INTERNATIONAL COMMISSION OF JURISTS
Commission internationale de juristes - Comisión Internacional de Juristas
" dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights"

Submission of the International Commission of Jurists to the Italian House of Representatives

ICJ Intervention on House of Representatives Bills C.2180[1] and C.2232[2]

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The International Commission of Jurists (ICJ) is a non-governmental organization dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The Commission was founded in Berlin in 1952 and its membership is composed of up to sixty eminent jurists who are representatives of the different legal systems of the world. Based in Geneva, the International Secretariat is responsible for the realisation of the aims and objectives of the Commission.

The International Commission of Jurists is pleased to present to the House of Representatives its intervention on Bills no. C.2180, "Provisions in Matter of Public Security" (hereinafter, "Security Bill") and C.2232, "Conversion into Law of Law Decree 23 February 2009, no. 11, on Urgent Measures in Matters of Public Security, of Countering Sexual Violence, and on Stalking (hereinafter, "the Law Decree") on the implications of their provisions for international law.[3]

In assessing the compatibility of this legislation with Italy's international legal obligations, the ICJ bears in mind the essential principle of international law that States must ensure the guarantees of human rights to all persons who may be within their territory and to all persons subject to their jurisdiction, whether they reside lawfully or unlawfully, and irrespective of their nationality.[4]

The ICJ recalls that article 117(1) of the Italian Constitution obliges the State to enact legislation that is in conformity with its obligations under international law. In particular, the Constitutional Court has held that a legislative provision in breach of an

[1] Previously classified as Bill S.733 in the Senate.
[2] Law Decree no. 11/2009 of 23 February 2009.
[3] This submission refers to the texts respectively as approved by the Senate on 5 February 2009 (C.2180) and as issued by the Council of Ministers on 23 February 2009 (C.2232).
[4] Article 1 ECHR; Article 2.1 ICCPR; General Comment No 15, Human Rights Committee, *The position of aliens under the Covenant*, 11/04/86. General Comment No 31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para. 10: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party […]".

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international obligation "violates, because of this, this constitutional requirement"[5], that judges must interpret primary legislation in conformity with international law and, when this is not possible, must seize the Constitutional Court of the issue in order to pass judgement as to the constitutionality of the relevant law, with the consequence, in case of declaration of unconstitutionality, of direct invalidity of the legal provision affected by the judgment.

In this paper, the ICJ analyses both provisions of the Security Bill, and provisions contained in the Law Decree, which, among other measures, introduces measures under discussion in this Chamber of the Parliament and was introduced in response to media news reporting episodes of sexual violence.

A Law Decree is an instrument with force of primary legislation that can be enacted by the Government with immediate force of law in cases of "necessity and urgency". The Law Decree must immediately be presented to the Parliament, whose two Chambers have to approve it within 60 days in order to maintain it in effect.[6] In the past, governments have made use of this instrument also in order to expedite the ordinary Parliamentary procedures through a wide interpretation by the Government of the requirement of "necessity and urgency".

The ICJ is particularly concerned that the provisions under discussion in the Parliament have been enacted as part of a Law Decree, and are not part of a documented situation of emergency. In this context it is inappropriate, and contrary to the principle of prescription by law, that criminal penalties, new criminal procedures and measures infringing or restricting fundamental human rights are enacted as part of a decree which is not subject to ordinary parliamentary procedures, including scrutiny for compatibility with national and international human rights obligations. It is of particular concern that measures which had already been under consideration by Parliament were removed in practice from the parliamentary process through their inclusion in a Law Decree. It is notable that, of the 47 laws approved by the Parliament between July 2008 and February 2009, 24 originated from a Law Decree. The ICJ is concerned at the widespread use of Law Decrees as a means to accelerate ordinary legislative procedure, as it curtails the possibility for the Parliament to discuss transparently and with due consideration important questions and threatens to undermine the principle of separation of powers between the legislative and the executive powers.

This paper focuses on aspects of the Security Bill and the Law Decree which give rise to particular human rights concerns.[7] These aspects include provisions affecting irregular migrants, such as the offence of illegal entry and stay in the territory and the rules related to expulsion (paragraph 1.1), the extension of administrative detention for migrants (paragraph 1.2), the removal of the defence for medical personnel on denouncing irregular migrants (paragraph 1.3), the norms on "money transfer" (paragraph 1.4), and the modification to the Civil Code affecting irregular migrants' right to marry (paragraph 1.5). Finally, the ICJ will deal with the international human rights law implications of the measures reforming the "hard" penitentiary regime, so-called "41-bis" detention regime (part 2).

[5] Sentence 349/2007, Constitutional Court, paragraph 6.2.
[6] See, Article 77(2) and (3) of the Italian Constitution.
[7] The lack of analysis of other parts or norms of the legal instruments addressed here does not signal support of the ICJ for these provisions.

Part 1: *Measures affecting irregular migrants*

1.1. The Offence of Illegal Entry and Stay and the Use of Expulsion Procedures

The Security Bill introduces within the Immigration Law[8] the offence (*contravvenzione*)[9] of illegal entry and stay within the territory of the State.[10] The offender is subject to punishment by a fine from 5,000 to 10,000 Euros.[11] Under the Bill, the new offence would be adjudicated by a justice of peace[12] with a new fast-track procedure.[13]

According to this new procedure, if there are particular reasons of urgency or the accused person is not subject to detention measures, the public prosecutor may authorise the immediate transfer of the defendant to trial within the following 15 days and may assign a defence lawyer if the defendant does not have one. If the defendant is detained, the public prosecutor can send the defendant immediately before the justice of peace.

The procedure during the trial phase takes place before the justice of peace, with particular informal procedures in respect of the calling of witnesses. The defendant can request time for preparation of the defence of not more than seven days, and of 48 hours in case he or she is already under detention or for reasons of urgency. Under the new procedure, the justice of peace can apply in sentencing the new Article 16 of the Immigration Law that favours the use of expulsion for a period of not less than five years, in substitution for other punishments, also for the new offence of illegal entry and stay.

