Commissione straordinaria
per la tutela e la promozione dei diritti umani

Stranieri dentro

Presentazione del Rapporto di ricerca

"La criminalizzazione dell'immigrazione irregolare: legislazione e prassi in Italia"

Giovedì 27 giugno 2013, ore 17
Senato della Repubblica, Palazzo Giustiniani, Sala Zuccari
Roma, via della Dogana vecchia 29

Introduzione
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I giornalisti devono accreditarsi presso
l'Ufficio stampa del Senato, fax: 06.6706.2947
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06.6706.5299

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The criminalization of irregular immigration: law and practice in Italy

PISA
UNIVERSITY
PRESS

The criminalization of irregular immigration: law and practice in Italy / Alberto Di Martino ... [et al.]. - Pisa : Pisa university press, 2013

325.45 (22.)
I. Di Martino, Alberto 1. Immigrazione - Italia - Diritto
CIP a cura del Sistema bibliotecario dell'Università di Pisa

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Società con socio unico Università di Pisa
Capitale Sociale € 20.000,00 i.v. - Partita IVA 02047370503
Sede legale: Lungarno Pacinotti 43/44 - 56126 Pisa
Tel. + 39 050 2212056 Fax + 39 050 2212945
press@unipi.it

Member of

ISBN 978-88-6741-077-4

graphic design: Andrea Rosellini

The cover photo was taken by Raffaella Cosentino, a freelance journalist, at the centre of identification and expulsion Ponte Galeria in Rome. Copyright Raffaella Cosentino.

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Acknowledgements

We wish to express our warmest thanks to all those who have helped us in writing this report and in collecting the information we have included. In particular, we would like to thank Guido Savio, attorney at law- Bar of Turin, ASGI, and Salvatore Fachile, attorney at law- Bar of Mistretta, ASGI, for their insightful advice. We also want to thank Angiolino Marrone, The Ombudsman for prisoner's rights of Lazio, Simone Ragno, the contact person at the CIE of Ponte Galeria for the Office for prisoner's rights of Lazio, and Raffaella Cosentino, freelance reporter, for the information they gave us. We would like to thank Prof. Francesca Romano, Scuola Superiore Sant'Anna, for the statistical projections related to the cost of CIEs. We are more generally thankful to all those who have worked for the campaign "LasciateCIEntrare." Last, but most important, we are extremely grateful to the Open Society Foundations, without whose funding this project would never have been possible. The usual disclaimers apply.

The writing of this research was divided between the authors but the end result is a joint whole. Alberto di Martino wrote the executive summary, the introduction and the conclusions and recommendations; Francesca Biondi Dal Monte wrote Part 1.1, the first two paragraphs of Part 1.2; part 3.5 and the relative Annex (pages 7-30, 111-120 and 145-148); Ilaria Boiano wrote Part 1.2 and Part 3.4 and the relative Annexes (pages 30-61, 97-110 and 133-143); Rosa Raffaelli wrote Part 2 (pages 65-93). All translations from an original Italian text (including the press release and the decisions commented) are ours. This report is last updated at October 2012.

Executive summary

This report presents the main findings of a research project that lasted almost two years and that has been financed by the Open Society Foundations. Our work on irregular immigration has been triggered by allegations of shabby detention conditions in the Centers for Identification and Expulsion (CIEs), where irregular immigrants may be detained before their expulsion, as well as by the awareness that the Italian system for the removal/expulsion of irregularly staying third-country nationals is not in line with the EU Returns Directive (Directive 2008/115). Indeed, it did not comply with the Directive at the time when we begun working on this issue, and it is still not in line with it, even after the Court of Justice declared such incompatibility (with its decision in El Dridi) and the law was amended with a view to ensure compliance.

The length of the project testifies of the frequent changes in national immigration law – a field of law which is always evolving. The report thus presents a snapshot of the legal framework concerning the treatment of irregular immigration in Italian, European and international law at the time of publication (end of 2012). Its main purpose, however, is not just to analyze existing legislation, but to focus on the everyday practice of Italian enforcement authorities, to check whether they actually comply with existing legislation. Our main finding, which we can already anticipate here, is that, on the one hand, Italian legislation concerning irregular immigration does not comply with constitutional, European and international requirements; on the other hand, the day-to-day practice of immigration enforcement authorities does not even comply with Italian law. Finally, we also attempted to evaluate the costs of the management of irregular immigration, and we came to the conclusion that, even from a strictly economical point of view, the existing system is both ineffective and inefficient.

The focus of the report is on the system of expulsion. Indeed, the Italian immigration system, seemingly in line with the Returns Directive, is based mainly on **expulsions**: irregular immigrants are subjected to removal/expulsion, and may be detained for up to 18 months (6 months plus exceptionally an additional 12) in the Centers for Identification and Expulsion (CIE).

This system, however, although it might seem to comply with the Returns Directive, is clearly not in line with it; moreover, we identified a number of additional problems, both legal and practical.

First of all, as emerged while we were writing this report (perhaps at the very moment we encountered the last in a long series of difficulties in gathering data and access to CIEs), the whole system of detention in the CIEs is **unconstitutional**, since it violates -first of all- Article 13, one of the most characterizing provisions set forth in the Italian Constitution. Indeed, Article 13 recognizes the most basic fundamental right concerning individuals living in a democratic society: that of personal freedom. This provision solemnly declares that **personal liberty** is inviolable, and that deprivation or restrictions of personal liberty may only take place "in such cases and in such manner as provided by law" - and this limit protects everyone, citizens and immigrants alike. However, detention in the CIE is not regulated by (Parliamentary) law: there is no law -and basically not even secondary sources- detailing the manner in which such detention is to take place. The consequence of this omission is not merely formal - the principle of legality may seem a mere procedural guarantee, but it actually is an important, substantive protection against arbitrariness. Indeed, the absence of a general law, detailing the conditions of detention in the CIEs, has made the development of different practices possible: thus, immigrants who are detained in a CIE are treated differently from those who are detained in another, giving rise to substantive disparities in their ability to enjoy their fundamental rights and in the level of their restriction.

The violation of Article 13 has therefore led to a **violation of the principle of equality**, or non-discrimination, which is also a basic rule of the Constitution (it is actually in Article 3, as the third most important principle of the whole legal system). Indeed, absent a general law, each CIE has its own rules, written or unwritten. This leads, firstly, to arbitrary decisions and uncertainties: immigrants are left in a condition where they do not know which rights they have, if ever they have any, and it is left upon those who manage the CIEs (be they public authorities or, most often, not) to explain them to the detainees, to enforce them and possibly to infringe them.

Secondly, it leads to differences in treatment that are not justified by differences in legal status. If all immigrants in the CIE are the same (irregular third-country nationals, whom the State is trying to identify and expel), then they must also be treated the same. On the contrary, as we have witnessed, there are great disparities between different CIEs: for instance, in

some CIEs detainees are allowed to talk with their family on the phone or in person, and may use the courtyard to play soccer, while in most of them visits are limited to a certain number per month (often, less than the minimum guaranteed by the prison law to criminal detainees) and there is sometimes no common area to eat or socialize -not to say to play soccer, despite the looting temptation of a pitch, not accessible for security reasons. Thus, in many cases, immigrants who are detained with a view to their expulsion – a form of administrative detention – are treated **worse than criminal detainees**, who have been convicted of crimes: this is a consequence of the lack of a general law, which should be adopted at the national level and reflect a parliamentary decision on the balance to be drawn between fundamental rights and the need to ensure the effectiveness of the expulsion system.

Another problem that we have identified is the complete lack of **transparency and openness** in the management of the CIEs. This lack of transparency, which seems to be unacceptable in a democratic State, concerns the applicable regulations, the data, and the physical structures of the CIEs themselves.

Firstly, with regard to **access to the buildings**, as a consequence of the absence of a clear, general legislative framework, there are no clear rules governing access to the CIEs – the relevant authorities may grant it, or refuse it, at their complete discretion. Thus the CIEs have been closed to the public (including journalists) for a long period of time, during which no control over the conditions of detention was possible. While reporters have tried to overcome the prohibition to access the CIEs in a number of manners, it is shocking to see that, in a democratic State, there exist entire areas of the public territory that are not subjected to any form of democratic control.

Secondly, a complete lack of transparency also concerns the **internal regulations** applicable in the CIEs. In the lack of any general legislation, most CIEs are regulated by internal acts, which are to be applied by those who manage them – who are, however, not civil servants, subjected to the laws on the police or the army, but ordinary citizens themselves. These regulations are often confidential: our requests to see them have been regularly refused, although in some cases (for some CIEs), they have been granted. It is clear that such denials affect the ability of the general public to exert some form of control over the existing regulations (again, as opposed to the laws and implementing acts governing criminal prisons); in addition to that, the decision to make the internal regulations public or not seems to be utterly arbitrary (and therefore discriminatory). Indeed, either there are reasons of

State security to protect the confidentiality of the applicable regulations, or there are none – it is difficult to see why such reasons would apply to some CIEs and not to others.

Thirdly, the **data** on the CIEs are either confidential, or partial and fragmented. Thus, for instance, when we requested data on the cost of the CIEs, our requests were, simply, ignored – our numerous requests received no reply. Thus, we had to extrapolate such data from the explanatory reports and impact assessment evaluations of single laws and draft laws – these, at least, must be accompanied by a detailed assessment of their impact over the State's **budget**.

Another aspect on which we decided to focus our report is the examination of whether the system of expulsion is efficient and effective: does detention in a CIE usually lead to expulsion?

If we consider the number of persons who, after having been detained for the maximum period, have not been identified and expelled, the only conclusion that we can draw is that this system is **utterly ineffective**.

Indeed, many irregular immigrants who are detained in the CIEs end up being freed and served with an order for voluntary departure: thus, their detention does not serve to ensure their expulsion, and is therefore unjustified according to the Returns Directive. According to the data provided by the Ministry for Home Affairs, since 2007, every year only around half of the persons who are detained in a CIE are actually expelled: the other half is released (either with due cause, for instance if they won an appeal, for health reasons, etc., or because, at the end of the maximum period of detention, they had not yet been identified) – or they manage to escape from the CIE. On such a background, and given that, according to the estimates included in legislative reports, one day of detention in a CIE for one person costs around 55 euros, it seems that the policy of detaining and trying to expel is particularly **inefficient**. However, even these data are not made public, even less so in a form that is accessible and that allows citizens to question the policy behind such an inefficient way of spending public funds. For this reason, one is led to wonder whether the public's control over the budget (that is, its control over how taxpayers' money is spent) has been deliberately made impossible.

There are a number of additional aspects under which the current immigration policy, as applied in practice, is clearly **irrational** and inefficient, even just from the point of view of expenditures. Thus, for instance, there have been many cases of immigrants who, after being convicted of criminal

offences and imprisoned for the term of their sentence, were subsequently detained in a CIE in order to identify and expel them – this was necessary because, during the months and sometimes years they spent in prison, no action was taken to identify them. This procedure is clearly too cumbersome and utterly inefficient, since it leads to an unnecessarily protracted deprivation of personal freedom and, as a consequence, to the irrational use of public money. Moreover, such a practice violates EU law, and in particular the Returns Directive.

There are a number of profiles under which Italian laws and practices violate the **Returns Directive**, and in particular the principle, enshrined in para. 16 of its Preamble, according to which "the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient." In Italy, even after the law has been amended to ensure formal compliance with the Returns Directive, none of these principles is respected. Detention is not used as a measure of last resort, but as a measure of first resort – alternative measures are hardly ever, if ever, applied, and in some cases public officers we have spoken with seemed to be quite unaware of their possibility. Moreover, it is difficult to say that detention is used "to prepare the return" of an immigrant whenever he has already been detained, albeit in an ordinary prison, before being brought to the CIE: in these cases, the spirit of the returns directive is completely circumvented, and its *effet utile* is not ensured. Moreover, in these cases (as mentioned above) we see the combination of an unnecessary restriction of fundamental rights (in particular, the right to persona freedom) and the irrational spending of public money.

Finally, this report also focuses on some aspects of **the criminal law regime of irregular immigration**. There has been a trend, in recent years, to criminalize irregular immigration – it is a trend that is known everywhere, and that has been particularly strong in Italy. However, the application of criminal measures against irregular immigrants can lead to a number of problems from the point of view of international and EU law, as emerges from the recent case-law of the Court of Justice of the EU. Indeed, as the Court of Justice has clarified, irregular immigrants, once identified as such (and identification must take place as soon as possible, and in any case in a reasonable delay), must be expelled. This means, firstly, that they cannot be

charged with a criminal offence, and imprisoned for being irregularly present, as happened in France before the Achughbabian judgment – once they are identified as irregular immigrants, they are subjected to the application of the Returns Directive. This means, secondly, that irregular immigrants must be expelled in accordance with the returns directive: their expulsion, if based merely on their irregular presence, must take place with full respect of the (few, but nonetheless significant) guarantees accorded by the directive. Yet, the Italian system of expulsions has been (re)structured mainly with a view to circumventing these guarantees: irregularly staying third-country nationals are criminalized and punished with a fine, which may be converted into a so-called **"criminal" expulsion**. The basic idea behind such a complex legislation is, as explicitly stated by the former Minister for Home Affairs, to circumvent the returns directive: since States may exempt criminal expulsion from the application of the directive (in accordance with its Article 2.2.b), by qualifying the expulsion of any irregular immigrant as "criminal" the Italian legislator aimed at making the directive completely inapplicable in Italy. Such a procedure, however, clearly violates the principle of good faith and loyal cooperation in the application of EU law, as well as the purpose of the directive of harmonizing legislation across EU States.

A second problematic aspect of the criminalization of irregular immigration is its potential **violation of international law**. Indeed, many irregular immigrants who arrive in Italy have been smuggled: their perilous travel is organized by unscrupulous smugglers who often put the lives and safety of the migrants at risk. Now, smuggling is a crime according to international law: the UN Convention on Transnational Organized Crime has a specific Additional Protocol on smuggling of migrants, which Italy duly signed and ratified. According to Article 5 of the Protocol, however, "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6" – which seems to mean that migrants cannot be criminalized for having been smuggled into a country. This rule clearly prohibits the criminalization of irregular immigration whenever this is facilitated by smugglers: however, Italian laws and practices do not distinguish between "ordinary" irregular immigrants and smuggled persons. Moreover, there are other categories of immigrants whose criminalization is forbidden by international or EU law: for instance, those who have a justified ground for non-return cannot be criminalized, according to the Court of Justice of the EU (see the Achughbabian decision); the same for victims of trafficking (see the UN Protocol on Trafficking). These

rules require States to distinguish between different categories of irregular immigrants, since some are protected against criminalization. Yet, while this may happen in the case of victims of trafficking, who are entitled to a special status under national law (although in practice their identification is often problematic), other categories are never granted a special status.

If these are the problems that this report identifies, it also attempts at bringing about positive change and making a positive **contribution to the current debate** over irregular immigration.

Firstly, since we have identified a number of problems of legality (violation of constitutional law, international law, and EU law), the main aim of the report is **to inform judges, lawyers and all public authorities** that are involved in migration policies: to draw their attention to the problems that exist, and to **suggest some possible avenues** to solve them. For instance, if a rule violates constitutional law, what we suggest (in the recommendations sections) is that judges must refer it to the Constitutional Court – and lawyers should suggest this course of action. If a rule violates EU law, it must not be applied – and if the judge is in doubt, it can always refer the case to the Court of Justice. If a rule violates international law, it also implicitly violates constitutional law (Article 117 of the Constitution is clear on this point) –the case can therefore be brought in front of the constitutional court. Finally, and most importantly, since the whole expulsion system is clearly unconstitutional, because it is not provided by law, cases based on the violation of Article 13 should be brought in front of the Constitutional Court: such a course of action would lead to dismantling the system in its entirety, at least until the Parliament approves a law on these issues.

Secondly, the other important contribution of our report is **its focus on data**. This is an area where huge amounts of money are spent to pursue a policy that is both ineffective and illegal. Knowledge, in this perspective, can trigger change: if the general public is made aware of how much money is spent in a hopeless attempt to expel irregular immigrants, and how few persons are indeed expelled, hopefully it will pressure the Government to rethink immigration policy, making it more rational.

Introduction

The report we are submitting does not deal with all the aspects of Italian immigration law.

This may sound quite obvious considering that 'immigration law' as such was not the specific subject of our research. The same statement is far less obvious if one considers that, in the light of our results, a general statement is still possible: a valid system of law that is worthy of being called "immigration law" is extremely hard to find in the daily practice of immigration government and management.

It would be more correct to say that we are attempting to deal with the regulation of a wider struggle rather than a system of law. This regulation is mostly provided by administrative authorities and is characterized by the use of restrictive measures that are supposedly applied "for security reasons." This struggle to control immigration flows has, however, begun to show its inconsistencies with Italian constitutional principles and even with European Union law, which already falls short of safeguarding the rights of irregular immigrants.

The criminal-administrative handling of immigration is now so specialized that focused training is necessary for all those who are called to deal with it – lawyers, judges, administrative authorities. It may seem of no importance, but the main feature of this specialization is that there are many non-formalized practices that affect the interpretation of the laws – or are even replacing them. Thus, if these practices remain unknown to scholars, that entire area of juridical experience remains unknown, and cannot be subjected to criticism or tested against the Constitution and international and European law.

Getting to know these practices is not easy for a researcher. One of the reasons is that authorities are not willing to grant requests for data and figures: these data are allegedly relevant to state security and therefore authorities are prevented from divulging them.

Another reason that hindered our research is that, as far as criminal procedures are concerned, there is no relevant computerized database available and thus we are prevented from giving a general evaluation of the impact and efficiency of this system. For example, with regard to the "security package" that entered into force in 2009, which included in particular the intro-

duction of the crime of irregular immigration, the Ministry of Justice and the ISTAT (the governmental agency for statistical studies) provide totally different data: there were several thousand trials according to ISTAT, only around a dozen according to the Ministry.

The general feature of the Italian situation – the difficulty of obtaining reliable data – is extremely worrisome when one considers the specific subject of this research: to get a realistic evaluation of the legal and practical impact of the amendment to the 2009 "security package". This law is marked by a sort of "turn of the screw" on irregular immigration. However, the inefficiency of the policies implemented to stop irregular immigration seems to be an ingrained feature rather than an accidental outcome. The number of immigrants who are effectively expelled is ridiculously low if compared to the estimates on the number of irregular immigrants living in Italy; the centres for identification and expulsion (CIEs) do not seem to be a useful tool to improve the expulsion strategy, for reasons which will be analyzed in the main part of this report.

One of the most important amendments involved the extension of the maximum length of the 'administrative detention' up to 18 months. This had deleterious effects on the conditions of life in the centres and on their management: not because of the prolongation of the time of effective permanence of each person in the CIE, but because of the uncertainty of that time, with its consequent sense of pointless waiting. As a result, this situation can lead to delinquency, as shown by enquiries carried out – with a lot of difficulty – by a few journalists (mostly freelance). We had the opportunity to meet and interact with some of the journalists who filmed in the CIEs, to whose work this report owes a lot.

With regard to the conditions of life in the centres, the administrative authority alone may grant access to the CIEs. There are no set rules, and we had to rely on the good will of those working in the centres to visit them. This is far from acceptable in a modern state founded on the rule of law, even when denial is allegedly based on security reasons: refusals are the norm, which is one of the main reasons for the difficulties we faced and for the gaps in the report. We tried to fill the lack of information by using unofficial methods. In fact, we gathered some data which the Ministry had denied us by examining reports from the *Corte dei conti* (Court of Auditors). Another method we used was simulation on a statistical basis, e.g. by considering the costs declared for the maintenance of the CIEs and their actual ability to match this purpose.

All this, and in particular the difficulties we faced and the secretive na-

ture of the administration of the CIEs (contrary to the principles of open, transparent government, which are essential in a democracy), highlights that the entire system of the identification and expulsion centres, in terms of current Italian law, is inconsistent with the Italian constitution.

Immigration law, as it is now, infringes upon the principle of legality, according to which only a statutory law can provide for restrictions of individual freedom: the CIEs are not regulated by law, but by administrative acts or even mere practices. It is significant that the criteria to build the CIEs were not originally set by law.

It infringes upon the principle of equality, because as far as we know the centres do not all apply the same set of rules, although they do share the same restrictions on individual freedom: thus, immigrants detained in different CIEs are treated differently, although their legal status is the same.

It infringes upon the principle of democracy, because the obscure nature of the rules that actually apply to the centres creates a field where secrecy is justified on the grounds of the superior interest of the state, outside the boundaries of the laws that specifically rule official secrets. This all implies that an entire section of collective life and territory (on which the centres are built) is removed from any democratic control.

The consequences of this statement could be extremely serious. However, they must be taken into consideration as representing the grounds for any possible advocacy action on specific issues (as highlighted in various boxes throughout the report).

Part 1

Immigration, security and expulsions in the Italian legislation and praxis

1. The framework of the security packages 2008-2009

The following sub-sections describe the crucial steps that have been taken to devise a systematic immigration law and the main intervening acts that increasingly view immigration as a security concern.
Starting with a brief analysis of the general provisions regarding immigrants and the first legislative acts dealing with immigration, the analysis focuses on the legal process that led to the passing of the immigration law in 1998, by describing its main amendments and criticisms up to the series of security packages, approved between 2008 and 2011.
These latest legislative acts introduced a strict connection between immigration, security and emergency, introducing new crimes related to the status of irregular immigrants.

The progressive adoption of the "expulsion model" in the Italian system of the removal of aliens

The phenomenon of immigration, which has been increasing since the 1980s, was initially addressed by the Italian authorities as an issue related exclusively to the **labor market**. In fact, the first legislation was introduced to enforce the I.L.O. Convention of 24 June 1975, No. 143, and to stem practices encouraging irregular intermediation and employment (Law No. 943/1986).

The only provision referring to immigrants was in the codex of public security laws (Royal Decree of 18 June 1931, No. 773), which required all immigrants to present themselves to the public security authority within three days of their arrival, so that their presence in Italy was recorded, but only for the purposes of public security.

Although **Article 10 of the Italian Constitution** establishes that the legal status of foreigners must be regulated by law (so called "riserva di legge"), until the 1990s a third-country national's status was defined exclusively by administrative practices. After 1990, following the first substantial migration flow from Albania, there were some attempts at setting up a systematic

immigration policy, but this aim was only achieved in 1998. The table below summarizes the main regulations underlying the immigration law of 1998:

HISTORY OF THE MAIN IMMIGRATION LAWS		
ACT	PROVISIONS	CRITICISMS
1990, "*Martelli* Law" **Law Decree n. 416/1989, converted with amendments into law n. 39/1990**	• introduction of residence permits • system of administrative expulsion for public order reasons • removal orders must be grounded • enforcement of the order is suspended in case of appeal • specific description of the appeals procedure • removal is generally enforced through an order to leave Italy • enforcement of the removal order is coercive only in the case of non-compliance with the order to leave • special surveillance of those issued with a removal order	• lack of a comprehensive policy protecting the rights of legal immigrants • disproportionate broadening of the conditions to legalize the status of irregular immigrants • inefficacy of the removal procedure
Law Decree No. 107/1993, temporarily in force in 1993, not converted into law	• power of the *prefetto* to remove detained immigrants by means of forced deportation to the border	• violations of the principle of equality, right of defense, presumption of innocence
1993, "*Conso Decree*" **Law Decree n. 187/1993, converted with amendments into law n. 296/1993**	• introduction of a type of removal for detained immigrants upon their request • the immigrant who destroys the passport or equivalent document in order to escape the execution of the expulsion order or who don't do the best to obtain from the competent diplomatic or consular authorities the travel document required shall be punished with imprisonment from six months to three years (article 7 bis, Martelli Law)	• in Judgment No. 34/1995, the Constitutional Court stated that the crime of article 7bis is not consistent with article 25 of the Italian Constitution because it is excessively vague
1995, "*Dini Decree*" **Law Decree n. 489/1995, reiterated five times and not converted into law**	• expulsion adopted on public authority's initiative • expulsion for reasons of public order and security of the state • expulsion as a preventive measure • obligation of residence if it is necessary to obtain information concerning identity or nationality or valid travel documents	• primacy of expulsion as a means to control immigrants' flows • the obligation of residence is the first administrative limitation to personal freedom of immigrants

The Immigration Law and subsequent amendments by the "Security Packages"

In 1998, **Law No. 40/1998** (the so-called **Turco-Napolitano law**) was enacted with the aim of defining a clear and unitary framework of provisions on the entrance, permanence and removal from Italy. The text of that law brought together other existing provisions, thus becoming **Legislative Decree 25 July 1998, No. 286**, entitled "Consolidated text of provisions governing immigration and the status of the alien", which is the current Italian legislation on immigration (hereinafter **Immigration Law**). It has been amended several times, so that now the legislation is the result of different policies that are not always consistent with each other.

Among other modifications, **the *Bossi-Fini* Law, No. 189/2002**, represents the most consistent reform of the last decade with the explicit political aim *of countering the danger of a real invasion into Europe* (as is written in the technical Report accompanying the draft of the Bossi-Fini Law, available at http://www.parlamento.it/service/PDF/PDFServer/BGT/00009027.pdf) and to counteract any attempt at circumventing the expulsion procedure. This aim was to be achieved through the immediate enforcement of removal by forcible deportation to the border, in order to find a solution for the inefficiencies of the Immigration Law. Since the Italian Constitutional Court declared some parts of the Bossi-Fini Law to be inconsistent with the Italian Constitution (judgment of the **Constitutional Court No. 222 of 15 July 2004**), **Law Decree No. 241/2004** was enacted. The decree modified the current rules on the expulsion of irregular immigrants to ensure that the guarantees provided by Article 13 of the Constitution fully applied to immigrants whose forcible deportation had been ordered and, at the same time, to ensure the maximum speediness of the confirmation procedure and the enforcement of expulsions.

Another important act amending the Immigration Law was **law No. 155/2005 converting Law Decree No. 144/2005** (hereinafter 2005, Pisanu Decree). It combines immigration measures with those aimed at counteracting the emergency of international terrorism and introduces ministerial expulsion orders for reasons of terrorism.

However, the most significant amendment act was the so-called **"Security Package"**, a group of legislative measures on which this report focuses. It was one of the first actions of Berlusconi's government in 2008. With reference to immigration, the measures approved are characterized by the close

connection between **immigration policies and security.**

The Security Package

1) Law Decree No. 92/2008, converted into Law No. 125/2008 with amendments (hereinafter "2008 Security Package");
2) a bill – which became Law No. 94/2009 (hereinafter "2009 Security Package");
3) another bill with which Italy joined the Prüm Treaty establishing the national database of DNA – which became Law 85/2009;
4) three Legislative Decrees amended the legislation on:
   - family unification of immigrants, introducing mandatory **DNA testing to ascertain the familial relationship**, restrictions on the categories of family members whose family reunification may be granted, and increasing the minimum income that has to be proven in order to enable the reunification – which became **Legislative Decree 160/2008**;
   - recognition of refugee status, which has become **Legislative Decree 159/2008**;
   - free movement of EU citizens, which should have introduced verification of requirements, such as income, for residence in the territory – abandoned because of informal remarks of the European Commission.

As we will see, this set of measures may be read as the expression of a policy aimed at curbing immigration, which is increasingly perceived as destabilizing the host society.

The **2008 Security Package** contains "urgent measures in the field of public security". The main amendments were:

- introduction of a new aggravating circumstance: all crimes will be punished with a harsher penalty if the offender committed the crime while he or she was residing irregularly in the country (in judgment 249/2010, the Constitutional Court declares that the aggravating circumstance is in breach of the Italian Constitution);
- all immigrants, even EU citizens, are subjected to expulsion if sentenced to more than two years' imprisonment (art. 235 criminal code);
- introduction of the crime of providing lodgings to an immigrant without a residence permit (imprisonment between six months and three years and confiscation of the property);
- increased penalties for all those who facilitate an irregular immigrant in staying in Italy (when the act is committed by two or more people or concerns the irregular residence of five or more immigrants);
- increased penalties for all people who employ immigrants without a residence permit (imprisonment between six months and three years and a fine of 5,000 Euros for each worker employed);
- the name of the temporary detention centre was changed from CPT to CIE (Centre for Identification and Expulsion).

Statements of the Unione Camere Penali Italiane about the 2008 Security Package

- **About the aggravating circumstance**: The Italian system distorts the function of criminal prosecution, bending it to emphasize the subjective disvalue rather than the more negative relevance of forms of aggression against legal interests.
- **About the new crime of giving lodging to a immigrant without a residence permit**: The confiscation of the real estate is excessive. The crime is not consistent with the constitutional principle of offensiveness.

The close connection between security and immigration is further highlighted by the **2009 Security Package** - entitled "measures in the field of public security". The main changes were:

- introduction of the crime of irregular entry and stay (fine from 5,000 to 10,000 Euros, see Part 2);
- the maximum period of detention in a CIE is extended from 60 days to 180 days;
- duty to show the resident permit to obtain authorizations, as well as access to public services, with the exception of sports and recreational activities, access to health care (for urgent and essential treatments) and schools;
- all third-country nationals who wish to marry must have a residence permit. In judgment No. 245/2011, the Constitutional Court declared that this provision is not consistent with Article 29 of the Italian Constitution, which provides for the right to marry as a fundamental human right;
- extension of the time required to obtain citizenship by marriage: from 6 months to 2 years, or 3 years if the marriage was celebrated outside Italy. The times are halved in the presence of natural or adopted children.
- introduction of a fee of 200 Euros for each application for citizenship;
- introduction of a fee (80 to 200 Euros) for any request of renewal / issuance of residence permits;
- introduction of the "Integration Agreement" for third country nationals over the age of sixteen years who enter Italy for the first time and who wish to apply for a residence permit for no less than one year. By signing the agreement, the aliens commit to achieving certain integration goals; loss of points can lead to expulsion. It is significant that this provision specifies that any action implementing the agreement

must not involve further public costs.

- introduction of an Italian language examination for the issuance of a residence permit for EU citizens who are long-term residents.

Press Release of "Unione Camere Penali Italiane" about the 2009 Security Package

The draft security law is a measure **of radically unacceptable content** and it represents a profound authoritarian involution of the system. This is reflected in the new rules on illegal immigration and detention centres for identification and expulsion, clearly not consistent with the Italian Constitution [...]. It shows to the people **the ferocious face of the State** by means of the easy demagoguery of the punitive ruggedness, thereby concealing and increasing well known faults of the system. More detention and more punishment will not guarantee more security, but instead it will determine the **collapse of the prison system** and a major burden for the judicial system resulting in a heavy impact in terms of security.

Once again, rather than dealing with a comprehensive reform of the system of crime and punishment that would bring it back to reasonableness, the citizens are deceived and the already exhausted system is further injured.

It is sad to see that, even where there would be the numbers to face and carry through a genuine reform process, **political propaganda prevails.**

Rome, July, 2 2009

The President of the Republic, Giorgio Napolitano, passed this bill, but he immediately expressed concern particularly regarding the "specific provisions whose consistency with the general principles of the criminal justice system is doubtful" - see **release of the Quirinale of July 15, 2009**. The President of the Republic focused especially on the crime of irregular entry and stay in Italy. While the President decided not to suspend the promulgation of these provisions due to their wide approval by the Parliament, he drew the attention of the Prime Minister and Ministers of Home Affairs and Justice to these problems "for any initiative they deem appropriate, in the light of the outlined problems". The letter was even sent to the Presidents of the Senate and of Chamber of Deputies.

Extract of the REPORT by Thomas Hammarberg

Commissioner for Human Rights of the Council of Europe
Following his visit to Italy on 13-15 January 2009

In the report the Commissioner focused on many aspects, including action against racism and xenophobia; the protection of human rights of Roma and Sinti; the protection of human rights of immigrants and asylum seekers; Foreign nationals' forced returns and compliance with the Rule 39 requests of the European Court of Human Rights.
With regard to the protection of human rights of immigrants:
"***While recognizing the serious challenges that migratory flows present to state mechanisms, the Commissioner continues to follow and to remain very concerned about new legislative measures on immigration and asylum which have been adopted or under consideration by Italy, such as those criminalizing the letting of accommodation to irregular immigrants and the decision to lift the ban on doctors to report to the authorities irregular immigrants who access the health system*** [discussed but not approved].
The Commissioner urges the authorities to review draft or adopted migration-related pieces of legislation that raise serious issues of compatibility with human rights standards, to pay particular attention to the needs of minor immigrants and to ratify promptly the Council of Europe Convention on Action against Trafficking in Human Beings" (see Executive summary of the report).

Finally, the most recent amendment to the Immigration Law was made by **Law Decree No. 89/2011** (hereinafter 2011 Security Package), entitled "Urgent provisions to complete the implementation of Directive 2004/38/EC on the free movement of EU citizens and for the transposition of Directive 2008/115/EC on the repatriation of irregular third country nationals", **converted into Law No. 129/2011**, on which this report will focus, especially in terms of its effects on the Italian legislation on the removal of third-country nationals.

