clandestine movements of migrants for employment and to penalize employments of irregular migrants. In order to achieve these aims the Convention sets out specific rights: - basic human rights of all migrants workers must be respected (art. 1); - “*equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits*” (art. 9.1); - due process in case of disputes art. 9.2); costs in case of expulsion should not be borne by the worker (Wickramasekara, 2002).

- *Enforcement mechanisms*: each State member of the ILO must periodically report on the steps taken to implement, in law and in practice, the Conventions which it has ratified. The Committee of Experts on the Application of the Conventions and Recommendations monitors the application and, after examining the reports transmitted, observations may be published in an annual report sub-

mitted to the International Labour Conference. Further, employers' and workers' organizations can address the ILO on a Member State's non compliance with a Convention it has ratified (Novitz, 2005).

The ILO recognizes the existing link between labour rights and migration, and the International Labour Conference's General Discussion 2004 adopted a Resolution on a fair deal for migrant workers in the global economy and is also called for an ILO Plan of Action on Labour Migration.<sup>12</sup> The ILO adopted a Multilateral Framework on Labour Migration – non binding multilateral framework for a rights-based approach to labour migration.<sup>13</sup> The ILO Multilateral Framework set forth principles and provides guidelines that can be of great value in the formulation of policies to ensure the application of international labour standards to migrant workers. In particular, several principles apply to workers in irregular situation.<sup>14</sup>

And they reaffirm that migrant labour standards apply to all migrant workers in the workplace irrespective of their status. At this effect, the Inter-American Court on Human Rights (17 September 2003) issued at the request of Mexico a advisory opinion on juridical condition and rights of undocumented migrants that clearly reinforces the international acceptance of the application of international human rights standards, including those related to work, to non-nationals.<sup>15</sup>

The recent developments increasing emphasis on “soft” law<sup>16</sup> as opposed to “hard” law. Within the ILO, the employers' representatives suggested that the adoption of international instruments may be less appropriate than “*campaign to raise public awareness, declarations, codes of conduct, and technical assistance*”.<sup>17</sup> Such a strategy has raised alarm on the part of workers' group, who have expressed concern at the “*proliferation of initiatives seeking to call into question the universal scope, the application, even the existence of standards*”.<sup>18</sup> The ILO Director-General, Juan Somavia, responded that he will not abandon the protection of standards, which are “*stern indicator of progress towards the achievement of ILO objective, not through lip-service but in law and practice*” (Alston, 2005).

### *International Conventions on Migrants Workers and Members of their families*

Considering the disappointed results achieved by the end of the 1970s, both regional and international levels, to deal with the problems of irregular migrants, Mexico with a group of countries of emigration, took the lead, within the framework of the UN, to elaborate a new international legal instrument to deal with all migrant workers (Bertinetto, 1983). The first step of the lengthy drafting process was the adoption of resolution 34/172 of December 1979 by General Assembly Resolution requesting the Secretary General of UN to explore the possibility of drawing up a Convention to protect the rights of all migrants workers and member of their families. A working group open to all Member States, and the international organs and organizations involved was established in 1980 and the Working group finished drafting the International Convention in 1990. International Convention concerning the rights of all migrant workers and members of their families (ICRMW), entered into force on July 1, 2003,

represents the first international instrument addressing the protection of all migrant workers, including irregular and regular migrants, recognizing their basic rights.

The relevance of this instruments is linked to specific reasons, as properly highlighted by several authors:

- *“it is the first universal codification of the rights of the migrant workers and their family members in a single instruments”* (Lonroth, 1991);
- this instrument applies specifically to migrant workers and members of their families and covers the entire migration process, including: preparations for departure, departure, transit, the entire period of stay and remunerated activity in the state of employment, and return (ICHRP);
- the most existing comprehensive definition of “migrant workers” is formulated at art. 2, with the explicit inclusion of irregular or undocumented migrant workers within its scope, (Wickramasekara, 2007);
- the provisions listed in the Conventions serve as a tool to encourage States to improve and to establish national legal provisions in line with international standards, considering the inadequate level of protection granted at migrants workers and member of their families at national level (International Steering Committee, 2009);
- this Convention formulate explicit measures to address and to prevent the phenomenon of clandestine migratory movements and to prevent and eliminate exploitation of employment of irregular migrants (International Steering Committee, 2009).

The Conventions consists of nine parts: particularly, Part III (art. 8 to 35) defines human rights of all migrants workers an members of their families, irrespective of their migratory status. The Convention does not formulate new series of rights, many of these articles are already enumerated in other international human rights instruments, but restate their application to this specific category.