Parallel to these criminal proceedings, the Bill would apply an already existing administrative expulsion procedure to persons denounced for illegal entry or stay.[14] Paragraph 4 of the new article 10-bis would seem to envisage the administrative expulsion of the alien "denounced"[15] for such an offence without the authorisation (*nulla osta*) of the criminal judge competent in the case.[16] Instead, the expulsion, once carried out, would be communicated to the competent judge who must close the proceedings. The alien would have the right to a hearing against the expulsion's execution before the

[8] D. Lgs. 286/98 of 25 July 1998, G.U. 18 August 1998 (hereinafter "Immigration Law").
[9] Offences in Italian criminal law are divided into *delitti*, which can include detention punishment, and *contravvenzioni*, which have as sanctions the arrest or a fine. For sake of translation, we are referring to *delitti* as crimes, *contravvenzioni* as contraventions, and we use interchangeably the term "offence" to include the spectrum of norm of criminal law, including both *delitti* and *contravvenzioni*, as an exact translation of the Italian term *reato*.
[10] This also in cases of overstaying a stay permit.
[11] Article 10-bis(1), D.lgs 286/1998 (new). The offence does not permit the application of a mechanism generally applicable to pecuniary sanctions, i.e. *oblazione*, according to which the fast paying of a part of the sanctions extinguishes the punishment. The offence is not applicable to people who have been rejected at the border by the authorities.
[12] Article 22(1)(a), Security Bill.
[13] Article 22(1) (b) and (c), Security Bill. See also, new article 10-bis (3), d.lgs 286/1998, introduced by article 21, Security Bill.
[14] Article 13(1) and (2), d.lgs 286/98
[15] Denouncing (*Denuncia)* is the act with which a person informs the authorities, whether the police forces, public officers or public prosecutors, of the commission of an offence (*notizia di reato*). See, articles 330-333, Code of Criminal Procedure.
[16] Another interpretation, more favourable, could ignore the ground of denunciation (as the combined reading is unclear) and still maintain the grounds of illegal entry and staying, therefore requiring a previous verification of them in at least an adversarial, though not really ordinary proceeding. Nevertheless, the principle of effectiveness in interpretation of legislation will suggest keeping the grounds of denunciation in place.

justice of peace with suspensive effect and with proceeding *in camera* in the presence of a lawyer, but the scope of review is exceedingly limited: the judge can only verify the respect of the deadlines and the presence of the grounds that justify the expulsion,[17] i.e. the denunciation for the offence of illegal entry and stay.[18] Meanwhile, the alien will be automatically subject to administrative detention. An exception would apply for those who had filed a request of international protection,[19] which suspends the abovementioned procedure.[20] The decision of the justice of peace can be subject to recourse to the Court of Cassation, without suspensive effect.

Finally, Article 45(1)(i) of the Bill modifies the procedures of expulsion. The law previously provided[21] for the Questore (provincial police chief) to order the person subject to expulsion to leave the territory of Italy within five days, if he or she could not be held in administrative detention or the maximum period of detention had expired. A person who violated this provision was sanctioned with detention, unless he or she could demonstrate a justified reason not to leave the territory. The Security Bill would make one major change to this regime: the judge would have to order the new expulsion, rather than the detention, of the alien violating the previous expulsion order, and again make such an order if he or she infringes the second order, in a continuous loop of expulsion orders that seems to create a parallel sanctioning system to the criminal one.[22] According to an already existing law, these expulsion decrees can be subject to recourse to the Court of Cassation, but such recourse does not suspend their execution.

1.1.1. Illegal entry and stay as a criminal offence

The ICJ is concerned at the use of criminal law offences for purposes strictly connected with policies of entry and stay of irregular migrants in the State's territory. While recognising the sovereign right of the State to regulate the entry and stay of aliens, the ICJ is concerned that the inappropriate application of criminal law to irregular migrants, in conjunction with immigration law, may lead to impairment of the exercise and enjoyment of human rights. In this regard, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, has recommended the Government to "review and amend the Bossi-Fini Law on immigration to replace the security approach and the criminalisation of migrants and guarantee the protection of the rights of migrants and their integration in society."[23] The UN Special Rapporteur on the rights of migrants has also recommended that "[i]nfranctions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur [stressed] that irregular migrants are not criminals per se and they should not be treated as such."[24]

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[17] Article 13(5-bis), Immigration Law.
[18] Article 13(8) of the Immigration Law provides for legal aid in these proceedings.
[19] "International protection" includes international protection for refugees, as according to Geneva Convention 1951, and subsidiary protection for aliens not eligible to refugee protection but who cannot be expelled in order not to breach the principle of *non-refoulement*. For better clarification see below at p. 6-7.
[20] Article 10-bis(6), Security Bill.
[21] Paragraphs 5-bis, 5-ter, 5-quarter and 5-quinquies of Article 14 of the Immigration Law, as modified by the so-called Law "Bossi-Fini" (Law 189/2002).
[22] Moreover, this regime has been extended also to those expelled because they overstayed tourism, business or studying stay permits.
[23] *Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène: Mission to Italy*, UN Doc. A/HRC/4/19/Add.4, 15 February 2007, paragraph 74.
[24] *Report of the UN Special Rapporteur human rights of migrants, Ms Gabriela Rodríguez Pizarro*, UN Doc. E/CN.4/2003/85, 30 December 2002, paragraphs 73-74. See also, *Report of the UN Special Rapporteur human rights of migrants, Jorge Bustamante*, UN Doc. A/HRC/7/12, 25 February 2008, paragraphs 50 and 60.

The ICJ is furthermore concerned that the new fast-track criminal procedure before the justice of peace does not sufficiently protect the right to equality of arms, an essential aspect of the right to fair trial (Article 14 ICCPR, Article 6 ECHR)[25] which requires equal access to documentation and "opportunity to contest all the arguments and evidence adduced."[26] In particular, the "accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms."[27] The ICJ considers that the time given to the defence under the new procedure, of 7 days or 48 hours in particular cases of urgency is insufficient to meet Italy's obligations under Article 14 ICCPR and Article 6 ECHR.

1.1.2. Illegal entry and stay offence as expulsion acceleratory mechanism

A systematic reading of the new offence together with the Immigration Law suggests that it is conceived, not primarily as an ordinary criminal offence, but as a trigger to accelerate the expulsion of irregular aliens.[28] In this regard, the ICJ is concerned that the application of the new Bill, in the context of existing Italian immigration law, risks violations of the right of *non-refoulement*.

