

“Undocumented” Justice for Migrants in Italy

A mission report



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October 2014

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I. Introduction

1. Context

The objective of protecting human rights and upholding the rule of law in the context of migration has grown ever more challenging and in the face of burgeoning migration to the European Union (EU). In this regard, there is no doubt that Italy is now one of the most important gateways to the EU. In recent years, the central Mediterranean route has reclaimed its central role for migration travels to mainland EU countries, as appears clear from graph no. 2 comparing the number of transits through the different entry routes to the EU.¹ The situation has been exacerbated in 2014, when, according to UNHCR, by 14 August 2014 the number of arrivals of migrants and asylum seekers had reached around 100,000 persons, more than double the total numbers of 2013 (see, graph no. 1).²

At least since 2008, the response of Italy to the increased numbers of migrant arrivals to its shores had been one of rejection, an approach best exemplified by the policy of push-backs on the high seas designed and implemented through the infamous 2008 *Treaty on Friendship, Partnership and Cooperation* with Libya during the reign of Muammar Gaddafi.³ Pursuant to that treaty, the Italian authorities began a practice of push-backs to Libya that was ultimately condemned by the European Court of Human Rights (ECtHR) in the case *Hirsi Jamaa and others v. Italy* as a violation of the prohibition of collective expulsion, of the principle of *non-refoulement* and of the right to an effective remedy.⁴

Recently, fortunately, the situation on the high seas seemed to have improved. On 18 October 2013, Italy unilaterally activated the operation *Mare Nostrum*, through which the Italian military navy and aviation, the *Carabinieri*, the *Guardia di Finanza*, the Police, coastguard and the military personnel of the Italian Red Cross have been patrolling the high seas, but this time in order to rescue migrants in distress and to bring them ashore on Italian territory.⁵ Although the conduct of this ongoing operation is outside the scope of this report, the ICJ welcomes the efforts of Italy to save lives in the Mediterranean Sea under operation *Mare Nostrum*. Nonetheless, this laudable effort has naturally strained Italy's resources more than in the past.⁶ At its meeting with representatives of the Directorates of Civil Liberties and Immigration and of Public Security of the Italian Ministry of Interior, the mission heard that, at the time of the visit, there were some 47,000 persons held in reception centres and that the overall reception capacity of the country was overstretched.⁷

¹ It is possible also to see some correlation between the decrease of arrivals in the Eastern Mediterranean route (through Greece, Bulgaria and Cyprus) and the increase towards Italy and Malta.

² UNHCR Italy, "100,000 Sea arrivals to Italy in 2014", 14 August 2014, available at <https://www.unhcr.it/news/100000-sea-arrivals-to-italy-in-2014-over-50-percent-of-them-are-fleeing-war-violence-and-persecution-it-is-necessary-to-provide-alternatives-to-the-perilous-sea-crossings>.

³ The Treaty was preceded by a bilateral cooperation agreement of 29 December 2007 and followed by a modification of this last in an Additional Protocol of 4 February 2009. See, history of the agreements in the case *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, application no. 27765/09, Judgment of 23 February 2012.

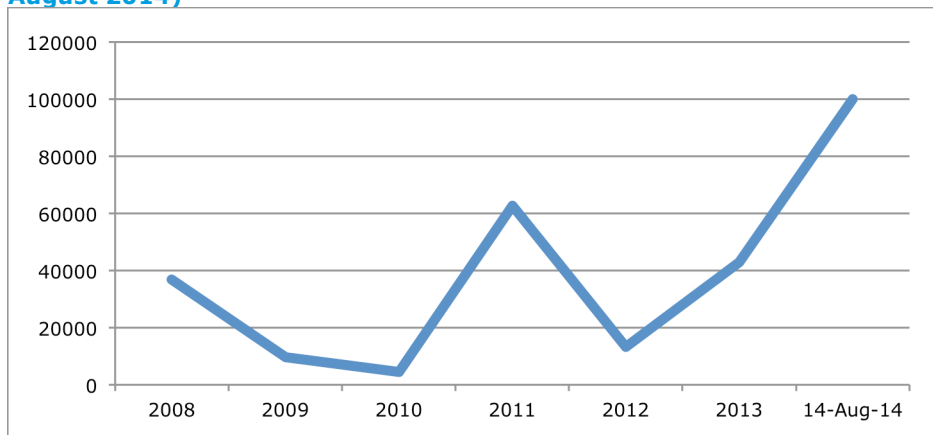
⁴ *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, application no. 27765/09, Judgment of 23 February 2012.

⁵ See an official description of the operation *Mare Nostrum* at <http://www.marina.difesa.it/attivita/operativa/Pagine/MareNostrum.aspx>.

⁶ The Minister of the Interior, Angelino Alfano, reported to the House of Representatives on 16 April 2014 that the operation costed more than 9 million of Euros per month (see, minutes of the discussion at <http://www.camera.it/leg17/410?idSeduta=0213&tipo=stenografico#sed0213.stenografico.tit00030.sub00010>). On 30 June, EU Commissioner Cecilia Malmström, after a meeting with the Italian Minister of the Interior, announced that the European Commission was "currently making 4 million EUR available in the framework of the Emergency Assistance to Italy, and we are looking at ways to contribute even more, within the available resources, to the financing of the Italian efforts to host migrants and refugees on their territory". According to the press, on 15 August, the Minister of the Interior, Angelino Alfano, announced that the operation *Mare Nostrum* would be terminated in October 2014 and substituted with a EU-led one (La Repubblica, "Non si fermano gli sbarchi. In poche ore centinaia di migranti. Alfano: 'A ottobre stop Mare Nostrum, via forza UE'", 15 August 2014, available at http://www.repubblica.it/cronaca/2014/08/15/news/sbarchi_di_immigrati-93825851/). However, according to the press, on 19 August, spokesperson of both the European Commission and the EU border agency, FRONTEX, denied that the EU institutions have the capacity to sustain or have ever offered to take charge of the operation (La Repubblica, "Emergenza migrant, l'UE gela l'Italia su Frontex: 'Non ha i mezzi per subentrare a Mare Nostrum'", 19 August 2014, available at http://www.repubblica.it/cronaca/2014/08/19/news/emergenza_migranti_frontex_gela_l_italia_non_abbiamo_mezzi-94075220/?ref=HREC1-6). More recently, while the Italian Minister of the Interior, Angelino Alfano, has repeatedly announced that the Frontex operation will take over from the *Mare Nostrum* operation, the European Commission and Frontex have been clear that operation Triton will not replace *Mare Nostrum*, and that therefore all 'humanitarian' efforts remain the responsibility of *Mare Nostrum* or in any case not the responsibility of the EU.

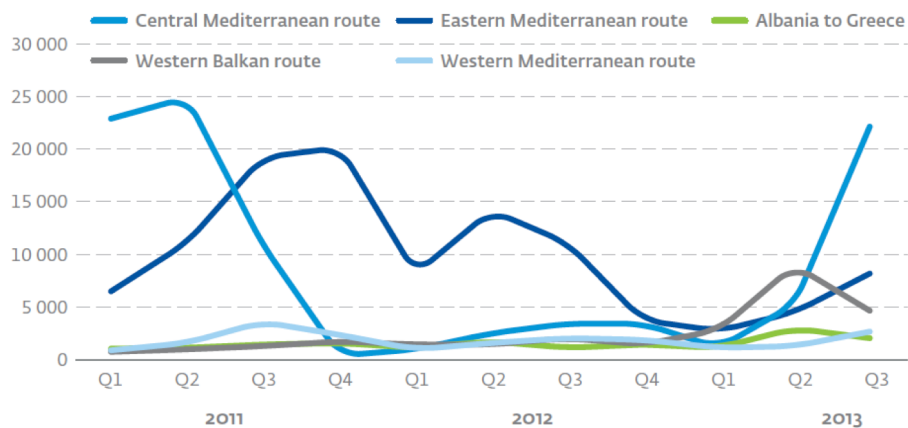
⁷ At its meeting with representatives of the Directorates of Civil Liberties and Immigration and of Public Security of the Italian Ministry of Interior, the mission was clearly told that the authorities did not consider *Mare Nostrum* to constitute a "pull factor" in attracting

Chart no. 1: Number of arrivals of undocumented migrants in Italy by sea (2008-14 August 2014)



Source: Ministry of Interior, UNHCR.

Chart no. 2: Evolution of migration routes towards the EU (2011-2013)



Source: FRAN data as of 5 November 2013

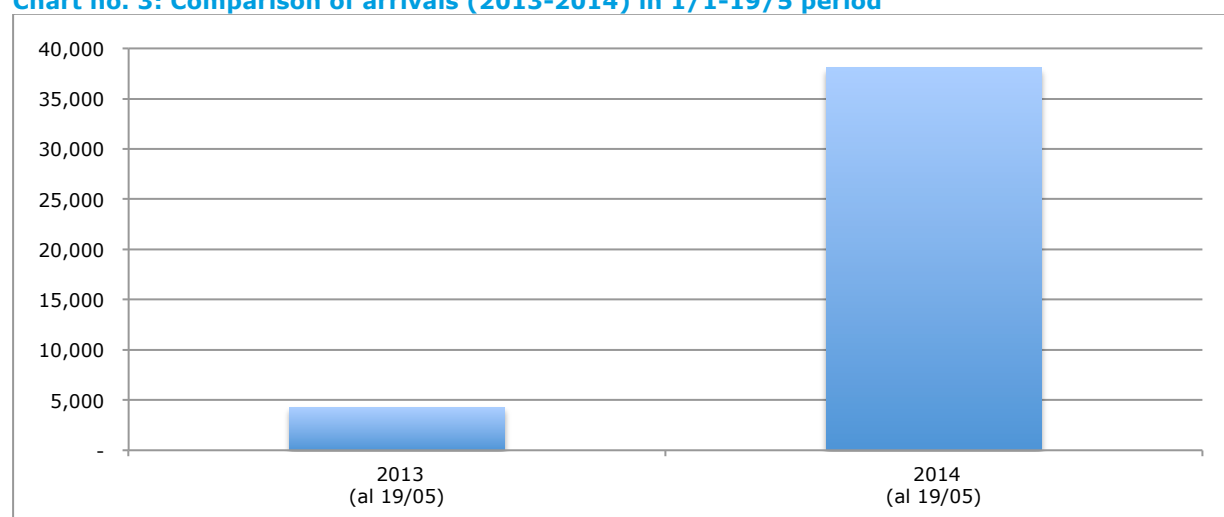
Published by Frontex, FRAN Quarterly, Quarter 3, July-September 2013, p. 15

Although the wider issues of European migration are also beyond the remit of this report, the ICJ shares the view expressed by Italian officials that migration through the Mediterranean Sea and southern Europe is not strictly a national issue, but also a global and especially European one, and that the EU should involve itself to a much greater extent, in a human rights compliant manner, in operations at sea that are crucial for the lives of many migrants. The EU Member States should certainly step up their efforts towards a “Europeanization” of borders by substantially contributing to the operation *Mare Nostrum*. It is however misplaced to consider that, in the present circumstances, responsibility for such engagement lies only with the European Commission and the EU border agency, FRONTEX, whose resources would not be able to relieve much of Italy’s burden in this operation. The ICJ, therefore, regrets the recent announcements that the operation may soon end.

migration, but rather more of a “damage control” operation. It was suggested that the most significant pull factors have been the conflicts in Africa and the Middle East in recent years, including the armed conflicts in Libya, Mali and Syria.

The situation of Italy is further complicated by the effect of the Dublin Regulation, which, even in its third reformulation, remains centred on the country of first irregular arrival of the asylum seeker as the country responsible to examine an asylum application. Such a legal hurdle places Italy in a “catch-22” situation, whereby the rescue of migrants, where their numbers are increasing, inevitably puts under extreme pressure the limited resources of the reception and asylum assessment systems. In 2014, the number of migrants landing in Italy has already doubled. While financial support and EU funds may of course be of some help, it is difficult to see that this money alone will relieve the situation of the country in the short term. The increase and improvement of reception capacity and conditions and of human resources capacity within the asylum assessment system, mandated by the Government by Law Decree no. 119 of 22 August 2014,⁸ requires not only financial resources, but also time and planning. It is obvious that the burden connected with the influx of migrants should be spread more equitably among EU Member States. For years, human rights advocates have pointed at the absurdity of the prominence of the “irregular entry” criteria in the Dublin system, and recent revisions have not changed this factor.⁹ It is time for the EU Member States – which are ultimately responsible for this deadlocked situation – to rethink thoroughly the EU migrant and asylum management system.

Chart no. 3: Comparison of arrivals (2013-2014) in 1/1-19/5 period

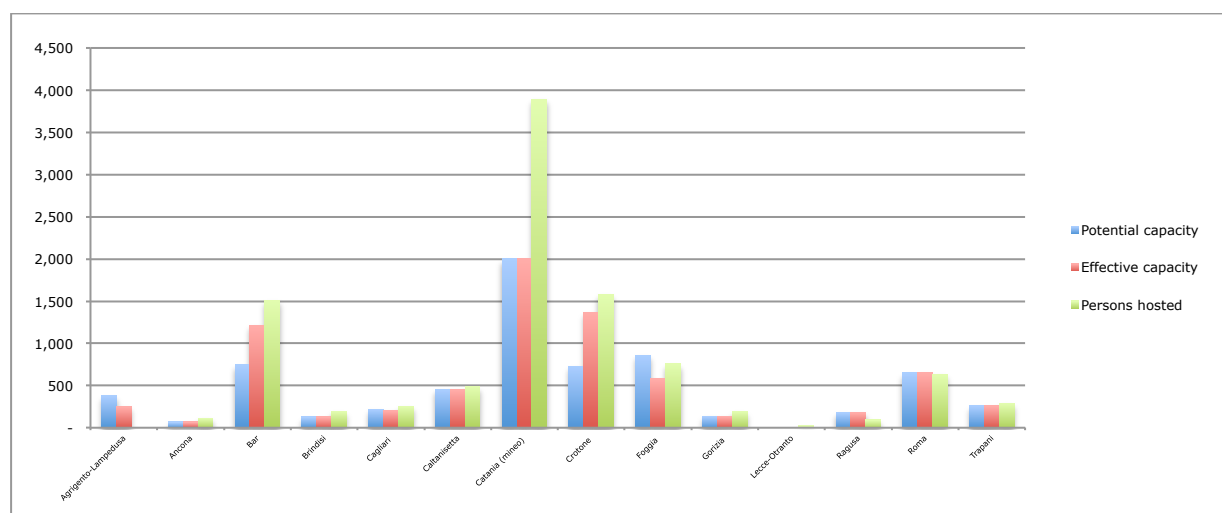


Source: ISMU

⁸ Press Release of the Council of Ministers of 8 August 2014, available at <http://www.governo.it/Governo/ConsiglioMinistri/dettaglio.asp?d=76500>.

⁹ See, among others, *The Dublin II Trap : Transfers of asylum seekers to Greece*, Index : EUR 25/001/, March 2010 ; Forum Réfugiés – Così, the Hungarian Helsinki Committee and the European Council on Refugees and Exiles (ECRE), *Dublin II Regulation : Lives on Hold*, February 2013 ; Human Rights Watch, *EU : Put Rights at Heart of Migration Policy*, 20 June 2011.

Chart no. 4: Situation in reception centres for asylum seekers in Italy at 4 March 2014



Source: ISMU

2. The scope of the mission

The focus of this report is not, however, *Mare Nostrum* or the situation of migrants at sea. It is about a much more day-to-day subject: the possibility for undocumented migrants who have found themselves in the situation of being subject to an expulsion order and/or held in administrative detention (hereinafter "detention")¹⁰ to access justice to challenge expulsion and detention decisions, and whether the legal system adequately and properly secures their substantive and procedural rights.

The ICJ has often emphasized that the legal profession, including judges, lawyers and prosecutors, is central not only to upholding the rule of law generally, but also in ensuring that human rights are respected, protected and fulfilled and that access to justice is effectuated.¹¹ In the context of migration, this role is no less pronounced. With these considerations, the ICJ decided to undertake a mission to assess whether the judges whose responsibility necessarily extends to the protection of human rights for undocumented migrants in situations of expulsion or detention, i.e. the justices of the peace, were able and well situated to exercise this task properly and effectively. The mission also undertook to assess whether the Italian legal system, through its law and in practice, is able to guarantee access to justice to migrants faced with expulsion or in detention, including by securing the enjoyment of all the related procedural rights.¹²

Access to justice, of course, encompasses much more than justice in expulsion or detention. It extends to protecting all civil, cultural, economic, political and social rights. However, cases that have been considered at the international level,¹³ including several judgments of the

¹⁰ For shorthand purposes, the report will use this term to mean only "administrative detention". Other forms of deprivation of liberty will be identified either through different nomenclatures, e.g. "imprisonment", or through specific adjectives.

¹¹ See, ICJ Declaration of Delhi, 10 January 1959 ; ICJ Declaration of Bangkok, 19 February 1965 ; ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004 ; ICJ Geneva Declaration and Plan of Action on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, 3 December 2008 ; ICJ Declaration on Access to Justice and the Right to a Remedy, 12 December 2012.

¹² The mission did not consider the issue of the criminal offence of irregular entry or stay, contained in article 10-bis of Legislative Decree no. 286/1998 as modified (hereinafter, the "Immigration Law") and punished with a fine, because, at present, it is undergoing modifications in Parliament and an assessment of it would be either moot or premature, depending on the solution adopted by the legislator.

¹³ Financial Times, "Kazakhstan opens way for return of Alma Shalabayeva to Italy", 23 July 2013, available at <http://www.ft.com/cms/s/0/8ec033ce-f3ae-11e2-942f-00144feabdc0.html#axzz3AoVj9KW> ; Report of a mission of the Italian Senate to Kazakhstan, available at <http://www.senato.it/application/xmanager/projects/leg17/file/Incontro%20con%20Alma%20Shalabayeva%20e%20sua%20figlia%20Alia.pdf> ; FIDH, "Italy - Kazakhstan: Italy grants refugee status to Alma and Ala Shalabayeva", 25 April 2014, available at

European Court of Human Rights (ECtHR),¹⁴ have prompted attention to the role of the “judge” in expulsion and detention procedures that justices of the peace have been responsible for over the last ten years. In consideration of these developments, the ICJ decided to give particular attention to a review of the system in light of international law and standards.

The mission visited Rome and Milan from 2 to 6 June 2014 and was composed of Ketil Lund, former justice of the Supreme Court of Norway and Commissioner of the ICJ, Ian Seiderman, ICJ Director of Law and Policy, and Massimo Frigo, ICJ Legal Adviser. The mission visited the Centre for Identification and Expulsion (C.I.E.) of Ponte Galeria and met with police officers and the NGO responsible for the running of the Centre. The mission held meetings and exchanged views in Rome with police personnel and members of the C.I.E. of Ponte Galeria; with senior officers of the Ministry of Interior’s Directorates of Public Security and of Civil Liberties and Immigration; with the research coordinator of the justice of peace jurisprudence clinic of the University Roma Tre (see box no. 4); with twenty lawyers and civil society representatives that provide legal representation and services to undocumented migrants; with eight justices of the peace part of the immigration section; and with one judge of the Court of Cassation. The ICJ mission also met in Milan with fourteen lawyers and civil society representatives that provide legal representation and services to undocumented migrants; and with seven justices of the peace of the migration section in Milan. An interview was also conducted through electronic means with a justice of the peace of Bologna.

During its visit in Rome and Milan, the ICJ mission had the opportunity to exchange views with representatives of the Democratic Unit of Justices of the Peace and Honorary Judges (UDGDP); the Confederation of Justices of the Peace (*Confederazione Giudici di Pace*); National Union of the Justices of the Peace (*Unione Nazionale Giudici di Pace*); of the Italian Association for Legal Studies on Migration (ASGI); the Italian Refugee Council (CIR); the Italian section of the Jesuit Refugee Service (*Centro Astarti*); the Criminal Chambers (association of criminal lawyers); the Forensic Union for Human Rights Protection (UFTDU); the Federation of Evangelical Churches in Italy (FCEI); the association “Progetto Diritti”; and the association Naga.

This report’s analysis is based primarily on international human rights law and standards. It is divided in two main chapters, one dedicated to the expulsion system (chapter II) and one to the detention system (chapter III). In these chapters, the systems will be presented in their legal and practical aspects and an analysis of their compliance with international law and standards will be provided. A final chapter will set out the ICJ’s conclusions and recommendations.

<http://www.fidh.org/en/europe/italy/15232-italy-kazakhstan-italy-grants-refugee-status-to-alma-and-alua-shalabayeva> .

¹⁴ See, *Seferovic v. Italy*, ECtHR, Application no. 12921/04, Judgment of 8 February 2011; *Hokic and Hrustic v. Italy*, ECtHR, Application no. 3449/05, Judgment of 1 December 2009; *Mannai v. Italy*, ECtHR, Application no. 9961/10, Judgment of 27 March 2012; *Tuomi v. Italy*, ECtHR, Application no. 25716/09, Judgment of 5 April 2011; *Saadi v. Italy*, ECtHR, Application no. 37201/06, Judgment of 28 February 2008; *Ben Salah v. Italy*, ECtHR, Application no. 38128/06, Judgment of 24 March 2009; *Darraj v. Italy*, ECtHR, Application no. 11549/05, Judgment of 24 March 2009; *O. v. Italy*, ECtHR, Application no. 37257/06, Judgment of 24 March 2009; *Soltana v. Italy*, ECtHR, Application no. 37336/06, Judgment of 24 March 2009.

3. An introduction to the Italian immigration legal system

a) The immigration system

Article 10 of the Italian Constitution states:

The Italian legal system conforms to the generally recognised principles of international law.

The legal status of foreigners is regulated by law in conformity with international provisions and treaties.

A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.

A foreigner may not be extradited for a political offence.¹⁵

The Italian legal system governing expulsion and detention of undocumented migrants is complex, to say the least. It is centred on Legislative Decree no. 286/1998, the "Immigration Law", that has been modified many times in the last twenty years, resulting in a patchwork of laws and increasing the disharmony and incoherence of the system. The entry into force of the European Union Directive 2008/115/EC (hereinafter, the "Return Directive") should have led to a coherent codification of the legal framework through a holistic reform of the whole system in line with the Directive itself and with international human rights and refugee law. However, the Directive was implemented by means of the rushed promulgation of a Law Decree, hastened by the previous excessive delay of the Italian authorities in the transposition of the Return Directive and the start of a legitimate infringement procedure by the European Commission. This accelerated process defeated any attempt at establishing coherence, and led to the discrepancies of national legislation with EU law that will be outlined below.

Procedures regarding undocumented migrants are undertaken in two parts: a declaratory phase and an execution phase. In the declaratory phase, the order of expulsion or push-back generally states the ascribed status of the migrant, i.e. the situation of incompatibility of the presence of the undocumented migrant in the national territory (or of his or her entry) with the national legal framework. In the execution phase, the orders of detention, forced accompaniment or voluntary return indicate measures of implementation of this declaratory decision. These distinctions vary depending on the situation: for example, in the case of a push-back at the border, the declaratory decision and its execution will be merged in practice. By contrast, in the cases of "deferred" push-backs (see, Chapter II) and expulsion, different measures and authorities will be involved in the declaratory and execution phase.

b) The role of international law

Human rights protection is enshrined in Italian national law both expressly in the Italian Constitution and through provisions affirming the direct applicability of international human rights law, as well as through EU law, specifically the Charter of Fundamental Rights of the European Union (the "EU Charter"). Specific rights, such as the right to health, to equality or to education, are explicitly included in the Constitution, while its article 2 leaves space to incorporate further rights, by providing that "[t]he Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed."¹⁶

¹⁵ Senate's official translation available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

¹⁶ Senate's official translation.

International human rights law is applicable within the Italian system, when sufficiently precise to be self-executing, through article 10 of the Constitution, that incorporates at constitutional level international customary law, and article 117.1 of the Constitution, which provides that "[l]egislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations."¹⁷ Through this constitutional provision, national legislation must secure human rights obligations expressed both by customary international law and treaty law. The Constitutional Court, in its judgments 348 and 349 of 2007, has ruled that all legislation must be compatible with the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights.

Finally, apart from the reference included in the abovementioned article 117.1, EU law is directly applicable by national courts through article 11 of the Constitution which provides that "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations."¹⁸ Through this constitutional clause, all EU law is directly applicable, including, first and foremost, the Charter of Fundamental Rights of the European Union, when EU law is applied.¹⁹ All national legislation must be interpreted in light of EU law obligations and must be disapplied if it is irretrievably in conflict with such law.

c) The justice of the peace

The justice of the peace is at the centre of the system of judicial protection of the human rights of undocumented migrants in situations of expulsion and administrative detention. The importance of this institution deserves that it should be examined at this stage.

