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IMMIGRATION DETENTION

The fundamental interdependence of the legal and psychosocial dimensions in protecting the human rights of detained migrants

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Abstract

This paper is a journey through a rigorous and detailed analysis of a very topical phenomenon that affects millions of people all over the world: violations of the human rights of detained migrants.

The stages of this journey start with a global and regional overview, within the Council of Europe, of the phenomenon in question, relying on the most recent reliable sources, and then continue with an analysis from a legal point of view, especially thanks to the study of important judgments of the European Court of Human Rights, and then from a psychological and social point of view, with the contribution of an adequate literature.

Some countries will be examined in detail in order to avoid a disproportionate generalisation and to respect the presence of individual geopolitical factors.

This research aims to demonstrate the presence, vastness and dangerousness of this phenomenon and, at the same time, offer the hypothesis of an alternative method to strengthen the protection of the human rights of detained migrants at the international level, namely that based on the interdependence between the legal and psychosocial dimensions when analysing and judging on cases of this kind.

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Finally, a special thanks goes to myself, that once again I have made it, that despite everything I have achieved this goal and am already ready for the next one. Every dark moment, every night when 3 a.m. seemed never to pass, is giving way to dawn, and you just have to open your eyes and look.

Preface

The decision to investigate such a complex topic as the protection of the human rights of detained migrants from a dual perspective, legal and psychological, stems from a more general interest in the topic of human rights. This interest arose, in turn, during the lectures on International Human Rights Law given by Dr. Gabriella Cintroni during my Master's degree in 'International Law and Policy Design and Management'.

Moreover, the topic of migration has always been among my main interests both in the work and academic spheres, it has been a starting point since as far back as 2017 working for the SAI Project of Reception and Integration Service in Milan, it has been a point of arrival in my academic path at the Global Campus of Human Rights with this thesis, and it will be a point of arrival in my future work.

The migration issue in Italy is extremely delicate. An intricate mix of political, economic, geographical, legal and social factors make this issue very relevant in the national context and, in my humble opinion, it is always the foreigner who suffers.

Researching, listening, writing and disseminating reliable, objective information that respects human rights and the dignity of the migrant person is the main driving force that has prompted me to investigate this very complex topic, so that I can, through an increase in my personal cultural background, have the right knowledge to be able to write and disseminate fair and reliable information.

Introduction

The topic addressed in this paper is that of immigration detention resulting in human rights violations, especially in relation to the right not to be subjected to torture and inhuman and degrading treatment and the right to liberty and security, enshrined in Articles 3 and 5 of the European Convention on Human Rights respectively.

Three major parts characterise this research, and all three are necessary to fully understand the scope and multidimensionality of the phenomenon.

The first part offers a comprehensive overview of the phenomenon of immigration detention in the geopolitical space of the Council of Europe, including both a statistical account of the migration phenomenon affecting the 46 member states and an overview of the major pronouncements of relevant international organisations on the in question.

The second part focuses on the international legal protection of detained migrants. The basis for the principles of justice and respect for human rights is a vast array of legal documents (binding and non-binding), pronouncements, rulings, research and actions that the international community has produced over the years, to a relevant level of protection, but which, unfortunately, does not fully protect against critical aspects that will be analysed. In light of the vastness and diversity of geographical, political and economic situations among the CoE member states, it was decided to propose four national focuses on member states that are very different from each other in terms of immigration and the detention of migrants, but have in common the critical issues that emerge in the cases brought before the European Court against them.

The third part, on the other hand, offers an analysis of the phenomenon from a completely different but at the same time complementary perspective to the legal one, namely from a psychological and social perspective. The contributions of the social sciences come to our rescue both in order to understand what may be the real weight of the phenomena of torture and inhuman and degrading treatment of detained migrants and to try to hypothesise the directly proportional relationship that there may be between the contributions of social psychology in analysing the violations that have occurred, between the reparation measures implemented by the Court and between the real level of present and future protection of the human rights of detained migrants.

Metaphorizing a delta river mouth, numerous branches and tributaries symbolise individual factors of the human rights protection situation of detained migrants, and they are mentioned and analysed with their own legal and psychological references. Some of them are related to purely legal dimensions, such as the recognition of international protection, and others more related to the concept of social and individual vulnerability, such as recovery from the trauma that the migratory journey has left behind. Like a delta river mouth, however,

all the branches flow into the great basin of human rights, as the ultimate goal is to strengthen their protection and enshrine their inviolability.

The subject matter is very complex, especially when one decides to analyse it from a dual perspective, the legal and the psychological. However, the ultimate aim is not to demonstrate which of the two best investigates and protects the fundamental freedoms of detained migrants, but rather to hypothesise and lay the groundwork for the demonstration of a strong interdependence between the two dimensions, showing how they, pursuing the same end, can mutually complement each other and be concretely applicable also to one of the most relevant and important levels of international human rights protection, namely that of the European Court.

CHAPTER ONE. OVERWIEW ON IMMIGRATION DETENTION

Geopolitical, legal and social context of immigration detention

The European social, political, legal and economic context, as much as the global one, has been mutually influenced by the migration issue for years now. It is now clear how the macro theme of migration is a multi-dimensional phenomenon that can be analysed from a variety of perspectives. Doing qualitative and quantitative research and analysis focusing on the topic of the detention of migrants requires, first of all, to be aware of the general overview of the phenomenon in the European system, both in terms of the current situation and the changes that have taken place over the years.

A first practical point that needs to be highlighted concerns the geopolitical framework of what we are about to analyse in detail. Migration is, by its very nature, a process involving two or more states, the one of departure, those of transit, and those of arrival (which, of course, may also become transit zones). This paper will analyse phenomena, situations, contexts and scenarios that occurred in Council of Europe member states, where they were countries of transit and/or arrival, not countries of departure.

First of all, it has to be pointed out that what is, and will be, called the 'European system' or 'European space' refers to the member states of the Council of Europe, which currently has 46 member states, whose legal organ of reference is the European Court of Human Rights, also known by its acronym ECtHR. Its official seat is in Strasbourg and it is composed of 46 judges, one for each member state of the Council of Europe. It is an international court established by the 1950 European Convention on Human Rights, which, together with the 16 Additional Protocols to the Convention, is the binding legal instrument of the European system. The European Court has jurisdiction over all 46 states of the Council of Europe that have ratified the European Convention on Human Rights. Numerous judgments of the ECtHR will be examined and for this reason it is essential to clarify their scope.

In the field of immigration, the jurisprudence of the ECtHR is extremely broad and peculiar in the quality and quantity of specific topics dealt with. Immigration detention is certainly among the topics that have been the subject of the most rulings and pronouncements by the Court, as we will see below.

But in such a wide range of scenarios and nuances, it is crucial to clarify what, really, is meant by immigration detention. Etymologically, it is a concept made up of two large conjoined parts, 'detention' and 'immigration'. Detention is a very broad limbo of scenarios that generally includes arrest and detention, detention and imprisonment.

Among the fundamental documents defining these circumstances at the international level are, first of all, the 1988 'Principles for the Protection of All Persons Subjected to Any Form of Detention or Deprivation of

Liberty', stipulated by the UN General Assembly in Resolution 43/173. These principles define the following: 'Arrest' refers to the act of apprehending a person for the alleged commission of an offence or the action of an authority; 'detained person' means any person deprived of liberty, except as a result of a conviction for an offence, and this defines the concept of 'detention'; and, finally, 'imprisoned person' refers to any person deprived of liberty as a result of a conviction for an offence, and this defines the concept of imprisonment[1].

Article 4 of the Optional Protocol to the Convention Against Torture[2] defines deprivation of liberty as 'any form of detention or imprisonment or placement of a person in a public or private custodial environment which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.

Thus, within this paper, whose research will be mainly based on sources derived from international human rights law and international humanitarian law, we can understand detention as any form of deprivation of liberty from the moment of arrest until the moment before release, including detention in detention centres, migrant reception centres or any other place where one or more of these circumstances occur: freedom of movement is deprived or restricted and there is active jurisdiction of a member state exercised by an agent of the state.

The concept related to detention is, of course, that of immigration.

The Immigration Glossary compiled and published by IOM[3] clearly illustrates the main definitions in the field of migration. This document, which is an extremely relevant tool on a legal as well as a sociological, linguistic and colloquial level, contains important and clear information on the appropriate terminology for trying to find one's way through the intricate world of migration. Indeed, as the IOM itself states, inappropriate terminology can have discriminatory and social consequences for the individual.

While there is no universally recognised legal definition for migrant status, for the concept of refugee, on the other hand, we can find it in Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees.

However, in this paper, the use of the term refugee will only be used in circumstances and cases where the status of the person(s) in question is specifically defined by national or international law, as it is not refugee status that is the target of analysis, but rather irregular migrant status.

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[1] Assembly, U. G. (1988). Resolution 43/173: Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. New York: United Nations (http://www. nchre. org/readingroom/undocuments/bpi1. shtml).
[2] Murray, R., Steinerte, E., Evans, M., & de Wolf, A. H. (2011). The optional protocol to the UN convention against torture. OUP Oxford.
[3] The IOM (International Organization for Migration) is an international organisation founded on December 6, 1951 that deals with migration. The headquarter is in Geneva, Switzerland, and the General Director is António Vitorino.

A general statistical overview can certainly help to understand the magnitude of the phenomenon we are about to deal with.

Migration has affected the European continent for many decades. In the following decades of the second half of the last century, the European continent experienced intense and prolonged periods of economic progress, better social protection and increased consumption, factors to which migrants (most of whom arrived with some degree of freedom, compared to the recent past) contributed, making Europe more diverse and cosmopolitan. Freedom of movement became a cornerstone of European cooperation [Calzolaio, 2020]. [4]

From the post-World War II period to the present day, migration flows into Europe, thus excluding emigration from Europe and internal migration, have been steadily increasing. While in 1960 there were between 5 and 10 million non-EU citizens in the European Union [Bettin, Cela 2014], over the years the number of migrants, i.e. people born in non-EU countries and then arriving in a member state, has been increasing due to armed conflicts, famine and natural disasters, both in terms of regular and irregular migration[5] . The latter presented very high numbers: in 2022, the number of irregular EU border crossings was 64 per cent higher than in the previous year, with approximately 330,000 crossings[6] . The European Commission has collected data published by Frontex and Eurodac to provide a demographic overview of migrants in Europe. In 2021, 23.7 million people in Europe were citizens of non-EU states, while another 37.5 million people were EU citizens but born in non-EU countries, i.e. migrants who acquired European citizenship[7] .

Of course, one must consider that the reference system of this paper is not the EU, but the Council of Europe, a vast geopolitical space that includes 46 member states 750 HR million km^2 and almost 700 million people. Each ECthR judgment that will be analysed therefore concerns cases of potential or actual human rights violations that occurred in the territory of one of the 46 member states or in any portion of land or maritime territory where, at that time, there was jurisdiction and/or control by agents of a member state.

The statistics in the CoE database do not report unambiguous data on total migration flows to member states. However, a demographic study carried out by the CoE, Frontex and the Ministry of Foreign Affairs of Spain, report data on regular and (to the extent traceable) irregular border crossings in Western Europe from 2015 to 2023 of 3,450,800 persons[8] . Other data from the CoE concern migration flows to Eastern Europe, which from

[4] Shoemaker, V. (2020). Recent European migrations 1945-2019: no people are autochthonous.
[5] The historical evolution of migration flows in Europe and Italy / G. Bettin, E. Cela. - Venice : UNESCO Chair SSIIM, 2014. - ISBN 978-88-87697-99-5.
[6] Source: Monitoring and risk analysis (europa.eu)
[7] Source: Statistics on Immigration in Europe - Statistics on Immigration in Europe
[8] Source: Illegal border crossings into EU up 61% in first two months of 2022 (europa.eu)

2015 to 2023 are about 12 million[9] . Of these 12 million, 60 per cent concern migration flows to Turkey. The country of Turkey, following the civil war in Syria that started in 2011, took in around seven million refugees, most of whom began their migration path following the events of 2014, in which an international coalition led by the United States of America, Jordan, Bahrain, Qatar, Saudi Arabia and the United Arab Emirates began bombing ISIS[10] .

In the 'Migration' section of the Council of Europe's official page, there is a figure of 214 million migrants on the territory of the CoE[11] , i.e. the number of people who were not born on the territory of a member state. We are therefore talking about a geopolitical space with a very high demographic intensity, as the current population of all member states of the Council of Europe, even after the exclusion of the Russian Federation, is an impressive 645 million people, which added to the previously reported figure of the number of migrants, comes to 859 million. According to the rules of international law and international humanitarian law in force, every one of these persons, and every person in any geographic area on land or sea where there is effective control by a member state, irrespective of nationality, sex, gender, age, sexual orientation, political preference and creed, is equally and fully protected by the European Convention on Human Rights and has the possibility of asserting his or her rights before the Court following one or more violations of the 59 articles of the Convention.

The reported figures are, of course, subject to the fluidity of the immigration phenomenon and should therefore be taken roughly. Of the 214 million migrants present in the Council's territory, of course, only a small percentage are detained in reception centres as a result of irregular immigration and/or are there awaiting the execution of a return order. There is no data regarding the total number of the target group in question, again with geopolitical reference to the CoE, both because the stay in these centres should only be temporary and because each state, as sovereign and autonomous in the implementation of the model of reception and detention of migrants, establishes the management architecture which, although it must be in accordance with international standards, can be of different levels and organisations than that of another state, depending on its own domestic immigration law.

At this point, it is essential to extrapolate from the various sources of international law one or more unambiguous and universally or regionally recognised definitions of immigration detention.

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[9] Source: EU action to address the migration situation in Turkey - Consilium (europa.eu)
[10] Lutte contre Daech (2014). la coalition des 22 réunie à Washington en quête d 'une stratégie. Le Parisien [online].
[11] Source : The Council of Europe: guardian of Human Rights, Democracy and the Rule of Law for 700 million citizens - Portal (coe.int)

Point 8a, within the Basic Document on Immigration Detention CPT/2017/3, offers a structured definition of what immigration detention is and the dynamics involved:

> *<< Immigration detention is a form of detention in force in most Council of Europe member states against migrants due to certain facts and circumstances.*
>
> *(...)*
>
> ***In other words, the detention of immigrants should be exceptional, proportionate and, by implication, a necessary individual measure to prevent illegal immigration.***
>
> *In line with its administrative nature, immigration detention should not be punitive in nature: it is not a sanction or punishment. Therefore, immigrant detainees should be in material and regime conditions appropriate to their legal situation. >>*[12]

These principles of exceptionality and the ultimate purpose of detention are two elements of great relevance to the protection of migrants' human rights. They are also two fundamental pillars of the analysis proposed in this paper.

The ECtHR has also spoken out clearly and unequivocally on the issue of the detention of migrants, providing a comprehensive interpretation of Article 5 of the ECHR. In the latest version of the 'Guide on the case-law of the European Convention on Human Rights' published on 31 August 2022, the Court stated the following:

> *<< Article 5 § 1(f) of the Convention allows States to control the liberty of aliens in an immigration context in two different situations.*
>
> *The first limb of that provision permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorisation to enter.*
>
> *Under the second limb of Article 5 § 1(f), States are entitled to keep an individual in detention for the purpose of his deportation or extradition. This includes detention for the purposes of surrender under the European Arrest Warrant>>.*[13]

The ECtHR jurisprudence on immigration detention boasts a very wide range of case types that, to varying degrees, have affected all CoE member states. What the ECtHR and the Council of Europe's European Committee for the Prevention of Torture and Inhuman and Degrading Treatment have established is also of great importance in order to identify the target population for this thesis. The target population, as we will see later

[12] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), March, 2017, CPT/Inf(2017)3

[13] European Court of Human Rights. (2020). Guide on the case law of the European Convention on Human Rights. Prisoners' rights.

in more detail, is a specific category of people: migrants detained in sorting, reception and repatriation centres in order to prevent their irregular entry or stay in the country or in view of a removal or expulsion order with repatriation.

On purpose, all migrants detained in 'common' detention centres 'for offences outside the scope of irregular entry or stay' are excluded from this target group, as their detention status does not relate to the irregular migration route, but to conduct contrary to the member states' criminal procedure codes.

