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Administrative Detention Pending Removal: The Blind Spot of Human Rights Protection in Europe

Prof. Davide Paris
Supervisor

Prof. Giuseppe Pascale
Co-Supervisor

Francesca Gentile
Candidate
ID No. 647282

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Introduction

On the fourth of February 2024, Ousmane Sylla committed suicide in his cell in the Centre for Repatriation (CPR) of Ponte Galeria in Rome. Ousmane was a Guinean boy of 22 years old who had been detained for the purpose of removal for seven months[1]. Italy has no bilateral agreement with Guinea to facilitate the enforcement of return in that country, and Guinea does not accept returnees. He should have been released in May, but after the Cutro Decree increased detention terms from 90 days to eighteen months in March 2023, his detention was also extended. Since he had been notified of the extension of his detention, Ousmane started showing signs of mental instability[2]. Initially, he was detained in the CPR of Trapani. The psychologist employed in the facility had warned about his mental state, affirming that it made him unfit for detention in a CPR[3]. Nevertheless, his detention was prolonged, and shortly before the suicide, he was transferred to Rome after a revolt broke out in the Trapani CPR to protest against the imprisonment of more than a hundred people in a single section of the centre.

Administrative detention is employed across Europe against undocumented migrants with the function of facilitating their repatriation. Since it represents an exception to the right to liberty, its legitimacy depends on the respect of strict safeguards against abuse, mistreatment, and arbitrariness[4]. In particular, the measure should be adopted in accordance with the law and as a last resort after alternatives have been exhausted[5]. It must ensure respect for human dignity and guarantee access to basic necessities, healthcare, and protection against abuse[6]. Due to its administrative function, the detention pending removal is not covered by fair trial guarantees[7]. Thus, in light of the exceptional nature of a measure employing modalities characteristics of criminal law without establishing, in parallel, the guarantees against arbitrariness typically applied to criminal detention, ensuring the respect of the few legal standards mentioned above becomes even more critical. Regrettably, though, that of Ousmane Sylla is not the only case of unmotivated[8] detention or the only situation where respect of the rights of returnees are not respected[9]. Since the administrative detention measure was

[1] The story of Ousmane Sylla is only summarized here. For the detailed story, see: Il Post (February 5, 2024), *Che posto è il CPR di Roma,* il Post; Camilli, A. (February 6, 2024), *Una Morte annunciata nel centro di detenzione di Ponte Galeria.* Internazionale; Forti, P. (February 8, 2024), *Il suicidio di Ousmane Sylla non farà cambiare idea al governo sui CPR.* Micromega.
[2] The paradox is that, when notified with the extension of the detention, Ousmane explicitly requested to be repatriated in Guinea. Nevertheless, for the reasons highlighted above, this was refused. In this sense, it is not clear at all what was the function of his detention. See Forti, P. (February 8, 2024).
[3] Camilli, A. (February 6, 2024).
[4] European Agency for Fundamental Rights (2020), *Handbook on European law relating to asylum, borders and immigration*, European Union.
[5] *Ib.*
[6] *Ib.*
[7] Wilsher, D. (2011). *Immigration detention: law, history, politics*. Cambridge University Press.
[8] This affirmation refers to the fact that since Guinea does not accept returnees and there was no agreement between the two nations to facilitate removals, in the case of Ousmane the link between his detention and the execution of removal (which is the only legitimate objective for administrative detention) was very weak, if not inexistent, and it cannot be said that there was a reasonable expectation for his removal to succeed. This is reinforced by the fact, mentioned above, that when he agreed to be removed, his request was denied, *supra note* 2.
[9] As will be explained in the course of the thesis, administrative detention can only be applied where it is certified by a competent legal authority that the condition of the non-national are suited to detention. Therefore, reference is made here to the fact that the psychologist of the CPR of Trapani had stated that his mental state made Ousmane unfit to detention.

instituted in Italy, it is estimated that at least forty people have committed suicide while being detained pending removal[10]. In recent years, numerous organisations have monitored violations occurring within administrative detention centres across Europe[11]. They reported numerous cases of severe violations of the human rights of migrants, which can also result in tragic events like self-harm and the death of detainees, often under uncertain circumstances, emphasizing as well that the data available on detainees whose removal is successfully executed does not seem to suggest the effectiveness of the measure in facilitating their returns[12]. Nevertheless, its employment by states has profoundly increased, making it an essential part of the EU return policy[13].

Given the quantity of cases where an insufficient protection of the rights of migrants placed in administrative detention was attested, this thesis delves into the question of establishing at which level the European regime protecting the human rights of migrants fails. Certainly, states are the subjects primarily entrusted with protecting the human rights of people under their jurisdiction[14]. Nevertheless, human rights are also protected within the European Union, whose adjudicatory body, the Court of Justice of the EU (CJEU) must apply human rights standards while interpreting EU law[15]. Another level of protection is established by the European Convention of Human Rights (ECHR) adopted by the Council of Europe, whose adjudicatory body, the European Court of Human Rights (ECtHR), ensures its application and respect by hearing complaints from individuals alleging violation of the rights protected under the Convention, provided that domestic remedies have been exhausted[16]. Therefore, in Europe, human rights protection is enforced at the domestic level by national courts, at the EU level by the supranational CJEU, and at the Convention level by the regional human rights body, the ECtHR. The objective of the thesis is, accordingly, to research whether the attested violations of migrants' rights are determined by inadequate protection of migrants' rights at the level of EU norms (including the interpretation offered by the CJEU), by insufficient scrutiny of the ECtHR or, finally, by shortcomings at the level of domestic implementation of the measure.

To accomplish this thesis' objective, it will be necessary to explore how each of these layers of protection interacts with the measure of administrative detention to ensure that the deprivation of liberty does not violate human rights standards. Accordingly, the first chapter will place immigration detention within the broader context of prevailing tendencies in the European understanding of migration, influenced by the processes of *crimmigration*, securitization, and *massification*. The second chapter will explore EU law concerning administrative detention and the interpretation given by the CJEU. Analogously, the third chapter

[10] Santi, S. (February 6, 2024), *C'è un grave allarme suicidi nelle carceri italiane e nei Cpr,* Lifegate.
[11] For an overview of the immigration detention systems of Spain, Belgium, France, Germany, and the United Kingdom, Greece, and Italy, see: Borlizzi, F., & Santoro, G. (2021), *Buchi Neri: la detenzione senza reato nei Centri di Permanenza per i Rimpatri (CPR), Primo Rapporto*, CILD; Cantat, C. (2020), *Locked up and excluded: Informal and illegal detention in Spain, Greece, Italy and Germany,* Migreurop. Moreover, some associations provide country reports on the implementation of administrative detention by these and other European states. See, in particular, the AIDA & ECRE and the Global Detention project database.
[12] *Ib.*
[13] Gatta, G. L., Mitsilegas, V., & Zirulia, S. (Eds.) (2021). *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on "crimmigration"*. Bloomsbury Publishing.
[14] Kälin, W., and Künzli, J. (2019). *The law of international human rights protection*. Oxford University Press.
[15] Schütze, Robert. (2018). *European Union law* (Second edition). Cambridge University Press.
[16] Kälin, W., and Künzli, J. (2019).

analyses the relevant provisions of the ECHR regarding immigration detention and the corresponding jurisprudence of the ECtHR. The fourth chapter will be a case study on the Italian administrative detention system, examining the domestic norms regulating it, its functioning and defining features, and the modalities through which the protection of the rights of immigrants placed in detention pending removal is assured. Each of the last three chapters will be concluded with an assessment of the standards of protection afforded to immigrant detainees at each level and to what extent this proves to be effective in preventing the arbitrariness of this type of deprivation of liberty and the occurrence of human rights violations.

Chapter one. Detention pending removal: *crimmigration,* securitization, and *massification* of the individual migrant.

1. Introduction: *crimmigration*

The primary function of this first chapter is to contextualize the subject of this thesis, namely the institution of administrative detention of migrants awaiting repatriation, as the outcome of a series of processes occurring over the last fifty years, which determined the hostile narrative surrounding migration. Thus, it will frame administrative detention of migrants within the phenomenon of *crimmigration* and the processes associated with it, by dealing as well with the *massification* of the individual migrant, which allowed the securitization logic to emerge with regard to the management of migration. Subsequently, it will explore the new notions of sovereignty, border and state which emerged accordingly, the membership theory elaborated by Stumpf[17], and the securitizing narrative adopted to justify the adoption of draconian policies towards migrants. As final points, it will analyse the significance and consequences resulting from the criminalisation of migration and, to conclude, the exclusionary effects of *crimmigration* policies, in their physical and normative manifestations.

The expression *crimmigration* was coined by Juliet Stumpf in 2006 to describe a persisting trend in United States law, consolidated in recent decades in European law as well[18]. The term refers to the merging between criminalizing logic and administrative efficiency in migration policies which results from the progressive convergence of criminal and immigration laws[19]. Such approach to migration, although variously justified to the public through vague notions of security and national integrity, is aimed at normatively justifying and normalizing the systematic exclusion of undesired foreigners from the domestic community. According to Alessandro Spena *crimmigration* is characterized by the proliferation of the modalities of exclusion of the foreigner, an increase in number and severity of the penalties for violations of the migration norms (which can be linked to the direct and indirect criminalisation of irregular entry, re-entry, and stay), and the massive use of detention, justified through the non-punitive objective of securing deportation of the irregular migrant[20].

To operationalize the process of *crimmigration* process Gianluigi Gatta identified three different 'strategies'[21]. These include (1) the introduction of consequences typical of criminal law for violations of immigration laws, (2) the employment of sanctions in the administrative and immigration field in response to criminal law convictions, and (3) the usage of tools typically associated to criminal law (e.g., custody) for

[17] Stumpf, J. (2006). The crimmigration crisis: Immigrants, crime, and sovereign power. *American University Law Review, 56(2),* 367-419.
[18] *Ib.*
[19] Spena, A. (2017). La crimmigration e l'espulsione dello straniero-massa. *Materiali per una storia della cultura giuridica, 47(2),* 495-514.
[20] *Ib.*
[21] Gatta, G. L. (2021). Global Trends in 'Crimmigration' Policies. In Gatta, G. L., Mitsilegas, V., & Zirulia, S. (Eds.). (2021). *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on" crimmigration".* Bloomsbury Publishing, 47.

immigration law violations. Especially with reference to the first strategy, it is extremely interesting to note how criminal law becomes instrumental to the carrying out of immigration law objective. Gatta describes, for example, the paradox for which the consequences of illegal entry (i.e., removal, or detention awaiting removal) take precedence with respect to any consequence, which may be already in progress, deriving from a criminal conviction (i.e., normal detention in the host country), so that the repatriation of a convicted criminal (for crimes not related to its migrant status), is prioritized over the criminal penalties ordered by a judge[22].

For how significant (in terms of effect on human lives) the consequences of the *crimmigration* phenomenon are, it is odd to notice how plausible the connection between these two branches of law seem to appear to the public. On one hand, it seems natural then when confronted with a phenomenon which is perceived by public opinion as a danger to society[23], criminal law, which is thought of as the branch of law which sanctions dangerous individuals will be applied. Indeed, criminal law was first applied to exclude immigrants convicted for certain categories of crime in the past[24]. However, as Stumpf notices, a more insightful justification for this merge looks at the core of these two legal systems[25]. She describes how, while the other systems of law at the national level seek to regulate the relationships between private persons, immigration and criminal law regulate those between state and citizens, and in doing so, they are 'systems of inclusion and exclusion'[26]. That is why when the aim of regulating migration, is not one tied to foreign policy matters or to the protection of human rights, but an essentially exclusionary one, policy makers will first turn to criminal law (in the modalities described above) and then justify the association through the proliferation of a dangerous image of the migrant.

The immediate result of such processes, and, as some believe, their direct objective, is in general terms the creation a third in-between legal system, which replicates practices specific to criminal law but with a much less accurate reproduction of the guarantee aspects, which, with their propensity towards rigidity, are not aligned with the flexibility necessary to achieve efficiently the systemic purpose of expelling the category of undesired migrants from society[27]. Gatta interestingly observes how there is no real legal purpose behind the introduction of criminal law in immigration law, especially in its most evident form of criminalizing illegal entry and stay, that can justify such intermingling[28]. As he observes, by taking Italy as an example, criminalisation of illegal entry does not prevent the conduct from being repeated (the crime per se is punished with a fine) , and most decisively, it does not have any consequences on removal which remains regulated by administrative law[29]. According to Gatta[30], and as suggested by Stumpf as well[31], therefore, the choice of

[22] *Ib.*
[23] The rest of the paragraph will explore the processes that contribute to such image.
[24] Stumpf, J. (2006).
[25] *Ib*.
[26] *Ib*.
[27] Gatta, G. L. (2021); Spena, A. (2017)
[28] Gatta, G. L. (2021)
[29] Gatta, G. L. (2021)
[30] *Ib.*
[31] Stumpf, J. (2006)

introducing criminal law and criminal law-like practices has a symbolic value in placing on the migrant the same stigma of dangerousness associated with people punished by criminal law.

2. *Massification*

As described above, the distinct system of law that results from the process of *crimmigration* incorporates the objectives, procedures, and juridical means of immigration law, while integrating a prevailing approach marked by deterrence and stigmatization, characteristic of criminal law. The core of such stigmatization rests first and foremost on the process through which the individual migrants are turned into what Spena terms a 'mass-foreigner'[32]. Indeed, looking at the Italian example, the scholar describes how the understanding of the individual migrant as a potential source of public insecurity is widely present already since the beginning of the last century but is not *per se* a determinant of the deterioration of the standards of protection of the alien[33]. More crucially, since the 90s, the methods used traditionally by the criminal justice system were adapted to be systematically deployed to confront the growing influx of immigrants, particularly from impoverished regions like central and North Africa, perceived as diminishing in quality over time[34]. Such flow, rather than being understood as an inevitable and structural phenomenon necessitating social and cultural policy shifts and international collaboration, was understood by policy makers as a matter of public safety and order and, therefore, the logic previously applied to single migrants who had manifested problematic behaviour, was applied to an entire mass of undesired people[35]. The image of the immigrant was transformed into an amorphous mass of unwanted aliens, collectively portrayed as a problem for the state, not only from a perspective of public security but also in terms of cultural identity and allocation of resources.

Connected to the notion of the mass-foreigner explored by Spena[36], is the social phenomenon of 'othering', defined by Dario Melossi as the act of labelling negatively the 'other' based on unfavourable features that we perceive as defining the category of 'other'[37]. Especially when associated with migrants, such a label most often associates the other with 'savagery': the other is perceived as inferior based on their class, race, or gender and, as such, prone to violence[38]. The link between stranger and savage is a long standing one, in social interaction and in academic discussion, as evident already in the works of Lombroso[39] and Ferri[40], who thought of migration as a 'penal substitute', essentially a substitute for the classic forms of punishment[41]. Nevertheless, Melossi goes on to explain how, taking the Italian example, the categories of crimes for which migrants are

[32] Spena, A. (2017).
[33] *Ib.*
[34] *Ib.*
[35] *Ib.*
[36] *Ib.*
[37] Melossi, D. (2021). The Connections between Migration, Crime and Punishment: Historical and Sociological Questions. In Gatta, G. L., Mitsilegas, V., & Zirulia, S. (Eds.). (2021). *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on" crimmigration".* Bloomsbury Publishing.
[38] Melossi, D. (2021)
[39] See Lombroso, C. (2006). *Criminal man*. Duke University Press.
[40] See Ferri, E. (1880). *Dei sostitutivi penali*. Roux e Favale.
[41] Melossi, D. (2021)

truly over-represented vis-à-vis the rest of the population are, first, what he defines as 'status crimes' (crimes sanctioned by migration laws and that only migrants can commit) and, second, those crimes which require action by law enforcement for detection (such as drug peddling or the organization of prostitution rings)[42]. The conventional association between crime and migration, he argues, subjects migrants, and national minorities in general, to heightened social pressure and higher scrutiny, contributing to a 'ratchet effect': higher scrutiny towards a certain category results in an over-reporting of crimes committed by these groups, further reinforcing the stereotype of the crime-prone migrant and justifying an intensified scrutiny, and so on in a vicious cycle[43].

With regard to detention of migrants awaiting deportation, individuals are, therefore, detained not on the basis of their deeds, but rather as a consequence of their association with this undesired mass, in other words, because correspondent to a stereotype which makes them undesirable for public safety. Given this, according to Spena[44], the criminalisation of illegal migration exemplifies a form of *Täterstrafrecht*, defined as a model of criminal law which sanctions the offender, as opposed to *Tatstrafrecht*, penalizing the offense. The first actor-centred approach*,* associated with anti-liberal and authoritarian ideologies, exhibits 'pure and spurious' manifestations, contingent on the extent to which the behavior of the offender is taken into account when evaluating 'criminality'[45]. While a pure version would be, for instance, the theory of born-criminals elaborated by Lombroso, the criminalisation of illegal migration, Spena argues, represents a spurious version of *Täterstrafrecht* where the norm formally refers to the conduct of illegal entry and stay, but where such a conduct can only be performed by people corresponding to a *Tätertyp* (stereotype), which is built to justify the stigma of inherent dangerousness of the category (i.e. people from non-visa-exempt countries lacking the means to acquire a visa)[46]. Therefore, the scholar contends that the formal legal focus on the conduct fails to conceal the fact that the criminalisation of illegal entry or stay operates as a ban on a category of people, identified as corresponding to the *Tätertyp* described above. The sanctioning of a category of people rather than specific actions is what, according to Campesi[47], marks the shift towards a preventive type of state, which will be discussed further in the next paragraph.

The *massification* of the migrant imposed, and, to a certain extent, provided justification for, the crucial objective of expulsion, transforming it from a measure sanctioning individuals who exhibited a behaviour dangerous to public safety, to a systemic objective seeking to eliminate the possibility of entry for undesired migrants, in virtue of which immigration law was now reconceived. In the Italian context, this shift was evident in the introduction from 1989 onwards of norms that, on one hand, broadened the scope of application of expulsion-related norms, and, on the other hand, created a new type of expulsion called *'ripristinatoria'*,

[42] Melossi, D. (2021), 86.
[43] *Ib.*
[44] Spena, A. (2014). Iniuria migrandi: Criminalization of immigrants and the basic principles of the criminal law. *Criminal Law and Philosophy, 8,* 635-657.
[45] Spena, A. (2014), 642.
[46] *Ib.*
[47] Campesi, G. (2020). Genealogies of immigration detention: Migration control and the shifting boundaries between the 'penal' and the 'preventive' state. *Social & Legal Studies*, *29*(4), 527-548.

having the function of restoring the territorial sovereignty of the state[48]. In such measures, the irregularity of the migrant does not result from their behaviour but from a condition of irregularity, that is pre-existent and determined by the entry requirement set by the receiving state. In other words, expulsion now serves as a systematic instrument to remove the mass of migrants who do not conform to the standards set by the state, particularly affecting people from non-visa-exempt countries without the means to acquire a visa, as described by the *Tätertyp* mentioned earlier.

3. New notions of state, border, and sovereignty, and the membership theory

The aforementioned trends find their roots in a reformulation of the phenomenon of migration and the figure of the migrant, which are in turn dependent on the emergence of new concepts of state, sovereignty, and border. For example, Spena argues that the introduction in Italy in 1998 of the *Testo unico sull'immigrazione* (Tuimm, Single text on immigration), which imposed for the first time limits on the migrants' ability to enter the state, is testimony of a paradigm shift in the understanding of borders[49]. The set of rules in force until then operated on a logic of open border and territory, where the state lacked the interest to establish boundaries on immigration, merely requiring that migrants register their status with the authorities[50]. Conversely, the rules introduced in 1998 reflect a completely different notion of border, where it is indeed prerogative and interest of the state to impose limitations on the migration within its territory, whose borders are conceived as closed and entry is solely permissible through the avenues prescribed by the state[51].

The self-accorded prerogative of the state to establish a priori which categories of people have the right to entry its territory is certainly correspondent to a closed notion of borders, but it is also evidence of the transition from a modern state whose 'control model' is built on penal measures to what Giuseppe Campesi defines as the 'preventive state'[52]. Briefly, the penal state operates on a retrospective logic of criminalisation, i.e., the state exercises its authority, by investigating and adjudicating on criminal actions violating its laws, *a posteriori* and, therefore, it employs coercion only after the criminal conduct has taken place. Instead, Campesi has identified in the introduction of regulations that allow the state to adopt coercive measures prior to the occurrence of a criminal act the emergence of a preventive logic, whereby the state places constraints on individuals considered likely to produce harm for its society by making an innocuous action a criminal offence, on the basis that it is predictive of potential future misconduct[53]. The preventive state analysed by Campesi is

[48] The first category of norms of which the scope of application has been extended after 1989 include those referring to border rejection (art.10§2, Tuimm), deferred rejection (art. 10§3, Tuimm), deportation as a security measure (art. 235 of the Italian Penal Code), while "restorative" expulsion was introduced in art. 13§2, Tuimm. See Spena, A. (2017).
[49] Spena, A. (2017).
[50] Before 1998, migration was still regulated by the highly technical prescriptions for migrants seeking residence in the state contained in the *Testo unico delle leggi di pubblica sicurezza (*Tulps, Unified text of public security laws), in force since the Mussolini government and reflecting the political guidelines of the time, especially where it regulated behavior to some extent related to politics. The establishment only of a number of technical prescriptions does not reflect a greater permissibility allowed by the regime vis-à-vis migrants, but only the lower degree of salience that migration control had at the time. See Spena, A. (2017)
[51] Spena, A. (2017)
[52] Campesi, G. (2020), 539.
[53] Campesi, G. (2020)

associated to the notion of mass-foreigner articulated by Spena[54] and his discourse on the *Tätertyp*[55] in that the assessment regarding which individuals are likely to pose a danger to society is made exclusively contingent on their association to the mass-foreigner and, therefore, is only dependent on their correspondence to a stereotype.

A further intriguing perspective on the relationship between the immigrant and the host state is offered by the coiner of the term upon which this chapter directs its attention. According to Juliet Stumpf's membership theory, the confluence between immigration and criminal law is primarily driven by the intrinsic similarity of these two legal systems, both governing the relationship between the state and the individual and both characterized by Stumpf as 'systems of inclusion and exclusion'[56]. Although criminal law does so implicitly, both these legal domains function to establish who is to reap the benefits of being a member of society and, consequently, enjoy the positive rights that arise from the 'social contract' between the state and the citizens[57]. In relation to the American context, Stumpf identifies two developments that show how membership theory interacted with the evolution of criminal and immigration law, leading to their convergence and, ultimately, the emergence of *crimmigration*[58]. Firstly, during the 1970s, rehabilitation as the motivation behind penology lost favour to be gradually replaced by more severe rationales, such as incapacitation or deterrence. Secondly, criminal penology progressively aligned with immigration law in recognizing an inherent power to the state to establish the contours of its membership, as a corollary of its sovereign power to protect its territory. To confirm Stumpf's line of reasoning, Bosworth and Turnbull trace the origins of immigration detention in the practice of confining people believed to represent potential danger in colonial societies[59]. In other words, as theorized by Bashford and Strange by examining the Australian context, detention practices have intervened in the processes of nation building by 'creating degrees of belonging and alien-ness'[60]. Stumpf concludes that, in its most recent consequences, granting the state a sovereign power to limit its membership, resulted in a population, racially and economically recognizable, which is excluded 'physically, politically, and socially' from the members' society[61].

According to Daniel Wilsher, the membership approach bears two significant questions regarding the status of migrants in a liberal democracy and the fundamental features of the latter. In the first place, in a liberal democracy, a migrant who has been denied a right to entry or stay is a non-member and as such will face the residue of arbitrary power that the state can exercise towards them, i.e., detention[62]. This is the

[54] Spena, A. (2017)
[55] Spena, A. (2014)
[56] Stumpf, J. (2006), 380.
[57] Stumpf, J. (2006), 397.
[58] Stumpf, J. (2006)
[59] Bosworth, M., & Turnbull, S. (2017). Immigration detention, punishment and the criminalization of migration. In Pickering S., and Ham J. (2017). *The Routledge handbook on crime and international migration*, 91-106. Routledge.
[60] Bashford, A. and Strange, C. (2002), Asylum–Seekers and National Histories of Detention. *Australian Journal of Politics & History, 48,* 509-527, 510.
[61] Stumpf, J. (2006), 413.
[62] Wilsher, D. (2011). *Immigration detention: law, history, politics*. Cambridge University Press.

'physical and legal expression of their exclusion' within the host community and in turn determines their exclusion from the protection of an external legal order[63]. As the scholar crucially concludes, the key implication of non-membership is the status of 'outlaw', which excludes the migrant from the possibility of leading 'an autonomous life governed by law'[64]. The second but not less significant question raised by the application of membership theory by a liberal democracy pertains to the inevitable tension that it creates with the rule of law, which cannot admit that a person subject to a state's power and, therefore, to its monopoly of force in peacetime, is not afforded safeguards against its abuse or that the exercise of such a force is not posed under constitutional limit[65]. Such tension is, therefore, informed by a question on whether it is rule of law or the control of membership to the domestic community to be 'more constitutive' of liberal democracies and in need of protection against erosion by the other[66].

4. Securitization

The mass narrative and the newly emerged notions of authority and membership certainly provided justification for the affirmation of a rhetoric extremely hostile toward unauthorized migrants, more crucially though, it provided grounds for the securitization of the issue. Accordingly, the choice to consider migration control as a security issue was decisive in a number of ways for the systematization of detention practices for unauthorized migrants and the proliferation of detention centres designed for such purpose. According to Campesi, the consolidation of an immigration management system heavily reliant on detention, especially in Italy, resulted from the conjugate impact of two dynamics of securitization[67]. The first results from a 'symbolic dramatization of threats' allowing exceptional measures outside the established normative order to be adopted; the second operates instead through the gradual erosion of legal standards and institutionalization of control measures, which, while preserving the aspect of exceptionalism become regular features of the system of immigration control[68].

According to Wilsher, beside the officially declared objective of facilitating deportation, the detention of aliens has, especially recently and as a result of the above mentioned process of securitization, served a number of purposes more closely related to moral panics concerning crime, security, and terrorism, then to immigration control[69]. Such motives were behind the increased and extended use of preventive detention against irregulars and unwanted foreigners, justifying the discard of the rule of law and fair trial guarantees. In fact, Wilsher explains, the assumption that aliens lack 'a membership right' and the formalization of their detention as a

[63] Wilsher, D. (2011), xx.
[64] Wilsher, D. (2011), xxii.
[65] Wilsher, D. (2011)
[66] Wilsher, D. (2011), xxii.
[67] Campesi, G. (2014). Immigrant detention and the double logic of securitization in Italy. In Ceccorulli, M., & Labanca, N. (Eds.). (2014). *The EU, migration and the politics of administrative detention*, 145-165. Routledge; Aliverti, A. (2017). The wrongs of unlawful immigration. *Criminal Law and Philosophy*, *11*, 375-391.
[68] Campesi, G. (2014); Aliverti, A. (2017)
[69] Wilsher, D. (2011)

practice ancillary to border control have been employed to validate their exclusion from fundamental rights protection[70].

The general discontinuity between the modern liberal regimes in which detention without crime has become commonplace and the illiberal nature of such practice is manifest and noticeably puzzling. As Wilsher notices, a notable gap was left open by modern liberal theorists who failed to investigate properly the balance to be struck between states' necessity to control migration to some extent and the protection of aliens' rights[71]. Such a lacuna in liberal theory has left modern governments free to occupy it with 'political opportunism and instrumental logic', by echoing classic illiberal theories and framing the migrant as an enemy to the state (Wilsher, 2013: 259). Therefore, the politicisation of migration, often drawing on the war analogy and the portrayal of migrants as an invading army[72], was the first step towards the adoption of a security narrative warranting draconian policies and the de facto suspension of the rights of aliens. The fundamental incongruity between liberal theory and the illiberal policies adopted towards aliens is also vigorously noted by Erminio Vitale. Considering the statement by Ferrajoli that circulation rights are accorded to individuals, not to citizens, and, as a result, that the *ius migrandi* has always been recognized as a fundamental right in the classic liberal tradition, Vitale concludes that all EU legislation regarding migration is in manifest contrast to the classic liberal foundations of the Union, and as such should be considered 'a form of illegal legality' [73].

As a final point, several scholars have drawn attention to the fictitious nature of the correlation between migration control and security. Melossi emphasized how the patterns of international migration have historically aligned with the waves of globalization, characterized by general rising inequality, and classified the securitizing narratives adopted by politicians as nothing more than 'reactionary diatribes against social change'[74]. Worldwide migration is an inevitable and uncontrollable reality, 'borders will always remain porous' and, therefore, any effort by a nation state to assert concrete control over the entry of migrants can, at best, be described as delusional [75].

5. Criminalisation of migration

A powerful manifestation in Europe not only of the processes of securitization and demonization of the migrants, but also of the emergence of the preventive state theorized by Campesi[76] can be observed in the criminalisation of migration, i.e., the introduction at the national level of the criminal offences of illegal entry,

[70] Wilsher, D. (2011), 208.
[71] Wilsher describes both partialist and impartialist theorizations of the 'problem of migrants'. The first category includes those scholars who do not differentiate particularly between citizens and aliens in their accounts, the latter indicates instead the scholars according to whom state have a right to protect their citizens' interests over those of aliens. See Wilsher, D. (2011)
[72] For an explanation of how classic illiberal theorist like Hobbes and Schmitt are traced in today's narratives on migration, see Wilsher, D. (2011)
[73] Vitale, E. (2014). The morality of detention. In Ceccorulli, M., & Labanca, N. (Eds.). (2014). *The EU, migration and the politics of administrative detention*, 229-239. Routledge, 233.
[74] Melossi, D. (2021), 94.
[75] Wilsher, D. (2011), 305.
[76] Campesi, G. (2020).

transit and stay. In fact, according to Mitsilegas, the introduction of criminal law alongside administrative regulation on migration responds to a preventive and symbolic logic, in that it serves the purpose, as already identified by Spena, of impeding the entry of people fitting a stereotype identifying them as likely to cause harm to the community[77,78]. Thus, the inclusion of criminal law in a domain already regulated by administrative law is strongly symbolic since it reinforces the stigma of 'undesirability and dangerousness' of migrants, by equating them to criminals [79]. As described in the introduction of this chapter, the symbolic significance of introducing criminal offenses for illegal entry, transit, and stay is stressed by Gatta as well, who notices how the introduction of criminal offences relating to migration neither facilitates removal (or detention) nor does it discourage illegal entry and stay as the penalty for the offense is irrisory and rarely enforced[80]. Accordingly, the only conceivable purpose for criminalisation is to amplify the association of migrants with 'the stigma of social disapproval' commonly attached to the criminal offence'[81].

