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“Gimme Shelter”: The Right to Silence for Silenced Migrant Victims*

“Gimme Shelter”:
 il diritto al silenzio per le vittime migranti silenziate

“Gimme Shelter”:
 el derecho al silencio por las víctimas migrantes silenciadas

SARA BIANCA TAVERRITI

Assegnista di ricerca in diritto penale presso l'Università degli Studi di Milano
 sara.taverriti@unimi.it

IMMIGRATION, PRIVILEGE
 AGAINST SELF-INCRIMINATION
 AND RIGHT TO SILENCE,
 FUNDAMENTAL RIGHTS

IMMIGRAZIONE, DIRITTO
 A NON AUTOINCRIMINARSI E DIRITTO
 AL SILENZIO, DIRITTI FONDAMENTALI

INMIGRACIÓN, DERECHO
 A NO AUTOINCRIMINARSE Y DERECHO
 A GUARDAR SILENCIO, DERECHOS
 FUNDAMENTALES

ABSTRACTS

This paper aims at addressing the issue of access to justice for victims of crimes with an irregular migration status. One of the prominent side effects of punishing irregular migration is the substantial exclusion of these individuals from the circuit of the criminal justice system, as they fear being tried or ordered to leave the country after approaching the police. The article draws on the similarities between the condition of victims with an irregular migration status and the “cruel trilemma” of the defendant forced to choose between maintaining his silence and being held in contempt of court; lying and thereby perjuring, or incriminating himself. Thus, the paper questions whether the *nemo tenetur se detegere* principle can be used to protect these victims. After reviewing a series of remedies and reliefs that somehow protect the right to silence of the migrant victim, the paper shows discriminations that are still affecting these individuals and it proposes to extend the scope of application of this guarantee, originally conceived for the defendant.

L'articolo affronta il tema dell'accesso alla giustizia penale per le vittime di reato con status migratorio irregolare. Uno dei prominenti effetti collaterali derivanti dalla criminalizzazione dell'immigrazione irregolare è la sostanziale esclusione di questi individui dal circuito del sistema giudiziario penale, dal momento che gli stessi temono di essere sottoposti a processo o comunque espulsi dal territorio statale a seguito del contatto con le forze di polizia. Il lavoro prende le mosse dalle somiglianze tra la condizione della vittima migrante irregolare e il c.d. “*cruel trilemma*” che avvince l'indagato/imputato nell'ardua scelta tra tacere, dichiarare il falso alle autorità o autoincriminarsi. L'Autrice si domanda quindi se sia possibile che il principio del *nemo tenetur se detegere* possa essere utilizzato per fornire protezione a queste vittime. Dopo aver preso in considerazione una serie di strumenti (domestici e non) che offrono protezione e rimedio a queste situazioni, anche attraverso la tutela del diritto al silenzio delle vittime, l'articolo propone l'estensione del campo di applicazione di questa garanzia (originariamente concepita in favore dell'indagato/imputato) anche a questi soggetti, in ragione dell'insufficienza dei meccanismi di tutela e delle perduranti discriminazioni gravanti sulle vittime migranti irregolari.

El artículo tiene por objeto la cuestión del acceso a la justicia de las víctimas extranjeras en situación irregular. Uno de los principales efectos colateral de castigar la inmigración irregular es la exclusión sustancial de estas personas del circuito del sistema de justicia penal, ya que temen ser procesadas o expulsadas del territorio tras el contacto con la policía. El artículo se basa en las similitudes entre la condición de las víctimas extranjeras irregulares y el “*cruel trilemma*” del acusado obligado a elegir entre mantener su silencio, cometer perjurio, o declarar contra sí mismo. Se analiza entonces si el principio *nemo tenetur se detegere* puede usarse para proteger a estas víctimas. Después de revisar una serie de instrumentos jurídicos y mecanismos que, de una u otra forma, protegen el derecho al silencio de la víctima migrante, el artículo muestra discriminaciones que aún afectan a estas personas y propone ampliar el ámbito de aplicación de esta garantía, originalmente concebido para el acusado.

“This paper constitutes the extended version of the presentation given at the *X AIDP International Symposium for Young Penalists – Criminal Justice in the Prism of Human Rights*, held at the University of Bologna on 27-28 October 2022, and it builds on previous research conducted within the scope of the international project “*Safe reporting*” of crime for victims and witnesses with irregular migration status in the USA and Europe (August 2018 – October 2019), funded by the University of Oxford and coordinated by the Center on Migration, Policy and Society. Further research on the topic is currently ongoing within the framework of the project *VISA RoC – Victims with Irregular migration Status’ Safe Reporting of Crimes* (JUST-2021-JACC) co-funded by the EU Commission.

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1. Introduction.

Over the last decades, the distance between criminal law and immigration law is somehow blurring as in most countries violations of immigration law are criminally prosecuted or, however, subject to administrative procedures of removal. One of the prominent side effects of punishing irregular migration is the substantial exclusion of these individuals from the circuit of the criminal justice system. In fact, as irregular migrants could be tried or ordered to leave the country after their identification, they are often disinclined to report crimes they have suffered or witnessed because they fear approaching the police. Therefore, part of the population is left not only unprotected but also more exposed to victimisation as these people become the favourite prey of offenders who can rely on the silence of these victims.

This paper addresses the issue of these migrant victims left unprotected taking into consideration the Italian legal system as the main field of observation, and drawing on human rights – and, in particular, the right to access justice for victims of crimes and the ‘right to silence’ and its derivative guarantees – as tools of a possible solution to it.

The paper is articulated as follows. First, it will reframe the issue of migrant victimization (and related crime underreporting) from a criminological and victimological perspective. Subsequently, it will delve into the legislation and practice of the Italian Legal system, analysing rules governing crime reporting and immigration enforcement processes, and their interlinks. Then, we will move to the main suggestion of the article which is the possibility of recognizing protection for victims with an irregular migration status building on the *nemo tenetur se detegere principle*, which is originally conceived to protect the defendant within the scope of the criminal proceeding. Then we will analyse a series of remedies and reliefs provided to this kind of victims that evoke the same *rationale* of the right to remain silent, taking into account not only the Italian legal system but also solutions offered in other countries. Subsequently, we will identify obstacles and limits that made these measures insufficient to protect victims’ right to access the criminal justice system and we will propose a different approach to the problem that suggests further solutions.