In fact, although there are countries where a part of migrants, who have entered or stayed irregularly in the territory, are detained in common prisons, in most member states most migrants are detained in special detention centres. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment of the Council of Europe, in fact, draws up annual reports following expeditions to the various states on the state of detention of the migrant population. The same Committee has, in numerous annual reports, made it clear that the detention of migrants for irregular entry and stay should not take place in common prisons in order to respect the protection and safeguarding of people's psychophysical conditions and human rights:

> *<<In the CPT's opinion, a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence..>>*[14]

The European Court of Human Rights has also ruled on this issue. In Saadi v. the United Kingdom in 2008, the Court stated that migrant status, in itself, represents a condition of vulnerability and that, in light of this, there is a need for special protection that cannot be fully guaranteed in cases of migrants' imprisonment in prisons and communal cells.[15]

As William McDonald argues in '*Sociology of Crime, Law and Deviance -Volume 13 - Immigration, Crime and Justice*', despite the differences and individuality of national migration systems, any person who intends to migrate, whatever the mode, reason, destination or origin, must pass through the receiving mechanism of the country of entry, which provides the authorities with the entry trail and manages the stay process. It is therefore reasonable to assume that every migrant, for a long or short period, must leave his or her fate in the hands of the receiving state[16] . Translated into practical terms, every migrant is, sooner or later, subject to the authority of the state, which, depending on the rules of its national law, will act in a certain way, either by issuing documentation or by arranging for detention with a view to forced repatriation. At the precise moment

[14] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), March, 2017, Safeguards for irregular migrants deprived of their liberty- CPT/Inf(2009)27-part
[15] European Court of Human Rights, Saadi v. United Kingdom, Application no. 13229/03, 29 January 2008, Strasbourg, [GC], § 74.
[16] McDonald, W. (Ed.). (2009). *Immigration, crime and justice*. Emerald Group Publishing.

when this happens, i.e. during the time when the person is subject to the control of state authority, international human rights law comes into play by ensuring a fundamental level of protection for the individual, who, confronted with state authority, especially if he or she belongs to a vulnerable category such as migrants, must enjoy full respect for his or her fundamental rights and freedoms.

As stated by the experts of PICUM, a network of organisations, in partnership with the European Commission, that offers legal assistance and advice for the rights of undocumented and irregular migrants, around 100,000 people are detained in Europe every year solely due to their irregular immigration status, which may start from the moment they set foot on European territory, thus with irregular entry, or may arise during their stay due to the loss of residence requirements, usually as a result of losing their jobs and their documents expiring or not being renewed. Every day, dozens of migrant children and adults are detained in immigration detention centres, often without knowing when they will be released or deported. As we will see in the following parts of this paper, alternative approaches are constantly being developed to manage this phenomenon, and the one that, according to statistics, is most likely to be successful is case management, which, as we will see, allows migrants in an irregular situation to stay in the community and not in detention centres[17] .

Deprivation of freedom of movement while awaiting documentation and/or repatriation is a condition that severely strains the individual and social safety of the person, who is often forcibly separated from his or her family.

The WHO Regional Office for Europe[18] has repeatedly denounced the danger of immigration detention in Europe, stating that in these centres there are, among others, problems of overcrowding, poor nutrition and reduced or lack of access to fresh air and exercise, risk of injuries, infectious diseases and mental disorders, which make this detention similar or worse to prison detention, with which there should be nothing in common. Particularly vulnerable are children, who should not be detained, but in 2019, according to the WHO Regional Office for Europe, this was the case in as many as 40 out of 53 countries in the WHO European region[19] .

There is a further factor that, in Council of Europe member states as in every other state in the world, plays a key role in relation to the protection of migrants' rights and the management of migration flows: the national policy framework. Although there are regional and universal standards in place for the protection of migrants'

[17] Keith, L. (2020). PICUM Submission on ending immigration detention of children-May 2020-EN.
[18] The WHO Regional Office for Europe (WHO/Europe) is one of WHO's six regional offices around the world. It serves the WHO European Region, which comprises 53 countries, covering a vast geographical region from the Atlantic to the Pacific oceans.
[19] World Health Organisation. (2022). Addressing the health challenges in immigration detention, and alternatives to detention: a country implementation guide. In Addressing *the health challenges in immigration detention, and alternatives to detention: a country implementation guide, 2022.*

human rights, each state is sovereign in preparing its own model of reception and integration. There are countries that have adopted more 'open' migrant policies and countries that adopt extremely restrictive approaches.

An example of a member country with a very restrictive approach to immigration is Italy. The Italian reception and integration model is extremely complex. Under Italian law, the path to citizenship from the moment one enters the state's territory and comes from non-EU countries can be as long as 15 years[20] (not counting any administrative delays). Moreover, the forced detention of migrants who have entered or stayed irregularly in the territory and are awaiting expulsion or removal takes place in the Centres of Permanence for Repatriation (CPR), whose maximum duration established by Legislative Decree 286/1998 is 120 days. The most recent Openpolis report, however, denounced cases of stay in CPRs of more than a year and a half. This is due to the political manoeuvres that, over the last five years, have continued to modify and stiffen the political and legal system of immigration[21] .

It is reasonable to assume that countries with a more restrictive approach to the integration and reception of migrants are more exposed to possible human rights violations. This is confirmed by the jurisprudence of the European Court of Human Rights, which has ruled numerous times in recent years on cases against Italy following alleged and actual human rights violations of migrants who were illegally detained and/or deported (Darboe and Camara v. Italy, 2022; Sharifi and Others v. Italy and Greece, 2014, S.Y. v. Italy, 2021, Khlaifia and Others v. Italy, 2016).

Italy is only one of the CoE member states that present these serious critical issues in relation to the detention of migrants. Subsequently, many cases from different countries will be analysed, with a particular focus on the Spanish case, where it is important to mention the cases of massive human rights violations that occurred in the Spanish territories of the African continent Ceuta and Malilla, the Turkish and Greek case, for episodes of torture and inhuman and degrading treatment in detention centres, and the Hungarian case for the illegal detention of migrants at the country's borders.

At this point, it is important to summarise the key points touched upon in this general overview, which gives us the opportunity, in the following parts, to analyse in detail what are the more specific topics of this paper, namely the conditions of detention of migrants in the facilities provided, the vulnerability of the detained individuals, possible human rights violations, the approach of the European Court and the sociological perspective of the phenomenon of migrant detention and the situations described.

[20] Source: Italian Citizenship - Asgi
[21] Source: The migrant reception system is far from collapse - Openpolis

Migration is a multidimensional and extremely complex phenomenon, which has always been a subject of study in the major branches of sociology and philosophy, but also a fundamental pillar in national and regional legal systems. In the vast area of the Council of Europe, large-scale migration flows have occurred and are still occurring, leading to a massive presence of migrants in the member states, which to date is estimated to be around 214 million people. International treaties and every binding legal document set minimum standards for the treatment of migrant populations, while rulings and judgments by legal bodies highlight their special vulnerable status. However, each state is sovereign in implementing its model for the reception and integration of migrants, which also includes the structure of its detention model. There are countries that adopt more or less restrictive approaches to reception and integration, depending on various factors such as geographical location, internal order, political current and socio-economic situation. In any case, every migrant, at the end or during his or her migratory journey, is subject to the authority of the state of arrival or transit, being in a passive position with respect to the dynamics that influence his or her present and future condition: social and individual vulnerability, national and international law and state authority. Migrants, who enter and/or stay illegally in the territory of a state, are subject to removal or expulsion orders (always based on national law), which may be preceded by a period of detention and imprisonment in pre-arranged detention facilities. In these facilities, as we will see in the following parts, numerous human rights violations take place, and have taken place, on which the European Court has pronounced several judgments against various states that have ratified the European Convention on Human Rights, the substance of which will be analysed in terms of the violations found and the approach maintained by the Court in relation to the condition of "special vulnerability" sanctioned by the Court itself, supplemented with a sociological perspective, which could be decisive in understanding the real gravity of the events that occurred and offer new perspectives of analysis and reasoning.

CHAPTER TWO.
INTERNATIONAL PROTECTION OF DETAINED MIGRANTS

2 Legal framework of international protection: global and regional level

The protection of the human rights of detained migrants does not only derive from the ECHR and court rulings. The layer of international legal protection is constantly expanding and member states of international organisations have an obligation to adapt to treaty standards. Detained migrants are generally protected at three levels: global, i.e. at the UN level; regional, i.e. by the European, Inter-American, African or Asian system of reference; and domestic, by the national law of the state.

At a global level, international human rights law offers a clear and comprehensive protection framework for all persons, including migrants, who are deprived of liberty: art 3, 9 of UDHR, art 9 of ICCPR, art 9 of Human Rights Committee General Comment 35 (Liberty and Security of Person), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Standard Minimum Rules for the Treatment of Prisoners ("Nelson Mandela Rules"), United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ("Bangkok Rules"), United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") and United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

Among the key global documents is the International Migration Law Information Note - International Standards on immigration Detention and Non-Custodial Measures - (Appendix B), published by the IOM in November 2011. This document is based on the fundamental principles on standards of detention in Article 10 of the ICCPR in the UN Standard Minimum Rules for the Treatment of Prisoners and in the Articles 10 and 11 of the International Convention Against Torture also protect the rights of those deprived of their liberty.

Specifically with regard to the detention of migrants, several documents protect their conditions from a threefold perspective: the first concerns the fact that detention must be non-arbitrary and necessary for the prevention of illegal immigration, the second concerns compliance with internationally sanctioned standards of detention, and the third concerns the prohibition of depriving children and particularly vulnerable individuals of their liberty.

Among the most important documents are the UNHCR's 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention'[22] , the IOM key document 'Migration Detention and Alternatives to Detention' and a series of reports and pronouncements by the UN General Assembly on the topic of immigration detention[23] .

The work of the United Nations in the protection of detained migrants seems, however, to be more focused in the area of detained migrant children [Wilsher, 2020], in fact the 'Report on ending immigration detention of children and seeking adequate reception and care for them' issued by the Special Rapporteur on the human rights of migrants Felipe González Morales during the General Assembly at its 75th session, October 2020 is a very reliable document for understanding the vastness of this phenomenon:

> *<<12. Every day, all around the world, migrant children are detained, whether alone or with their families, on the basis of their or their parents' migration status. At least 330,000 children are detained for migration-related purposes every year and 77 States are known to still detain children for migration-related reasons.>>.*

The fact that the United Nations has issued more documents and pronouncements in relation to the issue of detained migrant children is not, however, to be understood as a kind of neglect of the adult migrant population in detention centres. However, child detainees represent a sort of 'priority' on the UN's international agenda, especially since it is an ever-growing phenomenon that, on a physical and emotional level, can leave a child with wounds and traumas that are much more difficult to face and overcome, precisely because of the child's natural vulnerability. According to medical reports analysed by PICUM, 85% of children who are detained in immigration centres present side effects on their mental health, including post-traumatic stress, depression and suicidal thoughts[24] .

As far as the detention of adult migrants is concerned, the systems of international law that have, to the greatest extent, analysed developments and produced significant progress towards possible solutions are the regional ones [Wilsher, 2020][25] , especially the European one. Operating within this system is the European Court of Human Rights, which is based in Strasbourg and consists of 46 judges, one from each member state of the

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[22] UN High Commissioner for Refugees. (2012). Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention.

[23] **A/HRC/47/30** (12 May 2021); **A/RES/75/226** (20 Dec 2020); **A/75/542** (26 Oct 2020); **A/75/292** (5 Aug 2020); **ST/ESA/SER.A/441** (2000); **A/HRC/EMRIP/2019/2/Rev.1** (18 Sept 2019); **A/HRC/41/38** (15 Apr 2019); **A/RES/73/195** (19 Dec 2018); **/CONF.231/3** (30 July 2018); **A/72/643** (12 December 2017); **A/71/728** (3 February 2017); **A/HRC/34/31** (26 January 2017); **A/RES/71/1** (19 September 2016); **A/RES/70/296** (25 July 2016); **A/70/59** (21 April 2016) and **A/69/302** (11 August 2014).

[24] Source: Momentum builds towards ending detention of children - PICUM

[25] Wilsher, D. (2020). Detention of asylum seekers and refugees and international human rights law. In *The Challenge of Asylum to Legal Systems* (pp. 145-268). Routledge-Cavendish.

Council of Europe. The European Court is a body of international jurisdiction established by the 1950 European Convention on Human Rights, which, together with the 16 Additional Protocols to the Convention, is the binding legal instrument of the European system. The European Court has jurisdiction over all 46 states of the Council of Europe that have ratified the European Convention on Human Rights.

This is an external mechanism to that of the European Union, but their cooperation and collaboration is enshrined in several official documents, which also concern human rights and migration issues. In fact, both the Council of Europe and the EU have analysed and ruled on immigration detention.

As the Council of Europe's European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment has stated, a prison is by definition not an appropriate place to detain migrants who arrive or stay illegally[26] . The same reasoning applies to detention areas located at a country's main entry points, airport transit areas and police stations and police stations. In these facilities, detention, where necessary for the sake of security and public order, must be limited to the minimum necessary and must not exceed a maximum of 24 hours[27] .

The standards that migrant detention practices should maintain are fundamental to respect for the dignity of the individual, and concern not only with the human rights standard, but also with the criterion of necessity, type of facility and staffing, detention status and protection of vulnerable groups.

At the level of the Council of Europe, although no single, binding document has been drafted and published on the topic of immigration detention, the principles to which the Council refers are the same as those enshrined in UN bodies and international law on detention and immigration.

Particularly relevant is the work of the Committee of Experts On Administrative Detention Of Migrants (CJ-DAM), a committee set up under the auspices of the Council of Europe's Committee on Legal Affairs, consisting of 12 experts appointed by as many Member States, whose main aim is to codify existing international standards concerning the conditions under which migrants should be detained in closed administrative centres and, where appropriate, other places of non-criminal detention, in the form of a recommendation by the Committee of Ministers and using the European Prison Rules as a model[28] . The work of the Committee concluded with the promulgation of a very detailed report by the General Rapporteur Mr Christoph Henrichs, consisting of 44 key points divided into three sections. This report provided a specific overview of how the rules and

[26] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), March, 2017, CPT/Inf(2017)3
[27] 7th General Report on the CPT's activities, paragraph 27.
[28] Source: 1680792af4 (coe.int)

measures adopted internationally in relation to the detention of migrants should be interpreted in order to fully and unequivocally safeguard the fundamental rights and freedoms of the individual:

> *<<30. One particular point of concern raised was the question whether the rules on the use of force are sufficient and adequately defined. They are phrased in rather general terms (I.2, I.4) and lack more detailed provisions on who is entitled to use force, what kind of force and under what circumstances. >>* [29]

The European Prison Rules set out 108 rules in nine sections, and are a fundamental document for the protection of detained persons, and migrants held in reception or detention centres for repatriation are included in the protected category. It is precisely the first principle of Part One that, by its very nature, does not limit the application of the following rules to 'common' prisons only:

> *<< Part I*
>
> *2 All persons deprived of their liberty shall be treated with respect for their human rights.>>*[30]

Despite the fact that different mechanisms and institutions are involved, the 'European Prison Rules' are also taken into account at EU level, to the extent that the EU institutions contributed to the drafting of the 'Short guide to the European Prison Rules'.

Besides these rules, other fundamental documents for the protection of detained migrants (and for the ultimate purpose of this paper), published by the Council of Europe, are held in high regard by the EU and other international human rights bodies, namely, in example the '*10 Guiding Principles on Detention of Asylum Seekers and Irregular Migrants'* by the Parliamentary Assembly of the Council of Europe (PACE, Resolution 1707(2010)). "HUMAN RIGHTS AND MIGRATION - Legal and practical aspects of effective alternatives to detention in the context of migration" Analysis of the Steering Committee for Human Rights (CDDH), adopted on 7 December 2017 by the Council of Europe. Continuing wiht *"High time for states to invest in alternatives to migrant detention"* adopted on 31 January 2017 by the Council of Europe, a document that outlines a five-step plan to abolish migrant detention:

1. Include clear alternatives in law and policy
2. Developing a well-stocked toolbox of alternatives
3. Present a roadmap and a fixed deadline for the abolition of child detention
4. Planning the exchange of good practices

[29] NYS, P. H. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION (CDCJ).
[30] Council of Europe. Committee of Ministers. (2006). *European prison rules*. Council of Europe.

5. Improve data collection on migrant detention practices across Europe.

All of these documents are of great importance on a European level and have been taken into relevant consideration by one of the most important European institutions in the area of migration and its sub-area of immigration detention, namely the European Migration Network, a European Union body of migration and asylum experts who work together to provide objective, comparable and policy-relevant information and knowledge on emerging asylum and migration issues in Europe. The EMN has and still does take part in collaborations with other international institutions, especially the Council of Europe.

