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AT THE INTERNATIONAL, NATIONAL AND LOCAL LEVEL”**

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REPORT

**THE PROTECTION OF IMMIGRANT WORKERS
BETWEEN INTERNATIONAL STANDARDS AND LEGISLATION,
POLICY AND PRACTICE
AT THE NATIONAL AND LOCAL LEVEL**

by

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1. Like a preview: the international labour standards

1. Prior to a discussion of the central themes of the present study, it may be advantageous to summarise what is meant by *labour standards* and *core standards*^[2] since it is precisely their effectiveness that this approach aims to assess.

2. International Law contains detailed legislation covering all aspects of employment and labour, legislation which can largely be traced back to the numerous conventions adopted by the ILO. With the existence of all these legislative recommendations has come a necessity to define a much smaller nucleus of minimum *standards* (the *core labour standards*) determined to be a legislative *sine qua non*. The guaranteeist strategic approach aims towards a recognition of this subset of standards as obligatory and seeks to have the minimum standards implemented as widely as possible, but this does not preclude a more protectionist^[3] approach to their implementation on a national level. As proof of a more strategic approach to reaching the goal of worldwide acceptance of, at the very least, the minimum standards, one need only consider the fact that not a single one of the conventions relating to even the *core labour standards* has ever been ratified by all member states of the ILO.^[4]

3. The *core labour standards* refer to four principles considered to be fundamental and irrefutable. Their source is the 1998 ILO Declaration on the Fundamental Principles and Rights of Labour, and they specifically concern: the freedom of association and the right to collective bargaining; the abolition of forced labour; the abolition of any form of child labour and the raising of the minimum working age; the elimination of discrimination.

4. This study will analyse the value and importance of the work carried out by the ILO on the one hand; and on the other, the limited legislative effectiveness by which the ILO is characterised. We will therefore summarise international measures aimed at guaranteeing the *core labour standards* and in particular will, within the limits of a study of this kind, focus our attention on the most recent measure, the UN *global compact* programme, which happens also to be the most transversal. Our study will assess the effectiveness of the diffusion and application of the minimum *standards* of protection with regard to this specific UN programme.

1.1. The limits of international labour law

5. International labour law was defined in order to protect workers against problems arising from competition between States and national economies^[5]: as such, international labour law should not be considered in the same light as the regulations defined by each individual State. Historically, international legislation has been developed contemporary to and in coordination with the development of labour law in many single nations. Consequently, national regulation has been developed – in some cases – at the same time as international standards have been recognised, thus the two systems are frequently closely linked.

6. The encouragement of the international *standards* can be explained in many different ways. Simplifying matters slightly, one can distinguish between three principal reasons for their encouragement: the risk that globalisation without the protection of the labour standards might bring about increased unemployment levels in those countries which recognise and protect the standards; the desire to avoid the over-assertion of protectionist demands; and lastly, the sense of solidarity with workers who provide their services in those countries where labour guarantees do not exist^[6].

7. The first question that must be answered is whether international labour law should be considered a *soft law* or a *hard law*. The latter is more in line with the definition of the term

“legislation”, in that a legislation brings with it certain obligations of substance and procedure, and mechanisms to guarantee its effectiveness. For many authors, the essence of *hard law* lies in its economic sanctions, including fines and, above all, trade restrictions.

Soft law^[7] covers rules of conduct that are not enforced by binding legal obligation, but which, despite the absence of binding obligation, still have legal and practical effects.

8. ILO conventions are the principal source of international labour law and are binding only for those member states that have ratified them. The ILO's main activity is to promote, create peer pressure and provide technical assistance in the implementation of the *standards* laid out in the conventions. If violations occur, the ILO cannot impose economic or financial sanctions. One can therefore consider the ILO to be an organisation based on voluntary adherence. Despite this, one should not forget that this agency is unusual insofar as it possesses supervisory power and considerable means of applying pressure, a fact that makes the ILO a unique guarantor in the field of *international standards law*. The spirit of the ILO is not, then, to impose sanctions, but to spread a culture of recognition of ILO values and to help those values to become deeply rooted in the individual States themselves.

9. From what has been noted, one can deduce that the conventions of international labour law are *soft law*. To support this view, further evidence will need to be provided. The recipients and subjects of international human rights law (under which umbrella labour law is also found) are States themselves. This is perhaps the first limitation of international labour law, since it follows that only States can be held responsible for violations against these laws. There is no scope for individual responsibility^[8], which should instead be covered by laws within each nation^[9].

10. So if the State is subject to regulations, the single individual who breaks the regulations cannot be held accountable. With specific regard to labour law this is an even greater limit, since violations will for the most part be perpetrated by individual employers and companies. Logic would decree that the State that adhered to the international standards would (hierarchically) punish the offending individual, but as is widely known, this is not always the case.

11. Furthermore, if the enforcement of a regulation is brought about by application of sanctions, meaning that the deterrent generated by the prospect of punishment is what intrinsically defines a regulation, then we face a contradictory^[10] situation in the case of labour law. On the one hand, there is no doubt that these regulations qualify as “law” insofar as they protect fundamentally important principles and are created by organisations with legislative power; on the other hand, they are “*soft*” because they have no binding force. Breaking one of these laws does not incur a “classic” punishment or sanction, yet the laws are still capable of producing indirect effects. The only possible sanction lies in the principle of reciprocity as laid out in the ILO constitution's preamble, but this lacks the strength necessary to prevent violations.

12. Despite the limits described, the lack of a binding nature does not deprive *soft law* of all effectiveness, which is arguably the most interesting point, since it creates a theoretical and practical dissonance. The effectiveness and obedience of these regulations is determined by the ethical value recognised in them and by the expectation on behalf of third parties that they will be obeyed and respected^[11]. Furthermore it should be pointed out that there has been a recent emergence of the use of ILO principles in national law proceedings, testimony to which is the fact that even lower level courts^[12] make increasing reference to the Conventions and Recommendations. Nevertheless, the level of application is insufficient and there are still situations in which the regulations are not enforced, an example of which is given by the continued existence of child labour despite the fact that ILO Convention n.182 expressly forbids it^[13].

1.2. Other instruments determining the effectiveness of the core labour standards

13. As stressed above, there is no doubt as to the relevance of the *core labour standards*; the applicative approach used, which relies upon *soft law* measures, is a totally different matter and requires particular attention. The first observation that should be made has to do with the diversity of methods by which the *standards* are promoted^[14], beyond the international regulations laid out by the ILO. One can distinguish among them *hard law* measures, including the social clause^[15].

14. This term describes those regulations covering the core labour standards which States, and consequently businesses, must obey if they are to receive certain benefits brought about by the liberalisation of international trade and if they are to avoid incurring real economic sanctions. This stems from the collaboration between the ILO and the World Trade Organisation (WTO), thus from the collaboration between two organisations operating with different aims: labour legislation in the case of the former, commercial legislation in the case of the latter. This is the only situation that is truly binding upon adherents to labour standards, since it puts economic sanctions in place. To avoid the risk of giving weight solely to the economic interests which appear to prevail in the social clause, one should not overlook the relevance of human rights. Recognition of a more or less positive value in the social clause divides the theoreticians into two groups: neo-classicists and neo-institutionalists. Neo-classical theory, for the most part supported by an economic perspective, holds that there is no interest in placing binding labour legislation into international commercial agreements. Neo-institutional theory, on the other hand, holds that it is essential that the marketplace function by respecting and being bound by labour *standards*^[16].

15. Examples of agreements which introduce a social clause are GATT, ITO, WTO and NAFTA.

One can also bear *International Framework Agreements*^[17] in mind, since these agreements between multinational corporations and trade unions are characterised by the very fact of being half way between *soft* and *hard law*: they are voluntarily entered into by both parties, but are legally binding by nature of being contracts.

