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**TURNED AWAY: THE DETRIMENTAL EFFECT OF  
ITALY'S PUBLIC SECURITY LAW ON  
UNDOCUMENTED CHILDREN'S  
RIGHT TO EDUCATION**

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ABSTRACT

This note examines Italy's Legge n. 94/2009 as a response to the nation's immigration crisis. Specifically, this note focuses on Italy's violation of the Convention on the Rights of the Child and the prudence of including in its immigration policy a provision effectively denying education to undocumented children. Section two provides a history of Italian immigration law and discusses the conflicts between the immigrants seeking entrance to Italy and Italy's attempts to juggle its interest in public safety with these demands. This section also introduces Legge n. 94/2009 and briefly summarizes the controversy surrounding it. Section three discusses the Convention on the Rights of the Child's internationally recognized guarantee of education to every child and analyzes Italy's obligations under the Convention. The Universal Declaration of Human Rights is discussed in this section as a non-binding but influential UN instrument supporting the recognition of a right to education. Section three also analyzes Italy's international obligations under applicable EU directives. Section four compares Legge n. 94/2009 with international obligations imposed on Italy and concludes that Legge n. 94/2009 violates

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these obligations. This section further examines the futility of creating immigration policies aimed at harming the rights of undocumented children and includes a brief discussion of the U.S. Supreme Court Decision *Plyler v. Doe* as an example of an explicit rejection of such policies. Section five concludes that Legge n. 94/2009 violates international law by denying education to undocumented children and touches upon possible ramifications for Italy if this provision is not removed.

## I. INTRODUCTION

In the United States, there have been numerous attempts to punish immigrants who enter the country illegally by imposing penalties on children. The Supreme Court decision *Plyler v. Doe* struck down a Texas law which prohibited local school districts from receiving funds to educate alien children.<sup>1</sup> California's Proposition 187, which prohibited any person not a legal resident of California from attending school, likewise received a negative reception in the courts and ultimately its provisions regarding education were nullified.<sup>2</sup> The proposed Gallegly Amendment envisioned granting states the power to decide whether and under what conditions undocumented children would be allowed to attend school.<sup>3</sup> The amendment was introduced as part of the Illegal Immigration Reform and Immigrant Responsibility Act; however, it was ultimately excluded after President Clinton threatened to veto the entire bill unless the Gallegly Amendment was removed.<sup>4</sup>

Despite these attempts, and despite the apparent public support for such proposed laws, the United States has kept education free and available to undocumented aliens. The decision not to punish undocumented children for being in the United States illegally comes from the understanding that children are not making the decision to immigrate illegally, that denying them education will only place them at a greater disadvantage, and that punishing children will have little deterrent effect on illegal immigration.<sup>5</sup> Italy, however, recently passed an immigration law, part of which targets undocumented children and punishes them for being in the country illegally.

Italy's Legge n. 94/2009 was adopted July 15, 2009.<sup>6</sup> The law criminalizes illegal immigration<sup>7</sup> and has received a negative response from vari-

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<sup>1</sup> See *Plyler v. Doe*, 457 U.S. 202, 230 (1982); Jaclyn Brickman, Note, *Educating Undocumented Children in the United States: Codification of Plyler v. Doe Through Federal Legislation*, 20 GEO. IMMIGR. L.J. 385, 386 (2006).

<sup>2</sup> See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997); Brickman, *supra* note 1, at 390.

<sup>3</sup> See Brickman, *supra* note 1, at 391.

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* Part IV.

<sup>6</sup> Legge 15 luglio 2009, n. 94, in G.U. (It.).

<sup>7</sup> *Id.* at art. 1, ¶ 16.

ous human rights groups.<sup>8</sup> Criminalizing illegal immigration affects other sections of the Italian Penal Code (Codice Penale); of particular interest, and the area investigated by this note, is the new law's effect on Article 361 of the Codice Penale. Article 361 makes it a crime for a public official to fail to report a crime which he learned of through his duties.<sup>9</sup> Article 357 of the Codice Penale defines public officials as those persons who exercise public legislative, judicial, or administrative functions.<sup>10</sup> Educators are public officials<sup>11</sup>; therefore, under the new law, teachers must report undocumented children to immigration authorities. This provision can hardly be reconciled with the law's goal of slowing the tide of illegal immigration and protecting "public safety."<sup>12</sup> Furthermore, Legge n. 94/2009 violates international law by effectively denying undocumented children their rights to education, which have been repeatedly recognized in the international community.<sup>13</sup>

## II. A HISTORY OF ITALIAN IMMIGRATION LAW

### A. *Italian Statutory Law*

Italy passed its first immigration law in 1986; previously, immigration was governed by administrative regulations and "a collection of Public Safety Laws enacted in 1931 under Benito Mussolini's Fascist regime."<sup>14</sup> Title V of Mussolini's Royal Decree Number 733 provided narrow governance over aliens in Italy, requiring merely that foreigners declare their presence to local police officers within three days after entering Italy.<sup>15</sup> After declaration, police officers issued a stay permit and aliens needed to inform the police any time they changed their residence.<sup>16</sup> Foreigners were also required, should police request, to provide identification and

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<sup>8</sup> See Human Rights Watch, *Slow Movement: Protection of Migrants' Rights in 2009*, (Dec. 16, 2009), [http://www.hrw.org/node/87265#\\_Discriminatory\\_Treatment\\_of](http://www.hrw.org/node/87265#_Discriminatory_Treatment_of); Amnesty International, *Italy: Submission to the UN Universal Periodic Review: Seventh Session of the UPR Working Group of the Human Rights Council, February 2010* (Sept. 8, 2009), <http://www.amnesty.org/en/library/asset/EUR30/008/2009/en/751c2180-f8c1-46fd-9e75-b53f1dee5a0e/eur300082009eng.html>.

<sup>9</sup> C.p. art. 361.

<sup>10</sup> C.p. art. 357.

<sup>11</sup> Cass. Pen., sez. V, 14 aprile 1992, Giust. Pen. 1993, II, 49; Cass. Pen., sez. V, n. 6138/2001.

<sup>12</sup> See *infra* Part IV.

<sup>13</sup> See *infra* Part III.

<sup>14</sup> David Christensen, *Leaving the Back Door Open: Italy's Response to Illegal Immigration*, 11 GEO. IMMIGR. L.J. 461, 467 (1997); Michele Totah, Comment, *Fortress Italy: Racial Politics and the New Immigration Amendment in Italy*, 26 FORDHAM INT'L L.J. 1438, 1467 (2003).

<sup>15</sup> Christensen, *supra* note 14, at 467-68.