Briefly, some relevant provisions include the following: Article 11(1) and (2) states: *“No migrant worker or member of his or her family shall be held in slavery or servitude. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour”* (emphasis added). Article 15 protects migrant workers from the arbitrary deprivation of property, while article 21 makes illegal for anyone, except public officials “duly authorized by law”, to confiscate or destroy identity documents, work permits or residence permits, thus prohibiting employers from confiscating the passports of their migrant employees. Article 22 provides protection against the arbitrary and unlawful expulsion of all migrant workers and their families, regardless of their status. It provides that: *“Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.”* Article 23 spells out the rights to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin. Article 32 states that, upon termination of their stay in the State of employment, all migrant workers and members of their families are entitled to transfer savings and earnings as well as their personal effects and belongings on termination of their stay in the state of employment. With regard to liv-

ing conditions, specific provisions grant the right to receive medical care, basic rights of access to education and prohibit interference with the rights of religious freedom, expression, privacy and respect for the family.

Even if the entry into force of the ICMWR in 2003 represents a relevant step at international development on the adoption of the standards for the protection on migrant workers, the low number of ratification of ICMWR risk to avoid significant progress in this field. As stated the ILO Committee of Experts in 1999: *“as in the case with the ILO instruments, the majority of States parties to this convention are, on the whole, migrant-sending states which, while extremely important in terms of protection of migrant prior to departure and after return, hold little influence over the daily living and working conditions of the majority of migrant workers”* (Wickramaskara, 2007).

## **European Union and irregular migrants**

Since the Council of Europe Conference of Ministers of Labour, held in Rome in November 1972, irregular migration had been a subject of study in Europe. The EU had developed a significant body of norms regulating the treatment of non-nationals workers, considering primarily the economic aspects of migration to its social implications.<sup>19</sup> The protection is offered by Treaty articles, EC directives relating to irregular migration, soft law instruments, and the well settled jurisprudence of the Court (Novitz, 2005). It could be useful at this stage to have a closer look at the recent effort made to deal with the problem of “illegal” migration in Europe.

### *Irregular migrant -Regulatory measures taken*

Specific EC legislation has been adopted relating to migrant workers in irregular situation.

The EU adopted Regulation 562/2006, the *Schengen Borders Code*, on 15 march 2006. The Regulation sets up in particular the circumstances under which a non-EU national may enter the EU.

*Directive 2009/52* providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals. According to this directive an “illegally staying third-country national” is a migrant who does not fulfill or no longer fulfill the conditions for entry and stay in a member state. “Illegal employment” is the employment of an irregularly staying third-country national. Member states are required to prohibit the employment of “illegally staying” of aliens. The provisions stated the right of irregular migrants to be paid “on minimum wages” and the obligation for the employers to pay “taxes and social security contributions” (art. 6.1); at the same time this provision establishes that “Member states shall ensure that the necessary mechanisms are in place to ensure that illegally employed third-country national are able to receive any back payment of remuneration” (art. 6.4) and “in respect of cases where residence permits of limited duration have been granted

*[...], Member states shall define under national laws the conditions under which the duration of these permits may be extended until the third national has received any payment back" (art. 6.5).*

*Directive 2008/115 on common standards and procedures in member states for returning illegally staying third-country nationals has raised substantial criticism.<sup>20</sup> The language address the phenomenon in terms of "illegal" migrants – for example pre-amble states it is recognized that it is legitimate for member states to return illegally staying third country nationals. The provision at art. 6, 1 provides that "Member States shall issue a return decision to any third-country national staying illegally on their territory". Article 8, 4 provides: "Where member states use- as last resort- coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force".*

### **Specific issues concerning human rights of irregular migrant workers**

#### *Employment and Economic and Social Rights*

The existence of aforementioned international standards - embodied in specific conventions - is not sufficient to avoid the augmentation of case of abuse, discrimination and exploitation in correspondence with the increase of irregular movements. In fact, specific challenges exist to ensure the full enjoyment of human rights at the national level, as stated by a recent study of Council of Europe.

