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DETENTION OF ASYLUM SEEKERS AND IRREGULAR MIGRANTS: BALANCING HUMAN RIGHTS AND SECURITY POLICIES AT THE EU'S SOUTH-EASTERN BORDERS

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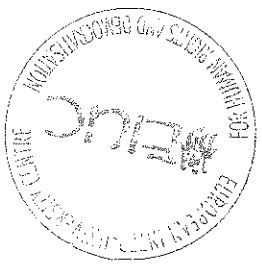
ABSTRACT

Migrants who are detained pending identity proceedings or waiting for the response of the State on their asylum application often face the impossibility to challenge the lawfulness of their deprivation of liberty and are kept in overcrowded and unhygienic conditions.

Arbitrary detention and accompanying ill-treatment clearly highlight the responsibility of States to take urgent and immediate measures to prevent such violations, in order to ensure that migrants could exercise their human rights, which are granted under a wide range of international instruments.

The main intent of this thesis is, therefore, to highlight the alarming legislative deficit with regard to guaranteeing the rights of people who are administratively detained. A special attention will be drawn to the contrast between the *de jure* perspective on administrative detention and the practical level, where States systematically undermine the human rights dimension of migration in the name of "security reasons". This ever-widening gap between the international human rights law and States practice will be analyzed by comparing the legislative framework regulating administrative detention in Greece and Italy, the two most important "entry points" along the EU's south-eastern borders. The policies adopted by these two Mediterranean countries will then reveal low minimum standards and restrictive exceptions to the migrants' core rights.



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"Devi tornare a casa. Ne avessi una, restavo.
Nemmeno gli assassini ci rivogliono.
Rimetteteci sopra la barca, scacciateci da uomini,
non siamo bagagli da spedire e tu nord non sei degno di te stesso.
La nostra terra inghiottita non esiste sotto i piedi,
nostra patria è una barca, un guscio aperto.
Potete respingere, non riportare indietro,
è cenere dispersa la partenza, noi siamo solo andata.
(...)
Faremmo i servi, i figli che non fate,
nostre vite saranno i vostri libri d'avventura.
Portiamo Omero e Dante, il cieco e il pellegrino,
l'odore che perdeste, l'uguaglianza che avete sottomesso."

"Solo Andata"
Racconti di Uno
Erri De Luca

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CHAPTER III
INSIGHTS INTO IRREGULAR MIGRATION AND DETENTION CENTRES IN GREECE AND ITALY

ACRONYMS

AU	African Union
DRC	Democratic Republic of Congo
CARA	Centri di Accoglienza per Richiedenti Asilo
CAT	Committee Against Torture
CDA	Centri di Accoglienza
CIE	Centri di Identificazione ed Espulsione
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EMHRN	Euro-Mediterranean Human Rights Network
EU	European Union
EUROSUR	European Border Surveillance System
HRC	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICMPD	International Centre for Migration Policy Development
ICRC	International Committee of the Red Cross
IGOs	Inter-Governmental Organisations
IBM	Integrated Border Management
IOM	International Organisation for Migration
JHA	Justice and Home Affairs
MSF	Médecins Sans Frontières
MSs	Member States
NGOs	Non-Governmental Organisations

OAS	Organisation of American States (OAS)
OHCHR	Office of the High Commissioner for Human Rights
PD	Presidential Decree
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
US	United States

INTRODUCTION

Irregular migrants are often held in detention centres, prisons, airports, police stations or any sort of containers while they await removal or a final decision concerning their asylum application. This is due to the fact that a considerable number of countries resort to administrative detention of irregular migrants for infractions, such as illegally crossing their borders. The term "administrative detention" implies an important difference from detention under the criminal law. It is, in fact, a coercive administrative measure that is aimed at facilitating the implementation of the deportation or expulsion of those migrants who are in an irregular situation.[2]

States have the sovereign authority in determining conditions of stay and the removal of non-nationals, by safeguarding their own borders and regulating their migration policies. However, the legal framework designed to manage migratory flows is often reflected in hostile and restrictive policies, including a greater criminalisation of irregular migration. These measures, while legitimately aimed at decreasing irregular migration, have contributed to frequent xenophobic sentiments towards the migration population, even if aliens are often filling an economic gap which helps an ailing sector of the host society. Furthermore, this anti-migrant discourse has in several cases legitimised an increase in institutionalised discrimination.[3]

Even if it is the sovereign right of all States to regulate migration flows, it is crucial to adhere to international human rights standards during the engagement with all aliens, either documented or not. As the Special Rapporteur on the Human Rights of Migrants observed, States power to safeguard their borders must be carried out in full respect for the fundamental human rights and freedoms of non-nationals.[4]

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[2] Over the course of this thesis, it has been decided to use always the term "irregular" or "undocumented", according also to the recommendation made by the United Nations General Assembly in Resolution 3449(XXX) of 9 December 1975. Defining a person as "illegal" can be in fact regarded as denying his/her humanity and it can strengthen the public perception that migrants only generate crimes and are a threat to the State public security.

[3] See, *inter alia*: Hamood, 2006, p. 29 et seq.; De Haas, 2007, p. 54.

[4] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, pp. 15-17, at: http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm (consulted on 26 June 2009).

The main intent of this study is, therefore, to highlight the alarming legislative deficit with regard to guaranteeing the rights of people who are administratively detained. A special attention will be drawn to the contrast between the *de jure* perspective on administrative detention and the practical level, where States systematically undermine the human rights dimension of migration in the name of "security reasons".

The first part of the thesis will identify the minimum level of rights to which irregular migrants who are facing detention should be entitled. The relevant international and European human rights instruments will be taken into account, in order to provide the comprehensive legal framework which regulates the topic of administrative detention.

The second chapter will then examine the European Union's approach to the migration phenomenon, with particular focus to the challenges emerging from the southern maritime borders. This analysis will serve to underline how EU policies on administrative detention are mostly based on strict security measures, which fail therefore to comply with the international human rights standards.

This theoretical part is aimed at introducing the critical challenge that States are facing nowadays in balancing the current international approach to migration based on a framework of control, and the need to establish a management strategy in which human rights are a central component. This ever-widening gap between the international human rights law and States practice will be further analysed by comparing the legislative framework regulating administrative detention in Greece and Italy. A significant number of common features of the Greek and Italian contexts contribute to explain the similar approach adopted by both countries in dealing with the large scale of undocumented migrants landing on their shores. As a result of geographical location and due to the nature of the migration flows they experience, the control of irregular migration has, in fact, become an increasingly important issue on their national agenda. The deep analysis of the policies and practices adopted by the two most important "entry points" along the EU's south-eastern borders will then reveal low minimum standards and restrictive exceptions to the migrants' core rights.

The research methodology will be developed on the basis of a common glossary, which defines the internationally recognised key notions in the field of irregular migration. The overview on the reality of detention centres and on undocumented migration in Greece and Italy will in fact be analysed in the light of criteria and standards drawn from established international legal instruments. The study will have a number of limitations, such as the lack of information made publicly available on detention centres. In this regard, it is worth mentioning that in both Greece and Italy access is not permitted to the centres in question. This has led, therefore, to a reliance on information from third parties gathered during the period of researches in Thessaloniki.

CHAPTER I
THE INTERNATIONAL PROTECTION OF IRREGULAR MIGRANTS FACING DETENTION

Introduction

Administrative detention is less regulated by law and as such, irregular migrants are often subjected to arbitrary detention and other abuses. Undocumented aliens and asylum seekers detained in these migration centres often face the impossibility to challenge the lawfulness of the State's decision and are kept in overcrowded and unhygienic conditions, in some cases with convicted criminals.

In most countries conditions of detention fall below international human rights standards.[5] Arbitrary detention and accompanying ill-treatment clearly highlight the responsibility of States to take urgent and immediate measures to prevent such violations, in order to ensure that migrants could exercise their human rights and freedoms, which are granted under a wide range of international instruments.

This first chapter is aimed at providing the legal framework with which detention of undocumented aliens must comply. This analysis will focus in particular on the fundamental principles of international law that prohibit arbitrary detention and inhuman treatment of all persons under any form of imprisonment. International human rights standards and norms precisely define the content of these principles and require a practical and effective implementation at national level. The main purpose of this section is then to highlight the States trend in considering migrants as commodities, rather than as human beings facing vulnerable situations.

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[5] See: Amnesty International, Migration-Related Detention. A Global Concern, AI Index: POL 33/004/2008, December 2008, at: http://www.amnesty.org/en/library/asset/POL33/004 (consulted on 24 June 2009); United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, pp. 15-17; Human Rights Watch, World Report 2009, 2009, pp. 479-485, at: www.hrw.org/world-report-2009 (consulted on 25 June 2009).

1. When are deprivations of liberty permissible?

Several countries employ administrative detention in connection with breaches of immigration laws, such as non-possession of visa documents or overstaying a permit. Such detention takes place by an administrative order, without trial or charge.

Migrants who are detained pending identity proceedings or waiting for the State's response on their asylum application are therefore held in *ad hoc* detention facilities. Most of the time places such as airport terminals and warehouses have been converted into detention centres for migrants.

Several international human rights instruments have defined the concept of detention of irregular migrants. The 1999 "UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers" define it as the *"confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory"*.[6]

The aforementioned Guidelines reiterate the principle that detention of asylum seekers and irregular migrants should normally be avoided. The main concern expressed by the Office of the United Nations High Commissioner for Refugees (UNHCR), as well as by many other governmental and non-governmental organisations dealing with human rights, is that in most States the decision to detain undocumented aliens is taken on the basis of wide discretionary powers. While international standards dictate that there must be substantive basis for the administrative detention, national laws allow for a high degree of discretion in ordering it. The post-9/11 anti-terrorism legislation, for instance, permits the detention of undocumented aliens on the basis of allegations of threats to national security.[7]

Such a diversity in national policies regulating detention and expulsion leads in most cases to abuses and to human rights violations.

[6] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, p. 3.
[7] Section 412 of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act" of 2001 (the so-called "USA Patriot Act") permits indefinite detention of citizens and immigrants and it is obviously incompatible with article 9 of the International Covenant on Civil and Political Rights (ICCPR), which stipulates the fundamental principle of prohibition against arbitrary detention.

1.1. Requirements of legality and prohibition against arbitrariness

There are several norms of international law which guarantee the right to liberty and security of a person, by stipulating the right to test the legality of detention before a competent tribunal. Among the significant norms of international human rights law, a reference must be made to the Universal Declaration of Human Rights (UDHR), whose article 9 states: *"No one shall be subjected to arbitrary arrest, detention or exile"*. This universally recognised principle has been incorporated then into the International Covenant on Civil and Political Rights (ICCPR), which also sets out that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide on the lawfulness of his detention.[8]

The relevant concepts enshrined in this specific article are therefore the requirement of legality and the prohibition against arbitrariness.

In its General Comment n. 8 concerning this article, the United Nations Human Rights Committee has specified that the provision applies to all persons under detention, both administrative and criminal. Furthermore, the main elements that must be taken into account in determining the legality of preventive detention are laid down: *"If so-called preventive detention is used [...] it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of breach"*.[9]

The requirement that detention has to be subjected to either an administrative or judicial review is a crucial element against arbitrariness. This concept means that whenever a deprivation of liberty occurs, there must be an applicable law. As the 1988 "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" states, any form of imprisonment shall be ordered by, or be subject to the effective control of a judicial authority.

Nowadays the high degree of discretion accorded to immigration and law enforcement officials represents a serious threat to the aforementioned requirement. As the UNHCR Executive Committee pointed out, in several States asylum seekers are

[8] Article 9(3).
[9] Human Rights Committee, General Comment 8, Article 9, UN Doc. HRI/GEN/1/Rev.1 at 8, 1994.

detained on the basis that it is likely that they will escape prior to completion of the determination procedures in case of negative response to their asylum application.[10]

The second element expressed in article 9 of the ICCPR is legality. Deprivation of liberty must then be permitted by national legislations, excluding therefore the arrest or detention of a person by an administrative act. The State normative itself must provide clearly for the arrest or detention. The principle of legality will be then violated if an arrest or a detention will occur on grounds not enshrined in domestic law.

1.2. Challenges and dilemmas regarding administrative detention

In the field of protection afforded to irregular migrants, a clear gap exists between theory and practice. Furthermore, as several studies pointed out, these hostile and restrictive policies towards undocumented migrants seem to lead to counterproductive effects.[11] This severe management and control of the movement of migrants may in fact intensify smuggling efforts, as migrants may try other avenues to arrive to the country of destination without risking to face detention. In the last decade, there has been, for instance, a diversification of trans-Saharan migration routes and attempted sea crossing-points, which cover now stretches of the African coastline from Guinea to the Libyan Arab Jamahiriya. Organized crime networks involved in the smuggling of migrants attempt to adjust their routes to overcome the ever-increasing restrictions, taking dangerous risks in circumventing the authorities.

Moreover, the current global climate of insecurity has a direct effect on migrants, as they are generally viewed with hostility and suspicion. Countries such as United Kingdom and the United States have in fact adopted *ad hoc* administrative measures granting the Governments wide discretion with regard to arrest and detention of alleged terrorists.

The *War on Terror* cannot, indeed, be considered the only reason for the considerable detention practices around the world, which systematically fail to comply with guarantees established in international human rights law. Lack of respect for international law has predated the events of 11 September and xenophobic policies have always been widespread in all parts of the world.

A fundamental attitude for national policy makers has to balance between the current global approach to irregular migration, which is mostly based on a climate of hostility and fear, and the need to incorporate the applicable human rights framework into the migration flow management.

As the Special Rapporteur for Human Rights of Migrants has emphasised, the *"governments should consider the possibility of progressively abolishing the administrative detention of migrants. When it is not immediately possible, it is recommended that measures be taken to ensure respect for the human rights of migrants in the context of deprivation of liberty".*[12]

As it will be explained in the next section of this chapter, in fact, detention practices are not only failing to comply with the requirement of legality, but are mostly carried out in an inhuman manner. A large number of migrants in fact are held in centres which lack basic appropriate furniture, as well as sanitary and other facilities necessary for an adequate standard of living.

2. International human rights standards for detention of irregular migrants

Safeguards regulating detention of irregular migrants are set in a considerable number of international instruments, either binding or non-binding. Among the Guidelines, the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" and the 1977 "United Nations Standard Minimum Rules for the Treatment of Prisoners" contain for example an exhaustive list of guarantees for the safeguard of the human dignity of persons deprived of liberty, migrants included.

Nevertheless, their detention continues raising deep concern, both in relation to the fundamental right to liberty, and also because they are often forced to live in difficult conditions, deprived of essential services. Furthermore, as access to these centres is usually prohibited, the awareness civil society has of the degrading treatment these migrants suffer is often very limited.

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[10] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, p. 14.

[11] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, p. 8; De Haas, 2007, p. 54; Hamood, 2006.

[12] United Nations, Communication sent by the Special Rapporteur on the Human Rights of Migrants to the Government of Japan, South-Africa, Spain, UN Doc. E/CN.4/2003/85/Add.1, 2003, para. 74, at: http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm (consulted on 26 June 2009).

As already argued, the right to liberty is a fundamental right enshrined in all universal human rights instruments. Additionally, other categories of human rights involved in the practice of administrative detention have to be mentioned. Firstly, the procedural safeguards guaranteeing the fair and correct deprivation of liberty will be presented. Secondly, the fundamental principles regarding standards of detention will be taken into consideration. This will be done by presenting the extensive list of guarantees for the protection of the human dignity of people deprived of liberty.

2.1. Restrictions on the use of detention

2.1.1. Challenge the lawfulness

The right to challenge the authority to detain is enshrined in Principle 11(1) of the "UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment", which provides that an effective opportunity to be heard promptly by a judicial authority shall be given to all persons held in detention.

The requirement that detention has to be subjected to judicial review is a fundamental safeguard against any type of arbitrary detention. Nevertheless, this international guarantee is very difficult to be fulfilled in case of detention of migrants. In fact, in several countries undocumented aliens are expected to initiate the administrative or judicial review themselves and this often causes serious difficulties, considering their unfamiliarity with the local legal system and their inability to speak the language of the host country.

Amnesty International has highlighted the widespread practice of violating the right to challenge the lawfulness of detention. For instance, lack of judicial review accorded to detained migrants is very common in the United States, where *"detained asylum-seekers face problems with all forms of access, including access to legal counsel [...]. Many of them are cut off from their families, legal representation and the support of NGOs. The net result is that they are denied access to justice"*.[13]

The Special Rapporteur on Human Rights of Migrants has expressed his concern about the fact that in most cases the lack of awareness of the right to appeal and the lack

[13] Amnesty International, USA: Lost in the Labyrinth: detention of asylum seekers, 1999, p.8, at: http://www.amnestyusa.org/countries/usa (consulted on 23 June 2009).

of interpreters and translation services dangerously prevent migrants from the correct exercise of their human rights.[14]

2.1.2. Legal assistance

As the Rapporteur on the Human Rights of Migrants has reiterated, it must be ensured that irregular migrants facing detention are allowed to enjoy their basic rights in such a vulnerable context.[15] This must be done by providing them with an exhaustive list of lawyers offering *pro bono* services, telephone numbers of consulates and organisations offering them assistance. Moreover, national authorities are required to conclude agreements with NGOs in order to provide detained migrants a translation service.[16]

This right to have legal assistance is enshrined in the "Standard Minimum Rules for the Treatment of Prisoners", whose Rule 93 expressly states that an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser.

Regrettably, in many countries the right to appeal against the detention order or the possibility to apply for alternative non-custodial measures are not guaranteed in cases of administrative detention. The difficulty to reach any outside assistance obviously undermines the exercise of the right of the person in question to challenge the lawfulness of his detention. This is the case of those migrants held in airport transit zones and other points of entry, under no clear authority, either with the knowledge of the official authorities or on mere instructions of airline companies.[17]

This situation can lead to a *de facto* indefinite detention, which is frequently *incommunicado* and justified on the basis of "national security" and other so-called extraordinary circumstances.[18]

[14] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, p. 16.
[15] Ibidem, p. 16.
[16] Ibidem, p. 16.
[17] United Nations, Communication sent by the Special Rapporteur on the Human Rights of Migrants to the Government of Japan, South Africa, Spain, UN Doc. E/CN.4/2003/85/Add.1., 2003.
[18] United Nations, Communication sent by the Special Rapporteur on the Human Rights of Migrants to the Government of France and Spain, UN Doc. E/CN.4/2005/85/Add.1., 2005, at: http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm (consulted on 26 June 2009).

2.1.3. Right to compensation

Article 9, paragraph 5, of the ICCPR establishes that anyone who has been victim of unlawful arrest or detention is entitled to compensation.

The Human Rights Committee has made recommendations to State Parties in order to pay compensation, when it has found that detention has occurred in an unlawful manner.[19] With regard to the Australian case, the Committee has also asserted that when a migrant's detention is proved to be unlawful, the Government in question has to conduct an urgent hearing to verify if other similar cases could be affected by the same Court's decision.[20] In neither case Australia has complied with the recommendation to provide an adequate compensation.[21]

States must then provide an effective remedy in circumstances in which deprivation of liberty is found to be unlawful or arbitrary. This principle is mirrored in the "UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment", whose Principle 35(1) states that any damage incurred because of facts or omissions by a public official have to be compensated according to the applicable rules provided by domestic law.

On paper, it is clear enough that international human rights law regulates in a comprehensive manner detention of undocumented aliens and asylum seekers. Nevertheless, in this specific area of law the gap between theory and practice seems to be ever-widening. Thus, this neglection is seriously undermining the global human rights protection regime for migrants facing administrative detention.

2.2. Conditions of detention

The living conditions of detained undocumented migrants are a serious concern among the several NGOs and IGOs working in the field of the safeguard of human rights. In addition to the legal aspect of the detention of irregular migrants, a mention to the humiliating conditions in which they are detained must be made.