The office of justice of the peace was established in Italy by Law n. 374 of 21 November 1991. In accordance with article 106 of the Italian Constitution, the Law on the Judiciary provides that "honorary" magistrates have all the functions that are attributed to professional "single judges".²⁰ As to professional judges,²¹ by contrast to justices of the Peace, the Constitution provides that they must be "appointed through competitive examinations."²² Professional judges or prosecutors have permanent tenure, are appointed after a public examination and receive fixed remuneration. It is worth noting that, despite their honorary status, justices of the peace are "ordinary" judges and, as such, competent to hear cases that affect rights, as stated in articles 1 and 4 of the Law on the Judiciary.²³ They are not administrative judges whose competence is limited only to "legitimate interests" not affecting "rights".²⁴ The justice of the peace, previously competent only in some specific civil cases, such as on movable goods up to 5,000 Euro and civil cases on damage compensation for road

¹⁷ Senate's official translation.

¹⁸ Senate's official translation.

¹⁹ Article 52, Charter of Fundamental Rights of the European Union (hereinafter, the "EU Charter").

²⁰ In Italy, ordinary first instance courts can sit in two configurations: either as a single judge or as a panel of more judges (the number depending from the matter at issue and the body of law considered) for more serious cases.

²¹ This report will refer to judges and prosecutors following the ordinary career path as "professional judges" in contrast with "honorary judges," of which justices of the peace are part. This choice was taken in order to follow the distinction suggested by the Italian High Council of Judicature in its English document of presentation of the Italian legal system, available at

<http://www.csm.it/documenti%20pdf/sistema%20giudiziario%20italiano/inglese.pdf>. In no way it wants to convey the idea that one group of judges is less professional than the other. Finally, the reader should note that, in this report, the term "judge" translates the Italian term *magistrato* that includes both judges and prosecutors subject to the same guarantees and the same governing body, the High Council of Judicature. This choice is dictated by the fact that the nearer term in English, "magistrate", designates, as false friend, honorary judges and would have created confusion in the English reader.

²² Article 106.1, Constitution (Senate's official translation).

²³ Articles 1 and 4 of Royal Decree no. 12 of 30 January 1941, as modified.

²⁴ The ordinary judge (Tribunal and Appeal Court) has competence on violations of subjective rights (article 24 of the Constitution). The administrative judge (Regional Administrative Tribunal (T.A.R.) and Council of State) has competence on violations of legitimate interests and in particular subjects identified by law, as well as on subjective rights (article 103 of the Constitution). The latter judge has the authority to annul illegitimate administrative acts and, only in a few cases identified in an exhaustive list, to reformulate the illegitimate act. The concept of "legitimate interest" is complex and has raised problems of definition that have divided for long time doctrine and jurisprudence. The majority opinion today is that a legitimate interest is the subjective juridical situation to which persons are entitled in their relations with the Public Administration, which exercises an authoritative power, established by law. Its object is a benefit or a vital good that a person aims to maintain (e.g. a land in expropriations) or to obtain (e.g. the authorization to exercise a particular professional activity), through the legitimate exercise of the administrative power.

accidents for up to 20,000 Euro,²⁵ was subsequently tasked by Legislative Decree no. 274 of 28 August 2000 with adjudicating on minor criminal offences.

Box no. 1: Honorary judges and justices of the peace

The honorary magistrature, as opposed to professional judges, is composed by:

1. Justices of the peace, instituted in 1991, as outlined above;
2. Auxiliary honorary judges, appointed to help solve the civil cases pending until 30 April 1995 at first instance, due to a reform of the civil procedure code;
3. Honorary tribunal judges, supporting career judges in ordinary tribunals;
4. Honorary vice-prosecutors, supporting the public prosecutors;
5. Lay judges that are experts in juvenile courts;
6. Lay judges in assize courts;
7. Lay judges that are experts in detention review tribunal;
8. Lay judges that are experts in specialized agrarian sections.¹

Each of these groups of judges is governed by different laws. They are overall referred to as "honorary judges", although their roles are quite different.

For a summary, see, in Italian, the presentation of the judicial system by the High Council of Judicature, at <http://www.csm.it/documenti%20pdf/SistemaGiudiziarioItaliano.pdf> .

The office of the justice of the peace is very precarious. Originally, article 7 of Law 374/1991 provided that justices of the peace could be appointed for a term of four years, renewable once. After these two terms, the justice of the peace had to wait for four years before applying for a reappointment. This article has been amended at least six times, by modifying the terms of appointment to four years, renewable once, plus another term of two years, and by renewing their mandate for one or two years at a time. Such reforms have been temporary measures, pending the reform of the whole category of honorary judges.²⁶ The last modification, in 2013, provides that, "while waiting for the overall reform of the justice of the peace system, the honorary judge that exercises the function of the justice of the peace lasts in office for four years and can be renewed for a second mandate of four years and for a third mandate of two years"²⁷ The precariousness of the office is also demonstrated by the fact that justices of the peace are paid according to the number and type of case and by the activity they perform and not through a fixed salary, as will be outlined below.

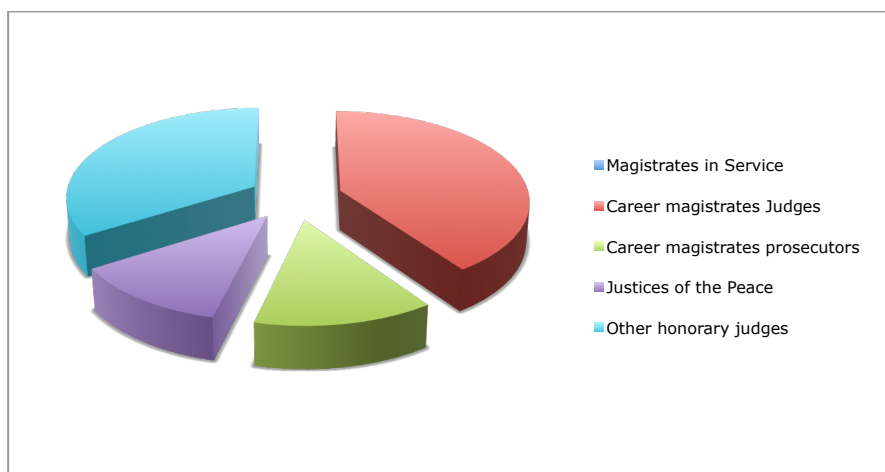
In its judgment no. 222 of 15 July 2004, the Constitutional Court ruled that the fact that the Immigration Law allowed for a forced accompaniment to the border to proceed, without a prior judicial authorization within 48 hours, violated the procedural guarantees under the right to liberty enshrined in article 13 of the Constitution. The Court further held that the lack of a judicial procedure violated the rights to an adversarial procedure and to defence under articles 111 and 24 of the Constitution.

²⁵ Article 7 of the Civil Procedure Code, as inserted by Law n. 374 of 21 November 1991, as modified.

²⁶ See the modifications in Normattiva, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1991-11-21;374> .

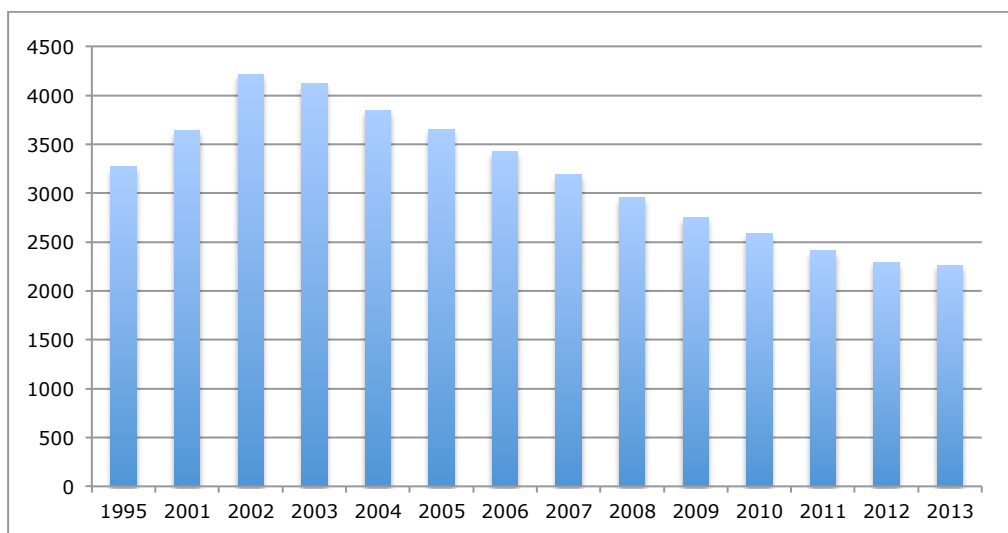
²⁷ Article 7.1, Law 374/1991, as modified (unofficial translation).

Chart no. 5: Composition of the Italian Judiciary



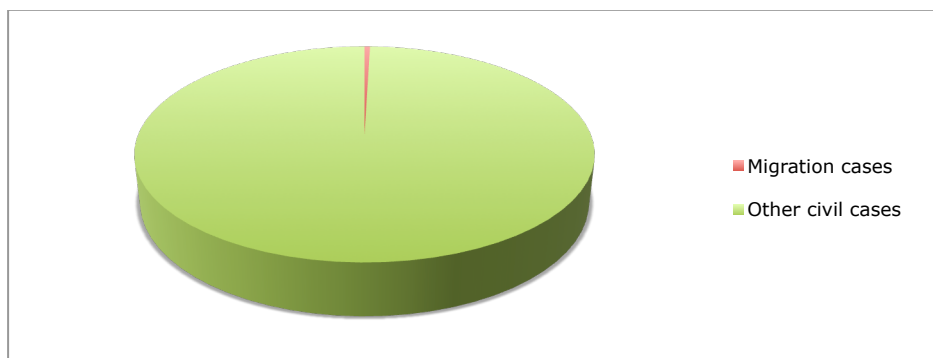
Source: Italian High Council of Judicature²⁸

Chart no. 6: Number of justices of the peace in Italy (1995-2013)



Source: Servizio studi Senato 2013

Chart no. 7: Comparison of migration cases v. other civil cases in 2011



Source: ISTAT²⁹

²⁸ See data at <http://astra.csm.it/organicoOrdinari/orgord.php>.

²⁹ See data at http://www.istat.it/en/files/2013/12/Cap_6.pdf.

In reaction to this judgment, Parliament adopted Law no. 271 of 12 November 2004, which converted into legislation the emergency Law Decree no. 241/2004 of 14 September 2004. This legislation assigned the task of judicial supervision in relation to expulsion, forced accompaniment and detention to the justice of the peace, removing it from professional judges in tribunals. This decision was justified as necessary in order to decrease the workload of professional judges.³⁰

Some justices of the peace told the mission that they felt that they had been given competence on migration matters because the justice of the peace "is more rooted in the territory" and knows the local realities better. During its visit, the ICJ mission was also told by practicing lawyers that the assignment of such competence was a deliberate political choice, in view of the precarious situation of the justices of the peace that would increase the possibility of these justices being prone to Executive's pressure or control.

The ICJ mission encountered a number of justices of the peace who demonstrated a great commitment to their office, including to their duty to uphold the rule of law in the field of migration. The mission was told that justices of the peace working on migration in Milan and Rome had generally chosen to specialize in the area and that this choice did not discharge them from following other cases in civil or criminal law.

The mission was told that justices of the peace are often on call to handle migration cases and that they considered themselves underpaid. Indeed, some justices of the peace told the mission that they had chosen to work on migration cases out of a sense of responsibility or for intellectual stimulation, since migration cases were much less well paid than, for example, those dealing with traffic violations.

The justices of the peace expressed a general frustration with having "the same duties of judges without the rights." The mission was told that justices of the peace felt abandoned and some also expressed the view that their institutional independence might be limited, in particular considering the precariousness of their working position.

The ICJ mission witnessed a considerable disparity in the situation between the offices of justices of the peace working on migration cases in Rome as opposed to in Milan. The overall impression was that the office in Rome, within the criminal section of the office of the justice of the peace, has a deficit of adequate resources, particularly human resources. The outlay premises of the two offices were also quite different, with the office in Milan more resembling to a courtroom than that of Rome.

The Council of Europe's *Recommendation on judges: independence, efficiency and responsibility*³¹ provides that "[t]he authorities responsible for the organisation and functioning of the judicial system are obliged to provide judges with conditions enabling them to fulfil their mission and should achieve efficiency while protecting and respecting judges' independence and impartiality."³² More precisely, "[e]ach state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently"³³ and "[a] sufficient number of judges and appropriately qualified support staff should be allocated to the courts."³⁴

³⁰ Technical report, Bill no. 3107, Senate: "the significant increase of the workload that the introduction of validation hearing for the accompaniment to the border would bring has advised towards an overall rethinking of the competence and to assign the whole matter of validation of accompaniment and detention, including the challenge against the expulsion decree, to the justice of the peace, and to free, therefore, the courts from this burden" (unofficial translation).

³¹ *Recommendation on judges: independence, efficiency and responsibility*, Council of Europe, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies.

³² Article 32, *ibid.*

³³ Article 33, *ibid.*

³⁴ Article 35, *ibid.*

Although not able to undertake significant research on the allocation of financial resources to the justices of the peace, the ICJ is concerned that State authorities may not be allocating sufficient support staff nor “resources, facilities and equipment to the courts to enable ... judges to work efficiently.” The ICJ understands that this problem likely extends to the judiciary as a whole and, therefore, urges the Italian government to allocate adequate resources, facilities, equipment and support staff to the judiciary. This is not only a question of respect of the right to a fair hearing but of the whole rule of law machinery.

The ICJ mission was made aware that the Ministry of Justice is currently preparing a comprehensive programme of reform of the office of the honorary judge, including the justices of the peace, in consultation with the honorary judges’ associations. The overall reform of the system falls outside of the scope of this report. However, the ICJ has identified two main issues relating to the structural situation of the justice of the peace that are incompatible with its purported institutional and individual independence and impartiality and, therefore, impact on the capacity of justices of the peace to provide an effective remedy for potential or actual human rights violations and to ensure access to justice.³⁵

The first area concerns security of **tenure**. As indicated, justices of the peace have no permanent tenure. Their terms of office are subject to renewal, the terms of which have changed over time, but this practice is itself highly problematic in respect of the pressures it places in respect of both the perception and the exercise of judicial independence. During its visit, the ICJ mission was made aware that there are constitutional obstacles to the granting of permanent tenure to justices of the peace. Indeed, the Constitutional Court considered that justices of the peace did not have to pass through a competitive examination as required by article 106 of the Constitution, exactly because of the “emergency” and “temporary” nature of their office. Had they had permanent tenure, they would have been regarded as professional judges and as such, would have had to pass through the examination system.³⁶ This necessarily gives rise to concerns about judicial competence and independence.

International standards provide a framework governing security of tenure, which is necessary to safeguard judicial independence. Under global standards, particularly article 12 of the *UN Basic Principles on the Independence of the Judiciary*,³⁷ “[j]udges, whether appointed or elected, shall have security of tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” The International Association of Judges’ *Universal Charter of the Judge*³⁸ affirms that a “judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.”³⁹ The Council of Europe’s *Recommendation on judges: independence, efficiency and responsibility*⁴⁰ underscores that “[s]ecurity of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”⁴¹ Furthermore, “[t]he terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.”⁴²

³⁵ The same two issues have been highlighted by the “Associazione Nazionale Giudici di Pace” that brought a case against Italy before the European Committee of Social Rights for breach of the European Social Charter for violation of their right to social security and welfare conditions under article 12. See, Complaint no. 102/2013 of 9 August 2013.

³⁶ Constitutional Court, judgment no. 103/1998 of 6 April 1998, recalling judgment no. 99/1964 of 7 December 1964.

³⁷ Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

According to the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*, adopted by the UN Economic and Social Council in resolution 1989/60 and endorsed by the UN General Assembly in resolution 44/162 of 15 December 1989, the “Basic Principles shall apply to all judges, including, as appropriate, lay judges, where they exist.”

³⁸ Approved by the International Association of Judges on 17 November 1999.

³⁹ Article 8.2, *Universal Charter of the Judge*.

⁴⁰ See fn no. 30.

⁴¹ Article 49, *Recommendation on judges: independence, efficiency and responsibility*.

⁴² Article 50, *ibid*.

The ICJ is conscious of the constitutional difficulty faced by Italy in respect of guaranteeing security of tenure to justices of the peace. Indeed, the institution is important in the Italian legal system as a cornerstone of the prohibition of the establishment of special courts, which had done so much damage to the rule of law and the protection of human rights during the years of the Fascist regime between the two World Wars. The ICJ is also aware that the Minister of Justice has proposed to institutionalize the term of tenure to four years, renewable twice upon an evaluation of the justice of the peace's competence.⁴³

The ICJ, however, highlights that limited tenure with the possibility of reappointment does significant damage to the independence and impartiality of the judicial function and has serious consequences for the right to a fair hearing and the right to an effective remedy. The ICJ stresses the critical importance of finding a solution to the problem of tenure of justices that will ensure the respect of the rule of law. Mindful of the significance of the constitutional limitations to a formal permanent term, but also to the important role of justices of the peace for the reduction of the professional judiciary's workload, the ICJ recommends that justices of the peace be appointed either for a single long fixed term without the possibility of renewal, or for fixed terms renewable only by the judiciary, without any intervention from the Executive power. Renewal of such terms should be denied only on conditions similar to those in place for dismissals of professional judges, such as incapacity or malfeasance. For example, in France, the *juges de proximité* are appointed for a non-renewable term of seven years.⁴⁴ In England and Wales, magistrates are appointed for life and have to do a minimum of 26 half-day sittings and a maximum of seventy per year, so that they must have another profession besides that of magistrate.⁴⁵ In Spain, the justices of the peace (*juzgados de paz*) are appointed for a term of four years.⁴⁶

A second problem concerns **remuneration**. Unlike other judges, justices of the peace do not benefit from continuous remuneration, which means that their salary is commensurate to their work in piecemeal terms.⁴⁷ For example, a justice of the peace is remunerated with 20 Euros per hearing concerning expulsion and with 10 Euros per validation of an expulsion decree, but will receive 36.15 Euros for other hearings. The Constitutional Court has repeatedly rejected challenges to the constitutionality of the law on justice of the peace which alleged that the payment by case of justices of the peace affected the justice's impartiality, either in fact or in appearance.⁴⁸

The *UN Basic Principles on the Independence of the Judiciary* affirm, in article 11, that "[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."⁴⁹ Article 13 of the *Universal Charter of the Judge* states that "[t]he judge must receive sufficient

⁴³ See outlines of the reform, in Italian, at

http://www.giustizia.it/giustizia/it/contentview.wp?previousPage=mg_2_7_1&contentId=ART1040205.

⁴⁴ See, Ministry of Justice website at <http://www.justice.gouv.fr/organisation-de-la-justice-10031/lordre-judiciaire-10033/juridiction-de-proximite-19668.html>

⁴⁵ See, Government website at <https://www.gov.uk/become-magistrate/can-you-be-a-magistrate>.

⁴⁶ Article 101 of the Law on the Judiciary (*Ley Organica del Poder Judicial*) and article 4 of the *Reglamento numero 3/1995, de 7 de junio, de los jueces de paz*. It is not clear whether the term is renewable. The law does not provide with a prohibition of renewal and even contemplates that the justice of the peace's mandate be extended until a new one is appointed (article 28, *Reglamento*) and says that those who have already been justices of the peace do not have to swear another oath before taking functions (article 21.2, *Reglamento*). It is, however, unclear whether the justice of the peace must have waited for a period of time off judicial function to re-apply again or can do it immediately at the end of his or her term.

⁴⁷ The expenses of the Justice of the peace is outlined by article 64 of the Decree of the President of the Republic No. 115 of 30 May 2002 (modified by the Law No. 147 of the 27 December 2013), which foresees the application of article 11 of the law No. 374/1991:

- 36,15 Euro for each hearing, but the maximum number of hearing per month is ten;
- 56,81 Euros for each final decision/ each friendly settlement;
- 10,33 Euros for each decree;
- 10 Euros for each decree of validation of expulsion;
- 20 Euros for each hearing for the validation of expulsion (article 1, para. 7, of the Law Decree No. 241 of 14 September 2004);
- 258,23 Euros per month (article 24-bis of the Law No. 341/2000);
- No payment of hearings that exceed the 110 agreed during one year.

⁴⁸ Constitutional Court, Ordinance no. 128/2013 of 5 June 2013; Ordinance no. 242/2013, 9 October 2013; Ordinance no. 48/2014, 10 March 2014.

⁴⁹ Article 11, *UN Basic Principles on the Independence of the Judiciary*.

remuneration to secure true economic independence. The remuneration must not depend on the results of the judges' work and must not be reduced during his or her judicial service."⁵⁰ The Council of Europe's *Recommendation on judges: independence, efficiency and responsibility* affirms that the "principal rules of the system of remuneration for professional judges should be laid down by law"⁵¹ and that "[j]udges' remuneration should be commensurate with their profession and responsibilities, and be sufficient to shield them from inducements aimed at influencing their decisions. Guarantees should exist for maintaining a reasonable remuneration in case of illness, maternity or paternity leave, as well as for the payment of a retirement pension, which should be in a reasonable relationship to their level of remuneration when working. Specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges."⁵² Importantly, the Recommendation stresses that "[s]ystems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges."⁵³ The former UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, in his 2008 report to the UN General Assembly, underscored that "judges must receive decent salaries so as to be able to live off their judicial functions alone. It is a proven fact that when judges' salaries go down or are kept low, the proper administration of justice and, therefore, the reliability and reputation of the justice system suffer."⁵⁴

The ICJ is concerned at the practice of paying members of the judiciary, whether or not honorary, on the basis of the amount of work produced (*cottimo*). This practice, according to international standards and in the opinion of the ICJ, seriously undermines not only the independence and impartiality of the office of the justice of the peace, but also the very core of the right to a fair hearing and the right to an effective remedy guaranteed by international law. Indeed, the remuneration by quantity of outcomes has the objective effect of inducing quantitative instead of qualitative work, with the result that justices of the peace may be prone to increase the numbers of hearings, decisions and other outcomes to reach a decent remuneration at the expense of the time and quality that is required in the judicial review of expulsion proceedings and of detention orders, let alone other competences in criminal and civil law cases. As will be shown below, these negative effects are evident in the practice of the justices of peace in expulsion and detention cases.

The office of the justice of the peace is obviously in need of reform. A reform package is presently under discussion by the Government, as part of a more comprehensive reform of the system of honorary judges. One thing is clear at the moment. In cases regarding undocumented migrants, the current system, with its precarious tenure, unsatisfactory remuneration and – as will be shown later – inherent flaws regarding substantive and procedural safeguards, cannot ensure sufficient independence, impartiality and effectiveness in the supervision of expulsion and detention proceedings. The ICJ is convinced that these problems, to a large extent structural, and other considerations developed in chapter IV, require that professional judges of the first instance be reinstated as the judicial review body in these cases.

⁵⁰ Article 13.1, *Universal Charter of the Judge*.

⁵¹ Article 53, *Recommendation on judges: independence, efficiency and responsibility*.

⁵² Article 54, *ibid*.

⁵³ Article 55, *ibid*.

⁵⁴ *Report of the UN Special Rapporteur on the independence of judges and lawyers to the General Assembly*, UN Doc. A/63/271, 12 August 2008, para. 45.

II. The expulsion system

1. International and EU law

a) International human rights law

Expulsion in international law "is an autonomous concept which is independent of any definition contained in domestic legislation [...]. With the exception of extradition, any measure compelling an alien's departure from the territory where he or she was lawfully resident constitutes an "expulsion".⁵⁵ The human rights guarantees engaged in the expulsion procedure originate in particular from the absolute prohibition of collective expulsion and from the right to an effective remedy.⁵⁶

Collective expulsion is prohibited absolutely under several human rights treaties.⁵⁷ Treaty prohibitions on collective expulsions are contained in article 4 of Protocol 4 to the ECHR,⁵⁸ and the UN Human Rights Committee has been clear that "laws or decisions providing for collective or mass expulsions" would entail a violation of article 13 of the International Covenant on Civil and Political Rights (ICCPR).⁵⁹ At the heart of the prohibition of collective expulsion is a requirement that individual, fair and objective consideration be given to each case.⁶⁰ The expulsion procedure must afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned have been genuinely and individually taken into account.⁶¹ Where individual expulsion decisions do not make sufficient reference to the particular circumstances of each of a group of migrants in similar circumstances, and where the procedures and timing of the expulsion of members of the group are similar, such shortcomings may be grounds for a finding of collective expulsion in violation of article 4 of Protocol 4 ECHR.⁶²

Where an individual is threatened with expulsion that gives rise to a real risk of a serious human rights violation in the receiving State, there is an effective **right to a remedy** that is prompt, accessible, and conducted by an impartial and independent authority capable of reviewing and overturning the decision to expel.⁶³

Remedies should generally be provided before a judicial body, and, in cases involving gross or serious human rights violations, such as torture and ill-treatment, equal access to an effective judicial remedy is mandatory. International standards governing the right to an effective remedy and reparation have been agreed by all States, in particular in the *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of*

⁵⁵ *Nolan and K. v. Russia*, ECtHR, Application no. 2512/04, Judgment of 12 February 2009, para. 112. See, ICJ, *Migration and International Human Rights Law*, Practitioners Guide no. 6, 2nd edition, pp. 150-151 and fn 495 for related comprehensive jurisprudence.