*"National laws in [Council of Europe] Members States make access to many of these rights very difficult if not possible. Moreover, even where such access is not prohibited by the law and should be available, the very illegality of migrants' stay creates further legal and practical obstacles to the enjoyment of these rights" (Cholewinski, 2005).*

Face to this situation of legal uncertainty, a migrant worker may accept any kind of working and living conditions. In worst cases, situations may create forced labour, and is evidenced by Siliadin v. France case, a decision issued by the European Court of Human Rights.<sup>21</sup> The ILO report highlighted that a relevant number face abuses in the form of "low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers' rights, discrimination and xenophobia, as well as social exclusion" (ILO, 2004). Employers prefer to hire migrants in irregular status because "they [employers] can do that person [irregular migrants] everything they want [...] they want to get as much as it is possible from people, but to pay as little as they can" (Anderson and Ruhs, 2006).

#### *Labour inspection and irregular migration*

The ILO Committee of Experts on the Application of Conventions and Recommendation stated in its 2006 General Survey on Labour Inspections (ILO, 2006) that the primary duty of inspections is to focus on abusive working conditions to which irregular

workers may be exposed and not the enforce national migration law (Wickramesekara, 2007). In this context, *“the fact that migrant workers are in an irregular situation will make it difficult to claim their rights, as the irregular situation may deter them from having recourse to the judiciary for fear of making their situation known to the authorities and hence incurring the risk of being expelled”*.<sup>22</sup>

Another issue of concern is that criminal sanctions against employers are not properly implemented, in particular because migrants face many difficulties when claiming their rights. For these circumstances *“labour inspectors have a key role to play to facilitate access for those workers and to collaborate with criminal justice authorities to adequately enforce sanctions”* and a peculiar national instrument to support migrant workers rights in irregular status (ILO, 2010 b).

## IRREGULAR MIGRATION IN ITALY

Having briefly addressed the relevant international legal framework and EU obligations that bind Italy on migration issues, this section deal with new national provisions introduced to identify the key issues that arise as point of contention..

Italy has been a country of emigration throughout history. From 1876-1976, 24 millions Italians migrated to other countries in Europe, the Americas, Asia and Oceania. In past three decades Italy has progressively become a country of immigration. From 1998-2008 the migrant population in Italy has reached the current figure of 3.89 millions. While migrants are an important resource for Italy's economy, at the same time the constant flow of irregular migrants entering the country becomes a growing issue of concern for the Italian government. The ISMU Foundation (2009) places estimates of irregular migrants throughout the Italian national territory at 541.000 individuals in 2005; 650.000 in 2006; 349.000 in 2007; 651.000 in 2008; and 422.000 in 2009.

As a traditional country of origin, the Italian Government had to adapt legislations and regulations Italy's current status as a destination country and to address the existing gap in the legal framework, which governs aliens' the entry and stay.

Italy's first attempted to introduce an extensive regulatory framework on migration in 1990 (Martelli Law n. 39/1990). An arguably less relevant intervention occurred in 1986 (Law n. 943/1986) via application of the ILO Convention (n. 143, 1975), stating the principle of equality between aliens and national workers. The most comprehensive instrument is the single Act n. 286 adopted in July 1998) in which the Italian migration policy has been declined: including specific provisions on entry, stay and working conditions. In particular this instruments states *“equality of access to the national health system for those with resident permits, and the right for irregular migrants the, in case of illness or injury, to urgent, even if ongoing, hospital treatment provided by public and recognized the right to education for the school-age children of irregular migrants”* (ICMPD, 2009). In 2002 the previous legislation was amended by the Bossi-Fini Law n. 189/2002. The 2002 introduced the so-called “residence contract”. Migrant obtain this document if they fulfil three requirements a valid working con-

tract, a residence permit and adequate housing (an updated provision required that the employer must cover the migrant worker's housing and return costs) (Merlino, 2009; Hammarberg, 2009).

Irregular migrants have increasingly become center of Italian media and political debate. New norms related to the fight against undocumented migration have been adopted. These seek to classify the lack of legal status as a criminal offence rather than as a simple administrative irregularity (Awad, 2009).

### **Implementation of international standards at national level: failure in protecting migrants' rights**

At the international level, Italy is party to the numerous international human rights instruments.<sup>23</sup> In applying the provisions of international conventions, Italian courts have recognized the primacy of international human rights law in a number of judicial decisions,<sup>24</sup> clarifying that such provisions could be directly applied in the case of self-executing provisions. The Supreme Court has endorsed the primacy of international norms in several decisions such as the Judgement n. 9459 of 10 September 1993, noting "*that specific provision of international convention are applied at national level if they are formulated as self-executing*".

Italy ratified the ILO Fundamental Conventions<sup>25</sup> and also notably the ILO Migrant Workers Convention n. 143.<sup>26</sup> It is interesting to consider that of the 23 countries that have ratified the Convention n. 143, Italy was the only one that was confronted with massive immigration.

