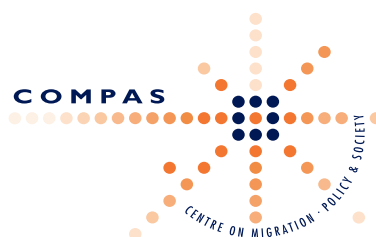




Safe Reporting of Crime for Victims and Witnesses with Irregular Migration Status in Italy

Sara Bianca Taverriti

September 2019





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About the Author

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Introduction

Irregular migrants face particular challenges in interacting with law enforcement authorities to report a crime, as they fear detection and deportation. This fear, together with their generally precarious situation, makes them particularly vulnerable to crime. This report aims to explain the existing legislation, policy and practices impacting on migrants' ability to access the Criminal Justice System in Italy, as either victims or witnesses, without running the risk of self-incrimination or deportation. In particular, the report focuses on 'firewall' practices – that is, measures that encourage reporting of crime by migrants with irregular status by neutralising the risk and the fear of deportation and expulsion as a consequence of reporting crime. This report is intended to analyse the strengths and weaknesses of these measures, in order to assess their effectiveness in facilitating safe reporting of crime by irregular migrants. Finally, the report will consider the potential of policy reforms in the area of safe reporting, including by considering the potential for implementation in Italy of local measures known as 'sanctuary policies'.

This research contributes to a project on safe reporting of crime for victims and witnesses with irregular migration status in Europe and the United States undertaken by the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford.¹ As well as Italy, this project examines the United States, Spain, the Netherlands and Belgium. The ultimate aim of the project is to promote learning of best practices and knowledge-exchange on this topic between countries. It also aims to evaluate the legal and political replicability of 'firewall' policies across different countries, and in particular the legal replicability of US experiences (for example, that of 'sanctuary cities') in European contexts.

Setting the scene: The overall picture of safe reporting of crime

It is important to define at the outset two main concepts discussed in this report: 'crime reporting' and 'irregular migrants'. Crime reporting is the procedure by which a person (usually the victim or a witness) brings to the attention of public authorities information on a crime, which generally initiates criminal proceedings against the offender. The reporting of crime is of paramount importance in preventing the reoccurrence of crime and allowing for prosecution. But the process also serves to guaranteeing the rights and the protection of victims and to break the cycle of repeated victimisation.²

In the context of this report, the term 'irregular migrant'³ refers to third-country nationals who entered Italian territory without authorisation or by infringing national legislation, as well as those who overstayed in Italy beyond the limits imposed by their residence permit. This includes not only people who irregularly entered (or re-entered) the State's territory, but also previously-regular

¹ In particular, this project is carried out by the Global Exchange on Migration and Diversity (GEM) initiative. GEM is the arm of COMPAS dedicated to facilitating knowledge-exchange, collaboration and social impact among academics, policy makers, professionals, civil society, lawyers, foundations, school students and others in the field.

² See *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, R n . (63)*.

³ In this report, the terms 'irregular migrant' or 'migrant with an irregular status' are preferred to 'illegal migrant', as the latter terminology carries unwanted negative connotations by stigmatising people as opposed to their misconduct. Moreover, the term 'irregular migrant' is commonly used (and preferred) by international organisations including the UN, the Council of Europe, and some EU institutions. See N. DELVINO, (2017) *The challenge of responding to irregular immigration: European, national and local policies addressing the arrival and stay of irregular migrants in the European Union*, Autumn Academy 2017, Global Exchange on Migration and Diversity.

migrants who could not obtain a renewal of their residence permits before expiration or, for instance, asylum seekers who remain after the rejection of their asylum applications.

Migrants with irregular status are often fearful of interacting with law enforcement authorities who could identify them for immigration deportation purposes, and therefore are generally reluctant to report crime. This situation translates into a barrier to migrants' right to access justice and protection. As a consequence, irregular migrants may become easy prey for criminals who may be aware that these migrants' vulnerable condition reduces the chances of detection and prosecution. This potentially increases the number of undetected crimes and makes it particularly difficult effectively to combat situations of severe exploitation and abuses against migrants with irregular status. As a consequence, this situation could bring harm to society as a whole, as it weakens the possibilities for criminal law enforcement.

Many 'firewall' measures have been developed, both in the USA and across Europe, with the aim of ensuring effective access to justice for irregular migrants who have suffered or witnessed a crime. 'Firewalls' for victims with an irregular condition are designed to encourage crime reporting by establishing confidence in law enforcement agencies.⁴ This is generally achieved by removing the possibility that reporting crime will lead to a deportation proceeding.

As we shall see, the issue of migrants with irregular status who have suffered a crime involves several aspects of Italian legislation. The study of the relevant legislation and practices suggests a system of 'swords and shields', as it reveals opposing trends in the Italian legal system: on the one hand a 'criminalisation approach' is taken towards irregular migrants, but on the other the protection needs of individuals who have suffered certain crimes while in Italy are taken into account, including by providing for the issue of special residence permits for victims of specific crimes. These contrasting approaches might cause inconsistencies and loopholes, which, in some cases, could jeopardise victims' protection.

Methods

This report is based on both desk research and interviews, conducted with the aim of combining theoretical analysis of the relevant legal issues with analysis of their implementation in practice. Desk research involved traditional legal inquiry sources such as legislation (primarily the Consolidated Law on Immigration, the penal code, the code of criminal procedure), case law (including rulings from local Courts, but especially from the Court of Cassation and the Constitutional Court), and relevant academic literature.

Seventeen interviews were conducted with nineteen stakeholders who were identified – on the basis of desk research findings – as some of the main legal and social actors with experience or expertise on crime reporting and/or on irregular migrants in Italy, including law scholars; criminal, immigration and labour lawyers; a judge of the Justice of the Peace; a Public Prosecutor; an official of the Ministry of Interior; national and local police officers; representatives of social services in the municipality of Milan; and volunteers working for NGOs.⁵ Interviews were conducted in person or over the telephone. Given the particular sensitivity of both irregular migration and crime, all interviewees were offered anonymity to ensure that policy stakeholders could freely provide evidence of their experience with the issue.

⁴ O. F. KITTRIE, (2006) *Federalism, Deportation and Crime Victims Afraid to Call the Police*, in *Iowa Law Review*, Vol. 91, pp. 1449-1508, 2006, available at SSRN: <https://ssrn.com/abstract=926766>.

⁵ See complete interview list at the end of the report.

Structure of the report

This report is organised into five chapters: the first chapter presents criminological and victimological issues underlying the situation of migrants as victims of crime in general, and foreign nationals with irregular status in particular. The second chapter provides an overview of the relevant Italian legislation: procedures that regulate crime reporting; criminal offences related to migration status; the obligation to report a crime; and the duty of confidentiality between lawyers and their clients. The third chapter analyses the four different kinds of special permits issued for victims and informants of certain crimes, which are the most important 'firewall' practice found in Italian legislation. Chapter four recalls the main Italian case law of the Constitutional Court and of the Court of Cassation which handled the principle of *nemo tenetur se detegere* in relation to migrants with irregular status. Chapter five explains some proposals to enhance the protection of migrants with irregular status, taking into account the current Italian political situation.

1. Criminological framework: Victims of crime with irregular migration status in Italy

1.1 Crime against irregular migrants: a phenomenon difficult to measure

This chapter investigates crimes against foreigners from a criminological perspective to outline the issues involved and highlight the particular vulnerability of irregular migrants. Crime against migrants with irregular status is difficult to measure for a number of reasons: on the one hand, it is almost impossible to estimate accurately the actual number of irregular migrants in Italy, as this group is mostly 'invisible' to public administrations. According to official statistics, 5,144,440 foreigners are legally residing in Italy,⁶ accounting for approximately 8.5% of the general population (60,483,973 people, according to ISTAT). With respect to irregular migrants, knowledge is limited to estimate studies, which provide very variable results. The last ISMU estimates (1 January 2018) suggest the number of foreign nationals in Italy without a valid residence permit to be 533,144.⁷

Measuring crime rates is also difficult, and commonly presents challenges in criminology, due both to limitations in research methods, and to the general difficulty of capturing the reality of a social phenomena like criminality. Constant variations in criminal legislation; the discretion retained by police officers in recording crimes; the disinclination of some victims to report crimes; and the interest of criminal organisations in covering up illegal trafficking, are just some of the factors leading to misrepresentations in statistics based on crime reporting data.⁸ The problem is so structurally embedded that criminologists developed the concept of a 'dark figure of crime' in an effort to identify the scope of undiscovered and unreported crimes that do not feed back into official data.

In relation to crimes against migrants with irregular status, the dark figure of crime is dramatically higher than the known figure, as the number of unreported (and thus undetected) crimes is supposedly higher due to irregular migrants' fear of interacting with public authorities, their fear of self-incrimination, and the risk of deportation. In addition, cultural gaps might lead foreign victims to misinterpret criminal action, for example when the behaviour in question is seen as natural for the victim according to his/her cultural background, but is a punishable offence in Italy. Migrants might be reluctant to report crimes when the offender is a member of the family or if he/she comes from the same ethnic or national background.⁹ In situations involving human trafficking and smuggling of migrants, victims are often afraid to contact authorities because of the relationship with traffickers, which can vary from complete subjection due to fear of retaliation to gratitude for the help provided in the migration journey.¹⁰

⁶ Data from ISTAT (Italian National Institute of Statistics), available at <http://stra-dati.istat.it/>, last data as of January 2019.

⁷ See ISMU, (2017) *Ventiquattresimo Rapporto sulle Migrazioni 2018* [24th Ismu Report on Migration 2018], Franco Angeli, Milan, presentation available at <http://www.ismu.org/wp-content/uploads/2018/10/Comunicato-Stampa-XXIV-Rapporto-Ismu-sulle-Migrazioni.pdf>

⁸ R. G. CAPUANO, (2009/2010) *Immigrants as Victims of Ordinary Crime in Caserta and Naples: An Exploratory Study*, Ph. D. Thesis in Criminology, Università Cattolica del Sacro Cuore, Milan, p. 22.

⁹ Victims often feel guilty about the consequences the offender would suffer for the conviction. Interview with NGOs staff (Interview n. 4).

¹⁰ UNHCR, (2017) *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral. Linee guida per le Commissioni Territoriali per il riconoscimento della protezione internazionale*, 2017, p. 9.

1.2 Migration status as a source of vulnerability producing victimization

The majority of studies on crime and immigration focus on the nexus between these two phenomena, and on immigrants as instigators of crime. The issue of migrants' victimisation has been somewhat neglected. What remains unexamined are the ways in which being a migrant can itself be a source of vulnerability, and how having irregular status in particular increases the level of vulnerability since such migrants might be *de facto* deprived of public authorities' protection. Nevertheless, there have been some 'jarring voices'¹¹ in victimology who gave this issue greater attention, and explored several factors that make migrants more exposed to crime than nationals. According to those voices, factors which influence migrant victimisation include: language and cultural barriers; migrants lacking time and economic support to invest in criminal proceedings; migrants lacking experience and, as minorities, suffering discrimination.¹² Ezzat Fattah in 1991 sketched a profile of typical migrant victims: they are often male, young, unmarried, unemployed or day workers; are easily recognizable as belonging to a certain minority based on ethnicity; and usually live in suburbs or 'skid-rows'.¹³ In this scenario, migrants are depicted as 'convenient scapegoat[s]'¹⁴ for society, which does not perceive them as fully-fledged members of the community, and the public is more insensitive and less indignant when the victim is a foreigner because of a lack of empathy.¹⁵

In fact, irregular migrants can be even more prone to victimisation than other foreign nationals, as their fear that contacting the police will lead to their being deported makes them easy targets for criminals. Thus, on the one side, irregular status and the related reluctance to report crimes exacerbates migrants' vulnerability, and on the other, it enhances the chances that criminals will perpetrate offences against people with irregular migration status. With specific regard to Italy, R. G. Capuano conducted a study of immigrants as victims of ordinary crimes in the area of Naples and Caserta in 2009. According to this study, there are several factors which enhance the vulnerability of migrants: recent arrival; being undocumented; being unemployed; being single; being a person of colour; being female (possibly); coming from Sub-Saharan Africa; living in degraded areas; and having a poor knowledge of the language.¹⁶

1.3 Crimes that migrants suffer most

In light of the above, it is not superfluous to highlight some data on crimes against foreign nationals both regularly and irregularly present in Italy. According to ISTAT's last report on Criminality and the Italian Criminal Justice System, one-fifth of reported crimes victimised a foreign citizen (including non-residents), but the percentage is dramatically higher for violent offences than offences against property. Thus, proportionately foreigners are more exposed to criminal offences than Italians.¹⁷ Previous studies have shown that immigrants are more likely to suffer crimes committed by nationals of their own countries of origin rather than by Italian nationals, and that crimes are more

¹¹ R. G. CAPUANO, (2010) *Immigrants as Victims of Ordinary Crime in Caserta and Naples: An Exploratory Study*, Ph. D. Thesis in Criminology, p. 13.

¹² R. G. CAPUANO, (2010), *op. cit.*, p. 14.

¹³ E.A. FATTAH, (1991) *Understanding Criminal Victimization*, Prentice-Hall Canada Inc., Scarborough, Ontario.

¹⁴ C. KELSEY, (1926) *Immigration and Crime*, in *Annals of the American Academy of Political and Social Science*, vol.125, *Modern Crime: Its Prevention and Punishment*, pp. 165-174.

¹⁵ H. VON HENTIG, (1948) *The Criminal and his Victim. Studies in the Sociobiology of Crime*, Yale University Press, New Haven, CT, 414-415.

¹⁶ R. G. CAPUANO, (2010) *op. cit.*, Ph. D. Thesis in Criminology, p. 172.

¹⁷ ISTAT, (2017) *Delitti, imputati e vittime. Una lettura integrata delle fonti su criminalità e giustizia*, available at <https://www.istat.it/it/archivio/204158>.

frequently within the same national group than between different groups.¹⁸ According to ISTAT's statistics, in Italy, foreign nationals are victims of 20% of voluntary manslaughters/murders, 30% of attempted murders, 30% of sexual assaults, 14% of incidences of stalking, 23% of criminal injuries, 14% of threats, 12% of insults, 18% of thefts, 16% of muggings, and 20% of robberies.¹⁹ In addition to common crimes, migrants tend to be victims of specific crimes like hate crimes, xenophobic assault, smuggling, trafficking in human beings and organs, modern slavery, debt bondage, exploitation of begging, and exploitation to commit other crimes.²⁰ According to Capuano, the main areas of migrants' victimization correspond to work, housing, personal crimes, property crimes, abuse of power by law-enforcement agencies, and hate crimes.²¹

¹⁸ B. BARBAGLI – A. COLOMBO, (2009) *Immigrants as authors and victims of crimes: the italian experience*, in *Immigration, Crime and Justice*, in McDonald W.F. (ed.), *Immigration, Crime and Justice. Sociology of Crime, Law and Deviance*, vol. 13, Emerald JAI, North America.