The EMN, with its multidisciplinary membership and international relevance, is certainly a very valuable source of data and information on migration issues. Of great relevance is its 'Annual Report on Migration and Asylum', which is one of the most reliable documents reporting on the most significant political and legislative developments of migration and asylum-related topics, including the topic of detention. In addition to this document, the EMN publishes Country Factsheets with data and details on the geopolitical context of each country and National Reports in relation to the countries identified as most sensitive to migration in the year in question[31] . These country reports will be very relevant in the subsequent parts dedicated to country focuses.

2.1 Violation of Human Rights of Detained Migrants: ECtHR's jurisprudence

The European Court of Human Rights 'boasts' extensive jurisprudence on immigration detention, and it is still a current topic in recent rulings.

In this sub-chapter of this paper, the approach that the ECtHR has taken, and still takes, in cases of human rights violations in immigration detention situations is analysed, with a particular focus on a few countries.

There are cases of this kind against almost all CoE member states. Immigration and detention for the purpose of preventing the illegal entry and stay of foreigners is, in fact, a topic that affects all European countries, albeit to varying degrees. Each country, as explained above, adopts its own domestic laws and implements its own mechanisms for managing incoming migration flows. Each state therefore has its own territorial centres where migrants are detained. Before this, however, a clarification regarding the concept of territoriality is in order. Most migrants are held in detention centres within the state's borders, and obviously managed by agents of the state itself. But migration is, by its very nature, a dynamic phenomenon, not a static one, even in terms of territoriality, and migrants are often detained in places that, geographically, are not on state territory. Clear

[31] Source: Country factsheets (europa.eu)

examples are the ships of the national navy, the barges that are subject to the control of the state authorities, the portions of territory that are militarily occupied, the means of transport on which migrants are transferred or repatriated, and so on. In these circumstances, the vulnerability of detained migrants is equally exposed to possible violations, and the state is responsible for their safety, security and respect for human rights despite the fact that they are physically outside state territory. The European Court of Human Rights has ruled on this issue in several cases of human rights violations that occurred in territories outside state land but in circumstances where there was physical control, by agents of the state, over an individual. The judgment that untied this legal knot on territoriality is from the 1995 case Loizidou v. Turkey, in which the European Court of Human Rights stated:

> *<< 62. In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. (...)>>*[32]

In most of the cases that will be analysed, the violations revolve around specific rights, which we can consider to be the most vulnerable to human rights violations in detention cases: the right not to be subjected to torture and inhuman and degrading treatment, enshrined in Art 3 of the European Convention, and the right to personal liberty and security, enshrined in Art 5 of the Convention.

Obviously, the individuality of cases and the great variability of circumstances means that there is no closed list of rights that may be violated in immigration detention.

Detention is, by its very nature, a condition of restriction of personal liberty and a form of exclusion from society for the purposes of re-education and safeguarding society as well as the individual himself. This deprivation of liberty has, without any doubt, effects on all the individual and social dynamics of the individual, in fact the range of human rights of the detainee who are catapulted into a condition of extreme exposure to violations is very wide. As the jurisprudence of the various human rights mechanisms shows, among the human rights most often violated in cases of detention are the right to respect for private and family life (Art 8 ECHR), the right to freedom of thought, conscience and religion (Art 9 ECHR), the right to freedom of expression (Art 10 ECHR) and the prohibition of all discrimination (Art 14 ECHR). In light of this, the detained individual, given his condition that exposes him to violations, has the right to be protected and fully enjoy all his rights enshrined in international and domestic legal systems. In accordance with European human rights law, the protection offered by the European Convention does not stop at the gate of the prison or detention facility *(Khodorkovskiy and Lebedev v. Russia, 2013, § 836; Klibisz v. Poland, 2016, § 354)* and detainees

[32] European Court of Human Rights, Case of Loizidou v. Turkey, No. 46347/99, 22 March 2006, Strasbourg para. 17.

continue to enjoy the fundamental rights and freedoms guaranteed by the ECHR. Any restriction of rights must be justified, and the justification must be for the sole purpose of safeguarding the safety of the community and preventing crime or disorder. Fundamental individual rights such as personal liberty may, therefore, be restricted on the basis of what is enshrined in law, but not infringed, i.e. restricted in an arbitrary or unjustified manner. Other rights must, on the other hand, be fully guaranteed without any possibility of derogation or exception, i.e. the rights enshrined as non-derogable in Art. 15 of the ECHR, i.e. Art. 2, except in respect of deaths resulting from lawful acts of war, or Art. 3, 4 (para. 1) and 7 must be carried out in accordance with this provision.

But the rights that must be guaranteed to prisoners are not limited to the mandatory ones just mentioned: prisoners must enjoy the right to freedom of expression, worship, religion, thought, correspondence and the right to a legal defence *(Hirst v. the United Kingdom (no. 2) [GC], 2005, § 69).*

On the subject of immigration, the European Court has laid down several principles that need to be highlighted in order to fully understand the dynamics of the cases that will be cited. First of all, it is important to re-emphasise that states have the right to control the entry, stay and expulsion of foreigners. At the same time, it is necessary that this control over these 'migratory dimensions' takes place with respect for fundamental rights and the dignity of the person. The matters on which the Court has pronounced itself the most concern cases in which the actions of the state result in the production of violations of Article 3 of the ECHR, i.e. freedom from torture and inhuman and degrading treatment. These situations ramify between cases of degrading or arbitrary conditions of detention and detainment *(Riad and Idiab v. Belgium, 2008, § 65)*, rejection at the border or *push back of* asylum seekers without adequate assessment of the merits of the claim *(J.A. and Others v. Italy, 2023, § 49)* and failure to protect the rights of individuals belonging to vulnerable categories *(Khasanov and Rakhmanov v. Russia [GC], § 107).*

In addition to Article 3, the Court has often ruled individually or jointly on alleged violations of Articles 5 and 8, the right to personal liberty and the right to respect for private and family life.

The topic of immigration detention encompasses these two scenarios that we can classify as vulnerable to the dignity of the person, so much so that at the international European level, the ECtHR has enshrined several principles.

The first among them is certainly related to Article 3 of the ECHR:

> *<< The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (...)">>* [33].

Many important Court judgments have analysed different situations of violations of Article 3, illustrating how flexible the concept of torture and inhuman and degrading treatment is. There is, in fact, no closed list of practices that can be classified as torture or inhuman and degrading treatment[34] , and this is a fundamental concept for the protection of the individual, not least because, otherwise, it would invite the imagination of torturers and cause numerous legal problems. There is not even a categorisation of the types of what can be torture, nor a hierarchy between the physical and mental level, precisely to preserve the most complete protection of the individual in all circumstances. Instead, there is a subtle division, discernible through the Court's jurisprudence, of the difference between torture and inhuman and degrading treatment, but not in terms of classifying a practice or act as torture or inhuman and degrading treatment, but rather in relation to certain indicators. First and foremost, the severity of the act committed, which must be serious and cruel *(Ireland v. the United Kingdom, 1978, § 167)*, must be absolutely intentional, i.e. with the intention of inflicting serious harm and causing excruciating suffering to the victim *(Petrosyan v. Azerbaijan, 2021, § 68)* and must have a purpose or aim, often that of obtaining a confession *(Selmouni v. France [GC], 1999, § 97)*. Some examples of violations classified as torture concern the most heinous actions that humiliate and annihilate a person's dignity, such as torture in detention *(Aydın v. Turkey, 1997, §§ 83-87, Maslova and Nalbandov v. Russia, 2008, § 108)*, deprivation of sleep and basic necessities *(Batı and Others v. Turkey, 2004, § 110 and §§ 122-124)*, beatings by police officers *(Satybalova and Others v. Russia, 2020, § 76)* or even mental and psychological torture *(Gäfgen v. Germany [GC], 2010, § 108)*.

With regard to the distinction between torture and inhuman and degrading treatment, it may derive, therefore, from the intensity of the suffering inflicted *(Ireland v. the United Kingdom, 1978, § 167)*, where examples may include prolonged detention in very poor conditions, such as solitary confinement *(Al Nashiri v. Romania, 2018, § 675 and Simeonovi v. Bulgaria [GC], 2017, § 90)*, cases of intentional destruction or deprivation of living places with serious consequences in the living conditions of the applicants *(Hasan İlhan v. Turkey, 2004, § 108)*, periods of prolonged suffering by a family member as a result of forced or involuntary displacement *(Musayev and Others v. Russia, 2007, § 169)*, situations where vulnerable individuals are subjected to excessive punitive treatment *(Chember v. Russia, 2008, § 57 and Price v. the United Kingdom, 2001, § 30)*.

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[33] European Court of Human Rights, Case of M.S.S. v. Belgium and Greece (application no. 30696/09), Grand Chamber judgment of 21 January 2011, §§ 216-218).
[34] Erdal, U., & Bakırcı, H. (2006). *Article 3 of the European Convention on Human Rights: A practitioner's handbook* (Vol. 1). OMCT.

Many migration-related cases are linked to Article 3 violations for inhuman and degrading treatment. For example, cases in which foreign minors have lived in precarious conditions in the country of arrival due to the state's failure to take care of them *(Khan v. France, 2019, §§ 94-95)*, excessive and prolonged detention of migrants and asylum seekers without justification *(Larissis and Others v. Greece, 1998, §§ 38-44 and Z.A. and Others v. Russia [GC], 2019, § 195)* or due to bureaucratic delays and legal failures on the part of the state's legal system *(N.H. and Others v. France, 2020, § 184)* and, of course, related to the conditions of detention of migrants *(Abdolkhani and Karimnia v. Turkey, 2010 and A.A. v. Greece, 2010...)*.

The other fundamental principle enshrined by the Court in relation to immigration detention cases is the right to personal liberty, enshrined in Article 5 of the ECHR. A detention, detention or arrest can lead to a serious violation of Article 5 in several cases, for instance in cases not explicitly provided for by law or ordered by a court or judge *(Selahattin Demirtaş v. Turkey (no. 2) [GC], 2020, § 311)*, when it takes place in places not provided for by law *(A. and Others v. Bulgaria, 2011, § 69; Riad and Idiab v. Belgium 2008, D.G. v. Ireland, 2002, § 79)*, when the applicant is not adequately informed of the reasons why he has been detained or held *(Murray v. the United Kingdom [GC], 1994, § 72)* and, of course, when there are degrading and humiliating conditions of detention *(Wells and Lee v. the United Kingdom, 2012, §§ 191-95). There are* also all the cases of violations of the right to personal liberty of persons belonging to vulnerable categories that have established the principle of special vulnerability and necessary protection, as in the case of minors *(Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006, § 100)*, persons suffering from mental illness *(Enhorn v. Sweden, 2005, § 43)*, persons suffering from addictions *(Hilda Hafsteinsdóttir v. Iceland, 2004, § 42)*, homeless persons *(De Wilde, Ooms and Versyp v. Belgium, 1971, § 68)* and, of course, migrants *(Khlaifia and Others v. Italy [GC], 2016, § 89)*.

The extensive jurisprudence of the European Court is an extremely valuable resource for understanding the topic of immigration detention. As explained above, however, this is a subject that, although it is governed by international human rights standards, is handled autonomously by states.

A rich jurisprudence on the part of an international mechanism, such as the European Court, in a specific matter is an unmistakable indication of a significant discrepancy between what international norms are and what actually happens within national borders on the basis of domestic law. This discrepancy, besides being unique to each state, differs from nation to nation based on numerous indicators, including domestic law, migration flows, political regime and socio-economic situation. In light of this, it is complex, and dangerously superficial, to analyse the immigration detention situation from a general perspective for the entire geopolitical space of the Council of Europe, and for this it is necessary to go into more detail in the following paragraphs.

2.1 National Focuses

In order to address this critical issue, four member countries, very different from each other in terms of migration flows and irregular migration control systems, Italy, Greece, Turkey and Hungary, are examined below.

2.1.1 The Italian Case.

When it comes to immigration, Italy is certainly among the European countries that have had, and still have, the most to do with managing the flows. With around 8,300 km of coastline on navigable seas and a geographical position very close to the African continent, i.e. the continent with the largest number of outgoing migrants[35] , Italy is, almost every day, a destination for the arrival of migrants by sea. From 1 January to 17 May 2023 alone, there were 45,507 arrivals by sea[36] .

The Italian regular migration system from non-EU countries is extremely complex for several reasons: there are twenty-one types of entry visas and residence permits that have many individual peculiarities, the path to obtaining documentation is dependent on having an occupation and economic requirements, the timeframes for obtaining citizenship are long, sometimes up to 15 years, and the maximum number of migrants who can, regularly, enter the country for work reasons is established annually by what are the *quotas* listed in the Decreto-Flussi, and is very small (about 23%) compared to the number of applications that are made. As far as asylum and international protection are concerned, timeframes are remarkably long (from six months to two years) and the level of evidence required to prove the validity of the application is extremely high [Nascimbene, Bonetti, 2004].

Professor Bruno Nascimbene in *'Citizenship Rights and Freedom of Movement in the European Union'* states:

> *<<Italian foreigners' law can be metaphorised as an obstacle course, with a series of steps aimed at keeping the foreigner in a perpetual condition of legal and social, as well as individual and political, insecurity and vulnerability. The restrictiveness of the legal entry system is an indirect compulsion for migrants to embark on a path of irregular immigration, despite all the risks it entails. (...)>>*[37]

It is also in light of this that, based on the study by the Institute for International Policy Studies (ISPI) in 2022[38] , there are approximately 600,000 irregular foreigners in the country. This figure is to be regarded as a variable,

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[35] Source: Forced to flee: Top countries refugees are coming from | World Vision
[36] Source: daily_statistical_dashboard_17-05-2023.pdf (interno.gov.it)
[37] Nascimbene, B., & Rossi Dal Pozzo, F. (2012). Citizenship rights and freedom of movement in the European Union (pp. VII-228). Cedam.
[38] Source: Migration in Italy: all the numbers | ISPI (ispionline.it)

as it is constantly rising and falling on the basis of irregular entries, new irregular stays (e.g. due to expiry of documentation), the number of regularisations of status and the number of expulsions.

From 2014 to 2021, the number of irregular migrants who have been ordered to return by deportation is about 200,000. But the returns actually implemented are only 1/6 of those ordered, about 33,000, with an average of 4781 returns per year. As a result, a large percentage of irregular migrants, 5/6 of them, about 167,000 from 2014 to 2021, have never been deported but are left with a pending deportation order[39] , and according to Article 14(1) of Legislative Decree 286/1998, they can be detained in facilities provided for this purpose, i.e. the Centres of Permanence for Repatriation.

Articles 10, 13, 13-bis, 14 and 14-bis of Legislative Decree 286/1998, better known as the Consolidated Text on Immigration, regulate the mechanisms for managing irregular entry, expulsions and detention of foreigners:

> *<<Art 10:*
>
> *The border police reject foreigners who present themselves at border crossing points without meeting the requirements of this Consolidated Text for entry into the territory of the State.*
>
> *Art 13 paragraph 2:*
>
> *Expulsion is ordered by the prefect, on a case-by-case basis, when the foreigner:*
>
> *(a) entered the territory of the State by evading border control and was not refused entry pursuant to Article*
>
> *Art 14 paragraph 1:*
>
> *When it is not possible to carry out expulsion by escort to the border or refoulement with immediacy, due to transitory situations that hinder the preparation of return or the carrying out of removal, the quaestor orders that the foreigner be detained for the time strictly necessary at the detention centre for returns>>*[40] .

These regulations are consistent with the directives issued by the Council of Europe and the European Union on detention to prevent irregular entry and stay or with a view to expulsion[41]. In addition, the respect for the fundamental rights and dignity of the detained migrant are also recognised in the Italian legal system as they are enshrined in Article 21 of Presidential Decree No. 394 of 1999:

> *<< The modalities of detention must guarantee, in compliance with the regular conduct of life in common, freedom of conversation within the centre and with visitors from outside, in particular with the defence counsel*

[39] Source: How CPRs affect irregularity - Openpolis
[40] Legislative Decree 286/1998, Consolidation Act on Immigration
[41] *Supra* p. 19

assisting the foreigner, and with ministers of religion, freedom of correspondence, including by telephone, and the fundamental rights of the person, without prejudice to the absolute prohibition for the foreigner to leave the centre. (...)>>[42]

As explained above, the place set up for immigration detention is the Permanence Centre for Repatriation. The problem arises when analysing the scope of these detention centres for repatriation: ten centres operating throughout Italy with a total of 1,110 places. The gap between the number of places available and the number of cases in which detention is ordered is very high, and this has led to three current situations, that of over-crowding in the CPRs, that of unlawful detention in places other than CPRs, and that of non-detention. The latter, however, projects the foreigner into a condition of irregularity punishable under the Code of Criminal Procedure, trapping him in a legal limbo from which it is extremely difficult to escape[43] .