2. Silenced migrant victims.

With migration flows becoming an ever-more topical issue in the Western world, irregular migration has significantly drawn the attention of criminal lawyers and criminologists in Europe and North America. Several studies looked at irregular migration under the lens of criminal law, including “cimmigration”¹ studies analyzing irregular migration as a crime in itself (in those countries, as in Italy, where irregular entry or stay is penalized), and the countless studies that tried to confirm or bust the myth that depicts migrants (and particularly those with irregular status²) as more prone than natives to carry out a crime³. In return, the same

¹ Term coined by Juliet P. STUMPF (2006), p. 367 ff.; SKLANSKY (2012), pp. 157 ff.; GARCIA HERNÁNDEZ (2017). On the roots of this tendency see also GARLAND (2001); SIMON (2007). The phenomenon of Cimmigration 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 immigration law enforcement, the criminalisation of rescue operation by NGOs; for a wide perspective on the European state of the art see, GATTA *et al.* (2021), CURI *et al.* (2020).

² Including individuals who have either entered the country without proper authorization, breaching immigration rules (irregular entrants), or who entered in compliance with such laws, but subsequently did not comply with the conditions of their stay (i.e. overstayers: migrants who have stayed in the country beyond the expiration of their visas ‘overstayers’; migrants who have lost their regular status following other events, like divorce, the refusal of an asylum application, the loss of regular employment).

³ On the nexus between immigration and crime rates see BERNAT (2017); JACOB I. STOWELL *et al.* (2009), p. 889; MARTINEZ *et al.* (2010), 797;

level of attention has not been given to the other side of the medal, the one that sees migrants as victims (or witnesses) rather than authors of crimes.

This article aims to fill this gap by focusing on irregular migrants as victims of crime, to analyze how the law may offer victims with irregular migration status an opportunity to report a crime or, conversely, get in these victims' way to interact with law enforcement authorities. In fact, among the various factors that may discourage migrants from reporting crime, criminal and immigration legislation play a determinant role in establishing a nexus between one's immigration status, victimization and inclination to report the crime. Irregular migrant victims' interactions with law enforcement authorities to seek protection may *de facto* be prevented by legislation that prioritizes sanctioning them with deportation (or even criminal charges) over the need of ensuring their protection and access to justice.

2.1.

From 'crimmigration' to 'victimigration'.

Understanding how being a migrant can itself be a source of vulnerability – and, in particular, how having irregular status increases the level of vulnerability – remains largely unexamined. Studies analyzing migrants' victimization tend to be limited to specific national contexts or specific criminal activities, such as trafficking and smuggling of human beings or labour exploitation⁴. Yet, as we shall see, some studies did flag that there is a clear correlation between one's condition as a migrant, particularly if irregular, and an increased vulnerability to victimization to (any kind of) crime. Some studies in victimology gave this issue greater attention and explored the factors making migrants more exposed to crime than nationals.

Ezzat Fattah (1991) sketched a profile of typical migrant victims: often male, young, unmarried, unemployed or day workers; easily recognizable as belonging to a certain minority based on ethnicity; and usually living in suburbs or 'skid-rows'.⁵ In this scenario, migrants are depicted as 'convenient scapegoat[s]'⁶ for society, which does not perceive them as fully-fledged members of the community, with the public being more insensitive and less indignant when the victim is a foreigner, due to lack of empathy⁷. As a result, there are several factors influencing migrants' victimization, including: language and cultural barriers; migrants lacking time and economic support to invest in criminal proceedings; migrants lacking experience and, as minorities, suffering discrimination; lack of knowledge of the legislation of the host country, social isolation, and psychological and cultural barriers which contribute to discouraging interactions with the police⁸.

Irregular migrants may be even more prone to victimization than other foreign nationals. It has been long shown that irregular migrants are strongly deterred from seeking services or reporting crime due to the fear that contacting the authorities would inevitably lead to the detection of their irregular status and, subsequently, their deportation.⁹ Irregular status and the related reluctance to report crimes exacerbate migrants' vulnerability, enhancing the chances that criminals will perpetrate offences against them. Studies in the US found, for example, that Latino migrants have been targeted by robbers because their ethnicity made them 'visually identifiable' to criminals who assumed Latinos would have irregular status, and therefore would not report crimes.¹⁰ According to a study conducted in Italy¹¹ focused on immigrant victims of ordinary crimes, in addition to common factors influencing migrants' victimisation, there are several factors that may further enhance their vulnerability, like: recent

CROCITTI (2014). See SAMPSON (2008), p. 28 ff.; RUMBAUT and EWING (2007). A recent synthesis of the empirical facts on immigration and crime, with a special focus on incarceration FASANI *et al.* (2019).

⁴ FRA, *Severe labour exploitation – Workers moving within or into the European Union* (Publications Office of the EU 2015), in fra.europa.eu, accessed 31 march 2023; FRA, *Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive* (Publications Office of the EU 2021), in fra.europa.eu, accessed 31 march 2023; CHUDŽÍKOVÁ and BARGEROVÁ (2018).

⁵ FATTAH (1991).

⁶ KELSEY (1926), pp. 165 ff.

⁷ VON HENTIG (1948), pp. 414 f.

⁸ See CAPUANO (2011); REINA *et al.*, (2014), pp. 593 ff.; MESSING *et al.* (2015), pp. 328 ff.

⁹ KITTRIE (2006), pp. 1449 ff.; RODRIGUES *et al.* (2018); REINA *et al.* (2014), pp. 593–615; MESSING *et al.* (2015), pp. 328–340; GLEESON (2018), pp. 561 ff.; PICUM, *Guide to the EU victims' directive: advancing access to protection, services and justice for undocumented migrants*, (Brussels 2015) <picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf>.

¹⁰ See DELVINO and GONZÁLEZ BEILFUSS (2021), pp. 1 ss.; BARRANCO and SHIHADEH (2015), pp. 440.

¹¹ See CAPUANO (2011).

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 poor knowledge of the language.