16. The majority of measures, however, fall into the category of *soft law*, as does the regulatory activity of the ILO, as already discussed. New measures are added to the traditional ones, and among the new are some created not by the usual *law makers*, such as States, but by entities such as the multinational corporations who will themselves be subject to the measures. This is the context in which private business codes of conduct come into being, codes which should not be confused with internationally defined codes of conduct, of which the OECD is the most influential.

17. Private ethical codes are voluntarily adopted by companies in order to guarantee certain internal labour *standards*. This development of social responsibility happens in response to the increasing demand from the consumer for ethical behaviour on the part of businesses. There is considerable doubt, however, as to the effectiveness of these codes of conduct, precisely because they are voluntary, and because proof of implementation of the codes is difficult to obtain.

18. The OCDE's *Guidelines for Multinational Enterprises* (MNEs) are the foremost example of an international code of conduct, and are recognised as "*good practice for all*", both for multinationals and for national-level businesses. International investments have enormous relevance in the economic world, thus one can argue that multinational enterprises play a deciding role in the adoption of standards, hence the *guidelines* also take on an essential role. The *guidelines* state that each country may determine the conditions by which multinationals must abide in order to operate under the nation's jurisdiction. It must be underlined that the guidelines slot in as a supplementary element below the hierarchy of national law and that they

are not of legal nature, rather they “*provide voluntary principles and standards for responsible business conduct addressed to multinational enterprises themselves*”^[18]. They are therefore a moral, rather than a legal, obligation.

19. To conclude, one should mention the Global Compact^[19] – a measure supported by the United Nations – characterised, as we will see in greater detail below, by the manner in which it brings the private perspective of business codes of conduct closer to the international perspective of the governmental organisations of the UN. The recent creation and rapid spread of this project, and the prospect that it might constitute another path towards guaranteeing the effectiveness of the *core labour standards* make it an interesting case for study.

1.3. United Nations action towards a more inclusive, sustainable global economy

20. The Global Compact was founded in 1999 with the objective of creating a more inclusive, sustainable global economy. Kofi Annan, former secretary of the UN, announced the programme at the World Economic Forum as a means to give citizenship to social responsibility^[20]. As we will see in greater detail, the programme is characterised by the transversality of its subjects, by the themes it covers and by its creation of *networks*. Nevertheless, enterprise is the protagonist and – by means of an increased emphasis on social responsibility – has a duty to contribute to finding solutions to the challenges presented by globalisation; challenges related to the diffusion of rights not closely linked to the interests of the economic market which have until now remained unanswered. In this regard, the existence of a dichotomy between what is covered by international legislation and what is received and put into action by each nation is evident. Thus, this programme operates not only by involving national institutions, as already happens in other projects, but also by putting pressure on businesses to in turn put pressure on governments by refusing to open facilities in nations in which the universally accepted minimum *standards* are not recognised^[21].

21. The encouragement of the programme is achieved by a *network* involving six United Nations agencies: the UN High Commissioner on Human Rights (UNHCHR), the UN Environment programme (UNEP), the International Labour Organization (ILO), the UN Development programme (UNDP), the UN Industrial Development Organization (UNIDO) and the UN Office on Drugs and Crime (UNODC). The involvement of subjects with such diverse activities shows that, although the target is the same as that of other projects, this programme is distinguished by its interdisciplinary approach.

22. The principles on which this programme is based are derived from several Declarations, all of fundamental importance but of different ages. The first two principles are defined in the 1958 Declaration on Human Rights, considered consuetudinary international law. Based on these principles, enterprises are expected to promote and respect universally recognised human rights within their sphere of influence (first principle), and also to ensure that they are not, even indirectly, complicit in abuses of human rights (second principle). The 1998 Declaration by the ILO on the Principles and Fundamental Rights of Labour is similarly called upon; this declaration recognises workers' right to association and collaborative bargaining (third principle), the abolition of forced and obligatory labour in any form (fourth principle), the encouragement of equal opportunities and equality of treatment in employment to eliminate all forms of discrimination (fifth principle), respect of the minimum working age and the abolition of all forms of child labour (sixth principle).

23. Beyond this, the programme also has an environmental scope and calls upon principles from the *United Nations Environment Programme*, taking fundamental elements of the Declaration of Principles and the United Nations International Action Plan on Sustainable Development (Agenda 21) as defined by the UN Conference on the Environment and Development held in Rio de Janeiro between the 3rd and 14th June 1992. Chapter 30 of Agenda 21 describes the idea that trade and the entrepreneurial world should both carry out a

fundamental role in safeguarding natural resources and the environment by means of a preventative approach to environmental challenges (seventh principle), developing initiatives to encourage environmental responsibility (eighth principle), fostering the development of technologies that respect the environment (ninth principle). Lastly, in 2004, a tenth and final principle was included concerning the fight against corruption of any kind, including extortion and bribery.

24. The activity of the programme exploits businesses' ethics, but does not put in place any obligations. Since adherence to the programme is absolutely voluntary, its integrity is guaranteed by an obligation upon businesses to communicate annually what progress has been made, even if the sanction for not following the principles and not meeting objectives is simply to be struck from the programme's lists. It is easy to understand how limiting the lack of deterrent sanctions against violations might be.

25. But aside from the (significant) limitations of the programme, an analysis of the annual monitoring reports submitted by participating companies is an interesting exercise. First, one can make certain considerations about the different focus of the companies based on where their facilities are located. In European locations, attention is shifted more towards environmental protection, while in developing countries, more time is spent on the affirmation of human rights. Global Compact has managed to gain 3800 members and 80 national *networks* in a few short years, and this result can be considered a very successful start.

1.3.1. The effectiveness of the United Nations in labour issues: a practical example.

26. The results obtained by the Global Compact are presented annually in regional reports. For the scope of this study it may be interesting to analyse a specific case study from the programme, since this will allow us to gauge the effectiveness of labour law from different viewpoints: corporate, state and international community.

27. The *network* we have chosen is one from the African continent, specifically covering South Africa[22].

South Africa allows us to consider labour law as it is understood in the industrialised world, since the nation has ratified many Declarations and regulations for minimum *standards* of protection; yet at the same time the nation is still part of the African continent, with all its inherent difficulties in effectively being able to guarantee these minimum *standards*.

Labour law in South Africa now contains regulation[23] of the right to association and collective bargaining, a right that didn't exist in the country during the period of *apartheid*, even if it transpires that there is considerable distance between the regulations and the real situation on the ground.

28. National legislation[24] has managed to abolish child labour under the age of 15. Despite the legislation, however, the 2008 report of the *International Programme on the Elimination of Child Labour* shows that 12.5% of children in urban areas either work or work and study, while the percentage leaps to 35.2% in rural areas[25]. These figures are a long way from an abolition of child labour. According to the statistics, 65% of child labour is rural/agricultural, 16% industrial and the remaining 31.6% in service industries.

29. Equally, measures relating to equal opportunities and treatment in the workplace, outlawing any kind of discrimination, are well-described. But again, the statistics are far from promising, and in fact the picture that emerges is one of a country that has suffered a regression in the last three years: from 2008 *World Economic Forum*[26] data it appears that 26.6% of women are unemployed, with only 46% employed in paid, non-agricultural work. Furthermore, the salaries earned by women are 50% lower than those earned by their male counterparts.

30. From the examples given of female and child labour, one can ascertain that action taken by multinationals has limited success in resolving the problem, since the problem really starts in small companies, requiring government involvement with the aid of international organisations, above all in terms of increasing awareness of the issues at stake.

31. Clearly, in a situation like this, the role of the Global Compact in encouraging human rights and labour standards could prove essential, which could be reflected in the whole continent, since many industries are spread across several nations (so-called transnationals or multinationals). This would result in the creation of long-lasting *best practices* which could spread their roots to rural areas. Furthermore, the programme could create further synergy for improving existing conditions by virtue of the fact that it is involving governments in its processes.

