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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **Report of the Special Rapporteur on the human rights of migrants, François Crépeau**

Addendum

**Mission to Italy: comments by the State on the report of the Special  
Rapporteur\***

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\* Reproduced in the annex as received.

## Annex

### **Proposed amendments to the report of the Special Rapporteur on the human rights of migrants by the Italian Government**

#### **I. General background on Italy and migration: a brief overview**

##### **Paragraph §8**

*The Special Rapporteur notes however that statistics reflect only those irregular migrants who come into contact with the Italian authorities and thus may not provide a comprehensive overview.*

1. Italy underlines that the data on irregular immigration collected by the Ministry of the Interior while pursuing its institutional goals only relates to non-EU nationals who are the subjects of removal measures, whereas the statistics on regular residents are drawn up based on the number of residence permits issued by the Questure. Irregular migration is inherently difficult to be estimated, unless it comes into contact with the authorities. Nonetheless, whereas possible, the phenomenon is monitored and statistics are periodically produced. The Ministry of Interior produces and provides statistics for public use in the highest transparency (e.g. official data are published in the ISMU Foundation website: [www.ismu.org/index.php?page=490](http://www.ismu.org/index.php?page=490) – based on the sources of the Ministry of Interior).

#### **II. Normative and institutional framework on migration and border management**

##### **Paragraph §17**

*Law 129/2011 further extended the maximum term of detention in a CIE from 6 to 18 months. It should be noted however that this provision was declared unconstitutional by the Italian Constitutional Court, however the provision still remains in law.*

2. The Constitutional Court never objected to the Italian detention system in CIEs: the Italian legislation is in line with the EU Directive 2008/115/EC that attaches great importance, in relation to the 18 month-period of stay in CIEs, to the foreign national's lack of cooperation in the activity aimed at his own repatriation. In this regard, the European Court of Justice has recently passed several judgments<sup>1</sup> containing indications on how to interpret some controversial issues of the above mentioned Directive.

3. The main characteristic of such Directive is to introduce a progressive expulsion mechanism "with an increasing, gradual intensity". The EU legislator favored the voluntary return over forced return<sup>2</sup>, provided that there is no reason to believe that it can endanger the purpose of the return procedure<sup>3</sup>, that is his actual return to the country of origin (or

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<sup>1</sup> European Court of Justice, Grand Chamber, Judgement of 30 November 2009, case *Kadzoev v. Bulgaria*; European Court of Justice, First Chamber, Judgement of 28 April 2011, case *El Dridi v. Italy*; European Court of Justice, Grand Chamber, Judgement of 6 December 2011, case *Achughbabian v. France*.

<sup>2</sup> Art. 7, par. 1, Directive 2008/15/EC

<sup>3</sup> "Whereas" No. 10, Directive 2008/115/EC

other). If there is a risk of absconding<sup>4</sup> or in other specific situations<sup>5</sup>, the foreign national shall be immediately repatriated; in this case, he shall be forcibly accompanied to the border without granting him the term for voluntary departure<sup>6</sup>.

4. To this regard, the detention may be ordered in the first six months, in case there is a temporary situation hindering the return procedure or the removal, for example when it is necessary to carry out additional checks on the foreign national's identity or nationality, or to find an adequate means of transport. After six months, detention can be extended up to no more than 18 months only when, regardless of any reasonable effort, the removal cannot be carried out, due to the foreign national's lack of cooperation to return or to delays in the delivery of the necessary documents by his origin or destination country. When entering a CIE, the foreign national is requested to sign an ad hoc form by which he is informed that his detention period will be limited to the strictly necessary time if he cooperates in his identification (for instance, submitting the original passport or copy thereof or any other identification document with a photo).

### **Paragraph §20**

*The Special Rapporteur notes key criticisms of the law included the fact that it was geared towards employers, and rendered individual irregular migrant workers unable to access the scheme without the consent of their employer, and the associated high fees, which was a further obstacle to obtaining employer consent.*

5. The law referred to in Paragraph §20 is the Legislative Decree n.109/2012 for the implementation of the Directive 2009/52/CE, concerning "Penalties for employers exploiting irregular third country nationals". Such Decree provided for a transitional phase for the regularization of irregular workers, in order to postpone some of the effects of the Directive for a certain period. It aimed both at allowing the enterprises to regularize the job relationship with their irregular employees, and at protecting the exploited irregular workers. Indeed, one of the principles of our national legal order is the non-retroactivity of criminal laws providing for an increase of penalty.

6. During this transitional phase, the penalties provided for by the Directive 2009/52/CE were not applied to those employers who had declared the irregular working relationship within an established term. In line with art. 6 of the Directive 2009/52/CE, the employers had to pay the arrears of wages and social contributions for at least <sup>5</sup> months and a lump sum of € 1.000 for each worker, which are the sums they would have paid in case the workers had a regular job contract. For irregular migrant workers, this regularization process caused a suspension of the penalty procedures related to the irregular entry and stay on the territory, as well as the issue of a work permit. Employers, who have been convicted for offences related to irregular employment of foreigners or work exploitation in the last 6 years, could not apply for the regularization procedure. Besides, irregular workers who have received a removal order for public policy or safety or for terrorism prevention could not be regularized within the framework of this provision. A total of 134.576 declarations of regularization were received: 115.969 (86,17%) of them were related to domestic work (36.654 for personal care services and 79.315 for housemaid). As for the non-domestic sector, the requests for regularization were 18.604 (13,82%).

<sup>4</sup> The so-called "risk of absconding" as envisaged in Art. 7 par. 4, 2008/115/EC Directive

<sup>5</sup> As envisaged in Art. 7, par. 4, Directive 2008/115/EC, in case the foreign national poses a risk to public policy, public security or national security, or in case his application for a legal stay has been dismissed as manifestly unfounded or fraudulent

<sup>6</sup> Art. 7, par. 4, Directive 2008/115/EC

7. Therefore, the Decree is aimed at allowing employers to regularize their irregular employees within a short period of time, so to avoid new and more severe penalties provided by the EU Directive itself. It has, also, been a means to urge employers to regularize their employees.

**Paragraph §26**

*The Ministry of Foreign Affairs also hosted the Inter-ministerial Committee of Human Rights... It should be noted however Decree 95/2012 abolished all Committees including the Human Rights Committee, which the Special Rapporteur regrets.*

8. The law decree 95/2012 (so called “spending review”) has abolished all Committees operating inside Ministries, the Inter-ministerial Committee of Human Rights included. The MFA has challenged this inclusion, as the Committee was set up to comply with international obligations. The final decision on the abolishment is now pending, but the Committee is not operational.

**Paragraph §34**

*Under the Schengen system, any irregular migrant who is registered in Italy will be returned to Italy even if they move onto another country within the EU.*

9. Italy observes that this statement is not correct since it is not consistent with the relevant provisions of article 6 of the Directive 2008/115/EC.

**Paragraph §35**

*The Special Rapporteur claims that, due to some shortcomings in the Dublin II Regulation “...persons who may in fact have a valid asylum claim, avoid lodging that claim in Italy as they believe they will not receive adequate protection or opportunities, as many asylum seekers in Italy do not receive social benefits, thus becoming homeless”.*

10. Italy believes this assertion largely overstates the existing flaws in the European and Italian asylum systems without giving a detailed account of the elements supporting the above mentioned statement. It is presumably based on grounds (often instrumentally) brought forward by claimants against transfer measures adopted by the competent Dublin Units of other Member States, and is unfounded since Italy has a well-developed protection system for asylum seekers and refugees, called SPRAR, recognized as a best practice on a European scale and appreciated on several occasions also by representatives of third Countries. With respect to the obstacles to the reunification of unaccompanied minors to the members of their families residing in other Member States, the improvement of the mechanisms foreseen by the Dublin Regulation is actually an agreed upon need to be pursued by applying the minor’s best interest criterion, thus facilitating the transfer of unaccompanied minors to those Member States where their family members legally reside.

### **III. Border management**

**Paragraph §36**

*The Special Rapporteur has observed the important influence of the EU, and its increasingly securitised approach to border management, on the development of Italy’s now more security-focused migration policies.*

11. Italy finds it necessary to remind that the main tasks of the FRONTEX Agency, according to the mandate provided for by the Regulation establishing FRONTEX, are to support Member States in the management and control of external borders, and to

coordinate the joint operations hosted by Member States in order to optimize the effective control of the borders while contributing to enhance the cooperation among Member States.

12. Accordingly, it is in the very mission of FRONTEX to deal with border security issues. Nevertheless, that does not imply that FRONTEX is not bound by the EU law relevant provisions protecting the human rights of migrants.