The main changes concern the following:

- the expulsion of irregular third country nationals is enforced by immediate forced deportation in the case of:
- risk to public order and state security;
- risk of escaping;
- judicial removal;
- violation of precautionary measures applied by the *Questore*;
- violation of the terms for voluntary departure;
- introduction of forced removal for EU nationals for reasons of public order if they stay in Italy in violation of directive 2004/38/EC;
- the maximum term of detention in a CIE is increased from 6 to 18 months;
- administrative precautionary measures are prescribed in order to avoid the risk of absconding. Violation of these measures is sanctioned by a fine of 3,000 to 18,000 euros;

- the crimes of violation and repeated violation of the order to leave are modified by the introduction of a fine and the possibility for the justice of the peace to order expulsion instead of detention (see Part 2);
- the jurisdiction of the justice of the peace is extended to the violation and repeated violation of the order to leave, to the violation of precautionary measures and alternative detention measures;
- alternative measures may be applied to irregular immigrants who are not dangerous instead of detention in CIEs. Such measures include: passport withdrawal, obligation to stay in a place previously identified and easily accessible; duty to report to the police authorities. The violation of these measures is sanctioned by a fine from 3,000 to 18,000 euros;
- further measures to adapt national legislation to the European Directives 38/2004 and 115/2008.

The jurisprudence of the Italian Constitutional Court on immigration law

Many of the immigration regulations and amendments cited above were pending before the Italian Constitutional Court because of inconsistencies with the Italian Constitution. The main decisions were the following:

- **judgment 105/2001**: the Court stated that the detention of immigrants is a violation of their personal freedom and thus detention orders must be taken under the guarantee of Article 13 of the Constitution (in cases provided by law and upon the decision of a Court). In fact, in the case of detention, "the humiliation of human dignity" - which occurs in all circumstances in which a person is under the physical subjugation of another person's power - is an indicator of the significance of the measure in terms of personal freedom. Therefore the Court claimed that the guarantees of Article 13 of the Constitution cannot be lower in the case of immigrants, in order to protect other public interests. In the Constitution the right to liberty is declared as an inviolable right of all human beings;
- **judgments 222 and 223/2004**: The Court stated that the procedure to validate an order of coercive removal must fully respect the right of defense, as provided by Article 24 of the Italian Constitution. The Court also stated that mandatory arrest of immigrants remaining in Italy longer than five days after the issuance of an expulsion order (Article

14, par. 5-ter, of the Immigration Law **as amended by the Bossi-Fini Law**) is not consistent with the Italian Constitution (Article 13).

- **judgment 249/2010:** the Court stated that the aggravating circumstance introduced by the 2008 Security Package, increasing the punishment for crimes committed by irregular immigrants, is not consistent with the Italian Constitution. The Court found no reasonable reason to justify fighting irregular immigration "by considering the behaviour of irregular immigrants as more serious than the identical conduct, if carried out by Italians or EU citizens". Therefore the Court stated that the aggravating circumstance is not consistent with the principle of equality provided by Art. 3 of the Constitution, and with the harm principle established by art. 25(2) of the Constitution, which requires that a person can only be punished for his/her harmful conduct, not for his/her personal qualities.
- **judgment 250/2010**: The Court stated that the crime of irregular entry and stay in Italy (**introduced by the 2009 Security Package**) complies with the Constitution, since irregular entry and stay is not a mere personal condition (whose criminalization would be arbitrary), but a specific behavior: the violation of existing legislation. The rationale of the crime is linked to the interest of the State to control and manage migration: such an interest cannot be considered as irrational and arbitrary in terms of criminal law protection. The Court stated that the legal control of immigration – which pertains to the State in the exercise of its sovereignty, as an expression of territorial control – necessarily requires the irregularity of any violation of the relevant rules. Determining what the most appropriate sanction is for that offense, and in particular whether it should have a criminal or an administrative connotation, "falls within the discretionary choices of the legislature, which may well change over time", in relation to the changing characteristics and dimensions of migration and the significance of the different needs associated with it.
- **judgment 359/2010**: Article 14, paragraph 5 *quater*, of the Immigration Law (**as amended by 2009 Security Package**) – which criminalized the conduct of immigrants who remained in Italy after the issuance of an expulsion order and an order of removal – is not consistent with the Constitution. The rule did not exclude punishment when the criminalized conduct had been committed for a "valid reason" (such as situations of extreme poverty, lack of suitable means of transportation, difficulty in obtaining travel documents, etc.). The Court stated

that this provision has the same rationale as art. 14, paragraph 5-ter, of the Immigration Law, which punished immigrants subjected to a first expulsion order provided that their conduct had not taken place for a valid reason. As a consequence of the judgment, article 14, paragraph 5 quater now includes a similar clause.

- **judgment 269/2010, 299/2010 and 61/2011**: State and Regions, within their competences, shall protect the fundamental rights of each human being, regardless of his/her regular presence in Italy. The protection of inviolable rights has no impact on border control policies and the enforcement of criminal measures.
- **judgment 245/2011**: Article 116 of the Civil Code (**as amended by 2009 Security Package**) required a document certifying the legality of residence in Italy for any non-national who wanted to get married in Italy. The Court stated that this provision is not consistent with the Italian Constitution, because it affects the fundamental right to marry, which is protected under Article 29 of the Constitution, and it is an unreasonable and disproportionate measure to combat irregular migration and the so-called "marriages of convenience". In addition, the Court stated that this provision is not consistent with Article 117(1) of the Constitution (which provides that Italian legislation must be consistent with EU law and international law), because the right to marry is also guaranteed by art. 12 of the European Convention on Human Rights.

Immigration, security and emergency. The 2010-2011 emergency after the Arab Spring

On 12 February 2011 Italy declared the existence of a "state of humanitarian emergency in Italy in relation to the exceptional flow of citizens from North Africa". The effects of this declaration were extended until 31 December 2012.

After the declaration, a series of measures were adopted, related to the reception of foreign citizens and the identification of structures and areas to be used for the emergency, with particular focus on minors. Humanitarian permits were issued to ensure the temporary protection of the citizens of North African countries who came to Italy in the first few months of 2011.

The state of emergency was declared by President of the Council of Ministers Silvio Berlusconi **under law No. 225/1992, related to the power of the Department of Civil Defence**.

The state of emergency and law No. 225/1992

The President of the Council of Ministers, in case of "natural disasters, catastrophes **or other events** that, both for intensity and extent, have to be faced by using extraordinary powers and means", may declare the state of emergency, determining its duration and territorial extent in close reference to the quality and nature of events.

As a consequence of the declaration of emergency it is possible for the government **to adopt decrees notwithstanding any provision in force, within the general principles of law**.

Among the "**other events**", the Italian government included also the phenomenon of migration.

Nearly ten years before, on 20 March 2002, a state of emergency had already been declared to deal with the exceptional flow of immigrants to Italy, although in the 1990s this had been used to manage the flow of third country nationals from Albania. The state of emergency was extended **from year to year until the 31st of December 2012** "to manage the influx of immigrants".

The state of emergency which had originally been declared in 2002 eventually it also was adopted to deal with the flow of citizens from North Africa. In April 2011, a state of humanitarian emergency in North Africa was declared and later extended to other countries on the African continent.

Therefore, in Italy the state of emergency – concerning the whole national territory – has been renewed for ten years in relation to the exceptional flow of non-EU citizens, despite the fact that extraordinary powers are (or should be) limited to exceptional and unforeseen events. Clearly, the problems arising from the flow of immigrants – which have justified the constant declaration and renewal of states of emergency since 2002 – would have required structural measures and broader policies. The latter would perhaps have avoided or otherwise mitigated the problems deriving from the North African emergency, and in any case would have allowed Italy to move from a state of emergency to one of normality, where ordinary events (such as immigration) are dealt with through ordinary means and powers.

The immigration flows as a permanent emergency

The declarations of emergency **from 2002 to 2011** characterized immigration in Italy **as a permanent state of emergency**, even if the term "emergency" implies temporariness.

Immigration, on the contrary, became part of the daily events and was no more an unexpected or unpredictable situation.

Consequently, it should be duly regulated through structural measures that should be adopted within the processes of democratic representation: by the Parliament, not by the Government.

Flows generated by the Arab Spring uprisings (source: report Sopemi Italia 2011 Censis)

- in the 9 months that followed the ***Jasmine Revolution*** of January 2011, **26,354 immigrants** – the majority of whom were Tunisian citizens – arrived on the island of Lampedusa;
- by the end of September 2011, **25,935** of the over 700 thousand people who fled Libya at the start of the violence reached the island of Lampedusa; the majority of these immigrants were originally from Somalia, Eritrea, Sudan, Nigeria, Bangladesh, Burkina Faso, the Ivory Coast, Congo, Gambia, Ghana, Guinea, Liberia, Mali, Niger, Pakistan, Senegal and Sudan (almost none were Libyan nationals); many of them reached Italy in highly unseaworthy vessels packed with more than 600 people per boat;
- In the first 8 months of 2011, **almost 60,300** immigrants landed illegally on the coasts of Italy: 56,700 of them arrived in Sicily. In the whole of the previous year, the number of illegal immigrants landing in Italy stood at just 4,400 citizens, of whom just over one quarter (1,264 individuals) attempted to enter Italy through the Sicilian shores.

Italy set up diplomatic relations with the new governments of **both Tunisia and Libya** in order to ensure the joint management of migratory flows. On 5 April 2011, Italy entered into an agreement with Tunisia according to which the Maghreb authorities would undertake to strengthen their control over departures and accept the direct repatriation of immigrants. As a result of the signing of this agreement, 3,592 Tunisian citizens were repatriated between April and the end of October 2011.

Foreign press

The Telegraph, 26 June 2008

Italy to fingerprint all Roma gipsy children – "Around 80,000 gipsy children are to be fingerprinted by the Italian authorities under a new scheme that has drawn comparisons to the policies of Benito Mussolini".

In addition, a specific state of emergency was also declared **for the Roma and Sinti population**. In fact, under the provision of law 225/1992, the President of the Council of Ministers approved a declaration of emergency for the regions of Lombardia, Lazio and Campania in relation to the Roma community settlements (decree of 21st May 2008). Consequently, three orders were approved on the 30th of May 2008 to tackle the emergency, including the appointment of special Commissioners. The state of emergency was declared until the 31st of May 2009. On the 28th of May, with a new decree, the state of emergency was renewed until the 31st of December 2010 and also extended to the regions of Piemonte and Veneto. Finally, on 17th of December 2010, the state of emergency was extended until the 31st of December 2011. This long chain of decrees is very similar to the series of emergency declarations concerning immigration flows. Public authorities also conducted a Roma

population census, even though numerous scholars, lawyers and non profit organisations said that there was a risk of creating an ethnic database, in violation of international, European and domestic constitutional law.

With **judgment 6050/2011**, the Italian Supreme administrative Court (Consiglio di Stato) ruled that the emergency declarations were inconsistent with Italian legislation. The *Consiglio* criticized the lack of reasonable justifications for such declarations: according to the judgment, there was no precise factual information which could confirm the existence of a link between the presence of Roma and Sinti settlements in Italy and the threat to peace and security. Moreover, the Consiglio stated that the preliminary investigation and reasons considered as a prerequisite of the declaration of emergency had not been duly carried out. The orders of May 2008, adopted under the unlawful declaration of emergency, were consequently declared illegal, including the part in which they allowed to identify all Roma and Sinti people living in the settlements, including minors, through fingerprint detection.

European Parliament resolution of 10 July 2008 on the census of the Roma on the basis of ethnicity in Italy

The European Parliament:

§ 9. **Expresses concern** at the affirmation – contained in the administrative decrees and orders issued by the Italian Government – that the presence of Roma camps around large cities in itself constitutes a serious social emergency with repercussions for public order and security which justify declaring a state of emergency for one year;

§ 10. Is concerned that, owing to the declaration of a state of emergency, **extraordinary measures in derogation from laws may be taken by Prefects to whom authority has been delegated to implement all measures, including the collection of fingerprints**, based on a law concerning civil protection in the event of 'natural disasters, catastrophes or other events', which is not appropriate or proportionate to this specific case;

§ 13. Reiterates in this context **the importance of developing strategies at EU and national level, making full use of the opportunities provided by EU funds**, to abolish Roma segregation in education, to ensure equal access to quality education for Roma children (participation in mainstream education, introduction of special scholarship and trainee programmes), to ensure and improve Roma access to labour markets, to provide equal access to health care and social security benefits, to combat discriminatory practices in the provision of housing, and to increase the participation of the Roma in social, economic, cultural and political life.

RECOMMENDATIONS

- → encourage a change in the political narrative of immigration through parliamentary questions and motions on:
  1) extraordinary acts that were adopted to manage the immigration flow;
  2) recent data relating to immigration;
  3) government strategies for future policies on immigration;
  4) data regarding removal proceedings;
  5) data of how CIEs are managed and their costs, in order to raise awareness of the rhetoric of immigration as an emergency and security issue and of the “hidden” costs of the current immigration policies;
- → lobby against the criminalization of undocumented migrants as a violation of human rights and an ineffective offence (no deterrence) and highlight its costs, both in terms of resources and the violation of rights;
- → encourage the dissemination of information on the long-term effects of the violation of fundamental rights and the inefficiency of the “emergency and security” approach to immigration issues;
- → ensure the effective implementation of human rights standards and EU legislation, in particular regarding equal access to services, information and legal counseling;
- → share in-house expertise and local best practices to promote them among national organizations and service providers;
- → strengthen local and professional skills.

2. The removal of third country nationals and its compatibility with EU law and international law

One of the most problematic issues of Italian immigration law is the removal of third country nationals, as a result of administrative or criminal proceedings, and its compatibility with EU and international law.
The first section will focus on the regulations concerning push-back operations and expulsions, particularly on the principle of non refoulement and the recent amendments of the 2008, 2009, 2011 Security Packages to cases of removal. The following analysis outlines the cases of removal (push–back operations, expulsions), the general limitations of removal and the most serious intersection between removal and international protection. The existing expulsion system shows the prevalence of a nationalist approach and is symptomatic of the refusal of the Italian system to deal with immigrants outside of the sphere of public order and security. This approach was only partially corrected by the 2011 Security Package: expulsion still appears as the sole tool for managing immigration.
The second section will focus on the issuing, judicial control and enforcement of expulsion, including administrative detention. The analysis concerns both the legal provisions and the practices, which were identified through observation and interviews.

Section I. The system of removal of third-country nationals and exclusions of third country nationals in certain conditions

Italian law provides for two types of instrument to ensure the removal of third-country nationals:

- push-back at the border [Article 10 Immigration Law]
- expulsions [Articles 13, 15 and 16 Immigration Law, article 3 of the

2005 Pisanu Decree, article 235 and 312 Penal Code, article 86 President of Republic decree No. 309/1990].

Article 19 of the Immigration Law states that the removal shall not be ordered in the case of:

- risk of violations of fundamental human rights by the authorities in the receiving country;
- minors (except in cases where their right to follow the expelled parents is at stake);
- persons with a long-term residence permit – a third-country national who is a long-term resident in Italy or in another EU member State may be removed solely in the case of serious reasons of public order, for national security reasons, to prevent terrorism (under article 3 **2005 Pisanu Decree**);
- cohabitation of the immigrant with relatives (up to second degree of kinship) or with an Italian spouse (this provision does not apply to *more uxorio* cohabitation);
- pregnant women, until six months after the birth. This provision also applies to the husband of a pregnant woman (see **Constitutional Court, judgment 376/2000**), not however to her cohabitating partner (see **Constitutional Court, ordinance 192/2006**).

The **2011 Security Package** provides that the execution of expulsion or push-back at the border of immigrants with disabilities, elderly immigrants, children, single parents with children, victims of serious psychological, physical or sexual violence or abuse must be carried out in a way that is compatible with their duly verified individual personal circumstances. The provision is too generic to be an effective guarantee for these vulnerable people and it is partially incorrect: in fact it also lists minors, who cannot be expelled or pushed-back at the borders.

Right to health and expulsion

With **judgment No. 252/2001**, The Italian Constitutional Court stated that an immigrant in need of care cannot be expelled if he/she might suffer an irreparable harm to the right to health because of the immediate enforcement of the measure. Therefore, the judge who is called to confirm the expulsion measure shall conduct a **case by case evaluation**, based on medical findings, of the health conditions of the immigrants: the right to health must prevail if the execution of the measure could seriously harm the person. However, the **protection of the fundamental right to health is only established in the Court's case law:** there is no legislative rule defining the cases and conditions for a decision not to expel, which leads to results that are not always uniform.

Push-back operations at the border and the principle of non refoulement

Article 10 of the Immigration Law provides for two cases of removal: **push-back at the border** and **delayed push-back.**

Push-back at the border	Delayed push-back
Push-back at the border shall be adopted by **border police** against third country nationals: – who arrive at the national borders without a valid passport and visa; – who arrive at the national borders without documents that prove the aim of their stay and the availability of adequate financial means [article 4 Immigration Law]; – in relation to whom an alert has been issued according to Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II); – in case of ascertained risks to public order or national security (concerning Italy, or a country with which Italy has signed agreements on the lifting of border controls and free movement of persons) – who arrive at the national border after a previous expulsion, if the period of the re-entry ban has not expired (see page 35).	**Delayed push-back** shall be adopted by the *questore* in the following cases: – people who have already entered Italy avoiding border controls and have been intercepted at the entrance or immediately afterwards; – people who entered irregularly and were temporarily admitted for emergency aid.

Pushbacks, both at the border and delayed, involve **limitations to personal freedom** and a **large margin of discretional evaluation**. This does not seem to comply with either the principle that “the legal status of foreigners is regulated by law” (article 10 (2) of Italian Constitution) nor the principles established by article 13 of the Italian Constitution, according to which all limitations to personal freedom shall be established by law (so called *riserva di legge*) and be subjected to jurisdictional control (so called *riserva di giurisdizione*). In fact in many cases, push-back orders have been adopted some days after the immigrant had been identified.

For this reason, with the judgment of 4 July 2011, the Justice of the Peace in Agrigento declared that a push back order violated the Italian legislation and Constitution **because the measure had been adopted some days** (ten days) **after** the immigrant had been found and the push-back order had been approved. The decision is very important because the judge clearly stated that each push-back order must be adopted within a reasonable time from the identification of the immigrant. There must be a **direct temporal connection** between the identification of the immigrant and the approval of the push-back. Otherwise, ***de facto* detention** occurs, in violation of Article 13 of the Italian Constitution, for an uncertain period of time and in accordance

with a discretional decision of the public administration. This temporal connection must be strictly interpreted, especially in the light of the **Returns Directive**: when the directive was implemented in Italy, it was decided not to apply it to push-backs as it was more favorable for third country nationals.

Push-back operations must also be consistent with international and European law on the protection of fundamental rights.

One limitation lies in the prohibition of collective expulsions (Article 4 of Protocol 4 of the European Convention of Human Rights, which came into force in Italy on 27 May 1982; Article 19 of the Charter of Fundamental Rights of the European Union). Moreover, push-backs should ensure the protection of asylum seekers, according to the 1951 Geneva Convention (the first agreement by the international community on the specific protection of refugees) and European Union Law (EU Directives 2003/9, 2004/83, 2005/85 and regulation No. 343/2003)

Prohibition of collective expulsion

The European Court of Human Rights stated that a collective expulsion **is any measure forcing some immigrants, as a group, to leave the country, except where such a decision is taken after a reasonable and objective analysis of the situation of each individual as member of the group** (see case ***Conka v. Belgium***, ECtHR Judgment 5 February 2002, and ***Sultani v. France***, ECtHR Judgment 20 September 2007).

One of the most complicated issues concerning refugee protection is related to the obligation of *non-refoulement*. Application of this principle is particularly problematic when it comes to the **rejection of immigrants at sea or in the territory of other states.** In these cases, immigrants are denied the possibility to apply for asylum.

The principle of *non refoulement*

According to the 1951 Geneva Convention, **a refugee** is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

The Convention includes the principle of non-refoulement of refugees (Article 33) according to which "no Contracting State shall expel or return a refugee, in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

After the treaty of August 30, 2008 on the partnership and cooperation between Italy and Libya, on a number of occasions the Italian government has returned irregular immigrants who had been intercepted in Mediterranean waters back to Libya. According to data provided by **Frontex,** landings decreased by 74% between 2008 and 2009. These data seem to suggest that the policy was effective, however the price has been paid by potential asylum seekers. Indeed, the data on applications for asylum in Italy in 2009 show a dramatic decline over the previous year. From the 30,492 applications made in 2008, they dropped by 43% to 17,603 in 2009. These findings prompted Laurens Jolles, UNHCR Representative for Southern Europe, to declare that: "The sharp fall in applications for asylum in Italy shows that the rejections instead of countering irregular immigration have severely affected the enjoyment of the right to asylum in Italy". As a consequence Jolles called on the Italian government to suspend expulsions and to readmit people who had been rejected.

The principle of *non-refoulement* and the jurisdiction of a State

One of the most complicated issues concerns the assessment on the jurisdiction of a State and the consequent duty to protect asylum seekers. There seems to be no problem for aircrafts and vessels flying a national flag and diplomatic representations, which are subjected to the jurisdiction of the national State. More problems exist **in the case of the diversion of ships carrying immigrants.** In those cases, it is necessary to evaluate whether such diversions take place in territorial waters (waters as far as 12 miles from the coast, according to the United Nations Convention on the Law of the Sea), or in international waters or in other States' territorial waters. In the first case, the State must allow third-country nationals to apply for asylum. In the case of non-territorial sea, other factors need to be assessed. Both the Office of the United Nations High Commissioner for Human Rights and the Committee Against Torture have contributed to the definition of non-refoulement, stating that the jurisdiction of a State extends even beyond its territorial borders if it has an effective control over a specific area or person. According to this interpretation, the jurisdiction of a State extends to cases in which a State's representatives board an intercepted ship and where immigrants are allowed to board on State ships. **Moreover, even if national authorities force ships carrying immigrants to change route, or send their military ships to prevent the entry of such ships into Italian waters, the State still has jurisdiction, since its authorities exerted control over the ship.** Therefore, in all the above cases the State is required to respect the obligation of ***non-refoulement***.

Similarly, **the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) of the Council of Europe**, in its report of 28 April 2010, argued that the Italian policy of intercepting immigrants at sea and forcing them to return to Libya or other non-European countries violated the principle of *non-refoulement*. The main

purpose of the CPT's visit to Italy was to look into the new policy of the Italian authorities to intercept, at sea, those immigrants approaching Italy's Southern Mediterranean maritime border and to send them back to Libya or other non-European States (i.e. push back). In the report, the CPT emphasized that **Italy is bound by the principle of *non-refoulement* wherever it exercises its jurisdiction**, including via its personnel and vessels engaged in border protection or rescue at sea, even when operating outside its territory. Moreover, all persons coming within Italy's jurisdiction should be afforded an appropriate opportunity and facilities to seek international protection. However, the immigrants who were sent back to Libya from May to July 2009 were denied the right to an individual assessment of their case and effective access to the refugee protection system. According to the report, Libya could not be considered as a safe country in terms of human rights and refugee law; the situation of persons arrested and detained in Libya, including that of immigrants – who are also at risk of being deported to other countries by Libya – indicates that the people sent back to Libya are at risk of ill-treatment. [The CPT's report and the response of the Italian Government are available on the Committee's website (http://www.cpt.coe.int, in particular at http://www.cpt.coe.int/documents/ita/2010-inf-14-eng.htm).]

Extract of the REPORT by Thomas Hammarberg
Commissioner for Human Rights of the Council of Europe
Following his visit to Italy on 13-15 January 2009

In his report the Commissioner focused, among other themes, on foreign nationals' forced returns, stating:
"The Commissioner remains worried by a number of deportations that have taken place, especially from Italy to Tunisia, and by credible reports showing that on certain occasions the deportees had been subjected to torture in the latter country. ***Of special concern to the Commissioner have been two such cases where deportations to Tunisia took place in 2008 even though the European Court of Human Rights had indicated interim measures under its Rule 39, requesting Italy to stay deportations while the deportees' applications were pending before it.*** *Even though the Commissioner is aware of the difficulties faced by member states in their efforts to protect their societies from terrorist violence, he remains deeply concerned by state practices that contravene fundamental European human rights standards such as the one prohibiting in absolute terms torture or inhuman or degrading treatment or punishment.* ***The Commissioner strongly opposes forced returns, even if they occur under cover of diplomatic assurances, to countries with long-standing, proven records of torture.*** *He calls on the Italian authorities to urgently review their policy in this field and effectively conform to the binding interim measures ordered by the European Court of Human Rights" (see the executive summary of the report).*

With regard to expulsions to Libya, the Italian praxis has finally been declared to violate the ECHR. On the 23rd of February 2012, the European Court of Human Rights **unanimously** condemned the Government of Italy in the case of **Hirsi and others v. Italy** (Appl. No. 27765/09), for the mass push-back from Italy to Libya carried out on the 6th of May 2009 against 24 immigrants (11 Somalis and 13 Eritreans). According to the Court, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1 of the Convention. The Court also concluded that, **by transferring the applicants to Libya, Italian authorities had exposed them to the risk of ill-treatment prohibited by the Convention**, therefore violating Article 3. In view of the foregoing, the Court considered that when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, bearing particular regard to the lack of any asylum procedures and the impossibility of forcing the Libyan authorities to recognize the refugee status granted by the UNHCR. It follows that the transfer of applicants to Libya violated the Convention because it exposed the applicants to the risk of **arbitrary repatriation**. Furthermore, the removal of the applicants, carried out without any examination of each individual situation, amounted to a **collective expulsion** in violation of Article 4 of Protocol No. 4. The Court also found a violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4, because the applicants **had been unable to lodge complaints** with a competent authority in order to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced. Finally, under Article 41 (just satisfaction), the Court held that Italy was to pay each applicant 15,000 euros in respect of non-pecuniary damage and 1,575.74 euros to the applicants jointly in respect of costs and expenses.

This is not the first time that the ECtHR has condemned Italy's practices concerning immigration. With the judgment **Saadi vs. Italy** of 28 February 2008, concerning the expulsion of a Tunisian citizen for reasons of international terrorism prevention, the ECtHR found a violation of Article 3 of the Treaty because the expulsion exposed the Tunisian citizen to inhuman treatment in his country of origin, where he had been convicted for international terrorism. The Court also made reference to the reports of Amnesty International and Human Rights Watch (points D and E of the decision), deeming them to be credible, coherent and supported by several sources of information. The reports provided "grounded reasons to establish that a real risk occurs" for the Tunisian citizen to face torture or other inhuman or de-

grading treatments once back in his country.

The Court recognized that states face immense difficulties in protecting their communities from terrorist violence, but this is not sufficient to call into question the absolute nature of Article 3 of the Convention, which prohibits torture and any other kind of ill-treatment. The judgment also discussed the issue of "diplomatic assurances". It pointed out that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights are not, in themselves, sufficient to ensure adequate protection against the risk of ill-treatment where, as in the case of Saadi, reliable sources reported practices that were tolerated by the authorities and that were manifestly contrary to the principles of the Convention.

This position was confirmed by the 13 April 2010 judgment in the case **Trabelsi v. Italy**, in which the Court convicted Italy for the expulsion to Tunisia of the former imam of Cremona. In this case, the Court recalled that diplomatic assurances must be verified in their effective application to ensure that they provide sufficient protection of the appellant against the risk of treatments prohibited by the Convention. The weight given to diplomatic assurances offered by the country of origin depends in any case on the circumstances of the period under consideration (see §§ 147 and 148 of the judgment).

Even the 2011 report of the NGO Human Rights Watch dedicated a section to Italy (pp. 428-429) showing how, from the episodes of violence which took place in Rosarno to the push-back operations in the Mediterranean, the Italian government did not do enough to protect human rights. The same concern was reiterated in the 2012 report (pp. 450-452).

Number of applications for asylum in Europe in 2011

Country	Number of applications
France	56,300
Germany	53,300
Italy	34,115
Belgium	31,900
Sweden	29,700
United Kingdom	26,400
The Netherlands	14,600
Austria	14,400
Greece	9,300
Poland	6,900

(source Eurostat)

Asylum seeker applications in Italy (2008-2011)

Year	Number of applications
2008	31,097
2009	17,603
2010	12,121
2011	37,350

(source National Commission for asylum right)

This table shows the trend of applications in Italy in the last four years. In 2009 there was a drastic reduction in the number of applications, due to the push-back operations in the Mediterranean and the agreement with Libya. The number of asylum seekers in 2011 is partially different in Eurostat data and in the National Commission in terms of asylum right. In 2010, 15% of applicants obtained refugee status and 39% other types of protection. In 2011, 8% of the applicants obtained refugee status and 32% other types of protection. In reference to 2011, at the time of writing, the applications are still under examination.

Refugees in European countries and in Italy

In Italy the number of refugees is small compared with other European Union countries:

Country	Number of refugees
Germany	600,000
France	200,000
United Kingdom	240,000
The Netherlands	75,000
Italy	56.000

(source UNCHR)

In Denmark, the Netherlands and Sweden refugees make up 3 to 9 per 1,000 inhabitants, in Germany more than 7, the United Kingdom almost 4, while in Italy less than 1 per 1,000 inhabitants.

Human rights world report 2011 – Focus on Italy

As stated in the Human rights report, "**racist and xenophobic violence and hostile political discourse remained a pressing problem**. In January, 11 African seasonal immigrant workers were seriously injured in drive-by shootings and mob attacks over a three day period in Rosarno, Calabria. At least 10 other immigrants, 10 law enforcement officers, and 14 local residents required medical treatment. Over 1,000 immigrants left the town following the violence, most evacuated by law enforcement personnel. Numerous countries expressed concern about racism and xenophobia in Italy during its Universal Periodic Review at February's UN Human Rights Council (HRC). [...] Italy continued to deport terrorism suspects to Tunisia, including Mohamed Mannai in May, **despite the risk of ill-treatment, persistent interventions from the ECtHR, and condemnation by the Council of Europe.** A June resolution from its Committee of Ministers reiterated Italy's obligation to comply with European Court decisions. The European Committee for the Prevention of Torture said in an April report that Italy violated the **prohibition on *refoulement* when it intercepted boat immigrants attempting to reach Italy and returned them to Libya without screening for people needing international protection**".

RECOMMENDATIONS

- → establish a single common procedure for asylum in Europe;
- → ensure that the procedure of international protection is effective, taking into account the conclusions of the ECtHR in Hirsi v. Italy;
- → ensure the existence of mechanisms for judicial review against decisions rejecting an application for international protection;
- → ensure that the Italian system of reception and assistance of asylum seekers complies with European standards, including both EU and ECHR standards.
- → abolish delayed push-back operations.

The system of expulsion

The system of expulsion was consistently amended by the 2008, 2009, 2011 Security Packages.

A preliminary clarification is necessary: the term **expulsion** refers both to the **act** ordering the removal issued by a national public authority and to **the subsequent enforcement of the measure**.

Expulsions are generally differentiated into **administrative measures** (mostly prefectural expulsions, since ministerial expulsions are very rare) and **criminal expulsions** (expulsion as a security measure, i.e. after committing a crime)**.** These measures differ in terms of the public authority that is charged with their adoption and with enforcing the removal – the Minister of Home Affairs or the *prefetto* in the first case, the judge in the second case.

The structural and ontological difference between **administrative and criminal expulsion** was highlighted by the **Constitutional Court. The Court was called to evaluate the legitimacy of article 7 Law No. 39/1990 and argued that these measures are not alternative: one cannot be adopted if the requirements for the adoption of the other are lacking** (Constitutional Court, judgment 5 April 1995, No. 129, and Constitutional Court, ordinance 18 July 1996, No. 328).

On the other hand, the introduction of criminal expulsion as a substitutive measure in the case of irregular entry and stay (article 10 bis **Immigration Law**) confuses the two measures and encourages public authorities to circumvent the application of the repatriation standards provided by **the Returns Directive**, since forced removal is the general principle for criminal expulsion (see infra, § 3).

Although the difference between administrative and criminal measures was strictly asserted, **the distinction became merely formal** and even the enforcement was the same. In fact, whereas in the past the prosecutor was responsible for the execution of the criminal removal (through the judiciary police), now the *questore* became the sole authority dealing with enforcement, both with criminal and administrative expulsions.

Introduction of the case-by-case rule in assessing individual cases in order to issue a removal order

The 2011 Security Package amended article 13 para. 2 Immigration Law in compliance with the Returns Directive and specified that expulsion orders should be adopted on a **case-by-case basis**.[1]

This implies that the prefectural authority should carry out an initial appraisal of the individual and specific conditions of any irregularly staying third country national. It is a significant amendment with a possible important impact on the system, because it requires a more complete appraisal of each individual case, in order to avoid standardized removal orders. Until 2011, on the contrary, the adoption of the expulsion order did not imply any evaluation by the *prefetto,* whose duty was merely to verify the existence of the conditions for removal.

[1] Chamber of Deputies, Technical Report no.4449/2011, http://nuovo.camera.it/Camera/view/doc_viewer_full?url=http%3A//www.camera.it/_dati/leg16/lavori/schedela/apriTelecomando_wai.asp%3Fcodice%3D16PDL0049550&back_to=http%3A//nuovo.camera.it/126%3FPDL%3D4449%26leg%3D16%26tab%3D2

Application of the case by case rule should allow for some discretionality in the adoption of the removal order, as well as in the decision to extend the terms for voluntary return and in the postponement of the removal or of the duration of the re-entry ban. However, this possible positive impact of the provision is merely theoretical: the rule is merely a formal implementation of the Returns Directive, since the **legislator did not clarify that the *case by case rule* applies during the entire removal procedure, or define the criteria guiding the exercise of administrative discretion**.