Initially, Italy as migrant source was most interested in articles pertaining to the promotion of equitable and lawful conditions in connection with international migration of workers and members of their families, as Italy sought to guarantee the protection of its emigrants. However Italy has since become a destination and transit country for migratory flows to Europe, a situation that has resulted in an increasing flow of undocumented migrants. Italy's current concerns and the practical consequences of this phenomenon have influenced Italian implementation of the international standards listed above.

During the last session of Universal Periodic Review in February 2010, the Human Rights Council raised several elements of concern regarding the implementation Italy's international human rights obligations. One particular issue under consideration was migrants' right to work and migrants' right to just and favourable work conditions. CERD highlighted the need to take measures to prevent and redress the serious problems faced by non-citizen workers "*including debt bondage, passport retention, illegal confinement and physical assault*".<sup>27</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance recommended combating the exploitation and abuses of migrant workers, particularly in agricultural sector and ensuring the appropriate legislation.

In 2009 ILO Committee of Experts on the Application of Conventions and Recommendations also decided to include Italy on the list of individual cases for examination, referring to Italy's "*climate of intolerance, violence and discrimination of the immigration population*". The Committee noted that the global financial crisis has created additional challenges for addressing the issue of irregular migration with specific attention to the implementation of Article 10 (promotion of equality and opportunity of treatment) and Article 12 (promotion and implementation of equality policy) of the ILO Migrant Workers Convention. It is worth consideration that the response of the Italian Government, which stated that "*those who are engaged in the black economy were not protected as they are not officially employer*" (ILCCR, 2009) in contrast with the specific provisions mentioned above. Nor was Article 8 (equal treatment of migrant workers losing their jobs) was guaranteed. In regard to Article 9 of the Convention, irregular migrant workers are not currently guaranteed compensation for their labour, much less social security benefit. Many workers who have reported violations in this context by their employers have subsequently been expelled and in this way are deprived from the opportunity to have to redress mechanisms.

## Overview of current immigration legal framework

A brief overview of the current Italian legal background to state the entry into the territory of foreigners and the residence, could contribute to assess the level of implementation and to focus on how Italy incorporated international standards into its domestic legislation.

In particular, a new immigration law was adopted on 8 August 2009, act n. 94, of 15 July 2009, - Regulation on Public Security (*Disposizioni in materia di sicurezza pubblica*), part of the so-called "security package". The 2009 legal provision cannot be considered a capable instrument that balances the need to protect the basic human rights of migrants alongside the introduction of specific measures to control the migratory flow, as solicited by the growing pressure on the Italian Government.

With regard to specific provisions:

- *Irregular entry and individual*: in 2008 Italian law was changed to make the irregular status of aliens who commit a criminal offence an aggravating circumstances for the purposes of conviction. The law of 2009 (art. 1.16) establishes that irregular entry became a criminal offence, subject to financial penalties from 5.000,00 to 10.000,00 Euros.<sup>28</sup> This provision may lead new treatment to the human rights of migrants in irregular situation, affecting their right to health, to education and to birth registration, as will be illustrated deeper analyzing other provisions. In this regard, it is important to highlight that the Tribunal of Pesaro, in a decision of 31 August 2009, raised a question to the Constitutional Court regarding the constitutionality of section 10 bis, as regards the offence of "*illegal stay*" in the territory on the basis that it is contrary to: "1) the principle of reasonableness, including the principle of proportionality; the principle of equality as it assumes arbitrarily that all migrants in an irregular situation are socially dangerous; 3)

*the principle of solidarity; 4) art. 10 of the National Constitution that provides for the respect of international customary law; 5) and article 3 and 57 of the National Constitution because it does not contemplate the possibility of “justified cause” for the irregular stay in the country”.*<sup>29</sup>

- *Relationship with public officers*, under the Criminal Code (arts. 361 and 362), any public officer who learn about an irregular residency status of a migrant in the course of exercising their duties are required to pass that information to Italian immigration police. The first text added to final draft of the code was of particular concern relevant to migrants' healthcare access. One of the most controversial provision was to introduce a “formal obligation” for the doctors to ask the exhibition residence permit to guarantee the access to all health services. This dramatic provision was finally dropped from the approved text to guarantee the exercise of their human rights to health.<sup>30</sup> Regardless, these provisions may deter irregular migrants for fear of being reported to the police, as it is established since 1998.<sup>31</sup>