[19] Human Rights Committee, C. v. Australia, Communication N. 900/1999, UN Doc. CCPR/C/76/D/900/1999, 13 November 2002.
[20] Ibidem.
[21] Ibidem.

Despite international human rights standards, the Special Rapporteur on Human Rights of Migrants continues to report cases in which irregular migrants have been denied the right to communication and have been subject to various forms of ill-treatment, such as physical and sexual abuses.[22]

Most of the time migrants deprived of their liberty are not held in facilities which take into account their vulnerable situation and their needs.[23]The main concern is that external mechanisms in charge of supervising these holding facilities do not always exist. Not all countries, in fact, permit visits by external actors, such as the Red Cross (ICRCR), the International Organisation for Migration (IOM), UNHCR or other relevant human rights institutions.[24]In some cases inspections are only carried out by representatives of hierarchically superior bodies of the Ministry to which the police service running the centre belongs.[25]

2.2.1. Prevention of torture and inhuman treatment

Prohibition against torture is a fundamental human right which is enshrined in instruments at the global, regional and national levels. As article 5 of the UDHR firmly establishes, *"no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment"*. The same provision has been reiterated in the *ad hoc* "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", whose article 2(1) requires State Parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture.

This universally recognised principle has been then enshrined in those international instruments specifically related to all deprivation of liberty by arrest or detention.[26]

Nevertheless, incidents of ill-treatment and torture of migrants in detention centres at the hands of prison guards and immigration officers have been reported. In

[22] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, p. 16.
[23] See for example reports of the Special Rapporteur on the Human Rights of Migrants on visits in Spain (UN Doc.E/CN.4/2004/76/Add2) and Italy (UN Doc. E/CN.4/2005/85/Add3), at: http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm (consulted on 26 June 2009).
[24] United Nations, Communication sent by the Special Rapporteur on the Human Rights of Migrants to the Government of Japan, South-Africa, Spain, UN Doc. E/CN.4/2003/85/Add.1., 2003.
[25] Ibidem.
[26] See: Principle 6 UN Body of Principles for the Protection of All Persons under Any Forms of Detention or Imprisonment and Rule 31 of the Standard Minimum Rules for the Treatment of Prisoners.

2003 the Communication sent by the former Special Rapporteur on Human Rights of Migrants, Ms. Gabriela Rodriguez Pizarro, to the Government of Japan included the following complaint: *"The Special Rapporteur informed the Government that she had received information according to which migrants were allegedly at risk ill-treatment by immigration authorities. This reportedly occurred during interrogation in Special Examination rooms [...]. It was alleged that foreign nationals had been strip-searched, beaten or denied food by security guards."*[27]

Incidents of abuse of power often occur in those countries in which migrant holding centres are run by private personnel, who do not always receive an adequate training on human rights.[28]

In North Korea, a nationwide survey by the National Human Rights Commission (NHRCK) carried out in 2005 revealed that 20% of detainees had been beaten and nearly 40% suffered verbal abuse.[29]Moreover, 34% of them said they had been stripped naked and 5.2% admitted to have been sexually abused by the immigration officers during body searches.[30]

Amnesty International has also documented several cases of torture and ill-treatment against persons subjected to migration-related detention around the world.[31]

2.2.2. Adequate standards of living

The problem of inadequate living conditions, in some cases amounting to inhuman and degrading treatment, is common in several countries where administrative detention is practiced.

The Report of the Special Rapporteur on the Human Rights of Migrants subscribed in 2003 firmly states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[32]

[27] United Nations, Communication sent by the Special Rapporteur on the Human Rights of Migrants to the Government of Japan, South-Africa, Spain, UN Doc. E/CN.4/2003/85/Add.1., 2003.
[28] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants on visit in Italy, UN Doc. E/CN.4/2005/85/Add3, 2005.
[29] Amnesty International, Migration-Related Detention. A Global Concern, December 2008, p. 6.
[30] Ibidem, p. 6.
[31] In the last report published in 2008, Amnesty documented different cases of ill-treatment in Malaysia. See: Ibidem, p. 6.
[32] United Nations, Report of the Special Rapporteur on Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003, at: http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm (consulted on 26 June 2009).

The "UN Standard Minimum Rules for the Treatment of Prisoners" cover specific needs of the detainee, such as clothing, food and personal hygiene. They in fact specify that: *"Rule 9(1). Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself.*

Rule 13. Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower [...] at least once a week.

Rule 17(2). All clothing shall be clean and kept in proper condition. Underclothing shall be changed and washed [...].

Rule 20(1). Every prisoner shall be provided by the administration [...] with food of nutritional value adequate for health and strength.

Rule 33. Instruments of restraints, such as handcuffs, chains, irons and strait-jackets shall never be applied as a punishment."

Despite the fact that these UN Rules are not strictly legally binding, they have a certain authoritative weight and some provisions are considered declaratory of existing rights under international customary law.[33]

Detention conditions vary from country to country, also depending on the different kind of regime to which migrants are subjected. In fact, as the aforementioned Recommendation of the Special Rapporteur has pointed out,[34] in cases of criminalisation of irregular migration, the migrants concerned are detained together with common criminals.[35]

On the other hand, when places such as schools and airport terminals have been converted into centres for the administrative detention, there exists the risk that these facilities lack basic infrastructures. The Special Rapporteur highlights, for instance, overcrowding, poor hygienic conditions, lack of privacy and impossibility of separating men from women in different detention centres.[36] The conditions in which a large number of undocumented migrants are detained may also pose a serious threat to their

[33] United Nations, Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1993/24, 12 January 1993, p. 9.
[34] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.
[35] See, for instance: Report of the Special Rapporteur on the Human Rights of Migrants on her visit to Peru, UN Doc. E/CN.4/2005/76/Add.4, 2005, at: http://www2.ohchr.org/english/issues/migration/rapporteur/annual.htm (consulted on 26 June 2009).
[36] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.

physical integrity. Amnesty International clearly states that detention, particularly when it is prolonged, can lead to deterioration of an individual's mental and physical health.[37]

2.2.3. Access to medical care

According to the General Comment N. 14 of the Committee on Economic, Social and Cultural Rights on the highest attainable standard of health, States have to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal migrants, to preventive, curative and palliative health services.

Principle 24 of the "UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", states, in fact, that a proper medical examination shall be offered to a detainee after his admission to the place of detention or imprisonment.

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, as enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESC), is then mirrored in the "Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment" and in the "UN Standard Minimum Rules for the Treatment of Prisoners". The latter firmly establishes that *"the medical officer shall see and examine every prisoner as soon as possible after his arrival and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures".*[38]

Nevertheless, few centres provide a medical check-up upon arrival.[39]The Special Rapporteur stressed that in many instances, only urgent medical care is provided and other types of medical expenses must be borne by the detainees.[40] Furthermore, in several cases there are no translation services available, thus making it difficult for migrants to understand medical diagnoses.[41]In this regard, there is widespread evidence

[37] Amnesty International, Migration-related Detention. A global concern, December 2008, p. 6.
[38] Rule 24.
[39] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.
[40] Ibidem.
[41] Ibidem.

that other inmates are used as interpreters.[42]This practice can lead to a breach of privacy and confidentiality and, in case of misinterpretation, a detainee may be prevented from discovering vital information about his physical status.

2.2.4. Communication with the outside world

The right to communicate with the outside world, once deprivation of liberty has occurred, is of fundamental importance.

The General Comment N. 20 of the Human Rights Committee concerning prohibition of torture and cruel treatment or punishment provides that the protection of the detainee also requires a regular access to doctors, lawyers and family members.

Principle 15 of the "UN Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment" underlines that any communication of the detainee with the outside world, especially his family or counsel, shall not be denied for more than a matter of days.

Moreover, several international instruments have stressed that, with regard to access to the outside world, detainees shall be permitted to receive regular visits from third parties, such as human rights organisations. The Report of Working Group on Arbitrary Detention, for instance, provides that the UNHCR and the ICRC must be allowed access to the places of custody.[43]

As already mentioned, however, mechanisms of external observation of migrant holding facilities are not always in place.[44]

With regard to the consular protection, consular posts are not always informed of detentions, often because detained migrants are not aware of the fact that they are entitled to communicate with consular representatives.[45]Moreover, the absence of public telephones and the fact that migrants have to pay for calls prevent contacts with consular representative.[46]

[42] Ibidem.
[43] Principle 10, United Nations, Report of Working Group on Arbitrary Detention, Deliberation n.5: Situation regarding immigrants and asylum-seekers, UN Doc. E/CN.4/2000/4, 2000.
[44] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.
[45] Article 63 of the Vienna Convention on Consular relations provides that, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State that its national has been deprived of his/her liberty.
[46] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.

The Special Rapporteur highlights therefore the importance of ensuring that migrants deprived of their liberty are informed of the status of their case and of their right to contact a consular or embassy representative and members of their families.[47]

2.3. The protection of vulnerable groups

The above international standards apply to the various categories of persons deprived of their liberty. However, the authority to detain specific vulnerable groups has been addressed by *ad hoc* instruments and provisions, by virtue of the fact that they may need a further protection.

In particular, detention of asylum seekers, children, unaccompanied minors and persons with special medical or psychological needs, raises significant concerns within the international community.

2.3.1. Refugees and asylum-seekers

A particularly delicate issue concerns the growing number of asylum-seekers who are subjected to administrative detention.[48]Their deprivation of liberty has been specifically addressed by the UNHCR. Its Executive Committee has firmly stated that refugees and asylum-seekers should not be detained and it has specified the ground for which detention may be permissible: *"if necessary, detention may be resorted to only on grounds prescribed by law to verify identity, to determine the elements on which the claim to refugee status or asylum is based, to deal with cases where refugees or asylum-seekers have destroyed their travel/identity documents [...], or to protect national security or public order".*[49]

Undoubtedly asylum seekers are in a different situation than other aliens, by virtue of the fact that they may be forced by delicate circumstances to enter a country illegally. Hence, article 31 of the Convention relating to the Status of Refugee firmly

[47] Ibidem.
[48] According to reporting from UNHCR offices worldwide, detention of asylum-seekers and refugees on the basis of their irregular arrival occur in approximately in 50% of all asylum countries where UNHCR is present. See: UNHCR, Measuring Protections by Numbers, 2006, p.12, at: http://www.unhcr.org/publ/PUBL/4579701b2.pdf (consulted on 20 June 2009).
[49] UNHCR, Detention of Refugees and Asylum Seekers, No. 44 (XXXVII)-1986, 13 October 1986, para. 128.

prohibits the punishment of refugees for illegal entry. The same article also provides that State Parties shall not apply to the movement of such refugees restrictions other than those which are strictly necessary.

Moreover, article 14 of the UDHR declares the right of everyone to seek asylum from persecution and therefore entry in search of protection should not be considered an unlawful act.

In connection with this, it is important to mention the "UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers", whose paragraph 1 expressly establishes that *"the detention of asylum-seekers is, in the view of UNHCR, inherently undesirable".*

Nevertheless, several countries continue to detain asylum-seekers for prolonged periods of times and on arbitrary basis, without giving them access to fair procedures for the timely review of their detention status.

A matter of major concern is that many jurisdictions permit the detention of asylum-seekers, by virtue of the fact that these persons often do not have identity documents. Thus, States do not recognise that delicate circumstances may compel an asylum seeker to leave the country without documents, especially when his physical safety is endangered.

Amnesty International has reported several cases in which national legislations expressly permit detention of asylum-seekers.[50]In the United States, for instance, asylum seekers entering the USA from designated countries, such as Haiti, are subject to automatic detention on the basis that they are a threat to national security.[51]

2.3.2. Unaccompanied children

Minors, including unaccompanied children, are regularly detained in countries which resort to administrative detention of undocumented aliens. Their detention is a matter of deep concern among human rights organisations, since such measures can cause serious risks to the children's well-being and education.

At the international level, the UN Convention on the Rights of the Child (CRC) expressly deals with the authority to detain children. Article 37(b) requires, in fact, that

[50] Amnesty International, Migration-related Detention. A global concern, December 2008, p.5.
[51] Ibidem, p. 5.

detention of a child must be a measure of last resort and for the shortest appropriate period. Furthermore, as stated in article 3 of the Convention, the best interests of the child shall be the primary consideration in any action taken by States. In particular, every child deprived of liberty and separated from adults shall have the right to maintain contacts with the family through correspondence and visits.[52]

Problems arise when children arrive to the host country unaccompanied. As a general rule, unaccompanied children must not be detained.[53] In cases in which such detention cannot be avoided, alternative care arrangements should be provided by the competent child care authorities, in order for the children to receive appropriate supervision. UNHCR recommends residential homes or foster care placements to ensure the proper physical and mental development of children.[54]

In some jurisdictions the release of an adult member of the family is permitted in order to avoid detention of minor children. On the other hand, the legislation of other countries provide for the so-called "family detention", where children are detained with their parents, either in the same facilities or in *ad hoc* rooms within the centre for migrants.[55]

According to UNHCR, children made up around 44% of refugees and asylum seekers in 2007 (excluding migrant children).[56]If children are detained in immigration-holding centres, all efforts must be made to ensure them the right to education. Specific provisions should then be adopted for their recreation and play, which is of fundamental importance to a child's mental development.

States practice is, however, not always in line with these internationally accepted principles.

[52] Article 37(c).
[53] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 6.
[54] Ibidem.
[55] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN.4/2003/85, 2003.
[56] Amnesty International, Migration-related Detention. A global concern, December 2008, p. 7.

2.3.3. Other vulnerable persons

Given the negative effects of detention on the psychological and physical well-being of detained persons, States are encouraged to take active measures to avoid the detention of torture survivors, pregnant women, unaccompanied elderly persons, victims of trafficking and persons with mental disabilities.[57]

Guideline 2, paragraph 6 of the "OHCHR Recommended Principles and Guidelines on Human Rights and Trafficking" provides that States should ensure that trafficked persons are not, in any circumstances, held in detention centres or other forms of custody.[58]The main concern is that victims of trafficking involuntarily commit administrative infractions, such as irregular entry, and are therefore liable to detention. The detention of torture victims is also highly undesirable. Amnesty International Medical Examination Group considers detention of a severely traumatised person as potentially dangerous as *"it could lead to an increase in his/her psychiatric problems"* and causes therefore a *"disproportionately traumatizing effect"*.[59]

Moreover, when detention of persons with mental and physical disabilities occurs, it is recommended that any qualified medical practitioners certify that the period of confinement will not affect their health and well-being.[60]

Women are another vulnerable group claiming *ad hoc* provisions when facing administrative detention. Women as well as adolescent girls are particularly at risk when detained in these facilities and should therefore be accommodated separately from male migrants, unless they are close family relatives. Moreover, in order to ensure the physical protection of women, the use of female staff is highly recommended.[61]As a general recognised rule, pregnant women in their final months of pregnancy should not be detained.[62]

[57] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 7.
[58] Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN Doc. E/2002/68/Add.1, 2002.
[59] Amnesty International, Migration-related Detention. A global concern, December 2008, p.7.
[60] Ibidem, p. 7.
[61] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, Guideline 7.
[62] Ibidem.

3. Regional human rights standards for detention of irregular migrants

As we have reported, conditions of detention in most countries fall below international human rights standards. Administrative detainees receive less protection, both relating to the conditions of detention and to the procedures regulating their deprivation of liberty.

Nevertheless, liberty and respect of the human dignity of a person are fundamental rights which have been also enshrined in instruments at regional level. Mention must now be made of the most relevant regional procedural guarantees aimed at ensuring that administrative detention is carried out fairly and correctly.

3.1. The Council of Europe's perspective

Irregular migration has always been near the top of the political agendas of the Council of Europe (CoE). In the last decade, in particular, the tragic nature of this type of migration, which often involves human deaths at sea, has exacerbated social and political tensions among the Member States.

Although the CoE does not have a declared policy on detention of irregular migrants, its position can be drawn from several policy statements.[63] The topic, in fact, is of fundamental importance within an Organisation which is committed to human rights, democracy and the rule of law.

3.1.1. The Council of Europe's Principles

The severity of the mechanisms introduced by Member States to restrict the movement, entry and residence of aliens remains a matter of major concern to the Organisation itself. The Parliamentary Assembly has in fact firmly declared that undocumented migrants, as they are often in a vulnerable situation, have a particular need for protection of their human rights, including basic civil, political, economic and social rights.[64]

[63] Bogusz, Cholewinski, Cygan, and Szyszczak, 2004, p. 301.
[64] Council of Europe, Human Rights of Irregular Migrants, Resolution 1509(2006), 2006, principle 5.

With regard to administrative detention, article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) clearly permits States to use detention in order to prevent the illegal entry of any person on their territory. Nevertheless, recent trends in detaining undocumented aliens in precarious conditions have given rise to concern regarding violation of human rights of migrants. In connection with this, the first Recommendation of the Human Rights Commissioner explicitly covers topics such as arrest, detention and expulsion of aliens. Its provisions include that *"wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures"*.[65]

On 4 May 2005 the CoE has also adopted the Twenty Guidelines on Forced Return of Illegal Residents, whose approach is based on the idea that human rights and effective procedures for return are mutually supportive. Chapter 3, in particular, deals with detention pending removal, by clarifying the circumstances, the length and the conditions of such detention.

Guideline 6 states that every detainee shall be informed promptly, in an understandable language, of the legal and factual reasons of detention and possible remedies.

With regard to the length of detention, Guideline 8 specifies that detention shall be reviewed at reasonable intervals of time. This principle draws the consequences from the fact that the deprivation of liberty of the migrant must not be arbitrary, according to article 5 of the ECHR. Although it is not required under the same provision that a decision to detain a person shall be taken by a judge, it nevertheless requires that there must be a possibility to challenge it before a judicial authority.

Guideline 10 deals then with conditions of detention, by saying that detainees should be accommodated in facilities specifically designed for that purpose. Such facilities should provide *"accommodation which is adequately furnished, clean and in good state of repair, and which offers sufficient living space for the numbers involved"*.[66]

[65] Council of Europe, Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders, CommDH/Rec(2001)1, 19 September 2001, principle 3.
[66] Council of Europe, Twenty Guidelines on Forced Return, Committee of Ministers, 4 May 2005.

The wording used in this Guideline was inspired from the 7th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which has expressed concern about the detention of irregular migrants in the international zone of airports and points of entry holding facilities, noting that conditions are often inadequate and not in compliance with the internationally recognised standards.[67]

3.1.2. The case-law of the European Court of Human Rights

Several times administrative detention is carried out in an unfair and inhuman manner, thus violating the constitution and the bills of rights of many countries, as well as a significant number of international instruments. The case-law of the European Court of Human Rights (ECtHR) provides concrete illustration and further explanation of the most common violations of fundamental rights of irregular migrants occurring as their deprivation of liberty takes place.

In the emblematic case "Dougoz v. Greece", for instance, the ECtHR found that there was a breach of articles 3 and 5 of the ECHR, with respect to the lawfulness, the length and the degrading treatment to which a Syrian-national asylum seeker was subjected in his period of administrative detention.[68]

The applicant in question entered Greece illegally in 1983, escaping from his home-country because he was sentenced to death. He applied for refugee status to the Athens Office of UNHCR in 1993 but the demand had been rejected because it had been submitted ten years after the arrival in Greece. In 1997 he asked to return to Syria because he had been granted a reprieve and the Greek Court decided for his expulsion. He was then placed in detention pending his expulsion.

The applicant complaint that the Drapetsona detention centre was over-crowded, with no beds, and detainees were given neither mattresses nor blankets. Moreover, according to his testimony, sanitary facilities were insufficient, there was no access to doctors and he could not address himself to the social services.