RECOMMENDATIONS

→ draw up detailed regulations that specify the circumstances that are to be taken into account for expulsion, expressly recalling the need to protect the unity of the family, to provide for urgent medical assistance if necessary, to take into account the educational needs of minors and the special needs of the most vulnerable. Thus, ensure a case-by-case appraisal and limit the discretionary powers of the *prefetto*, reducing the risk of arbitrary decisions .
→ provide mandatory information on the right to legal counsel from the beginning of the expulsion proceedings;
→ ensure that irregular immigrants are heard before the adoption of the expulsion decree.

Amendments to article 13 para. 2 Immigration law: denegation of the renewal of the residence permit for more than three months or more than the term prescribed by the visa such as in cases of irregular residence

An expulsion is adopted by the *prefetto* by issuing an order under article 13(2) lett. a) b) and c), Immigration Law, in the case of:

a) irregular entry;
b) irregular residence;
c) threat to public security.

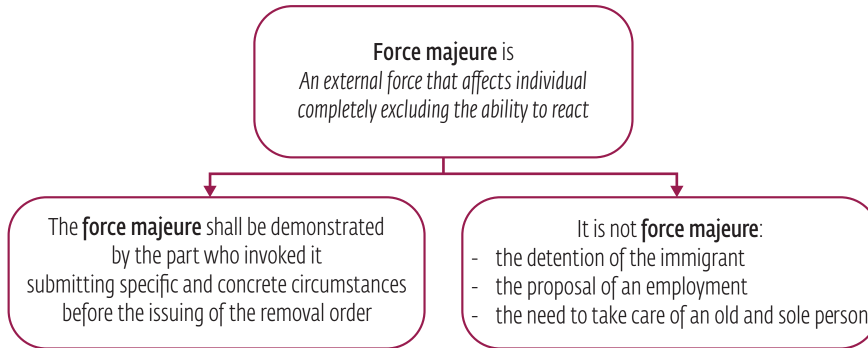
The 2011 Security Package only amended letter b) regulating the case of overstayers.

This amendment does not implement any provision of the Returns Directive, but simply reproduces provisions of Law No. 68/2007, which were already sanctioned by removal.

On the other hand, the legislator did not specify **the criteria that constitute *force majeure*** (that is, the cases in which a person cannot be removed), or detail how to appraise the threat to public security which may justify ex-

pulsion under lett. c). Thus, public authorities (the prefetto) are left an excessively broad margin of appreciation.

Concerning *force majeure*, its meaning has been defined in the case law. The main principles can be summarized as follows:



Threats to public security have been defined by law in order to allow for the application of preventive measures.

In particular, the law lists as indicators of such threats:

- lack of a long-term job,
- frequenting people convicted of crimes,
- having a criminal record,
- being a repeated offender,
- living off the profits of criminal activities.

However, **in the case of prefectural expulsion, the evaluation of the threat is left to an administrative authority** (*questore*), who is not used to carrying out this kind of evaluation, since this generally pertains to the judiciary. It is true that a risk assessment constitutes a precondition for the administrative power of expulsion provided by law[2] and that the aim of an expulsion is different from that of a preventive measure. This argument, however, is very weak: the evaluation is not subjected to any form of judicial control, since control is possible solely if the issuance of a measure is appealed and only as regards "the complete, reasonable, and not contradictory assessments made by the Administration",[3] so that the judge cannot modify or add to the reasoning outlined by the administrative authority.

[2] Cons. Stato, Sez. VI, 21.09.2006 No. 5544.

[3] Court of Cassation, 1st Civil Section, 7.12.2005, No. 27068.

Another criticism is that there are no provisions to allows immigrants to participate in the procedure leading to the assessment of the threat, since there is no oral notice or communication of the start of the proceedings in violation of the law on administrative proceedings (article 7 Law No. 241/1990).

RECOMMENDATIONS

→ expressly recognize that expulsion based on an assessment of perceived danger is a preventive measure, in order to ensure the application of full judicial guarantees including the right to a public (see Constitutional Court No. 93/2010);
→ provide specialized legal assistance from the beginning of the proceedings in order to ensure the immigrant's active participation in the evaluation of the level of security threat he/she poses.

Expulsion or forced deportation for immigrants who are identified while leaving the country

The 2011 Security Package **prohibits expulsion or forced deportation of immigrants who are identified while leaving the country during police controls at the external borders** (see para. 2 ter of article 13 Immigration Law).

The rationale underlying this provision is clearly the **lack of any risk of absconding** in cases of people returning to their country and **the full achievement of the State's interest in the removal of irregular or already expelled immigrants.**

However, **the provision should also have provided for the automatic nullification of any previously adopted expulsion order.**[4] On the contrary, while any previous expulsion order is not enforced by public force, it still bears the same consequences as coercive expulsion, including a re-entry ban (that is, a prohibition to re-entry into the country for a period of time determined by law). On the other hand, when irregularity is revealed during police controls at the exit, no expulsion order is adopted, and the person may re-enter without any limitations.

RECOMMENDATIONS

→ encourage withdrawal of the expulsion order for immigrants who are leaving the country;
→ encourage requests for withdrawal of the expulsion order or re-entry ban against immigrants who are leaving the country in order to avoid discrimination.

[4] G. Savio, *La nuova disciplina delle espulsioni risultante dalla Legge 129/2011*, available online at www.asgi.it.

Reduction in the length of the re-entry ban

Recipients of the expulsion order may not re-enter Italian territory for a period of time specified by law without a special authorization from the Minister of Home Affairs (Article 13 para. 13 Immigration Law).

The 2011 Security Package modified the duration of the re-entry ban following the adoption of an expulsion order: **the re-entry ban now lasts between 3 and 5 years** depending on the specific circumstances of each individual, in accordance with the Returns Directive.

Until these amendments, the re-entry ban lasted ten years, and although it could be reduced, it never lasted less than five years. **However, the length of the re-entry ban was not amended for EU citizens who are subjected to removal: the term lasts up to five years – or ten years in the case of an expulsion for reasons of national security (article 20 Legislative Decree No. 30/2007).**

Integration and expulsion in the case of a breach of the integration agreement

The 2009 Security Package amended the Immigration Law (Art. 4 bis) providing for an Integration Agreement that must be signed by all third country nationals applying for permission to reside in Italy for more than one year, with the exception of citizens suffering from specific diseases or disabilities that involve serious linguistic and cultural learning difficulties, and victims of trafficking or violence.

This provision, however, was only implemented in 2011. A new Decree finally described the content and duration of the integration agreement, the procedure for signing the agreement, the criteria for computing, acquiring and reducing credits, the general guidelines for the content of the training programs and the procedure of verification, and created a national register of signed agreements (DPR No. 179/2011).

The agreement requires each third country national to complete a course during which he or she must acquire a basic knowledge of the Italian language (Level A2), general knowledge of Italian civic life and specific knowledge of the Italian health, education and social service systems, the Italian labour market and the Italian fiscal system.

Every third country national starts with an initial score of 16 credits but must obtain at least 30 credits within two years in order to honour the agree-

ment. Credits are awarded for:

- the acquisition of pre-determined linguistic skills, a certain level of cultural knowledge and the knowledge of civic life in Italy; this knowledge will be tested by means of an examination;
- the completion of pre-determined activities such as educational and vocational training courses, the passing of academic qualifications, registration with the national health service, the signing of a rental agreement or the purchase of housing and the supply of voluntary work.

Credits are detracted if the citizen is convicted of a crime (even on a non-definitive basis), subjected to personal security measures, or if he/she is involved in serious administrative or tax-related misdemeanours. Fifteen credits are subtracted for failure to attend civic training sessions organized by the Immigration Desks of the Ministry of Home Affairs. These courses last between 5 and 10 hours and must be attended within one month of signing the agreement.

If the immigrant fails to obtain 30 credits by the end of the month prior to the expiry of the Integration Agreement (two years after it has been signed) but has obtained at least 17 credits, the agreement may be extended for one year in order to give the person an additional opportunity to collect sufficient credits to fulfill the agreement. On the other hand, if the person has lost all or more of his/her initial credits, his/her residence permit is not renewed and he/she is expelled.

The Integration Agreement has been operative since 10 March 2012; thus it is not yet possible to evaluate its effectiveness as a tool of integration or to assess any shortcomings.

However, it seems to be no more than a manifesto, without any concrete function. The agreement adds an additional **and disproportional burden** to the **vulnerability and insecurity** of third-country nationals who request a residence permit. Moreover, it expresses **the idea of a forcible process of integration**, where no consideration is given to the fact that the immigrant is a person with a different culture and experience.

Even **its name is misleading:** the term agreement, in fact, refers to any mutual and voluntary exchange of promises, with the understanding and acceptance of reciprocal rights and duties as to particular actions or obligations, which the parties, in position of equality, intend to exchange. In contrast, in this case **the third country national is the sole party who is compelled to assume several duties**, whose execution is strictly related to

conditions that do not depend on the immigrant's will, but on external conditions (such as the availability of free courses or the employer's permission to temporarily leave the work place in order to attend them). The Agreement, indeed, does not provide for the duty, on the part of employers, to grant the immigrants a special study permit to enable them to attend the courses during work hours.

The Joint Directive of the Minister of Home Affairs and the Minister of International Cooperation and Integration (adopted on 2 March 2012) stresses that a translation of the Agreement and its annexes in 19 languages and a video-course of 5 hours for civic education in the same 19 languages should be made available.[5] However, there are no provisions regarding the organization of the courses and their standards, expert multilingual staff and materials, experts in cultural intermediation, nor there is a common study program that takes into consideration the needs of illiterate immigrants, or of immigrants who are not familiar with the Latin alphabet.

Although the provisions regarding the Integration Agreement have been operative since 10 March 2012, the first circular, containing guidelines for how the provisions were to be applied, was issued by the Minister of Home Affairs on 5 March 2012: clearly, local authorities had no time to organize the necessary services.[6] Furthermore, currently public calls for traineeships, internships and activities organized by local authorities usually do not allow for participation by non-Italian citizens: a significant example is the last annual call for the national civil service, which was in fact appealed against on the grounds of discrimination.[7] Such discrimination prevents non-nationals from volunteering for public interest work and traineeships, thus depriving them of an opportunity to gain additional integration points, as well as to meaningfully integrate into the society.

The integration Agreement is signed between a third-country national and the Prefetto: the latter, however, has no obligations, except for the duty to verify the immigrant's fulfillment of the conditions provided for in the agreement. The law does not even require him to inform the immigrant of the existing public services available, including the national health service or public housing, nor to guarantee free access for everyone and at

[5] http://www.libertaciviliimmigrazione.interno.it/dipim/export/sites/default/it/assets/circolari/Direttiva_Congiunta.pdf

[6] http://www.libertaciviliimmigrazione.interno.it/dipim/export/sites/default/it/assets/circolari/Direttiva_Congiunta.pdf

[7] http://www.asgi.it/public/parser_download/save/tribunale.di.milano.sez.lavoro.ordinanza.nr.15243.11.r.g.pdf

any time of the day to courses and training. The 2012 Joint Directive only recognizes the State's duty to provide "free or very cheap" language courses: **thus, although immigrants are obliged to attend the courses, there is no corresponding duty on the part of local authorities to provide such courses for free**.

Additionally, any possibility for spontaneous action by local entities is *de facto* excluded, since the Immigration Law and the Joint Directive specify that all actions should be without any additional cost for the State. Moreover, the system for deducting credits seems to be unreasonable and discriminatory, since a person can be expelled or the renewal of the permit denied on the basis of a mere calculation of credits, despite the person's efforts to achieve the results and without considering how much he/she may have tried to integrate.

RECOMMENDATIONS

→ provide adequate financial resources for services aimed at improving immingrants' integration and positive actions, and recognize such activities and services as fundamental rights of immigrants;
→ provide for the detailed specification by law of actions and services that local administrative authorities must provide and of the standards they should comply with;
→ introduce special "study permit" that employers shall grant to employees in order to allow them to take part in the activities that are necessary based on the Integration Agreement;
→ define a common study program to be followed by all persons who sign an Integration Agreement;
→ require public offices to inform the persons concerned of all available courses and services;
→ train staff in multilingual skills, in teaching reading and writing skills and cultural intermediation.
→ improve the methods used for identifying detained third country nationals in order to avoid subsequent detention in CIEs;
→ encourage networking between local authorities and civil society organizations;
→ ensure that immigrants concerned have full access to all the services provided by local authorities;
→ appeal against all individual integration agreements whenever the public authority fails to ensure the availability of the services needed for their effective enforcement;
→ appeal against all discriminatory regulations that exclude immigrants from taking part in services or volunteering activities that might be useful to fulfill the conditions set out in the Integration Agreement.

The removal of dangerous third country nationals: expulsion as a security measure and the risk index

The regulation of expulsion as a security measure was modified by the 2008 Security Package. This law broadened the conditions of application, thus redefining the rationale of the measure: the judge shall now order the removal of the immigrant whenever it is prescribed by law and whenever an immigrant is convicted and sentenced to more than two years' imprisonment.

Article 235 of the Penal Code provided for expulsion as a security measure only for cases of conviction for serious crimes (e.g. crimes punishable by **a minimum of 10 years' detention**). Expulsion as a security measure was once deemed appropriate for crimes which *per se* were recognized as an indication of the person's danger to the society. On the contrary, the above-mentioned modifications clearly introduce a presumption that all immigrants pose a social risk and reinforce the stereotype of immigrants as "dangerous people" who may be removed in order to remove the threat they pose to society. In fact, expulsion as a security measure now relates to various crimes, which are not always symptomatic of a concrete risk, and the measure has now become an ordinary tool to neutralize any presumed social threat posed by immigrants.

The 2008 Security Package also modified article 312 of the Criminal Code, which is now also applicable to EU nationals.

Taking into consideration the very different nature of crimes that involve the application of security measures, the extension of their applicability to EU nationals does not seem to be consistent with **EU Directive 38/2004**. The Directive only allows for the expulsion of EU citizens if it is proportionate and after an examination of the threat posed by the EU national: such threat should be sufficiently serious to violate a fundamental interest of the society (ECJ, judgment 4.10.2007, C-349/06; 7.06.2007, ECJ, 19.01.21999, C-348/96).

Amendments introduced by the **2008 Security Package**, moreover, raised – again – the issue of the security measures being backdated. According to the Criminal Code, security measures are ruled by the law in force at the time of their enforcement: even if a measure was not provided by law when the crime was committed, it can still be applied, as long as the act for which the person is tried was criminalized and sanctioned with the application of a security measure.

Expulsion as a security measure is also foreseen by article 15 of the Immigration Law, as modified by the **Bossi-Fini Law**: the judge may order ex-

pulsion in the case of a conviction for crimes for which arrest is mandatory or allowed, without any consideration of the legality of the administrative status of the person. However, such expulsion is not mandatory, and the judge has some discretion as to whether to apply it, as opposed to mandatory expulsion as provided by the criminal code.[8]

This difference could encourage the application of the measures in breach of the constitutional principles recognized by the Constitutional Court (judgment of No. 58 of 1995). In its decision, the Court stated that the social threat posed by convicted immigrants must be examined case by case: this involves an assessment of the **possibility that the person convicted will repeat his/her criminal behavior**. The assessment should be in accordance with the criteria established by generally binding legal provisions (article 31 para. 2 law No. 663/1986 and article 133 Criminal Code).[9] Such an evaluation will also be carried out in the case of the removal of EU nationals. This concept of **risk** is controversial because of its **vagueness**.

Requirements for expulsion as a security measure	
Article 235 Criminal Code	Sentence to imprisonment for over two years
Article 312 Criminal Code	Conviction for a crime against the State
Article 15 Immigration Law	Conviction for crimes for which arrest is mandatory or allowed, if the person is dangerous
Article 86 Drugs Law	Conviction for drug crimes, if the person is dangerous

The removal has no maximum length, but may be revoked or substituted with a less restrictive measure by the judge.

The decision to apply expulsion as a security measure may be appealed before the judicial authority (the ordinary judge if the appeal also concerns at least one of the criminal charges; in all other cases, the surveillance tribunal).

Expulsion as a substitute and as an alternative measure to punishment: use of expulsion as an essential tool in immigration policy

Expulsion as a substitute measure (so called "misura sostitutiva", that is, a measure that may be applied to substitute criminal detention) is generally

8 Court of Cassation,3rd Criminal Section, 28.05.1999, no. 6673.
9 Court of Cassation, 3rd Criminal Section,5.11.2009, Koesslinger.

classified as a "judicial expulsion" due to the fact that it is ordered by a judicial authority (an ordinary judge). However, the authority that enforces it is the *questore* (police superintendent), not the Prosecutor, contrary to what is provided for other criminal expulsions). Such expulsion may only be adopted against third country nationals who are in the conditions set out by article 13 para. 2 Immigration law, that is, whose stay in Italy is irregular: therefore, it should be considered as an administrative measure (as recognized by the Constitutional Court already in 1999, with ordinance No. 369).

The **2009 Security Package** provides that the **expulsion as a substitute measure may be adopted by the justice of the peace in the case of conviction for the crime of irregular entry or stay (Art. 10 bis Immigration Law)**: this, taken together with the introduction of an accelerated procedure for this crime, confirm that the sole intent of the law is to facilitate expulsion and removal of irregular immigrants. However, as many justices of the peace have claimed since the introduction of the crime of irregular immigration, the aim of expelling irregular immigrants could actually be achieved by administrative measures alone.

Expulsion as an alternative measure, that is, as an alternative to criminal detention for convicted persons, was introduced by the **Bossi-Fini Law** and has not been amended since: the doubts it raised regarding the possibility of effectively achieving the aims that are typical of alternative measures remain open. In fact, if alternative measures generally aim to re-socialize convicted persons, interrupting their contacts with a criminal context, expulsion is applied regardless of the person's good conduct. The measure therefore seems to be a non-typical alternative measure, to be applied exclusively in order to reduce the prison population.

RECOMMENDATIONS

- → raise the question of the constitutionality of articles 235 and 312 of the Criminal Code, in particular concerning their reasonableness and proportionality;
- → issue a reference for a preliminary ruling regarding the interpretation of EU directive 2004/34 and the compatibility of Art. 312 Criminal Code with it;
- → submit to local courts the interpretation of the Court of Cassation regarding the non-backdating of article 235 criminal Code as amended, which is consistent with article 7 ECHR;
- → provide for specialized legal assistance when the threat posed by a person is being assessed;
- → grant legal assistance after the expulsion, in order to ensure that the need for such measure is periodically assessed and, if need be, to allow for withdrawal.
- → improve the identification of third country nationals who are imprisoned in order to avoid subsequent detention in CIEs.

Section II. **Procedural and formal expulsion: a vague mix of illegal practices forming the soft-law at the root of an immigration management that undermines the rule of law**

The following sections deal with each procedural step of an expulsion order with the aim of assessing its constitutionality.
Expulsion affects constitutional rights, such as personal freedom and freedom of movement and residence guaranteed by Articles 13 and 16 of the Italian Constitution. Both provisions establish that any limitation of these rights shall be provided by law; moreover, article 13 subordinates any limitation to the right to personal freedom to a judicial evaluation. In order to evaluate the effectiveness of these guarantees when the fundamental rights and freedoms of removed third-country nationals are at stake, in the cases of both administrative and judicial expulsion, a mere analysis of existing legislation is not sufficient. In fact, despite their potential negative impact, practices and procedures applied by public authorities still go unnoticed.
Once specific stages of the removal procedure were identified as being particularly serious threats to fundamental rights, information was obtained on the most common application of the provisions regulating such stages by the courts as well as on the practices followed by relevant actors. This was done by interviewing judges, prosecutors, the police and qualified practitioners who were questioned regarding the following aspects: issuance of the removal order and its legal requirements, judicial review of the order, enforcement of the removal, precautionary measures and detention, and the effectiveness of the right to defense.

Issuance of the removal order: legal requirements and effectiveness of the legal safeguards

Administrative and criminal expulsions are based on different requirements and subjected to different procedures.

With regard to administrative expulsion, the applicability of the general principles established by law and case-law for administrative proceedings is unclear.

These rules are as follows:

Law on Administrative Proceedings (241/1990)	
Article 3	Administrative acts must be fully grounded
Article 7	The beginning of the administrative proceedings must be communicated to the person concerned

Communication of the beginning of the proceedings

According to the Court of Cassation, the duty to communicate the beginning of an administrative procedure (Art. 7 of the law on administrative proceedings) does not apply to the removal procedure, because of its specific aim and structure.[10] The Court thus clearly shares the view that all immigration issues should be read in relation to *public security and public order*: granting the person concerned the possibility to participate in the expulsion procedure could frustrate the public order and security aims, as well as slowing down the removal proceedings.[11] In addition, notification would be pointless since expulsion is mandatory.[12] However, this interpretation, which is confirmed by the law on administrative proceedings (article 21*octies*, which was introduced by law No. 15/2005), is superficial and reveals the lack of a global understanding of the whole system of expulsions, where discretionary measures are actually the rule.

10 Court of Cassation, 1st Section, No. 13364/2007, No. 28858/2005

11 Court of Cassation, 1st Section, No. 16030/2001

12 Court of Cassation, 1st Section, No. 5050/2002

Requirements of the expulsion order

Expulsion orders must satisfy the following requirements:

Requirements of the expulsion order		
article 13 Immigration Law	signature of the Prefetto, Vice Prefetto or a delegate	an authentic copy of the act, including the signature, is to be given to the person concerned.
Article 13 Immigration Law, Article 3 Law on administrative proceedings	due motivation	The act ordering the expulsion shall explain the legal and factual reasons for the adoption of the measure.
Article 13 (7) Immigration Law Article 3 law on administrative proceedings	deadlines and means of appeal	The act shall indicate the deadlines and means of appeal.
Article 3 (4) d.p.r. No. 394/99	Information regarding the right to defense	The order shall contain information on the right to legal assistance by a lawyer of one's own choice or to have a lawyer assigned *ex officio*. This legal assistance may be paid by the State.
Article 13 (7) Immigration law	Translation	The order shall be in writing and in a language that the person concerned knows or, if not possible, in English, Spanish or French.
Article 2 (7) Immigration law	Information regarding diplomatic protection	The removal order shall be preceded by a notice of the expulsion decree to the diplomatic or consular authorities of the State of origin of the recipient.

These provisions seem to respect the rule of law by ensuring:

- the transparency of the proceedings,
- the possibility to check the grounds of the expulsion,
- the concrete and effective knowledge and understanding of the content of the act,
- the right to defense and respect for personal freedom.

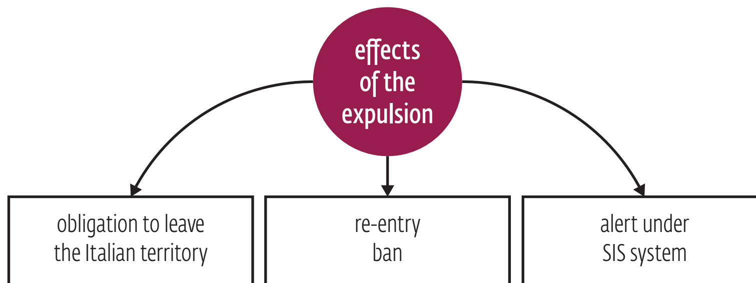
However, practice is very far from respecting these standards, and the courts' interpretation of the consistency of the act with the requirements prescribed by law tends to be very generous, thus only rarely leading to the invalidation the act.

- **Signature**. The act is not valid, and its invalidity is absolute (the act is null and void and no correction is possible) only where there is no signature. Notification of a copy of the act which is not certified may be corrected by the transmission of a certified true copy of the act.

- **Grounds.** The act must specify the factual reasons for the removal, but it is valid even if legal references are not included. The order is considered to be "grounded" (and thus, valid) even if it merely refers to a denegation of renewal of the residence permit. The practitioners we interviewed underlined that **the motivation may also seem "long" and consist of two-three pages**, but **the part of the act that explains the reasons for the order is perfunctory, with superficial or completely standardized reasoning, which merely repeat the legal provisions without explaining the reasons why they are deemed to be applicable to the person concerned**. Furthermore, the standard of the motivations vary among prefectures: this is problematic because it leads to different treatment of immigrants who are in the same situation, in violation of the principle of equality**.** In general, fully reasoned orders are issued mostly by the prefectures in Piemonte, Lombardia, Veneto, especially with reference to the risk of absconding and the level of risk posed by the person to be expelled. The orders issued by Prefectures of the Centre-South of Italy are **less thorough.** Some prefectures still use **old forms,** listing elements that were relevant according to the "Manganelli" circular of December 2010 but that are no longer so according to the 2011 Security Package. **Only few offices have updated their forms**. Generally, the *case by case* rule is not applied: there is no case by case evaluation of the specific circumstances of each individual concerned.
- **Information on the appeal and right to defense.** The lack of this information does not render the act invalid, because courts' interpretation considered it a mere irregularity that could justify a delay in appealing the act.
- **Translation.** The right to a translation of the act arises **only if the person concerned does not understand Italian**. Moreover, this right is fulfilled if the act includes a translation (not of the full text, but just a summary) in a language known to the individual, or, if impossible, in English, Spanish or French. No consequences arise from translation mistakes that do not inhibit comprehension: the translation concerns the communication of the order and, consequently, the *efficacy* of the act, not its *validity*. The obligation to translate the expulsion decree into a language known to the person concerned, even if by an intermediary language such as English or French, is generally respected. However, according to practitioners the translation does not always ensure correct information of the content of the order, the criminal

relevance of its violation and the deadline to appeal; the forms often refer to previous versions of the relevant legislation. In some cases, the Italian form of the expulsion order differs from the translated form.

- **Communication to diplomatic authority.** The lack of a notice to the diplomatic or consular authorities is considered as a mere irregularity of the proceedings. Such an interpretation disregards the fact that effective notice could prevent translation problems and ensure that the person has detailed information on his/her rights, on specialized legal assistance, on voluntary repatriation and on any existing reintegration programs in the country of origin. Furthermore, the rapid communication to diplomatic authorities could immediately resolve problems of identification, reducing the time spent in detention centres.
- **According to case law, any formal irregularity in the act is counterbalanced by a full understanding of the meaning of the act**, which is factually appraised by the court. Courts are thus called to ascertain the immigrant's knowledge of Italian, and may do so even on the basis of precise and univocal presumptions (Court of Cassation, 1st Civil Section, 20.03.2009, No. 6928, *contra* Court of Cassation, 1st Civil Section, 16.11.2005 No. 23211 and 23313).



- **Notification and effects of the expulsion order.** The effect of the expulsion order is the obligation to leave the country and the issuance of a re-entry ban. The expulsion order becomes effective when the recipient is notified. Practitioners report that, although each administrative file concerning an expelled person includes proof of notification, the recipient of the order may not have the copy of the order.
  We also learned that the push-back orders are issued by the *Questura* of Agrigento generally have the following stamp: " the person refused to sign but received a copy": in such cases, it is unclear how (and if) the order has been duly communicated to the person concerned.

- **Suspension of the enforcement of the expulsion order.** The expulsion order is immediately enforceable: no automatic suspension is provided even if the it is appealed. This exceptional regime, which is provided for by article 13 (8) Immigration Law, is contrary to the rules that are generally applicable to administrative acts (in accordance with the law on administrative proceedings, article 21 ter). Suspension is only granted if requested; however, the deadlines for such a request are not prescribed and, in any case, suspension is rarely granted. Consequently afforded an it is not ensure an effective remedy to appeal against or seek review of decisions related to deportations according article 13 Returns **Directive**.
- **Right to defense in the expulsion proceedings**. The full exercise of the right to defense is seriously at risk in the case of third-country nationals or EU nationals who are issued an expulsion order and, at the same time, are involved in criminal proceedings. Indeed, with the exception of persons held in pre-trial detention, all other immigrants must be expelled as soon as possible: **the *questore* is obliged to ask the proceeding judge to authorize their expulsion**. Such an authorization is considered as granted if the judicial authority takes no action within 7 days of the request (before the **2008 Security Package, the term was 15 days**), in application of the principle of the *silenzio assenso* (silent-consent rule). This principle, however, is a typical administrative tool whose application to judicial authorities is absolutely exceptional. As a consequence, the need for judicial authorization can serve no function as a guarantee of the rights of the immigrant concerned: given the enormous backlog of Italian courts, judges and prosecutors find it difficult to act within the short term provided by law. Moreover, once the person has been heard and all the evidence requiring his/her presence has been produced, judicial authorities have no reasons to deny the authorization to expel.

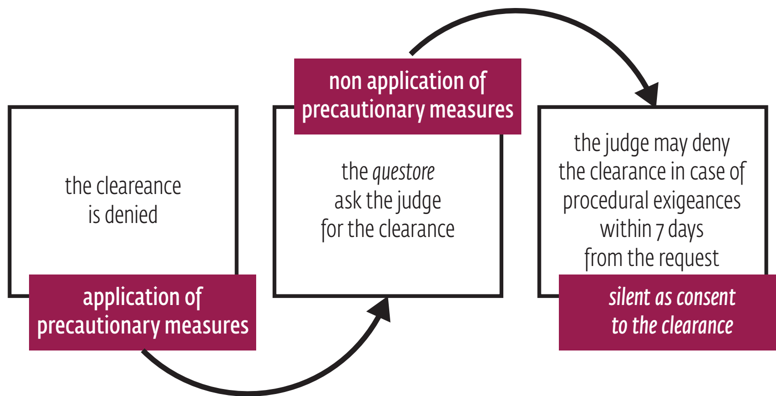
Furthermore, **the margin of appreciation of judicial authorities was reduced substantially by the 2008 Security Package.** The reasons that may justify a refusal have been strictly defined: authorization to expel may be refused only if the person's presence is necessary to ascertain the criminal responsibility of other persons accused of the same crime or of connected charges, or if it is in the victim's interest. However, the person's expulsion while criminal proceedings against him/her are pending has significant consequences for the proceedings, because it affects prosecution. In fact,

when it is enforced before the indictment, the court shall issue an acquittal (Article 13, para. 3 quater and quinquies, **Immigration law**). Consequently, public authorities often give up prosecuting crimes, even serious, once the accused has been removed: this policy is justified by the need to reduce the number of proceedings pending. Consequently, among the possible aims of criminal law, protecting the society (by expelling dangerous individuals) always prevails over reeducation and specific prevention, although reeducation is the only objective of criminal law that is specifically mentioned by the Constitution (Art. 27).

Moreover, the illegitimacy of a judicial authorization bears no consequences on the validity of the expulsion order, since it only invalidates its enforcement: once more, the right to defense is marginalized.

Authorization is not required to expel immigrants victims of crimes: the victim's expulsion cannot be suspended, although article 17 Immigration Law formally ensures the full exercise of the right to defense of both victims and alleged perpetrators of crimes.

Such inconsistency in the system seriously affects the victim's right to a fair trial, in violation of the EU standards of protection for victims of crime.



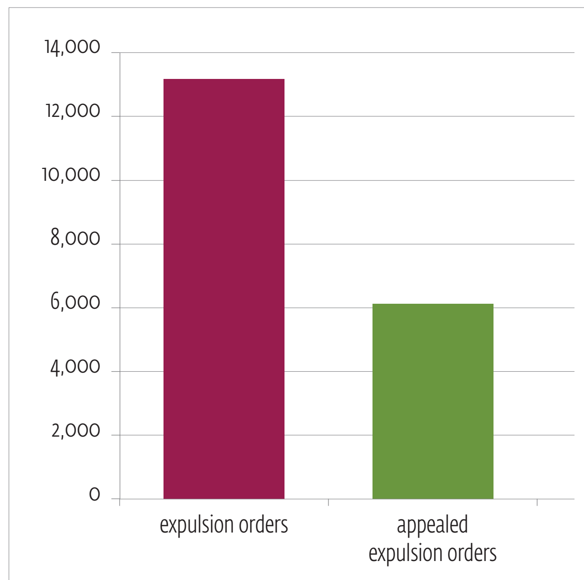
If expulsion is suspended, third country nationals may be detained in Identification and Expulsion Centres (CIE): it is not clear if detention in administrative camps should also be applied to immigrants who are subject to precautionary measures other than pre-trial detention.

Consequently, persons detained in the CIEs include immigrants who are to be removed merely due to their irregular status, together with irregular immigrants who have been accused of different kinds of crimes (including serious crimes), and who have been victims of crime.

The current ineffectiveness of verifications of the legitimacy of expulsions

The judicial review system has gradually lost its role as a tools to check the legitimacy of the expulsion.

The most significant problems arise from the recognition of the jurisdiction of "the justice of the peace of the place where the expulsion was issued" (article 13 para. 8 Immigration Law as modified by **Law No. 271/2004**) for prefectural expulsions. Moreover, while the person concerned has a right to be present at the hearing (and must therefore be informed of its date), his/her presence is not required for the hearing's validity (Court of Cassation, civil section, 3841/2006). Consequently, the person's effective and direct participation in the proceedings is not ensured, and his/her right to give evidence is not fully granted.