⁵⁶ While article 13 of the ICCPR and article 1 of Protocol No. 7 ECHR are relevant to this question, they have been held to apply exclusively to a non-national lawfully in the territory of a State (ICCPR) or "lawfully resident" there (Protocol 7 ECHR). While there are residual cases in which these provisions might apply to undocumented migrants, i.e. in the case of long-term residents, their application generally goes beyond the personal scope of this mission report. See, ICJ, *Migration and International Human Rights Law*, Practitioners Guide no. 6, 2nd edition, Chapter III, Section II, Title 1.

⁵⁷ Article 4 of Protocol 4 to the ECHR, article 12.5 of the African Charter on Human and Peoples' Rights, article 22.9 of the American Convention on Human Rights, article 26.2 of the Arab Charter on Human Rights, and article 22.1 International Convention on the Rights of Migrant Workers and of the Members of Their Families.

⁵⁸ See, *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 at the 925th meeting of the Ministers' Deputies, Guideline 3.

⁵⁹ Human Rights Committee, *General Comment no. 15, The position of aliens under the Covenant*, UN Doc. HRI/GEN/1/Rev.9 (Vol.1), 11 April 1986, para. 10.

⁶⁰ The European Court of Human Rights has stated that "collective expulsion ... is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group", *Čonka v. Belgium*, ECtHR, Application No. 51564/99, Judgment of 5 February 2002, para. 59. See also, *Sultani v. France*, ECtHR, Application No. 45223/05, Judgment of 20 July 2007, para. 81.

⁶¹ *Čonka v. Belgium*, ECtHR, *op. cit.*, para. 63; *Sultani v. France*, ECtHR, *op. cit.*, para. 81; *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, *op. cit.*, para. 184-186.

⁶² *Čonka v. Belgium*, ECtHR, *op. cit.*, paras. 61-63.

⁶³ See, ICJ, *Migration and International Human Rights Law*, Practitioners Guide no. 6, 2nd edition, pp. 166-171 for related comprehensive jurisprudence. A thorough analysis of the right to a remedy is to be found in, ICJ, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners' Guide No. 2, Geneva, December 2006.

International Human Rights Law and Serious Violations of International Humanitarian Law, adopted unanimously by the UN General Assembly.⁶⁴ The Basic Principles and Guidelines assert that a "victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law."⁶⁵

For a remedy to be effective, it must have the power to bring about cessation of the violation and appropriate reparation (restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition), including, where relevant, to overturn the expulsion order, and must be independent and impartial.⁶⁶ The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.⁶⁷ In cases of *non-refoulement* to face a risk of torture or ill-treatment, the decision to expel must be subject to close and rigorous scrutiny.⁶⁸

The European Court of Human Rights has held that, in order to comply with the right to an effective remedy, a person threatened with an expulsion which risks leading to a violation of another Convention right must have:

- access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- where necessary, translated material and interpretation;
- effective access to legal advice, if necessary by provision of legal aid;⁶⁹
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.⁷⁰

Where the State authorities fail to communicate effectively with the person threatened with expulsion concerning the legal proceedings in his or her case, the State may not justify a removal on the grounds of the individual's failure to comply with the formalities of the proceedings.⁷¹ The Committee of Ministers of the Council of Europe has recommended that "the removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative [and] shall indicate the legal and factual grounds on which it is based [and] the remedies available, whether or not they have suspensive effect, and the deadlines within which such remedies can be exercised."⁷²

The right to an effective remedy also requires review of a decision to expel, by an independent and impartial appeals authority, which has competence to assess the substantive human rights issues raised by the case, to review the decision to expel on both substantive and procedural grounds, and to quash the decision if appropriate. The European Court has held that judicial review by an independent and impartial tribunal constitutes, in principle, an effective remedy, provided that it fulfills these criteria.⁷³ The appeal procedure must be accessible in practice, must provide a means for the individual to obtain legal advice, and

⁶⁴ *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

⁶⁵ Article 12, *ibid.*

⁶⁶ See, ICJ, Practitioners' Guide No.2, *op. cit.*, pp. 49-54.

⁶⁷ *Muminov v. Russia*, ECtHR, Application no. 42502, Judgment of 4 November 2010, para. 100; *Isakov v. Russia*, ECtHR, Application no. 14049/08, Judgment of 8 July 2010, para. 136; *Yuldashev v. Russia*, ECtHR, Application no. 1248/09, Judgment of 8 July 2010, paras. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application no. 53688/08, Judgment of 10 June 2010, paras. 82 and 84.

⁶⁸ *Jabari v. Turkey*, ECtHR, Application no. 40035/98, Judgment of 11 July 2000, para. 39.

⁶⁹ *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application no. 30696/09, Judgment of 21 January 2011, para. 301.

⁷⁰ *M.S.S. v. Belgium and Greece*, ECtHR, GC, *op. cit.*, para. 302; *C.G. and Others v. Bulgaria*, ECtHR, Application no. 1365/07, Judgment of 24 April 2008, paras. 56-65. See also, *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, *op. cit.*, paras. 202-204.

⁷¹ *M.S.S. v. Belgium and Greece*, ECtHR, GC, *op. cit.*, para. 312.

⁷² *Twenty Guidelines on Forced Return*, *op. cit.*, Guideline 4.1.

⁷³ *Vilvarajah and Others v. United Kingdom*, ECtHR, Applications nos. 13163/87 – 13164/87 – 13165/87 – 13447/87 – 13448/87, Judgment of 30 October 1991, para. 99; *Isakov v. Russia*, ECtHR, *op. cit.*, para. 137; *Yuldashev v. Russia*, ECtHR, *op. cit.*, para. 110-111; *Garayev v. Azerbaijan*, ECtHR, *op. cit.*, paras. 82 and 84; *Al-Nashif v. Bulgaria*, ECtHR, Application no. 50963/99, Judgment of 20 June 2002, para. 133. See also, *C.G. and Others v. Bulgaria*, ECtHR, *op. cit.*, para. 56.

must allow a real possibility of lodging an appeal within prescribed time limits.⁷⁴ In *non-refoulement* cases, an unduly lengthy appeal process may render the remedy ineffective, in view of the seriousness and urgency of the matters at stake.⁷⁵

To provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed.⁷⁶ A system where stays of execution of the expulsion order are at the discretion of a court or other body is not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal.⁷⁷ In practice, this will also mean that authorities have an obligation to respect interim measures prescribed by a court or human rights authority enjoining the State to desist from expulsion or other transfer until the case can be decided on its merits, so as to prevent irreparable harm to the migrant.⁷⁸

The Council of Europe's Committee of Ministers has specified that "the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution."⁷⁹ The Committee of Ministers also stated that the time limits within which to exercise the remedy must not be unreasonably short; the remedy must be accessible, with the possibility of granting legal aid and legal representation.⁸⁰

The Committee of Ministers of the Council of Europe also declared in its *Twenty Guidelines on Forced Return* that "the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid."⁸¹

b) EU Law

i) Legislation

The EU Return Directive no. 2008/115/EC (the "EU Return Directive") is the principal governing legislation in matters of expulsion and administrative detention of undocumented migrants throughout the European Union.⁸² Since its implementation deadline expired on 24 December 2010, every national administration and court has been obliged to apply the Directive, or any element of it that has not been incorporated into national law, directly, and to disapply any legislation or practice that is contrary to it.

A Member State may decide not to apply the Directive in the case of third country nationals that are "subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who

⁷⁴ *M.S.S. v. Belgium and Greece*, ECtHR, *op. cit.*, para. 318.

⁷⁵ *Ibid.*, para. 320.

⁷⁶ See, ICJ, *Migration and International Human Rights Law*, *op. cit.*, p. 169 and fn 602 for related comprehensive jurisprudence.

⁷⁷ *Conka v. Belgium*, ECtHR, *op. cit.*, paras. 81-85; *De Souza Ribeiro v. France*, ECtHR, GC, Application No. 22689/07, Judgment of 13 December 2012, para. 82; *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, *op. cit.*, para. 206.

⁷⁸ See, *Mannai v. Italy*, ECtHR, Application no. 9961/10, Judgment of 27 March 2012, paras. 49-57, for an application of this principle to Italy. For the general legal rule. See, ICJ, *Migration and International Human Rights Law*, *op. cit.*, pp. 312-313 for related comprehensive jurisprudence.

⁷⁹ *Twenty Guidelines on Forced Return*, *op. cit.*, Guideline 5.1.

⁸⁰ *Ibid.*, Guideline 5.2.

⁸¹ *Ibid.*, Guideline 5.2.

⁸² The subject of the Return Directive is to set out "common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations," article 1, Directive no. 2008/115/EC, of 16 December 2008 (hereinafter, the "EU Return Directive").

have not subsequently obtained an authorisation or a right to stay in that Member State.”⁸³ This category of persons corresponds more or less to the categories of people subject to push-back or deferred push-back in Italy (see section 2). However, even in these cases, the Member State must respect the principle of *non-refoulement* and “ensure that their treatment and level of protection are no less favourable” than as set out in the Directive with regard to limitations on use of coercive measures; postponement of removal; emergency health care and taking into account needs of vulnerable persons; and detention conditions.⁸⁴

In particular, article 13 of the Schengen Borders Code, directly applicable in Italian law, provides that a third-country national not fulfilling the conditions of entry and not entitled to exceptions to the entry requirements (see box no. 3) “shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.”⁸⁵ As for the procedure, the Code provides that entry “may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law. It shall take effect immediately.”⁸⁶ The decision should be given through a standard form, but the persons refused entry must be afforded “the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national. Lodging such an appeal shall not have suspensive effect on a decision to refuse entry.”⁸⁷

Box no. 2: Exceptions to the application of the Return Directive for expulsions under criminal law

EU Member States may choose not to apply the Return Directive to third country nationals who are “subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures” (Article 2.2.b, Return Directive).

The Court of Justice of the European Union has clarified that this exception may not be used to disguise as a criminal law sanction what would be in practice an administrative expulsion. It has therefore considered a provision providing for imprisonment for not having respected an order to leave the national territory to be contrary to the Return Directive (see, Hassen El Dridi, alias Soufi Karim, Case C-61/11 PPU; Alexandre Achughbabian v Préfet du Val-de-Marne, Case C-329/11; Criminal proceedings against Md Sagor, Case C-430/11).

During its visit, the ICJ mission heard repeatedly that many migrants passing through a Centre for Identification and Expulsion (C.I.E.) were being expelled as part of their criminal sentence, as an additional sanction after having served a term of imprisonment. Lawyers representing undocumented migrants have stressed the absurdity of subjecting these persons to administrative detention in view of identification or in preparation of expulsion, considering that the authorities had the time to undertake these procedures while the migrant to be expelled was serving his or her term of imprisonment (see, chapter III).

⁸³ Article 2.2.a, EU Return Directive.

⁸⁴ See, article 4.4, *ibid.*

⁸⁵ Article 13.1, Regulation no. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p.1), as modified (hereinafter, the “Schengen Borders Code”).

⁸⁶ Article 13.2, *ibid.*

⁸⁷ Article 13.3, *ibid.*

Generally, the EU Return Directive favours voluntary over forced return in matters of expulsion. Indeed, article 7.1 sets out that “[a] return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.” It provides that “[c]ertain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.”⁸⁸

Only in limited situations are States allowed resort to forced returns as a first option, or to grant a shorter period for voluntary return:

- a risk of absconding, defined as “the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond,”⁸⁹
- an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or
- the person concerned poses a risk to public policy, public security or national security.⁹⁰

Otherwise, forced return may be ordered only when the migrant has not complied with a voluntary return order.⁹¹

The Return Directive provides that “[r]eturn decisions shall be accompanied by an entry ban ... if no period for voluntary departure has been granted, or ... if the obligation to return has not been complied with.”⁹² In all other cases, the entry ban is not mandatory and remains at the discretion of each Member State.⁹³ The length of the entry ban must “be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years[, unless] the third-country national represents a serious threat to public policy, public security or national security.”⁹⁴

⁸⁸ Article 7.3, EU Return Directive.

⁸⁹ Article 3.7, *ibid.*

⁹⁰ Article 7.4, *ibid.*

⁹¹ Article 8.1-2, *ibid.*

⁹² Article 11.1, *ibid.*

⁹³ Article 11.1, *ibid.*

⁹⁴ Article 11.2, *ibid.*

Box no. 3: Entry requirements in EU and national law

According to the Schengen Border Code, the cumulative conditions for the authorized entry of a third country national onto the territory of a EU Member State are:

- a) possession of a valid travel document, issued within the ten years prior to the person's entry, entitling the holder to cross the border. The document must have a validity of at least three months after the intended date of departure from the territory of the Member States, apart from cases of emergency;
- b) possession of a valid visa, except where they hold a valid residence permit or a valid long-stay visa;
- c) justification of the purpose and conditions of the intended stay, and possession of sufficient means of subsistence, both for the duration of the intended stay and for the return to the person's country of origin or transit to a third country into which they are certain to be admitted, or being in a position to acquire such means lawfully;
- d) they are not persons for whom an alert has been issued in the Schengen Information System for the purposes of refusing entry;
- e) that the person is not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

These rules can be derogated from when:

- a) the person has no valid travel document, but he or she holds a residence permit or a long-stay visa. In this case the third country national is authorised to enter the territory of the other Member States for transit purposes so that he or she may reach the territory of the Member State which issued the residence permit or the long-stay visa, unless their names are on the national list of alerts of the Member State whose external borders they are seeking to cross and the alert is accompanied by instructions to refuse entry or transit;
- b) the person has been issued with a VISA at the border for exceptional reasons;
- c) a third-country national who does not fulfil one or more of the entry conditions is authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.

These requirements are reflected in article 4 of the Italian Immigration Law and are, in any case, directly applicable within Italy.

With regard to procedural guarantees, the Return Directive provides that "[r]eturn decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies."⁹⁵ The State must "provide, upon request, a written or oral translation of the main elements of decisions related to return ..., including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand."⁹⁶ However, this requirement is relaxed when applying to "third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State."⁹⁷ In these cases, the Return Directive only obliges States to provide a standard form as set out in national legislation and "generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned."⁹⁸

⁹⁵ Article 12.1, *ibid.*, that continues : "The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences."

⁹⁶ Article 12.2, *ibid.*

⁹⁷ Article 12.3, *ibid.*

⁹⁸ Article 12.3, *ibid.*

Fundamentally, article 13.1 of the Return Directive provides that migrants must “be afforded an effective remedy to appeal against or seek review of decisions related to return ... before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.” Such authorities must have “the power to review decisions related to return ... including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation”,⁹⁹ and the migrant must “have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.”¹⁰⁰ States must “ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid.”¹⁰¹

ii) the EU Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (“EU Charter”), under article 19, prohibits collective expulsion and provides for the duty to respect the principle of *non-refoulement*. As to procedural guarantees, article 41 protects the right to “good administration” for “every person” (and not every citizen) that has “the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.”¹⁰²

Further, article 47 of the EU Charter encompasses the right to an effective remedy, according to which “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal”, and the right to a fair trial: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Unlike the ECHR and the ICCPR, which limit the scope of the right to a fair trial to the “determination of ... civil rights and obligations or of any criminal charge” and exclude it for expulsion proceedings,¹⁰³ article 47 is far broader in application. Similar to the approach to the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR),¹⁰⁴ the standard also applies the right to a fair trial *mutatis mutandis* to cases related to migration, including expulsion proceedings.

For this reason, it is useful to invoke the jurisprudence of these human rights treaties’ supervisory bodies, i.e. the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights, which, while not directly controlling on Italy, have affirmed following guarantees with regard to expulsion procedures:

- the right to a public hearing;
- the right to be given an adequate opportunity to exercise the right of defense;
- the right to be assisted by a lawyer and have access to free legal aid;
- the right to sufficient time to ascertain the charge against them;

⁹⁹ Article 13.2, *ibid*.

¹⁰⁰ Article 13.3, *ibid*.

¹⁰¹ Article 13.4, *ibid*.

¹⁰² Article 41.1, EU Charter. This right comprises “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; ... the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; ... the obligation of the administration to give reasons for its decisions” (article 41.2). While article 41 of the Charter disciplines only the procedures of the “institutions, bodies, offices and agencies of the Union,” the Court of Justice has ruled they it reflects a general principle of EU law, and, as such, its content is opposable also to EU Member States when they exercise authority within a EU competence, such as migration and asylum. See, *H.N. v. Minister for Justice, Equality and Law Reform*, Case C-604/12, Judgment of the Court (Fourth Chamber) 8 May 2014, para 49; *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, Judgment of the Court (Second Chamber) of 10 September 2013; and *Y.S. and M, S v. Minister voor Immigratie, Integratie en Asiel*, Cases C-141/12 and C-372/12, Judgment of the Court (Third Chamber) of 17 July 2014.

¹⁰³ Article 6.1 ECHR.

¹⁰⁴ See, ICJ, Migration and International Human Rights Law, op. cit., pp. 159-162 for related comprehensive jurisprudence.

- the right to reasonable time in which to prepare and formalize a response, and to seek and adduce responding evidence;
- the right to receive prior communication of the reasons for expulsion;
- the right to appeal a decision before a superior judge or court;
- the right to prior notification.
- the right to be expelled only pursuant to a decision reached in accordance with law.¹⁰⁵

2. The Italian system in law and practice

Italy's Immigration Law affirms that the foreigner enjoys "the fundamental rights of the human person enshrined in domestic law, international conventions in force and in generally recognized principles of international law," regardless of his or her status, entry or stay situation.¹⁰⁶ It is important to stress that the same Immigration Law provides that non-nationals enjoy "equality of treatment with citizens in relation to judicial protection of rights and legitimate interests, in his or her relations with public administration and in the access to public services, within the limits and the ways contemplated by law."¹⁰⁷

a) Types of expulsion

The expulsion system in Italy is characterized by a three-fold structure: 1) push-backs at the border (*respingimento immediato*); 2) deferred push-backs (*respingimento differito*); both provided for by article 10 of the Immigration Law; and 3) expulsions under article 13 of the Immigration Law. They answer to three different operational needs, but operate under broadly similar legal frameworks. From the point of view of international law, they all constitute expulsions.

Under article 10.1 of the Immigration Law, the **push-back at the border** is carried out whenever a migrant is present at the border without satisfying the legal requirements for regular entry (see box no. 3).¹⁰⁸ In such a case, the migrant is transferred to the custody of the same carrier¹⁰⁹ with which the migrant initially arrived. The carrier has the obligation to take charge of and bring the migrant to the State of departure, or to the State that has issued the travel document with which the migrant has travelled.¹¹⁰ Push-back at the border is performed by the police.

In regard to both push-backs at the border and deferred push-backs (see next page), the ICJ recalls that any transfer of a person outside a State's territory constitutes an expulsion under international human rights law and refugee law. This means that, in both procedures, the principle of *non-refoulement*, the prohibition of collective expulsion and the right to an effective remedy, as provided for in article 47 of the EU Charter, must be respected. This principle is further affirmed by the EU law applicable in these cases, i.e. recital 20 of the Schengen Borders Code¹¹¹ and article 4.4 of the Return Directive.¹¹²

The ICJ mission did not have the possibility to verify push-backs at the border. It was, however, told during its visit that cases of push-backs at the borders are quite common and only very rarely lead to a legal challenge of the lawfulness of the measure. The ICJ has been able to analyse some of the jurisprudence with regard to push-backs at the border and

¹⁰⁵ *Ibid.*

¹⁰⁶ Article 2.1, Immigration Law (unofficial translation). See also, article 2.2.

¹⁰⁷ Article 2.5, *ibid.*

¹⁰⁸ Article 10.1, *ibid.*

¹⁰⁹ The carrier may be, in a non exhaustive list, a ferry boat, a private ship or a truck, arriving at the borders.

¹¹⁰ Article 10.3, Immigration Law.

¹¹¹ "This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States' obligations as regards international protection and non-refoulement."

¹¹² "With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall ... respect the principle of non-refoulement."

concludes that it is indeed possible to lodge a complaint. However, the mission was told that access to lawyers or interpreters remains difficult or practically impossible, considering the speed of the procedure. The ICJ is particularly concerned that EU law, in article 13 of the Schengen Borders Code (see section 1.b.1) does not provide for the suspension of the execution of the push-back pending the resort to an effective remedy. The ICJ recalls that, as outlined by the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy*, even in the high seas, when undertaking a push-back at the border authorities must:

- provide sufficient information to enable the migrants to gain effective access to the relevant procedures and to substantiate their complaints;¹¹³
- provide sufficient guarantees, including personnel trained to conduct interview, legal advisers and interpreters;¹¹⁴
- ensure an independent and rigorous scrutiny of any complaint made by a person when the principle of *non-refoulement* is potentially at stake;
- ensure “the possibility of suspending the implementation of the measure impugned.”¹¹⁵

The ICJ considers that the lack of automatic suspensive effect of a challenge against a push-back order is at odds with Italy’s obligations under article 13 ECHR and article 2.3 ICCPR read together with the principle of *non-refoulement*. The ICJ is conscious that this law is based on the Schengen Borders Code, EU law directly applicable in Italy, but stresses that, without an automatic suspensive effect of the remedy, article 13 of the Schengen Borders Code is not in compliance with article 47 of the EU Charter of Fundamental Rights. In any case, the ICJ recommends that Italy deletes the legal provisions on push-backs at the border under article 10.1 of the Immigration Law, to avoid any confusion with article 13 of the Schengen Borders Code, and recommends that action be taken to invalidate this last provision of EU law.

The **deferred push-back** or “push-back by accompaniment to the border” (*respingimento con accompagnamento alla frontiera*) under article 10.2 of the Immigration Law is a procedure ordered by the Questore¹¹⁶ in two types of situations:

- a) when a migrant, “while having entered the territory of the State, by eluding border controls, has been stopped at the entry or immediately after;”¹¹⁷ or
- b) when a migrant, that was present at the border without satisfying the legal requirements for regular entry, has been admitted provisionally in the national territory “for reasons of emergency healthcare assistance.”¹¹⁸

When such an order is issued, the migrant is accompanied to the border and transferred to the custody of the carrier with which he or she has travelled, if possible.¹¹⁹ Otherwise, he or she may subject to detention (see, chapter III).¹²⁰ However, the Court of Cassation has affirmed that there is a clear obligation on the Questore to verify, at least summarily, that there are no circumstances that could represent a ground for a request for international protection.¹²¹

A representative of the Public Security Directorate within the Ministry of Interior told the mission that, as a matter of practice, “immediately after” generally means within hours from the entry on the territory. Many of those concerned are people rescued at sea, brought ashore for health reasons, if they are considered to be nationals of those identified within the Ministry of Interior as “safe countries.” The measure is based on the fiction that since the migrants to be subject to a deferred push-back have arrived accompanied by Italian authorities, they have not really “entered” Italy and so they may be generally treated as if they were at the border.

¹¹³ *Hirsi Jamaa and Others v. Italy*, ECtHR, GC, op. cit., para. 204.

¹¹⁴ *Ibid.*, para. 185.

¹¹⁵ *Ibid.*, para. 198.

¹¹⁶ The Questore is the provincial head of public security and exercises activities of security and administrative police. The competences exercised are various and, *inter alia*, they amount to: criminal offences prevention and repression, safeguard of democratic order, counterterrorism, protection of minors, passports, permit of sojourn, push-back of irregular migrants.

¹¹⁷ Article 10.2.a, Immigration Law.

¹¹⁸ Article 10.2.b, *ibid.*

¹¹⁹ Article 10.3, *ibid.*

¹²⁰ Article 14.1, *ibid.*

¹²¹ Court of Cassation, Ordinance no. 15115 of 17 June 2013.

However, other experts told the ICJ mission that the expression “immediately after” is vague and does not clarify whether there even is an actual temporal limitation for the issuance of a deferred push-back, at least in law, let alone the parameters of any supposed limitation. This allows the public administration excessive discretion and does not appear to respect the principle of legality for expulsion measures.

With regard to deferred push-backs, the ICJ considers them to be “disguised” expulsions under international law. As such, they should be subject to the full protection of the principle of *non-refoulement*, of the prohibition on collective expulsion and of the right to an effective remedy, as with expulsion decrees. This is particularly important with reference to judicial review mechanisms, including for their execution measures (see chapter III). The ICJ is concerned that the procedure may be used to bypass the legal guarantees attached to the expulsion procedure and that the concept of “immediately after” may be in practice applied to include situations that are clearly grounds for expulsion.

The ICJ is further concerned that this deferred push-back procedure gives rise in practice to expulsions towards so-called “safe countries” that may not be safe. During its meeting with the representatives of the Ministry of Interior and with justices of the peace, for example, the possibility was discussed that, at the time of the visit, Egypt might not be considered a safe country for transfers, as any person associated with the banned Muslim Brotherhood might be at risk of suffering persecution or inhuman or degrading treatment or other serious violations of human rights to which the principle of *non-refoulement* applies.