### **Paragraphs §38 and §39**

*(38) In 2011 alone, at least 1500 persons are estimated to have died attempting to cross the Mediterranean. Whilst the Special Rapporteur on the Human Rights of Migrants in no way wishes to imply Italian Authorities and singlehandedly responsible for these tragedies, the data make apparent the need for ongoing attention to this issue.*

*(39) For example, in Tunisia, the Special Rapporteur met with some Somali women who had sought to reach Italy irregularly on a small boat... Yet despite being in Italian territorial waters, following negotiations between Italy, Malta and Tunisia, the Tunisian SAR team was called to carry out the SAR operation, and the migrants were returned to Tunisia, where they found themselves in the Choucha camp.*

13. Italy has no evidence of the rescue in Italian territorial waters by the Tunisian naval units of people intercepted at sea and returned to Tunisia, as mentioned in the Report. However, Italy wishes to underline the special attention paid by Tunisia to the rescue at sea, in line with the Tunisian-Italian Agreements, which aim at guaranteeing a closer surveillance in the Mediterranean Sea, also as regards search and rescue activities.

14. As to the rescue at sea, the Montego Bay Convention of 10 December 1982 (Unclos)<sup>7</sup> is at the basis of the Italian action, envisaging the obligation to assist anyone in danger at sea. In particular, the rescue obligations do not cease after giving the first medical treatment or meeting the immediate needs, and cease as soon as the survivors land in a “safe place”, which is the place where<sup>8</sup>: rescue operations are considered as concluded; survivors’ safety or life are no longer threatened; immediate needs, such as food, accommodation and medical treatment are met; survivors’ transport to the closest or final destination can be organized. The SAR and Solas Conventions refer to the concept of “safe place” and not of “the closest place”. Said “safe place” must be: identified by the Authorities of the country in charge of the rescue operations in their own SAR waters; suitable to meet the survivors’ immediate needs, such as medical treatment. Therefore, a “place” with no hospital like Lampedusa does not meet the requirements envisaged in the aforementioned legal instruments and cannot be considered safe.

15. The operations in international waters, by which the Italian naval units intercept foreign people on board boats not flying any flag which intend to cross illegally the external European borders, are conducted in order to: give first aid to people intercepted at sea, in case they are in difficulty; safeguard the Italian sea borders. In relation to the activities aimed at safeguarding the Italian, and therefore the EU sea borders, they are conducted in compliance with the following international legislation: the UN Convention and Protocols

<sup>7</sup> The following instruments should be recalled as well: the International Convention for the Safety of Life at Sea of 1974 (Solas); the International Convention on Search and Rescue at Sea (SAR), adopted in Hamburg on 27 April 1979; the 1989 Convention on Salvage at sea; the IMO MSC 167/78 Resolution of 20 May 2004 as well as the amendments to the Annex to the SAR and Solas Conventions.

<sup>8</sup> This definition is taken from the guidelines adopted by the recalled IMO MSC 167/78 Resolution of 20 May 2004 and from the above-mentioned amendments to the Annex to the Sar and Solas Conventions, after their entry into force in July 2006.

on the fight against transnational organized crime<sup>9</sup>; the additional Protocol to the UN Convention against transnational organized crime to combat migrants' smuggling by land, sea and air<sup>10</sup>; the general principle by which States have the duty of mutual cooperation<sup>11</sup>; the Agreements and Understandings in force between Italy and a Third Country<sup>12</sup> by which the necessary steps to counter the above-mentioned phenomenon are identified; the Inter-ministerial decree of 14 July 2003; the EC Regulation No. 562/2006 of 15 March 2006<sup>13</sup>; the Decision No. 252 of 26 April 2010<sup>14</sup>, adopted by the European Union Council.

16. In compliance with the above mentioned international laws, a State naval unit can stop a vessel without nationality and suspected of being used to transport migrants. The mentioned State may return the foreign nationals to a port of the country from which they left to hand them over to its authorities. When dealing with a vessel flying no flag, which is involved in migrant smuggling, the State is able to choose the appropriate measures to be adopted in agreement with the country of departure<sup>15</sup>; whereas, if a vessel displays a State flag a number of measures to be adopted, only upon authorization of such State are laid down<sup>16</sup>. In this context, migrants requesting any form of protection or in need of urgent medical treatment shall not be returned to the country of departure.

17. By Decision No. 252 of 26 April 2010 the European Union Council established the rules to be complied with by member States during FRONTEX operations to monitor external sea borders. In particular: the possibility to apply specific measures against suspected vessels; said measures include the handover of the persons found on board to the authorities of a third country, if the vessel is on the high sea and is involved in migrant smuggling<sup>17</sup>. Following an appeal lodged by the European Parliament on 14 July 2010, the European Court of Justice ordered by judgement of 5 September 2012 the annulment of the Decision No. 252 by safeguarding, however, its effects in order not to jeopardize the ongoing and future operations, provided that new rules are adopted within reasonable time limits. Therefore, the European Court of Justice recognized the legality of the measures contained in the above mentioned Decision, including the handover. In fact, pending the adoption of new rules, the mentioned Court still allows the application of the Decision<sup>18</sup>.

<sup>9</sup> They were concluded in New York on 15 November 2000 and 31 May 2001, and were ratified by Italy by Act No. 146 of 16 March 2006. The need of cooperation, in particular, is envisaged by Article 27 of said Convention.

<sup>10</sup> Signed in Palermo on 12 December 2000; it was ratified by Italy by Act No. 146 of 16 March 2006.

<sup>11</sup> UN General Assembly Resolution (XXV) of 24 October 1970.

<sup>12</sup> As already stated, it can be defined also as Partner Country

<sup>13</sup> Article 12, EC Regulation No. 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a EU code on border crossing (Schengen borders code).

<sup>14</sup> It integrates the Schengen Borders Code in relation to the surveillance of the external sea borders in the framework of the operational cooperation coordinated by the European Agency for the management of the operational cooperation at EU member states' external borders; it was published in the EU Official Journal on 4 May 2010.

<sup>15</sup> Articles 7 and 8, paragraph 7, of the mentioned additional Protocol to the UN Convention against Transnational Organized Crime to combat migrants smuggling via land, sea and air, signed in Palermo on 12 December 2000.

<sup>16</sup> Article 8, paragraph 2, letter c), of the mentioned additional Protocol to the UN Convention against Transnational Organized Crime to combat migrants smuggling via land, sea and air, signed in Palermo on 12 December 2000.

<sup>17</sup> In compliance with the additional Protocol to the UN Convention against Transnational Organized Crime to combat migrants smuggling via land, sea and air, signed in Palermo on 12 December 2000, ratified by Italy by Act No. 146 of 16 March 2006.

<sup>18</sup> It should also be recalled that the EU legislator, by Regulation (EC) No. 562/2006 of 15 March 2006, which establishes a EU code relating to border crossing by persons (Schengen Code on Borders),

**Paragraph §42**

*FRONTEX officers allegedly are conducting interviews with migrants in Italian detention facilities...without any external supervision, and it is unclear if human rights concerns arise in these interviews, they are dealt with or reported upon.*

18. Italy underlines that EU law does not explicitly require an external supervision to interviews carried out by FRONTEX. Indeed, the article 10 of the Directive 2005/85/EC that establishes guarantees for applicants for asylum does not provide for an external supervision to the interviews with migrants. In addition, Italy considers the Special Rapporteur's concerns about "how, if information about human rights concerns arise in this interviews, it is dealt with or even reported upon" unfounded, since the interviews do not exhaust the procedures available to migrants in order to obtain effective protection of their human rights.

19. Regarding the management of irregular migrants, Italy highlights that the identification of landed foreign nationals is carried out through qualified interpreters and cultural mediators who communicate immediately to Questura officers any protection needs expressed by said immigrants. No foreign national is forced to abandon Italy when he/she fears to be persecuted in case of a return to his/her country. Trafficking victims, as well as minors under 18 of age and vulnerable persons are detected during said police investigations. Non-accompanied minors, at the end of the information-investigation activity, are directed to the assistance envisaged under the Italian legislation. The Italian legislation envisages that the information activity in relation to asylum seekers, as well as the one regulated by the Praesidium project, is carried out in favour of foreign nationals once they ask for protection. As to asylum, the relevant procedure is started by Italy also when the foreign national fears any uneasiness in case of a return to the country of origin or provenance: to this regard, the European Legislation is stricter, because it envisages that the information on the rights and obligations are given to the foreign nationals "...after having granted them" the required status<sup>19</sup>.

**Paragraphs §43-46**

*The Special Rapporteur notes that these [readmission] agreements, which are the result of private consultations, are used as a means of bilateral border control, however often without sufficient human rights safeguards.*

20. Italy believes that SR Crepeau's concerns are ungrounded. Bilateral Agreements on readmission concluded by Italy contain specific references to the universally accepted human rights principles and Conventions.