The migratory landscape that has characterised Italy for about thirteen years now, i.e. since the massive landings of migrants by sea, with the Mediterranean route, and by land, with the Balkan route, began in 2011, has placed the country in the position of having to implement concrete immigration management policies and measures without the reception system being really ready for this, especially under the economic and structural dimensions. The most serious consequences have obviously been paid for by the migrants themselves, as the Italian state has failed to guarantee legal and social protection with minimum standards of decency established by law, and has catapulted thousands of foreigners into every worst-case scenario imaginable, including illegitimate forced repatriations even in conflict zones, extreme poverty and arbitrary detention. Once these treatments have been suffered, bringing one's case before a judge is not at all easy for the foreigner, first of all because of the economic cost, but also because of the very long procedural waits of the Special Sections for Immigration of the Courts of Appeal [Nascimbene, 2011][44] .

As stipulated in the Rules of the European Court, in order to bring the case to Strasbourg, domestic remedies must be exhausted. However, if procedural delays are so long that they risk violating an individual's right of access to justice, the appellant has the option to go directly to the European Court by alleging a showing that access to domestic justice was not effective (Selahattin Demirtaş v. Turkey (No. 2) no. 58169/13). This has happened many times in Italy in cases of human rights violations in immigration matters; this is another reason why European case law against Italy is so consistent.

[42] Presidential Decree No. 394 of 1999
[43] Degl'Innocenti, L. (Ed.). (2011). Irregular foreigners and criminal law. Giuffrè Publisher.
[44] Nascimbene, B., & Di Pascale, A. (2011). The 'Arab spring' and the extraordinary influx of people who arrived in Italy from North Africa. *European Journal of Migration and Law*, *13*(4), 341-360.

In order to fully understand the Italian scenario, it is essential to analyse some important cases that have reached the European Court regarding illegal immigration detention. These are two symbolic cases, because they reflect the most common illegal detention scenarios in the country, namely those in Centres of Permanence for Return or Hotspots, and those of forced detention on boats.

Case of Khalifa and others v. Italy

The applicants, Ben Mohamed Ben Ali Khlaifia, Fakhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar, are Tunisian nationals who left the African continent on 16 September 2011 aboard makeshift boats to reach the Italian coast and, after more than 24 hours of travel, arrived at the port of Lampedusa. Here they were let into the First Reception Centre and held in overcrowded and unsanitary conditions for several days, until there was a riot and the reception centre was set on fire. That night, the claimants were taken to a park and made to sleep there, while from the next day, together with about 1,800 other migrants, they were detained first at Lampedusa airport, then at Palermo airport, and finally in the dining rooms of a ship moored in Palermo, in total overcrowding, lack of hygiene, forbidden to go to the toilets and to go out on the deck of the ship in case of need, and with continuous beatings and mistreatment by police officers. After several days, the migrants were repatriated to Tunisia without the Italian authorities issuing them any documents and without being able to start the process of applying for residence permits or international or humanitarian protection.

The case was brought to the Court, which, given the great significance this ruling would have on future cases, issued one of what is known as a 'pilot ruling' by the Grand Chamber.

The applicants complained of violations of Article 3 (freedom from torture) for the conditions in which they were detained in the various locations in an overcrowded manner and with multiple beatings, Article 5 (right to liberty and security) for being detained without giving any necessary reasons, Article 13 (right to an effective remedy) and Article 4 of Protocol No. 4 of the ECHR (prohibition of collective expulsion of aliens). The State, for its part, denies all allegations and asserts that the procedures implemented with respect to the applicants' detention are standard ones, that there is no evidence of overcrowding and beatings, and that documentation was, indeed, issued to the applicants and that it should be their responsibility to bring it before the courts.

The Grand Chamber has, of course, ruled on all the alleged violations. With regard to Article 3, the Grand Chamber concludes that the conditions of detention resulted in levels of suffering comparable to other cases in which Article 3 has been declared violated (T. and A. v. Turkey and Koktysh v. Ukraine) (§ 168) and that the ill-treatment suffered was not proven beyond reasonable doubt by rebuttal evidence and presumptions (Ramirez Sanchez v. France). Moreover, the Court cannot disregard the fact that the circumstances of the management of the migratory phenomenon were an exceptional circumstance at the time of the facts (§ 140), so that the continuous change of place and means of residence is justifiable. In light of this, the Grand Chamber holds that there was no violation of Article 3 of the ECHR (§ 211).

As regards Article 4 of Protocol No. 4 to the Convention, it states that collective expulsions are prohibited. The applicants claim that they were collectively expelled only on the basis of their rapid identification and without each individual situation having been individually assessed. On the other hand, the State asserts that the procedure followed was the standard one, especially by virtue of the Italian-Tunisian agreement 1445/98, which provides for a faster and more simplified procedure for executing repatriation. The applicants claim that this agreement is incompatible in this case with Article 4 of Protocol No. 4 of the Convention, but the Grand Chamber does not agree with this. In the judgment in fact, the judges stated:

> *<<The Court considers that, in the present case, the relatively simple and standardised nature of the refusal orders can be explained by the fact that the applicants were not in possession of any valid travel documents and had not alleged either fears of ill-treatment in the event of return or any other legal obstacles to their deportation. In light of this, the agreements between the two States in question did not pose a threat to Article 4 of Protocol No. 4, either at the time of the events or in general. (...)*
>
> *Therefore, there was no violation of Article 4 of Protocol No. 4.>>* (Khalifa and Others v. Italy, §§ 251-254).

On Article 5, on the other hand, the applicants complain that their manner of detention was totally arbitrary and disproportionate, especially the fact that they were deprived of any information and any possibility of contacting family members and legal assistance, and that the places of detention did not meet the standards of minimum dignity required by law.

The Chamber affirms, also following the interventions of the international organisations AIRE, ECRE and McGill, that there were no reasons for not informing the applicants of the manner and timing of their detention, as they did not represent a danger to public order and safety and there was no real danger of their escape. In addition, the state failed to ensure respect for the dignity of the person, as detention in the dark is an excessive practice of probation. Moreover, the Italian authorities detained the applicants NOT for the time necessary to implement the expulsion procedure, but rather to prevent them from entering the territory. In light of this, the Court finds Article 5 of the ECHR violated.

For Article 13, the applicants claim that they have been denied the right to an effective remedy in the Italian legal system. In fact, the Court stated that the manner of detention, removal and repatriation was so restrictive and expeditious that it did not give individuals the opportunity to fully exercise their right, violating Article 13 in conjunction with Article 3 of the ECHR.

As reparation measures, the Court unanimously orders the state to pay the sum of EUR 17,500 to each applicant within three months. No further reparation measures were mentioned.

Case of J.A. and others v. Italy

The case in question is extremely recent, in fact it dates back to 30 March 2023 and concerns events that took place in October 2017, with a similar script to the previous case. The applicants, J.A. and others, left the

Tunisian coast in a boat carrying approximately one hundred people and were docked in Lampedusa. After quick medical examinations, the applicants together with another hundred or so people were put up in a shed near the migrant reception centre and given copies of documents written in Italian of which they understood nothing. They remained in this shed for over ten days, and were absolutely forbidden to interact with the authorities and to leave the shed, in which they were literally locked up. The hygienic and material conditions of the huts were described by the applicants as inhuman and degrading, especially in terms of overcrowding, dirt, food and excrement residues, lack of soap and clean clothes, and food and water that caused illness. In addition, there were only two communal toilets, some mattresses were on the floor, and there were no hygienic standards whatsoever. After more than ten days, all the migrants in the shed were abruptly woken up at dawn, made to undress, frisked, handcuffed behind their backs with Velcro straps and loaded onto buses that took them to Palermo, where they were held in police rooms, frisked again, beaten and humiliated by the authorities, until one by one they were put on a plane and repatriated to Tunisia.

The applicants take the case to Strasbourg, complaining of the following violations: Article 3 (freedom from torture), Article 5 (right to liberty and security) and Article 4 of Additional Protocol No. 4 (prohibition of collective expulsion).

In relation to Article 3, following the treatment complained of by the applicants, the State asserts that there is no conclusive evidence regarding the search and undressing practices complained of by the applicants, and that handcuffs were necessary to ensure the order and security of the operation. The Court, after hearing both sides, stated that, in light of the applicants' complaints, it affirms that the treatment suffered, either as a whole, or with the accumulation of each individual component (overcrowding, handcuffs, search...) caused a level of suffering that exceeded the threshold of inhuman and degrading treatment. Furthermore, the Court stated that the absolute character of Art 3 can in no way be reduced or annulled in situations of visible difficulty on the part of the government to manage a phenomenon, such as the influx of migrants to Lampedusa (§§ 47-67).

In relation to Article 5, the right to liberty and security, the state asserts that the applicants had not been deprived of their liberty, but had merely been subjected to a restriction of liberty due to public interest requirements related to the identification procedures and the transfer of migrants. The Court stated that Article 5 has, in the past (Saadi v. United Kingdom), provided exceptions for restricting the personal liberty of aliens in order to preserve public safety. However, the circumstances of the case are not comparable to Saadi's case or to any other case where the restriction of liberty was lawful. Indeed, in the present case, the Court stated, the time of detention considerably exceeded what was necessary, as did the measures taken to implement the deprivation of liberty, which must take place in appropriate places and under dignified conditions. Moreover, among the pronouncements of the United Nations, International Organisations and the CoE, the conditions of

detention in the Hotspots had already been described as inadequate and dangerous for the dignity of the person. Moreover, the Court considers it relevant that this mode of detention caused not only physical but also psychological suffering. In light of this, the Court condemns Italy for violation of Article 5 of the Convention.

With regard to Art 4 of Protocol No. 4 of the ECHR, which prohibits the collective repatriation of migrants, the government reaffirmed the existence of the agreements with Tunisia that fan that the measures applied were legitimate and that the applicants had been fully informed through the provision of clear documentation.

The Court stated that, notwithstanding the presence of the Agreements or any other form of legislation, any measure that forces aliens, as a group, to leave a country without a reasonable and objective examination of the particular case of each individual alien in the group, must be considered under Article 4 of Protocol No. 4. Following this, the Court stated:

> *<<(...) The applicants were forcibly removed on the day they were notified of the refoulement orders. Their wrists were bound with Velcro ties during the transfer to the airports and they were deprived of their mobile phones until their arrival in Tunisia.(...)*
>
> *It should also be observed that, taking into account the short period of time between the applicants' signature of the refusal orders and their removal and the fact that they had allegedly not understood the content of the orders and that two applicants had not received a copy of them, the Government has not sufficiently demonstrated that, in the circumstances of the case, the applicants benefited from the opportunity to challenge those decisions (...)*
>
> *The rejection and expulsion orders issued in the applicants' case did not adequately take into account their individual situations (...)*
>
> *Such decisions thus constituted a collective expulsion of aliens within the meaning of Article 4 of Protocol No. 4 to the Convention and in the present case there was therefore also a violation of that provision. >> (J.A. and others v. Italy, §§ 64-69)*

The Court ordered Italy to pay a sum of EUR 8,500 to each applicant.

These two sentences, along with many others, are an unequivocal demonstration of what Professor Nascimbene stated earlier, namely that Italy suffers from an effective and consistent deficiency in managing the phenomenon of immigration without jeopardising human rights and human dignity, and without the immigration

management system becoming an increasingly impregnable fortress for every migrant who applies to enter and stay in the country[45] .

The issue of immigration detention is, of course, a very relevant problem in Italy. The deprivation of liberty, or even just the reduction of it, the arbitrary prohibition of which is enshrined in Article 5, is, as we analysed above, closely linked to the modalities of detention. The latter have standards, which must be respected, otherwise there is a real risk of escalating into torture or inhuman and degrading treatment. The migratory wave that has seen Italy as a destination has been, and still is, of considerable dimensions, putting the Italian reception system to a severe test. Having been caught unprepared, the difficult relations of action and communication with the European Union and the country's precarious socio-economic situation were arguments used by the State before the European Court in immigration detention cases. The Court has, of course, taken this into account, making important pronouncements about the difficulties the country has faced and indirectly trying to 'shake up' the European national systems to take action for cooperation. The Court has never justified torture or inhuman and degrading treatment because of the logistical and social difficulties in managing the migratory phenomenon, and the hope remains that the Italian state, with all its resources, in terms of money, time and facilities, will comply with the fundamental respect of the principle of prohibition of arbitrary deprivation of liberty and prohibition of torture and inhuman and degrading treatment.

2.1.2 The Greek Case

Greece has been one of the main entry points for migrants and refugees seeking to enter the European Union, particularly through its eastern islands opposite Turkey. The country has faced significant challenges in managing the influx of migrants and asylum seekers, resulting in complex humanitarian and political issues. In recent years, Greece has implemented several measures to address the situation. These include increased border security, the establishment of reception centres and efforts to improve the asylum process. The EU has provided financial and operational support to assist Greece in managing migration flows. In March 2020, Greece suspended asylum applications and tightened border controls in response to increased arrivals. This move came after Turkey announced that it would no longer prevent migrants and refugees from crossing the border into Greece. However, the suspension was later lifted and asylum applications resumed.

The situation often resulted in overcrowded reception centres on Greek islands, leading to poor living conditions for migrants and refugees. Inadequate access to health care, sanitation and other essential services have

[45] *Supra* p. 38

been reported. Humanitarian organisations and international agencies have worked to alleviate these conditions, but the pressure on resources remains worrying.

Greece has also been criticised for its handling of asylum applications and allegations of rights abuses, including rejections of migrants and refugees attempting to enter the country irregularly. These allegations raised human rights concerns and were the subject of investigations and legal proceedings, especially by the European Court of Human Rights.

According to data from the International Rescue Committee, the number of refugees in Greece is around 50,000, i.e. individuals who have already applied for and been granted status. For asylum seekers, on the other hand, the situation is very high. As of May 2023, there are approximately 119,000 asylum seekers, of which 19,100 are on the islands of Lesbos, Samos and Chios. In 2021, the population born in third countries was 7.1 % of the total population, while in 2023 it is expected to be 9 %. Every year, the government issues a large number of residence permits, the curve of which rose sharply in 2019, reaching 42,348 permits, then falling to 19,821 in the following year, and remaining stable. Of these permits, about 50 per cent went to foreigners from three countries, first of all Albania, then China and Georgia. Forty-two per cent of the reasons for issuing residence permits concerned family reasons, while only 4% concerned study permits. The situation is different for asylum applications, which from 2020 to 2022 alone reached almost 150,000 in favour of citizens mainly from Syria, Afghanistan and Pakistan. However, the percentage of rejected applications is, since 2018, higher than those accepted, except in 2020 when those rejected were 45%. With regard to irregular immigration, in 2021, more than 3145 people were refused entry, 38,015 were detained for illegal stay and, of these, 28,815 were ordered to leave the country, but only 6855 actually did so. The rest of the population is, as a result, detained in detention centres for repatriation or illegally present on the territory.

The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment CoE has expressed its views several times following territorial visits to Greece. The most recent report dates back to 2020 in which, briefly, it highlights several critical issues in the area of security and prevention of detained migrants against possible forms of torture. Below are some significant paragraphs from the document issued by the Committee:

> *<< 27.*
>
> *(...) Access to natural light was limited and there was no artificial lighting, no heating, no beds and no mattresses. The detained migrants slept on blankets or on cardboards placed on the floor of the cell.*
>
> *The toilets not divided into cells were blocked and emitted a foul odour into the rest of the cell. Access to three portable toilets located outside the cell was offered to small groups a few times a day.*

There was no common area or courtyard for outdoor exercise. The migrants encountered did not have access to a shower for more than two weeks and were not given soap to wash their hands after going to the toilet. Women were given wet wipes, but no other hygiene products were provided to them;

Many women recounted the embarrassing and unhygienic situation they faced while in detention. These conditions clearly constitute inhuman and degrading treatment. The fact that the Greek authorities continued to detain this group of 93 people, many of whom were clearly vulnerable, for 18 days without any effort to diminish the harshness of their situation could be considered inhuman punishment.

In addition to the squalid conditions, they were not given the opportunity to make contact with the outside world (their mobile phones had been switched off). outside world (their mobile phones had been confiscated).

29.