<sup>16</sup> *Id.* at 468.

prove they were in compliance with the self-reporting requirement.<sup>17</sup> The decree mandated that employers report to the government any hiring or termination of foreign employees and placed no other duties on employers.<sup>18</sup> Under the law, (1) “aliens could be deported for criminal convictions, for failure to comply with reporting and identification requirements or for reasons concerning ‘the public order,’ including lack of sufficient means of support,” and (2) previously deported aliens who re-entered Italy were subject to punishment of two to six months of imprisonment and re-deportation.<sup>19</sup> The decree imposed few regulations on immigrants because, at the time of its passage, Italy was focused on curbing emigration and any regulations regarding immigration were meant to provide police with the authority to keep track of the relatively small number of foreigners who entered Italy.<sup>20</sup>

Between 1931 and 1986, Italy created a series of administrative regulations which governed the rights of aliens and consequently prompted the growth of a large undocumented alien population in Italy.<sup>21</sup> The complex regulations sharply reduced the amount of time one could spend in Italy, making it nearly impossible for immigrants to legally reside in the country.<sup>22</sup> The increase in the number of undocumented immigrants created the need for Italy to reform its immigration policies. In 1986, Italy passed Law n. 943/86 to specifically address immigration.<sup>23</sup> Law n. 943/86 limited the admission of aliens to Italy by the number of available jobs for new arrivals, provided amnesty to aliens who identified themselves to officials within three months of their arrival, granted all legal alien workers the same rights as Italian workers, and contained punishment provisions for those found engaged in human trafficking or illegal employment.<sup>24</sup> Additionally, this law contained a family-reunification provision, allowing spouses and children of legally residing aliens to join them in Italy.<sup>25</sup> The law had minimal effect and was largely unsuccessful in regulating immigration.<sup>26</sup> The immigrant population continued to rise as did tensions between Italian citizens and undocumented aliens.<sup>27</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> Laura J. Callahan Ragan, *Educating the Undocumented: Providing Legal Status for Undocumented Students in the United States and Italy Through Higher Education*, 34 GA. J. INT'L. & COMP. L. 485, 503 (2006).

<sup>19</sup> Christensen, *supra* note 14, at 468.

<sup>20</sup> *Id.*

<sup>21</sup> Ragan, *supra* note 18, at 504.

<sup>22</sup> *Id.*

<sup>23</sup> Totah, *supra* note 14, at 1467.

<sup>24</sup> Christensen, *supra* note 14, at 479.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 480.

<sup>27</sup> Ragan, *supra* note 18, at 505.

Italy's next response to the pressures of immigration was the passage of the Martelli Law (Law 39/90) in 1990.<sup>28</sup> The Martelli Law sought to "integrate immigrants into the labor force" and "fight illegal immigration by enhancing control procedures and sending back all those without valid documents."<sup>29</sup> This law marked the creation of Italy's first comprehensive immigration legislation, and repealed many of Mussolini's Laws on Public Security.<sup>30</sup> The Martelli Law required non-citizens seeking to enter Italy for extended stays to obtain a visa, allowed border officials to refuse entry to aliens who had no financial support in Italy or who represented a threat to public safety, and provided those denied entry for financial reasons a defense (if one could show he had a job, property, or an approved sponsor in Italy, he could not be denied admission).<sup>31</sup> The law also extended the time period for requesting a stay-permit from three days after entry to eight days, required officials who denied stay-permit requests to provide a written explanation for the denial, and gave the denied aliens the opportunity to refute the reasons for denial.<sup>32</sup>

The most significant changes brought about by the Martelli Law affected Italian Refugee Law. Italy's policies towards refugee and asylum seekers were previously governed by its Constitution and the 1951 Geneva Convention, which Italy applied only to applicants from Eastern European countries; the Martelli Law removed the geographic limitation, opening asylum to all applicants who qualify under the Geneva Convention.<sup>33</sup> Further, for the first time the Martelli Law "permitted illegal immigrants who were self-employed to obtain legal status," provided they satisfy both government enrollment and educational requirements and are citizens of countries that "offered a reciprocal right of self-employment to Italian citizens."<sup>34</sup>

The Martelli Law failed to strengthen Italian immigration controls due to both internal and external problems.<sup>35</sup> A black market for undocumented workers developed in Italy because of the weaknesses in previous immigration policies and laws; provisions, for example deportation, in the Martelli Law that may have slowed the growth of this market were rarely enforced.<sup>36</sup> The requirement that aliens prove they will be able to financially support themselves also contributed to the growth of the undocumented population because when this obstacle was too great to surmount,

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<sup>28</sup> Legge 28 febbraio 1990, n. 39, in G.U. (It.).

<sup>29</sup> Totah, *supra* note 14, at 1469.

<sup>30</sup> Christensen, *supra* note 14, at 483.

<sup>31</sup> *Id.* at 483-84.

<sup>32</sup> *Id.* at 485-86.

<sup>33</sup> *Id.* at 487-88.

<sup>34</sup> *Id.* at 489.

<sup>35</sup> Ragan, *supra* note 18, at 506.

<sup>36</sup> *Id.*

applicants opted for illegal entry and illegal employment.<sup>37</sup> Furthermore, neighboring countries bolstered their immigration laws, which were comparatively stronger than the laws and policies of Italy, making illegal immigration into Italy more attractive because of its comparative ease.<sup>38</sup> “The relative lack of enforcement of Italy’s policies, combined with the thriving black market for undocumented workers, continued to attract undocumented immigrants despite the new regulations.”<sup>39</sup> The population of undocumented aliens continued to grow in Italy, despite the goals of the Martelli Law.<sup>40</sup>

In 1995, the Dini Decree amended the Martelli Law, allowing aliens to challenge deportation before leaving Italy, requiring aliens to be employed, extending entry and stay provisions for seasonal workers and increasing punishment for those found employing undocumented aliens or engaged in trafficking.<sup>41</sup> Political reactions to the Dini Decree were divided, as “[t]he right believed the decree was not restrictive enough and called for the immediate expulsion of all illegal immigrants, while the left and the Church urged for more tolerant measures.”<sup>42</sup> Immigration law was still unsatisfactory and tension continued to exist between citizens and non-citizens.

The Turco-Napolitano Law, enacted in 1998, sought to provide full rights for legal aliens and basic rights for undocumented aliens, and expanded entry mechanisms for immigrants.<sup>43</sup> At the time of the law’s passage, the immigrant population in Italy exceeded one million, creating the need for the legislature to address the position of immigrants in Italy.<sup>44</sup> “The three goals of the Turco-Napolitano [Law] were to implement more effective planning to deal with persons entering for employment reasons, preventing illegal immigration, and integrating foreign citizens who had legal residence permits.”<sup>45</sup> The law provided documented aliens with civil rights comparable to Italian citizens, including housing, job placement, pensions, and public housing while undocumented minors were given a right to education.<sup>46</sup> Additionally, the Turco-Napolitano Law forbids discrimination on the basis of race, nationality, ethnic origin or religion.<sup>47</sup>

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<sup>37</sup> Christensen, *supra* note 14, at 491.

<sup>38</sup> Ragan, *supra* note 18, at 506.

<sup>39</sup> *Id.*

<sup>40</sup> Christensen, *supra* note 14, at 491.

<sup>41</sup> *Id.* at 495, 496.

<sup>42</sup> Totah, *supra* note 14, at 1471.

<sup>43</sup> Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359, 399, 400 (2007).

<sup>44</sup> Totah, *supra* note 14, at 1472-73.

<sup>45</sup> *Id.* at 1473.

<sup>46</sup> Wexler, *supra* note 43, at 400.

<sup>47</sup> Totah, *supra* note 14, at 1473.