2.2. *Underreporting and the dark figure of crime against migrants.*

Moreover, crime against migrants with irregular status is difficult to measure for a number of reasons: measuring crime rates, in general, is a difficult task and commonly presents challenges in criminology, due both to limitations in research methods and to the general difficulty of capturing the reality of social phenomena like criminality.¹² For irregular migrants, this task is even harder, as estimating accurately their actual number is particularly challenging, due to this group's 'invisibility' to public administrations.

The dark figure of crime against irregular migrants is likely higher than any known figure since a significant number of crimes go unreported (and thus undetected) due to irregular migrants' fear of self-incrimination and deportation.¹³ In addition, cultural gaps might lead foreign victims to disregard criminal action, when they see this as a natural behaviour within their cultural background despite it being a punishable offence in the country where they live. Migrants might also 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.¹⁴

Concerning the situation in Italy, the Italian National Institute of Statistics (ISTAT) produced data on crimes against all foreign nationals, including those regularly or irregularly present in the national territory. According to a 2017 ISTAT report on Criminality, victims were foreign citizens (including non-residents) in one-fifth of crimes reported in Italy, but the percentage was dramatically higher for violent offences than offences against property. Proportionally, foreigners were more exposed to criminal offences than Italians.¹⁵ Previous studies had 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 frequent within the same national group than between different groups¹⁶. According to ISTAT, 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.¹⁷ In addition to common crimes, migrants tend to be victims of specific crimes like hate crimes, xenophobic assault, smuggling, trafficking of human beings and organs, modern slavery, debt bondage, exploitation of begging, and exploitation to commit other crimes.¹⁸

¹² 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 organizations in covering up illegal trafficking, are just some of the factors leading to misrepresentations in statistics based on crime reporting data. 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. See the almost equivalent notion of 'secret deviance' in BECKER (1963); Bureau of Social Science Research (Washington, D.C.) *Report on a Pilot Study in the District of Columbia on Victimization and Attitudes Toward Law Enforcement* (Washington, DC: President's Commission on Law Enforcement and Administration of Justice 1967).

¹³ GUTIERREZ and KIRK (2017), p. 926; REINA *et al.* (2014); MESSING *et al.* (2015); BUCHER *et al.* (2010), pp. 159 ff.; COMINO *et al.* (2020), pp. 1214 ff.; FUSSELL (2011), pp. 593 ff.

¹⁴ 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. 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*, available at www.unhcr.org, p. 9.

¹⁵ ISTAT, (2017) *Delitti, imputati e vittime. Una lettura integrata delle fonti su criminalità e giustizia*, available at www.istat.it.

¹⁶ BARBAGLI and COLOMBO (2009).

¹⁷ ISTAT, (2017) (n 15).

¹⁸ See FRA, Encouraging hate crime reporting. The role of law enforcement and other authorities (Report) 2021; FRA, Protecting migrants in an irregular situation from labour exploitation. Role of the Employers Sanctions Directive (Report) 2021. Amongst EU and international legislation, see Directive 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; 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).

3. Going around a minefield: in search of a safe path for irregular migrants to report a crime.

Now that we have reframed the topic from a criminological and victimological perspective, we have to analyse the issue in practice, considering the Italian legal system as a point of observation.

To get into the topic in practice, it might be useful to question which are the paths for crime reporting available in Italy, for a victim with an irregular migration status seeking to access the criminal justice system, knowing that in the Italian legal system, irregular entry and stay is provided not only as an administrative offence but also as a criminal offence¹⁹. In fact, Italian legislation establishes four different misconducts related to irregular migration punished as criminal offences. The main offences criminalising irregular migrants are detailed in the Consolidated Law on Immigration²⁰. These are ‘irregular entry and stay’ in the State’s territory²¹; the infringement of an order to leave the State’s territory²²; the re-entry into the State’s territory after an administrative expulsion²³; and the re-entry into the State’s territory after a border rejection or expulsion²⁴. In practice, some of these criminal offences coincide with having an irregular migration status as such – this being particularly true for the crime of irregular entry or stay which sanctions people who irregularly entered the territory or overstayed in Italy after their residence permit expired.²⁵

Moreover, all these crimes are prosecutable *ex officio*, and the Italian criminal justice system places a duty to report crimes prosecutable *ex officio* upon all police officers, public officials, and, under certain conditions, doctors. Meaning that every public official (including police officers) has the duty to report crimes they gained knowledge of in the exercise of their function. The violation of the duty to report a crime for public officials is punished by art. 361 and 362 of the Italian Penal Code.

In short, the combined effect of the criminalisation of migrants with an irregular *status* and the duty to report irregular migrants for public officials, including police officers, makes the interaction between migrants and public authority problematic.

Concerning the paths for crime reporting, the victim can report directly to public authorities or through the support of another person (usually a lawyer). Reports by private parties (*denuncia*) can be submitted by whoever has knowledge of an offence (when prosecutable *ex officio*). The report shall be submitted orally or in writing, personally or by means of a proxy, to a Public Prosecutor or a criminal police official. When submitted in writing the report shall be signed by its author or their proxy (Art. 333 CPP²⁶). Conversely, minor crimes, and some

¹⁹ See DI MARTINO *et al.* (2013); MENTASTI (2022), p. 502 ff.

²⁰ Decreto legislativo 25 luglio 1998, n. 286, Testo Unico sull’immigrazione (also Consolidated Law on Immigration, or CLI).

²¹ CLI, Art. 10-bis, punished with a fine ranging from 5.000 euros to 10.000 euros.

²² CLI, Art. 14 (5-ter) punished with a fine ranging from 10.000 to 20.000 euros and (5-quater) punished with a fine ranging from 15.000 to 30.000 euros. In both of these cases, the Italian legislation provides for administrative detention pending expulsion. 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 (Corte cost., sentenza 13 gennaio 2004, n. 5) 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 febbraio 2018 n. 7915).

²³ CLI, Art. 13 (13) and (13-bis) 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.” Nevertheless, the provision does not apply to foreigners already expelled, for whom entry was authorized for family reunification (pursuant to CLI, art. 29). 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.

²⁴ CLI, Art. 10 (2-ter) punished with detention ranging from one to four years and expulsion and (2-quarter) punished with detention ranging from one to five years. These two offences have been recently introduced by the the Decreto Legislativo 4 ottobre 2018, n. 113 (also ‘Salvini Decree’), for a comment see AIMI (2019), pp. 137 ff.; MASERA (2019).