Although States have the sovereign right to regulate the entry and stay of aliens, this right is limited by international law, in particular by international human rights law and international refugee law. The ICJ recalls that States must respect the obligation of *non-refoulement* as provided in international human rights law, as well as in international refugee law. [29] Under international human rights law, including under the European Convention for Human Rights, the obligation in respect of *non-refoulement* applies where there are substantial grounds for believing that an individual faces a real risk, following removal, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial.[30] The right to *non-refoulement* cannot be overridden by considerations of national security or on grounds of the offences committed by the concerned person.[31] People subject to removal and deportation or similar transfer orders have the right to contest such measures, in the light of this principle, before an independent and effective judicial mechanism, which shall have suspensive effect on the application of the expulsion measure until a final decision is

[25] Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.
[26]Human Rights Committee, *General Comment no. 16*, paragraph 13.
[27]Human Rights Committee, *General Comment no. 32*, paragraph 32.
[28]See, for example the duty of medical personnel to denounce (paragraph 1.4, below) and paragraph 2 of the new Article 10-bis which excludes from the application of the offence those who were recognised as illegal immigrants and rejected at the border.
[29]CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 27. See also, See, *Preliminary report on the expulsion of aliens*, Special Rapporteur Mr Maurice Kamto, International Law Commission, 2 June 2005, A/CN.4/554*, paragraph 16; *Third report on the expulsion of aliens*, Special Rapporteur Mr Maurice Kamto, International Law Commission, 19 April 2007, A/CN.4/581, paragraphs 17 and 27.
[30] Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozd and Janousek v. France and Spain,* Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. On the wider application of *non-refoulement*, see *R v. Special Adjudicator, ex parte Ullah,* [2004] UKHL 26, *per* Lord Bingham, § 21.
[31] See, *inter alia*, *Soering v. UK*, Judgment of 7 July 1989; *Chahal v. UK*, Judgment of 25 October 1996; *Saadi vs. Italy*, Judgment of 28 February 2008, Application no. 37201/06.

reached.[32] In particular, the duty to ensure the respect of these principles, and in particular of the principle of *non-refoulement,* rests with the State's authorities, irrespective of whether there has been an initiative or application of the alien. As a consequence, the authorities must evaluate, in the light all information available, including from non-governmental and United Nations sources, the risk of breach of the principle of *non-refoulement* before the issuance of the expulsion order. [33]

Concerning the access to an effective remedy with sufficient procedural guarantees, the Committee of Ministers of the Council of Europe has also declared that "time-limits for exercising the remedy shall not be unreasonably short; [34] the remedy shall be accessible " with sufficient free legal assistance in case of need, and "when the returnee claims that the removal will result in a violation of his or her human rights [to *non-refoulement*], the remedy shall provide rigorous scrutiny of such a claim."[35]

The European Court of Human Rights has held that "the repeated expulsion of an individual, whose identity was impossible to establish, to a country where his admission is not guaranteed, may raise an issue under Article 3 of the Convention […]. Such an issue may arise, a fortiori, if an alien is over a long period of time deported repeatedly from one country to another without any country taking measures to regularise its situation."[36]

The new regime of expulsions proposed by the Bill must be seen in the context of existing Italian Law, which provides for the refusal or revocation of international protection, i.e. refugee status protection or subsidiary protection,[37] in certain circumstances. Such refusal may occur when there are well grounded reasons to believe that the alien has committed a crime against peace, war crime or crime against humanity; has committed a serious crime, including, though not confined to, those punishable by not less than four years of detention in the minimum or ten years in the maximum, provided for in Italian law; he/she is guilty of acts contrary to the aims and purposes of the United Nations; or constitutes a danger to the State's security or for public order and security. This applies also to aliens who instigated or otherwise concurred in the commission of the abovementioned acts.[38]

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[32] Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30. See also, *Report of the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène: Mission to Italy*, UN Doc. A/HRC/4/19/Add.4, 15 February 2007, paragraph 72; *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guidelines 5(1) and 5(3). CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 25.

[33] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 2(1) and 2(4); *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004*, CPT/Inf (2006) 16, Strasbourg, 27 April 2006, paragraph 167.

[34] *Case of Jabari vs Turkey*, ECtHR, Application no. 40035/98, 11 July 2000, paragraph 40.

[35] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 5(2).

[36] *Case of A.H. vs. the Netherlands*, ECommHR, Application no. 10798/84, 5 March 1986, The Law, paragraph 1.

[37] The institute of "subsidiary protection" covers cases of non-expulsion for *non-refoulement* reasons. The term is taken from the one used by EU Directive 2004/83/CE, which originated the Italian Law on this matter.

[38] See, D.Lgs. 19 November 2007, no. 251, implementing Directive 2004/83/CE, combined reading of Articles 16 and 18.

Moreover, even when the refugee or the alien are admitted to international protection, they can still be expelled when there are reasons to deem that they present a danger to State's security; or they present a danger to public order and security, as they have been convicted for an offence for which the law provides the punishment of detention not inferior to four years in the minimum or ten years in the maximum.[39] The only absolute exception in these cases is the prohibition of expulsion or rejection "towards a State where the alien could be subject to persecution on grounds of race, sex, language, citizenship, religion, political opinion, personal or social conditions, or could risk to be sent to another State where he/she will not be protected against persecution."[40] The ICJ notes that, while this law in general follows EU Council Directive 2004/83/EC of 29 April 2004, it omits that part of the Directive which protects the international law principle of *non-refoulement*.[41] Therefore, although *non-refoulement* to face a real risk of torture, cruel inhuman or degrading treatment or other serious violation of human rights, in principle forms part of Italian law under Article 10 of the Constitution and as part of its international legal obligations, the extent of the protection it effectively provides under Italian law is unclear.

In this context, the ICJ is concerned that the procedures for expulsions under the new law provide insufficient safeguards to ensure that the right to *non-refoulement* to face a real risk of torture, cruel inhuman or degrading treatment or other serious violation of human rights is adequately protected.

In view of the above,

- **the ICJ calls on the House of Representatives to delete from the Security Bill under discussion the criminal offence of illegal entry and stay and the whole Article 21 of the Bill, as well as any provisions connected with the new Article 10-bis to be introduced in the Immigration Law (D. Lgs. 286/98);**
- **the ICJ recommends the deletion of Article 22 of the Bill, introducing the new fast-track procedure before the justice of peace;**
- **the ICJ calls for the deletion of Article 45(1)(i) of the Bill introducing the new expulsion procedure;**
- **the ICJ recommends that the House of Representatives:**
    a) **either, insert an Article in the Bill abrogating Articles 16, 18(1)(a), and 20, and the words "e 16" at the end of Article 17(1) of D.Lgs no. 251/2007;**
    b) **or, insert an Article declaring that "nothing in D.Lgs 251/2007 should be read to allow for conduct inconsistent with the principle of *non-refoulement* as provided under Italy's legal obligations, which retains constitutional force through Article 10 of the Italian Constitution, and the application of all provisions in direct contrast with it are to be considered null and without legal effect";**
- **the ICJ recommends that the House of Representative insert a provision in the Bill requiring officers and judges to respect the principle of *non-refoulement* before authorising the expulsion.**

[39] See, D.Lgs. 19 November 2007, no. 251, implementing Directive 2004/83/CE, Article 20. For refugee protection, see articles 10, 12 and 13 of the same law.
[40] Article 19(1), Immigration Law (Unofficial translation).
[41] See, EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection ad the content of the protection granted, Official Journal L 304, 30/09/2004 P. 0012 – 0023, Article 21.