The extension of the jurisdiction of the justice of the peace (JP) to cover immigration law has been widely criticized, because it is not coherent either with the role of the JP (who is a lay magistrate) or with the aims of the jurisdiction itself. The JP was created in order to try and reconcile conflict situations (in particular, in the case of misdemeanours and minor crimes), thus reducing the work and backlog of ordinary judges. A gradual reduction in the effectiveness of this type of judicial review is revealed by the data on the workload of civil JPs: in two years, 13,177 prefectural expulsions took

place with forced deportations (2008-2009, Ministry of Home Affairs, National Summary of the removal of immigrants), and 6172 appeals under article 13 of the Immigration law were registered for the same period.

- **Territorial criteria to establish jurisdiction** give rise to many difficulties in the case of persons who are detained in a CIE, because the place where the expulsion was ordered is often different from the place of detention. The jurisdiction criteria thus can lead to serious difficulties in finding lawyers for the appeal: generally third country nationals, especially if detained, have no information on lawyers who are specialized in immigration law, and the lawyer dealing with the validation of the detention often has the added burden of finding a lawyer in the place where the expulsion has been issued. Practitioners highlight the **lack of expertise of lawyers in the field of immigration law** and immigrants' defense rights: lawyers are assigned on the basis of pre-determined shifts, as provided by the local Council of the Bar, which does not require any specific expertise. However, immigration law is a complex field of law, in which specialization is essential in order to ensure the effective and full guarantee of the immigrants' right of defense. However, a good practice has been established in some areas: thus, for instance, the Council of the Bar in Turin requires lawyers who are registered as potential ex officio lawyers to have specific training in immigration law.
- **The lack of a database of the decisions taken by the Justice of the Peace** is also problematic: currently, such judgments are difficult to find, since they're often not published, and it is difficult to evaluate whether the interpretation and application of the law is uniform, or even to be aware of interpretative issues which may be resolved differently by different judges.

RECOMMENDATIONS

→ provide specific and regular training for Justices of the Peace on immigration law;
→ establish a database of decisions of Justices of the Peace and prefectural expulsion orders;
→ provide specific training on immigration law as a requirement for registration in the list of ex officio lawyers.

- **Object of the judicial review**. In practice, when the legitimacy of the expulsion is examined, this only involves a verification of the existence of the formal requirements prescribed by law for the expulsion order: no consideration is given to any invalidity of the act which does not affect

the aims pursued by the law.[13] **The legitimacy of the expulsion order is not questioned even if it is issued after police investigations that were found to be illegal.** The Court of Cassation, in fact, does not recognize such "illegality" as a breach of the procedure determining the invalidity of the subsequent expulsion order, because the judge's verifications do not cover how the irregular status was actually ascertained, The judge just verifies if the factual conditions to order the expulsion were present (Court of Cassation, 1st Criminal section, No. 5322/2008). Such an interpretation of the scope of judicial review reveals a distorted application of the rule of law and frustrates the aim of checking the legitimacy of expulsion order. As a consequence, any irregularity or illegitimacy of the previous acts does not affect the validity of the expulsion order: all violations of the rules established to protect fundamental rights do not bear any effective consequence. In conclusion, it seems that the concrete advantages of ensuring the fulfillment of all legal requirements of the order are underestimated. A more in-depth verification of the order could ensure better efficiency of the proceedings and, at the same time, waste less resources, as well as providing a better guarantee of fundamental rights, which should be a priority in a democratic system. One recent example of "worst practice" is the communication from the Immigration Office of Turin to the local Justices of the Peace, encouraging the extension of the detention of Tunisian nationals (Immigration Office – Questura of Turin, Cat.a12.imm/2011, 8.8.2011, http://fortresseurope.blogspot.com/2011/08/il-viminale-ai-giudici-di-pace-non.html.) This guideline constitutes an evident and serious breach of the principle of separation of powers and shows the basis of the Italian Immigration policy: a vague mix of illegal practices forming the soft-law at the root of an immigration management which undermines the founding principles of the rule of law.

- **Suspension of the enforcement**. Precautionary suspension of the expulsion is not provided for while the legality of the order is ascertained, because the confirmation or revocation of the order takes place very close to the expulsion: only in the case of a delay can the judge consider whether to suspend expulsion. **Suspension** of the enforcement **is only granted upon request**, so that, in practice, it is very rare.

[13] Court of Cassation, 1st Civil Section, 30.08.2002, No. 12721; Court of Cassation, 1st Civil Section, 5.6.2006, No. 13189.

Enforcement of the removal: coercive expulsion as a general form of enforced removal, despite the Returns Directive

Enforcement of the expulsion orders implies a direct contact between the public authority and the recipient of the expulsion order, so that it is the most critical phase where an individual's fundamental rights are at risk of significant violation. The *questore* is the administrative authority for the enforcement of the expulsion (article 13 para. 4 Immigration Law). Until 2002, issuance of an order to leave Italian territory was the general way to enforce the expulsion; forced deportation was only adopted for dangerous immigrants, or if there was suspicion that the person would not leave the country. The system however seemed to be ineffective, because out of 64,734 orders, only 2867 were spontaneously executed.[14] The legislator, therefore, introduced coercive expulsion by public force as a general rule in order to remedy to the lack of effectiveness of the orders for voluntary departure (article 13 para. 4 as amended by the **Bossi-Fini Law**). In order to apply the Returns Directive, the **2011 Security Package** amended article 13 para. 4 Immigration Law, providing that **coercive expulsion is exceptional**, whilst article 13 para. 5 establishes that the general rule **is** that the immigrant can request the issuance of an order for **voluntary return** to the prefectural authority in charge of expulsions. Despite these modifications, the decision of the legislator not to modify the structure of the Immigration Law leads to a system that does not comply with the Returns Directive. Indeed, issuance of an order for voluntary return is only granted upon the immigrant's request (instead of as a general rule), if such request is filed within the deadline. These provisions distort the role of the amendments, confirming that coercive expulsion is still the rule when it comes to returning irregular immigrants. This was underlined by the Court of Cassation (Report of the Court of Cassation, July, 4 2011 No. III/08/2011, p. 5).

Circular No. 17102/124 of 23rd June 2011 of the Ministry of Home Affairs also clarifies that the legislator actually intended to maintain a system in which forcible return is still the rule: this act listed, among the reasons leading to a decision that there is a "risk of absconding", the immigrant's failure to request for a period for voluntary return.[15] However, it seems that the peri-

[14] C. Favilli, Le nuove modifiche alla disciplina dell'espulsione degli stranieri extracomunitari, p. 733. About enforcement of expulsion, see Centonze, *Sicurezza e immigrazione*, Milano, 2006.

[15] Ministry of Home Affairs, Circular No. 17102/124, 23.06.2011, http://www.asgi.it/public/parser_download/save/circolare.23.giugno.2011.pdf

od for voluntary departure should be requested from the *prefetto* before the expulsion order is issued, because article 13 para. 5 provides that the prefectural authority shall issue orders to leave Italy on a case-by-case basis and within a term which may vary from seven to thirty days. Consequently, third-country nationals need to request for this period before the order is issued, but at the same time there is no provision for his/her previous participation in a hearing during which it would be possible to submit the request; nor does the immigrant have any legal assistance in this phase. The period of time granted for voluntary return may be prolonged on the basis of personal circumstances, such as the length of their stay in Italy, the presence of children attending school, or family and social relations. However, there is no provision describing the procedure by which third country nationals may submit evidence of such personal circumstances**.** Article 13, para. 5, n. 1, **Immigration Law** prescribes that the immigrant shall receive adequate information by means of information sheets including translations into some foreign languages. However, the full comprehension of this information is questionable, taking into account the general quality of communications and translations of immigration orders and other acts directed at irregular immigrants. Moreover, in many cases the person may be illiterate. Scholars argue that, whenever a person does not request for a period for voluntary return, public authorities should assess whether the information provided was adequate; however, this is only possible in the case of an appeal against the expulsion order.

In cases of voluntary return, the recipient of the expulsion order must prove that he/she has **sufficient and lawful economic resources:** the provision consequently **makes economic resources a requirement to obtain the period for voluntary return**, whilst they are mentioned by the Returns Directive as a mere guarantee. If the period for voluntary departure is granted, the *questore* has to prescribe one or more of the following measures:

1) withdrawal of the passport or equivalent valid document – to be returned at the time of departure;
2) obligation to stay in an identified place where the immigrant may be easily contacted;
3) obligation to report to the local public authority.

These measures are clearly unreasonable.

Firstly, **it is not reasonable to request an irregularly staying third-country national to provide proof of regular accommodation and residence; furthermore, it has not been clarified how they should be proved.**

Many doubts also arise concerning the possibility of providing a declaration of housing by relatives or friends in such a short period;

moreover, there is no certainty as to whether such declarations will be deemed sufficient.

Additionally, these measures seem to be compulsory, whilst article 7(3) of the returns directive prescribes that such obligations "*may* be imposed". The Italian legislation, however, does not allow for any case-by-case evaluation.

Despite the fact that these measures affect the immigrant's personal freedom, the right of defense is not fully protected: even if enforcement of the measure is suspended, the participation of the person concerned in the proceedings is **allowed, but not required**, since he/she "can" file acts concerning his/her defence.

Additionally, we are not aware of cases where such measures have been applied. Many police officers who were questioned about the application of these measures were not aware of their existence.

- **Coercive removal**. This is prescribed by article 13(4) **Immigration Law** for the enforcement of:
  1) ministerial expulsion for public order and security reasons;
  2) ministerial or prefectural delegated expulsion to prevent terrorism;
  3) if the immigrant is believed to be dangerous - which, according to the law, is implied from the fact that the person belongs to specific categories listed by law.

Cases of ministerial expulsion for reasons of public order, security and terrorism are very rare.

In fact when the Ministry of Home Affairs were questioned about such cases, they submitted the following information:

Year	Legal basis of expulsions	No. of expulsions
2007	Ministerial expulsions in case of risk for public order or for reasons of security of the State	2
	Expulsions preventing terrorism	4
Total		6
2008	Ministerial expulsions in case of risk for public order or for reasons of security of the State Decree	5
	Expulsions in case of stay without renewal of the permit of stay and in case of dangerous person	3
Total		8
2009	Ministerial expulsions in case of risk for public order or for reasons of security of the State	3
	Expulsions in case of stay without renewal of the permit of stay and in case of dangerous person	9
Total		12
2010	Ministerial expulsions in case of risk for public order or for reasons of security of the State	3
	article 13 para. 1 Immigration Law	2
	Expulsions in case of stay without renewal of the permit of stay and in case of dangerous person	6
Total		11
2011	Ministerial expulsions in case of risk for public order or for reasons of security of the State	2
	Ministerial expulsions	1
	Expulsions in case of stay without renewal of the permit of stay and in case of dangerous person	4
Total		7

[Data of the Ministry of Home Affairs - Department of public security - Central Management of Immigration and border police]

Coercive expulsion is furthermore prescribed in cases where:

1) there is a risk of absconding;
2) the request for a permit was rejected because it was manifestly unfounded or fraudulent;
3) when the period granted for voluntary return has not been respected without a justified reason;
4) one of the precautionary measures provided to ensure the immigrant's effective return has been violated;
5) the expulsion order was issued by a judge (articles 15 and 16 Immigration Law).

The first critical issue is the definition of the risk of absconding by article 13 (4 bis) Immigration Law.

According to the law, the existence of a risk of absconding can be assessed based on any one of the following circumstances:

a) failure to provide a passport or other equivalent valid document;[16]
b) no proof of the availability of housing where the person can be easily contacted,
c) having previously declared a false identity;
d) violation of the term for voluntary return, of a removal order or of a re-entry ban;
e) violation of one of the precautionary measures adopted to ensure the immigrant's effective return.

However, the Returns Directive, in referring to "**the existence of reasons**" to believe that the person might abscond (Article 3.7) clearly implies that the risk assessment must be based on more than one circumstance.

The criteria to assess the risk of absconding are based on conditions that are beyond the person's control (e.g. loss of passport; non-availability of housing because of irregular status, which prevents rental of accommodation), or on the basis of previous conduct already sanctioned by law (i.e. declaring false identity). The application of such rules makes voluntary return a very marginal option.[17]

With regard to the enforcement of expulsion as a security measure (which can apply both the third country nationals and to EU citizens), the legal provisions (articles 183 bis and ter, code of criminal procedure) have been amended in 2011. The measure is to be adopted by the criminal judge who finds the person concerned guilty of a crime and may only be enforced after the execution or extinction of the criminal sentence by a judge of the execution, who is supposed to evaluate whether the person is dangerous.

In cases of third country nationals, the expulsion is enforced by the *questore*: the third country national is forcibly escorted to the border or detained in a CIE. In the case of an EU national, the measure is enforced through an order issued by the *questore* and previously communicated to the local Justice of the Peace, who has to validate this order. Whenever transporting EU nationals at the border is not possible, they may also be detained in CIEs.

[16] On the contrary article 9 (2) (b) directive 2008/115/CE, provides that a lack of identification involves postponing a removal, so that failure to provide a passport or other identity document that may constitute a risk of absconding should be excluded.

[17] See G. Savio, *cit.*, 2011, p. 10 ff.

Temporary administrative measures to ensure the enforcement of removal orders in cases where immediate (voluntary or coercive) expulsion is not possible

As a result of the 2011 Security Package, article 14 Immigration Law provides for some temporary administrative measures, which are progressively stronger, to ensure the enforcement of removal orders whenever immediate voluntary return or coercive expulsion is not possible:

a) obligation to stay in a place previously identified and easy to be reached;
b) obligation to report, at a set date and time, to a local police station;
c) detention in a CIE, which should be a residual measure.

However, the first two measures are not applicable if the person fails to provide a passport or other equivalent valid document. In such cases detention is mandatory, while, according to the Returns Directive, it should only be allowed. Furthermore, the non-application of less coercive measures to third country nationals who are considered to be dangerous contrasts with the purposes of detention in a CIE, whose aim is to ensure the effectiveness of the removal, not to protect the society from a potentially dangerous a third country national (see ECJ, 30.11.2009, Kadzoev, C-357/09).

The above mentioned measures are the same as those applicable to third country nationals who are granted a period for voluntary departure: **the main difference is that, in this case, they are compulsory their maximum length is not set by law.** We may however imply that, since these measures are applied instead of detention in a CIE, they may only last as long as detention would have been possible: that is, after the last amendments, for up to 18 months.

However, the provision introduced to paragraph 7 article 14 Immigration Law is ambiguous: it prescribes that, if the person concerned absconds (i.e. flees), detention has to be re-established by "a new act of detention". This provision could be interpreted as implying that the period of detention starts running again and anew, and thus that it may last another eighteen months. This interpretation is the one that accords to the intent of the Government (see the Brief Note of the Study service of the Parliament, No. 25, August 2011).

The resulting system violates article 13 of the Constitution, which sets the conditions to limit personal freedom: **the concept of "risk" is too broad**.

These measures should be validated by the Justice of the Peace of the place where the expulsion order has been issued or, in cases of detention, by the Justice of the Peace of the place where the CIE is. The validation request is to be submitted by the *questore* within 48 hours and it should be communicated to the person concerned and translated. The presence of the person to be removed at the validation hearing is mandatory.

The judge should verify the respect of the delays prescribed by the law, the existence and legitimacy of the expulsion decree, the decree ordering forced removal and its validation, and the decree adopting precautionary measures. The validation order, which must be grounded, is adopted within forty-eight hours from the request; in cases of delay or invalidation, the detention decree becomes ineffective.

Practitioners reported **a general lack of application of the administrative measures** other than detention: indeed, since their introduction, there has been no case in which alternative measures to detention in a CIE were adopted. Additionally, no circulars regarding the application of these measures seem to have been sent to the *questore* or to Justices of the Peace.

The fact that they have systematically not been applied is confirmed by the detention orders that we have seen: in fact, they generally consist of standardized forms in which the presence of all indexes of the risk of absconding is mentioned; thus, detention has been automatically applied, and no case-by-case evaluation has been carried out.

Administrative detention in a CIE

In application of the Returns Directive, administrative detention **should be a residual measure** that may be applied when immediate enforcement of an expulsion order is impossible, and if the previous measures could not be applied However, in violation of EU obligations, the provisions of the 2011 security package favour detention.

Length of detention

Art. 23 of the 2011 Security Package extended the overall maximum length of detention in CIEs **from 180 days, as prescribed by the 2009 Security Package, to 18 months** (article 14 para 5 Immigration Law), with retroactive effects. The prolongation of the length of detention was immediately criticized:

Extract from the Statement by the UN Working Group on Arbitrary Detention at the End of its Mission to Italy

"[....]With regard to the duration of detention in expulsion centres, the UN Commissioner for Human Rights stressed that "the limit of 18 months provided in the EU return directive is meant to limit the duration of detention in countries which currently have no limit. It is certainly not meant to encourage countries with laws that establish reasonable limits [...] to abandon their good practice".

Moreover, this extension of the maximum limit of detention does not comply with the Statement made by the EU Council and annexed to the Returns Directive, according to which the implementation of the Directive 'should not be used in itself as a reason to justify the adoption of provisions less favourable to persons to whom it applies'.[18]

With reference to the detention of irregular immigrants, Article 5 of the ECHR allows for restrictions of personal freedom, as provided by law, in cases of arrest or detention of a person to prevent unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition (paragraph 1, letter f). In this regard, the European Court of Human Rights has stated that, in order to avoid arbitrary deprivations of liberty, States should ensure, inter alia, that they **respect the principle of reasonable duration, under which detention may not exceed the time necessary to attain the objective pursued** (see, in particular, the judgment of 29 January 2008 Saadi v. United Kingdom, § § 72-74 and the judgment of November 15, 1996 Chahal v. United Kingdom, § § 112-113). With reference to the implementation of the Returns Directive, the need to ensure full respect for Article 5.1.f of the ECHR has been underlined, for instance, by the EU Agency for Fundamental Rights in its 2009 Report on Detention of third-country nationals in return procedures: detention becomes arbitrary once there are no prospects of removal. The prolongation of the detention does not correspond to an increase in the number of identifications, but solely an increase in the capacity of the existing structures.

All the directors of CIEs that we visited reported that, when the length of detention was extended, there were serious riots and demonstrations inside the centres and an increase in self-harming acts.

[18] See document n. 16166/08 ADD 1 REV 1.

- An operator who had been working in the CIE of Trapani since 1999 noted that, while usually the maximum length was not applied at the beginning, detention was then gradually extended until it reached the maximum.

The right to defense and validation of the detention order

Practitioners reported that the judicial control of the detention order is merely formal and *de facto* in breach of the right to a fair trial.

a) **Validation of the detention**. In many cases the detention order is not validated within the prescribed term, which is encouraged by the practice of setting the hearing for the last day.
b) **The Justice of the Peace (JP)**. As mentioned above, the decision to confer jurisdiction to the criminal JPs, who are not professional magistrates, sterilizes the effectiveness of judicial control over acts concerning personal freedom. JPs are paid on the basis of the number of acts they adopt per day, so that they have a vested interest in issuing many acts, rather than in conducting hearings where the rights of the defence are fully ensured. They are assisted by a chancellor or, in his/her absence, by a representative of the police. Practitioners reported that they often do not have legal codes and other legislative texts with them. The representative of the police often acts as a legal advisor for the judge. The judge is competent to verify whether the terms prescribed by law have been respected, the existence and legitimacy of the expulsion order, the existence and validity of an order for coercive enforcement of the expulsion, and the adoption of precautionary measures. Despite the Judgment of the Constitutional Court No. 105/2001, usually JPs only ascertain the actual existence of the expulsion order. They only hold hearings to validate the order. Each extension of detention is granted either without a hearing, or following to a hearing without the participation of the detained person, even though such presence is required by law (as confirmed by the Court of Cassation with judgment No. 4544/2010).
c) **We requested the Coordinator of the Justices of the Peace in Rome to provide us with specific information regarding the existence internal circulars and directives, but we received no reply.**
d) **Validation hearing**. The hearing is generally held in the morning from 09:00 to 14:00 in a room at the CIE, which is usually at the entrance of the building. A schedule of the hearings is not provided, so

that lawyers have to wait without any information about when exactly the hearing will be held. This practice discourages lawyers from accepting to assist detained immigrants, because of the heavy organizational burden. The following people are present: the judge, the chancellor, who is sometimes replaced by a police officer, the detainee with his/her lawyer, an interpreter, and a representative of the *Questura*. There are no computers or internet connection. The chancellor and the judge write the minutes and the decision by hand. Each validation hearing lasts a few minutes and most of the time is usually dedicated to formal introductory speeches.

e) **Translation**. All declarations of the detainee are translated by an interpreter and then written by the chancellor. Practitioners report that a list of interpreters is not always available, and that the criteria to choose them are unclear. Interpreters therefore tend to always be the same persons. Their behavior varies from neutrality to supporting the judges or police, and they often focus on making sure that the hearing goes quickly.

f) **Right to defense**. The detainees have the right to be present at the validation and prorogation hearing, but they are often transferred from one CIE to another before the hearing. They usually have *ex officio* lawyers who are not selected on the basis of their expertise on Immigration Law. The detainee may see the lawyer in the CIE, where a room is provided for the lawyers' visit. Visiting hours are from 3.00 to 6.00 p.m. Thus, if communication of the date of the hearing is only granted the day before it, it is not possible for the lawyer to meet the detainee before the hearing. In the presence of the judge, the detainees usually arrive in poor conditions, wearing pajamas and slippers. The detainee may defend his/her position through a defence lawyer. Practitioners reported that it is only possible to provide evidence if this is immediately available: since no other hearings are scheduled, usually the submission of evidence is impossible.

g) **Validation Act**. The validation should be adopted by reasoned order. Usually the justification for the validation act is brief, and is filled in by hand on pre- stamped forms, often simply with standard phrases irrespectively of the specific case, or simply left blank.. The most common reasons for the validation of the detention include identification problems and the lack of transport capacity.

Part 2

Immigration and criminal law

3. Crimes committed by irregular immigrants

Italian immigration law includes a number of criminal provisions, forbidding both the conduct of irregular immigrants or of people who assist or facilitate their irregular stay. The latter offences are grouped under article 12 of the immigration law, while offences related to irregular entry or stay are spread over several articles, since they criminalize non-compliance with specific legal requirements.
The use of criminal law in immigration matters has increased since 2001, leading to criminalization of both those who facilitate irregular migration and, since 2009, irregular immigrants themselves. With regard to the latter, new crimes have been introduced and the penalties for each crime have become consistently more severe, finally culminating in the criminalization of irregular immigration itself with the 2009 security package.
This section will examine the most significant criminal provisions together with their history and background.
The general trend has always been for the penalties to become more harsh and to expand the scope of the criminal provisions – often, in violation of European and international law, as well as the national Constitution.

Box: Criminal law regarding irregular immigration in the security packages of 2008 and 2009. Some examples of increasingly harsh penalties.

2008 security package	Criminalization of irregular immigration is first suggested. Disagreement between the political parties supporting the Government → the then Prime Minister Berlusconi declares that irregular immigration should not be a crime but an aggravating circumstance → criminalization is postponed.
	Introduction of an aggravating circumstance for all crimes committed by irregular immigrants (EU or non-EU). Punishment: up to 1/3 higher. Inclusion of EU citizens is politically justified based on statistical data on the number of crimes committed in Italy by (new) EU citizens.
Criticisms to the new law	The European Commission and the Legal Services of the European Parliament criticize the circumstance. Harshening the punishment for crimes committed by irregular EU citizens violates EU law (freedom of movement and non-discrimination based on nationality).
2009 security package	The aggravating circumstance is amended to exclude irregular EU citizens.
	Irregular immigration (entry and residence) is criminalized. Punishment: a fine and expulsion.
2010	The Constitutional Court declares that the aggravating circumstance is in breach of the Constitution (Art. 3, non-discrimination clause; Art. 25, personality of criminal liability).
	As a consequence, judges have to review all sentences in which the circumstance was applied to exclude their effects → waste of resources.
2011	The ECJ clarifies that criminalization of irregular immigration, according to national law, is not allowed under Directive 2008/115 (Returns Directive) and violates the principle of cooperation.

For the purposes of this report, we focus on the regulations which criminalize the conduct of irregular immigrants. These may be divided in two broad groups, those which sanction:

- the violations of specific orders or decrees (such as re-entry bans and expulsion orders);
- irregular entry and stay *per se* (article 10 *bis*; article 61, n. 11 *bis* of the criminal code, which has recently been declared to violate the Constitution).

Both categories allow for the conversion of the sentence into expulsion.

A final remark must be added, concerning the structure of this chapter. We move from the provisions that are most often applied in practice (or used to be, before the Court of Justice of the EU ruled them out) to those that have had more resonance in the media. This order is justified both by the practical importance of the rules examined and by the need to discuss the case-law of the CJEU firstly, so as to make it possible to understand its impact over the rest of criminal immigration law. Thus, the analysis of the crime of irregular

entry or stay comes after that of other, apparently more technical provisions.

Violation of an expulsion decree

Article 14, para. 5 *bis* requires the Questore to issue a decree ordering any illegally staying third-country national to leave Italy within 7 days; this decree is adopted both when the person cannot be detained in a CIE and once detention has reached its maximum length (now, 18 months). According to article 14, para. 5 *ter*, any third country national who - without due cause - remains in Italy after the period for voluntary return has expired, thus disobeying the decree, commits a crime, which is now punishable by criminal expulsion.

History and background

Before examining the provision as it is today, it is essential to describe the numerous amendments it has been through, and in particular the reasons why it has recently been completely rewritten.

Table: Introduction of new crimes (Bossi-Fini Law)

Expulsion procedure	Art. 14, para. 5 *ter*	Art. 14, para. 5 *quater*
• Irregular immigrants are found → forcible expulsion. • If impossible → detention in a CIE. • Exceptionally, if both impossible → decree ordering voluntary departure in 5 days.	• Non compliance with the order for voluntary departure, without due cause, is a crime. • Punishment: arrest (6 months to 1 year) and forcible expulsion. • Arrest is mandatory in *flagrante delicto*.	• Re-entry after expulsion is a crime. • Punishment: imprisonment (1 to 4 years) and expulsion. • Arrest is mandatory in *flagrante delicto*. [NB: the crime is hardly ever applied since it requires previous expulsion].

Although the adoption of a decree ordering voluntary departure should be exceptional, it has become the rule: resources to carry out forcible removals are lacking, and the CIEs are often too full to accommodate new detainees. Immigrants are thus expected to voluntarily carry out the departure order, while the State lacks the resources to enforce it.

Personal freedom and arrest
the role of the Constitutional Court

Art. 14, para. 5 *ter* → Arrest in *flagrante delicto* is mandatory.
– The maximum sentence is so low that it does not allow for pre-trial detention.
Consequences:
– The police have to arrest the immigrant.
– The prosecutor must order his/her immediate release (Art. 121, rules on the implementation of the code of criminal procedure).

Constitutional Court, 223/2004:
– Violation of Art. 3 (reasonableness and equality) and 13 (personal freedom).

Government reaction: Law 271/2004:
– Divided into two crimes:
  – If the immigrant illegally entered the country or did not request a residence permit → more serious crime (punishment: imprisonment for 1 to 4 years). Arrest is mandatory.
  – If the person did not request the renewal of a residence permit → less serious crime (misdemeanor).

Amendments in 2009

Art. 14, para. 5 *ter*	Art. 14, para. 5 *quater*
• The crimes of non compliance with the order for voluntary departure are maintained. • In addition, immigrants found to have violated the decree, after serving their sentence, have to be alternatively: - forcibly removed; - detained; - if both are impossible, issued another decree ordering their departure.	• Non-compliance with the second return order (issued according to Art. 14, para. 5 *ter*) is criminalized. • Punishment: imprisonment between 1 and 5 years and renewed application of the expulsion procedure. • Arrest is mandatory in *flagrante delicto*. • [NB: no mention of "due cause" was originally included.]. • Constitutional Court, 2010 → violation of art. 3. The crime includes a requirement of due cause.

Role of Article 14 in the system

It strengthened the enforcement of decisions ordering voluntary departure of irregular immigrants (which are perceived by the Government as being "weak") by allowing criminal arrest, conviction and detention of irregular immigrants who do not comply with them;
It allowed for a longer period of time in which expulsion may be carried out forcibly (before, during and after criminal conviction and detention of the immigrant).

The importance of these crimes, in the national immigration system and for the purposes of expelling immigrants, cannot be underestimated. The data available through the Ministry for Justice show that, in 2006, more than 18,000 immigrants were tried for the crime foreseen in Article 14, para. 5 *ter*, leading to more than 14,000 convictions and around 7,700 expulsions (see table below).

Table: data for 2006 (Source: Ministry for Justice)

Relevant article	Nr- of trials	Defendants	Defendants acquitted	Defendants convicted	Defendants expelled after conviction
art. 14, para. 5 ter	17.607	18.877	4.858	14.019	7.743
art. 14, para. 5 quater	673	789	187	602	311
Total	20.345	21.859	5.439	16.420	8.859

Entry into force of the Returns Directive

In 2008, the European Parliament and the Council approved Directive 2008/115/EC on the common standards and procedures in Member States for returning irregularly staying third-country nationals (so called "The Returns Directive"). The Directive, which should have been transposed into national legislation by December 2010, is aimed at establishing an effective common removal and repatriation policy for irregular third-country nationals. This policy should be based on common standards in order to ensure that persons are returned in a humane manner and with full respect for their fundamental rights and dignity.

Once the Returns Directive came into force, and – even more so – once the deadline to transpose it into national law had expired, Italian scholars and judges began discussing whether the two criminal provisions of article 14 could be deemed to comply with it. Indeed, the national expulsion procedure was clearly not in line with the procedure set out in the Returns Directive, as shown in the table below. Moreover, the use of criminal sanctions (and in particular, criminal imprisonment) was also deemed not to comply with the Returns Directive: Article 14, para. 5 ter and quater were thus heatedly debated.

Table: Incompatibility of the Italian expulsion procedure with the Returns Directive

Previous Italian legislation: procedure for the enforcement of return decisions	Returns Directive: procedure for the enforcement of return decisions
Issuance of a return decision (Article 13.2).	Issuance of a return decision (Article 6.1).
Immediate forcible removal of irregularly staying third-country nationals (Article 13.4).	Period for voluntary departure (7/30 days), granted either automatically or upon request (Article 7).
	If the person does not comply / no period is granted, (forcible) removal. Coercive measures may be used as a last resort (Article 8).
Pending removal (if immediate removal is impossible): pre-removal detention is ordered (Article 14.1). No less coercive measures are provided for.	Pending removal: if less coercive measures are insufficient, pre-removal detention may be ordered (Article 15). Maximum length: 18 months.
Once the maximum period of detention (180 days) expires or if pre-removal detention is impossible: issuance of an order for voluntary departure in 5 days (article 14.5 bis).	If the immigrant does not comply with the order, criminal detention applies and a new order for voluntary departure is subsequently issued (article 14.5 ter and quater).

Consequence: legal uncertainty and judicial chaos

The national debate over Article 14, para. 5 *ter* and *quater* and its compliance with the Returns Directive can be summarized as follows:

- According to a number of scholars and judges,[1] the crimes were not compatible with the Returns Directive → they deprived it of its *effet utile* with regard to the protection of fundamental rights, in particular the right to personal freedom. The directive was deemed to aim not only at ensuring the effective removal of irregular immigrants, but also at protecting the immigrants' fundamental rights. Article 14 was deemed incompatible with the directive: the maximum sentence was much longer than that allowed by the directive; its enforcement did not comply with any of the guarantees of Arts. 15 and 16 (e.g., it took place in a penitentiary, not in a separate detention facility).
- Other judges continued applying Article 14 and sentencing irregular immigrants to criminal detention, considering it not to breach the Returns Directive.

[1] E.g. Viganò, F., and Masera, L., 2010. Inottemperanza dello straniero all'ordine di allontanamento e "direttiva rimpatri" UE: scenari prossimi venturi per il giudice italiano. *Cassazione penale*, v. 5, p. 1410 ff.; Court of Cassation, decision n. 11050/2011, 18 March 2011 (reference for a preliminary ruling to the Court of Justice); Procura della Repubblica presso il Tribunale di Firenze, Document of 18 January 2011; Procura della Repubblica presso il Tribunale di Milano, Guidelines of 11 March 2011. All documents available online, at http://www.penalecontemporaneo.it/materia/3-legislazione_penale_speciale/41-stranieri/

The adoption of different and opposing judgments on the same issue gave rise to uncertainty, which the judgment of the ECJ in the *El Dridi* case (summarized in the table below) finally put an end to.

Table: the judgment of the ECJ in the *El Dridi* case. Assessment from the Italian point of view.

Origin of the case: reference for a preliminary ruling from the Court of Appeals in Trento.	• May criminal penalties be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed? • May a sentence of up to four years' imprisonment be imposed in respect of a simple failure to cooperate in the deportation procedure?
Decision of the Court: 28 April 2011, case C-61/11 PPU	• The directive had not been transposed into Italian law → breach of the Directive; • States may not detain irregular immigrants who do not comply with a decision ordering voluntary departure, but they must try to enforce the return decision; • Imposing a custodial penalty jeopardizes the attainment of the purpose of the directive: the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals; • Imposing a custodial penalty may frustrate the application of measures aimed at enforcing the return decision, delaying it.