¹⁹ ISTAT, (2017) *op. cit.*

²⁰ Amongst EU and international legislation, see *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*; *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*; *ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (Entry into force: 09 Dec 1978).

²¹ R. G. CAPUANO, (2010) *op. cit.*

2. The Italian legal framework on crime reporting and migrants with an irregular status in Italy

This chapter presents the Italian legislation and practices governing crime reporting for migrants with an irregular status. It describes how the reporting process takes place in practice, and the possible outcomes when the victim or the witness is an irregular migrant in terms of risks of deportation or criminal prosecution.

2.1 Context: Reporting a crime in Italy

The *notitia criminis*, i.e. the information that a crime has allegedly been committed, is the origin of any criminal proceeding, and is needed to let a Public Prosecutor and criminal police begin investigating a case. The source of this information may be public (Public Prosecutors, criminal police, public officials) or private (any individual, including foreigners). According to the Italian Code of Criminal Procedure (hereafter CPP), there are several ways to report a crime in the Italian Criminal Justice System. Art. 330 CPP states that ‘The Public Prosecutor and criminal police shall acquire the *notitia criminis* on their own initiative and receive *notitiae criminis* that are submitted or forwarded according to the following articles’. Art. 331 CPP. regulates reports by public officials and persons in charge of a public service, when they receive information about an offence subject to prosecution of the Public Prosecutor’s motion (prosecutable *ex officio*), while carrying out (or because of) their functions or service. They must report in writing, even if the alleged perpetrator of the offence is not identified. The duty to draft and forward the report to the Public Prosecutor is incumbent on the proceeding authority in civil or administrative proceedings (Art. 331 CPP., para. 4). On the other side, a report (*denuncia*) by private parties can be submitted by whoever has knowledge of the offence (when prosecutable *ex officio*). The report shall be submitted orally or in writing, personally or by means of a proxy, to the Public Prosecutor or a criminal police official. When submitted in writing the report shall be signed by its author or his/her proxy (Art. 333 CPP). Minor crimes, and some major offences (for instance, sexual assault or stalking), require a ‘complaint’²² (*querela*) by the victim for the prosecution to be initiated. Vice versa, reports against crimes prosecutable *ex officio* may be reported by whoever has knowledge of the offence. The complaint shall be submitted in the same way as the report by private parties (orally or in writing, personally or by means of a proxy). Moreover, if it bears an authenticated signature, the statement may also be delivered by an appointed person or sent by mail in a registered envelope.²³ Another source of knowledge of the *notitia criminis* is a medical report. Under certain circumstances,²⁴ doctors and other healthcare professionals have the duty to draft a medical report and send it to the Public Prosecutor or to a criminal police official.

Both the private report and the complaint can be presented by the means of a proxy, which could prove particularly relevant for the scope of this study. Indeed, in these cases, the private party is usually assisted by a lawyer, who also provides his/her address for official notifications to the victim. Reporting through the intermediation of a lawyer may prevent direct contact between victims with an irregular status and public authorities. While this can be reassuring for victims who are reluctant to face public authority directly, the identification of the victim and his/her participation in the trial

²² The complaint is partially different from the report, even though it serves the same goal of bringing an offence to Public Prosecutor’s attention. In addition, the complaint has the function of expressing the will of the victim for the author of the offence to be prosecuted (Art. 336 CPP). This is the reason why the complaint is required for prosecution, and its absence prevents the beginning of the criminal proceeding against the offender.

²³ Art. 337 of CPP. This way of reporting is relevant to the research because it does not imply a direct contact with police forces.

²⁴ These circumstances generally exclude the criminal acts committed by the patient himself.

is almost always necessary in order to continue the investigations and the trial. Moreover, it cannot be ruled out that this way of reporting may disclose (and bring evidence of) the irregular presence of the complainant, or clues of his/her irregular migration status.

Following the transposition of Directive 29/2012/EU²⁵ (the 'Victims Directive') into the Italian Criminal Justice System,²⁶ public authorities that receive reports or complaints have the duty to inform the victim of all the rights he/she is entitled to exercise throughout the criminal proceeding.²⁷ These include the right to understand and be understood,²⁸ the right to a translator,²⁹ the right to be informed about all the steps of the criminal proceeding,³⁰ the right to be assisted by a lawyer,³¹ and all the pieces of information regarding reimbursement, social assistance and compensation.³² The Directive clarified unequivocally that all these rights shall apply to all victims of crime, including migrants with an irregular status.³³

2.2 The criminalisation of migrants with irregular status in Italy

The spreading phenomenon of *Crimmigration* (i.e. the progressive intertwining of Criminal and Immigration Law)³⁴ did not spare legislation and policy in Italy over the past decade. In one instance of the use of criminal punishment as a tool of repression of irregular immigration,³⁵ Italian legislation

²⁵ Directive 2012/29/EU of The European Parliament and of The Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA; transposed into Italian legislation in art. 90-bis of the Code of Criminal Procedure in 2015 (D. Lgs. N. 212 of 2015).

²⁶ See S. B. TAVERRITI, (2017) *La tutela della vittima tra procedibilità a querela e procedibilità d'ufficio*, in Vv. AA., *Vittime di reato e sistema penale. La ricerca di nuovi equilibri*, M. Bargis – H. Belluta (ed. by), Giappichelli, Torino, p. 503-526; L. LUPARIA, *Victims and Criminal Justice. European Standards and National Good Practices*, Wolters Kluwer, 2015, available at <http://www.protectingvictims.eu/upload/pages/85/English-volume.it.en.pdf>.

²⁷ Interviews confirmed the effectiveness of the victims' rights in practice. Police stations are usually well equipped with translators and charters of victims' rights drafted in several languages. Interview n. 7, n. 9, n. 10, n. 14, n. 16, n. 17.

²⁸ Art. 3, Dir. 2012/29/EU.

²⁹ Art. 7, Dir. 2012/29/EU.

³⁰ Art. 4 (Right to receive information from the first contact with a competent authority), art. 5 (Right of victims when making a complaint), art. 6 (Right to receive information about their case), art. 10 (Right to be heard), art. 11 (Rights in the event of a decision not to prosecute) of the Dir. 2012/29/EU.

³¹ Art. 13 (Right to legal aid) of Dir. 2012/29/EU.

³² Art. 8 (Right to access victim support service), art. 9 (Support from victim support services), art. 14 (Right to reimbursement of expenses), art. 15 (Right to the return of property), art. 16 (Right to decision on compensation from the offender in the course of criminal proceedings) of Dir. 2012/29/EU.

³³ N. DELVINO (2017), *The challenge of responding to irregular immigration: European, national and local policies addressing the arrival and stay of irregular migrants in the European Union*, in *Autumn Academy 2017*, September 2017, p. 52, note 272: 'Art. 1 states that: "The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status". The official guidance note accompanying the Directive specifies that "The application of the Directive in a non-discriminatory manner also applies to a victim's residence status. Member States should ensure that rights set out in this Directive are not made conditional on the victim having legal residence status on their territory [...]. Thus, third country nationals and stateless persons who have been victims of crime on EU territory should benefit from these rights. This may be of particular importance in the context of [...], crime against irregular migrant women and girls who are particularly exposed to various forms of gender-based violence (such as physical violence, sexual exploitation and abuse, female genital mutilation, forced marriages and so-called 'honour crimes') and trafficking in human beings". See European Commission (2013), DG JUSTICE guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.'

³⁴ Term coined by J. STUMPF, (2006) *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, *American University Law Review*, Vol. 56, p. 367; C. C. GARCÍA HERNÁNDEZ, *Crimmigration Law*, ABA ed., 2017.

³⁵ The phenomenon of *Crimmigration* is also extending to other collateral political strategies, like the provision of immigration law consequences for criminal convictions, and the deprivation or limitation of personal freedom in

allows for four different misconducts related to irregular migration status to be punished as criminal offences. The main offences³⁶ detailed in the Consolidated Law on Immigration (D. Lgs. N. 286/1998, also CLI) that serve to criminalise irregular migrants are: the irregular entry and stay in the State's territory, (Art. 10-*bis* CLI); the infringement of an order to leave the State's territory (Art. 14 c. 5-*ter*³⁷ and 5-*quater* CLI);³⁸ the re-entry into the State's territory after an administrative expulsion (Art. 13, par. 13³⁹ and 13-*bis*⁴⁰ CLI); and the re-entry in the State's territory after a border rejection⁴¹ (Art. 10, par. 2-*ter* and 2-*quater* CLI).

Art. 10-*bis* punishes any foreigner who enters or remains on the State's territory, infringing the provisions of the CLI,⁴² with a fine ranging from 5,000 to 10,000 euros. Since its introduction with Law No. 94 of 15th July 2009 (known as the 'security package'), Art. 10-*bis* has been the subject of criticism by Italian legal scholars and the judiciary, who have cast several doubts over its constitutionality. Even though Art. 10-*bis* CLI provides for less severe sanctions (compared to other articles in CLI), it is a crime that involves the largest number of migrants with irregular status (all irregular entrants and 'overstayers' who are not liable for a more severe crimes), to the extent that it coincides with irregular status as such. This is one of the reasons why it has been claimed that Art. 10-*bis* CLI infringes the 'harm' and the 'culpability' principles.⁴³

immigration law enforcement, and the criminalisation of rescue operations by NGOs. See, G. L. GATTA, (2018) *La pena nell'era della 'Crimmigration' tra Europa e Stati Uniti*, Riv. It. Dir. Proc. Pen., 2, p. 675-724.

³⁶ The CLI also provides for a fine, ranging from 3,000 to 18,000 euros, for the infringement of one of the measures imposed in order to guarantee voluntary departure (Art. 13, para. 5.2 of CLI) or the measures provided by the *questore* in place of detention in a identification and expulsion centre.

³⁷ It is important to note that this article provides for a safeguard clause, which refers to a justified reason that exempts the person from his/her criminal liability. The Constitutional Court affirmed that the justified reason does not require situations as severe as State of Necessity or coercion. Moreover, the Court stated the justified reason which legitimates the infringement of the order to leave consists in objective conditions or in subjective and personal situations of serious and pressing psychological conditioning that make compliance with the order extremely difficult. Nevertheless, the Court of Cassation also specified that the migrant condition as such and other derived situations such as the lack of a regular job or an unstable financial situation are not considerable justified reasons (Cass. Pen., Sez. I, 19 February 2018 n. 7915 of 2018, ud. 12 ottobre 2017).

³⁸ In both of these cases, the Italian legislation provides for administrative detention pending expulsion.

³⁹ Once the foreigner received an expulsion measure, he/she cannot re-enter the State's territory without a special authorization issued by the Ministry of Interior. In case of transgression, the foreigner is punished with imprisonment for a period of one to four years, and is newly expelled with immediate removal (Art. 13, para. 13 CLI). Nevertheless, the provision does not apply to foreigners already expelled, for whom entry was authorized for family reunification (pursuant to article 29 of CLI).

⁴⁰ The same punishment is applicable for transgression of the prohibition to re-enter, in case of expulsion ordered by the judge. By contrast, when the foreigner has been already reported for irregular re-entry in the State's territory and re-expelled, his/her re-entry in the national territory is subject to imprisonment for a period of one to five years (Art. 13, par. 13-*bis* of CLI).

⁴¹ The two offences of entry and re-entry into the State's territory after a rejection at the border (art. 10, par. 2-*ter* and 2-*quater* CLI) have been recently introduced by the the 'Salvini Decree' (Law-decree of 4 October 2018, no. 113).

⁴² As well as those mentioned under article 1 of law n. 68 dated 28 May 2007, regulating short-term stays for visits, business, tourism and study.

⁴³ According to critic accounts, Art. 10-*bis* would violate the harm principle (*nullum crimen sine iniuria*) to the extent that it criminalises a human condition (rather than a human behaviour) which does not produce any harm. The lack of a clause that envisages a 'justified reason' excluding the criminal liability and other circumstances which do not depend on the migrant would violate the culpability principle. Most of these criticisms were summarised in the constitutional reviews analysed by the Constitutional Court in the judgment of Constitutional Court of 5th July 2010 n. 250; for comments on this judgement see M. CAPUTO, *La contravvenzione di ingresso e soggiorno illegale davanti alla Corte Costituzionale*, DPP, 2010, 1187; L. MASERA, *Corte Costituzionale e immigrazione: le ragioni di una scelta compromissoria*, in RIDPP, 2010, p. 1373; F. VIGANÒ, *Diritto penale e immigrazione: qualche riflessione sui limiti alla discrezionalità del legislatore*, in QG, 2010, 3, 13; A. CAVALIERE, *Diritto penale e politica dell'immigrazione*, in *Critica del diritto*, 2013, 1, p. 32-33; L. FERRAJOLI, *La criminalizzazione degli immigrati (Note a margine della l. n. 94/2009)*, in QG.

2.3 Immigration law enforcement: Institutional authorities and police

With the repressive framework of immigration misconduct in mind, it is time to clarify the organisational structure of immigration law enforcement in Italy⁴⁴ (which will be further taken into consideration in the final chapter of this report to assess the possibility of replicating in Italy the firewall practices of Sanctuary Cities). First of all, it is important to highlight that the Italian law enforcement system does not provide for an agency specifically and exclusively tasked with enforcing immigration law, unlike the U.S. Immigration and Customs Enforcement (ICE). The Italian Constitution gives legislative power to the State in immigration matters and in matters of public order and security, with some powers devolved to local administrative police.⁴⁵ The Law assigned the function of protecting public order and security to five police forces:⁴⁶ the *Polizia di Stato* (State Police), the *Arma dei Carabinieri* (Carabinieri Corps), the *Guardia di Finanza* (Financial Police), the *Polizia Penitenziaria* (Penitentiary Police) and the *Corpo Forestale dello Stato* (Wildlife Police).⁴⁷ The functions of the Criminal Police, which carries out investigations (under the supervision of the Judiciary Authority) when a crime has been committed, are also divided among the different police forces. Even though Police Forces are formally separated, they share the same functions and responsibilities for preventing and investigating crime. As long as irregular immigration is a criminal offence in Italy, they are all formally required to enforce that law.

Immigration matters, public order and security are the responsibility of the Ministry of the Interior.⁴⁸ The latter consists of several departments, including the Department on Civil Liberties and Immigration, and the Public Security Department. The first of these comprises the central managements for immigration policies and asylum, for immigration and asylum civil services, and the National Commission for Asylum, which coordinates the local commissions dealing with asylum applications. The Public Security Department⁴⁹ is responsible for public order and security and the coordination of the police forces, and for preventing and combating crime. With specific regard to the field of irregular immigration, the central management for Immigration and Borders Police was established within the Police Public Security Department, and is responsible for fighting irregular immigration, handling irregular presence on the territory, and immigration law enforcement at sea.⁵⁰

In this context, the State Police plays a prominent role in the enforcement of immigration law, because the local offices of the Ministry of the Interior (*Prefetture* and *Questure*) are specifically responsible for assessing residence permit applications, the management of the expulsion procedure, and handling immigration matters in general. All the other Police Forces have to report migrants with an irregular status with whom they interact to the State Police and the Public Prosecutor (see § 4 for further details).