The two cells of the police and border guard station in Isaakio were once again found dirty, damp, smelly and dilapidated; one of the sanitary outbuildings contained piles of faeces on the floor and had an overpowering stench. Dirty mattresses and sponge blankets were piled on the floor of the cells (...).

30.

At the police station in Vathi, Samos, the situation was dramatic in terms of overcrowding and squalid conditions. Two cells, each 18m², housed 14 and 15 men respectively, while four men four men in the 12m² cell, three slept on the floor of the corridor and one man was housed in the broom closet. one man in the broom closet (which measured just 1.5 m2)). The foam mattresses were The foam mattresses were filthy, the bedding was insufficient for all the inmates, and the sanitary facilities were filthy and in an appalling state of hygiene (...).>>.[46]

This report unequivocally describes a very dangerous scenario for the human rights of detained migrants. It is, of course, not only the Committee that has commented on this, but also numerous NGOs and other international institutions. As in the previous case, it is important here with the analysis of at least two European Court rulings, so that we can actually understand the seriousness of the issue.

[46] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:. (2016). Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 April 2015; Para 27, 29, 30.

Case of M.M.S. v. Greece and Belgium

The applicant, M.S.S., an Afghan citizen from Kabul, travelled through Iran and Turkey and entered the European Union, taking the first step in Greece. On 10 February 2009, he arrived in Belgium where he applied for asylum. Under the Dublin II Regulation, the Belgian government gave the request to Greece, despite the fact that the UNHCR had sent a recommendation to the Belgian ministry on the precarious and unsafe conditions of the Greek reception centres. The applicant complained to the Belgian authorities, explaining both the detention conditions he would be subjected to in Greece and his well-founded fear that the Greek authorities would reject his asylum application and he would be repatriated to Afghanistan under the Taliban regime. The claim was rejected and on 15 June, he arrived at Athens airport and was immediately detained in an adjoining building in a tiny room with 20 other detainees, with no access to fresh air, restricted access to toilets, rationed and rotten food and a pile of dirty mattresses placed on the floor as his bed. When he was released, the state did not proceed with a subsistence or integration project, and the applicant lived on the streets for a long time, only to be detained again in another centre where he was subjected to police torture.

The applicant brought the case to Strasbourg complaining of violations of Article 2 (right to life) against Greece and Belgium for exposing him to the risk of returning to the Taliban regime and making him live on the streets in conditions of serious danger and Article 3 (prohibition of torture) for the conditions of detention and torture suffered by the agents.

Importantly, the ECHR also enshrines positive obligations on member states, including that of protecting and preventing claimants from situations that could expose them to human rights violations, such as not allowing repatriation to a country whose situation poses a real danger to the individual's safety.

The case belongs to the category of Pilot Judgments, i.e. those issued by the Grand Chamber on topics relevant to the entire international community, so as to enshrine new fundamental pillars of European jurisprudence. In this case, the reasoning made around the importance of Art 3 is fundamental and is analysed situation by situation. Decision of the Court on:

- Possible violation of Article 3 due to the conditions of detention in Greece: the Court does not underestimate the difficulties Greece is experiencing in managing a huge flow of migrants to its borders, but this does not justify in the slightest that officers may detain migrants in inappropriate places and in conditions that affect the dignity of the person. The circumstances under which the applicant was detained near the airport, the beatings he suffered and the trauma this has left on the applicant, go far beyond the limit of inhuman and degrading treatment, thus violating Article 3

- Possible violation of Article 3 due to living conditions in Greece: The Court stated that, normally, Article 3 does not oblige states to provide socio-economic assistance to refugees to maintain certain standards of living. However, M.S.S.'s situation, living on the street, was particularly serious, and resulted from not being included in any integration programme and no indication of housing possibilities, also due to the fact that the applicant was an asylum seeker, thus belonging to a vulnerable population category. In light of this, Greece deliberately violated Art 3.
- Possible violations of Articles 2 and 3 due to the decision of the Belgian authorities which exposed the applicant to the handling of the asylum case by Greece: The Court considers that the Belgian authorities must have been aware of the complex asylum situation in Greece, especially after the UNHCR alert and after the numerous complaints from the international community. Indeed, following the transfer decision, concrete human rights violations actually occurred. Belgium thus failed to fulfil its positive obligations in relation to Art 3, violating its principle. With regard to Art 2, on the other hand, the Court finds it unnecessary to examine the case as it has already reached its conclusion on Art 3.
- Possible violation of Art 3 by the decision of the Belgian authorities that exposed the applicant to the subsequent living conditions in Greece: Following the same reasoning as in the previous paragraph, the Court declares a violation of Art 3 by Belgium for failure to fulfil its positive obligations.
- Possible violation of Article 13 in conjunction with Articles 2 and 3 by Greece and Belgium: the Court held that the applicant could not fully enjoy the right to an effective remedy because there was a complete lack of communication by the states, both with each other and with the applicant, especially regarding the modalities of his transfer and detention in Greece and the fact that the length of the proceedings, especially at the Supreme Administrative Court, exceeded five years. In light of this, the states violated Article 13 in conjunction with Article 3, while there was no need to analyse the matter under Article 2.

In light of the breaches found, the Court orders Greece and Belgium to pay monetary compensation to the applicant.

This judgment is of great significance for the international community as it shows an approach by the Court that does not simply analyse such a complex case as if it were a single situation, but manages to identify the multiple dimensions of the case and proceed separately to judgment. The remedial measures section remains, however, limited to monetary compensation.

Case of Mohamad v. Greece

This case, dating back to 2014, concerns an Iraqi citizen detained for irregularly crossing the border into Greece, where a Frontex officer misclassified the applicant as an adult. He was served with a deportation order, which was never executed, and the applicant was detained in the Soufli migrant detention centre in conditions of overcrowding, risk of disease due to poor hygiene, shortage of basic necessities and lack of information, which was summarily given to him in English, a language he did not understand. Although the director of the Alexandroupoli police department notified his age as under 18, Mohamad was nevertheless kept in detention. He subsequently spent some time in hospital for examinations and was then detained again at the Turkish border for five months in conditions of degradation similar to his previous detention.

The applicant alleges violations of Articles 3, 5 and 13 of the European Convention.

The Court proceeded to the analysis of the case, and with regard to Art 3, it was stated that already the erroneous estimation of the applicant's age represents a condition of serious vulnerability for future developments, and the Greek authorities should have proceeded with further verifications. Moreover, the detention conditions constitute actual inhuman and degrading treatment, thus violating Art 3.

With regard to Art 13, it was declared violated in conjunction with Art 3 because, during the period of detention, he was not given any information (except in English and Greek) of the possibilities of domestic appeal.

With regard to Article 5, the Court reaffirms this fundamental principle:

> *<< An arrest or detention of a person is lawful to prevent him from entering the country illegally, or against whom deportation or extradition proceedings are pending (...) (§ 77).*
>
> *The Court reiterates that it follows from the case-law on Article 5 § 1 (f) that, in order not to be regarded as arbitrary, a detention measure must be carried out in good faith; it must also be strictly related to the purpose of preventing a person from entering the country illegally; moreover, the places and conditions of detention must be appropriate; finally, the duration of detention must not exceed the reasonable time necessary to achieve the purpose pursued (§§ 81). >>*

Considering the circumstances and facts of the case, the detention considerably exceeded the strictly necessary period, with the aggravating circumstance that the applicant was a minor (which, moreover, was notified by the Greek police authority) and that the conditions constituted inhuman and degrading treatment. In light of this, the Court holds that Greece violated the right to liberty and security enshrined in Article 5 of the ECHR.

For the violations found, the Court orders Greece to pay the sum of €8,500 within three months, but does not implement any other remedial measures.

The analysed cases are a clear testimony of the risk migrants face on Greek territory, especially in terms of detention conditions. The overcrowding of the centres and the problems of migration management is, undoubtedly, due, in part, to the high flow of migrants arriving by land and sea, but also to a socio-economic situation that does not favour an adequate management of funds for migration policies. However, this cannot, and should not, in any way be considered a justification for treating people as in the cases mentioned. Solutions proposed by the European community concern cooperation between European countries in the administrative management of migratory flows, however, in not rare cases, what may turn out to be a winning solution, turns into a hub of diplomatic and bureaucratic complications, of which migrants are always the ones to pay the price, as in the case of M.S.S. v. Greece and Belgium. The aforementioned Dublin II Regulation is nothing but a further obstacle for states and individuals, as they are forced to return to the first country they set foot in. This is not only a huge restriction on freedom of movement, but is also the source of huge delays in the handling of asylum procedures, as it is not always easy to determine which state is competent to examine the application.

2.1.3 The Hungarian case

Like most CoE member states, Hungary is not exempt from having to manage the numerous dynamics of incoming migration flows. Unlike the two countries previously analysed, however, Hungary is not geographically located on the Mediterranean, but rather in the eastern part of Europe, bordering Ukraine, Slovakia, Romania, Serbia, Croatia, Slovenia and Austria. Bordering as many as seven states requires a significant commitment to border management, which, by its very nature, requires an obligatory relationship with the other state.

The migration situation is very complex in Hungary; the Orban government has adopted extremely restrictive policies towards the entry and stay of migrants in the country.

The Stop Soros legislative package is the third legislative package prepared by the Orbán government in 2018, consisting of three bills, and on 20 June 2018, Parliament voted in favour of the Stop Soros law, which punishes those who help illegal immigrants apply for asylum or obtain residency status.

The law is self-contradictory, since only after the assessment of the application is it determined whether the person is legally present in Hungary or whether he or she comes from a place where he or she is not entitled to apply for political asylum. In addition, the UN Refugee Convention imposes an obligation on adhering

countries to allow illegal immigrants to apply for asylum, as they often enter illegally to save their lives. Moreover, asylum can also be granted on a case-by-case basis to persons who do not come from war zones (but are subject to political or religious persecution, for example).

The Helsinki Committee and the Open Society Foundation, founded by George Soros, have taken the law to the Hungarian Constitutional Court and the Strasbourg Court, while the European Commission has initiated infringement proceedings against Hungary.8 The government has stated that 'Hungary will not withdraw legislation that protects the country and Europe'.

The Court of Justice of the European Union (CJEU) ruled that Hungary's 'Stop Soros' legislation, which criminalises a number of legitimate immigration-related activities by making them punishable by up to one year in prison, violates EU law.

According to data reported by the EMN, foreigners present on Hungarian territory account for about 1.2 per cent of the total population, of which the nationalities that make up this percentage, calculated on the basis of the issuance of non-asylum residence permits, are, in order, Ukraine, with about 21,000 permits, China, with about 6,000 and Vietnam, with about 3,000 permits. In the area of international protection, on the other hand, asylum status issuances have been drastically on the rise since 2018, and not because of reduced migration flows, but because of immigration legislation. While 670 asylum residence permits were issued in 2018, in 2021 the figure is only 40 applications, mainly for refugees from Afghanistan, Syria, Iraq and Nepal.

Following the outbreak of the Russo-Ukrainian conflict, the number of migrants from Ukraine attempting to cross the border has been steadily growing and by 31 March 2022, one month and six days after the first bombing, more than 350,000 Ukrainian refugees had been registered in Hungary[47] .

Moreover, like all countries receiving migrants from the Balkan route, it has to deal with the phenomenon of human trafficking. In 2021, the Hungarian police arrested as many as 1277 traffickers who attempted to transport illegal migrants through the country, compared to 455 in the previous year[48] .

A very large number of migrants are, therefore, detained at the borders, often in degrading and precarious conditions. Numerous incidents of abuse of migrants at the border have been recorded and reported by Human Rights Watch, for example, which carried out a series of interviews with asylum seekers from Serbia and

[47] Source: Hungary, a country that once shut out refugees, has opened its doors to those fleeing Ukraine | CBC News
[48] Source: Despite border fence, Hungary is route of hope for migrants to the West | Reuters

found that 12 people interviewed, out of a group of 40, were brutally beaten and abused, including pregnant women and minors.

The CPT has issued several reports regarding the conditions under which migrants are detained in the transit zones, especially in Roszke and Tompa, which are also the only gates of entry into the Hungarian asylum system from the Serbian border. Although the CPT reported that the conditions under which migrants are detained in these two places are generally acceptable, and do not present extremely degrading conditions with regard to overcrowding, open spaces, toilets and food, the main problem is the abuse of power by the security officers. The CPT report contains several similar testimonies denouncing abuses and forms of torture, an example being those reported in the following points:

> *<<14.5*
>
> *A foreign national stated that around midnight on 18 October 2017, he crossed the border into Hungary and was caught by Hungarian police at around 2 a.m.. He claimed that he was beaten by Hungarian police officers, even receiving a punch to his left ear that 'made his ear dead', before being escorted through the border fence towards Serbia (...)*
>
> *14.7*
>
> *A foreign citizen claimed he, together with 13 or 14 other people, were caught by two Hungarian police officers. Afterwards, 15 to 20 other police officers, including two or three women, intervened. The foreign citizens were allegedly lined up and the police started to kick and punch the group, while the policewomen allegedly hit many foreign citizens with batons. (...)*
>
> *He also stated that a police officer pushed his heel onto the big toe of his right foot and hit him with kicks and punches. He was then made to kneel on the ground for two or three hours and continued to beat him. He was then taken to the border fence gate, photographed and deported to Serbia.>>*

As with each national focus that is proposed in this paper, we analyse two judgments of the European Court against Hungary, which are by the way very recent, in order to fully understand the Court's approach in this context, which differs considerably from the two previous ones.

Case of H.M. and Others v. Hungary

In the present case, whose final judgment was issued by the court on 10 October 2022, an Iraqi family, including four children, was detained at the Tompa border point located between Serbia and Hungary for almost four months. After leaving Iraq, where the father of the family was brutally tortured and threatened by the national authorities, the family arrived in Tompa on 3 April 2017 and immediately requested asylum from

Hungary, but, under the Dublin II Regulation, the competence of analysis would lie with Serbia. The applicants requested the Immigration and Asylum Office to speed up the procedures because of the mother's pregnancy and the needs of the children, which did not happen. For months they were detained in Tompa and put to live in a container. The father, a victim of torture, requested psychological and psychiatric support, which was denied, and the same fate befell the mother, almost seven months pregnant, who was denied medical care despite the pregnancy being considered high risk. On 24 August 2017, she gave birth to her fifth child. During a necessary medical check-up, the officers handcuffed and attached the mother to an iron chain to take her to hospital, using brutal manners and doing so in front of the children. They did the same to the father, but he remained handcuffed and forcibly moved to the hospital for the duration of the check-up.

The plaintiffs took the case to Strasbourg, which, after declaring it admissible, heard the opinion of the State, which denied all allegations, stating that no ill-treatment had been carried out against the plaintiffs. The latter complained of a violation of Articles 3 (freedom from torture), 4 (freedom from slavery), 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to a fair trial).

The Court does not consider that the right to liberty and security of the family was deliberately violated, as the detention in the Tompa centre considerably exceeded a reasonable time limit. The manner in which they were detained cannot be considered lawful under Article 5 and Article 4 of the Convention, thus finding a violation.

In relation to Article 3, the Court analyses different scenarios in relation to the applicants' situations:

- With regard to the child applicants, the Court cites the case of R.R. and others v. Hungary, emphasising that the treatment of the children, especially with the mistreatment of their mother before their eyes, constitutes inhuman and degrading treatment.
- With regard to the father of the family, the Court dwells on the fact that he was denied psychiatric and psychological support, which is a necessity for those who have suffered torture and apply for asylum in third countries.
- In relation to the mother of the children, who in herself being incited belongs to a particularly vulnerable category of individuals, the Court stated:

  << 65.

  As regards the second applicant, the Court finds it established that she had a high-risk pregnancy and experienced repeated complications. While she appears to have received the necessary medical attention (see paragraph 7 above), the Court considers that the constraints inherent during confinement, to which she was subjected throughout her advanced stage of pregnancy, must have caused her anxiety

and psychological suffering, which, given her vulnerability, attained the threshold of severity required to engage Article 3 of the Convention (see R.R. and Others, cited above, § 65)
There has accordingly been a violation of Article 3 of the Convention with respect to the second applicant and the applicant children. >> (§ 65)

In relation to the other violation complained of, namely Article 8 (right to respect for private and family life), the Court stated that there is no need to continue with the analysis of the case.

In light of the stated violations, the Court stated the State must compensate the plaintiffs with €15,500 within three months of the issuance of the judgment, but does not order any further remedial measures.

Case of Alhowais v. Hungary

The final judgement in this case is 2 May 2023, the date on which the European Court ruled again against Hungary for possible human rights violations against detained migrants.