32. A study carried out by Cape Town University^[27] is a good example of this: the study analysed the problems which a multinational petrochemical company faced in trying to adhere fully with the Global Compact programme. The study analysed the significance of the ten principles from a critical perspective with respect to the multinational company.

33. The first relevant question concerned the defining of “internationally recognised human rights” for the company in question, and the possibility of identifying behaviour that could be complicit to abuses of those rights. If on the one hand governments have principal responsibility in supporting human rights, on the other, the 1948 Declaration of Human Rights places “every individual and organ of society” under obligation. It follows naturally that one might wonder what is the nature of multinationals’ responsibility, in the sense that they are bound by the laws of the country in which their facilities are located and need only make reference to these, thus there is only an ethical obligation towards respecting minimum labour *standards* if no national legal regulations exist in the country where the facilities are located. A further question follows as to the need for a company to balance the cultural or legislative prerogatives of the country in which the company is based, with those of the international community. In the specific case covered by the study, the company adopted an ethical code marked by a very restrictive set of limits for the opening of facilities in countries, thus limiting the risk of being considered complicit to any abuse of rights^[28].

1.4. Conclusions

34. The points raised in this analysis demonstrate the already widely-known limits in the application of the *core labour standards*. The voluntary nature of the implementation, left as it is more or less up either to Nations – which can use the ratification and enforcing of Conventions, or international agreements that take the *standards* into account and provide punitive measures – or to corporations – which can adopt codes of conduct or make agreements with trade unions - shows its limits in the equally voluntary nature of these measures. Even the most recent UN programmes follow this same logic, relying on the same mechanisms of encouragement or ethical respect. Thus the conclusion that one can draw is contradictory: to the voluntary nature of the application of the standards (even assuming that the application is determined by national-level regulations) we must add the fact that there is hardly any real measure of their actual application. In a global context it might be useful to knock down the frontiers of legal systems and oversee the enforcement and cogency of standards on an international and internationally-punitive level, but even this might not be enough, since it might not make the standards become firmly rooted in each nation’s culture. This cultural rooting alone would be the only way for the core labour standards to be recognised as essential and inviolable.

Work, Citizenship, Immigration

35. The world of work and the economy cannot be separated from a global context, in particular from a European context. In the face of economic globalization, there must be a response that defends basic human rights. By this we mean to say that while the free circulation of goods is an established fact, most institutions are finding themselves in front of a situation that deals with the "elimination of borders" with regard to the use and abuse of rights and people without sharing a common approach or ideology in these situations. This is the reason for this discussion which seeks to create a definition of citizenship in the light of the constantly shifting and changing borders. Over the years, the idea of a "European Citizen" has become recognized with the elimination of economic and monetary borders. With a stronger sense of a European identity, a new perspective has evolved which retains that immigration is involving people from outside of the 27 European Union (EU) member states.

36. In particular, these people are allowed access to free circulation and stay, as well as professional mobility. This was possible only after the elimination of borders for the marketing of goods and in hindsight we see that it has served to highlight the importance of recognizing the dignity of the individual. What limits is that dignity subjected to since it is still not granted to those who are considered foreigners because they come from non-EU countries?

37. Italy itself gave a new definition to the word 'foreigner' as a people arriving from outside of the local culture not so long ago.

38. Therefore, the information presented should lead to an analysis of the immigrant labor worker from two different perspectives: the perspective of the EU citizen and the perspective of the Non-EU citizen, appealing to a *descrimen* based on geographic origin. This represents progress as previously all immigration was the responsibility of the legislative powers of each State and no differentiation was made at all [29]. It must be recognized, instead, that there is a distinction that exists and that should bring with it a particular sensitivity to the new "poor, huddled masses", those who find themselves at a disadvantage due to the situation in their place of birth.

2.1. EU Citizens

39. To talk about EU workers the laws set forth in the Treaty on European Union (henceforth TEU) must be referenced. In addition, that treaty was created to symbolically represent the need to eliminate borders between Union states.

40. It is necessary to remember article 39 TEU that specifically regards workers and that must ensure their right to freely circulate within the EU. It gaurantees the absence of any discrimination based on nationality among workers of member States for employment, payment and other working conditions, except for those which may be justified for reasons of public order, safety and health. Therefore, the EU citizen is guaranteed the possibility to: a) respond to job offers made, b) move freely within the Union territory in order to do the aforementioned, c) obtain housing in one of the member States in order to perform a job in accordance with the legislative, regulatory and administrative provisions that govern the employment of national workers, d) to stay in a member State after having performed a job, under conditions that will establish the object of application regulations set forth by the Commission. At the end of the article, in the last paragraph, it is specified that those orders are not applicable to positions in public administration.

41. Reading this legislation it is easy to see that in regards to labor practices the European Union does not have borders that mark each State. It must also be added that those

regulations must then be considered together with every local reality and in the context of the laws of each country. The analysis of Union workers therefore involves the use of the traditional categories, and by that we mean: dependant employees, and self-employed workers.

2.1.1. The Dependant Workers

42. The right to freely circulate has had important consequences in each member State in the work world from an economic perspective as well as in the procedures which govern the stay of the member State citizen.

43. The subject in question is regulated by the 2004/38/CE Directive that brought all of the legislation governing the right of entry and stay of EU citizens together under one act, considering the ruling of the Justice Court as well. In Italy the directive was applied with the legislative decree of 6 February, 2007, no. 30.

44. That legislative decree states that the citizen of a member State may stay in Italy for more than three months with only an Identity Card and without any document of stay (from article 6). In addition, article 7 states that a stay for more than three months is possible when certain conditions have been met: the person is a dependant or self-employed worker; has sufficient economic resources for him/herself and his/her family; is staying in the country to study; is a family member of someone who meets the aforementioned conditions. In this case, the person must register with the Registry office in the municipality of residence. In accordance with what was set forth by the Justice Court, the aforementioned procedure is not an authorization but a declaration that attests to a pre-existing right and in fact, is not referred to as a "permit of stay" but a "certificate of registration with the Registry office of the municipality of residence" that is immediately issued upon presentation of: I.D. card or valid passport and a declaration by the citizen confirming the conditions set forth in art. 7 [\[30\]](#).

45. A reading of the legislative decree clearly shows how the reasoning behind the law (with the exclusion of the law's extension to family members) is closely linked to working conditions and aimed at fulfilling article 39 TEU which states: "any citizen of a member State has the right to work in another member State". So, while the law emphasizes the value and dignity of people, it is also coming from motivations which favor economic advantages and growth of businesses in the States by making a greater pool of manual workers and brain power more easily available.

2.1.2. The Self-employed Workers

46. Article 39 TEU also applies to self-employed workers. In this context there are another two fundamental freedoms that emerge in addition to the ever important guarantee of free circulation of the worker and they are: freedom of workplace and freedom to deliver services. The first is ordered by article 43 TEU, according to which restrictions on the freedom of EU citizens to establish a workplace in the territory of a member State are prohibited [\[31\]](#). That prohibition also extends to restrictions related to the opening of agencies, affiliates or branches by a citizen of a member State set up in the territory of a member State. Furthermore, it guarantees access to non-wage earning businesses and their business activities as well as the creation and management of businesses and, particularly, companies as provided for in article 48 TEU, second paragraph, and therefore respecting the conditions outlined in the legislation of the country of establishment regarding its own citizens.

47. Freedom to deliver services is confirmed in Article 49 TEU which prohibits any restriction within the Union regarding citizens of member States set up in a member Country that is not the same as the state of service performance.

48. These articles have indirect consequences that may be seen in the situation of dependant workers as they create a lack of distinction with respect to which laws will be applied to immigrant workers who may find themselves precarious and subjected to either national laws of the legal headquarters of the business or those of the country where the services are provided. It must be added that this has significant consequences for the ways that workers may make their demands and so also in expressions of collective bargaining. To better understand this, there is the example of the ruling of the European Justice Court in *Viking* [32] and *Laval* [33].