2009, 5, 9; GATTA, *Il "reato di clandestinità" e la riformata disciplina penale dell'immigrazione*, DPP 2009, 1323.

⁴⁴ M. SAVINO, (2008), *L'assetto delle forze di polizia in Italia: i problemi esistenti e le prospettive di riforma*, scritto integrativo dell'Audizione del 5 dicembre 2007 per l'Indagine conoscitiva sullo stato della sicurezza in Italia (7 maggio 2007 – 31 gennaio 2008).

⁴⁵ Art. 117 para. 2, lett. b) and h) of the Italian Constitution.

⁴⁶ Even though these Police Forces depend on different Ministries, they are all attached to the Ministry of the Interior in the exercise of their functions of public order and security.

⁴⁷ The *Corpo Forestale dello Stato* has been incorporated in the *Arma dei Carabinieri* in 2016.

⁴⁸ Art. 14 of the Legislative Decree n. 300 of 1999, which reformed the organisation of the Government.

⁴⁹ Art. 4 of the Law n. 121 of 1981, *Nuovo ordinamento della pubblica sicurezza e coordinamento delle forze di Polizia* [New order of the Public Security and coordination of Police Forces].

⁵⁰ See www.interno.gov.it/it/ministero/dipartimenti/dipartimento-pubblica-sicurezza/direzione-centrale-dellimmigrazione-polizia-frontiere.

Local Police – which is separated from the State Police and is organised at the municipal level – is assigned Criminal Police functions and auxiliary Public Security functions in the scope of their territorial competences.⁵¹ Cooperation of the Local Police with the State Police for public security purposes is authorised by the *Prefetto* (the local body of the State Police, representing the Ministry of the Interior on the provincial territory), upon the Mayor's request.⁵² The Mayor also exercises powers under state responsibility, he/she has government official duties in the field of Public Order and Security, and he/she supervises Local Police in their Public Security and Criminal Police functions. This task is carried out by cooperating with the State Police, and all of the acts he/she adopts in this field shall be communicated to the *Prefetto* in advance.⁵³

In general, the Mayor shall take the measures provided for by laws and regulations, he/she shall give directions to the Local Police in order to steer its activity, and will monitor Local Police's activities.⁵⁴ Even though the Mayor retains political guidance on the Local Police, Local Police officers have to take instructions from the Chief of Local Police only. In other words, the Mayor can issue guidelines to direct the activity of the Local Police, but he/she is not the formal head of the Local Police. Moreover, with regard to immigration law, Italian legislation expressly obliges the Mayor to report irregular migrants to the State Police or to the Judiciary Authority for deportation purposes.⁵⁵ Certainly, the Mayor can direct the Local Police activity to specific areas of intervention and not others, but the Rule of Law (in general) and the CLI (specifically) prevent the Mayor from explicitly limiting the cooperation of Local Police forces with national authorities in the field of immigration law enforcement.

All of the Police Forces mentioned above can conduct identity checks on suspicious or dangerous persons or on individuals who refused to prove their identity.⁵⁶ Within their functions as Criminal Police, they have to identify suspects and all relevant persons of interest (including victims and possible witnesses).⁵⁷ Moreover, according to Art. 6 para. 3 of the CLI a foreigner has to produce his/her passport or another identification document and residence permit upon the request of public security officers. When there is doubt regarding the person's identity, he/she is subject to fingerprint and other identification analyses.⁵⁸

2.4 The obligation to report irregular migrants.

As already mentioned in § 1, the Italian Criminal Justice System places a duty to report crime⁵⁹ upon all police officers, public officials, and, under certain conditions, doctors. This obligation to report irregular migrants is one of the most relevant contexts for this study, since it is the foundation of migrants' fears and distrust in approaching public authorities. The obligation does not derive from a legal obligation to report irregular migrants as such, but rather from the fact that their condition has criminal relevance. Indeed, criminal offences laid down in the CLI are coincident with the irregular migration *status* of the foreigner – this being particularly true for people who irregularly entered the territory or overstayed in Italy after their residence permit expired.⁶⁰

⁵¹ Art. 5 of the Law n. 65 of 1986, *Legge quadro sull'ordinamento della Polizia Municipale*, [Framework law on the order of Municipal Police].

⁵² Art. 3 of the Law n. 65 of 1986.

⁵³ Art. 54 of the Legislative Decree n. 267 of 2000, *Testo Unico delle leggi sull'ordinamento degli enti locali*, [Consolidated Law on the local bodies order legislation]

⁵⁴ Art. 2 of the Law n. 65 of 1986.

⁵⁵ Art. 54, para. 5-bis of the Consolidated Law on the Local Bodies Order Legislation.

⁵⁶ Art. 4 of the Consolidated Law on Public Security.

⁵⁷ Art. 349 of the Code of Criminal Procedure.

⁵⁸ Art. 6, para. 4 of CLI.

⁵⁹ Subject to the Public Prosecutor's motion.

⁶⁰ Art. 10-bis CLI.

Moreover, all of the criminal offences mentioned in Section 2 are prosecutable *ex officio*. Consequently, migrants with irregular status may be reported for one of the offences mentioned above any time they are required to exhibit a valid permit to reside, even in situations where interactions with a public authority constitute the exercise of a right (as in the right of defence of a victim) or the compliance with a public obligation (as in giving testimony in a trial). Thus, access to the criminal justice system for migrants with irregular status may be nullified by the risk of incurring criminal proceedings and being deported.

In relation to the focus of this research, it is important to clarify the scope of this obligation to report crime. With regard to the duty incumbent on public officials and persons in charge of a public service, the Italian Penal Code (hereafter CP) provides for the criminal prosecution of public officials or people in charge of a public service who omit or delay reporting a crime they gained knowledge of in the exercise or because of their professional function (articles 361 and 362 CP).⁶¹ However, it is a common opinion among criminal law scholars and jurisprudence that, for the duty to be triggered, all of the constitutive elements of a criminal offence (both material and subjective) must be met.⁶² Regarding evidence that the crime has been committed, case law usually requires more than just a vague hypothesis of the fact: a clear representation of its essential profile is needed instead.⁶³

There are many situations in which a migrant victim is identified or is required to exhibit documents in a criminal proceeding. The identification is usually required at the time someone is submitting a report to the police or to the Public Prosecutor, and at the time of his/her testimony. Thus, police officers may find themselves obliged to denounce migrants with irregular status whenever they are in contact with them. Nevertheless, as noted by Delvino and Spencer (2014):

‘the sole fact that a foreign national does not exhibit a residence permit to a public service provider does not immediately imply the duty to report the migrant, as the public official or the person in charge of a public service must denounce only when he or she is certain of the crime. The mere fact that a foreign national did not show a valid residence permit may indeed be due to reasons other than an irregular condition.’⁶⁴

A similar criminal offence applies to doctors who do not comply with the duty to denounce and present a medical report (365 CP). However, this obligation does not apply when the medical report would expose the patient to criminal proceedings (Art. 365, para. 2). In addition, Art. 35, para. 5 CLI explicitly states that access to healthcare facilities cannot mandate *any kind* of reporting (of migrants) to law enforcement authorities, except in cases where such reporting would be mandatory for Italian citizens as well. This provision is aimed at reassuring migrants in need of healthcare, as they do not have fear being reported or deported.

In light of the above, it is clear that Italian legislation provides for variations in the obligation to report irregular migrants, depending on the situation. While healthcare facilities are conceived as safe harbours for migrants with irregular status, the same cannot be said for police stations and other public facilities. Indeed, even if the duty to report does not automatically derive from contact

⁶¹ In addition to Art. 331 CPP.

⁶² G. PIFFER (2005), *I delitti contro l'amministrazione della giustizia. I delitti contro l'attività giudiziaria*, in E. Dolcini- G. Marinucci (a cura di), *Trattato di diritto penale. Parte speciale*, Vol. IV, 2005, p. 20;

⁶³ Cass. Pen. 14.1.1966, Balestra, CED 100348, Sp 168, 609, Cass. 1.2.1983, D'Amico, GP, 1984, III, 90; cass 9.5.1985, Di Giovanna, ced 169537, gp 1986, II, 4; C. 19.2.1988, Marzilli, CED 178378; Cass 4.4.2008, Martinelli CED 241165.

⁶⁴ DELVINO N. – SPENCER S. (2014), *Irregular Migrants in Italy: Law and Policy on Entitlements to Services*, ESRC Centre on Migration, Policy and Society (COMPAS), University of Oxford, 2014, p. 16, note 74.

between an irregular migrant and a public authority, a situation of legal uncertainty may lead to different outcomes depending on the individual officers interacting with migrant victims. In practice, the decision about whether to report the victim to immigration authorities or not may often be at the discretion of the individual officer.

The interviews conducted for this study suggested how crime reporting happens in practice, and how the obligation to report migrants is generally interpreted and implemented. One of the first aspect that clearly emerged from interviews with police officers is that migrants with irregular status very rarely report a crime they have suffered or witnessed;⁶⁵ some interviewees reported never having encountered such a situation.⁶⁶ All the interviewees stated that one of the first procedures they have to follow when a person (either a citizen or a foreigner) wants to report a crime is confirming their identity. In the case of foreign nationals, most of the time police officers require them to exhibit both an identification document and a valid residence permit. When the person is undocumented or is suspected to have an irregular migration status he/she is subject to fingerprint and other identification analyses.⁶⁷ When the right to remain on the State's territory is not supported by a valid document, the person should be accompanied to the police station responsible for immigration issues, which will proceed to administrative expulsion. As underlined above, police officers have no discretionary power over this procedure and are obliged to control and report even though they are not directly responsible for immigration issues.

At the same, most of the interviewed officials specified that they do anything they can to avoid discouraging crime reporting.⁶⁸ Often they deal with the report first, and then carry out the identification of the victim/witness. The main goal is fighting the most severe crime first. When the person is eligible for a special residence permit (see below), the report of a crime opens the door for their regularisation, and deportation proceedings are not started, or are suspended.⁶⁹ In those cases, some police officers would get immediately in contact with specialised centres and shelters which could host the victim,⁷⁰ some others stated that they would treat him/her as if he/she was a citizen.⁷¹ In practice, police officers communicate, together with the *notitia criminis* of the crime the migrant has suffered, notice of the irregular condition to the Public Prosecutor, so as to comply with their duty to report both the reported crime and the irregular condition.⁷² Another interviewee stated that in a similar situation he would accompany the person to the *Questura* highlighting that the person has suffered a criminal offence, in order to let them know that it is possible to start the procedure for the special permit.⁷³ In general, interviews with members of the police force showed a general awareness of the procedures protecting irregular migrants. Nevertheless, interviews also highlighted a lack of clear guidelines about crime reporting by irregular migrants and diversity training that could mean that responses to victims and witnesses with irregular status could vary significantly.

The problem is less evident during hearings in which migrants have to give testimony. Most of the interviewees stated that inquiries about the migration status of witnesses are not made during the trial. Judges generally accept any identification document in order to identify the witness and, in some cases, they do not even require an identification document. It appeared that in hearings in

⁶⁵ Interviews n. 7, n. 8, n. 9, n. 12, n. 13, n. 14.

⁶⁶ Interviews n. 7, n. 8, n. 9, n. 15.

⁶⁷ Art. 6, para 4 of CLI.

⁶⁸ Interviews n. 7, n. 9, n. 14, n. 16, n. 15

⁶⁹ Confirmed by the Ministry of the Interior Official (Interview n. 10).

⁷⁰ Interviews n. 7, n. 16.

⁷¹ Interviews n. 7, n. 9, n. 13, n. 16.

⁷² Interview n. 7, n. 9, n. 13, n. 14, n. 16.

⁷³ Interview n. 9.

front of the Justice of Peace (*Giudice di Pace*),⁷⁴ situations in which migrants seeking to defend their position vis-à-vis immigration law are reported to the Public Prosecutor are uncommon.⁷⁵ By contrast, the Public Prosecutor reaffirmed that the obligation knows no exceptions, nonetheless it may happen that the criminal proceeding does not end with a conviction for a number of reasons.⁷⁶

2.5 The duty of confidentiality and the lawyer-client privilege

As mentioned in § 1, one of the options available for victims who need to report a crime is denouncing by the means of a proxy. Most of the time, if a victim wants to opt for this solution, he/she would nominate a lawyer to submit the report, which helps victims with irregular status avoid the risk of exposing their status to police and other public officials. The presence of a protective shield allows the criminal proceeding to begin so that the migrant participation in the process is, at least, postponed until after the investigations have already begun.

Moreover, legal professional privilege protects information (including personal information and information on migration status) and conversations between the lawyer and his/her client. Indeed, in the Italian Code of Conduct of Lawyers, the lawyer/attorney is strictly obliged to observe attorney-client (or lawyer-client) privilege, in the interest of his/her client. The duty of confidentiality extends to clients' background situation: it does not only refer to issues emerging in the legal process, but also to related aspects disclosed during the attorney-client relationship. This encourages the client to be sincere and to relate truly and unconditionally to his/her lawyer.⁷⁷

Reporting by the means of a lawyer may be reassuring for a migrant who doesn't want to disclose his/her status to the police. Nevertheless, it is worth noting that the signature of the complaint or the delegation of power to the lawyer has to be done personally, so this may serve as evidence of the presence of the migrant at the moment of the signature.

In this regard, immigration lawyers play an important role. They are often the main and first point of reference for migrants in Italy. The attorney-client privilege is a guarantee of which migrants are often aware, because it is recognised in many legal systems around the world. The relationship between the lawyer and the migrant relies on mutual trust and is protected by the duty of confidentiality so that the migrant feels reassured when he/she addresses his/her issues to a lawyer. Nevertheless, even if migrants might be encouraged to talk to a lawyer, they might not have sufficient means to pay. Even if legal aid can be granted for foreigners with irregular status, migrants are often not aware of this possibility.⁷⁸

⁷⁴ The *Giudice di Pace* is a judicial office competent for minor crimes and for immigration issues like the confirmation or the rejection of the deportation or expulsion.

⁷⁵ Interview with the Judge of the Justice of Peace, n. 5.

⁷⁶ Interview with Public Prosecutor, n. 17.

⁷⁷ The lawyer-client privilege is protected by Art. 200 of CPP, which states that lawyers (as well as other professionals) cannot be obliged to testify about what they learn because of their profession. Moreover, Art. 380 CP provides for the criminal offence of unfaithful legal assistance, which takes place anytime the lawyer causes damage to his/her clients by breaching the duties related to the legal profession.

⁷⁸ Interviews with immigration lawyers n. 2 and n. 6.

3. Special residence permits for victims of crime in Italy

As mentioned above, the Italian legal system suggests a system of swords and shields for victims with irregular status, who are at once criminalised as irregular migrants and protected as victims of crime. This chapter examines the protective side of Italian legislation.