The Boss-Fini Act amended the Turco-Napolitano Law in 2002.<sup>48</sup> The Boss-Fini Act (1) requires immigrants to have a job before entering Italy and before receiving a residency permit, (2) requires immediate enforcement of deportation orders,<sup>49</sup> and (3) “restricts family reunification to dependent children that experience total invalidity (lack of health) and for parents over the age of sixty-five that have no other children in their country of origin.”<sup>50</sup> The Boss-Fini law also requires immigrants desiring a stay permit or renewal of their stay permit to give their fingerprints to authorities.<sup>51</sup> Nevertheless, the Act does not repeal the anti-discrimination provisions of the Turco-Napolitano Law.<sup>52</sup> The history of Italian immigration law thus illustrates a trend toward tightening immigration controls and demonstrates a recurring friction between Italian citizens and third country nationals.

### B. *Current Social Trends Affecting Italian Immigration*

Over the past three decades Italian immigration law has dramatically developed; however, Italy continues to receive a large influx of undocumented immigrants due to its coastal location and because surrounding nations have stricter immigration laws. Annually, Italy receives the fourth highest number of asylum claims worldwide.<sup>53</sup> In 2008, nearly 37,000 immigrants arrived on Italian shores, mostly via boats from Libya and Tunisia.<sup>54</sup> Many make the journey from the African coast across the Mediterranean.<sup>55</sup> The Treaty on Friendship, Partnership and Cooperation between Italy and Libya, signed August 2008, contains a provision obligating Libya to deter illegal immigration from its borders through technologies provided and funded by Italy.<sup>56</sup> Italy, however, is not receiving the assistance from Libya that it expected, adding to the strain

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<sup>48</sup> *Id.* at 1475.

<sup>49</sup> Ragan, *supra* note 18, at 507.

<sup>50</sup> Wexler, *supra* note 43, at 402.

<sup>51</sup> Totah, *supra* note 14, at 1490, 1491.

<sup>52</sup> Wexler, *supra* note 43, at 402.

<sup>53</sup> Sabina Castelfranco, *Italy Cracking Down on Illegal Immigration*, VOA NEWS (May 14, 2009), <http://www.voanews.com/english/archive/2009-05/2009-05-14-voa47.cfm?moddate=2009-05-14>.

<sup>54</sup> Madeline Morris, *Italy's Immigrants Despair at New Laws*, BBC NEWS (July 27, 2009), <http://news.bbc.co.uk/2/hi/europe/8170187.stm>.

<sup>55</sup> *See Italy Pushes for Steps to End Illegal Immigration Problem*, VOA NEWS (Mar. 31, 2009), <http://www1.voanews.com/english/news/a-13-2009-03-31-voa4768824532.html?CFTOKEN=88937127&jsessionid=de30e3b974134a1690fa80331e3e1a6d3513&CFID=304277446>.

<sup>56</sup> Interview by Chiara Sulmoni with Natalino Ronzitti, Professor, LUISS Guido Carli University, Rome, *The Italy-Libya Treaty on Friendship, Partnership and Cooperation*, [http://www.cermam.org/en/logs/zoom/the\\_italylibya\\_treaty\\_on\\_frien\\_1](http://www.cermam.org/en/logs/zoom/the_italylibya_treaty_on_frien_1).

on Italian immigration controls.<sup>57</sup> “Italy’s capacity for coping with the influx of illegals arriving on rafts and rusting hulks from Libya is said to be ‘collapsing.’ Some 6,500 illegals have been crammed into reception centers intended to house 3,000.”<sup>58</sup> Italy is also seeking assistance from the European Union to alleviate the pressures of immigration, but Italian officials feel aid cannot come quickly enough.<sup>59</sup>

Recently, Italy has received criticism for sending boats of immigrants headed for Italy back to the ships’ places of origin.<sup>60</sup> Critics argue that Italy sends immigrants and asylum seekers, who are risking their lives on the dangerous trek to Italy, back to countries which may not respect or guarantee their human rights.<sup>61</sup> Hundreds of thousands of Africans pay to make the journey to Italy, often in unstable watercraft, “in an effort to escape poverty and unemployment.”<sup>62</sup> The vessels travelling to Italy “can easily become trapped in the marshy bottom of the shallow water or wrecked by the sea’s unpredictable weather.”<sup>63</sup> In fact, in March 2009, hundreds of migrants from Africa were believed to have drowned attempting the journey in an unseaworthy vessel.<sup>64</sup> A boat fit to carry 50 passengers set sail from Libya carrying 250 people and capsized; the passengers were too far from the coastline to swim to safety and there were no safety devices on the vessel.<sup>65</sup> Forcing ships to return to their port of origin requires the immigrants to make the dangerous journey a second time, only now their destination may not provide human rights protection. The risks of the journey are high, yet many continue to attempt the voyage in order to seek a new life in Europe.

The horrendous voyages to Italy from the African coast receive much media attention, yet according to official reports only a small portion of the undocumented aliens in Italy have entered the country this way.<sup>66</sup> It is difficult to accurately measure the undocumented population within a

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<sup>57</sup> See generally John Phillips, *Illegals Unravel Libya Treaty*, THE WASHINGTON TIMES (Sept. 24, 2008), <http://www.washingtontimes.com/news/2008/sep/24/illegals-unravel-libya-treaty>.

<sup>58</sup> *Id.*

<sup>59</sup> *Brussels Rejects Berlusconi’s Criticism in Immigration Row*, EU BUSINESS (Sept. 2, 2009), <http://www.eubusiness.com/news-eu/italy-immigration.ae>.

<sup>60</sup> *Italy Detention Profile*, GLOBAL DETENTION PROJECT (Sept. 2009), <http://www.globaldetentionproject.org/countries/europe/italy/introduction.html>.

<sup>61</sup> *Id.*

<sup>62</sup> Ariana Reguzzoni & Diana Ferrero, *Italy: One Way Ticket to Europe, Background Facts*, FRONTLINE/WORLD (July 27, 2006), [http://www.pbs.org/frontlineworld/rough/2006/07/italy\\_oneway\\_tilinks.html](http://www.pbs.org/frontlineworld/rough/2006/07/italy_oneway_tilinks.html).

<sup>63</sup> *Id.*

<sup>64</sup> *Italy Pushes for Steps to End Illegal Immigration Problem*, *supra* note 55.

<sup>65</sup> *Id.*

<sup>66</sup> See FRANCESCO FASANI, CLANDESTINO RESEARCH PROJECT, IRREGULAR MIGRATION IN ITALY (July 2009), [http://clandestino.eliamep.gr/wp-content/uploads/2009/11/italy-policy-brief\\_july-091.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/11/italy-policy-brief_july-091.pdf).



country but the estimates officials are able to provide gives the impression that the undocumented immigrants in Italy are a diverse group.<sup>67</sup> The Italian Ministry of Internal Affairs estimated that between 2000 and 2006, between 60% and 75% of irregular aliens in Italy had entered the country legally but had overstayed their visit.<sup>68</sup> The largest percentage of undocumented aliens in Italy originally came from Eastern Europe, “followed by North Africans, and immigrants from Asia and Oceania, Sub-Saharan Africa and Latin America.”<sup>69</sup> Migrants enter Italy for a variety of reasons, the most common of which is family reunification and the search for employment.<sup>70</sup> While it was once the norm for migrants to enter Italy as merely a gateway to continental Europe, now it is typical for Italy to be the final destination of undocumented immigrants.<sup>71</sup>