2.1.3. The CGCE decisions on Viking and Laval

49. In the above cited cases, the Court spoke on rights recognized for workers in the case of solidarity strikes and reflection on economic and labor rights.

50. The *Laval* case stands out because it is legitimate and recognizes solidarity strikes to be among the basic rights of workers, while in the *Viking* case the Court seems to require that the primary industrial action be recognized as legitimate and be considered a direct threat to working conditions. These arguments have different consequences in different areas, according to the ordinance one refers to. As for the situation in Italy, it is very different from most others since substantial guarantees are given to striking which provide that no restrictions for either solidarity strikes or those strikes regarding company relocation are set forth. In addition, there is an absence of any type of judicial control in this area. The material regarding wages in the *Laval* ruling causes one to reflect upon the minimum amount of pay established in the union contracts and respecting article 36 of the Constitution. It is the reason that Italian judges have well defined parameters regarding minimum wages to reference. As for the second argument, the Justice Court, it speaks to the idea of having a balance between social rights and economic liberties, thereby articulating the principles that judges of each single member State must adhere to in evaluating the legitimacy of the actions of workers and labor unions with respect to EU law as there does not exist a European agreement as to what factors need to be considered in balancing rights in these matters. From the aforementioned rulings it is evident that protection is given not so much to the rights of European Union citizens as to the economic interests of each single nation State. The right to strike is limited by normal living standards of each person and economic interests. This intervention places itself as an indirect source of national decision making and creates problematic situations in all of the countries where there is already an imbalance in favor of social rights and not of fundamental liberties, as occurs in Italy, Germany and Spain.

In fact, it is an unfinished game whose final results will be only be seen in years to come.

2.2. Non-EU Citizens

51. Those who come from countries outside of the European Union are not only subject to specific laws regarding them, but also to more restrictive treatment. The only intervention by lawmakers to give our country a comprehensive law [34] regarding the conditions of foreigners and immigration is a single text issued as d.lgs. 25 July, 1998 no. 286 which brought together and coordinated the laws regarding this matter. The legal analysis of the Single Text and its amendments is preceded by several paragraphs.

3. The constitutional perspective

52. It is time to introduce the constitutional principles immanent to "labor" in a unified way with regards to immigrants, effectively defined as "producers" [35]; principles which have been legally implemented.

53. On this topic, law no. 943/1986 had already foreseen two guarantees set aside for immigrant workers who are legal residents: 1) equal treatment, or better, prohibition of

discrimination caused by the presence of a socially typical situation, 2) complete equality of rights just as with Italian workers, a "formal" equality in front of the law.

54. The right to work as in article 4, for example, does not apply to the aforementioned extension in the case of foreign citizens unless there is an intervention made regarding this point by a lawmaker. And this applies especially if the principle is not in line with that which is set forth in article 4 of the Constitution (right to work) and the universal principle stated in article 2 (principle of social solidarity), or rather, to those person-centered principles referenced in the aforementioned legislation[36]. The right to private economic initiatives as in article 41 of the Constitution (and we may also add property rights to this) is different, however; recognized by law no. 39/1990 wherein self-employment of the immigrant worker is regulated.

55. As for the principle of freedom of Labor Union organization as set forth in article 39, paragraph 1 of the Constitution, it seems that no discrimination is enforceable; and this is valid also for the right to strike as it is also considered part of Labor Union freedoms and principles and available for immediate use [37].

56. A question may be asked regarding the legitimacy of statutory clauses of Labor Union members who request Italian citizenship to register with the Labor Union, that is, in the reverse order; the obvious response is that it is not possible based on the legislation set forth not only in article 39 of the Constitution, but also of what is stated in article 31 *disp. prel* (disposition effective prior to constitution) the second perspective must be denied for the aforementioned principles of full equality and equality of treatment, unless the subject falls under, perhaps, article 18 of the Constitution.

57. As for the related topic of rights to assistance and social security, these elements are fundamental in a judicial system that is socially evolved. The right to safeguarding and social welfare as laid out in article 38 of the Constitution, as is known, regards only citizens. The principle set forth in article 38, paragraph 2 - but not only, can be considered to extend to non-citizens thanks to the principle of a common EU territory. The expression "workers" is to be understood with reference to article 35 of the Constitution which sets forth a law that does not make distinctions based on citizenship; the Constitutional Court held that the right to social welfare is due to workers as such. The case of medical assistance is yet another, distinct question. As provided for in article 32 of the Constitution, confirmed by law no. 33/1980, the foreign worker has a legal right to medical care, considering related costs which may be covered by the Consulate. But care is currently divided for legal and illegal foreigners: for the former, medical care is guaranteed just as with Italian citizens, through voluntary registration and payment of taxes and occurs automatically with the implementation of a dependant work contract. Moreover, care is also extended to foreigners who have presented a request for a permit of stay or who are registered on the placement list. The important thing is, and will continue to be, that the level of care not become "unchangeable" in only an upward direction and so in contrast with the current, fundamental principle of equality as stated in article 3 of the Constitution.

3.1. Immigration as an economic resource

58. It appears that the not-so-obvious opinion that immigration is primarily a positive resource for businesses, demographics, the pension system and for the idea of multiculturalism which, when we think about it, is a much needed element, is growing in popularity. Even so, seen from the other side, the arrivals of illegal immigrants usually with increased numbers in the summer period, have seemed so frequent and numerous that they have created a sort of dread that in the Mediterranean basin alone the numbers could reach into the millions of immigrants. This may be seen as an "invasion" of sorts. In the face of this real or imagined situation, we must ask ourselves if the at times hoped for closure of the "European fortress" with uncrossable borders encompassing developed countries is really a rational and effective response even

before we stop to consider if it is ethically just. Upon examination it is clear that this approach is costly and ineffective [38].

59. Along with that first, unsound response, came the idea that the long-term solution was to create rapid economic growth in the countries where the immigrants were coming from in order to support development with international aid policies and by eliminating unjustified protectionisms.

60. It stands to reason that according to the ideas received, the law in general and labor law in particular intervene in different ways. It may be that the jurist risks becoming a sociologist or even philosopher, but he or she must consider how immigration and labor law are part of a circular process that rotates around the central idea of citizenship [39]. Immigration is like this, a preliminary test of social inclusion, a litmus test for the policies of labor law [40].

61. In light of all this, some criticisms can be made in particular regarding one of the amendments to the Single Text of 1998, which was put in place with the Bossi-Fini law. This amendment is not sensitive to the dynamics of supply and demand, even with the great demand by Italian businesses to provide more labor and the willingness on the part of foreign workers to supply that demand. The system put in place by that reform appears to be extremely rigid as it imposes the c.d. "contract of stay" that must be drawn up for a person who is abroad and does not allow any alternative form of entry into the labor market. That rigidity may have served to increase illegal entry and decrease actions against it[41]. The most recent and latest modifications will be analyzed in the following paragraphs.

3.2. Work, religion and culture

62. Article 43 of the Single Text states that any behaviour that discriminates on the basis of race, color, ancestry, nationality or ethnicity, religious conditions and practices or that is aimed at or has the effect of destroying or compromising recognition, enjoyment or activity under conditions of equality of human rights and with regard to essential political, economic, social or cultural freedoms and any other area of public life is prohibited. By discrimination we mean any behaviour that poses less advantageous conditions or refuses to give access to the occupation of the foreigner who is legally staying in the country, or impedes legitimate economic activities undertaken.