21. The agreements in force with Libya are aimed at enhancing the surveillance of the Mediterranean Sea to give more impetus to the safeguard of life at sea and to the fight against criminal groups smuggling human beings. In operational situations, the return to a port of the country of departure of foreign nationals – after they have been traced in international waters on board of vessels involved in migrant smuggling – is a necessary activity aimed at hindering unauthorized entries through EU external borders. In fact, there

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requested member States to carry out border surveillance by impeding unauthorized crossing, combating cross-border crime, adopting measures against the persons who illegally enter their territories.

<sup>19</sup> Article 22 of the Council Directive no. 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 and the content of the protection granted" turned into legislative decree no 251 of 2007 by Italy.

is not an alternative scenario to the return and handing over of foreign nationals to the Authorities of the country of departure in case it is found out that said foreign nationals: (a) are sailing in international waters headed toward the Italian coasts; (b) are not entitled to legally cross the European borders; (c) have been detected and stopped in international waters on board of a vessel involved in migrants smuggling; (d) have not shown an intention to ask for international protection; (e) cannot have access to temporary protection measures<sup>20</sup> because not ordered by the relevant Authority; (f) have been examined by a doctor who did not order an hospitalization.

22. It is to be stressed that the EU law requires Member States to control the common border aiming at: (a) hindering an unauthorized border crossing; (b) fighting against cross-border crime; (c) adopting measures against persons irregularly entered in their territories<sup>21</sup>. In case the return operation is not ordered in presence of the above-mentioned conditions, the relevant Authority<sup>22</sup> would infringe the national legislation envisaging the obligation to hinder the perpetration of illegal entry into the national territory by foreign nationals<sup>23</sup>, whose legitimacy was recognized by the European Court of Justice<sup>24</sup>, as well as the obligations stemming from the above-mentioned European legislation on external border surveillance<sup>25</sup>.

#### **Paragraph §47**

*The Special Rapporteur remains concerned that this new framework for Italian - Libyan cooperation [Processo Verbale] contains very few concrete human rights safeguards.*

23. The Italian-Libyan Processo Verbale, which is posted on various internet sites, does not contain any provision against international conventions on human rights. Far from being merely formal, the reference to human rights is a substantial part aimed at fostering the Libyan capacity of reception of migrants and person in need of international protection. Italy is aware that Libya should tackle the issue of migration with determination and urgency, with the help and support of the international community, especially in light of the growing instability in the Sahel region and of the need for a rapid re-establishment of an effective and autonomous Libyan capacity of control and management of its borders. The Italian action in support of Libya takes place in this context, on the basis of the specific agreement signed by the Ministries of Internal Affairs (Processo Verbale) within the framework of the "Tripoli Declaration", signed by the Libyan and Italian Prime Ministers on January 2012. This agreement gave a new impetus to a substantial package of technical assistance, education, training, institution building and supply of materials in favour of Libyan authorities.

24. At the bilateral level, the Italian action includes interventions aimed at facilitating Libya's accession to the Geneva Convention on Refugees of 1951 or, alternatively, the conclusion of a Headquarters Agreement between Tripoli and UNHCR in order to enable

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<sup>20</sup> Article 20 of Legislative decree no. 286 of 1998 and amendments thereto.

<sup>21</sup> Article 12 of the Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

<sup>22</sup> Ministry of Interior - Department of Public Security through the Central Directorate for Immigration and Border Police.

<sup>23</sup> Article 10-bis of the Legislative decree no. 286 of 1998 and amendments thereto.

<sup>24</sup> European Court of Justice, Grand Chamber, decision of 6 December 2011, case Achunghabian/France

<sup>25</sup> Article 12 of the Regulation (EC) no. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

the High Commissioner to regularly work in the country. It should also be reminded the co-operation activities initiated by Italy with Tripoli as part of training for the control and management of Libyan land, air and maritime areas – activities which include, among other things, the development of technological infrastructure, training of employees in different areas of operation and capacity and institution building activities in favour of the relevant Libyan authorities. Italy has also contributed financially to the opening of a OHCHR Office in Tripoli.

25. Equally effective is the Italian action within the UE, in order to encourage a stronger commitment in North Africa, with particular reference to the issue of migration. As a result of the constant and continuous Italian awareness raising initiative for an effective and rapid support to Libya in the field of security and border control, the European Union – recognizing the seriousness of the situation in the country in terms of security – confirmed its commitment to provide further assistance in the areas of border management and security. In this way, among other things, the European project “Sah-Med” – created for the prevention of human beings trafficking from the Sahara to the Mediterranean and co-financed by the UE and Italy – after a suspension due to the war, has been re-started.

#### **Paragraph §49**

*This expedited process [of Egyptian and Tunisian migrants] does not ensure the proper identification of all potential protection needs, including age assessment, claims for asylum and other vulnerabilities.*

26. Italy deems SR Crepeau’s concerns are ungrounded: the expedited identification procedures do not prevent the person concerned from applying for asylum. Suffice it to say that 4,100 foreign nationals, who transited through the Italian Identification and Expulsion Centers (CIEs) in the years 2011/2012, enjoyed international protection.

27. Also age assessment is carried out based on the directives given each time by the competent Juvenile Court, in compliance with the legislation in force. In particular, the issue of age assessment of unaccompanied minors without identity papers was dealt with by a technical inter-institution table, which resulted in a Protocol approved in 2009 by the Health High Committee (Consiglio Superiore di Sanità). Such Protocol provides for a multi-dimensional approach, aimed at guaranteeing the protection of minors' individual rights.

#### **Paragraph §51**

*The Special Rapporteur is very concerned by another practice - the unregistered return of irregular migrants who are detected as stowaways arriving by ferry to Italy's Adriatic ports.... According to testimonies received by the Special Rapporteur, migrants intercepted on ferries are placed in the custody of the ferry's captain and are not allowed to disembark from the vessel. They are reportedly detained on board in precarious conditions, with reports indicating that they were tied up or locked in cabins often for extensive periods including for up to 18 hours or more. They are then sent back to Greece on the same vessel and subsequently handed over to the Greek authorities, at risk of ill-treatment and degrading conditions of detention.*

28. Italy underlines that a complete information and assistance activity is ensured at all border crossing points for all those who are entitled to protection, even though they are found in an irregular status to enter the national territory. The system applied at the Border Police Offices operating along the Adriatic coast envisages the significant involvement of NGOs, which also ensure on-call service when their representatives cannot be constantly present. The status of the irregular migrant and the actual existence of the prerequisites entitling him/her to assistance or protection are established only on the basis of the outcome

of such joint activity, also supported by an adequate service of language and cultural mediation.

29. The above-mentioned procedures ensure full compliance with the provisions contained in the Practical Handbook for Border Guards<sup>26</sup>, which envisages that the application for asylum does not need to be expressly declared by the asylum-seeker. The interviews made by the competent staff provide detailed information on the perception of the risk to which the migrant would be exposed if he/she is returned to his/her country of origin or former habitual residence. The right to express the willingness to request international protection is always granted in all border crossing points, as in the whole Italian territory. Italian Council of Refugees' (or other bodies competent for asylum) staff members have been cooperating for years at the border points with the most considerable in-flow of migrants: those who wish to apply for international protection are therefore immediately assisted. In the last years, from 2008 to 2012, at the Adriatic border, the trend in the number of asylum-seekers (both adults and minors) out of the number of irregular migrants coming from Greece showed an increase of 340%.

### **Paragraph §53**

*Through these pushbacks, unaccompanied minors are being sent back to Greece. The return of unaccompanied minors is in direct contravention of international and Italian law. The Special Rapporteur met with a number of Afghani unaccompanied minors who confirmed this practice, one of whom reported being pushed back twice on Greek ferries, without being asked about their age, without access to interpretation or NGO advice, or any information about access to asylum procedures.*

30. Italy observes that the Italian legislation<sup>27</sup> provides for unaccompanied minors found at the Adriatic border the best safeguards, and highlights that the competent judicial authorities punctually established a series of actions to be carried out by the Border Police.

31. Minors who are found as being unaccompanied are immediately received in the territory of the State and at the same time entrusted to specialized care facilities. If there are doubts about their being under age, legal medical examinations are carried out in public health facilities. If such examinations cannot prove full age with certainty, the person is always considered to be under age.

32. In compliance with the legislation in force, the judicial authority competent for minors and the local social services are always informed about the presence of a minor, who is immediately taken to a safe place. In addition to the assistance of NGOs during police checks, in case of unaccompanied minors, there is a first contact with psychologists and mediators to create the best emotional conditions, the immediate involvement of local social services and of the Juvenile Court, which promptly takes the necessary action.

33. In case of minors accompanied by adults who are not able to prove their actual kinship, the procedure envisages, once again, the involvement of NGOs which, with the help of interpreters, cultural mediators and psychologists, ascertain and certify the existence of a family relationship: in that case, the minor undergoes the same process of the adults with whom he/she was found. Only when kinship cannot be ascertained, the minor is

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<sup>26</sup> The common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons was established by the Commission Recommendation of 6/11/2006. Cf. Section 1, paragraph 10, of the Handbook.