[67] Council of Europe, The CPT 7th General Report on activities covering the period 1 January to 31 December 1996, DOC. CPT/Inf(97)10, 1997, para. 29.
[68] ECtHR, 'Judgment Dougoz v. Greece', Application N. 40907/1998, at: www.echr.coe.int/eng/Press/2001/Mar/Dougozjudepress.htm (consulted on 15 June 2009).

In 1998 he was transferred to the Police Headquarters in Alexandra Avenue, in Athens, where the conditions of the cells were the same.

The Court held that, considering the overcrowding, the absence of sleeping facilities in both places and the inordinate length of the detention period, there was a breach of article 3 of the Convention, since the manner in which the applicant's detention occurred amounted to degrading treatment.[69] In addition, the unlawfulness and the unjustified length of the detention period amounted to a violation of article 5 of the ECHR, which provides that no one shall be deprived of his liberty save in accordance with a procedure prescribed by law.

The above case-law reflects a universal consensus that an individual cannot be deprived of his liberty without procedural safeguards. Nevertheless, as De Zoya points out, this reality is not only military dictatorships but also western democracies which detain aliens and asylum seekers, sometimes indefinitely, under a variety of pretexts.[70]

Another recent emblematic case for the purpose of this dissertation, which also attracted considerable attention from the media in the meantime, is the "Mubilanzila Mayeka and Kaniki Mitunga v. Belgium".[71]

The two Congolese nationals - mother and her five-year-old daughter - complained for the violation of articles 3 and 8 of the ECHR. In 2001 the mother obtained the refugee status in Canada and applied to the Canadian authorities for a visa for her daughter. In the meantime the daughter arrived at Brussels National Airport accompanied by her uncle, without immigration papers and therefore she was refused to enter Belgium and she was held in a detention centre at the border. The UNHCR representatives in Brussels requested the Belgian Aliens Office a permission for the daughter to remain in Belgium while her application for a Canadian visa was being processed.

Nevertheless, in 2002 the young child was deported to the Democratic Republic of Congo (DRC). In the meantime the mother had been granted a work permit and was consequently entitled to have her family join her.

[69] Article 3 of the ECHR states: *"No one shall be subjected to torture or to inhumane or degrading treatment or punishment"*.
[70] De Zayas, 2005, p. 22.
[71] ECtHR, 'Judgment Mubilanzila Mayeka and Kaniki Mitunga v. Belgium', Application n. 13178/03, at: www.echr.coe.int/Eng/Press/2006/Jan/HearingMubilanzilaMayeka&KanikiMitungavBelgium260106.htm (consulted on 15 June 2009).

Before the Strasbourg Court the first applicant submitted that the detention of the second applicant, a five-year-old child, in a detention centre for adults constituted inhuman and degrading treatment under article 3 of the ECHR. The Court held that, since the mother had not been advised about her daughter's deportation in DRC, she experienced deep anxiety, which amounted to inhuman treatment, thus violating article 3.

With regard to article 8 of the Convention, the Court held that the second applicant's detention had constituted a disproportionate interference with the right to respect private life, amounting to a breach of article 8 for both applicants.

The role of the ECtHR in establishing important international jurisprudence against the unfair practice of detention of migrants has been crucial. Actually the jurisprudence clarifies the constitutive elements of an illegal detention, not only by pointing out the time element, but also by considering the combination of other factors affecting the deprivation of liberty, such as the level of severity, its physical and mental effects and the ill-treatment to which many detainees are subjected.[72]

3.2. Other regional perspectives

The increasing use of detention as a restriction on the freedom of movement of undocumented migrants on the ground of their illegal entry is a matter of deep concern also to other regional human rights organisations, such as the Inter-American regional system, the African Union and the League of Arab States.

The fundamental principles prohibiting arbitrary or unlawful detention, as well as the right to enjoy adequate living conditions once deprivation of liberty is occurred, have been in fact incorporated into the American Convention on Human Rights, into the African Charter on Human and Peoples' Rights and into the Arab Charter on Human Rights.

[72] See also: 'Amuur v. France', Case n. 17/1995/523/609, 20 May 1996; 'Mohd v. Greece', Application n. 11919/03, 27 April 2006; 'Quinn v. France', Application n. 311, 22 March 1995; 'Conka v. Belgium', Application n. 51564/99, 5 February 2002, 'Kaya v. Romania', Application n. 33970/05, 12 October 2006.

Concluding remarks

Detention of irregular migrants is not, in itself, contrary to international law. Nevertheless, as it has been largely emphasised, most of the time administrative detention occurs in an unlawful and inhuman manner.

In particular, deprivation of liberty should be permitted only on the basis of criteria expressly established by law. Therefore all detained irregular migrants should be entitled to bring proceedings before a court, in order to verify the lawfulness of their detention.

There are also significant problems with respect to the living conditions to which these undocumented aliens are subjected once deprivation of their liberty takes place. Serious overcrowding and living spaces which lack appropriate furniture and sanitary facilities are commonly reported deficiencies. Moreover, access to legal counsel is sporadic, in many countries detainees do not receive information in a language they can understand, and they are often held in prisons with convicted criminals.

This chapter has largely addressed the issue of detention of irregular migrants, focusing both on the legality of detention itself and on the violations of human rights standards which commonly occur.

States practice of detaining migrants due to the unauthorised manner of their arrival or because of violations of visa conditions needs then to be reviewed. In particular, States must incorporate the applicable human rights framework for managing migration flows and administrative detention. As many human rights organisations - both governmental and non-governmental - have stressed, States should harmonise their national laws with international norms which prohibit inhumane treatment and ensure due process.

The protection of the migrants' human rights, regardless of their status or mode of entry, should therefore be the core of national migration policies.

CHAPTER II
THE EUROPEAN UNION'S PERSPECTIVE ON IRREGULAR MIGRANTS FACING DETENTION

Introduction

After having introduced the international and regional instruments which provide guarantees for irregular migrants facing administrative detention, the following chapter will attempt to examine the treatment of irregular migration and administrative detention from the perspective of the European Union. To that end, a comprehensive overview of the most recent legislative acts adopted on migration, borders and asylum policies will be presented.

In particular, the second section of this chapter will set out those challenges and security dilemmas, which the EU's southern maritime borders are confronting in dealing with clandestine migrations. The geographical location of the EU Mediterranean countries has made them a natural target for migrants transiting the Mediterranean Sea, both from the southern shores countries and those entering the region from more far-flung origins, such as the Middle East and Sub-Saharan Africa.

The aim will be then to better understand the detention and reception conditions for third-country nationals in Europe. The major problems that irregular migrants face as they enter the European territory will be shown, with particular reference to the manner in which their administrative detention is carried out.

Finally, a critical look at the effectiveness of the rights granted to irregular migrants held in European detention centres will be taken, in order to understand whether the EU law complies with international human rights standards or a sort of euro-centric, anti-immigration rhetoric is nowadays occupying EU policies.

1. The European Union's immigration and asylum law

The entry in the European Union is regulated by the Schengen rules, which fix standards for the legal entry into a Member State (MS). In particular, article 5 of the Schengen Code on borders defines the conditions for legal entry into the European Union: *"[...] in possession of a valid travel document or documents authorising them to cross the border [...], in possession of a valid visa [...], not considered to be a threat to public policy, internal security, public health or the international relation of any of the Member States [...]".*[73]

Immigration and asylum have always been the most contested and delicate issues among the EU policies, since they are often characterised by competing political sensitivities and opposite ideologies.

It is rather complex to trace more than 30 years of European policy on irregular migration, since different phases have to be considered: from the era of intergovernmental cooperation outside Community structures to those recent measures adopted following the transfer of asylum and immigration issues to the Community pillar.

1.1. The legal framework of EU policies on immigration and asylum

It was in the mid-1970s that immigration, asylum and judicial cooperation appeared on the collective political agenda. In 1974, in particular, the European Commission set up an "Action Programme in Favour of Migrant Workers and their Families" which was focused, *inter alia*, on irregular migration. There had been stressed the importance of strengthening cooperation among MSs in the campaign against irregular migration and human trafficking.[74]

During that decade, there had been several attempts to bring migration and asylum matters within the ambit of European policy-making. In particular, the creation of the

[73] European Council Regulation N. 562/2006/EC of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), art. 5.
[74] European Commission, Action Programme in Favour of Migrant Workers and Their Families, COM (74) 2250, 18 December 1974.

Trevi Group at the European Council of 1975 was important, as it showed that MSs started discussing about these issues at European level.

Beside this new Group dealing for the first time with the management of the Community's external borders, the most significant project had been the Schengen Agreement in 1985. These accords sought to remove control on persons at the Community internal borders and therefore allowed MSs to agree to develop common entry policies for their territory.

Moreover, in the field of asylum, the most remarkable development was the conclusion of the 1990 Dublin Convention, where MSs also agreed to adhere to common criteria when analysing the merits of an asylum claim.

The entry into force of the Maastricht Treaty in 1993 was then particularly relevant, as it brought asylum and immigration matters under the auspices of the EU, forming the "third pillar" of the Union. "Combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States" became then one of the areas of common interest, characterised by the fact that intergovernmental negotiation marginalised the Community institutions from the decision-making process.

It is worth mentioning that none of the legislative measures adopted in this period on irregular migration focused on the protection of the rights of undocumented aliens, although the European Commission had laid down the foundations for the development of a "Comprehensive Policy on Asylum and Immigration" in its 1994 Communication on asylum and immigration policy.[75]

The current framework of cooperation in "Justice and Home Affairs" was shaped by the Treaties of Amsterdam and Nice. The Amsterdam reforms in particular were motivated by widespread dissatisfaction with the intergovernmental procedures of Maastricht. The amendments to the EC Treaty introduced by "Amsterdam" led to important changes with regard to migration and asylum matters. The insertion of Title IV into the Treaty in particular brought a number of third pillar issues into the EC pillar, thus moving decisively in the direction of a common policy with the creation of the EU as an area of "freedom, security and justice".

[75] European Commission, Communication to the Council and the European Parliament on Immigration and Asylum policies, COM(1994)23 final, February 1994.

According to articles 62 and 63, "Amsterdam" established the development of common standards for the control of external borders, cooperation in civil law matters and the safeguarding of the rights of third-country nationals.[76] Article 67 specified the new decision-making rules, by establishing a transit period of five years after the entry into force of the Amsterdam Treaty (1 May 2004). After this period the Commission would gain an exclusive right of initiative and the co-decision procedure would be introduced.

At the same time the *Schengen acquis* was incorporated into the EU, by an *ad hoc* protocol appended to the Amsterdam Treaty.

1.2. Towards a Common European Asylum and Immigration System

The creation of an "area of Freedom, Security and Justice" under the Amsterdam Treaty endorsed the objective set by the EU of establishing a common asylum system and striving towards a balanced and coordinated approach in the immigration management.

An *ad hoc* European Council summit dedicated exclusively to JHA was organised in Tampere, Finland, in October 1999. On matters of asylum and immigration, Tampere signalled a new phase in JHA, by advocating a comprehensive approach, which included also a commitment to human rights, the rule of law and the fair treatment of third-country nationals.[77]

After the Tampere legislative acts aimed at ensuring similar reception conditions for refugees in MSs, a common set of minimum standards for the review of asylum claims and family reunification schemes for refugees were adopted.[78]

In this regard, in 2000 the "Eurodac" Regulation established new obligations on MSs to promptly fingerprint aliens aged 14 and over who seek asylum on their territory

[76] Marshall, 2004, p. 57.
[77] See: European Council, Tampere Conclusions 15-16 October 1999.
[78] See respectively: Council Directive laying down minimum standards for the reception of asylum seekers (2003/9/EC), Council Directive on the minimum standards on procedures in MSs for granting and withdrawing refugee status (2005/85/EC) and Council Directive on the family reunification (2003/86/EC).

as well as those undocumented migrants who crossed illegally the EU external borders.[79]

Moreover, in order to facilitate the determination of the State responsible for examining an asylum application lodged in one of the MSs, the so-called "Dublin II" was adopted in 2003.[80]

Another significant measure has been the creation of the European Refugee Fund, aimed at supporting the reception and integration measures in the MSs. It has also established a financial reserve for the implementation of emergency responses to provide temporary protection in the event of a mass influx of refugees.[81]

With respect to the specific matter of irregular migration, 2002 witnessed an intense activity by the EU on the issue of collective policing of its external borders. In preparation for the Sevilla Summit, Ministers of Justice and Home Affairs agreed on a "Comprehensive plan to combat illegal immigration", which provided for tighter border controls, improved security of visas, the formulation of common standards for the repatriation of illegal migrants, measures against employers recruiting illegally, and radar and satellite surveillance of the coast.[82]

The objective of a common EU immigration and asylum policy has been further developed by "The Hague Programme", adopted in November 2004.[83] The Programme has re-iterated the goal of a Common European Asylum System, which has to be based on the establishment of uniform procedures for those aliens who are granted asylum or subsidiary protection.

Furthermore, on 16 October 2008 the European Council formally adopted the "European Pact on Immigration and Asylum", which calls on MSs to further enhance cooperation in this field.[84]

[79] Council Regulation 2725/2000/EC concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention, 11 December 2000, Arts. 4(1) and 8.
[80] Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in one of the MSs by a third-country national, 18 February 2003, which replaced the Dublin I of 1990.
[81] Decision N. 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows.
[82] European Council, Plan to Combat Illegal Migration and Trafficking of Human Beings in the EU, 28 February 2002.
[83] European Council, The Hague Programme. Strengthening freedom, security and justice in the European Union, Brussels, 4-5 November 2004.
[84] European Council, European Pact on Immigration and Asylum, Brussels, Doc. 13440/08, 16 October 2008.

It is worthy pointing out that in the field of irregular migration the Pact recommends to use only case-by-case regularisation and to conclude readmission agreements at EU level or bilateral level with third countries. However, as it will be later shown in the case of Italy and Greece, this option does not always provide a comprehensive and effective human rights framework.

1.3. The unsatisfactory protective human rights framework

Looking at the EU framework, it can be easily observed that protection of the human rights of irregular migrants is not really comprehensive, despite the considerable amount of Directives and Regulations dealing with this matter.

The main challenge to fundamental rights of undocumented aliens seems then to be the severity of the mechanisms introduced at European level to restrict the entry and the residence of foreigners. The EU is evidently placing increased priority on migration control measures in order to eliminate the perceived threats to internal security.[85] The national identity which seems to be so threatened by the arrival of migrants has in fact shifted also the public opinion to the question of control.

This threat perception was already present in the "Justice and Home Affairs" pillar of the Maastricht Treaty, where both asylum and immigration were grouped together with other forms of organised crime.[86]

Despite the fact that a considerable space was devoted to human rights of third-country nationals at the Tampere European Council of 1999, there has been an evident shift in focus to the strengthening of external border controls in the next years, which can be traced to the conclusions of the Seville European Council in June 2002. After that date, the EU control has in fact shifted increasingly to devices preventing migrants' arrival, with a range of measures which contributed to the symbolic creation of "Fortress Europe".[87]

For instance, the aforementioned "Comprehensive Plan to combat irregular migration and human trafficking" recognises that undocumented aliens in need of international protection should be guarded against *refoulement*, but other specific and relevant human rights standards which provide safeguards in the context of expulsion do not receive any mention.

Moreover, with regard to the Dublin II Regulation, an *ad hoc* study of UNHCR pointed out that States practice revealed a clear lack of harmonisation and an inconsistent interpretation of the refugee definition contained in article 1 of the 1951 Geneva Convention, which may lead to direct or indirect *refoulement*.[88]

The minimal will at EU level to extend rights to irregular migrants is also reflected in the revised Association Agreement with Algeria, Marocco and Tunisia, where irregular migrants are explicitly excluded from the safeguards of social security.[89]

In view of this exclusionary attitude towards asylum and immigration, the Justice and Home Affairs and Employment and Social Affairs units of the European Commission worked on different Communications, in an attempt to soften the harsh position towards irregular migrants adopted by the Council.[90] The 2003 "Communication on immigration, integration and employment", in particular, considered the position of irregular migrants with a view to their possible regularisation and affording them social rights.[91]

Regrettably, this "emergency" approach to irregular migration has remained in the draft EU Constitutional Treaty adopted by the Convention on the Future of Europe, which contains specific measures dealing with the removal and repatriation of persons residing illegally.[92]

Furthermore, it will later be shown how the specific provisions included in the EU's legislation on detention of irregular migrants, clearly reveal low minimum standards and restrictive exception to the core rights of this vulnerable group.

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[85] See: Tiersky, 2004, p. 159; Crepeau et alii, 2006, p. 304; Balzacq and Carrera, 2005, p. 32; Marshall, 2004, p. 56.
[86] Art. K(1).
[87] Bogusz, Cholewinski, Cygan and Szyszczak, 2004, pp. 159-238.

[88] UNHCR, The Dublin II Regulation. A UNHCR Discussion Paper, April 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344&page=search (consulted on 20 June 2009).
[89] See, for example, the Euro-Mediterranean Association Agreements with Marocco (OJ 2000 L. 70/2), whose art. 66 establishes that *"The provisions of this chapter [on Workers in Title VI of the Agreement on Cooperation in Social and Cultural Matters] shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries"*.
[90] See, *inter alia*, the following: Commission Green Paper of 11 January 2005 on an EU approach to managing economic migration [COM (2004) 811] and Communication from the Commission to the Council, the European Parliament and the Social Committee and the Committee of the Regions of 4 June 2004, Study on the links between legal and illegal migration [COM (2004) 412].
[91] European Commission, Communication to the European Council on Immigration, Integration and Employment, COM(2003)336 final, 3 June 2003, p. 26.
[92] Draft Treaty Establishing a Constitution for Europe, OJ 2003 C 169/1, arts. III-168(2)(c) and (3).

2. The management of the EU's external maritime borders

The EU has in particular developed an *ad hoc* border management strategy which aims at facing the increasing challenges emerging from irregular migration through the southern maritime borders.

In fact, the southern maritime borders, especially those of the Mediterranean Sea, are seen as the main source from which the threat of irregular migration comes and against which all the security measures should be made operational and effective.

2.1. The irregular migration at the EU's southern maritime borders

The Mediterranean Sea is considered a new delicate space across which many migration flows have developed.[93] Several geographical, economic, political and socio-cultural factors explain why the Mediterranean Sea has become an arena for intense migratory activity over the past 20 years.

It is during the 1980s in fact that southern countries such as Spain, Portugal, Italy and Greece have witnessed a turnaround in their migration behaviour from emigration to immigration. The fast development of the southern European countries in recent decades has created new openings for migrant workers. Additionally, in the 1980s migrants started looking for other EU countries where immigration control policies were not as strict as in France, Germany and the Netherlands, thus moving towards countries whose borders were more open, as Italy and Spain.[94]

There is a significant element of illegality in contemporary immigration into southern Europe, mostly due to the generally increased attempts on the part of the EU to control and reduce legal migration.

With particular reference to the Mediterranean area, there exist three main routes leading to south-European countries. The Western African route leads from the Maghreb countries, from and via Marocco, to the Spanish mainland and from Sub-Saharan countries towards the Spanish Canary Islands. The Eastern Mediterranean route leads from the Middle East, via Turkey and Egyptian ports, towards Greece and Italy.

[93] King, 2001, p.2.
[94] Ibidem.