²⁵ According to many Italian scholars, Art. 10-bis of the CLI 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 ummarized in the constitutional reviews analysed by the Constitutional Court in the judgment Corte cost., sentenza 5 Luglio 2010, n. 250; for comments on this judgement see CAPUTO (2010), pp. 1187 ff.; MASERA (2010), p. 1373; VIGANÒ (2010), pp. 13; CAVALIERE (2013), pp. 32 f.; FERRAJOLI (2009), p. 9 ff.; GATTA (2009), p. 1323 ff.

²⁶ Codice di Procedura Penale, DPR 22 Settembre 1988, n. 447 (hereafter CCP).

major offences (for instance, sexual assault or stalking), require a ‘complaint’ (querela) by the victim for the prosecution to be initiated²⁷. 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.

When the victim approaches a police station he/she is immediately identified by police officers – either through ID documents or through database checks. At this moment, the migrant victim is immediately detected as irregularly present on the Italian territory and the criminal proceeding against him/her must start. In a different scenario, he/she could report the crime in writing, through a proxy (for example, a report drafted by a lawyer) preventing direct contact between the migrant with irregular status and public officials. Nevertheless, the identification of the victim and his/her participation in the trial is almost always necessary 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.

With all this in mind, it is easy to understand that irregular migrants’ approaching public authorities in Italy are effectively exposed to the risk of being detected, prosecuted and deported.²⁸

In this scenario, migrant victims are trapped in a deadlock: reporting the crime they have suffered, thus revealing (sooner or later) their condition of irregularity; or keeping silence on the crime suffered and remaining unprotected and exposed to the risk of further victimization.

4. A right to silence for silenced victims?

The situation we have just sketched sounds familiar to criminal lawyers as it reminds us of the so-called “cruel trilemma” of the defendant forced to choose between maintaining silence and being held in contempt of court; lying and thereby perjuring, or incriminating himself²⁹. In that situation, the *nemo tenetur se detegere* principle – no one is bound to incriminate himself – offers a way out of this impossible decision: the defendant can remain silent without fearing contempt or other negative consequences.

4.1. The right to remain silent: essential features.

The right to silence has distant roots that are impossible to summarize in a few lines³⁰ and even though it is not always expressly provided, most criminal justice systems rely on it. An explicit recognition of the right to not be a witness against oneself lies in the Fifth amendment of the US Constitution of 1791³¹, in the International Covenant on Civil and Political Rights, which also provide the right not to be compelled to confession³², in the Inter-American Convention on Human Rights³³ and the Rome Statute of the International Criminal Court³⁴.

The European Court of Human Rights recognised the right to remain silent and the

²⁷ See PECORELLA, (2016); VITARELLI (2020), pp. 474 ff.; TAVERRITI (2017), pp. 503 ff.

²⁸ Just to name two episodes that took place in Italy, see “*Chiami l’ambulanza? Arriva la polizia. Dei migranti chiamano il 118, ma con l’ambulanza arriva la polizia: 18 fogli di via, un rimpatrio*”, in www.osservatoriodiritti.it; “*Irregolare vittima di reato? Ti arrangi. Giovane immigrato senza permesso di soggiorno denuncia l’aggressore e riceve il foglio di via*”, in www.osservatoriodiritti.it

²⁹ Term used by the United State Supreme Court in *Murphy v. Waterfront Comm’n.*, 378 U.S. 52, 55 (1964), GREENAWALT (1981), pp. 39 ff.; for a critical review of the argument see DOLINKO (1986), pp. 1090-1107.

³⁰ See ALSCHULER (1996), pp. 2625 ff.; DOLINKO (1986), pp. 1063; HELMHOLZ (1990), pp. 962; LEVY (1968); REDMAYNE (2007), pp. 209 ff.; CATALANO (2011), pp. 4020 ff.

³¹ «No person [...] shall be compelled in any criminal case to be a witness against himself».

³² See Art. 14, para 3, (g) providing «In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] Not to be compelled to testify against himself or to confess guilt.».

³³ See Art. 8, para 2 (g) «Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [...] g. the right not to be compelled to be a witness against himself or to plead guilty».

³⁴ See Art. 67, para 1(g) «In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence»

privilege against self-incrimination within the scope of art. 6 of the Convention³⁵, although not specifically mentioned as these are «generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6»³⁶. The *rationale* is to fulfil the requirements of a fair trial and to assure the presumption of innocence preventing improper compulsion by the authorities and miscarriages of justice.

EU Law also recognized this right in art. 47 and 48 of the EU Charter of fundamental rights, which together provide for the right to a fair trial, the presumption of innocence and the right of defence³⁷. As usual, in accordance with art. 52 (3) of the EUCHR, these standards are recognized the same meaning and scope as the corresponding guarantees provided by the ECHR, and they are thus interpreted taking into account art. 6 of the ECHR and the related case law. Also, the EU Court of Justice has recently recognised that the right operates even in administrative proceedings which fall within the scope of the *matière pénale*³⁸ when individuals are required to answer questions which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability³⁹. EU also took significant steps to further enhance the protection of the presumption of innocence with the 2016/343 Directive⁴⁰ explicitly providing the right to remain silent and not to incriminate oneself at art. 7⁴¹.

Even though the right to remain silent seems to enjoy a good reputation in most legal experiences around the globe, there are some points to outline about its objective and subjective scope of protection and range of application.

First, the right to remain silent is usually recognised as a guarantee for individuals that are already accused or at least suspected of committing a crime, and it generally applies to criminal proceedings starting from the point at which the suspect is questioned by the police⁴². So, it basically does not apply before the beginning of the police investigation. Moreover, the right to remain silent is not absolute. In fact, the scope of the guarantee does not protect against the making of self-incriminating statements *per se*, but against the risk of obtaining evidence through moral or physical coercion in defiance of the will of the accused⁴³. This situation recurs when the accused person is obliged to testify under the threat of sanctions⁴⁴, when he/she is under physical or psychological pressure to obtain evidence or statements⁴⁵; when authorities try to elicit information using subterfuge even though the accused chose to remain silent⁴⁶.