The **expulsion** is ordered by the Prefect,¹²² on a case by case basis, when the migrant:

- a) “has entered the territory of the State by eluding border controls and has not been subject to push-back”,¹²³ whether at the border or deferred;
- b) is present on the territory without a regular permit, including cases of overstay;¹²⁴ or
- c) falls within one of the following vaguely circumscribed categories included in the Code of anti-mafia legislation and on preventive measures, i.e. Legislative Decree no. 159/2011:
 - a. persons that, based on factual elements, must be considered to be “regularly dedicated to criminal activities,”
 - b. those who, because of their behaviour and standard of life, must be deemed, based on factual elements, as “regularly living out of, including in part, earnings from criminal activities,” or
 - c. those who, because of their behaviour, must be considered, based on factual elements, to be dedicated to the “commission of criminal offences that offend or put in danger the physical or moral integrity of minors, the public health, security or peace.”¹²⁵

¹²² The Prefect is the representative of the Government at the provincial level, where it coordinates the activity of the public administration. A “province” is a territorial entity that has autonomous powers. The Prefect is appointed by decree of the President of the Italian Republic, adopted on the basis of a Council of Ministers deliberation and of a Minister of Interior proposal. The prefect exercises at the provincial level all the State’s administrative functions that are not expressly excluded by law.

¹²³ Article 13.2.a, Immigration Law.

¹²⁴ The conditions are: a) person remained in the territory of the State without any communication authorizing the entrance and stay in cases of transfer of a foreigner worker, who is working for an employee established abroad, and who has been authorized to enter in Italy according to a tender contract; b) a person overstayed in the territory of the State without having asked the permit of stay within eight working days, except if the delay is due to force majeure (article 5(2) of Immigration Law); c) not having presented a declaration of presence to the Questore Office, within eight days from the entry. Such a declaration is needed if the presence within the State is for tourism, business, visit or study and it is foreseen to last less than ninety days (article 1(3) of the Immigration Law); d) if the permit has been revoked by the Questore and the person nevertheless remained; e) the permit of stay has been cancelled or refused by the Questore; f) a person overstay even if the permit of stay has expired of more than sixty days and a renovation has not been asked (such a provision however is not applicable in case the foreigner fulfills the conditions to keep the family unity and the permit has expired less than one year before, according to article 30 of the Immigration Law); g) a person overstay longer than ninety days in case this is the expiring period indicated in the permit issued for reasons of tourism, study, visits or business; h) a person has been issued a permit of stay or similar document, from another member State but has not declared to the Questore Office the presence within sixty days from the entry. In such a case however, the expulsion is not mandatory (article 5(7) of the Immigration Law).

¹²⁵ Article 1, Legislative Decree no. 159/2011 (Anti Mafia and Preventive Measures Code), that substituted preventative laws nos. 1423/1956 and 575/1965, to which article 13.2.c of the Immigration Law refers.

The Constitutional Court ruled in 1980 that the use of preventive measures leading to deprivation of liberty under article 13 of the Italian Constitution on similar categorical grounds did not comply with the principle of legality.¹²⁶ In its judgment 177/1980, the Court held that, in order to comply with the principle of legality, the situations in which preventive measures are applied must be foreseeable. The Court further ruled that the behaviours considered for the application of preventive measures must be connected, explicitly or implicitly, to criminal offences or groups of criminal offences they are aimed to prevent, as the purpose of preventive measures is to prevent criminal offences.¹²⁷

The European Court of Human Rights has considered that preventive measures, under similar grounds and effectively interfering with the right to freedom of movement against persons suspected of being members of the Mafia, were legitimate “even prior to conviction, as they are intended to prevent crimes being committed.”¹²⁸ It also held that “an acquittal does not necessarily deprive such measures of all foundation, as concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify reasonable fears that the person concerned may in the future commit criminal offences.”¹²⁹

The jurisprudence of the Court of Cassation relating to expulsion orders for reasons of “social dangerousness” holds that the judge, when assessing the existence of the grounds for expulsion, must adopt the same interpretative categories used for the assessment of the lawfulness of preventive measures:

1. The objective character of the elements that justify suspicions and presumptions;
2. The contemporaneous existence of the “dangerousness”;
3. The necessity of an overall assessment of the personality of the subject.

Furthermore, the assessment must be conducted by means of close scrutiny of the completeness, cogency and consistency of the authorities’ assessment.¹³⁰ The ICJ mission was told by some justices of the peace that, while “social dangerousness” is sometimes used as a ground for issuing expulsion decrees, the justice themselves will verify the actuality of the dangerousness. The mission was told of cases in which justices of the peace had annulled expulsion decrees that had been based on prior criminal convictions, but that did not justify an actual and present dangerousness of the person.

Despite these judgments purporting to narrow the scope of the grounds of “social dangerousness”, the ICJ remains concerned that the grounds such as “public health, security or peace” are too vague to comply with the principle of legality and to avoid arbitrariness in the decision of expulsion. The danger is that invocation of the grounds of “social dangerousness” may be invoked in order to detain or exclude a person based, for example, on status or lifestyle considerations rather than actual “danger” in the plain sense of term. Furthermore, it is difficult to see in practice the difference between two of the criteria: “being regularly dedicated to criminal activities” (letter (a)) and “being dedicated to commission of criminal offences,” as set out in letter c). In any case, the ICJ considers that the risk is too high that any ground of “social dangerousness” may be applied to crimes or other legal infractions that are not sufficiently serious to justify a preventive measure. The ICJ suggests modifying these criteria in a way that is more precise and objective and, critically, limiting their application to conduct leading to the commission of serious crimes punishable by lengthy prison sentences.

¹²⁶ More precisely, the Constitutional Court upheld the first definition in point a) and declared unconstitutional the previous version of point c) that referred more generically to persons “prone to crime.”

¹²⁷ See, Constitutional Court, Judgment 177/1980 of 22 December 1980, para 4.

¹²⁸ *Labita v Italy*, ECtHR, GC, Application no. 26772/95, Judgment of 6 April 2000, para. 192.

¹²⁹ *Ibid.*

¹³⁰ See, Court of Cassation, Sixth Civil Section, ordinance no. 17585/2010 of 27 July 2010; Sixth Civil Section, ordinance no. 18482/2011 of 8 September 2011; Sixth Civil Section, ordinance no. 21796/2013 of 24 September 2013.

b) Obstacles to expulsions

Under national law, no push-back or expulsion may be carried out to a State where the migrant may be subjected to persecution for reasons of race, sex, language, citizenship, religion, political opinion, personal or social conditions, or where the migrant is at risk of being removed to another third State where there is such a risk of persecution.¹³¹ This prohibition reflects the equivalent standards under international refugee law.¹³²

Furthermore, the protection of *non-refoulement* constitutes a bar to the transfer of a foreign national, as recognized by the Court of Cassation in its ordinance no. 11535 of 2008.¹³³ In addition, the Immigration Law, article 5.6, provides the migrant with the possibility to apply for "humanitarian protection", when there are undefined "serious reasons" of a humanitarian character or originating from constitutional or international obligations binding upon Italy, that may potentially extend beyond the principle of *non-refoulement* under international law. The same prohibitions are explicitly reiterated for push-backs, in article 10.4 of the Immigration Law, "in the cases foreseen under the provisions concerning political asylum, the recognition of the refugee status or the adoption of measures of temporary protection for humanitarian reasons". Finally, concerning the measure of expulsion, Italian law prohibits the transfer of minors, except for their right to follow a parent or foster parent who has been expelled; long-term residents; close family members, e.g. grandchildren for grandparents, or co-habiting spouses, of Italian citizens; and pregnant mothers or mothers caring for children younger than six months, as well as the husband living with her.¹³⁴

A migrant who is present at the border has a right to submit an asylum application.¹³⁵ In such cases, the provisions concerning the push-back are not applicable.¹³⁶ With regard to humanitarian reasons, a justice of the peace told the mission that he would regularly annul an expulsion decree for health reasons, if the lawyer of the migrant could demonstrate that the medication that a migrant needed for essential health reasons were not available in the destination country.

The Court of Cassation has ruled that "article 19.1 of Law Decree 286/98 obliges the justice of the peace, when ruling on the challenge of the validity of the expulsion decree, to assess and decide on the real risk, claimed by the opponent, of being subject to inhuman and/or degrading treatment ... because the provision introduces a humanitarian measure with negative character, that gives the right-holder the right not to be exposed again to a situation of great personal risk, if this condition is ascertained by the judge."¹³⁷

The mission was told by a Court of Cassation judge that, while the European Convention on Human Rights, and human rights law in general, appeared to be mentioned with increasing frequency in justices' of peace decisions appealed to the Court of Cassation, they were rarely referred to in an appropriate and correct way, and almost never in detention validation orders (see, chapter III). Furthermore, it was reported to the mission by some lawyers representing undocumented migrants that justices of the peace did not properly fulfill the task of assessing *non-refoulement* obligations when the expulsion decree was challenged. The same source

¹³¹ Article, 19.1, Immigration Law. According to article 28.1.d of the Decree of the President of the Republic no. 394/1999, a migrant who meets one of the conditions foreseen in article 19.1 mentioned above, has the right to receive a permit of stay for humanitarian reasons, except when a removal to a safe third country can be carried out.

¹³² See, articles 1 and 33 of the 1951 Convention relating to the status of refugees.

¹³³ Court of Cassation, United Sections, Judgment no. 27310 of 17 November 2008. A recent judgment applying the principle of non-refoulement and stressing its absolute nature can be found at Court of Cassation, Sixth Civil Section, Ordinance no. 21667, Rv. 627979.

¹³⁴ Article 19.2, Immigration Law. The inclusion of the "husband" in the prohibition of expulsion is due to the judgement of the Constitutional Court no. 376 of 2000 that found it infringed the right to family life and the duty of care towards children under articles 29 and 30 of the Italian Constitution. The Constitutional Court interpreted these obligation in light of articles 8 and 12 ECHR, article 10 ICESCR, article 23 ICCPR, and articles 9 and 10 of the CRC.

¹³⁵ Article 6, Legislative Decree No. 25 of 28 January 2008.

¹³⁶ Article 10.4, Immigration Law.

¹³⁷ Court of Cassation, First Civil Section, judgment of 17 February 2011 no. 3898 (unofficial translation); judgment of 3 May 2010, no. 10636.

highlighted that it was difficult to assess whether justices of the peace followed the same rulings of the Court of Cassation, due to the apparent disparity in their decision-making.

The principle of *non-refoulement* incorporated in Italian law includes both a prohibition on expulsions that reflects international refugee law and a prohibition on expulsions where there are substantial grounds for believing that someone will be at risk of torture, inhuman or degrading treatment or punishment, the death penalty, or serious health deterioration. The ICJ is not aware of any decision that referred to the application within the Italian system of the principle of *non-refoulement* to flagrant denials of the right to liberty or of justice, following the jurisprudence of the European Court of Human Rights in *Othman v. the United Kingdom*. However, the ICJ is confident that, if and when the case will arise, Italian courts will apply this landmark decision, as required pursuant to Italy's international law obligations, which binds all State authorities.

Considering the potential importance of the principle of *non-refoulement* in expulsion cases, the ICJ is concerned at allegations that justices of the peace do not apply appropriately, correctly and systematically, in their work, the jurisprudence of the Court of Cassation, of the European Court of Human Rights and of other international human rights bodies, such as the UN Human Rights Committee. The lack of a proper understanding and assessment of these principles greatly imperils the effectiveness of the international protection system, and risks undermining access to asylum and related protection in practice. Furthermore, it exposes Italy to findings of violations of the principle of *non-refoulement* and of the right to an effective remedy before international human rights courts and bodies. Finally it is a breach of the same Italian law that, as held by the Court of Cassation, requires an assessment of whether the principle of *non-refoulement* might be breached.

The ICJ considers that this situation is untenable and recommends that Italy takes meaningful and immediate measures to ensure that justices of the peace properly apply the principle of *non-refoulement* in proceedings on both expulsion decrees, forced accompaniment orders and detention orders, including through mandatory and substantial training on international human rights and refugee law.

c) Execution of the expulsion decree

The expulsion decree, issued by the Prefect, must set out factual and legal reasoning. It is immediately enforceable, even if contested or appealed by the migrant subject to expulsion.¹³⁸ When the migrant has been arrested for a criminal offence but is not subject to pre-trial detention, the expulsion decree becomes effective only after the judicial authority in charge of the criminal proceedings has granted leave (*nulla osta*).¹³⁹

The Court of Cassation has held that, in order to guarantee the protection of the migrant's rights, the expulsion decree only need contain a summary of the necessary and sufficient elements that a reasonable person would know or ought to know, in order for the migrant to be able to understand the violation of the law on which the measure is based.¹⁴⁰

Once the expulsion decree has been issued, the migrant is either forcefully accompanied to the border, by law enforcement officers, or may be assigned a period of time for voluntary return.

Article 13.4 of the Immigration Law prescribes the implementing measure of forced accompaniment to the border, which must be ordered by the Questore in the following circumstances:

¹³⁸ Article 13.3, Immigration Law

¹³⁹ Articles 13.3 to 13.3-quinquies, Immigration Law.

¹⁴⁰ Court of Cassation, First Civil Section, judgment no. 462/2010 of 13 January 2010.

1. when there is a risk of absconding;
2. when the residence permit application had been rejected because it was manifestly unfounded or fraudulent;
3. when, without a justified reason, the migrant has not respected the deadline for voluntary return;
4. when the migrant had breached the control measures alternative to detention or attached to the voluntary return decision;
5. when the expulsion has been ordered following an arrest or a conviction for a criminal offence; or
6. when the migrant does not choose a voluntary return.¹⁴¹

The existence of a risk of absconding, sufficient to provide grounds for an order of forced accompaniment to the border, is to be assessed by the Questore by determining the presence of one of the following elements, on a case-by-case basis:

- a) lack of valid passport or other similar document;
- b) lack of documentation attesting to the existence of an address where a migrant can be easily reached;
- c) having previously given false personal information;
- d) not having respected the deadline for voluntary departure; re-entered the territory of the State after having been expelled, despite an entry ban; having breached the order of detention or the measures alternative to detention or one of the control measures issued pending the voluntary departure.¹⁴²

The ICJ notes that the EU Return Directive makes reference to “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that a third-country national who is the subject of return procedures may abscond.”¹⁴³ The mission understood from research provided by the University of Roma Tre and its interview with the research coordinator, Dr. Enrica Rigo, that the conception of “risk of absconding” in Italian Law is subject to a very wide construction and has accordingly been the object of strong critiques.¹⁴⁴ The opinion was expressed to the mission that the criteria to assess the risk of absconding were not objective criteria, but more a “list of situations that operate as presumptions of risk of absconding.”¹⁴⁵ The research of the University Roma Tre has been able to conclude, on the basis of observing the repetition of identical expressions in the decrees of forced accompaniment to the border, that the police tend to “use a ‘pre-stamped form’ to indicate the reasons justifying the existence of a risk of absconding.”¹⁴⁶

The ICJ concurs that, in law and in practice, the grounds set out in Italian law, rather than establishing objective criteria relevant for the concrete assessment of the risk of absconding on a case-by-case basis, appear to constitute presumptions for a practically automatic resort to the measure of forced accompaniment based on the risk of absconding. Applied in this automatic way, the ICJ considers that this part of the Immigration Law is not in line with the Return Directive. Accordingly, national courts and administrative authorities should adopt an interpretation in compliance with Italy’s obligations under EU law.

When there are no conditions for the application of the measure of forced accompaniment to the border, the migrant may ask the Prefect to issue a deadline for voluntary departure. In such a case, the migrant will be given a period of time (between seven and thirty days, with the possibility of prolongation) to leave the territory of the State.¹⁴⁷ The police (*questura*) have

¹⁴¹ Article 13.4, Immigration Law.

¹⁴² Article 13.4-bis, *ibid.*

¹⁴³ Article 3.7, EU Return Directive.

¹⁴⁴ See Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, Osservatorio sulla giurisprudenza del Giudice di Pace in materia di immigrazione, Clinica del Diritto dell’Immigrazione e della Cittadinanza, Dipartimento di Giurisprudenza, UniRoma3, p. 9.

¹⁴⁵ See, *ibid.*, p. 9.

¹⁴⁶ See, *ibid.*, p. 9.

¹⁴⁷ Article 13.5, Immigration Law.

the responsibility to inform the migrant of the possibility to request voluntary return, through forms written in several languages.¹⁴⁸ The possibility of voluntary return is not contemplated for any of the two forms of push-back.¹⁴⁹ Pending the decision on voluntary return, the Questore asks the migrant to demonstrate the availability of sufficient economic resources and subjects the migrant to at least one of the following measures:

- a) surrendering of the passport;
- b) obligation to live in a designated place;
- c) obligation to appear periodically at a Police Office, at the discretion of the authorities.

The decision on these measures is taken by a reasoned decree, has effect from the notification to the migrant, and contains information to the migrant as to the possibility to make submissions to the justice of the peace before the validation. The Questore must communicate the decree to the migrant.

Several lawyers representing undocumented migrants and NGOs providing legal assistance expressed the view to the ICJ mission that the transposition of the Return Directive had betrayed the spirit of the EU law, since it establishes forced accompaniment and detention as the rule and voluntary return as the exception. In practice, authorities very rarely concede periods of voluntary return of thirty days, while they often resort to orders to leave the national territory within seven days. The mission was informed by a representative of the police in the C.I.E. of Ponte Galeria that, usually, if a migrant has a document, he or she is subject to an order to leave the country within seven days, otherwise a detention order is issued. In deciding on the length of the voluntary return period, in practice there appears to be no assessment of proportionality in light of the circumstances of the individual case.

The ICJ agrees that the systematic reading of the two previous provisions on forced accompaniment to the border and voluntary return suggests that voluntary return is secondary to the choice of forced accompaniment to the border, a reading that subverts the spirit – and the letter – of the Return Directive. Ideally, the Immigration Law should be reformulated to establish clarity and predictability. However, it is also possible to construe paragraph 5 of article 13 of the Immigration Law as taking precedence over paragraph 4 concerning the forced accompaniment. In this case, the latter measure would be issued only when no voluntary return has been possible, including by provided reasoning as to why it has not been possible. In addition, the ICJ notes that the Return Directive does not require the migrant to “demonstrate the availability of sufficient economic resources” to accede to voluntary returns, a condition that is clearly contrary to the Directive and should not be a factor taken into account in the decision.

d) Communication of decisions

The push-back decision, whether at the border or deferred, the voluntary return order, and the expulsion decree, each must contain an indication of the modalities and procedures by which the decisions may be challenged by the migrant. The decision must be communicated to the migrant through hand delivery or notification, and must be in writing and reasoned. In addition, if the migrant does not understand Italian, the removal decision must be issued along with a summary of its content in a language that the migrant understands. If this is not possible because of unavailability of appropriate interpreters, the decision must be in English, French or Spanish, according to the preference expressed by the migrant.¹⁵⁰

The Court of Cassation held in 2012 that, before resorting to one of the three standard languages, the authorities must first ascertain whether a translator for a language that the

¹⁴⁸ Article 13.5.1, *ibid.*

¹⁴⁹ Article 13.5, *ibid.*

¹⁵⁰ Article 3.3 of Decree of the President of the Republic no. 394/99 and article 2.6 of the Immigration Law, and article 13.7 Immigration Law.

migrant understands is immediately available, and if one is not, provide reasons why this is the case. It must also demonstrate that no pre-prepared text of an order, considering that they are generally standardized, is available in such language and explain and justify this lack of availability. Only then will it be possible for the administration to use one of the three standard languages to communicate the act to the migrant.¹⁵¹

The ICJ notes that the EU Return Directive puts as a minimum standard the availability of “generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.”¹⁵² The ICJ notes that, at present, the law provides for only three mandatory languages. The ICJ recommends that the law be amended to refer, at a minimum, to the five languages most frequently used or understood by undocumented migrants and that the Ministry reassess periodically which language to prioritize depending on composition of the arrivals. In any case, the ICJ stresses that any means of communication must be employed to communicate effectively in writing with the person threatened with expulsion concerning the legal proceedings in his or her case, by indicating the legal and factual grounds on which it is based and the remedies available, whether or not they have suspensive effect, and the deadlines within which such remedies can be exercised.

d) Right to judicial review and procedural rights

i) Push-backs at the border

The Immigration Law is silent as to the authority before which the validity of **push-backs at the border** may be challenged. On 23 January 2014, the Court of Cassation ruled that the ordinary judge, in this case the justice of the peace, is competent in cases of push-back at the border.¹⁵³ Previously, the Council of State, the supreme administrative court of Italy, ruled, referring to the jurisprudence of the Court of Cassation on deferred pushbacks, that the measure of push-back at the border does not differ legally from the deferred push-backs. Both measures, the Council says, interfere with the enjoyment of human rights, or “subjective rights” in the words of the Council, so that the duty to assess the validity of such measures must fall upon ordinary courts.¹⁵⁴

ii) Deferred push-backs

There have been conflicting decisions on the competence on judicial review of deferred push-back orders over the course of many years between administrative and ordinary courts.¹⁵⁵ However, recently, the Court of Cassation, in the judgment no. 15115 of 17 June 2013 has resolved the conflict of jurisdiction on the competence of adjudicating on the validity of **deferred pushbacks** in favour of the ordinary courts and has ruled that jurisdiction adheres to the ordinary judge territorially competent with regard to the place where the push-back decision has been issued, i.e. the justice of the peace.¹⁵⁶ The Court of Cassation has ruled that the deferred push-back carries the possibility of a double scrutiny by courts. The first consists in the review of the existence and adequacy of the grounds for a decision of deferred push-back, according to article 10.2.a and .b of the Immigration Law. The second consists in the review as to whether the push-back respects the principle of *non-refoulement*. The Court ruled that contested questions on the assessment of requisites for international or

¹⁵¹ Court of Cassation, Sixth Civil Section, judgment of 8 March 2012 no. 3678/12

¹⁵² Article 12.3, EU Return Directive.

¹⁵³ Court of Cassation, Sixth Civil Section, judgment no. 1459/2014 of 23 January 2014.

¹⁵⁴ Council of State, judgment no. 4543 of 13 September 2013, paras. 5-6.

¹⁵⁵ T.A.R. Sicilia, 9 September 2010 n. 1036 and 17 March 2009, n. 510; T.A.R. Campania, 3 July 2007, n. 6441; T.A.R. Calabria, 23 February 2007, nn. 112 and 113; T.A.R. Sicilia, 7 November 2006, n. 2706; T.A.R. Calabria, 26 April 2006, n. 432; justice of the peace of Agrigento 8 July 2011, n. 478 and 26 September 2008, n. 555; Council of State advisory opinion of 4 February 2011, n. 571/11; T.A.R. Lombardia, 16 February 2009, n. 1312, T.A.R. Friuli Venezia Giulia 29 January 2007, n. 102; T.R.G.A. Bolzano 23 September 2006, n. 119; T.A.R. Piemonte 19 July 2005, n. 2561; T.A.R. Lazio 28 May 2003, n. 4830; Tribunal of Agrigento 26 March 2009; Tribunal of Palermo 13 May 2005.

¹⁵⁶ Court of Cassation, Ordinance no. 15115 of 17 June 2013

humanitarian protection involve subjective rights of a fundamental character that must be accorded to a non-national who is present at the border or in the territory of the State.¹⁵⁷ Such situations are covered by the guarantees afforded by article 2 of the Constitution, which provides that “the Republic recognizes and guarantees the inviolable rights of the individual ...” According to the Court, those situations must not be downgraded to mere legitimate interests¹⁵⁸ only on account of the fact that the decision is taken by an administrative organ.¹⁵⁹

iii) Expulsion decrees

The **expulsion** decree is subject to challenge before the justice of the peace of the region where sits the Prefect that issued it. Any appeal to the justice of the peace must be submitted within thirty days from the notification of the expulsion order, or within sixty days if the appellant is not in Italy. If these temporal requirements are not met, the appeal will be inadmissible. If the appellant is not in Italy, he or she may make a submission through an Italian diplomatic or consular delegation. The appellant is entitled to legal aid (see below at section 2.g in chapter III) and an interpreter.¹⁶⁰ The decision is not subject to *de novo* review on appeal, but it may be submitted to the Court of Cassation on questions of law.¹⁶¹ Under article 3.1 of Legislative Decree no. 150/2011, the procedure is a “summary assessment procedure.” According to this provision, read together with article 702-ter of the Civil Procedure Code, at the first hearing, the justice of the peace must hear the parties without following formalities which are not strictly necessary to ensure that the hearing is conducted with respect for the principles of an adversary procedure. The justice has, during the hearing, the power to “proceed in the way he deems best” to acts of inquiry in respect of the object of the hearing.