The complainant, together with some of his fellow Syrians and an Iraqi family with three children, tried to cross the Tisza river to cross the border between Serbia and Hungary. The boat was spotted by a platoon of Hungarian authorities consisting of about a hundred officers who shouted for them to turn back to Serbia. However, the boat could not reach the Serbian shore due to the waves pushing it in the opposite direction. One of the claimant's family members fell into the water and disappeared. The Hungarian authorities sent a rescue boat but abandoned the search after only twenty minutes. The body was found two days later.

When the boat approached the Hungarian shore, the applicant and his family tried to hand the children over to the agents, but the latter responded by throwing stones at them and firing poison gas and tear gas at the boat. Because of the gas they had to abandon the boat and try to swim to the Serbian border. The Iraqi family, consisting of the mother and three children, could not get ashore because of the barbed wire and they all remained in the icy waters of the river for over an hour, waiting for the authorities to leave. They then managed to climb ashore but were caught and the Iraqi family was taken to hospital in a state of hypothermia.

After being hospitalised, the Iraqi family was taken to a different migrant reception centre from the one to which the applicants were sent several days later.

The plaintiff presents the case to the Strasbourg Court after having been unsuccessful in the various domestic courts in Hungary, claiming violations of Articles 2 (right to life) and 3 (freedom from torture) of the ECHR.

The Court reaffirms the fundamental nature of both articles, as they are two fundamental pillars for the protection of human rights and human dignity.

With regard to Article 2, the Court notes that after the events that occurred, the police chief initiated the investigation in a timely manner, but, the investigation itself was piloted only to ascertain whether the officers had actually used force, and not whether they had actually protected and tried to save the life of the applicant and the other persons involved. In light of this, the Court affirms:

> *<< 84.*
>
> *The Court thus concludes that the manner in which the Hungarian justice system operated in response to the event did not secure the full ALHOWAIS v. HUNGARY JUDGMENT 19 accountability of State officials or authorities for their role in conducting the border control operation as they did. (...)*
>
> *It follows that the proceedings did not discharge the State's duty under Article 2 of the Convention to investigate those matters.>>* (§ 84)

On the subject of Article 3, i.e. the absolute prohibition of being subjected to torture and inhuman and degrading treatment, the applicants invoke this principle not only because of the use of tear gas and stones thrown at them, but also because these threats by the Hungarian police forced them to remain in the icy river water for over an hour. The government insists that there is no evidence of any of this, rejecting all accusations.

The Court stated that, indeed, the applicants did not present any evidence that they had been injured by the stones and gas, nor that these had been used. However, this absence of evidence cannot be attributed to a failure on the part of the applicants, but rather to the failure of the Hungarian authorities to carry out effective, timely and efficient investigations. The Court established that there was not a violation of the substantive aspect of Article 3, but it can declare a violation of its procedural aspect (§§ 154-156).

The Court therefore condemns Hungary for violations of the procedural aspects of Articles 2 and 3 of the ECHR, ordering the payment of the sum of EUR 34,000 for non-pecuniary loss and EUR 5,600 in respect of costs and expenses to the applicant, and ordering no further remedial measures.

This case puts the lens on a fundamental aspect of international human rights law, namely positive obligations, i.e. the substantive aspect of the law, and negative obligations, i.e. the procedural aspect. While negative obligations are explicitly enshrined in the Convention, i.e. what a state must not do, such as not to deprive someone arbitrarily of life, positive obligations are arrived at through case law. The positive obligations may vary from case to case, but generally there are four: prevention, investigation, punishment and reparation. In the case of ALHOWAIS v. HUNGARY, the state failed to fulfil its obligation to investigate, resulting in a lack

of due process, sanction and reparation. In cases that put the freedoms of individuals at extreme risk of deprivation of life or torture, investigations must be timely, impartial, independent, transparent and thorough, and the reason, as Damein Short, jurist, sociologist and director of the Human Rights Consortium of the Institute of Commonweath Studies, puts it, is very simple: in cases of gross violations of human rights that have already taken place, such as torture or arbitrary killing, there is no going back completely, there is no perfect reparation, however, one can try to restore a modicum of the victim's dignity and alleviate the suffering of family members, through a fair and just investigation, which the longer it is prolonged and piloted, the less it can offer guarantees of justice and satisfaction[49] .

The Hungarian case is, to be sure, very complex. The dangers faced by migrants and refugees attempting to cross the nation's borders are extremely high. However, especially in the aftermath of the Russian-Ukrainian conflict, it is inviting that the government has made, and must make, specific moves in relation to the reception and integration system. Although the differences between the Hungarian and Turkish cases are significant, there are nevertheless some points that connect the two countries and will be analysed shortly.

2.1.4 The Turkish case

Since Russia's exclusion from the CoE, Turkey is the largest country by area and population, as well as by number of refugees and asylum seekers. The latter factor is due to the ongoing conflicts in the surrounding countries, especially Iran, Iraq and Syria. As of today, the number of migrants in the country is about 5.2 million, 9.9 of whom are refugees, and as many as 3.6 of them claimed to be Syrians when they applied for temporary protection, asylum or international protection from the government.

As IOM states, the Turkish situation is particularly delicate because flows of people come both by sea and land, and the largest peninsula in south-eastern Europe has 7,200 km of coastline and 2648 km of land border, with as many as eight countries, five of which are affected by conflicts (Iraq, Iran, Syria, Azerbaijan and Armenia). The number and diversity of categories of migrants present and entering Turkey requires effective humanitarian assistance and migration management strategies, but the situation remains very delicate.

Turkey has one of the most extensive and complex systems of migrant detention, with as many as 30 detention and deportation centres with a total capacity of almost 16,000 people, excluding the number of *ad hoc* centres and detention places at ports, airports, borders and police stations.

[49] Short, D. (2016). *Reconciliation and colonial power: Indigenous rights in Australia*. Routledge, pp. 135-139.

As the Global Detention Project states, Turkey's approach can be defined as a gatekeeper of rejection for refugees, asylum seekers and migrants trying to enter Europe. At the level of the geopolitical space defined as Eurasia, Turkey's influential role has been repeatedly put on display, especially following the Syrian refugee 'crisis' in 2015, culminating in the adoption of the controversial EU-Turkey refugee agreement; and, more recently, following the Taliban takeover in Afghanistan in 2021, which stimulated an exodus of Afghan refugees seeking to reach Turkey.

The EU-Turkey agreement just mentioned concerns a statute of cooperation between the government of Erdogan and the European Union signed in 2016 and proposed by the EU to try to respond to the sharp increase in the number of people arriving on the shores of member countries, which in the year preceding the agreement numbered over one million, while almost 4,000 tragically lost their lives during the migration journey.

Agreement was reached on three key points:

- Turkey would take all necessary measures to prevent people from travelling irregularly from Turkey to the Greek islands;
- Anyone who arrived on the islands irregularly from Turkey could be repatriated;
- For every Syrian repatriated from the islands, EU Member States will accept one Syrian refugee who waited in Turkey.

In return, Turkey received EUR 6 billion to improve the humanitarian situation of refugees in the country and Turkish citizens would be granted visa-free travel to Europe.

The message was clear: those who attempted to reach Greece illegally would be quickly repatriated, while those who waited patiently in Turkey would be allowed to enter instead. Did this lead to the expected results? Yes and No, as the International Rescue Committee states. Although the implementation of the EU-Turkey declaration may have contributed to a significant reduction in the number of people risking the perilous journey to Greece, the price for those who manage to reach the EU has been unbearable and the total number of returnees to Turkey under the agreement has been negligible.

Only 2,140 people were returned from Greece to Turkey under the agreement. This is partly due to the fact that, in many cases, Greek courts have recognised that Turkey is not a safe country to send people back to.

The situation has been further aggravated by the COVID-19 pandemic, as Turkey has refused to accept refugees from Greece since March 2020.

Since the implementation of the agreement, there has been no mass return from Greece to Turkey. Some 38,000 Syrian refugees have been resettled from Turkey to EU Member States under the agreement[50] .

Especially in the aftermath of the internal uprisings in Iran and the seizure of power by the Taliban regime in Afghanistan, a wave of refugees crossed Iran into Turkey. Turkey found itself having to respond to this emergency, and did so by intensifying its military efforts at the border, violently herding refugees at the border, pushing them back into Iran, arresting them when they crossed the border, or deporting them without proper legal permission[51] . Journalists are still prevented from documenting the issue in the area. Separating the two countries in question is a 295-kilometre-long wall built by Turkey and equipped with a very high surveillance system along the entire border, where hundreds of thousands are engaged in the often violent rejection, detention and deportation of Afghan and Iranian refugees.

Among the CoE member countries, Turkey is among those that have the most to do with the phenomenon of immigration detention. As a result of the sensitive situation, the CoE's Committee Against Torture makes almost annual site visits to examine the treatment and conditions of foreign detainees and the procedures applied in their return or integration cases. In the most recent CPT report, the conditions found by the CoE members raise serious concerns. The main problems relate to overcrowding of cells, very poor quantity and quality of food, deprivation of drinking water for more than 24 hours, absence of aggregation activities, extremely limited access to open spaces, complete absence of hygiene products, denial of access to medical examinations and treatment, and ill-treatment through torture. Point 12 of the report collects some cases reported by prisoners, such as, for example, the second of these:

> *<<12*
>
> *(...)*
>
> *(ii) One detained person stated that, in April 2019, he had been apprehended on the street by ten 'Yunus' police officers and handcuffed to the back. The team leader allegedly told the officers 'to beat him up'. Subsequently, the person concerned was allegedly kicked and punched on various parts of the body (including the face) and received baton blows. At a certain point, the team leader also kicked him in the face.>>.*

The report is extremely significant in the area of torture and inhuman and degrading treatment, so much so that the Committee expresses strong concern for the protection of the human rights of detained persons that Turkey is clearly requested to implement, immediately and without further delay, remedial measures for the

[50] Source: What is the EU-Turkey deal? | International Rescue Committee (IRC)
[51] Source: Turkey plans to expand border wall along entire 295-km Iran frontier (duvarenglish.com)

problems encountered, make legislative changes that do not go in the same direction as the absolute protection of human rights, and rearrange the prison structure and management to remedy the overcrowding and the precarious and vulnerable conditions to which detainees are exposed.

Two judgments of the European Court of Human Rights against Turkey on immigration detention are proposed below.

Case of Asalya v. Turkey

The plaintiff, originally from Palestine, lived for a long time in the Gaza Strip, witnessing the death of more than twenty-five family members due to Israeli attacks, while he survived three Israeli bombings. In 2007, shortly after receiving an anonymous call to be located, a surface-to-air missile hit him from very close range, rendering him a paraplegic. In March 2008, he was taken to Turkey by a humanitarian organisation, and a year later he got married to a Turkish citizen, obtaining a long-term residence permit. Subsequently, two Turkish police officers raided the flat where the applicant lived with his family, he was picked up and taken to the police station. He was informed that his residence permit had been cancelled, without being given a reason, and he was deported to the Kumakapi Detention Centre for Foreigners in Istanbul. His wife reported to UNHCR that her husband was detained in very poor conditions, sleeping on a table, left alone for hours without being accompanied to the toilet (important to remember that the applicant is paraplegic) and deprived of his essential medical care. Moreover, he was threatened several times that he would soon be deported back to Palestine. Subsequently, his application for asylum was granted and he was not deported, but his detention continued for further time.

After a series of internal legal proceedings that did not lead to any result, the case was taken to Strasbourg, alleging violations of the right to life (Art 2), the prohibition of torture (Art 3) both for the conditions of detention and the threats of repatriation, the right to liberty and security (Art 5) the right to a fair trial (Art 6), the right to respect for private and family life (Art 8), the right to freedom of thought, conscience and religion (Art 9), the right to freedom of expression (Art 10) and the right to an effective remedy (Art 13) in conjunction with Art 2 and 3 (right to life and prohibition of torture).

As regards Articles 2 and 3 in relation to the threats of repatriation, which according to the applicant would certainly have made him a victim of possible danger to his life and torture, the Court dwells on the term "victim", stating that from a legal point of view, an individual can only be considered as such in cases where a threat is actually carried out (Vijayanathan and Pusparajah v. France, § 46) or, at least, is accompanied by binding legal acts (Sisojeva and Others v. Latvia [GC], § 92), which did not happen in the present circumstance,

thus rendering the case inadmissible. The same applies to Article 8, whose complaint is also declared inadmissible as unnecessary to examine.

On Articles 6, 9 and 10, the Court states that on the basis of the present documentation, no violation can be found.

With regard to the possible violation of Article 3 on detention conditions, the Court reiterates a fundamental pillar of European jurisprudence, enshrined in Price v. United Kingdom as well as in many others, namely that individuals suffering from one or more forms of disability, whether physical or mental, are entitled to special care and attention because of their double level of vulnerability, namely that of disabled persons and that of detained persons. This was not respected by the Turkish authorities, in fact the conditions in which he was detained represented a total annihilation of human dignity through acts of torture and inhuman and degrading treatment:

> *<< 53*
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> *(...)*
>
> *The Court nevertheless considers that the detention of the applicant in conditions where he was denied some of the minimal necessities for a civilised life, such as sleeping on a bed and being able to use the toilet as often as required without having to rely on the help of strangers, was not compatible with his human dignity and exacerbated the mental anguish caused by the arbitrary nature of his detention. (...) >>*

With regard to Article 5, the Court states that the deprivation of liberty of the applicant, a holder of a long-term residence permit, without any information being given to him, exceeds the minimum standards ensuring respect for personal liberty. Moreover, the detention of an individual must take place on a sound legal basis, with reasons enshrined in law and stated to the applicant, which the Court did not find in its analysis of the domestic legal proceedings initiated by the applicant. Moreover, the conditions of detention, especially for persons with disabilities, already declared as inhuman and degrading treatment under Article 3, contribute to making the applicant's detention arbitrary and disproportionate. In light of this, Article 5 of the ECtHR is declared to be violated.

Article 13, complained of separately in conjunction with Articles 2 and 3 and then with Article 8, is declared violated in both cases, as the applicant did not, in practice, enjoy the right to an effective remedy, starting with the arbitrary detention without grounds and threats of return. All this jeopardised his right to an effective remedy, which could have led to very serious violations of his human rights as enshrined in Articles 2, 3 and 8. For these reasons, Article 13 is declared violated in relation to all articles in conjunction.

The Court, in paragraph 35, quotes an extract from Article 14§2 of the 2006 Convention on the Rights of Persons with Disabilities, which states:

<<States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation>>

In spite of all this, the Court does not come up with any further remedial measures other than monetary compensation under Article 44§2, respectively €9,750.

Case of G.B. and others v. Turkey

The four applicants, a mother and their three children, all born in Russia, entered Turkey through Istanbul airport on a valid entry visa and were arrested the next day in Kilis for trying to enter Syria illegally. They were thus caught and taken to the Security Directorate in Kilis. On 19 October 2014, the governor of Kilis sentenced them to a period of detention in the Kumkapi Migrant Detention Centre for trying to cross the border illegally. The order used by the governor only shows the law to which it refers (Law no. 6548), but the details of the applicants' case are not given. In November 2014, the applicants applied for international protection, stating that they had left Russia for fear of persecution due to their politico-religious ideologies, but the application was rejected for lack of sufficient qualifications.

The prolonged detention in the centre, resulting in the rejection of the application for international protection and the fear and threat of being sent back to Russia, is denounced as arbitrary by the applicants, alleging inhuman and degrading conditions of detention that have had extremely serious repercussions on their psychological and physical health.

After one year of detention, the applicants, who we recall were a mother and three children aged six, two and one year, were transferred to the Gaziantep Repatriation Centre. In the first centre, the one in Kumkapi, the conditions reported by the applicants were as follows: overcrowding, with more than twice as many people in excess (680 people for a maximum capacity of 300), critical hygienic conditions due to the lack of cleanliness of the cells and toilets, which had leaks and gave off bad smells. An invasion of insects was reported in the cell, biting the children and causing severe allergic reactions. Disinfection of the cell with toxic chemicals was arranged and the woman and children were forced to remain inside the cell during the trial. There were no windows large enough to avoid being intoxicated by tobacco smoke every day and night, and no natural light was allowed in. Artificial light was also kept on every night. The plaintiffs were not allowed to go out into the open air, and the food was not only unsuitable for such small children, but was of low quantity and rotten

quality. In addition, any material necessities to which the infants should have been entitled and had access were almost never provided. One of the children, due to the poor conditions, became seriously ill on 21 January 2015 and the Turkish authorities, despite his mother's pleas, waited until 27 January to take him to the doctor.