Finally, the Central Mediterranean route goes from Libyan and Tunisian ports towards the Italian islands of Lampedusa, Pantelleria and Sicily.[95]

The Mediterranean is therefore considered one of the most important gateways for undocumented aliens in the EU. Evidently, this type of migration is by definition unknown, since the existing records of migrants are mostly based on registers of "legally present foreigners". In response to the inadequate and missing migration data, a new Regulation has been adopted by the European Parliament and the Council on Community Statistics, which obliges MSs to provide harmonised estimates of international migration.[96]

The International Centre for Migration Policy Development (ICMPD) had estimated that in 2004 approximately 100.000 to 120.000 irregular migrants crossed the Mediterranean, with about 35.000 coming from Sub-Saharan Africa, 55.000 from the South-East Mediterranean and 30.000 from other countries.[97]

Irregular migration across the Mediterranean represents nowadays a serious humanitarian challenge, given the increasing death toll of migrants seeking to reach EU by sea. As Michael Pugh has pointed out, in countries such as Italy and Spain, there are reports of shipwrecks and dead bodies of migrants found in their waters every week.[98]Over the last decade, a total of 10.000 persons have died trying to cross the Mediterranean and reach Europe's southern shores.[99]

As a response by the EU, there has been a considerable expansion and intensification of policing and law enforcement activities in the Mediterranean Sea.

[95] Gebrewold, 2007, p. 38.
[96] European Council Regulation N. 862/2007/EC on Community statistics on migration and international protection, 11 July 2007.
[97] ICMPD, 2004.
[98] Pugh, 2001, pp. 1-20.
[99] ICMPD, 2004.

2.2. Interception and rescue at sea

The southern maritime borders constitute therefore the main target addressed by the EU's integrated border management strategy (IBM).

The innovative management of the EU's Mediterranean borders relies on the establishment of a series of operational mechanisms which are rooted in the use of sophisticated means of monitoring.

In November 2003 the European Council adopted an *ad hoc* "Programme on combating illegal migration across the EU's maritime borders". The Guidelines require MSs to promptly check shipping services, cargo vessels, fishing boats and pleasure craft, in order to achieve an effective management of their maritime borders.[100] EU policies are therefore clearly based on preventive measures, which often have the opposite result of increasing the dangers for migrants, for example through the practice carried out by smugglers to abandon migrants before reaching the shores.[101]

FRONTEX is one of the main players in the EU's response to migration flows from Africa. In 2004 a Council Regulation established this European Agency for the "Management of Operational Cooperation of the External Borders of the MSs of the EU", with the specific aim of training national border guards and implementing an integrated management of external borders.[102]

This Agency deals in particular with other relevant actors at European level, such as EUROPOL, EUROJUST and the EU Maritime Safety Agency. In this regard, it can be easily observed that the cooperation with these Agencies, which mainly aim at preventing and combating crimes, such as terrorism and drug trafficking, clearly corresponds to an attempt of criminalising and stigmatising irregular migration, without thus considering its "human rights" dimension.[103]

Following this logic, the Commission presented a Communication for the creation of an European Border Surveillance System (EUROSUR), with the purpose of

[100] European Council, Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union, 27 November 2003, guideline 21.
[101] See: Pugh, 2001, pp. 1-20.
[102] European Council Regulation 2007/2004/EC establishing a European Agency for the management of operational cooperation of the external borders of the Member States of the EU, 26 October 2004.
[103] It must be pointed out that after the events of 9/11 and the Madrid bombings of 11 March 2003, these concerns have been further accentuated, as migration from the South has been increasingly linked to Islamism terrorism. See: Lutterbeck, 2006, pp. 59-82.

broadening the existing network of reporting and monitoring activities in seas under the jurisdiction of MSs.[104]

Moreover, in the last decade there has been an increasing deployment of semi-military security forces along the Mediterranean frontiers.[105] This borders militarisation is often due to the fact that maritime police forces can be insufficiently equipped in terms of boats and aircraft to efficiently patrol the sea.[106]

The involvement of warships and other sophisticated means of surveillance raise important questions in terms of migrants' human rights. It has been pointed out, for instance, how these forces should rather focus on humanitarian operations and rescue.[107]

In these specific circumstances, the standards that can apply to migrants arriving in Europe by sea are the rules on sea search and rescue. There are in fact different applicable international conventions on the law of the sea, all based on the principle that, whether in illegal or legal situation, people have fundamental rights and States are therefore bound to provide them an appropriate assistance.[108]

In connection with it, the UNHCR's main concern is that there are not adequate mechanisms in place to ensure that asylum seekers and persons in need of international protection are not pushed back to their home-countries without the possibility that their demands will be properly examined.[109]

3. The administrative detention of irregular migrants

As the IBM strategy has clearly demonstrated, the approach of the EU to irregular migration may easily undermine undocumented aliens' human rights. The question of control has increasingly shifted to devices preventing their arrival, making very difficult for them to seek for refuge, safety or a better economic situation in the EU countries.

[104] European Commission, Communication on Examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68, 13 February 2008.
[105] Lutterbeck, 2006, pp. 59-82.
[106] Ibidem.
[107] Pugh, 2001, pp. 1-20.
[108] See: The 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 Convention for the Safety of Life at Sea and the 1979 Convention on Maritime Search and Rescue.
[109] UNHCR, Refugee Protection and Mixed Migration: A 10 Point Plan of Action, 1 January 2007, at: http://unhcr.org/4742a30b4.html (consulted on 20 June 2009).

After having considered the issues related to the migrants' first arrival in the destination countries and the vast EU legal framework dealing with it, it is necessary now to identify the minimum level of rights to which irregular migrants should be entitled once their deprivation of liberty occurs.

As it has been pointed out, at the European level there is a significant gap between good-willed reception and mistrust and rejection, which has led to a non-humanist reception strategy.[110]

This approach is reflected in the European policy on administrative detention, which presents significant shortcomings. Although an *ad hoc* EU legislation on the reception and accommodation of irregular migrants does exist, there are not specific and detailed provisions on the human rights standards which must be applied in detention centres.

There are therefore wide gaps in the interpretation of standards related to these issues on a European scale. The aforementioned standards laid down by the Council of Europe and the United Nations should complete these references on standards, in order to protect people received in these centres and to prepare them for integration into the receiving society.

3.1. Typology of centres for irregular third-country nationals

There are real difficulties in establishing a unique centre typology, due to the heterogeneity of the reception and accommodation systems for irregular foreign nationals in the European scenario.

These centres vary according to the relevant procedure (first reception, identification, processing admission applications or organisation of expulsions) or the legal status of the aliens received (asylum seekers, refugees, persons arrested at the borders or within the State's territory without a regular stay permission).

[110] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, December 2007, p. 34, at: http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf (consulted on 25 June 2009).

Two main categories of centres could be identified in the European countries: the so-called "closed centres" or detention centres, in which aliens are deprived of their freedom, and the "open" ones, which are mostly first reception centres.

The detention centres are meant for those irregular foreign nationals who have infringed regulations and laws governing the entry and the stay at different stages of their migration process. Most of these centres are under the responsibility of the Ministries of Home Affairs, Justice and Immigration, or their management can be sometimes subcontracted to private companies.

The open centres are generally aimed at receiving people having applied for international protection.[111] They are considered as first reception centres, in which an initial identification of the alien is taking place, in order to proceed with the examination of the asylum application and to host the person concerned until the procedure is terminated. Sometimes, decentralised authorities or local NGOs are responsible for running these structures.

A study commissioned by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament has counted in 2007 around 220 detention centres all around Europe, without including informal structures.[112]

Although there is a vast EU legal framework dealing with irregular migration, administrative detention is touched upon only marginally. The EU has only few Directives at its disposal for confronting the problems arising from deprivation of liberty of undocumented aliens found within its territory: the Council Directive 2003/9/EC concerning the minimum standards for the reception of asylum seekers, the Council Directive 2005/85/EC on minimum standards for procedures related to the granting or refusal of refugee status and the Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.

These Directives set minimum standards of reception and they apply to two different circumstances: the first two are dealing with detention in the context of asylum

[111] The international protection includes the recognition of the refugee and subsidiary protection status. The latter is accorded to those persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that the persons concerned would face a real risk of suffering serious harms.

[112] When the study was commissioned at the end of 2006, Romania and Bulgaria had not yet joined the European Union, so the study framework only included twenty-five countries.

procedures and the third one focusing on irregular migrants facing detention in order to be expelled.

3.2. Detention in the context of asylum procedures

As already said, a Common European Asylum System is a constituent part of the European Union's objective of establishing an area open to those persons who legitimately seek protection in the Community.

The Council Directive 2003/9/EC concerning the minimum standards for the reception of asylum seekers constitutes the legal framework according to which MSs should receive third-country nationals seeking for international protection.

This Directive explicitly allows for detention of asylum seekers, by stating that *"when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national laws"*.[113]

It is clear that this provision allows for exceptions and a wide measure of interpretation by MSs. Moreover, the fact that detention may be resorted to as an exceptional measure and should always be applied in accordance with international standards is not mentioned. In this regard, UNHCR also recommends that national legislations shall incorporate those international standards which ensure human treatment during the period of detention.[114]

It is worth adding that this article does not specify that asylum seekers should generally not be detained in places designated for criminal justice purposes. Furthermore, there is not an *ad hoc* provision for detention of children, providing for alternative care arrangements, such as residential homes or foster care placements.[115] In addition, taking into consideration schooling and education of minor asylum seekers, the Directive states that such education may be provided in accommodation centres.

[113] Article 7(3).
[114] UNHCR, UNHCR Annotated Comments on Council Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers, July 2003, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f3770104&page=search (consulted on 20 June 2009).
[115] UNHCR, Reception Standards for Asylum Seekers in the European Union, 1 July 2000, at: http://www.unhcr.org/refworld/category,LEGAL,,COMMENTARY,,3ae6b3440,0.html (consulted on 20 June 2009).

Nevertheless, it could be pointed out that these separate facilities for the education of children may contribute to marginalisation.

Article 14 describes then the different types of possible accommodation (centres, border facilities and private accommodation), but without underlining that it should always be for the shortest period of time. It is however mentioned that this accommodation should only be provided during the examination of an application for asylum and it should guarantee an adequate standard of living.[116]

Chapter IV provides then for specific references to persons with special needs, such as minors, unaccompanied minors, disabled persons, elderly people, pregnant women and persons who have been subjected to torture, rape or other serious forms of psychological and physical violence. In these delicate circumstances MSs are required to protect vulnerable persons' best interests.

The European Parliament Resolution of 5 February 2009 on the implementation of this Directive regrets that almost all the provisions dealing with the protection of asylum seekers are being poorly applied throughout Europe.[117]

With respect to detention, the report deplores the number of deficiencies regarding the level of reception conditions which result from the MSs' wide margin of discretion concerning the establishment of reception conditions at national level. Moreover, open accommodation centres set up by certain MSs have low capacity and do not appear to meet the needs of migrants.[118] The same report also regrets that in most of the detention centres visited, asylum seekers complained about insufficient and inadequate medical care.[119]

The main shortcoming of the Directive 2003/9/EC is that there is not any explicit reference to the fact that persons should not in any event be held in detention for the sole reason that they are seeking international protection. Therefore MSs are making increasing use of administrative detention, without relying on other less coercive measures.

[116] Article 14(1).
[117] European Parliament Committee on Civil Liberties, Justice and Home Affairs, Report on the implementation of the Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee 2005-2008, PE 414.969v02-00, 27 January 2009, at: http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0024/2009 (consulted on 20 June 2009).
[118] Point 8.
[119] Point 23.

This gap has been partially filled by the Council Directive 2005/85/EC on minimum standards for procedures related to the granting or refusal of refugee status, whose article 18 firmly establishes that *"Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review"*. Nevertheless, as already discussed in the first section of this paper, judicial reviews in these circumstances are not realistic options, since there exist serious problems of access to quality legal advice.

3.3. Forcible return of irregularly staying third-country nationals

The detention of irregular aliens to whom a return decision has been issued is covered by the Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. The so-called "Return Directive" establishes a common set of rules applicable to aliens staying illegally in the territory of Member States, in order to ensure a harmonised approach to return procedures.

Regrettably, this Directive does not incorporate all the safeguards necessary to ensure that returns take place in safety and dignity.[120]

The first shortcoming is the provision set forth in article 2(a), which allows MSs to exclude from the scope of the Directive the persons intercepted while irregularly crossing the external borders and who have not subsequently obtained authorisation to stay. This means that many of the safeguards contained in the Directive will apply only to third-country nationals who entered the EU legally, thus not recognising that many persons seeking protection are compelled to enter the EU in an irregular manner.

For irregular migrants excluded from the full scope of the Directive, MSs are still required to ensure a minimum level of safeguards, such as those related to emergency health care and detention conditions. Nevertheless, they could be deprived of access to

[120] See: UNHCR, UNHCR position on the proposal for a Directive on common standards and procedures in MSs for returning illegally staying third-country nationals, 16 June 2008, at: http://www.unhcr.org/refworld/category,POLICY,,,4856322c2,0.html (consulted on 20 June 2009); ECRE, Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in MSs for returning illegally staying third-country nationals, (COM(2005)391 final), at: www.ecre.org/policy/position_papers.shtml (consulted on 20 June 2009).

an effective legal remedy and judicial review of detention decisions. UNHCR has pointed out that the inapplicability of the Directive to transit zones may also lead to the violation of the principle of *non-refoulement*.[121]

There are other ambiguous provisions in the "Return Directive" which could render some safeguards meaningless in practice. For instance, although the acknowledgement of the priority of voluntary return over forced return can be seen as a positive element, the Directive does not define the risk of absconding (Article 7(4) and 15). Therefore, the provision that there is no longer an obligation to provide for a period of voluntary departure, if there is no risk of absconding, is too vague.

The question of detention is also controversial, since the Directive allows a combination of repressive measures, which do not comply with the aforementioned international human rights standards.

Article 15 allows MSs to hold in temporary custody third-country nationals who are subject to a removal order or a return decision. The administrative detention can be carried out when there are serious grounds to believe that there is a risk of absconding and when other less coercive measures would not be sufficient.

This provision sets out therefore a right to detain, without specifying that MSs should always have the opportunity not to detain and that there should be always a comprehensive assessment of the particular circumstances of the individual concerned.

Although the same article establishes that any decision on detention should be taken by a judicial authority, the same provision should expressly require judicial instances to take into account both the legality and the proportionality of the detention measures.

As far as the time limit for detention is concerned, the Directive extends the pre-removal detention to 18 months in those specific circumstances in which there are lack of cooperation and delays in obtaining documentation (Article 15(6)). This will therefore cover a wide range of cases and individuals will be punished for the unwillingness or inability of a country to provide documentation. This maximum time limit clearly undermines the principle of proportionality, according to which administrative detention should always be for the minimum period necessary and never prolonged indefinitely. A detention of 18 months is definitely excessive, considering the

[121] Ibidem.

fact that the persons concerned did not commit any criminal offences and most of the times are entering the EU's external borders illegally just because they are seeking better living conditions.

Concerning the requirements of temporary custody, article 16(1) allows MSs to detain in prisons when specialised detention facilities are not available. This provision can lead to a further stigmatising of irregular migrants, reinforcing the public opinion to mix the issue of immigration and asylum with security issues.

The right of the detainees to be informed of the grounds of their detention, the right to establish contacts with legal representatives, family members and competent consular authorities as well as the right to health care are guaranteed.

With respect to the special needs of vulnerable persons, article 14(d) sets out that these *"are to be taken into account"* in removal situations, but without specifying safeguards which would require MSs to address those needs. In particular, the safeguards for unaccompanied children are insufficient (article 10). In this specific case return is allowed if *"adequate reception facilities"* are in place in their home-countries, without a definition of what this constitutes and without requiring an entity legally responsible for the child in the country of return. Moreover there is not a specific prohibition of detaining both unaccompanied and accompanied minors.

Although the presence of some positive elements in the "Return Directive", such as the obligations to ensure minimum reception conditions (the respect for family unit, schooling and education for minors, access to emergency health care), there is an evident lack of protection of the interests of the individuals concerned.

As the ECRE has underlined, much of the worst practices at national level have been incorporated into the EU's irregular migration legislation.[122]

[122] ECRE, Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in MSs for returning illegally staying third-country nationals (COM(2005)391 final), *See above.*

3.4. Reflections on the compliance of the EU with international human rights standards

A growing number of irregular migrants are detained in Europe, often in harsh conditions and without appropriate safeguards regulating their vulnerable conditions. As previously demonstrated, the EU legislation does not seem to provide for specific safeguards which would oblige MSs to address migrants' needs in these circumstances.

In fact, the aforementioned Directives set common rather than minimum standards regarding migrants' human rights. In particular, as far as detention is concerned, they do not afford a satisfactory level of procedural guarantees to ensure that violations of fundamental rights will not occur.

The study carried out in 2006 by the European Committee on Civil Liberties, Justice and Home Affairs, in order to get more in-depth information on reception and detention conditions in EU countries, has clearly confirmed this negative trend. This study specifically focuses on 130 centres, both open and closed, of the 25 countries which made up the EU in 2006.[123]

According to the general findings concerning the situation in closed centres, most of the facilities present a *"dehumanising appearance"* and some of them are described as unacceptable or even degrading. The application of a prison regime in the majority of closed centres (such as the confinement to small cells and handcuffing detainees during transfer) has also led to a further criminalisation of people whose only fault is to have tried to enter the EU territory illegally.

In addition, the report points out significant difficulties related to healthcare and access to suitable treatments. The assistance for detainees with psychological or psychiatric disorders is inexistent or inappropriate.

Different types of incidents have been reported to the field study teams, such as riots, hunger strikes and suicides or attempted suicides.

In the vast majority of the States there was a significant percentage of detained minors, thus underlining that less coercive measures for this vulnerable group are very rarely used. Situations of vulnerability seem not to be taken into account, as the

[123] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, December 2007, p. 23.

investigators underlined the lack of identification procedures used for vulnerable categories. In particular, the lack of competent personnel, such as social workers and psychologists, is one of the main reasons for the failings in the identification system.

The duration of detention is also a matter of major concern, as in some countries it can be extended by several years. Many external organisations working in the centres emphasised that long periods of confinement tend to create pathogenic situations, further aggravated by isolation and difficulties in understanding procedures.

With respect to open centres, the situation is very similar. The shortcomings are the same of those found in closed centres: lack of an appropriate social assistance, difficulties in accessing doctors and medical products, large number of attempted suicides and non-implementation of processes for identifying vulnerable persons.

Concluding remarks

EU law is still far from setting a comprehensive and human rights-based approach in dealing with irregular migration, leaving a wide margin of appreciation at national level. Accordingly, EU policies on administrative detention are mostly based on coercive measures, failing to adopt positive policies aimed at protecting migrants' human rights.

Detention of irregular migrants becomes the representation of the State's willingness to properly control and protect its borders. Consequently, the fundamental rights to which aliens shall be entitled are replaced by controversial policies justified by the necessity to defend the State from dangerous presences.

As it has been shown, these emergency measures start with the arrest of the migrants at their arrival and turn into systematic violations of their basic rights, once they are deprived of their liberty. Detention is therefore often carried out outside the international standards ensuring the right of health, education, family life and adequate living conditions.

This Europe is then shaking off its responsibility to provide the essential hospitality and to guarantee fundamental human rights to those persons who, having crossed borders illegally, loose the entitlement to be recognised as human beings.

With respect to detention, these policies are punishing individuals for the sole reason that they are seeking international protection or adequate living conditions. The massive practice of administrative detention in the EU countries seems then to deny the basic right of persons to live in a social order in which they can fully exercise their rights and freedoms.

CHAPTER III
INSIGHTS INTO IRREGULAR MIGRATION AND DETENTION CENTRES IN GREECE AND ITALY

Introduction

The large scale of arrivals of undocumented migrants on European southern shores has become a phenomenon of significant importance, with almost daily reports of tragedies at sea. Typically, migrants travel in unsafe and overloaded boats in their attempt to cross the Mediterranean Sea, risking their lives as they search for better living conditions.