1.2. Administrative Detention of Irregular Migrants

While an amendment aimed at introducing a maximum length of administrative detention of eighteen months for irregular migrants was defeated in Senate, the Italian Government has approved a Law Decree[42] introducing a maximum length of administrative detention of six months, through repetitive renewals of sixty days to be granted by the justice of peace in cases of lack of cooperation of the irregular migrant or of delays in obtaining the necessary documentation from third countries for the repatriation.[43] The previous legislation allowed for a maximum length of detention of 60 days.

Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 5 of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* (ECHR) prohibit any kind of detention to be arbitrary, and provide for a right to judicial review of the detention. The ICJ recalls that, in particular, administrative detention to prevent unauthorised entry on the territory or to facilitate deportation should not be automatic but should be provided for only if no less intrusive measures are available, according to the principle of proportionality.[44] Moreover, the length of administrative detention must be provided for in primary legislation,[45] be proportional to the purposes of the individual case,[46] and subject to periodic review of its grounds by independent and impartial courts.[47] In particular, "justification for the ["irregular immigrant's"] detention [based on the country's] general experience that asylum seekers abscond if not retained in custody"[48] is not sufficient.

Administrative detention must be subject to judicial review both as regards the procedure that led to it and to the merit of the detention itself in light of domestic and international law.[49] The judicial review on the lawfulness of detention must be provided

[42] A Law Decree is an emergency primary legislation instrument, issued by the Government and signed by the President of the Republic, which has immediate force of law and requires, for its permanent validity, the ratification by the Parliament within 60 days from its entry into force. Such decrees can be issued only in cases of "necessity and urgency", according to Article 77 of the Italian Constitution.

[43] See, Article 5, Law Decree no. 11/2009 of 23 February 2009.

[44] Human Rights Committee (HRC), *Omar Sharif Baban vs, Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, 7.2; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, para. 8.2; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2 and 9.3; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, para. 7.2; ECHR Article 5.1.f, ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 43 (relative to ECHR); ECtHR, *Saadi vs, United Kingdom*, Application no. 13229/03, 29 January 2008, para. 67. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 13; *Report of the UN Special Rapporteur human rights of migrants, MS Gabriela Rodríguez Pizarro*, UN Doc. E/CN.4/2003/85, 30 December 2002, paragraph 75(f); *Report of the Working Group on Arbitrary Detention: Mission to Italy*, United Nations, 26 January 2009, UN Doc. A/HRC/10/21/Add.5, paragraph 116 and 121.

[45] ECtHR, *Amuur v France*, Case no. 17/1995/523/609, 20 May 1996, para. 50. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 10.

[46] See, UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 3; ECtHR, *Saadi v United Kingdom*, Application no. 13229/03, 29 January 2008, para. 72, 74; Resolution 1521(2006) on Mass Arrival of Irregular Migrants on Europe's Southern Shores, Parliamentary Assembly of the Council of Europe, 5 October 2006, para. 16.4.

[47] HRC, *A v Australia*, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

[48] HRC, *Danyal Shafiq v Australia*, CCPR/C/88/D/1234/2004, para. 7.3.

[49] HRC, *Omar Sharif Baban vs, Australia*, CCPR/C/78/D/1014/2001, 18 September 2003, para. 7.2. See also, HRC, *Saed Shams and others vs. Australia*, CCPR/C/90/D/1255 and others, 11 September 2007, paras. 7.2 and 7.3; HRC, *C vs. Australia*, CCPR/C/76/D/900/1999, 13 November 2002, paras. 8.2 and 8.3; HRC, *D and E and their two children vs. Australia*, CCPR/C/87/D/1050/2002, 9 August 2006, para. 7.2; HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, paras 9.2, 9.3 and 9.5; HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, paras. 7.2 and 7.4; ECHR Article 5.4; ECtHR, *Amuur vs. France*, Case no.

to the person subjected to administrative detention "without delay"[50] and "speedily".[51]

The length of administrative detention of irregular migrants should not be extended because of the failure of the hosting State's authorities to implement and expedite an efficient procedure with due diligence aimed at accomplishing removal. In other words, the State cannot claim justification of administrative detention on grounds of its own acts and/or omissions.[52]

Recently, the UN Working Group on Arbitrary Detention found that "the judicial review over detention in CIEs,[53] while formally complying with the requirements of Article 9 (4) ICCPR, appears to be in most cases an empty formality".[54]

The ICJ expresses its deep concern at the fact that such a measure directly limiting the enjoyment of the right to liberty has been adopted and entered into force through the instrument of the Law Decree. The ICJ strongly opposes the use of this instrument, which bypasses the safeguards and procedures of the legislature in order to enact a law aimed at limiting human rights.

Consequently,

- **the ICJ calls on the House of Representatives and the Senate not to ratify Article 5 of Law Decree no. 11/2007;**
- **the ICJ urges the House of Representatives to modify the legislation regarding administrative detention of migrants by including the following principles:**
    - **principle of subsidiarity of the detention, i.e. it should be used only when all alternative methods are ineffective and in no case should it be automatic;**
    - **administrative detention should not be employed when the delays in the practice of removal are, directly or indirectly, attributable to the State authorities' responsibilities, failures or omission;**
    - **administrative detention must be subject to judicial review by ordinary courts, which must be empowered to adjudicate both on formal requirements and the merit of the order, and to order its revocation or to modify the detention with less intrusive measures, in accordance with the principle of proportionality.**

1.3. Lifting of Denunciation Shield for Medical Personnel

Article 45(1) (t) of the Security Bill abrogates the law which shielded health personnel

17/1995/523/609, 20 May 1996, para. 43; ECtHR, *Saadi vs, United Kingdom*, Application no. 13229/03, 29 January 2008, para.67. See also, Sahed Shams and others vs. Australia, HRC, 11 September 2007,CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004, paragraphs 7.2 and 7.3. See also, HRC, Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari vs. Australia, 6 November 2003, CCPR/C/79/D/1069/2002, paragraphs 9.2 and 9.4.