Issue: what are the purposes and aims of the Returns Directive?

Italian judges and scholars:
1. To ensure effective enforcement of return decisions (i.e. expulsions);
2. To protect immigrants' fundamental rights (in particular, to personal freedom).

ECJ, El Dridi case:
1. To ensure effective enforcement of return decisions. No additional aim is explicitly recognized.

Consequences of the *El Dridi* judgment

- **Immediate and direct effect → non-application of para. 5 *ter* and *quater* of article 14**.
  - Persons who were under trial for these crimes at the time of the adoption of the ECJ's ruling were acquitted.
  - Persons who were under detention at the time of the ECJ judgment should by now have been released and had their convictions withdrawn.
  - Persons who were detained after the El Dridi judgment was adopted, and possibly after the deadline to transpose the Returns Directive expired, are entitled to claim compensation for their unlawful detention.
- **Indirect effect → Adoption of the 2011 Security Package**. The expulsion procedure is amended and new criminal penalties are introduced, so as to ensure (at least *formally*) their compliance with the directive. The new law decree is designed to ensure formal respect of the Returns Directive, while maintaining the highest possible level of coercion against irregular third-country nationals.
- **Impact → The core of immigration criminal law is gone.**

The new crimes – violation of an order to depart

The new provision of article 14, para. 5 *ter* now provides that violation of the decree ordering voluntary departure (issued in accordance with article 14, para. 5 *bis*) without due cause is punishable with a criminal fine and with expulsion. A new expulsion decree is adopted on a case-by-case basis; such a decree is to be carried out, whenever possible, by forcibly removing the immigrant.

Article 14, para. 5 *quater* consequently criminalizes the violation of this second expulsion order, punishing it by a fine, accompanied by the adoption of another expulsion decree to be carried out through the same procedure described in article 14, para. 5 *ter*.

Issue: What happens if the immigrant never complies?
Does art. 14, 5 *quater* allow for multiple convictions?

Yes: if an irregular immigrant remains non-compliant to the expulsion decree → he may be convicted again and again. → Consequence: a **"spiral of convictions"** for the same conduct (not leaving Italy).
Problem: **is this compatible with the Constitution?**
No: it violates the principle of proportion between offence and punishment and the objectives of criminal penalties (reintegration and education).

The 2011 Security Package has also redefined the rules concerning jurisdiction over these crimes, assigning them to the jurisdiction of the Justice

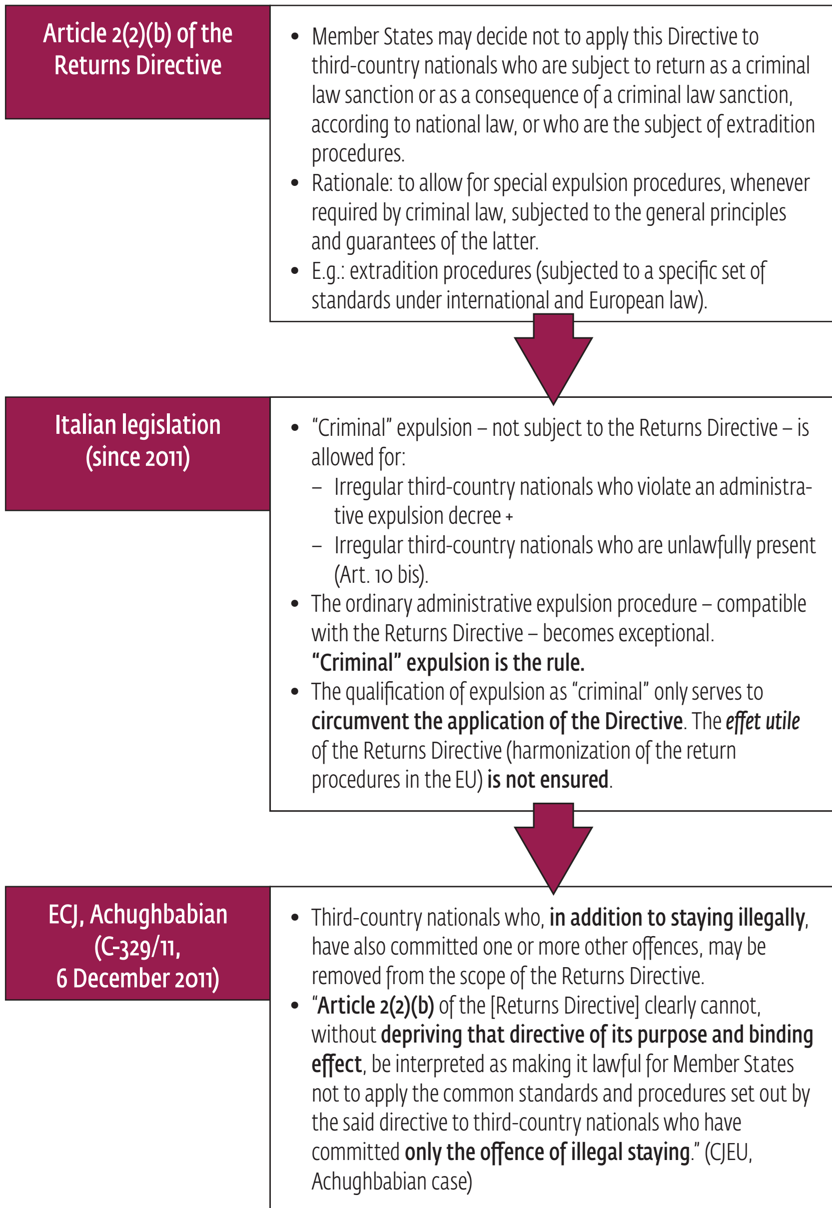
of the Peace. This choice seems highly questionable, since it contributes to marginalizing the criminal immigration law, assigning it to non-professional judges, whose workload is already excessive and whose decisions and judgments are rarely published (see below, on Art. 10 bis).

Moreover, article 16 of the immigration law, as amended in 2011, now allows the Justice of the Peace to apply expulsion as a substitutive sanction even for offences set out in article 14, para. 5 *ter* and *quater*.[2] The end result of this unwieldy system is that the Justice of the Peace now has the power both to confirm administrative expulsion decrees and to issue criminal expulsion decrees in substitution of other criminal sanctions; the latter type of decree, however, according to the interpretation of the Returns Directive provided by the Italian Government, need not be carried out in accordance with the Returns Directive, since the Government opted for the application of article 2(2)(b) of the Directive (see box below on the inadmissability of this interpretation).

While the criminal provisions under consideration have been amended in order to ensure compliance with the Returns Directive, their compatibility with the latter certainly seems questionable.

[2] According to article 62 bis of legislative decree 274/00 (on the criminal jurisdiction of the justice of the peace), as amended in 2009.

Box: incompatibility of the new Italian legislation with the Returns Directive



Issue: what is the scope and meaning of Art. 2(2)(b) of the Returns Directive?

- **Italian Government**: it allows to exclude all types of criminal expulsion from the scope of the Directive.
  - IF irregular immigration is criminalized and punished with "criminal" expulsion, such expulsion does not need to comply with the Directive.
  - Administrative expulsion is amended to ensure compliance with the Directive, but in practice expulsion is to take place through the criminal procedure.
- **ECJ, Achughbabian case**: Article 2(2)(b) of the Returns Directive does not allow States to exclude from the scope of application of the Directive irregular immigrants who have committed only the offence of illegal staying. Such an interpretation deprives the directive of its purpose and binding effect.

Consequence:

- "Criminal" expulsion, as a consequence of a violation of Art. 10 ***bis*** or 14, para. 5 ***ter*** and ***quater***, is subjected to the Returns Directive and must be carried out in accordance with it.

An additional problem related to the two new provisions in Art. 14, para. 5 *ter* and *quater* is whether they may be considered a "continuation" of the pre-existing provisions (which would allow for their application even to crimes committed before they were enforced, given their more favorable nature) or whether there has been a substantial breach of continuity. In the latter case, any criminal conduct taking place before the 2011 Security Package was enforced would need to go unpunished. It seems that, even though the pre-existing and new criminal provisions share the same nature and aims, and thus the new provisions can easily be deemed a continuation of the previous ones, there has been a substantial interruption in their validity. This is because the Returns Directive had the direct effect of hindering the application of the pre-existing criminal provisions. Indeed, the previous criminal provisions ceased to be applicable from 25th December 2010 (the day after the period to convert the Directive expired), while the new provisions were only enforced on the 24th of June 2011 (the day after the 2011 Security Package was published in the official journal). Thus, national judges have stressed that the new provisions cannot be deemed to be a continuation of the pre-existing ones, since the conduct was first de-criminalized (as a consequence of the Returns Directive) and only later on re-criminalized (with different criminal sanctions).[3]

[3] See for instance Tribunale di Pinerolo, 14 July 2011, available online at www.penalecontemporaneo.it/upload/TRIBUNALE%20DI%20PINEROLO.pdf; Tribunale di Torino, 27 June 2011 (according to

As a consequence, **all immigrants who committed the crimes of Article 14 before the 2011 Security Package was enforced should be acquitted of the crime and freed**.

The regularization procedure: background and impact of the criminal provisions

Another problematic issue which arose from Articles 14, para 5 *ter* and *quater*, was related to their impact on the regularization procedure. Law 102/2009 allowed for the regularization of irregular immigrants working at home, either as domestic helps or as caretakers. The law was adopted in connection with the new crime of irregular migration, in order to allow families who relied on the domestic help of irregular immigrants to regularize them, thus avoiding criminalization.

The Government was initially split on the need to adopt the law: the then Minister for Home Affairs, Maroni, a member of the political party Lega Nord, originally strongly opposed the proposed regularization, arguing that "irregular caretakers are already illegal" since they work in the black market.

After some debate, however, the regularization decree was approved. According to the original proposal, the regularization decree should have been extremely selective, only allowing for the regularization of carers of people older than 70 and of people with disabilities.

Subsequently, its scope of application was expanded so as to include all domestic helps and carers. However, the law included a number of preconditions for regularization (see box below); its application to people who had been convicted for crimes related to irregular immigration was therefore long debated, giving rise to a serious lack of coherence and of legal certainty.

which, the new crime is not comparable to the previous one, given that it is based on a very different administrative expulsion procedure), in www.penalecontemporaneo.it. Also see L. Masera, Il riformato art. 14 co. 5 ter d.lgs. 286/98 e la sua applicabilità nei procedimenti per fatti antecedenti all'entrata in vigore del d.l. 89/2011, also in http://www.penalecontemporaneo.it/materia/3-/41-/-/800-il___nuovo___art__14_co__5_ter_d_lgs__286_98_e_la_sua_applicabilit___nei_procedimenti_per_fatti_antecedenti_all___entrata_in_vigore_del_d_l__89_2011/.

Box: the regularization of irregular immigrants who had been convicted for violation of an expulsion order

Precondition for regularisation	• the third-country national has never been convicted of crimes for which arrest in *flagrante delicto* is either allowed or mandatory, in accordance with artt. 380 and 381 of the code of criminal procedure.
Article 14, para. 5 *ter* and *quater*	• Article 14, para. 5 *quinquies* → both crimes give rise to mandatory arrest in *flagrante delicto*.
Do convictions based on article 14, para. 5 *ter* or *quater*, also prevent regularisation?	• ORDINARY JUDGES → No: arrest for these crimes is not based on Art. 380 and 381, but on a special rule + it's a nonsense to exclude from regularization persons who have convicted merely because they were irregular. • CHIEF OF POLICE → Yes: the punishment for non-compliance with an order to depart allowed for arrest under the ordinary regime; the special rule provided for an even stricter regime. • CENTRAL ADMINISTRATIVE TRIBUNAL → No. After El Dridi, the conduct is no longer criminal; decriminalization has retroactive effects. [Consiglio di Stato, Adunanza Plenaria, 10 May 2011, n. 7, Charaf]. • MINISTRY FOR HOME AFFAIRS (*Circolare* n. 3958 of 24 May 2011) → immigration offices should re-examine regularization requests not taking into account previous convictions based on article 14. • MINISTRY FOR HOME AFFAIRS (n. 4027 of 26 May 2011) → suspended application of the former decision, offices must await for further instructions. • This decision is not in line with the judgment of the Central Administrative Tribunal and is invalid for mistake of law.

The crime of irregular entry or stay

Article 10 *bis*, introduced in the immigration law with the 2009 security package, provides that: unless the same conduct also constitutes a more serious crime, any immigrant entering or remaining on Italian territory, in violation of this law or of article 1, law 68/2007, is punishable by a fine of between 5,000 and 10,000 €. Article 162 of the criminal code does not apply to this offence.[4]

[4] This rule makes it possible to abate misdemeanors punishable by a criminal fine only by paying a portion of the fine before the trial (estinzione della pena, that is, the person is relieved of any

History and rationale

2008	• Draft "security package," adopted unanimously by the Government → irregular immigration is a crime • Prime Minister Berlusconi declares that irregular immigration should not be a crime, but merely an aggravating circumstance to other crimes • The draft is correspondingly amended.
2009, draft	• The draft "security law" proposes criminalization of irregular migration as a *delitto* (a serious crime) punishable by imprisonment between 6 months and 4 years.
2009	• 2009 security package → irregular entry and stay is a crime. • The offence is a *contravvenzione* (less serious crime) punishable with a fine between 5,000 and 10,000 €. • The penalty may not be extinguished by paying before trial - application of article 162 of the criminal code is exceptionally excluded.

- The exclusion of Art. 162, of the criminal code, clarifies the **real objective** of the new crime: criminal liability may not be abated, but it may be substituted with judicial expulsion, according to article 16, para. 1 (as amended by the same law 94/09).[5] Expulsion may be carried out, while the criminal trial is ongoing, without the authorization of the relevant criminal judge.
- **Real aim of the new crime**: to ensure expulsion of irregular immigrants by means of criminal law, since the administrative expulsion procedure is often inefficient and in many cases does not lead to the person's removal.
- **Additional aim**: to circumvent the Returns Directive, by qualifying expulsion as "criminal" and thus excluding it from its scope of application.[6]

criminal punishment through payment of the fine). It is a general rule whose application may never be refused; art. 10 bis is, in this respect, exceptional.

[5] According to the Constitutional Court (250/10) and to the Court of Cassation (13408/11), such a substitution is merely allowed, not mandated, by law - the judge has the discretionary power to decide whether to substitute the fine or not.

[6] See box. The text cited is a portion of a speech held at the Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione. Available at http://www.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202

Analysis of the crime and its compatibility with international and European law

The crime is a "**subsidiary" provision,** that is, an offence that only applies if the facts are not punishable under a more serious rule. Moreover, it does not apply to aliens who are stopped at the border (article 10 bis, para. 2) and, if the person applies for international protection, the trial concerning this crime is suspended until the request has been examined and, in the event that it is accepted, the charges are dismissed.

> "The European directive provides that the general rule to remove third-country nationals will be by voluntary repatriation instead of expulsion, unless the expulsion is a consequence of a criminal sanction. We therefore want to introduce a crime of irregular entry or stay focusing mainly on the alternative sanction of judicial expulsion instead of the principal sanction, which will be a fine. Thus we can proceed to immediate expulsion with a judicial decision, applying the European directive but eliminating the problem which would render it ineffective, since, as the Italian experience has proved, voluntary departure means that nobody is expelled".
>
> On. R. Maroni, then Minister for Home Affairs.

Although Article 10 *bis* seemingly applies to all irregularly staying immigrants, regardless of the reasons for their stay, there are a number of categories of immigrants who are protected against expulsion under international law (see box below). These immigrants cannot be expelled and, as a consequence, their presence on Italian territory, even if irregular, cannot be considered illegal or subjected to criminalization. Indeed, criminalizing their presence would result in an indirect violation of international law – protection against expulsion also includes protection against being forced to leave "voluntarily" in order to avoid criminal consequences.

Criminalized conduct
(Art. 10 *bis*, as introduced by the 2009 security package)

- Irregular entry;
- Irregular presence – including:
  - immigrants who entered Italy after entry into force of the new legislation;
  - immigrants who were already irregularly staying in Italy at that time.

To avoid criminalization, immigrants should:
- Not enter illegally into the national territory;
- If they were already irregularly in Italy, depart before entry into force of the law;
- If their presence subsequently becomes irregular, depart as soon as possible.

Issues for irregular immigrants who are already on the national territory:
- There is no specific time-limit to comply with the duty to leave the national territory;
- If they do not leave, they are criminalized, regardless of the reasons therefore → "due cause" is not mentioned in Art. 10 ***bis*** and does not excuse commission of the crime.

One revealing example of the second category of immigrants is that of Mr. Kadzoev, whose detention in Bulgaria gave rise to a first judgment of the ECJ on the Returns Directive (case C-357/09 PPU). Mr. Kadzoev was in possession of Chechen identity papers, which Russia did not recognize. He could thus not be returned to his country of origin, and was detained for a very long period of time before the ECJ ruled that his detention was unlawful, both because it had lasted longer than the maximum term provided for by the Directive, and because there was no reasonable prospect of removal (Art. 15.5 of the Directive). People who are found on Italian territory and who cannot be returned to their home country, for any of the reasons listed above, should not be subjected to the penalties foreseen in Art. 10 *bis*, since their irregular presence in Italy is due to circumstances outside their control (a case of *force majeure*). According to the Achughbabian judgment, such individuals cannot be criminalized, since they have justified grounds for non-return (their State of origin does not accept their return).

Table: categories of immigrants to whom the crime of irregular entry or stay should not apply based on international law

Category	International law	Italian law
People who cannot be returned to their country of origin due to risk of persecution or torture.	General principle of *non refoulement* for people at risk of persecution or torture (international customary law; Art. 33, 1951 Convention on Refugees; Art. 3, Convention against Torture).	Article 10 *bis* provides for suspension of the trial if the person applies for humanitarian protection. If such protection is granted, the trial is closed. Issues arise when immigrants are not identified as people entitled to humanitarian protection.
People who cannot be returned (e.g. stateless persons, persons whose country of origin does not recognize their citizenship).	According to the ECJ, criminal sanctions may only be imposed to people who are irregularly staying in the territory of a State without any justified grounds for non-return (Achughbabian, § 48).	Italian law does not provide for any exception to their criminalization.
Trafficking victims	The UN Additional Protocol on Trafficking and the Council of Europe Convention against Trafficking provide that such people are entitled to special protection and considered as victims. Art. 26, CoE Convention: Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.	Italian immigration law provides for their protection and a special residence permit (Art. 18). Issues arise when they are not identified as trafficking victims. Risk: the crime of irregular immigration may prevent them from coming forward and reporting their traffickers.
Smuggled individuals (people whose irregular entry has been facilitated by others)	UN Additional Protocol on Smuggling, Art. 5 – Immigrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.	Article 10 *bis* makes no exception for immigrants who have been smuggled into Italy. In most cases, such people will not be identified as such, but merely as "irregular immigrants."

RECOMMENDATIONS

Possible courses of action for national judges in trials for art. 10 *bis* against immigrants who have justified grounds for non-return:

- give direct effect to EU law (as interpreted by the ECJ) → refusal to apply art. 10 *bis*. Acquit the immigrant.
- if in doubt as to the admissibility of this interpretation → request a preliminary ruling of the ECJ asking what grounds may justify a non-return of an irregular immigrant.

As far as the third and fourth categories of immigrants are concerned,

some additional explanations are required. With regard to trafficking victims, Art. 26 of the CoE Convention against Trafficking requires States to provide for the possibility of not imposing penalties on victims for unlawful activities that they were compelled to engage in. Moreover, both the Convention and the UN Protocol consider trafficking victims as victims of a crime, providing for their protection and encouraging States to legalize their immigration status. Thus, the criminalization of trafficking victims for their irregular presence may not be explicitly prohibited but is clearly implicitly excluded – trafficking victims are to be considered and treated as victims of a crime, not as perpetrators.

Italian law seemingly complies with this international obligation, since it provides for a special residence permit (Art. 18, immigration law) for trafficking victims. However, the real problem is that of identification – trafficking victims are not easy to identify as such, and usually do not report the crime for fear of retaliation on the part of their traffickers. Moreover, art. 10 *bis* may represent an additional deterrent for those who might want to come forward and report the crimes and an extra tool in the hands of traffickers – victims will fear being criminalized and expelled if they report the crime, and traffickers might use criminal law to threaten the victims with imprisonment and expulsion if they escape and fall into the hands of the police.

People who have been smuggled into Italy – i.e., people whose irregular immigration was facilitated and assisted by others – are also protected against criminalization, according to international law, since they are also considered as "victims" of a crime.

Table: the meaning of the Smuggling Protocol in reference to the criminalization of immigrants

Article 5, UN Smuggling Protocol	Immigrants should not become liable to criminal prosecution under this Protocol having been the object of conduct set forth in article 6 of this Protocol.
Art. 6, para. 4, UN Smuggling Protocol	Nothing in this Protocol should prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.
Interpretation by the Division for treaty affairs, UNODC, in the Legislative Guide to the Protocol	Fundamental policy of the Protocol → the focus of criminalization is on the smuggling of immigrants, not on migration itself. The Protocol takes a neutral position on the criminalization of irregular immigration: • Art. 5 → the Protocol does not require the criminalization of mere immigrants, or of conduct likely to be engaged in by mere immigrants; • Art. 6, para. 4 → the Protocol does not limit the existing rights of each State to take measures against people whose conduct is an offence under its domestic law.

Issue: is the UNODC's interpretation in line with the scope and purpose of the Protocol?

- Purpose of the Protocol (see Preamble): provide immigrants with humane treatment and full protection of their rights.
- Criminalization of smuggling: including by providing for aggravating circumstances when the crime endangered the life or safety of the immigrants, or entailed their inhumane or degrading treatment.

Smuggled persons are to be considered as victims of the crime; their rights are to be protected.
Meaning of Art. 5: immigrants may not be subjected to criminal prosecution, if their violation of national criminal law was committed while they were victims of conducts which constitute a crime under the Protocol. [See D. McClean, *Transnational organized crime*, OUP 2006, p. 389].

If this is the correct interpretation of the smuggling protocol, there are a number of possible courses of action which may be taken in order to ensure compliance with international law. Action may be taken at a national level, since laws not complying with international duties of the State also breach Art. 117 of the Constitution. According to Article 117, "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations." Thus, any law which does not comply with international or EU law may be declared unconstitutional.

RECOMMENDATIONS

Possible courses of action for national judges in trials for art. 10 ***bis*** against immigrants to whom the rule should not apply according to international law:

- Adopt a constitutional interpretation of Article 10 ***bis*** → excluding its application to those immigrants who, according to international law, should not be criminally liable for the mere fact of their irregular immigration (e.g. immigrants smuggled or trafficked into Italy).
- Refer the case to the Constitutional Court → asking the Court to declare Article 10 ***bis*** unconstitutional, at least insofar as it applies to immigrants who are protected against criminalization by international law.

Article 10 bis is also clearly incompatible with European legislation regarding immigration.

As mentioned above, one of the explicit reasons for the introduction of Article 10 was the Government's desire to reduce the scope of the Returns Directive, circumventing its aims and purposes. Law 94/09 introduced the new crime of irregular entry and stay and assigned it to the jurisdiction of the Justice of the Peace, which is clearly inappropriate given the nature of

the crime. At the same time, it also provided that the penalty be substituted with "criminal" expulsion. The criminal fine cannot abated - this crime is, indeed, the only exception to the general rule, according to which misdemeanors punishable exclusively with a fine can always be settled by an advance payment. Thus, a criminal trial will normally lead to the immigrant's expulsion. Such an expulsion, however, having been qualified as "criminal", may fall within Article 2(2)(b) of the Returns Directive and thus be excluded from the scope of the latter - or, at least, this was the view of the Government at the time of its adoption. The crime was therefore created in order to circumvent the guarantees stipulated by the Directive, and, first and foremost, the general principle according to which immigrants should normally be allowed to return to their country of origin voluntarily, with forcible expulsion being exceptional. The introduction of Article 10 *bis* therefore clearly runs counter to the spirit and purpose of the Directive and may deprive it of its effectiveness. Moreover, since Art. 10 *bis* was introduced after the Directive had been adopted, and while the deadline for it to be transposed was still running, Italy has infringed not only the Directive, but also the general principle according to which, during the period for transposing Directives, states must refrain from taking any measures that could seriously compromise the result prescribed.

Table: the incompatibility of Article 10 bis with the Returns Directive

- Article 10 *bis* punishes with a fine irregular entry and presence in the national territory.
- The fine may not be extinguished, but it may be substituted with criminal expulsion. Such expulsion is not subjected to the limits and procedures set out in the Returns Directive, since it's qualified as criminal and Italy has decided not to apply the Directive to criminal expulsions (Art. 2.2.b. of the Directive).
- The ordinary administrative expulsion procedure – compatible with the Returns Directive – is exceptional; "criminal" expulsion is the rule.
  → The expulsion procedure applicable in Italy is, in practice, not compatible with the Directive and its aim (to harmonize the returns procedures applied in all EU Member States) is frustrated.
  The *effet utile* of the Returns Directive is not ensured and the principle of sincere cooperation is violated. The legal qualification of expulsion as "criminal" is a mere tool to circumvent application of the Directive.
- ECJ, El Dridi, para. 49: "the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure." The same conclusion is warranted with regard to criminal penalties for the mere fact of being an irregular immigrant.
- ECJ, Achughbabian, para. 41: "Article 2(2)(b) of the [Returns Directive] clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying."

Italian judges have already considered Art. 10 *bis* as a violation of the Returns Directive

Two courses of action have been taken:

- A request for a preliminary ruling of the ECJ → see Tribunale di Rovigo, ruling 15 July 2011, which led to ECJ's pending case C-430/11. The judge asked the ECJ to rule on the compatibility of the crime with the Returns Directive, claiming that the latter does not allow an irregular stay to be criminalized merely in order to substitute the criminal penalty with a criminal expulsion, and that the introduction of the crime while the deadline to transpose the directive was pending was a violation of the principle of sincere cooperation on the part of Italy. The case is pending, but the ECJ's decision in the Achughbabian case leaves no doubt as to its future conclusion;
- Non-application of the crime, based on its incompatibility with the Returns Directive → some Italian judges have deemed that Art. 10 *bis* clearly violates EU law, and thus - according to the general principles of EU law - should not be applied by judges in Italy. While this solution seems correct under both Italian and European law, it is impossible to know exactly how many judges have followed this course of action. Indeed, since Article 10 *bis* falls within the jurisdiction of the Justice of the Peace, and decisions taken by these judges are usually not published, the interpretation and application of this crime still remains unknown, but for a few decisions that have been made available.[7]

RECOMMENDATIONS
POSSIBLE COURSES OF ACTION FOR ITALIAN JUDGES

- Refer the case to the Constitutional Court, claiming a violation of Article 117
- Refuse to apply the crime → give direct effect to EU law and refuse to apply Art. 10 ***bis*** based on its incompatibility with EU law.
- If in doubt as to the compatibility of Art. 10 *bis* with the returns directive → request a preliminary hearing of the ECJ.

[7] See e.g. Giudice di Pace in Rome, 16 June 2011, available at http://www.penalecontemporaneo.it/upload/gdp%20roma%2010%20bis%2016.6.2011.pdf

The right to health of irregular immigrants

Article 35, paragraph 5, Immigration Law, explicitly prohibits doctors from reporting irregular immigrants who request medical care. The aim of this prohibition is to safeguard the effectiveness of the immigrants' fundamental right to health, as recognized in Art. 32 of the Italian Constitution (see Constitutional Court, 252/2002). Accordingly, irregular immigrants are encouraged to seek medical help whenever in need and are protected against the risk of being reported to the police and subjected to expulsion.

However, during the discussion preceding adoption of the 2009 security package, some members of the Parliament proposed to repeal this rule. This would have had a strong negative impact on the right to health, since many immigrants would have decided not to seek medical care for fear of being reported and expelled. The proposed amendment gave rise to a fierce debate, involving national political parties as well as some international actors; for instance, it was strongly criticized by the COE's Commissioner for Human Rights, Thomas Hammarberg, in his report following his visit to Italy on January 2009. Finally, the draft law was amended and the rule was not repealed.

The 2009 Security Package expressly excludes the need to exhibit a residence permit in order to obtain access **to health care** (Art. 35, Immigration Law) and **to school** (Art. 6, para. 2, Immigration Law). However, with the entry into force of Art. 10 *bis*, which criminalizes irregular entry and stay, it was unclear whether doctors were under a duty to report irregular immigrants who sought medical care. Art. 365 of the Criminal Code criminalizes doctors who do not report cases that give rise to suspects that a crime may have been committed. Yet, this duty does not extend to misdemeanours (contravvenzioni), such as the crime of irregular entry or stay, nor does it apply when reporting the case would give rise to criminal proceedings against the person seeking medical assistance. Moreover, the Ministry of the Home Affairs provided clarifications on this rule, confirming the validity of Art. 35, para. 5, Immigration Law. Even before the intervention of the Ministry, many Italian Regions in their regulations had already expressed the full enforcement of the prohibition of reporting.

Available data

As mentioned above, one of the main issues with Article 10 bis is the lack of data. This problem concerns both the specific content of the judgments applying this provision, and the data regarding the number of people convicted or acquitted for the crime.

With regard to the first issue, the crime falls within the jurisdiction of the Justice of the Peace. This has a number of consequences both in terms of the quality of the decisions that are taken and their availability. The Justice of the Peace was created as an alternative system of justice for minor offences, where alternative dispute resolutions should play a major role and defendants can only be convicted for mild sentences (such as fines and home detention). These characteristics justified the decision to confer judicial powers to non-professional judges, who are, of course, lawyers, but have not passed the national examination to become magistrates and whose decisions are rarely, if ever, published. In the case of immigration crimes, how-

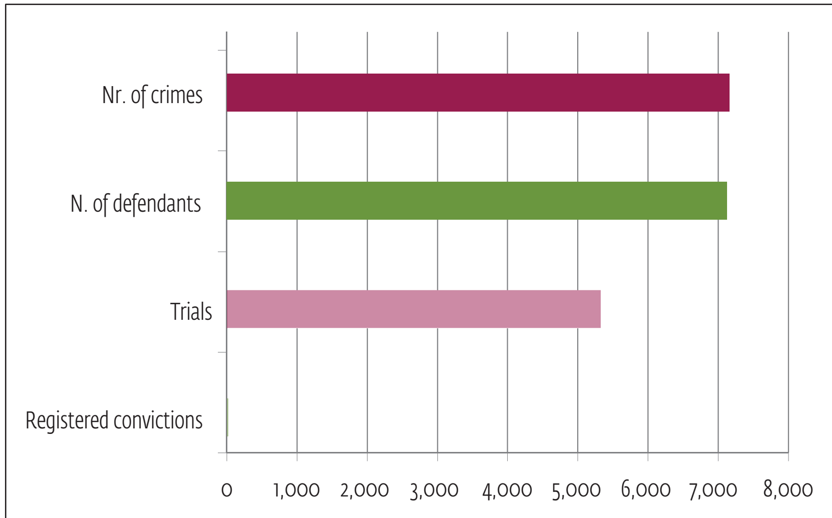
ever, there is no real space for mediation; moreover, conviction may result in a very harsh punishment, such as expulsion – a penalty whose effects are very long-lasting and which the Constitutional Court has already deemed as affecting a person's right to personal freedom.[8] Assigning crimes such as the one under examination to the Justice of the Peace has the effect of further marginalizing immigration law, thus separating it from other fields of criminal law. In addition, this decision also involves a substantial reduction in the ordinary guarantees that relate to criminal trial, which is however not justified given the harshness of the criminal sentence, which may be set after the trial. Finally, it also means that it is difficult, if not impossible, to understand how Article 10 bis is interpreted and applied in everyday practice, since the judgments of the Justice of the Peace are rarely, if ever, published. Data on these decisions is thus only sporadic, and no conclusions can be drawn on how the crime is applied in practice – whether it is applied at all, how it is interpreted, which categories of immigrants – if any – are excluded from its application, etc.

This lack of qualitative data is even more problematic given that quantitative data are also lacking, or disputable. According to the ISTAT (national institute for statistics), in 2009, judges tried 7157 crimes under Article 10 bis, involving 7126 defendants. Of these, 5323 criminal trials had begun, i.e., the prosecutor had requested the commencement of a criminal trial. As was explained to us by an employee of ISTAT, this means that the remaining 1834 cases were shelved (dismissed), for instance, due to procedural or substantive reasons.[9] However, according to the same data, in 2009 there were only 26 criminal convictions for this crime.

[8] See Pugiotto, A., 2009. Purchè se ne vadano. La tutela giurisdizionale (assente o carente) nei meccanismi di allontanamento dello straniero. Relazione al Convegno nazionale dell'Associazione Italiana Costituzionalisti. In http://www.astridonline.it/Immigrazio/Studi--ric/Pugiotto-AIC-2009.pdf. Also see Caputo A. and Pepino L., 2005. Giudice di pace, riserva di giurisdizione e libertà dagli arresti. Questione giustizia, n. 1, 13-31.

[9] See email exchange of 2 November 2011, on file with the authors.