Expulsion decrees are accompanied by an entry ban for three to five years, starting from the execution of the expulsion, which is attested by a stamp on the exit document or any other document attesting to the absence of the foreigner from the territory of the State. Violating the entry ban may subject the migrant to liability for a criminal offence, with the possibility of sanction with one to four years of imprisonment and a subsequent expulsion by forced accompaniment at the border.¹⁶²

The Court of Cassation has ruled that the justice of the peace must assess the concrete existence of the grounds for the expulsion decree by making use of all his or her powers of inquiry. Furthermore, the Court of Cassation has highlighted that the justices of the peace must assess and provide reasons for their decision on the respect or otherwise of the principle of *non-refoulement* by the expulsion decree.¹⁶³

The ICJ mission was told by one judge of the Court of Cassation that orders from administrative authorities and decisions of justices of the peace are usually only very superficially reasoned and are not very understandable. The Court of Cassation judge clarified that the justice of the peace in practice would be able to conduct a full inquiry in the proceedings against the expulsion decrees.

For the reasons indicated above in section 2.b, the ICJ considers that this situation is untenable and recommends that Italy take serious and immediate measures to ensure that

¹⁵⁷ See, article 2.1, Immigration Law.

¹⁵⁸ See, fn no. 24.

¹⁵⁹ Court of Cassation, Ordinance no. 15115 of 17 June 2013. The Court of Cassation has acknowledged that, according to the European Court of Human Rights’ judgment in the case of *Hirsi Jamaa and Others v. Italy*, the difficulties in the management of arrivals cannot justify the recourse to practices by States that would be incompatible with their obligations under international treaties and, especially, under article 3 of ECHR, on the grounds that the applicants omitted to apply for asylum or to explain the risks they would have faced if returned.

¹⁶⁰ Article 18.4, Legislative Decree n. 150/2011.

¹⁶¹ Article 13.8, Immigration Law, referring to article 18 of Legislative Decree 150/2011.

¹⁶² Article 13.13-14, *ibid.* See also, article 4.6.

¹⁶³ Court of Cassation, Sixth Civil Section, judgment of 14 May 2013, no. 11466 (unofficial translation).

justices of the peace properly conduct a thorough and *proprio motu* assessment of the principle of *non-refoulement*.

A 2011 reform has given rise to interpretative issues with regard to the possibility of suspending the effectiveness of the expulsion decree pending its examination by the courts. Previously, the Constitutional Court had ruled that a judge had to find the legal means to grant a suspension of the execution of the expulsion decree, whenever the times for appealing its lawfulness were extended so as not to amount to a *de facto* suspension.¹⁶⁴ Therefore, tribunals, when they had competence, sometimes resorted to article 700 of the Civil Procedure Code to grant suspension of the execution of the expulsion decree,¹⁶⁵ but one justice of the peace told the mission that this provision was not appropriate in this context and is inapplicable to the procedure before the justice of the peace. Another solution apparently used by some justices of the peace prior to 2011 was to apply by analogy article 22, last paragraph, of Law no. 689/1981 on suspension of the execution of an injunction.¹⁶⁶

However, currently, article 18 of Legislative Decree no. 150/2011 does not provide for any suspension power and explicitly excludes the resort to provisions of other laws, albeit generic, to justify a suspension power. This leaves the Italian system deprived of a suspensive effect for appeals against expulsion decrees. It appears, however, that, at present, the only possibility is to resort directly to article 13 of the Return Directive, which, after the expiration of the implementation deadline, has become directly applicable for lack of appropriate transposition in national law. However, some lawyers representing undocumented migrants told the ICJ mission that not many justices of the peace had made direct use of the suspension powers and obligations under article 13 of the Return Directive. On the other hand, a representative of the police in the C.I.E. of Ponte Galeria told the mission that usually the execution of the expulsion does not take place in the fifteen days following the notification of the expulsion decree, in which an appeal may be filed.

As outlined above, to provide an effective remedy, the appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed. A system where stays of execution of an expulsion order are at the discretion of a court or other body is not sufficient to protect the right to an effective remedy, even where the risk that a stay will be refused is minimal. In practice, this will also mean that authorities have an obligation to respect interim measures prescribed by a court or human rights authority enjoining the State to desist from expulsion or other transfer until the case can be decided on its merits, so as to prevent irreparable harm to the migrant.

The ICJ recommends that Italy introduce in legislation an automatic suspensive effect for all appeals claiming a violation of the principle of *non-refoulement*. Although the EU Return Directive does not require an automatic suspensive effect, article 4 of the Directive allows for more favourable provisions to the migrant. Proceeding in this manner, Italy would be in line with its obligations under both international human rights law and EU law. If the executive administration or Parliament fail to take such action, then it is the responsibility of the judiciary, including the justices of the peace, to submit a constitutional preliminary question to the Constitutional Court on the compliance of the Immigration Law with international human rights law on this point.

¹⁶⁴ Constitutional Court, judgment no. 161/2000 of 31 May 2000, para 5. At the time of the decision, the period was a total of ten days which, in the Court's opinion, was a *de facto* suspension.

¹⁶⁵ Article 700, Code of Civil Procedure: "Apart from the proceedings disciplined in the prior sections of this Chapter, whoever has a reasonable ground to fear that, during the time necessary to vindicate his right through a ordinary judicial procedure, such a right is threatened by an imminent and irreparable harm, may ask, through an immediate request to the judge, the issuance of interim measures that would be, according to the circumstances, more apt to ensure provisionally that the effects of a decision on the merit of the case would be preserved" (unofficial translation).

¹⁶⁶ See, Tommaso Cataldi, *Provvedimento di espulsione del prefetto e sua impugnativa*, 23 February 2011, p. 6.

The ICJ further recommends that in all other cases not related to the principle of *non-refoulement*, the justices of the peace systematically apply the power of suspension of the execution of the expulsion decree, under article 13 of the Return Directive.

iv) Forced accompaniment to the border

The order for the implementing measure of the **forced accompaniment to the border**, when it originates in an expulsion decree, must be notified to the justice of the peace by the Questore immediately and, in any case, within 48 hours of its adoption. The order's execution is suspended until a decision on the validation is taken. The migrant is entitled to legal aid and to the assistance of an interpreter. The migrant is immediately informed of the date of the hearing, which is conducted *in camera* with the presence of the migrant and his or her lawyer. The justice of the peace then issues a decree, containing reasons for the decision, on the request for validation within the 48 hours from the notification of the decision to the chancellor's office. The validation of the forced accompaniment to the border is subject to appeal before the Court of Cassation, but any such appeal will not suspend its effects or its enforcement. If the justice of the peace decides not to validate the decision, this decision annuls the order.¹⁶⁷ Pending the issuing of the decision from the justice of the peace, the Questore may order the detention of the migrant (see, chapter III).

The ICJ mission was informed that the procedure of validation of the forced accompaniment to the border by the justice of the peace takes place only when this measure is in execution of an expulsion decree, while the law does not provide for the same judicial guarantees in case of a forced accompaniment to the border ordered in execution of a decision of deferred push-back.

Chapter III on administrative detention will address the procedure and the assessment of potential violations. However, the ICJ expresses here its concern at the lack of judicial review and *habeas corpus* procedure for the cases of forced accompaniments to the border that originate from an order of deferred push-back. As outlined by the Italian Constitutional Court in its judgment 105/2001, these measures constitute a deprivation of liberty and must respect the guarantees enshrined both in the Constitution and in international human rights law. The lack of a judicial review and *habeas corpus* procedure is contrary to article 13 of the Italian Constitution (see, below in chapter III) and non-compliant with articles 5.4 ECHR and 9.4 ICCPR.

The ICJ recommends that Italy promptly introduce a judicial review and *habeas corpus* mechanism for forced accompaniment to the border that originates from a deferred push-back order.

v) Voluntary returns

With regard to the order of **voluntary return**, the justice of the peace must decide within 48 hours, with a reasoned decree, on the control measures attached to it. However, the migrant has access to the justice of the peace, personally or with a lawyer, and may make submissions before the validation, or ask the justice of the peace to modify or cancel the measures, after they have been validated.¹⁶⁸ Researchers at the University of Roma Tre (see box no. 4) have so far been unable to identify any decision of a justice of the peace validating or invalidating voluntary return control measures.¹⁶⁹

¹⁶⁷ Article 13.5-bis, Immigration Law.

¹⁶⁸ Article 13.5.2,, Immigration Law.

¹⁶⁹ See, Enrica Rigo and Lucia Gennari, Rapporto preliminare sullo stato della ricerca – aprile 2014, op. cit., p. 17.

The ICJ refers to its recommendation above in section 2.c to reinstate the spirit and approach of the EU Return Directive and prioritize voluntary returns over forced ones.

Box no. 4: The observatory on justices of the peace migration jurisprudence

The legal clinic of University of Roma Tre has established, under the coordination of Dr. Enrica Rigo, an observatory of the jurisprudence of the justices of the peace in migration cases.

The aim of the project is that of monitoring the rulings of the justices of the peace related to expulsion and detention proceedings that may have an impact on the human rights of migrants. The observatory is focusing its research on the justices of the peace offices of Rome, Turin, Bologna, Florence, Bari and Naples. It is collecting and analysing rulings related to validations of detention orders, extension of detention, and challenges against expulsion decrees. The period of reference for the research included rulings issued from 1 October to 31 December 2013.

On the basis of this empirical data, the project aims to systematize the rulings of the justices of the peace in accordance with the nature of the proceedings and, in order to ascertain the manner in which hearings are conducted, and which elements are taken into consideration for the justice's decision. Its objective is to assess the compliance of these proceedings and rulings with national and European law.

The observatory makes available online all the rulings that have been used for the research, which is still ongoing. An interim research report is also available.

Website in Italian: <http://giudicedipace.giur.uniroma3.it/>

Interim research report in Italian: <http://giudicedipace.giur.uniroma3.it/wp-content/uploads/2014/05/Rapporto-gdpMaggio2014.pdf>

f) Forms of appeal

Article 111 of the Constitution guarantees that “[a]ppeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts.”¹⁷⁰ This means that, in the absence of any applicable legislative provision, appeals against decisions of ordinary courts on push-backs and on deferred push-backs, may be appealed to the Court of Cassation on questions of law, but not on the merits. As described above, the decision of the justice of the peace on the expulsion decree is not subject to appeal, but may be referred to the Court of Cassation.¹⁷¹ The same condition applies to the justice of the peace's decision of validation of the forced accompaniment to the border.¹⁷² None of these appeals to the Court of Cassation is suspensive of the execution of the contested measure. During its visit in Rome, the ICJ mission was given data demonstrating a sharp decline in appeals to the Court of Cassation for migration cases in the last two years (see chart no. 8).

The ICJ mission heard concerns from lawyers and civil society persons representing undocumented migrants that the only court of appeal is the Court of Cassation, which hears matters only on issues of law, has a high rate of dismissal, and requires that the case be brought only by lawyers that are authorized to plead before the Court of Cassation (*cassazionisti*). Only a very few of such lawyers seem to be either legally competent or *de facto* available to undertake these appeals.

¹⁷⁰ Senate's official translation.

¹⁷¹ Article 13.8, Immigration Law, referring to article 18 of Legislative Decree 150/2011.

¹⁷² Article 13.5-bis, *ibid*.

Furthermore, the lawyers pointed out that the appeal is not suspensive of the execution of the expulsion decree and the procedures and time until a decision is reached are typically protracted. Usually, the migrant will have already been removed by the time the case is decided on appeal. It was suggested that it would be advisable for migrants to seek interim measures before the European Court of Human Rights, until such time as the case may be heard by the Court of Cassation.

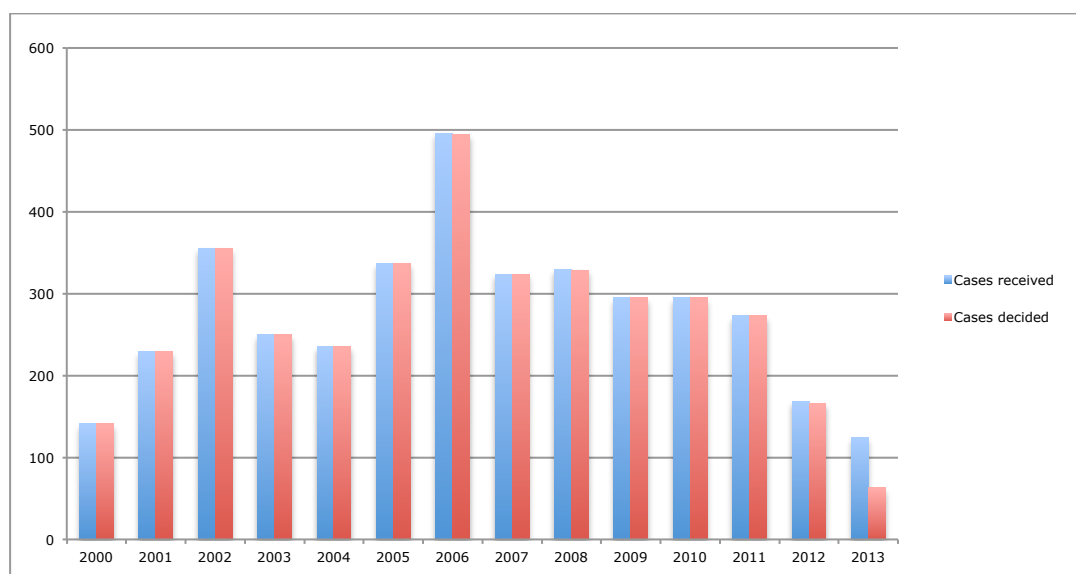
As outlined above, to provide an effective remedy, any appeal must be suspensive of the expulsion measure from the moment the appeal is filed, since the notion of an effective remedy requires that the national authorities give full consideration to the compatibility of a measure with human rights standards, before the measure is executed. This automatic suspensive effect continues until the question is finally resolved by the appellate court. The European Court of Human Rights has found a violation of the right to an effective remedy in the case of *Gebremedhin v. France*, where the applicant's expulsion order had not been subject to automatic suspensive effect on an appeal to the Conseil d'Etat.¹⁷³

The ICJ recommends that Italy introduce in legislation an automatic suspensive effect for all appeals claiming a violation of the principle of *non-refoulement*, up to and including for appeals to the Court of Cassation. Although the EU Return Directive does not require an automatic suspensive effect, article 4 of the Directive allows for more favourable provisions to the migrant. In this way, Italy would be compliant with its obligations under international human rights law, including EU law. If the government or Parliament does not take such action, then it is the responsibility of the judiciary, including the justices of the peace, to submit a constitutional preliminary question to the Constitutional Court on the compliance of the Immigration Law with international human rights law on this point.

The ICJ further recommends that in all other cases not related to the principle of *non-refoulement*, the Court of Cassation systematically apply the power of suspension of the execution of the expulsion decree, under article 13 of the Return Directive.

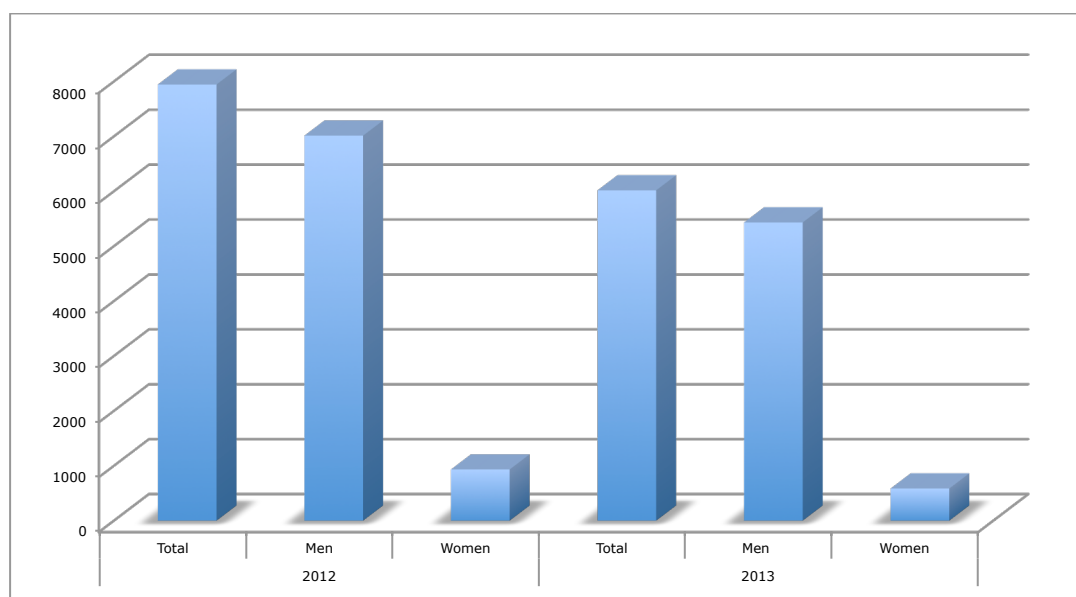
¹⁷³ *Gebremedhin v. France*, ECtHR, Application no. 25389/05, Judgment of 26 April 2007, para 66.

Chart no. 8: Appeals on migration to the Court of Cassation



Source: Court of Cassation

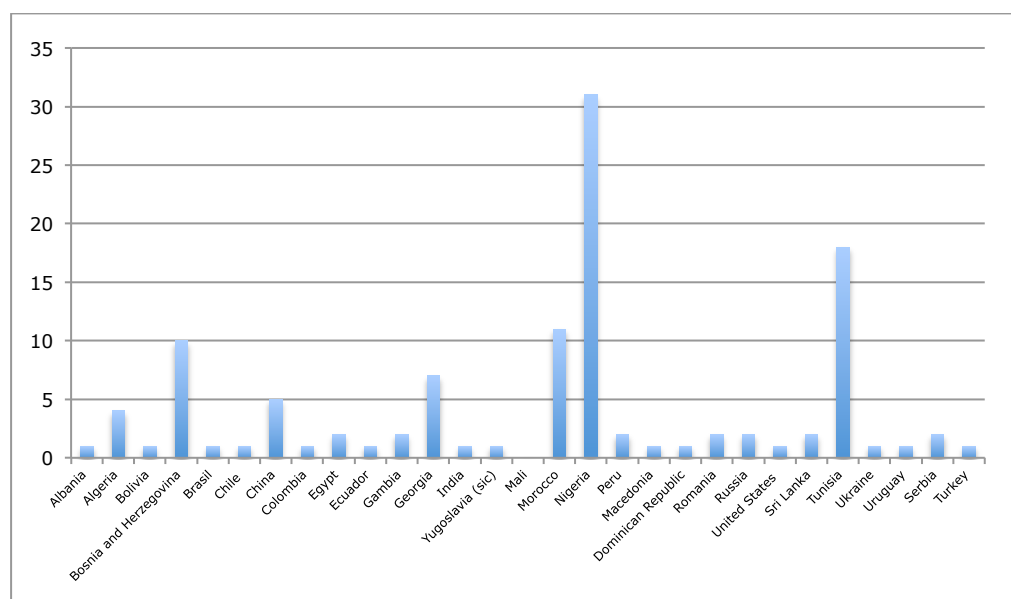
Chart no. 9: Presence of migrants in C.I.E. in 2012 and 2013



Source: Medici per i Diritti Umani.¹⁷⁴

¹⁷⁴ Elaboration from data of the police, see at http://www.mediciperidirittiumani.org/pdf/Tabella_comparativa_2012-2013.pdf.

Chart no. 10: Nationality of detainees present at the CIE of Ponte Galeria on 3 June 2014



Source: Auxilium, cooperative running the C.I.E. of Ponte Galeria (denominations of countries is that of Auxilium)

III. The detention system

1. Italy's international and EU legal obligations

a) International human rights law

The right to liberty and freedom from arbitrary detention is addressed in a number of international legal instruments, three of which are particularly pertinent to the situation of migrants in Italy. Article 9.1 ICCPR provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Article 5.1.f of the European Convention on Human Rights provides that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." Article 6 of the EU Charter provides that that "[e]veryone has the right to liberty and security of person".

A determination of compliance with the core of these obligations requires addressing two questions: 1) is there a deprivation of liberty; and 2) if so, is this deprivation arbitrary because it is not predicated on a permissible ground to restrict the individual's right to liberty or has been effectuated without respect for procedural guarantees (due process)? With regard to the first question, it should be noted that certain restrictions on the individual may not rise to the level of a deprivation of liberty in the strict sense, but may nonetheless constitute a denial of the right to freedom of movement, which is also protected under international law.¹⁷⁵ Deprivation of liberty is not only prolonged imprisonment. Indeed, "[a]ny confinement or retention of an individual accompanied by restriction on his or her freedom of movement, even if of relatively short duration, may amount to de facto deprivation of liberty."¹⁷⁶ Accumulation of lesser restrictions may also constitute deprivation of liberty. The European Court of Human Rights, for example, in *Guzzardi v. Italy*,¹⁷⁷ found a deprivation of liberty where the applicant had been confined on a small island and subject to a curfew, reporting requirements, restrictions on movement and communications.¹⁷⁸

As to the permissible grounds for restricting liberty, article 9 of the ICCPR prohibits detention that is "arbitrary", the meaning of which has been elaborated upon in the jurisprudence of the Human Rights Committee. Article 5 of the ECHR, however, allows for deprivation of liberty only in those situations enumerated in the six sub-provisions of 5.1. Of these, the two identified in 5.1.f, are most pertinent to the migration context with which this report is concerned: to prevent unauthorized entry to the country, and pending deportation or extradition.

Any form of detention must, pursuant to the principle of legality, be prescribed by law, meaning that it must accord with national law and procedures; and that those laws and procedures must be capable of protecting the individual from any arbitrary conduct of the State authorities.¹⁷⁹ In this regard, the European Court of Human Rights has emphasized that

¹⁷⁵ See, article 12 ICCPR; article 2 of Protocol 4 ECHR; and article 22 ACHR.

¹⁷⁶ UN Working Group on Arbitrary Detention (WGAD), para 55, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law. See also para 59, which states: "Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty. The Working Group has confirmed this in its previous deliberations on house arrest, rehabilitation through labour, retention in non-recognized centres for migrants or asylum seekers, psychiatric facilities and so-called international or transit zones in ports or international airports, gathering centres or hospitals."

¹⁷⁷ *Guzzardi v. Italy*, ECtHR, Plenary, Application no. 7367/76, Judgment of 6 November 1980, para. 93.

¹⁷⁸ See, ICJ, *Migration and International Human Rights Law*, op. cit., pp. 175-178 for related comprehensive jurisprudence.

¹⁷⁹ See, ICJ, *Migration and International Human Rights Law*, op. cit., p. 178 for related comprehensive jurisprudence.

"the absence of elaborate reasoning for [a] deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention."¹⁸⁰ For the information on the detention to be accessible, it must also be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand his or her circumstances.¹⁸¹

The European Court of Human Rights has held that for a deprivation of liberty, including detention, to be devoid of arbitrariness, it must, in addition to complying with national law:¹⁸²

- be carried out in good faith and not involve deception on the part of the authorities;
- be closely connected to the purpose of preventing unauthorised entry of the person to the country or deportation;
- the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear of their lives;
- the length of the detention must not exceed that reasonably required for the purpose pursued.¹⁸³

A person detained for any reason, including for purposes of immigration control, has the right to be informed promptly of the reasons for detention, under article 5.2 ECHR and article 9.2 ICCPR. Information provided on the reasons for detention must be provided in simple, non-technical language that can be easily understood, and must include the essential legal and factual grounds for the detention – including the detention order – and information concerning the remedies available to the detainee. The information provided must be sufficiently comprehensive and precise to allow the detainee to challenge his or her detention judicially.¹⁸⁴ The principle that the information must be provided in a form that is accessible may require, in the case of migrants, that it be translated. Reasons for detention must go beyond a "bare indication of the legal basis" for the detention; there must also be some indication of its factual basis. The responsibility of the State to inform the detainee of the grounds for detention is not discharged where the detainee has had to try to infer from the circumstances, or various sources, the basis for the detention. In such circumstances, there remains an obligation on the State to provide the information.¹⁸⁵

Detained migrants, like any other person deprived of their liberty, have the right to prompt access to a lawyer, and must be promptly informed of this right.¹⁸⁶ In accordance with international standards, detainees should have access to legal advice and facilities for confidential consultation with their lawyer at regular intervals thereafter. Where necessary, free legal assistance should be provided. Translation of key legal documents, as well as interpretation during consultations with the lawyer, should be provided where necessary. Facilities for consultation with lawyers should respect the confidentiality of the lawyer-client relationship.

While neither article 5 ECHR nor article 9 ICCPR refer expressly to legal counsel,¹⁸⁷ abundant international jurisprudence under both treaties makes clear that these provisions encompass the right of detainees to have access to a lawyer. The Human Rights Committee has held that "[p]rompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires,

¹⁸⁰ *Lokpo and Toure v. Hungary*, ECtHR, Application No. 10816/10, Judgment of 20 September 2011, para. 24.

¹⁸¹ See, ICJ, *Migration and International Human Rights Law*, op. cit., pp. 179-180 for related comprehensive jurisprudence.