When they were transferred to the Gaziantep centre, the conditions reported were even worse: the cell was 10 square metres without windows and was shared with three other women and a child. The conditions of food, hygiene, presence of animals and lack of living space were worse than before. Milk, fruit, baby food, blankets and winter clothes were denied.

After exhausting domestic remedies, the applicants take the case to the European Court complaining of violations of Articles 3, 8 and 13 for the conditions of detention in the Kumkapi and Gaziantep centres, and violations of Article 5 for arbitrary imprisonment without giving reasons and providing access to an effective remedy.

With regard to Article 3, the Court recalls the general principles drawn from its case law on torture and inhuman and degrading treatment in detention, reiterating what are the minimum standards that every prison or detention facility must have.

The Court stated that the detention conditions in both centres do not meet the requirements of European case law. Important is the focus the Court adopts on the categories of victims which, in this case, include a woman and three very young children. As stated in Article 37 of the Convention on the Rights of the Child, every child deprived of liberty must be treated with respect and dignity by providing for all essential needs related to his or her age.

The Court, in fact, stated the following:

> <<111.
>
> (...)
>
> *The Court would stress that the manifestly adverse conditions of detention at the Kumkapı Removal Centre, which have led to findings of violation even in respect of adult applicants, were particularly unsuitable for the applicant children in view of their extreme vulnerability and were completely at odds with the widely recognised international principles on the protection of children (...).>>*

Although the government responded to the allegations made by the applicants by submitting photographs of the occupied cells claiming that there was no overcrowding, the Court stated that it is unclear in which cell

the applicants were held and that there is no evidence that the situation at the time of their imprisonment was as depicted in the photographic exhibits.

Furthermore, the fact that the Turkish authorities excessively restricted the applicants' contacts with their legal representatives, and that they were not informed of the reasons for and duration of the detention, results in a violation of the applicants' right to an effective remedy.

In light of this, the Court stated that there was a violation by Turkey of Articles 3 and 13 of the European Convention on Human Rights.

Regarding Article 5, the Court considers it violated in relation to the first and fourth paragraphs. The first enunciates the right to personal liberty and security, and in this specific case it was violated because the detention was arbitrary, without offering clear and consistent reasons and limiting the possibility of legal action. Paragraph 4 states that anyone who is detained has the right to appeal an unlawful detention to be tried before a court, which will promptly and impartially confirm the detention or order its release. In the present case, especially with the presence of children deprived of their liberty, the domestic court acted untimely and ineffectively against the applicants, who were arbitrarily detained and deprived of their right under Article 5§4.

As regards Article 5 §§ 2 and 5, the Court does not consider it necessary to examine a potential violation having already declared Article 5 §§ 1 and 4 violated.

As regards Article 8, the Court does not consider it necessary to examine the case.

In light of the violations found, which concern Articles 3 and 5 §§ 1 and 4, the Court orders Turkey to pay € 2,250 for the mother and € 20,000 for each of the children who are victims of violations of the above-mentioned articles. There are no other restorative measures to be taken by the State.

These two ECtHR rulings are very illustrative of the particularly dangerous situation migrants experience when they decide to approach the country's borders.

Moreover, in both judgments, the victims belong to categories defined as vulnerable by regional and universal human rights jurisprudence.

In the case of Asalya v. Turkey, the applicant has a severe disability as a paraplegic, which is why, especially in cases of detention, there must be a double level of protection for his fundamental freedoms. This was ignored by the Turkish authorities, who trampled on the person's dignity in a sadistic and profound manner, transporting him into a situation of tragic suffering.

In the case of G.B. and Others v. Turkey, the applicants are a mother with three children aged six, two and one year, who as such belong to particularly vulnerable categories. Despite this, they were confined in extremely small cells that endangered, and indeed compromised, their physical and mental health.

The four focus countries carried out help us to investigate cases of torture and inhuman and degrading treatment in migrant detention situations. Although it is the violation of Article 3 against migrants that unites the analysed cases, they present substantial differences that show the peculiarity of each context. Moreover, these cases analysed in detail give us the opportunity to grasp peculiarities that are useful in the last part of this paper, i.e. the one dedicated to analysing the phenomenon of immigration detention from a sociological and psychological perspective.

CHAPTER THREE.
ANALYSING THE PHENOMENON OF IMMIGRATION DETENTION FROM A PSYCHOSOCIAL PERSPECTIVE

3 The psycho-physical vulnerability of migrants

Beyond the purely legal sphere, these cases describe situations of tragic suffering of the victims. These episodes are capable of leaving extremely deep traumas and scars on the person. Sometimes, the consideration of these traumas seems to be only partially taken into account by the European Court, both with regard to the recognition of violations and, above all, with regard to reparation measures. The psychology and sociology of human rights could act as a shield against this situation, which could be hypothesised as a criticality of the European system.

What is the real burden of human rights violations suffered by migrants in detention? What long-term consequences might result? Can monetary compensation be considered an adequate measure of reparation and a form of long-term protection against physical and psychological suffering? In an attempt to answer these questions, the following part is proposed with the ultimate aim of demonstrating the interdependence between legal and socio-psychological protection of human rights as a comprehensive form of protection.

Keeping the focus on the four countries examined, we see the connecting lines of completely different scenarios and common atrocious sufferings experienced by detained migrants.

In the Italian case, for example, the torture practices concern migrants who arrived by sea in makeshift boats. Despite a journey of hope that has brought them so close to death and suffering, the inhuman and degrading conditions in which they have been held by the Italian authorities are nothing more than a reflection of a rigid reception system and a social and political context that is anything but welcoming towards them. In the decade between 2012 and 2022, more than 30,000 people died in the Mediterranean Sea. While this humanitarian tragedy is partly to blame for the instability of the boats and the unpredictability of the movement of the sea, another part of the responsibility lies with the Italian government, which has tightened the already high requirements for NGOs to be able to operate at sea and increased the sanctions against them to over €50,000[52] . This measure puts migrants in double jeopardy: the first concerns safety at sea. NGOs, staffed by experts and

[52] Decree-Law 1/2023

with state-of-the-art equipment, are ready at all times to carry out rescue operations. In fact, NGO ships often do not wait for distress calls, but patrol territorial waters in case there are boats in distress. The second concerns guarantees of protection. NGOs that rescue migrants at sea take charge of medical examinations and the safety of survivors. When their intervention is not allowed, migrants can only be rescued by the vessels of the Italian coast guard, which only acts on call and picks up migrants from the sea and takes them directly to hotspots, which are among the places where the human rights violations of the previously analysed cases against Italy took place.

Whoever undertakes the migration journey knows that they are crossing borders illegally. To be rescued by international organisations instead of state police forces is a very different thing, not so much physically, but more psychologically. NGOs, by their very nature, have respect for the dignity of the individual's life as their highest priority. In their teams there are human rights experts, cultural mediators and experts in psychology and medicine. It is therefore a multidisciplinary team capable of dealing with all eventualities, to act promptly in situations of serious danger and extreme vulnerability of individuals.

Sabine Schönfeld, stated that sea rescue is, in itself an extremely traumatic experience[53], and that the individual is in what Wendy Foden calls the highest level of human vulnerability[54] , so it is crucial that intervention is not only timely, but also effective, so as to reduce the severity of the trauma that the migratory journey will surely create in the individual.

The cases against Greece, on the other hand, show the very serious side effects of cumbersome and impractical European rules, such as the Dublin II Regulation on determining the state responsible for examining an application for international protection.

High-ranking regulations such as this represent a constant situation of uncertainty. The migrant usually has no or partial knowledge of the rule's force, and the fact that he is deprived of the freedom to choose where to place his residence and domicile, and is, again, obliged to interface with territorial boundaries and border agents, thus a further source of particular insecurity for him, represents a strong exposure to trauma and psychological vulnerability, in which the foundations on which any hope of salvation and new life rested suddenly collapse and the legal limbo in which one remains trapped also directly affects psychological stability [Nascimbene, Bonetti, 2004].

[53] Source: (4) Psychological Impact of Sea Rescue | Facebook
[54] Foden, W. Oppenheimer, M., Campos, M., Birkmann, J., Luber, G., O'Neill, B., Takahashi, K., ... & Semenov, S. (2014). Emergent risks and key vulnerabilities. *Risk*, *19*, 1.

It is undeniable, also because it is admitted by the European Court itself in its judgments (J.A. v. Italy, 2023, § 65), that episodes of torture and inhuman and degrading treatment in migrant detention centres are indirectly related to the difficulties of states to manage the quantity of migratory flows.

Despite the obvious differences between the innermost and outermost countries, they too have to deal with all the complex migration situations they come into contact with. In the Hungarian case, for example, one can see how land border crossings are equally critical and dangerous. Indeed, in the Alhowais v. Hungary case, the national authorities repressed the entry of Syrian and Iraqi migrants who wanted to come to Hungary from Serbia by throwing stones and tear gas. The aggressiveness and ferocity of these acts show a total disregard and lack of sensitivity towards human life. We are facing a further level of rejection of the foreigner, the violent and coercive one at the border, a real *violent push-back.* Important exponents of social psychology such as Lonnie Athens[55] and Zimbardo[56] have categorised authoritarian physical violence as the most brutal form of behaviour aimed at imposing one's authority, capable of leaving physical and psychological traumas that are difficult to combat, even more difficult to overcome. Being rejected with firearms, in addition to the imminent danger to life, symbolises the total and effective absence of any form of tolerance and possibility of integration. As Karolina Augustova states, the rejection of reception applications is a long and tortuous path, but one that should not involve any physical or psychological danger for the person, since until the rejection order is notified, his or her safety remains under the protective wing of the state[57] . When, on the other hand, we speak of violent rejections at the border, we must take into account the psychological dimension of those who are rejected, since, again according to Augustova, this creates a feeling of terror for the danger to life, of annihilation for the vanished hope of salvation and of emotional collapse for the hopes of trying again in the future.

The last proposed national focus is Turkey. Its territorial position is unique, not least because it connects EU member states with states where bloody conflicts are ongoing. Turkey is therefore an almost obligatory filter of the migration system that starts in conflict countries and ends in Europe. The cases analysed show another peculiarity, namely that of human rights violations against migrants belonging to extremely vulnerable groups, such as disabled people and children. If being a migrant is already in itself a factor of social, legal, economic and individual uncertainty and instability, further belonging to one of these categories transports the human rights sphere of the detained migrant person into a further level of precariousness. Although it is never appropriate to make classifications or hierarchies of cases of human rights violations, it must be admitted that in

[55] Athens, L. H. (2017). *The creation of dangerous violent criminals*. Taylor & Francis.
[56] Zimbardo, P. G., & Leippe, M. R. (1991). *The psychology of attitude change and social influence*. Mcgraw-Hill Book Company.
[57] Augustova, K., & Sapoch, J. (2020). Border Violence as Border Deterrence Condensed Analysis of Violent Push-Backs from the Ground. *Movements: Journal for Critical Migration and Border Studies*, *5*(1).

situations where the victims belong to protected categories, such as children and disabled persons, the disregard for human life reaches levels that must be highlighted as extremely serious and high. Mehmet Tevfik Ozcan, a jurist and legal sociologist at Istanbul University, states that it is not at all easy for states to implement special and appropriate measures towards people in vulnerable situations who are going to government facilities. However, it is extremely common that such places do not maintain adequate standards to provide for the care and needs of these people, and it is there that a democratic state, with a system of support and accompaniment for vulnerability, must become aware of this shortcoming and stop the process of staying in a particular place. The 'proceeding in spite of everything' is the main problem of the Turkish welfare state according to Ozcan, which hides a deep discriminatory and selfish root typical of totalitarian regimes, oriented to create a nation of perfect subjects[58] [Ozcan, M.T., 2008].

3.1 Reparation Measures in ECtHR Judgments

The national scenarios analysed include not only the psycho-physical vulnerability of migrants and violations of Articles 3 and 5 of the European Convention. At the end of each analysed case there is a reference to the reparation measures ordered by the Court. They always refer only to monetary reparation, and not only in the eight cases examined, but in all the judgments the Court has issued over the decades of its jurisprudence. Reparation measures are a key component of the judgments, as well as a fundamental step in trying to restore the dignity of the person trampled by the state.

In addition to monetary compensation, they fall into four broad categories:

- Restitution, which would be the perfect reparation measure in which the situation is restored as it was before, but in serious human rights violations this is impossible, especially with those who have already been killed or tortured, so this measure must be interpreted circumstantially. For example, in cases of enforced disappearances of persons, restitution would be the search, identification, exhumation and return of the body of the missing person;
- Rehabilitation, which concerns the implementation of care and recovery actions for victims, such as psychological support or social reintegration paths;
- Satisfaction, as in public apologies, perhaps in the local language in cases against indigenous peoples;
- Guarantees of non-repetition, i.e. measures to prevent other violations of the same nature, such as the amendment of a law or the implementation of training programmes for the armed forces.

[58] Ozcan, M. T. (2008, January). The Rule of Law and Human Virtue. In *Proceedings of the XXII World Congress of Philosophy* (Vol. 40, pp. 92-105).

As stated above, none of these reparation measures are usually found in European Court judgments. As a yardstick to understand how these measures are taken, one has to call into question another regional human rights mechanism, the Inter-American mechanism. This is a perfect binary system, consisting of the IACtHR, composed of seven judges and based in San José, and the Commission, composed of seven commissioners and based in Washington D.C. The latter is a compulsory filter for access to the former. The binding document is the 1969 American Convention on Human Rights, which, however, has not been ratified by Canada and the United States, so there is no jurisdiction of the Court over these two countries.

To understand how the IACtHR adopts the above-mentioned remedial measures, let us take a symbolic case in American jurisprudence: Vélez Loor v. Panama (2010).

The case is similar to those analysed against European countries, in that the applicant, Jesus Tranquilino Vèlez Loor, of Ecuadorian nationality, was first detained in the Dareìn penitentiary and then in the La Joya Joyita prison in Panama City, suffering in both centres degrading and inhuman conditions of detention. In both detention centres he was tortured by prison officials with beatings with iron batons, kicks, punches, cigarette burns and other means of torture that caused him serious head injuries, for which he never received the treatment he needed (Vèlez Loor v. Panama, §§ 31 - 34). Taking the case to the Inter-American Court of Human Rights, the applicant complains of violations of the prohibition of torture and inhuman and degrading treatment (Art 5 IACHR), right to personal liberty (Art 7 IACHR) and other articles concerning protection before the law and legal guarantees (Art 1, 2, 8, 9, 24 and 25 IACHR) and Articles 1, 6 and 8 of the Inter-American Convention against Torture (Vèlez Loor v. Panama, §§ 65, 66, 67).

The Court, after analysing the case, condemned the State of Panama for violations of Articles 5, 7, 8 and 9 of the IACHR and violations of Articles 1, 6 and 8 of the Inter-American Convention against Torture (Vèlez Loor v. Panama, § 327).

Turning now to reparation measures, the Court maintains an extremely inclusive approach towards not only the plaintiff, but also the family and the entire community indirectly affected, i.e. the detained migrants.

As rehabilitation measures, the Court orders the State to offer the victim all the psychological and social support he or she needs, free of charge and in a timely manner (§261). As satisfaction measures, the State must publish a simplified version of the judgment and provide for its distribution to the population groups affected, i.e. detained persons, including migrants (§264). Furthermore, the Court orders the state to reopen the investigation of acts of torture against the applicant and to judge and sanction those responsible (§ 266). Regarding guarantees of non-repetition, the Court orders the state to take measures to ensure the separation of persons detained for criminal offences and those detained for migratory reasons, thus ordering a reform of the

state prison system (§ 270). In order to implement this measure, the Court offers the state a reasonable period of time to take the necessary measures for the accommodation of detained migrants in appropriate centres that respect standards of dignity and human rights (§ 272). As a further part of this measure, the Court orders that every detention centre, of whatever nature, has multidisciplinary staff, including doctors, psychologists and nurses, to ensure adequate care in cases of need (§ 274).

Finally, as a guarantee of non-repetition, the Court orders the state to implement human rights training courses for state officials working in prisons, the National Migration Service and all officials who have contact with persons deprived of their liberty (§ 277). In addition, the state must amend the national law on torture and immigration detention to conform to international standards, especially those of Articles 7 and 8 of the Inter-American Convention on Human Rights (§§ 280, 288).