First of all, in order to allow the exercise of the fundamental right to defence and overcome the limitations imposed by irregular migration status, Italian law provides for the issuance of special residence permits that remove the fear of approaching authorities and foster victims' emancipation from the offenders (as, for instance, in cases of domestic violence). In general, a residence permit can be issued upon the request of judicial authorities any time the presence of a foreign national is essential to carrying out criminal proceedings for one of the crimes provided for in Art. 380 of the CPP.⁷⁹ Both offenders and victims are eligible for the issuance of this permit. It lasts up to three months and it is renewable for the same duration, but is not convertible into other kinds of residence permit. Moreover, it is important to remark that Art. 17 of the CLI entitles foreigners who are victims of any crime to be permitted to enter the country only for the purpose of taking part in the criminal proceeding they are involved in. The foreigner is authorised⁸⁰ to re-enter the State's territory for the time necessary to exercise the right to defence, with the sole purpose of participating in the trial and/or taking any action for which his/her presence is necessary.

With specific regard to certain kind of crimes, the Italian legislation provides migrant victims with special permits that offer protection by adopting a multi-agency approach. This chapter examines such special permits, and is divided into four sections. The first section discusses special permits for victims of criminal organisations carrying out severe crime, such as human trafficking and sexual exploitation; the second, special permits for victims of domestic violence; the third, permits for victims of labour exploitation; and the fifth section examines permits for informants of criminal acts of terror. The last section explores the usage of these special permits in practice.

3.1 Special residence permits for victims of serious crime released for social protection reasons

Art. 18 CLI provides a special permit issued for reasons of social protection to people who have suffered a serious crime perpetrated by a criminal organisation. The main scope of application of this special permit refers to victims of sexual exploitation and human trafficking; however, the crimes for which the permit can be released is extensive. It can be issued for victims of offences⁸¹ within the specific area of sexual exploitation, including sexual exploitation as such, recruitment for prostitution, and sex trafficking committed both at national and international level. The permit also covers a wide range of offences which have in common the provision of mandatory arrest *in flagrante delicto*⁸² - this including intentional crimes, committed or attempted, for which the law imposes the most severe punishments.⁸³ In addition, Art. 18 CLI provides more cases which refer to

⁷⁹ Art. 11, D.P.R. N. 394 of 1999, *Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286.*

⁸⁰ The authorisation is issued by a 'Questore' through a diplomatic or consular representative upon documented request of the offended party or of his/her defender.

⁸¹ Laid down in L. n. 75/1958.

⁸² Art. 380, para. 1 of Criminal Procedure Code (CPP).

⁸³ Specifically: life sentence, and imprisonment for a minimum of at least five years and a maximum of at least ten years.

a variety of crimes.⁸⁴ To name a few: modern slavery;⁸⁵ crimes related to child prostitution;⁸⁶ child pornography;⁸⁷ tourist initiatives aimed at exploiting child pornography;⁸⁸ illegal labour intermediation and labour exploitation;⁸⁹ sexual abuse;⁹⁰ gang rape;⁹¹ sexual activities with a minor;⁹² crimes of aggravated theft and robbery;⁹³ crimes concerning weapons;⁹⁴ crimes concerning narcotic drugs;⁹⁵ mafia-type organising aiming at committing other crimes;⁹⁶ and domestic abuse and stalking.⁹⁷

Art. 18 CLI is one of the most inspiring examples of integration and protection tools the Italian legislation has been offering to migrants who are victims of a crime since the introduction of the CLI in 1998. Indeed, the rationale for the special permits for social protection reasons is not only to allow the victim to participate in the criminal proceedings, but also to include them into a special programme of assistance and social integration, in order to facilitate the migrant's inclusion in society and prevent re-victimization. It is important to highlight that case law has confirmed that the main aim of this special permit is victims' protection: the permit is not conceived as a reward for migrants who cooperate with the Criminal Justice System. Nonetheless, it has an encouraging 'side effect' for people subjugated by criminal organisations.⁹⁸

This residence permit lasts six months and can be renewed for one year, or for a longer period if necessary for justice reasons.⁹⁹ Para. 5 of Art. 18 clarifies the entitlements attached to the permit, which include access to social services, the right to study, and the ability to work. If upon the expiry of the residence permit, the interested party is employed, the permit can be further extended or renewed for the duration of the employment relationship, or – if the person holds a permanent work contract – the permit can be converted into a residence permit of two years.¹⁰⁰ It can also be converted into a residence permit for study reasons should the holder be enrolled in a regular study path.

⁸⁴ Those listed in art. 380 para. 2 CPP.

⁸⁵ Art. 600 CP.

⁸⁶ Art. 600-*bis*, para. 1 CP.

⁸⁷ Art. 600-*ter*, para. 1 and 2 CP, art. 600-*quarter*.1 CP.

⁸⁸ Art. 600-*quinqüies* CP.

⁸⁹ Art. 603-*bis* CP.

⁹⁰ Art. 609-*bis* CP.

⁹¹ Art. 609-*octies* CP.

⁹² Art. 609-*quarter* CP.

⁹³ Art. 624, 624-*bis* and 625 CP.

⁹⁴ L. No 110 of 18 April 1975.

⁹⁵ Art. 73 of the Consolidated Text approved by DPR No 309 of 9 October 1990.

⁹⁶ Art. 416 and 416-*bis* CP.

⁹⁷ Art. 572 and 612-*bis* CP.

⁹⁸ In Italian case-law, see Cons. Stato, 10 October 2006, n. 6023: *‘l’ autorizzazione alla permanenza in Italia per le ragioni di cui all’art. 18 d. lgs. 286/98 non ha valore premiale di un contributo dato al corso delle indagini di polizia giudiziaria proseguite in sede penale. La norma prosegue, infatti, l’esigenza sul piano sociale di assicurare immediata protezione ad una parte considerata debole (lo straniero vittima di violenza o di grave sfruttamento), onde consentirgli di sottrarsi alla violenza ed ai condizionamenti di organizzazioni criminali e di partecipare ad un programma di assistenza ed integrazione sociale.’*; commented in F. NICODEMI, (2006) *L’art. 18 TU 286/98 non ha natura premiale – Note a margine della sentenza n. 6023/06 del Consiglio di Stato*, in *Dir. Imm. Citt.*, 4, p. 73 ss; L. MASERA, (2017) *I permessi di soggiorno per gli stranieri vittime di reato*, in *Vittime di reato e sistema penale. La ricerca di nuovi equilibri*, Giappichelli, Torino, p. 443.

⁹⁹ Art. 18, para. 4 CLI.

¹⁰⁰ In accordance to art. 5, par. 3-*bis*, lett. c).

If the migrant is the victim of a crime of slavery¹⁰¹ or human trafficking,¹⁰² he/she is included in a special programme supporting his/her social reintegration and guaranteeing transitorily adequate lodging, meals and health assistance, in line with the National Action Plan against human trafficking and serious exploitation.¹⁰³ This provision was introduced with the D. Lgs. No. 24/2014,¹⁰⁴ in the scope of the transposition of Directive 2011/36/EU.¹⁰⁵

The permit is revoked in case of interruption of the programme or due to conduct of the holder which is incompatible with the purposes of the programme. This conduct is reported by the public prosecutor or by the social service of the local body, or otherwise ascertained by the *Questore*. The permit can also be revoked when other conditions that justified its issuing no longer exist.

Requirements: There are three requirements that define the scope of application of the special permit for social protection reasons:

- 1) It is necessary that the victim has suffered one of the criminal offences listed in Art. 18 CLI, which, as noted, include the most serious crimes provided for in Italian criminal law. However, case law reveals that sometimes courts are inclined to extend this permit to other cases in which there is a situation of violence against a foreigner or his/her serious exploitation and actual danger to his/her safety.¹⁰⁶
- 2) The situation of violence against a foreigner or his/her serious exploitation has to be ascertained. The only avenues expressed by Art. 18 CLI to this end is that the situation of violence or severe exploitation emerges during police operations, investigations or proceedings for one of the abovementioned crimes, or during intervention carried out by the social services.
- 3) The emergence of an actual threat to the migrant's safety following his/her attempts to escape the pressure of a criminal organisation perpetrating one (or more) of the crime listed, or the risk of retaliation following his/her release of statements during preliminary investigations or a trial. In this second case, the special permit carries out a form of witness protection.

It is important to notice that a special permit for social protection reasons does not apply to cases in which the crime is perpetrated by one single person, being necessarily the activity of a criminal organisation. This might significantly limit the application of this measure of protection.

¹⁰¹ Art. 600 CP.

¹⁰² Art. 601 CP.

¹⁰³ Art. 18, para. 3-bis of CLI. See Consiglio dei Ministri, *Piano nazionale d'azione contro la tratta e il grave sfruttamento 2016-2018*, adopted on the 26th of February 2016. For the 'referral procedure' of the trafficked person from the Local Commission to Social Services and the reflection period see Consiglio dei Ministri, *Meccanismo Nazionale di Referral per le Persone Trafficate in Italia* (attached to the National Plan abovementioned) available at: <https://www.osservatoriointerventitratta.it/wp-content/uploads/2018/01/allegato-1-meccanismo-nazionale-referral.pdf>.

¹⁰⁴ Legislative Decree N. 24 of 4 March 2014, 'Attuazione della direttiva 2011/36/UE, relativa alla prevenzione e alla repressione della tratta di esseri umani e alla protezione delle vittime, che sostituisce la decisione quadro 2002/629/GAI.'

¹⁰⁵ Dir. 2011/36/EU of the European Parliament And of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

¹⁰⁶ See TAR Trento, 7 novembre 2014, n. 397, in Dejure, in accordance to the D.M. 4 agosto 2007 of the Ministero dell'interno.

Path to access this measure: The decision about the issuance of this special permit (and the issuance itself) is responsibility of the *Questore*, who is also competent for the assessment concerning the existence of the conditions as provided in Art. 18 CLI.¹⁰⁷

Art. 18 CLI provides for two different paths to access the permit: a ‘judicial path’, and a ‘social path’. The judicial path takes place when the criminal offence is made known in the context of a criminal proceeding, irrespective of the phase of the proceeding.

For the judicial path to take place, it is not required that the migrant submit a report or a complaint. This factor reaffirms the protective (and non-rewarding) aim of the measure.¹⁰⁸ In this field, the Public Prosecutor who is leading the investigation can promote the issuance of the permit by making a specific request to the *Questore*. In this case, the procedure for the issuance of the special permit takes place concurrently with the criminal proceeding, but it is important to note that the outcome of the trial does not affect the issuance of the permit.¹⁰⁹ Otherwise, the social protection would be denied, for example, anytime it is impossible to identify or locate the perpetrator.¹¹⁰ The Public Prosecutor expresses his/her advice (either when promoting the issuance, or upon the *Questore*’s request) regarding whether the requirements have been met, with particular reference to the seriousness of the crime, the actual danger to the migrant, and the relevance of the contribution offered for an effective fight against the criminal organization or finding or capturing of those responsible for the crimes mentioned above.¹¹¹ Nevertheless, the Prosecutor’s adverse opinion – which could emerge when he/she did not promote the issuance of the permit – shall not tie the final decision of the *Questore*.

The second path to access the permit for social protection reasons is the ‘social path’. This path stems from interventions carried out by the social services of local authorities, during which the situation of violence or severe exploitation emerged. Social services, associations and other entities entitled to offer assistance to migrants can promote the issuance of the special permit. Even in this case, the victim is not required to report the crime or to cooperate in the criminal proceeding in order to receive the special permit.¹¹² In order to encourage the use of this path, the Ministry of

¹⁰⁷ On receipt of an application for the special permit, the *Questore* shall obtain:

- Prosecutor’s advice;
- a proposal for a programme of assistance and social integration;
- the foreigner’s admission to the abovementioned programme;
- the acceptance of the commitments related to the programme by the appointed of the social service.

¹⁰⁸ See Consiglio di Stato, Sez. VI, 10.10.2006, n. 6023; T.A.R. Abruzzo, L’Aquila, sez. I, 7-03-2012, n. 158, in www.giustizia-amministrativa.it; T.A.R. Sicilia, Catania, Sez. II, 28-05-2007, n. 892, in www.giustiziamministrativa.it.

¹⁰⁹ Consiglio di Stato, Sez. VI, 10.10.2006, n. 6023: *‘La determinazione dell’Autorità di P.S. circa la sussistenza dei presupposti per apprestare detti presidi – onde assicurare su un piano di effettività lo scopo perseguito dalla norma – non deve attendere la conclusione del processo penale per i fatti denunciati ma, in presenza di istanza di protezione, può intervenire allo stato delle indagini e delle acquisizioni istruttorie con valutazione autonoma dell’effettiva situazione in cui versa lo straniero e dell’attendibilità dei fatti denunciati’.*

¹¹⁰ G. SAVIO, *Codice dell’immigrazione. Il D. lgs. 286/1998 commentato articolo per articolo con giurisprudenza*, Maggioli, Rimini, 2012, p. 184-185.

¹¹¹ A Public Prosecutor interviewed for this report stated that they generally provide positive advice, unless dealing with an evidently specious complaint (which, however, never occurred in their experience). Interview N. 17.

¹¹² Circular letter of the Ministry of Interior 2.1.2006: *‘ai fini del rilascio del permesso di soggiorno per motivi di protezione sociale, non è necessariamente richiesta da parte della vittima la denuncia, né alcuna forma di collaborazione con gli organi di polizia o con l’A.G. La norma richiamata, infatti, stabilisce che tale permesso di soggiorno possa essere rilasciato anche qualora la fattispecie in questione sia accertata nel corso di interventi assistenziali dei servizi sociali’.*

Interior also clarified that, in these cases, the Prosecutor's advice is not required for the issuance of the permit, which is possible even in the absence of criminal proceedings.¹¹³

3.2 Special residence permits for victims of domestic violence

Art. 18-*bis* of CLI provides a special permit for victims of domestic violence.¹¹⁴ The introduction of this special permit was one of the positive consequences – in the scope of combating gender-based violence and protecting victims – of the Italian ratification of the Istanbul Convention.¹¹⁵ There are several similarities between this permit and the permit for reasons of social protection. First, this special permit provides protection to victims of domestic violence irrespective of their contribution to criminal proceedings, and victims are eligible for the issuance of this special permit even if they did not report the crime they suffered. Indeed, the Ministry of the Interior specified that the victim is not required to take part in the criminal proceedings and that the *Questore* can issue the permit regardless of the beginning of the trial.¹¹⁶ The main difference from Art. 18 CLI consists in the scope of application of this measure, which applies to crimes related to domestic violence covering crimes perpetrated by one single offender. Thus, the permit for victims of domestic violence is limited to particular kinds of criminal offences – those taking place in a domestic setting.

The holder of this permit has access to assistance services, and he/she can study, work or register for a job listing. Following the introduction of the 'Salvini Decree'¹¹⁷ in 2018, the residence permit for victims of domestic violence shall bear the words 'special cases',¹¹⁸ last for one year, and may be converted into a permit for work or for study reasons.¹¹⁹

Requirements: the scope of application of this special permit refers to victims of a limited number of criminal offences perpetrated in the context of domestic violence. Art. 18-*bis* CLI specifically refers to: ill-treatment and abuses against family and cohabitants;¹²⁰ simple and aggravated

¹¹³ Circular letter of the Ministry of Interior of 22.5.2000, Circular letter of the Ministry of Interior of 04.08.2000; Circular letter of the Ministry of the Interior of 29.09.2008.