[50] Article 9(4), International Covenant on Civil and Political Rights (ICCPR).

[51] Article 5(4), European Convention on Human Rights (ECHR). See also, *Report of the UN Special Rapporteur human rights of migrants, MS Gabriela Rodríguez Pizarro*, UN Doc. E/CN.4/2003/85, 30 December 2002, paragraph 75(c); *Report of the UN Special Rapporteur human rights of migrants, Jorge Bustamante*, UN Doc. A/HRC/7/12, 25 February 2008, paragraph 65.

[52] *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers of the Council of Europe at the 925th Meeting of the Ministers' Deputies, 4 May 2005, Guideline 7.

[53] "Centri di Identificazione ed Espulsione", i.e. administrative detention centres for irregular migrants for identification and expulsion.

[54] *Report of the Working Group on Arbitrary Detention: Mission to Italy*, United Nations, 26 January 2009, UN Doc. A/HRC/10/21/Add.5, paragraph 83.

from denouncing the presence of irregular aliens under their care (former article 35(5) of the Immigration Law). This abrogation is linked with the enactment of the offence of illegal entry or stay.

Indeed, according to articles 361 or 362 of the Criminal Code, "public officers" or "persons in charge of public services" commit a criminal offence if they fail to denounce any offence – crimes and contraventions – which they came to know in the exercise or because of their service. Whenever one of these persons, among which is included health personnel, becomes aware of evidence of an offence while on duty, he/she must communicate it to the police or the public prosecutor, or face criminal sanction. The introduction of the offence of illegal entry or stay will mean in this context that whenever public officers or persons in charge of public services come into contact with an irregular migrant they will be obliged to refer this fact to the authorities, under threat of criminal prosecution. The present regime, unreformed, provides in this regard a defence for health personnel, that the new provisions would remove.

Italy is a party to the *International Covenant on Economic, Social and Cultural Rights*, as well as to the *Revised European Social Charter*, under which it has the obligation to ensure the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[55] Consequently, Italy is obliged to implement the "prevention, treatment and control of epidemic, endemic, occupational and other diseases",[56] and provide for the "creation of conditions which would assure to all medical service and medical attention in the event of sickness".[57] In particular, Italy must grant these rights in full respect of the principle of non-discrimination,[58] and without discrimination based on the migrant's irregular status.[59]

The National Federation of the Orders of Surgeons and Dentists (*Federazione Nazionale degli Ordini dei Medici Chirurghi e degli Odontoiatri*) has already expressed its view that this provision is in conflict with certain basic principles of the medical profession, with their professional oath and with Article 3 of their Code of Conduct (*Codice Deontologico*). Moreover, they have stressed that this possibility of denunciation of irregular migrants could lead to the creation of clandestine medical care systems and could impede the possibility for the public health service to control and remedy emerging diseases.[60]

The ICJ also considers that this provision could facilitate the emergence of clandestine channels of health care with resulting serious danger for the health of both irregular migrants and for the health of the general public, as risks of possible epidemics or transmittable diseases would become more difficult to detect. The ICJ also considers that people in charge of humanitarian, health or assistance missions, such as *inter alia* health personnel, should not be put in a position to be obliged to denounce persons under their care or assistance.

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[55] ICESCR, Article 12(1). See also, *European Social Charter (revised)*, Article 11(1).
[56] ICESCR, Article 12(2)(c). See also, *European Social Charter (revised)*, Article 11(3).
[57] ICESCR, Article 12(2)(d).
[58] ICESCR, Article 2(2). See also, *European Social Charter (revised)*, Article E.
[59] See, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 16 (2005)*, UN Doc. E/C.12/2005/4, 11 August 2005, paragraph 10; and, *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 11 August 2000, paragraphs 12, 18, 34, and 43; Parliamentary Assembly of the Council of Europe, *Human Rights of Irregular Migrants*, Resolution 1509(2006), adopted by the Assembly on 27 June 2006, paragraph 13.2; CERD, *General Comment no. 30, Discrimination against Non-Citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 1 October 2004, paragraph 36; *Report of the UN Special Rapporteur human rights of migrants, MS Gabriela Rodríguez Pizarro: Visit to Italy*, UN Doc. E/CN.4/2005/85/Add.3, 15 November 2004, paragraph 113.
[60] See, Press Release at µhttp://portale.fnomceo.it/Jcmsfnomceo/cmsfile/attach_7514.pdf§. On implications for right to health and epidemics, see also µhttp://www.meltingpot.org/articolo14041.html§ .

Consequently, the ICJ calls on the House of Representatives to delete Article 45(1)(t) of the Bill.

1.4. "Money transfer"

Article 43 of the Security Bill, introduces a provision aimed at ensuring tighter control on "money transfer" operations, often used by migrants, both regular and irregular, to remit part of their gains to people in their country of origin. The provision mandates that "agents of financial activities who provide for payment services in the form of money transfer shall acquire and store for ten years copy of the stay permit if the subject ordering the operation is a non-EU citizen. […] If the stay permit is missing, the agents must signal to the local police authorities within 12 hours, by transmitting the identification data of the subject. The lack of respect of this norm is sanctioned with the cancellation from the list of the agents of financial activities (…)",[61] with the consequence of closing down the business.

The modalities of storage of the information are provided for, by direct reference, by the Minister of Interior's Decree of 16 August 2005, a regulation issued in accordance with Counter-terrorism Law 155/05.[62] According to the regulation, the data must be gathered and stored with in accordance with specific procedures. The agents must adopt the "necessary measures to memorise and maintain the data related to date and time of the communication and to the typology of the service used, […] excluded the content of communications. [They] adopt the necessary measures in order for the registered data to be stored with modalities that will grant the inalterability and the non-accessibility by persons unauthorised."[63] The data gathered and stored for a period beyond 30-days can be used only for the aims of the present Decree. i.e. counter-terrorism operations and/or investigations.