- *Access to legal assistance*: In terms of private enforcement, international law, require that workers have unimpeded access to the courts and legal assistance and to meet this obligation must Italy must ensure that irregular migrants are eligible for legal aid. This leads to the question: if the judge has a formal obligation to pass the information of this situation of irregularity to the police and which kind of safeguarding could still exist at national level for migrants workers?<sup>32</sup> This also raised different question of compatibility with the provision of the Directive 2009/52, that has to be implemented in Italy by 20 July 2011, specifically art. 6, 4 comma, mentioned above, which entitle to the remedy of back pay (compensation for wages lost because of unlawful firing) (art.6, 4 comma). Another interesting point to consider in this context is that even in the case of irregular migrant the prevalent jurisprudence affirmed that the art. 2126 of National Civil Code must be applied. As such, the contract of employment must to be considered completely valid and all the related effect of this contract must be respected, also by the way to bring the dispute before a national tribunal (see art. 9 of the Convention “*equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits*”).<sup>33</sup> So it could be important to follow up which will be the practice adopted by the national jurisprudence to conciliate the right to free access to legal assistance and the provision mentioned above.

- *Access to social rights*: access to social rights such as medical health care or accommodation is affected by the criminalization of foreigners. Recent law make it a criminal offence to rent accommodations to person irregularly present (and allows for the seizure of property and income from it on this ground). The criminalization of the provision of some services, including housing, may force migrants in irregular status into even more precarious circumstances, opening the way for further abuse and exploitation. These migrants' vulnerability is compounded by the fact that they cannot secure legal remedies due to their status. The measures are a cause for alarm, considering the risk to irregular migrants regarding their

basic human rights, in accordance with the article 1-9 of the Convention n. 143, and with respect to claims regarding past employment, even when they have immigrated or are employed illegally and their situation cannot be regularized. Here it is important also to highlight that the art. 35, 3 comma, explicitly recognizes the right to health services to all migrants, without being reported to the police, and this is affirmed by the jurisprudence.<sup>34</sup> As regards education, the free access to primary school is granted to all children.

Moreover, the vulnerability of irregular migrants in Italy has been addressed repeatedly by international organization that advocate for the protection of migrants' rights and that seek to amend or withdrawn specific provisions of the "security package" (Amnesty International, 2010; HRW, 2010, Comitato per la Promozione e Protezione Dei Diritti Umani, 2010). In their public statements, these organizations highlight the need to ensure full respect of the fundamentals rights of migrants and to ensure Italy's compliance with obligations under international standards.

### *Regularisation Programme and National Policy in Regard to Regularization*

While the Italian Government has addressed the growing concern for irregular immigration by strengthening the legal framework to face irregular migratory movements and irregular stay of aliens , it has also adopted a series of amnesties.

According to the results of country report realized in the frame of Regime Programme, several instruments were introduced to address the phenomenon of irregular migrants and, as underlined by several scholars, the main effect was to incremental *"the institutionalized production of illegality"*. First, the adoption of *flows decrees*,<sup>35</sup> established in 1990 by Law 39/90 (Martelli Law), which required the Ministry of Interior to use amnesties<sup>36</sup> to address situations of irregularity (ICMPD, 2009).

The Italian Government has put forward seven regularisation programmes, most recently in 2009.<sup>37</sup> These legalization procedures were implemented *"within a short-term and emergency framework"* rather than as first steps towards the creation of an effective planning of migratory inflows (Nascimbene, 2000), however it could represent a valuable instrument to call attention to the issue of irregular migration rather than simply focusing on restrictive legal instruments.<sup>38</sup>

It is important to highlight that at the European level the debate on regularizations is becoming a positive perception, which allows for *"the possibility that European member states will grant amnesty on a case-by-case basis"*.<sup>39</sup>

## **Conclusion**

The aforementioned analysis demonstrates significant inconsistencies in regards to adherence to human rights obligation and it has also lead to an increase in the association of migrants with criminal sanctions , in particular, as stated by Hammemberg, much more attention needs to the discriminatory effect of labeling migrants illegal

and how this leads to a higher chances of their human rights violations. This paper highlighted that migrants conditions need to be evaluated in the context of the human rights standards already agreed upon by member states - such as Italy.

At national level, there is an urgent need to increment specific legislative provisions in order to promote the full respect for normative human rights standards concerning migrants, irrespective of their status, and to implement and properly interpret the provisions existing at international level, including the the Migrants Workers Convention n. 143.. To this regard, it could be more than positive to ensure an adequate dissemination of information on migrants' rights to strengthen the awareness of national authorities and public officials.