¹¹⁴ The permit is one of the measures introduced with the Law Decree No. 93 of 2013 (Converted into Law n. 119 of 2013) in the field of combating gender-based violence.

¹¹⁵ Italy ratified the *Istanbul Convention* in 2013 with Law No. 77 of 2013. *Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11.V.2011, whose Chapter V is entirely about 'Migration and Asylum'. Art. 59 of the Istanbul Convention expressly states: '1. Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognised by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. (...) 3. Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both: (a) where the competent authority considers that their stay is necessary owing to their personal situation; (b) where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings'.

¹¹⁶ Circular letter of the Ministry of Interior of 26.08.2013.

¹¹⁷ Law-decree of 4 October 2018, no. 113, converted into Law of 1 December 2018, no. 132.

¹¹⁸ The indication of 'special cases' on the permit of residence is a consequence of the abrogation of the residence permit for humanitarian reasons. Even though the indication does not disclose detail about the reasons that justified the issuance, this adjustment has been criticized because it would not ensure the migrant maintains a sufficient level of confidentiality regarding his/her personal background. See ASGI, (2018) *Le modifiche in tema di permesso di soggiorno conseguenti all'abrogazione dei motivi umanitari e sull'art. 1, D.L. 113/2018 – Prime osservazioni* (25 October 2018), available at https://www.asgi.it/wp-content/uploads/2018/10/2018_10_25_scheda_ASGI_art_1_DL_Immigrazione_113_ok-1.pdf.

¹¹⁹ Before the Salvini Decree, it was issued as a permit for humanitarian reasons (Art. 5, para. 6 of CLI) whose duration was related to the relevant necessity (mostly ranging from six months to two years), and it was convertible into a permit for study, work or family reasons.

¹²⁰ Art. 572 CP.

personal injury;¹²¹ female genital mutilation;¹²² kidnapping;¹²³ sexual violence;¹²⁴ stalking;¹²⁵ and any of the crimes provided for in Art. 380 CPP¹²⁶ committed within a context of domestic violence.

For the special permit to be issued, any of the crimes abovementioned must have been committed in Italy and in a context of domestic violence, which is intended as ‘*one or more acts, serious or non-episodic, of physical, sexual, psychological or economic abuse that occur within the family or family unit or among people connected, currently or in the past, by matrimony or sentimental relationship, regardless of the fact that the author of said facts shares or used to share the same residence with the victim*’. In this context, a situation of violence or abuse against the foreigner has to be ascertained.

Moreover, there must be a real and actual danger for the foreigner’s safety, taking place as a consequence of the choice to escape the domestic violence or due to statements provided during preliminary investigations or trial. The instrumental nexus perfectly reflects the wording of Art. 18 CLI, which clearly inspired Art. 18-*bis* CLI.

Paths to access this measure: Art. 18-*bis* CLI follows the paradigm of Art. 18 CLI regarding the path for access. The situation of violence or abuse might arise during police operations or criminal proceedings for the abovementioned crime. Moreover, the risk to the foreigner’s safety should arise as a consequence of his/her choice to avoid the violence, or of his/her statements issued in the criminal proceedings (‘judicial path’). The application for the permit can be submitted to the *Questore* by the judicial authority operating – not only the Public Prosecutor, as in the case of Art. 18 CLI.

On the other side, the situation of violence or abuse can emerge within interventions carried out by anti-violence centres, local social services or social services specialised in assisting victims of abuse (‘social path’). These entities can submit to the *Questore* a proposal for the issuance of the special permit, accompanied by a report detailing how the requirements have been met. However, the operating judicial authority is also required to express his/her opinion regarding the requirements expressed in para. 1, Art. 18 CLI.

The *Questore* is the only office responsible for the issuing of the permit for victims of domestic violence, and the judicial authority opinion is not binding for the final decision. The *Questore* can revoke the permit when he or she becomes aware of incompatible conduct on the part of the holder, as reported by the Public Prosecutor or social services, or otherwise ascertained. Revocation also takes place when the conditions for the issuance of the permit no longer apply.

3.3 Special residence permits for victims of particularly severe labour exploitation

In 2012, the Italian legislator added para. 12-*quater* and 12-*quinquies* to article 22 of CLI, which regulate residence permits for cases of particularly severe work exploitation. The main purpose of such permits is to allow the Criminal Justice System to benefit from the victim’s cooperation in criminal proceedings as part of the fight against illegal employment and exploitation of migrants

¹²¹ Art. 582-583 CP.

¹²² Art. 583-*bis* CP.

¹²³ Art. 605 CP.

¹²⁴ Art. 609-*bis* CP.

¹²⁵ Art. 612-*bis* CP.

¹²⁶ See § 1 for a list of crimes included in Art. 380 CP.

with irregular status.¹²⁷ This permit was introduced with the Legislative Decree N. 109/2012, in compliance with the Directive 2009/52/EC.¹²⁸

The special permit for victims subject to criminal work exploitation lasts for six months, and is renewable for one year (or, when necessary, for a longer period) in order to allow the conclusion of criminal proceedings. Before the 2018 'Salvini Decree', the special permit for victims of particular exploitation was regulated as a residence permit for humanitarian reasons (duration defined depending on necessity, and always convertible into a permit for study, work or family reasons). After the reform abolished the permit for humanitarian reasons, this special permit can be only converted into a residence permit for work reasons.

Requirements: There are three basic conditions required for the permit to be issued: a situation of particular labour exploitation; a report submitted by the foreigner; and that he/she takes part in the proceedings against the employer.

Art. 22, par. 12-*quater* defines¹²⁹ a situation of particular exploitation by identifying some indexes of severe exploitation applicable when the employer hires foreign workers who have irregular migrant status. These include: the employment of more than three workers; the employment of minors who have not reached the working age; and the subjection to other working conditions which reflect severe exploitation.¹³⁰ The following conditions are also considered as indexes of severe exploitation: the repeated underpayment of workers compared to minimum wages settled by collective contracts; the repeated breach of legislation concerning working hours, leave and vacation, and so on; the violation of rules on health and safety in the workplace; the subjection to degrading working conditions, surveillance and lodging facilities.¹³¹

On the other side, unlike the two other special permits analysed above, it appears that the permit for particular labour exploitation is at least partially intended as a reward – it requires cooperation agreement between the victim and the Prosecutor. Indeed, the victim must have submitted the report that initiated the criminal proceeding, and he/she has to cooperate in the trial against the exploiters. Thus, for the permit to be issued, the victim has to prove his/her contribution to the criminal proceeding. Even though this special permit provides for a weaker protection, its scope of application and that of the permit issued for reasons of social protection overlap, as severe labour exploitation is one of the crimes included in the catalogue of Art. 18 CLI. Nevertheless, this special permit is far less frequent (see § 6) than Art. 18 CLI, and it is usually considered conditional on the lack of requirements for the issuance of the special permit for social protection reasons.¹³²

¹²⁷ A. ANGELINI, (2015) *Strumenti normativi per la tutela delle persone migranti vittime di sfruttamento sui luoghi di lavoro*, in *Illeciti nell'impiego di manodopera straniera: strategie di contrasto e tutela delle vittime*, by Maura Frasca e Alessia Angelini, Itallavoro, 2015, p. 41-58; M. BRAGLIA, *La tutela delle vittime di grave sfruttamento lavorativo negli interventi della Regione Emilia-Romagna*, in *Illeciti nell'impiego di manodopera straniera: strategie di contrasto e tutela delle vittime*, by Maura Frasca e Alessia Angelini, Itallavoro, 2015, p.109-122.

¹²⁸ Dir. 2009/52/EC of The European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Art. 13, para. 4: '*Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC.*'

¹²⁹ By referring to para. 12-bis of Art. 22 of CLI.

¹³⁰ Defined in art. 603-bis, par. 3 CP. This referral caused some problem of interpretation for a while, because of flaw coordination between art. 22, par. 12-bis and art. 603 CP.

¹³¹ Art. 603-bis, para. 3 CP.

¹³² L. TRUCCO – M. PAGGI – F. NICODEMI, (2015) *La tratta e il grave sfruttamento lavorativo dei migranti. Guida agli strumenti giuridici per la tutela delle vittime*, Cittalia – Fondazione ANCI ricerche, P. 62-63.

Path to access this measure: As with the other permits, this special permit is issued by the *Questore*, who has to check the fulfilment of the requirements. In this case, according to the formulation of the article, the *Questore* retains less discretionary power, as if the issuance was a right entitled to the migrant.¹³³ Since it is necessary that the migrant submit a report against the employer, the social path does not take place in this case. The Public Prosecutor can submit the proposal to the *Questore*. Nevertheless, the wording of Art. 22, par. 12-*quater* implies that the application for the issuance can also come from someone else other than the Public Prosecutor. In this case, the Public Prosecutor is still required to express favourable advice on the request. The permit can be revoked when the Prosecutor notifies (or the *Questore* ascertains) that the holder behaves in a way incompatible with the aim of the permit.

3.4 Special residence permits for investigative reasons

The Law Decree n. 144 of 2005¹³⁴ introduced 'Urgent measures for combating international terrorism'. One of these measures consists in the special permit for persons who cooperate with Italian public authorities to the end of preventing terrorist attacks.¹³⁵ In this situation, the person who reports a crime is not a victim of crime, but an informant who is encouraged to report to public authorities as a witness of the activities of a terrorist organisation.

It is possible to issue this special residence permit when, during police operation or investigations or criminal proceedings for crimes of terrorism, the permanence in the State's territory of the person who cooperated becomes necessary. The *Questore* can issue a residence permit to persons who cooperated with the judicial authority or with the police by offering statements considered reliable, new and complete, or of paramount importance for the continuation of the proceeding.

The permit can be issued on the initiative of the *Questore*, upon the Public Prosecutor's request, or upon the recommendation of provincial police forces or the directors of Services of Information and Security. These public authorities are required to motivate the existence of the abovementioned conditions, with specific regard to the cooperation offered by the foreigner.

The permit lasts for one year and it is renewable for a further year for justice or public security reasons. It is revoked when the holder behaves incompatibly with the aims of the permit, if reported by the proposing authority or otherwise ascertained by the *Questore*. Additionally, it is possible to revoke the permit when the relevant conditions no longer apply. If the cooperation had an extraordinary relevance in preventing terrorist attacks and related damages or in identifying persons who committed acts of terrorism, the foreigner is eligible for the issuance of an EU residence permit for long-term residents.

3.5 Special residence permits for victims with irregular status in practice

Even though the special permits for victims of crime are the most salient example of measures provided in law to facilitate crime reporting by irregular migrants, in practice there are factors that could mitigate their impact.

First, special permits do not cover the whole spectrum of crimes provided for in the Italian legislation, including some of the crimes that migrants with irregular status suffer the most (i.e. immigration scams related to their irregular condition, episodic rape, street robbery perpetrated by one single offender).

¹³³L. TRUCCO – M. PAGGI – F. NICODEMI, (2015) *op. cit.*, P. 65.

¹³⁴ Converted into Law n. 155 of 2005.

¹³⁵ Art. 2 of the Law Decree 144/2005.

It is important to highlight that, as seen above, official procedures to issue the special residence permits do not explicitly provide the possibility for migrant victims (or informants) to apply directly for these permits. Both judicial and social paths provide for the formal requests to come from either public prosecutors or service providers, and not from migrants themselves, which in practice could limit the incentives to report crime. In theory, as confirmed by interviews conducted for this study, nothing prevents migrant victims from (informally) requesting a public prosecutor or service providers to sponsor a request on their behalf. However, victims are most often not aware of the existence of the special permits, or are otherwise unable to handle the procedure by themselves.¹³⁶ They often need an external support whose presence is not ensured. Moreover, the issuance of a special permit is never automatic, which is to say that a victim/witness cannot predict if he/she will be protected or deported. Nor is the release of the permit immediate. This uncertainty can make irregular migrants disinclined to report. Moreover, the actual possibility of issuing the special permits depends on the presence, within a certain territory, of local initiatives carrying out special programmes for social protection. Indeed, the lack of special programmes can result in the impossibility of accessing the social path, thus preventing the issuance of special permits in practice. Therefore, the possibility of accessing the special permits may vary significantly depending on the territorial spread of the relevant authorized associations, which carry out the special programmes for social protection.¹³⁷ In addition, the local *Questori* and Public Prosecutors have wide discretion in supporting the release of a special permit. This in practice can create a situation of uneven geography in the usage of the permits, with authorities in certain areas particularly more inclined and trained in the use of the special permits, than those of other provinces.

Interviews conducted for this report suggested that the permits are not being widely used. For instance, a Public Prosecutor who worked for several years in the office prosecuting crimes against vulnerable people was only rarely required to take part in the proceeding for the release of special permits.¹³⁸ On an average of 3000 proceedings in total seen during their career, only three cases involved special permits.¹³⁹ This mostly depended on the fact that there were very few proceedings involving irregular migrants.

At the national level, the Ministry of the Interior releases annual data on the total number of residence permits released in Italy.¹⁴⁰ The following are the figures on the total number of special residence permit issued in Italy, updated yearly, in the period 2013-2017:

Table 1

	2013	2014	2015	2016	2017
Permits for social protection reasons (art. 18 of CLI)	898	732	771	1246	1595
Permits for victims of domestic violence (art. 18-bis of CLI)	4	55	85	100	102
Permits for victims of particular labour exploitation (art. 22, par. 12- <i>quater</i> of CLI)	11	3	3	10	4
Permits for cooperation against Terrorism (L. n. 155/2005)	89	84	66	135	92
Total	1002	874	925	1491	1793

¹³⁶ Interview n. 10.

¹³⁷ See N. DELVINO – S. SPENCER (2014), *op.cit.*, p. 29; ASGI, *Misure di protezione sociale - Scheda pratica*, Francesca Nicodemi, Paolo Bonetti (eds.), (2009), available on www.asgi.it.

¹³⁸ Interview n. 17.

¹³⁹ Interview n. 17.

¹⁴⁰ Ufficio centrale di statistica-Ministero dell'Interno, *Le statistiche ufficiali del Ministero dell'Interno. Immigrazione regolare – Attività della Polizia di Stato: anno 2018* available at: http://ucs.interno.gov.it/ucs/contenuti/Le_statistiche_ufficiali_del_ministero_dell_interno_ed_2018-7358400.htm;

The table above shows that permits for reasons of social protection are the most frequent. The Government doubled the funds for supporting programmes that protect victims of human trafficking in 2016, and provided special trainings that facilitate the identification of trafficking victims for operators who work in the 'hotspots'¹⁴¹ to which migrants are transferred upon disembarkation and in the local commissions for asylum.¹⁴² The special permit for domestic violence and for particular labour exploitation are less commonly used. This might also depend on the fact that they are newer compared to those provided by Art. 18 CLI, which was introduced since 1998, and on the fact that the scope of application of the special permits might sometimes overlap. Permits for victims of particularly severe labour exploitation are very rare; this may also depend on the fact that, when the scope of application coincides, the special permit for protection reason is preferred. Also, migrants might be disinclined to report their employer, as this implies losing their job.¹⁴³ By contrast, there is a reasonable number of permits for cooperation against terrorism.