63. The legislation regarding equal treatment not only relates to dependant work, but also to the opportunity to be self-employed. We must not forget the important role that immigration may have in opening new business activities. This topic goes together with the idea of national economic development. Actually, while it is true that we could focus on the possible displacement of Italian businesses by ethnic businesses, we must also recognize the possibility that an immigrant entrepreneur need not only fulfill the role of specialization in sectors of lesser value in addition to and yet distinct from businesses of low profile, but may become an entrepreneur and be able to contribute with his/her skills to the development of business initiatives in diverse and innovative fields thereby offering important economic and intellectual contributions in new sectors not yet discovered in our country[42].

64. With the entrepreneurial phenomenon, the difficulty in recognizing cultures tied to religions that are different from our own is understandable, as is the difficulty to understand those that traditionally turn to methods of financing unknown to us. Their extension to and interaction with the Western world may seem difficult at first, but it is not impossible. In fact, England serves as a model example of integration in this sense as well and shows the possibility to apply types of financing in the Western world which are not native to its system. In the view of this author, an attitude of this nature is to be interpreted as a sense of respect of the traditions of others and a way to enrich through the recognition of new financing solutions [43].

65. Think about holidays, as well. In every country the protection of religious freedom is upheld by the relationship between the separation of church and state and the equal treatment of all citizens. In our laws, holidays and days off are related to: Catholic holidays, dates of national historic importance and periods to recuperate one's energy. Even so, the traditional correspondence of state recognized religious holidays connected to Catholicism has not shut out the recognition of some holidays of other minority faiths. They are not recognized by the state but recognition is made available to the followers of that religion by giving them the right to observe their holidays; this is provided for by the application of specific international agreements. Taking the holiday in this case is subject to certain conditions: 1) the absence be requested by the interested member; 2) the holiday be arranged within the limits of flexibility of the working organization and all the essential services considered; 3) the hours missed must be made up. In this way a co-existence of religious needs and production needs may be found. In conclusion, it is evident that the possibility for workers to take holidays according to those set forth in their religious beliefs exists, but it is dependent upon the will of the parties involved. Some labor union contracts have agreed to giving preferential treatment to those requests related to religious needs[44].

4. The legal sources on immigration in Italy

4.1.A brief history

66. In the ancient world every right was denied to foreigners, as they were considered enemies.

The denial of every right to foreigners was a cornerstone in civil law for the Romans, so much so that it remained until the last years of the empire. Foreigners not only had no rights, but anything that they possessed was considered *res nullius* and could become the property of any other person at any time. In addition, any deal concluded between a foreigner and a Roman citizen was not recognized by the law.

67. Following this period, when the Italian Republic was formed, the conditions for foreigners did not improve much. They continued to be restricted by many limitations. However, we must remember that in certain statutes the principle of reciprocity ruled.

It was only with the French revolution that, for the first time, that entitlement to intrinsic human rights was recognized and that concept was introduced as the right to reciprocity in the Napoleonic Code.

68. In the period following the Unification of Italy, it was necessary to simplify the right to be and stay in Italy for citizens who were not Italian but who came from territories that could have become Italian, and diminish the presence of foreigners to help fortify a sense of belonging in the nascent State. With the first version of the Civil Code of 1865 there is notable progress towards legal principles that recognize the person subject to the laws as a person and not a citizen [45].

69. The Italian nation was the first to insert in its Civil Code an article (article 3), which ratified the idea that "the foreigner shall be allowed to enjoy the same civil rights given to citizens".

The right to stay then was granted to all foreigners who requested it, with the possibility to deny it to those who were considered a danger to the State. It was in these years that the first steps towards a greater safeguarding of the rights of foreigners were taken on international levels, as well.

70. In fact, the Institute of International Rights, affirmed the legal ability of foreigners and their allowance to enjoy civil rights regardless of any international stipulation or condition of

reciprocity in 1874. Following this, in 1880 it reaffirmed the equality of foreigners with citizens.

4.2. After the Constitution

71. Legislation after the enactment of the Constitution was aimed at the idea of "freedom of immigration".

72. A key point for the legislation on this matter was sanctioned by article 10 of the Constitution which obliges the Italian judicial order to conform to the international laws generally recognized and especially, in paragraph 2, affirms that the legal condition of foreigners is regulated by law conforming to those laws set forth in international treaties and therefore casting in doubt the standard procedure of judging the matter according to simple regulations^[46].

73. With the d.lgs (Italian law) from the 15 April, 1948, no. 381, regional and provincial offices were given the task of examining the applications for emigration for employment purposes, and of sending emigrant workers to gathering and assistance centers.

74. The organization of government commissions was entrusted to the Ministry of Foreign affairs, and the scope of tasks of the general management of emigration was widened. The consultant Committee of Italians abroad was formed to better understand their problems and make services available for their well-being and assistance. In the 1960s the interministerial Committee on Emigration was formed with the task of coordinating interventions in the field of emigration (d.p.r. no. 18/1967, amended by law no. 1221/1971), and passport issuance became free for emigration, with notable liberalization (laws no. 253/1959 and 1185/1967).

4.3. The law n. 943/1986 and others

75. With the law of 30 December, 1986, foreign immigration was primarily regulated with the implementation of the international convention of the International Labor Organization of 24 June, 1975, no. 143, amended by the law of 10 April, 1981 no. 158.

76. Access to employment is regulated on a case by case basis, with regards to employment availability, which is dependant upon prior confirmation that Italian and EU workers with professional qualifications required for the position are not to be found.

77. Following this, there is law 39 of 1990, the Martelli law, which represents a turning point. The government realizes that this immigration is not just transitory and therefore requires more complete and comprehensive legislation.

78. Among the more important changes is the right and recognition of a refugee status ^[47], and entry into Italy is regulated and defined for non-EU citizens for any reason, not just limited to employment stays but also tourism, study, dependent or self-employed work, healthcare, family, and religious purposes. The idea of flow and planning for entry into Italy for reasons of employment of non-EU citizens (art. 2, paragraph 3), a filter system is set up to regulate entry - the first directly at the border and the second through the police headquarters of the place of stay where it is decided whether or not to issue a permit of stay depending on the reason for entry into Italy and then determining the length of stay.

79. The 1995 Dini law sought to make the numerous illegal positions legal by substituting the idea of "immigration amnesty" with the idea of "legalization", the introduction of quotas for the entry of seasonal workers and different expulsion policies.

The Turco-Napolitano law 40 of 1998 is the first comprehensive law on the topic of immigration and is right in line with the Single Text that is still in effect. It lays out three objectives:

- Fight against illegal immigration and criminal exploitation of immigrant populations
- Realization of a carefully planned policy of limited legal, planned and regulated entries
- Begin methods of integration for new legal immigrants and foreigners already legally staying in Italy.

80. A restriction regarding entry into Italy and, for legal foreigners, many more possibilities for integration and recognition of basic rights. The law sets forth:

- ways of entry and forms of border control;
- regulation of access to employment;
- the regulation of self-employment and seasonal work;
- the most effective ways to turn away subjects at the border and to expel subjects from the country;
- criminal and proceedings laws aimed at combating the criminal organizations that manage illegal immigration;
- guarantees for the legal immigrant to be able to pass from a temporary condition to a more stable one through the use of new tools such as the residence card; to have the right to take care of one's family or create a new one, defended; to obtain recognition of citizenship rights such as the right to health, education, social services, representation and the right to vote.

81. The following law no. 189 of 2002, called the Bossi-Fini law, represented a complete revision of Italian legislation regarding foreigners and the modification of the Single Text in several areas:

82. - the introduction of a contract of stay as something that justifies entry and stay in the country by a foreigner who is there to perform employment activities at the time of stay. In the contract, provisions are made for accommodations, and the payment of expenses necessary for the definitive return to the foreigner's country of birth (art. 6).