The perspective that criminalisation of illegal entry, transit and stay serves a primarily symbolic function is further underscored by the asymmetry that characterizes the incorporation of criminal offences related to migration. The result of such an incorporation is a hybrid system in which criminal law loses the fundamental safeguards that govern its application and render its enforcement consistent with the protection of human rights. The asymmetry is examined by Spena, who observed a reversal of the procedural-criminal logic[82] within the Italian system, where administrative expulsion takes precedence over criminal proceeding relative to migrants. According to the scholar, criminal and administrative law mutually reinforce and contaminate each other in an asymmetrical manner, functional to the expulsion of the mass-stranger from the national community[83].

To conclude, Ana Aliverti offers an extremely stimulating perspective on the problematics surrounding the criminalisation of immigration offences[84], by evaluating their alignment with the core tenets of criminal law (i.e., a criminal offence requires the commission of an act or failure to fulfil a duty, a culpable mental state of the prosecuted -*mens rea*-, and that the burden of proof be borne by the prosecution) and with the harm principle. Aliverti highlights that most of migration-related crimes, especially 'possession offences'[85], rely on situational liability, lack or impose a weak *mens rea* requirement, are 'too remote from harm', and place the

[77] Mitsilegas, V. (2021). The Criminalisation of Migration in the Law of the European Union: Challenging the Preventive Paradigm. In Gatta, G. L., Mitsilegas, V., & Zirulia, S. (Eds.). (2021). *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on" crimmigration".* Bloomsbury Publishing.
[78] Spena, A. (2014)
[79] Mitsilegas, V. (2021), 48.
[80] Gatta, G. L. (2021)
[81] Gatta, G. L. (2021), 59.
[82] *'Rovesciamento della logica processual-penalistica'* in Spena, A. (2017)
[83] Spena, A. (2017)
[84] Aliverti considers three clusters of immigration-related criminal offences: (1) 'seeking leave to enter or remain or postponement of revocation by deception, assisting unlawful immigration, and being unable to produce an immigration document at a leave or asylum interview'. See Aliverti, A. (2017), 377.
[85] Aliverti provides a list of 'possession offences' often criminalized by immigration law: 'possessing any passport, certificate of entitlement, entry clearance, work permit or other document which the defendant knows or has reasonable cause to believe to be false; possessing a false or altered registration card without reasonable excuse; possessing an article designed to be used in making or altering a registration card without reasonable excuse; and possessing an immigration stamp or a replica immigration stamp without reasonable excuse'. See Aliverti, A. (2017), 378.

burden of proof on the defendant instead of the prosecutor[86]. She argues that such offenses criminalize trivial conducts that only potentially, and collectively, could create a harm to a vaguely defined public interest and, therefore, cannot be considered to satisfy the harm principle[87]. According to her, the criminalisation of conducts 'too far removed from the causation of real harm' is based on a diluted version of the harm principle relying on a 'subjective security' driven by 'social anxieties'[88]. Crucially, the scholar concludes that the criminalisation of immigration offences, as evaluated against criminal law principles, inflicts an unnecessarily excessive pain on migrants which can be justified neither by the supposed danger posed by the aggregate phenomenon of unchecked migration, nor by the adoption of detention as a measure ancillary to deportation[89].

6. Physical and normative marginalization

These processes and the resort to administrative detention by states have dramatic effects on the life of migrants, producing a two-fold effect of separating them from the community. In a more obvious sense, they are physically excluded from public life when confined in detention centres. In a more profound and permanent way, migrants suffer a normative marginalization from the system of rights and protections upheld by the state, as well as from international legal safeguards. In this final part we will dwell on these two aspects[90], which collectively define the (non-) status of the migrant vis-à-vis the state and the rest of the global population.

Detention centres can be viewed as the physical representation of migrants' non-membership to the domestic community. As pointed put by Daniel Wilsher, the historical development of the practice of detaining migrants prior to authorization of entry or repatriation has consistently revolved around the notion of 'camp' as a liminal 'extra-legal' space, neither fully within the jurisdiction of the state nor entirely outside it, where government actions could, to some extent, manage to evade legal scrutiny[91]. Today detention camps continue to stand as the tangible embodiment of the residue of states' power to select the population at entry. They constitute the actualization of the normative exclusion suffered by migrants, which, in Wilsher's words, can be viewed as truly 'outlaws as regards their capacity to lead an autonomous life governed by law' [92].

The physical features of detention facilities reflect the exclusionary function of detaining migrants awaiting repatriation and, to some extent, confirm the proximity in methods between immigration detention and conventional penal detention. While the third and fourth chapters will delve into the specific features of detention facilities for migrants awaiting repatriation in Italy and Spain, it is worth examining now some fundamental characteristics that are common to the experiences of migrants in immigration detention centres across different countries. The timing, location, and duration of immigration detention varies according to a

[86] Aliverti, A. (2017), 378.
[87] Aliverti, A. (2017)
[88] Aliverti, A. (2017), 386.
[89] Aliverti, A. (2017)
[90] The concrete conditions of detention centres and of the life of the people detained will be dealt with in the third and fourth part of this dissertation, with case studies dedicated to Italy and Spain. In this part, my intention is to insert detention in the context of the different phenomena discussed above.
[91] Wilsher, D. (2011), xix.
[92] Wilsher, D. (2011), xx.

country's immigration system. Migrant can be detained at entry, during the stay, or before repatriation. Detention centers may be located near ports, scattered through the nation, or situated offshore. Confinement may be temporary, short-term, or long term. Most facilities are repurposed prisons or are built following 'high security prison architectural standards', while detention may result, depending on the facility, in lack of or restricted access to healthcare, legal aid and possibility to contact people outside the centre[93]. According to interviews gathered by Bosworth and Turnbull to previously detained migrants or conducted during visits to the facilities, detainees often experience a sense of uncertainty regarding the duration and regulation of their detention[94]. They also report a difficulty to relate other detainees, and to access medical aid in relation to complex medical needs, like past torture, addiction but also pregnancy and sexually transmitted diseases[95]. Moreover, depression rates among detainees are notably high and detention facilities often become places of violence with frequent fights between detainees, cases of suicides and attempted suicides, fires, and riots[96].

As previously mentioned, the physical isolation of undocumented persons in detention facilities mirrors their legal marginalization, which persists at all levels of normative safeguards, from constitutional to international legal frameworks, even extending to human rights law. As discussed by Stumpf, membership theory presumes that positive rights arise from a social contract between state and the 'People', a non-member, therefore, is not endowed with any constitutional right[97]. Both criminal and immigration law approach the question of establishing the scope of membership to the People, however they do so from opposite directions. While the former assumes membership and places the burden of proof on the state, the latter assumes non-membership and places the burden on the migrant to prove otherwise[98]. Ergo, access to constitutional protections depend on the migrant's ability to prove a connection to the community or to gain membership, resulting in undocumented migrants seeking entry enjoying virtually no constitutional protection. Moreover, Wilsher emphasized how historically such controversies pertaining to migration policies and the legal status of undocumented migrants have predominantly been resolved through democratic and bureaucratic channels, with courts 'officially' relinquishing most powers over such matters to the executive and legislative branches since the twentieth century [99].

The uncertain legal status of undocumented migrants at the domestic level is echoed in the failure to establish an effective internal legal regime regulating migration and protecting aliens' rights. According to Wilsher, while there was little discussion on the matter[100] at least within common law countries and until the emergence of human rights norms, 'an accepted maxim' within customary international law was that states

[93] Bosworth, M., & Turnbull, S. (2017)
[94] *Ib.*
[95] *Ib.*
[96] *Ib.*
[97] Stumpf, J. (2006), 397.
[98] Stumpf, J. (2006)
[99] Wilsher, D. (2011), xiii.
[100] Nevertheless, Wilsher interestingly mentions the studies of Nazfiger who had attempted at the end of the nineteenth century to codify rules on the admission of aliens, establishing as grounds for refoulment that the migrant pose, collectively or individually, a menace to 'public safety, security, general welfare or essential institutions'. See Wilsher, D. (2011), 120.

had a virtually unlimited power over migration issues, with detention being simply an aspect of such prerogative[101]. The treaties adopted in the wake of the second world war, were never fully implemented, nor effectively updated through the decades. The Refugee Convention of 1951, entered into force in 1954,[102] applies only to detention of asylum seekers, therefore, although it provides the possibility of recognizing a 'refugee' or 'stateless' status to aliens, enabling their integration into new states, the majority of undocumented aliens do not fall into this category and do not enter the scope of any treaty regime applicable within the countries employing detention[103]. In 1984, another intersection between human rights and refugee protection resulted in the inclusion of the principle of non-refoulment in the UN Convention against Torture (CAT). Article 3 of the Convention[104] prohibited states from deporting (*refouling*) individuals in countries where ther is a possibility that they can face persecution, expanding the number of individuals falling into the scope of international protection[105]. In 1990 the UN Convention on the Rights of Migrant Workers and their Families (UNCMW) was opened for states to sign, it covered both documented and undocumented migrants and prohibited their arbitrary detention, however, it reached the twenty ratifications necessary for entry into force only in 2003 and among the current fifty nine signatories, most are migrants-sending nations[106].

Between 2016 and 2018, migrants and refugees returned to the forefront of debates within the UN, resulting in the adoption of two instruments, a Global Compact for Safe, Orderly and Regular Migration and a Global Compact for Refugees. Evident in the Compacts is a new perspective insisting on the integration of migration in a human rights and 'shared responsibility' context and on an effort to limiting its vulnerability to criminal law[107]. Although both Compacts are explicitly stated to be non-legally binding, they clearly hold substantial political weight, also given their contextualization within the 2030 Agenda for Sustainable Development and the human rights obligation of states.[108] Their relevance is emphasized by the fact that, even without them carrying any legal obligation, the discussion of the two instruments led to controversy and

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[101] Wilsher, D. (2011), 120.

[102] The Refugee Convention actually allows detention in some instances. Article 9 allows the State to adopt provisional measures 'in time of war or other grave and exceptional circumstances […] which it considers to be essential to the national security in the case of a particular person, pending a determination' that the person is a refugee and 'that the continuance of such measures is necessary in his case in the interests of national security' (United Nations Convention Relating to the Status of Refugees, 1954, art. 9). Article 31 instead seeks to restrict, rather than eliminate, the adoption of penalties, including detention, for the refugees who enter the state's territory illegally, provided, first, that they come 'directly from a territory where their life or freedom was threatened in the sense of Article 1', second, that 'they present themselves without delay to the authorities' and, third, 'show good cause for their illegal entry or presence' (United Nations Convention Relating to the Status of Refugees, 1954, art. 31).

[103] Wilsher, D. (2011), xiv.

[104] Art. 3 reads: '1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.' (United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, art. 3)

[105] Guild, E. (2021).

[106] United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (2003). Signatories are indicated here: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4

[107] Guild, E. (2021).

[108] Guild, E., Basaran, T., & Allinson, K. (2019). From Zero to Hero? An analysis of the human rights protections within the Global Compact for Safe, Orderly and Regular Migration (GCM). *International Migration, 57(6)*, 43-59.

tension[109] especially in those migrant-receiving states where draconian policies against undocumented migrants are employed[110], resulting in five contrary votes and twelve abstentions, among which Italy and other four EU members[111].

Within the United Nations system, the Human Rights Committee (HRCttee), established under the fourth part of the 1966 International Covenant on Civil and Political Rights (ICCPR)[112], attempted to establish limits for immigration detention by implementing the prohibition of arbitrary detention, as articulated in Article 9 of the Covenant[113]. Interest towards the policy grew during the mid-90s when lengthy or unlimited detention of migrants was quite widespread outside continental Europe and a consensus within the agency grew on the necessity to scrutinize the proportionality and necessity of such measure[114]. In two opinions in particular, A. v Australia of 1993[115] and C. v Australia of 1999[116], Wilsher identifies a valuable attempt by the monitoring body to 'juridify' global migration and find a legal balance between sovereignty and liberty[117]. Although it recognized migration control as a valid policy goal, the Human Rights Committee established as a premise that all individuals, except in the case of a criminal conviction, must be free and are owed effective procedural and substantive safeguards[118]. Moreover, the HRCttee retained that mere illegal entry or stay are not adequate grounds for prolonged detention exceeding the time strictly necessary to identify undocumented migrants and process their application and, finally, it emphasized the necessity of imperative judicial oversight over the merits of the detention[119]. As Wilsher points out, had they been implemented, such principles would have entailed a radical shift in the detention policies of western states. Their failure to generate adherence underscores exceptionally clear evidence of the failure of the human rights system to instigate 'legal and political change'[120].

Without excessively dwell on the topic, on which the next chapter will focus more intensively, it is worth noting that a similar failure is reproduced in the system of the Council of Europe, under the ECHR. Article 5 of the Convention concerning the right to liberty not only is not an explicit and general prohibition

[109] The United States Mission intervention to the United Nations in 2018 accurately represents the position of those states contesting the invasiveness of the Compacts: "We believe the Compact and the process that led to its adoption, including the New York Declaration, represent an effort by the United Nations to advance global governance at the expense of the sovereign right of States to manage their immigration systems in accordance with their national laws, policies and interests." as cited in Guild, E., Basaran, T., & Allinson, K. (2019)
[110] Guild, E., Basaran, T., & Allinson, K. (2019)
[111] The United States (who did not participate to the negotiations), Israel, Hungary, Poland, and the Czech Republic voted against, while the EU member states abstaining include Austria, Bulgaria, Italy, Latvia, and Romania.
[112] Kälin, W., and Künzli, J. (2019). *The law of international human rights protection*. Oxford University Press.
[113] Art. 9 (1)(2) reads: '1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.' (United Nations International Covenant on Civil and Political Rights, 1966, art. 9 (1)(2))
[114] Wilsher, D. (2011), 158.
[115] UN Human Rights Committee, 1997, A. v Australia, CCPR/C/59/D/560/1993
[116] UN Human Rights Committee, 2002, C. v Australia, CCPR/C/76/D/900/1999
[117] Wilsher, D. (2011), 165.
[118] Wilsher, D. (2011).
[119] Wilsher, D. (2011).
[120] Wilsher, D. (2011), 166.

against arbitrary detention, but it also expressively allows for the detention of foreigners awaiting deportation[121]. Historically, the European Commission of Human Rights (ECmHR, then Court) displayed a significant degree of deference for states' power over immigration matters and perceived administrative detention as a negligible phenomenon and a policy incidental to deportation[122]. According to Wilsher, there has recently been an evolution in the salience that the policy assumed in the political debate and calls by the Council of Europe institutions[123] to reconsider the approach adopted previously[124]. Nevertheless, as documented by the study made by Sartori on recent cases[125], there is still a tendency of the Court to not challenge state's choices in immigration policy and to be less involved then necessary in the solution of cases brought before it concerning immigration detention.

Moving away from a human rights oriented approach, international law and European Union law have also looked at migration from a criminalizing perspective. The turning point for the integration a criminal legal logic in the international regulation of migration was the negotiation in Palermo of the 2000 UN Convention against Transnational Organized Crime[126], and, in particular, of the two protocols adopted immediately afterwards on the trafficking of persons, especially women and children[127], and on trafficking of migrants[128]. Both Protocols aim at criminalizing the 'means of movement across international borders', both in case of smuggling (where the migrant pays directly for the service) or when it involves trafficking (where the migrant is manipulated into forced labour "in exchange" for the service)[129]. A first problem in the Protocols is found by Guild in the stigmatization of women and young people as vulnerable individuals, lacking agency, and autonomous decision-making[130]. Most importantly, Guild describes how the adoption of the Protocols and, in general, the introduction of a criminalizing approach from 2000 onwards has actually proven counterproductive to the intended purpose, in that they resulted in an exacerbation of labour exploitation, and a rise in unauthorized and unsafe crossings[131]. The European Union as well (at the time, the European Community and the European Union) participated to the negotiations and ratified the Palermo Convention and the Protocol on Trafficking[132]. In 2002, it adopted binding legislation and defined the crime of facilitating unauthorised entry, transit or residence and the related sanctions through the adoption of the 'Facilitators

[121] Art. 5: '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […] the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. (European Convention on Human Rights, 1950, Article 5)
[122] Wilsher, D. (2011), 140.
[123] Parliamentary Assembly (2010), Resolution no. 1707, Detention of asylum seekers and irregular migrants in Europe.
[124] Wilsher, D. (2011), 141.
[125] See, for example: Sartori, D. (2022), Administrative detention of foreigners and the ECtHR: a case study, CILD.
[126] UN Convention against Transnational Organized Crime, 2000.
[127] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2000.
[128] UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 2000.
[129] Guild, E. (2021)
[130] Guild, E. (2021), 13.
[131] Guild, E. (2021)
[132] *Ib.*

Package', constituted by a Council Directive and a Council Framework Decision[133]. Just for a brief mention, as this aspect will be explored further in the next chapter, the introduction in EU states of offences of irregular entry, transit and stay occurred at the national level. Mitsilegas described, on one hand, how such a criminalisation rests on 'shaky normative foundations' justified by not accurately defined interests (such as protecting the public safety or of state sovereignty) or a generic preventive rational, on the other, he emphasizes how to a certain extent EU law serves to limit overcriminalisation, deriving constraints from the obligation of states to ensure effectiveness of EU law (whose policy objective remains the return of irregular migrants[134]) and from the foundational elements of the Area of Freedom, Security and Justice (AFSJ) [135].

7. Conclusion

The objective of this first chapter was to present the framework in which this thesis seek to operate. The measure of administrative detention of migrants is among the most illiberal outcomes of several processes which have been going on in the last fifty years. Thus, the chapter first dealt with the notion of *crimmigration* and the interplay between immigration and criminal law. It proceeded by exploring the concepts of mass-foreigner and othering, also delving into the significance of the *Tätertyp* in the criminalisation of illegal migration. A third section was dedicated to the new notions of state, border, sovereignty, and membership which are contours to the shaping of a new image of the migrant. The fourth part was dedicated to exploring how the immigration phenomenon came to be understood as a security issue, providing rationale for the systematization of detention practices for unauthorized migrants. The criminalisation of immigration offences was examined more closely in the fifth part, with particular attention to the asymmetric incorporation of criminal law into migration control and the symbolic nature of such merge. The chapter concluded with a discussion on the physical and normative marginalization experienced by detained returnees, both domestically, and, more significantly, at the international level. The next chapter will thoroughly explore the European regime of administrative detention. It will examine on one hand how it is regulated by the EU, and the related case-law of the CJEU and, on the other, how the ECHR seeks (if it does) to protect undocumented migrants against arbitrary detention practices, and the related jurisprudence of the ECtHR.

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[133] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence and Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.
These instruments were adopted together and are commonly referred to as the 'Facilitators Package'.
See European Commission (2020), Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (2020/C 323/01)

[134] European Parliament and Council of the European Union, Directive 2008/115/EC of the European Parliament of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[135] Art. 3(2) of TEU reads: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (Treaty on European Union, 2007, article 3); Mitsilegas, V. (2021).

Chapter Two. The law of the European Union and the jurisprudence of the Court of Justice of the European Union on pre-deportation detention

1. Introduction

The initial chapter was aimed at conceptualising the employment of detention in immigration control by situating it within wider legal and social developments that, from the perspective of this research, resulted in a hostile portrayal of migrants, who are de-individualized in the public discourse and treated as a mass of potential criminals. Such a narrative legitimised the intensified use of penal measures to regulate (punish) illegal migration. Towards the conclusion of the chapter, the ensuing marginalisation of the migrant was discussed, providing an opportunity to explore in brief the rather limited arsenal of international legal instruments which seek to define and regulate the status and treatment of undocumented migrants. The second chapter will delve into the European regime of administrative detention of migrants awaiting repatriation. This involves an analysis of the regional legal instruments that regulate immigration detention and protect the rights of migrants, both in the context of the European Union and the Council of Europe. Therefore, the discussion revolves around not only the directives of the Union and the ECHR, but also the case-law of the two courts responsible for their implementation, namely, the CJEU, engaged in a dialogue with the national courts of the Member States, and the ECtHR. The chapter will start with a brief overview of these two regimes and some trends observed by scholars in relation to immigration detention in Europe. Then, it will introduce the EU's legal framework on pre-deportation detention and the relevant jurisprudence of the CJEU and will conclude with an assessment of both the standard of protection provided to returnees by the Return Directive and the interpretations given by the CJEU in its jurisprudence, as well as the overall EU's activity in this field.

The EU, as will be described later in the chapter, has acquired competence over immigration issues relatively recently. In 1999, when the treaty of Amsterdam entered into force, Member States agreed to gradually transform immigration, which as discussed in the previous chapter is traditionally considered a prerogative of the national executive, into a shared competence with the EU. The EU is then to take appropriate efforts to guarantee 'respect to external border controls, asylum, immigration and the prevention and combating of crime' with a view to 'maintain and develop the Union as an area of freedom, security and justice'[136]. The inclusion of migration control, and then immigration detention more specifically, into the process of European integration and in the content of EU law[137] gave positive impetus to the protection of undocumented migrants. It strengthened legal accountability and challenged the traditional deference of

[136] European Union, 1999, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ C 340, 10.11.1997, p. 1–144.* Article B
[137] In particular, with the Return Directive adopted in 2008.

domestic judges to executive/administrative authorities in this field, resulting ultimately in the improvement of procedural safeguards available to detainees[138].

The ECHR was adopted by the Council of Europe in 1950 and focuses on a catalogue of civil and political rights, in a very similar manner as the above mentioned ICCPR will in 1966. Several states extending beyond the boundaries conventionally understood as 'Europe' and that were not involved in the process of European integration acceded in time to the Convention, including, e.g., Azerbaijan and, until 2022, Russia. Less directly than EU law, the European Convention of Human Rights enters our discussion on immigration detention mainly through its prohibition of arbitrary deprivation of liberty, contained in Article 5, which is often employed by detainees to challenge the legitimacy of their detention in front of the ECtHR. Regrettably, as will be explored in the next chapter, the Court has historically maintained a rather deferential attitude towards states' decisions to detain and the conditions of detention, ultimately affording a rather low standard of protection to undocumented migrants detained, also compared to other international instruments of human rights law.

Particularly in this domain, the two systems intersect to a significant extent. All EU Member states are parties to the Convention, EU institutions observe its standards and the CJEU employs them to evaluate validity of EU acts, while the ECtHR accords a certain deference to the EU system's autonomy, under the standard of equivalent protection[139,140]. At the same time, the characteristics of the two courts that guard these regimes are rather different. The ECtHR is accessible to applicants only after they have exhausted domestic remedies, and the impact of its decisions vary depending on the state concerned[141]. The CJEU is not a human rights court, instead it is tasked with interpreting EU law and settling disputes between EU institutions and Member states. Under the preliminary reference procedure (described later in the chapter), nevertheless, the Court is referred questions directly by national judges. In fact, almost the entirety of CJEU jurisprudence dealing with immigration detention are preliminary references relating to the interpretation of the Return Directive (RD) of 2008. Another difference is that the rulings of the CJEU generally have more teeth than those issued by the ECtHR, especially because of the direct effect and primacy of EU law doctrines, described later in the chapter. In general, while the Convention places primary responsibility for the protection of human rights of the people within their jurisdiction on states (hence the satisfaction of domestic remedies as a ground for admissibility of cases before the ECtHR), EU law establishes duties for the national judges directly[142].

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[138] Cornelisse, G. (2022). Criminalisation, containment and courts: a call for cross-fertilisation between the social sciences and legal-doctrinal research into immigration detention in Europe. In *Research Handbook on EU Migration and Asylum Law*, 455-470. Edward Elgar Publishing.

[139] Costello, C. (2012). Human rights and the elusive universal subject: immigration detention under international human rights and EU law. Indiana Journal of Global Legal Studies, 19(1), 257-303.

[140] The standard of equivalent protection is used as a standard of review by the ECtHR, especially with regard to the EU. It refers to the fact that the Court will not engage in a detailed review of EU acts, given the systemic equivalence/compatibility of the two regimes, i.e., the ECtHR is satisfied that those acts, because they are adopted within the EU, already afford a standard of protection equivalent to that afforded under the ECHR.

[141] Costello, C. (2012)

[142] Costello, C. (2012)

a. *Recent trends in the protection of the rights of undocumented migrants in Europe: administrative paradigm, constitutionalisation, and shifting borders*

In Europe, recognition of the rights of undocumented immigrants is undermined, as observed by Galina Cornelisse, mainly by the prevalence of the administrative paradigm in migration control[143]. Indeed, norms and regulations which govern the procedures negotiating the status of undocumented migrants are those specific to administrative law, which normally is characterised by discretion and the presence of limited checks and balances and not by a particular concern for human rights protection[144]. Different rules in the migration control sector are, therefore, in direct contradiction with human rights in general and the rights accorded to traditional detainees. The legal requirement to collaborate with authorities (under penalty of prolonged detention, denial of voluntary return or issue of an entry ban) is present in the majority of European states and an example of the administrative character of migration law[145]. The same applies to the deference normally accorded by national judges to the decisions of administrative authorities concerning the detention of undocumented individuals, a practice with which the ECtHR's approach seems to be in continuity, especially with regard to the denial of fair trial guarantees to the detainees[146]. Cornelisse observes how, in particular, the above mentioned duty to cooperate imposed on immigrants is in contrast with the right to remain silent accorded to traditional detainees, repeated detentions are clearly at odds with the right not to be tried twice for the same offence, and, finally, the burden of proof and the criteria for evidence in immigration proceedings, as observed in the preceding chapter, would violate the principle of presumption of innocence applied to penal detainees[147].

Beyond this general framework, as observed by Galina Cornelisse and Madalina Moraru, the adoption of the Return Directive by the European Commission and its entry into force in 2008 has brought about two main developments in the practice of European states[148]. It expanded the scope of judicial review in the field of migration control, traditionally considered within the ambit of the executive power, and, at the same time, it allowed undocumented migrants, which as a group were previously marginalised from modern legal developments, to acquire rights which can now be subject to enforcement and litigation[149]. According to the two scholars, it was exactly through the judicial interactions favoured by these developments that 'a constitutionalisation' of migration control was initiated[150]. As highlighted by Cornelisse in other contributions, the increasing adoption of legislation in the field of migration control, however restrictive such legislation may be, still opens a space for legal claims by the category of undocumented migrants[151]. Even more, it allowed

[143] Cornelisse, G. (2022)
[144] *Ib.*
[145] *Ib.*
[146] *Ib.*
[147] *Ib.*
[148] Cornelisse, G., & Moraru, M. (2022). Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance. *European Papers-A Journal on Law and Integration*, *2022*(1), 127-149.
[149] *Ib.*
[150] Cornelisse, G., & Moraru, M. (2022), 129.
[151] Cornelisse, G. (2016)

the authority of states on migration control to enter the legal discourse, as new legal concepts such as 'voluntary departure' or 'return' emerge, and be challenged in its concrete exercise[152].

More recently, some scholars observed[153], especially in relation to New Pact on Migration and Asylum of 2020[154], a new trend which sees return procedure reinforced, also with regards to asylum policies. The emergence of a new 'migration-asylum continuum'[155] heavily characterised by the increased employment of repatriation (and, therefore, detention for the purpose of) is a clear representation of the notion of shifting borders, not fixed in time and space but formed by 'legal barriers', where rights are not determined by territory and physical borders, but by the characteristics of the migrants who ask access to them[156], and where courts take the form of 'border zones where immigration status is contested and determined'[157].

2. EU law and the detention of undocumented migrants

Until the 1970s, numerous European states were more predominantly affected by emigration, than immigration. The common market, the free movement of people and the introduction of European citizenship, along with the increasing interconnectivity of its members, seemed to be steering European integration in the direction of 'a post-Westphalian land' with a revised conception of borders and sovereignty[158]. Accordingly, immigration was not considered a matter of concern for the national and supranational policies of the states of the then European Economic Community (EEC)[159]. The EEC Founding Treaty of 1957 granted the right of free movement to economically active nationals of the Member States, although with states still retaining an authority to curtail these rights for reasons of public policy, public health, or public security[160]. The first directives related to migration did not mention any right of the states to detain migrants. Directive 64/221/EEC[161] significantly limited states' power to expel nationals of other members, while Directive 68/360/EEC[162] abolished the limitation on the mobility and residence of Member States nationals and their families'[163]. More crucially though, Regulation of the Council 1612/68[164] established the central distinction

[152] Cornelisse, G. (2020). The Scope of the Return Directive: How Much Space Is Left for National (Criminal) Procedural Law on Irregular Migration?. In Moraru, M. Cornelisse, G., & De Bruycker, P. (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union, Oxford: Hart Publishing*.
[153] Cornelisse, G., & Moraru, M. (2022); Shachar, A., & Niesen, P. (2020). *The shifting border: Legal cartographies of migration and mobility: Ayelet shachar in dialogue* (1st ed.). Manchester University Press; Burridge, A., Gill, N., Kocher, A., & Martin, L. (2017). Polymorphic borders. *Territory, Politics, Governance*, *5*(3), 239-251.
[154] Communication from the Commission on a New Pact on Migration and Asylum, COM/2020/609 final, 23 September 2020.
[155] Cornelisse, G., & Moraru, M. (2022), 128.
[156] *Ib.*
[157] Cornelisse, G., & Moraru, M. (2022), 131.
[158] Lucarelli, S. (2021). The EU migration system and global justice: An introduction. In *The EU Migration System of Governance: Justice on the Move*, 1-32, 2.
[159] Borlizzi, F., & Santoro, G. (2021), Buchi Neri: la detenzione senza reato nei Centri di Permanenza per i Rimpatri (CPR), Primo Rapporto, CILD.
[160] Wilsher, D. (2011)
[161] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.
[162] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.
[163] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, art. 1.
[164] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

between the right to circulate with no restrictions within the territory of the EEC for citizens of Member States and the limitations imposed on the freedom of movements of citizens of third states, laying the foundations of what will be later defined 'fortress Europe'[165].