Moreover, the ECtHR considers the right to remain silent a relative one⁴⁷. So, even though it is not possible to extinguish the very essence of this right, public interest concerns (i.e. in investigation and punishment) can justify – to some extent – a limitation of the right to silence⁴⁸.

All this considered, the victim with irregular migration status approaching authorities to report a crime he/she has suffered is not yet accused or suspected of a crime, but the mere discovery of his/her name might disclose his/her condition, thus incriminating oneself. Nevertheless, he/she could not enjoy the right to silence which is exclusively recognized for the accused/suspected person.

In Italy, the right to silence is recognized as an articulation of the fundamental right of

³⁵ See ASHWORTH (2008), pp. 751 ff.; LAMBERIGTS (2016), pp. 418 ff.; VEAS (2022), pp. 869 ff.; See *Funke v France* (1993) 16 EHRR 297, para 44; *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68; *Murray v United Kingdom* (1996) 22 EHRR 29, para 45; *O'Halloran and Francis v United Kingdom* (2007) 46 EHRR 21, para 45; *Bykov v Russia* App no 4378/02 (EctHR Grand Chamber, 10 March 2009), para 92; *Ibrahim and Others v the United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (EctHR 13 September 2016), para 272).

³⁶ *Murray v United Kingdom* (1996) 22 EHRR 29, para 45.

³⁷ HANCOX (2021), p. 231.

³⁸ See for all MAZZACUVA (2017).

³⁹ Case C-481/19, *DB vs Consob* (GC, 2 February 2021) commented by BASILE (2021); ARANCI (2021). See also the request for a preliminary ruling deriving from the Italian constitutional Court, Corte Cost., 10 maggio 2019, Ord. n. 117 commented by CONFALONIERI (2020); CANESCHI (2020), pp. 579 ff.; FARES (2020), p. 57; LASAGNI (2020), p. 135.

⁴⁰ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11 March 2016

⁴¹ See PIVATY *et al.* (2021), p. 328; PIVATY (2021), p. 427.

⁴² *Murray v United Kingdom* (1996) 22 EHRR 29, para 45.

⁴³ *Ibrahim and Others v the United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (EctHR 13 September 2016), para 267.

⁴⁴ *Saunders v United Kingdom* (1996) 23 EHRR 313, para 68-70.

⁴⁵ *Jalloh v. Germany* [GC], 2006-IX; *Gäfgen v. Germany* [GC], 2010-IV.

⁴⁶ *Allan v. the United Kingdom*, 2002-IX; contrast with *Bykov v. Russia* [GC], 2009, para 101-102).

⁴⁷ ASHWORTH (2008), pp. 760-762; *Murray v United Kingdom* (1996) 22 EHRR 29, para 47; *Ibrahim and Others v the United Kingdom* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (EctHR 13 September 2016), para 269.

⁴⁸ *Saunders v United Kingdom* (1996) 23 EHRR 313, para 67; *Heaney and McGuinness v Ireland* (2000) 33 EHRR 12, para 57.

defence, provided in art. 24 of the Italian Constitution, but it is also connected to art. 27, c. 2 affirming the presumption of innocence, and art. 111 Cost. which sets the standards for due process in the Italian legal system, and art. 13 Cost which enshrined personal liberty is inviolable⁴⁹.

4.2.

Mixed signals from the Italian case law.

In Italy, after the introduction (2009) of art. 10-bis of CLI – which criminalised illegal entry and stay, some of the numerous constitutional reviews submitted to the Constitutional Court regarded the possible conflict between art. 10-bis CLI (and other norms of the CLI) and the fundamental right not to self-incriminate.

To our ends, the most important case⁵⁰ referred to a woman who was required to testify in the trial against her abusive husband, but she refused to attend the examination because she was afraid that the Judge would have denounced her, due to her irregular condition (art. 10-bis), based on the duty to report (art. 331 CP). According to the Judge who submitted the question to the Constitutional Court, the risk of being detected as irregular migrants undermined the right to justice and to a fair trial, as laid down in art. 24 (right of defence) and in art 47 of the EUCFR⁵¹, given the lack of exemptions from the duty to report irregular migrants. The Constitutional Court declared the question inadmissible⁵², but the ruling is noticeable because the Court indirectly claimed 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 states 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 legally reside in Italy even before the issuance of the permit by the Questore.

In another case⁵³, a migrant with irregular status was seeking to receive the payment of his salary and compensation due to an accident at work. The migrant did not appear at the hearing in front of the Labour Court, and his attorney referred that the man feared he would have been denounced by the Judge. The Judge submitted the question to the Constitutional Court in similar terms to those mentioned above. One important difference, in this case, was that the migrant could not have access to the special permit for victims of crimes, because his situation did not meet their requirements. Astonishingly, the question has never been decided (or maybe received) from the Constitutional Court.

5.

Seeking some shelter: safe reporting mechanisms between 'firewalls' and special resident permits.

With all this in mind, we can now consider some measures that have been actually taken in different legal systems⁵⁴ to mitigate victimization and underreporting of people with irregular migration status, which could also be considered as an articulation of the *nemo tenetur se detegere* as there could be: (i) 'firewalls' shielding victims from being identified as "irregular" by authorities responsible for deportation/prosecution, thus protecting their silence; (ii) remedies that provide a regular migration status after crime reporting, thus encouraging victims to speak up.

⁴⁹ For an overview of the right to remain silence in Italy see GREVI (1972); AMODIO (1974), pp. 408 ff.; LUPARIA (2006); MAZZA (2004); PATANÈ (2006); TASSINARI (2012); MARCHESI and PANZAVOLTA (2021), pp. 365.

⁵⁰ Trib. Min. Roma, Ord. N. 84/2010, 30.09.2010, in G.U. n. 21 del 18.5.2011.

⁵¹ Art. 47 EUCFR - *Right to an effective remedy and to a fair trial*: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

⁵² Corte Cost., 11 novembre 2011, Ord. n. 306.

⁵³ Trib. Voghera, 20 novembre 2009, R.G. 91/09 commented by BOZANO and GUARISO (2009), p. 1077.

⁵⁴ See the comparative research conducted with regard to Belgium, Netherlands, Spain, USA and Italy under the guide of the University of Oxford available at <https://www.compas.ox.ac.uk/project/safe-reporting-of-crime-for-victims-and-witnesses-with-irregular-migration-status-in-the-usa-and-europe/>

5.1.