¹⁸² Equivalent jurisprudence has been expressed by the Human Rights Committee (see, among others, *A v. Australia*, CCPR, Communication no. 560/1993, Views of 30 April 1997; *Saed Shams and others v. Australia*, CCPR, Communication no. 1255/2004, Views of 11 September 2007; *Sambo Jalloh v. the Netherlands*, CCPR, Communication no. 794/1998, Views of 15 April 2002) and by the UN Working Group on Arbitrary Detention (Deliberation No. 5 on situation regarding immigrants and asylum-seekers, available at <http://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf>).

¹⁸³ See, ICJ, *Migration and International Human Rights Law*, op. cit., p. 180-181 for related comprehensive jurisprudence.

¹⁸⁴ See, *ibid.*, pp. 212-214 for related comprehensive jurisprudence.

¹⁸⁵ See, *ibid.*

¹⁸⁶ See, *ibid.*, p. 215 for related comprehensive jurisprudence.

¹⁸⁷ The right to legal counsel is guaranteed by article 6 ECHR, article 14 ICCPR and article 47 EU Charter.

to family members.”¹⁸⁸ The European Court of Human Rights has held that failure to provide any or adequate access to a lawyer, or measures taken by the State to obstruct such access, may violate article 5.4 ECHR where such conduct prevents the detainee from effectively challenging the lawfulness of his or her detention.¹⁸⁹ Interference with the confidentiality of lawyer/client discussions in detention has also been found to violate the right to challenge the lawfulness of detention under article 5.4.¹⁹⁰ In the case of *Suso Musa v. Malta*, the European Court held that, “although the authorities are not obliged to provide free legal aid in the context of detention proceedings ..., the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy.”¹⁹¹

The right to challenge the lawfulness of detention judicially, a right protected by article 9.4 ICCPR and article 5.4 ECHR and one that does not allow for any limitation or derogation,¹⁹² is a fundamental protection against arbitrary detention, as well as against torture or ill-treatment in detention.¹⁹³

The right to judicial review of detention applies to persons subject to any form of deprivation of liberty, whether lawful or unlawful, and requires that they have effective access to an independent court or tribunal to challenge the lawfulness of their detention, and that they or their representative have the opportunity to be heard before the court.¹⁹⁴ Persons detained must have prompt access to court when they are first detained, but thereafter there must be regular judicial reviews of the lawfulness of the detention.

Judicial review of detention must provide a practical, effective and accessible means of challenging detention. The principle of accessibility requires that the State ensure that the detainee has a realistic possibility of effectuating the remedy, in practice as well as in theory. This may require provision of information, legal assistance or translation.

For a judicial review to accord with international human rights law, it must fulfil a number of requirements:

- The review must be clearly prescribed by law.
- The review must be by an independent and impartial judicial body.
- The review must be prompt, of sufficient scope, sufficient to be effective and real and not merely a formal review of the grounds and circumstances of detention, and with judicial discretion to order release.
- The review must meet standards of due process and able to ensure “equality of arms” between the parties.
- Legal assistance must be provided to the extent necessary for an effective application for release.
- Where detention may be for a long period, procedural guarantees should be close to those for criminal procedures.

Persons who are determined by domestic or international courts or other appropriate authorities to have been wrongly detained have a right to full reparation, including compensation,¹⁹⁵ for their wrongful detention (article 5.5 ECHR and article 9.5 ICCPR). Under

¹⁸⁸ See, Human Rights Committee, Draft General Comment no. 35, para. 58, referring to Concluding Observations on Algeria 2007, para. 11; Armenia 2012, para. 19; Belgium 2010, para. 17; Benin 2004, para. 16; Vietnam 2002, para. 13; Kuwait 2012, para. 19. See, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 17-19, 24, approved by UN General Assembly resolution 43/173; Committee on the Rights of the Child, *General Comment No. 10*, para. 87.

¹⁸⁹ *Öcalan v. Turkey*, ECtHR, Application no. 46221/99, Judgment of 12 March 2003, para. 72, endorsed by the judgment of the Grand Chamber, Judgment of 12 May 2005, para. 70.

¹⁹⁰ *Istratii v. Moldova*, ECtHR, Applications Nos. 8721/05, 8705/05 and 8742/05, Judgment of 27 March 2007, paras. 87-101.

¹⁹¹ *Suso Musa v. Malta*, ECtHR, Application no. 42337/12, Judgment no. 23 July 2013, paras. 61.

¹⁹² See, for example, Human Rights Committee, *General Comment no. 29, States of emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

¹⁹³ *A. and Others v. United Kingdom*, ECtHR, GC, Application no. 3455/05, Judgment of 19 February 2009, para. 202; *Kurt v. Turkey*, ECtHR, Case no. 15/1997/799/1002, Judgment of 25 May 1998, para.123.

¹⁹⁴ See, ICJ, *Migration and International Human Rights Law*, op. cit., pp. 219-225 for related comprehensive jurisprudence.

¹⁹⁵ See, *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human*

the ICCPR, this right arises whenever there is “unlawful” detention, i.e. detention which is either in violation of domestic law, or in violation of the Covenant. Under the ECHR, it arises specifically where the detention is in contravention of the Convention itself, although in practice this will include cases where the detention did not have an adequate basis in domestic law.¹⁹⁶

b) EU Law

Article 6 of the EU Charter states that “[e]veryone has the right to liberty and security of person.” Under article 52 of the Charter, the meaning and scope accorded to this right is the same as that arising from the ECHR and, accordingly, the jurisprudence of the European Court of Human Rights on article 5 ECHR will be directly applicable for the interpretation of Charter article 6.

Articles 15 and 16 of the Return Directive provide the EU secondary law framework on administrative detention of undocumented migrants. Article 15.1 provides that detention is a measure of last resort that may be ordered only “[u]nless other sufficient but less coercive measures can be applied effectively in a specific case.”¹⁹⁷ If alternative measures to detention are not available, then, and only then, may a State “keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when ... there is a risk of absconding or ... the third-country national concerned avoids or hampers the preparation of return or the removal process.”¹⁹⁸

With regard to the length of detention, the fundamental principle is that “[a]ny detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.”¹⁹⁹ In particular, “[w]hen it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions [for detention] no longer exist, detention ceases to be justified and the person concerned shall be released immediately.”²⁰⁰ Indeed, the measure of detention must only “be maintained for as long a period as the conditions [for detention] are fulfilled and it is necessary to ensure successful removal”²⁰¹ and must in any event last no longer than six months. Detention may, exceptionally, be extended “for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to ... a lack of cooperation by the third-country national concerned, or ... delays in obtaining the necessary documentation from third countries.”²⁰²

The Court of Justice of the European Union²⁰³ has made clear that detention may not be indefinite, whether or not there are “reasonable prospects of removal.” The Court of Justice has clarified that even the existence of such prospects of removal does not justify the extension of detention beyond an absolute maximum period of eighteen months²⁰⁴ and that

Rights Law and Serious Violations of International Humanitarian Law.

¹⁹⁶ See, Manfred Nowak, *UN Covenant on Civil and Political Rights Commentary*, 2nd Revised Edition, N.P. Engel Publisher, 2005, pp.180-182.

¹⁹⁷ Article 15.1, EU Return Directive.

¹⁹⁸ Article 15.1, *ibid.*

¹⁹⁹ Article 15.1, *ibid.*

²⁰⁰ Article 15.4, *ibid.*

²⁰¹ Article 15.5, *ibid.*

²⁰² Article 15.6, *ibid.* The Court of Justice of the European Union has ruled that “the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.” *Said Shamilovich Kadzoev (Huchbarov)*, Case C-357/09 PPU, Judgment of the Court (Grand Chamber) of 30 November 2009, Ruling 3. The Court has also stressed that, “where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.” *Ibid.*, Ruling 6.

²⁰³ For sake of readability, in this report, the Court of Justice of the European Union will be referred to with its current name even in relation to cases prior to the Lisbon Treaty, when it was called the European Court of Justice.

²⁰⁴ *Said Shamilovich Kadzoev (Huchbarov)*, *op. cit.*, Ruling 4.

"only a real prospect that removal can be carried out successfully ... corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country" ²⁰⁵ Furthermore, the Court of Justice has stressed that the initial six month period cannot be "extended solely because the third-country national concerned has no identity documents" ²⁰⁶ and clarified that this fact can be considered a "lack of cooperation" only if the assessment of the third country national's conduct demonstrates this lack of cooperation and was instrumental to the delay in the expulsion. ²⁰⁷

When a decision is made to detain, the detention order must be in "writing with reasons being given in fact and in law." ²⁰⁸ The order may be issued either by judicial or administrative authorities. However, when it is ordered by administrative authorities, Member States must ensure that there must be "speedy judicial review of the lawfulness of detention." ²⁰⁹ Alternatively, the migrant should have the "right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings." ²¹⁰

With regard to judicial review of the detention, the Directive states that it must "be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority." ²¹¹

The Court of Justice of the European Union has recently set out detailed principles in relation to the judicial review of detention under the Return Directive. In the case *Bashir Mohamed Ali Mahdi*, ²¹² the Court ruled that the Directive, read in the light of articles 6 and 47 of the Charter of Fundamental Rights of the European Union, entailed the following obligations:

- all decisions on detention, including on its extension, must be in the form of a written measure that includes the reasons in fact and in law for that decision;
- the mandatory judicial review must rule on the detention measure:
 - on a case-by-case basis;
 - by assessing the principle of proportionality;
 - by assessing whether detention may be replaced with a less coercive measure or whether the person concerned should be released;
- the court or judge must have the power to take into account the facts stated and evidence adduced by the administrative authority that has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings.

The ICJ mission heard positive indications by both justices of the peace and lawyers that they considered the Return Directive to be an instrument that had brought coherence, clarity and a framework for analysis, albeit in an ever-changing and complex legislative landscape. The mission was told, however, that the Directive was generally not well understood by many legal practitioners, including government officers, justices of the peace and lawyers. There

²⁰⁵ *Ibid.*, Ruling 5.

²⁰⁶ *Bashir Mohamed Ali Mahdi*, CJEU, Case no. C-146/14 PPU, Judgment of 5 June 2014, Ruling 3 and 4.

²⁰⁷ *Ibid.*, Ruling 3 and 4.

²⁰⁸ Article 15.2, EU Return Directive.

²⁰⁹ Article 15.2.a, *ibid.*

²¹⁰ Article 15.2.b, *ibid.* The Court of Justice of the European Union has held that, "where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different," *M. G. and N. R. v Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, Judgment of the Court (Second Chamber) of 10 September 2013, Ruling.

²¹¹ Article 15.3, *ibid.*

²¹² *Bashir Mohamed Ali Mahdi*, CJEU, *op cit.*, Ruling 1.

seemed to be a lack of understanding as to the necessary effect that the Return Directive had on the interpretation of national law. In particular, the obligation, under the Directive to undertake a proportionality assessment and only resort to detention as last measure had not been understood, or at least internalized.

2. The Italian system in law and in practice

Article 13 of the Italian Constitution provides:

"Personal liberty is inviolable.

No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law.

In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void.

Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished.

*The law shall establish the maximum duration of preventive detention."*²¹³

Article 13 of the Constitution, therefore, establishes, in accordance with the principle of legality, an obligation to place restrictions on personal liberty only through primary legislation (*riserva di legge assoluta*). It also provides for the exclusive competency of only ordinary judges to assess the legality of one's detention (*riserva di giurisdizione*).

The Constitutional Court, in its landmark judgment no. 105 of 2001, ruled that the administrative detention of a migrant "is a measure that impacts on personal freedom, and cannot be adopted outside of the guarantees provided by article 13 of the Constitution."²¹⁴ The Court affirmed the absolute character of the guarantees under article 13 that are not "attenuated for foreigners, in view of the protection of other constitutionally relevant goods."²¹⁵

²¹³ Senate's official translation.

²¹⁴ Constitutional Court, Judgment no. 105/2001 of 10 April 2001, para. 4 (unofficial translation).

²¹⁵ *Ibid.* (unofficial translation).

Box no. 5: The Centre for Identification and Expulsion of Ponte Galeria

On 3 June, the ICJ mission visited the C.I.E. of Ponte Galeria. The purpose of the visit was to assess the situation in which migrants found themselves when coming in contact with the judicial system in obtaining legal advice. The detention centre, the largest in Italy, was only at half capacity on the day of the visit. It was not therefore possible for the mission to assess the conditions at full capacity. The facility is divided in two main wards, one for men and one for women. Both are surrounded by very high iron bars and such bars are also placed between the accommodation zones. No detainee is able to pass from one ward to the other, but they are permitted to move within their ward during the day. At night, detainees are confined in their accommodation section within the ward.

The mission was not tasked to undertake a full scale evaluation of conditions of detention, but, nonetheless, is able to offer a few observations in this respect. The mission considered the overall physical environment to be dismal, with the towering iron bars likely to give the persons inside a profound feeling of oppression. The mission notes that there were instructional, educational and recreational services available, although the facilities themselves seemed inadequate. The C.I.E. hosted a small courtroom that was located within the police quarters near the main entrance, but still within the detention centre. Detainees would enter the courtroom from a separate room furnished only with chairs. Besides the corridor that introduced the courtroom, a room for interviews was available for the lawyers to speak to their clients. The mission could witness that the room was soundproof. However, a big window allowed the police to see everything going on in the room.

The police and the centre personnel were available to answer all the questions of the mission and to show all parts of the detention centre. As for the detainees, the women did not address the mission, while some of the men complained to have been wrongly detained. One detainee, who reported to the mission that his brother had died in front of him when they tried to cross the Mediterranean Sea, asked with desperation why he was sent from France to Italy, since he had gone to France to join his girlfriend. The detainee carried signs of self-mutilation.

It should be recalled that in Italy, both in law and in the administrative lexicon, the situation of migrants deprived of their liberty is not referred to as detention, but as "holding" (*trattenimento*). Likewise, the police running the centre refer to the detainees as "guests" (*ospiti*). The C.I.E. is run by a non-governmental organization, Auxilium, financed by the Ministry of Interior. The police are present in the centre to maintain security and to represent the Questura.

The ICJ notes that, despite the clear pronouncements in judgments of this Constitutional Court and of the European Court of Human Rights on the issue (see section 1) and although there was little question to the mission team that at least the detention centers constituted no less a deprivation of liberty than that faced in many low to mid security level prisons around the world, yet, remarkably, one justice of the peace told the mission that the situation of migrants in a C.I.E. simply amounted to a restriction of freedom of movement, and not a deprivation of liberty.

The ICJ heard from a number of lawyers convincing arguments that at least certain aspects of the system of administrative detention of undocumented migrants were unconstitutional, being in breach of the principle of legality under article 13 of the Constitution. It was argued that the primary law which covers detention (Legislative Decree 286/1998) does not regulate

the “manner”²¹⁶ of detention, unlike in penitentiary legislation, for which primary law provides quite some detail. Indeed, the Immigration Law makes almost no mention of the “manner” of detention and the references to the “manner” in the implementation regulation, which is secondary legislation,²¹⁷ are quite scarce. This omission leaves the detailed regulation of the detention centre to ministerial directives or formal or informal agreements with the managing entity of the centre.²¹⁸ With regard to the constitutional obligation that only ordinary judges may assess the legality of one’s detention, some civil society representatives and lawyers pointed out that it is only in immigration matters that the judge validating a detention is not necessarily a professional judge, a situation they found to be highly problematic.

a) Grounds of detention

The Immigration Law grants the Questore the power to detain a migrant in order to prepare his or her deferred push-back or expulsion, for the time “strictly necessary”.²¹⁹ Detention may be ordered when expulsion through forced accompaniment to the border²²⁰ or deferred push-back²²¹ cannot be executed immediately, due to a temporary situation that obstructs the preparation of the repatriation or the execution of the removal.²²² Such situations may include: the existence of a situation of risk of absconding; and/or the need to give emergency assistance to a migrant, to undergo verification of identity/nationality, to obtain documents for the trip or to check availability of adequate means of transport.²²³

The Questore is also authorized to issue a decision to detain criminal suspects or persons under pending order of expulsion, specifically:

- a) pending the issuing of the decision of the justice of the peace on the request of the Questore for leave (*nulla osta*) to expel a migrant who is subject to criminal proceeding and who is not already in detention on remand or imprisonment under criminal law;²²⁴
- b) pending the issuing of the decision of the justice of the peace on the validation of the decision of forced accompaniment to the border, unless the proceeding can be held in the place where the expulsion decision has been adopted, even before the transfer to a C.I.E.²²⁵

A representative of the Directorate of Public Security within the Ministry of Interior informed the mission that internal directives provide that the decision as to whether or not to detain are to be based on assessments on a case-by-case basis. It was confirmed that, in practice, at least three indicators were taken into account in the decision: whether the migrant had been arrested on suspicion of having committed a criminal offence; whether the migrant had a previous criminal conviction; and/or whether the migrant was alleged to have used different aliases in the past. In addition, the police officials with whom the mission met at the C.I.E. of Ponte Galeria affirmed that, if a migrant is in possession of a legitimate identity document, he or she is usually subject to an order to leave the country within seven days. Otherwise, the migrant will be detained, the possession of the identity document being an essential element for the detention decision.

²¹⁶ For the purpose of this paragraph, the term “manner” is used, as employed in the English translation of article 13 of the Italian Constitution on the Senate website. In that article “manner” of detention is a term employed to include conditions of detention; procedures inherent to detention, including disciplinary proceedings, penitentiary benefits, etc.; hierarchies and structures; competences and prerogatives of the different services and treatment.

²¹⁷ Decree of the President of the Republic no. 394 of 31 August 1999.

²¹⁸ Alberto di Martino, *La disciplina dei “C.I.E.” è incostituzionale – Un pamphlet*, Diritto Penale Contemporaneo, 2010. Unfortunately, a challenge of constitutionality of the detention system as a whole was dismissed by the Constitutional Court because too generic, Constitutional Court, Ordinance no. 93/2014, 7 April 2014.

²¹⁹ Article 14.1, Immigration Law.

²²⁰ Article 13.4, *ibid.*

²²¹ Article 10.2, *ibid.*

²²² Article 14.1, *ibid.*

²²³ Article 14.1, *ibid.*

²²⁴ Article 13.3, *ibid.*

²²⁵ Article 13.5-bis, *ibid.*

A number of NGOs and lawyers representing undocumented migrants told the mission that, often, where a migrant has a criminal conviction or has been subject of a criminal complaint, this would automatically trigger, in practice, a validation of his or her detention. Other migrants were said to be detained on the basis of a perceived "social dangerousness", a vague and undefined standard, which could not be clarified by those with whom the mission spoke.

It was reported that, at present, in the C.I.E., those detained are mainly persons with previous criminal convictions. Lawyers told the ICJ mission of their view that the administrative detention of migrants following the serving of a criminal sentence is a legal absurdity and, *de facto*, an additional punishment, since the migrant could have been identified and the expulsion prepared while serving his or her sentence. These findings are further corroborated by the authoritative statement of the UN Working Group on Arbitrary Detention, at the end of their mission to Italy on 11 July 2014, that "a significant number of detainees in CIEs are foreign nationals convicted of criminal offences who were subsequently remanded into these centres.... [The Working Group called] on the Government to avoid the transfer to CIEs of convicted migrants who should be identified during their detention in prison."²²⁶

The ICJ is aware that the European Court of Human Rights has indicated that "to revoke a residence permit and/or to impose an exclusion order on a settled migrant following a criminal conviction in respect of which that migrant has been sentenced to a criminal-law penalty does not constitute a double punishment."²²⁷ Nonetheless, the ICJ considers that this does not exempt the Italian authorities from satisfying their obligations of due diligence for the preparation and execution of the expulsion measure. The ICJ agrees with the views expressed by lawyers that preparations for expulsion can be undertaken while the migrant is serving his or her term of imprisonment after conviction. The authorities will therefore have to demonstrate why they have not been able to undertake these preparatory acts during this period. If they do not, then the administrative detention measure will be in breach of article 5.1.f ECHR and article 9.1 ICCPR and article 6 of the EU Charter.

The ICJ is not aware of any legal obstacle to performing these preliminary activities during the period in which the migrant is imprisoned following conviction. It, therefore, recommends that the government authorities undertake all preparatory measures for expulsion before the migrant is released from imprisonment. It further recommends to justices of the peace that they should not validate expulsion measures or execution measures of detention and accompaniment to the border, if the authorities have not clearly, credibly and reasonably explained why such preparatory acts have not been possible.

b) Communication of the decision

Under the Immigration Law, the detention decision is translated into a language understandable by the detainee, or, when this is not possible, in French, English or Spanish, according to the preference indicated by the detainee.²²⁸ In addition, the decision must be in writing and reasoned.²²⁹ The decision must contain an indication of the judicial authority competent in case of appeal and the right to be assisted by a lawyer.²³⁰

The most recent migrants to Italy come from a diverse range of countries. As an example, during the visit of the mission in the C.I.E. of Ponte Galeria, the most represented, in

²²⁶ UN, "Italy/Arbitrary Detention: UN expert body calls for action to end over-incarceration and to protect rights of migrant", 11 July 2014, available at

[http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/98644DDF78A6E0FFC1257D1200560FFE?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/98644DDF78A6E0FFC1257D1200560FFE?OpenDocument).

²²⁷ *Uner v. the Netherlands*, ECtHR, GC, Application no. 46410/99, Judgment of 18 October 2006, para. 56.

²²⁸ Articles 2.6 and 14.2, Immigration Law.

²²⁹ Article 20, Decree of the President of the Republic no. 394/99.

²³⁰ *Ibid.*

numerical order, were nationals of: Nigeria, Tunisia, Morocco, Bosnia and Herzegovina, Georgia, and China. Most of these detainees will therefore speak such languages as Arabic, Serbo-Croat, Georgian or Chinese.

The police in service at the C.I.E. of Ponte Galeria confirmed to the ICJ mission that often it was not possible to find a translator in the language needed to translate the order and that, in such cases, the decision was given in English, French or Spanish, the “convey” languages.

The ICJ underscores that it is essential that the person subject to a deprivation of liberty be informed promptly of the reasons for detention in a language he or she understands.²³¹ The ICJ notes that, at present, the law does provide for only three mandatory languages and that the present system is not in line with Italy’s obligations under article 5.2 ECHR and 9.2 ICCPR.

The ICJ recommends that the law be amended to refer at least to the five languages most frequently used or understood by undocumented migrants and that the Ministry reassess periodically which language to prioritize depending on the composition of the arrivals. In any case, the ICJ stresses that, in case of measures constituting a deprivation of liberty, any means of communication must be employed to communicate effectively in writing with the person threatened with expulsion concerning the legal proceedings in his or her case, by indicating the legal and factual grounds on which it is based and the remedies available, and the timeframes within which such remedies can or must be exercised.

c) Length of detention

Following detention of an initial period of thirty days, such detention may be prolonged by the justice of the peace, upon request of the Questore, for:

- 1) thirty days more, in case of serious difficulties for the identification of the migrant and/or for the acquisition of the travel documents;
- 2) sixty days more, if the same difficulties persist;
- 3) sixty days more, if the same difficulties still persist. It follows that the maximum period amounts to 180 days, even if the Questore executes the forced accompaniment as soon as possible, without waiting for the expiry date of each period.
- 4) However, the justice of the peace, at the request of the Questore, may prolong the detention again for further periods of sixty days up until a total of eighteen months if, despite having employed any reasonable efforts, it has not been possible to execute the removal, because of lack of cooperation by the migrant or of the delay in obtaining the documentation from third countries.²³²

The mission was told, during its visit to the C.I.E. of Ponte Galeria, that migrants do not generally remain in the detention centre for more than six months. There had been only one or two cases of people who remained for eight or nine months, according to the police at the centre. The reason given was that it would be considered unreasonable to detain people for more than six months since, if an identification had not been possible during that extended period, it would not be expected that the person would be identified in the reasonably foreseeable future. The mission was told that, typically, after six months the police do not ask for an extension of the detention.

The ICJ considers that the eighteen months limit under article 15 of the EU Return Directive is excessive for any case of detention with a view to deportation undertaken with the requisite

²³¹ Article 5.2 ECHR and article 9.2 ICCPR; Principle no. 1, WGAD Deliberation no. 5; Body of Principles, principle 14; *Rahimi v. Greece*, ECtHR, *op. cit.*, para 79.