Secondly, a detailed analysis leads to my conclusion that Italian legislation, have acknowledged the need for a review of labour migration framework, but practice and policy are generally inconsistent with its human rights obligations, which seems to prevail in the affirmation of the instances of the principle of sovereignty. As regards to the concrete application of national law, a specific set of rights pertaining to the access of social and economic rights, employment and welfare interests, and the facts that Italy is bound by the ratification of particular treaties, demonstrates two parallel trajectories: 1) an expansion (in the embryonic stages) of migrants in irregular situation to the access to basic human rights, as elaborated in judicial pronouncements and 2) a dangerous increase in the criminalization of their status, which risk to legitimate their exclusions from core labour standards. This situation faces a parallel regime of integration/exclusion of immigrants in conflict, which need to be deeply addressed to conciliate this paradox, as defined by Merlino, of "legal insecurity".

## Notas

<sup>1</sup> The Statement pronounced by the High Commissioner for Human Rights, Navanethem Pillay, and adopted by the Global Migration Group (GMG) on 30 September 2010, reflects the trend in which the protection of irregular migrants is moving: *"Too often, States have addressed irregular migration solely through the lens of sovereignty, border security or law enforcement, sometimes driven by hostile domestic constituencies. Although States have legitimate interests in securing their borders and exercising immigration controls, such concerns cannot, and indeed, as a matter of international law do not, trump the obligations of the State to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfill the rights necessary for them to enjoy a life of dignity and security"*, available at: [www.ohchr.org](http://www.ohchr.org), last visited 25 January 2011.

<sup>2</sup> UN Convention on the Protection of the Rights of All Migrants Workers and Members of their Families, art. 2. means: *"any worker participating in such migratory movements either within the countries and territories described in clause (a) of Paragraph 11 above or from such countries and territories into or through the countries and territories described in clauses (b) and (c) of Paragraph 1 above, whether he has taken up employment, is moving in search of employment or is going to arranged employment, and irrespective of whether he has accepted an offer of employment or entered into a contract. Where applicable, the term migrant worker also means any worker returning temporarily or finally during or at the end of such employment"*.

<sup>3</sup> Non-documented or in an irregular situation (ICRMW, Art 5 b) are considered as *"non-documented or in an irregular situation, if they do not comply with the conditions provided for in subparagraph (a)"*. Working Paper, Committee on Migrant Workers, Geneva 25 March 2005, CMW/C/2/L.1.

<sup>4</sup> On the perception of migrants of the difference between non-compliance of labour law and immigration rules, see also Anderson and Ruhs (2006). Also REGINE Report 2009, *"We distinguish four main aspects of legality/formality: entry, residence, employment (legal) and employment (formal). The dimension of "entry" merely refers to the legality of entering the territory, with a crude distinction of legal and illegal"*.

<sup>5</sup> In 1975 the UN General Assembly recommended that all UN bodies use the term *"non-documented or irregular migrant workers"*, "General Assembly Resolution [3449 (XXX)], 1975, *"Measures to ensure the human rights and dignity of all migrant workers"*) at article 2 *"Requests the United Nations organs and specialized agencies concerned to*

utilize in all official documents the term “non-documented” or irregular migrant workers, to define those workers that illegally and/or surreptitiously enter another country to obtain work”.

<sup>6</sup> Article 72 establishes that the Committee on the Protection of the rights of All Migrant Workers and Members of their families, composed of 10 experts elected by States parties, monitors the implementation of the provisions of the International Conventions on the Protection of all migrants Workers and Members of their families (ICMWR). The Committee has closely followed the implementation and the application of the provisions of this Convention to the irregular migrant workers, in interpreting and applying the rights in practice.

<sup>7</sup> UNHCR, *Committee of Migrants Workers*, Algeria, U.N. Doc. CMW/C/DZA/1 (May 2010), para. 18-19.

<sup>8</sup> As affirmed Ibrahim Awad, during the Expert Meeting on Linking human rights and migrants empowerment for development (Geneva 2009), the normative action for the realization of the constitutional objectives follows three roads: 1) Provisions on Migrants Workers in Conventions of universal application (e.g ILO Convention No. 2 on Unemployment); 2) Thematic conventions with specific provisions related to migrant workers (ILO Convention No. 21 on Inspection of Emigrants); 3) Two general Conventions on Migrant Workers (No. 97 of 1949 and No. 143 of 1975).