Graph: 2009 trials and convictions under Art. 10 *bis* (source: ISTAT)



The gap in the data (between the number of trials and convictions) seems unreasonable, in particular given that the crime of irregular entry or stay is tried according to a special, accelerated procedure, and that evidence of the crime is usually self-evident (given the presence of the person on national territory and his/her lack of a residence permit). In response to our request for additional explanations, however, we did not receive anything concrete. Instead it was argued that there is a time gap between the conviction of the crime and registration of the criminal sentence. Such a time gap, however, does not explain the huge discrepancy in the data. The only alternative solution, which would not call into question the reliability of these data would be that, in most cases, criminal trials do not lead to a final conviction, because the person is expelled (following the administrative expulsion procedure) during the course of trial. However, even this explanation cannot possibly account for the discrepancy shown above. Indeed, it would actually imply that, in almost all cases, administrative expulsion had initially been impossible, but during the (very short) criminal trial, the person was identified, the necessary documents for his/her repatriation were obtained, and the financial resources needed to carry out his/her removal also became available.

Thus, the data available are very difficult to interpret rationally. Moreover, no comparison is possible with the data regarding different years, since, in November 2011, ISTAT only had the data concerning crimes committed in 2009, and the data for 2010 were not yet available. However, the

Ministry for Justice also replied to our requests for data, providing us with a different set of statistics. While ISTAT was only in possession of the data regarding crimes committed in 2009, the Ministry for Justice stated that the data on the number of crimes reported and prosecuted in 2009, 2010 and 2011 were not available. Thus, it seems that the Ministry for Justice and ISTAT both collect and analyze data on criminal trials, but do so separately and without any form of coordination – so much so, that the Ministry for Justice is not in possession of the data collected by ISTAT. However, the Ministry for Justice provided us with their available data i.e., the number of trials for the crime under Article 10 *bis* that were pending at the time of our request (March 2011). According to the Ministry, 13 trials were pending at that time. In five cases, the person was only being tried for the crime of irregular entry or stay, while in the remaining eight cases, the person was also under trial for a different crime.

Violation of a re-entry ban

Another provision that criminalizes the conduct of irregular immigrants is the violation of a re-entry ban (Art. 13, immigration law). This offence seems the only one that is compatible with the Returns Directive, at least according to one of its possible interpretations.

According to Italian law, expulsion of third-country nationals also involves the adoption of a re-entry ban, which should last, according to article 13, para. 14, between 3 and 5 years depending on the specific circumstances of each individual case. Violation of re-entry bans leads to mandatory arrest of the person concerned and is punishable by imprisonment of between 1 and 4 years and expulsion, in cases of violations of a first re-entry ban, issued by an administrative or judicial authority (Art. 13, para. 13 and 13 *bis*); or by imprisonment of between 1 and 5 years (article 13, para. 13 *bis*), in the case of people who re-enter Italian territory after having been accused of violating a first re-entry ban.

Elements of the crime of article 13, para. 13

- the defendant was previously expelled, either voluntarily or forcibly, based on a valid expulsion order issued by an administrative authority;
- the order was accompanied by a related re-entry ban;
- the defendant re-entered Italian territory while the ban was still valid;
- re-entry was not authorized by the Ministry for Home Affairs, nor was it otherwise lawful according to the immigration law, Art. 17 (to ensure the right to a fair trial and to defend oneself at trial) or Art. 31 (to protect a child's right to development).

[NB: Law decree 89/11 now also envisages that re-entry is not unlawful if the immigrant requested and obtained withdrawal of the entry ban, showing that he/she left Italian territory before the expiry of the period granted for voluntary departure].

Elements of the crimes of article 13, para. 13 *bis*

a. **Violation of an expulsion order issued by a judge**
   - the defendant was previously expelled, either voluntarily or forcibly, based on a valid expulsion order issued by a judge:
     - as a security measure (article 15 TUImm); or
     - as an alternative or substitutive penalty (article 16, TUImm);
   - the defendant re-entered the national territory while the order was still valid.

   Issue: does the criminal penalty also apply when the expulsion order was issued as an alternative or substitutive penalty?
   - No: Article 16 provides that, in case of violation, the expulsion order is withdrawn and the person is subjected to the criminal punishment to which he was originally sentenced;
   - Yes: after the person has served the original sentence, he/she will serve a new sentence, based on Art. 13, para. 13 *bis*.

b. **"Recidivism"**
   - The immigrant was previously accused of the crime of Article 13, para. 13;
   - the immigrant is subsequently found, again, on the national territory.

   Issue: does this regime comply with the Constitution?
   - A higher sentence is inflicted merely based on the fact that the immigrant had already been reported for a crime – a criminal conviction is not necessary.
   - According to the Constitutional Court (466/2005), it is a violation of the presumption of innocence (article 27 of the Constitution).
   - The rule has been amended, maintaining the same constitutional fault.

One problematic issue is whether Article 13, as amended in 2011, complies with the Returns Directive.

Immediately after the adoption of the El Dridi ruling, some judges issued decisions acquitting people accused of violating the re-entry ban, arguing that Article 13, para. 13 was not compatible with the Directive, since nation-

al re-entry bans were issued automatically and lasted longer than the maximum allowed by article 11 of the directive.[10]

Subsequently, the law has been amended to ensure - at least, formally - compliance of the national re-entry bans with the directive. However, the issue is still not clear.

Table: Does Article 13, para. 13 comply with the Returns Directive?

<table>
<tr><th colspan="3">Issue: for how long does the Directive continue to apply?</th></tr>
<tr><th>Source</th><th>Principle</th><th>Application / explanation</th></tr>
<tr><td rowspan="2">Italian jurisprudence</td><td>a. Only until an irregular immigrant is expelled for the first time and served with a re-entry ban.</td><td>Violation of a re-entry ban before its expiration (as a general rule, 5 years – Art. 11.2 Directive) may be criminalized and subjected to criminal imprisonment.</td></tr>
<tr><td>b. Indefinitely: immigrants can never be subjected to criminal sanctions; the State must always try to expel them [see e.g. Trib. Roma, 9 May 2011].</td><td>Even immigrants who have already been expelled and who re-enter, in violation of a re-entry ban, are subjected to the Returns Directive.</td></tr>
<tr><td rowspan="3">ECJ, El Dridi</td><td rowspan="3">"In a situation where such measures [i.e., coercive measures such as deportation] have not led to the removal of the third-country national, the Member States remain free to adopt measures, including criminal law, aimed inter alia at dissuading those nationals from remaining irregularly on those States' territory." [§52]</td><td>Who does this sentence refer to?</td></tr>
<tr><td>People who cannot be expelled (e.g., stateless) → but they have not been subjected to coercive measures such as deportation, as explicitly mentioned by the Court.</td></tr>
<tr><td>Immigrants who have been deported but subsequently re-enter Italy, violating a re-entry ban → most plausible interpretation.</td></tr>
<tr><td rowspan="3">ECJ, Achughbabian</td><td rowspan="3">"Directive 2008/115 does not preclude penal sanctions being imposed, following Italian rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are irregularly staying in the territory of a Member State without there being any justified grounds for non-return." [§48]</td><td>Consequences</td></tr>
<tr><td>People whose irregular presence in a Member State has justified grounds → no criminalization is allowed.
E.g.: People who cannot be returned in application of the principle of non-refoulement; or Individuals who are stateless (see Kadzoev case).</td></tr>
<tr><td>Individuals who have been expelled but who continue to stay on in Italy → criminalization is allowed.
E.g. People who have been expelled but re-entered Italy in violation of a re-entry ban.</td></tr>
</table>

[10] See Trib. Bologna, 9 June 2011, in www.penalecontemporaneo.it.

Criminalizing an immigrant's lack of documents?

Article 6, para. 3 of the immigration law criminalizes aliens who - without due cause - do not show their passport, any other identification document, and residence permit, or any other document attesting the regularity of their stay, upon request by the police; the crime is punishable with arrest and a fine of up to 2000 €. This rule was also amended by the 2009 Security Package, giving rise to a wide debate on its interpretation and application.

In its original text, Art. 6.3 criminalized the non-exhibition of a passport, or any other identification document, residence permit, or any other document attesting the regularity of stay.

Issue: did it also apply to irregular immigrants?

- No:
  - otherwise irregular presence would be a crime per se (at the time, it was not);
  - it is in the portion of the TUImm which establishes the rules on entry and stay in Italy (which only apply with regard to regularly entering and staying immigrants).
- Yes: but only if they cannot show any identification document. The purpose of the law is to ensure that all immigrants may be identified, regardless of their immigration status.
- Grand Chamber of the Court of Cassation: the offence is applicable to all immigrants, regardless of their status. Irregular aliens may only be convicted of the crime if they did not show any identification document of any type.

The 2009 security package: amendments to article 6 and its new interpretation

Art. 6.3 criminalizes non-exhibition of the passport, or any other identification document, **AND** residence permit, or any other document attesting the regularity of stay.

Meaning of the amendment: all third-country nationals must show **both** their identity documents ***and*** residence permit (or equivalent authorization).

Issue: does the crime also apply to irregular immigrants?

- Yes: intent of the law. Otherwise the amendment would be without effects.
  → additional punishment for irregular immigrants (together with Art. 10 *bis*). [Cassazione, 44157/2009]
- No: irregular immigrants are excluded, since – by definition – they cannot show a residence permit (*ad impossibilia nemo tenetur*).
  Irregular immigrants cannot be requested to show even their identifying documents → this would amount to a violation of the right to silence (being a self-incrimination for the crime of irregular stay).
- Grand Chamber of the Court of Cassation (27 April 2011, n. 16453): the 2009 amendment rendered the offence inapplicable to irregularly staying immigrants, as they can never show any residence permit or authorization.

It is important, however, to examine the reasoning behind the judgment of the Grand Chamber of the Court of Cassation; the Court, indeed, seems also to have taken into consideration some “political” issues when determining the aim and objective of the criminal provision. Indeed, according to the Court, the law now provides for two separate mechanisms to deal with regular and irregular immigrants – While the first may be criminalized if they do not show their identification documents and residence permits to the national authorities, the latter is to be expelled. According to the Court, if Article 6 was deemed to apply to this second group of people, it would hinder the expulsion procedure, since it is not included among the crimes to which the special procedures relating to the expulsion of irregular immigrants apply. Thus, if Article 6 also applied to irregular immigrants, they would need to be tried and have their sentence carried out before being expelled, and expulsion during the course of trial would only be allowed by a competent judge. The Court therefore justified its decisions also based on the need to ensure the purpose and objective of the law, that is, the rapid expulsion of irregular immigrants.

Consequences of the judgment

- Irregular immigrants who refuse to show their identification documents to national authorities are no longer to be criminalized.
- Irregular immigrants who were convicted before entry into force of the security package, on the basis of the previous text of Art. 6 → immediate release – the fact is no longer criminalized (the security package has the effect of decriminalizing refusal to show personal documents coming from irregular immigrants).
  E.g. Tribunale di Alessandria, 7 April 2011, in *www.asgi.it*
- Irregular immigrants who were convicted after entry into force of the security package, based on the interpretation of Art. 6 that the Court rejected → NO consequences.
  – The Italian legal system (art. 673, code of criminal procedure) only allows for retroactive effects of formal amendments of criminal provisions or judgments declaring them to violate the Constitution; new interpretations of the law do not have retroactive effects even if they are more lenient.
  – The Turin Tribunal has deemed this provision not to comply with Art. 117 of the Constitution, since the principle of retroactive application of the more lenient penalty is enshrined in the European Convention of Human Rights → the law violates:
    - Art. 117 Cost. (setting out the principle that domestic laws must comply with international law);
    - Art. 3 Cost. (equality and non-discrimination);
    - Art. 13 Cost. (personal freedom);
    - Art. 25 Cost. (retroactive application of more lenient penalties);
    - Art. 27 Cost. (criminal punishments aim at re-education).

    See Tribunale di Torino, *Ordinanza*, 27 June 2011, in *http://www.penalecontemporaneo.it/upload/questione%20leg%20cost%20673.pdf*

Part 3

The italian centres for identification and expulsion and the costs of immigration

4. The Centres for Identification and Expulsion

The following sections describe: the CIEs and how they are managed (size, capacity, technical characteristics, managers); the detainees (nationalities, languages, status, reasons for removal and detention, average length of detention, effectiveness of the identification procedure for each nationality); and the conditions of detention, based on data collected, interviews with operators and legal practitioners, and direct access to the centres.

The 2008 Security Package replaced the Centres for Temporary Stay and Assistance with the Centres for Identification and Expulsion (CIEs). This was only **a nominal modification:** there were no organizational changes as such. The same buildings that had originally been used for receiving and assisting immigrants were converted into detention centres.

In order to evaluate the current system of detention, in terms of its removal efficiency and its compliance with the detainees' fundamental rights, the Ministry of Home Affairs, local public authorities, independent authorities and practitioners were questioned through questionnaires and interviews regarding the following issues:

a) the centres and their management (size, capacity, technical characteristics, managers),
b) the detainees (nationalities, languages, status, reasons for removal and for detention, average length of detention, effectiveness of the identification procedure for each nationality),
c) the conditions of detention.

CIEs fall under the authority of the Ministry of Home Affairs, Department of Civil Liberties and Immigration. The CIEs are managed at a local level by the prefectures and the local police. Questionnaires were thus sent to each prefecture with a CIE in its area according to the official data of the Ministry of Home Affairs.

The Ministry of Home Affairs only provided data regarding the total number of detained immigrants in the entire country per year.

No prefecture supplied us with the information requested, neither internal regulations nor circulars. The only exceptions were Caltanissetta and Turin, which in any case only sent partial information.

There was no written refusal to provide the information requested.

In order to obtain the required information, an official request was submitted to all the prefectures concerned, asking for authorization to conduct an official visit to CIEs for research purposes.

We conducted authorized visits at the CIE of Ponte Galeria in Rome, the CIE in Turin, the CIEs in Bologna and Modena, the CIEs of Milo and the Serraino Vulpitta in Trapani, but the request for information regarding internal regulations and directives was refused, because of its 'sensitive' nature, with the exception of the regulations of the CIE of Turin.

In addition, independent authorities such as the detainees' ombudsman, the ombudsman of the local councils, and practitioners were also interviewed.

a) **Centres and their management.** According to the website of the Ministry of Home Affairs there are 13 CIEs:

CIE	Capacity (No. of detainees)
Bari-Palese, area aeroportuale	196
Bologna, Caserma Chiarini	95
Brindisi, Loc. Restinco	83
Caltanissetta, Contrada Pian del Lago	96
Catanzaro, Lamezia Terme	80
Crotone, S. Anna	124
Gorizia, Gradisca d'Isonzo	248
Milan, Via Corelli	132
Modena, Località Sant'Anna	60
Rome, Ponte Galeria	360
Turin, Corso Brunelleschi	180
Trapani, Serraino Vulpitta	43
Trapani, loc. Milo	204
Total number of places	1,901

[Source: Ministry of Home Affairs, http://www.interno.gov.it/mininterno/export/sites/default/it/temi/immigrazione/sottotema006.html]

Some of these centres, such as Caltanissetta and Crotone, have been closed many times for renovation after riots by detainees, mostly organized after their detention had been extended.

The official data do not include the **three temporary centres** in Santa Maria Capua Vetere (Caserta), Palazzo San Gervasio (Potenza) and Kini-

sia (Trapani) which, under the **ordinance of the Prime Minister No. 3935 April, 21 2011,**[1] acted as CIEs with a total of 500 places **until December 31, 2011. This term was extended to December 2012 by the Ordinance of the Prime Minister No. 4000 January, 23 2012.**

The Special Commission for the defense and promotion of human rights (Commissione straordinaria per la tutela e la promozione dei diritti umani, a special commission established in the Italian Parliament) examined the status of the human rights of detained people, including those of people detained in the CIEs (Report of March, 6th 2012, p. 129). The Commission reported that in the temporary CIE of Santa Maria Capua Vetere, "*hundreds of people lived in a tent area for weeks under the sun in unbearable conditions, with moments of high tension and serious incidents with the police. On June, 9 2011, the CIE was closed after a fire occurred during the night, which destroyed part of the centre, and the immigrants were transferred.*"

To be furthermore mentioned is the alleged improper use of the *First Aid and Reception Centres* in Lampedusa and Pozzallo (Ragusa) for the purpose of detaining people, as those Centres were CIEs. Following the fire in one Sicilian Centre, also ships were used to transfer and subsequently detain people in conditions of severe limitation of their personal liberty, as highlighted in the table below:

Detention ships in the harbor of Palermo

August- September 2011

For at least two months, from August 2011 to the end of September, several hundred immigrants, mostly of North African origin, were held at the First Aid and Reception Centre of Contrada Imbriacola in Lampedusa, and in Pozzallo, in the province of Ragusa, for several weeks, in some cases more than a month without the timely adoption of formal measures of push-back, expulsion or detention.
[...] From Friday, September 23 some hundred immigrants from Lampedusa, after the fire of the centre Imbriacola in which they had been detained for several days, were transferred to the harbor of Palermo and detained on three ships, the MOBY FANTASY, the MOBY VINCENT, and AUDACIA.
[...] Foreign nationals detained on board the three ships, some of them handcuffed with plastic ties, were in conditions of extreme limitation of their personal freedom, without any possibility of movement, even within the vessels, deprived of the possibility to communicate with the outside world, and thus subject to continuous monitoring, without the adoption or notification of individual measures and without any judiciary control.

From a complaint to the Prosecutor of Palermo, September, 27 2011, www.meltingpot.it

[1] http://www.protezionecivile.gov.it/jcms/it/view_prov.wp?facetNode_1=f4_4_5&prevPage=provvedimenti&catcode=f4_4_5&toptab=2&contentId=LEG24382#top-content

Local prefectures have service contracts with a variety of private entities, including non-governmental groups, for the provision of basic needs and services. The private contractor is responsible for the conditions of the detainees and for the efficiency of the centre.

b) **The detainees.** The Prefectures were questioned about the numbers of female and male immigrants, in each CIE per year. Only the Prefecture of Turin supplied the requested information.

We also asked for the reasons behind the expulsion orders, but no official data were sent.

However, from the interviews with internal staff[2] it emerges that the population in the CIEs is made up of the following:

- third country nationals who have been removed solely due to their irregular status,
- irregular immigrants who have been accused/convicted of different kinds of crimes, even serious crimes for which precautionary measures are provided or for which the detainee's safety requires his/her isolation (e.g. rape, terrorism, serious violations of human rights)
- irregular immigrants who are the victims of crime, especially women who are victims of trafficking for sexual exploitation, often detained in the same CIE as members of the criminal organization responsible for the trafficking, as many detained women revealed when speaking to staff at the help desks of NGOs.[3]

For more details see Annex 1.

With regard to the data on immigrants in the CIEs, one issue that seems particularly disturbing, in terms of the Italian legislation on this issue, is **the constant presence of asylum seekers**. Indeed, according to legislation, such third-country nationals should not be detained in CIEs, since they are subject to special procedures and granted additional rights. According to national law, asylum seekers should be detained in specialized separate structures, the so-called CARA (centri di accoglienza per richiedenti asilo, centres for asylum seekers), in compliance with international law and in particular with EU standards. Asylum seekers may be detained only when they ask for asylum after the expulsion order.

[2] Interview of the internal staff of the CIE of Turin and of the CIEs of Trapani.

[3] The information was furnished by the legal office of the NGO Differenza Donna, which operates in the CIE of Ponte Galeria in Rome.

The presence of asylum seekers in the centres, which ranges from 104 in 2007 (representing 1.08% of the total number of immigrants in CIEs) up to 1589 in 2008 (representing an appalling 15.08% of the total number of immigrants detained in CIEs), is worrying. It denotes the ineffectiveness of the assistance procedures for asylum seekers and an inability to identify individuals who need international protection. **The data we present also highlight the number of immigrants who manage to break out of the CIEs**, which grew steadily from 2007 to 2011, with just a slight drop in 2008. The percentage of irregular immigrants who left the CIE without authorization grew from an initial 2.53% to a worrying 7.41% in the first few months of 2011. This seems to be due to the poor living conditions in the CIEs, which are driving immigrants to desperation, and also to their structural inadequacies. Indeed, if one of the reasons to detain immigrants prior to their expulsion is to ensure that expulsion is effectively carried out, such a high proportion of break-outs is indicative of the fact that pre-return detention is inefficient. In the first five months of 2011, 223 irregular immigrants (almost all males) left the CIE without authorization, out of a total number of 3009 detainees.

This is a very high number, and it is likely that the recent decision to amend the legislation and extend the maximum length of pre-return detention from 6 to 18 months will lead to an increased number of people attempting to escape. Indeed, the length of pre-return detention, combined with the appalling living conditions in many of the CIEs (which will only be more overcrowded if immigrants are kept there longer) and with their inadequate structure, will probably lead to even more immigrants trying to escape. Moreover, since the existing centres have proven to be ineffective in preventing immigrants from escaping, the decision to extend the maximum term of detention without addressing the structural deficiencies of the centres seems more of a symbolic decision than the result of an effective, carefully designed plan.

Another particularly problematic element is **the high number of detention decisions that are not confirmed by the Justice of the Peace**. Since pre-return detention impacts on the immigrants' personal freedom, administrative decisions to detain irregular immigrants must be confirmed by a judge. The number of detention orders that have not been confirmed ranged from 5.21% (503 people) in 2007 to 10% (704) in 2010; again in 2011, the judicial authorities decided not to confirm 6.75% of the detention orders that had been issued. These data are worrying since they seem to highlight that, in a high number of cases, decisions to detain irregular immigrants had been taken in violation of existing legislation, and thus did not survive judicial

review - even of the somewhat superficial type often associated with the Justice of the Peace. Additionally, recently there have been allegations that, in a high number of cases, judges have confirmed detention orders that were only seemingly lawful, since they had been adopted according to the law but with a consistent delay so that the person concerned had spent a considerable amount of time in (irregular, since unregistered) detention in violation of terms prescribed by immigration law and in violation of constitutional provisions. Cases such as these highlight the importance of ensuring that the Justice of the Peace complies with the rules regarding fundamental rights, such as personal freedom. The sheer numbers of irregular immigrants arriving in Italy clearly put both the administrative and the judicial systems under considerable pressure, and the solutions adopted have clearly not been in line with Italian law. If we consider the data provided by the Ministry for Home Affairs, bearing in mind how superficial the judicial reviews over detention orders have sometimes been, the fact that around 7% of the decrees have not been confirmed seems even more appalling. Indeed, our current understanding of the situation, as emerges from the media, leads us to believe that the number of illegal detention orders may be even higher than the orders that were eventually not confirmed.

The conditions of detention in CIEs from the data collected, interviews and visits

Regarding the conditions of detention, article 14 (2) of the Immigration Law stipulates that the CIEs should ensure:

- assistance,
- respect for dignity,
- freedom of communication with the outside world.

The likelihood that such provisions are respected is doubtful: the conditions in the CIE, in fact, seem very far from respecting the fundamental rights of the detainees, and there has been a serious deterioration in their personal situation after the length of detention was extended to 18 months. An increase in the number of serious acts of self- harm and attempted escapes, hunger strikes and other kinds of demonstrations was reported, both by NGOs and independent authorities and by internal staff. However, there is little awareness of the fact that such acts are indicative of the fact that detention conditions are intolerable. The staff working for the CIEs and the po-

lice underlined that detainees from Tunisia, Algeria and Morocco *"commonly make these forms of demonstration"*. However, it was stressed that when the detention was for a maximum of 30 days, no self- harming acts were reported.

Despite the increase in serious protests, there was no official statement from the Government or inquiry, except for the report by the De Mistura Commission (2007) and its recommendations regarding reforms of the administrative detention system, which are still to be implemented.

The recent report by the Special Commission for the defense and promotion of human rights (6 March 2012) claimed that *"living conditions in the CIEs are precarious and unsuitable for an extended stay, especially in centres that have recently been set up"*(Report, p. 128). The same conclusion was reached by the technical survey commissioned by the Mayor of Bari on the CIEs within its jurisdiction.

The latter survey criticized the various types of limitation of the immigrants' freedom, which were compared to prisons, and stressed the inadequacy of the centres and the violation of minimum living standards.

For a long time the authorities have been reluctant to grant access to the CIEs to civil society representatives. There is an extremely complicated bureaucratic procedure to request such access, which is beset with obstacles and difficulties. Another example was the recent refusal to grant an effective public check on the internal conditions of the CIEs through Circular No. 1305 (1 April 2011), which forbids access to journalists. The circular was finally only withdrawn on 14 December 2011, after eight months of demonstrations by journalists and other organizations.

However access is still very difficult to obtain, as was reported by journalists and activists leading the campaign against the denegation of access to CIEs "LasciateCIEntrare".

Since the immigration law (D.P.R. 394/1999) has come into force, no detailed and common regulations have been adopted. Each prefecture continues to have different regulations that are widely modified according to changing needs, an approach that is encouraged by the lack of common guidelines for managing the Centres (which should be drawn up and whose implementation should be monitored nationally) and by the lack of transparency of the local authorities. In fact, since at least 2006, the Prefectures have refused to reply when questioned regarding the existing regulations, the agreements drawn up with individual managing bodies, the available services, the number of staff assigned to the centres, the existence and number of people employed to take care of linguistic and cultural intermediation and about social workers, psychologists, legal advisors. According to the Pre-

fecture of Rome, this was due to the sensitive nature of the acts and documents requested (see letter refusing such information).[4]

After we had accessed the local CIE, the Prefecture of Turin was requested to provide a copy of the CIE regulation, furnished only after three months from the visit. The CIE of Milo, which opened in July 2011, is currently waiting for approval of the regulations by the Prefecture of Trapani. The CIE of Trapani, Serraino Vulpitta, is waiting for the updated regulations, but the director has not provided a copy of the current regulations.

- **Layout.** The centres generally look like prisons, with high walls under camera surveillance that surround three main blocks. The blocks consist of an administrative area, living units and service areas. The first area at the entrance houses the offices of the police and the medical area. Then there is an area devoted to services, the dining hall, and an open courtyard surrounded by walls and iron bars. Men and women are separated, and each living unit takes up an average area of 25 m2 for 6/8 people. The living units are equipped with armored doors and anti-escape gates, so that each living unit is isolated. In the CIE of Turin, the living units are identified by color (e.g. yellow or red), while in the CIE of Trapani they are identified by letters. According to the staff members we interviewed, the different colors or letters are not supposed to be based on any potentially discriminatory ground, such as for instance country of origin, past convictions, religion or sexual orientation. The only distinction is on the basis of sex – assignment to different units takes place on the basis of purely logistical criteria. **One particular case is the CIE in Serraino Vulpitta (Trapani), which is in a very old building which was originally a nursing home and was converted in 1999 into a CPT, then a CIE.** The building consists of a ground floor, where there are administrative offices, the first floor, where there are services for visitors and the second floor where there are rooms of different sizes for 2, 4, 6 and 10 people. The rooms look out onto an internal corridor, which is the only area dedicated to leisure and meetings, and onto an external veranda, which has recently been made accessible after various security adjustments.
- **Staff and Services.** In the Centres there is an inter-force police unit who are there to maintain public order. They do not usually receive any specific training on how to deal with immigrants or the most vulnerable. The managing bodies take on the task of supplying ser-

[4] See letter addressed to Prof Di Martino by mail and dated March, 5 2012.

vices from health assistance to psychological and social support, the supply of clothing, blankets, sheets and toiletries as well as reception services and maintenance of the facilities. We found that staff members perceive the centre as a detention institution, and often suffer from depressive syndromes and stress due to the work environment and conditions. No data on the number of interpreters/translators, cultural mediators, doctors or psychologists assigned to the Centres were provided, and the only data we managed to access regarded the staff of the CIEs we personally visited. The local health agencies (part of the public nublic a part of the national health service) regards the staff of the CIEs we personally visitedth obstacles and difficulties. National Health Service) play no part in assessing the quality of the health standards of the facilities, their levels of hygiene and living conditions, or the health conditions of the detainees. Since medical assistance is managed in complete independence by the contractor, inconsistent standards of care and assistance are applied in different CIEs, which results in a regime that does not comply with the principle of non discrimination and equality (Article 3 of the Italian Constitution). Referring in particular to undocumented immigrant women, NGOs underlined that on arrival, they do not undergo a medical check-up; such an examination, however, could identify and treat diseases caused by any violence they may have suffered, from exploitation to domestic violence, and, at the same time, provide evidence of the sufferings experienced and thus entitle them to protection and to be treated as victims of crimes.[5] The pharmacological therapies that detainees receive are merely palliative, thus hiding the symptoms and preventing the proper care of the diseases.

- **Activities.** Although the Rules implementing the immigration law (D.P.R. No. 394/1999, article 21 para. 2) provide for *"socialization activities"*, the detainees are in a condition of total inactivity. For instance, in the CIE in Rome the internal soccer pitch, which was built with the contribution of the Detainees' Ombudsman of Lazio, cannot be accessed for security reasons. Access was also forbidden to the dining room, where there is a television. In Turin, while the managing staff described social activities (such as soccer matches and gymnastics), the detainees we interviewed denied ever having access to any kind of activity and complained about the total inactivity they had suffered

[5] Information furnished by the Legal Office of the NGO Differenza Donna, Rome.

since arriving at the centres. No social activities are carried out at the CIE of Milo, Trapani. At the CIE of Vulpitta, the detainees have access to the internal soccer pitch twice a day.

- **Communication with the outside world**. While the CIE regulations are set up by the Prefectures, they still are not homogenous. In theory, detainees are entitled to see their relatives (if legally staying in Italy) every day from 9:00 to 12:00. However, in Rome, until November 2011, a maximum of three visits plus one before repatriation was allowed, in accordance with a provision that had been introduced when the length of detention was 60 days. This regime is particularly striking when compared to the rules applicable to people convicted for mafia crimes, who are detained under special detention regimes: this category of detainees has the right to one visit per month. The current regulation, which is still not publicly available but to which the practitioners and staff we interviewed made reference, seems to prescribe a maximum of 27 visits; moreover, it is up to the managing body to inform each detainee of this right. In Turin and Trapani, it is possible to have visits with lawyers and relatives every day.
- **Security measures**. According to the rules implementing the immigration law (Article 21.8), the CIEs' internal rules should be adopted by the *prefetto*, after having consulted the *questore*. The *questore* adopts all necessary acts to ensure internal security and may ask for the assistance of the staff of the managing body. However, none of these acts and regulations are available and, according to the practitioners we interviewed, they vary depending on the CIEs. Thus, for instance, it seems that current regulations applicable in the CIE in Rome forbid the use and supply of shoes and all detainees have to wear slippers. Moreover, in violation of Article 21 of the Rules implementing the immigration law, newspapers are not allowed for security reasons. In Trapani there are similar regulations regarding clothes and shoes: although the police reported that detainees may wear shoes provided by the contractor, the director of the CIE clarified that detainees may only wear slippers. In Turin there are no similar regulations regarding clothes and it is possible to have access to newspapers and books in various languages. Such differences in treatment are clearly arbitrary, since they are not based on different levels of security in the different CIEs, and therefore are not justified; moreover, practices restricting access to newspapers, clothes and shoes, if not based on a clear, fully grounded risk-assessment, violate existing legislation and

are therefore illegal.

- **Identification.** The numbers of irregular immigrants who were allowed to leave the CIEs because they could not be identified before the maximum pre-return detention period had expired was particularly high from 2007 to 2009 (around 30% every year). This number has recently gone down, but still represents a share of around 15% of all immigrants who were detained in the CIEs. As seen above, the recent decision to extend the maximum detention period from 6 to 18 months was based on the need to ensure that the immigrants are effectively identified before being released, thus permitting their forcible repatriation to their country of origin. As emerges from the data cited above, an extension of the maximum detention period does not necessarily lead to the identification of the immigrants concerned. On the contrary, there is a high risk that individuals who cannot be identified will be detained for longer periods (in accordance with the letter of the law, since the person is clearly refusing to cooperate by not providing the information necessary for his/her identification), and will then eventually be released after an average of six months' detention. In such cases, the sacrifice of the immigrant's personal freedom, lasting for such a long period of time, would clearly not be justified by its foreseeable outcome, i.e., the person's release without any increased opportunity for his/her expulsion. The non-identification of immigrants who are subjected to expulsion as a security measure is a very serious problem. In the CIEs of Turin and Trapani, 50% of the detainees are immigrants who had already been sentenced to detention as a punishment for previous crimes but had not been identified while in prison and, consequently, they had to suffer another undetermined period of detention in order to be identified. Such prolonged detention, however, violates Articles 3 and 5 ECHR, as the European Court of Human Rights held unanimously in the case *M.S. v. Belgium*, ECtHR, judgment 31 January 2012, concerning the extension of the detention period while awaiting removal from Belgium after having served their sentence.

According to the interviews, there is no involvement of the diplomatic authorities in the identification procedure. Moreover, practitioners reported that diplomatic authorities often select which nationals to admit, while at the same time refusing to recognize others as their nationals.

The criminal nature of the detention of immigrants in CIEs

CIEs are essentially similar to prisons, even if the law and every act relating to detention refer to immigrants as "guests".