²³² Article 14.5, Immigration Law.

due diligence.²³³ The ICJ points out that, in its recent visit to Italy, the UN Working Group on Arbitrary Detention said that they remained “seriously concerned about the length of administrative detention (with a statutory maximum duration of 18 months) and the conditions of detention in the Identification and Expulsion Centres (CIEs) but are encouraged by recent legislative initiatives to reduce the maximum period of detention of irregular migrants to 12, or even six, months.”²³⁴ The ICJ further notes the view of the representatives of the police closely working with detained migrants that found that, generally speaking, six months constituted more than enough time for a genuine attempt at disposition. The ICJ welcomes as a step in the right direction the approval by Parliament, on 21 October, of article 3 of European Law 2013-bis that reduces the maximum length of administrative detention to ninety days.²³⁵

The ICJ stresses that the cornerstone of the lawfulness of detention, more than length, must remain the mandatory assessment of necessity and proportionality of the detention measure; an assessment of the availability of alternatives to detention; and the availability at any moment of a remedy of *habeas corpus* as well as of a mandatory periodic review of the lawfulness and of the conditions of detention. Nonetheless, since article 4 of the EU Return Directive allows for the introduction of measures more favourable to the migrant, the ICJ recommends that the Italian Government and Parliament considerably reduce the maximum length of detention, to a period that is as short as possible in order to ensure that a removal is carried out with the necessary promptness and due diligence.

d) Rights and procedures of judicial review

During its visit, the ICJ mission was informed of a number of problematic elements in respect of the rules applicable to the procedure for judicial review of detention; with the manner in which this procedure is typically conducted; and with the outcomes of many such reviews.

i) General procedure

Following the issuing of a detention order, the Questore with jurisdiction in the same area of the detention centre (C.I.E.) transmits a copy of the documentation related to the detention order to the justice of peace that has jurisdictional competence in the area. That justice of peace is charged with the validation of the detention within the 48 hours following the notification of the decision. The migrant must be promptly informed of the place and date of the hearing and, at the appropriate time, accompanied to the hearing. The hearing is held *in camera*, with the mandatory presence of a defense lawyer, and, if needed, of an interpreter. The justice of the peace must verify “the respect of the deadlines [and] the existence of the grounds provided for by article 13 [and article 14 of the Immigration Law]”.²³⁶ If the justice of the peace fails to validate the order within 48 hours, the migrant may not be detained. Action or failure to act on the detention order, however, does not have any effect on the expulsion decree, which in any event remains *prima facie* valid.

According to the law, the validation of the detention, in principle, may be pronounced along with a validation of other orders, such as an order on forced accompaniment to the border as well as with the decision on the appeal against expulsion.

If the justice of the peace validates the detention order, a migrant may be detained for thirty days in a CIE, a period of time which may be prolonged several times according to article 14.5 of the Immigration Law, but the total detention period must not exceed eighteen months (see

²³³ See, article 5.1.f ECHR.

²³⁴ UN, “Italy/Arbitrary Detention: UN expert body calls for action to end over-incarceration and to protect rights of migrant”, 11 July 2014, available at [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/98644DDF78A6E0FFC1257D1200560FFE?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/98644DDF78A6E0FFC1257D1200560FFE?OpenDocument).

²³⁵ See, current text before the House of Representative, Draft Law no. C-1864-B.

²³⁶ Article 14.4, Immigration Law.

section 2.c).²³⁷ Any extension of the periods of detention must in each instance be confirmed by the justice of the peace.

The law does not require the justice of the peace to hold a hearing to decide on extensions. However, the Court of Cassation, in its decision no. 4544 of 24 February 2010, ruled that the proceedings of extension of the detention must be subject to the same guarantees that are afforded for the validation of the detention, including the mandatory presence of a lawyer and the hearing of the detainee. The Court of Cassation has reaffirmed this principle in the judgment no. 13767/10 of 8 June 2010, wherein it also stressed that the detainee should be heard and that the request should be formulated with sufficient notice so as to give the possibility to the justice of the peace to decide within 48 hours. The Court of Cassation has also held that the validation and extension of detention cannot be considered, "when the efficacy of the expulsion decree that was its prerequisite has been ... suspended."²³⁸

According to the police officials the mission met during a visit to the C.I.E. of Ponte Galeria, the typical length of a hearing before a justice of the peace is between fifteen minutes and one hour. Research from the University Roma Tre (see box no. 4), however, reported that hearings on validation of detention measures frequently lasted only between five and ten minutes.²³⁹ The length of the hearing on extension of the detention was measured in actual terms, where it was possible to do so, as lasting from one minute to 22 minutes.²⁴⁰ The mission was surprised to be presented with such contrasting views with regard to the length of the hearings. However, considering the objective empirical methodology of research of the University of Roma Tre, their assessment is particularly convincing. The ICJ, however, stresses that judicial review of measures of deprivation of liberty requires the strictest scrutiny and is concerned that the length of hearings presented is not by itself dispositive, or even necessarily indicative, of the measure of respect of this obligation.

A group of lawyers and civil society representatives providing legal assistance to undocumented migrants pointed out to the mission that a significant problem with the procedure of validation and extension of detention is that it applied civil procedure (as mandated by the legislation) which is more adversarial and less formal than criminal procedure. In their view, the criminal procedure would have been more appropriate and in most other cases governs situations of deprivation of liberty, as outlined in the next paragraph. It was also pointed out that the use of civil procedure may run contrary to the right to personal freedom under article 13 of the Constitution.

Indeed, the mission was repeatedly and consistently told, during its visit, that the only comparable procedure is that of validation of police custody after arrest for suspicion of having committed a criminal offence. It was, however, pointed out that, even in exceptional cases, detention on this basis could last only 72 or 96 hours before the detainee were brought before a professional judge. In such cases, following the validation, the suspect would be held in detention on remand, with all the guarantees attached to it, including the possibility to address at any time a "detention surveillance magistrate" to ask for revision of the detention decision, and to appeal to a detention tribunal, i.e. an ordinary court, on the merits. Conversely, the only possible opportunity for undocumented migrants to contest the validity of detention after its validation is at the moment of extension of the detention time. This problem was identified and presented in similar terms by both NGOs and lawyers.

²³⁷ Article 14.3, *ibid.*

²³⁸ Court of Cassation, Sixth Civil Section, Ordinance no. 20869 of 10 October 2011 (unofficial translation).

²³⁹ Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, op. cit., p. 7.

²⁴⁰ *Ibid.*, p. 12.

ii) The hearing and the role of the justice of the peace

A hearing before the justice of the peace *in camera* is governed by articles 737 to 742-bis of the Civil Procedure Code. The rules provide that decrees issued *in camera* must be reasoned (article 737) and that the judge has the power to “gather information” (article 738). Apart from these areas, not many provisions of the Civil Procedure Code governing the *in camera* proceedings appear to fit with the Immigration Act, leaving wide discretion to the justice of the peace.

The Constitutional Court in its judgment 105/2001 had ruled that the judge must ensure a “full judicial control, and not only a formal one” upon measures of detention and of forced accompaniment to the border, and all deprivations of liberty. This means that the judge must not stop at the mere respect of formalities and at the existence of the acts on which the execution measure is based, but must assess all elements, including “the reasons that have led the administration to decide for that particular means of execution of the expulsion”.²⁴¹

With regard to the procedure under article 738.3 of the Civil Procedure Code, the Constitutional Court has specified that the power to “gather information” can help the judge to assess “the actual existence of the impediments for an immediate execution of the accompaniment to the border put forward by the police and to ascertain if there are situations that prohibit the expulsion.”²⁴² The Court considers the power to be quite wide and flexible, allowing the judge to seek information from any person or legal entity.

These two judgments of the Constitutional Court were issued in cases where professional judges were tasked with judicial control, but there is no reason to consider that they would not also be applicable to justices of the peace.

With regard to the possibility to perform a full assessment *proprio motu* through direct questioning of the migrant or the police or through other acts of inquiry within the hearing, the Court of Cassation has repeatedly held that in ordinary cases the justice must assess only the mere formal existence and efficacy of the prerequisite act.²⁴³

On the other hand, the Court of Cassation also affirmed that, if the efficacy of the prerequisite act, e.g. an expulsion decree or an order of deferred push-back, has been suspended, then the justice of the peace must automatically invalidate that execution measure. In a recent judgment, the Court has identified an intermediate situation, whereby the justice of the peace has to incidentally assess *proprio motu*, while considering the validity of an execution measure, whether the prerequisite act is manifestly unlawful, as would be the case when the modalities of the expulsion do not give any possible chance to challenge the underlying order of transfer.²⁴⁴ The Court has held that manifest unlawfulness is a criteria that must be interpreted in line with the jurisprudence of the European Court of Human Rights in respect of article 5.1.f ECHR. Such criteria included lack of competence of the issuing authority, lack of good faith by the authorities and the existence of a legal obstacle to the expulsion.²⁴⁵

The mission was told that, while such an assessment would be possible from a legal point of view, in practice only formal issues are typically adjudicated. A justice of the Court of Cassation informed the ICJ Mission that inquiries will be in practice much more cursory in the validation hearings because of the very short 48-hour time frame mandated for disposition. The judge also indicated that the 48 hours deadline is a constitutional obligation for all measures restrictive of liberty that, understandably, does not allow for a proper inquiry.

²⁴¹ Constitutional Court, Judgment no. 105/2001 of 10 April 2001, para. 5 (unofficial translation).

²⁴² Constitutional Court, Ordinance no. 35/2002 of 26 February 2002 (unofficial translation).

²⁴³ See, among others, Court of Cassation, First Civil Section, Judgment no. 462/2010 of 13 January 2010, and judgment no. 5715/2008 for the forced accompaniment to the border.

²⁴⁴ Court of Cassation, Sixth Civil Section, judgment no. 17407/2014 of 30 July 2014.

²⁴⁵ Court of Cassation, Sixth Civil Section, judgment no. 12609/2014 of 5 June 2014.

However, a police representative at the Ponte Galeria told the mission that, while the competence of the justices of the peace is quite limited in law, in practice they enjoy a certain degree of discretion and everything is taken into account in the hearing, including formally inadmissible elements.

In a meeting with the justices of the peace of the migration section of Rome, there appeared to be no agreement among them as to whether the justice of the peace had powers to make inquiries on questions other than those raised by the parties. This also appears to be linked to the specialization of the justice of the peace: those specialized in criminal law would be prone to make inquiries on their own initiative, while the civil law experts would adopt a purely adversarial model relying only on the issues raised by the parties. The overall impression of the mission is that there is widespread confusion among the justices of the peace as to their powers of inquiry in validation and prorogation cases.

The ICJ underlines that the European Court of Human Rights has held that the review should, however, be wide enough to consider the conditions which are essential for lawful detention.²⁴⁶ The Human Rights Committee has repeatedly emphasized that judicial review requires real and not merely formal review of the grounds and circumstances of detention, and judicial discretion to order release.²⁴⁷ The ICJ further recalls the ruling of *Bashir Mohamed Ali Mahdi*²⁴⁸ of the Court of Justice of the European Union (see section 1.b) requiring a full review of the detention measures and their grounds.

The ICJ highlights and welcomes the recent developments in the Court of Cassation, which has increased the scope of judicial review of the administrative detention order. However, the ICJ considers that, in light of the Italian Constitutional Court decision of 2001 and the position of the Court of Justice of the European Union, this development is not sufficient and that in all proceedings of judicial review of detention a full assessment, including on the validity and reasonableness of acts from which the execution measure originated, must be ensured. As it stands at present, this lack of powers to conduct full assessment, including of the necessity and proportionality of the detention measure, is non-compliant with Italy's obligations under articles 5.4 ECHR, 9.4 ICCPR, and 6 and 47 of the EU Charter, or under the EU Return Directive. The ICJ, therefore, recommends the justices of the peace and the Court of Cassation to their jurisprudence in order to ensure that such a full assessment takes place.

iii) Decision-making and reasoning

With regard to the basis of decisions of the justices of the peace, research conducted by the University of Roma Tre in Rome (see box no. 4) shows that in detention validation decisions "the reasoning of the ruling analysed is often poor if not even totally absent, for example there are at least ten decisions out of 66 without any reasoning."²⁴⁹ The research found that in at least half of the decisions examined, the justices made use of stereotyped formulas. The preliminary report of the research reveals that, even in a case in which the migrant had the tickets to leave the country ready, the justice of the peace "considered that there are the conditions [for detention] and there is the will to leave",²⁵⁰ and the detention order was validated, contrary to the purpose of the detention to facilitate the expulsion from the country. Some lawyers and civil society representatives providing legal assistance to undocumented migrants expressed the concern that justices of the peace appeared to act as "validation machines." The police representative told the mission that any differences in reasoning of decisions among justices of the peace depended mostly on the work of the lawyers and whether or not they present a substantial and convincing legal argument. As

²⁴⁶ *A. and Others v. United Kingdom*, ECtHR, *op. cit.*, para. 202; *Chahal v. United Kingdom*, ECtHR, GC, Application no. 22414/93, Judgment of 15 November 1996, paras. 127-130.

²⁴⁷ *A v. Australia*, Human Rights Committee, Communication no. 560/1993, Views of 30 April 1997.

²⁴⁸ *Bashir Mohamed Ali Mahdi*, CJEU, *op. cit.*, Ruling 1.

²⁴⁹ Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, *op. cit.*, p. 8 (unofficial translation).

²⁵⁰ *Ibid.*, p. 10 (unofficial translation).

concerns the decisions on extension of the detention, the research of University Roma Tre revealed that, in the period between October and November 2013 in Rome, 60 out of the 61 decisions on extension, approved the extension.²⁵¹

The mission heard from several sources that it was extremely difficult to anticipate the criteria that might be applied by any particular justice of the peace in detention decisions, as their approaches were quite disparate, an assessment also confirmed by a judge of the Court of Cassation and by a representative of the police met at the C.I.E of Ponte Galeria.

In a meeting with justices of the peace of the migration section in Rome, it was reported to the ICJ mission that a confirmation of the suspicion of criminal offence by a judge of preliminary investigations, tasked in Italy with supervising the validity of investigatory acts of the prosecutor, was usually a sufficient presumption of criminal activity for a justice of the peace to validate the detention.²⁵² One justice of the peace disconcertingly told the mission that it was difficult to question migrants at the hearing because NGO lawyers would give them incorrect information leading them not to speak and that only a relaxed interview without the lawyer might help the justice of the peace to discover the truth.

These views are not necessarily representative of all the justices of the peace the ICJ mission met, and certain decisions of justices of the peace are in fact reasoned at length. However, there does appear to be a lack of thoroughness in the work of some justices of the peace that the research of the University Roma Tre has also documented as regards the lack of proper reasoning of their decisions, at least in Rome.

The ICJ is concerned that this information, taken altogether, highlights serious gaps not only in the knowledge and use of international human rights law and EU law during the validation and extension hearings, but also in the application of part of the jurisprudence of the Court of Cassation highlighted in this report. Situations such as those encountered during this mission give rise to the risk of violations of the right to judicial review of detention, under articles 5.4 ECHR, articles 9.4 ICCPR, and 6 and 47 of the EU Charter for lack of adequate reasoning.

The ICJ urges the justices of the peace to modify their practices and align them to those of professional judges in providing full reasoning for their decisions, not only in accordance with national law but also with international and EU law. In particular, each decision should set out the reasons why the detention measure is necessary and proportionate and why other alternative measures to detention have not been resorted to.

iv) Facilities

The Immigration Law provides for the possibility that, "the [police offices] provide to the justice of the peace, within the limits of available resources, the necessary support and the availability of an appropriate space."²⁵³ This measure is in order to ensure the "promptness" of the procedures of "validation" of orders of detention, forced accompaniment to the border, or control orders.

The research of the University Roma Tre documented that it was the practice of justices of the peace in Rome, Bari and Turin to hold hearings in the detention centre premises, although justices of the peace in Rome began to hold hearings at their own premises from March 2014.²⁵⁴

²⁵¹ *Ibid.*, p. 12.

²⁵² One justice of the peace voiced that, if the person had precedents for serious criminal offences, e.g. rape, this would lead to validation of the detention in any case, even if there were exceptions to it.

²⁵³ Article 13.5-ter, Immigration Law (unofficial translation).

²⁵⁴ Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, op. cit., pp. 5 and 7.

Justices of the peace with whom the mission met in Rome reported that the environment of the C.I.E. leads to a certain reticence from the undocumented migrant, that even their lawyers have problems overcoming. Opinion amongst the justices of the peace were, however, divided on whether they preferred to hold hearings at the detention centre room or at their own premises, which are also relatively modest.

In Milan, lawyers and civil society representatives also told the mission that holding hearings in a room of the Ministry of the Interior, beside the room of the police, did not give an appearance of institutional independence. Rather, it gave the impression that the justice of the peace is a guest of the Ministry of Interior, which is a party to the case, deciding also when and for how long the lawyer can meet the client.

The ICJ mission was directed to two decisions of the High Council of the Judicature²⁵⁵ of 2009 and of 2010 that strongly advised against holding hearings of the justice of the peace at the premises of the Questore, not to speak about detention centres. While recalling that the Council had in the past expressed reservations at the very idea of attributing competence on restrictions of personal liberty to the justice of the peace, the Council stated that "the primary safeguard of the value of freedom ... and the need to protect the image of impartiality of the judge ... dictate that it is possible to make use of the logistical and organizational support of the Questura only residually and only when it is not possible to proceed to the validations by accompanying the foreigner to the office of the judge."²⁵⁶

The ICJ shares the view of the High Council of the Judicature that holding hearings at facilities under the control of the Ministry of Interior, a party in the proceedings, undermines the appearance of independence and impartiality of the justice of the peace and is, therefore, incompatible with due process and the right to a fair hearing and the effectiveness of the right to a remedy, including due to the feeling of subjection it may instil in the migrant. For this reason, the ICJ urges that hearings before the justice of the peace be held only in their premises. Budgetary or human resource constraints cannot be considered legitimate grounds for restrictions of these rights.

e) Measures alternative to detention

If the Questore decides not to issue a detention decision, he or she may instead subject the migrant to one or more of the following measures: temporary confiscation of a valid passport; obligation to reside in a specified place; and/or obligation to periodically report to a law enforcement office.

These measures must be adopted by a reasoned decision, in the form of a decree, which is notified to the migrant and which contains an indication that the person has the possibility to make submissions, personally or through a lawyer, to the justice of the peace. The decision is communicated within 48 hours of the notification to the justice of peace with jurisdictional competence in the area where the decision on the measure has been taken. The justice of peace decides on the validation within 48 hours. However, the addressee of the measures may afterwards ask for a review and the measures may be modified or cancelled by the judge.²⁵⁷

When it has not been possible to detain a migrant in a C.I.E. or when, notwithstanding the detention in a C.I.E., it has not been possible to forcibly expel the migrant, the Questore may order him or her to leave the national territory within seven days. This decision must be

²⁵⁵ The High Council of Judicature, established under articles 104 and 105 of the Italian Constitution, is the body of self-government of the Italian judiciary and "has jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges" (article 105, Italian Constitution).

²⁵⁶ See, High Council of the Judicature Directives of 8 July 2009 at http://www.csm.it/circolari/090708_6.pdf (unofficial translation), and of 21 July 2010 at http://www.csm.it/circolari/100721_6_7.pdf.

²⁵⁷ Article 14.1-bis, Immigration Law.

issued in writing, must be reasoned and translated, with the indication of the criminal sanctions deriving from its possible transgression. Moreover, it may be accompanied by the information on how to reach the consular delegation of the country of nationality or of origin of the migrant in Italy,²⁵⁸ but there is no legal obligation to provide such information.

The research of University Roma Tre, at the time of the ICJ visit, had not been able to find any decision of a justice of the peace validating measures alternative to detention or making an assessment of proportionality in deciding whether detention had been properly assessed as a measure of last resort to be applied.

The ICJ notes that, as for voluntary returns and forced expulsions, the Italian Immigration Law appears to reverse the priorities affirmed under international human rights law, including EU law, in deciding on measures of control. As outlined above, these two bodies of law provide that the first assessment of the authorities should consider whether any measure alternative to detention would be applicable, as provided by article 9 ICCPR and article 15.1 of the Return Directive. The ICJ therefore urges national courts and administrations to construe the Immigration Law in a manner that respects these international and EU obligations by giving priority to alternative measures to detention and to resort to detention only when those are not available, on a strict application of the principles of necessity and proportionality.

f) Access to a lawyer

The ICJ mission met with several lawyers in Milan and Rome representing undocumented migrants and civil society representatives providing legal advice and support to migrants. These persons shared their experiences, in which they highlighted a number of problems in law, but mainly difficulties encountered in practice in ensuring proper access to a lawyer and legal representation to undocumented migrants.

During its visit to the C.I.E. of Ponte Galeria, the mission was told that detainees could see lawyers every day from 3 p.m. to 6 p.m. in a room near the entrance of the centre and right beside the police offices. The room was said to be soundproof to ensure that conversations between lawyers and clients remain confidential. However, it is open to the view of the police through a glass window allowing for the view of the entire space.

The mission was told that, usually, detainees have a lawyer of their own choosing and that they obtain lawyers' contacts through the other detainees, with the result that there is a small group of lawyers who are "trusted" by migrants. Generally, these are individual private lawyers, although recently some NGOs have also provided legal assistance. This impression was confirmed by the research of the University Roma Tre which found, in the analysis of justice of the peace decisions in Rome of hearings around October and November 2013, that "the names of a few defence lawyers ... constantly recur. For example, if we take as sample survey the total of the 66 decisions analysed by the study, a single lawyer appears appointed in 16 proceedings, and other two in 9 and in 7 respectively."²⁵⁹ The research revealed that, in around one third of the cases, the defence lawyers used stereotyped formulas for their arguments, at least according to the transcript of the hearings which are done on standard forms. The research also highlighted problems in the quality of the legal representation, which is often provided by the same four or five lawyers. The mission was also informed by some other lawyers that certain of these repeat lawyers represented migrants in an unethical and unprofessional manner.

The ICJ does not have at present sufficient information to assess with empirical precision whether the legal representation generally provided to undocumented migrants, in particular

²⁵⁸ Article 14.5-bis, *ibid.*

²⁵⁹ Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, *op. cit.*, p. 7 (unofficial translation).

in Rome, crosses the line of ethical principles of the legal profession. However, what the mission has learned does give rise to concerns in this respect. Although the ICJ mission met with a number of highly competent lawyers and civil society representatives, several persons from various stakeholders groups complained about the lack of quality of the representation provided by some lawyers, other than those the ICJ mission met during its visit.

The ICJ stresses that, according to the *UN Basic Principles on the Role of Lawyers*, lawyers, "in protecting the rights of their clients and in promoting the cause of justice, ... shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession"²⁶⁰ and that they "shall always loyally respect the interests of their clients."²⁶¹ The ICJ, therefore, would recommend the National Bar Association (*Consiglio Nazionale Forense*) to investigate the question of representation of migrants and to assess whether the prevailing practices are in line with its Code of Ethics.

The mission was made aware of a number of obstacles to effective legal representation arising from the provision in law which assigns competence to hear appeals against expulsion decrees, forced accompaniment to the border and detention orders, to different justices of the peace, respectively that of the place of the Prefect and that of the detention centre. In practical terms, this means that a lawyer from Trento, for example, who had represented a migrant against that city Prefect's expulsion decree would have to travel to Rome, if the migrant is detained there, to challenge the detention order, i.e. an execution measure of the expulsion decree itself, before another justice of the peace in Rome. The journey, as well as case preparation, including meeting with the client, would have to be accomplished within 48 hours. In addition, it should be emphasized that the decision about which C.I.E. the migrant will go to is dictated by the availability of places, and not typically by the effective administration of justice.

The mission was told by the police presiding the C.I.E. of Ponte Galeria that detainees do not usually speak with a lawyer immediately before the hearing, indicating that such interviews were unnecessary because they would usually have had already talked to the lawyer the previous day. The police reported that, while an interpreter is present during the hearing, he or she is generally not available before the hearing, including during any meeting with the lawyer. Lawyers representing undocumented migrants reported that, while in theory they could bring an interpreter along, the interpreter would have to be authorized separately by the police and it was in practice impossible to obtain an authorization within 48 hours. They are, therefore, obliged to ask for interpretive help from other detainees or from the managing administration. It was pointed out that the lawyer would sometimes only be contacted the evening before a hearing, sometimes for the validation of ten or twelve persons. While the lawyer could ask to speak with the client, he or she might have only one or two minutes' audience per client, usually without an interpreter, making the meeting useless for the purpose of the case. The mission was told, however, that in Milan sometimes interpreters, when available, might informally help out lawyers in their meetings *pro bono*.

The ICJ stresses that, as outlined above in section 1 on international human rights law and EU law, the effectiveness of the access to and representation by a lawyer in cases of deprivation of liberty is essential to ensure that the right to judicial review of detention is respected. As the European Court of Human Rights held in the case of *Suso Musa v. Malta* (see, section 1), lack of effective legal advice and representation may lead to a breach of article 5.4 ECHR, and, consequently, of article 9.4 ICCPR and articles 6 and 47 of the EU Charter.

²⁶⁰ Article 14, *UN Basic Principles on the Role of Lawyers*, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²⁶¹ Article 15, *ibid*.

The ICJ, therefore, recommends that independent interpreters be made available to the lawyers for their communications with their clients. Furthermore, the ICJ recommends that Italy consider modifications to its legal aid system in order to ensure that costs related to the defence of an undocumented migrant, such as travel and accommodation for the lawyer and interpreters fees, are appropriately covered.

With regard to the effectiveness of the lawyer's representation due to lack of time, the ICJ understands that the 48 hours limit for a hearing for judicial review is a constitutional requirement under article 13 of the Italian Constitution. It is also an international human rights law obligation. The ICJ, however, believes that the uneasiness shared by many lawyers as to their incapacity to adequately represent their clients due to time constraints could be addressed through the introduction of a *habeas corpus* action that the migrant may launch at any time, including after the first validation within 48 hours from the arrest. This action of *habeas corpus* would have to be fully covered by the legal aid legislation so as to ensure effective access to justice. Furthermore, the ICJ stresses that this is an obligation for Italy under article 5.4 ECHR and 9.4 ICCPR.