<sup>9</sup> In its general comment No. 15 the Human Rights Committee explained that “the rights set forth in the *International Covenant on Civil and Political Rights* apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness [...] The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens”. General comment No. 15 delineated further the fundamental rights of non-citizens: “Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority ..., they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant” (para. 7).

<sup>10</sup> <http://www.ilo.org/ilolex/english/convdisp1.htm>.

<sup>11</sup> Convention 143 enumerates three categories of workers’ rights: 1) migrants who have entered legally; 2) migrants who entered legally but become irregular; 3) all migrants, even those who entered irregularly.

<sup>12</sup> The ILC report was Towards a Fair Deal for Migrant Workers in the Global Economy and it reaffirmed the human rights of migrants.

<sup>13</sup> ILO adopted a Multilateral Framework on Labour Migration – non binding principles guidelines for a rights-based approach to labour migration, 2006.

<sup>14</sup> Principle 4: All States have the sovereign right to develop their own policies to manage labour migration. International labour standards another international instruments, as well as guidelines, as appropriate should play an important role to make these policies coherent, effective and fair. Principle 8: The human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions,<sup>5</sup> and the relevant United Nations human rights Conventions; Principle 9 (a): All international labour standards apply to migrant workers, unless otherwise stated. National laws and regulations concerning labour migration and the protection of migrant workers should be guided by relevant international labour standards and other relevant international and regional instruments. Principle 9 (c): National law and policies should also be guided by other relevant ILO standards in the areas of employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction and hotels and restaurants; Principle 11 :Governments should formulate and implement, in consultation with the social partners, measures to prevent abusive practices, migrant smuggling and trafficking in persons; they should also work towards preventing irregular labour migration.

<sup>15</sup> J/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18. The Court clarifies that “the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those labour-related nature”.

<sup>16</sup> On the relevant role of “soft law”, prof. George Abi-Saab (1987:207) stated that “La soft law n’est ni du non-droit ni une lex imperfecta. Elle n’est pas non plus toujours et nécessairement un droit en gestation, car il peut s’agir également d’un droit différent, d’une variété de droit qui remplit une fonction différente de celle du droit limite; non pas le droit de justicier ou de gendarme, mais celui, plus discret et malléable, de l’architecte social”, see too Duplessis (2006).

<sup>17</sup> Report of the ILO Governing body Committee on the Application of standards (2000), paras. 37-8.

<sup>18</sup> Report of the ILO Governing body Committee on the Application of standards (2000), paras. 42.

<sup>19</sup> Among the most relevant regulations: Regulation n. 1408/71/EEC on the application of social security regime to employed persons and self employed and to member of their families who have moved into the Community (modified by Regulation n. 1606/98/EC, 29 June 1998). The basic documents determining in more details the treatment of non-nationals within the region is the Community Charter of the Fundamental Social Rights of Workers (1989), even if it is not legally binding. It provides guiding principles for the treatment of non-nationals.

<sup>20</sup> In July 2008, ten independent human rights experts of the Special Procedures of the United Nations Human Rights criticized this directive, in particular they stated that *"Irregular migrants are not criminals. As a rule they should not be subjected to detention at all. Members states are obliged to explore the availability of alternatives to detention and detention must only be for the shortest possible period of time"*, A/HRC/11/7/Add.1, P. 27.

<sup>21</sup> In 2005, the ECHR issued a landmark decision finding a Togolese domestic worker in Paris had been subjected to both forced and involuntary servitude at the hands of her employers. The Court stated *"In interpreting Article 4 of the European Convention, the Court has in a previous case already taken into account the ILO conventions, which are binding on almost all of the Council of Europe's member States, including France, and especially the 1930 Forced Labour Convention"* [see Van der Mussel v. Belgium, judgment of 23 November 1983, Series A no. 70, p. 16, § 32]. [...] ECHR, Silian v. France, n. 73316/01, available at: [www.echr.coe.int/Eng/Press/.../ChamberJudgmentSiliadvFrance260705.htm](http://www.echr.coe.int/Eng/Press/.../ChamberJudgmentSiliadvFrance260705.htm).

<sup>22</sup> CEACR, Individual Observation concerning migrant workers, Cameroon, 2009.

<sup>23</sup> Italy has either ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

<sup>24</sup> See for instance, Constitutional Court, n.376/2000).