<sup>27</sup> Under section 19(2a) of Legislative Decree No. 286 of 25 July 1998 and its subsequent amendments, foreign minors cannot be expelled.

separated from the accompanying persons to be received in the Italian territory and placed in a care facility based on stringent and binding order of the competent judicial authority.

34. In case of underage asylum-seekers, in addition to the already mentioned medical examinations to ascertain the age, the Border Police involve the competent authorities and bodies<sup>28</sup>. In case of unaccompanied minors, in addition to the envisaged actions concerning international protection and the reception of the request, also the same operative practices mentioned above are applied to identify and place the minor in an adequate care facility.

35. There are no differentiated paths for detained foreign minors, who receive education, social and work inclusion, training, health care as well as linguistic and cultural mediation and primary schooling, if necessary. All minors who enter the criminal justice system are given a "Chart of Rights and Duties of Minors encountering the Juvenile Justice Services". With a view to supporting the link with the various competent authorities, guidance has been provided to Juvenile Justice Services with respect to legislation and practices in force regarding foreign minors (also if lacking parents or guardians or unaccompanied) and young adults in the criminal circuit, who are entitled to request social, humanitarian or temporary international protection. With a view to the rights of minors entered in the criminal circuit, documents on best practices and guidelines have been drawn up, concerning the cooperation between Juvenile Justice services with judicial authorities, guardianship judges, Childhood Watchdog, Offices of guardians and minors, Regions, local bodies, no profit organisations in order to quickly provide minors in the criminal circuit and lacking parents with a legal guardian, which is a requirement necessary for them to fully exercise their rights.

#### **Paragraph §54**

*...The 1999 readmission Agreement [between Italy and Greece] allows for readmission of a Greek national, and not a foreigner, to Greece...*

36. This statement is incorrect; since the Agreement provides also for the readmission of third country nationals (see art.5).

## **IV. Detention of migrants in an irregular situation**

#### **Paragraph §57**

*While the government assured the Special Rapporteur that persons were usually only held for 48 hours in such centres [Reception Centres/First Rescue and Assistance Centres], other reports received by the Special Rapporteur indicate that people are sometimes held for several days or weeks in these locations.*

37. Italy considers that such circumstances occur in the event of exceptional inflows of migrants which highly pressure the Italian reception system thus making temporarily difficult the immediate transfer of migrants from such Centres to other government facilities. Furthermore, there are cases of transfers delayed because of migrants themselves, who scrape off their fingertips to avoid them being photo-fingerprinted, as first step of the identification procedure; therefore, it is necessary to wait for papillary crests to form again.

<sup>28</sup> In compliance with the legislative decree 25/2008 concerning international protection, according to the procedure established in sections 6, 10 and 26. In particular, section 26 unequivocally establishes that, when the request for international protection is made at the Border Police Office (that is, when entering the national territory) "... the requesting person is addressed to the local Questura for the adoption of the relevant measures".

In this context, it should be also considered that the absence of cooperation by foreign nationals for the purpose of being identified does not only contravene the provisions on removal, but also international protection laws<sup>29</sup>.

38. With regard to the port of Lampedusa, it should be specify that, in order to provide first rescue to migrants who land along the coasts of the island, works for the partial restoration of the CPSA located in the Imbriacola area, were accomplished on 3 July 2012. The Centre had been closed following a fire and has been opened again with a capacity of 250 places. Furthermore, restoration procedures of the CPSA located in the Imbriacola area as well as extraordinary maintenance works of the former Loran Base continue. This Base is intended for hosting only persons belonging to vulnerable categories.

#### **Paragraph §59**

*In the event that the individual does not comply...they may be ordered to pay a fine of between 10,000 and 20,000 euros.*

39. In accordance with the Consolidated Immigration Act, the violation of the order to leave the country connected to a forced departure is punished by a fine ranging from 10,000 to 20,000 euros. However, if the violation refers to the order to leave Italy in relation to a voluntary return, the fine may range from 6.000 to 15.000 euros.

#### **Paragraph §60**

*Other vulnerable categories of migrants, such as victims of trafficking or asylum applicants, or those who could be prosecuted cannot be removed....However, the SR notes that certain practical obstacles, including lack of cooperation of countries of origin of irregular migrants, statelessness, and difficulties in the identification of persons subject to a removal, are other reasons for which these orders are not able to be carried out.*

40. The Report mentions the obstacles to the enforcement of expulsion which seem to be put on the same level as the causes, provided for by the law that make expulsion impossible. We consider that such comparison is not correct and that it diminishes the value of such causes which constitute a safeguard for migrants. However, if the person falls within the vulnerable subjects category, he/she shall be repatriated according to modalities compatible with his personal status<sup>30</sup>.

#### **Paragraph §62**

*Such centres are closed facilities and involve a deprivation of liberty, they therefore should be considered as detention centres.*

41. Such centres are not a special Italian feature since they have been established on the basis of EU law.

#### **Paragraph §64**

*The lack of applicable nationwide standards appears to leave a large margin of discretion to centre managers. Indeed, from his visits to three different CIEs, he observed varying conditions, with two of the CIEs he visited exhibiting significantly substandard conditions.*

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<sup>29</sup> Section 11, subsection 4 of legislative decree No. 25 of 28 January 2008 and subsequent amendments, according to which "...In all the procedure stages the applicant is obliged to facilitate the carrying out of the checks envisaged by the relevant public security laws..., which include identification checks.

<sup>30</sup> Article 19, paragraph 2-bis, Consolidated Immigration Act.

42. The provisions to regulate the living together within the centres and those to ensure persons' safety are adopted by the Prefect, after hearing the Questore who has to adopt any other measure to guarantee public order and security, as well as to prevent individuals from being unduly removed<sup>31</sup> (see Paragraph § 71 about "Ruperto Committee")

### **Paragraph §70**

*The Special Rapporteur is also concerned that there is no general investigative authority to monitor the conditions of all places where migrants are held. (...)*

*The "Praesidium" initiative is project-based, and participating organizations reportedly find it difficult to access all temporary or informal centres where migrants are detained.*

43. Since 1 January 2012, the Organizations involved in the "Praesidium VII" Project (IOM/IRC/UNHCR/Save the Children), funded by the Ministry of Interior – Department for civil liberties and immigration – have been acting, each of them according to its institutional mandate, in the main landing spots (Lampedusa and Pelagie islands, Calabria, Sicily, Apulia, Sardinia but also in Latium and Friuli) as well as in the government Centres and have been making themselves available for the hosts' needs. Furthermore, the project is characterized by an undeniable continuity since it has been renewed for eight successive years. Starting from 2013, "Praesidium VIII" contains new provisions according to which, in order to strengthen the monitoring and control actions carried out by the local Prefecture through the audit procedures, a commission is established in each government Centre where it is tasked to monitor and check the reception standards.

44. In particular, the services provided for by the above mentioned Organizations are as follows: (a) legal counselling for migrants; (b) information with regard to the Italian legislation in force in the field of irregular migration, trafficking of human beings and enslavement, as well as information over regular entry procedures in Italy and the submission of the application for international protection; (c) information over the opportunities for voluntary or assisted return; (d) carrying out and distribution of information material regarding the specific institutional responsibilities of each Organization; (e) identification of the vulnerable groups and subsequent reporting to the competent authorities; (f) monitoring of reception procedures both at the landing spots and at destination Centres, with particular attention for the safeguard of human rights.

45. Several NGOs (for example the Astalli Centre, Gente della Pace within the S. Egidio Community, ASGI, IRC, Arciconfraternita del S. Sacramento e di S. Trifone, Associazione senza confine, and others) as well as the asylum desks which are established in several Italian municipalities, in addition to those which are part of the SPRAR system, are active in the field of assistance and legal counselling to asylum seekers and holders of international protection.

46. All this shows that the Centres' hosts are in touch with the outside world, since the access to such centres is allowed to a great number of subjects, such as territorial bodies, protection bodies, eminent figures having institutional assignments, volunteers' associations and social solidarity cooperatives, as well as the media (also journalists as well as the photographers and cameramen who accompany them can enter the Centres if previously issued with an authorization by the Prefects, having heard the bodies which manage the concerned Centers). In this regard, the directive of the Ministry of Interior dated 1 April 2011, in spite of revoking the implementation of the previous directive dated 24 April 2007, during the North Africa emergency, has nonetheless made an exception for

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<sup>31</sup> Section 21 of Decree of the President of the Republic No. 394 of 31 August 1999 and subsequent amendments.

the access by UNHCR, IOM, the Italian Red Cross, Amnesty International, Médecins sans Frontières, Save the Children, Caritas, as well as all the associations which cooperated with the Ministry of Interior in connection with on-going schemes in the reception facilities funded through national and European resources.

47. The last Ministry of Interior directive, issued on 13 December 2011, re-established the contents of the above mentioned directive of 2007, thus providing for the possible postponement (not denial) of access to the Centres only for reasons of public order and security in the event the facility is undergoing restoration works.