### C. *Legge n. 94/2009*

Italy's most recent attempt to control immigration was its *Legge n. 94/2009*, which increases sanctions against undocumented aliens found in Italy. *Legge n. 94/2009* redefines illegal immigration as a criminal offense.<sup>72</sup> The new law increases monetary penalties for undocumented aliens; increases detention time to six months; requires citizens to report undocumented aliens, teachers to report undocumented children attending school, and doctors to report undocumented persons seeking medical attention; and forbids civil acts to be performed by non-citizens.<sup>73</sup> Italy believes that the strengthening of its immigration laws is justified because “it faces an unmanageable flood of immigrants, many arriving on outlying islands which do not have the means to cope.”<sup>74</sup>

Human rights groups and the Catholic Church have opposed the new law, which shifts the aim of Italy's immigration laws from integration to

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> SANDRA LAVENEX, FOCUS MIGRATION, COUNTRY PROFILE NO. 17: EUROPEAN UNION (Mar. 2009), [http://www.focus-migration.de/uploads/tx\\_wilpubdb/CP\\_17\\_EU\\_01.pdf](http://www.focus-migration.de/uploads/tx_wilpubdb/CP_17_EU_01.pdf).

<sup>71</sup> PHILIPPE FARGUES, TRANSATLANTIC COUNCIL ON MIGRATION, EMERGING DEMOGRAPHIC PATTERNS ACROSS THE MEDITERRANEAN AND THEIR IMPLICATIONS FOR MIGRATION THROUGH 2030 11 (Nov. 2008), <http://www.migrationpolicy.org/pubs/Fargues-Paper.pdf>.

<sup>72</sup> Morris, *supra* note 54.

<sup>73</sup> EVERYONE GROUP, PUBLIC SECURITY LAW 773B [SIC] DENOUNCED AS RACIAL LAW (July 16, 2009), available at [http://www.everyonegroup.com/Everyone/MainPage/Entries/2009/7/16\\_Public\\_Security\\_Law\\_773B\\_denounced\\_as\\_racial\\_law.html](http://www.everyonegroup.com/Everyone/MainPage/Entries/2009/7/16_Public_Security_Law_773B_denounced_as_racial_law.html) (referring to law 733B, which is the name of the bill ultimately adopted as *Legge 94/2009*).

<sup>74</sup> *Italy Adopts Law to Curb Migrants*, BBC NEWS (July 3, 2009), <http://news.bbc.co.uk/2/hi/europe/8132084.stm>.

deterrence.<sup>75</sup> Such activist groups argue the law “will deny immigrants the same rights Italian citizens have to basic public services, including access to medical care, besides severely restricting personal liberty and limiting the livelihood of economically or socially disadvantaged foreigners or those in need of humanitarian aid on Italian territory.”<sup>76</sup> Archbishop Agostino Marchetto, who has served as secretary in the Pontifical Council for Pastoral Care of Migrants and Itinerant Peoples, has been the most outspoken Catholic Church official opposing the law, predicting it will cause many problems for Italy without addressing the factors which fuel illegal migration.<sup>77</sup> Prior to the law’s passage, Amnesty International expressed concern that the bill would violate human rights; in particular the organization was concerned with the criminalization of illegal migration, the effective restriction of access to education and health services, and the authorization of vigilante patrols.<sup>78</sup> Amnesty International called on the Italian government to amend these provisions before it passed the law, but these provisions were still in place when the law was passed.<sup>79</sup>

Despite objections, many parts of Legge n. 94/2009 are legal under national and international law. The Italian Constitution grants the state exclusive legislative power over immigration.<sup>80</sup> The Treaty of Lisbon Article 3a § 2 dictates that states shall be in charge of national security.<sup>81</sup> Nevertheless, Legge n. 94/2009’s requirement that principals and school officials report undocumented children attending school to the authorities is in violation of international law and is in direct contradiction with the United Nation’s Convention on the Rights of the Child (“CRC”). This requirement also violates the Italian Constitution which mandates (1) that the Italian legal system conform to generally recognized international law principles<sup>82</sup> and (2) that schools are open to *everyone* and students have the right to obtain high grades.<sup>83</sup> The scope of this note,

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<sup>75</sup> *Id.*; see EVERYONE GROUP, *supra* note 73.

<sup>76</sup> EVERYONE GROUP, *supra* note 73.

<sup>77</sup> See John Allen Jr., *Tough Immigration Law in Italy Spawns Catholic Backlash, Insider Drama*, NATIONAL CATHOLIC REPORTER, Feb. 18, 2010, <http://ncronline.org/blogs/ncr-today/tough-immigration-law-italy-spawns-catholic-backlash-insider-drama>; ZENIT, *PRELATE DECRIES NEW ITALIAN PUBLIC SECURITY LAW* (Aug. 25, 2009), <http://www.zenit.org/article-26681?l=english>.

<sup>78</sup> AMNESTY INTERNATIONAL, *ITALY: DISCRIMINATORY DRAFT LAW AFFECTING MIGRANTS AND ROMA COMMUNITY* (June 26, 2009), <http://www.amnesty.org/en/appeals-for-action/italy-must-not-pass-law-that-discriminates-against-migrants-and-Roma>.

<sup>79</sup> *Id.*

<sup>80</sup> Title V, Art. 117 §§ 2(a)-(b) Costituzione [Cost.] (It.).

<sup>81</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>82</sup> Art. 10 § 1 Costituzione [Cost.] (It.).

<sup>83</sup> Title II, Art. 34 §§ 1, 3 Costituzione [Cost.] (It.).

however, will not cover the law in connection with the Italian Constitution but will focus primarily on international law.

### III. CHILDREN'S RIGHT TO EDUCATION

#### A. *Convention on the Rights of the Child*

The Convention on the Rights of the Child was the first international legally binding document concerning the rights of children.<sup>84</sup> The CRC is influenced by the 1959 United Nation's Declaration on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.<sup>85</sup> The creation of the CRC was inspired by the UN declaration of 1979 as the International Year of the Child.<sup>86</sup> Professor Adam Lopatka is considered the father of the CRC because, as the Polish delegate to the UN Commission on Human Rights, he proposed a convention on the rights of the child during the Commission's 34th Session.<sup>87</sup> The proposal generated much discussion and resulted in the creation of a working group under the Human Rights Commission to draft what would eventually become the CRC.<sup>88</sup>

The CRC was adopted by the UN in November 1989 and entered into force in September 1990.<sup>89</sup> The Committee on the Rights of the Child is the CRC's monitoring and advisory body which verifies compliance by requiring periodic reports from states.<sup>90</sup> The Committee also monitors states' compliance by analyzing information provided by other sources such as non-governmental organizations ("NGOs"), intergovernmental organizations ("IGOS"), the press, etc.<sup>91</sup> The Committee then reviews and evaluates states' reports and publishes their concerns and recommendations to improve compliance.<sup>92</sup> The Committee has no authority to enforce its recommendations and the CRC itself contains no formal enforcement provisions.<sup>93</sup> Today all nations except the United States and

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<sup>84</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>85</sup> Cris R. Revas, *An Introduction to the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHT OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 9, 12-13 (Jonathan Todres et al. eds., 2006).

<sup>86</sup> *Id.* at 13.