<sup>25</sup> ILO Convention n. 29 concerning Forced or Compulsory Labour; Convention n. 105 concerning the Abolition of Forced Labour, Convention n. 87 concerning Freedom of Association and Protection of the Right to Organize; Convention n. 98 concerning the application of the Principles of the Right to Organize an to Bargain collectively; Convention n. 100 concerning Equal Remuneration for Men and Women Workers for work of Equal value; Convention n. 111 Concerning Discrimination in Respect of Employment and Occupation; Convention n. 138 concerning Minimum Wage for Admission to Employment; Convention n. 182 concerning the Prohibition and Immediate action for the Elimination of the Worst Forms of Child Labour.

<sup>26</sup> Article 2 of Legislative Decree 286/2008, affirms the relevance of the ILO Convention 143 at national level, ratified by the Law n. 158, 10 April 1981. Also art. 10, 2 comma of the Italian Constitution affirms that the legal status of alien is regulated in compliance with provisions of international treaties.

<sup>27</sup> CERD/C/ITA/co/15, para. 4.

<sup>28</sup> See for example other national law on border crossing as the case of Germany, where irregular entry is an offence under the criminal law or UK where is a criminal offence punishable by fine, similar in Greek where criminal law sanctions are provided.

<sup>29</sup> See Merlino (2009), *The Italian (In) Security Package*, CEPS, analysis on this provision. Merlino states that this provision is contrary to the principle of non-discrimination on the grounds of nationality, also to the principle of equality before law and protection against discrimination. This provision is based *"on the assumption of dangerousness, which automatically stems from the status of simple administrative irregularity. On this point, the Italian Constitutional Court has stated in its ruling n. 22/2007 that "the condition of being [an] irregular non-national cannot be linked to the assumption of dangerousness"*.

<sup>30</sup> In this regard the UN High Commissioner stated that *"by the finding of a recent survey by Censis, [...] 80 percent of Italians are in favor of granting free national health coverage to irregular migrants. Although limited in scope, this survey shows that contrary to perceptions, the Italian public deeply cares about the fundamental human rights of migrants, irrespective of their status under the law"* (UNHCHR, 2009)

<sup>31</sup> On June 14th a Chinese woman aged 33, fearing that she would be reported as an illegal immigrant, fled from the Sacco Hospital in Milan, taking with her newborn son, who had been operated on from a very serious malformation of the heart. Recent research has shown in the main hospitals in Rome and Milan a reduction of 35 percent in the immigrants seeking treatment.

<sup>32</sup> A question of constitutionality has been raised by the Tribunal of Voghera, 20 November 2009, regarding the obligation for a Judge to denounce an irregular migrant.

<sup>33</sup> Tribunal of Monza, 9.04.2009, Tribunal of Milan, 13 April 2007, Supreme Court, 10128/98, Supreme Court 9407/2001.

<sup>34</sup> See for instance, Supreme Court 1964/05 and 6598/05.

<sup>35</sup> The flows decree annually set up a quota restrictions on entries for the purpose of work according to the single nationality. Not all years the flows decree is issued or for several years very few entries were allowed.

<sup>36</sup> Law 943/86 introduced specific provisions for recourse to amnesties to regularize migrants workers in irregular situation.

<sup>37</sup> The regularizations programmes are as follows: 1982 (an administrative regularization, by the Ministry of labor); 1986-1988 (a legislative regularization, Law 943/1986), by the Parliament); 1990 (a legislative regularization, Law 39/90, by the Parliament), 1995-96 (a legislative regularization, law 489/95, by the Parliament); 1998 (indirect regularization, the result of an item on the agenda approved by a majority of Italian Senate); 2002 (a legislative regularization), 2009 (including only those workers who take care of disabled people or of elderly people over-70).

<sup>38</sup> Note an important sentence of the Constitutional Court, which issued on a question of constitutionality of a regularisation programme, stating that a national provision is allowed to decide, comparing all the interests concerned, to adopt a regularization programme without violating any provisions of the National Constitution, Constitutional Court, n. 206/2006.

<sup>39</sup> On the changing role of regularizations at European level see for instance Carrera Sergio and Merlino Massimo, *Undocumented Immigrants and Rights in EU*, CEPS, December 2009. Also a recent opinion of the European Economic and Social Committee SOC /335: *'Governments are acting hypocritically. Return policy is not the only answer to irregular immigration. Many Member states have implemented procedures to put irregular immigrants on a legal footing. Seeing regularization under specific conditions as appropriate in order to guarantee fundamental rights in the light of their economic and social needs'*.

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