One of the largest shipwrecks in the contemporary history of immigration into Europe occurred on 29 March 2009, 30 Km away from the Libyan coast, where three vessels which had set off from the port of Sid Belal Janzur sank. The IOM announced on 31 March that the number of victims was estimated at 300.[124]

This acute humanitarian crisis - as it has been defined by Médecins Sans Frontières - is further aggravated by the fact that the States are considering it only as a threat to their national peace and stability, forgetting that the persons involved are human beings, despite their illegal status.

An important aspect of this serious humanitarian challenge is that the increasing number of arrivals is putting an enormous strain on the detention facilities of EU Mediterranean countries and on their capacity to hold such a significant number of persons.

As it will be later highlighted, conditions of detention in these facilities continue to be reported as unhygienic and overcrowded.[125]

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[124] IOM, Press Briefing Note: Fears Grow Over Fate of Migrants Missing at Sea, 31 March 2009, at: www.iomnederland.nl/english/Configuratie/Homepage/...IOM/IOM.../IOM_ (consulted on 24 June 2009).

[125] UNHCR, Greece's infrastructure struggles to cope with mixed migration flow, 19 January 2009, at: http://unhcr.org/497495174.html (consulted on 20 June 2009).

This last section will then attempt to give a comprehensive overview on the detention of irregular migrants in Italy and Greece. These two countries have been chosen since they represent nowadays the most important entry points along the EU's southern borders and have adopted similar approaches to the migration phenomenon.

The in-depth analysis of the control efforts along their Mediterranean borders will in fact reveal a response to the growth in undocumented immigration which clearly lacks a human rights-based approach.

The main purpose will be to better understand whether the restrictive procedures for legal migration indirectly encourage irregular entry and how deep is the gap between international law and States practice as regards conditions of detention and apprehension of migrants along the Mediterranean borders.

With respect to the Greek scenario, it must be mentioned that valuable information have been provided by Dr. Katia Mavromati, co-ordinator of the project *"Action AEGEAS: Enhancing reception capacity for migration flows at border areas of Greece"*, currently involved in the dynamics of the detention centre of Mytilini, Lesvos, and Salinia Stroux, vice-director of the Reception Centre for Unaccompanied Minors – "Villa Azadi" of Ayassos, Lesvos.

1. The Greek administrative detention: an example of the tension between security policies and human rights protection

A new Europe-wide survey reveals a wide gap between rhetoric and reality when it comes to Greece's efforts to meet irregular migrants' needs. The "CLANDESTINO" interdisciplinary project, carried out by the Hellenic Foundation for European and Foreign Policy (ELIAMEP) and published in December 2008, stresses that the care provided to undocumented migrants in Greece is still far behind what it should be and that living conditions inside the detention centres are unacceptable.[126]

In order to better understand this problematic scenario it is necessary to offer an overview on the Greek policy landscape regulating irregular migration and border controls.

[126] Maroukis, Undocumented Migration: Counting the Uncountable. Data and Trends across Europe. Country Report – Greece, December 2008, CLANDESTINO Project, at: http://clandestino.eliamep.gr/wp-content/uploads/2009/02/greece.pdf (consulted on 25 June 2009).

1.1. Entry, stay and exit of migrants in and out of Greece

Greece became an immigration country in the early 90s, but the phenomenon of irregularity has not been properly addressed until 1998. Greek governments have been in fact quite reluctant to institutionally follow-up the changes occurring at demographic and socio-economic level.

The first law attempting to manage migratory inflows was adopted in 1991, mostly focusing on stricter controls at border areas and prohibiting any contact between undocumented aliens and public services (Law 1975/1991). Nevertheless, the influx of migrants continued, amounting at already half a million in the mid-1990s.[127]

A comprehensive migration law was voted in 2001, including also another regularisation programme (Law 2910/2001). 360.000 people applied to legalise their status but the percentage of successful cases remains unknown.[128]

The current law on migration issues is Law 3386/2005, which simplified the renewal of stay permits and introduced a third regularisation programme, incorporating also the European Directives on family reunification (Presidential Decree 131/2006) and the status of long-term residents (Presidential Decree 150/2006) into the national legislation.

Finally, in order to overcome some significant shortcomings of the aforementioned legislation, an amendment was approved in February 2007 (Law 3536/2007).[129]

There are now four main channels to enter Greece legally: with a VISA for family reunion and study; with a VISA for dependent work purposes, through the method called "metaklisi", which is the system of inviting foreign workers; by applying for asylum and finally for the purpose of tourism.

In all these circumstances the duration of the stay permit is one year and its renewal is extended to every two years until five years are completed and the migrant can apply for a long-term residence permit (Law 3386/2005, art. 12, par. 6). The

[127] Triandafyllidou and Maroufof (with the collaboration of Nikolova M.), Immigration towards Greece at the Eve of the 21st Century. A Critical Assessment, ELIAMEP, Athens, June 2008, p.4, at: http://www.eliamep.gr/en/wp-content/uploads/2009/02/immigration-towards-greece-at-the-eve-of-the-21st-century-a-critical-assessment.pdf (consulted on 25 June 2009); Lazaridis and Poyago-Theotoky, 1999, p. 715 et seq.; Skordas, 2000, p. 213 et seq.
[128] Ibidem et Fakiolas, 2003, p. 535 et seq.; Papassiopi-Passia, 2001, p. 261 et seq.
[129] For the new Greek legislation see: Papassiopi-Passia, 2008, p. 409 et seq.

indefinite duration permit can then be given upon the completion of 10 years of continuous regular stay.

According to Law 3386/2005 (after the amendments of the recent Law 3731/2008), a migrant is eligible to bring his/her family members only after the completion of two years of legal stay in the country. In order to be entitled to the family reunification, the worker has to provide the yearly income that has to be enough to support both the husband/wife and the children.

The problem arising from this policy is that many migrants work informally and often take part of their pay without any receipt, thus facing significant challenges if they want to provide evidence of their income. Accordingly, the Immigration Committee of the Region (Perifereia) is reported to reject family reunification application that demonstrates a yearly income of less than 10.200 euros.[130]

The extensive informal economy of Greece is affecting also the second channel through which migrants can legalise their presence within the Greek territory.

The system of inviting a foreign worker does not work in practice, due to the difficulty in finding a job with a proper contract and welfare contributions. Irregular migrants are in fact crucial for the survival of the major niches of the Greek economy, such as the construction industry, agriculture and the domestic work sector.[131] "Metaklisi" is then unable to meet the goal it sets, also because between inviting a foreign worker and effectively getting him a permit, a period of 12 to 18 months is needed. It is therefore very common that unauthorised migrants are previously regular migrants who have fallen back into irregularity as a result of the difficulty in finding a legal job.

These restrictive and lengthy bureaucratic procedures for legal migration are clearly producing, rather than deterring, large numbers of irregular migrants.[132]

[130] Triandafyllidou and Maroufof (with the collaboration of Nikolova M.), Immigration towards Greece at the Eve of the 21st Century. A Critical Assessment, ELIAMEP, Athens, June 2008, p. 8.
[131] Irregular migrants are mainly employed in the constructions (35%), in private households (30%) and as skilled workers, physical labour workers and small tradesmen (47%). See: Lianos, Kanellopoulos, Gregou, Gemi & Papakonstantinou, Estimate of the size of foreigners residing illegally in Greece, IMEPO, 2008, p. 81, at: http://www.imepo.gr/documents/AENEAS_IMEPO_RESEARCH_2008_EN.pdf (consulted on 25 June 2009).
[132] See: Skordas, 2002, p. 23 et seq.

1.1.1. The Greek asylum system

Many migrants attempt to legalise their stay in Greece by applying for asylum: in the first half of 2008, 10.164 applications for asylum were in fact registered.[133] The asylum process is set out in the Presidential Decrees 220/2007, 90/2008, 96/2008 and 167/2008, which establish that applications must be examined by the Security Police Department and Aliens Department within three months. This procedure requires a hearing of the person concerned. After this, a "pink card" is provided, in order to certify that the owner has applied for asylum and has the right to remain in Greece for six months. However, in practice, the first issue of the pink card is frequently delayed.[134]

After the first application, the decision on asylum is taken by the Aliens Department of the Greek Police Headquarters, with the cooperation of an authority that also controls borders and the prevention of irregular migration.

If the application is rejected at first level, the asylum seeker has the right to lodge an appeal against the refusal within 30 days. This time limit is however shortened to fifteen days for applicants who are arrested in transit areas at airports or seaports. The second decision falls under the responsibility of the Ministry of Interior, after a consultation with a six-person Appeals Board constituted by a legal adviser, two representatives from the Ministry of Foreign Affairs, a high-ranking officer of the Greek police, a representative of the Athens Bar Association and a representative of the UNHCR. One should however bear in mind that this panel of experts has no decision-making powers and that the final decision is exclusively made by the Minister. Moreover, the verification of the process carried out by the Council of State following a second negative response does include only investigation on potential procedure errors and not on detailed reasons for the refusal of the asylum.[135]

While the applicants wait for the Government's response on their asylum petitions, the Ministry of Health and Social Solidarity is the organisation responsible for

[133] Council of Europe, Commissioner for Human Rights - Greece Report, 4 February 2009, COMDH(2009)6, p.4, at: https://wcd.coe.int/ViewDoc.jsp?id=1401927&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679 (consulted on 26 June 2009).
[134] Pro Asyl, The truth may be bitter, but it must be told. The situation of Refugees in the Aegean and the practices of the Greek Coast Guard, October 2007, p. 31, at: www.proasyl.de/fileadmin/proasyl (consulted on 15 June 2009).
[135] Ibidem, p. 31.

their material reception conditions. There are ten functioning reception centres throughout Greece, all managed by non-governmental organisations and partially supported by the state.[136]

However, these reception facilities cannot be considered satisfactory.

During a visit at the "Social Solidarity" centre in Thessaloniki, the serious deficiency in the asylum seekers' reception capacity has become visible. This facility operates since 2000, implementing the project "Accommodation and Support of Asylum Seekers in the Refugee Reception Centre in Northern Greece". The capacity of the centre is 70 people and its target groups are families, women and unaccompanied minors. Due to the high number of requests, the centre is currently facing a significant problem of overcrowding, which raises serious issues with regard to adequate standards of living. As it has been pointed out by one of the social workers working there, in order to provide for an accommodation to as many asylum seekers as possible, there are currently even ten persons per room.[137]

Nevertheless, the NGO which is running the facility tries to fill in the numerous existing gaps by providing for medical care, legal assistance and psychosocial support.

As a consequence of the poor existing infrastructure relating to asylum seekers' reception, there exists an alarming situation of illegal settlement of the persons concerned. In these circumstances, insufficient reception capacity makes even more difficult the asylum seekers' lives, calling therefore for the establishment of a coherent resourced action plan on their reception.

It is now worth mentioning that the number of those granted refugee status in Greece is the lowest recognition quota in the EU: in 2008, it was 1.8% of all asylum seekers.[138]

In the last two years there have been some positive developments in the Greek refugee legislation, since in November 2007 Presidential Decree 220 transposed Directive 2003/9/EC and in July 2008 Presidential Decrees 90 and 96 transposed

[136] Council of Europe, Comments by the Greek Authorities in response of the Human Rights Commissioner of the CoE Report on Greece, CommDH(2009)6, p. 20.
[137] Interview with Manolis Zaugos, Psychologist, "Social Solidarity" Refugees' Reception Centre, Thessaloniki, 30 April 2009.
[138] In 2008 the refugee status has in fact been granted to 350 persons, out of a total of 19.884 applications. See: Council of Europe, Comments by the Greek Authorities in response of the Human Rights Commissioner of the CoE Report on Greece, CommDH(2009)6, p. 19.

respectively Directive 2005/85/EC and Directive 2004/83/EC concerning the qualification of refugee and subsidiary protection.

However, the position of UNHCR dated 15 April 2008 stressed the persistence in Greece of serious shortcomings in the asylum procedure, by affirming that *"asylum seekers continue to remain in limbo, unable to exercise their rights, for prolonged periods of time"*.[139]Consequently, UNHCR advised EU States to *"refrain from returning asylum seekers to Greece under the "Dublin Regulation" until further notice"*.[140] In April 2008, the Giessen Administrative Court in Germany ruled that an Afghan asylum seeking family should not be transferred from Germany to Greece for at least six months on the ground that the family would be at risk of facing an unfair asylum procedure in Greece, not respecting EU and international human rights standards.[141]

In particular, during his visit to Greece on 8-10 December 2008 the Commissioner for Human Rights of the CoE expressed deep concern for instances of informal *refoulement* at entry points in Evros and rejection by the police authorities of asylum applications.[142]In connection with this, also the Greek Deputy Ombudsman had identified serious deficiencies in the system of proper asylum-related information to potential asylum seekers.[143] In 2008, for instance, out of a group of 65 aliens arrested at the Feres borders for having illegally crossed the Evros River, 50 were immediately deported.[144] In this context, it has to be underlined that Greece has not yet acceded to the 1963 Protocol n. 4 to the ECHR, which prohibits the collective expulsions of aliens.

The Greek National Commission for Human Rights has also stressed that the lack of state interpreters in the asylum procedures is a fact that *"violates the elementary*

[139] UNHCR, UNHCR Position on the Return of Asylum Seekers to Greece under the "Dublin Regulation", 15 April 2008, p. 7, at: http://www.unhcr.org/refworld/docid/4805bde42.html (consulted on 20 June 2009).
[140] Ibidem, p. 9.
[141] Council of Europe, Commissioner for Human Rights of the CoE - Greece Report, 4 February 2009, CommDH(2009)6, p.5.
[142] Ibidem, p. 6.
[143] Greek Deputy Ombudsman, Reports of Visits in situ in the Departments of Evros and Rodopi, 25-30 June 2007, at: www.synigoros.gr/reports (consulted on 25 June 2009).
[144] Council of Europe, Commissioner for Human Rights of the CoE - Greece Report, 4 February 2009, CommDH(2009)6, p.7.

procedural principles of the rule of law and fundamental principles of international human rights law".[145]

Moreover, with respect to the procedural guarantees that should be granted to asylum seekers, it is noteworthy that article 11 of the Presidential Decree 90/2008 (which transposed Directive 2005/85/EC) establishes that asylum seekers have the right to consult a legal or other counsel *"at their own expense"*. In two cases the ECtHR had found Greece to be in breach of the right to a fair trial because the applicant aliens did not have access to legal aid in order to appeal to the Greek Supreme Court in the context of proceedings in which they had been involved.[146]

During the interview with the co-ordinator of the Project "AEGEAS", which is providing legal and social aid to those migrants held in the detention centre of Mytilini, Lesvos, a common practice of not informing properly detainees of asylum procedures has been reported. In fact, in Mytilini, migrants are given a leaflet in 5 different languages which is explaining to them how to apply for asylum. According to Dr. Mavromati, the whole procedure is not occurring in an accurate and formal way, thus exposing approximately the 20% of the detainees to the risk of not receiving the aforementioned leaflet.[147]

Another matter of major concern remains the situation of unaccompanied asylum seekers. According to article 19 of Directive 2003/9/EC (transposed in Greece by Presidential Decree 220/2007), States should take appropriate measures to ensure the necessary representation of unaccompanied minors by legal guardianship. Nevertheless, Greek Prosecutors have rarely intervened in respect of issues linked to reception arrangements, despite being designated by law as temporary guardians of minor asylum seekers.[148]

[145] Greek National Commission for Human Rights, Proposals for the promotion of a modern, efficient framework of refugee protection in Greece, Report 2001, Athens, National Printing Office, 2002, pp. 125-128, at: www.nchr.gr (consulted on 25 June 2009).
[146] ECtHR, Judgment 'Twalib v. Greece', Application N. 42/1997, 1998, available at: www.echr.coe.int/eng/Press/1998; Judgment 'Biba v. Greece', Application N. 33170/96, 2000, at: www.echr.coe.int/eng/Press/2000 (consulted on 15 June 2009).
[147] Interview with Katia Mavromati, Co-ordinator of the Project "Action AEGEAS: Enhancing reception capacity for migration flows at border areas of Greece", Mytilini Prefecture, Mytilini, 18 May 2009.
[148] UNHCR, Unaccompanied Minors Asylum Seekers in Greece, April 2008, pp. 50-57, at: http://hosting01.vivodinet.gr/unhcr/UAM_english.pdf (consulted on 20 June 2009).

1.2. Recent trends in irregular migration

Estimating the population of irregular migrants is a difficult task, since undocumented aliens do not have any reasons to declare their presence and, instead, they make all possible efforts to remain unidentified.

Although there do not exist reliable and direct sources from which this number can be estimated, different surveys attempted to find out the irregular immigrant population in Greece.[149]

One of the latest studies carried out in Greece, in order to achieve an estimate as precise as possible, has used the following data sources: data from schools and kindergartens, apprehensions data, estimates from immigrant associations, data from municipalities, data from Family Budget Survey, the 2001 Census and third regularisation programme as well as from data of the Greek police.[150]

According to this survey, between 172 and 209 thousand irregular migrants were in Greece in 2007.

Most irregular migrants in Greece come from neighbouring countries: it is then not at all that surprising to see that in 2008 Albanians were 72.454 of the total irregular foreign population.[151]The historical links between Greece and Albania and their geographical proximity have always been factors qualifying Greece as the major migratory destination for a significant part of the Albanian population.

With the turn of the new century there has been an important change in the composition of the irregular migrants' population in Greece. Migrants from Asia, Middle East and Africa have in fact significantly increased, usually crossing the Greek-Turkish land and sea borders. The main nationalities among those intercepted on the Greek sea borders are Afghanis, Iraqi Kurds, Turkish Kurds, Iraqis, Turks and Iranians.

Considering the geographical position of Greece as the south-eastern border of the EU, there exist several main routes of irregular entry to the country.

In the 1990s, the main clandestine entries were the Ionian Sea, linking Albania with the north-western Greek coastline, the land and sea borders connecting northern

[149] See, *inter alia*: Delaunay and Tapinos, 2008; Futo, Jandl and Karsakova, 2005, pp. 35-54.
[150] Lianos, Kanellopoulos, Gregou, Gemi & Papakonstantinou, Estimate of the size of foreigners residing illegally in Greece, IMEPO, 2008.
[151] Data reported from "Kathimerini", 11 June 2009.

Greece with Bulgaria, FYROM and Turkey. A considerable percentage of Albanians entered Greece on foot crossing the mountainous border.[152]

From the turn of the century onwards, however, different strategic entry-points have been developed. From Turkey the narrow straits that divide the mainland from several of the Greek islands of the Aegean (Mytilini, Samos, Chios and Leros) are nowadays the main gateway to Greece. Moreover, the Evros river on the north-eastern part of the border in Thrace is an important channel of clandestine entry. Vessels carrying migrants from Egypt, Somalia and Nigeria towards Crete is then another route.

The migrants crossing the sea borders are often travelling on small and unsafe boats, most of the time accompanied by smugglers. The trip can also last for months when migrants have to cross more than one country to reach their final destination. Smugglers' networks can be mafia-like organisations or more informal associations of local agents, which offer a precise schedule of the journey and ask for a considerable amount of money.

It is however worth mentioning that Greece is not always the final destination of these irregular entries. The Greek port of Patras has, for instance, become a transit station for those migrants who attempt to secretly board on one of the ferries heading to Italy: on 29 March 2009 an Iraqi was found dead in the port of Ancona, Italy, inside a Greek ferry coming from Patras, where he embarked hidden under a truck.

1.3. Interception and detention

One main policy response of Greece to the growing concern about clandestine migration has been to step up its efforts at policing the Mediterranean borders.

In 1998 the Border Guard Force (Synoriofylaki) was created to identify, arrest and send back irregular migrants. Nevertheless, the length of the Greek islands' coastline in the Aegean and their proximity to Turkey require a further help in terms of human resources. Therefore the Greek coast guard co-operates with EUROPOL, FRONTEX and police authorities of other EU countries.