As further measures, the Court orders the government to issue a public act acknowledging the guilt of what happened to the applicant in the place where it occurred, to create protocols requiring full medical examinations of persons deprived of their liberty when entering the various prisons in case of signs of ill-treatment and torture, to create a mechanism for periodic visits to the places of detention and a mechanism where persons deprived of their liberty have the possibility to directly inform competent authorities outside the prison in cases of aggression in the institution (§ 293). As compensation, finally, the sum to be awarded to the applicant is $27,500, of which $20,000 is for intangible damage, i.e. the psychological and social consequences suffered by the applicant as a result of the events that occurred (§ 314).

The difference with the remedial measures taken by the European Court are obvious.

This paper does not intend to classify the two mechanisms, nor does it claim the right to judge the European Court's approach as wrong or inadequate. The difference in the adoption of reparation measures is not intended to try to demonstrate a kind of 'lack' of the psycho-social dimension in the Court's judgments, but rather to try to hypothesise how the protection of the human rights of detained migrants could be raised to a higher level if the Court adopted measures similar to those of the IACtHR.

As we have analysed in the course of this paper, more than one certified source has highlighted the critical issues that the Council of Europe system has with regard to immigration detention. Geographical locations, economic crises, armed conflicts, inadequate reception systems, large migratory flows, political scenarios, abuse of power by security forces... these are just some of the critical points. The President of the Council of Europe, Charles Michel, said on 23 June 2023 that the tragedies in the Mediterranean and on the 'hottest'

borders are shocking and the critical issues present are real, which is why a response of joint cooperation between countries and with the European Union is essential[59] .

The potential of the European Court's judgments is well known in the international community, not only because of the binding nature of the judgments themselves, but also because of the relevance of the mechanism itself. If the Court, in its judgments, were to adopt an approach similar to that of the IACtHR with regard to reparation measures, a significant improvement in the human rights situation of detained migrants could be envisaged, both from a concretely legal perspective and from a psychosocial perspective.

It must be admitted that the European Court, in all the judgments analysed, always refers to the psychological and social condition of the victim (i.e. G.B. v. Turkey, § 75). However, the difference between the consideration of psychophysical suffering in a paragraph of the judgment rather than in the reparation measures is equally evident.

The main link between the restorative measures that the Court is empowered to implement and the protection of the human rights of detained migrants from a psychological and social perspective is, of course, the psychosocial interpretation of what these measures can mean.

The etymological meaning of the word *reparation* refers to the action of righting a wrong suffered by providing payment or other assistance to the wronged party. The harm, therefore, has already happened, with all the consequences it brings. When it comes to human rights violations, where it is not possible to restore the situation as it was before, reparation does not lose its fundamental role, not least because, as Jane Corazon Okinyo, a Kenyan clinical psychologist and human rights expert, states, their role tends to protect the victim, and potential future victims, over time[60] .

According to Charles E. Tucker, Executive Director and co-founder of the World Engagement Institute, the meaning of restorative justice branches into two large sets of meanings: the individual and the community. The same types of restorative measures could be placed in these two sets: compensation, psychological help, re-integration programme and reopening of investigations target individual reparation of the wrong suffered, while the distribution of the sentence, the order to reform a domestic law, training courses for the armed forces and acts of apology and public acknowledgement of the events that occurred, involve the whole community.

Let us analyse in detail two restorative measures also adopted by the IACtHR, one at the individual level, i.e. the order of the state to offer psychological support to the victim, and one at the community level, i.e. the

[59] Source: Az Európai Tanács elnökének következtetései a migráció külső dimenziójáról - Consilium (europa.eu)
[60] Source: Jane Corazon Okinyo, Kenya (humanrightspsychology.org)

obligation of the state to publicly admit its responsibility for what happened and to proceed with a public apology, and let us try to hypothesise the impact they would have in the European system in cases similar to those analysed in the country focus[61] .

3.1.1 Psychological support for detained migrants victims of human rights violations

Psychosocial support refers to processes and actions that promote the well-being of people in their individual and social worlds. It can also be described as a process of facilitating resilience within difficult contexts and aims to help individuals recover after a crisis has disrupted their lives and improve their ability to return to normal after experiencing negative events that cause trauma.

Another aspect must also be considered: cases of violations reach the European Court long after the events have occurred, especially due to the obligation to exhaust domestic remedies, and the timeframe can even exceed ten years. Therefore, during all this time, and as the EMDR unit[62] of the Italian Federation of Psychological Societies of the Ministry of Health states, the time spent without a trauma-focused therapeutic intervention is directly proportional to the aggravation of the trauma itself. And if we consider that, according to data from Médecins Sans Frontières, 77% of migrants who faced the migration journey reported signs of mental health disorders[63] , we understand how important psychological support is. Traumas such as those caused by the migratory journey or by detention with torture and inhuman and degrading treatment are difficult to cope with, even more difficult to overcome, also because, like a photograph in the memory, they can never be forgotten by the person[64] .

As Gabriel Twose stated, human rights violations represent the worst and most painful form of disregard for human dignity, causing such suffering that it annihilates the individual physically and mentally[65] .

Concretely, psychological support in the aftermath of gross human rights violations could be very helpful in protecting the individual, as it can help survivors of human rights violations to heal from their traumatic experiences, it empowers them by helping them regain a sense of control and responsibility over their lives by promoting resilience, it acknowledges the lived experiences and suffering of marginalised individuals or communities, and it can help to break the cycle of violence and stigma associated with mental health problems by addressing the psychological impact of human rights violations. It also supports transitional justice processes:

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[61] *Suora pp. 35*
[62] Eye Movement Desensitisation and Reprocessing (EMDR)
[63] Source: Migrants and mental disorders: a specific risk? (ausl.re.it)
[64] Brown, R., & Kulik, J. (1977). Flashbulb memories. *Cognition*, *5*(1), 73-99.
[65] Twose, G., & Cohrs, J. C. (2015). Psychology and human rights: Introduction to the special issue. *Peace and Conflict: Journal of Peace Psychology*, *21*(1), 3.

psychological support is crucial in the context of transitional justice processes, such as truth and reconciliation commissions or court proceedings. It enables survivors to participate fully in these processes, to share their testimonies and to seek justice. By addressing the psychological needs of survivors, these processes can be more effective in discovering the truth, promoting accountability and achieving reconciliation.

Moreover, those who are veterans of serious human rights violations may find themselves catapulted into conditions of very serious social and psychological vulnerability, so severe that they are unable or unwilling to seek psychological support, whether for economic, cultural or individual reasons[66] .

It is in the light of the considerations just made that the hypothesis that state-ordered psychological support is a fundamental measure of redress for the justice of the individual is founded. It would be a fundamental step for two reasons: to recover part of the trampled dignity and rebuild the basis of one's life, as psychological well-being is concretely related to social and economic well-being, and to prevent and defend human rights by promoting awareness, resilience and cooperation strategies among individuals and communities, reducing the possibility of future violations. Furthermore, mental health professionals who provide psychological support can play an active role in defending human rights and influencing policies and practices that protect and support survivors.

3.1.2 The admission of responsibility and public apology for what happened

It is one of the reparation measures with the highest symbolic significance, capable of being extremely meaningful for the victim, the community and the government.

Starting with the state representatives themselves, they are very reluctant to admit responsibility for facts of this gravity, and even less so to do so publicly.

Usually, the Inter-American Court orders the state to hold public ceremonies admitting how things really happened, the seriousness of the facts, a public apology and, often, even to affix a memorial to the victims (IACtHR, Case of the 'Masacre de Mapiripán' vs. Colombia - 15 September 2005), and often this ceremony must be held in the place where the violations took place or in the communities to which they belong. Often the victims are one or more people belonging to indigenous communities, living in remote and isolated places in a country, locations that are difficult to reach because they are far from the big cities and capitals where the

[66] Twose, G., & Cohrs, J. C. (2015). Psychology and human rights: Introduction to the special issue. *Peace and Conflict: Journal of Peace Psychology*, *21*(1), 3.

government resides. Despite this, in the inter-American system, the government is obliged to go there and perform the ceremony there (IACtHR, Case of Masacre de Plan de Sánchez Vs. Guatemala, 19 November 2004).

There is no shortage of cases against indigenous communities or ethnic and cultural minorities in the European system, such as the numerous cases against Turkey for events in Turkish Kurdistan, but the government has never been obliged to implement a ceremony there, nor to apologise publicly.

Even in the cases analysed above, the violations took place in places far from urban centres, such as along the Hungarian border with Serbia (Alhowais v. Hungary) or in first reception centres located on the remote Italian coast (J.A. v. Italy). If in the Hungarian case it would be insignificant for the ceremony to take place at the remote border point, in the Italian case things could have a very important symbolic meaning if the state representatives went to the migrant reception centre where the torture took place and publicly apologised.

The social impact of this action would also be extremely significant in terms of the media.

To understand the true meaning of public admissions of guilt by the perpetrator state, social psychology comes to our rescue.

Sanderijn Cels, an expert in social and political psychology from Harvard University, USA, states a very important concept. When the government publicly admits its responsibility for real events, especially when these events are of great social relevance and can cause a stir in public opinion (such as massive human rights violations), a basic hierarchical mechanism in the structure of any democratic regime is broken, namely the vertical State-Community-Individual relationship system. The state that admits to what happened in a public ceremony renounces its position of supremacy and purity, drops the foundations of its reputation as a powerful entity that watches over the safety of its citizens, and sews onto itself the label of tyrannical and oppressive government that all modern democratic philosophies want to tear down. The hierarchy is reversed as this label rightly places the individual as the protagonist, where his protection is the most important thing, and after that comes the community, as all individuals feel vulnerable and exposed to the same treatment, and remember that it is they who hold the electoral power and will not vote for a violent and oppressive state. The pyramid and the chain of needs is reversed, where in the foreground is no longer the need of every individual and society to have a solid government that respects rights and freedoms, but rather the need of the state not to lose, and in case to regain, its reputation and the trust of the voters[67].

[67] Cels, S. (2015). Interpreting political apologies: The neglected role of performance. *Political Psychology*, *36*(3), 351-360.

What Dr Cels says is very significant. Although these are not dynamics visible to the 'naked eye', they are political, psychological and social phenomena that determine the future of a country, hence of its citizens and ruling authorities.

Going to reception centres, to the borders, to minority communities whose ethnicity corresponds to that of the victim, or even just apologising in the language spoken by the victim, could be an action of great potential to remind us that the power of state authorities has limits, one of which, probably the most important, concerns respect for human rights and the dignity of the person.

The effect on the community would be of the same magnitude, but diametrically opposite, to that on the government.

There are several potential social impacts that a public apology by a government can have. Firstly, in terms of acknowledging the wrong done, which could acknowledge and validate the pain, suffering or injustice experienced by individuals or communities, helping them to feel heard and understood. Secondly, it would serve to restore trust between the government and the people, including initiating a process of healing and reconciliation by providing emotional relief, allowing those affected to move on, and promoting a sense of unity and understanding within society.

Other societal impacts that it is crucial to highlight are those in the past and future perspective. In the first case, public apologies can serve to address historical injustices, even in the present migration situation: cases of aggression and oppression of migrants are certainly nothing new nowadays, national and international courts have collected decades of jurisprudence on the subject, and this symbolises a chronic problem in European countries. Public apology ceremonies, especially on the spot, could be an important symbolic step towards acknowledging and rectifying past wrongs. It can act as a catalyst for broader discussions on historical injustices and prompt efforts to address systemic issues that have marginalised certain groups.

As for the future perspective, this action may set a precedent for future policy manoeuvres, signalling that certain acts or behaviour are unacceptable and should not be repeated. It can create an expectation of higher standards for governance and accountability, influencing future decision-making and policy implementation. Furthermore, government apologies can stimulate public discourse and raise awareness of a particular issue or injustice, thereby stimulating conversations about social, political and ethical issues and encouraging individuals and communities to critically examine and discuss the implications of government actions. Finally, getting more concrete, public apology ceremonies can result in effective measures to address the harm caused. This may include policy changes, reparations, or initiatives to rectify the consequences of past actions. Such

actions can have a positive impact on affected individuals or communities and demonstrate the government's commitment to making amends.

In this light, this reparation measure can be a crucial step towards protecting the human rights of detained migrants.

As Vincenzo Ferrari stated, the legal potential of European Court rulings is indisputable. A state's reputation is damaged whenever the Court rules against it. However, each state, directly or indirectly, has control over its national press, so there is usually no tendency to overemphasise European Court rulings. Furthermore, the fact that states are only obliged to pay monetary compensation makes the ruling less resounding in public opinion[68] .

If, on the other hand, the reparation measures adopted by the Court oblige the state to offer free psychological support to the victim or to apologise publicly, thus directly involving the person and the entire community, states would rightly carry a heavier burden commensurate with the severity of the human rights violation, and consequently be inclined to want to avoid going through this process again. Added to this are all the individual and social impacts listed in the two reparation measures under consideration, which together can act as a shield for future violations and protect the dignity of detained migrants.

[68] V. Ferrari, 'Law and Society: Elements of the Sociology of Law', 2004, cited pp. 111-119.

Conclusion

In conclusion, this paper has highlighted the fundamental interdependence between the legal and psychosocial dimensions in protecting the human rights of detained migrants within the Council of Europe. By examining the intricate relationship between the legal framework and the psychosocial well-being of detainees, we have emphasised the importance of a comprehensive approach to immigration detention. We emphasised that the issue of protecting the human rights of detained migrants is a very critical area, globally as well as at the regional and state level. Country focuses helped us to understand the different peculiarities of migration management systems and the kind of human rights violations they often entail. We analysed the approach that the European Court of Human Rights adopts in this kind of case and focused on reparation measures, ending the argumentation on the latter by proposing a psychological and social perspective.

The legal dimension sets the framework for detention practices, outlining the rights and obligations of both states and migrants. It is crucial that states adhere to international human rights standards and ensure that their laws and policies are in line with the principles of fairness, non-discrimination and due process. A robust legal framework should ensure access to legal representation, effective remedies and safeguards against arbitrary detention, thus safeguarding the human rights of detained migrants, especially in relation to the risk of torture and inhuman and degrading treatment.

However, it is equally essential to recognise the interconnectedness of the psychosocial dimension in immigration detention. Detention can have serious psychological, emotional and social impacts on individuals, amplifying their vulnerabilities and exacerbating existing traumas. Therefore, it is the duty of states to prioritise the well-being of detainees by creating an environment that promotes their mental health, ensures access to healthcare and supports their social integration. In this paper, however, we wanted to go one step further, namely to emphasise the importance of psychosocial protection of migrant detainees not only by states, but by the European Court itself. Notwithstanding the Court's legal prestige and importance, contributions from the psychological literature allow us to assume that in order to effectively protect the human rights of detained migrants, it is indispensable that the Court also adopts a holistic approach that harmonises the legal and psychosocial dimensions, both by collaborating with central figures who bring their knowledge to bear in cases such as those analysed, such as mental health workers, civil society organisations, social psychology experts and social workers, but also, and above all, by increasing the range of restorative measures ordered to the state in cases of guilt.

The intention of this paper is, of course, not to discredit or criticise the action of the European Court, but rather to try to envisage the impact of its judgments if reparation measures were more widely available. It is clear how far psychological and social research can go with respect to issues related to the humanity and dignity of

the person. This does not mean that the legal perspective does not do so at the same level, there is just a great and natural difference in approach.

The contributions of social psychology that we have included in this paper can serve as a springboard for a deeper consideration and reading of human rights violations by the judges of the Court, who will hopefully begin to implement specific restorative measures focused both on the full recovery of the individual and social dignity of the person, and on the protection of future potential victims and the community.

Whether analysed from a legal, sociological, psychological or simply moral perspective, torture remains among the most heinous forms of human rights violation, which states unfortunately continue to use in various forms.

Information about what is happening and public denunciation is the strongest form of protection from torture, but also learning from those who have always respected the humanity of the individual and proudly defended the integrity of the state and the uniform they wear.

After the disappearance and killing of Aldo Moro, General Carlo Alberto Dalla Chiesa, one of the main protagonists of the Italian fight against organised crime, especially against the Mafia of *Cosa Nostra* and the *Brigate Rosse*, said:

> *<<Italy can afford to lose a life, but it cannot afford to embrace torture as a means of pursuing justice.*
>
> *The difference between a democratic rule of law and a criminal state lies in the means it uses to ensure justice and respect for the dignity of every individual. If Italy embraced torture, it would become a shadow of what it is trying to fight against and we would no longer be able to distinguish good from evil>>.*

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  - Masacre de Mapiripán' vs. Colombia - 15 September 2005, San Josè ;
  - Masacre de Plan de Sanchèz v. Guatemala, 19 November 2004, San Josè.