The ICJ recalls that the UN General Assembly has recommended on a number of occasions that "all States […] remove obstacles that may prevent the safe, unrestricted and expeditious transfer of earnings, assets and pensions of migrants to their country of origin or to any other countries, in conformity with applicable legislation, and to consider, as appropriate, measures to solve other problems that may impede such transfers".[64]

The ICJ also recalls that, although the right to privacy is not an absolute right, any restrictions must be undertaken in accordance with the law, [65] i.e. in accordance with aims, purposes and procedures set up by primary legislation, respectful of international human rights law, and specific in details about the circumstances when such interference is allowed and the procedures to be followed. The extent to which the search or surveillance activities are authorised must not be arbitrary or left to discretionary authority. [66] Moreover, any such actions must respect the principle of non-

[61] Article 43(1), Security Bill (Unofficial translation).
[62] In particular, its Article 7(4).
[63] Article 2, Decree of the Minister of Interior, joined by Minister of Communications and Minister of Innovation and Technology of 16 August 2005, published in G.U. 190 of 17 August 2005 (Unofficial translation).
[64] *General Assembly Resolution no. 59/194*, adopted at its 59th session, 18 March 2005, UN Doc. A/RES/59/194, paragraph 11. See also, *General Assembly Resolution no. 60/169*, adopted at its 60th session, 7 March 2006, UN Doc. A/RES/60/169, paragraph 17.
[65] Human Rights Committee, *General Comment 16*, paragraph 4.
[66] Ibidem, paragraph 8. See also, Human Rights Committee, Views of 15 November 2004, *Antonious Cornelis*

discrimination.[67] The European Court of Human Rights has found anti-terrorism measures discriminating on grounds of nationality status to be contrary to the Convention, where the different treatment of non-nationals does not have a rational basis.[68]

The ICJ is concerned that the requirement of transmission of stay permit data seems directed more to aims of migration control and policies and to discovery of irregular migrants than to the anti-terrorism purposes stated in Law no. 155/2005. As a result, the requirement risks unnecessary, disproportionate and discriminatory interferences with respect for the private life of migrants.

Consequently, the ICJ calls on the House of Representatives to delete Article 43 from the Bill.

1.5. The Modification to the Civil Code Affecting Aliens' Right to Marry

Article 6 of the Security Bill modifies article 116 of the Civil Code which regulates the conditions for contracting marriage for aliens. According to the new formulation, aliens will be obliged to present a document demonstrating the legality of his or her presence in Italian territory as a necessary condition to contract marriage recognised by the Italian Republic, in addition to other documentation already required.

The ICJ is concerned that this provision introduces in the Civil Code an unjustified and discriminatory infringement of the right to marry and found a family contained in Article 12 ECHR and in Article 23(2) ICCPR. This right is not subject to restrictions based on national security and/or migration policies, the only limit being its accordance with procedures provided with by law. Limits to the right to marry prescribed by law must not reduce or restrict the right in such a way or to such an extent that the very essence of the right is impaired[69] and must not impose unreasonable or disproportionate restrictions.[70] This new requirement, apparently aimed at preventing abuse of the institution of marriage for regularisation, will affect in a discriminatory way irregular migrants who desire to marry, and who, for example, cannot exercise this right effectively in their country of origin or residence.

Indeed, the Parliamentary Assembly of the Council of Europe has stated that "irregular migrants have the right to marry and total barriers should not be put in place preventing them to do so."[71] The ICJ considers that putting into practice this provision would impede the very essence of the right to marry of irregular migrants as the presentation of documents demonstrating the regularity of their stay will expose them to measures of

Van Hulst vs. The Netherlands, UN Doc. CCPR/C/82/D/903/1999, paragraphs 7.3 and 7.6. See also, ECtHR, *Klass and Others vs Germany*, Application no. 5029/71, 6 September 1978, Court (Plenary), paragraph 50; *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Articles V and VI(1).

[67] See, Article 2(1) ICCPR read in conjunction with Article 17 ICCPR, and Article 14 ECHR read in conjunction with Article 8 ECHR.

[68] See *mutatis mutandis*, *A and others vs. United Kingdom*, ECtHR, Grand Chamber, Application no. 3455/05, 19 February 2009, paragraph 190. See also more specifically on Article 14 ECHR, House of Lords, *A and others vs. SSHD*, [2004] UKHL 56, 16 December 2004.

[69] *I vs. UK*, Application No.25680/94, 11 July 2002; *Rees vs. UK*, Application No. 9532/81, 17 October 1986; *B and L vs. UK*, Application no. 36536/02, 13 September 2005.

[70] *F v Switzerland*, Application No.11329/85, 18 December 1987.

[71] Parliamentary Assembly of the Council of Europe, *Human Rights of Irregular Migrants*, Resolution 1509(2006), adopted by the Assembly on 27 June 2006, paragraph 12.15.

expulsion. The ICJ considers that, in practice, this is likely to give rise to violations of Article 12 ECHR, Article 23(2) ICCPR, Article 2(1) ICCPR and Article 14 ECHR.

Consequently, the ICJ calls on the House of Representative to delete Article 6 of the Bill.

Part 2*: Modifications to "Hard" Penitentiary Regime*

The "hard" penitentiary regime, provided for by Article 41-bis of the Penitentiary Law[72], is applied according to the following requirements and procedure: "when serious order and public security reasons are present, also under request of the Minister of Interior, the Minister of Justice has the power to suspend, wholly or in part the application of the rules on treatment and of the provisions in the [Penitentiary] law that may conflict with the abovementioned exigencies of order and security, for people detained or imprisoned for one of the offences enlisted in Article 4-bis (1) [of the Penitentiary Law],[73] in relation to whom there are elements that let deem the existence of connections with a criminal, terrorist or eversive association."[74]

The "hard" penitentiary regime applies restrictions on the amount of meetings, on the surveillance of the same, on the possession of money, goods and objects, on control of correspondence,[75] and limitations to outdoor activities.[76] The restrictions are ordered with the aim of impeding the contacts of the detainee with his or her criminal organisation.

At present, the restrictions to the rights of the detainee are discretionarily invoked by decision of the Minister of Justice, separately from the decision on application of the regime of "hard" detention. The new Bill[77] would provide for them to be mandatory once the application of the regime of Article 41-bis is chosen.

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[72] Law no. 354/75 (hereinafter, "Penitentiary Law").

[73] i.e., people charged or convicted for crimes of terrorism, Mafia association, slavery, kidnapping, smuggling, or drug-related offences. Article 41(4) of the Security Bill adds crimes related to sexual violence and sexual intercourses with minors.

[74] Article 41-bis (2), Penitentiary Law (Unofficial translation).