In this phase, neither the treaty of Rome nor the EU normative instruments related to migration mentioned non-EU citizens, who to this date are not accorded any treaty-based right to migrate into the EU. In the following years, a consensus gradually developed among some states that coordinated action over migration would streamline the elimination of controls at the internal borders and enhance monitoring and policing of the external ones[166]. Accordingly, in 1985, with the signing of the Schengen Treaty, Belgium, France, Germany, and Netherlands established an extra-EU framework to combine efforts on migration issues. A crucial element of Schengen was the establishment of a robust security and policing system targeted at non-EU nationals. This included not only monitoring of the external border of the mentioned states and stricter border controls, but also the creation of a shared database of individuals deemed ineligible to entry on grounds of security.[167] Legislative competence over migration was gained by the Union, as described above, only with the Treaty of Amsterdam[168]. The text explicitly linked the freedom of EU citizens to the restricted entry of non-EU nationals, expressing the need for flanking measures directly related to external border controls, asylum and immigration'[169]. In the same year, the European Council meeting in Tampere established more accurately the EU's objective in the field, namely the adoption of common asylum policies, decisive action against illegal migration, and enhancing integration of long term residents[170].

At the close of the century and the start of the new one, the western political landscape evolved into one of strong opposition to immigration, exacerbated by the perceived connection between immigrants and terrorism[171]. This favoured a resurgence of nationalistic discourses, connected to an imperative to protect the cultural purity of nations and of Europe, which resulted in European borders being redefined and enforced as hard borders, while cultural communities came to be delimited from a geo-cultural perspective[172]. Two important catalysts of such a reformulation of sovereignty, borders and cultural identity were the 2008 economic crisis and the 2015-2016 surge of immigration flows to Europe[173].

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[165] Borlizzi, F., & Santoro, G. (2021), 16.
[166] Wilsher, D. (2011).
[167] *Ib.*
[168] European Union, 1999, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.
[169] European Union, 1999, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Article 15.
[170] Wilsher, D. (2011)
[171] Wilsher, D. (2011)
[172] Lucarelli, S. (2021)
[173] In particular, the surge of arrivals on EU territory in 2015, amidst the recovery from the 2008 crisis, provoked reactions on the part of various Member States to stem the flow. Such responses included the construction of physical barriers, the reinstatement of internal border controls within Schengen, and the conclusion of agreements with third countries aimed at externalising the control of arrivals on European coasts (the EU-Turkey agreement of 2016 and the Italy-Libya agreement of 2017) as well as partnership agreements with African countries. See Lucarelli, S. (2021)

Prior to 2008, detention powers with regards to migrants were not regulated at the EU level, although they were acknowledged in the framework of the Common European Asylum System (CEAS)[174]. Under Dublin II[175], when an asylum seeker is held in detention, Member States can request an urgent response by the Member States deemed responsible for the examination of its application. Detention is also mentioned in the original Reception Conditions Directive (RCD)[176], in relation to individuals with special needs held in detention and the possibility to deviate from the Directive standards in the case that an applicant was held in detention, and in the first version of the Asylum Procedures Directive (APD)[177], in reference to legal representatives and the United Nations High Commissioner for Refugees (UNHCR) being able to access detainees. This limited approach to immigration detention on one side certainly mirrored the limited involvement of the EU in immigration and asylum matters at the time, on the other side are mostly[178] testimony of a concern for the protection of the right to liberty, with an intention to ensure that, when detention was resorted to, it was carried out in a humane and limited manner[179]. Therefore, at the time, how the legality of a detention was to be determined was determined exclusively by domestic legislators[180].

The EU legal instrument to regulate the employment of detention in migration control for the first time was the Return Directive[181], adopted in 2008 by the Union and that Member States had to implement by December 2010. The Directive was designed to harmonise domestic regulations for undocumented migrants across Member States and to enhance EU's efficacy in enforcing returns to the countries of origin. The second objective in particular, as will be described later in the chapter, was particularly emphasised by the CJEU in its jurisprudence, which affirmed the importance of an effective return policy and, consequently, an obligation for all member states to issue a return order for all third-country nationals found to be unlawfully present on their territory[182]. As was described in the introduction, the regularisation of states' power to detain migrants was a key development as it made the exercise of such authority contestable[183].

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[174] CEAS is the European framework setting out common standards and facilitating cooperation in the management of asylum seekers. The European Council committed to its establishment in 1999, based on the principles of the 1951 Geneva Convention and with the purpose to harmonize asylum policies across the Union. The five key pieces of legislation of CEAS are the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the EURODAC Regulation and the Dublin Regulation.

[175] Council Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Art 17(2).

[176] Directive 2003/9/EC of the Council of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18. Articles 13(2) and 14(8).

[177] Directive 2005/85/EC of the Council of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13. Articles 16(2), 21(1)(a).

[178] Stefanelli rightly notices how above-mentioned art. 14(8) of the RCD, allowing states to depart from the Directive's standards when an applicant is placed under detention, is not reflective of such a concern to limit the inhumane or extended employment of detention.

[179] Stefanelli, J. N (2021)

[180] Cornelisse, G. (2016)

[181] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. The content of the Directive will be examined in the upcoming section.

[182] Cornelisse, G. (2016)

[183] Cornelisse, G. (2020)

After Lisbon, the Treaty on the Functioning of the European Union (TFEU)[184] outlines the distribution of competences between the Member States and the EU in the following manner. According to Article 67, the EU is tasked with guaranteeing the elimination of internal border checks and formulating 'a common policy on asylum, immigration and external border control' founded on reciprocal support among Member States and on fairness towards third country nationals[185]. Article 79 underlines the objectives of such common policy, namely establishing an effective management of migration and preventing 'illegal migration and trafficking of human beings'[186]. This means that the EU has the authority to legislate with regards to entry and residence conditions, the rights of documented migrants, the return of undocumented ones, and the fight against human trafficking[187].

However, at the same time, as underlined by Lucarelli, it is Member states that specify the admission quota for third country nationals and the co-decision procedure (where both the European Parliament and the European Council participate) is employed for decisions regarding regular and irregular migration[188]. In addition, Article 78 establishes that the Council alone can enact provisional measures to aid Member States facing a sudden flow of arrivals, following a proposal by the Commission and consultation with the European Parliament[189]. Article 78 was triggered in 2015 to adopt plans to redistribute asylum seekers among Member States to assist Italy and Greece[190].

a. The Return Directive

As described above, detention of foreign nationals subject to repatriation procedures in EU Member States is governed by Directive 2008/115/EC, the Return Directive[191], adopted several years after Directive 2001/40/EC[192] concerning the reciprocal recognition of expulsion decisions among Member States. While the Directive, resembling more a 'code regulating each aspect of detention', was the result of an evident consensus among the Union institutions and the States on the necessity of regulating (and recognising) the power to detain aliens at EU level, the negotiation of the content of the directive was more complex due especially to the diversity of domestic laws with regards to the time limits of detention, the requirement of judicial authorization, the grounds for detention, and so on[193]. As a result, a number of elements limiting detention

[184] Consolidated version of the Treaty on the Functioning of the European Union, *OJ C 326, 26.10.2012*
[185] Consolidated version of the Treaty on the Functioning of the European Union, article 67 (2).
[186] Consolidated version of the Treaty on the Functioning of the European Union, article 79 (1).
[187] Lucarelli, S. (2021)
[188] *Ib.*
[189] Consolidated version of the Treaty on the Functioning of the European Union. Article 78.
[190] Lucarelli, S. (2021)
[191] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[192] Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.
[193] Wilsher, D. (2011), 191.

which were included in the draft presented by the Commission, for example mandatory judicial approval and regular judicial review in the course of the detention, did not make it to the final version[194].

Article 1 of the Directive identifies the objective of the text in setting out 'common standards and procedures' for the enforcement of return decisions by Member States and establishes such returns must be carried out in compliance with fundamental rights 'as general principles of Community law' and with international law, 'including refugee protection and human rights obligations'[195]. Article 2 defines the scope of the Directive as applying to non-EU nationals staying unlawfully in the territory of a Member State[196], while Article 3 clarifies the definitions of relevant notions employed the Directive, such as third-country national, illegal stay, removal, return decisions, vulnerable people and further [197]. Notably, illegal stay is defined as the presence within the borders of a Member State, of a third-country national failing to meet, or no longer fulfilling the entry conditions of entry specified 'in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State'[198], and ,therefore, the Directive does not seek to harmonize the standards under which a third country national is deemed illegal (thus entering the scope of the Return Directive). A return decision, which can be of a judicial or administrative nature, declares the presence of the non- EU national to be unlawful and imposes an 'obligation to return'[199]. Such decisions must be subject to judicial or administrative appeal[200], and are ideally conducted as voluntary departure within a period that Member States may set between 'seven and thirty days' since the issue of the decision[201]. Removal is to be intended, then, as the consequence for not having complied with the return decision during the voluntary

[194] Wilsher, D. (2011). In particular, judicial review was substituted in art.15.2 of the final version with approval by 'administrative or judicial authorities', and the regular further review of detention with review 'at reasonable intervals of time' (Art. 15.3).
[195] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Art. 1.
[196] Article 2 also establishes two conditions for limiting the application of the Directive, namely where the third country nationals 'are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State; (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.' See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 2.
[197] In particular, third-country national 'means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code' (art. 3.1); return indicates ' the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to: — his or her country of origin, or — a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted'. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 3.
[198] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 3(2).
[199] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 3(4).
[200] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 13.
[201] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 7.

departure period[202]. Finally, point 16 of the Preamble stressed that detention pending removal is a measure whose employment must be limited and adherent to the principle of proportionality with regards both to the means employed and the aims pursued.[203]

The proportionality requirement of the Preamble is reiterated in Article 15 of the Directive, which governs detention pending removal. States may resort to detention for the purpose of facilitating and/or carrying out the removal process, only if less coercive alternatives cannot be applied in the particular case specific case and may only last for as long as necessary for the completion of removal arrangements, ensuring that they are conducted promptly and diligently[204]. Article 15 RD also includes a list of grounds for the detention of foreigners to be considered legitimate, including the risk of absconding or the fact that the third-country national escapes or obstructs the execution of repatriation or removal[205]. A risk of absconding, as defined in the Directive, is present when reasons exist 'in *an individual case* which are based on *objective criteria defined by law'* that indicate such a risk[206]. As noted by Wilsher, although the standard of proof required is not very high, the provision at least mandates an objective and reasoned ground for the detention[207]. The scholar also notices how the second ground, which was introduced to respond to problematics related to documentation and de facto statelessness, is both redundant and uncertain[208]. Indeed, administrative authorities are afforded a wide discretionary, 'almost arbitrary', power in establishing whether someone is "hampering", since the provision does not indicate any objective criteria[209].

Article 15 RD continues by mandating a 'speedy judicial review' of the legitimacy of the detention when the measure is ordered by administrative authorities, automatically or on the request of the detainee[210]. Having affirmed that detention should be as brief as possible and limited to the duration required for the completion of the removal, Article 15 imposes a temporal limit on the duration, specifying that it should not exceed six months[211]. This period can be prolonged for an additional twelve months under the circumstances

[202] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 8.
[203] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Preamble. Note that here, the Directive incorporates the Council of Europe's Twenty Guidelines on Forced Return, as observed by Costello. See Council of Europe, Committee of Ministers (2005), Twenty Guidelines on Forced Return, 925th Meeting of the Ministers' Deputies; Costello, C. (2012). Human rights and the elusive universal subject: immigration detention under international human rights and EU law. Indiana Journal of Global Legal Studies, 19(1), 257-303.
[204] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 15.1.
[205] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 15.1.
[206]Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 3.7 [emphasis added].
[207] Wilsher, D. (2011)
[208] 'One who is judged as 'hampering' is surely likely to abscond if released in any event. There was thus no need for the second ground for detention'. See Wilsher, D. (2011), 193.
[209] Wilsher, D. (2011), 193.
[210] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 15.2.
[211] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 15.4 and 15.5.

outlined in Article 15(6), specifically if the delay is attributable to a lack of cooperation from the relevant third-country national or is a consequence of problems in acquiring essential documents from third countries[212]. Such grounds for the extending detention raise a number of concerns. First of all, the 'lack of cooperation' ground is not only legally uncertain in the same manner as the "hampering" notion of Article 15.1 (b) is, but most importantly it accentuates the punitive nature of detention for individuals who do not wish to cooperate with their own removal or are subject to bureaucratic delays beyond their control[213]. Secondly, in relation to the second ground in particular, detention seems to be employed as a negotiating tool to prompt diplomatic response, which can hardly be considered in line with the rule of law[214]. Thirdly, the provision of an overall detention limit of eighteen months raised serious criticism by human rights and experts[215]. Indeed, although EU states are not required to allow for such a long detention, implementation of the Directive has resulted in an increase of detention times in some Member States[216]. Concerning the manner of detention, Article 16 of the Directive establishes that foreigners must be held in specific temporary detention facilities separate from prisons or, if this is not possible, separated from ordinary detainees and that special consideration should be given to situations of particular vulnerability[217]. Finally, Article 17 deals with the detention of minors and families. A final point to be made with regards to the content of the Directive is that, although it does not prevent Member States from retaining jurisdiction over the criminal aspects of illegal migration, it was emphasized by the CJEU how the application of national criminal law may not impede the efficacy of the return procedures[218]. Hence, as underscored by a series of CJEU judgements, a Member State (where illegal entry, stay and re-entry are criminalized) may only incarcerate third country nationals staying illegally on its territory as a criminal sanction, when the established return procedure has been implemented and the individual continues to stay within the state's territory without a legitimate justification or re-enters in violation of an entry ban[219].

The Directive in general has been the focus of much criticism. According to Wilsher, it contributes to the normalization of prolonged detention of undocumented migrants[220]. Moreover, notwithstanding EU law emphasizing the necessity of restoring basic liberties after enforcement failure, the Directive does not prescribe any automatic re-authorization mechanism, whereby released individuals, are left in a 'legal limbo', facing a

[212] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 15.6.
[213] Borlizzi, F., & Santoro, G. (2021)
[214] Wilsher, D. (2011)
[215] Borlizzi, F. & Santoro, G. (2021)
[216] In particular, Greece, Itay and Spain. See Costello, C. (2012). Human rights and the elusive universal subject: immigration detention under international human rights and EU law. Indiana Journal of Global Legal Studies, 19(1), 257-303.
[217] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, art. 16.
[218]CJEU, El Dridi, C-61/11 PPU. The case will be explored in more detail in the section of this chapter dedicated to the jurisprudence of the Court.
[219] CJEU, El Dridi, C-61/11 PPU; CJEU, Sagor, C-430/11; CJEU, Alexandre Achughbabian, C-329/11; CJEU, Celaj, C-290/14. See Cornelisse, G. (2020)
[220] Wilsher, D. (2011).

lack of legal status and entitlements upon relief[221]. The matter is left under the discretion of national states, which usually enforce standard national restrictions on socio-economic rights, such as employment rights[222]. Moreover, with regards to the guarantees accorded to detainees, the scholar argues that, while upholding rule of law (establishing principles such as court access, for example), the Directive diminishes its efficacy by placing the onus on detainees to act for themselves, which is (predictably) often unrealistic, due to limited access to information or legal assistance[223]. Additionally, it is interesting to note how the numbers on returns effectively carried put have remained low after 2008, standing at 29 percent in 2019, and decreasing to 17% in 2022, while the number of individuals who are ordered to leave the EU increases: 340,500 in 2021 (with a 14% increase compared to 2020) and 431,200 in 2022 (with a 27% increase compared to 2021)[224]. This is also due, apart from the effectiveness of the EU's readmission policy, to external factors involving third states (e.g., as inadequate cooperation, delays in identifying individuals and providing documents and deficiencies in national administrative capabilities to execute readmission agreements) to which the EU has responded by employing employed conditionality measures, such as leveraging the EU visa policy or the allocation of EU funding[225].

b. Detention of asylum seekers

It is important to briefly clarify how under EU law immigration detention does not relate only to return proceedings, but it may occur during asylum proceedings as well. Nevertheless, EU asylum law only mentioned detention until the second phase of CEAS, which concretized in a recast version of the Reception Conditions Directive (Recast RCD)[226], of the Asylum Procedures Directive (Recast APD)[227], and of the Dublin Regulation (Dublin III)[228]. All of the above establish that asylum seekers cannot be detained solely because they are applying for asylum and mandate compliance with Article 31 of the Refugee Convention[229]. Dublin III, adopted in order to assign responsibility for examining an asylum application to only one state, permits detention to facilitate a transfer from one Member State to the other where there is a significant risk of

[221] Wilsher, D. (2011), 197.
[222] Wilsher, D. (2011)
[223] *Ib.*
[224] European Commission (n.d.)*Statistics on migration to Europe*.
[225] See Tsourdi, E., & De Bruycker , P. (2022). The evolving EU asylum and migration law . In *Research Handbook on EU Migration and Asylum Law, 1-55*. Edward Elgar Publishing; Molnár, T. (2022). EU readmission policy: a (shapelifter) technical toolkit or challenge to rights compliance? . In *Research Handbook on EU Migration and Asylum Law, 486-505*. Edward Elgar Publishing.
[226] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive) [2013] OJ L180/137
[227] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive) [2013] OJ 2013 L 180/249
[228] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation) [2013] OJ L180/108.
[229] Cornelisse, G. (2016). See Recital 20 of Dublin III, article 26 of the Recast APD, and article 8 of the Recast RCD. According to Article 31 of the Refugee Convention, asylum seekers may not be penalized for entering the territory of the receiving state illegally, and may not suffer restrictions on their movements, which are stricter than what is necessary.

absconding[230]. Such risk has to be assessed individually and legally certain[231], detention must satisfy a proportionality and a least coercive measure test and be as short as possible, not exceeding the time necessary to effectuate the transfer, which anyway cannot last longer than twelve months[232]. For the conditions of detention, the Regulation refers to the recast RCD, including the right to a speedy judicial review of detention. The recast RCD provides a legal framework for the detention of asylum seekers, reiterating the need to individually assess the necessity of detention and the availability of less coercive measures[233]. The Directive also considers five grounds for the detention of asylum seekers, which include (1) the determination of nationality or identity, (2) a situation in which detention is essential to establish factors necessary to consider the application for international protection, where these elements could not be ascertained without detention, especially when there is a risk of flight, (3) a situation where the applicant is already detained under the Return Directive, (4) a necessity to ensure public order or national security, and (5) a situation where the applicant is already detained under Dublin III[234].

c. The Charter of Fundamental Rights of the EU

The protection of fundamental rights of the individual has long represented a key objective of the European Union, as reflected in the EU Charter of Fundamental Rights (CFREU)[235]. Article 6 of the CFREU protects the right to liberty, which, pursuant to Article 52 CFREU, must be interpreted in accordance with Article 5 of the ECHR. The right to liberty is, therefore, not absolute and may be limited under certain conditions, among which the regulation of entry and exit from a state's territory, specifically to implement national immigration and asylum policies[236]. Nevertheless, Article 52 of the CFREU goes one step further then Article 5 of the ECHR by including necessity in the proportionality test for the limitation of the rights contained in the Charter[237]. An interesting point is raised by Wilsher, in relation to the duality between the categories of citizen and individual expressed in the Preamble of the Charter[238]. The latter states: '[The EU] places the *individual* at the heart of its activities, by establishing the citizenship of the Union *and* by creating an area of

[230] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 12.
[231] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 2.
[232] See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, Article 18.
[233] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Article 8. This requirement is made stronger here by establishing that the national law of Member States must contain provisions concerning alternative measures to detention of asylum seekers.
[234] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Article 8.3.
[235] European Union, 2009, Charter of Fundamental Rights of the European Union.
[236] European Convention of Human Rights, 1950. Article 5.1 (f).
[237] 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. European Union, Charter of Fundamental Rights of the European Union, Article 52.1.
[238] Wilsher, D. (2011)

freedom, security and justice'[239]. The Charter seems to detach himself from the national instruments protecting the rights of the citizens, to associate with international instruments , protecting the rights of human beings[240]. Therefore, he makes the point, undocumented migrants would seem to fall in the category. Accordingly, the interpretation of Article 6 of the Charter (simply stating that every individual has 'the right to liberty and security of person'[241]) in accordance with Article 5 ECHR would not create a specific exception for migration control equivalent to the explicit one contained in Article 5 ECHR[242].

d. Proposals for a recast Return Directive

During September 2018, the Commission advanced a proposal to revise the Return Directive, based on the need to address increasing migratory pressure and challenges in the implementation of the Directive, in particular an inconsistent employment of immigration detention by Member States[243]. The proposal sought to address the issue by amending Article 15 (proposed Article 18) in the following manner. First of all, the term 'only' was removed from paragraph 1, so that the list of grounds for detention is no longer exhaustive. Secondly, proposed Article 18 adds a new ground for detention when the non-EU national represent a 'risk to public policy, public security or national security'[244]. Then, the provision adds an obligation for state to codify detention grounds in national law (a principle already affirmed by the CJEU in Al Chodor[245])[246]. Finally, according to the proposed provision, Member States should set a maximum period of detention, between three and six months[247].

The Commission's justifications for the changes are deemed unconvincing and incomplete[248], in particular since they do not address the elimination of the term 'only' from the list of grounds, which, according to the Parliamentary Research Service, transforms 'the limiting clause […] of the current Return Directive into an enabling clause'[249]. The addition of a new ground of detention was justified by the Commission instead by the need to address emerging risks, signalling according to the European Parliament, a departure from an earlier perception of the Return Directive's role as one primarily related to migration to one where the Directive

[239] European Union, Charter of Fundamental Rights of the European Union, Preamble [emphasis added].
[240] Wilsher, D. (2011)
[241] European Union, Charter of Fundamental Rights of the European Union, Article 6.
[242] Wilsher, D. (2011)
[243] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) ('Return Directive Proposal'), COM(2018) 634 final, 12 September 2018). See Stefanelli, J. N (2021).
[244] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), Article 18.1 (c).
[245] CJEU, Al Chodor, C-528/15.
[246] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), article 18.1.
[247] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), article 18.5.
[248] Stefanelli, J. N (2021)
[249] European Parliamentary Research Service, 'The proposed Return Directive (recast): Substitute Impact Assessment', PE 631.727 (February 2019), Annex I, 69.

becomes 'a tool for safeguarding the public from threats to national security.'[250] The European Parliament's impact assessment also expressed concerns about potential conflicts with Article 5 ECHR and about the Proposal attempting to circumvent the guarantees afforded in normal criminal processes through the employment of immigration detention[251]. Also, the Commission's justification for the maximum detention period (supposed to address the large number of ineffective removals) was challenged by the Parliament, which argued that available data did not show a clear correlation between shorter detention periods and ineffective removals[252]. No progress has been made since January 2019, when the European Parliament presented its amendments to the Commission's Proposal, including the reinsertion of the term 'only' to Article 15 and an absolute maximum period of detention of three months[253].

3. The jurisprudence of the CJEU

Before exploring the case law of the CJEU related to immigration detention pending repatriation, it is essential to point out some characteristics of EU law that define the peculiar and unique relation between the national courts of the Member States and the EU Court. In the words of the Court itself, the fundamental features of the EU legal system are its 'primacy over the law of the Member States and the direct effect' of EU law on the citizens of the Member States[254]. Primacy of EU law dictates that in case of conflict between national and EU law, the latter takes precedence[255]. Instead, the doctrine of direct effect allows individuals to invoke provisions of EU law directly in their national legal systems, irrespective of whether these rules have been implemented nationally[256]. Therefore, EU directives are mandatory regulations that anticipate additional legislative action by the Member States for their implementation. When the implementation deadline has passed, the provisions in the directive which are sufficiently clear and precise have direct effect, and therefore can be relied on by individuals in national courts[257]. The cooperative and federative nature of the EU judicial system is further strengthened by the preliminary reference procedure[258]. This allows any court in each Member States to seek a preliminary ruling by the CJEU on the interpretation of the Union Treaties and of the acts of its institutions, bodies, offices, and agencies[259]. The Court provides an authoritative interpretation of

[250] Stefanelli, J. N (2021), 228. See European Parliament Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018/0329(COD), 16 January 2019.
[251] European Parliamentary Research Service, 'The proposed Return Directive (recast): Substitute Impact Assessment', PE 631.727 (February 2019).
[252] Stefanelli, J. N (2021); European Parliament Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 2018/0329(COD), 16 January 2019
[253] Stefanelli, J. N (2021)
[254] CJEU, Opinion 1/91.
[255] Schütze, R. (2018). *European Union law* (Second edition). Cambridge University Press.
[256] *Ib*.
[257] Schütze, R. (2018). Note that direct effect empowers individuals to invoke an unimplemented directive against the state, not the other way around. See also Costello, C. (2012).
[258] Schütze, R. (2018).
[259] European Union (2009), Treaty on the Functioning of the European Union (TFEU), Article 276.

EU law, and the national courts apply it. All the cases addressed in this section are preliminary rulings of the Court on the interpretation of the Return Directive.

a. Kadzoev [260]

This first case was a preliminary reference addressed to the Court by the *Administrativen sad Sofiagrad* concerning the interpretation of Article 15.4 RD. The case was related to the prolonged detention of Mr. Said Shailovich Kadzoev well beyond the maximum period of 18 months (34), without repatriation being achieved and despite bringing unsuccessful asylum claims and asking for judicial reviews on the validity of its detention. In particular, the Bulgarian Court referred five questions to the EU Court on the material and temporal scope of Article 15. The first two questions focused on determining the covered periods within the maximum detention timeframe specified by the Directive. The first question concerned periods preceding its enactment (para. 30.1(a)), the second concerned periods when asylum applications were pending (para. 20.1(b)). The third question addressed the periods where removal execution was suspended pending the appeal (para. 30.2). The fourth delved into the interpretation of the notion of "reasonably possible" removal, with specific concerns over the non-cooperation of Russian authorities (para. 30.3). The final question related to the course of action of Bulgarian authorities in the case that, after surpassing the maximum detention period, there remained 'a doubt as to his identity, he is aggressive in his conduct, he has no means of supporting himself and there is no third person who has undertaken to provide for his subsistence' (para 30.4).

The Court answered in the following manner. The periods spent in detention before the enactment of the Return Directive did count towards the maximum 18 months (paras. 34-39), while those where the asylum application was pending do not enter the scope of the Directive and as such were to be excluded from the count (paras. 40-48). Third, the periods where an appeal was pending, and removal was suspended did enter the scope (paras. 49-57). Fourth, "reasonable prospect of removal" meant a realistic possibility, contingent as well on the receiving country's willingness to admit the individual (paras.65-66). Fifth, according to the Court, no further legal basis existed under EU law to continue the detention, mandating immediate release, despite the public safety factors invoked by the Bulgarian authorities (paras. 68-71).

Thus, in Kadzoev, the Court reaffirms the absolute nature of the time limits set by the Directive: once the established eighteen months are passed, detention cannot continue on its basis. It also reiterated how detention pending removal and detention of asylum seekers fall under two distinct regimes. Additionally, it emphasized that detention on public order grounds is not permissible under the Directive[261]. Nevertheless, the Advocate General[262] recognized the potential for residual authority of the State to detain the individual due to his

[260] CJEU, 2009, Kadzoev, C-357/09 PPU.

[261] Galina Cornelisse interestingly points out how the above mentioned grounds for the detention of asylum seekers are in tension with these ruling. In her words, 'if irregular immigrants cannot be detained on public order grounds under EU law, it is difficult to see which reasons can justify the fact that asylum seekers can'. See Cornelisse, G. (2016)

[262] An advocate general is a magistrate who aids the CJEU in its duties. Their role involves delivering an impartial and independent "opinion" on the cases assigned to them. See Schütze, R. (2018)

aggressive behavior under a national law preserving public order or under criminal law, while the Court remained silent on the issue and did not address the question as to what extent does the Return Directive pre-empt this type of action by the Member State[263].

b. El Dridi[264]

With respect to Kadzoev, El Dridi delves deeper into the detention practices of the Member States, in this case Italy, and poses the same question on pre-emption of Member State action by the Return Directive, which the Court had left unanswered in that judgement. Criminal detention is conceptually and legally separate from immigration detention. In Italy, due to the introduction of the stringent anti-immigrant norms in the so-called "security package", it is now a crime for a non-national to remain on the Italian territory after a legal order to leave has been issued[265]. As a response, Italian judges sent numerous similar preliminary references on the subject[266]. The question regarded whether, 'in the light of sincere cooperation, the purpose of which is to ensure the *attainment of the objectives* of the Directive, and the principle that the penalty must be *proportionate, appropriate, and reasonable*', Article 15 and 16 of the Directive rule out the possibility of (1) imposing criminal penalties 'for a breach of an *intermediate stage* in the administrative return procedure […] by having recourse to [detention]' and (2) imposing a sentence of up to four years' imprisonment 'in respect of a simple *failure to cooperate* in the deportation procedure' (para. 25)[267].