¹⁴¹ See Ministero dell'Interno, *Procedure Operative Standard (SOP) applicabili agli hotspot italiani* [Standard operating procedure (SOP) applicable to Italian hotspots] available at: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf. For commentaries on the 'hotspot approach' see G. SAVIO, (2018) *Il trattamento riservato ai migranti sbarcati sulle coste italiane. Obbligo di identificazione nell'approccio hotspot*, ASGI; and ASGI, *Country report on asylum*, for AIDA, available at: <https://www.asylumineurope.org/reports/country/italy/asylum-procedure/access-procedure-and-registration/hotspots>.

¹⁴² Ministero delle pari opportunità, *Più che raddoppiati i fondi del governo per la protezione delle vittime di tratta*, <http://www.pariopportunita.gov.it/faqs/raddoppiati-i-fondi-del-governo/>; Aumentano le segnalazioni anti-tratta, <http://www.pariopportunita.gov.it/faqs/aumentano-le-segnalazioni/>.

¹⁴³ Interview n. 10 and n. 6.

4. The *nemo tenetur se detegere* principle in Italian jurisprudence

This chapter is dedicated to relevant Italian case law drawn from the jurisprudence of superior courts (the Italian Constitutional Court and Cassation Court) addressing the problems faced by migrants with irregular status in seeking access to Italian Courts, and the related risks of self-incrimination. This analysis of the Italian case law particularly looks at the application of the legal principle of '*nemo tenetur se detegere*' – generally known as 'the right to silence' – to the situation of irregular migrants interacting with judicial and police authorities in Italy. This principle – protected both in the Italian Code of Criminal Procedure and the Italian Penal Code – implies that no person shall be compelled to make statements implying his/her criminal liability. Thus one can remain silent or even lie to any question posed by the police or by the public authority, when answering would raise criminal accusation against oneself. For the purpose of this study, the application of the *nemo tenetur se detegere* principle is scrutinised as a legal basis that could enhance victims' protection. Even though not the focus of this report, it is worth noting that further studies could extend the analysis of the principle throughout International and European sources from the twofold perspective of the European Union and of the European Convention of Human Rights.¹⁴⁴ This line of research could identify a common ground in European supranational systems which would foster the harmonisation of sources within European countries in the field of safe reporting of crimes for migrants with irregular status.

4.1 The *nemo tenetur se detegere* in general: legal framework

In the Italian Legal System, the privilege against self-incrimination is based on the right to personal freedom,¹⁴⁵ the right of defence,¹⁴⁶ the presumption of liberty,¹⁴⁷ and the right to due process.¹⁴⁸ Art. 63 of CPP, entitled 'Incriminating statements', states that if a person who is not accused or suspected makes statements before the judicial authority or the criminal police that raise suspicion of guilt against him/her, the proceeding authority shall interrupt the examination. Immediately after, the proceeding authority shall warn him/her that, following such statements, investigations may be carried out on him/her and advise him/her to appoint a lawyer. Such statements shall not be used against the person who has made them. Moreover, Art. 198 CPP states that the witness is obliged to appear before the Court and answer truthfully the questions addressed to him/her.¹⁴⁹

Considering that irregular entry or stay in Italy is a crime, self-incrimination for migrants with irregular status may derive from the sole fact of disclosing their personal identity to the police or the public authority. Therefore, the detection of the irregular status may automatically imply the beginning of criminal proceedings against him/her,¹⁵⁰ and will most probably trigger administrative

¹⁴⁴ See ECHR, (2018) *Guide on Article 6 of the European Convention on Human Rights*, Right to a fair trial (criminal limb), updated on 31 December 2018, p. 35-38, available at: https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf; D. TASSINARI, (2012) *Nemo tenetur se detegere*. La libertà dalle autoincriminazioni nella struttura del reato, BUP, Bologna, 2012, p. 260-273; J. CALLEWAERT, (2004), *The Privilege against Self-Incrimination in European Law - An Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe*, ERA-Forum 2004, N. 4, p. 488-498.

¹⁴⁵ Art. 2 of the Italian Constitution.

¹⁴⁶ Art. 24, para. 2 of the Italian Constitution.

¹⁴⁷ Art. 27, para. 2 of the Italian Constitution.

¹⁴⁸ Art. 111 of Italian Constitution.

¹⁴⁹ In addition, Art. 384 CP provides for a defense when a person commits one of the crimes against the administration of Justice (like false witness, fraud in the trial, calumny and so on) because he/she was constrained by the necessity of saving him/herself or a close relative from a severe and inevitable prejudice to his/her liberty or honour.

¹⁵⁰ Both the administrative and the criminal proceedings against migrants who are eligible for one of the special permits for victims and witnesses of crimes are suspended until the *Questore* decides on the special permits. But even

proceedings for his/her expulsion (which is not protected from the *nemo tenetur se detegere* principle).

The main issues addressed in Italian case law are related to the fundamental right of defence, insofar as the latter involves protection against self-incrimination and the *nemo tenetur se detegere* principle. Thus, it could imply some limitations to the obligation to report a crime (related to irregular migration). In Italian case law, this principle did not directly emerge with specific regard to the right to report a crime as an articulation of the right of defence. However, it is worth mentioning some cases in which migrants with irregular status risked self-incrimination in the exercise of other legal entitlements, such as the right of defence in front of a Civil Court, the right-duty to education of the children, and the right to take part in the proceeding concerning their legal protection.

4.2 Some questions referred to the Italian Constitutional Court

Since the introduction (2009) of Art. 10-*bis* CLI – which punishes *illegal entry and stay* (see Chapter 2 §2), the Italian Constitutional Court has been inundated with requests for constitutional reviews submitted by lower Courts concerning the compatibility of that article with several rules of the Italian Constitution. Some of the constitutional reviews submitted regarded the possible conflict between Art. 10-*bis* CLI (and other rules of the CLI) and the fundamental right not to self-incriminate.

The most relevant case¹⁵¹ concerned a woman from Pakistan who had been segregated at home, threatened, and abused by her husband after joining him in Italy. Due to this situation of segregation, she did not apply for a family residence permit in order to regularise her immigration status. Two months after her arrival in Italy, she finally escaped from her husband and reported the situation to the police. A criminal proceeding against the man began and the Public Prosecutor appealed to the Juvenile Court to revoke parental responsibility. The woman was required to testify in the trial, but she refused to attend the Court because she was afraid that the Judge would denounce her for her irregular condition (Art. 10-*bis*) on the basis of the duty to report crime (Art. 331 CP). Her attorney represented the situation in the hearing in front of the Juvenile Court, which in turn promoted a constitutional review immediately after. The Judge requested a declaration of unconstitutionality which would extend (by the means of an additive ruling) the derogation from the duty to report the migrant's situation, in order to prevent the beginning of criminal proceedings or a deportation procedure against him/her.¹⁵² According to the Judge who submitted the review to the Constitutional Court, the risk of being subjected to denunciation or to an administrative report was hindering the migrant's right¹⁵³ to justice and to a fair trial, as laid down in Art. 24 (right to defence) and in Art. 47 of the Charter of Fundamental Rights of EU. The Judge considered it

in the absence of the residence permit, the migrant shall not be subjected to the criminal or administrative proceeding for his/her expulsion when there is, for instance: an expulsion and rejection prohibition concerning vulnerable categories (as provided for in art. 19 of CLI); a special authorization to entry and stay in the State's territory of the Juvenile Court for serious reasons connected to psychophysical development and keeping into account the age and health conditions of the minor; right of asylum according to Art. 10 para. 3 of Italian Constitution; the eligibility for the issuance or the renewal of a permit for family reunification (as provided for in art 5, para. 5 of the CLI). See ASGI, *I minori stranieri extracomunitari e il diritto all'istruzione dopo l'entrata in vigore della legge n. 94/2009*, September 2009. p. 7.

¹⁵¹ Trib. Min. Roma, Ord. N. 84/2010, 30.09.2010, in G.U. n. 21 del 18.5.2011.

¹⁵² The constitutional review challenged Art. 2, par. 5 CLI (which recognizes the foreigner's jurisdictional protection of rights and legitimate interests), combined with Art. 10-*bis* CLI, Art. 331, par. 4 CPP, by invoking Artt. 2 (recognition of fundamental rights), 11 (limitation of sovereignty), 24 (Right to defence) and 117 (compliance with the EU legislation) of the Italian Constitution.

¹⁵³ Equality of the foreigner with regard to jurisdictional protection of rights and legitimate interests is also provided for in Article 2, par. 5, irrespective to the regularity of his/her status.

impossible for him to avoid the duty to report the crime deriving from Art. 331, para. 4 CPP, due to the lack of an exemption such as the one made in Art. 35 CLI for medical professionals.

However, the Constitutional Court considered the application for the review inadmissible because of loopholes in the description of the facts, and lack of relevance in the judgment. According to the Constitutional Court, the Judge would have to verify whether the woman's condition was still irregular at the time of the hearing. The Court highlighted that, at the time of the trial, the woman had already contacted Public Authorities (when reporting her husband's abuses), and that she was hosted and helped by the social services. Nevertheless, Public Authorities did not start a criminal proceeding against her, nor an administrative expulsion.¹⁵⁴ Although the Constitutional Court declared the question inadmissible, the ruling is very important because the Court, indirectly, made two important arguments. On the one hand, the Court reaffirmed that *there is no obligation to report a crime when it is already known to the Public Prosecutor*. On the other hand, the Court stated that *the migrant eligible for one of the permits related to victims protection or that is potentially allowed to remain in Italian territory has the right to remain in Italy even before the issuance of the permit by the Questore*.¹⁵⁵

4.3 Suggestions from the Supreme Court of Cassation

Problems regarding observance of the *nemo tenetur se detegere* principle arose even before the criminalisation of irregular entries and stays, and in the context of another criminal offence provided for in the CLI. Before 2009, an irregular entry and stay was only treated as an administrative offence. However, at that time art. 6, para. 3 of CLI punished as committing a criminal offence the foreigner who, upon the request of officials and police agents, did not comply - without a justified reason - with the order to exhibit a passport, other identification documents, a residence permit, or other documents certifying legal presence on the State's territory. Italian case law has questioned for a long time whether this rule was also applicable to foreigners with an irregular status.

The main court ruling¹⁵⁶ in this regard considered the rule applicable to irregular migrants. According to this ruling, the aim of the obligation was indeed to identify irregular migrants for the purposes of their expulsion, moreover the fact of having an irregular status was not considered as a justified reason to evade the obligation, as the foreigner caused their condition in violation of other rules of the CLI. At the same time, other case law¹⁵⁷ excluded extending Art. 6, par. 3 of CLI to foreigners with an irregular status, as it was impossible for them to obtain the documents required and because, even if he/she tried to obtain them, he/she would have had to self-incriminate him/herself.

¹⁵⁴ Corte Cost., Ord. N. 306/2011, of 11.11.2011: *'il giudice a quo non ha, infatti, precisato se e quali verifiche siano state svolte in ordine all'eventuale, asserita e perdurante situazione di irregolarità di J.N. alla data dell'ordinanza di rimessione (presupposto imprescindibile per la rilevanza della questione), come sarebbe stato necessario, soprattutto in considerazione delle circostanze della fattispecie, tenuto conto che, secondo tale provvedimento, è stata la predetta a denunciare alla Polizia di Stato i fatti i quali hanno dato origine all'instaurazione da parte del P.M. del processo principale ed ella, a seguito della denuncia, è stata ospitata presso un centro di accoglienza e, successivamente, è stata assistita da un centro provinciale per donne in difficoltà'*

¹⁵⁵ Corte Cost., Ord. N. 306/2011, of 11.11.2011: *'il giudice a quo non ha, invece, esposto i motivi che dovrebbero far ritenere sussistente l'obbligo di denuncia anche qualora l'autorità di pubblica sicurezza, prima, e l'autorità giudiziaria, poi (in particolare, il P.M. presso il Tribunale per i minorenni di Roma, che ha promosso il giudizio principale), siano già venute a conoscenza del fatto oggetto dello stesso come pure risulta dalla stessa ordinanza di rimessione'*

¹⁵⁶ Cass. Pen., Sez. I, n. 13562 of 1999, Lecheheb; Cass. Pen., Sez. I, n. 1402 of 1999, Fathi; Cass. Pen., Sez. I, n. 15572 of 2001, Baana; Cass. Pen., Sez. I, n. 14084 of 2001, Rahalmi; Cass. Pen., Sez. I, n. 383777 of 2001, Chalgom; Cass. Pen., Sez. VI, n. 33859 of 2001, Lenoir.

¹⁵⁷ Cass. Pen., Sez. I, n. 14008 of 1999, Karim; Cass. Pen., Sez. I, n. 14009 of 1999, Bersi; Cass. Pen., Sez. I, n. 14011 of 1999, Kalil; Cass. Pen., Sez. VI, n. 29142 of 2001, Jalal; Cass. Pen., Sez. VI, n. 31990 of 2003, P.G. in proc. Rrasa Astrit; Cass. Pen., Sez. Fer., n. 37510 of 2003, P.G. in proc. Gezim Leka.

In 2003, the Joined Chambers of the Italian Supreme Court of Cassation overruled both arguments, stating that foreigners with irregular status were not liable if they did not exhibit a residence permit, whereas they could infringe Art. 6, par 3 CLI when not exhibiting a different document.¹⁵⁸ On that occasion, the Joined Chambers also specified that there is no right to self-defence which justified the refusal to exhibit documents in order to prevent the disclosure of the migrant's irregular status.¹⁵⁹ According to that ruling, since irregular entry was not punished as a criminal offence, but just as an administrative offence, the *nemo tenetur se detegere* principle could not apply.¹⁶⁰

The wording of Art. 6, par. 3 has changed following the introduction of the 'Security Package' in 2009, which also introduced the crime of *illegal entry and stay* (art. 10-*bis* CLI). Foreigners are now required to exhibit both an identification document *and* a valid residence permit or other document certifying their legal presence in the Italian territory. Right after the reform of 2009, concerns on the *nemo tenetur se detegere* principle have been raised again in academic literature¹⁶¹ and considered in a few rulings of local Courts¹⁶² due to the penal relevance of irregular entry and stay. Once again, the Joined Chambers solved the issues that emerged in case law.¹⁶³ The Supreme Court stated that the cumulative requirement of both an identification document and a valid entitlement to stay on the State's territory definitely prevents the criminal liability of migrants with an irregular status for not showing documentation upon official request, due to their impossibility to exhibit a valid entitlement concerning their migration status. Nevertheless, the Court admitted the possibility that a foreigner with irregular status may be subject to a criminal proceeding under Art. 10-*bis* of CLI after his/her irregular status has been detected during the identification.¹⁶⁴ The Court of Cassation described the situation as a 'double-track' punitive system, which aims both to control the regularity of foreigners, and to detect migrants with an irregular status. Thus, according to the Supreme Court, it is not possible to avoid the identification¹⁶⁵ of the foreigner with irregular status because of the principle of *nemo tenetur se detegere*. In conclusion, even though a migrant with irregular status is not punished for the sole fact of not exhibiting the documents, the identification itself automatically triggers his/her incrimination under Art. 10-*bis* CLI, and the beginning of an administrative proceeding for his/her deportation.