With regard to access to documents, the ICJ mission was told that the detention order is deposited with the registry of the justice of the peace within 48 hours of the notification of detention to the detainee. The lawyer is able to see the order at the hearing or ask to see it at the registry, but it is not affirmatively notified to the lawyers. The ICJ was informed by the researchers of the University Roma Tre that difficulties in knowing a migrant's case is also due, at least in Rome, to an unhelpful system of filing. The research showed that every single proceeding of validation and extension, even if concerning the same person, has a separate number and is part of a separate judicial file.²⁶² This makes it extremely difficult to know the migrant's history and to assess the validity of linked acts. The ICJ has found that this practice was not followed in Milan.

With regard to court-appointed lawyers, the Immigration Law requires the justice of the peace to designate a court-appointed lawyer if the migrant has not appointed his or her own lawyer, in the proceedings of challenge of the expulsion decree,²⁶³ of the validation of the forced accompanying to the border,²⁶⁴ and of the validation of the detention order.²⁶⁵ The Immigration Law and Legislative Decree no. 150/2011 both provide that the court-appointed lawyer is to be chosen from the lists of court-appointed lawyers established by the Criminal Procedure Code's implementing rules.²⁶⁶

The ICJ mission was informed that the procedure to appoint lawyers differs from jurisdiction to jurisdiction, depending on the practices of the local bar association. The mission was told that, in Rome, the court-appointed lawyer is often taken from a list of criminal defence lawyers who do not necessarily have expertise in the Civil Procedure Code, which is applicable to the procedure before the justice of the peace in matters of migration. Lawyers and NGOs in Rome suggested that it would be helpful to have a list of migration lawyers to be referred to for court-appointed lawyers in these cases. In Milan, there appears to have been established immigration lawyers lists for designation as court-appointed lawyers.

The ICJ notes that, often, in judicial proceedings mere administrative changes can have a great impact. The ICJ suggests that the creation of judicial files around the person and not the proceedings may help the justice of the peace, and the migrant's lawyer, to cogently reconstruct its history and perform that full assessment of the detention's lawfulness required by international and EU law. The ICJ further considers that the creation of immigration

²⁶² Enrica Rigo and Lucia Gennari, *Rapporto preliminare sullo stato della ricerca – aprile 2014*, op cit., p. 6.

²⁶³ Article 18.4, Legislative Decree no. 150/2011.

²⁶⁴ Article 13.5-bis, Immigration Law.

²⁶⁵ Article 14.4, *ibid.*

²⁶⁶ Article 29, Criminal Procedure Code's implementing rules.

lawyers lists within bar associations, both for court-appointed lawyers and for legal aid purposes, on the example of Milan, may constitute a useful tool to ensure that appropriate legal expertise is at the service of detained migrants.

g) Legal aid

The undocumented migrant is automatically guaranteed legal aid for the proceedings related to the validation of the order of forced accompanying to the border,²⁶⁷ the validation of the order of detention,²⁶⁸ and in the proceedings challenging the expulsion decree.²⁶⁹ The legal aid covers both hired lawyers and court-appointed lawyers.

The ICJ mission was told by lawyers representing migrants that the legal aid fee given to the lawyer is typically around 115 Euros per validation of detention order. The transfer fees, necessary when the detention centre is located in a different city from that in which the expulsion decree had been issued, and the interpretation costs, that often are needed for communication with clients, are not covered by the legal aid. In Milan, at the bar association, there was a list of lawyers specialized in migration issues that were available for covering legal aid clients.

The ICJ reiterates its recommendation to revise the system of legal aid to ensure that all expenses related to the defence of the detained migrant are covered.

²⁶⁷ Article 13.5-bis, Immigration Law.

²⁶⁸ Article 14.4, *ibid.*

²⁶⁹ Article 142 (L), Presidential Decree no. 115 of 30 May 2002, and article 18.4 of Legislative Decree no. 150/2011.

Box no. 6: The assessment of the judicial review and procedural rights in detention by the criminal judge: a case

In a judgment of the criminal tribunal of Crotone (Calabria) (judgment no. 1410 of 12 December 2012) three migrants, from Morocco, Algeria and Tunisia, were acquitted of having damaged the C.I.E. of Isola Capo Rizzuto during a protest. The tribunal held that the detention order had not been properly reasoned because the Return Directive requires that a proportionality assessment be undertaken and detention only be used as last resort, and that such an assessment was not apparent from the reasoning of the detention order. The Judge ruled that the administration "must justify its choice, and in particular give the reasons according to which, in the concrete case at hand, it is not possible to apply a less coercive measure which is less afflictive than the detention in a Centre of Identification and Expulsion" (point 5.6). The tribunal found all of the detention orders unlawful as contrary to the Return Directive. The tribunal also ruled that the risk of absconding (as well as the hostile behavior of the foreign citizen concerned) does not constitute by itself an exception of the principle of proportionality and does not exonerate the administrative authority from the burden to assess the possibility to use, in the concrete case, a less afflictive coercive measure.

The tribunal also held that the standards of conditions of detention must not be considered in relation to the average undocumented foreign citizen (who may be used to dire housing conditions) but to the average citizen, without distinction of race, status or nationality. The judge ruled that the migrants had acted in legitimate defence, since under article 52 of the Criminal Code this exception to criminal liability is engaged when someone acts because of the necessity to defend his or her rights against a present danger of an unjustified abuse, if the act of defence is proportionate to the threatened abuse. The tribunal further ruled that the judicial control over detention had not been effective, because the order had not been translated in the migrants' own language; the migrants had not been assisted by an interpreter in the validation hearing and the office defence lawyers assisting the foreigners in the validation hearing before the justice of the peace are appointed, notoriously, on the same day of the hearing or immediately before, and, therefore, do not have the possibility to adequately know the single specific case. However, it does not appear that this decision has been taken into account in the jurisprudence of justices of the peace or of the Court of Cassation related to expulsion and detention proceedings.

h) Forms of appeal

According to article 14.6 of the Immigration Law, it is possible for a migrant to appeal to the Court of Cassation to challenge the decrees of validation and extension of the detention of the justice of the peace. Critically, however, any such appeal does not suspend the execution of the detention measure.

Lawyers and civil society organizations representing undocumented migrants expressed concern to the ICJ mission as to these limitations, noting that the only court of appeal with jurisdiction is the Court of Cassation, and that this court reviews cases on matters of law. Furthermore, the Court of Cassation has a high rate of dismissal. And additional impediment is that such a case may only be brought only by those lawyers authorized to plead before the Court of Cassation (*cassazionisti*).

Furthermore, a number of lawyers pointed out that, while in criminal law cases it is possible to represent oneself (*pro se*) without appointing a lawyer, this was not possible in cases of appeals from an expulsion decree, forced accompaniment, detention validation or extension. Under the applicable civil procedure, as opposed to the criminal procedure, it is not possible not to be represented by a lawyer.

The ICJ mission was told by a judge of the Court of Cassation that, in the judge's experience, the rate of appeals reaching the Court of Cassation against a validation order or an expulsion decree of the justice of the peace is, on average, one out of ten. Furthermore, the mission was told that, in the last two years, the number of migration cases reaching the Court of Cassation has sharply declined (see chart no. 8).

i) Complaints about conditions of detention

While visiting the Centre of Ponte Galeria, the mission was told that there was no equivalent to the Detention Supervisory Judge (see next paragraph) in the C.I.E., but that the migrant could complain about conditions or treatment in detention before the justice of the peace, who might order any health check and other examination. The ICJ mission was told at the Centre that these elements were relevant for the decision of the justice of the peace on the extension of detention. The ICJ mission, however, was not pointed towards, nor could it find the legal basis, for such alleged prerogatives of the justice of the peace. At the C.I.E., the ICJ mission was also told that detainees could complain about conditions of and treatment in detention to NGOs, to the police or to the Detainees' Ombudsperson, which is a regional body reportedly in charge of visiting detention centres. However, the Ombudsperson does not appear to have significant enforcement powers.

In the penitentiary regime, article 35 of Law No. 354 of 26 July 1975 (hereinafter, the "Penitentiary Law") provides that any person, subject to detention pending trial or following conviction, has a "right to present a complaint" to a Detention Supervisory Judge.²⁷⁰ Following the judgment of the European Court of Human Rights in the case *Torreggiani and others v. Italy*,²⁷¹ where it ruled that this remedy is not effective within the meaning of article 13 ECHR, Parliament approved Law No. 10 of 21 February 2014, bringing into legislative force Law Decree No. 146, of 23 December 2013. This legislation introduced in the Penitentiary Law the possibility of filing a "judicial complaint" that may be submitted before the Detention Supervisory Judge, in order to challenge an illegal action of the Penitentiary Administration with regard to the application of disciplinary sanctions or for a violation of the rights of the detainee.²⁷² The complaint may be submitted directly by the detainee, or by his/her lawyer, to the Detention Supervisory Judge having jurisdiction on the relevant detention centre. The procedure is regulated by articles 666 and 678 of the Criminal Procedure Code. If the Detention Supervisory Judge accepts the complaint, an order directed to the Executive will be adopted, imposing a cessation of the illegitimate conduct. The decision of the Detention Supervisory Judge may be challenged within fifteen days before the Tribunal of Surveillance and, finally, to the Court of Cassation.

The ICJ considers as unacceptably discriminatory the practice of denying undocumented migrants access to a judicial complaint mechanism about conditions of detention and treatment in defence of their human rights, while at the same time making such a mechanism available to all other detainees. This practice is not in accordance with Italy's obligations under article 14 ECHR read together with article 3 and 5 ECHR; under article 2.1 read together with articles 7, 9 and 10 ICCPR; and articles 1, 3.1, 4, 6, 20 and 21 of the EU Charter. The ICJ therefore recommends that this remedy be extended to persons subject to detention under the Immigration Law.

²⁷⁰ The Detention Supervisory Judge is a judicial organ that has been established by Law No. 354, of 26 July 1975. It is composed by two jurisdictional organs: the Office of Surveillance and the Tribunal of Surveillance. The competences of these organs are different and are identified under article 677 of Criminal Procedure Code. Article 68 of Law No. 354 of 1975 provides that magistrates coming from Court of Appeal, Court of Cassation and ordinary Tribunal can be appointed as Detention Supervisory Judge and, according to article 68.4, they cannot exercise any other jurisdictional function while they are magistrates of surveillance.

²⁷¹ *Torreggiani and others v. Italy*, ECtHR, Application no. 43517/09 and others, Judgment of 8 January 2013.

²⁷² Article 35-bis, Penitentiary Law.

j) Reparation for unlawful detention

Under international law, a victim of a human rights violation, including unlawful or arbitrary detention in violation of the right to liberty, is entitled to a remedy and reparation for the harm suffered.

There appears to be a legal vacuum when it comes to reparation, particularly in the form of compensation, for unlawful detention of a migrant in a Centre for Identification and Expulsion. The ICJ mission could not be pointed to any specific legal provision on this kind of reparation. A procedure for compensation for unlawful detention in criminal law exists in articles 314 and 315 of the Criminal Procedure Code, but encompasses only persons unjustly detained or imprisoned for a criminal offence.

However, the mission was informed of a judgment of the Tribunal of Rome of 15 March 2013 (no. 5764) in which the Tribunal recognized the right of reparation for unlawful detention in a C.I.E. and ruled that the victim was entitled to pecuniary damages²⁷³ and to non-pecuniary damages. The Tribunal referred to the rule of compensation for unlawful detention in criminal law for guidance in quantifying the damage, which is assessed at a rate of 235.82 Euro per day of unlawful detention. It is not clear what legal provisions or basis the Tribunal employed in reaching its judgment. However, since the Tribunal is competent for civil matters, and not criminal or administrative ones, it is highly likely that it resorted to the provisions of general tort law of the Civil Code, under articles 2043 and following.²⁷⁴

The Court of Cassation confirmed recently, in its judgment on the Shalabayeva case, that an unlawful administrative detention under the Immigration Law "gives rise to the right to reparation of the damage for the concrete deprivation of liberty, not justified by law".²⁷⁵

²⁷³ The Tribunal did not award compensation for these damages as the migrant had no revenue at the time of detention.

²⁷⁴ The Court of Appeal of Rome also awarded damages in a case of unlawful detention in a C.I.E. in judgement no. 4865/10 of 6 October 2010, but used in that case an "equitative criteria" to quantify the damage.

²⁷⁵ Court of Cassation, Sixth Civil Section, judgment no. 17407/2014 of 30 July 2014.

IV. Conclusions and recommendations

The International Commission of Jurists predicates its work on the principle that a strong and independent legal profession, including judges, lawyers and prosecutors, has an indispensable role to play in ensuring the availability of and equal access to justice and in the promotion and protection of human rights law and of the rule of law. This fundamental role played by jurists is indispensable when what is at stake is access to justice for the more marginalized, in this case undocumented migrants subject to situations of expulsion and detention.

The findings of this report are unequivocal: the need for substantial reforms in both the legal framework and in policies and practice of Italian officials, both executive and judicial, charged with administering the expulsion and detention regime, is compelling, if equal access to justice is to be guaranteed to undocumented migrants.

During its visit to Italy, albeit limited to Rome and Milan, the ICJ mission encountered a system that has assigned the duty to take decisions having profound implications for human rights, including for the right to liberty and the principle of *non-refoulement*, to judges (justices of the peace) with precarious career status and a highly informal procedural system, devoid of clear rules and safeguards in a number of operative aspects. It is hard to imagine that an Italian citizen's right to personal liberty and security would be effectively entrusted to such an informal system. No doubt, the system of the justices of the peace, with this flexible and more informal procedures, can be acceptable, and even important, in other fields of law, considering the help it gives to the professional judiciary in terms of workload for ordinary civil cases and for some administrative infractions. However, duties in area of human rights and fundamental freedoms mandate a higher level of safeguard protection.

In contrast to the operation *Mare Nostrum*, where Italy has acted to intervene and take on the responsibility to protect the right to life of migrants, the State, in respect of access to justice, has devised a system that strongly differentiates in guarantees – even at a structural level – between undocumented migrants and the rest of the population. This differentiation not only exacts a serious toll on many of the migrants themselves, but also on the rule of law in Italy, as it demonstrates the State's unwillingness to effectively discharge its obligations under international law. Indeed, the precariousness of the status of the justices of the peace, the irregularities, inconsistencies and informalities in practice, and lack of uniformity and adequately articulated reasoning inherent in the system, somehow seem to reflect the most precarious condition faced by the undocumented migrant him or herself. It is not only migrants who are "undocumented"; the legal system itself when dealing with migrants seems in some respects to be undocumented, as the title of this report suggests.

The ICJ mission found the present system to be seriously and unacceptably flawed and incapable of ensuring an effective remedy to migrants in situations of expulsion or detention. Indeed, due to the temporary nature of their tenure coupled with the possibility of reappointment and a remuneration system based on piecemeal work rather than a consistent salary, justices of the peace at present lack fundamental guarantees of institutional or structural independence presupposed by international standards. Their situation poses some general concern, but is clearly unacceptable in migration cases where State interests are heavily involved. The problem is therefore structural. In addition, the present system is seriously lacking in respect of the guarantees linked to the right to an effective remedy and the right to *habeas corpus* and judicial review of detention. The current system, as it stands, risks repetitive violations of articles 5 and 13 ECHR, articles 2.3 and 9 ICCPR and articles 6 and 47 of the EU Charter.

1. The judge and the right to a remedy

Law no. 271/2004, which transferred the supervision in relation to expulsion and detention from professional judges to the justices of the peace, was based on the assumption that there was a pressing need to decrease the workload of professional judges. While cognizant of the strains that heavy workloads can place on both individual judges and the administration of justice as a whole, the ICJ stresses that in no circumstances can the excessive workload of the judiciary be used as a justification for restricting the right to an effective remedy of human beings and access to justices for their rights protection. To the extent that the system is strained, this can be addressed through reform and resource allocation of the ordinary justice system and not by creating a second class tier of justice. In addition, the ICJ points to the fact that migration cases are only a minor part of the workload of the justices of the peace (see chart no. 7).

The argument that justices of the peace should now retain competences on expulsion and detention because, in the last ten years, they have acquired a unique expertise in the field, is flawed. Although many justices of the peace do have valuable experience and some are highly capable jurists, professional judges in tribunals have gathered similar experience covering a broader area because of their competence on judicial review of asylum decisions and have higher expertise in decisions concerning deprivation of liberty. In addition, an assignment of the overall migration and asylum competence to the professional judges should ensure that international, EU and national migration and asylum law is interpreted holistically, with the likely result of decreasing considerably the gaps in the respect of international human rights and refugee law and of the EU Common European Asylum System.

For these reasons, the ICJ recommends that the Italian government and Parliament reinstate the competence of professional ordinary judges of first instance for judicial review of expulsion proceedings and administrative detention of migrants. However, the ICJ considers that the role of the justices of the peace in alleviating the professional judiciary's workload remains very important and recommends to the Italian Government that it consider ways in which the competence of justices of the peace might be expanded in respect of some civil cases. This recommendation is, however, dependent on a reform of the justice of the peace system to ensure at least the guarantees outlined below.

The ICJ considers that, at the very least, the Italian Government and Parliament should entrust the proceedings of judicial review (appeal) on the merits and validation of detention to professional judges.

In order to guarantee the independence, impartiality and effectiveness of the office of the justice of the peace in providing an effective remedy for human rights violations and respecting fair trial rights, the Government and Parliament should:

- allocate financial, human and logistical resources to the offices of the justices of the peace necessary to fully and effectively administer justice in the areas of their competency;
- ensure tenure of the justices of the peace that protects their independence and impartiality by either providing for a single long fixed term without possibility of renewal or by providing fixed terms renewable only by the judiciary, without any intervention from the Executive. The term would be presumptively, but not automatically, renewed, but terms and conditions for non-renewal would be similar to those in place for dismissals of professional judges;
- provide adequate and fixed remuneration to the justices of the peace unlinked to the number of cases decided or decisions issued.

2. Issues concerning the Immigration Law

The ICJ found that the legal system of access to justice for undocumented migrants and the implementation of the Immigration Law are flawed and inconsistent with Italy's obligations under international human rights law and EU law. The EU Return Directive has not been effectively implemented and much of the provisions of the Immigration Law seem to have been formulated more to bypass these guarantees than to apply them. The ICJ has identified several situations of inconsistency with international human rights law and EU Law, in particular the EU Return Directive, in this report. Notably, the ICJ is concerned at the existence of a procedure of deferred push-back that has the potential to be used to override procedural guarantees linked to the ordinary expulsion procedure. In particular, the ICJ is concerned that the legislation does not provide for a judicial review of the execution measures of deferred push-backs, such as forced accompaniment to the border and detention.

The ICJ considers it problematic that, in law and in practice, the domestic definition of "risk of absconding" allows resort, *de facto* almost automatically, to forced accompaniment to the border and detention. Furthermore, the approach of Italian legislation in favouring forced return over voluntary, and detention over alternatives to detention, does not appear to respect the spirit of the EU Return Directive and runs contrary to Italy's obligations under article 9 of the ICCPR. The ICJ is also concerned at the lack of automatic suspensive effect of the appeals against expulsion on its execution, both at first instance and before the Court of Cassation, when respect of the principle of *non-refoulement* is at stake. This situation is not in line with the effectiveness of the right to a remedy under article 2.3 ICCPR, 13 ECHR and 47 EU Charter, read together with the principle of *non-refoulement*.

Finally, the ICJ is concerned at the lack of clarity, in law and in practice, with regard to the powers of the justices of the peace in assessing fully the implications of expulsion with the *non-refoulement* and international and domestic law, and at the still limited scope of the power of the justice of the peace to assess the validity of the expulsion order when considering the lawfulness of the detention or forced accompaniment measures.

The ICJ hopes that Italy, as a founding member of the European Union, and as a State with ancient antecedents as one of the cradles of the rule of law, will deploy all efforts to put its system in line with its obligations under EU and international law.

In order to bring the system into line with its international human rights law and EU law obligations, the ICJ recommends that the Italian Government and Parliament:

- With regard to the system of push-backs:
 - Fully eliminate the system of push-backs at the border under article 10.1 of the Immigration Law;
 - Fully eliminate from national law the procedure of deferred-push-backs.
- With regard to the system of expulsion decrees
 - reform and adopt an interpretation of article 13 of the Immigration Law to give general priority to voluntary over forced returns, in line with the Return Directive and eliminate the requirement to "demonstrate the availability of sufficient economic resources" to accede to voluntary returns;
 - introduce in legislation an automatic suspensive effect for all appeals claiming a violation of the principle of *non-refoulement*.
- With regard to administrative detention of undocumented migrants:
 - enact primary legislation governing the "manner" of administrative detention of undocumented migrants;
 - introduce a system of judicial review and *habeas corpus* procedure for administrative detention and forced accompaniment to the border;

- in case of contemplated expulsions following imprisonment by criminal conviction, undertake any preparatory measures with a view to expulsion before the migrant is released from prison, so as to avoid prolonged detention for administrative reasons;
- considerably reduce the maximum length of detention pending expulsion to the shortest possible time, in order to ensure that a removal is carried out with the necessary promptness and due diligence;
- reform the immigration law to give priority to measures alternative to detention and to apply detention as a last resort, on a strict application of the principles of necessity and proportionality.
- In all procedures related to undocumented migrants:
 - make available independent interpreters to lawyers for communications with their clients and make them effectively accessible during and before all stages of proceedings;
 - modify the legal aid system in order to ensure that costs related to the defence of an undocumented migrant, such as travel and accommodation for the lawyer and interpreters fees, are appropriately covered;
 - extend the judicial complaint mechanism concerning conditions of detention and treatment to ensure protection of a detainee's human rights, contained in Law No. 10, of 21 February 2014, to undocumented migrants in administrative detention;
 - amend the Immigration Law to ensure that all communications related to expulsions, push-backs and their execution are provided in a language that the migrant understands and, if that if this demonstrably is not possible, at least in the five languages most frequently used or understood by undocumented migrants, reassessed periodically.

3. The role of the judiciary

This report demonstrates that the weaknesses of the immigration legal system may at least partly be addressed directly by courts and justices of the peace, including through their interpretation, construction and application of international human rights and EU law. The ICJ recommends that the judiciary, including the justices of the peace:

- With regard to expulsion and push-back proceedings:
 - apply the principle of *non-refoulement*, as provided in international human rights law and refugee law, and systematically assess *proprio motu* its potential application in every single case;
 - adopt an interpretation of the definition of "risk of absconding" in line with EU law and based on a case-by-case assessment of the actual risk of absconding;
 - adopt an interpretation of article 13 of the Immigration Law to give general priority to voluntary over forced returns in line with the Return Directive;
 - conduct a thorough and *proprio motu* assessment of all the grounds of validity and lawfulness of an expulsion order, of the potential implications for the principle of *non-refoulement*, of the existence of concrete possibilities of voluntary return, of the lawfulness, necessity and proportionality of the detention and forced accompaniment to the border, and of the non existence of any alternative to detention.
- With regard to the execution of the expulsion decree:
 - systematically apply the power of suspension of the execution of the expulsion decree, under article 13 of the Return Directive, in all cases not related to the principle of *non-refoulement*;
 - desist from validating expulsion measures or the execution measures of detention and accompaniment to the border, in case of expulsions following imprisonment by criminal conviction, if the authorities have not clearly,

- credibly and reasonably explained why such preparatory acts have not been possible;
- provide full reasoning for decisions not only on grounds of national law but also of international human rights and EU law, set out the reasons why the detention measure is necessary and proportionate and why other alternative measures to detention have not been resorted to;
- interpret and apply the Immigration Law in a manner that respects EU and other international legal obligations by giving priority to alternative measures to detention and resort to detention only when those are not available, on a strict application of the principles of necessity and proportionality.
- In all proceedings concerning undocumented migrants:
 - refrain from holding hearings on premises of the Ministry of Interior;
 - create judicial files concerning individual persons and not simply the proceedings, to assist the justice of the peace, and the migrant's lawyer, to objectively assess the circumstances of the case and to make a full assessment of the detention's lawfulness, required by international human rights and EU law;
 - provide regular expert training on international human rights and refugee law to judges supervising administrative decisions on undocumented migrants.

Throughout its history, Italy has faced totalitarianism and terrorism and, conscious of the slippery slope effect of giving in to exceptional measures, has never effectively surrendered to exceptional laws or states of emergency. The rule of law has been and remains the bedrock of the Italian Republic. Italians have also been migrants and have felt what it means to be considered as second-class human beings. This experience should make clear that a system that does not assign the same judicial and procedural guarantees to undocumented migrants, as are enjoyed by Italian citizens and regular migrants, is a profound denial of the same foundations of the rule of law. The recommendations of this report are designed to ensure that Italy lives up to its strong traditions of respect of the rule of law by ensuring that being "undocumented" never amounts to an exclusion from justice.

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