Firewall measures: keeping silence.

Firewalls are measures that aim at keeping separated immigration enforcement activities from public service provision, criminal justice or labour law enforcement, to ensure that migrants with an irregular migration status are not discouraged from accessing essential services and/or reporting crime⁵⁵. Also known as non-cooperation policies, firewalls in the area of crime reporting would prevent the detection of the victim as an irregular migrant or the communication of his/her personal details to other authorities responsible for immigration enforcement. Such firewalls generally operate according to a *'don't ask'* model, when they prohibit or limit the possibility of crime enforcement officers inquiring about the immigration status of the person they are interacting with; a *'don't tell'* model, when they proscribe communicating information about someone's immigration status to immigration enforcement authorities; and/or *'don't enforce'* model, when they prevent the arrest or detention of individuals by criminal enforcement actors solely for a violation of immigration law⁵⁶. The rationale of these measures is to reassure migrants by encouraging them to report crimes they have suffered but also to build trust among police and communities in order to promote the cooperation of civilians in crime prevention.

Non-cooperation policies include a wide range of combinations of practices, encompassing one or more of the components cited above (*don't ask, don't tell, don't enforce*) and are pretty common in the United States, where they are often adopted at the local level (counties, cities and – at times – states) to prevent local police officers from getting involved in immigration law enforcement, which is the responsibility of the federal government (US Department of Homeland security)⁵⁷.

This is also the case of the Netherlands which implemented the 'free in, free out' policy, which allows irregular migrants freely to enter a police station to report a crime and be guaranteed to be able to leave freely, without being arrested or detained⁵⁸. The policy started as a pilot project in Amsterdam, and it was progressively extended to further municipalities (Utrecht and Eindhoven) and finally recognised at the national level as an implementation of the EU Victims' Directive requirements in the Netherlands⁵⁹.

Local initiatives undertaken by some municipalities envisage the issuance of identity documents that do not show the immigration status of the holder. This is the case of San Francisco, New Heaven and New York City's status-blind municipal ID card: a broadly accepted government-issued photo identification, recognized for interacting with the New York Police Department (NYPD)⁶⁰.

Taking a closer look at the Italian legal system, it is evident that it is not possible to replicate firewall measures deployed at the local level. The lack of distinction between immigration enforcement and police forces, and the duty to report irregular migrants, which binds both police officers and public servants make it particularly difficult to replicate in Italy firewall practices structured like those developed in Sanctuary cities in the USA⁶¹.

Something similar to a non-cooperation policy is provided about the obligation to report irregular migrants in the scope of the right to health. In fact, the duty to present a report does not apply to medical doctors when there is a risk of exposing the patient to criminal proceedings (Art. 365, para. 2 IPC). In addition, Art. 35, para. 5 CLI explicitly states that access to healthcare facilities cannot mandate any kind of reporting of migrants. This provision is aimed at reassuring migrants in need of healthcare, so they do not fear being reported or deported for accessing healthcare. The same exemption is not provided for migrants seeking to access the criminal justice system to report a crime they have suffered. Therefore, 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 migrants may need to access to exercise their rights.

⁵⁵ CRÉPEAU and HASTIE (2015), p. 165.

⁵⁶ See extensively DELVINO (2019), pp. 28 ff.; KITTRIE (2006), pp. 1449.

⁵⁷ MEISSNER *et al.* (2013).

⁵⁸ TIMMERMAN *et al.* (2020), p. 427.

⁵⁹ TIMMERMAN *et al.* (2020), p. 438.

⁶⁰ See DE GRAAUW (2014), p. 309.

⁶¹ See TAVERRITI (2019), pp. 32 f.

5.2.

Special resident permits: protecting words.

Another way to defuse the deportation threat dynamic that discourages irregular migrants from reporting crime is providing migrant victims or witnesses with authorization to regularly reside in the state territory after crime reporting. These measures include special visas or residence permits, or the suspension of immigration enforcement. Unlike firewalls, these measures do not ensure the right to remain silent, but instead, provide protection to individuals releasing self-incriminating statements concerning their irregular status.

Italian legislation has introduced special resident permit for victims of certain crimes, showing both legislators' interest in addressing crime underreporting and in filling the justice gap for irregular migrant victims. These special permits offer protection by adopting a multi-agency approach, allowing victims to stay in the country, but also to obtain public support to reintegrate into Italian society. They are usually renewable and/or convertible into permits for work or study reasons, so they offer an encouraging horizon of stabilization. In Italy, special residence permits are provided for: (a) victims of serious crime released for social protection reasons; (b) victims of domestic violence; (c) victims of severe labour exploitation; (d) persons who cooperate in the prevention of terrorist attacks.

Art. 18 of CLI provides a *special permit issued for reasons of social protection to people who have suffered a serious crime perpetrated by a criminal organisation*. This permit is one of the most inspiring examples of tools offered by Italian legislation for the integration and protection of migrant victims, it can be issued for victims of offences within the area of sexual exploitation, including sexual exploitation as such, recruitment for prostitution, and sex trafficking committed both at national and international level. But the permit also applies to a wide range of other serious offences that have in common the provision of mandatory arrest *in flagrante delicto*⁶². Three requirements define the scope of application of the special permit for social protection reasons: 1) the victim must have suffered one of the criminal offences listed in Art. 18 CLI; 2) the situation of violence against a foreigner or his/her serious exploitation has to be ascertained (either during police/judicial operations, or during intervention carried out by the social services); 3) the presence of an actual threat to the migrant's safety consequent to his/her attempts to escape the pressure of a criminal organisation perpetrating the crime⁶³, or in retaliation for the statements given during preliminary investigations or trial.

Art. 18-bis CLI provides a *special permit for victims of domestic violence*. This special permit was introduced in compliance with the Istanbul Convention, with the aim of combating gender-based violence and protecting victims.⁶⁴ The aim of this tool is to protect victims of domestic violence irrespective of their contribution to criminal proceedings. Accordingly, its issuance does not require victims to report the crime. It applies to crimes related to domestic violence⁶⁵, thus including crimes perpetrated even by a single offender. There must be a real and actual danger for the foreigner's safety as a consequence of escaping the violence or due to statements provided during preliminary investigations or trials.