- worsening of systems to combat exploitation of illegal immigration.
- The introduction of a new Organization, the Singular desk, purposefully set up through the prefecture of the Ufficio Territoriale del Governo (local government offices) , in an attempt to reduce bureaucratic actions necessary for entry in employment and recognition of family members (art. 18).
- The length of the permit of stay for work commensurate with the length of the related contract of stay for the job.
- The removal of the sponsor institution and the introduction of a legal disposition that favors foreigners who have completed an educational course in their country of origin, based on professional skills programs approved by Italian public administrations (art. 19).
- Revision of the laws and standard procedures for family reunification, in particular, eliminating the possibility for the foreigner to use the family reunification argument for relatives up to the third degree of kinship (art. 23 and 24).
- The creation of a national Committee to coordinate and monitor related legislation (art. 2)
- Provides for a sanction in the case of late communication to the public safety authorities about the hospitality given to a foreigner or of his/her hiring (art. 8)
- Definition of set times to apply for the renewal of the permit of stay and the possibility that the employer may hire a foreigner with an expired permit if the renewal application was made within the time set forth by the law.
- The increase from a five to a six year period of stay necessary to be able to apply for a residence card (art. 9).

- The obligation for foreigners to be subject to collection of data including photo, fingerprinting and other identificatory data
- The increase of time of denial for re-entry after expulsion from 5 to 10 years (art. 14).
- The introduction of a simplified procedure to recognize the right to asylum in order to avoid that this right is improperly used to deceive the laws regarding immigration (art. 32).
- A new law on expulsion that provides for a maximum 60 day stay in the *Cpta* (holding facility) (up from 30 days in the previous provision).
- Make residence legal for dependent workers as well as those who work as domestic collaborators and family assistants.

4.2. The new rules step by step

83. The brief stay in office of the Left-Center government from 2006-2008 acknowledged important European directives in the area of family reunification on the EU permit of stay for those who stay for extended periods, and for EU citizens and their family members to circulate and stay freely in the territory of the Union member States. The directive 2003/09/Ce of the Counsel of 25 November, 2003 related to the status of non-EU citizens who are staying for extended periods, introduces a new title of European stay. Under this law, it is sufficient to have stayed legally in Italy for 5 years to be able to request the permit of stay, and it is possible to work in all of the States that have implemented the directive.

84. The d.lgs. amends the Single Text adding a new article that regulates family reunification of refugees that transforms a much debated practice into a law. Moreover, with the acknowledged modification, the possibility is also given to relatives of a minor to obtain a permit of stay for "assistance to a minor", which would also allow work activities for the length of the authorization.

85. After this, the d.lgs. no. 30 of 2007, then amended in the d.lgs no. 32 of 2008, re-emphasizes the right of entry and stay for Union citizens and their family members, with notable simplifications: the Union citizen is no longer obligated to request a formal title of stay at the police headquarters as a declaration with the Registry office is sufficient, and the degree of kinship for those who may come to live with the EU citizen in Italy is more permissive.

4.3. The current law in effect

4.3.1. Rights and duties of the foreigner staying legally in the State

86. Article 2 of the D.lgs (actually made up of articles 2, 1. no 40/1998 and 1,1. no. 943/1986) gives to the foreigner the basic human rights provided for in national, EU and international sources only if he/she presents at a border or is already within the territory of our country. The foreigner who is "legally staying in the State territory" is given the same rights as Italian citizens in civil matters, except for specific orders given in the S.T. and any condition of reciprocity (par. 2) and participation in the local public life (par. 4), as well as equal treatment with a specific reference to workers and their families, and full equality of rights with respect to Italian workers (par. 3).

87. Equal treatment is guaranteed as well for that which regards jurisdictional protection, relations with the public administration and access to public services (par. 5); while any measures dealing with various aspects such as entry, stay and expulsion will have to be translated into a language that is understood by the addressee(par. 6)

88. Paragraph 7 outlines the relationship, in simple terms, between foreign citizens and their diplomatic representatives with certain obligations to inform which are the responsibility of

different national authorities in various cases related to the foreign citizen, unless the foreigner has requested asylum, refugee status or entry for measures of temporary protection for humanitarian purposes[48]. With the exception of possible dispositions in favor contained in international accords created to prevent or limit illegal immigration(par. 8), the law set forth in art. 2 states that the foreigner who is present in the territory of the State must observe the laws that are in effect(par. 9).

89. Every standard procedure and disposition comes under the direction and supervision of the President, seeing the extreme relevance of the topic of immigration in these times.

4.3.2. The laws for entry into Italy

90. First it must be stated that, as of 26 October, 1997 Italy is also part of Schengen territory, that is to say that it is part of that group of States who signed the Schengen Agreement which allows for the complete freedom of circulation [49]. This gradual process which is one of the pillars of the European Union, has allowed the Union to reinforce the shared external border while at the same time allowing internal border controls to be eliminated [50], utilizing not only national sources but European ones as well [51].

91. Foreigners who are not from Schengen countries must have a passport or equal travel document issued by the authorities of their country of origin.

92. These travel documents must adequately attest to the identity of the holder, nationality and citizenship up to the date of expiration of the document.

93. Whoever crosses the border is subject to a minimum verification that allows the controller to establish identity with the display of a travel document.

94. Citizens of non-EU countries are instead, subject to more in-depth verifications. The in-depth verification upon entry includes verification of the conditions of entry, also in those cases where the documentation authorize a stay and professional work activities. In that case, the border guard will stamp the travel document of the non-EU citizen upon entry and exit in accordance with art. 10 of the EC Regulation 562/2006. The travel documents of non-EU citizens are systematically stamped at the moment of entrance and exit.

95. Art. 2 S.T. advances the argument that it is necessary to put a stop to the disordered entry of foreign citizens into our country through the use of a documented three year program, indicating the actions and interventions planned in Italy related to immigration policies. This plan could also be in cooperation with other member States of the European Union or other institutions or international organizations and moreover, measures of an economic or social nature which do not fall under the power of the law(par. 2).

The same planned intervention will determine the general criteria to define entry quotas, and also define opportune public interventions (par. 3).

96. With the decree of the President of the Council of Ministries (DPCM) the maximum entry quotas for foreigners to be admitted into the country for dependent work, seasonal and self-employed work are defined. The issuance of entry visas (par. 4) will have to be adjusted to fall within these quotas.

4.3.3. Powers and obligations inherent to the stay Facoltà ed obblighi inerenti al soggiorno.

97. If the foreigner has already obtained the permit of stay for self-employed work, even if he/she has not performed this job, he/she may register on a placement list and be hired as a dependent worker without making any changes to the permit in possession [52]. It is necessary to show documentation related to one's stay to public administration offices for the

issuance of licenses, authorizations, registrations and other things of interest to the foreigner; and in the case that documentation is not presented the foreigner is punished with arrest for up to six months and with fines, and could be subject to the recording of personal information for identification purposes(par. 4). Public safety authorities may also request within the verifications provided for in the S.T., information and proof of the availability of a sufficient income (par. 5) Registrations and anagraphic changes are performed just as with Italian citizens and are also communicated to the Police headquarters with jurisdiction for the area; residence is considered regular when the subject has stayed for more than three months in a detention center (p.7). Changes in one's regular residence must be communicated by the foreign citizen directly to the police headquarters within fifteen days (par. 8).

4.3.4. Obligations of the host and employer

98. The typical situation is one in which the foreign worker, especially at the very beginning, finds accommodations through his/her employer or another person, family or relative who is referred to as the "host". This person must give written communication that they are hosting a foreigner to the local public safety authorities within forty-eight hours (par.1), indicating the general information of the host, the foreigner or stateless person, his/her passport or identification card information, the exact location of the house or of the person or employer who is actually hosting the subject.

4.3.5. Entry Visa Il visto di ingresso

99. The entry visa is an authorization given to the foreigner to enter into the national territory of Italy, or in those of other parties, for reasons of travel or stay. It is subject to expiration and its issuance is not automatic but it subject to the discretion of the Consulate. It may be revoked by measures set forth by the authority that issued it. It is not a right of the foreign citizen to obtain a visa, but is a legitimate interest on the part of who makes the request and the denial of a visa does not require an explanation by the authority that makes that decision.