With regards to the claim made by the government that its employment of criminal law placed the measure detention for illegal entry outside the scope of the Directive, pursuant to the exception contained in Article 2(2)(b)[268], the Court simply dismissed the plea, while the Advocate General stressed that the exception only applied when the return obligation resulted from a criminal conviction (para. 48, 49). Then the Court, having established that the Italian legislation allowed detention solely on the ground that the migrant had breached an order to leave, emphasized how the Return Directive, in contrast, establishes a fixed procedure with 'various, successive stages' (para. 34) and that States must execute the removal employing 'the least coercive measures possible' (para. 39). Subsequently, it identified various ways in which the removal procedure prescribed by the Italian legislation differed from the one established under the Return Directive, including the lack of a period of voluntary return (para 51), and the resort to criminal detention (para. 55, 56). Finally, after reassuring Member States that they 'remain free' to implement measures, which may involve the use of criminal law, with the objective of discouraging non-nationals from staying unlawfully on their territory (para. 52), the Court established how such measures must still ensure compliance with EU law (para. 54) and ensure its

[263] CJEU, Kadzoev, C-357/09 PPU, n. 38.
[264] CJEU, 2011, El Dridi, C-61/11 PPU.
[265] Costello, C. (2012).
[266] *Ib.*
[267] [emphasis added]
[268] 'Member States may decide not to apply this Directive to third-country nationals who: […] (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures'. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Article 2.

effectiveness[269]. Therefore, according to the principle of proportionality (requiring the adoption of the least coercive measure) and that of effectiveness of EU law that precluded the application of a law providing for detention in respect of a breach of the order to leave the territory, as it would have resulted in making removal more difficult[270].

c. Arslan[271]

The Arslan case involved the detention of an irregular migrant arrested by the Czech border police under the Return Directive and subsequently applying for asylum. The question addressed the interplay between the Return Directive and the CEAS, in particular, whether a foreigner who has applied for international protection falls within the scope of the Return Directive, and, if yes, whether the detention under the Return Directive must be terminated when the third country national applies for asylum (para. 31). The Court answered in the negative to the first question: asylum seekers do not fall within the scope of the Directive, as they cannot be characterized as staying illegally on the territory of the state. As to the second question, the Court emphasized how a pending asylum application does not imply the termination of the Return procedure, as this may continue in the case that the application is rejected. The Court, emphasizing obligation of Member States to ensure efficacy of EU law, describes how allowing automatic release pending an asylum application would threaten the Return Directive's efficacy. Nevertheless, the CJEU specified that detaining an asylum seeker would comply with EU law only when it seemed that the application was filed to avoid return, and detention was needed to impede an evasion[272].

d. Mahdi[273]

Mahdi was a case referred to the CJEU by a Bulgarian Court, related to Article 15(2) RD requiring the provision to detainees of factual and legal reasons for their detention. The central question posed to the Court was if such an obligation extended to decisions on the continuation of detention adopted under Article 15(6) (para. 31). The Court answered affirmatively and underscored the role of Article 15(2) within the broader context of ensuring access to justice, emphasizing how the provision of reasons empowers detainees to challenge their detention and equips the reviewing Court with the necessary information for a comprehensive

[269] CJEU, El Dridi, para 55, 56. That the application of national criminal law to sanction illegal migration may not deprive the Directive of its effectiveness was affirmed by the Court in other two judgements of the same year, Sagor and Achughbabian. See CJEU, 2012, Sagor, C-430/11; CJEU, 2011, Achughbabian, C-329/11; see Cornelisse, G., & Moraru, M. (2022).
[270] An interesting point is made by Cathryn Costello, who notices how although the Court's approach in El Dridi had the potential to mitigate certain punitive aspects of criminalization, it did so on the ground that criminalization hinders the application of EU law. Therefore, 'If criminalization was demonstrated to be effective in achieving deportation, then one would fall back on the principle of proportionality alone to restrain it under EU law, in which case the notion that the RD would preempt the national rules would be a much more audacious claim'. See Costello, C. (2012).
[271] CJEU, 2013, Arslan, C-534/11.
[272] As pointed out by Cornelisse, the decision in the Arslan case implied that the specific demarcation between the asylum framework and the Return Directive could vary among Member States. This was because, during that period, the Procedures Directive allowed individual Member States to decide whether asylum seekers had the right to stay in the territory while appealing a negative decision on their application. However, the revised Procedures Directive has brought about a change as asylum seekers now have the right to stay in the Member States' territory, not just until the initial decision is reached, but typically throughout the duration of their appeal following an adverse decision. See Cornelisse, G. (2020).
[273] CJEU, 2014, Mahdi, C-146/14 PPU

review of the decision to detain (para. 45). The CJEU added that the CFREU prescribes additional written reasons also for extensions (para. 52), after asserting that the prolongation of detention is a deprivation of liberty comparable to the initial decision to detain itself (para. 44). Without an obligation to provide reasons for extensions, detainees would be unable to contest their continued detention, leaving them without an effective remedy under EU law, which the CJEU deemed impermissible[274]. The Court also emphasized the link between the obligation contained in Article 15(2) with the notion of proportionality as a least coercive means test, clarifying that the judge responsible for determining the lawfulness of the detention, must assess whether alternative less restrictive measures exist (para. 61, 62) and whether there is a risk of absconding, individually assessed in relation to the specific case concerned (para. 70). As noted by Blisa and Kosař, by explicitly stating that national judges, when authorising the extension of detention for third-country nationals under the Directive, have the authority for comprehensive judicial review and can replace administrative decisions with their own (para. 62), the CJEU surprised several EU Member States[275]. The Mahdi ruling unexpectedly rendered certain domestic models of judicial review applied to immigration detention inconsistent with Union law, exposing substantial diversity among EU Member States concerning the domestic judicial approaches to reviewing immigration detention[276].

e. G and R[277]

Similar to Mahdi, in G and R as well the Court examined principles related to procedural guarantees. Here, the central question was whether the failure to guarantee the respect of the right to be heard of detainees before a decision of extension required the immediate cessation of the detention (para. 21). The analysis carried out by the Court focused on the impact of this absence on the decision's outcome. While recognizing the fundamental nature of the right to be heard within the EU legal order (para. 32), the Court acknowledged that this right is not absolute. As discussed above, rights in the CFREU can be restricted, provided such limitations serve a legitimate public interest, are proportional, and do not undermine the essence of that right (para. 33). Consequently, the CJEU ruled that States need to assess case-by-case the scale of the breach to establish whether it influenced the outcome of the decision (para. 38), since establishing the voidance of detention for every breach would jeopardize the effective application of the Return Directive (para 41, 42). As described by Stefanelli, scholars have expressed notable criticism for the Court's omission of consideration for Article 5(1)(f) ECHR regarding the right to be heard in detention proceedings, especially considering the explicit acknowledgment of the importance of this article in the Advocate General's opinion[278]. Stefanelli also

[274] CJEU, Mahdi, para 46. Curiously, the CJEU held the view that written reasons were, instead, unnecessary for periodic reviews under Article 15(3) during the initial period of detention (para 47). See Stefanelli, J. N (2021).
[275] Blisa, A. & Kosař, D. (2020). Scope and Intensity of Judicial Review: Which Power for Judges within the Control of Immigration Detention?. In Moraru, M. Cornelisse, G., & De Bruycker, P. (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union, Oxford: Hart Publishing*.
[276] E.g., Bulgaria, Slovenia and the Netherlands. See Blisa, A. & Kosař, D. (2020).
[277] CJEU, 2013, G and R, C-383/13 PPU.
[278] An obligation to consider art. 5 (1)(f) can be inferred from Article 1 of the Directive, which mandates the application of the Directive be in accordance with fundamental rights […] as well as international law, […] including human rights obligations'. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and

expresses disappointment for the fact that, while the CJEU's reluctance to risk compromising returns by mandating the termination of detention in every breach case is understandable, the Court did not adequately consider the significance of the decision which related to the extension of the initial six-month detention period[279]. For example, De Bruycker and Mananashvili interestingly argue that the review power of the Court should increase proportionately to the duration of the detention[280].

f. Bero and Bouzalmate and Pham[281]

In the Bero and Bouzalmate and Pham cases, the German referring courts inquired the Court on whether the provision on the employment of specialized detention facilities for the detention of returnees (Article 16 RD) [282] is applicable to Länders[283] where such facilities are unavailable (para. 13, 21). The Court answered positively, and emphasized the cruciality of specialized facilities in fulfilling the objective of ensuring humane detention practices that uphold fundamental rights and dignity (para. 20, 21). The Court also asserted that detainees cannot be allowed to waive their rights in relation to article 16, since the provision is mandatory in nature[284].

g. Affum[285]

The Affum case relates to the definition of the scope of the Directive and, therefore, to the interpretation of articles 2 and 3 of the Directive[286]. Affum, a Ghanian national intercepted by French police while passing through French territory en route from Belgium to the UK (paras. 35-42). She was undocumented, and authorities ordered her detention for illegal entry into French territory, although no criminal proceedings were initiated against her. The local Prefect ordered her transfer to Belgium, under a readmission agreement, and her detention for five days, later extended buy a judge. The French Court of Cassation referred the case to the CJEU, seeking to assert the compatibility of the Return Directive with national laws permitting imprisonment of third-country national for illegal entry and stay. In particular, it asked, whether article 3(2) defining the notion of illegal stay was to be interpreted as including a foreign national 'merely in transit' on the territory of one Member State (France) from another Member State of the Schengen area (UK) and directed towards a different Member State (Belgium) (para. 43(1))[287].

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procedures in Member States for returning illegally staying third-country nationals*, p. 98–107. See Stefanelli, J. (2020). Judicial Review of Immigration Detention in the UK, US and EU (1st ed.). Bloomsbury Publishing.*

[279] *See Stefanelli, J. (2020). In particular, see chapter 6 'Using the Law'.*

[280] De Bruycker, P., & Mananashvili, S. (2015). Audi alteram partem in immigration detention procedures, between the ECJ, the ECtHR and Member States: G & R. *Common Market L. Rev.*, *52*, 569.

[281] CJEU, 2014, Bero and Bouzalmate, Joined Cases C-473/13 and C-514/13; CJEU, 2014, Pham, C-474/13.

[282] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *p. 98–107. article 16.*

[283] German federated states.

[284] Stefanelli, J. N (2021).

[285] CJEU, 2015, Affum, C-47/15.

[286] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, p. 98–107. Article 2 relates to the scope of application of the directive, article 3 defines the notions employed in the Directive.*

[287] CJEU, Affum, para 43 (1).

First of all, the Court clarified that the length of stay and the intentions of the foreigner are not significant factors in determining their inclusion within the scope of the RD (para. 48). It added that in the context of the Directive the notions of illegal stay and illegal entry are interconnected, with the act of entry being one of the factors that can make the foreigner's presence on the territory of the respective Member State illegal (para. 60). The Court restated its conclusions from Achughbabian[288], emphasizing that the Return Directive prohibits any Member State legislation imposing imprisonment for an illegal stay and reiterating how imprisoning solely on the ground of illegal stay would impede the execution of the return, causing delays in return and thereby compromising the efficacy of the Return Directive (para. 63). The Court also made it clear that this interpretation remains valid, even though Ms. Affum was returned by another Member State under an agreement pursuant to Article 6(3) of the Return Directive (para. 57).

During the proceedings, the French government had invoked the external border control exception[289], contending that it was applicable to the unauthorized crossing of a Member State's external border upon entry into and exit from the Schengen area (para. 58). However, the Court made it clear that the external border control exception specifically refers to external borders, as defined by the Schengen Borders Code Article 2(2) and, consequently, Member States are not permitted to exempt individuals crossing internal borders from the Directive's scope (para. 77). Additionally, the exception does not extend to individuals attempting to depart (para. 78). The CJEU later reaffirmed the difference between internal and external borders in the Arib case, which addressed the reinstatement of intra-Schengen border controls by Member States[290]. The Court stated here that an internal border where a Member State has reintroduced border controls does not equate to an external border under the provisions of the Schengen Borders Code (para. 60). Both rulings, thus, affirmed the applicability of the Directive and its safeguards, preventing the national criminalisation of irregular entry by establishing a clear distinction between internal and external border crossings in EU law[291].

4. Assessment and Conclusion

This section will conclude the chapter dedicated to EU law by undertaking an initial evaluation of the transformative impact that the Return Directive, along with the jurisprudence of the CJEU, exerted on domestic practices of immigration detention and on the protection of human rights of detainees and an assessment of the efficacy of EU's activity of migration management.

a. Impact of judicial interactions on state practice

Galina Cornelisse and Madalina Moraru assessed the effect of judicial interactions on the domestic implementation of the Return Directive[292]. Specifically, they examined how the engagement of domestic courts

[288] CJEU, 2011, Achughbabian, C-329/11.
[289] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, article 2(2)(a).
[290] CJEU, 2019, Arib, C-444/17.
[291] Mitsilegas, V. (2021).
[292] Cornelisse, G., & Moraru, M. (2022).

and the CJEU with the Directive, first, have restricted the possibility to adopt so-called *crimmigration* measures, second, have established enforceable rights for detainees, and third, have addressed the legislative gaps of the Directive itself. Such three-fold process affected, in particular, the trend of convergence of criminal justice and immigration policing, the employment of detention for immigration enforcement, and the legal and social exclusion of irregular migrants[293].

As for the first point, they observe, thanks to vertical judicial interaction between the CJEU and the Italian, Dutch and French courts contributed to curbing the criminalisation of illegal entry and stay. When Member States took advantage of provision 2(2)(b) of the Return Directive[294] in order to preserve such measures, the ruling of the CJEU in El Dridi[295], Achughbabian[296], and Sagor[297] clarified that such measures only functioned as a derogation from the Directive subject to the principle of effectiveness[298]. At the same time, when Member States manipulated the temporal boundaries between the directive and criminal law (i.e. imposed criminal penalties for illegal entry and stay without completing the stages of the return procedure) judicial interactions, in cases like Celaj[299] and El Dridi[300], the CJEU underlined that the Directive establishes a specific and mandatory order for the measures to be taken in order to achieve return[301]. Finally, when Member States sought to exploit Article 2(2)(a), the external border control exception,[302] 'by pushing inwards the external borders of the EU', the CJEU clarified, in Affum[303] and Arib[304], the meaning of the provision in relation to the Schengen Borders Code's definition of external border[305]. In other words, as a result of these proceedings, domestic courts were empowered to expand their judicial review of *crimmigration* measures and assess their alignment with both the Directive and the conditions of proportionality, effectiveness, and sincere cooperation.

Regarding the second point, vertical interactions between the CJEU and domestic courts introduced a judicial review process involving an individual assessment of necessity, proportionality and the availability of alternative measures[306]. In other words, rulings like El Dridi[307], Arslan[308], and Mahdi[309] have expanded the reach and depth of judicial review across most Member States, granting courts the authority to consider elements which were not previously assessable in relation to the detention of returnees. The CJEU also

[293] Cornelisse, G., & Moraru, M. (2022), 127-8.
[294] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[295] CJEU, 2011, El Dridi, C-61/11 PPU.
[296] CJEU, 2011, Achughbabian, C-329/11.
[297] CJEU, 2012, Sagor, C-430/11.
[298] Cornelisse, G., & Moraru, M. (2022), 133-135
[299] CJEU, 2015, Celaj, C-290/14,
[300] CJEU, El Dridi.
[301] Cornelisse, G., & Moraru, M. (2022), 135-136.
[302] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
[303] CJEU, Affum.
[304] CJEU, Arib.
[305] Cornelisse, G., & Moraru, M. (2022), 136-137.
[306] Cornelisse, G., & Moraru, M. (2022), 138-142.
[307] CJEU, El Dridi.
[308] CJEU, Arslan.
[309] CJEU, Mahdi.

affirmed, in FMS and Others, that, when lacking a basis in domestic legislation, the principles of EU law primacy and Article 47 of the CFREU (the right to effective judicial protection), serve as a foundation for such review[310].

Finally, in connection to the third point, the domestic courts and the CJEU remedied to some legislative gaps in the Directive, derived from the political negotiations which, to ensure its adoption, sacrificed procedural requirements, such as the right to be heard or obligatory judicial review of all measures adopted under the return procedure, and a stronger protection of individual rights[311]. The CJEU, in particular in G and R[312], Mukarubega[313] and Boudjilida[314], inferred a right for returnees to be heard. Similarly, interactions between Belgian courts and the CJEU clarified the nature of the appeal that should be available against return-related measures and its suspensive effect, remedying the ambiguity of article 13 of the Return Directive and relying on the alignment with Article 47 CFREU[315].

b. Paralysis, bordering and externalisation

Another interesting contribution is the one offered by Fassi and Lucarelli in relation to the European Union's reaction to the 2015-16 crisis. They observed that this response was marked not only by an absence of solidarity among EU Members but also by collective actions resulting in three key outcomes, detrimental to the EU's enduring self-image as a principled actor in the field, namely what they call paralysis, bordering, and externalisation[316].

First, they observe, widespread concerns about irregular migrants crossing national borders among Member States led to a politicisation of the issue and an instrumentalization by populist forces, resulting in uncoordinated suspensions of the Schengen Agreement[317]. Concurrently, the EU found itself pressured to implement measures ensuring control over its external borders, resulting in a paralysis of its ability to formulate collective norms.[318] Such *paralysis* extended to the asylum system reform, the Dublin Regulation, and the EU's involvement in the UN Global Compact for Safe, Orderly and Regular Migration, where EU's inaction hindered its role as a norm setter, impeding the adoption of norms crucial for the equitable management of migration flows at both regional and global levels[319].

Secondly, bordering involves the 'enhanced control, patrolling and securitization' of EU internal and external borders[320]. Responses by the EU to the crisis included the erection of physical barriers to movement,

[310] CJEU, 2020, FMS and Others, C-925/19 PPU, para 291.
[311]Cornelisse, G., & Moraru, M. (2022), 142-147.
[312] CJEU, 2013, G and R, C-383/13 PPU.
[313] CJEU, 2014, Mukarubega, C-166/13.
[314] CJEU, 2014, Boudjilida, C-249/13.
[315] CJEU, 2014, Abdida, C-526/13.
[316] Fassi, E., & Lucarelli, S. (2021). The EU Migration System and Global Justice: An Assessment. In *The EU Migration System of Governance: Justice on the Move*, 259-277, 260.
[317] Fassi, E., & Lucarelli, S. (2021).
[318] *Ib.*
[319] *Ib.*
[320] Fassi, E., & Lucarelli, S. (2021), 261-262.

the mobilization of the EU Border and Coast Guard, and enhanced surveillance of the Mediterranean, resulting, on one hand, in the portrayal of an image of a fortress Europe striving to impede irregular crossings to 'save Schengen' and in an intensified perception of borders as 'delineations of rights and duties'[321].

Finally, the EU response as caused the external dimension of EU migration policy to take a 'particularly problematic' form[322]. Indeed, by entrusting third countries with the task of merely halting migration flows towards Europe, as evident in the 2016 agreement with Turkey or the 2017 accord with Libya, the EU has transferred the duty to safeguard potentially vulnerable migrants, thereby facilitating significant human rights violations, and indeed, the implemented policies have approached condoning outright human rights abuses, hindering the EU's ability to contribute to the establishment of global standards for migration and asylum as a normative power and likely diminishing its overall credibility as a principled authority.

c. How the reality of migration is neglected in EU policy

A final contribution worthy to be mentioned is the one offered by Maria Giovanna Manieri, who observes how especially in recent times, EU lawmakers have overlooked three crucial aspects that define contemporary migration to the EU, and which should serve as foundational elements for evidence-based policies on human movement[323]. Such elements include the distinction between migration flows and migration stocks[324], the artificiality and fluidity of migration categories, and third, an acknowledgment of the fact that the majority of migrants enter EU territory through legal channels. In recent years, Manieri explains, legislative reform and policy recommendations have predominantly relied on the analysis of migrant flows, without considering the impact on future migration stocks and resulting in short-term solutions. This method lacks a comprehensive long term strategy for a sustainable migration management, which could reduce irregular migration stocks and prevent migrants from entering irregular situations. Furthermore, an excessive focus on migrant flows contributes to the misconception of migration as a temporary and unregulated phenomenon, fostering negative narratives surrounding migrants. Turning to migration categories, classifying individuals as refugees, asylum seekers, or irregular migrants fails to consider both the dynamic nature of migration and the way migrants often shift between and across categories, resulting in EU legislation and policies lacking flexibility.

5. Conclusion

This chapter on the EU normative framework on administrative detention of returnees firstly addressed the evolution of EU's competence in migration policy and its role in regulation Member States' detention powers

[321] Fassi, E., & Lucarelli, S. (2021), 262.
[322] Fassi, E., & Lucarelli, S. (2021), 262.
[323] Manieri, M. G. (2021). Current Trends, Numbers and Routes in EU Migrations Is Existing Legislation Creating More Irregularity? In Gatta, G. L., Mitsilegas, V., & Zirulia, S. (Eds.). *Controlling Immigration Through Criminal Law: European and Comparative Perspectives on "crimmigration"*. Bloomsbury Publishing.
[324] Migrant flows refer to the number of migrants entering and leaving a country over the course of a specific period, migrants stocks are the estimates of the total number of migrants present in a given country at a particular point in time. See Manieri, M. G. (2021), 103.

vis à vis undocumented migrants. Secondly, it delved into a more detailed analysis of the Return Directive, particularly focusing on Article 15 which regulates administrative detention for the purpose of removal. Afterwards, a brief excursus explored the detention of asylum seekers, the CFREU, on the proposals for a recast Return Directive. A separate section was dedicated to the jurisprudence of the CJEU related to the implementation of the Directive, including a short introduction to the peculiarities of the relationship between the European court and the domestic courts. Several cases were addressed, which significantly affected the domestic implementation of the Return Directive, where the Court continuously balances the protection of detainees' human rights, the efficiency of return policies, and Member States' efforts to keep administrative detention within the realm of domestic criminal law. To conclude, three key contributions of relevant scholars in the field were considered to make an assessment of the Directive and the jurisprudence relating to it, of the reaction of the EU to the 2015-16 crisis, and finally of its lawmaking activity in migration and asylum.

The analysis conducted in this chapter underscores the critical role played by both the CJEU and domestic courts in safeguarding the human rights of migrants. The strength of the EU adjudicative system is precisely the dynamic dialogue between the supranational and national courts, which is encouraged by the judicial activism of domestic courts at all levels. This cooperative framework has proven to be instrumental in protecting the rights of migrants. In the context of immigration detention cases, the Return Directive represents a laudable attempt to regulate detention practices at the supranational level. However, it is worth noting that the Directive was not only explicitly aimed at making the states' implementation of returns more effective but also resulted from negotiations that inevitably entailed a trade-off between competing interests, with the protection of migrants' rights losing salience in comparison to the chief aim of the Directive. Indeed, its establishment of a highly extended time limit for detention is a clear example of such a trade-off. Despite some limitations, domestic courts have leveraged the preliminary reference procedure and the CJEU's interpretation to enhance the protection afforded by the Directive's provisions to migrant detainees. Thus, even though the EU's political activity towards migration lacks a comprehensive and long-term approach and does not appear to prioritize migrants' rights in its policies, the approach of the CJEU, which is not a specialized human rights court, seems to exert a positive, albeit limited, influence on the practices of states.

The following chapter will delve into the provisions of the ECHR related to the administrative detention of returnees, and the jurisprudence of the ECtHR. It will then conclude with an assessment of the standard of protection guaranteed by the Convention and the Court to migrants detained with a view to removal.

Chapter Three. The European Convention of Human Rights and the European Court of Human Right's approach to migrants' rights and pre-deportation detention.

1. Introduction

After delving into the normative framework of the European Union concerning the detention of immigrants pending repatriation and the related jurisprudence of the CJEU, the forthcoming chapter will be centred on the ECHR[325], exploring its content and application to migration issues through an examination of the jurisprudence of the ECtHR. The chapter will, first of all, address how the content of the ECHR relates to migration issues, with a focus on the prohibition of arbitrary detention, the prohibition of discrimination, the right to liberty and security, the prohibition of torture and the right to a fair trial. The discussion on ECtHR's case law will encompass various cases defining the standard of protection afforded to migrants and address the themes of rightlessness and statelessness of non-returnable migrants. The conclusion will assess the standards of protection afforded by the Court to detainees pending repatriation[326] in comparison with the approach adopted by the same Court in relation to pre-trial detention[327], the detention of unauthorised children and the detention of individuals of unsound mind[328]. Additionally, it will analyse how such an approach differs from the one adopted by the Inter-American Court of Human Rights (IACtHR) and the UN bodies in analogous cases, to conclude with a general evaluation of the standard of protection of migrants' rights guaranteed by the ECtHR, in comparison with that guaranteed by the CJEU.

2. The European Convention on Human Rights

As already introduced in the preceding chapter, the ECHR was adopted in 1950 by the Council of Europe and protects civil and political rights. The ECtHR, instead, was established in 1959 to ensure respect and implementation of the Convention. However, before 1998, when it was abolished with Protocol 11[329], access to the Court was conditioned by the European Commission of Human Rights, a body designated by the executives of the signatories to make an early evaluation of the admissibility of the complaints brought to it[330]. We already anticipated how the ECtHR has historically adopted a deferential attitude with regard to the state's activity in migration management. To understand why this is, it is worth looking at the drafting process of the Convention and the historical trajectories of the Court's activity.

As Marie-Benedicte Dembour described[331], the Convention was conceived by its framers as an instrument effective in safeguarding Europeans against a new World War II, potential arbitrariness of their

[325] European Convention on Human Rights, 1950.
[326] Regulated by article 5 (f) of the ECHR.
[327] Regulated by article 5 (c) of the ECHR.
[328] Regulated by article 5 (e) of the ECHR.
[329] See Protocol No. 11 in European Convention on Human Rights, 1950.
[330] Kälin, W., & Künzli, J. (2019). *The law of international human rights protection* (Second edition). Oxford University Press.
[331] Dembour, M.B. (2021). The Migrant Case Law of the European Court of Human Rights: Critique and Way Forward. In Çalı, B., Bianku, L., & Motoc, I. (Eds.). (2021). *Migration and the European Convention on Human Rights*. Oxford University Press, 19–40.

governments, and the spread of communism. Addressing the challenges faced by migrants was not part of their intent. Instead, the Convention was designed with European citizens as its intended beneficiaries. Consequently, guarantees that could have specifically protected migrants (e.g., rights to nationality, asylum, and expulsion only after due process) were not prioritized by negotiators[332]. As further explored by Amanda Spalding, the Convention not only overlooked the rights of migrants but, more significantly, it exhibited a significant inclination towards safeguarding states' prerogatives concerning migrants, even before it came into being. An initial draft of the Convention specified state's obligation to grant rights to 'all persons residing within their territories'. However, Italy opposed this wording in favour of 'all persons living in their territories'[333]. Initially, other states responded to the amendment by seeking to include an 'aliens clause' specifically limiting the political rights of foreigners, including freedom of expression, association, and assembly. However, a broader clause emerged in the Convention's draft, allowing states to establish specific rules within their territory to guarantee the respect of foreigners' rights under the prohibition of arbitrary detention, the right to a fair trial, and the political rights mentioned above[334]. Such clause, now Article 16 in the Convention, was later revised to include restrictions to migrants' freedom of expression and assembly and protection from discrimination[335].

The ECtHR itself frequently refers to an 'undeniable sovereign right [of states] to control aliens' entry into and residence in their territory'[336]. Such a principle, and its indisputability, is not exclusive to this Court but is rather a recurring theme in international law, affirmed by the International Court of Justice as well[337]. Bas Schotel explains how such assertive language implies a consensus that states possess this right without needing to provide a rationale as if it simply was as an undisputed fact[338]. However, this is far from uncontested and has been disputed by some scholars[339]. Restrictions on the movement of non-nationals began to be introduced in Europe only at the close of the nineteenth century, gaining momentum during the First World War[340]. Even during this period, as the notion that states had an inherent prerogative to refuse entry to their territory was starting to get recognition, there was evident resistance to its adoption[341]. Various sources, though not constituting binding law, indicate that opinions at the time were not unanimous, and the acceptance of this

[332] Dembour, M.B. (2021). She also reports how some commentators, for instance, Hersch Lauterpacht, express regret about this omission, but such concerns went unheard.
[333] Spalding, A. (2022). *The Treatment of Immigrants in the European Court of Human Rights: Moving Beyond Criminalisation*. Bloomsbury Publishing. See chapter six, section II.
[334] Dembour, M. B. (2015). *When humans become migrants: study of the European Court of Human Rights with an Inter-American counterpoint*. Oxford University Press, USA.
[335] Article 16 on Restrictions on political activity of aliens states that 'Nothing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [prohibition of discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.'. European Convention on Human Rights.
[336] ECtHR, Grand Chamber, 2008, Saadi v. the United Kingdom, App. No. 13229/03, para 64.
[337] For The ICJ refers in the Nottebohm case (Liechtenstein v. Guatemala) of 1955 to an 'unfettered' right to refuse admission, the US Supreme Court as well variously referred to this notion as inherent in state sovereignty and essential to its capacity to protect itself (in particular, it did in Nishimura Ekiu v US of 1892). See Spalding, A. (2022)
[338] Schotel, B. (2013). *On the right of exclusion: law, ethics and immigration policy*. Routledge.
[339] Dembour, M. B. (2015).
[340] Spalding, A. (2022).
[341] Spalding, A. (2022).

principle was met with opposition[342]. As concluded by Spalding, the novelty of such a notion displays how the claim that states have always tackled migration through the lens of state sovereignty is not true and raises significant doubt on the stance adopted by Courts, where the notion of a broad state power in immigration is treated as an undisputable fact and is still given a central role in the judgments of the ECtHR[343].

a. The prohibition of discrimination

Before analysing the jurisprudence of the ECtHR, this section will explore the pertinent provisions of the Convention with regard to the detention of migrants. Of course, as will be apparent in the next section, Article 5 on the right to personal liberty and security is the provision on which most of the jurisprudence of the ECtHR on the detention of foreigners has developed[344]. Nevertheless, this is not the only provision that holds significance in the context of immigration detention. Therefore, in addition to examining the content of Article 5, this section will scrutinize the prohibition of discrimination, the prohibition of torture (Article 3), and the right to a fair trial (Article 6). The prohibition of discrimination is a general obligation under human rights, in the sense that human rights law imposes a duty on states 'to respect, protect, and fulfil human rights without discrimination'[345]. Additionally, under the ECHR, the prohibition of discrimination is also treated as an autonomous human right, with Article 14 explicitly prohibiting discrimination in securing the rights protected by the Convention 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'[346]. The same wording appears in Article 1 of Protocol 12 of the ECHR, even though its effect is more limited than that of Article 14 as many states have failed to ratify the Protocol[347].

b. The right to liberty and security

Article 5 protects the right to liberty and security with the aim of preventing arbitrary detention. However, the right is not absolute but can be limited under certain conditions and 'in accordance with a procedure prescribed by law'[348]. Article 5(1) provides an exhaustive list of six cases in which deprivations of

[342] In 1889, a resolution by the International Emigration Conference affirmed the individual's right to the fundamental liberty accorded to him by every civilized nation to come and go and dispose of his person and his destinies as he pleases'. In 1892, the 'International Regulations on the Admission and Expulsion of Aliens' adopted by the Institute of International Law stipulate that 'free entrance of aliens to the territory of a civilised state, may not be generally and permanently forbidden except in the public interest and for very serious reasons', specifying that protecting national labour cannot be a sufficient ground for refusing entry. See Spalding, A. (2022), Chapter Six, Section II.
[343] ECtHR, Grand Chamber, 1996, Chahal v. United Kingdom, App. No. 22414/93, para 73; ECtHR, Grad Chamber, N. v. United Kingdom, 2008, App. No. 26565/05, para 30; ECtHR, 2016, Popov v. France, Apps. Nos. 39472/07 and 39474/07; See Spalding, A. (2022).
[344] Borlizzi, F. & Santoro, G. (2021).
[345] Kälin, W.& Künzli, J. (2019), 105-6. This principle is affirmed in these terms in Article 2(2) of the International Covenant on Economic, social and Civil Rights, Article 2(1) of the ICCPR, in Article 1(1) of the Inter-American Charter of Human Rights, and in Article 3(1) of the Arab Charter on Human Rights, and, most crucially, in Article 1(3) of the UN Charter.
[346] European Convention on Human Rights, Article 14.
[347] European Convention on Human Rights, Protocol 12, Article 1.
[348] European Convention on Human Rights, Article 5(1)

liberty[349] are allowed, among which 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'[350]. The exhaustiveness of the list found in paragraph 1 is strengthened by Article 18 of the Convention, which establishes that no restriction of the rights in the Convention shall be applied for for any reason other than those for which they were designated[351]. Moreover, in addition to the requirement in Article 5 that a deprivation of liberty be 'in accordance with a procedure prescribed by law', each ground of the provision mandates that detention be 'lawful'. As described by Cornelisse, the Court has specified in its case law that while lawfulness encompasses both substantive and procedural requirements, 'in accordance with a procedure prescribed by law' is more specific and refers mainly to domestic procedural guarantees, requiring a legal basis for the deprivation liberty within domestic legislation[352]. Nevertheless, since the notion involves ensuring that detention is applied according to a fair and proper procedure, the two terms overlap in certain aspects, and the ECtHR mainly considers them together. Thus, the two requirements necessitate, beyond conformity with national law, that any measure depriving an individual of liberty aligns with the purpose of Article 5, which, although not explicitly mentioned in the provision, is protection against arbitrariness[353]. Moreover, as pointed out by Costello, 'in accordance with a procedure prescribed by law' implicitly includes additional obligations of the state under EU law or international law[354]. In the context of human rights law, arbitrariness should be interpreted as including 'elements of inappropriateness, injustice, lack of predictability and due process of law' and, therefore, the deprivation of liberty should not be blatantly disproportional, and the modalities of arrest should be non-discriminatory and proportional to the circumstances[355].