These two special permits show a multi-agency approach focusing on victims' protection and encouragement: in both cases, the victim is also included in a social program of assistance and social integration⁶⁶. Moreover, both permits are accessible through a *judicial path* or a *social path*. The *judicial path* takes place when the criminal offence is known in the context of a criminal proceeding, but it does not require that the migrant submit a report or a complaint for

⁶² Just to name a few of them, the permit can be issued to victims of: modern slavery, crimes related to child prostitution and pornography; tourist initiatives aimed at exploiting child prostitution; illegal labour intermediation and labour exploitation; sexual offences and grooming of minors; crimes of aggravated theft and robbery and serious crimes against the property; crimes concerning weapons, narcotic drugs, mafia-type association aiming at committing other crimes; trafficking of migrants, domestic abuse and stalking, and other. For the full list of crimes, see CPP, Art. 380.

⁶³ 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.

⁶⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence, made in Istanbul, 11.V.2011.

⁶⁵ Namely, art. 572 IPC (abuses in the family), artt. 582, 583, 583-bis CP (providing different kind of personal injuries), art. 605 CP (kidnapping), art. 609-bis CP (sexual violence), art. 612-bis (stalking) or one of the crime listed in art. 380 CPP.

⁶⁶ Social services usually take away the victim from his/her environment and prevent him/her to keep in touch with the persons who caused the situation of violence or exploitation. This is often not easy since relatives and friends are often involved. The programme involves arranging for an accommodation, initial reception, and classes of Italian.

the permit to be released. The *social path* arises from aid interventions carried out by the social services highlighting a situation of violence or severe exploitation against the migrant. Social services, associations and other entities entitled to offer assistance to migrants can promote the issuance of these special permits, and even in this case, the victim is not required to report the crime or to cooperate in the criminal proceeding to receive it. This confirms these permits are conceived as tools of protection rather than as a reward for victims' cooperation.

in compliance with Directive 2009/52/EC⁶⁷, Italy introduced a *special permit for victims of severe labour exploitation*⁶⁸. The main purpose of such permits is to allow the criminal justice system to benefit from the victim's cooperation in the fight against illegal employment and exploitation of migrants with irregular status. There are three basic conditions required for the permit to be issued: 1) a situation of severe labour exploitation; 2) a report submitted by the foreigner; 3) and that he/she takes part in the proceedings against the employer. Unlike the two other special permits analysed above, the permit for severe labour exploitation is at least partially intended to act as a reward as it requires the active cooperation of the victim with prosecutors. Indeed, to obtain the permit a victim must report the crime and cooperate in the trial against the exploiters.

The special permit for investigative reasons was introduced in 2005 as a tool for counter-acting terrorism⁶⁹. 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 operations, investigations or criminal proceedings for crimes of terrorism, the permanence in the State's territory of the person who cooperated becomes necessary.

Despite being considered 'best-practices', these special permits also suffered from limitations and shortcomings. On the one hand, special permits do not cover the whole spectrum of crimes that migrants with irregular status suffer the most (i.e. immigration frauds related to their irregular condition, street crimes perpetrated by one single offender or outside the scope of domestic violence). On the other hand, the successful use of these measures depends on victims' awareness about the existence and the functioning of special permits; but also on the actual presence, within a certain territory, of associations authorized to carry out these initiatives.⁷⁰ In addition, the release of special permits is never automatic, as the public authorities who are responsible for their issuance (the Public Prosecutor and the Police Commissioner) retain wide discretion about it.

6.

Concluding remarks and future directions.

At the end of our analysis, we can now draw some conclusions on the state of the art of the protection of victims with an irregular migration status and suggest some proposals to enhance equal and effective access to justice for this kind of individuals.

This article outlined the condition of vulnerability affecting victims with an irregular migration status that makes them more exposed to victimization and demonstrated that the fear of being detected as 'irregular' and thus being subject to criminal or administrative proceedings that culminate in deportation plays an important role in discouraging crime reporting for these people. Thus, there are victims – with special needs of protection – who are discriminated and substantially denied justice, as they are not able to access the criminal justice system in practice. We have then verified that in Italy there is an actual risk of deportation or prosecution discouraging irregular migrants from reporting crime, precisely deriving from the conjunction of the criminalization of irregular entry or stay, the need for identification of the victim during reporting procedures which easily reveal their condition, and the duty to report irregular migrants with no exceptions for public authorities.

As immigration and public security issues are the monopoly of the central state and are both the responsibility of the same police forces, firewall practices seem unlikely to take place

⁶⁷ Directive 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.

⁶⁸ D. lgs. 16 July 2012, n. 109, 'Attuazione della direttiva 2009/52/CE che introduce norme minime relative a sanzioni e a provvedimenti nei confronti di datori di lavoro che impiegano cittadini di Paesi terzi il cui soggiorno è irregolare'.

⁶⁹ D. L. 27 July 2005, n. 144, Misure urgenti per il contrasto del terrorismo internazionale.

⁷⁰ See DELVINO and SPENCER (2014).

in Italy. Thus, the most suitable action for enhancing equal protection for victims with an irregular status would be a legislative reform at the national level. To this end, comparing the right to healthcare and the right to access justice for the victims, it would be reasonable to introduce a special exemption to the obligation to report irregular migrants applicable to judicial authorities and police forces receiving a criminal report from a migrant seeking protection, irrespective of the crime suffered. Likewise, the potential extension of the scope of application of special permits for victims of crimes ought to be conceived at the national level, considering the wide range of criminal cases whose victims are typically irregular migrants that are still not covered by this form of relief.

Alternatively to legislative reforms, which might be difficult to achieve, there may be some room for the judicial affirmation of the right to remain silent for victims with irregular migration status in order to prevent discrimination in their access to justice.

As we have seen, the condition of migrant victims compelled to reveal their irregular migration status resembles very much to the condition of the defendant at risk of self-incriminating oneself, but limitations in the scope of application (the suspect or the accused person, after the beginning of the proceeding) and in the relativity of the right to remain silent suggest that the *nemo tenetur se detegere* is not *per se* a way out of the issue. The protective measures we have analysed show several similarities with the right to silence and its corollaries, suggesting that the right to remain silent and not incriminate oneself could be a suitable tool of protection. So, it remains to verify if there are other possible way to affirm a general right not to incriminate oneself for the migrant victim when reporting a crime. Hereafter we will sketch some proposal to achieve this objective at different levels, challenging the duty to report irregular migrant for public authorities.