[75] The European Court of Human Rights has already examined this limitation to correspondence, which is subject to control by public authorities, and has found it in violation of article 8 ECHR, although it did not address yet the new discipline as reformed in 2004 (Law 95/2004), if not for the fact that it does not redress violations under the previous legislation. See, *Affaire Ospina Vargas c. Italie*, ECtHR, Application no. 40750/98, 14 October 2004, in French, paragraphs 38-44; *Affaire Madonia c. Italie*, ECtHR, Application no. 55927/00, 6 July 2004, in French, paragraphs 10-14; *Affaire Natoli c. Italie*, ECtHR, Application no. 26161/95, 9 January 2001, in French, paragraphs 43-46; *Affaire Rinzivillo c. Italie*, ECtHR, Application no. 31543/96, 21 December 2000, in French, paragraphs 27-32; *Affaire Campisi c. Italie*, ECtHR, Application no. 24358/02, 11 July 2006, in French, paragraphs 50-53; *Affaire Argenti c. Italie*, ECtHR, Application no. 56317/00, 10 November 2005, in French, paragraphs 37-39; *Affaire Viola c. Italie*, ECtHR, Application no. 8316/02, 29 June 2006, in French, paragraphs 45-47. *Affaire Asciutto c. Italie*, ECtHR, Application no. 35795/02, 27 November 2007, in French, paragraphs 85-87; *Affaire De Pace c. Italie*, ECtHR, Application no. 22728/03, in French, paragraphs 56-59; *Affaire Bagerella c. Italie*, ECtHR, Application no. 15625/04, 15 January 2008, in French, paragraphs 52-55; *Affaire Salvatore c. Italie*, ECtHR, Application no. 42285/98, 6 December 2005, in French, paragraphs 35-37; *Affaire Bastone c. Italie*, ECtHR, Application no. 59638/00, 11 July 2006, in French, paragraphs 17-19; *Affaire Di Giacomo c. Italie*, ECtHR, Application no. 25522/03, 24 January 2008, in French, paragraphs 24-26; *Affaire Leo Zappia c. Italie*, ECtHR, Application no. 77744/01, 29 September 2005, in French, paragraphs 21-25; *Affaire Guidi c. Italie*, ECtHR, Application no. 28320/02, 27 March 2008, in French, paragraph 52-56; *Affaire Zara c. Italie*, ECtHR, Application no. 24424/03, 20 January 2009, in French, paragraphs 33-35.

[76] See, Article 41-bis (2-quater), Penitentiary Law.

[77] See, Article 39, Security Bill.

The European Court of Human Rights has examined this regime and noted that it "is designed to cut the links between the prisoners concerned and their original criminal environment, in order to minimise the risk that they will maintain in contact with criminal organisations. In particular, it note[d] that […] before the introduction of the special regime imprisoned Mafia members were able to maintain their positions within the criminal organisation, to exchange information with other prisoners and the outside world and to organise and procure the commission of serious crimes both inside and outside their prison. […] [T]he Court consider[ed] that the Italian legislation could reasonably consider, in the critical circumstances of the investigations of the Mafia being conducted by the Italian authorities, that the measures complained of were necessary in order to achieve the legitimate aim."[78] The European Court found that prolonged application of Article 41-bis regime did not constitute cruel, inhuman or degrading treatment or punishment under article 3 ECHR in the cases adjudicated as it constituted part of the legitimate punishment.[79]

Concerning meetings with family members or unmarried partners, Article 39 of the Security Bill replaces the obligation to allow one to two visits with a maximum of one per month. It also replaces optional with mandatory monitoring of such meetings pursuant to judicial authorisation, provides for mandatory video-recording of the visits without judicial authorisation, and considers the right to one phone call per month, to be alternative rather than additional to the monthly visit. Finally, while excluding the surveillance provisions for the meeting with the defence lawyer (as in the present regime), it expressly limits the meetings with counsel to three times a week, while previously there had been no limit.

Article 17 ICCPR and Article 8 ECHR provide for restrictions to the right of privacy and family life for reasons of national security and while serving a legitimate punishment. Nevertheless, these restrictions in order to be legitimate, especially when they deviate - in the case of detention upon punishment - from the ordinary restrictions, need to respect the principle of proportionality. Any rules or procedures which would impede the ordinary courts' appreciation of the proportionality of detention measures breaches of the rights to privacy and family life.

The European Court of Human Rights did not find a violation to the right of the detainee to family life (Article 8 ECHR) with regards to the present regime of restrictions on visits. [80] Nevertheless, the Committee on the Prevention of Torture of the Council of Europe recommended Italy *inter alia*, with regards to the Article 41-bis detention regime, to authorise at least two visits of one hour each per month, with the possibility to cumulate them if not used, and to have right to their phone call per month regardless of the visits received.[81] More recently, the United Nations Working Group on Arbitrary

[78] *Case of Messina vs. Italy (No. 2)*, ECtHR, Application no. 25498/94, 28 September 2000, paragraphs 66-67.
[79] *Affaire Campisi c. Italie*, ECtHR, Application no. 24358/02, 11 July 2006, in French, paragraphs 38-41; *Affaire Argenti c. Italie*, ECtHR, Application no. 56317/00, 10 November 2005, in French, paragraphs 21-23; *Affaire Viola c. Italie*, ECtHR, Application no. 8316/02, 29 June 2006, in French, paragraphs 25-29; *Affaire Asciutto c. Italie*, ECtHR, Application no. 35795/02, 27 November 2007, in French, paragraphs 27-29; *Affaire De Pace c. Italie*, ECtHR, Application no. 22728/03, in French, paragraphs 36-37; *Affaire Bagerella c. Italie*, ECtHR, Application no. 15625/04, 15 January 2008, in French, paragraphs 34-36; *Affaire Guidi c. Italie*, ECtHR, Application no. 28320/02, 27 March 2008, in French, paragraph 34; *Affaire Zara c. Italie*, ECtHR, Application no. 24424/03, 20 January 2009, in French, paragraphs 16-18.
[80] *Affaire Viola c. Italie*, ECtHR, Application no. 8316/02, 29 June 2006, in French, paragraphs 32-37; *Affaire Asciutto c. Italie*, ECtHR, Application no. 35795/02, 27 November 2007, in French, paragraphs 72-73; *Affaire Bagerella c. Italie*, ECtHR, Application no. 15625/04, 15 January 2008, in French, paragraph 44.
[81] See, *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre*