100. Visa issuance is under the authority of the Ministry of Foreign Affairs, or in actuality, of the diplomatic and Italian consular representatives in the country of origin or stable residence of the foreigner, and with authority granted in special cases to the Italian border police offices for a time not longer than ten or five days, respectively, only where it is absolutely necessary.

101. The visa is issued, if all of the requirements and conditions are present, for the length of time necessary related to the reason for the request and the documentation provided by the applicant (art. 5 par.2. reg. att.). There is a big difference between visas which are separated into National visas (VN) and Schengen visas (VSU). The latter may be issued by any State which adheres to the convention and is valid in all of the territory of the Convention.

4.3.6. Reasons for entry into Italy

102. The reasons for entry into Italy correspond to the various visas that may be issued by Consulates. There are 21 different type of entry visas, therefore 21 different reasons for entering Italy. It's one thing to speak of reasons for entering Italy, but another to speak of reasons for staying there regularly. The visas are grouped into 4 categories:

- entry visas within the quota;
- entry visas outside of the quota
- visas for family reasons;
- special visas.

Entry visas within the quota refer to visas issued for dependent, self-employed or seasonal work [53].

[1] Thank's to Silvia Foffano (Univ. of Modena and Reggio Emilia) for this chapter.

[2] For the distinction between these two terms, see R. Blanpain- m. Colucci, *The globalization of labour standards : the soft law track*, in *Bulletin of comparative labour relations*, Kluwer, 2004;

[3] The 1998 Declaration, which codifies the core labour standards, has only exhortative not binding value. But from an increment in economic growth, matched with an effective guarantee of fundamental rights should follow an impulse towards improved social conditions, as well as the need to strengthen the application of regulatory measures aimed at protecting any progress already made S. Sanna, *Diritti dei lavoratori e disciplina del commercio nel diritto Internazionale*, Giuffrè, 2004, 51.

[4] According to the ILO database (ILOLEX) of 182 member countries, the conventions on collective bargaining (N 87 & 98) were ratified by 149 and 159 countries respectively. Convention 29 on eliminating forced labour was ratified by 173 countries, while convention 105 was ratified by 171; conventions 100 and 111 on equal opportunities were ratified by 166 and 168 countries; conventions 138 and 152 on eliminating child labour were ratified by 151 and 169 countries. Data correct at 7th Feb 2009.

[5] At the root, faced with the problem of guaranteeing conditions in free competition between economic entities within national limits is born industrial labour law as the competent judge of trade law. A. Perulli, *Diritto Diritto del lavoro e globalizzazione : Clausole sociali, codici di condotta e commercio internazionale*, Cedam, 1999

[6] The first argument focuses on the behavior of multinational companies to invest in countries with low labour standards. Further there is a risk that it will lead to a downward pressure on domestic labour standards.

[7] The huge variety of instruments that may fall within the scope of the above definition makes it impossible to make general comments on the nature, function, possible legal effect and other characteristics of soft law, such as addressees, possible legal basis, etc. This does not mean that a classification of soft-law instruments would also be impossible. Even if soft-law instruments are not defined or regulated in any way, it appears possible to establish their core features by looking at the instrument itself, its actual contents and the intention of its drafters. With a view to assessing their possible use as an alternative or complement to legislation, a classification is best made on the basis of the function and objective the various soft-law instruments can be said to have. L. Senden, *Soft law, self regulation and co-regulation in European law: why do they meet?*, in *Ecjl*, n. 9, 200

[8] The notion of "international labour law" seems to be contradictory: the person is the unique subject that can drive a labour contract, whereas states haven't the capacity to conclude a contract of work and to be obligated to give their labour. M. Decleva, voce *Diritto internazionale del lavoro*, in *Nuovissimo digesto italiano*, vol. V, Utet, 1960, pag. 881.

[9] S. Sanna, op. cit., 128 ss.

[10] The author defines soft law as an oxymoron. I. Duplessis, *Soft International labour law: the preferred method of regulation in a decentralized society*, in *Governance, International Law & Corporate Social Responsibility, International labour Organization*, 2008, 11

[11] Respect of this rule is determined by instrumental rationality. A. Perulli, *Alcune riflessioni sulla tutela dei diritti fondamentali dei lavoratori nel diritto internazionale*, in *Globalizzazione, responsabilità sociale delle imprese e modelli partecipativi* (S. Scarponi a cura di), Trento, 2007, 82.

[12] France's Court of Cassation has historically been reluctant to draw on universal sources of labour law. Such explicit references to international labour standards as have appeared in its rulings have been marginal at best. A partial explanation may be that the monistic system operating under French law implies direct incorporation of international law into national law. Yet, the judgment of 26 March 2006 of the Court of Cassation's labour division has interesting potential implications for future judicial decisions in regard to the use of international labour law instruments. Indeed, this judgment recognizes the direct application of the ILO's Convention No. 158 in the following terms: "Article 1, subparagraph 2(b) of Article 2 and Article 11 of International Labour Convention No. 158 concerning Termination of Employment at the Initiative of the Employer, adopted at Geneva on 22 June 1982 and having

entered into force in France on 16 March 1990, are directly applicable before national jurisdictions"; and Supreme Court of Canada, *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, 21 December 2001; Supreme Court of Canada, *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (Justice Dickson), 9 April 1987; These cases are analysed in E. Gravel – Q. Delphéc, *International labour standards: Recent developments in complementarity between the international and national supervisory systems*, in *International Labour Review*, Vol. 147 (2008), No. 4.

[13] M. V. Ballestrero, *Giustizia Globale e diritti oltre la dimensione nazionale*, speech on Basso foundation, Rome, 21 June 2007.

[14] J. Malmberg, *Promoting fair labour standards in a Globalized economy: the need for a multi track approach*, in *Bulletin of comparative labour relations*, n. 60, Kluwer, 2006, 156.

[15] A. Perulli, *op. cit.*, Cedam, 1999 and A. Mazzoni, *Globalizzazione, commercio internazionale e giustiziabilità di pretese private fondate su norme internazionali*, in *Diritto del commercio internazionale*, Aprile- Giugno 2006, pag. 255

[16] Organization for economic co-operation and development, *Trade, Employment and Labour Standards*, Paris, 1996, 78 ss.

[17] IFAs nonetheless, constitute a strong basis for industrial relations on international level and have a strong moral and commercial effect. IFAs further have an interpretative function in national labour law. So while a hard binding effect is rather disputable, IFAs as soft law instrument definitely have a strong morally binding value that even goes beyond the status of soft law. IFAs should therefore be positioned somewhere in a grey area between the soft track and hard track law. In G. van Wezenbeek, *International framework agreements and fundamental social rights, master thesis international and european labour law*, Tilburg University, 2008, 91.

[18] OECD, *Guidelines for international enterprises*, foreword.

[19] R. Blanpain, *International labour law and globalization*, Textbook, 2009, 155.

[20] Enterprise social responsibility can be understood from a sociological point of view, the approach of S. Gherardi, P. Rossi, *La responsabilità sociale d'impresa: uno sguardo sociologico*, in *op. cit.*, 47 ss. The authors identify situations in which companies go beyond economic performance and engage in actions for the social good. A recent study shows that what is missing is a theoretical framework that would allow these ethical rules to be put into practice in the day to day life of the enterprise.

[21] Research conducted in Africa studied a multinational which implemented an ethical code which meant limiting where it would open facilities, since to open in some states (Iran, in the example) would mean the company itself were complicit to abuse carried out in these States: on this topic J. Hanks, *Sasonal and Ungc principles on human rights, case study, south Africa in learning forum Global Compact*, www.globalcompact.org, 3 February 2009.

[22] see: Global Compact South Africa, *Communication on Progress*, January to September 2007.