¹⁵⁸ Cass. Pen. SS. UU., sent. n. 45801, 29.10.2003, Mesky.

¹⁵⁹ This argument raised in Cass. Pen., Sez. I, n. 3517 of 2003, Dinaj; and in Cass. Pen., Sez. VI, 27.06.2001, n. 29142.

¹⁶⁰ Cass. Pen. SS. UU., sent. n. 45801, 29.10.2003, Mesky.

¹⁶¹ L. MASERA, (2009) '*Terra bruciata*' attorno al clandestino: tra misure penali simboliche e negazione reale dei diritti, cit., p. 60-61.

¹⁶² Trib. Monza, 23.03.2010, in G. Dir., 2010, 23, 85; Trib. Monza, 03.05.2010, n. 851, in *DeJure*. These local courts considered that irregular migrants are not criminally liable for not exhibiting documents, because the right against self incrimination constituted a justified reason for not providing the documents.

¹⁶³ Cass. Pen., Sez. Un., 24.2.2011, No. 16453, Alacev.

¹⁶⁴ Art. 6, para 4 of the CLI, which provides for a duty of identification of the foreigner when there is a doubt about his/her identity.

¹⁶⁵ Cass. Pen., Sez. Un., 24.2.2011, No. 16453, Alacev, p. 11: '*Invero, la mancata esibizione di documenti attestanti la regolarità del soggiorno, di per sé, costituisce un indizio del reato di cui all'art. 10-bis, con tutto ciò che consegue in termini di accertamenti di polizia giudiziaria, a cominciare dai poteri d'identificazione di cui all'art. 349 cod. proc. pen. In ogni caso, ritenere che la fattispecie dei cui all'art. 6, comma 3, d.lgs. cit. escluda come soggetto attivo lo straniero in posizione irregolare, non implica affatto che egli sia sciolto dai vincoli connessi al dovere di farsi identificare, a richiesta anche di ufficiali e agenti di pubblica sicurezza, applicandosi comunque a tutti gli stranieri (in posizione regolare o irregolare) l'art. 6, comma 4, che consente di sottoporre a rilievi fotodattiloscopici e segnaletici lo straniero (in posizione regolare o irregolare) nel caso che vi sia motivo di dubitare della sua identità personale.*'

5. New horizons for Safe Reporting by victims and witnesses with an irregular status in Italy

This chapter examines the legal and political potential for reforms that could improve the possibilities for victims and witnesses with an irregular status to report crime. The first section looks at the Italian political landscape with regard to immigration. The second section assesses the ‘replicability’ of Sanctuary Cities experience in Italy. The third section discusses other proposals for improvements that could take place both at the national and at the local level.

5.1 The Italian Political context and the feasibility of a reform agenda

Over the past decades, immigration has been a sensitive topic in the Italian political arena, irrespective of the political hues of successive parliaments and governments. Intense debates have taken place across political lines every time a reform of immigration law has been envisaged.¹⁶⁶ One main reform, implemented in 2009,¹⁶⁷ significantly tightened up the treatment of irregular migrants, including criminalising their condition.¹⁶⁸ Led by a centre-right government, the reform was subject to severe criticism.¹⁶⁹ In 2014, the parliament¹⁷⁰ decided and instructed the government to decriminalise irregular entry and stay. Yet, under the rule of the Democratic Party, the decriminalisation of irregular entry and stay was set aside in 2016.¹⁷¹ The left-wing government omitted to implement the decriminalisation and justified this decision by stating that the reform would have required a more in-depth consideration and legal reform.¹⁷² However, commentators argued that in reality the possible loss of public support played a major role.¹⁷³

The political situation in Italy at the time of writing (the first half of 2019) displays mixed tendencies arising from different levels of governance. On the one hand, the Italian government is pursuing strict policies against irregular migrants; on the other, a bottom-up trend is arising from civil society and some municipalities in opposition to the government’s immigration policies. At the national level, the Italian political agenda on immigration is leaning towards a repressive approach. In particular, this could be observed in the Minister of the Interior’s statements about the ‘shutting

¹⁶⁶ For a history of Italian Immigration law specifically focusing on irregular migrants, see N. DELVINO – S. SPENCER (2014), *op. cit.*, 2014, p. 4.

¹⁶⁷ The ‘Bossi-Fini’ Law, Law No. 189/2002.

¹⁶⁸ The ‘Security Package’, Law No. 94/2009.

¹⁶⁹ Criticisms came from opposition parties, from civil society, from part of the judiciary and from academia. E.g. Repubblica (Rome, 2 July 2009), *Palazzo Madama approva il progetto del governo. Franceschini: ‘Un danno per il paese’. Il Vaticano: ‘Basta criminalizzare gli stranieri. Norma che porterà dolore’ Il pacchetto sicurezza diventa legge. Si alle ronde, la clandestinità è reato. Berlusconi: ‘E’ un provvedimento da me fortemente voluto che garantisce i cittadini’* available at: <http://www.repubblica.it/2009/06/sezioni/politica/del-sicurezza-7/terza-fiducia/terza-fiducia.html>; E.g. Repubblica (Rome, 10 June 2009), *Il Csm sul pacchetto sicurezza ‘Paralizzerà gli uffici giudiziari’*, available at: <https://www.repubblica.it/2009/04/sezioni/politica/del-sicurezza-5/parere-csm/parere-csm.html>; See. N. DELVINO – S. SPENCER (2014), *op. cit.*, p. 5, note 24.

¹⁷⁰ Law No. 67 of 2014, which aimed at reforming the system of sanction of the Italian Penal code in view of the total inefficiency of the criminal provision in terms of deterrence and the consequent overburden on Italian Courts.

¹⁷¹ Legislative Decree No. 8 of 2016.

¹⁷² Ministry’s Report of the Legislative Decree No. 8 of 2016, p. 5: *‘le ragioni politiche sottese alla scelta di non attuare le direttive di depenalizzazione vanno parimenti ricercate nel carattere particolarmente sensibile degli interessi coinvolti dalle fattispecie in esame: per tali materie, in assenza di un intervento sistematico di più ampio respiro, lo strumento repressivo penale appare, invero, indispensabile ai fini della composizione del conflitto innescato dalla commissione dell’illecito’*

¹⁷³ C. RUGGIERO, *La depenalizzazione del reato di ‘immigrazione clandestina’: un’occasione mancata per il sistema penale italiano*, in *Diritto Penale Contemporaneo* – online version, 2/2017, available at: https://www.penalecontemporaneo.it/pdf-viewer/?file=%2Fpdf-fascicoli%2FDPC_2_2017.pdf#page=135

the ports' policy, according to which Italy shall refuse permission to dock to ships carrying migrants and asylum seekers rescued in the Mediterranean.¹⁷⁴ Moreover, in October 2018, the Italian government promoted the adoption of Law Decree No. 113 of 2018,¹⁷⁵ known as the 'Salvini Decree' (named after the Minister of Interior at the time), which reformed the CLI to impose more restrictive rules on immigration and asylum. In particular, the Decree abrogated the 'humanitarian permits', provided for a tightening of the protection system for asylum seekers and refugees (SPRAR), extended the period of detention in the Permanent Centres for Repatriation (CPR) and in hotspots, introduced new limits to the recognition of international protection, and established the withdrawal of the refugee status for those convicted of a wider range of offences.¹⁷⁶ Officially, the Decree was aimed at combating irregular immigration.¹⁷⁷ However, many fear that one of the long term effects of this legislation could actually be an increase in the number of irregular migrants. Indeed, new restrictions imposed by the Decree and the abolition of the residence permit for humanitarian reasons raised concerns about the risk that many people will lose their protected status and may therefore fall into irregularity.¹⁷⁸ Even though the Decree did not affect the regulation of the special permits for victims of crime, the potential growth in the number of irregular migrants makes research on crime reporting for victims with irregular status even more relevant today. However, these recent policy developments suggest that the current government favours a repressive approach towards immigration. Thus, measures that could facilitate the inclusion and protection of people with irregular migration status might not be among the priorities of the government at the moment.

By contrast, a countertrend against governmental policy is observed across municipalities which take into serious consideration migrants' fundamental rights and their inclusion. Many are the initiatives trying to raise awareness of the problems faced by migrants and opposing the current government policies on immigration. The 'Salvini Decree' raised a wave of political disagreement in several Italian municipalities worried about the possible negative effects. In particular, the Mayors of Naples, Palermo, Milan,¹⁷⁹ Florence and Parma publicly announced their refusal to implement

¹⁷⁴ See F. CANCELLARO – S. ZIRULIA, (2018) *Controlling Migration through De Facto Detention: The Case of the 'Diciotti' Italian Ship*, in *Border Criminologies*, 22 October 2018, University of Oxford, available at: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/10/controlling>. For other examples of the 'shutting ports policy' E.g. *Il Sole 24 Ore* (26 June 2018), Salvini: «Le Ong non toccheranno più un porto italiano», <https://www.ilsole24ore.com/art/notizie/2018-06-26/salvini-le-ong-non-toccheranno-piu-porto-italiano--105538.shtml?uuid=AEehXbCF>; more recently, E.g. *Adnkronos* (5 January 2019), *Salvini non cede: 'Porti chiusi finché sarò ministro'*, https://www.adnkronos.com/fatti/politica/2019/01/05/salvini-non-cede-porti-chiusi-finche-saro-ministro_yurfw87Z5Fg04jX7dEjxQQ.html; E.g. *Il Giornale* (6 april 2019), *Migranti, ora Salvini sfida i pm: 'Mi indagano? I porti restano chiusi'*, <http://www.ilgiornale.it/news/politica/migranti-ora-salvini-sfida-i-pm-mi-indagano-i-porti-restano-1675371.html>.

¹⁷⁵ Converted into law with Law No. 132 of 2018, *'Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata'*.

¹⁷⁶ C. TORRISI, *The Italian government has approved a new bill targeting migrants*, in *Open Migration*, 19 December 2018, available at: <https://openmigration.org/en/analyses/the-italian-government-has-approved-a-new-bill-targeting-migrants/>.

¹⁷⁷ <http://www.interno.gov.it/it/notizie/vigore-decreto-legge-sicurezza-e-immigrazione>.

¹⁷⁸ M. VILLA, *I nuovi irregolari in Italia*, 19 December 2018, <https://www.ispionline.it/it/pubblicazione/i-nuovi-irregolari-italia-21812>.

¹⁷⁹ The Mayor of Milan announced the creation of a new municipal register which recognises the residency in the municipality of Milan of individuals who have a continuous relationship with the territory and have expressed the wish to remain in Milan. This includes homeless people and asylum seekers. This solution allows the compliance with both the Salvini Decree and the aim of not depriving asylum seekers of their rights while they are waiting for a response

the rules of the Decree.¹⁸⁰ These mayors, followed by many other colleagues, accused the Decree of jeopardising the rights of asylum seekers and people who will lose humanitarian protection. They are also concerned about the social consequences of an increase in the number of people in their city with insecure migration status. Thus, these mayors decided to continue registering asylum seekers in their cities' registers even though one provision¹⁸¹ of the Salvini Decree prohibited registration on the basis of the sole application for asylum.¹⁸²

Many are also the initiatives of civil society organising in support of migrants' rights and opposing the repressive approach adopted by the central government. A march for migrants' rights (*People – Prima le persone*) took place in Milan, on March 2nd of 2019 and attracted almost 200,000 people and more than 1000 NGOs.¹⁸³ Among the many initiatives undertaken by civil society, the European Citizens' Initiative (ECI) entitled '*We are a welcoming Europe, let us help!*'¹⁸⁴ is particularly relevant, as it touches on the core of the issue addressed in this report. One of the main objectives mentioned in the proposal is: '*Everyone has the right to justice. We want the EU Commission to guarantee more effective ways and rules to defend all victims of labour exploitation and crime across Europe and all victims of human rights abuses at our borders*'. The Initiative aimed, *inter alia*, at introducing measures¹⁸⁵ for safe reporting of crime and protecting migrants from abuses at the borders.

These countertrends suggest that there is considerable concern for the fundamental rights of migrants, irrespective of status. Even though the national agenda towards migrants with irregular status is towards restrictiveness, a part of the civil society and local authorities are truly concerned about the condition of irregular migrants, and this could represent a fertile ground reforms in the future.

from the administration. The requirement of the continuous relationship with the territory and the wish to remain in Milan are certified by local services, NGOs and the Centre Aid at the Central Railway Station. More details are available at:

http://www.comune.milano.it/wps/portal/ist/it/news/primopiano/tutte_notizie/politiche_sociali/residenza-mi_quattro_nuovi_sportelli.

¹⁸⁰ The Independent (4 January 2019), *Italian mayors rebel against Salvini's laws cracking down on asylum seekers*, available at <https://www.independent.co.uk/news/world/europe/italy-immigration-matteo-salvini-laws-asylum-seekers-mayors-a8711051.html>.

¹⁸¹ Art. 4 del d.lgs 142/2015.

¹⁸² Corriere della Sera (8 January 2019), *Decreto sicurezza, i sindaci (e i governatori) che dicono no*, available at https://www.corriere.it/politica/19_gennaio_08/decreto-sicurezza-mappa-sindaci-governatori-a42d58fe-1329-11e9-bf49-18644da0d07c.shtml

¹⁸³ Corriere della Sera, (Milan, 2 March 2019), *Manifestazione a Milano, People sfilano contro il razzismo: 'Siamo 200mila'. Sala: 'Ecco, questa è la nostra Italia'*, available at: https://milano.corriere.it/19_marzo_02/sfila-people-contro-razzismo-migliaia-slogan-palloncini-28bd9fa0-3ce9-11e9-a007-aa95ee5722e6.shtml.

¹⁸⁴ The initiative has been supported, among others, by *Radicali italiani*, several NGOs and associations, and has collected more than 65,000 signatures in Italy, even though it did not reach the required threshold for the initiative to be carefully examined by the European Commission. See ec.europa.eu/citizens-initiative/public/initiatives/open/details/2018/000001.

¹⁸⁵ Welcoming Europe ECI annex: '*This includes issuing guidance on the need for additional implementing measures, including a clear separation between the powers and remit of labour inspectors, authorities, courts from migration law enforcement, and explicit requirements for police to ensure victims and witnesses of crime can safely report crime and engage in criminal justice mechanisms without facing repercussions for their immigration status. This should also include residence permit schemes to provide victims having an ongoing complaint/criminal procedure with a permit for at least the duration of the procedure, with the possibility of extension and change of permit/status.*'

5.2 Sanctuary Cities in Italy: Is this just a pipe dream?

Following the analysis above and recalling the legal framework governing the organisation of police forces as well as their obligation to report irregular migrants, it is now worth reflecting on the ‘replicability’ of Sanctuary City initiatives in Italy.