Detention declared, referring to the abovementioned reform, that "changes to the system currently envisaged, however, would significantly weaken the already feeble safeguards against abuse of this very strict form of detention."[82]

The new provisions also extend the length of validity for "41-bis" detention orders. The present regime provides for flexible terms from one to two years renewable for fixed periods of one year, while the new law will provide for the acts to have a fixed length of four years renewable by acts of two years.[83] Moreover, the new provisions abrogate the possibility for the Ministry of Justice to revoke the application of the "hard" penitentiary regime *ex officio* at any time a determination is made that the grounds for its application are no longer present.[84]

The new draft law extends the term of application for petitions against the "hard" penitentiary detention order from ten to twenty days. However, it assigns the exclusive competence for adjudicating these claims to the Surveillance Tribunal of Rome, whereas previously this was decentralised to the Surveillance Tribunals that had territorial jurisdiction on the penitentiary institute. Moreover, the Surveillance Tribunal will have competence to adjudicate only on the existence of the grounds for issuance of the order and no longer on the adequacy of its content to the exigencies expressed by the Penitentiary Law.[85] The European Court of Human Rights has already decided that, specifically with regard to Article 41-bis detention orders, a lack of decision by the court on the merit of the recourse constitutes a violation of Article 6(1) of the ECHR.[86]

As for the mandatory and fixed nature of the restrictions to the detainees' rights, the ICJ is concerned that this fails to respect the principle of proportionality which requires a tailored case-by-case assessment of the situation of each detainee. Moreover, detainees must have the right to judicial review of all restrictions and of the "hard" detention order on the merit, and that the court in charge of it must have the power to revoke or modify the restrictions in accordance with the law and with the principle of proportionality. The ICJ, moreover, rejects all limitations to the number of visits with a detainee's lawyer, as such limitation would disproportionally infringe the detainee's right to communicate and consult with its legal counsel in accordance with Principle 8 of the UN *Basic Principles on the Role of Lawyers*[87] and Principle 18 of the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.[88]

2004, CPT/Inf (2006) 16, Strasbourg, 27 April 2006, paragraph 86.

[82] *Report of the Working Group on Arbitrary Detention: Mission to Italy*, United Nations, 26 January 2009, UN Doc. A/HRC/10/21/Add.5, paragraph 49. The new regime introduces also further limits on length and nature of outdoor exercises. Presently the detainee has a right to exercise for a length not greater than four hours a day and with a group of no more than five people, the new amendments provide for a maximum length of two hours per day and reduces the group of people to not more than four. This new regime goes in the opposite direction of the recommendations of the Committee for the Prevention of Torture of the Council of Europe which encouraged revision of the legislation in order to assure more human contact and activities for these detainees. See, *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 22 octobre au 6 novembre* 1995, CPT/Inf (97) 12 [Partie 1], Strasbourg, 4 December 1997, paragraph 91; and, *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) 13 au 25 février 2000*, CPT/Inf (2003) 16, Strasbourg, 29 January 2003, paragraph 76.

[83] New Article 41-bis(2-bis), as modified by Article 39 Security Bill.

[84] Article 39(1)(e) Security Bill abrogates Article 41-bis (2-ter) of the Penitentiary Law.

[85] New articles 41-bis (2-quinquies) and (2-sexies).

[86] *Affaire Viola c. Italie*, ECtHR, Application no. 8316/02, 29 June 2006, in French, paragraphs 53-55.

[87] *UN Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[88] *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Adopted by General Assembly resolution 43/173 of 9 December 1988.

Finally, the ICJ is concerned at the extension of duration of the "hard" detention orders and the abrogation of the power of the Ministry of Interior to revoke its application *ex officio* when the conditions are no longer present. The ICJ fears that these amendments do not allow for the "hard" detention regime to respect the principle of proportionality.

Consequently, the ICJ calls on the House of Representatives

- **to remove Articles 39 from the Bill;**

Part 3: *Recommendations*

On the offence of illegal entry and stay and the use of expulsion procedures

- **the ICJ calls on the House of Representatives to delete from the Security Bill under discussion the criminal offence of illegal entry and stay and the whole Article 21 of the Bill, as well as any provisions connected with the new Article 10-bis to be introduced in the Immigration Law (D. Lgs. 286/98);**
- **the ICJ recommends the deletion of Article 22 of the Bill, introducing the new fast-track procedure before the justice of peace;**
- **the ICJ calls for the deletion of Article 45(1)(i) of the Bill introducing the new expulsion procedure;**
- **the ICJ recommends that the House of Representatives:**
  - **c) either, insert an Article in the Bill abrogating Articles 16, 18(1)(a), and 20, and the words "e 16" at the end of Article 17(1) of D.Lgs no. 251/2007;**
  - **d) or, insert an Article declaring that "nothing in D.Lgs 251/2007 should be read to allow for conduct inconsistent with the principle of *non-refoulement* as provided under Italy's legal obligations, which retains constitutional force through Article 10 of the Italian Constitution, and the application of all provisions in direct contrast with it are to be considered null and without legal effect";**
- **the ICJ recommends that the House of Representative insert a provision in the Bill requiring officers and judges to respect the principle of *non-refoulement* before authorising the expulsion.**

On the administrative detention of irregular migrants,

- **the ICJ calls on the House of Representatives and the Senate not to ratify Article 5 of Law Decree no. 11/2007;**
- **the ICJ urges the House of Representatives to modify the legislation regarding administrative detention of migrants by including the following principles:**
  - **principle of subsidiarity of the detention, i.e. it should be used only when all alternative methods are ineffective and in no case should it be automatic;**
  - **administrative detention should not be employed when the delays in the practice of removal are, directly or indirectly, attributable to the State authorities' responsibilities, failures or omission;**
  - **administrative detention must be subject to judicial review by ordinary courts, which must be empowered to adjudicate both on formal requirements and the merit of the order, and to order its revocation or to modify the detention with less intrusive measures, in accordance with the principle of proportionality.**

On the lifting of the denunciation shield for medical personnel,

- **the ICJ calls on the House of Representatives to delete Article 45(1)(t) of the Bill.**

On the provisions on "money transfer",

- **the ICJ calls on the House of Representatives to delete Article 43 from the Bill.**

On the modification to the civil code affecting the aliens' right to marry,

- **the ICJ calls on the House of Representative to delete Article 6 of the Bill.**

On the modifications to "hard" penitentiary regime,

- **the ICJ calls on the House of Representatives to remove Articles 39 from the Bill.**