[23] Labour relations act (66 of 1995) and amendments 1996 & 1998; employment opportunity act (55 of 1998); Skill development act (97 of 1998); Unemployment insurance act (63 of 2001).

[24] Basic Conditions of Employment Act (No. 75 of 1997) amended by Basic Conditions of Employment Amendment Act, 2002, Contract Cleaning Wage increase, and Domestic workers wage increase 1 Dec 2007, chapter 6: Prohibition of employment of children and labour forced, art. 43: prohibition of employment of children.

[25] International Programme on the Elimination of Child Labour, South Africa child labour data brief, ILO, 1/2008 which refers to the results of the Survey of Activities of Young People, 1999.

[26] World Economic Forum, *The Global Gender Gap Report 2008: Country Highlights and Profiles*, 2008, in www.weforum.org, (seen on 4 February 2009).

[27] J. Hanks, *Sasonal and Ungc principles on human rights, case study, south Africa in learning forum Global Compact*, www.globalcompact.org, visited (seen on 3 February 2009).

[28] Among the questions tackled by the study is a more in-depth analysis of the meaning of this being "complicit in abuse" identifying different types of complicity, which one

can sum up quickly by saying that complicity occurs when a rights abuse happens within the sphere of influence of the enterprise. By this one means individuals or organisations who have a contractual, geographic, political or economic relationship with the company in question. The company's grasp on this will be closely linked to the type of relationship between the company and the other entity. J. Hanks, *Sasonal and Ungc principles on human rights, case study, south Africa in learning forum Global Compact*, www.globalcompact.org, (seen on 3 February 2009).

[29] Immigration was originally under national jurisdiction and a matter of public safety. In the 1970s a Community body was created to coordinate these issues. The states that were part of the Schengen territory adopted a sort of intergovernmental approach that created a gradual end to border control among member States and the transferral of those borders to those external ones along non-member States. These accords were then incorporated in the Treaty of Amsterdam in 1999 (ratified in Italy in 1998).

[30] For a more in-depth look at professional mobility and circulation with specific reference to directive 2004/38/CE, please see Colucci M., *La libera circolazione delle persone*, in *L'Unione Europea*, Colucci M. – Sica S. (care of), Zanichelli, 2005, 166 ss

[31] Cortese B., in this volume.

[32] Case C-438/05, *International Transport Workers' Federation, Finish seamen's Union v. Viking Line ABP, Vibing Line Eesti*.

[33] Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd 1, Byggettan e Svenska Elektrikerförbundet*.

[34] Nascimbene B., *Orientamenti e norme nazionali in materia di immigrazione. L'incidenza del diritto internazionale e comunitario. Le iniziative di riforma e le modifiche in corso*, in *Rivista italiana di diritto pubblico comunitario*, n. 3/4/2008, 724.

[35] Viscomi A., *Immigrati extracomunitari e lavoro subordinato*, Edizioni scientifiche italiane, 1991.

[36] Contra, peraltro, Cass. S.U. n. 2265/1988; in the same vein Cass. 5156/1980, which prohibited the introduction into our ordinance from art. 25 disp. prel. foreign laws "that have a regulation of labor relations less favourable than Italian law".

[37] From contrary warning, Mengoni L., *Il contratto di lavoro nell'ordinamento positivo italiano*, in A.A. V.V., *Il contratto di lavoro nel diritto del lavoro dei Paesi membri della C.E.C.A.*, Milano, 1965.

[38] Boeri T. - Spilimbergo A., *Immigrazione illegale, leggi italiane e lezioni degli Stati Uniti*, in *La Voce*, Visible on-line at www.lavoce.info.

[39] They intend citizenship in its most widely accepted sense, in the same way that many will be entitled to rights that "can't not be granted to every citizen in every democracy", see Lo Faro A., *Funzioni e finzioni della contrattazione collettiva comunitaria. La contrattazione collettiva come risorsa dell'ordinamento giuridico comunitario*, Giuffrè, 1999, Ferratoli L., *Dai diritti del cittadino ai diritti della persona* in Zolo D. (care of), *La cittadinanza. Appartenenza, identità, diritti*, Laterza, 1994, 263-292, Rigo E., in this volume.

[40] from this warning Ghezzi G., *Dinamiche sociali, riforma delle istituzioni e diritto sindacale*, Giappicchelli, 1996, Nappi S., *La disciplina e le politiche in materia di immigrazione*, in *Il diritto del mercato del lavoro*, n. 1-2/2007, 77.

[41] Nascimbene B., op. cit., 723

[42] For more information on immigration and entrepreneurship please see E. Di Maria – V. De Marchi, *Immigrazione e imprenditoria in Veneto*, in *Veneto Lavoro - osservatorio e ricerca*, June 2008, 7. The analysis in the introduction reports important studies from the United States regarding ethnic entrepreneurs and following that, the Veneto region is the focus of the analysis.

[43] Many muslims manage small and very small businesses and commercial activities which generate a constant need for bank services, not only traditional but also muslim ones. The classic Islamic bank contracts such as the muraba, istina and ijara meets these needs perfectly. Italian banks have started to see immigrants as a potential target market maintaining that the promotion and creation of new products created specifically for clientele with characteristics that are different from their usual groups could produce interesting results. It would be difficult to open an Islamic bank, but it is easier to imagine creating specific Muslim

desks within conventional institutions as they have done in the United Kingdom and Luxembourg. The latter experienced a rather difficult situation. V. P. Greco, *Le banche islamiche: tra religione e finanza. La richiesta dei fedeli immigrati ed il ruolo internazionale delle banche islamiche*, in *Diritto, immigrazione e cittadinanza*, 2/2008, 38.

[44] The matter would benefit from further study, and for this purpose we indicate the article *Festività e riposi settimanali nelle società multiculturali* by Coglievina S. in the *Rivista italiana di diritto del lavoro*, 3/2008, 381.

[45] Thanks to the intervention of two important scholars, Mancini and Pisanelli, this Code was able to include as a condition of the enjoyment of civil rights for foreigners, residency alone, adopting the principle of reciprocity exclusively in the case of non-resident foreigners.

[46] Regarding this please see Viscomi A., *Giuslavoristi ed immigrazione extracomunitaria: un incontro difficile*. In *Lav. Dir.*, 1992, pag. 170 ss. on art. 10, in particular see Cassese A., *Sub art. 10*, in G. Branca (care of), *Commentario alla Costituzione*, Zanichelli, Bologna, 1980, pag. 485 ss.

[47] Art. 1, in fact, references the Geneva Convention.

[48] Regarding this last point the directive of the President Cons. Min. 6.8.98., in *Guida al lavoro*, 8.9.98, n. 34, p. 14, to adjust any type of permit of stay issued for humanitarian purposes in the law n. 40/1998.

[49] The area included among the following countries is Schengen territory: Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland, Sweden, Romania and Bulgaria.

[50] It must be remembered that, for reasons of public order and safety, the States have the right to reintroduce border controls.

[51] Among the various Italian legal sources we must consider the following: the Single Text of dispositions regarding regulation of immigration and laws on the conditions of foreigners (law 25 July, 1998, no. 286 and following modifications); Law of Single Text implementation (31 August, 1999, no. 394 modified by the decree of 18 October 2004, no. 334); Interministerial decree on visas of 12 July, 2000 on the "Definition of the types of entry visas and the requirements to obtain them". Directive from the Ministry of the Interior from 1 March, 2000 on the "definition of means of sustenance for entry and stay of foreigners in the country".

[52] Newsletter *Min. lav.*, 24.9.99, n. 70, in *D.prat.lav.*, 1999, 40, p. 2781; but against, in the case of employment activities outside of those listed in the permit of stay, T.a.r. Abruzzo, sez. Pescara, 15.1.98, n. 119, in *T.A.R.*, 1998, I, p. 1020.

[53] Visas for study, sport activities and volunteer activities are included in this category as they depend on specific limitations.