<sup>87</sup> *Id.* at 12.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 14.

<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Somalia have signed the CRC.<sup>94</sup> Italy signed the CRC in 1990 and ratified the Convention one year later.<sup>95</sup>

The CRC applies “to all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally.”<sup>96</sup> Therefore, undocumented children in Italy are ensured any rights guaranteed within the Convention. Articles 28 and 29 of the CRC discuss states’ obligations with respect to children’s rights to education. Article 28 mandates that “state parties recognize the right of the child to education.”<sup>97</sup> Again, every child includes undocumented alien children. The CRC requires states to provide free, compulsory primary education to every child and to encourage children’s regular school attendance.<sup>98</sup> Article 29 requires state parties to direct education to the development of the child to his/her fullest potential, to the respect for fundamental human rights, and to the respect for the child’s parents and cultural identity.<sup>99</sup> Article 2 forbids state parties from discriminating against children “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”<sup>100</sup> The CRC therefore forbids ratifying countries from restricting children’s access to education and imposes affirmative duties on nations to promote education for all children within their borders.

Article 28 regards education as “both a core human right and an engine for economic growth.”<sup>101</sup> This view is hardly surprising as the CRC was influenced by the UN’s International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>102</sup> The Committee on Economic, Social and Cultural Rights, in its general comments, stated that “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized [persons] can lift themselves out of poverty and obtain the means to participate fully in

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<sup>94</sup> *Id.* at 9.

<sup>95</sup> United Nations, Multilateral Treaties Deposited with the Secretary-General, vol. 1, at 390, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

<sup>96</sup> Rachel Hodgkin & Peter Newell, UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 23 (3d ed. 2007).

<sup>97</sup> CRC, *supra* note 84, at 53.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 54.

<sup>100</sup> *Id.* at 46.

<sup>101</sup> Hodgkin & Newell, *supra* note 96, at 408.

<sup>102</sup> CRC, *supra* note 84, at 45; see Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHT OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION, *supra* note 85, at 40.

their communities.”<sup>103</sup> The importance of education in the development of the child cannot be overstated and runs as a common theme throughout UN documents.<sup>104</sup>

The education guaranteed under the CRC is not limited to that received in a school setting, but “the reference in [article 28’s] subparagraph (e) to ‘attendance at schools’ and in article 29(2) to private ‘educational institutions’ implies that children will normally attend school.”<sup>105</sup> Therefore, under the CRC, states are required to provide children with the ability and opportunity to attend school. “Equality of educational opportunity can only be achieved if education is recognized as a right for all children, irrespective of their background.”<sup>106</sup> No child should be prevented from seeking an education, and all children, whether citizens or non-citizens, should have equal access to schools. The wording of the CRC is intentionally general because it seeks to reflect the values of nearly all nations.<sup>107</sup> Nevertheless, it is clear that Article 28 guarantees the right to compulsory primary education and “failure to meet this standard is a major source of concern to the Committee.”<sup>108</sup> The Committee’s reports illustrate that concern lies mainly with accessibility and availability to education, rather than monitoring the subject matter covered in schools.<sup>109</sup> As a baseline, states must provide education to young children; Legge n. 94/2009 denies even this basic right to undocumented alien children.

Italy ratified this legally binding convention yet its new public safety law denies undocumented children the right to an education by requiring teachers to report any undocumented children seeking an education. The law violates the CRC’s Article 28 by discouraging undocumented families who fear deportation from taking their children to school. Legge n. 94/2009 deters undocumented children from seeking an education and effectively shuts them out of schools. In addition to the requirement that states provide accessible education to children, Article 28(e) mandates that states shall promote school attendance and reduce the drop-out rate of students.<sup>110</sup> Rather than encouraging regular school attendance, the law promotes lack of attendance by using fear of deportation to keep undocumented children away and thereby increasing the likelihood of school drop-outs. By denying education to these children, Italy is stunt-

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<sup>103</sup> Committee on Economic, Social and Cultural Rights, General Comment 13, Art. 13 (Twenty-First Session, 1999), U.N. Doc. E/C.12/1999/10 at 1 (1999) [hereinafter Committee].

<sup>104</sup> See *infra* Part III.B.

<sup>105</sup> Hodgkin & Newell, *supra* note 96, at 411-12.

<sup>106</sup> *Id.* at 417.

<sup>107</sup> Revas, *supra* note 85, at 13.

<sup>108</sup> Hodgkin & Newell, *supra* note 96, at 422.

<sup>109</sup> *Id.* at 412.

<sup>110</sup> CRC, *supra* note 84, at 53.

ing their mental and social growth, contrary to the CRC's goal of helping each child develop to his/her fullest potential.

Furthermore, Italy violates Article 2 of the CRC with Legge n. 94/2009 because the new law is meant to discriminate against these children on the basis of national origin; the only children denied an education are those who will be prevented from attending school because the risk of deportation is too great. As long as Legge n. 94/2009 is in effect, the internationally recognized right to an education cannot be exercised by the children of undocumented immigrants in Italy.

### B. *Supporting UN Instruments*

The Universal Declaration of Human Rights ("UDHR"), a resolution of the UN General Assembly, was adopted in 1945 as a reaction to World War II.<sup>111</sup> The UDHR carries great weight because of its frequent use as an interpretive tool and its acceptance as international legal custom.<sup>112</sup> As a resolution, the UDHR is applicable to the every nation regardless of UN membership because it need not be ratified like a convention or a treaty.<sup>113</sup> Nevertheless, it is not legally binding and is enforced through political and social pressure.<sup>114</sup> The right to education is set out in Article 26 of the UDHR, which states "[e]veryone has the right to education" and requires elementary education to be compulsory and free.<sup>115</sup> This right is guaranteed to both children and adults and is to be broadly construed.<sup>116</sup> The requirement that elementary education be compulsory reflects the interest in protecting children from being prevented from attending school by their parents.<sup>117</sup> This concern is precisely implicated when considering the consequences of Legge n. 94/2009. Children of undocumented aliens will likely be kept home by their parents for fear of teachers reporting the family to immigration authorities. The law creates the exact situation the UDHR sought to avoid and thus runs counter to the resolution.

Another UN source violated by Legge n. 94/2009 is the ICESCR, entered into force in January 1966, which contains provisions declaring a

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<sup>111</sup> THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT xxvii (Gudmunder Alfredsson & Asbjørn Eide eds., 1999).

<sup>112</sup> *Id.* at xxxi.

<sup>113</sup> *Id.*

<sup>114</sup> Paolo De Stefani, *Italy: A Legal Puzzle, But the Civil Society Has Taken the Ball and Run With It, in 60 YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN EUROPE* 213, 214 (Vinodh Jaichand & Markku Suksi eds., 2009).

<sup>115</sup> Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. DOC. A/RES/217(III), at 71, 76 (Dec. 12, 1948).

<sup>116</sup> Pentti Arajärvi, *Article 26, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT*, *supra* note 111, at 554.