‘Firewall practices’ developed at local level encompass a variety of different experiences, including those of the many US municipalities known as ‘Sanctuary Cities’.¹⁸⁶ The term ‘Sanctuary City’ is here used to mostly refer to municipalities that have adopted local ordinances limiting or prohibiting the proactive cooperation of municipal employees (including the local police) with the US Federal Government in the latter’s enforcement of immigration law. Sanctuary policies¹⁸⁷ are usually adopted with municipal ordinances, and they include one or more of the following components: a ‘don’t ask’ component, *i.e.* the prohibition upon municipal employees inquiring about the immigration status of the people they interact with in the exercise of their mandate; a ‘don’t tell’ component, which prevents municipal employees from reporting migrants to immigration enforcement bodies; and a ‘don’t enforce’ component, which limits local police’s ability to arrest or detain someone at the request of immigration enforcement authorities. In addition, some US cities introduced the issuance of Municipal ID cards that do not display any information about the holders’ immigration condition, and are provided to all residents irrespective of migration status. These local ID cards can be used as a proof of identity for accessing municipal services and interacting with the police when reporting a crime.

With this in mind, have the initiatives carried out by the Italian Mayors in opposition to the Salvini Decree opened a window to the possibility of introducing Sanctuary practices in Italy? The opposition to the central government – or, at least, the alternative way of compliance suggested by the Mayors – is similar to the political inspiration which fostered the rise of Sanctuary Cities.¹⁸⁸ There is indeed an actual will to protect vulnerable individuals by allowing access to basic municipal services and fundamental rights. Nevertheless, none of the solutions adopted by the Italian Mayors

¹⁸⁶ R. CUISON VILLAZOR, ‘Sanctuary Cities’ and Local Citizenship, in *Fordham Urban Law Journal*, 2009, Vol. 37 (2), 573-589, available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2338&context=ulj>; C. CARLBERG, *Note: Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, in *The George Washington Law Review*, 2009, Vol. 77, 740–765; E. DE GRAAUW, *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, in *Politics & Society*, 2014, Vol. 42(3), p. 309–330, Thousand Oaks, SAGE Publications, available at <http://www.ilo.org/dyn/migpractice/docs/203/Article.pdf>

¹⁸⁷ For a thorough examination of Sanctuary Policies, see O. F. KITTRIE, (2006) *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, in *Iowa Law Review*, 91, p. 1466-1475; R. CUISON VILLAZOR, (2009) ‘Sanctuary Cities’ and Local Citizenship, in *Fordham Urban Law Journal*, Vol. 37 (2), 573- 589, available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2338&context=ulj>; C. CARLBERG, (2009) *Note: Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, in *The George Washington Law Review*, Vol. 77, 740–765; E. DE GRAAUW, (2014) *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, in *Politics & Society*, Vol. 42(3) 309–330, Thousand Oaks: SAGE Publications, available at <http://www.ilo.org/dyn/migpractice/docs/203/Article.pdf>.

¹⁸⁸ For an historical framework on Sanctuary Policies and their political background, see S. H. PIRIE, (1990) *The Origins of a Political Trial: The Sanctuary Movement and Political Justice*, 2 *Yale J.L. & Human*, available at: <https://digitalcommons.law.yale.edu/yjlh/vol2/iss2/7>; M. KAGAN, *What We Talk About When We Talk About Sanctuary Cities*, in *UC Davis Law Review*, Vol. 52, No. 1, November 2018, Symposium — Immigration Law & Resistance: Ensuring A Nation Of Immigrants, p. 391-406; H. MOTOMURA, *Arguing about Sanctuary*, in *UC Davis Law Review*, Vol. 52, No. 1, November 2018, Symposium — Immigration Law & Resistance: Ensuring A Nation Of Immigrants, p. 435-469; R. CUISON VILLAZOR - P. GULASEKARAM, *The New Sanctuary and Anti-Sanctuary Movements*, in *UC Davis Law Review*, Vol. 52, No. 1, November 2018, Symposium — Immigration Law & Resistance: Ensuring A Nation Of Immigrants, p. 549-569.

is comparable to sanctuary ordinances, nor to the issuance of identification documents for migrant with irregular status.

Concerning the legal feasibility of firewall practices inspired by Sanctuary Cities, there are two main points that make it difficult to replicate those experiences: 1) the lack of distinction between immigration enforcement and police forces, and 2) the duty to report irregular migrants, which binds both police officers and public servants (including, as seen above, Mayors). The discretionary power that Mayors retain over local police can address municipal police forces toward certain areas of enforcement over others, but they cannot limit or prohibit immigration law enforcement. Thus, as long as the articulation of immigration enforcement remains centralised and as long as the obligation to report a crime knows no derogations, Sanctuary City experiences seem to be far from the Italian legal system.

Even though local authorities may not be able to replicate Sanctuary ordinances as intended in the US context, they may still play a crucial role in facilitating access to crime reporting. For example, in relation to the issuance of special permits, the activities of local social services specialised in the field of victims of crimes are of paramount importance for the functioning of the protection tools for such victims. Social services operate within the scope of municipalities, working especially with migrants eligible for the issuance of special permit for special protection reasons or special permits for domestic violence. They operate through a multi-agency approach, which involves several actors, including the local commissions for asylum, the Public Prosecutor, and the *Questore*.¹⁸⁹ One important contribution coincides with the emergence of migrants' victimisation. In order to detect situations of violence against migrants they receive alerts from the territorial commission for asylum, institutional actors,¹⁹⁰ NGOs,¹⁹¹ and individuals.¹⁹² NGOs tend to encourage reporting a crime only when the situation falls within the scope of special permits issuance, whereas they suggest the social path to access the special permits when available. There are also mobile units on the road and indoor interventions that try to verify if there is a situation of exploitation and violence in commercial exercises.¹⁹³ Social services support victims before¹⁹⁴ and all along the social path, which is often very challenging for the victim.¹⁹⁵ The programme involves arranging for an accommodation, initial reception, literacy and classes in Italian. Once the specialised programme is completed, the migrant is put in contact with the local social services that will continue the assistance.

¹⁸⁹ Interview with social services officials, n. 11.

¹⁹⁰ Some of the sources of alert are services of social secretariats and counselling services. Hospitals or police stations often redirect victims to social services immediately after the crime. Interview n. 7 and n. 11.

¹⁹¹ Interview n. 4, legal advisors from NAGA.

¹⁹² Interview n. 11.

¹⁹³ Interview n. 11.

¹⁹⁴ Concerning the programme of social integration provided for in Art. 18 and 18-*bis* CLI, interviewees emphasised that, for the programme to begin, a serious and voluntary commitment on the victim's side is required. So, they tend to solicit the victim to report by him/herself, because they think that the path should begin with an act of emancipation.

¹⁹⁵ The social services usually take away the victim from his/her environment and prevent him/her from keeping in touch with the persons who caused the situation of violence or exploitation. This is not easy since relatives and friends are often involved. Interview n. 11.

Conclusion

Some proposals for enhancing the protection of migrants with irregular status while reporting a crime

The development of Sanctuary City practices (as interpreted in this paper) in Italy seems unlikely, yet other scenarios that might improve the opportunities for migrants with irregular status to access the criminal justice system and report a crime, as those proposed in this section, could be considered. As noticed in the first section, the government's immigration policy is becoming ever more restrictive vis-à-vis irregular migrants. Thus, solutions that improve the situation of victims of crimes with irregular migration status might not be a priority for the current government. Yet, with this in mind, the reforms considered hereafter would be achieved by making small changes to the current legislation. Some of these scenarios require legislative reforms, some others involve local initiatives. The three scenarios here presented – Local Hubs, the extension of special permits, and an exemption from the duty to report – are not mutually exclusive.

The extension of special permits for victims with an irregular migration status

The option of extending the scope of application of the special permits for victims of crimes can appear, at first glance, the most significant reform. In fact, there are several criminal cases in which victims are typically irregular migrants that do not fall within the catalogue of crimes eligible for a special permit. These circumstances create a situation of inequality between migrants and citizens, and also amongst migrants, depending on the criminal offences they have suffered. This solution is certainly the most favourable for victims, who are not only protected during the criminal proceeding, but also integrated in the longer term. Yet, this option seems to be the least likely in the current political context. Moreover, the risk of abusive use of the permits has to be taken into serious consideration, since there is evidence of cases of human traffickers exploiting the permits in order to cover up their crimes.¹⁹⁶ The risk of misleading practices related to the extension of the catalogue of crimes for which a special permit can be issued also emerged in some interviews,¹⁹⁷ even though most of the time migrants are not even aware of the existence of the special permits.

Special exemption from the obligation to report a crime

The analysis of legislation and jurisprudence has clearly highlighted that there might be unequal treatment of migrants with irregular status, depending on the fundamental right they seek to exercise. Concerning the right to health, they are reassured they will not be reported to law enforcement authorities due to their irregular status. This is possible due to the exemption expressly provided for in Art. 35 of the CLI and in Art. 361 CP. By contrast, there are no derogations to the duty to make a report when a migrant with irregular status is seeking to exercise his/her right to defence by reporting a crime he/she has witnessed or suffered. Thus, the rules on the right to health suggest that one solution to the problems faced by victims in accessing protection could also be found in a special exemption to the obligation to report a crime, which would be applicable when the migrant is accessing the criminal justice system to protect his/her right to report a crime and is in need of protection. The reform would be consistent with Art. 2 of the CLI¹⁹⁸ and Art. 24 of the

¹⁹⁶ See Internazionale (11 April 2018), *Scafisti per forza*, available at: <https://www.internazionale.it/video/2018/04/11/scafisti-per-forza>.

¹⁹⁷ Interviews with Ministry of the Interior Official (n. 10); Local Police Officers (n. 16).

¹⁹⁸ Art. 2, par. 1 of CLI states: '*Regardless of his or her presence status, the foreigner at the border or on the State's territory is entitled to the fundamental rights of the human person provided by domestic laws, by international conventions and by the principles of international law generally recognised*', see also L. BUSATTA, (2017) *L'effettività del*

Italian Constitution, which guarantee the right of defence to every person irrespective of migration status. Such an exemption would encourage the reporting of crimes which are difficult to detect and which often remain undiscovered, and thus foster the fight against prevarication of vulnerable individuals. Again, the political context suggests that a modification of the CLI in this way is not likely. Nevertheless, the practices and sensitivity of Police Forces vis-à-vis victims has inclined towards the protection of victimised migrants. Even if police-officers cannot ignore the duty to report those with irregular status, they usually place to one side immigration law enforcement and prioritise the report of the crime that the migrant has suffered or witnessed.

Local Hub for collecting reports: Cultivating synergies between the public and the private sector

Encouraging crime reporting could be based on fostering a public-private partnership to establish Local Hubs which would operate as 'safe harbours' where migrants could report the criminal offences they have suffered or witnessed without fearing of being denounced. Public and private actors would be involved in the hubs. The public sector would be required to take part in the project (e.g. through economic support), as it is in the public interest to ensure respect for the fundamental right of defence. Concerning the private sector, legal professionals are perfectly situated to facilitate interactions with irregular migrants, as attorney-client privilege means they are not obliged to report them. Reports would be drafted by lawyers on behalf of migrant victims, and transmitted directly to the Public Prosecutor, guaranteeing confidentiality regarding the migrant's status. Moreover, in cases of eligibility for a special permit for victims and witnesses of a crime, the Public Prosecutor could promote the administrative proceeding, addressing the request to the *Questore*.

'For everything to change, everything can remain the same': Protecting victims, enhancing constitutional principles, and building awareness

Given that legislative reforms might be unlikely in the current political context, it is worth noting that, even without reforms, improvements could be achieved within the current legal frameworks through a proper usage of the measures already provided by the Italian legislation, an enhancement of existing good practices, and an interpretation of the law consistent with constitutional principles and human rights.

In this regard, it could be argued that, when a migrant reports a crime he/she has suffered, he/she might already be eligible for the issuance of a special residence permit. Even though there is a discretionary power retained by the *Questore* concerning the issuing of the permit, the expectation of the permit could be considered in favour of the migrant. Interviews have suggested that in practice this interpretation has already taken root,¹⁹⁹ but it is probably not sufficiently widespread. Indeed, treating the victim/witness as a regular foreigner is quite common among Police Forces.²⁰⁰ Moreover, residence permits or other documents certifying the legal presence on the State's territory shall not be required anytime it is not strictly necessary, especially when this implies the exercise of a fundamental right like the right of defence. This suggests that dedicated training among public authorities on the special permits could help increase their usage, and ensure homogeneity in their usage across provinces.

By contrast, when migrant victims are not eligible for a special permit, there is no presumption of regularity to invoke, even though it is evident that irregular migrants retain the right to access fundamental rights. Irregular migrants could still be eligible for the issuance of a residence permit

diritto d'accesso alla giustizia per gli stranieri, in *Il diritto in migrazione. Studi sull'integrazione giuridica degli stranieri*, by F. Cortese and G. Pelecani, Trento.

¹⁹⁹ Interview the Ministry of the Interior Official, n. 10.

²⁰⁰ Interviews with: police officers, n. 7 and n. 9; interview with Local Police Officers, n. 16.

for justice reasons, which could be replaced with a special permit where appropriate.²⁰¹ The integrated interpretation of Italian Immigration Law suggests that the Italian legislation is intended to protect victims and witnesses with an irregular status, and that it recognise their right to defence. In light of this, irregular migrants should always be allowed to take part in the criminal proceedings involving them, irrespective of whether they are victims, witnesses or the defendants.

Thus, the Italian legal system, in theory, offers the opportunity to legitimise the permanence of irregular migrants who suffered or witnessed a crime to ensure their protection and prosecute the crime. This is to say that a better and more comprehensive protection is already possible in Italy, even without deep legislative reforms. Yet, for the system to be effective, raising awareness of the system is still very much needed, as well as special training of administrative offices and police forces.

²⁰¹ Art. 11, D.P.R. N. 394 of 1999, *Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286.*

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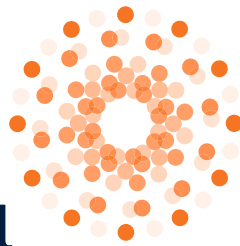
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Interview list

1	Criminal Law Researcher and Lawyer	5 th December 2008
2	Immigration Lawyer	15 th January 2019
3	Criminal Law Professor and Lawyer	23 rd January 2019
4	NGO representatives (a Volunteer and a Lawyer)	24 th January 2019
5	Judge of the Justice of Peace	12 th February 2019
6	Labour and Immigration Lawyer	18 th February 2019
7	Police Officer	23 rd February 2019
8	Police Officer	26 th February 2019
9	Police Officer	26 th February 2019
10	Ministry of the Interior Official	28 th February 2019
11	Social Services Officials (a Psychologist and a Lawyer)	1 st March 2019
12	Police Officer	27 th March 2019
13	Police Officer	28 th March 2019
14	Police Officer	28 th March 2019
15	Local Police Officer	29 th March 2019
16	Local Police Officer	09 th April 2019
17	Public Prosecutor	18 th April 2019



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