Cornelisse identified four aspects in the ECtHR case law influencing the lawfulness of detention: the quality of the domestic legal basis, the manner of implementation, the reasons, and the duration of the

[349] For Article 5 to be invoked, there needs to be a deprivation of liberty, while restrictions of liberty are regulated under Protocol 4 of the Convention. In Guizzardi v. Italy the ECtHR that the difference between a restriction and a deprivation f liberty 'merely one of degree or intensity, and not one of nature or substance'. See ECtHR, 1980, Guzzardi v Italy, App. No. 7367/76, para 93.
[350] '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.' European Convention on Human Rights, Article 5(1).
[351] European Convention on Human Rights, Article 18.
[352] Cornelisse, G. (2004). Human rights for immigration detainees in Strasbourg: Limited sovereignty or a limited discourse?. *European Journal of Migration and Law*, *6*(2), 93-110. See also Costello, C. (2012), 278-280.
[353] Cornelisse, G. (2004), 95.
[354] Costello, C. (2012), 278.
[355] Cornelisse, G. (2004, 96) considering reports and communications by the Human Rights Committee and authoritative commentary to the ICCPR.

detention[356]. First, to avoid the risk of arbitrariness, the law authorizing detention must be predictable and appropriate, meaning that it must be accessible to the individual concerned, who must be able to anticipate the consequences (foreseeability). The domestic legal basis must, additionally, establish the reasons that justify detention and the procedures involved[357]. The Court emphasized that such requirements carry an increased significance in cases concerning aliens, as such individuals are unfamiliar with national laws[358]. Thus, when assessing the legality of detention according to the rule of law criteria, the Court has found that when domestic legislation does not meet the requirements of preciseness, accessibility, and foreseeability there is a violation of article 5(1)(f) and, accordingly, it has been examining compliance with domestic law more closely[359]. The Court has also found detention unlawful when the authorities failed to provide a reasoned decision for the continuation of detention[360]. As for the second element, the conditions and place of detention may also impact lawfulness, through the necessity of a connection between the ground for detention relied on by authorities and manner in which detention is applied[361]. Thirdly, the Court will consider whether detention is actually carried out for the reasons envisaged in Article 5, namely, to secure the detainee's deportation or to prevent unauthorized entry. Thus, detention for the purpose of deterring others would be unlawful, as would one pursuing criminal law purposes[362]. The Court has also established that a failure of the authorities to expressly state that detention pursues one of the aims authorized by Article 5 amounts to arbitrariness of the detention[363]. Finally, the ECtHR clarified that the duration of the detention must be contingent on the execution of the removal[364] and, therefore, it should last as long as deportation proceedings, carried out with due diligence[365], are ongoing. At the same time, consideration is paid to the detainees' behaviour as well; the state cannot be held responsible for delays caused by their conduct[366]. Therefore, according to the Court, an exceedingly long detention is not unlawful if caused by a detainee's refusal to collaborate. The ECtHR has also held that when the interests at stake for the detainee are particularly serious, longer detention may be justified[367]. The lawful duration of detention is, thus, assessed on a case-by-case basis, as the ECtHR has failed to indicate a maximum limit for the detention to avoid arbitrariness[368].

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[356] Cornelisse, G. (2004), 96-102.
[357] Claro Quintáns, I. (2022). Estrasburgo y la detención de inmigrantes: ¿nueva línea jurisprudencial?. Derecho PUCP, (89), 177-203.
[358] ECtHR, 1996, Amuur v. France, App. No. 19776/92, para 50.
[359] ECtHR, 2009, Rusu v. Austria, App. No. 34082/02; See Costello (2012), 280.
[360] ECtHR, 2012, Lokpo and Touré v. Hungary, App. No. 10816/10: See Costello (2012), 280.
[361] While the ECtHR has affirmed in Bizzotto that the arrangements for carrying it out do not generally affect the lawfulness of the detention, it held in Ashingdane and Bouamar the need for a connection between the ground and the manner of implementation of detention. So, for example, a detention for the purpose of repatriation should not have punitive aspects. See ECtHR, 1996, Bizzotto v. Greece, App. No. 22126/93, para 34; ECtHR, 1985, Ashingdane v. the United Kingdom, App. No. 82225/78, para 44; ECtHR, 1988, Bouamar v. Belgium, App. No. 9106/80, para 52-53; Cornelisse (2004), 97.
[362] Cornelisse, G. (2004), 98.
[363] ECtHR, 2019, Tarak and Depe v. Turkey, App. No. 70472/12, para 62. See Claro Quintáns, I. (2022), 184.
[364] ECtHR, Grand Chamber, 1996, Chahal v. United Kingdom, App. No. 22414/93, para 113.
[365] ECtHR, 1992, Kolompar v. Belgium, App. No. 11613/85, para 36.
[366] ECtHR,1992, Kolompar v.Belgium, para 42
[367] Cornelisse (2004), 101; ECtHR, 1996, Chahal v. United Kingdom, para 117. This point in articular, as we will see later in the chapter, was the object of criticism, most notably expressed in the dissenting opinion in Chahal.
[368] Borlizzi F., & Santoro, G. (2021), 21.

The rest of Article 5 provides for procedural safeguards against arbitrary detention. Detainees have a right to be informed of the reasons for their detention[369], to be promptly brought before a judge[370], the right to challenge the legality of their detention before a court empowered to order the release[371], and the right to compensation in case of unlawfulness[372]. The ECtHR has found Article 5 (4), the right to challenge the detention before a Court, to require equality of arms and adversarial procedure as well[373]. Article 5 (4) also establishes that the decision on the legality of the detention shall be taken 'speedily'; the ECtHR, however, has made such a determination on a case-by-case basis, considering periods from seventeen days up to six months excessively long[374].

c. Right to a Fair Trial

The right to a fair trial is guaranteed by Article 6 of the Convention, which states that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]' [375]. However, the Commission have consistently declared this provision inapplicable to immigration cases, on the ground that these constitute administrative matters[376]. Such conclusion was, in particular, reaffirmed by the Grand Chamber in Maaouia v. France[377]. In the case, Mr. Maaouia sought the annulment of an expulsion order and invoked Article 6 against the prolonged time that it took for his case to reach court. This the first time that the ECtHR was called to rule on the applicability of Article 6 in aliens' expulsion cases, since all previous cases were declared inadmissible by the Commission before reaching the Court. The ECtHR ruled that the case did not involve the determination of civil rights, and, therefore, article 6 could not be applied. However, the Court decided to endorse the Commission's view merely referring to the Commission's case-law on the matter and without discussing it. Sheona York discusses how all the cases[378] cited by the Court simply refer to each other, all lacking a detailed rationale or a discussion about the soundness of this conclusion[379]. She underlines how, given the lack of a reasoned judgement by the Court and given the increasing formalization and judicialization of immigration management in the last four decades (the first

[369] European Convention on Human Rights, Article 5 (2)
[370] European Convention on Human Rights, Article 5 (3)
[371] European Convention on Human Rights, Article 5 (4)
[372] European Convention on Human Rights, Article 5 (5)
[373] Spalding, A. (2022); ECtHR, 1996, Chahal v. the United Kingdom.
[374] Spalding, A. (2022); ECtHR, 2013, Aden Ahmed v. Malta, App. No. 55352/12.
[375] European Convention on Human Rights, Article 6 (1).
[376] Stefanelli, J. (2020); ECtHR, 1979, Singh and Uppal v. United Kingdom, App. No. 8244/78.
[377] ECtHR (Grand Chamber), 2000, Maaouia v. France, App. No. 39652/98.
[378] ECmHR, Urrutikoetxea v. France, App. No. 31113/96, para 4: 'The Commission recalls that expulsion proceedings do not entail any determination of an applicant's civil rights and applications or of any criminal charge against him'; ECtHR, 1986, Bozano v. France, App. No. 9990/82, para 38: '[…] On 15 May 1984, the Commission declared part of the application inadmissible […] ratione materiae with respect to Article 6 […]'; ECmHR, 1996, Kareem v. Sweden, App. No. 32025/96, para 3: '[...] The Commission recalls its established case-law according to which procedures followed by public authorities to determine whether
an alien should be allowed to stay in a country or should be expelled do not involve the determination of civil rights within the meaning of Article 6 […]'. See York, S. (2017)
[379] York, S. (2017). Deportation of Foreign Offenders—A critical look at the consequences of Maaouia and whether recourse to common-law principles might offer a solution. *Journal of Immigration, Asylum and Nationality Law*, *31*(1)

Commission decision on the matter dates back to 1977[380]), it is increasingly difficult and circular to accept this principle[381]. Additional criticism was expressed within the Court in the dissenting opinions of judges Loucaides and Traja[382]. The two judges suggest a lack of attention to the issue and propose to define 'civil' as simply 'non-criminal'[383]. They observe how the Court had already considered claims related to social security and social assistance as involving the determination of civil rights, despite the fact that they related to public administration matters. Regarding this point, York observes how the system of social assistance and that of immigration and asylum today have little 'structural difference', only differing in their 'subject matter'[384]. Nevertheless, the Court did not refer to this aspect to declare inadmissibility in Maaouia and appears to have distinguished the two system in its case law only on the ground that one of them concerns 'aliens'[385]. Judge Loucaides and Traja also highlight how the provision should be interpreted in good faith and taking into consideration its purpose and that of the Convention, which is the protection of individual rights: 'if a term allows more than one interpretation, the one which enhances individual rights is more in line with the object and purpose of the Convention and should always be preferred'[386].

d. The prohibition of torture

Other than Article 5, a provision that can serve as a limitation to the employment of immigration detention by states parties to the ECHR, is the prohibition of torture and of inhuman or degrading treatment and punishment (Article 3) which is protected in an absolute manner, i.e., without possibility of exception or derogation[387]. The notion of 'degrading treatment' is assessed by the Court by insisting on two main ideas[388]. First, it requires a minimum level of severity, substantiated by appropriate evidence. Second, this minimum level of severity, is always relative. The Court assess severity through the examination of circumstances specific to the case, the applicant, and the character of the detention[389]. Due to the specificity of the test adopted by the Court, it is impossible to identify a stable threshold of severity to be reached for a violation of Article 3 to occur. In general, the ECtHR seems to investigate breaches of Article 3 mainly on the basis of the duration, the conditions, and the place of detention of immigrants[390].

[380] ECmHR, 1976, Agee v. United Kingdom, App. No. 7729/76
[381] For a detailed critique of the position taken by the Court in Maaouia, see York, S. (2017).
[382] ECtHR, Grand Chamber, 2000, Maaouia v. France, Dissenting Opinion of judge Loucaides joined by judge Traja.
[383] *Ib.*
[384] York, S. (2017), 19.
[385] *Ib.*
[386] ECtHR, Grand Chamber, 2000, Maaouia v. France, Dissenting Opinion of judge Loucaides joined by judge Traja.
[387] European Convention on Human Rights, Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The absolute nature of the prohibition is established by article 15(2) of the ECHR ('No derogation from Article [...] 3, […] shall be made under this provision.') and was emphasized by the ECtHR in Soering v. United Kingdom. See ECtHR, 1989, Soering v. The United Kingdom, App. No. 14038/88
[388] Claro Quintáns, I. (2022).
[389] Factors 'such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim' but also the purpose, context, and vulnerability of the complainants. See ECtHR, 2002, Mouseil v. France, App. No. 67263/01, para 37; ECtHR, 2016, Khlaifia and Others v. Italy, App. No. 16483/12, para 160.
[390] Claro Quintáns, I. (2022)

As for the duration, the absence of a fixed time pattern allows for the consideration of diverse circumstances in the examination, such as those derived from a physical disability or deterioration of mental health, and, therefore, the objective duration of detention must be combined with the vulnerability factor of the individuals[391]. For instance, the Court deemed a detention of twenty six days a violation of Article 3 due to the vulnerability of the applicant, whose leg amputation impeded free movement[392]. Regarding the place of detention, the two relevant elements are the mandatory nature and the absence of valid consent from the detainee to be deprived of liberty: the ECtHR considers that de facto detention occurs when a person is not free to leave voluntarily, as occurs in international airport zones[393]. As for the conditions of detention, the ECtHR examines a variety of issues. For instance, the ECtHR has commented on police stations considering them, by their very nature, places where a violation of Article 3 could be established[394]. As places where people are supposed to be held for a brief period of time, a breach of Article 3 may be ascertained if the continuation of detention for a prolonged period of time is not justified[395]. So, for example, in Arabi v. Greece, a two day detention in a police station was found not in violation of Article 3 due to the duration of the stay and lack of evidence on the severity of detention conditions[396]. At the same time, in S.F. and Others v. Bulgaria, a violation was found with regards to the poor conditions in which a married couple of Iraqi citizens and their three minor children experienced while detained in a border police station[397]. Finally, the ECtHR crucially clarified that the migratory pressure experienced at the EU borders does not diminish the responsibility of the state under the prohibition of torture[398]. Consequently, domestic authorities are under a duty to investigate when there are indications of a potential violation of Article 3: failure to investigate would result in a lack of diligence and will constitute, in itself, a violation of the ECHR[399].

3. The jurisprudence of the ECtHR

As introduced earlier in the chapter, while the first section concentrated on the content of the ECHR's provision pertinent to the detention of migrants awaiting repatriation, this subsequent section delves into the jurisprudence of the ECtHR in this domain. The discussion begins with a concise and general overview of the stance adopted by the Court in evaluating migrants' rights, then progresses to a more detailed examination,

[391] Claro Quintáns, I. (2022)
[392] ECtHR, 2018, Tsarpelas v. Greece, App. No. 74884/13, para 48.
[393] As pointed out by Claro Quintáns, I. (2022), a third country national held in an international airport zone only for attempting irregular entry into the country has their freedom is restricted in a way that is different from the restriction of liberty experienced in detention centers while awaiting deportation. According to the Court, it is necessary for this deprivation of liberty to occur with the appropriate safeguards that make it compatible with the State's international obligations, it should not be excessively prolonged, and if prolonged, judicial intervention must be possible. See ECtHR, 1996, Amuur v. France, App. No. 19776/92, para 43.
[394] Claro Quintáns, I. (2022)
[395] ECtHR, 2019, H.A. and Others v. Greece, App. No. 59670/19, para 167-168.
[396] ECtHR, 2015, Aarabi v. Greece, App. No. 39766/09
[397] ECtHR, 2017, S. F. and Others v. Bulgaria, App. No. 8138/16
[398] ECtHR, 2011, M.S.S. v. Belgium and Greece, App. No. 30696/09, para 223-224.
[399] Claro Quintáns, I. (2022), 191

scrutinizing specific cases and exploring patterns of case law associated with specific challenges faced by migrants.

a. Historical Overview of the Court's approach to migrants' rights

Examining the case law of the ECtHR, Marie-Benedicte Dembour observes how the Court of Strasbourg generally prioritizes state sovereignty over migrants' rights[400]. While its jurisprudence includes impactful judgements producing protective effects towards migrants, a complete analysis including cases where violation of the Convention were not found and cases which never reached the Court because they were declared inadmissible reveal important gaps for the protective framework of ECHR. Despite the lack of attention reserved to migration by the framers and the exclusion of migrants' rights from its content[401], migrants' representatives, understanding the protective potential of the Convention, started to submit applications to the Commission 'in surprisingly high numbers' already since the 1950s[402]. However, their applications were routinely declared inadmissible for decades. Actually, the Commission declared almost all applications inadmissible until the late1970s, when 'the system awakened', at least for European citizens[403]. Significantly though, it took another ten years for the Court to start hearing migrant cases[404].

As noted by Dembour, the Strasbourg jurisprudence certainly contains important victories for migrants' right, for example Soering[405] and Berrehab[406] paving the way for successful applications by asserting that return to the country of origin can entail violation of Article 3 and 8 ECHR, respectively. Yet, the less protective jurisprudence mostly escapes scrutiny. A crucial example is Maaouia, rarely mentioned in academic studies, notwithstanding its status as a precedent-setting ruling and the lasting and detrimental consequences for migrant's rights[407]. Such jurisprudence consisted since the 1980s of a series of rulings progressively eroding the arsenal of provisions to which migrants could appeal under the Convention: the Court declared that migrants have no right to choose the country of residence, no right to respect for privacy and family life, no right to access social protection systems, and no right to be granted a residence permit[408]. In Abdulaziz, Cabales and Balkandali (the first migrant case to reach the Court) it was established by the Court that migrants

[400] Dembour, M.B. (2021); Dembour, M.B. (2015).
[401] The negotiations on aliens' rights within the Convention are discussed at the beginning of the second section of this chapter.
[402] Dembour, M.B. (2021), 19.
[403] Dembour, M. B. (2021), 20; See ECtHR, 1978, Tyrer v. the United Kingdom, App. No. 5856/72 (corporal punishment for children); ECtHR, 1979, Marckx v. Belgium, App. No. 6833/74 (discrimination towards children born out of wedlock); ECtHR, 1979, Airey v. Ireland, App. No. 6289/73 (lack of access to justice due to lack of legal aid).
[404] The first migrant case brought by the Commission to Court was Abdelaziz, Cabales and Balkandali, decided in 1985. It concerned 'immigration widows' in the UK. The Court established that legally settled women do not have a right to have their husband join them. See ECtHR, 1985, Abdulaziz, Cabales and Balkandali v. the United Kingdom, Apps. Nos. 9214/80, 9473/81, 9474/81
[405] ECtHR, 1989, Soering v. The United Kingdom, App. No. 14038/88
[406] ECtHR, 1988, Berrehab v. the Netherlands, App. No. 10730/84
[407] ECtHR, Grand Chamber, 2000, Maaouia v. France, App. No. 39652/98
[408] ECtHR, 1996, Gaygusuz v. Austria, App. No 1737/90. In Gaygusuz, the Court found that denying an applicant a social security benefit based solely on not being a national of the state where they legally worked for over ten years breached Article 14 ECHR. Nevertheless, as pointed out by Dembou, M.B. (2021), although hailed as a victory for equality, Gaygusuz did not lead to significant changes, as the Court did not explore avenues for migrants to access social security or assistance denied due to work permit issues or "illegal" residence.

have no right to choose their place of residence, interpreting Article 8 in such a way that very few duties are imposed on states regarding the migrants' applications to family reunion[409]. Moreover, under the ECtHR, migrants have no protection against the possibility of being separated from their family or removed from their environment where they established themselves (Article 8)[410]. The denial of a right to a residence permit by the Court[411], as will be described later in this chapter, make it nearly impossible for a foreigner, who cannot be returned nor authorized, to build a stable working and private life[412].

When considered individually, each of these so-called 'non-rights' might seem reasonable, as transforming them into rights would burden the state with substantial responsibilities, likely facing resistance from politicians and citizens. However, such an 'accumulation of protection deficit' is extremely problematic and led to what Dembour calls the 'Strasbourg reversal'[413]. This notion, exemplified by the Üner ruling, indicates a reversal of reasoning in the decisions of the Court for cases involving the rights of migrants. Therefore, while normally the provision to be interpreted would be at the centre of the ruling, when dealing with migrant cases the state's prerogative to control entry to its territory ('as a matter of well-established international law') is the starting point of the judgement to which the Court will add that decisions made by the state in this regard must be compliant with its obligations[414]. The preceding section already dwelled on the historical and factual unfoundedness of the assertion that the principle of state control is firmly established in international law, but this is not the point here[415]. When the Court prioritizes the state's rights, human rights appear relegated to exceptions that merely serve to curb the principle of state sovereignty. Instead, by refraining from invoking the state control principle, the ECtHR would base its reasoning on the premise that migrants are fundamentally human beings with inherent human rights, legally classified as aliens subject to the state's exclusionary powers: the primary principle to guide the judgement of the Court would be, as it should be and as it is for cases

[409] ECtHR, 1985, Abdulaziz, Cabales and Balkandali v. the United Kingdom, Apps. Nos. 9214/80, 9473/81, 9474/81
[410] Dembour M.B. (2021)
[411] ECtHR, 2005, Bonger v. the Netherlands, App. No. 10154/04; see Dembour, M.B (2015), in particular Chapter 13 'The Darkest Case Law: Condoning Rightlessness (Bonger et alia)'.
[412] As pointed out by Dembour, M.B. (2021), since the 90s, it occasionally happened that the Court found a denial of residence permit to be in violation of the ECHR. Looking at the numbers though , this remains an exception to the rule.
[413] Dembour, M.B. (2021), 29.
[414] 'The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there [. . .]. The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of maintaining public order, Contracting States have the power to expel an alien convicted of criminal sentences. However, their decisions in this field must, [..], be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'. ECtHR (Grand Chamber), 2006, Üner v. the Netherlands, App. No. 46410/99, para 54. See Dembour., M.B. (2021) and Dembour, M.B. (2015). Although, in a less evident way, this principle whereby cases involving migrants' human rights must be assessed under the undoubted assumption of state's aliens power, is present since the beginning of the Court's activity. In its first migrant case, Abdulaziz, Cabales, and Balkandali, the reversal takes the following form: 'the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'. ECtHR, 1985, Abdulaziz, Cabales and Balkandali v. the United Kingdom, Apps. Nos. 9214/80, 9473/81, 9474/81, para 67.
[415] This is further demonstrated by the fact that such principle encountered substantial opposition also from within the Court. Judge Francoise Tulkens, Vice-President of the Court from 2011 to 2013, publicly described her efforts to eliminate this principle from judgments where she participated in a personal communication of March 2014. This is reported by Dembour, M.B.(2021), 31.

involving EU citizens, the imperative to uphold human rights, with state sovereignty assuming a secondary position[416].

The rest of this section scrutinizes a number of cases on immigration detention. The first is the landmark case of Chahal v. the United Kingdom, exemplifying the Court's position on pre-deportation detention. The second case is Čonka v. Belgium, which illustrates the Court's perspective on the relationship between immigration detention and its implementation. The third case is Saadi v. the United Kingdom, a highly contested ruling where the Court devised a restrictive test for arbitrariness. Finally, the fourth case is A. and Others v. the United Kingdom, where the Court established that detention under Article 5(1)(f) necessitates a realistic prospect for deportation. Furthermore, this section examines the Court's case law concerning the condition of rightlessness and the issue of repeated immigration detention faced by de facto stateless individuals. The section concludes by demonstrating how the Court can still alter its approach and accommodate migrants' rights, through an analysis of the case of M.S.S. v Belgium.

b. Chahal v. the United Kingdom[417]

Mr. Chahal was the applicant with his wife and their two children with UK citizenship. He had entered the UK illegally in 1971 but was granted to remain indefinitely under an amnesty (paras. 12-56). In 1985, he became involved in organizing passive Sikh resistance in Punjab, leading to arrests and detentions upon his return to the UK. The Home Secretary decided to deport him in 1990, prompting Chahal to apply for asylum, claiming a risk of torture and persecution if sent back to India. After seven months, his application was refused. He requested judicial review of the decision, which was quashed by the High Court and referred back to the Home Secretary. After six months, the Home Secretary decided again to refuse asylum, affirming that even if there was a risk of torture and persecution, given the threat he posed to national security, he was not entitled to asylum. Over the following five years, various legal avenues were pursued, including unsuccessful appeals and applications for judicial review[418]. Chahal applied to the Commission, alleging that his deportation to India would violate Article 3, exposing him to a concrete risk of torture or inhuman treatment and that his prolonged detention (six years) and ineffective judicial control violated Article 5 (1) and (4), (para. 68).

Both the Commission and the Court agreed that returning the applicant to India would entail a violation of Article 3 (para. 69). In particular, the Court rejected the government's claim that the national security threat allegedly posed by the applicant should mitigate state's obligations under Article 3, reiterating the absolute nature of the prohibition against ill-treatment (para. 80, 107). Turning to Article 5, the Court established, and has consistently reaffirmed since, that Article 5(1)(f) 'does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary', the only

[416] Dembour, M.B. (2021)
[417] ECtHR, Grand Chamber, 1996, Chahal v. United Kingdom, App. no. 22414/93
[418] In particular, a new application for judicial review was refused, his appeal to the Court of Appeal was dismissed, another appeal was also refused by the House of Lords, and, finally his application for habeas corpus was rejected as well.

requirement under the provision is that the applicant faces deportation, adding that 'it is therefore immaterial' for the Court to scrutinize the justification for initial decision to expel under national or Convention law (para. 112). From the Court's rejection of a necessity test it follows that states are also not under any obligation to consider less coercive measures. The Court went on to affirm that to protect against arbitrariness, with regards to the length of detention, it would be sufficient that deportation proceedings were being carried out with due diligence (para. 113). Moreover, the Court added that, given the grave interests involved in the case, it was not in the interest of the applicant or of the general public that decisions about his case be taken 'hastily'(para. 117). Apart from the Court's problematic claim that a long detention, especially when this does not need to be reasonably necessary, can be in the interest of the detainee, this also means that extremely long periods of detention, as were those involved in Chahal, will be justified as long as the detainee cannot prove that proceedings are not pursued with due diligence. The Court concluded that both the periods spent in detention and those taken to reach decisions regarding his case were not excessive and did not violate Article 5 (1) (f) (para. 115 and 117). Finally, the Court affirmed that domestic court proceedings should incorporate essential elements of judicial procedure, including the right to legal representation, sufficient notification, and an impartial review by a court empowered to make legally binding decisions and, as a result, found violations of article 5(4) (paras. 130-133).

The Court's interpretation of Article 5(1)(f) is particularly broad. This is confirmed by Galina Cornelisse, according to whom it would challenging to imagine an interpretation of this provision granting the state greater discretion[419]. At the same time, such an interpretation not only does not seem to have been adopted in light of the purpose of the article, i.e., to protect humans against arbitrary deprivations of liberty, but appears in contrast with the very nature of the Court as well. It is difficult to reconcile the claim that a restriction of the right to liberty of migrants awaiting repatriation does need to be necessary, with the chief task of a body protecting human rights, namely, to make sure that 'interferences with these rights be kept to the minimum'[420].

c. Čonka v. Belgium[421]

The applicants in Čonka v. Belgium were a Slovakian family of Roma descent. They sought political asylum in Belgium in 1998, asserting that they had been subjected to assault and threats by skinheads without police intervention (paras. 7-23). Following the rejection of their asylum request by Belgian authorities due to insufficient evidence and after being served with an order to leave, they filed an immediate appeal, which was subsequently rejected. Their requests for legal assistance were denied due to the omission of necessary documents. Additionally, their applications for a stay of execution and judicial review with the *Conseil d'Etat* were dismissed due to non-payment of court fees. Subsequently, they, along with other Roma families from Slovakia, were called to a police station in Ghent under the pretext that they had to complete some files related

[419] Cornelisse, G. (2004).
[420] Cornelisse, G. (2016), 6.
[421] ECtHR, 2002, Čonka v Belgium, App. No. 51564/99

to their asylum applications. The applicants complied, only to be handed deportation notices and placed in detention. Following this, they were transported to a closed transit facility and deported five days thereafter. The applicants claimed a breach of Article 5(1) related to their apprehension by the Ghent police, asserting that they were misled about the purpose of their attendance (para. 34). They also contended a violation of Article 5(2) due to inadequate information provided regarding the reasons for their arrest and raised concerns about a breach of Article 5(4) (para. 47). Additionally, they raised objections to a collective expulsion, contrary to Article 4, Protocol 4 and to the absence of a recourse to address it, contrary to Article 13 (paras. 56-85) [422].

The ECtHR concluded that the wording in the notice summoning the applicants was intentionally chosen to ensure the compliance of a large number of recipients, indicating bad faith on the part of the authorities and rendering the detention arbitrary (para. 41). The Court acknowledged the use of strategies to deprive criminals of liberty but found it inconsistent with Convention principles if these strategies were employed to gain the trust of asylum seekers, regardless of their lawful status in the country, for the purpose of arrest (para. 41). Therefore, the conscious decision to mislead aliens for easier expulsion, without providing information on available remedies in their language, a shortage of interpreters, and lack of legal assistance at the detention centre, made accessing a remedy practically impossible, violating Article 5(1) (para. 46). Regarding Article 5(4), the remedy of appealing to the committals division of the criminal court was made difficult due to information in a language the applicants could not understand, with minimal interpreter availability. Moreover, the applicants' lawyer was informed too late to lodge an appeal before their removal, leading to a violation of Article 5(4) (para. 55).

d. Saadi v. the United Kingdom[423]

Mr. Saadi was an Iraqi Curd doctor who sought asylum upon arriving in the United Kingdom at Heathrow Airport (paras. 9-18). He was initially released temporarily and later asked to return to the airport immigration authorities, which he did. However, after four days, he was detained and transferred to a detention centre. He was given a standard from outlining the reasons for the detention and his rights, but which did not clarify that he was being detained under the fast track procedure. Three days after detention, his representative was contacted from an immigration officer and informed that the reason for the detention was that Mr. Saadi, as an Iraqi, met the criteria for detention at the reception centre which was a specific one designed to expedite the processing of asylum claims through the fast-track procedure (para. 23, 24). The applicant claimed that his detention violated Article 5(1) (para 41) and that the 76 hours that it took authorities to notify him of the reasons for his detention determined a violation of Article 5(2) (para. 81). A Chamber of the ECtHR determined that there was no violation of Article 5(1) regarding the seven-day detention (para 44); it did find, however, a

[422] This part of the judgement is not addressed here, but the Court identified a violation Article 4, Protocol 4 ECHR due to the absence of guarantees showing that the individual circumstances of each person involved had genuinely and individually been considered. The Court also determined that the applicants lacked available recourse to address their alleged collective expulsion in violation of Article 13 ECHR.