First, according to the principle of primacy of the EU law, it could be argued that public authorities getting in touch with an irregular migrant in the scope of a reporting procedure can disapply on their own motion, and thus infringe the norm providing a duty to report, as it would be in contrast with EU law with direct effect⁷¹. To this end, it is worth noticing that victims' protection has gained greater attention from the EU over the last decade, especially with the adoption of the so-called 'victims directive' Dir. 29/2012⁷², which emphasized the need for victims' protection inside and outside the criminal proceeding, clearly establishing that victims' rights should apply to all victims without discrimination with respect to residence status (Art. 1) and Member States should "take the necessary measures" to ensure that the rights set out in the Directive are not made conditional on the victim's residence status (Recital 10)⁷³. Indeed, obstacles in crime reporting for irregular migrants violate several provisions of the victims' directive regarding information and support, the rights related to the participation of the victim in the proceeding, and the right to receive adequate protection. Thus, combining the right to remain silent deriving from EU legal sources mentioned above, and the victims right laid down in the victims' directive, we can derive the possibility of disapplying the duty to report irregular migrants approaching public authorities to report a crime. Nevertheless, this solution shows some risk of arbitrariness and uneven application when left to the discretion of each public authority involved, thus it could be useful to request a preliminary ruling from the Court of Justice of the EU.

Further perspectives of protection could be achieved through a judicial review of the duty to report irregular migrants deferred to the Constitutional Court. As we have seen, precedent case law did not expressly address the issue of victims' right to silence concerning their irregular status when reporting a crime. So, as the range of applications of the right to remain silent is recently expanding in the view of the Italian constitutional Court⁷⁴, it could be interesting to raise the question in front of the Court to verify if the reasons supporting the right of de-

⁷¹ See essentially the seminal case law Case 106/77, Simmenthal, EU:C:1978:49, Case 103/88, Costanzo, EU:C:1989:256 and subsequent jurisprudence of ECJ. In the Italian doctrine, for all, MANES (2019), pp. 26 ff.; VIGANÒ (2019), p. 481.

⁷² 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, see BARGIS and BELLUTA (2017); LUPARIA (2015).

⁷³ Equal access to justice is functional to the full implementation of the EU Victims Directive in line with the aims and recommendations recently stated in the EU's "Strategy on the rights of victims of crime" (2020-2025), which include a European Commission's commitment to "assess legal and practical tools at EU level to improve reporting of crime and access to support services for migrant victims, independently of their residence status", and recommendations to EU countries to "take actions to ensure that all victims, including migrant victims have access to justice independently of their residence status".

⁷⁴ See, just recently, Corte cost., sent. 6 aprile 2023 (dep. 5 giugno 2023), n. 111, pres. Sciarra, rel. Viganò.

fence of the victim (articulated in the right to report crimes suffered) could be used as a driver of the expansion of the right not to incriminate oneself to any individual (irrespective of his formal condition of accused/suspected of having committed a crime) even before the formal beginning of the proceeding against him/her (thus, in any form of approach of the individual to public authorities).

Finally, the case law of the ECtHR gives some food for thought to suggest wider protection in these situations. As we have seen, if we consider the right to remain silent and not to incriminate oneself taken alone, as recognised according to the interpretation of art. 6 provided by the ECtHR, there is no way to cover the situation of migrant victims of crime with irregular status. Nevertheless, if we consider the whole picture, one could argue that the duty to report irregular migrants even when they are approaching public authorities to report a crime gives rise to serious discrimination in the effective access to justice and related protection for victims of crimes, which make these individuals disinclined to report, and thus more exposed to suffer crimes in the territory of the State. Looking at the issue from this perspective, the duty to report irregular migrants seeking to report a crime, would not only infringe on victims' right of defence (the right of access to a court according to art. 6 of the ECHR), but also the positive obligation (derived from art. 1 of the ECHR) to protect his/her life, physical and psychological well being, and private life (i.e. artt. 2, 3, 8 of the ECHR), which requires domestic authorities to display due diligence in protecting individuals whose life is at risk and take preventive measures⁷⁵. The same considerations apply when we consider that the substantial deprivation of accessing the criminal justice system to report a crime results in the breach of the duty to put in place and apply an adequate legal framework affording protection against acts of violence by private individuals⁷⁶. Besides all, we should consider that the denial of justice deriving from the situation analysed affects only migrants with an irregular status, precisely because of their migration status, resulting in clear contradiction with the prohibition of discrimination established by art. 14 of the Convention.

In the end, the road towards the affirmation of the right to silence for victims of crimes is long and winding, but when we consider reshaping the *nemo tenetur se detegere* to adjust it to this situation, we should also consider balancing the extension of the guarantee with the public interest of the State. Well, on a closer inspection, keeping the duty to report irregular migrants grants the enforcement of immigration law (including its criminal limb), whereas the silence of victims with an irregular status carries the weight of the public interest to protect that single victim, but also to detect and prosecute all the crimes committed on its territory, without exceptions. We should probably reflect on what is our priority and if this can be considered a fair and proportionate balance of interests⁷⁷.

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⁷⁵ See SUDRE, (1995), pp. 363 ff.; MOWBRAY (2004); SCHABAS (2016), pp. 90 ff. and *passim*; in the Italian doctrine see NICOSIA (2006), pp. 255 ff.; PAONESSA (2009); VIGANÒ (2011), pp. 2645 ff.; MANES (2013), pp. 106 ff.; BERNARDI (2020), pp. 129 f.;

⁷⁶ See, for example, *Osman v UK* ECHR 1998-VIII; *L.C.B. v. the United Kingdom*, 9 June 1998, para. 36, Judgments and Decisions 1998-III; *Opuz v. Turkey*, 2009-III, para 128; *Makaratzis v. Greece* [GC], no. 50385/99, para. 57, ECHR 2004-XI; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 71, ECHR 2002-II. *Beganović v. Croatia*, no. 46423/06, §§ 85-86, 25 June 2009.

⁷⁷ See, for all, RECCHIA (2020).

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