<sup>117</sup> *Id.*

right to education.<sup>118</sup> The ICESCR, just like the UDHR, was developed in reaction to WWII atrocities.<sup>119</sup> The ICESCR, along with the UDHR and the International Covenant on Civil and Political Rights (“ICCPR”) are together considered the International Bill of Rights.<sup>120</sup> The ICCPR does not contain any specific reference to educational rights, but binds nations to uphold basic human rights and ensure that their citizens are free from government interference with these human rights.<sup>121</sup>

Article 13 of the ICESCR, however, requires parties to the agreement to recognize that everyone has the right to education and that education shall be free to all and compulsory.<sup>122</sup> The ICESCR binds party states to “guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to . . . national or social origin . . . or other status.”<sup>123</sup> The ICESCR’s insistence on providing education to everyone and prohibiting states from discriminating against certain groups reinforces the international norm, reflected in the CRC and UDHR, that children must be allowed access to schools. Again, attendance is compulsory, indicating the ICESCR wants neither parents nor the state to prevent children from receiving an education. Unfortunately, under Legge 94/2009, it is likely that minors will be kept away from schools, for fear of deportation. The CRC, UDHR, and ICESCR all illustrate the UN’s commitment to providing free, accessible education to all children throughout the world. Italy, a member state of the UN and a signatory to each of these agreements, violates international law by insisting on the reporting of undocumented children by educators.

### C. *European Law*

Aside from UN membership, Italy is also bound, as a member state, to abide by the laws promulgated by the European Union (“EU”). The EU protects the educational rights of children in its directives, the European Convention on Human Rights and the European Union Charter of Fundamental Rights. Directives lay out certain objectives Member States are obligated to achieve but also grant nations the freedom to implement the directives using whatever form and method that best suits each nation.<sup>124</sup> If a Member State fails to implement the results required before the

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<sup>118</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>119</sup> Symposium, *Adding Teeth to United States Ratification of the International Covenant on Economic, Social and Cultural Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1211 (1993).

<sup>120</sup> *Id.*

<sup>121</sup> Woodhouse, *supra* note 102.

<sup>122</sup> ICESCR, *supra* note 118, at 8.

<sup>123</sup> *Id.* at 5.

<sup>124</sup> NICHOLAS MOUSSIS, *ACCESS TO EUROPEAN UNION LAW, ECONOMICS, POLICIES* 34 (18th ed. 2009).

directive's deadline, the nation is infringing European Community legislation because the directive now has direct effect.<sup>125</sup> The European Commission must ensure Member States meet their obligations under the directives.<sup>126</sup> Upon complaint from an individual, in response to a government request, or of its own initiative, the Commission can exercise its investigative powers to determine whether a Member State is infringing on Community law.<sup>127</sup> If the Commission finds the state is in violation of the directive, it will allow the state to submit its comments within a certain period of time.<sup>128</sup> If the explanations do not satisfy the Commission or if the state does not comply, the Commission issues a reasoned opinion which the state must comply with; failure to do so will result in the Commission referring the matter to the European Court of Justice ("ECJ").<sup>129</sup> The ECJ will then adjudicate the dispute, which likely will result in the state being sanctioned and ordered to conform to the Community legal order.<sup>130</sup> Therefore, if Legge 94/2009 conflicts with any EU directives now in effect, Italy is at risk of reprimand from the Commission.

The EU's most recent effort aimed at creating a common migration policy is its Directive 2008/115/EC, which lays out common standards and procedures for returning third country nationals who are illegally staying in Member States.<sup>131</sup> This directive illustrates the European Union's commitment to the CRC and to the rights of children. Article 5 of the directive requires member states to consider the best interests of the child when implementing the directive.<sup>132</sup> The directive favors voluntary departure by third country nationals and mandates that the period for voluntary departure shall be extended when circumstances require.<sup>133</sup> "Existence of children attending school" is listed in the directive as a factor to be considered when deciding whether to extend the stay period.<sup>134</sup> These provisions illustrate (1) the EU's commitment to protecting the interests of the child and (2) the importance the EU places on the education of children. The consideration of school attendance in deciding whether stay periods should be extended reveals that under the EU, education is not to be abruptly disrupted. Further evidence of such commitment to education is found in Article 14, which guarantees children access to education during the period prior to voluntary departure (as

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 46.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Council Directive 2008/115, art. 1, 2008 O.J. (L 348) 98, 100 (EC).

<sup>132</sup> *Id.* at 102.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*



granted in Article 7) or when removal has been postponed.<sup>135</sup> The directive also guarantees the right to education to children who are detained for extended periods of time prior to departure.<sup>136</sup>

Member States were required to bring their laws into compliance with the directive by December 24, 2010, at which time the directive was given direct effect.<sup>137</sup> As the deadline has passed, Legge n. 94/2009 is in contradiction with the directive. The directive mandates that children are to be given *access* to an education prior to voluntary departure; however, Legge n. 94/2009 denies such access because it results in deportation for children who seek such access. Additionally, Legge n. 94/2009 can hardly be considered a law that takes into account the best interests of the child, for it encourages parents to keep their children from school. Italy may be able to argue under Article 2 of the directive it is not required to amend Legge n. 94/2009 because “Member states may decide not to apply this Directive to third-country nationals who . . . are subject to return as a criminal law sanction or as a result of a criminal law sanction, according to national law.”<sup>138</sup> As Legge n. 94/2009 criminalizes illegal immigration, any undocumented immigrant, including a minor, is subject to criminal sanctions. This argument, however, is not in line with the spirit of the directive, which seeks to provide a fair deportation system that guarantees basic rights.<sup>139</sup>

A directive embodying similar principles with respect to children is Council Directive 2004/81/EC, which addresses residence permits granted to cooperating third-country nationals (“TCNs”) who were victims of human trafficking or were subject to an action to facilitate illegal immigration.<sup>140</sup> The directive applies to TCNs who are in a Member State illegally.<sup>141</sup> In addition to requiring Member States to ensure these TCNs have access to medical treatment, including psychological treatment,<sup>142</sup> the directive also requires Member States to provide minors with “access to the educational system under the same conditions as nationals.”<sup>143</sup> The directive states that the only permissible limitation Member States may impose is the requirement that undocumented children attend public, rather than private, schools.<sup>144</sup>

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<sup>135</sup> *Id.* at 104-05.

<sup>136</sup> *Id.* at 106.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 101.

<sup>139</sup> *Id.* at 98.

<sup>140</sup> Council Directive 2004/81, art. 1, 2004 O.J. (L 261) 19, 20 (EC).

<sup>141</sup> *Id.* at 21.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 22.

<sup>144</sup> *Id.*

A TCN who has been a victim of human trafficking enjoys enforceable rights stemming from this directive.<sup>145</sup> Therefore, in national legal proceedings concerning the enforcement of Legge n. 94/2009, TCNs could challenge the law's validity, prompting the ECJ to declare it in conflict with EU law.<sup>146</sup> When nationals attend school, they are not worried about being reported to immigration authorities; therefore undocumented children are not provided school access under the same conditions as nationals. This directive reinforces the importance the EU places on education for children residing in Member States illegally and the EU's commitment to promoting equal access to education.