#### **Paragraph §72**

*The decision regarding the length of detention appears to be largely discretionary, depends on the attitude of the local authorities running the detention centre, with practices varying considerably between regions.*

48. This issue was examined by the above mentioned Committee chaired by the Undersecretary of State Prof. Ruperto. The Committee suggested to reduce to 12 months the present maximum term of 18 months, also keeping into account some trends identified in the jurisprudence of the Justices of the Peace, which do not validate the detention unless the third-country national has been identified during the first 12 months.

49. However, when entering a CIE, the foreign national is requested to sign an ad hoc form by which he is informed that his detention period will be limited to the strictly necessary time, if he cooperates in his identification (for instance, submitting the original passport or copy thereof or any other identification document with a photo; see comments to Paragraph §17).

#### **Paragraph §79**

*The Special Rapporteur learned that some migrants detained in the CIEs were expelled to their countries of origin, despite having previously expressed their desires to make an asylum claim, however prior to the formal registration of that claim.*

50. The statement of SR Crépeau appears neither likely nor grounded. Italy points out that detention is a measure to be examined by the judicial authorities who do not authorize the foreign national's removal before the asylum procedure is concluded. Moreover, access to the CIEs is guaranteed to lawyers and representatives of humanitarian associations.

#### **Paragraph §80**

*The Special Rapporteur is very concerned about the high number of ex-prisoners who are transferred from prisons to CIEs...The ex-prisoners were often unaware that they would be transferred to a CIE at the completion of their sentence, and often had no clear indication of how long they would be held there, with some being held for numerous months.*

51. The foreign national identification starts when he/she enters the prison, and his photo-fingerprint cards are sent to the competent diplomatic mission. Nevertheless, the sending of said cards is not sufficient because numerous third countries have no efficient central identity records, and issue the relevant expatriation documents only after an interview, but very often do not intend to make these interviews in prisons. In order to ensure consistency of the identification procedure initiated during detention, a system was started for the tracing of the procedure followed to identify the foreign prisoner with a view to limiting the criticalities which might arise if the person is transferred from one prison to another.

52. In relation to the detained foreign national's unawareness of his situation, it should be highlighted that the presence of lawyers is ensured at CIEs, with the relevant legal aid.

Moreover, the transfer from one center to another always takes place by transferring at the same time all documents certifying the detained person's administrative situation: in cases where detention periods are indicated, detention orders are always notified to the person concerned who is therefore able to understand how long he will stay at the Center. If the detained person cooperates in his identification, his stay at the Center is very short. In this connection, when the foreign national enters the CIE, he must sign an ad hoc form by which he is informed that his detention length will be reduced to the minimum extent possible if he cooperates in his identification (e.g., by producing the original/a copy of his passport or of any other identification document, duly provided with his photo).

#### **Paragraph §82**

*(Minor migrants) Italy still lacks an adequate nationwide multidisciplinary age determination procedure.*

53. This issue is under discussion between the Ministry of Health and the Ministry of Justice. Recently, a working-group involving also the Regions, which have the responsibility in health matters, has been set up in order to draw-up a specific protocol, with regard to the assessment of unaccompanied foreign minors' age, which is based on a multidisciplinary approach.

#### **Paragraph §84**

*The Special Rapporteur notes that Italy appears to not have developed any meaningful alternatives to detention.*

54. SR Crépeau's remarks do not take into account the Italian legislation. Actually, decree law No. 89 of 23 June 2011, has turned into Act No. 129 of 2 August 2011, transposed Directive 2008/115/EC<sup>32</sup> on the return of foreign nationals by introducing a gradually increasing automatic expulsion. In particular, the foreign national's voluntary departure is preferred over forced return<sup>33</sup>, provided that there are no grounds to believe that this may undermine the purpose of the return procedure<sup>34</sup>, i.e. the actual removal of the foreign national.

55. If there is the risk for the foreign national to abscond<sup>35</sup> or in presence of other specific situations<sup>36</sup> he shall be immediately returned. In this case he shall be forcibly escorted to the border without granting him a period for voluntary departure between seven and thirty days<sup>37</sup>. Therefore, the EU legislator does not envisage the possibility for a foreign national to choose how to comply with a return obligation notified to him. Instead, he gives the member State the power to adopt the measure attesting the irregularity of the foreign national's stay and imposing the obligation of return<sup>38</sup> on him.

56. In compliance with the Directive under consideration the Italian legislator excluded automatic expulsion, which has to be adopted on a case by case basis, and envisaged a gradually increasing repatriation mechanism. In fact, an irregular foreign national can leave

<sup>32</sup> Containing "Common standards and procedures in Member States for returning illegally staying third-country nationals"

<sup>33</sup> Article 7, paragraph 1, Directive 2008/115/EC

<sup>34</sup> Whereas No. 10, Directive 2008/115/EC

<sup>35</sup> The so-called "risk of absconding" under article 7, par. 4, Directive 2008/115/EC

<sup>36</sup> Indicated in article 7, par. 4, Directive 2008/115/EC and existing if the foreign national poses a risk to public policy, public security or national security or he submitted an application for a legal stay which has been dismissed as manifestly unfounded or fraudulent.

<sup>37</sup> Article 7, par. 4, Directive 2008/115/EC

<sup>38</sup> Article 3, Paragraph 4, EC Directive 115/2008

according to different modalities (voluntary leaving through the external border crossing points; access to voluntary and assisted return programmes; granting of a time limit for voluntary departure; less coercive measures than detention in a centre; detention in a centre; forced repatriation; consideration of the special status of a foreign national falling within the vulnerable subjects category).

57. Italy gives priority to voluntary return as against forced repatriation. In fact, a foreign national who irregularly stays in Italy is aware that, if he decides by his own to leave the Italian territory, he shall not be stopped during police checks at the external borders and, therefore, shall not be expelled<sup>39</sup> nor subject to criminal sanctions<sup>40</sup>. Said mechanism significantly stimulates a foreign national to voluntarily leave the European Union territory, thus achieving the purpose of the EU Directive. When stopped within the territory, he shall be duly informed of the possibility granted to him to request a term for voluntary return<sup>41</sup>. Said mechanism also implements the final effect of the Directive, that is achieving the actual removal of the foreign national from the European Union territory. Moreover, he may ask for voluntary and assisted repatriation programmes, provided that he was never subject to an expulsion measure and there are no specific causes of exclusion from said procedure<sup>42</sup>. He shall not obtain a time limit for voluntary departure only if he is at risk of absconding or socially dangerous or submitted a manifestly unfounded or fraudulent application to regularly stay or is subject to an expulsion order by the judicial authority<sup>43</sup>. However, even if he is at risk of absconding, he may avail himself of less invasive coercive measures than detention in an identification and expulsion centre, provided that he has a valid travel document and is not socially dangerous<sup>44</sup>. Finally, if he falls within the vulnerable subject category, he shall be repatriated according to modalities compatible with his personal status<sup>45</sup>.

## V. Cross cutting concerns

### Paragraph §87

*In his visit to the region of Castel Volturno, the Special Rapporteur was shocked by the conditions of migrant workers he encountered. The migrants, for the most part from sub-Saharan Africa with irregular migration status, lived in abhorrent conditions, in overcrowded houses, without proper sanitation. The Special Rapporteur learned that the wages received were often not sufficient to maintain an adequate standard of living, with reports of being paid 20 euro or less for a full day of difficult manual work. Furthermore, many workers reported that they were often at the mercy of authorities, in particular the Carabinieri that subjected them to cruel treatment including not only physical assault but also racial taunts. Complete impunity appears to surround the situation of these workers, who were being exploited by landlords and employers to benefit the Italian economy, especially in the agricultural sector.*

58. From January 2010 to March 2013 no member of the Carabinieri operating in Castel Volturno and in the whole Province of Caserta was involved in criminal proceedings

<sup>39</sup> Article 13, paragraph 2-ter, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>40</sup> Article 10-bis, paragraph 2, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>41</sup> Article 13, paragraphs 5 and 5-bis, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>42</sup> Article 14 -ter, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>43</sup> Article 13, paragraph 4, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>44</sup> Article 14, paragraph 1-bis, Legislative decree No. 286 of 25 July 1998, as subsequently amended

<sup>45</sup> Article 19, paragraph 2-bis, Legislative decree No. 286 of 25 July 1998, as subsequently amended

concerning illicit and/or discriminatory behaviors against foreign citizens. If this was the case, the hierarchy of the Carabinieri would undoubtedly intervene on disciplinary grounds. Given the critical presence of irregular migrants in that area, the Carabinieri have established a local Labor Inspectorate aimed at monitoring labor legislation. Since 2010, 2.175 inspections were carried out: 169 foreigners were irregularly employed by local firms and 95 people were deferred to the Judicial Authority for violating labor and migration legislations. At a general level, the Carabinieri are firmly committed both to protecting human rights of the most vulnerable victims and to punishing any illicit or discriminatory behavior.