[152] Antonopoulous and Winterdyk, 2006, pp. 439-461.

Apprehension at the sea borders is bigger in summer months when the number of tourist yachts in the Aegean Sea undermines the capacity of the port authorities in patrolling the sea border.[153]

The Greek coast guard has been intercepting between the Greek-Turkish borders approximately 30.149 people in 2008.[154]

All individuals caught by the Greek police at the borders are regarded as aliens who have illegally entered the territory. Police officers have then the duty of interrogating these persons and preparing a file for each of them, in order to get information about the migrant's identity and country of origin.

Following their apprehension, undocumented aliens are held in detention centres for a maximum period of 90 days. According to Greek legislation (Law 3386/2005) the main purpose of detention is the implementation of a removal order and therefore it should be considered as an extraordinary measure.

In the circumstance in which after three months the police authorities have not been able to establish their identity and either issue removal orders or directly return them to the last transit country of their journey, it is obligatory to set them free. In both cases the aliens concerned will be registered in the EURODAC system, so if they are apprehended another time their full record can be traced via the EURODAC database.

Migrants who have received a deportation order will then be asked to leave the country within 30 days (Law 3386/2005, arts. 76-77). In practice, many of these migrants continue their journey to Athens, in order to settle there and join the informal labour market.[155]

With regard to this, it has to be stressed that the implementation of the Readmission Protocol with Turkey[156] does not work properly, and out of the 21.000 readmission requests submitted from Greece in the period 2003-2007, only 1.200 persons have been readmitted to Turkey.[157]

[153] Maroukis, Undocumented Migration: Counting the Uncountable. Data and Trends across Europe. Country Report – Greece, December 2008, CLANDESTINO Project, p. 34.
[154] Data reported from "Kathimerini", 11 June 2009.
[155] Papadopoulou, 2004, pp. 167-184.
[156] The Protocol in question implements only the third paragraph of the art. 8 of the Law 2926/2001 concerning the fight against terrorism, organized crime, illegal transfer of drugs and illegal migration. It does not implement the second paragraph dealing with the Turkish obligation of readmitting irregular aliens in its territory.
[157] Maroukis, Undocumented Migration: Counting the Uncountable. Data and Trends across Europe. Country Report – Greece, December 2008, CLANDESTINO Project, p. 16.

Nevertheless, informal and unlawful readmission practices are often occurring. As it has already been said, migrants are often returned to Turkey by force without having been provided with first aid or having been informed about their right to seek asylum.[158]

1.3.1. Procedural guarantees

Contrary to the claims of the officials of the Greek Authorities that their operations are taking place with full respect of the migrants' human rights, there has been evidence of the opposite.[159]

Between 12 July and 14 August 2007, a delegation from Pro Asyl undertook a fact-finding mission in order to monitor reception and detention conditions of migrants detained on the Islands of Chios, Samos and Lesvos.

The study in question reports the practice of arresting all new arrivals and stresses that detention is carried out as a rule, not as an exception.[160] Moreover, after the three months of pre-removal detention, many of the detainees continue to be held in these centres. The length of detention is in fact determined by the police authority concerned and it is reported to be *"arbitrary"*. In this regard, the European Parliament Committee on Civil Liberties, Justice and Home Affairs stresses that detention procedures in Greece should be tightly controlled and should not be used as a systematic means of managing undocumented aliens.[161]

Nevertheless, after the implementation of the Project *"Action AEGEAS: Enhancing reception capacity for migration flows at border areas of Greece"* in the centre of Mytilini, good practices with regard to the length of detention have to be highlighted. As the co-ordinator of this Project has revealed, now detention lasts for the shortest period possible and *"it never reaches the 3 months"*.[162]

[158] Pro Asyl, The truth may be bitter, but it must be told. The situation of refugees in the Aegean and the practices of the Greek coast guard, October 2007, p. 4.
[159] Council of Europe, Comments by the Greek Authorities in response of the Human Rights Commissioner of the CoE Report on Greece, CommDH(2009)6, pp. 18-29.
[160] Pro Asyl, The truth may be bitter, but it must be told. The situation of refugees in the Aegean and the practices of the Greek coast guard, October 2007, p. 4.
[161] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, 2007, p. 122.
[162] Interview with Katia Mavromati, *see above*.

The Greek legislation does not provide for free legal assistance to asylum seekers. On the doors of the rooms of one of the detention centres of the Evros Department, a two-page bulletin is taped in different languages informing the detainees that they are subject to deportation and that during their detention they have a right to *"engage, at their own expense, a lawyer of their choice"*.[163] This clearly undermines the detainees' opportunity to receive an adequate and qualified legal advice. It has been reported, for instance, that in the detention centre on Samos only one lawyer is active and, given the numbers of detainees, he is not able to give legal advice or to lodge appeals on their behalf.[164]

Another serious shortcoming of the Greek practice of detaining irregular aliens is the total absence of interpreters. In Samos, the Arabic-speaking owner of a shop informally acts as an interpreter.[165] This practice can give rise to mistrust and fear, since many detainees do not want to recount their personal story to this individual.

The lack of communication with the outside world is also a matter of major concern, since it can easily lead to a deterioration of the psychological status of the detainees. Support organisations in Chios, Samos and Lesvos have not obtained permission to visit the centres yet. Moreover, in Samos, there is no accessible phone and the possibility of calling is therefore dependent on being allowed to go out into the yard.[166] The same situation was registered in Mytilini before the implementation of the "AEGEAS" Project, thanks to which awareness on the importance of communicating with the outside world has been raised and telephone cards are now made available by local NGOs. Nevertheless, this right cannot be exercised by all detainees, as *"cards are often less than the actual number of persons asking for them"*.[167]

With respect to deportation, the individual is handed a document in Greek, in which he is told to leave the country within 30 days. The paper does not contain any suggestions on applicable legal remedies, much less in an understandable language. Although provided by law, in practice there is no possibility of appeal against deportation orders. Regrettably, it has been reported that in Lesvos, released detainees

[163] Council of Europe, Commissioner for Human Rights of the CoE - Greece Report, 4 February 2009, COMDH(2009)6, p.6.
[164] Pro Asyl, The truth may be bitter, but it must be told. The situation of refugees in the Aegean and the practices of the Greek coast guard, October 2007, p. 20.
[165] Ibidem, p. 20.
[166] Ibidem, p. 20.
[167] Interview with Katia Mavromati, *see above*.

are not given bus tickets for Athens and they are therefore compelled to remain in the port area without any means of support.[168]

It is evident that the entire process through which detention and deportation orders are issued in Greece violates most of the time constitutional and international human rights law. In particular, the aforementioned practices constitute a breach of the right to a fair hearing, the right to a fair procedure and the right to an effective appeal (articles 5(2), 5(4) and 6(1) ECHR, article 13 ICCPR, articles 7 and 8 UDHR).

1.3.2. Adequate standards of living

A delegation of the CPT carried out a visit to the detention centres in Mytilini and Venna, in the Attica and in the Evros regions, from 20 to 27 February 2007.

The delegation noted that *"there still did not appear to be minimum operating standards for any of these centres"*.[169]

The Petru Rali facility, for instance, did not have any common spaces for recreational purposes and detainees were confined to their cells 24 hours a day. Furthermore, at the time of the visit, a considerable number of juveniles did not have a bed. New arrivals were not provided with clean blankets and sheets and there were not in cell sanitary facilities.

Similarly, the bedding and mattresses in the Pireaus centre were found to be *"filthy"* and a number of detainees complained to have developed serious rashes. Also the sanitary facilities were described as *"dirty"* and *"in need of repair"*.

The Commissioner of Human Rights of the CoE expressed a similar concern after the visits at the facilities in Evros department. The Report states that detainees were *"crammed in the rooms, sleeping and stepping upon mattresses that had been placed on the floor and on a cement platform, one next to the other"*.[170] Moreover, the conditions of the bathrooms are described as *"squallid"*.

The Pro Asyl Report stresses how the detention conditions on all three islands visited constitute inhuman and degrading treatment. In particular, the lack of open spaces represents a matter of major concern, since the access to yards and to fresh air was not being regulated. Sanitary facilities are also described as *"extremely dirty"* and *"partially broken"* and detainees are not provided with adequate sanitary articles for their personal hygiene.

In Mytilini, the interview with the Co-ordinator of the Project "AEGEAS" has highlighted both good and bed practices with respect to detainees' living conditions and provided an accurate overview on their daily life. The centre has 7 rooms and 4 containers, each of them has in door sanitary facilities. Blankets are available for all detainees, who are also given toothbrushes and toothpaste. Women receive sanitary towels. Other kinds of clothes are always made available by the Red Cross and private citizens. The food is given three times a day and it has been described as *"packed in proper hygienic boxes"*. The catering service also takes into consideration the special needs of the Muslim detainees.

Nevertheless, gaps are still present and are directly affecting the right of these persons to enjoy adequate living conditions and not to be treated as convicted criminals held in prison. One of the most controversial practices within the centre is represented by the total absence of freedom of movement. The detainees are in fact compelled to spend almost all the day in their rooms, as they are allowed to go to the yard only once per day and for less than one hour. The fact that these persons have to spend most of their detention period in rooms with approximately 60 other inmates and with a permanent mix of water and urine on the floor - as the toilets are often out of order - can be obviously considered a breach of the basic rights to which a human being should be entitled. Moreover, during the summer period when the centre faces a considerable overcrowding, extra mattresses are placed on the ground.

With regard to the health-care services the situation in the detention facilities raises also great concern. In Mytilini the situation seems more positive since there are

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[168] Pro Asyl, The truth may be bitter, but it must be told. The situation of refugees in the Aegean and the practices of the Greek coast guard, October 2007, p. 20.

[169] Council of Europe, Report to the Government of Greece on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf(2008)3, 8 February 2008. p. 17, at: http://www.cpt.coe.int/documents/grc/2008-03-inf-eng.htm (consulted on 26 June 2009).

[170] Council of Europe, Commissioner for Human Rights - Greece Report, 4 February 2009, COMDH(2009)6, p.6.

at the moment two doctors and a nurse. Moreover, migrants apprehended at the borders are immediately brought to the local closest hospital, in order to have X-Ray.

At Aspropyrgos and Piraius, instead, there is still no system in place whereby doctors can visit the detainees. Although the right to access to a doctor is established by law, in light of the information gathered by these different visits *in loco* by the CPT, this right is not fully effective in practice.

Although it may sound obvious, it is important to underline that detaining persons under these conditions constitutes inhuman and degrading treatment in breach of fundamental human rights (art. 3 ECHR, art. 7 and 10(1) ICCPR, art. 9 UDHR).

1.3.3. Torture and ill-treatment

Evidence gathered during the CPT visit in the aforementioned facilities indicates a serious problem as regards the manner in which migrants detained are treated. A considerable number of ill-treatment, such as slaps, punches, kicks and blows with batons have in fact been reported. They usually take place upon arrest and during questioning by police officers.

In Mytilini, where it has been possible to gather direct information about conditions of detention from the "AEGEAS" Project, police officers' shouting is reported to be part of daily routine.[171]

At Petru Rali, for instance, a Bangladesh national alleged that he had been slapped by the escorting police officers in the deportation cell at Athens International Airport, after his refusal to being deported. [172]

In several cases, the doctors found that the allegations of ill-treatment were consistent with injuries.[173]

After having gathered all these information, the CPT has strongly called upon the Greek authorities to reiterate the message of zero tolerance of ill-treatment of detained persons.

[171] Interview with Katia Mavromati, *see above.*
[172] Council of Europe, Report to the Government of Greece on the visit carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf(2008)3, 8 February 2008. p. 12.
[173] Ibidem, p. 12.

1.3.4. Vulnerable groups

The Greek legislation is defective in terms of recognition of the vulnerability of detainees. There is in fact a lack of identification procedures for vulnerable persons upon arrival in Greece and during the detention.

The police is in fact allowed to arrest all new arrivals, including asylum seekers, victims of torture and human trafficking, disabled persons, pregnant women, minors and refugees. They are all issued with automatic deportation orders, without any examination of their delicate status.

As already seen, these persons enjoy special protection under international law, due to the negative effects of detention on their psychological well-being. Nevertheless, these human rights standards are not taken into account by Greek law.

The situation of unaccompanied children raises a deep concern, as they are not protected against detention and expulsion. The Greek authorities justify the lack of an *ad hoc* provision for the exclusion from detention of unaccompanied minors in terms of *"utility"*. It is said, in fact, that the prospect of such a provision would increase the problem of the "children of traffic lights" and child labour in general.[174]

In October 2005 the Greek Ombudsman published a report on administrative detention of minors prior to removal.[175] The report in question highlights that detention of minors, both with family members and when unaccompanied, is a breach of articles 21 and 5 of the Greek Constitution. Furthermore, the detention of children constitutes a serious violation of article 37(b) of the CRC, of which Greece is signatory.

At the time of Pro Asyl fact-finding, more than 30 minors from Afghanistan were in detention in Mytilini, not separated from the adults. In this specific circumstance, the Prosecutor for minors had not been informed, although this is established by law in the case of deportation orders, detention and release of children.

[174] Council of Europe, Comments by the Greek Authorities in response of the Human Rights Commissioner of the CoE Report on Greece, CommDH(2009)6, p. 23.
[175] Greek Ombudsman, Special Report: Administrative Detention and Deportation of Alien Minors, Athens, October 2005, at http://www.synigoros.gr/reports/SR-detention-expulsionOCTOBER-2005.pdf (consulted on 25 June 2009).

In practice, after their release, minors are left homeless, since they do not receive information about applying for asylum or searching for a proper shelter.[176]

Nevertheless, the situation regarding unaccompanied minors is partially improving, as it has been stressed during the visit at the "Reception Centre for Unaccompanied Minors – Villa Azadi" in Ayassos, Lesvos. The opportunity to discuss with the actual Co-ordinator of this facility has in fact highlighted good practices which are have been occurring during the last year and are positively affecting minors' lives after their apprehension at the sea borders.[177]

This care centre opened in July 2008 after that some representatives from the Ministry of Health were sent to Lesvos to observe the squalid conditions in which unaccompanied minors were detained.[178] Moreover, in early 2008, the Hellenic Red Cross and UNHCR estimated that approximately 200 minors were living in precarious conditions in the informal settlements of Patras, the only destination they could afford after being released from detention facilities with a written order to leave the country within 30 days.[179]

"Villa Azadi" represents a valid alternative to detention, as minors are held now in the detention facility of Mytilini just for the time necessary to take their fingerprints and to issue them with a deportation order. Upon the completion of this bureaucratic procedure, they are sent to this reception centre, so as to avoid the widespread practice of dumping them onto street without any kind of minimal assistance.

Although this could be considered as a good example of unaccompanied children's reception, there is no other similar state-sponsored accommodation throughout Greece, which would allow to render minors' detention an exception and not a rule.

[176] Pro Asyl, The truth may be bitter, but it must be told. The situation of refugees in the Aegean and the practices of the Greek coast guard, October 2007, p. 25.
[177] Interview with Salinia Stroux, Co-ordinator "Villa Azadi – Reception Centre fro Unaccompanied Minors", Ayasssos, 21 May 2009.
[178] Human Rights Watch, Left to Survive, 11 December 2008, at: www.hrw.org/en/node/76791/section/11 (consulted on 25 June 2009).
[179] Interview with Salinia Stroux, *see above*.

2. *Detention of irregular migrants in Italy: human rights at stake*

Following his visit to Italy on 13-15 January 2009, the Commissioner for Human Rights of the Council of Europe expressed deep concern regarding a general trend of racism and xenophobia, which has also led to violent acts against migrants present in the Italian territory.[180]

The aim of this final section will be then to underline the new legislative measures on immigration and asylum adopted by Italy - in particular with respect to administrative detention - which raise serious issues of compatibility with human rights standards.

2.1. The Italian legislation on migration

Italy is considered a relatively late-comer among immigration countries, since the first significant migration flows occurred between 1984 and 1989, when approximately 750.000 aliens entered the country.[181]

The first legislative framework aimed at shaping Italian migration policy was adopted only in 1990, with the so-called "Legge Martelli" (Law 39/1990). This legislation established a "fixed number" of new entrants per year, but migrants continued entering the Italian territory irregularly or overstaying their tourist visas.

It has to be highlighted that the 1990s have produced huge flows of refugees and migrants in search of humanitarian protection, especially after the political crisis of Albania and former Yugoslavia. Thus, Italian legislation in the field of immigration has been characterised in these years by a "reaction to emergency" attitude.[182]

The fist comprehensive reform regarding migration and treatment of migrants has been the "Legge Turco-Napolitano" (Law 40/1998), in which every single aspect of entry, residence and working conditions has been extensively defined.

This legislation has introduced important provisions with respect to the safeguarding of regular migrants, which are addressed as potential citizens and are

[180] Council of Europe, Commissioner for Human Rights - Italy Report, 16 April 2009,CommDH(2009)16, p. 2, at: https://wcd.coe.int/ViewDoc.jsp?id=1428427&Site=CM (consulted on 26 June 2009).
[181] Zincone, 2006, p. 3.
[182] Bolaffi, 1996.

entitled of rights equal to those of nationals, as far as social rights are concerned. Moreover, one of the main innovations was the introduction of a "programmed entries" system of foreign workers via quotas.

Nevertheless, most repressive measures have been introduced with respect to administrative detention of undocumented aliens. According to article 14, the possibility of holding irregular migrants in *ad hoc* "temporary detention centres" (CPT- Centri di Permanenza Temporanea) has been introduced. The detention could not exceed 30 days and it was meant to identify and possibly repatriate aliens who entered the country illegally.

In 2002 the aforementioned law was modified by the right-wing government coalition, whose main aim was to increase the effectiveness of the irregular migration contrast. The so-called "Legge Bossi-Fini" (Law 189/2002) has in fact imposed strict restrictions on the entry of aliens and limited a series of rights for migrants being already in the country.[183]

Although the law in question conserved some solidarity-oriented measures of the previous law – such as access to education and public health for irregular aliens – it tightened links between residence permits and employment, abolished the job seeker's residence permit and reduced the period of unemployment tolerated from 12 to 6 months.

It is noteworthy that two specific measures of the law have led to more than 1.000 constitutional objections submitted to the Supreme Court, which has then issued rulings eliminating parts of the Bossi-Fini Act. The provisions in question were the possibility to forcibly escort irregular aliens to the borders, in order to ensure their expulsion, and the mandatory imprisonment for those migrants found for the second time without a regular residence permit. Both the provisions were found to be in breach of the Italian constitutional law, since a person cannot be deprived of his liberty for a mere administrative offence and cannot be arrested and escorted to the borders by means of a simple endorsement by a judge, without a proper hearing and defence.

As regards family reunification, the current legislation appears also controversial. All aliens holding residence permits linked to employment, education, religion, political asylum or humanitarian protection may apply for family reunification. The applicant

[183] United Nations, Report of the Special Rapporteur on the Human Rights of Migrants. Visit to Italy, UN Doc. E/CN.4/2005/85/Add. 3, 2005, p. 18.

must prove that his accommodation complies with the minimum required standards and that his income is not less than the annual social subsidy[184] if the family reunification involves one person or not less than double this amount for two or three family members. It can be easily pointed out that especially for female migrants the family reunification can become a right difficult to achieve, since their annual low incomes hardly reach the amount fixed by law and prevent them from finding a proper accommodation.[185]Moreover, DNA tests may be required to take place at the applicants' expenses in those circumstances in which the conditions for reunification may not be verified with proper documents.

The legislation in force has also amended some of the previous provisions related to administrative detention. Act 189/2002 has in fact included the possibility to extend the maximum period of detention to 60 days, following which the Chief of Police will issue an order of mandatory removal from the Italian territory within 5 days.