Italy is further bound by the European Convention on Human Rights ("ECHR"). The ECHR was adopted in 1951 and was created by the Council of Europe largely as a reaction to the human rights violations that occurred during World War II.<sup>147</sup> The protocols to the ECHR are binding on all ratifying states, which include Italy.<sup>148</sup> Although the ECHR was drafted by the Council of Europe, much of it has been indirectly applied to EU law via rulings of the ECJ.<sup>149</sup> Protocol 1, Article 2 of the Convention states that "[n]o person shall be denied the right to education."<sup>150</sup> In *Timishev v. Russia*, a European Court of Human Rights decision, the court was presented with an alleged violation of Protocol 1, Article 2 of the Convention.<sup>151</sup> The Court held that "the right to education guarantees access to elementary education which is of primordial importance for a child's development . . . [T]he Convention and its Protocols do not tolerate a denial of the right to education."<sup>152</sup> Therefore, state action taken to prevent children from receiving an education is in violation of the ECHR. The right to education under the ECHR is to be interpreted broadly to comply with the policy view that the right to education plays a critical role in preserving and protecting human rights.<sup>153</sup> This provision has been construed to mean that states do not have an obligation to provide education but once educational institutions are established, states cannot deny persons the right to access them.<sup>154</sup> Legge n. 94/2009 violates the ECHR by denying undocumented children an education: placing children in a situation where they must choose between staying in Italy or going to school deprives children of a meaningful

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<sup>145</sup> *Id.* at 22-23.

<sup>146</sup> *Id.* at 22.

<sup>147</sup> DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (2d ed. 2009).

<sup>148</sup> *Id.* at 2 & n.4.

<sup>149</sup> *Id.* at 28.

<sup>150</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 1, 1998, E.T.S. No. 155.

<sup>151</sup> *Timishev v. Russia*, 2005-XII Eur. Ct. H.R. 169, 172 (2005).

<sup>152</sup> *Id.* at 189.

<sup>153</sup> HARRIS ET AL., *supra* note 147, at 699.

<sup>154</sup> *Id.* at 697.

opportunity to access educational resources. It is conceivable that a claim that Italy is in breach of Protocol 1, Article 2 could be brought before the European Court of Human Rights.

The new law also runs contrary to the values the EU wishes to promote. As mentioned above, the EU places primacy on the best interests of the child and regards education as fundamental. The European Union Charter of Fundamental Rights (the "Charter"), proclaimed in Nice in December 2000, reaffirms these views.<sup>155</sup> The goal of the Charter was to express the common values of the EU and to make them apparent to those within the EU.<sup>156</sup> The Charter applies to EU action, not to action by individual Member States.<sup>157</sup> The ECJ, however, has affirmed its own authority to review state action, on grounds of human rights violations, whenever a state has acted to implement EU law.<sup>158</sup> Arguably, Legge n. 94/2009 falls within the scope of the ECJ's judicial scrutiny as a matter of human rights law because Italy has a duty to implement the above-mentioned EC directives ensuring fair treatment for TCNs. Substantively, Legge n. 94/2009 clearly places Italy in breach of its Charter obligations. Article 14 of the Charter declares that "Everyone has the right to education."<sup>159</sup> This right to education is general and limited.<sup>160</sup> Nevertheless, Legge n. 94/2009 denies even this basic construction of the right to education. The law does not merely prohibit undocumented children from seeking education in their own language or from attending schools tailored to their religions; Legge n. 94/2009 requires *all* public officials to report these children, preventing the children from seeking *any* educational services. The Charter sets out the common values of Member States, and the security law blatantly contradicts those principles. It is difficult to reconcile the consequences of the security law with the Charter's requirement that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration,"<sup>161</sup> for lack of education is hardly in the best interest of children. As of December 1, 2009, the Treaty of Lisbon

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<sup>155</sup> See ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS vii (Tamara K. Hervey & Jeff Kenner eds., 2003).

<sup>156</sup> *Id.*

<sup>157</sup> Chloë Wallace & Jo Shaw, *Education, Multiculturalism and the Charter of Fundamental Rights of the European Union*, in ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 157, at 233.

<sup>158</sup> Case C-60/00, *Carpenter v. Sec'y of State for the Home Dep't*, 2000 E.C.R. I-6279; Case 368/95, *Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. 3689.

<sup>159</sup> Charter of Fundamental Rights of the European Union, art. 14, 2007 O.J. (C 364) 11.

<sup>160</sup> Wallace & Shaw, *supra* note 157, at 236, 238.

<sup>161</sup> Charter of Fundamental Rights of the European Union, *supra* note 159, at 13.

granted the Charter binding legal force.<sup>162</sup> Therefore, the right to education, in its broadest sense as found in the EU Charter of Fundamental Rights, cannot be withheld from children within the European Union.

The EU's Commission of the European Communities released a communication addressing illegal immigration in 2006.<sup>163</sup> This communication strove to outline policy priorities for a comprehensive migration management plan.<sup>164</sup> It noted that "[t]he comprehensive EU approach to combat illegal immigration is guided by a set of fundamental principles which aim to reconcile the need for solidarity within the Union, fundamental rights, expectations of third countries and public perception in Member States."<sup>165</sup> The ECHR and EU Charter of Fundamental Rights declare education is a fundamental right. The communication continues on to state "[i]rregular migrants must be offered a humane and dignified treatment" and that any limitation on fundamental rights must be in compliance with the Convention on Human Rights and Charter of Fundamental Rights.<sup>166</sup> The goals of a unified EU immigration program, as set out above, emphasize protection of vulnerable groups. The dignity of the individual is to be respected at all times, hence the restriction that limitations on rights must comply with the EU's human rights policies. The Commission lists lack of access to education as a factor that makes persons, including children, vulnerable to human trafficking and exploitation.<sup>167</sup> In laying out the policies to guide an EU immigration plan, the Commission recognizes how crucial education is to an individual's well-being and development. The Commission reaffirms the primacy of respecting human rights in immigration. The EU clearly expects its states to uphold these same values. Italy, in its new law, does not respect the dignity of the immigrant, does not uphold fundamental rights listed in the Convention on Human Rights and Charter of Fundamental Rights, and does not consider the best interests of the child because it puts undocumented children in a position that makes them vulnerable to exploitation and human trafficking.

#### IV. "BLAMING THE VICTIM" AS IMMIGRATION POLICY

The result of making teachers report undocumented children to the authorities will not be an increase in identifying undocumented families, but more likely a decrease in school attendance of children residing ille-

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<sup>162</sup> *Treaty of Lisbon: Treaty at a Glance*, EUROPA, [http://europa.eu/lisbon\\_treaty/glance/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/index_en.htm) (last visited Jan. 29, 2011).

<sup>163</sup> *Communication from the Commission on Policy Priorities in the Fight Against Illegal Immigration of Third-Country Nationals*, COM (2006) 402 final (July 19, 2006) [hereinafter *Communication*].