For example:

a) the centres are generally designed on the lines of detention buildings, surrounded by high walls and under surveillance; in some cases, they are prisons or military barracks that have been converted into CIEs;
b) the entrance of the building is under surveillance;
c) surveillance is ensured by police units under the control of the Questura or even by military staff;
d) entrance is allowed only upon authorization of a public authority and previous identification;
e) visits are allowed on set days and times for relatives who are legally in Italy, and with previous authorization for lawyers, religious ministers, diplomatic staff, associations and entities that have agreements with the local *prefettura*;
f) the immigrants are housed in cells or in living units that are separated from each other by means of metal barriers or plexiglas, and they are not allowed to freely move from one unit to another;
g) it is not possible for the guests to leave the centre without authorization;
h) men and women are strictly separated;
i) specific items that could be used as weapons are forbidden, including pens with caps, paper clips, flammable material, and (in some cases) also newspapers and magazines;
j) internal staff perceive the CIE as a prison;
k) the technical survey commissioned by the Mayor of Bari on the CIE in the municipality of Bari stressed that "*the centre is entirely similar to prison facilities*", and, consequently, the minimum standards that the survey recommends to follow are those provided for prisons by the penitentiary law;
l) the penitentiary nature of CIEs is referred to in the report of the Special Commission for the defense and promotion of human rights (report of 6 March 2012);[6]

[6] http://www.ristretti.it/commenti/2012/marzo/pdf1/rapporto_comm_diritti_umani.pdf

m) in the case Cosentino-Liberti against the Minister of Home Affairs, the State Advocate clearly considered detention in CIEs and in reception centres as equivalent to detention: Cosentino and Liberti, two journalists leading the campaign "LasciateCIEntrare," appealed the circular forbidding the press to visit CIEs claiming a violation of article 10 ECHR. The State Advocate, in claiming that the appeal should be rejected, admitted that "the comparison with prisons is not excessive".

Wrongful detention and the right to compensation

In the case of wrongful detention, immigrants should obtain compensation, but, as was remarked by the European Court of Human Rights (ECtHR, Hokic e Hrustic v. Italia, Judgment 1/12/2009; ECtHR, Seferovic v. Italia, Judgment 11/2/2011), the Italian system has no provision to allow immigrants to request for reparation for having been wrongfully detained in a CIE. Article 314 of the criminal code recognizes, in fact, the right to compensation only in the case of wrongful detention within criminal proceedings (eg, custody in prison or house arrest), whilst Art. 2, para 3 let. d) Law No. 117/1988, regarding the civil liability of judges, limits the liability of judges for the unlawful application of detention in cases of willful misconduct or serious guilt. In addition, Italian courts denied the direct applicability of Art. 5 § 5 of the ECHR, which recognizes the right to compensation to any person who suffered arrest or detention in violation of Article 5 ECHR (see e.g. Court of Cassation, judgment 20 May 1991, n. 2823).
Expert practitioners (ASGI) suggest that compensation should be requested under the general rules of civil liability in cases of detention on the basis of invalid expulsion orders or of prolongation of detention without a validation hearing. Finally, the Court of Cassation recognized the jurisdiction of the ordinary civil judge when detention was not extended by the Justice of the Peace (ordinance No. 9596/2012, Grand Chamber).
Another option is to request compensation of the basis of article 5 ECHR. However, the direct application of the Convention, despite the opinion of many authors (e.g. Viganò, Diritto penale sostanziale e Convenzione europea dei diritti dell'uomo, in Riv. it. dir. proc. pen., 2007), is still controversial (e.g. the Court of Cassation referred to article 5 § 4 ECHR as a self-executing provision in its Grand Chamber judgment of 23/11/1988, and to article 8 ECHR as selfexecuting in its judgments 12/5/1998, Medrano, and 12/7/2006, Somogyi. However, the same Court held the contrary in judgment 20/5/1991, No. 2823).

The outcome of the visits in the CIEs

The outcome of the visits in the CIEs are sketched in Annex 2. The following recommendations are summarized in the table below

RECOMMENDATIONS
For the organization of the centres – provide detailed national guidelines regarding the detention of immigrants in order to limit the excessive discretion of the single Prefetture and the disparity in treatment in the different centres – draw up a charter of the rights and duties of the detainees – allow visits from relatives and others without any restrictions – monitor the health assistance provided to detainees through local health agencies and specialized public hospitals – collect personal information to identify vulnerable subjects and individual situations requiring international protection. Refer to the experience of the CIE in Bologna – offer daily activities to detainees – provide specific training for police units – provide specific training for all operators dealing with detainees, as is stipulated for staff of the CIE of Ponte Galeria, Rome – monitoring by local bodies, such as the regional and municipality administrations. A good practice is the technical advice on the local CIE that was requested by the municipality of Bari, which was followed by an inquiry of the local Office of the prosecutor – create a register reporting the main problems that occur, day by day. **For the public** – inform the public on the CIEs – allow the permanent monitoring of the CIEs by the public opinion and members of parliament – raise awareness on the inhumane treatment of detainees due to their lack of activities in the centres – For a new policy in managing immigration: – provide for and encourage the use of alternatives to detention (e.g. application of non-custodial measures) – establish periodical and centralized monitoring of management – request transparency from the prefectures and management regarding internal regulations and directives. **For the right to defense and the protection of liberty** – claim the unconstitutionality of the administrative detention of immigrants for violations of Articles 13 (deprivation of personal freedom takes place under conditions that are not regulated by law) and of Article 3 (as a consequence thereof, the conditions of detention vary from CIE to CIE, in violation of the principle of equality) – request damages for wrongful detention – submit to the courts the interpretation of detention in CIEs as criminal detention.

5. The cost of CIEs. Construction, renovation and management

The following sections analyze the cost of CIEs and in particular, the cost of their construction and management and the influence of the length of detention (increased from 6 to 18 months with the 2011 Security Package). The analysis is mainly based on various technical reports of laws on immigration and security that have been approved over the last few years. This part also includes a statistical projection of the costs related to the extension of the detention period. The data are significant since they highlight the high cost of this detention policy compared with the efficacy of the system of expulsions in Italy.

Introduction. Methodology and data resources

Analysing the cost of detention in the CIEs is fundamental in order to evaluate the current Italian immigration policy, especially at this time of economic crisis. The lack of financial resources must lead to a re-examination of how the funds are allocated in order to guarantee the efficacy of public activities.

We thus sent a questionnaire to all Italian CIEs with specific questions related to the costs of the centres: in particular, we asked questions regarding the cost of accommodating one person; the daily management costs; the cost of construction/renovation; employees wages, etc.

Our questionnaires received no replies. However, we tried to estimate the costs through an analysis of various parliamentary technical reports of Bills approved over the last four years. Data from the Ministry of Home Affairs on detainees in Italian CIEs were also useful in assessing the cost of extending the period of detention (from 60 to 180 days and in 2011 to 540 days).

Construction costs

Article 3 of **Law Decree 151/2008** helped us to evaluate the cost of constructing a new centre, as it authorized the spending of financial resources "*to cope with the intensification of the phenomenon of illegal immigration and to ensure the most rapid implementation of European legislation by extending and improving the availability of accommodation centres for identification and expulsion*". In fact, some of these resources have been allocated to the construction of new CIEs, as can be seen from the technical report of the bill of law converting Law Decree 151/2008 (the report is available at: http://documenti.camera.it/leg16/dossier/Testi/nv1857.htm).

Year	Financial resources (€)	Resources for the construction of new CIEs (€)
2008	3,000,000	3,000,000
2009	37,500,000	37,500,000
2010	40,470,000	37,500,000
after 2011	20,075,000	

At that time there were 10 CIEs, with a total capacity of 1,160 places. The aim of the provision of the 2008 Decree was to increase the capacity by another 1,000 places through building new centres. In the above mentioned technical report, the cost of constructing the CIE in Turin is taken as a reference to evaluate future spending. **The cost, according to the technical report of the law, is € 78,000 per new place**: therefore, the creation of another 1,000 places would require a total spending of € 78,000,000, allocated as follows:

- year 2008: € 3,000,000
- year 2009: € 37,500,000
- year 2010: € 37,500,000.

The cost of accommodating each person in this type of centre is calculated as € 55 per day (the same as the cost of accommodation in a centre for asylum seekers, as reported in the technical report on Legislative decree 25/2008).

Therefore, in 2010 the management costs appear to have been as follows:

Year 2010	€ **2,970,000** (55 € × 300 places × 180 days)
Year 2011	€ **20,075,000** (55 € × 1,000 places× 365 days)

Total annual costs:

Year	Construction cost (€)	Management cost (€)	Total (€)
2008	3,000,000	-	3,000,000
2009	37,500,000	-	37,500,000
2010	37,500,000	2,970,000	40,470,000
2011		20,075,000	20,075,000

According to the technical report, building new centres is the first step in implementing European legislation on the detention of immigrants through the availability of a higher number of places.

The cost of extending the detention period in CIEs

The technical report of the Bill of law converting **Law Decree 11/2009** is useful to evaluate the cost of detaining a person in a CIE. In fact, art. 5 of the Decree extended the period of detention from 60 to 180 days. The provision amended art. 14, paragraph 5, of the Immigration Law, providing that, after 60 days, in case of a lack of cooperation on the repatriation of third country citizens or a delay in obtaining the necessary documents, the *Questore* may ask the judicial authority to extend the detention for 60 days and – if, at the end of this period, the same conditions persist – for an additional 60 days, until a maximum of 180 days. This new provision was also applicable to third country nationals who were already detained in a CIE at the time of the enforcement of the decree. The provision was not converted into law and was moved in the bill of the **2009 Security Package**. As explained in Part I, this provision was also modified by the **2011 Security Package**, which provided an extension of detention up to 18 months.

However, this technical report (available at: http://documenti.camera.it/leg16/dossier/Testi/nv2232.htm) enabled us to partially estimate the cost of detention. In fact, the impact of the extension of the maximum period of detention is clearly explained and involves the following costs:

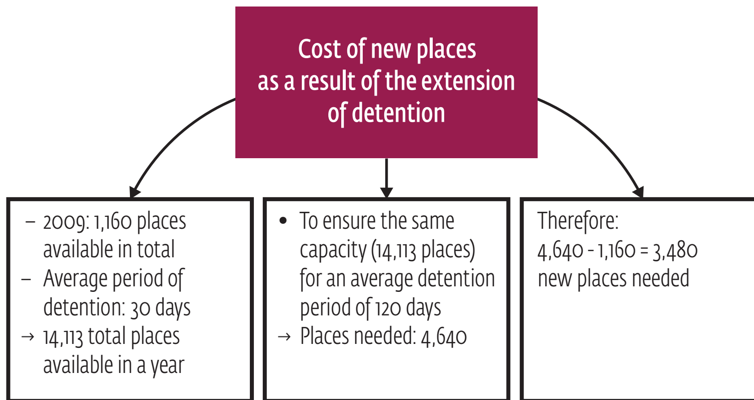
a) construction or renovation of CIEs to provide new places;
b) increase in the period of detention and consequently in the cost per person;
c) increase in the number of detention validations by a judicial authority (Justice of the Peace).

The following table shows the estimated cost according to the report, as-

suming a maximum detention of 180 days:

	2009 (€)	2010 (€)	2011 (€)	After 2012 (€)
Construction or renewal of CIEs	35,000,000	83,000,000	21,050,000	/
Increase in the period of detention (180 days)	/	3,630,000	26,963,750	49,786,000
Increase in the number of detention validations by a judicial authority (Justice of the Peace).	/	434,000	3,454,200	5,271,200
Total	35,000,000	87,064,000	51,467,950	55,057,200

With the extension to 180 days, the report considers a conservative estimate to determine a new average residence time as 120 days: four times the previous average time of 30 days. Assuming, therefore, **an average period of detention of 120 days**, in order to ensure the same capacity with the new residence time, the report calculated that 3,480 places would be needed:



NB: the 14,113 places result from the availability of 1,160 places, to be used for an average period of 30 days: in a year, the same place in a CIE may be used for 12.166 detainees (365 total days in a year/30 days of average stay), and thus, the 1,160 places can accommodate 14,113 detainees (12.166 x 1,160).

The technical report of the Bill assumes that:

- the **cost for creating a new place is € 78,000** (based on the cost of the CIE in Turin),
- the **cost of renovation ranges between € 5,000 and € 40,000**: the minimum is based on the centre in Brindisi, where the (very simple) renovation was carried out with a cost per detainee of about € 5,000; € 40.000 is the maximum needed for renovation (which corresponds

to about half of the cost of building a center anew), beyond which it makes more sense to build a new centre from scratch.

The extension of the length of detention also leads to an increase in the activity of the Justices of the Peace, who are called to validate the detention order (as seen in the previous table). The costs in Euros refer to:

- **the validation of detentions**;
- **legal aid and interpreting services**.

The cost of legal aid is € 350 per person, considering the "*low level of complexity*" of the defence (given the repetitiveness of the hearing, as seen in the report). This includes the cost of the interpreting services.

The technical report of the Bill assumes the following costs, based on the payment that a Justice of the Peace receives for every decree he/she adopts and for every hearing he/she holds:

- **€ 10 for each validation order;**
- **€ 20 for each hearing.**

The maximum number of validations for a period of detention of 180 days is 4 per person.

The costs are reported in the following table:

	2010 (€)	2011 (€)	After 2012 (€)
Activity of Justices of the Peace	31,500	270,950	399,200
Legal aid/interpreting	402,500	3,183,250	4,872,000
Total	**434,000**	**3,454,200**	**5,271,200**

Other data regarding detention, expulsion and costs. The 2009 and 2011 Security Packages

As stated above, the **2009 Security Package** extended the maximum period of detention from 60 days to 180 days. For this amendment to Art. 14(5) of the Immigration Law, the Security Package provided the following financial resources, based on the planning explained in the previous paragraph:

Year	Total financial resources (€)	Resources for construction/renovation of CIEs (€)
2009	35,000,000	35,000,000
2010	87,064,000	83,000,000
2011	51,467,950	21,050,000
after 2012	55,057,000	

The planning for the resources needed is the same as the identical provision included in Law Decree 11/2009 and then moved into the 2009 Security Package.

With specific reference to the **2011 Security Package**, the parliamentary discussion focused on the maximum period of detention, which was increased from 180 to 540 days. In the parliamentary technical report (available at http://documenti.camera.it/leg16/dossier/Testi/D11089a_0.htm) there are some interesting data on the expulsion and detention of immigrants:

- the average period of detention is 120 days;
- the extension of the period of detention from 60 to 180 days led to a drastic reduction in the numbers of non-identified immigrants who are released due to the expiration of the maximum period of detention (from 3,900 in 2009 to 1,200 in 2010);
- there were more than 43,000 reports of the crime of irregular entry and stay from August 2009 to April 2011;
- there were more than 56,000 reports of the crime of violation of an expulsion order (Article 14 of the Immigration Law);
- there were about 60,000 expulsions (from 2008 to 2010).

Art. 5 of the 2011 Security Package provided the financial resources for the extension of the period of detention with specific reference to the 2009 Security Package. The resources provided in this latter act will be reduced to cover this new spending:

Year	Financial resources (€)
2011	16,824,813
2012	40,000,000
2013	40,000,000
2014	40,000,000

A statistical projection of the costs related to the extension of the detention

Assuming the different hypotheses of the detention's lenght - see details in Annex 3 – the cost of managing the CIEs ranges between **€ 147,475,304 and € 73,077,180.**

Finally, assuming the need of 4.640 places (as stated in the technical report of Law Decree 11/2009), we calculated the management costs related to the different capacities of the centres:

Table 1 Estimation of the costs related to the maximum capacity of the centres.

Maximum capacity	Detention days (capacity x 365 days)	Annual cost (2011 index NIC)
1,681	613,565	€ 35,500,871
2,000	730,000	€ 42,237,800
2,500	912,500	€ 52,797,250
2,900	1,058,500	€ 61,244,810
3,480	1,270,200	€ 73,493,772
4,640	1,693,600	€ 97,991,696

Source: our calculations based on Ministry of Home Affairs and ISTAT data

Considering the current capacity of 1,681 places, the number of places needed is 2,959. If the public administration decides to provide for a new place for a detainee at the average cost of € 78,000 (updated for 2011 € 82,056), the cost is as follows:

Table 2 Estimation of the costs for creating new places in CIEs

	Cost per person		Total
Places to build	2008	Updating 2011	Average 2011
2,959	€ 78,000	€ 82,056	**€ 242,803,704**

Source: our calculations based on Ministry of Home Affairs and ISTAT data

On the contrary, according to the above mentioned technical report of the bill of law converting Law Decree 11/2009 (partially annexed to the 2009 Security Package), the total financial resources needed for the construction/ renovation of CIEs were € 139,050,000, also considering the possibility of renovating some centres at a maximum cost of € 40,000 per person instead of € 78,000.

The public contract for the management of CIEs

The cost of managing a CIE varies throughout Italy. For example the cost was about € 70 per detainee in Modena and in Bologna, while the cost is lower in bigger centres in southern Italy.

In order to reduce such costs, in a recent invitation to tender, the public administration set **a maximum cost per person of € 30 (plus VAT)**, with the application of the award criteria of 'the lowest price' instead of 'the most economically advantageous tender'. However, only this second criteria would make it possible to strike a balance between saving money and the number and type of services guaranteed (for more details see EU directive 2004/18); the 'lowest price,' on the contrary, applies regardless of the type, quantity

and quality of services.

Many experts and politicians are worried about the **drastic reduction in spending**, which could have an effect on the living conditions of immigrants in CIEs and on the protection of their fundamental rights. For example, for the CIE of Bologna, the winner of the public contract was a consortium whose tender foresaw a cost of only € 28,50 per person, with a reduction of more than € 40 compared with the previous costs.

The notices to the public for the management of CIEs are available on the web site of the Ministry of Interior (the recent calls for tenders are at the link: http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/bandi_gara/dip_liberta_civili/). Attached to each notice, there is a tender specification with the details of the services to be granted in a CIE: health services, social services; clothing, food, etc. It is hoped that those to whom the contracts will be awarded will really respect these provisions, thus ensuring the fundamental rights of the detainees.

The need for more transparency and monitoring. Is detention in CIEs necessary to combat irregular immigration?

The Italian Court of Auditors (Corte dei Conti), in the 2004 audit, examined the general spending on immigration, and made some important criticisms of Italian policies, which are still relevant now.

For 2003, the total spending of Prefectures for CIEs was € 33,912,205.86 and for the first 9 months of 2004, the spending was € 30,440,753.36 (plus € 25,372,361.09 for reserves).

The Court noted that **any assessment of the efficiency of the administration in pursuing its objectives was impossible**, because of the lack of set goals that were "sufficiently specific so that they could be verified". The Court also stated that the funds allocated in the budget were appropriate to build and manage wider-reaching welcome services.

In its report, the Court stated that **immigrants detained in CIEs are only a (small) fraction of the number of persons illegally staying in Italy**; in particular, it came to this conclusion by comparing the number of applications for legalization with the number of immigrants detained.

The *Dossier Statistico Caritas Migrantes* 2011 (p. 147) also shows some data that confirm that the same conclusion may be reached for 2010:

- In 2010, the number of immigrants detained in a CIE was 7,039

- In 2010, the number of illegal immigrants in Italy was 544,000 (ISMU estimates)
- Thus, **only 1.2% of all irregular immigrants are detained** in a CIE (7,039/544,000*100)
- The number of immigrants repatriated in 2010 was 3,399
- Thus, **only 0,6% of all irregular immigrants are effectively repatriated**, in accordance with the current immigration policy and laws.

The percentage of migrants detained (or repatriated) compared to the estimates on the number of irregular immigrants currently in Italy is incredibly low: this underlines the inefficacy of detention as a tool against illegal immigration. In fact the detention of immigrants involves only a very small minority of migrants who are illegally in the country, in most cases selected at random, due to their "bad luck" more than to any reasonable criterion. This should encourage a re-examination of the entire detention system and immigration policy, as already stated by the **De Mistura Commission** (see: http://www.interno.it/mininterno/export/sites/default/it/assets/files/1/2007131181826.pdf).

As emerges clearly from these data, the only possible solution is not to extend the length of the detention (with higher costs, but no higher level of success in implementing the expulsion policy) but to plan and improve an alternative system to the detention.

As stated in the report of the Court of Auditors, extending the period of detention (at the time of the program, up to 60 days) had one effect: to reduce the number of migrants repatriated. **The extension of the detention period could only be considered as a success if it led to an increase in the percentage of immigrants identified and expelled.** However, the data analyzed by the Court for 2003-2004 shows that the vast majority of expulsions (70-80%) took place in the first 30 days of detention: the remaining length of detention led to the expulsion of a further 20-30%. Therefore extending the period of detention is of limited use as a means to increase expulsions, which are instead linked "to the *gradual improvement of diplomatic relations and the conclusion of specific agreements for cooperation with countries of origin*". In 2003, the costs for repatriation amounted to € 12,765,754.25. These data include the following spending: cost of transportation (airplanes, ships); meals, other transportation costs (to the CPT / at police headquarters).

For the repatriation of an immigrant, the State pays five tickets: for the immigrant, and for the two police agents who accompany him/her (and who, of course, will need to take first an outbound and then an inbound

flight), as clarified in the recent report of the Senate on human rights in prisons and centres for migrants (6 March 2012, available at http://www.senato.it/documenti/repository/commissioni/dirittiumani16/Rapporto%20carceri.pdf, p. 179).

Finally, a Parliamentary inquiry of April 2011 is worth noting in terms of the costs of immigration. In the act, the annual reported cost of immigration policies is **€ 460,000,000** (border control, identification and expulsion of irregular immigrants, integration policies). The "complete management" of an irregular migrant (from identification to expulsion) costs about € 10,000, including the cost of the flight and the agents (see http://banchedati.camera.it/sindacatoispettivo_16/showXhtml.Asp?idAtto=37940&stile=6&highLight=1).

The spending reported in this and the previous section is particularly high. Compared with the number of migrants that are illegally in the country, this type of policy is highly inefficient. **A major rethinking of the management of immigration** as a logistical phenomenon of our time is vital.

RECOMMENDATIONS

- increase the transparency and control of immigration policies, especially by the Court of Auditors
- assess the efficacy of the public policies on immigration
- balance the need to save money with the need to protect the fundamental rights of immigrants in CIEs
- monitor the management of services provided in CIEs by those who are awarded public contracts
- improve diplomatic relations with Countries of origin to increase the identification and repatriation of immigrants.

Conclusions and Recommendations

This report shows how the Italian legal system perceives immigration mainly in terms of of security: immigrants are seen as inherently dangerous, as foreigners who should be expelled or, at least, marginalized and interned. In the "fight against illegal immigration," two main instruments are available, and widely used: criminalization, and administrative detention followed by expulsion.

The criminal prong of the legal system serves to isolate immigrants, punishing everyone who has anything to do with them, and punishing the immigrants themselves for their irregular presence (irrespective of the cause). The system may originally have been conceived as a coherent body of legislation, in which criminal law would gradually expand until it became the main instrument used to control irregular immigration. However, the coherence of the system has been disrupted by both the national Constitutional Court and the Court of Justice of the European Union, whose findings indicated that current Italian legislation violates both the Italian Constitution and EU law. Thus, if criminal law is still an essential tool in the global response to irregular immigration, it is full of gaps and complex issues that make its application extremely problematic.

The administrative prong of the legal system (detention in a CIE, followed by expulsion) has also evolved over the years, becoming more and more focused on pre-return detention and forcible expulsion, to the detriment of voluntary expulsion and non-custodial measures. Many administrative measures violate EU law, as well as international law. In practice, expulsions have often been carried out in a manner that is not compatible with the Geneva Convention on refugees nor with the European Convention of Human Rights. This has led in turn to convictions in international courts and to calls by many international organizations and NGOs for amendments to the legislation.

What emerges from our study is a system of immigration law that has been created, and amended, in the wake of (existing, or perceived) emergencies, and therefore lacking in overall organization. Legislation is often sloppy in its drafting, and best practices on "better legislation" are hardly ever followed. This has consistently led to the Courts reversing certain laws, amending specific rules, changing the wording or interpreting others. Consequently, the system has lost whatever coherence it may have

had, and – since it changes constantly – it has become extremely difficult to understand. Irregular immigrants are socially isolated: they fear laws that have never been enacted but widely discussed, or laws that existed for a short period of time before being repealed, declared unconstitutional, or disapplied. In many cases, irregular immigrants suffer the consequences of laws, rulings, and practices that have subsequently been declared as unconstitutional, or incompatible with EU and international law. However, it is impossible for an immigrant who has been expelled to Libya without ever touching Italian soil, or subjected to illegal practices that are consistently applied, to contest the validity of administrative action that is so blatantly unlawful as to overstep the law.

As for detention in the CIEs, first of all we must reiterate that it takes place in violation of the Constitution. According to the Italian Constitution, deprivation of liberty can only take place "in such cases and in such manner as provided by law" (Art. 13). However, detention in CIEs is not regulated by law, and the cases and the manner in which it takes place are not specifically described in any law. Moreover, and to add to this already extremely worrying conclusion, there is a complete lack of transparency as regards the CIEs. Access to the Centres is restricted, and it is only granted at the discretion of the administrative authorities: a regime that is even worse than the one that applies to criminal detainees. Indeed, access to CIEs has been consistently limited, or denied, over the last few years, and journalists have been fighting to re-open them. However even now, when they should be open to visits, the decision whether to let certain individuals in or not is based on the discretion, and good will, of the administrative authority in charge. In addition, requests for data can be refused, or ignored, without any explanation of the reasons why certain data are considered to be too "sensitive" to share with the public – including data concerning how taxpayers' money is spent.

To add to this image of illegality and apparently random decision-making, recent "emergencies" have led to a complete disregard for the rule of law in the enforcement of administrative detention. The absence of a legislative framework setting out the basic conditions for detention has led to a situation where detention can – and indeed, does – take place under any conditions. This includes temporary tents, or ships anchored in a harbor (indicative of the complete marginalization and isolation of irregular immigrants and their situation of legal uncertainty). An increasing number of immigrants (around 10%) are detained according to orders that are subsequently declared to be void by the Justice of the Peace, and even higher is the number of people detained in violation of the law – for instance, because the

detention order is issued after the person has already been deprived of his/her liberty for some time. The conditions of detention are also often worse than in a prison: the existing buildings are overcrowded, lacking minimal comforts, and detainees are often placed in "temporary" buildings that are even worse off.

If this is an overview of the current situation, there seems to be only one possible conclusion: the legal system regarding illegal immigration currently in force in Italy is … illegal. It is illegal because it violates the national Constitution, EU law, and international law. It is illegal because it violates the basic principles of democracy, including transparency and the rule of law. If we compare the law as it stands with existing possible tests to assess its validity, there are very few rules and practices that are fully compatible with all the legal instruments that Italy is bound to comply with.

We have drafted a number of recommendations that are aimed at different actors in the legal system. However, the most important recommendation is to legislators: to re-draft the whole system, after carrying out an accurate impact assessment and a thorough evaluation of all the different levels of legislation with which it must comply, in order to establish a coherent, lawful system. This is not an issue of political choices. It is about respecting the rule of law and the commitments that Italy has taken in the international, as well as national, sphere.

* * *

We have outlined three levels of recommendations and practices, which are "macro", "meso" and "micro" on the basis of the subjects involved in the action.

The *"macro"* recommendations and practices are aimed at creating and/or strengthening a favorable political, social and legal environment for immigrants in order to pursue an effective integration model and to ensure equal access to justice and fundamental rights by modifying the law and existing practices.

The *"meso"* recommendations and practices are aimed at supporting and strengthening the capacity of public bodies, non-state actors and private subjects at a local level, of in order for them to participate in processes that promote the protection of immigrants' rights by encouraging information-sharing and best practices, lobbying, networking and partnership building.

The *"micro"* recommendations and practices are aimed at supporting the development and implementation of a human rights based approach to immigrants by the courts, police, local entities and civil society.

Part 1. Immigration, security and expulsions in Italian legislation and praxis.

For politicians and civil organizations:

- encourage a change in the political narrative of immigration through parliamentary questions and motions on: 1) extraordinary acts that were adopted to manage the immigration flow; 2) recent data relating to immigration; 3) government strategies for future policies on immigration; 4) data regarding removal proceedings; 5) data of how CIEs are managed and their costs, in order to raise awareness of the rhetoric of immigration as an emergency and security issue and of the "hidden" costs of the current immigration policies;
- lobby against the criminalization of undocumented migrants as a violation of human rights and an ineffective offence (no deterrence) and highlight its costs, both in terms of resources and the violation of rights;
- encourage the dissemination of information on the long-term effects of the violation of fundamental rights and the inefficiency of the "emergency and security" approach to immigration issues;
- ensure the effective implementation of human rights standards and EU legislation, in particular regarding equal access to services, information and legal counseling;
- share in-house expertise and practices to promote local best practices among national organizations and service providers;
- strengthen local and professional skills;
- establish a single common procedure for asylum in Europe;
- ensure that the procedure of international protection is effective, taking into account the conclusions of the ECtHR in Hirsi v. Italy;
- ensure the existence of mechanisms for judicial review against decisions rejecting an application for international protection;
- ensure that the Italian system of reception and assistance of asylum seekers complies with European standards, including both EU and ECHR standards.
- abolish delayed push-back operations and improve border services.

For legislators:

- draw up detailed regulations that specify the circumstances that are to be taken into account for expulsion, expressly recalling the need to protect the unity of the family, to provide for urgent medical assistance if necessary, to take into account the educational needs of minors and the special needs of the most vulnerable. Thus, ensure a case-by-case appraisal and limit the discretionary powers of the *prefetto*, reducing the risk of arbitrary decisions .
- provide mandatory information on the right to legal counsel from the beginning of the expulsion proceedings;
- ensure that irregular immigrants are heard before the adoption of the expulsion decree
- expressly recognize that expulsion based on an assessment of perceived danger is a preventive measure, in order to ensure the application of full judicial guarantees including the right to a public hearing (see Constitutional Court No. 93/2010);
- provide specialized legal assistance from the beginning of the proceedings in order to ensure the immigrant's active participation in the evaluation of the level of security threat he/she poses;
- encourage withdrawal of the expulsion order for immigrants who are leaving the country;
- encourage requests for withdrawal of the expulsion order or re-entry ban against immigrants who are leaving the country in order to avoid discrimination;
- provide adequate financial resources for services aimed at improving immigrants' integration and positive actions, and recognize such activities and services as fundamental rights of immigrants;
- provide for the detailed specification by law of actions and services that local administrative authorities must provide and of the standards they should comply with;
- introduce special "study permits" that employers can grant to employees in order to allow them to take part in the activities that are necessary based on the Integration Agreement;
- define a common study program to be followed by all those who sign an Integration Agreement;
- require public offices to inform all those concerned about all available courses and services;
- train staff in multilingual skills, in teaching reading and writing skills and cultural intermediation.

- improve the methods used for identifying detained third country nationals in order to avoid subsequent detention in CIEs.

For local authorities:
- encourage networking between local authorities and civil society organizations;
- ensure that immigrants concerned have full access to all the services provided by local authorities.

Possible courses for judges:
- raise the issue of constitutionality regarding articles 235 and 312 of the Criminal Code, in particular concerning their reasonableness and proportionality;
- issue a reference for a preliminary ruling regarding the interpretation of EU directive 2004/34 and the compatibility of Art. 312 Criminal Code with it.

For practitioners:
- appeal against all individual integration agreements whenever the public authority fails to ensure the availability of the services needed for their effective enforcement
- appeal against all discriminatory regulations that exclude immigrants from taking part in services or volunteering activities that might be useful to fulfill the conditions set out in the Integration Agreement.
- submit to local courts the interpretation of the Court of Cassation regarding the non-backdating of article 235 criminal Code as amended, which is consistent with article 7 ECHR;
- provide for specialized legal assistance when the threat posed by a person is being assessed;
- grant legal assistance after the expulsion, in order to ensure that the need for this measure is periodically assessed and, if need be, to allow for withdrawal.

Part 2. Immigration and criminal law

For national judges in trials for the crime of illegal entry or stay (Art. 10 bis)

If the immigrants have justified grounds for non-return:

- give direct effect to EU law (as interpreted by the ECJ) → refusal to apply art. 10 *bis*. Acquit the immigrant.
- if in doubt as to the admissibility of this interpretation → request a preliminary ruling of the ECJ asking what grounds may justify a non-return of an irregular immigrant.

If the immigrants are protected against criminalization by international law:

- adopt a constitutional interpretation of Article 10 *bis* → excluding its application to those immigrants who, according to international law, should not be criminally liable for the mere fact of their irregular immigration (e.g. immigrants smuggled or trafficked into Italy).
- refer the case to the Constitutional Court → asking the Court to declare Article 10 *bis* unconstitutional, at least insofar as it applies to immigrants who are protected against criminalization by international law.

With regard to the violation of the Returns Directive by Article 10 bis:

- Refer cases to the Constitutional Court, claiming a violation of Article 117
- Refuse to apply Article 10 *bis* → give direct effect to EU law and refuse to apply the rule based on its incompatibility with EU law.
- If in doubt as to the compatibility of Art. 10 *bis* with the Returns Directive → request a preliminary hearing of the ECJ.