59. With regard to the penalties foreseen for landlords who exploit migrants housing them in inappropriate and unhealthy conditions, the Consolidated Immigration Act<sup>46</sup> states that “Unless the act constitutes a more serious offence, whoever provides accommodation or gives, including on a lease, a house to a foreigner who has no residence permit shall be punished with imprisonment from six months to three years. The conviction, or the application of the penalty at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure, even in case of suspended sentence, entails confiscation of property, unless it belongs to a person who is not involved in the offence. The provisions currently in force on the management and disposal of confiscated property shall apply. The amount of money obtained from the sale, if ordered, of confiscated property is used to strengthen the prevention and prosecution of irregular immigration offenses”.

60. It is worth specifying that the case-law of the Supreme Court included in the scope of the offence of “Reducing to or keeping in slavery or servitude<sup>47</sup> the case of reducing migrants to a state of subjection, imposing sacrifices on them concerning their basic needs, poor housing, lack of sanitation, food deprivation, impossibility to move on the territory and, therefore, making them unable to avoid exploitation”<sup>48</sup>.

61. Furthermore, Italy transposed Directive 2009/52/EC into national law through the Legislative Decree No. 109 of 16 July 2012, which introduced minimum standards concerning sanctions and measures against employers who engage third-country nationals with irregular migration status. In particular, the law-maker introduced specific aggravating circumstances in case of irregular employment associated with labour exploitation, and the possibility for the foreign national who reports his/her employer and his/her condition of exploitation to be issued a residence permit for humanitarian reasons (this possibility had already been introduced in 1998 by Legislative Decree No. 286).

## VI. Conclusions and recommendations

### Recommendation §93

*Ensure the establishment of a fully independent National Preventive Mechanism, in accordance with the Optional Protocol to the Convention against Torture, mandated to visit all places where migrants are deprived of their liberty.*

(see also comments to Recommendation §107)

62. The “Optional Protocol to the UN Convention against Torture and other cruel, inhuman or degrading punishments or treatments” of 18th December 2002, signed by Italy on 20th August 2003, was ratified on 9 November 2012. The Members of Parliament who

<sup>46</sup> Article 12, paragraph 5-bis

<sup>47</sup> Article 600 of the Criminal Code

<sup>48</sup> Court of Cassation, Sec. 5, no. 40045 of Sept. 24, 2010, dep. 12/11/2010 Murmylo et al., Rv. 248,898

participated in the parliamentary discussion during the ratification procedure expressed the wish that the above-mentioned “National Mechanism of Prevention” should be implemented by creating a National Commission for the promotion and the protection of human rights.

63. As for life inside penal establishments, in the Italian system Supervisory Magistracy has effective powers of supervision and control on the enforcement of sentences to imprisonment. Said branch of Magistracy guarantees both the humaneness of punishments and the effectiveness of prisoners’ rights, including their right to the rehabilitation treatment, which is essential to the purpose of the punishment. The Italian Penitentiary Administration gathers information concerning every single event occurring in each prison; in order to make the task of the Supervisory Magistracy effective, our Administration has recently provided that those information be promptly forwarded also to the relevant Supervisory Magistrates, to the purpose of keeping the highest level of awareness on the prisoners’ conditions and on the most important events.

64. Article 67 of the Penitentiary Act (Law nr. 354 of 1975) lists a number of subjects who may enter penal establishments in order to assess prisoners’ conditions, without any further authorization on the grounds of their institutional offices or of their jurisdictional, religious or political position.

### **Recommendation §97**

*Establish a comprehensive mechanism for the identification of unaccompanied minors that includes not only medical exams but also a psychosocial and cultural approach, in order to best identify specific protection measures in the best interests of each child.*

65. Par. 403 of the Civil Code is applicable to migrant minors and allows the Public Prosecutor with the Juvenile Court to place the foreign child straightforward in a foster community, upon arrival in Italy, where the migrant minor is provided with a protection and training program, in compliance with his/her needs for protection and safeguard. Such provisions are usually enforced on behalf of virtually any unaccompanied migrant minors who entered the Italian territory, regardless of the ways of his/her entry, without prejudice to different practices carried out by some Judicial Authorities, which deem it more appropriate to previously institute de potestate proceedings ex officio, in order to entrust the child to the competent Welfare Office and subsequently order his/her placement in a local community.

66. The protection of unaccompanied minors was particularly difficult after the 2011 Arab Spring, because of their high presence and the vulnerability of this specific category of migrants. With particular reference to minors flow, from 1 January 2011 to 12 January 2012 4,176 unaccompanied minors entered in Italy within the so called “North Africa Emergency”. Specific measures were adopted for the protection of unaccompanied minors in order to guarantee a fast reception of these minors in appropriate structures<sup>49</sup> with the collaboration of Municipalities. Law no. 135/2012<sup>50</sup> has also provided a specific National Fund for the reception of unaccompanied foreign minors, in order to ensure the continuation of operations related to the overcoming of the humanitarian emergency in 2012 and allow ordinary management of reception for the future. For the year 2012, the financial resources of the fund were € 5 Millions and they were shared among the Municipalities in charge with the reception of unaccompanied minors. As of 28 February 2013, 5.626 unaccompanied minors are present on the territory. Concerning the reception

<sup>49</sup> Ordinance No. 3933/2011 and ff.

<sup>50</sup> Article 23, paragraph 11

measures, according to the national legislation, when a minor is found on the territory of the State, he/she is promptly placed in a secure place (community for minors). Following age assessment (before an intercultural mediator and a paediatrician), the minor is provided with a personal integration path. Assisted voluntary return procedures are only activated in case of positive feedbacks from the family tracing, developed in collaboration with IOM, and after the minor's declared willing, the positive opinion of the judicial authority and of the local social services. In order to facilitate the social and labor integration of unaccompanied minors who become of age (17-18 years old), the Ministry of Labour and Social Policies have funded specific interventions. In particular 1,226 projects have been financed, aimed at training these minors, facilitating the conditions under which they can obtain a resident permit after eighteen years and preventing them from irregularity.

### **Recommendation §98**

*Revoke the declaration (Ordinance of 24/09/2011) of Lampedusa as not being a safe place for the disembarkation of migrants rescued at sea in order to maintain an effective system of search and rescue at sea.*

(see comments to Paragraph §39)

67. SAR and Solas Conventions refer to the concept of “safe place” and not of “the closest place”. Such “safe place” must be identified in their own SAR waters by the Authorities of the country in charge of the rescue operations and must be adequate to satisfy the survivors' immediate needs, such as medical treatments.

68. The Ordinance declaring Lampedusa an unsafe port has been issued by the Commander of the maritime district Office within the Ministry of Infrastructure and Transports (Ordinance no. 15/2011 of 24.09.2011) in conformity with an IMO resolution of 2004 which regards as safe the place where primary human needs are guaranteed (food, shelter and medical treatment). This declaration refers to the status of unsafe port for the landing of migrants only in relation to rescue at sea.

### **Recommendation §99**

*Set up information services providing information on international and national protection mechanisms in all landing points.*

69. Italy points out that reception services are already operating at port and airport border crossings in Ancona, Bari, Brindisi, Rome, Varese and Venice for third-country nationals and asylum seekers entering the Italian territory for periods of time longer than three months. Furthermore, within the “Praesidium” Project (see also comments to Paragraph §70), the partner bodies (UNHCR, IOM, IRC, Save the Children) are present in all landing places and government centres. They provide legal counseling on the Italian legislation in force in the field of irregular migration, trafficking of human beings and enslavement, information on regular entry procedures in Italy, applications for international protection in Italy as well as opportunities for voluntary or assisted return.

### **Recommendation §105**

*Ensure that migrants are detained only because they present a danger for themselves or others, or would abscond from future proceedings, always for the shortest time possible, and that non-custodial measures are always considered first as alternatives to detention.*

70. Irregular migrants posing threat to public security are expelled according to a Minister's decree, in conformity with art. 13, paragraph 1 of Legislative Decree no. 286/98 (Consolidated Immigration Act). As regards alternatives measures to detention, see comments to Paragraph §84).

**Recommendation §107**

*Ensure that all detained migrants have access to proper medical care, an interpreter, adequate food and clothes, hygienic conditions, adequate space to move around and access to outdoor exercise.*

71. Italian Law does not make any difference between Italian prisoners and foreign prisoners, who are granted the same access to healthcare and enjoy the same hygienic conditions and the same spaces as national prisoners. Difficulties related to language, cultural and religious background are tackled through cultural mediators and interpreters.