[423] ECtHR, Grand Chamber, 2008, Saadi v. the United Kingdom, App. No. 13229/03

violation of the promptness requirement outlined in Article 5(2) concerning the timely provision of reasons (para. 84).

The majority opinion of the Grand Chamber in this judgment rested on the notion that the detention of individuals without authorized entry was deemed a 'necessary adjunct' to a state's 'undeniable sovereign right to control aliens' entry into and residence in their territory' (para. 64). The Court emphasized that, until formal entry authorization is granted, any entry must be considered "unauthorized" and, thus, recourse to detention was justified under Article 5 (para. 65). After reiterating Chahal's rejection of a necessity test (para 72), the Grand Chamber stressed, nonetheless, that the state exercise of its right to detain was subject four conditions. To avoid arbitrariness, the detention must be: (1) conducted in good faith; (2) closely linked to the purpose of preventing unauthorized entry; (3) in an appropriate place and under suitable conditions, recognizing that detainees have not committed criminal offenses but may have fled for their safety; and (4) of a duration not exceeding that reasonably necessary for the pursued purpose (para. 74)[424]. Applying these criteria to the case, the majority found that condition (1) was satisfied because the applicant was selected on the basis of his nationality for the fast-track procedure (para. 76). Condition (2) was met, as well since detention was employed to expedite the examination of the asylum case, 'in the interests not only of the applicants but of those increasingly in the queue' (para. 77). The third condition was respected, as the detention centre was specifically designed for asylum seekers and provided various amenities (and, in fact, the Applicant had not raised concerns about the conditions of his detention) (para. 78). Condition (4) was satisfied as the seven-day detention before release, following the refusal of asylum at first instance, was deemed reasonable (para. 79). The Grand Chamber also noted that the implementation of a more efficient processing asylum claims reduced the need for more extensive use of detention (para. 80). The Grand Chamber, therefore, agreed with the lower Chamber, establishing no violation of Article 5(1), but finding an inconsistency with the promptness requirement under Article 5 (2) (para. 80,81).

A partly dissenting opinion criticizes several points of the majority's judgment related to Article 5 (1), urging a greater adherence to other human rights instruments[425]. They first contested the majority's failure to differentiate among categories of non-nationals, subjecting all of them to the 'states' unlimited sovereignty'[426]. The dissenters also criticized the majority's treatment of detention as inherent to sovereign entry control, arguing that it conflicted with the principle that asylum seekers are to be considered legally within a state's territory, as sustained by the case law of the HRCttee related to the interpretation of Article 12 ICCPR[427]. They, then, denied that Article 5 (1) could be applied in the particular case, since a detention under this provision

[424]With regards to the fourth requirement, Spalding observes how assessment of the duration of detention might have served as a test for the "least restrictive means" if it had evaluated whether the length of detention was essential for the legitimate objective. However, this is not the situation; all that is required is to demonstrate that the authorities are handling the claim with appropriate diligence. See Spalding, A. (2022).
[425] ECtHR, Saadi v. the United Kingdom, 'Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvela'.
[426] *Ib.*
[427] *Ib.*

must be solely in the pursuit of one of the aims mentioned in the Article and, in this case, 'the applicant did not enter or attempt to enter the country unlawfully'[428]. As highlighted by Spalding as well, an interpretation of the provision where detention is only requested to be closely linked to the prevention of unauthorised entry could include all measures linked to migration control[429]. The dissenters found the detention of Saadi, explicitly to expedite the asylum determination process, to be improper, adding that claiming detention is in the interests of the person concerned and 'those increasingly in the queue' is an unacceptable stance: 'no person, no human being may be used as a means towards an end'[430]. The minority also raised concerns about the application of the four requirements test, in particular regarding the failure to determine an appropriate test for the duration of the detention and the exclusion of a least alternatives test as part of the non-arbitrariness assessment[431]. Finally, the minority underlined how the Convention 'does not apply in a vacuum', underlining that Article 5 ends up affording a lower standard of protection than that recognised by other human rights bodies 'as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come' and concluding: 'Is it a crime to be a foreigner? We do not think so'[432].

Harsh criticism towards the majority's opinion came from the Parliamentary Assembly of the Council of Europe as well.[433] Rapporteur Mendonça criticized the stance that an individual is unauthorized until it is concretely authorized as this could imply that unless authorities grant entry permission, an individual could potentially be detained indefinitely under the pretext that authorities are preventing unauthorized entry, which is in 'blatant conflict with the UNHCR Guidelines'[434]. It further invited the ECtHR to take 'fully into account other international sources of law and views of the international community'[435].

e. A. and Others v. the United Kingdom[436]

The eleven applicants of this case were individuals who were detained by UK in the high security prison of Belmarsh authorities under suspicion of terrorism, pursuant to the Anti-terrorism, Crime and Security Act of 2001, enacted post-9/11, under a derogation to Article 5 pursuant to Article 15 of the ECHR (paras. 9-13). In particular, section 4 of the 2001 Act granted expanded authority to arrest and detain foreign nationals when their removal or deportation from the United Kingdom is unfeasible[437]. The applicants were all suspected of providing financial support to terrorist groups associated with Al Qaeda through activities such as

[428] *Ib.*
[429] Spalding, A. (2022)
[430] *Ib.*
[431] *Ib.*
[432] *Ib.*
[433] Mendonça A. C. (2010), Explanatory Memorandum to the Detention of Asylum Seekers and Irregular Migrants in Europe, Parliamentary Assembly, Report Doc. 12105.
[434] Mendonça A. C. (2010) 'Appendix 1 – 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible', Principle IV (2).
[435] Mendonça A. C. (2010) 'Appendix 1 – 10 guiding principles governing the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible', Principle IV (10).
[436] ECtHR, Grand Chamber, 2009, A. and Others v. United Kingdom, App. No. 3455/05.
[437] Such a power to detain was triggered by a certificate issued by the Secretary of State, expressing a belief that the person poses a national security risk and is suspected of being an international terrorist. This certificate was subject to appeal before the Special Immigration Appeals Commission (SIAC), a non-judicial authority, which could annul it if deemed unjust. *Id.*

fundraising, fraud, or forgery (paras. 26-69). Two of the applicants were released as they opted to leave the United Kingdom, while three were transferred to a psychiatric hospital, and one was released under conditions tantamount to house arrest (paras. 70-81). The remaining eight applicants were incarcerated until the repeal of the 2001 Act by Parliament in March 2005, after in 2004 the House of Lords had declared Part 4 of the 2001 Act incompatible with the Convention[438]. Post-release, the applicants faced restrictive conditions and were held in immigration custody pending their removal to their respective countries of origin (paras. 81-86). The Applicants asserted a breach of Article 3 ECHR, alone and in conjunction with Article 13, since no remedy was available to bring their complaints under Article 3 (para .114). Furthermore, they deemed their detention inconsistent with Article 5(1) (para. 137) and discriminatory, in breach of Article 14, since the 2001 Act provided only for the detention of non-nationals, with the result that UK nationals, subjects of the same suspects, were not held in detention (para. 191). Finally, they argued that the domestic procedures to challenge their detention were not compliant with the requirements of Article 5 (4) (para. 193).

The Court, first of all, denied that the conditions of the present detention amounted to inhuman or degrading treatment and affirmed that civil and administrative law remedies were available, finding, consequently, no violation of Article 3 and 13 ECHR (para. 134, 136). The Court, nonetheless, admitted that the Applicants could not be removed under Article 3 and rejected the Government's attempt to justify their detention asserting that it was actively reviewing the possibility of removal (para. 167, 168.)[439]. The Court dismissed the argument not only because of the government's inactivity with regard to the organization of the Applicants' removal, but also deeming that an active review was insufficiently certain and could not qualify as 'action […] being taken with a view to deportation'[440]. After finding that the Applicants' detention was not with a view to deportation and, thus, was arbitrary under Article 5 (1)(f), the Court turned to assert whether the derogation to Article 5 under Article 15 was indeed valid (para. 171, 172), finding that the measures adopted under the derogation were not proportional due to the unjustified between nationals and foreigners (para. 190). Regarding Article 14, the Court deemed it not necessary to make a ruling on the matter, considering its earlier analysis of Article 5(1) (para. 192). Instead, it determined a breach of Article 5(4) because the Applicants were unable to effectively contest the accusations made against them (para. 224).

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[438] See House of Lords, 2004, A. and others v. Secretary of State for the Home Department, [2004] UKHL 56; See ECtHR, A. and Others v. United Kingdom, paras. 17-23 for a summary of the House of Lord's opinion. Nevertheless, 'In the present case, because a declaration of incompatibility under the Human Rights Act is not binding on the parties to the domestic litigation (see paragraph 94 above), the applicants' success in the House of Lords led neither to their immediate release nor to the payment of compensation for unlawful detention and it was therefore necessary for them to lodge the present application.' (ECtHR, A. and Others v. United Kingdom, para. 158). The House of Lords' decision followed the Applicants' (unsuccessful) challenge of the derogation before the SIAC and the Court of Appeal granting leave to appeal to the House of Lords. See ECtHR, A. and Others v. United Kingdom, paras. 14-17.

[439] One of the Applicants was stateless, and the UK government had not presented any proof of other countries being willing to accept him. Deporting certain other applicants would contravene Article 3 of the Convention. Additionally, despite some applicants being of Algerian or Jordanian nationalities and being in custody since 2001, the UK government did not initiate negotiations with these states until the conclusion of 2003. Assurances from either country were not secured until 2005.

[440] *Ib.;* ECHR, Article 5 (1) (f).

f. Bonger: the right to have rights[441]

Although relatively obscure, the Bonger case captures the indifference of the Court towards the widespread problem of insecure legal status faced by millions of undocumented migrants in Europe. While the case details were specific to the Netherlands, the ruling itself holds a central position in European human rights law, since it represents the logical culmination of Strasbourg jurisprudence on migrants' rights and non-rights[442]. Before going into details about the case and its implications, it is worth defining the nature of the problem. Migrants experiencing de facto statelessness are those who, following a definitive rejection of their asylum claims, face the inability to be repatriated to their country of origin[443]. This circumstance may arise due to various reasons: the rejecting state acknowledging the risk of treatment prohibited by Article 3 ECHR upon return, uncertainty about the individual's actual place of origin, or the alleged state of nationality not recognizing the individual without proper documentation confirming nationality status[444]. This problem is frequently linked to lack of a residence permit, which hinders the opportunity to engage in legal employment and makes it challenging or even impossible to secure access to adequate housing, healthcare, and education for oneself and any dependent children, resulting in 'extreme vulnerability and an acute sense of hopelessness' as well as extreme poverty[445].

The applicant in Bonger was an Ethiopian national who had been residing in the Netherlands for nearly ten years with no residence permit[446]. He had applied for asylum in 1995, explaining that he had worked as a pilot in the air force during the regime President Mengistu Haile Mariam, which had led him to carry out military operations, including bombings, and which now caused him to risk facing treatment contrary to Article 3 ECHR if returned to Ethiopia[447]. While this meant that he could not be repatriated, it also made him, according to Dutch authorities, ineligible for refugee status, pursuant to Article 1 F(a) of the 1951 Refugee Convention excluding the application of this instrument to 'any person with respect to whom there are serious reasons for considering that […] he has committed […] a crime against humanity'[448]. Mr. Bonger argued that the denying him a residence permit, based on an unproven assumption that he had committed crimes against humanity, prevented him from integrating into Dutch society[449]. According to the Applicant, this amounted to a violation of his human rights and dignity, in breach of Article 3 ECHR[450]. The Court determined that the case related to a refusal of a residence permit, a matter outside the scope of Article 3 or any other provision of

[441] ECtHR, 2005, Bonger v. the Netherlands, App. No. 10154/04.
[442] Dembour, M. B. (2015). See, in particular, Chapter 13 'The Darkest Case Law: Condoning Rightlessness (Bonger et alia)'.
[443] Dembour, M. B. (2021).
[444] *Ib.*; Equal Rights Trust, 2010, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*. See, in particular, chapter 2: 'Critiquing the Categorisation of the Stateless'; European Network on Statelessness, 2021, Statelessness determination and protection in Europe: good practice, challenges and risks, *Statelessness index*.
[445] Dembour, M. B. (2015), 444.
[446] ECtHR, Bonger v. the Netherlands, 1.
[447] ECtHR, Bonger v. the Netherlands, 2.
[448] United Nations Convention to the Status of Refugees, 1951, Article 1 F(a). See ECtHR, Bonger v. the Netherlands, 2.
[449] ECtHR, Bonger v. the Netherlands, 'COMPLAINTS'.
[450] *Ib.*

the Convention and declared the case inadmissible[451]. The inadmissibility ruling in Bonger was later confirmed in several cases involving individuals who were denied a residence permit by Dutch authorities, without having the possibility to return to their countries[452].

As highlighted by Dembour, while on a literal examination of the Convention, the Bonger case law aligns with the absence of any explicit reference to a right to a residence permit, a broader interpretation of human rights, considering principles such as the rule of law and equality before the law, raises concerns about the legality of leaving certain individuals with no possibilities 'to live legally'[453]. Even more crucially, the reasons for the denial of refugee status under Article 1F are never subject to proper legal or judicial scrutiny, despite human rights law emphasizing the presumption of innocence until proven guilty in a court of law [454]. When confronted directly about this issue in Naibzay, the ECtHR dismissed the application as inadmissible since it related to Article 6 ECHR which, as established in Maaouia, does not extend to proceedings regarding the entry, stay, and removal of aliens[455].

Scholars have found a continuity between the condition of rightlessness suffered by non-returnable individuals who have no access to asylum protection and Arendt's discourse on the 'right to have rights'[456]. Arendt emphasized its centrality in safeguarding individuals in a state-centric world, warning about the potential for governments to deprive individuals of the 'right to have rights' by either forcing them into a state of rightlessness or intentionally neglecting it[457]. Apart from the general approach adopted by the Court, seemingly ignoring the implications of its literal examination of the Convention, there are some specific aspects in the *Bonger* case law which the Court approaches as inevitable circumstances rather than consequences of state action, in a manner which appears almost surreal, or, as defined by Dembour, 'kafkaesque'[458]. First of all, the denial of an opportunity for the applicants to challenge the presumption of guilt against them is obviously problematic, especially when such an unchallengeable presumption relates to mere suspicions derived from past involvement in a country's former regime and is a barrier to refugee status. Secondly, the court seems to put much emphasis, in these cases, on the 'current circumstances'[459] related to the non-returnability of Applicants, placing on them the burden to prove a negative fact, namely, that there is no prospect of change in its country which would make the return possible in the future – something, as

[451] ECtHR, Bonger v. the Netherlands, 'THE LAW'.
[452] ECtHR, 2011, I. v. Netherlands, App. No. 24147/11; ECtHR, K. v. the Netherlands, App. No. 33403/11; ECtHR, 2013, Naibzay v. the Netherlands, App. No. 68564/12.
[453] Dembour, M. B. (2021), 23.
[454] ECHR, Article 6 (2); ICCPR, Article 14 (2); CFREU, Article 48 ; UDHR, Article 11.
[455] See Naibzay v. the Netherlands, para. 15, 25.
[456] Arendt, H. (1951), *The Origins of Totalitarianism*, Penguin Books, United Kingdom; Dembour, M. B. (2015); Krause, M. (2008). Undocumented migrants: an Arendtian perspective. *European journal of political theory*, *7*(3), 331-348; Kesby, A. (2012). *The right to have rights: citizenship, humanity, and international law*. Oxford University Press, USA.
[457] Arendt, H. (1951); Dembour, M. B. (2015).
[458] Dembour, M. B. (20), 445.
[459] Naibzay v. the Netherlands, para 25. In I. v. the Netherlands, para 11, the Court supports the argument put forth by the Dutch Deputy Minister that there is no conclusive evidence demonstrating the absence of potential improvements in the conditions preventing the applicant's deportation to Afghanistan, because the country was undergoing a transitional phase.

confirmed by Dembour, practically impossible to prove[460]. Such perspective that a situation which may resolve itself in the future implies no violation of the Convention at present is at least perplexing, especially when it is applied by the Court to cases like Bonger, where the enduring nature of the applicants' rightlessness makes their condition virtually irreversible. Furthermore, the failure to consider the duration and likely continuation of the stalemate adds another layer of concern[461].

g. Repeated immigration detention

Indefinite immigration detention is characterized as an unrestricted and potentially enduring deprivation of an individual liberty for immigration purposes. In EU countries, indefinite detention is prevented by the legal limit of eighteen months[462]. As explained by Vrolijk, such a practice does nonetheless arise in the form of repeated immigration detention, i.e., the successive use of detention pending removal for non-removable immigrants[463]. Administrative detentions following each other, often resulting in an ongoing irregular status for the individual, escape scrutiny since they are not recorded in duration statistics and statistically decrease the likelihood of removal[464]. As noted by Cornelisse[465], despite EU Members having maximum terms for pre-removal detention, released detainees may be re-apprehended and re-detained although the possibility of this happening varies among Member States[466].

The Court has dealt at times with issue linked to repeated detention. In John v. Greece, the Court explicitly deemed it a violation of article 5 (1) ECHR, and emphasized that each deprivation of liberty must adhere to domestic law and to the requirements of article 5 (1)(f)[467]. In Giama v. Belgium and Z. v. the Netherlands, the ECmHR had dealt with repeated attempts to return an irregular migrant without guaranteed entry to that country, considering that could violate Article 3 ECHR, although neither case reached the Court[468]. However, given the Court's interpretation of Article 5, excluding from the test for arbitrariness of immigration detention the requirement of reasonable necessity and the exercise of a case-by-case analysis, the ECtHR is unlikely to categorically find repeated immigration detention in contrast with the Convention, unless the

[460] Dembour, M. B. (2015), see in particular Chapter 7: 'The Sleeping Beauty Awakens Late: An Absolute Prohibition with Many Buts (Around Soering)'.
[461] Dembour, M. B. (2021).
[462] See the analysis of Article 15 of the Return Directive in Chapter Two of this thesis.
[463] Vrolijk, M. A. (2016). Immigration detention and non-removability before the European court of human rights. *Immigration Detention, Risk and Human Rights Studies on Immigration and Crime*, 47–72
[464] Vrolijk, M. A. (2016). This practice is also known as re-detention or revolving-door detention.
[465] Cornelisse, G. (2010). *Immigration detention and human rights: rethinking territorial sovereignty*. Brill.
[466] For example, in Malta, repeated immigration detention is explicitly allowed in national legislation. In Belgium, the cumulative total length of detention is not considered, potentially leading to limitless detention. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament criticizes Belgium for inaccurate detention statistics. Concerns about re-arrest after reaching the maximum period are raised for the Netherlands. In Greece, immigrants with infeasible deportations may be released and then re-detained after 30 days. Repetitive immigration detention has been deemed unlawful in Portugal (2007) and Greece (2008). In Italy, for example, the UN Working Group on Administrative Detention reports that many immigrant detainees were detained multiple times, spending the nationally allowed period but unable to be removed. See Cornelisse, G. (2010); Vrolijk, M. A. (2016), 48-49.
[467] ECtHR, 2007, John v. Greece, App. No. 199/05, para 33.
[468] ECmHR, 1980, Giama v. Belgium, App. No. 7612/76; ECmHR, 1984, Z. v. the Netherlands, App. No. 10040/83, para 31.

application of the detention does not satisfy the quality of law test[469]. Several options would limit recourse to repeated immigration detention. Apart an enlargement of the court's scrutiny on detention under Article 5(1)(f) including necessity and proportionality requirements to each decision to detain, the establishment of a cumulative time frame may prevent recourse to repeated detention[470]. Nonetheless, just as the rightlessness problem addressed above, repeated immigration detention is a result of the underlying question, left with no answer by the Court, of how to address de facto statelessness of non-removable individuals[471]. Therefore, according to Vrolijk, recognizing both de jure and temporary de facto statelessness could alleviate the complexities related to non-removability and immigration detention by excluding this group of people from repeated detention[472].

h. M.S.S. v. Belgium and Greece[473]

Reassuringly, there are instances in the Court's history which demonstrate the possibility to halt an apparently established logic. An example of this is M.S.S. v. Belgium and Greece, where the Court declared the transfer of an asylum seeker from Belgium to Greece, compliant with EU law, to be in violation of the ECHR. Very briefly, the Court established that Belgium should have been informed of the severe flaws of the Greek system of asylum determination leading to inhuman conditions for the applicant upon transfer and at the same time, despite acknowledging Greece's geographical challenges, the Court maintained that this did not absolve it (or Belgium) from responsibility for serious deficiencies[474]. The ECtHR ultimately found both states to be in violation of Article 3 on two grounds (conditions of detention and living conditions when not in detention), as well as Article 13 (para. 234, 264, 321, 360, 368, 396).

These conclusions were surprising because, in a preceding pivotal case, K.R.S,, the Court had explicitly ruled that the transfer of an asylum seeker to Greece could not be assumed to contravene the Convention[475]. After the decision of inadmissibility in K.R.S., the acceptability of such transfers became an established principle in the Court's case law[476], much like the Bonger case law or the principles established in Maaouia or Chahal. Indeed, in his dissenting opinion to the M.S.S. judgement, Judge Bratza questioned how Belgian authorities could have foreseen that transferring M.S.S. to Greece would be deemed a breach of the Convention[477]. Within the context of its own case law up to that point, M.S.S. appeared incongruous: both K.R.S. and the subsequent practice of the Court, systematically deeming similar cases inadmissible unequivocally indicated the lawfulness of transfers to Greece. It seems that the dismal conditions faced by

[469] Vrolijk, M. A. (2016), 63.
[470] Vrolijk, M. A. (2016), 65; European Fundamental Rights Agency (2010), Detention of third country nationals in return procedures.
[471] Costello, C. (2012)
[472] Vrolijk, M. A. (2016), 68.
[473] ECtHR, 2011, M.S.S. v. Belgium and Greece, App. No. 30696/09.
[474] ECtHR, M.S.S. v. Belgium and Greece; Dembour, M.B. (2021)
[475] ECtHR, 2008, K.R.S. v. the United Kingdom, App. No. 32733/08.
[476] Dembour, M. B. (2021)
[477] ECtHR, M.S.S. v. Belgium and Greece, 'PARTLY DISSENTING OPINION OF JUDGE BRATZA'.

asylum seekers in Greece, strongly criticized and substantiated by numerous organizations, convinced the Court that it could no longer approve transfers to Greece. The M.S.S. judgement marked unprecedented jurisprudential shifts, with the court even establishing that a situation of extreme poverty could constitute a breach of Article 3 ECHR (para. 264). As concluded by Dembour, 'what the Court has done with M.S.S., it can do with the Bonger or any other objectionable case law'[478].

4. Assessment

a. The test for pre-trial detention

A discussion on pre-trial detention[479] can provide insights into the approach usually adopted by the ECtHR with regards to detention under Article 5, encompassing not only the adherence to domestic law, and the quality of law test, but also a thorough evaluation of the necessity and proportionality of the detention. In Neumeister v. Austria[480], the Court established that the basis for the detention of the Austrian applicant, suspected of tax fraud, was not sufficiently robust to satisfy the reasonable necessity test, as it consisted of a mere suspicion that there was a risk of flight given that the detainee risked a long sentence (para. 12). The Court also emphasized how, in evaluating whether there is a risk of flight, the authorities must take other factors into consideration, such as such as the individual's character, morals, home, occupation, assets, family ties, and connections with the country of prosecution (para. 10). Thus, the Court established that pre-trial detention must be based, not on mere suspicion, but on a robust belief, based on multiple factors, that there is a risk of flight, and it established that it must align with the *raison d'être* of Article 5 (3), namely, to guarantee release once detention ceases to be reasonably necessary, in line with a presumption of innocence and in favour of release (para. 12, 15)[481]. In McKay v the United Kingdom, the Court instead specified that such necessity must persist throughout the detention, not just at the initial decision to detain, and that each case of pre-trial detention must considered individually[482]. In Jablonski v Poland, it found an explicit duty for states to consider less coercive measures to mitigate the risk of absconding, such as bail or police supervision, under Article 5(3), establishing that release can be conditioned upon guarantees to appear in Court[483].

Thus, the Court has found pre-trial detention to require the case-by-case assessment of the suspect's circumstances based on the presumption of release, persisting throughout the entire detention and which must include the consideration of alternatives to detention. As observed in the last section, proportionality includes an assessment of necessity, in the sense of a least restrictive means test, but also suitability of the measure to

[478] Dembour, M.B. (2021), 37.
[479] Article 5 (1) (c) ECHR regulates pre-trial detention, namely 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. Article 5 (3) ECHR adds: 'everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial'
[480] ECtHR, 1968, Neumeister v. Austria, App. No. 1936/63
[481] Spalding, A. (2022). See, in particular, chapter two: 'The Right to Liberty'
[482] ECtHR, 2006, McKay v. the United Kingdom, App. No. 543/03.
[483] ECtHR, 2000, Jablonski v. Poland, App. No. 33492/96.

the aim pursued and an evaluation of proportionality in the narrow sense, requiring that the harm caused by the deprivation of liberty is proportional to the interest pursued. The principles of suitability and proportionality are reflected in the requirement for a legitimate purpose for detention under Article 5(1)(c) read in conjunction with the related Strasbourg jurisprudence, whereby pre-trial detention requires that there is a reasoned and genuine motive to suspect the commission of an offence or that such commission can be prevented by the use of detention. In Spalding's words, the public interest pursued only outweighs the burden placed by detention when there is a genuine danger that it will not be realized, not when there is a mere possibility of this[484].

b. The test under Article 5(1)(e)

Article 5 (1) (e) regulates 'the lawful detention […] of persons of unsound mind, alcoholics or drug addicts or vagrants'. Just like Article 5 (1)(f), Article 5 (1)(e) does not state the objectives pursued by the detention of mentally ill people, nor does it include a necessity requirement. Nonetheless, detention of these people does not allow detention based merely on their condition. Indeed, the Court, in the case of Guzzardi, established the motivations that underline the permissible detention of the mentally ill, drug addicts, alcoholics, and vagrants, namely because they are considered dangerous to public safety or because their own interests may necessitate their detention[485]. The mental condition of the detained individual must be attested by an objective medical report, must be of such severity as to require compulsory confinement, and must persist throughout the detention[486]. In Varbanov, the Court explicitly stated that the detention must be necessary and that the least restrictive means test is not sufficient to satisfy the Court's standard[487]. The Court leaves considerable discretion to national authorities in evaluating the necessity of the detention, without specifying the kind or degree of mental illness justifying it[488]. Nonetheless, in Witold Litwa, the ECtHR stressed that detention is justified when alternatives have been considered but deemed insufficient to realise the objective pursued, with an evaluation considering the specific circumstances of the case[489].

This brief analysis of the Court's approach to detention under Article 5 (1) (c), Article 5 (1)(e), and of children under Article 5 (1)(f), clarifies how the scrutiny level applied by the ECtHR in assessing immigration detention differs from other categories of deprivation of liberty. Especially with regard to Article 5 (1)(e), it is impossible not to ask why the Court, for example, deemed the lawfulness of the deportation order irrelevant for immigration detention but strictly requires official proof of a mental illness to justify detention of the mentally ill. At the same time, the court states that immigration detention is not required to be reasonably necessary, while it ascribes great importance to necessity and proportionality requirements, including the least restrictive means test and a case-by-case evaluation, under Article 5 (1)(e). According to Cornelisse, such an

[484] *Ib.*
[485] ECtHR, 1980, Guzzardi v. Italy, App. No. 7367/76, para. 98.
[486] ECtHR, 1988, Herczegfalvy v. Austria, App. No. 10533/83, para 63.
[487] ECtHR, 2000, Varbanov v. Bulgaria, App. No. 31365/96.
[488] ECtHR, 1990, Wassink v. the Netherlands, App. No. 12535/86, para. 25.
[489] ECtHR, 2000, Witold Litwa v. Poland, App. No. 26629/95, para. 78

inconsistent approach in the Strasbourg jurisprudence, cannot be ascribed only to the nationality of detainees, but also to a general failure of the Court to develop a coherent framework for determining when and how individual rights prevail over public interest and an unresolved tension between a universal understanding of human rights protection, whereby rights are acquired simply by virtue of being human, and a narrower ad contractual conception, whereby rights are acquired due to nationality[490].

c. The test for immigration detention adopted by the IACtHR

Established in 1979 and headquartered in San José, Costa Rica, the IACtHR (in which neither the USA nor Canada participates) is frequently implied in human rights law literature as a less effective emulation of its counterpart in Strasbourg. According to Dembour, this is a contestable assumption, especially given its vigorous '*pro homine*' approach[491]. Without firmly adopting this pro homine approach, the IACtHR might have lacked any raison d'être, especially considering its initial cases involved grave human rights violations during the brutal dictatorships of Latin America in the 1970s, with numerous allegations of forced disappearance, torture, and massacres[492]. In its first case on forced disappearance, since the victims' allegations aligned with practices documented in reports from reliable sources, the IACtHR boldly shifted the burden of proof onto the defendant state[493]. This and other procedural and substantive steps made in the IACtHR jurisprudence determined a clear-cut departure from state-centric perspectives. Indeed, Judge Antonio Cancado-Trindade, who presided over the IACtHR from 1999 to 2003, often emphasized that the legitimacy and efficacy of international law needed to shift from the will of states to what he referred to as 'the universal juridical conscience'[494]. Though handling relatively few cases, the IACtHR delves deeply into each, prioritizing human rights at its core[495]. Migrants have especially benefited from this focus, evident in cases like Vélez Loor v. Panama[496]. In this case, the allegations made by the Ecuadorian Applicant, who was detained in Panama for lacking a valid visa, regarding overcrowding, inadequate water supply, isolation from the outside world, and lack of medical care were acknowledged by the defendant state, even before the public hearing took place. Nonetheless, the Court did not close the case, but found several elements necessitating adjudication and proceeded to establish a series of safeguards to be observed when resorting to immigration detention: this must not be a punitive measure; alternative measures must be explored, given the burden placed on the detainee; the detainee must be promptly brought before a judge who will evaluate the detention based on the specific circumstances of the case; judicial remedies must be available, readily accessible and involve judicial authorities; the right to defense must be guaranteed, including free legal representation by a qualified lawyer; detainees must be informed of their right to possible consular assistance; detainees cannot be housed

[490] Cornelisse, G. (2016)
[491] Dembour, M.B (2021), 32.
[492] *Ib.*
[493] IACtHR, 1988, Velasquez-Rodriguez v. Honduras
[494] Dembour, M.B. (2021); IACtHR, 1999, Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Concurring Opinion of Judge A. A. Cancado-Trindade, para. 13,14.
[495] Dembour, M.B. (2021)
[496] IACtHR, 2010, Vélez Loor v. Panama.

in prisons accommodating criminals or individuals on remand; and, finally, special attention must be paid to the situation of families[497].

d. The test for immigration detention adopted by the HRCttee and the ICJ

At the UN level, cases regarding immigration detention are primarily handled by the HRCtte and the ICJ. These bodies differ from the ECtHR and the IACtHR as they are international rather than regional entities. They apply legislative frameworks such as the ICCPR, the UN Charter, and other UN human rights conventions, which are intended to set a global minimum standard. It would be unacceptable both legally and institutionally for a regional system to fall short of this standard. As stressed by Costello, people living in regions with well-established human rights systems should not have to seek protection at the UN level as this would indicate a failure at both the domestic and regional levels[498]. Conversely, it should be the regional system to encourage progressive developments within the broader international framework.