<sup>164</sup> *Id.* at 1.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 7.

gally in Italy. The current Italian law illustrates a startling approach to tackling illegal immigration: punishing children for conditions over which they have no control. Attempts to implement such measures to curb immigration have failed in the United States but it is disconcerting that governments perceive this as a legitimate tactic.<sup>168</sup> The United States Supreme Court decision in *Plyler v. Doe* provided sound reasoning for rejecting laws restricting undocumented children's rights to education. As mentioned in this note's introduction, *Plyler* involved a state statute that withheld funds from schools attended by undocumented children. Justice Brennan, writing for the majority, rejected Texas's argument that charging undocumented children tuition would help deter the flow of illegal immigration and offered that "prohibiting the employment of illegal aliens" is a more realistic alternative to achieve such a goal.<sup>169</sup> He noted that the statute is "directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control."<sup>170</sup> The sentiment that undocumented children are merely victims of circumstance is echoed in the UDHR's mandate for compulsory elementary education and the CRC's promise of education to all children, including those residing in a party state illegally. The CRC notes that in light of its non-discrimination principle, special attention should be paid by states to the needs of marginalized children, a category under which undocumented children undoubtedly fall.<sup>171</sup>

The *Plyler* decision also noted that migrating illegally is rarely, if ever, a choice made by the child.<sup>172</sup> Yet Legge n. 94/2009 creates a regime where children are punished as if they had made the conscious decision to enter Italy illegally. Children are not intentionally violating Italy's immigration laws but their rights are being taken away as a consequence of their guardians' actions. Many undocumented migrants in Italy chose to leave their home nations as a result of social conflict or because they suffered financial hardship.<sup>173</sup> The European Commission recognizes that one of the greatest incentives for immigrants to enter a country illegally is the potential for obtaining employment.<sup>174</sup> Nevertheless, under

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<sup>168</sup> See Halle I. Butler, *Educated in the Classroom or on the Streets: The Fate of Illegal Immigrant Children in the United States*, 58 OHIO ST. L.J. 1473, 1488 (1997) (discussing the 1996 Gallegly Amendment proposed to permit states to deny free public education to undocumented children).

<sup>169</sup> *Plyler*, 457 U.S. at 202, 228-29.

<sup>170</sup> *Id.* at 220.

<sup>171</sup> Comm. on the Rights of the Child, Rep. of the Comm. on the Rights of the Child, ¶ 287, U.N. Doc. A/55/41, Supp. No. 41 (May 8, 2000).

<sup>172</sup> *Plyler*, 457 U.S. at 220.

<sup>173</sup> European Migration Network, *Illegally Resident Third Country Nationals in Italy: State Approaches Towards Them and Their Profile and Social Situation*, 36 (Dec. 2005), available at <http://emn.sarenet.es/Downloads/prepareShowFiles.do?jsessionid=18542686578C62171A54D0820046D94E?directoryID=17>.

<sup>174</sup> *Communication*, *supra* note 163, at 8.

Legge n. 94/2009, the harm falls on the child: if Italian teachers must report undocumented children, then the children will no longer attend school. Consequently, illegal immigration is not decreased, but rather school drop-out rates are increased as a result of the new law.

The punishment imposed by Legge 94/2009 is not proportional to the alleged crime because placing a barrier between the child and education causes irreparable harm. Justice Brennan astutely wrote in the *Plyler* opinion that “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”<sup>175</sup> The new immigration law condemns the current generation of undocumented youth to illiteracy and ignorance, making it likely that they will earn their living in the black market (because they will be unqualified both in terms of academic achievements and in citizenship status for a legal occupation), “perpetuating a cycle of poverty and minimal tax contributions.”<sup>176</sup> Replenishment of the black market economy will inevitably result in continuing illegal migration into Italy. Education prepares children to be self-sufficient participants in society. Without education, undocumented children, who are already disadvantaged because they lack citizenship, have even more obstacles placed before them.

Furthermore, the immediate effects of keeping undocumented children away from schools must also be examined. If children do not go to school, where do they go and who is monitoring them? At best, child care, if not home education, is available but at worst the new law’s provisions will result in increases in juvenile crime rates and teen pregnancy.<sup>177</sup> The UN recognizes that “Education has a vital role in . . . safeguarding children from exploitative and hazardous labour and sexual exploitation . . . education is recognized as one of the best financial investments States can make.”<sup>178</sup> Schools play a valuable role in the development of the person; in inspiring self-confidence and dignity in individuals; in socializing children to become members of society; and in ensuring children have a positive, safe place to be while their parents are at work. An additional consequence of requiring teachers to report undocumented children is that division may be created among educators and communities.<sup>179</sup> The effect of implementing Legge n. 94/2009 is yet to be

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<sup>175</sup> *Plyler*, 457 U.S. at 222.

<sup>176</sup> Ragan, *supra* note 18, at 493-94.

<sup>177</sup> Butler, *supra* note 168, at 1492.

<sup>178</sup> Committee, *supra* note 103.

<sup>179</sup> See generally Nina Rabin et al., *Understanding Plyler’s Legacy: Voices From Border Schools*, 37 J.L. & EDUC. 15 (2008) (detailing a survey sent to American teachers seeking their response to hypothetical laws concerning immigration. Of particular interest is Section B.1. “I am a teacher, not a Border Patrol agent” which asks teachers to respond to the hypothetical passage of a law similar to Legge n. 94/2009.).

analyzed, but it is certain its requirements are placing teachers in a difficult position, parents in a frightening position, and children in a desperate position.

## V. CONCLUSION

Italy's Legge n. 94/2009 violates international law by effectively denying undocumented children their internationally recognized right to education. The right to education has been repeatedly recognized in various international instruments. Legge n. 94/2009 restricts access to education for children residing in Italy illegally by requiring teachers and public officials to report these children to immigration authorities, should they attend school. The law's threat of deportation effectively creates a ban on attendance by these students and violates the CRC's provisions concerning education and non-discrimination. The law also violates EU directives, values, and policies regarding immigration. UN conventions and principles are likewise contravened by the security law. Such violations may be useful to opponents of the new law in attacking the provision or advocating amendment. For example, since Italy is bound by the ECHR, a claim can be brought under Protocol 1, article 2 which forbids the denial of education to any person. Likely such a claim would have to be brought by citizens of Italy (perhaps school staff), for it is unreasonable to expect an undocumented immigrant to risk exposure with Legge n. 94/2009 still in force. Another possible means of challenging the law exists by means of the EU directives mentioned above. The Italian courts are bound to enforce the directives once they are in effect. Therefore, should an undocumented child who was a victim of human trafficking be refused an education, Legge n. 94/2009 would be superseded by Council Directive 2004/81/EC. Furthermore, under Directive 2008/115/EC, undocumented children must be given access to schools and any public official who is prosecuted under Legge n. 94/2009 for not reporting the child can assert the directive as a defense.

The provision and its violation of international law may also be a signal to the EU that it needs to take a greater role in helping nations that are particularly affected by illegal immigration in constructing effective laws that comply with international law and human rights. Italy, however, must be ready to implement the EU values, should a comprehensive immigration policy come into effect. Italy's current problems are in part the result of the nation's delayed legislative response to immigration; however, Legge n. 94/2009 steps too far in its effort to curb the illegal population. By attacking children, whose decision to enter Italy illegally is normally made by their caregivers, Legge n. 94/2009 lashes out against a class who can do little to promote Italy's desired immigration policies. Nevertheless, blaming and punishing undocumented children by taking away their rights is a strategy for nations who are being overwhelmed by a growing population of undocumented immigrants. Only when states

have sufficient support will they stop restricting children's rights and get to the heart of their immigration problems. Italy needs to reexamine Legge n. 94/2009 and its immigration policy. It needs to seriously consider the real causes of immigration and develop a fair, humane law that addresses these factors and conforms to the international obligations to which Italy is bound. Italy needs to repeal Legge n.94/2009's provision which restricts children's access to education.