**Recommendation §108**

*Systematically inform detained migrants in writing, in a language they understand, of the reason for their detention, its duration, their right to have access to a lawyer, the right to promptly challenge their detention and to seek asylum.*

72. Italy points out that each prisoner and internee is given the Charter of Prisoners' Rights and Duties, translated into the main foreign languages, in order to guarantee the exercise of their rights and to ensure their awareness of the rules regulating prison life<sup>51</sup>.

73. In relation to the detained foreign national's unawareness of his situation, it should be highlighted that the presence of lawyers is ensured at CIEs, with the relevant legal aid. Moreover, the transfer from one Center to another always takes place by transferring at the same time all documents certifying the detained person's administrative situation: in cases where detention periods are indicated, detention orders are always notified to the person concerned, who is therefore able to understand how long he will stay at the Center. If the detained person cooperates in his identification, his stay at the Center is very short.

**Recommendation §109**

*Seek to ensure the early identification of migrants' prisoners to avoid further detention in CIE.*

74. The Italian Penitentiary Administration, in compliance with an inter-ministerial order (Ministry of Justice and Ministry of Interiors), issued a document regulating the "Procedure to identify the non-EU citizens waiting for removal". Such procedure provides that every two months prisons send to the local Police Headquarters (Questure) the information about the date of release of non-EU foreign prisoners who will be the object of expulsion, as well as all elements useful for their identification, which was gathered during their imprisonment. To that purpose, the Register Officers of the prisons draw specific lists of those prisoners who are in the position of being removed; such lists are then sent to the relevant Supervisory Judge and to the local Police Headquarters in order to correctly identify the prisoners, to prepare the papers necessary to their journey and to verify if there are any reasons impedimental to the subjects' removal. The enforcement of removal is carried out by law enforcement officers who escort the subject to the border, once all formalities are complied.

75. Therefore (see comments to Paragraph §80), the foreign national identification starts when he/she enters the prison, and his photo-fingerprint cards are sent to the competent diplomatic mission. Nevertheless, the sending of said cards is not sufficient because numerous third countries have no efficient central identity records, and issue the relevant expatriation documents only after an interview, but very often do not intend to make these

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<sup>51</sup> Article 69, paragraph 2 of the Decree of the President of the Republic nr. 230 of 2000, as amended by the Decree of the President of the Republic nr. 136 of 5th June 2012.

interviews in prisons. In order to ensure consistency of the identification procedure initiated during detention, a system was started for tracing the procedure followed to identify the foreign prisoner with a view to limiting the criticalities which might arise if the person is transferred from one prison to another.

### **Recommendation §110**

*Ensure that all migrants deprived of their liberty are able to promptly contact their family, consular services and a lawyer, which should be free of charge.*

76. Italy points out that all prisoners have the right to inform their families and their defense counsels upon their entry into a penal establishment<sup>52</sup>, and even earlier, upon their arrest. Foreign prisoners have the right to ask that consular authorities be informed of their arrest as well as the right to make telephone calls and to have interviews/visits with the support of an interpreter<sup>53</sup>.

### **Recommendation §113**

*Ensure full and proper access to justice for all detainees, including a more accountable system for lodging complaints within detention centres.*

77. Italy highlights that the present system ensures a judicial review of the following measures:

- expulsion order issued by the prefect: the measure may be challenged before the justice of the peace, having territorial jurisdiction, who shall decide within twenty days of the date of the filing of the appeal<sup>54</sup>;
- detention order issued by the Questore [Chief of police]: this measure is validated by a decree by the justice of the peace having territorial jurisdiction within 48 hours of notification, which must occur within 48 hours of service of the measure on the person concerned<sup>55</sup>; the validation measure may be appealed against to the Supreme Court<sup>56</sup>;
- deportation order [provvedimento di accompagnamento alla frontiera] issued by the Questore: this measure is validated (after verifying the formal and substantive requirements) by decree of the justice of the peace having territorial jurisdiction within 48 hours of notification, which must occur within 48 hours of service of the measure on the person concerned; the validation measure may be appealed against to the Supreme Court<sup>57</sup>.

78. These measures, although often perceived by the migrant as a whole, are different in nature, are issued by different authorities and have different effects and preconditions and are subject to a particular system of validation and appeal.

79. While the provisions of the prefect do not require validation by a judicial authority (but may be challenged before the justice of peace of the place where the prefect is located), the measures issued by the Questore must be validated by a judicial authority (failing which, they lose validity).

<sup>52</sup> Article 29, Law nr 354/75 (Penitentiary Act).

<sup>53</sup> Article 35 and Article 62, paragraph 3, Decree of the President of the Republic nr. 230 of 2000; Article 36, letter c), Vienna Convention of 24 April 1963.

<sup>54</sup> Article 18, Legislative Decree no. 150 of Sept. 21, 2011

<sup>55</sup> Article 14, paragraph 4, Consolidated Immigration Act

<sup>56</sup> Article 14, paragraph 6, Consolidated Immigration Act

<sup>57</sup> Article 13, paragraph 5-bis, Consolidated Immigration Act

80. The use of two systems for the validation and appeal is, therefore, due to a diversification of controls always aimed at the protection of the recipient of the measures restricting personal freedom:

- validation by the judicial authority of the measure issued by the Questore satisfies the need to ensure a check on the work of the public security authority (as required for any form of restriction of personal freedom, see Article 13 of the Constitution);
- the appeal system for measures issued by the prefect follows the ordinary appeal rules applied to measures infringing a right.

81. It should also be noted that, as expressly provided for by the law<sup>58</sup>, the validation of the detention order may also be ordered upon validation of the deportation order and upon examination of the appeal against the expulsion order.

82. This hypothesis – which is not uncommon in practice – implies that one single procedure is developed instead of two.

83. Moreover, the possible presence of two procedures does not result into the undermining of "access to funds or legal advice", as mentioned in the Report, since, for both procedures, the use of a court-appointed defense counsel and the granting of legal aid are always guaranteed when the conditions required by law exist<sup>59</sup>.

#### **Recommendation §114**

*Establish a fairer and simpler system for migrant detainees to be able to challenge expulsion and detention orders.*

84. Italy observes that the recipient of the measure can always appoint a private counsel (to be chosen possibly on the basis of his/her skills and specialization). If the person fails to appoint him/her or remains without, the Code of Criminal Procedure provides for the institution of the court-appointed lawyer<sup>60</sup>. The court-appointed counsel is provided solely for the protection of migrants, in order to ensure that, even when the latter has not (or not yet) appointed anyone for his/her defense, a person technically apt to defend him/her is always present in the proceedings.

85. The migrant has the power to deprive the act carried out by the defense counsel of its effectiveness<sup>61</sup> and, above all, the power to appoint a private counsel, revoking automatically the appointment of the court-appointed counsel previously appointed<sup>62</sup>.

86. The possibility to freely revoke the appointment of his/her defense counsel and to appoint, on the basis of personal evaluation, another counsel is the maximum form of protection against the risk, mentioned in the Report, of the defense counsel's conduct not fully responding to the interests of his/her client.

#### **Recommendation §115**

*Provide explicit training for the Justices of the Peace on international human rights law and international refugee law.*

87. Jurisdiction for disputes concerning the expulsion of nationals of non-EU Member States is attributed to the justice of the peace of the place where the authority which issued

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<sup>58</sup> Article 14, paragraph 4 of the Consolidated Immigration Act

<sup>59</sup> Article 98 Code of Criminal Procedure

<sup>60</sup> Article 97, paragraph 1, Code of Criminal Procedure

<sup>61</sup> Article 99 Code of Criminal procedure

<sup>62</sup> Article 97, paragraph 6 of the Code of Criminal procedure

the challenged measure is located<sup>63</sup>. Jurisdiction for disputes concerning the expulsion of nationals of other EU Member States is attributed to the single-judge court of the place where the authority which issued the challenged measure is located<sup>64</sup>. The different jurisdiction is linked to the different quantitative extent of the disputes (there are more disputes concerning nationals of non-EU Member States) and to the diversity of the two procedures which reflects, above all, the need for a speedy settlement of the dispute. Although both procedures provide for the application of a summary declaratory judgment [rito sommario di cognizione]<sup>65</sup>, only for the first procedure is it stipulated that the proceedings be settled "in any case" within twenty days (the law does not provide for any "speeding-up" term for the second procedure). The choice of the legislator to attribute the dealing of these proceedings to different judges - far from implying less protection for non-EU Member States - is aimed at ensuring the maximum speed of settlement of disputes on expulsion. The legislator's intent to provide an effective and prompt remedy to the person concerned emerges also from the fact that actions concerning the expulsion of nationals of non-EU Member States are totally free of charge.

88. It should be recalled that the justices of the peace –competent for disputes concerning the expulsion of nationals of non-EU Member States – are not professional judges but this does not mean that they lack professionalism. In the Italian legal system, justices of the peace have traits and functions far different from their common law counterparts. Law no. 374 of 21st November 1991, establishing the justice of the peace, provides that honorary judges called to assume the office of justice of the peace are appointed by the Minister of Justice, upon deliberation of the Supreme Council of the Judiciary, as a result of a careful selection based on qualifications, intended for Law graduates who got the qualification to practice law or who exercised judicial functions (for at least two years), as notaries, as law teachers in universities, executive functions and functions related to managerial careers in clerks' offices and judicial secretariats.