The HRCttee established in A. v. Australia that immigration detention should only be utilized when deemed necessary based on the specific circumstances of each case[499]. Similarly, in the Danyal Shafiq v. Australia case in 2002, involving a stateless individual detained for seven years, the HRCttee stressed that detention must not only be justified if necessary but also be proportionate to its intended objectives[500]. It, consequently, found the lengthy detention in the Shafiq case to be arbitrary and a violation of Article 9(1) of the ICCPR. Likewise, the ICJ ruled in a case of 2010, Republic of Guinea v. Democratic Republic of the Congo, that the detention of a Guinean national was arbitrary due to the absence of justification for its necessity[501]. Moreover, the HRCttee deemed the detention in the Bakhtiyari case arbitrary due to the failure to consider alternatives[502]. Both bodies emphasize that arbitrariness must be assessed though a case-specific analysis[503]. Furthermore, the ICJ addressed the issue of repetitive detention, asserting that the cumulative duration of detentions should not exceed the maximum permissible length[504]. Even International Law Commission, not a human rights bodies but whose primary task is to advance the codification of international law in general, indicates in its draft articles on the expulsion of aliens that immigration detention should be limited to the duration reasonably necessary for removal[505].

5. Conclusion

The ECtHR primarily focuses on legality criteria in its case law but lacks a clear review of the purposes and necessity of detention, which undermines protection in practice. The first two evidently weak points in the

[497] *Ib.;* Dembour, M.B. (2021)
[498] Costello, C. (2012).
[499] UN Human Rights Committee, 1997, A. v Australia, para. 9.4.
[500] UN Human Rights Committee, 2006, Danyal Shafiq v. Australia, para. 2.2, 7.2.
[501] International Court of Justice, 2010, Republic of Guinea v. Democratic Republic of the Congo, para. 82.
[502] UN Human Rights Committee, 2003, Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia, para. 9.3.
[503] UN Human Rights Committee, 2002, C. v Australia, para. 8.2; International Court of Justice, 2010, Republic of Guinea v. Democratic Republic of the Congo, para. 82.
[504] International Court of Justice, 2010, Republic of Guinea v. Democratic Republic of the Congo, para. 79.
[505] International Law Commission, 2010, Sixth Report of the *Special Rapporteur*, Maurice Kamto,

ECtHR jurisprudence include its approach to states' power to determine unauthorized entry and the loose nexus required between deportation and detention. First, accepting the notion that states have an inherent and almost unchecked power to control entry undermines human rights and is equivalent treating countries as plenipotentiaries on a matter they already share control over[506]. Secondly, the Court's rejection of a necessity test determines an incredibly low threshold for justifications, where it is only required that a nexus between the measure and its objective exist but where the intensity of the nexus is not evaluated at all. Furthermore, the Court's not requiring a demonstrably strong connection between the specific detention and the justification provided (either to prevent unauthorized entry or to facilitate deportation) blurs the distinction between permissible goals of immigration detention and the question of when those goals justify detention in specific situations, undermining the clear textual commitment to restrict detention to enumerated grounds[507]. Finally, the absence of individual circumstance considerations within the Court's criteria, except when evaluating the duration of detention, is definitely problematic. Omitting the analysis of elements like flight risk or alternative measures precludes the determination of whether the detention's negative impact is truly balanced against the immigration control objectives, which, it is worth repeating, is normally the chief task of a human rights adjudicative body. This way, the proportionality assessment is reduced to simply evaluating the likelihood of a successful deportation. This interpretation of Article 5(1)(f) ECHR is in contrast with the approach adopted by the Court with regard to other forms of detention under Article 5, with the principle of proportionality enshrined in the ECHR, where rights restrictions must be demonstrably necessary and suitable for the intended aim[508], and with the requirements of necessity and proportionality found in both HRCttee and ICJ jurisprudence and EU norms.

When comparing the jurisprudence of the ECtHR and that of the CJEU, the disparity between the two standards is clear. Indeed, as verified by Cornelisse[509], the impact of EU law on the constitutional safeguards states provide to immigration detainees surpasses that of the ECtHR. This is especially due to CJEU's inclusion of the individual assessment of detention grounds, application of the lesser means test, and insistence on transparent and reasoned decision-making. The discrepancy is wholly inappropriate, especially since an EU Member State disregarding the above-mentioned requirements for immigration detention would certainly violate EU law, but also Article 5 ECHR, given that compliance with domestic law (including EU law for Member States) is a requirement for the legality of any detention under the ECHR[510]. Oddly enough, in El Dridi, the CJEU reads into the Convention the requirement of a maximum duration of detention, establishing

[506] Costello, C., 2012, 286.
[507] Costello, C., 2012; Cornelisse, G., 2004
[508] See European Convention on Human Rights, Art. 8-11. Although, usually, the relevant Articles explicitly demand restrictions be "necessary in a democratic society," the concept of proportionality transcends this textual basis, becoming an underlying principle within the entire framework of analysing limitations on rights. See Costello, C., 2012.
[509] Cornelisse, G., 2010.
[510] ECtHR, Amuur v. France, para 50.

that although the time limit is 18 months, this is not justified in all cases[511].Instead, the ECtHR only deduced the requirement of reasonable duration.

Regrettably, neither the ECtHR nor the CJEU demonstrates sufficient engagement with other human rights authorities. Costello's concept of 'constructive human rights pluralism', advocating for open dialogue and mutual learning while preserving individual court integrity, offers a desirable alternative whereby the Strasbourg court could engage more meaningfully with international human rights standards and potentially align its interpretation with stricter norms. Moreover, the presence of comprehensive EU standards could serve as a catalyst for this internal move towards harmonization. While the legislative framework of EU law might not initially appear conducive to robust human rights protection, it has demonstrably incorporated and improved upon essential aspects of ECtHR jurisprudence, notably by integrating the necessity requirement for detention that the ECtHR erroneously rejected. It would be a regressive step for the EU to converge on the ECtHR's minimum standards when articulating its own interpretation of the right to liberty. Notably, textual fidelity to the Return Directive has thus far yielded outcomes that are demonstrably more protective of human rights than those achieved through the ECtHR's approach.

This chapter concluded the central section of the thesis focusing on the normative protection of human rights afforded to immigrant detainees in Europe. It covered the system established by the Council of Europe, examining the ECHR and its application to migration issues through an analysis of the case law of the ECtHR. The chapter began by discussing the ECHR provisions that relate to migration issues, namely the prohibition of arbitrary detention, the prohibition of discrimination, the right to liberty and security, the prohibition of torture and the right to a fair trial. The ECtHR's case law was then analysed to determine the standard of protection afforded to migrants. This included examining cases that address the issues of immigration detention, as well as rightlessness and repeated immigration detention affecting stateless migrants. In conclusion, the chapter evaluated the standard of protection provided by the ECtHR to detainees awaiting repatriation, comparing it to the approach taken by the same Court in cases involving pre-trial detention, undocumented children's detention, and the detention of individuals of unsound mind. The chapter also highlights the differences between the approach taken by the ECtHR, the IACtHR, the HRCttee and the ICJ in similar cases. Finally, the chapter concluded with a general assessment of the standard of protection of migrants' rights guaranteed by the ECtHR, in comparison to that guaranteed by the CJEU.

The next chapter will be a case study on immigration detention pending removal in Italy. It will first provide a brief overview of the domestic laws and regulations that govern immigration detention for the purpose of deportation. Secondly, it will delve deeper into the fundamental features of the system and the functioning of the Italian *Centri Per il Rimpatrio* (CPRs, centres for repatriation). It will then analyse how the rights of migrants are guaranteed within the facilities, by assessing separately the protection of the right of

[511] CJEU, El Dridi. See Costello, C., 2012.

defence, the right to health, and the right to normative information, with a brief excursus on the critical events occurring inside CPRs. It will conclude with an evaluation of the protection accorded to migrants' rights within the Italian system.

Chapter Four: Immigration Detention Pending Removal in Italy.

1. Introduction

As extensively explained, recourse to administrative detention of foreigners is legitimate only insofar as it is functional to the enforcement of return. The purpose of this case study, in addition to the description of the detention system for migrants pending repatriation in Italy, is to assess to what extent administrative detention increases the effectiveness of the return policy and the human costs of a return policy based on coercion and deprivation of liberty. Assessments of this kind need reliable information, but systematic and comprehensive data on the administrative detention of foreigners in CPRs are notably lacking. This is undoubtedly due to the inaccessibility of detention facilities to the press and the gaze of civil society, but also by the absence of consolidated information on, for example, the number of people transiting through these facilities and their characteristics or the administrative aspects of their management. Over the years, various non-governmental organisations, associations, and monitoring bodies have helped to shed light on the functioning of these, among the first the Italian section of Médecins Sans Frontières[512]. Such reports collected qualitative data resulting,

The CPR of Turin. CILD staff (September 18, 2023), *Cpr: l'aumento dei tempi di permanenza disumano, vessatorio e costoso*. CILD.

[512] Medici Senza Frontiere – Missione Italia (January, 2024), *Rapporto sui Centri di Permanenza Temporanea e Assistenza.* Medici Senza Frontiere Onlus. More recent examples include: Associazione per gli Studi Legali sull'Immigrazione (ASGI) (2021), *Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human. The Black book on the Pre-Removal Detention Centre (CPR) of migrants in Turin – Corso Brunelleschi.* Torino; Borlizzi, F., & Santoro, G. (2021), Buchi Neri: la detenzione senza reato nei Centri di Permanenza per i Rimpatri (CPR), Primo Rapporto, CILD; Accardo, Y., Mazzuzi, F., Vitale, G., & Bottazzo, R., *Dietro le mura. Abusi, violenze e diritti negati nei Cpr d'Italia*, LasciateCIEntrare; Campesi, G. (2023). *Trattenuti: Una radiografia del sistema detentivo per stranieri*. *Università di Bari, ActionAid Italia;* De Falco, G. (2021), *Delle pene senza delitti. Istantanea del CPR di Milano*. *Report dell'accesso presso il Centro di Permanenza per il Rimpatrio di Milano, via Corelli n. 28, del Senatore Gregorio De Falco nelle giornate del 5 e 6 giugno 2021*; Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), *L'affare CPR. Il profitto sulla pelle delle persone migranti*, CILD; Associazione per gli Studi Legali sull'Immigrazione (ASGI), Asylum Information Database (AIDA), & European Council on Refugees and Exiles (ECRE), Country Report: Italy.

for example, from field visits and interviews with lawyers of detainees in the centres, attempting to remedy the fragmentary nature of the material collected, which, except for some aspects, hardly allows a systematic analysis of the phenomenon. Some information can also be found in parliamentary documents, such as the reports of the Senate's Extraordinary Commission for the Protection and Promotion of Human Rights, or from official sources, such as (since 2016) the reports of the Ministry of the Interior on the functioning of the reception system or the annual reports to parliament of the National Guarantor of the Rights of Persons Detained or Deprived of their Liberty[513]. However, even for existing institutional sources, the problem is the extreme fragmentary and sometimes even contradictory nature of the published data[514].

Therefore, although not with the pretension of being able to conduct an exhaustive comparative and longitudinal analysis, this chapter constitutes a case study on the Italian administrative detention system with the aim of carrying out evaluations on the proportionality and necessity of the detention measure for repatriation purposes in Italy. The chapter draws information from the sources mentioned above and from academic literature. The first part of the chapter is an introduction to the Italian legislation on administrative detention pending repatriation, describing both the historical trajectory of the laws regulating it and the current functioning of the system. The second part is an overview of the current features of the system, concentrating, therefore, on the trends in recent years regarding the detention facilities themselves, the population detained there, the private management of the centres, the efficacy of the system in facilitating returns and the consideration of alternatives by the judicial authorities ordering detentions. The third part, on the other hand, aims to describe how the rights provided for detainees in the legislation are guaranteed in practice by the management bodies of the centres. In particular, it focuses on the right to health, normative information, and defence, with a brief final excursus on the critical and violent events marking life in the CPRs. The conclusion attest to provide an answer to the question posed by the chapter and, therefore, carries out an assessment of the legislation and practice relating to the Italian regime of administrative detention for the purposes of repatriation, addressing the actual existence of a link between the detention measure and the purpose it serves, and its proportionality in relation to the human cost that immigration detention determines.

2. The Italian law on immigration detention

[513] The National Guarantor for the Rights of Persons Detained and Deprived of their Liberty (Garante nazionale dei diritti delle persone detenute o private della libertà personale) is responsible for monitoring immigration detention as well, by carrying out visits and publishing reports. Since it ratified the European Convention on the Prevention of Torture of 1988, Italy also receives monitoring visits by the CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). Senato della Repubblica - Commissione Straordinaria per la Tutela e la Promozione dei Diritti Umani (December, 2017), *Rapporto sui Centri di permanenza per il rimpatrio in Italia – aggiornamento dicembre 2017*; Garante Nazionale dei diritti delle persone private della libertà personale (2021a), *Rapporto Tematico sull'attività di monitoraggio delle operazioni di rimpatrio forzato di cittadini stranieri (Gennaio 2019-Giugno 2021);* Garante Nazionale dei diritti delle persone private della libertà personale (2021b), *Rapporto sulle Visite Effettuate nei Centri di Permanenza per i Rimpatri (CPR) (2019-2020;* Garante Nazionale dei diritti delle persone private della libertà personale (2021c), *Rapporto sulla Visita Effettuata nel Centro di Permanenza per i Rimpatri (CPR) Di Torino Il 14 Giugno 2021;* Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018), *Rapporto sulle visite tematiche effettuate nei centri di permanenza per il rimpatrio (CPR) in Italia (febbraio-marzo 2018);* Council of Europe (April, 2018), *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*.

[514] Campesi, G. (2023).

a. Evolution of the legislation on immigration detention

The Italian legislature has been favouring immigration detention as a tool to regulate migration flows, especially after 2017[515]. Indeed, the period between 2017 and 2023 marked a gradual expansion of the immigration detention system, including an increase in the number of places available to deprive irregular migrants of their liberty and, in parallel, an extension of the maximum duration of the restrictive measure and the grounds on which the public security authority can resort to it. This section will discuss the evolution of the normative framework regulating the detention of undocumented migrants and life inside the CPRs.

Administrative detention of undocumented foreigners was first introduced in Italy in 1995 with the Dini Decree as a temporary and exceptional measure[516]. The Dini decree provided the possibility of detaining non-nationals on an administrative basis for a maximum period of thirty days in places designated by the Ministry of Interior[517]. Although the Decree was never converted into law, it paved the way for the subsequent normalization of the practice[518]. It was the Turco-Napolitano law of 1998 to establish administrative detention as a legal practice by allowing Chiefs of Police (*questori*)[519] to order detention of non-nationals for a maximum of thirty days when the immediate implementation of border rejection or forced expulsion was not possible.[520] At this stage, the facilities where detention took place were named *Centri di Permanenza Temporanea ed Assistenza* (*CPTA*, temporary stay and assistance centres). Over the following years, the law's implementing Regulation[521] and two Circulars of the Ministry of Interior[522] regulated the practice in more detail, establishing national guidelines for the management of centres, granting Prefectures the option of contracting out the management of centres to external entities, and attempting to standardise the management of centres throughout the country by specifying a list of standard services (*convenzione tipo*) to be provided by centre managers.

In 2002, the Bossi-Fini law redefined Italian immigration policies, providing, among other things, for the criminalisation of the condition of illegality and the immediate administrative expulsion of irregular immigrants through forced escort at the border[523]. Detention in CPTAs was, moreover, extended to a maximum

[515] Borlizzi, F., & Santoro, G. (2021).
[516] *Ib.*
[517] Law Decree 489/1995 (November 19, 1995), *Disposizioni urgenti in materia di politica dell'immigrazione e per la regolamentazione dell'ingresso e soggiorno nel territorio nazionale dei cittadini dei Paesi non appartenenti all'Unione europea*, GU 270/18-11-1995 (lapsed due to failure to convert).
[518] Borlizzi, F., & Santoro, G. (2021).
[519] The Italian *questore* is an official of the Ministry of the Interior in charge of police services in provincial capitals. 'Chief of Police' is the translation employed by the ECtHR. See ECtHR, Khlaifia and Others v. Italy, para 226.
[520] Law 40/1998 (March 27,1998), *Disciplina dell'immigrazione e norme sulla condizione dello straniero,* GU 59/12-03-1998.
[521] Decree of the President of the Republic 394/1999 (November 18, 1999), *Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286,* GU 258/03-11-1999.
[522] Ministry of Interior (August, 30 2000), *Direttiva generale in materia di Centri di Permanenza Temporanea ed assistenza ai sensi dell'articolo 22, comma i del D.P.R. 31 agosto 1999, n. 394*, Prot. n. 3435/50; Ministry of Interior (August, 30 2000), *Convenzione tipo e "linee guida" per la gestione di Centri di Permanenza Temporanea e Assistenza (CPT) e di Centri di Identificazione (CId, già centri d'accoglienza)*, Prot. n. 3435/50.
[523] Law 189/2002 (September 10, 2002), *Modifica alla normativa in materia di immigrazione e di asilo,* GU 199/26-08-2002.

of 60 days to identify and repatriate irregular immigrants[524]. In 2008, the CPTAs were renamed *Centri di Identificazione e Espulsione* (centres for identification and expulsion, CIEs)[525]. In 2009, the Security Package adopted by the Berlusconi government raised the maximum detention period from 60 to 180 days[526]. It also introduced the offense of 'clandestine' immigration, to be judged through summary proceedings before a Justice of Peace[527]. Two years later, with the implementation of the Return Directive, the maximum detention period in CIEs was extended to 18 months[528]. Thus, the maximum limit provided by the European directive on repatriation, intended solely for exceptional cases, ended up becoming the norm in Italy[529]. According to the Ministry of the Interior, this extension led to an immediate increase in economic burdens for the maintenance and conservation of the facilities, resulting, moreover, excessive if compared to the effectiveness of identification procedures, given that the number of foreigners identified after one year of stay was almost negligible[530]. In the same year, through Directive 1305, the Berlusconi government restricted access to CIEs only to certain humanitarian organizations, completely excluding the press[531]. In 2014, for the first time, the state intervened on the administrative detention not to extend its use but to limit it, setting a non-extendable term for detention of three months[532]. The period between 2011 and 2014 was one of disinvestment in administrative detention of foreigners, with a halving of operational centers and a collapse of the system's receptive capacity, which in a short time went from 1901 available places to 359[533]. The choice to disinvest in administrative detention appeared politically sustainable because, between 2011 and 2014, all indicators related to the migratory phenomenon were declining: the number of new residence permits issued decreased, as did arrivals by sea, (estimated) unauthorized stays, and the number of expulsion orders issued[534].

The trend reversed from 2015 onwards, following the increase in arrivals by sea and, consequently, asylum applications and under pressure exerted by the EU for the detention system for foreigners to restore 2011 capacity levels[535]. From 2017 onwards, a season begins in which all the country's successive governments have started to reinvest in the administrative detention of foreigners, announcing the intention to open a centre in each Italian region[536]. This result will never be achieved, but within four years, the number of active centres will double, while the number of available places will increase by 107%[537]. In 2017, a law-decree renames the

[524] Law 189/2002 (September 10, 2002), *Modifica alla normativa in materia di immigrazione e di asilo,* GU 199/26-08-2002.
[525] Law Decree 92/2008 (May 27, 2008), *Misure urgenti in materia di sicurezza pubblica,* GU 173/25-07-2008
[526] Law 94/2009 (August 8, 2009), *Disposizioni in materia di sicurezza pubblica,* GU 170/24-07-2009.
[527] *Ib.*
[528] Law-Decree 89/2011 (June 24, 2011), *Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari.* GU 144/23-06-2011
[529] Borlizzi, F., & Santoro, G. (2021).
[530] Ministry Of Interior (2013), *Documento Programmatico sui Centri di Identificazione ed Espulsione*; Campesi, G. (2023). *Trattenuti: Una radiografia del sistema detentivo per stranieri*. *Università di Bari, ActionAid Italia.*
[531] Ministry of Interior (April 1, 2011), *Accesso ai centri per immigrati,* Prot. n. 1305 – 11050/110 (4).
[532] Law 161/2014 (November 25, 2014), *Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013-bis.* GU 261/10-11-2014.
[533] The data refer to actual capacity, not official capacity. See Campesi, G. (2023), 5.
[534] Fondazione Iniziative e Studi sulla Multietnicità (ISMU, n.d.), *Dati sulle migrazioni*; Campesi, G. (2023).
[535] Campesi, G. (2023). *Trattenuti: Una radiografia del sistema detentivo per stranieri*. Università di Bari, ActionAid Italia.
[536] *Ib.*
[537] *Ib.*

places of detention CPRs, establishing that, compared to CIEs, they should be smaller, more widely distributed throughout the territory, and suitable for ensuring respect for the personal dignity of the detainees[538]. However, as stated by the National Guarantor for the Rights of Persons Deprived of Personal Liberty, beyond the name, not much else had changed[539]. In 2018, the Salvini Decree increased the maximum time of detention in CPRs to 180 days, revoked the possibility of obtaining humanitarian protection for detainees, and allowed non-nationals to be detained in facilities (vaguely described as 'suitable' in the text) available to public security authorities other than CPRs[540]. In 2020, the Lamorgese Decree lowered the maximum detention terms to 90 days, except for detainees from countries that have signed readmission agreements with Italy, whose detention may be extended by an additional 30 days, for a total of 120 days[541]. Furthermore, it extended the possibility to appeal to the National Guarantor to detainees in CPRs and established that adequate hygiene and housing standards must be guaranteed inside the CPRs, in such a way as to ensure the necessary information regarding the detainee's status, assistance, and full respect for their dignity, ensuring the freedom of correspondence, including telephone correspondence, with the outside world[542].

In February 2023, a shipwreck occurred off the coast of Steccato di Cutro, resulting in the death of 91 asylum-seekers due to the lack of intervention by port authorities. The Meloni government responded by issuing the Cutro Decree, which was mainly focused on reducing reception measures for irregular migrants arriving by sea and established specific centres and procedures for the accelerated examination of asylum applications from migrants coming from countries deemed 'safe'[543]. Moreover, the decree also established an extension of the immigration detention system, reaffirming the objective of providing each region with a CPR, and an increase in the length of stay in the centres to 18 months[544]. The Cutro Decree was highly contested by civil society but also within the judiciary. In particular, the rules concerning the new accelerated procedure and the payment of a fixed bail for asylum seekers became the subject of a preliminary reference to the CJEU

[538] Law-Decree 13/2017 (February 18, 2017), *Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegale,* GU 40/17-02-2017.
[539] Borlizzi, F., & Santoro, G. (2021).
[540] Law-Decree 113/2018 (October 4, 2018*), Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonche' misure per la funzionalita' del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalita' organizzata,* GU 231/04-10-2018.
[541] Law-Decree 130/2020 (October 22, 2020), *Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare, modifiche agli articoli 131-bis, 391-bis, 391-ter e 588 del codice penale, nonche' misure in materia di divieto di accesso agli esercizi pubblici ed ai locali di pubblico trattenimento, di contrasto all'utilizzo distorto del web e di disciplina del Garante nazionale dei diritti delle persone private della liberta' personale.* GU 261/21-10-2020.
[542] *Ib.*
[543] Law-Decree 20/2023 (November 11, 2023), *Disposizioni urgenti in materia di flussi di ingresso legale dei lavoratori stranieri e di prevenzione e contrasto all'immigrazione irregolare.* GU 59/10-03-2023. The new measure also stipulates that migrants originating from countries deemed safe (and therefore likely to be denied the requested international protection) may deposit a kind of bail of 4,938 euros to avoid waiting in detention for the examination of their asylum application.
[544] *Ib.*

by the Court of Cassation[545], after their compatibility with the EU recast APD and RCD directives[546] had been questioned by the Courts of Florence[547] and Catania[548], refusing to validate the detention of asylum seeker pursuant to the Decree.

b. Current functioning of the immigration detention system

Detention in the CPR is ordered by the Chief of Police after an expulsion order has been issued, in the specific cases provided by the law[549], namely, when it is not possible to immediately execute the expulsion, due to temporary situations hindering the preparation of repatriation or the carrying out of removal[550]. In such circumstances, and provided that less coercive measures cannot be adopted, the Chief of Police orders that the foreigner be detained for the time strictly necessary[551].

Turning to maximum detention terms, the regulations of the last years significantly diversified the duration of detention depending on the legal status of the detained individuals, distinguishing, in particular, between at least three main categories of detainees[552]. Firstly, for non-nationals found in irregular conditions on Italian territory or rejected at the border immediately after entry, the maximum duration of their detention terms ranges from 90 to 180 days, with a separate regime for nationals of states with which Italy has signed a readmission agreement, as established by the Lamorgese and Cutro decrees[553]. As noted by Borlizzi e Santoro, however, this extension has not been accompanied by adequate information regarding such readmission agreements which, in the vast majority of cases, consist of informal agreements between police forces[554]. Secondly, for foreigners exiting prison after serving a sentence the maximum duration of detention has been increased in 2017 to 45 days and again in 2020 and in 2023 to 60 days, especially for citizens of nations with which Italy has signed a readmission agreement (75 days)[555]. The third group is composed by asylum seekers.

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[545] Supreme Court of Cassation (February 8, 2024), *Comunicato stampa - Immigrazione, trattenimento alla frontiera, ricorsi del Ministero dell'interno, ordinanze delle Sezioni unite civili, rinvio pregiudiziale alla Corte di Giustizia dell'Unione europea.* [Press release.]

[546] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

[547] Tribunale Ordinario di Firenze – Sezione Immigrazione (September 20, 2024), R.G. 9787/ 2023

[548] Tribunale Ordinario di Catania - Sezione Immigrazione (September 29, 2023), R.G. 10461/ 2023; Tribunale Ordinario di Catania - Sezione Immigrazione (September 29, 2023), R.G. 10459/ 2023; Tribunale Ordinario di Catania - Sezione Immigrazione (September 29, 2023), R.G. 10460/ 2023.

[549] Legislative Decree 286/1998, *Testo unico sull'immigrazione.* GU 191/18-08-1998, Article 13.

[550] Guido Savio criticizes the lack of clear rules justifying detention. He points out that the phrase "temporary situations hindering repatriation" is extremely general and, while examples like flight risk or lack of documents are mentioned, there is no clear definition of what constitutes a "temporary situation." This vagueness creates uncertainty and makes the detention unforeseeable, since it makes it difficult for individuals to know when they might be targeted for detention. See Salvio, G. (2016), *Espulsioni e Respingimenti. La fase esecutiva,* ASGI.

[551] Legislative Decree 286/1998, *Testo unico sull'immigrazione.* GU 191/18-08-1998, Article 13.

[552] Campesi, G. (2023).

[553] Law-Decree 130/2020 (October 22, 2020); Law-Decree 20/2023 (November 11, 2023).

[554] Borlizzi, F., & Santoro, G. (2021). As noted by the National Guarantor, the lack of transparency on negotiated agreements risks leading to uncertainty regarding the scope of application of the provision regarding the extension of detention: only complete knowledge of all signed agreements and their texts can ensure the exact observance of the application of the deferment of the detention term and allow for an effective exercise of the right to defense. See

[555] Underscored by Campesi, the legitimacy of detaining this category of foreigners for an extended period of time has been a subject of significant debate, especially since authorities could have carried out repatriation procedures during the period of incarceration. See Campesi, G. (2023), 7.

In addition to those who apply for asylum subsequent to the removal order, in 2015 certain categories of asylum seekers were identified who may be subject to detention pending the decision on their asylum application, thus entirely independently of a removal order, setting the maximum detention period for both categories at 12 months [556]. The Salvini Decree of 2018, then, added the category of asylum seekers whose citizenship and identity must be verified, who can be detained for a maximum of 120 days in CPRs (often after having already undergone detention in hotspots for a maximum duration of 30 days)[557]. Lastly, in 2023 the Cutro decree introduced the possibility to detain asylum seekers subjected to accelerated asylum procedures at the border or "take back" procedures provided for by the Dublin Regulation for a maximum of 4 and 6 weeks respectively[558]. Note that the progressive differentiation of categories of detainees has not been followed by the creation of differentiated detention regimes within CPRs[559].

The minimum detention conditions within these places are only briefly outlined by primary legislation. Detention in the CPRs must be carried out 'in a manner that ensures necessary assistance and full respect for their dignity' and that freedom of correspondence with the outside must be ensured[560]. As already mentioned, Decree Lamorgese mandated adequate living conditions, including hygiene, sanitation, and housing, as well as guaranteed access to information, assistance, and the preservation of human dignity, as well as freedom of correspondence, including telephone correspondence, with the outside. The remaining provisions are entrusted to Regulations[561], which establish the private management of CPRs also for services related to healthcare. As emphasized by Borlizzi and Santoro, the overall legislation is rather scant, with the result that the rights of detainees are largely dependent on the discretion of the Prefectures, Police Authority (*questura*)[562], and managing entities, who are the primary actors responsible for managing life within the CPRs.