Following the escalation of the anti-migrants rhetoric – occasionally supported by actions of local authorities and police officers – on the 23 May 2008 the emblematic Law Decree n. 92 (converted into Law n. 125 of 24 July 2008) was adopted. The most important provisions on irregular migration are the following:

- the irregular status of aliens who commit a criminal offence is added to the list of aggravating circumstances of the Criminal Code;
- The "Temporary and Assistance Centres" (CPTs), where immigrants subject to expulsion or asylum seekers have been detained during examinations of their applications are renamed "Identification and Expulsion Centres" (CIE).

Additionally, a new Law on "public security" was approved on the 14 May 2009 by the Chamber of Deputies. As far as irregular migration is concerned, the Law in question (Pacchetto Sicurezza 2180/2009) introduces some controversial measures. Firstly, it introduces the criminalization of undocumented migrants. Moreover, the initial draft also provided that irregular entry would be subject to a sentence of imprisonment ranging from six months to four years. The draft law that has been approved provides not for a sentence of imprisonment but for a pecuniary penalty ranging from 5.000 to 10.000 euros.

[184] In 2004 the amount was 4.783,61 euro. See: Ibidem, p. 13.
[185] Ibidem, p. 12.

With respect to administrative detention, aliens may now be detained in the "Identification and Expulsion Centres" for 180 days in order to be identified. The initial proposal was even harsher, since it would have extended the detention up to 18 months.

Furthermore, other provisions are clearly aimed at rendering the regular status of migrants within the Italian territory a complicated task to achieve. For instance, the first request or the renewal of the residence permit requires a financial contribution ranging from 80 to 200 euros from the person involved. In addition to that, the acquisition of the Italian citizenship by marriage will now be possible after a two-year residence in Italy or three-years residence abroad.

It is also noteworthy that the initial proposal of the Law contained a provision according to which medical personnel would be allowed to report to the authorities the irregular residence of a foreign national who accesses health facilities.

Fortunately, the aforementioned provision has not been included in the last draft of the Law, since it would have raised serious issues of compatibility with article 12 of the ICESCR and with General Comment N. 14 (2000) on the right to the highest attainable standard of health, of the UN Committee on Economic, Social and Cultural Rights.[186]

Nevertheless, the whole Law lacks a human rights-based approach in dealing with the issue of irregular migration. Criminalisation, in particular, seems a disproportionate measure which clearly violates international law standards that run counter to this kind of provisions. It is evident that such a policy will lead to a further stigmatisation of undocumented aliens who are equated to the smugglers and employers who exploit them.

In this regard, the High Commissioner for Human Rights of the Council of Europe *"firmly opposes measures criminalizing irregular migration since they may result only in a further rise of anti-immigration and xenophobic climate in the country, despite the authorities' declared intentions"*.[187]

[186] See, in particular, paragraph 34: *"States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, asylum seekers and illegal migrants, to preventive, curative and palliative health services [...]"*.
[187] Council of Europe, Commissioner for Human Rights - Italy Report, 16 April 2009, CommDH(2009)16, p.19.

2.1.1. The Italian asylum system

Italy has not adopted a comprehensive legislation on asylum yet.[188] Nevertheless, in 2005 two important provisions of the "Bossi-Fini Law" dealing with asylum procedures entered into force.

The first one is aimed at reducing the time required to reach a decision upon the refugee status, by establishing ten local decision committees which have to cooperate with the existing national one.

The second provision has introduced the possibility to detain asylum seekers while they wait for their applications to be examined, in order to avoid the risk of absconding in case of negative response. In this respect, both the average waiting periods and the percentage of asylum seekers absconding during the process have significantly reduced after 2005.[189]

According to the current law, asylum seekers can be hosted in open reception centres (CARA- Centri di Accoglienza per Richiedenti Asilo) for a variable period of 20-35 days, in order to be identified and proceed with their asylum application. In case they are issued with an expulsion or rejection order prior to filling their asylum application, they will no longer be hosted in these centres but they will be held in the CIE for a maximum period of 60 days.

It is therefore evident that in most cases the detention of asylum seekers represents the rule and not an exception. In 2006, for instance, almost 70% of over 10.000 applicants were detained while a decision was made upon their claim.[190]

In 2008 Italy recorded 31.200 asylum claims, more than double the figure of the year before (14.100 applications).[191] This sharp increase in new asylum applicants can be mostly attributed to the number of undocumented migrants arriving by sea, estimated at 36.000 persons in 2008.[192] Nigeria is the main country of origin of applicants with

[188] In 2005 the Legislative Decree 140/2005 transposed Directive 2003/9/EC and on 9 November 2007 the Legislative Decree 25/2008 transposed Directive 2004/83/EC and Directive 2005/85/EC.
[189] Fasani, Undocumented Migration. Counting the uncountable: data and trends across Europe. Country Report Italy, CLANDESTINO Project, November 2008, p. 66, at: http://clandestino.eliamep.gr/wp-content/uploads/2009/02/italy.pdf (consulted on 20 June 2009).
[190] Ibidem, p. 67.
[191] UNHCR, Asylum levels and trends in industrialised countries 2008, 24 March 2009, p. 6, at: http://www.unhcr.org/49c796572.html (consulted on 20 June 2009).
[192] Ibidem, p. 7.

5.300 new claims, followed by Somalia with 4.500 applications, Erythrea with 2.700 and Afghanistan with 2.000.[193]

According to the latest available data, out of the 31.200 applications received in 2008, 20. 968 have been examined so far and the refugee status has been granted only to 1.695 applicants. 7.054 persons received the subsidiary protection and 11.084 receive a negative response on their claims.[194]

2.2. Public discourses on irregular migration

Nowadays Italy is sadly famous for the images of irregular migrants who land along its southern shores, often in alarming physical conditions. In this regard, the word "invasion" has been often used by politicians and mass-media in order to describe the scale of sea arrivals.[195]

Nevertheless, the number of undocumented aliens who attempt to cross the Mediterranean Sea and arrive in Italy is much smaller than it is generally perceived. The majority of the irregular population (70%), indeed, are overstayers, while another considerable number enter Italy through the northern borders and at international airports.[196]

The latest estimates available value the stock of irregular migrants found within the Italian territory to be around 541.000 in 2005, 650.000 in 2006 and 349.000 in 2007.[197]

There are different critical entry channels for migrants who want to enter the Italian borders illegally, since its geographical position represents an accessible intermediate stop also for those persons who will continue their travel towards other European countries.

[193] Ibidem, p. 7.
[194] Consiglio Italiano per i Rifugiati – ONLUS, Richiedenti Asilo 2008. Dati Statistici della Commissione Nazionale Asilo, 2009, at: www.cir-onlus.org/Statisticheitalia.htm (consulted on 15 June 2009).
[195] In 2004, for instance, the former Minister of Interior Pisanu spoke of an *"assault on Italian costs"*. See: Godenau, Zapata Hernadez, Cuttitta, Triandafyllidou and Pinyol, 2008, p. 47.
[196] Fasani, Undocumented Migration. Counting the uncountable: data and trends across Europe. Country Report Italy, CLANDESTINO Project, November 2008, p. 13.
[197] Blangiardo, The centre sampling technique in surveys on foreign migrants. The balance of a multi-year experience, United Nations Statistical Commission and EUROSTAT, Working Paper 12-19 February 2008, at: http://www.unece.org/stats/documents/ece/ces/ge.10/2008/wp.12.e.pdf (consulted on 20 June 2009).

The Italian-Slovenian border is mainly crossed by Eastern European citizens and migrants coming from the Middle East and Asia. The Italian-French border represents the favourite route for migrants coming from Africa, who travel along the entry-point of the Strait of Gibraltar. Finally, there are the coasts of the Southern maritime regions, where the migrants land after unsafe and dangerous trips by boat. During the 1990s these persons used to arrive from the coasts of former Yugoslavia and Albania, but now these unauthorised inflows are mainly composed of migrants coming from both Northern Africa (Marocco, Libya, Algeria, Tunisia and Egypt) and Sub-Saharan Africa.

It can be easily pointed out that the arrival by sea has a stronger media impact on public opinion and it is often associated with the threat of international terrorism. In September 2006, for instance, the deputy Minister of Interior Lucidi stated that the link between undocumented migration with *"international terrorism requires a particular surveillance of clandestine immigrants from the Horn of Africa as well as from the Sub-Saharan region, where Islamic fundamentalism is spreading rapidly"*.[198]

With regard to this, since the 1990s all Italian governments - both centre-left wing and right-wing – have been engaging in the process of externalisation of the southern maritime border controls. In particular, the so-called Guardia di Finanza - a semi-military police force - has emerged as the main agency in Italy in preventing crossing borders by sea, equipped with various military-style hardware, including warships.[199]

It has then to be underlined how the current Italian debate is mostly focusing on the connection between crime and undocumented migration, without considering the touching aspect of these sea-arrivals. According to the estimates in the last two decades, two thousand migrants have died in the area between Sicily, Libya, Tunisia and Malta.[200]

Nevertheless, a recent survey carried out by Transcrime in 2007, clearly reveals a discomfort of Italians towards undocumented migrants. The alarm among them is in fact very high, since 60% of the sample thinks that *"immigrants increase crime rates"*.[201]

[198] Godenau, Zapata Hernadez, Cuttitta, Triandafyllidou and Pinyol, 2008, p. 48.
[199] Lutterbeck, 2006, p. 65.
[200] The organisation Fortress Europe is counting the number of deaths or missing individuals reported in the international press. See: http://fortresseurope.blogspot.com.
[201] Transcrime, Indagine sulla percezione degli Italiani riguardo la criminalità degli stranieri, 2007, available at: http://transcrime.cs.unitn.it (consulted on 15 June 2009).

The aforementioned novelty in the current legislation on entry and residence, which classifies the lack of legal status as a criminal offence rather than a simple administrative irregularity is only one example of this widespread conviction that there exists a connection between undocumented status and propensity to commit crimes.

In this regard, it is worth mentioning the horrendous crime committed by a Romanian migrant who raped and killed an Italian woman in the end of October 2007. This episode has in fact contributed to an escalation of xenophobic resentment against the Romanian community and all migrants in general, considered as the main responsible of all serious crimes occurring in Italy.[202] This prejudice expressed by the Italian society has also been mirrored in the legislation, since after this crime the Prodi government approved a Law Decree to ease the deportation of European citizens who could not prove to have adequate means of subsistence.[203]

2.2.1. Arrivals at sea: current trends in the violation of the "principle of non-refoulement"

The practice of returning migrants from Italian territory and international waters is very widespread and it seems to be one of the last resorts adopted in order to manage the migration flow coming from the Mediterranean. As the Euro-Mediterranean Human Rights Network (EMHRN) has recently stressed, these forced repatriations represent a clear signal that *"Italy has chosen to turn its back on democratic principles and on the commitments that bind it in the field of fundamental rights"*.[204]

In particular, the HR Commissioner has expressed deep concern for the tendency of deporting to Tunisia, where evidence clearly revealed that deportees are subjected to torture and other forms of ill-treatment.[205]

[202] Against this stereotype, the Italian National Institute of Statistics (ISTAT) presented a survey on sexual offences in Italy, according to which almost 70% of the rapes are committed by the partners of the victims and at least 90% of all rapes are attributable to Italian citizens. See: www.corriere.it, 10 December 2007.
[203] Sarzanini, 2007, p. 6.
[204] EMHRN, Illegal *refoulement* of 500 migrants to Libya: the EU must condemn Italian authorities, Press Release, 11 May 2009, at: www.euromedrights.net (consulted on 20 June 2009).
[205] See, *inter alia*: Amnesty International, In the name of security: routine abuses in Tunisia, London, 23 June 2008, at: http://www.amnesty.org/en/library/asset/MDE30/007/2008/en/b8527bf4-3ebc-11dd-9656-05931d46f27f/mde300072008eng.html (consulted on 23 June 2009).

There has been an emblematic case in which Italy has been found in breach of article 3 (prohibition of torture) of the ECHR, by having exposed the applicant to serious risks of facing ill-treatment in Tunisia.[206]

The policy of forcibly sending back these migrants to countries where their basic rights are violated is controversial both from a juridical and an ethic point of view.

It should be pointed out in fact that most asylum seekers are compelled to cross the Mediterranean irregularly if they want to seek protection in Europe. According to Antonio Virgilio, head of the Italian Mission of MSF, 30% of the persons that arrived in Lampedusa in 2008 came from the crisis region of the Horn of Africa.[207]

It is reasonable to assume that a large percentage of those migrants, apprehended before having crossed the Italian borders, would be entitled to protection if only they were allowed to get there.

Recent returns from international waters carried out jointly by Italy and Malta breach therefore international obligations, by failing to protect the rights of migrants and asylum seekers rescued at sea.

One of the latest significant episodes which occurred in May 2009 has raised particular concern among NGOs, trade unions, the Catholic Church and representatives of the opposition. In the morning of 6 May 2009 three vessels with approximately 300 people on board were saved by a merchant vessel and offloaded onto Italian coastguards boats in waters belonging to the Maltese Search and Rescue Zone. Rescue operations were delayed due to a dispute between the Maltese and Italian government over who had the responsibility of these operations. In the late afternoon of the same day the persons rescued at sea were brought directly to Tripoli, Libya, without having the possibility to reach the Italian territory and request asylum.

The *refoulement* to Libya of these migrants has been defined by the Italian Minister of Interior Roberto Maroni an *"historical achievement after one year of*

[206] In June 2008 a Tunisian national, Essid Sami Ben Khemais, has been deported to Tunisia under the so-called "Pisanu Law" on emergency measures to combat international terrorism, even though the person in question had earlier lodged an application with the ECtHR which expressly requested Italy, under its Rule 39, to suspend the deportation since Ben Khemais would have faced the real risk of torture and other serious ill-treatment if returned to Italy. The EctHR found that Italy in this case violated article 3 of the ECHR. See: European Court of Human Rights, 'Ben Khemais v. Italy', Judgment of 24 February 2009, paragraph 64.
[207] Godenau, Zapata Hernadez, Cuttitta, Triandafyllidou and Pinyol, 2008, p. 57.

bilateral negotiations with Libya".[208] At governmental level there does not seem to be any awareness of the fact that the return of these migrants to Libya is contrary to Italy's obligations under international human rights and refugee law. This country is not in fact a party to the UN Convention related to the Status of Refugee and it has not signed a cooperation agreement for an official presence of the UNHCR within its territory. This fact could mean that anyone wishing to ask for asylum will have only limited possibilities to do so. Furthermore, there are not procedures set forth by national legislation to permit asylum seekers to apply for recognition of their refugee status.

The concern raised by this episode is due to the fact that in Libya persons found to be in need of protection are detained in awful conditions and sent back to their home-countries, where they may be at risk of torture or other ill-treatment.[209]

With regard to this, UNHCR sent a letter to the Italian government, expressing concern that the *"policy now implemented by Italy undermines access to asylum in the EU and carries with it the risk of violating the fundamental principle of non-refoulement which is enshrined in the UN 1951 Convention and in EU law as well as in other instruments of international human rights law".*[210]

2.3. The reality of the reception and detention centres

There are currently three types of reception and detention centres in Italy. The First Reception Centres (CDA-Centri di Accoglienza) are facilities located relatively close to the main entry points, in order to provide undocumented migrants with a first medical aid and to proceed with their identification.

If the migrant does not apply for asylum, he will either be repatriated or, in circumstances in which the consular authorities of his home-country do not cooperate, he will be directly sent to a CIE. If the alien in question decides to file an application for asylum, he will be given an official document certifying the status of asylum seeker (the

[208] Jesuit Refugee Service, Removal of 227 migrants to Libya directly contravenes international laws, Press Statement, 7 May 2009, at: http://www.jrs.net/news/index.php?lang=en&sid=4475 (consulted on 24 June 2009).
[209] Amnesty International, The state of the world's human rights. Report 2008, pp. 192-193, at: http://thereport.amnesty.org/sites/report2008.amnesty.org/files/documents/air098en.pdf (consulted on 24 June 2009).
[210] UNHCR, Follow-up from UNHCR on Italy's push-backs, Briefing Notes, 12 May 2009, at: http://unhcr.org/4a0966936.html (consulted on 20 June 2009).

so-called "modulo C3") and will be transferred to a CARA. Nevertheless, as it has been stressed by the UN Working Group on Arbitrary Detention, the deprivation of liberty of the asylum seeker taking place until the aforementioned document is issued is not based on a legal cognizable basis and thus must be considered arbitrary.[211]

Asylum seekers will be then accommodated in these facilities throughout the refugee status determination procedure, which should not exceed 35 days. Although they are free to leave the centre every day from 8 a.m. to 8 p.m., asylum seekers are restricted in their freedom and any delays or failure at the CARA will negatively affect their asylum proceedings. If the first claim is rejected and the asylum seeker appeals the decision before a court, he will stay in the CARA up for a maximum of six months, until the court decides on the appeal.

Finally, the CIE are closed centres where undocumented aliens subject to a deportation or removal order are held. Administrative detention in these facilities is ordered by the police chief and the migrant concerned will be brought before a "justice of the peace", who will hold a hearing. As already said, detention can now last for three months. This period of time allows the authorities to establish the identity of the migrant and organize the deportation. If after 90 days the detainee has not been deported, he will be released with an order to leave the country within five days.

2.3.1. Procedural guarantees

According to the international human rights standards, administrative detention must always comply with sufficient procedural safeguards in accordance with Article 9(4) of ICCPR. However, deprivation of liberty of asylum seekers and other undocumented aliens in Italy presents some deficiencies.

With respect to the length of detention, for instance, the last change in the legislative framework resulting from Law 2180/2009 - which is enhancing the period up to 3 months - seems to be excessive. Moreover, as it has been pointed out by the UN Working Group on Detention, many of the CIE migrants have been detained for more

[211] United Nations, Report of the Working Group on Arbitrary Detention: Mission to Italy, UN Doc. A/HRC/10/21/Add.5, 26 January 2009, p.17, at: http://www2.ohchr.org/english/bodies/hrcouncil/10session/reports.htm (consulted on 26 June 2009).

than three times, since their deportation was not properly organised and therefore they had been re-apprehended a second and a third time.[212]

Additionally, the fact that a CIE detainee who files an asylum claim has to be held in the detention centre while the application is processed, remains also a matter of major concern. This practice is in fact a breach of the internationally recognised standard which prohibits detaining persons seeking for asylum.

Although the judicial review over administrative detention formally complies with the requirement set forth in Article 9(4) of the ICCPR, it is important to point out that in the criminal justice system decisions on remand detention are taken by professional judges and are appealable to a tribunal composed of three professional judges, while the administrative detention of migrants is only reviewed by a single justice of the peace. Justices of the peace are not in fact professional judges, but qualified lawyers appointed by the Superior Council of the Magistracy to sit as the lowest level of the judicial hierarchy. Moreover, the ex-officio lawyers assisting detainees have been described as *"not very engaged and effective"*.[213]

With respect to the situation of asylum seekers, the legal information provided to them seems to vary from one centre to the other[214] and the UN Committee Against Torture has therefore expressed concern since some asylum seekers may have been denied the right to apply for asylum and their claims may not have been assessed in *"a fair and satisfactory procedure"*.[215]

[212] Ibidem, p.19.
[213] Ibidem, p.19.
[214] Commissione De Mistura, Rapporto per le verifiche e le strategie dei Centri di permanenza Temporanea per Immigrati, 31 January 2007, at: www.interno.it (consulted on 15 June 2009).
[215] United Nations, Consideration of Reports submitted by States Parties under Article 19 of the Convention. Conclusions and Recommendations of the Committee against Torture: Italy, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, p. 4, at: http://209.85.129.132/search?q=cache:Lqy1QdC70PcJ:www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.ITA.CO.4.doc+United+Nations+Committee+against+Torture:+Italy,+UN+Doc.+CAT/C/ITA/CO/4,&cd=5&hl=it&ct=clnk (consulted on 26 June 2009).