89. The law expressly provides that the appointment shall be made among people capable of properly carrying out these functions for their independence and prestige, as well as for their legal and cultural experience. In addition, the honorary judges called to hold the office of justice of the peace are appointed after a training period and after they have been declared eligible to perform the tasks, as required by law. In particular, the training period lasts six months and is carried out under the direction of a "tutor-judge", who ensures that the trainee carries out practice in civil and criminal matters at court offices or at offices of a particularly expert justice of the peace. The Judicial Council organizes and coordinates the training following the directives of the Supreme Council of the Judiciary (now School for the Judiciary), appointing "tutor-judges" among court judges and organizing several theoretical and practical courses. At the end of the training period, the tutor-judge draws up a report on the training which was carried out. At the end of the training period, the Judicial Council expresses its assessment on competence and provides a list of suitable candidates for the appointment as justice of the peace, on the basis of the reports of the tutor-judges and of the participation in the courses.

90. Great attention is also ensured in the subsequent phase, providing for regular refresher courses. This activity is structured –based on specific legislative provisions - according to the specific needs of each district and with attention to subjects specifically dealt with in the different geographical areas (for example, expulsion of nationals of non-EU Member States). These refresher courses are organized on a yearly basis by the same

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<sup>63</sup> Article 18 of Legislative Decree no. 150 of September 1st, 2011

<sup>64</sup> Article 17 of Legislative Decree no. 150/2011

<sup>65</sup> Articles 702-bis et seq. of the Code of Civil Procedure

body organizing the training and refresher courses of professional judges and require the involvement of professional judges.

91. The Superior School for the Judiciary provides both the access of honorary magistrates to the courses organized by the School for professional magistrates, and the carrying out of five training courses reserved exclusively to honorary magistrates, for a grand total of 626 honorary magistrates. It is a central training offer that supports the decentralized one, delivered by the commissions for the training of honorary magistrates, operating in each Court of Appeal.

**Recommendation §118**

*Ensure that all decision makers within the Territorial Commissions are adequately trained.*

92. Training of the territorial Commissions' representatives for the recognition of international protection is already implemented through training initiatives organized by the National Asylum Commission, also by means of video-conference devices. A training scheme has also been included in a Support Plan which the Ministry of Interior will shortly launch with EASO.

**Recommendation §119**

*Ensure that those migrants awaiting for the judicial decision on their request to suspend repatriation (...), not be repatriated before the aforementioned decision is made.*

93. Italy underlines that the suspension effect caused by challenging a negative decision made by the competent territorial Commission for the recognition of international protection already exists in the Italian system. In fact, in the event of rejection of the asylum application, a temporary residence permit called "for asylum application" is issued to the applicant.

**Recommendation §120**

*Provide access to basic services to everyone living in the Italian territory regardless of their immigration status.*

94. Italy confirms that access to basic services, primarily sanitary ones, is guaranteed to all migrants in Italy even if in an irregular condition.

**Recommendation §121**

*Take all necessary measures to execute of the judgment of the European Court of Human Rights in the Hirsi case.*

95. Regarding the Hirsi case follow-ups, Italy recalls that the "Processo Verbale" (see comments to Paragraph §47) provides the basis for a new cooperation between the two countries, with a clear reference to the respect of migrants' human rights, also related to the stay of irregular migrants in Libyan reception centers. At the same time, all individuals possibly intercepted at sea are currently brought to specific centers in Italy, in order to assess their individual situation, respecting all guarantees provided for by the European Convention of Human Rights.

96. As a result of the meeting of 7 March 2013, the Council of Europe's Committee of the Ministers expressed its appreciation for all measures adopted, holding that Italy complied with the indications contained in the judgment<sup>66</sup>.

### **Recommendation §122**

*Fully implement the EU Employers' Sanctions Directive, including through developing comprehensive measures to sanction Italian employers who abuse the vulnerability of migrants by paying them low or exploitative wages.*

97. Italy points out that the EU Employers' Sanctions Directive<sup>67</sup>, has been implemented by the Italian legislator through Legislative Decree no. 109 of July 16, 2012.

98. As to the sanctions (Paragraph §87 of the Report mentions "complete impunity"), Italy observes that the phenomenon of the so-called "caporalato" [illegal employment] was not only the subject of the aforementioned Legislative Decree, but also of other more substantial regulatory intervention implemented by Decree-Law no. 133 of August 13, 2011, on "Further urgent measures for financial stabilization and development", entered into force on August 13, 2011<sup>68</sup>, which introduced a new type of offence in the Criminal Code: "Illegal intermediation and exploitation of labour", aimed at better fighting the "caporalato". The new offence (Article 603-bis), which punishes "whoever carries out an organized intermediation activity, recruiting labor or organizing its activities characterized by exploitation, by means of violence, threats, or intimidation, taking advantage of the state of necessity or needs of the workers", provides a more effective fight against all forms of labor exploitation (applicable to anyone, including migrants), the punishment of which was previously provided for by mild provisions.

99. The penalty established for the basic offence is imprisonment from five to eight years together with a fine ranging from 1,000 to 2,000 euros for each recruited worker; specific aggravating circumstances (resulting in an increase of sentence from a third to one half) are: 1) the fact that the number of recruited workers is more than three; 2) the fact that one or more recruited persons are minors of non-working age; 3) having committed the offence exposing "intermediated workers" to seriously dangerous situations, given the characteristics of the tasks to be performed and working conditions. In those cases, migrants denouncing or cooperating during the penal procedure against the employer can obtain a resident permit for humanitarian reason. Specific sanctions for legal persons (such as companies or corporations) that employ irregular migrants are also provided.

100. In order to provide a complete framework of sanctions, mention should be made of particularly severe ancillary punishments (Article 603-ter): a) disqualification from holding executive posts within legal entities or enterprises; b) prohibition to enter into contracts for works, fiduciary task-work contracts [cottimo fiduciario], contracts for the supply of works, goods or services in the public administration, and related subcontracts; c) exclusion for a period of two years from benefits, loans, grants or subsidies from the State or other public bodies and from the European Union relevant to the field of activity in which the exploitation took place.

101. As to the interpretation in the case-law of the Supreme Court [Corte di Cassazione], even before the introduction of the criminal offense referred to in Article 603-bis, the said

<sup>66</sup> The issue of the payment of the just satisfaction still remains, due to the difficulty in identifying the actual legal representatives of the applicants and the concrete modalities of payment.

<sup>67</sup> Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers who employ illegally staying third-country nationals.

<sup>68</sup> Converted, with amendments, into Law no. 148 of Sept. 14, 2011

Court had extended the scope of certain pre-existing criminal offenses to suppress pre-existing forms of exploitation of migrant labor. In this regard, it should be noted that the Supreme Court integrated the offence of “Reducing to or keeping in slavery or servitude”<sup>69</sup>, by taking advantage of the state of necessity of others, with the conduct of those who take advantage of the lack of living alternatives of migrants from poor countries, imposing abnormal living conditions on them and taking advantage of the work done in order to pay back the migrants’ debt incurred with those who facilitated their irregular immigration”<sup>70</sup>.

102. It should be also recalled that the 1998 Legislative Decree No. 286 had already been dealt with irregular employment associated with labour exploitation, ensuring for the foreign national who reports his/her employer and his/her condition of exploitation the possibility to be issued a residence permit for humanitarian reasons.

**Recommendation §123**

*Effectively sanction landlords who exploit migrants by housing them in appropriate and unsanitary conditions*

See comments to Recommendation §122 and Paragraph §87.

**Recommendation §130**

*Promote the family reunification among unaccompanied minors (both asylum seekers and not) with their relatives regularly resident in other EUMS.*

103. Italy observes that such measure could prove effective and successful as regards the protection of the minor migrant and his/her social and cultural settlement. However, this would request a legislative intervention from the EU and the creation of a common data bank among the EU Member States, thus allowing the child’s reunification also with his/her relatives regularly residing in other EU Member States and not only the limited reunification currently regulated by the Consolidated Immigration Act.

104. Italy believes the text could be amended as follows:

“Improving the mechanisms provided for by the Dublin Regulation through the prior implementation of the minor’s best interest criterion, in conformity with the UN Convention on children’s rights of 1989, thus facilitating the transfer of foreign unaccompanied minors to those MS where their family members legally reside”.

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<sup>69</sup> Article 600 of the Criminal Code

<sup>70</sup> Court of Cassation, Sec. 5, Judgment no. 46128 of Nov. 13,2008, filed on Dec.15,2008, PM in proc. Ingrassia, Rv. 241,999