Part 3. The Italian centres for identification and expulsion and the costs of immigration

For the organization of the centres:
- provide detailed national guidelines regarding the detention of immigrants in order to limit the excessive discretion of the individual *Prefettura* and the disparity in treatment in the different centres
- draw up a charter of the rights and duties of the detainees
- allow visits from relatives and others without any restrictions
- monitor the health assistance provided to detainees through local health agencies and specialized public hospitals
- collect personal information to identify vulnerable subjects and individual situations requiring international protection (as has been done in the CIE in Bologna).
- offer daily activities to detainees
- provide specific training for police units
- provide specific training for all operators dealing with detainees, as is stipulated for staff of the CIE of Ponte Galeria, Rome
- promote monitoring by local bodies, such as the regional and municipality administrations, as was done by the municipality of Bari
- create a register reporting the main problems that may arise.

For the public:
- inform the public about the CIEs
- allow the permanent monitoring of CIEs by public opinion and members of parliament
- raise awareness on the inhumane treatment of detainees due to their lack of activities in the centres.

For a new policy in managing immigration:
- provide for and encourage the use of alternatives to detention (e.g. application of non-custodial measures)
- establish periodical and centralized monitoring of management
- request transparency from the prefectures and management regarding internal regulations and directives.

For the right to defense and the protection of liberty:
- claim the unconstitutionality of the administrative detention of immigrants for violations of Articles 13 (deprivation of personal freedom takes

place under conditions that are not regulated by law) and Article 3 (since the conditions of detention vary from CIE to CIE, in violation of the principle of equality)
- request damages for wrongful detention
- submit to the courts the interpretation of detention in CIEs as criminal detention.

About the cost of CIEs. Construction, renovation and management

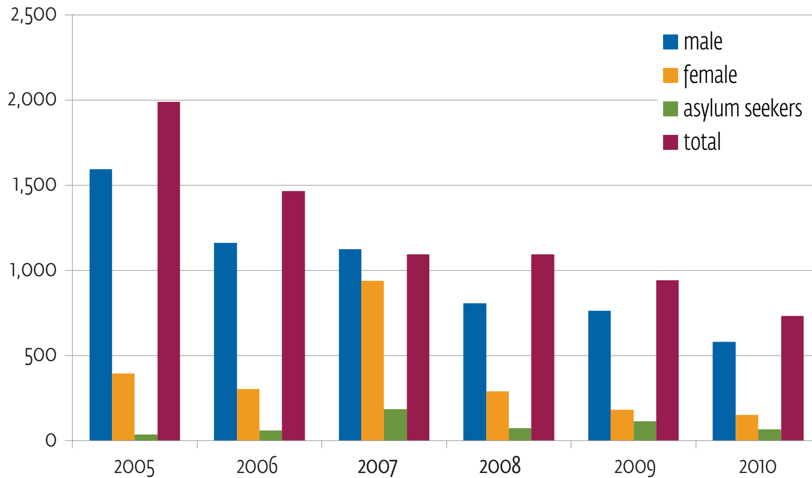
- reasonably reduce the spending capacity of the prefectures
- avoid building or enlarging CIEs, but adapt the buildings to the extension of the detention period
- increase the transparency and the monitoring of immigration policies, especially by the Court of Auditors
- balance the need to save money with the need to protect the fundamental rights of immigrants in CIEs
- monitor the management of services provided in CIEs by those who are awarded public contracts
- improve diplomatic relations with Countries of origin to increase the identification and repatriation of immigrants.

Annexes

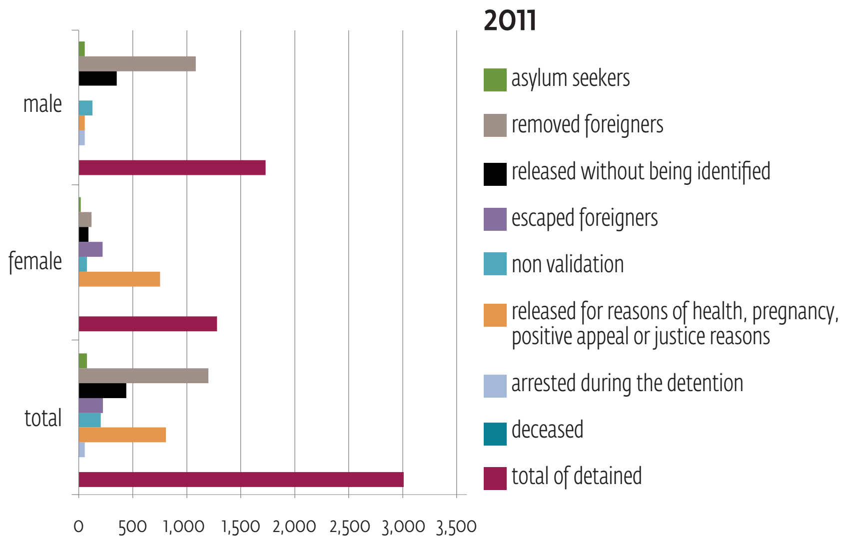
Annex 1.

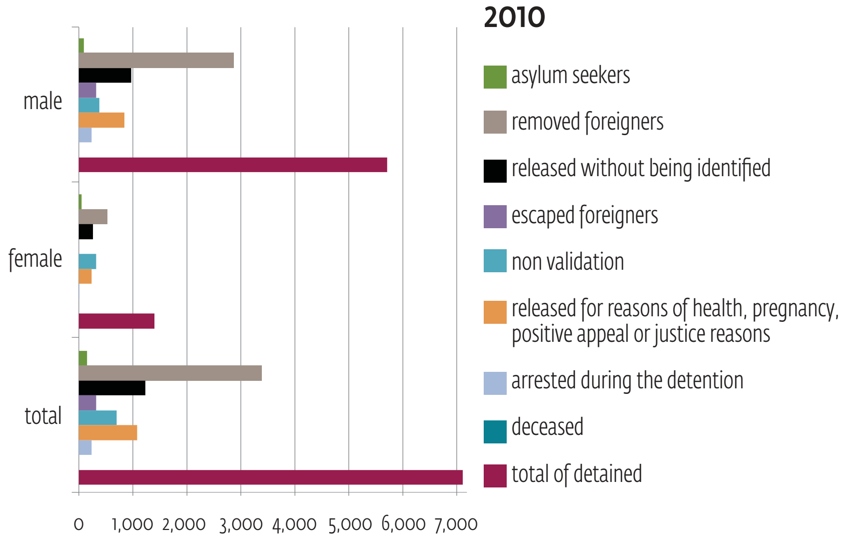
Detainees in Italian CIEs

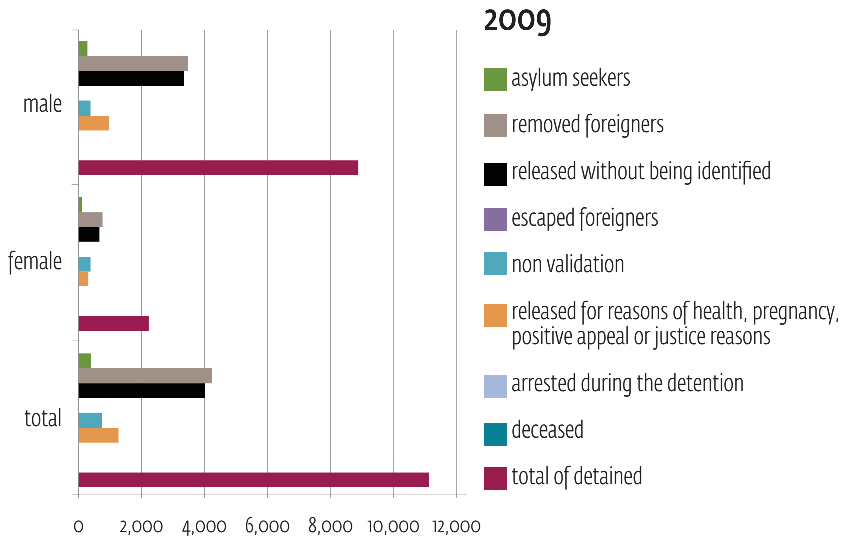
Detainees from 2005 to 2010

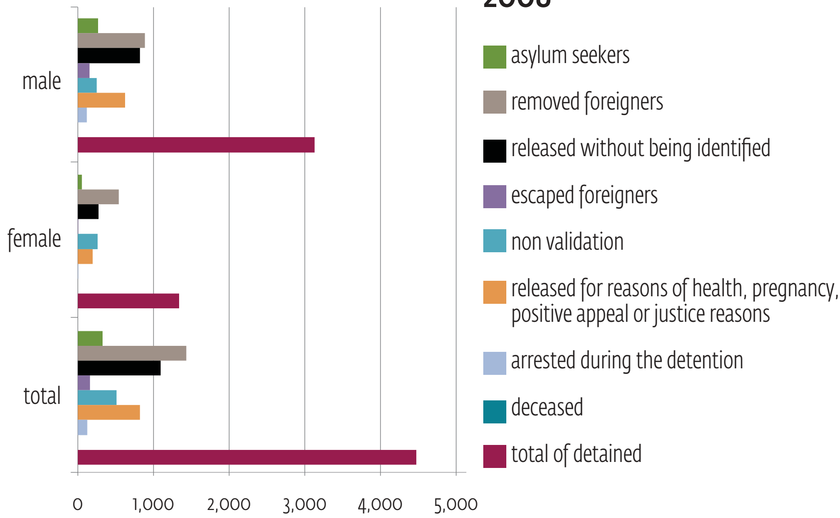


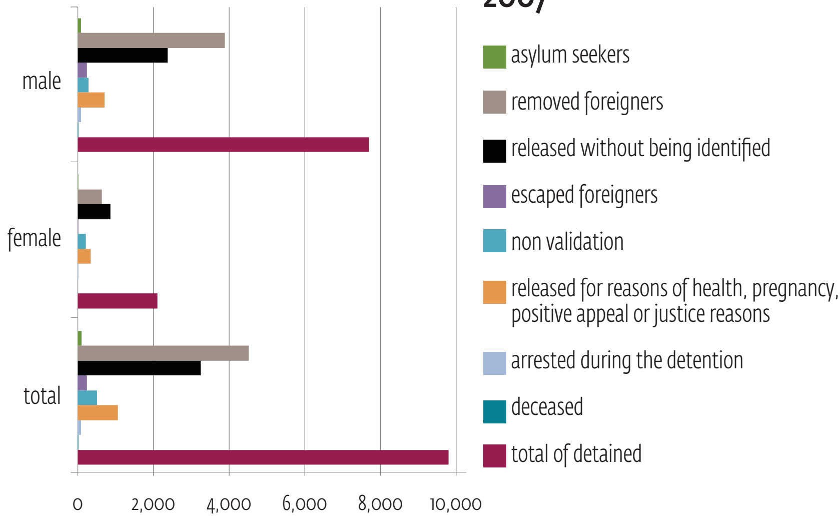
Annual presence in CIEs (source Ministry of Home Affairs)




2010
male
female
total
asylum seekers
removed foreigners
released without being identified
escaped foreigners
non validation
released for reasons of health, pregnancy, positive appeal or justice reasons
arrested during the detention
deceased
total of detained
0
1,000
2,000
3,000
4,000
5,000
6,000
7,000


2009
male
female
total
asylum seekers
removed foreigners
released without being identified
escaped foreigners
non validation
released for reasons of health, pregnancy, positive appeal or justice reasons
arrested during the detention
deceased
total of detained
0
2,000
4,000
6,000
8,000
10,000
12,000


2008
male
female
total
0
1,000
2,000
3,000
4,000
5,000
asylum seekers
removed foreigners
released without being identified
escaped foreigners
non validation
released for reasons of health, pregnancy, positive appeal or justice reasons
arrested during the detention
deceased
total of detained


2007
male
female
total
0
2,000
4,000
6,000
8,000
10,000
asylum seekers
removed foreigners
released without being identified
escaped foreigners
non validation
released for reasons of health, pregnancy, positive appeal or justice reasons
arrested during the detention
deceased
total of detained

Annex 2.
The outcome of the visits in the CIEs

Following our requests for access to the CIEs, which were sent to all those Prefectures that are responsible for a CIE, without following any set procedure we received answers from the Prefectures of Rome, Turin, Milan, Trapani, Bologna, Modena and Caserta by means of oral or written communication.

PONTE GALERIA, ROME – date of access: March, 2 2012	
Status	In operation since 1999
Facility type and description	Building surrounded by high and large wall. At the entrance there are the administrative and police offices, a room for visits and a room for hearings, then the services, library, canteen. Each area is separated by an electronic door.
Level of security	Secure: detainees are generally allowed to move around in the facility at set times and in set areas. The level of security is increasing: most of the furniture has been removed, the football field is not accessible, the canteen, television and decoder to watch football matches are no longer accessible. Newspapers or magazines are not allowed because of the risk of fire. Shoes are not allowed, but only slippers, also during the winter. On 16 May 2012, the questura forbade the use of the canteen to groups of more than five detainees, so that immigrants were obliged to have their lunch in the living unit on the bed or on the floor. Many protests followed the decision. The Detainees' Ombudsman of Lazio opposed the introduction of new restrictive rules, which, in his view, have the sole effect of increasing the tension.
Management	Coop. Auxilium
Maximum Capacity	360
Population on the day of the access	NA
Demographics	Nigerians, Moroccans, Tunisians, Egyptians, Algerians, East Europeans, Chinese, Russians, Senegalese, Brazilians, Romanians. 50% of detainees come from penitentiaries.
Vulnerable groups	Asylum seekers, women suffering from gender based violence, including trafficking for sexual exploitation, transsexuals.* * Information provided by Differenza Donna NGO-Rome. The presence of women who have been trafficked is particularly problematic, since they are actually entitled to a residence permit according to Article 18 of the Immigration Law; while the permit was created in order to protect them from the risk of further revictimization, it becomes scarcely effective if it does not prevent the victims' permanence in a CIE, together with smuggled persons and possibly also smugglers and traffickers.

→

Average length of detention	2/3 months
Information about rights	NA
Internal staff	Interforce police unit consisting of carabinieri, finance police, military personnel; management staff made up of director, social workers, psychologists, cultural mediators, doctors, religious support.
Services	Periodical supply of kits including clothes and personal care items, medical assistance, psychological counselling, cultural mediators. Counselling Services for women run by Differenza Donna NGO and COOP. Be Free.
Activities	NA: the detainees are completely inactive .
Visits received	27 in 18 months: such information was supplied by the Detainees' Ombudsman of Lazio, but not by the prefecture or internal staff.
Communication with the outside world	Mobile phone without camera; a fixed phone.
Interviews	Management staff, police staff, two detainees.
Acts and regulations	Regulations of the prefettura and orders from the questura: not provided due to their sensitive nature.
Facts and figures	Acts of self-harm, hunger strikes, riots and escapes.

BRUNELLESCHI, TURIN – date of access: April, 26 2012	
Status	In operation since 1999, when the previous camp for military activities was converted into a Centre of temporary residence (CPT) with the introduction of containers which were then replaced by prefabricated buildings.
Facility type and description	It is surrounded by high walls. There are administrative offices, a room for hearings, a room for visits. The living units are separated by high bars. There are 6 units distinguished by color with 5 rooms each. 5 units are for men and 1 for women. In each room of 20 sqm there are 7 people. At the time of access, one unit was closed for renovation after it was destroyed during a fire last August 2011.
Level of security	Secure: detainees are not allowed to leave each unit if not accompanied. Despite the staff referring to football matches and other activities, detainees reported that they had never been to the football field or in other parts of the buildings, except for medical assistance and to receive visits. They have to wear slippers or shoes supplied by the management.
Management	Red Cross
Maximum Capacity	210
Population on the day of the access	117= 90 males+ 27 females
Demographics	Tunisians, Moroccans, Nigerians, Romanians. 40% from penitentiaries, 9 out of 10 have a serious criminal record.
Vulnerable groups	Asylum seekers, many cases of minors released after the RX exam. Many detainees have been in Italy for 15-20 years. The interviews with male detainees highlighted a number of cases of labor exploitation. The majority of women were from Nigeria, at risk of sexual exploitation.
Average length of detention	2011: 154 days
Information about rights	Charter of rights and duties
Internal staff	Interforce unit of police consisting of carabinieri, finance police, military personnel; management staff, social workers, psychologists, 8 cultural mediators, doctors, religious support.
Services	Periodical supply of kits including clothes and personal care items, medical assistance, psychological counselling, cultural mediators. Counselling Service run by Gruppo Abele and Tampep.
Activities	The staff referred to football matches, gymnastics and others, but detainees denied being involved in any activities and spent all the time in a state of total inactivity.
Visits received	Every day after authorization of the questura
Communication with the outside world	Mobile phone and fixed phone
Interviews	Internal staff, representatives of the prefettura and questura, three detainees.
Acts and regulations	Regulations of the prefettura, orders from the questura: not provided
Facts and figures	Fires, escapes, self-harm and hunger strikes

MILO, TRAPANI – date of access: May, 10 2012	
Status	In operation since July 2011
Facility type and description	A new large building originally conceived as an immigration centre, divided into six sections identified by letter. The first area includes administrative offices, a room for hearings, rooms for the Territorial Commission for Asylum Seekers, a medical room, and a room for a social worker and psychologist. According to the director, the building is too big, which puts its operations at risk.
Level of security	Secure: the detainees may not leave their section, but it was reported that they move from one section to another through the common windows. The meals are served in each secton.
Management	Coop. Insieme, Coop. Badia Grande
Maximum Capacity	204, but have occasionally reached 280
Population on the day of the access	214 + 6 arriving during our visit
Demographics	Tunisians. At the beginning detainees came from illegal entry via sea, now they come from other CIEs and from penitentiaries.
Vulnerable groups	Asylum seekers, people at risk of ill treatment in case of repatriation, people without any connection with the country of origin due to being in Italy for a long time.
Average length of detention	57 days, but there are many people who have been detained since January 2012 and one person since August 2011.
Information about rights	Not provided during the access
staff	Interforce unit of police, military personnel, carabinieri and finance police, social workers and interpreters, medical staff.
Services	Periodical supply of kit including clothes and personal care items, legal counselling, medical assistance, psychological counselling, cultural mediators
Activities	No activities except for television and board games. Detainees can have access to newspapers and magazines, but, according to staff, they do not usually request them. Shopping service.
Visits received	Without limitations, but they are very rare.
Communication with the outside world	Mobile phone
Interviews	Internal staff, legal counsel, police
Acts and regulations	Regulations of the prefettura, orders from the questura: not provided
Facts and figures	Escapes, riots, self-harm acts and hunger strikes

Serraino Vulpitta, Trapani – date of access: May, 11 2012	
Status	In operation since 1999
Facility type and description	The building was originally an old people's home built at the beginning of the 20th century. It is surrounded by a high wall, with a soccer field at the entrance. The ground floor consists of offices and a room for hearings and visits. All floors are separated by electronic gates and all windows have bars. On the first floor there is a cell on the left, where there were 6 Egyptian asylum seekers. In addition there are rooms for medical and other services. On the second floor, which was not visited for security reasons, there are rooms for 2, 4, 6 and 10 people.
Degree of security	Secure: the detainees are locked in on the second floor, except for the six detained on the first floor. They cannot leave the second floor except for special services and for football matches, in any case under police surveillance. Each floor is separated by electronic gates. The rooms open onto a corridor where there is a television and onto a balcony, surrounded by high bars. The external area has only been accessible since 2011.
Management	Coop. Insieme
Maximum Capacity	43
Population on the day of the access	41
Demographics	Men: Tunisians, 6 Egyptians, 1 Cote D'Ivorian, 1 Palestinian, 1 Albanian, 2 Moroccans
Vulnerable groups	Asylum seekers, minors, people at risk of ill treatment if repatriated
Average length of detention	37 or 36 days, but the data is distorted by the arrival of people from other CIEs and waiting for the repatriation flight from Palermo airport.
Information about rights	Regulation of the prefettura
Services	Medical and psychological assistance, social assistant, cultural mediators, shopping service
Activities	Football, cards and board games, television.
Visits received	Every day, each detainee has the right to receive two visitors for a maximum of 30 minutes
Communication with the outside world	Mobile phone without camera
Interviews	Director, doctor
Facts and figures	Self-harm, riots and escapes, vandalism. The wall of the second floor is no longer painted due to sniffing. Placebos are distributed to calm detainees down.

Ex Police Station Chiarini, Bologna – date of access: May, 25 2012	
Status	Active since 2002
Facility type and description	The building was formerly a police station. It is surrounded by a high fence of iron bars and a plastic plate towards the top of the bars, to prevent detainees from climbing out and escaping. The centre is divided into two sections: one for women and the other for men. All the bedrooms are on the ground floor. Each bedroom has an average of five beds, which look onto an internal courtyard. The beds are made of stone for security reasons; the bed sheets are disposable, and each bedroom has a TV. One room is dedicated to recreational activities and interviews with social workers, one is a canteen and one, in the male section, is for religious activities (for use as a small mosque). There are also rooms for medical assistance and other services.
Level of security	Secure: the police and army patrol the building behind the security fence around the building. The police and army personnel do not enter the building, except if necessary for security reasons.
Management	Confraternity "Misericordia" until July 2012. Over the past few months, the competitive tender to manage the centre was won by Consorzio l'Oasi, therefore after July the management changed. The services of the Misericordia cost € 69.50 per day per detainee, while the the Consorzio's offer was for € 28.50. The press underlined the great difference in price. Some experts are worried about the future conditions of the centre, because the services will remain the same (if not increase) and the financial resources available are very low (see the interview with the previous Director: Testa A., *Lombardo, direttrice del Cie Bologna: «La legge va riformata: le donne non ci devono entrare»*, Il Manifesto online, Bologna, 26.5.2012; see also A. Dall'Oca, *Bologna, gara al massimo ribasso per il Cie: 28 euro al giorno per detenuto*, Il Fatto quotidiano on line, Emilia-Romagna, 23.4.2012). In addition, there are some issues concerning some of the organizations that make up the winning Consorzio, due to problems in managing other centres and similar institutions in the past (D. Franda, *È battaglia legale per il Cie: spunta Il passato della coop siciliana*, Gazzetta di Modena, 25.5.2012).
Maximum Capacity	95 (availability for 45 women and 50 men)
Population on the day of the access	58 (26 women)
Demographics	Great heterogeneity of nationalities, especially women. The five areas of origin are: West Africa, East Europe, Maghreb, South America, China. Regarding men, the nationalities are more homogenous: Maghreb, Pakistan and East Europe. In 2011, there were 665 detainees, including: 249 from Tunisia, 91 from Morocco, 90 from Nigeria, 38 from Albania, 21 from China, 21 from Ukraine (other nationalities less than 20). 104 people came from prisons. In the same year, 334 expulsions were executed: 134 Tunisians, 56 Moroccans, 31 Albanians, 13 Chinese, etc. Only 10 of the 90 Nigerians were expelled. 192 persons asked for international protection (especially Tunisians and Nigerians, 89 and 51 people respectively). 30 individuals obtained a resident permit for reasons of protection (9 women and 21 men).
Vulnerable groups	Asylum seekers, female victims of trafficking. Some asked for social protection under Art. 18 of the Immigration Law. Social workers in the centre are very active in helping these victims. Each Thursday a specific service is available for victims of trafficking and violence. Access to the services is voluntary: 17 women accessed the services in 2011 (5 from Nigeria, 3 from Ukraine, 2 from Morocco and Algeria, 1 from Bosnia, Brazil, China, Tunisia, Uruguay). 4 obtained protection under Art. 18 of Immigration Law.

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Average length of detention	30-40 days
Information about rights	Regulation under review
Services	Medical and psychological assistance, social workers, cultural mediators, shopping room. In terms of medical assistance, under the management of the Misericordia, the centre had an agreement with the local health agency (AUSL) for diagnostic services. In particular the agreement provided for the availability of dermatology, orthopedic, pulmonology, dentistry and gynecology services, drug assistance, blood tests. The director gave us the agreement, which represents a good practice in the assistance of migrants detained in a CIE. An interesting project on the health of women who have been the victims of violence is starting in the centre, with the support of the regional administration of Emilia-Romagna and the local health agency (AUSL). Regarding social assistance, each person fills in a specific form which is useful to understand the situation of the immigrant and to evaluate how best to assist the person, from health services to legal assistance. Psychologists are also available. In 2011, 107 persons benefitted from an individual assistance project (61 for men and 46 for women). This type of intervention started in 2005 with the cooperation of cultural mediators, psychologists, lawyers, social assistants, local authorities and third sector bodies. The aim of the project is for the detainee to take charge of their situation by offering a specific and targeted support to his/her needs. The project was carried out with the cooperation of the University of Bologna, Parma, Venice, Turin, Colonia for student training courses.
Activities	Television
Visits	Every day for close relatives and lawyers, in a specific room.
Communication with the outside world	Mobile phone without camera.
Interviews	Director of the centre and a psychologist, director of the individual social projects within the centre. All the people who worked in the centre were very helpful in providing information.
Facts and figures	Self-harm, riots and escapes, vandalism. The walls of some bedrooms and the fences have been burned in parts. One of the main causes of these events is the uncertainty regarding how long the detainees will be kept in the centre and the length of the period of possible detention. One woman was there because she reported that her bag with passport had been stolen and the police discovered that she was illegally in Italy. Another person was there because she did not go to the Questura within 8 days from her arrival in Italy with a tourist visa (For the stories of the people detained in the CIE of Bologna, see A. Testa, Voci da una terra di nessuno chiamata Cie, Il Manifesto online, Bologna, 26.5.2012).
Other information	The centre was visited by the CPT Commission two weeks before our access. The CIE of Modena was managed by the same organization, Misericordia. The director of Bologna also gave us information about the other centre. In Modena, the centre has a capacity for only 60 men. The two centres (Bologna and Modena) employ about 70 persons (doctors, nurses, psychologist, cultural mediators, etc.). In Modena the management is also due to change. Consorzio l'Oasi took part in the public tender.

Annex 3.
A statistical projection of the costs related to the extension of the detention[1]

In this annex we attempt a statistical projection of the costs related to the extension of the detention based on data mentioned in Part 3.5 and the number of immigrants detained in CIEs over the last few years (provided by the Ministry of Home Affairs, Department for Civil Liberties and Immigration, General Directorate for Immigration Policies and Asylum, Service I: Documentation, Communication and Statistics).

Table 1 Immigrant landings from January and May 2011

Period	days	Immigrant landings	Men	Women	Minors	Total
1/1/2011-31/5/2011	151	507	38,623	2,036	2,148	42,807

Source: our calculation based on Ministry of Home Affairs data

Table 2 Numbers of detainees in CIEs – from 2007 to 2011

Category of detainee	365 days **2007**	365 days **2008**	365 days **2009**	365 days **2010**	152 days (from 1st January to 1st June 2011)	Hypothesis 2011
Asylum seeker	104	1.589	384	150	76	184
Repatriated	4,459	4,321	4,152	3,399	1,202	2,905
Released as not identified	3,198	3,060	3,945	1,234	440	1,064
Escaped from the CIE	244	156	268	321	223	539
Detention not validated	503	497	734	704	203	491
Released for other reason	1,047	796	1,248	1,084	809	1,956
Arrested within the centre	89	119	178	147	56	135
Died in the centre	3	1	4	0	0	0
Total number passing through a CIE	9,647	10,539	10,913	7,039	3,009	7,274

Source: our calculation based on Ministry of Home Affairs data

The table shows the data of immigrants passing through a CIE from 2007 and 2011. The data provided by the Ministry refer to the period 1st January 2007 – 1st June 2011. Therefore the number of immigrants related to year 2011 is

[1] We would like to thank Prof. Francesca Romano, Scuola Superiore Sant'Anna, for the statistical projections reported in this Annex.

an estimate (obtained by hypothesizing the same influx for the second half of 2011, although in the summer there are usually higher numbers or landings). The numbers of immigrants in Italian CIEs is not constant over this period.

But what is the limit of available places in the CIEs?

Table 3 CIEs in operation in June 2012

Place	Capacity
Bari-Palese, area aeroportuale	196
Bologna, Caserma Chiarini	95
Brindisi, località Restinco	83
Catanzaro, Lamezia Terme	80
Gorizia, Gradisca d'Isonzo	248
Milano, via Corelli	132
Modena, località Sant'Anna	60
Roma, Ponte Galeria	360
Torino, corso Brunelleschi	180
Trapani, Serraino Vulpitta	43
Trapani, località Milo	204
Total	**1,681**

Source: Ministry of Home Affairs

Table 4 CIEs not operative – June 2012

Place	Capacity
Crotone, S. Anna	124
Caltanissetta, Contrada Pian del Lago	96
Total	**220**

Source: Ministry of Home Affairs

The following data come from the tecnical reports mentioned in Part 3.5:

- Daily management cost € 55 per person;
- Cost of construction of each place € 78.000.

These data refer to September 2008.

The following table shows the maximum management costs of each operative centre considering its capacity. The value was obtained by multiplying the number of places (capacity) for 365 days by € 55, under the assumption that all places are occupied for the maximum number of days. **In the last column the cost has been updated using the ISTAT INC index.**[2]

[2] The national index of consumer prices for the entire resident population (NIC code) is an index of consumer prices, calculated by Istat on the basis of a basket of goods and services, which measures infla-

Table 5 Maximum cost of management –CIEs operative in June 2012

Centre	Place	Capacity Aug. 2011	Maximum cost (cost in Sept. 2008)	Maximum cost (updated – Index NIC)
CIE	Bari-Palese, area aeroportuale	196	€ 3,934,700	€ 4,109,697
CIE	Bologna, Caserma Chiarini	95	€ 1,907,125	€ 1,991,945
CIE	Brindisi, Loc. Restinco	83	€ 1,666,225	€ 1,740,331
CIE	Catanzaro, Lamezia Terme	80	€ 1,606,000	€ 1,677,428
CIE	Gorizia, Gradisca d'Isonzo	248	€ 4,978,600	€ 5,200,025
CIE	Milano, Via Corelli	132	€ 2,649,900	€ 2,767,755
CIE	Modena, Località Sant'Anna	60	€ 1,204,500	€ 1,258,071
CIE	Roma, Ponte Galeria	360	€ 7,227,000	€ 7,548,424
CIE	Torino, Corso Brunelleschi	180	€ 3,613,500	€ 3,774,212
CIE	Trapani, Serraino Vulpitta	43	€ 863,225	€ 901,617
CIE	Trapani, loc Milo	204	€ 4,095,300	€ 4,277,440
Total		**1.681**	**€ 33,746,075**	**€ 35,246,946**

Source: our calculations based on Ministry of Home Affairs and ISTAT data

The total amount (**about 35 million Euros**) is an estimated maintenance cost unrelated to the length of detention.

We therefore tried to calculate another type of projection based on the daily management cost (€ 55 in September 2008) and a different hypothesis of the detention period (between 180 to 540 days). The cost has been updated for 2011 (ISTAT index NIC).

The results of the calculations are shown in Table 6. Updating the value in 2011 prices, **the cost of maintenance for an immigrant detained for 540 days is € 31,244.**

Table 6 Estimate per person of the management costs (in €) related to the length of detention

	Cost per person and per day	Days of detention				
		180	250	350	450	540
Annual average 2008	55,00	9,900	13,750	9,250	24,750	29,700
Annual average 2011 updating NIC	57,86	10,415	14,465	20,251	26,037	31,244

Source: our calculations based on Ministry of Home Affairs and ISTAT data

We also tried to calculate the costs by connecting the length of detention and the number of people detained in Italian CIEs, based on the data provided by the Ministry of Home Affairs on immigrants detained in 2011 (considering the estimated values of the year 2011 as explained for Table 2).

tion of the entire economic system. It is the benchmark used by the governing bodies for the implementation of economic policies (notes taken from the official website http://rivaluta.istat.it/Rivaluta/ ISTAT).

Hypothesis:

Table 7 First estimation – detention period between 10 to 540 days

	Category of detainee 2011	Hypothesis 1 Different length of detention	Total days of detention	Management cost (2011 index NIC)
Asylum seekers	184	10	1,840	€ 106,462
Repatriated	2,905	540	1,568,700	€ 90,764,982
Released as not identified	1,064	540	574,560	€ 33,244,042
Escaped from the CIE	539	270	145,530	€ 8,420,366
Detention not validated	491	100	49,100	€ 2,840,926
Released for other reason	1,956	100	195,600	€ 11,317,416
Arrested within the centre	135	100	13,500	€ 781,110
Total	**7,274**		**2,548,830**	**€ 147,475,304**

Source: our calculations based on Ministry of Home Affairs and ISTAT data

Table 8 Second estimation – detention period between 10 to 180 days

	Category of detainee 2011	Hypothesis 1 Different length of detention	Total days of detention	Management cost (2011 index NIC)
Asylum seekers	184	10	1,840	€ 106,462
Repatriated	2,905	180	522,900	€ 30,254,994
Released as not identified	1,064	180	191,520	€ 11,081,347
Escaped from the CIE	539	90	48,510	€ 2,806,789
Detention not validated	491	100	49,100	€ 2,840,926
Released for other reason	1,956	100	195,600	€ 11,317,416
Arrested within the centre	135	100	13,500	€ 781,110
Total	7,274		**1,263,000**	**€ 73,077,180**

Source: our calculations based on Ministry of Home Affairs and ISTAT data

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Finito di stampare nel mese di febbraio 2013
da Tipografia Monteserra - Vicopisano (PI)
per conto di Pisa University Press