2.3.2. Living conditions

The aforementioned study of the European Parliament Committee on Civil Liberties, Justice and Home Affairs reported serious deficiencies as far as detention standards of living are concerned.[216]For instance, the use of large cages and containers to detain people in some centres is described as *"dehumanizing"*. Moreover, poor hygienic conditions and overcrowding are seriously affecting the detainees' rights to enjoy adequate standards of living within these facilities.

A lack of appropriate medical and psychological care has also been reported by MSF, whose final Report on conditions of administrative detention in Italy describes an alarming situation.[217]It underlines in particular the widespread practice of giving to detainees psycho-drugs, in order to keep them quiet and without taking into consideration the negative effects of a prolonged and massive use of this kind of medication.

As regards the common situations of overcrowding registered in both CIE and CDA, it is worth mentioning the peculiar case of Lampedusa, a small island of 20 Km2 located in the middle of the Sicilian Channel. The CDA found there has obviously limits to receive and host the mass of migrants and asylum seekers who systematically land on the island in desperate condition. Nevertheless, according to UNHCR, in January 2009 the number of irregular migrants (including asylum seekers) obliged to stay on Lampedusa approached 2.000, while the capacity of the reception center is 850.[218]

Concerning the living conditions, the Report of the visit by 6 members of the European Parliament to the Lampedusa center carried out in February 2009 highlighted serious deficiencies.[219] The material conditions of the dormitories are reported as *"terrible, inhuman and degrading"* and the bathrooms as *"not working properly"*. Furthermore, at the time of the visit, 972 migrants were detained, regardless the fact that

[216] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, 2007, p. 140.
[217] MSF, Rapporto sui centri di permanenza temporanea e assistenza, January 2004, at: http://www.medicisenzafrontiere.it/Immagini/file/CPT_FINALE.pdf. (consulted on 25 June 2009).
[218] UNHCR, Press Release, 23 January 2009, available at: www.unhcr.org.
[219] European Parliament, GUE-NGL Group, Report of the visit to Lampedusa-Italy, 13-14 February 2009, at: http://www.statewatch.org/news/2009/mar/eu-gue-lampedusa-report.pdf.(consulted on 20 June 2009).

there was an availability of only 800 beds. Thus, approximately 172 persons were obliged to sleep on the floor or outside in the yard.

The delegation also visited the new reception centre "Loran", which seems to be totally inadequate to accommodate people safely and healthily. The premises are in fact described as *"against national housing and safety standards"*, since the electromagnetic waves are potentially higher than normally allowed and there is a lack of anti-fire devices.

Once again, the illegal status of these persons seems to prevent them from enjoying basic rights, such as living in adequate conditions or being treated as human beings rather than commodities.

2.3.3. Torture and ill-treatment

Allegations of torture and ill-treatment committed by law enforcement officials are common. As the CAT has pointed out, the matter of major concern is that there has been only a limited number of investigations carried out by Italy in such cases.[220]

On 18 February 2009, for instance, a riot lead by the Tunisian detainees broke out in the center of Lampedusa after one month of detention in inhuman conditions. The Italian police answered beating tens detainees and most of them reported serious injuries.[221]

Although this fact should have raised concern among Italian mass-media and civil society, a limited number of journals and TV broadcasts have focused on this event. Furthermore, a parliamentary interrogation has been presented only recently.

Other serious forms of ill-treatment are described in an insightful report written by an Italian journalist who disguised himself as an irregular migrant and spent one week in the reception center of Lampedusa.[222] The journalist revealed that several inmates were made strip naked and forced to run a gauntlet into a protected area. Moreover slaps and shouts by the Carabinieri were reported as normal and frequent.

[220] United Nations, Consideration of Reports submitted by States Parties under Article 19 of the Convention. Conclusions and Recommendations of the CAT: Italy, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, p. 8.
[221] Del Grande, Picchiati dalla Polizia. Parlano i detenuti del CIE di Lampedusa, 15 April 2009, at http://fortresseurope.blogspot.com/2006/01/picchiati-dalla-polizia-parlano-i.html. (consulted on 20 June 2009).
[222] Gatti, 2005.

2.3.4. Vulnerable groups

According to the European Parliament's survey, the measures for caring for vulnerable groups are inadequate and psychological support standards in place are unsuitable.[223] A significant number of migrants who have been subjected to both physical and mental violence are in fact held in Italian detention centres.

However, administrative detention is usually avoided for disabled persons and pregnant women. The latter can be held only in the Centres for First Identification, in which living conditions can still be considered unsuitable for them.[224]

As far as foreign unaccompanied children are concerned, the Italian immigration Law does provide for a more protective framework.[225] Minors found illegally in the country can neither be detained nor be deported. The only exceptions can occur when the child in question has to follow a parent who has been deported or when an expulsion order has been issued for reasons related to State security. Notwithstanding this positive provision, the same safeguard is not granted to those minors who are found at the border without the necessary entry requirements. In such a circumstance, in fact, the child can be denied access, deported to the home-country or detained while awaiting removal.

Recent reports have also highlighted a series of shortcomings in the Italian practice which are aggravating the vulnerability of undocumented minors.[226]

With regard to the guardianship, for instance, there is a lack of adequate safeguards, due to the fact that general laws on guardianship are applied only for unaccompanied children who are asylum seekers. In addition to that, a representative of the Municipality is most of the time appointed as a guardian and this can lead to an

[223] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, 2007, p. 141.
[224] Ibidem, p. 141.
[225] The main laws regulating the rights of separated minors coming from non-EU countries are the Immigration Law n. 286/1998 (as amended by the Law n. 189/2002), DPR n. 394/1999, DPCM n. 535/1999 and a number of Ministerial Memorandums.
[226] See: Amnesty International, Invisibili - I diritti umani dei minori migranti e richiedenti asilo detenuti all'arrivo alla frontiera marittima italiana, 2006, at: http://www.amnesty.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/107 (consulted on 24 June 2009); Rozzi, 2008, pp. 13-26; Save the Children – Italy, Opportunities and Challenges for social intervention aimed at migrant minors, 2008, at: http://www.savethechildren.it/2003/download/pubblicazioni/ODCMailnglcorr2.pdf (consulted on 25 June 2009); Save the Children – Italy, L'accoglienza dei minori in arrivo via mare, April 2009, at: http://www.savethechildren.it/2003/download/pubblicazioni/dossier_monitoraggio09_hr.pdf (consulted on 25 June 2009).

obvious situation of conflicting interest. In fact, according to Italian legislation, the Municipality is financially responsible for reception and this means that the appointed guardian could advocate for the child's return to his home country in order to reduce the number of separated children present in its territory.

With respect to unaccompanied children arriving from the sea, the first step that has to be undertaken is the procedure of registration. The minor's identity has to be verified by the Police authorities and usually age assessment is carried out through wrist-bone X-ray and tooth examination. According to juvenile criminal justice law, when there are doubts on the minor's age even upon the completion of the age assessment, the child must be given the benefit of the doubt and therefore treated as a minor.

Separated migrant children are then placed in specialized centres for minors, where the quality of reception varies a lot. In Sicily, for example, the quality is described as very *"poor"*, due also to the high number of separated children coming from Lampedusa.[227] As Save the Children has pointed out, in November and December 2008 approximately 200 minors have been sent to facilities not designated for children's reception.[228]In the Municipality of Ragusa, for instance, structural and procedural deficiencies have systematically been reported. Tens of unaccompanied minors are in fact held in the CDA/CARA without any possibilities of going out and they are not given any beds and other hygienic stuff.[229]

In these cases, when children are not immediately placed in the child welfare upon their arrival, there is the risk of exposing them to exploitation and other forms of child rights violations.[230]

Although many steps forward are required in order to enhance the quality of the unaccompanied minor's reception, some of the Italian policies may be considered as "best practice". Under the immigration legislation for non-EU citizens, in fact, separated children are entitled to a special residence permit "for minor age", which ensures them the right to work and the right to be documented once they become of age.

[227] Rozzi, 2008, p. 27.
[228] Save the Children – Italy, L'accoglienza dei minori in arrivo via mare, April 2009, p.8.
[229] Ibidem, p. 9.
[230] Miazzi, 2002, pp. 68-80.

Concluding remarks

By analyzing and comparing irregular migration policies adopted by Greece and Italy, a number of significant common features must be underlined. First of all, Italy's and Greece's proximity to unstable areas in the Mediterranean Sea plays a crucial role in determining the flow of migrants crossing their borders.

Furthermore, a large underground economy in both countries represents an important pull factor for migrants, as well as the structure of their Welfare State. In this sense, the undocumented aliens are not attracted to these countries by their Welfare provisions, but rather by the growing demand for household workers to compensate for the shortcomings of the Greek and Italian Welfare State. In Italy, for instance, undocumented baby-sitters, care workers and family helpers receive special attention from the Authorities, due to a widespread consensus among the society on their usefulness.[231]

As far as the management of undocumented migration is concerned, it seems obvious from both sides that restrictive and lengthy bureaucratic procedures for legal migration indirectly encourage irregular entry. In fact, complicated regulations aimed at deterring immigration do not reduce the determination of migrants to attempt to enter "Fortress Europe", but they only push smugglers to change their routes to cross the countries borders. As it has already been stressed, the phenomenon of "boat people" can be considered as the direct consequence of the EU strict immigration, visa and asylum policies, which have left clandestine entry as the only possibility to search for better living conditions outside their home-countries.

In addition, the poor design of the Greek and Italian migration policies renders the chances of becoming a regular resident migrant higher for an undocumented alien who is already in their territories, than for a potential migrant who is attempting to gain a legal access to the labour markets from abroad.[232]

[231] The Italian Welfare Minister and the Minister for Equal Opportunities have recently proposed to legalize those irregular workers who take care of disabled people or of elderly people over-70. See: Sarzanini, 2008.
[232] Fasani, Undocumented Migration. Counting the uncountable: data and trends across Europe. Country Report Italy, CLANDESTINO Project, November 2008, p. 18.

Both in Italy and Greece irregular migration policy should not be focused only on border controls and new channels for regular migration have to open. In practice, it is urgent to simplify and shorten the procedures to receive contracted workers through "metaklisi" in Greece and the "quota system" in Italy. More specifically, there should be a more comprehensive coordination between external control efforts and the regulation of the labour market, by speeding up the processing of stay permits, re-organizing the "worker invitation" procedure, reinforcing measures like sanctions on employers hiring illegal migrants and re-assessing the whole enforcement system supporting this venture.

With respect to the asylum system, in both countries the situation can be described as critical. In Greece, in particular, the matters of major concern remain the insufficient reception capacity for refugee applicants, the lack of legal aid and the doubtful effectiveness of second instance in the asylum procedure. In Italy, even though there is the possibility for all asylum seekers to be held in *ad hoc* facilities, the fact that they are deprived of their liberty until the asylum document is issued can be seen as arbitrary and not lawful.

Moreover, Greece and Italy present a high level of selectiveness in granting the refugee status and poor benefits are offered to asylum seekers. Given this adverse setting, it is quite common that potential asylum seekers end up opting for an unauthorized residence.

The matter of the readmission agreements is also highly questionable in both countries. On 30 August 2008 Italy signed the new police cooperation agreement with Libya, providing, *inter alia*, for Italian-Libyan joint patrolling in Libyan territorial waters. Similarly to the Readmission Protocol between Turkey and Greece, this agreement risks exposing irregular migrants and asylum seekers to human rights violations, including the return to their countries of origin without respecting the Geneva Convention. It is in fact obvious from the Greek experience that the Readmission Protocol between Turkey and Greece has exposed undocumented aliens to abuse by Turkish Authorities without effectively protecting the EU's external borders.

As far as administrative detention is concerned, in both Greece and Italy living conditions are reported as unhygienic and overcrowded. Migrants held in these facilities suffer ill-treatment and often face arbitrary and lengthy detention. Especially in Greece,

the total lack of transparency in the procedures - both on a legal level and in their application - reveals a worrying situation.

In Italy migrants and asylum seekers without valid documentation are routinely detained upon arrival in detention facilities before having the chance to apply for international protection. Recently, the practice of returning migrants from Italy and international waters without granting them the possibility to apply for asylum obviously put migrants' human rights at stake.

With regard to minors, in Greece the situation seems particularly worrying, since Greek law does not protect them against detention and expulsion. On the other hand, Italy presents a more protective "children's rights approach" in dealing with this matter, considering the rules regulating the protection of separated children from expulsion and detention and the residence permits "for minor age".

Given this controversial framework, it is urgent for both Greece and Italy to tackle irregular migration as a complex and transborder issue, having as priority the effective protection of the people compelled to migrate for searching for a better life.

CONCLUSIONS

As stressed over the course of this study, administrative detention raises many concerns, both in relation to the right of liberty and to the controversial quality of treatment to which migrants are subjected.

It is therefore of fundamental importance that procedural guarantees established by international human rights law are properly applied in these circumstances.

The question of detention cannot obviously be considered without taking into account the wider framework of irregular migration. The applicable human rights standards must therefore be incorporated into the regional and national arrangements in order to manage migration flows better, so as the human dignity of the migrants is not denied.

As far as bilateral agreements are concerned, for instance, Greece and Italy resort to "Readmission Protocols", in order to tackle the migration flows coming from the Mediterranean. It has been pointed out, however, that sending these migrants back to countries such as Turkey and Libya, is most of the time contrary to Italy's and Greece's obligations under international human rights and refugee law. In fact, Turkey continues to maintain a "geographical limitation" to the applicability of the Geneva Convention, and Libya is not yet a party to the Convention. This leads to the fact that deported migrants could be sent back to their home-countries, where they may be at risk of torture or other ill-treatment.

Once again, decisions adopted in the field of immigration and asylum at national level are characterized by the constant struggle between the preservation of aliens' human rights and States claim to control their borders.

As previously demonstrated, the EU's normative framework does not provide for specific safeguards which would oblige MSs to properly address the needs of irregular migrants.

At EU level, in fact, administrative detention is touched upon only marginally by a few Council Directives, which set out common minimum standards which do not allow for a satisfactory level of guarantees to ensure that migrants' deprivation of

liberty is carried out in a lawful and human manner. The direct consequence of this is that MSs enjoy a wide margin of appreciation in dealing with this delicate topic and tend to adopt restrictive exceptions to the migrants' core rights. According to the general findings concerning European detention centres, in fact, most of the facilities have been described as *"dehumanizing"*, *"unacceptable"* and even *"degrading"*.[233]

The concern is that the EU has adopted a plethora of instruments in support of the fight against irregular migration, but most of the time without a clear human rights-based approach. Furthermore, the EU should achieve a greater multilateralism in its external relations policy. Although it may sound obvious, one of the EU's priorities should be to create a coherent and fairer policy towards non-EU migrants, based upon the human rights' concept of equal treatment.

At a concrete level, the EU should urgently consider the possibility of increasing the assistance to those Mediterranean countries, such as Greece and Italy, who are facing large scale arrivals of undocumented aliens on their maritime southern shores. This significant number of arrivals is, in fact, putting a strain on the detention and reception facilities of these countries, thus seriously undermining detainees' rights to enjoy adequate living condition, once deprived of their liberty. In this sense, there should be a sharing of responsibilities among EU MSs. It is clearly unfair that this lack of harmonization and co-operation results in a burden on the EU's Mediterranean countries and, as such, their capacity to hold such a significant number of persons is affected. In extreme cases, this could also lead to the risk of violating the fundamental principle of *non-refoulement*, by directly returning migrants to their home-countries in order to prevent overcrowding of their reception facilities.

As far as asylum seekers are concerned, the Dublin II Regulation has also contributed to create further imbalances to the distribution of migrants who claim for asylum among the EU MSs. One of the criteria that govern responsibility to examine the asylum claim of a third-country national indicates that the responsibility shall lie with the MS in which the asylum seeker has first entered the territory irregularly. It is obvious then, that the "entry points" along the EU's southern borders pay the costs of this provision, and strains on detention capacity occur as a result. Moreover, there is a worrying trend that sees the detention of Dublin II claimants, in order to ensure their transfer to the responsible State.[234] This practice, therefore, confuses Dublin claimants with rejected asylum seekers, who are detained while they wait for removal.

At national level, by taking into consideration the case-study of Greece and Italy, it seems clear that concerns over national security continue to be the main purpose of the management of migration flows. Nevertheless, it is important to stress that addressing the root causes of irregular migration should be considered more urgent than the attempt to cure its symptoms. States shall therefore deploy a wide range of policies for sustainable growth in low-income countries, such as more investment in multilateral aid and the use of sector-support mechanisms to implement development programs.[235]

The worrisome gap between international human rights standards and national practices must be properly addressed and administrative detention should not deny the human dignity of aliens.

However, it must be acknowledged that render conditions of detention more human is a difficult goal to achieve. In this regard, it is urgent to find proportionate solutions that will not affect irregular migrants in such a harsh way. Entry in search of protection should not be considered an unlawful act and aliens ought not be penalized solely by reason of such entry. Initial periods of administrative detention for the purposes of identifying irregular migrants and establishing their claims to asylum must be minimized and not be extended for the purposes of punishment.

Contrary to recommendations constantly made by UN Treaty Bodies, in fact, third-country nationals continue to be held in facilities which lack basic appropriate furniture necessary for an adequate standard of living. States seem not to be aware of the negative effects of detention on the psychological well-being of those detained. Moreover, all national policies have the clear objective of discouraging illegal migration, thus not meeting migrants' needs and respecting their fundamental rights. Given this framework, it is highly unlikely that States will agree on the adoption of alternative and non-custodial measures when dealing with persons who entered their territory illegally.

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[233] European Parliament Committee on Civil Liberties, Justice and Home Affairs, The conditions in centers for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU MSs, 2007.

[234] UNHCR, The Dublin II Regulation. A UNHCR Discussion Paper, April 2006, at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4445fe344&page=search.

[235] See, *inter alia*: OECD, Managing Aid Practices of DAC Member Countries, OECD Publishing, 2009, p. 13, at: http://www.oecd.org/dataoecd/32/60/35051857.pdf (consulted on 25 June 2009).

Notwithstanding, it is worthy and reasonable to mention these possibilities, in order to change the whole concept of administrative detention. The fact that people are incarcerated although they have not committed any crimes and for the sole reason that circumstances compelled them to enter without proper documents is unfair. Although it may sound utopian, to review the notion and the purpose of aliens' detention is highly desirable. Alternatives to detention have been proposed both by the UNHCR and the OHCHR, in order to privilege individual assessments of the personal circumstances of the migrants found irregular in a country.[236] These alternatives can be:

- reporting/residency requirements, especially meant for asylum seekers whose freedom may be conditional on compliance with periodic reporting requirements;
- provisions of a Guarantor, who would be responsible for ensuring their attendance at official hearings,
- release on Bail, and
- open centres.

The latter may be considered the most affordable alternative, since it implies that migrants can be released on condition that they reside at *ad hoc* accommodation centres, where they would be allowed to leave and return during stipulated times.

These alternatives cannot, of course, be considered the only solution to the wider problem, which involves the perception of the migrants as a threat to national security and identity. This is why there is an urgent need to learn the actual critical conditions of the main sending countries, so as to be able to understand the "others", by regarding their concerns from their own point of view.[237]

It must be always kept in mind that these migrants are people who, most of the time, feel compelled to leave their own home-countries, due to dire poverty or because of environmental disasters. Moreover, they are people with families, hopes and dreams and the international community has therefore a moral and a legal obligation to protect them and to ensure the respect of their fundamental rights.

[236] UNHCR, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, February 1999, G. 4; United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/7/12, 25 February 2008, p.21.
[237] See, *inter alia*: Essinger, 1991, pp. 3-18.

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