3. Overview of the administrative detention system

a. The facilities

The system of administrative detention in Italy, in terms of volume, has fluctuated considerably since 1998. In 2007, during the peak expansion period of this system, there were a total of 14 active centres with a combined capacity of 1940 places[563]. By February 2016, there were 6 CIEs (Bari, Brindisi, Rome, Turin, Caltanissetta, Crotone) in operation, with a total of 720 available places[564]. By December 2017, there were 5 active CIEs (Bari, Brindisi, Rome, Turin, Caltanissetta) with a theoretical capacity of 700 places but an actual

[556] Legislative Decree 142/2015, *Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonche' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale.* GU 214/15-09-2015.
[557] Law-Decree 113/2018 (October 4, 2018*)*.
[558] Law-Decree 20/2023 (November 11, 2023)
[559] Campesi, G. (2023).
[560] Legislative Decree 286/1998, *Testo unico sull'immigrazione,* Article 14.
[561] Decree of the President of the Republic 394/1999 (November 18, 1999); Ministry of the Interior (October 20, 2014), *Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall'Articolo 14 del Decreto Legislativo 25 Luglio 1998, n. 286 e le sue successive modificazioni [c.d. Regolamento Unico CIE],* Prot. No. 12700.
[562] The complex of officers and services under the authority of the Chief of Police (*questore*)
[563] Borlizzi, F., & Santoro, G. (2021)
[564] *Ib.*

capacity of 486[565]. As of 2023, there are ten active CPRs with a total capacity of approximately 1100 places: the CPR in Via Corelli in Milan, Via Brunelleschi in Turin, Gradisca d'Isonzo near Gorizia, Ponte Galeria in Rome, Palazzo San Gervasio in Potenza, Macomer in central Sardinia, Brindisi-Restinco and Bari-Palese in Puglia, and Trapani-Milo and Caltanissetta-Pian del Lago in Sicily[566]. The capacity of the detention system has changed significantly in the decade from 2011 to 2021, although, as previously mentioned, the goal of restoring the system to its original capacity has never been achieved. In the period from 2014 to 2021, a limited number of facilities have housed the majority of the over 37,000 individuals who entered a CIE/CPR[567]. Specifically, the centres in Caltanissetta, Rome, Turin, and Bari alone have hosted 74% of foreigners detained between 2014 and 2021[568]. Moreover, until 2017, the Caltanissetta centre alone hosted almost 40% of foreigners entering detention each year[569]. This is influenced not only by the different capacities of the centres but also by the turnover rate, i.e., the speed at which individuals leave the detention facility. According to data on the six detention facilities with the longest history that have been opened continuously from 2014 to 2021 (namely Bari, Brindisi, Caltanissetta, Rome, Turin, and Trapani), some centres have significantly longer average stay times than the national average, which is 33 days[570]. In particular, while the Brindisi and Turin CPRs are the centres with the longest average stays, at 50 and 44 days respectively, the Caltanissetta and Trapani CPRs have the lowest average daily presence, at 24 and 27 days respectively[571]. On the overall data of the CPR system, in the period from 2014 to 2021, there is a strong fluctuation in the average length of stay. In particular, between 2015 and 2020, the average detention period increases from 25.2 to 41.3 days, before decreasing again to 35.2 in 2021[572]. The data on an increase in the average length of stay in the immigration detention centres is a clear indicator that those entering are staying longer. This is certainly due to the transformation of the legal framework, which, as seen, has repeatedly led to an increase in the maximum detention terms, but is also influenced by the practice of the judicial authorities, namely their willingness to scrutinise more carefully the reasons for detention during validation or extension[573].

While conditions across Italy's pre-removal detention centers differ, the visits of the National Guarantor and of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (CPT) between 2017 and 2019 consistently raise several concerning issues, from the prison-like environment to limited leisure options and absent worship spaces, raising concerns about the centres' ability to provide a

[565] *Ib.*
[566] Campesi, G. (2023); Borlizzi, F., & Santoro, G. (2021). For a detailed discussion of the history of each CPR, see Borlizzi, F., & Santoro, G. (2021), 50-107.
[567] Campesi, G. (2023), see Table No. 8 on the number of admissions to different CPRs (absolute values and percentages) for the period 2014-2021.
[568] *Ib.*
[569] *Ib.*
[570] Campesi, G. (2023), see Table No. 9 on the average length of stay and available spaces in certain CPRs for the period 2014-2021.
[571] *Ib.*
[572] Campesi, G. (2023). Campesi employed, for the period 2014-2015, the data provided by the Senate's Extraordinary Commission for the protection and promotion of human rights, and, for the years 2018-2021, tha data provided by the National Guarantor.
[573] *Ib.*

humane and dignified environment for the detainees. These reports allow to make an overview of the conditions of the seven CPRs active during that period.

During its visit to the CPR of Brindisi, the National Guarantor noticed a severe lack of communal areas and organized leisure activities. Beyond a football field, a single television, and an Italian language course, the report found no regular offerings to stimulate or engage detainees[574]. The National Guarantor identified various issues regarding the detention conditions in the Bari centre as well, including insufficient communal space for recreational activities, inadequate sleeping arrangements with beds lacking sheets or other bedding, and unattended damages to the facility by the management[575]. During the visit to the Palazzo San Gervasio CPR by the National Guarantor, a significant issue observed was the absence of any communal area, including a designated space for detainees to eat[576]. The National Guarantor also expressed concern about the inadequate number of showers, their distant location from the living quarters, the lack of handles on doors, continuous 24-hour lighting, and a prevalent cockroach infestation within the facility[577]. Following its 2017 visit to the Caltanissetta CPR, the CPT depicted the conditions within the centre as extremely inadequate[578]. Specifically, they noted that in certain areas, the allotted space per detainee was insufficient, rooms lacked furnishings, bedding was unclean, and restroom and shower facilities were in a state of disrepair[579]. According to the CPT, at times, the number of detainees surpassed the centre's designated capacity[580]. Likewise, the National Guarantor described the physical conditions as significantly deteriorated, emphasizing the necessity for maintenance, highlighting especially the cramped rooms with poor ventilation and minimal natural light[581]. Visiting the facility of Turin, instead, the CPT deemed satisfactory the material and hygiene conditions in the rooms and sanitary facilities[582]. However, the National Guarantor pointed out that common areas lacked furnishings, and the sanitary facilities were not adequately separated from the living quarters[583]. Additionally, detainees had limited control over the lighting as the controls were situated in staff areas, requiring communication through gates[584]. The National Guarantor also raised concerns about the presence of security

[574] Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018), *Rapporto sulle visite tematiche effettuate nei centri di permanenza per il rimpatrio (CPR) in Italia (febbraio-marzo 2018)*. On June 2nd, 2019, a young Nigerian man hunged himself while being detained here. LasciateCIEntrare highlighted this incident as a preventable loss, denouncing that the man's known mental health struggles were ignored. Despite proof, he was never allowed access to psychiatric support. Further fueling concerns, LasciateCIEntrare also denounced the authorities' hurried burial without an autopsy, calling for a full investigation, including an autopsy and toxicology report. See Global Detention Project (2019), Country Report, *Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? October 2019*, Geneva.
[575] Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018).
[576] *Ib.*
[577] *Ib.* In December 2018, detainees set fire to the facility to prevent the deportation of six Nigerians, unsuccessfully. See Global Detention Project (2019).
[578] Council of Europe (April, 2018), *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*
[579] *Ib.*
[580] *Ib.*
[581] *Ib.* In December 2018, there was a fire set by detainees at the centre, and during the same month, multiple detainees engaged in a mass brawl. In January 2019, an attempted escape resulted in severe injuries to one detainee. See Global Detention Project (2019).
[582] Council of Europe (April, 2018).
[583] Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018).
[584] *Ib.*

cells, urging for their discontinuation[585]. During the visit to the CPR of Ponte Galeria, the National Guarantor found the conditions to be unacceptable, posing health risks to both detainees and staff[586]. They highlighted a shortage of furniture, limited recreational activities, and detentions occurring without considering individuals' immigration statuses[587]. In contrast, the CPT's findings from a June 2017 visit contradicted those of the National Guarantor, reporting that hygiene, lighting, and ventilation met standards, and healthcare services were adequate[588].

b. The detained population

In 2020, 4,387 individuals (including 223 women) passed through the Italian CPRs, with 2,623 being of Tunisian nationality[589]. The second most prevalent nationality was Moroccan, with 490 individuals, followed by Nigerians, Egyptians, Albanians, Gambians, and Algerians[590]. As underscored by Borlizzi and Santoro, gender-disaggregated data on the population detained in CPRs has only been available since 2017, and unlike prisons, there is a lack of data regarding the detainees' age, legal status, education level, and so on[591].

Similarly to the data on detention system capacity, figures on CPR occupancy from 2014 to 2021 also demonstrate fluctuating trends[592]. The numbers exhibit a clear increase from 2018 onwards, correlating with the observed patterns in detention system capacity[593]. Moreover, trends in entry into CPRs display oscillations, declining until 2016 before partially rebounding until 2021[594]. Explaining the variation in the number of entries is complex and involves multiple factors, including the foreign population subject to repatriation and turnover. While data on overall CPR turnover has been discussed earlier, estimating the number of foreigners subject to repatriation is challenging, but it can be partially assessed by observing the number of deportation orders issued by the public security authority[595]. The trajectory of deportation orders generally mirrors that of entries into detention centers, declining until 2014 and rebounding until 2019[596]. Conversely, data on the main reasons

[585] *Ib.*
[586] *Ib.*
[587] *Ib.*
[588] Council of Europe (April, 2018)
[589] Tunisian citizens accounted for 59.8% of foreigners subject to forced repatriation that year. Specifically concerning the Rome centre, Tunisians constituted 81.82% of those passing through the CPR in 2020. Garante Nazionale dei diritti delle persone private della libertà personale (2021a)
[590] Nigerians numbered 204, Egyptians 125, Albanians 110, Gambians 101 and Algerians 97. *Ib.*
[591] Borlizzi, F., & Santoro, G. (2021)
[592] To observe the trend in admissions, the report 'Trattenuti' uses data on admissions as of 31 December each year, taken from the annual reports of the Ministry of the Interior. On average, between 2014 and 2021, presences at the end of the year were around 406 persons. From 2018 onwards, the data show a clear increase in attendance, so much so that in the four-year period 2018-2021 an average of 519 presences were recorded at the end of the year, whereas in the previous four-year period the same figure stood at 293 presences. Campesi, G. (2023).
[593] In fact, even a decreasing trend in the years after 2018 seems to be attributable to the strong fluctuation of the capacity of the detention system, due to continuous closures for restructuring that have often reduced the places actually available. Campesi, G. (2023)
[594] *Ib.*
[595] These numbers include both expulsion and rejection orders. In both cases the conduct is similar, since it involves illegal entry, but whereas in the case of expulsion the irregular entry has been completed some time ago, in refoulement the foreigner is caught in an irregular entry situation immediately after entry, i.e. close to the border. See Savio, G. (September 15, 2016), *Espulsioni e respingimenti: i profili sostanziali*, ASGI*; Ib.*
[596] Campesi, G. (2023). Interestingly, between 2014 and 2017, although there was a growth in the number of removal orders taken, there was no parallel growth in the number of admissions to detention facilities.

for exiting detention centers for foreigners indicates a declining trend in the percentage of individuals repatriated relative to the total entries from 2014 to 2021[597]. At the same time, the percentage of people leaving following a court order increased until 2018 and then fell sharply[598]. Overall, the data suggests a significant increase in the average duration of detention from 2014 to 2021, without a corresponding improvement in repatriation efficacy.

Regarding nationality trends, among individuals passing through the centers between 2014 and 2021, despite some gaps, the overall trend remains relatively stable, aligning closely with the 2020 data, with Tunisians comprising 42.9% of entrants in the CPRs, followed by Moroccans (11.3%), Nigerians (10.2%), and Egyptians (7.9%)[599]. However, the relationship between the different nationalities changes profoundly depending on the reasons for leaving the centres. With regard to the foreigners repatriated in the 2014-2021 period, the incidence of Tunisian nationals becomes even more significant[600]. On the other hand, data on exits due to non-validation or extension by the judicial authorities or due to the expiry of detention periods show a much more balanced ratio between the different nationalities[601]. Thus, persons entering a CPR have radically different fates depending on their nationality of origin: some are more likely to be repatriated, while others are more likely to remain in detention until their terms expire. During the four-year period 2018-2021, with an average annual incidence of returns of 48.3 % of entries, the detainees most likely to be returned were foreigners of Tunisian, Egyptian and Albanian nationality[602]. In the same period, it was the Gambian, Algerian, and, to a lesser extent, Moroccan nationals to be more likely to undergo long periods of detention lasting until the end of their terms[603]. These same nationalities also have a much lower probability of being repatriated than the general average[604]. The only ones with a very low probability of undergoing long periods of detention are

[597] With an average of 48.3% in the second four-year period compared to an average of 55.1% in the first.
[598] Campesi, G. (2023)
[599] Due to missing or incomplete answers from the Police Authorities surveyed by Campesi, data on the nationality of about 4200 people are missing, i.e. 15.7% of the more than 37,000 foreign citizens who entered a centre between 2014 and 2021, with a particular concentration in 2014 and 2015, years for which the nationality of about 40% of the foreigners entering is missing. Regarding repatriated persons, there is a lack of information on the nationality of about 20% of the more than 19,000 persons repatriated between 2014 and 2021. However, the gap in the data is evenly distributed throughout the period. Tunisians remain the first nationality to enter throughout the period considered, with a significant increase in incidence in the second four-year period, when they cover, on average, 46.6% of annual entries; in the four years 2014-2017, they accounted for 37.8% of the total. In parallel with the growth of Tunisians entering, the incidence of Nigerian and Egyptian nationals decreased. For Egyptians, whose decrease was more marked from 2015 onwards, there is a reversal of the trend in 2021, when admissions reach 10%. More stable over time is the incidence of citizens of Moroccan and Albanian origin on the total number of entries, which remains at an average of 11.3% and 3.4% per year throughout the period considered. See Campesi, G. (2023).
[600] The incidence of Tunisian nationals reaches 60.3% of the more than 15,000 out of 19,000 repatriated foreigners whose nationality is known. The annual average always remains steadily above 50%, rising from 51.2% in the first four-year period to 67.7% in the second four-year period. No other nationality accounts for more than 10% of the total, with the sole exception of Egyptians, who in the four-year period 2014-2017 represented an average of 16.5% of the foreigners repatriated annually but then fell to 6.6% in the second four-year period. Campesi, G. (2023)
[601] In the four-year period 2018-2021, Tunisian nationals accounted on average for 27.8 % of the foreigners released following a court order and only 12.6 % of the total of those released due to expiry of time limits, out of which Moroccan nationals had an almost double incidence, averaging 22.9 %. Campesi, G. (2023)
[602] On average, the percentage of Tunisians annually repatriated from a CPR was 57.6%, 53% for Egyptians and 54.5% for Albanians, followed by Nigerians (23.3%) and Romanians (9.7%). As for Moroccan nationals, on average, only 6.5% are actually repatriated each year. *Ib.*
[603] On average, each year, 26.7%, 27.3%, and 15.5%, respectively, of the total number of entries of those nationalities remain in detention until their terms expire, compared to an overall average of 11.2%. Campesi, G. (2023).
[604] Respectively 15% for Gambian nationals, 5.8% for Algerians, and 6.6% for foreigners of Moroccan origin. *Ib.*

Tunisian nationals, who in the period 2018-2021 on average only in 1.9% of cases remain in a CPR until the end of the detention period, suggesting a progressive specialisation of CPRs in the management of accelerated returns of Tunisians[605]. Finally, regarding exits following non-validation or non-extension by the judicial authority, the highest incidence is of Chinese and Nigerian nationals[606].

In 2020, it was established that the administrative detention of those who are considered a threat to order and security or have already been convicted, even not definitively, of certain offences must be prioritized[607]. The purposes of social defence are not among those that legitimise the administrative detention of foreigners. However, as people leaving prisons (for whom, however, return proceedings could have been initiated during their first detention) are more difficult to deport, they remain detained longer in CPRs[608]. Between 2014 and 2021, prisoners from prison made up 12% of the population transiting through the CPRs, with a significant increase between 2018 and 2021 (from 10 to 16.4%). Mainly Moroccan, Tunisian, Nigerian, and Albanian nationals arrive in the CPRs from prison[609]. Confirming what has been said with respect to the probability of repatriation of detainees coming from prisons, Moroccan and Romanian citizens, whose average of about 30% comes from prison, are among those who have among the lowest percentages of repatriations carried out in the four-year period 2018-2021[610]. Another significant change in recent years was the introduction of specific detention regulations for asylum seekers. Data collected by Campesi suggest that, between 2018 and 2021, the incidence of detained asylum seekers on the total number of admissions to the CPRs grew significantly, from 15.4 % in 2018 to 19.2 % in 2021[611]. In absolute terms, the most represented nations among asylum seekers are Tunisia, Nigeria, Egypt, Morocco, and finally, but with a significant gap compared to the other nationalities, Albania[612].

Women are traditionally a minority component of the detained population in Italy. Between 2014 and 2021, only the Rome and Turin centres hosted a women's section. In particular, the centre in Turin stopped detaining women as of 2015, while the centre in Rome was only dedicated to the detention of women for the entire period between 2016 and 2018, and then definitively closed its women's section in 2021[613]. The most prominent datum is the very low percentage of women who remain in detention until the end of the maximum

[605] *Ib.*
[606] As explained, the data on exits for non-validation or extension indicates a propensity of the judicial authority to scrutinise the reasons for the detention order more closely. In this case, the observed figures depend on the incidence of the female population on the total number of entries for those nationalities, 89% and 17%, respectively. *Ib.*
[607] Law-Decree 130/2020 (October 22, 2020).
[608] Campesi, G. (2023)
[609] Moroccans are 24.5% of the population coming from prisons, Tunisians 18.2%, Nigerians 9.6% and Albanians 7.7%. In particular, about 30% of the Moroccans, Albanians, and Romanians entering the CPR came from prison, compared to a general average for the period of 15.3%. *ib.*
[610] in partial contrast is the figure for Albanian nationals, who, despite having a high incidence of detainees from prison (on average 29.2% of entries), have one of the highest percentages of executed returns (54.5%) in the period 2018-2021. *Ib.*
[611] Detained asylum seekers means the total number of detained persons who are also asylum seekers, regardless of when the asylum application was submitted. *Ib.*
[612] *Ib.*
[613] The percentage of women detained out of the total number of admissions to the detention centres goes from 20.5% in 2016 to 0.1% in 2021, the year in which only 5 women enter the Rome CPR. Borlizzi, F., & Santoro, G. (2021); *Ib.*

detention term: in the period from 2016 to 2021 on average only 3.7%[614]. The order of the judicial authority is the main reason for leaving the CPRs for women throughout the period (54% against a general average of 16%), a clear indication of the propensity of judges to scrutinise more carefully the reasons for detention in cases involving women[615]. In 2016-2021, Nigerian women accounted for 31.2% of the female population in the CPRs, followed by Chinese (18.7%), Moroccan (6.6%) Ukrainian (6.6%) and Romanian (3.8%) nationals. Again, the probability of being returned varies significantly according to nationality. The women most likely to be repatriated are Romanian, Georgian, and Albanian nationals, all with an above-average incidence of repatriations performed on the number of entries by nationality[616]. In particular, some of the leading incoming nationalities, such as Chinese, Moroccan, or Nigerian women, have a very low probability of being repatriated[617].

c. De Facto Privatisation

As already described, although detention facilities fall under the jurisdiction of the Ministry of the Interior and the Prefectures, the provision of services to individuals is entrusted to private entities. At the same time, public administration remains responsible for procedures related to the legal status of non-nationals detained, for maintaining order within the facilities, as well as routine and extraordinary maintenance of the buildings[618]. The management of the CPRs is based on annual contracts, renewable once, usually following an open procedure[619]. This section will briefly describe how this system came into being and which entities are now managing of the ten active CPRs on Italian territory[620].

Initially, the CPTAs were managed by the Italian Red Cross, a public entity. Already in the early 2000s, some NGOs had started denouncing the poor detention conditions in the CPTAs, characterized by overcrowding, poor legal and medical assistance, detention of drug addicts and people with psychiatric problems, abuse in the administration of psychotropic drugs, and numerous cases of self-harm[621]. Also, the Parliamentary Commission of Inquiry on the CPTAs De Mistura inspected the different structures during the peak expansion period of the system (in the period 2006-2007 there were as many as 14 active centers nationwide with a capacity of 1400 places), highlighting numerous critical issues: unsatisfactory hygienic-sanitary conditions, detention of highly vulnerable migrants, like victims of trafficking and exploitation,

[614] *Ib.*
[615] *Ib.*
[616] In absolute terms, however, Chinese nationals account for 22.1% of all executed returns, followed by women of Romanian (12%) and Nigerian (10%) origin. *Ib.*
[617] *Ib.*
[618] Borlizzi, F., & Santoro, G. (2021).
[619] Campesi, G. (2023).
[620] The information found in this section is mostly taken from four reports on immigration detention in Italy. Borlizzi, F., & Santoro, G. (2021); Campesi, G. (2023); Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), *L'affare CPR. Il profitto sulla pelle delle persone migranti*, CILD; Global Detention Project (2019), Country Report, *Immigration Detention in Italy: Complicit in Grave Human Rights Abuses? October 2019*, Geneva.
[621] Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023)

minors, asylum seekers, drug addicts, and inadequacy of health, legal, and information assistance[622]. The Commission Report concluded by proposing the definitive overcoming of this form of detention through a progressive emptying of the centres[623]. In the following years, the detention centers shed their 'false humanitarian veneer', first with the change of denomination in 2008, then with the extension of the maximum detention terms to 180 days in 2009 and to 18 months in 2011, and, in general, with the progressive emergence of a tendency of the State to minimize the management costs of centres[624]. In fact, more cooperatives had begun to participate in the tender notices proposing economically more advantageous offers. To understand the problematic nature of this development, it is useful to quote the words of the then Extraordinary Commissioner of the Red Cross who, regarding the management handover of the CIE of Rome-Ponte Galeria from the Red Cross to the Auxilium cooperative, declares: 'We cannot lose a tender because we respect the laws, apply collective agreements, but we have a slightly higher labour cost due to our public nature'[625]. In fact, within a few years, the Red Cross was ousted from the management of all centres, which passed into the hands of cooperatives. During this period, there were also the most bitter protests by detainees, the first inquiries by Public Prosecutors into mismanagement by the Cooperatives, and some critical court rulings that ascertained inhumane detention conditions within the CIEs, many of which were made uninhabitable by internal riots[626]. At the same time, since 2014, companies and large multinationals that manage detention centers and ancillary services within prisons across Europe have begun to participate in the tendering for the management of the centres[627]. The Salvini Decree further favoured large immigration companies, making it harder for smaller cooperatives to compete[628].

Today, five companies manage six of the ten currently active CPRs, which, between 2014 and 2021, have handled almost 25,000 entries[629]. The remaining structures are managed by social cooperatives, formally non-profit enterprises, specialized in the management of detention facilities for migrants. The first instance of a non-profit organization is the cooperative Badia Grande, which currently manages only the CPR of Bari Palese[630]. It is interesting to note that Badia Grande was even praised for its management of the Bari CPR, which was identified as a best practice, only to be, then, excluded from the tender in 2022 due to investigations

[622] Ministry of the Interior (February 1, 2007), *Rapporto della Commissione per le verifiche e le strategie dei Centri di Permanenza Temporanea per immigrati.*
[623] *Ib.*
[624] *'Finta patina umanitaria'* in Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 6.
[625] As quoted in Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 8. [translated]
[626] To delve into the events of these years, such as the protest of the sewn mouths undertaken by detainees at the CIE of Rome-Ponte Galeria in 2014 or the attempts at mass escape and internal riots involving the CIE of Gradisca in 2013, see Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 7-9.
[627] In 2014-2015, the multinational Gepsa obtained almost a monopoly on the then-existing CIEs, becoming the managing entity of the centres of Rome (2014-2017), Milan (2014-2017), and Turin (2015-2022). *Ib.*
[628] Global Detention Project (2019)
[629] Campesi, G. (2023)
[630] Between 2014 and 2019, Badia Grande managed the Trapani Milo centre, which between 2016 and 2017 functioned as a Hotspot, as well as the Hotspots of Lampedusa, Ragusa, and Messina, in addition to several other reception facilities for asylum seekers. Finally, Badia Grande was excluded from the tender for the management of the Trapani CPR because its legal representative was found guilty of fraud in public supplies, ideological falsehood in public acts, and fraud against the State. For the same reasons, the cooperative was also excluded from the tender for the management of the CPR of Gradisca d'Isonzo. See Campesi, G. (2023)

initiated against its legal representative and other managers of the CPR, which revealed how the precariousness of essential services provided by the cooperative contributed to creating conditions of exasperation that led to protests and fires inside the facility, determining fraud in the execution of the assignment contract, particularly regarding health assistance services, and the violation of workplace safety measures[631]. Forward, the CPR of Trapani, Brindisi, and Caltanissetta are perfect examples of what Campesi defines as 'management promiscuity'[632]. The first is entrusted to Consorzio Hera, in a temporary business association with the cooperative Vivere Con. Consorzio Hera has also managed the CPR of Brindisi and the adjacent Reception Center for asylum seekers since 2019, in partnership with AGH Resort Srl, recently subject to a judicial investigation[633]. The CPR of Caltanissetta, which also houses a Reception Center for asylum seekers, is managed by the social cooperative Essequadro in a temporary business association with Ad Majora Srl, both of which have been subject to judicial inquiries in the past due to the poor conditions in the reception centers they managed[634]. Finally, the cooperative Ekene has been managing the CPRs of Macomer and Gradisca d'Isonzo since 2022. The cooperative was excluded in May 2023 from the tender for managing the CPR of Caltanissetta due to behaviours that concerning serious crimes against the Public Administration in the context of the management of reception centers for migrants[635].

Turning to the companies involved in managing the CPRs, the first case worth mentioning is that of ORS Italia Srl, a Swiss holding whose Italian subsidiary is expanding its presence in asylum seeker reception and administrative detention[636]. In 2015, Amnesty International and, in 2018, the NGO *Droit de Rester* denounced ORS for the inhumane conditions in an Austrian reception centre and the poor management of reception facilities in Fribourg[637]. ORS Italia Srl currently manages the CPR of Rome Ponte Galeria and, before its temporary closure, the one in Turin[638]. Another emblematic case is that of Engel Italia Srl, already known for serious irregularities in the management of reception centres, it was criticized for its management of both the CPR of Milan and that of Palazzo San Gervasio, ending up under investigation by the Potenza prosecutor's office[639]. Through the transfer of a branch of Engel Italia Srl, Martinina Srl, which remains 90% under the control of the sole director of Engel Italia Srl, takes over the management of the CPR in Milan,

[631] To delve into the events related to the management of detention centres by Badia Grande, see Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 148-165.
[632] *'Promiscuità gestionale'* in Campesi, G. (2023), 11.
[633] Campesi, G. (2023)
[634] *Ib.*
[635] *Ib.* To delve into the events related to the management by Ekene, see Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 60-78.
[636] Campesi, G. (2023)
[637] Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023); Campesi, G. (2023). Both reports make reference to: Bisko. S &Pichler, D. (2015). *QUO VADIS AUSTRIA? Die Situation in Traiskirchen darf nicht die Zukunft der Flüchtlings-betreuung in Österreich warden.* Amnesty International; Droit De Rester (April 2019) *Gestion de l'asile | ORS Fribourg: Quand l'État fait la sourde oreille. Business is Business?.* Asile.ch.
[638] For further details regarding ORS Italia's management, see Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023), 18-36.
[639] Campesi, G. (2023). See Moliterni, F. (January 9, 2020). *Palazzo S. Gervasio: orrore al centro migranti. Inchiesta della procura di Potenza: al CPR droga, abuso sdi pesanti sedativi e violenze fisiche.* Le Cronache Lucane.

subsequently winning the contract in 2022[640]. As for the CPR of San Gervasio, its management has been assigned to Cooperative Officine Sociali since July 2023, which had already been excluded from participating in tenders for the management of numerous other CPR facilities due to severe irregularities[641].

It is evident from this brief overview of the managing entities of CPR that awarding service provision through low-ball tenders is problematic for several reasons. It clearly prioritizes the aspect of containing public expenditure over the protection of the rights of particularly vulnerable individuals. Indeed, adopting the "most economically advantageous" criterion lowers the quality standards of the services provided and the working conditions of the staff employed within the centres[642]. It is worth remembering that within CPR facilities, access to and protection of human rights depends exclusively on the quantity and quality of services these companies provide. Secondly, as we have seen, the competitive drive has favoured the entry of large multinational corporations specializing in services related to the management of detention facilities, diverging from the initial choice to entrust the management of such facilities to humanitarian actors, such as the Italian Red Cross, precisely to emphasise the prevalence of the assistance dimension over that of control[643]. Lastly, another implication of the privatized management of CPR facilities can be traced to the progressive de-responsibilisation of the public administration it entails. By outsourcing the management of such facilities, the public administration self-exempts itself and shies away from responsibilities for poor management and violations of rights. Any violations are dealt with through the judicial system, which, focusing on individual accountability, loses sight of the political-administrative and structural dimensions of CPR critical management[644].

d. Productivity and Alternatives

Questioning the effectiveness of administrative detention and whether or not it meets the functional need to make repatriations effective, is essential to verify whether there is, in Italian practice, a balance between personal freedom and broader 'border defence', beyond which national authorities cannot legitimately pursue the latter[645]. To begin, as regards the overall effectiveness of the Italian return system (for persons detained in CPRs or elsewhere, rejected at the border, or forcibly escorted to the border), this remains remarkably modest. In fact, according to the figures of the National Guarantor, during 2020, 3,351 persons were repatriated, against an estimated 517,000 irregular immigrants present on Italian territory[646]. Even more significantly, in the decade 2020-2021, the percentage of executed repatriation orders, compared to the total of those issued, never exceeds 32%, showing a clear downward trend, which began well before the collapse due to the Covid-19 pandemic,

[640] *Ib.*
[641] *Ib.*
[642] For further details on the procedures for awarding the management of the centres and the related tender specifications, see Campesi, G. (2023), 13-15.
[643] Campesi, G. (2023)
[644] *Ib.*
[645] Borlizzi, F., & Santoro, G. (2021), 35 [translated]
[646]Garante Nazionale dei diritti delle persone private della libertà personale (2021d), *Relazione al Parlamento 2021.*

which obviously had a significant impact on the possibility of executing repatriations[647]. Moving on to the data collected by Campesi on the modalities of enforcement of repatriation, a paradigm shift is apparent after 2019, whereby the incidence of repatriations carried out via charter flights has increased significantly, while the percentage of unescorted repatriations has decreased[648]. In essence, after Covid-19, fewer people are repatriated and in an increasingly coercive manner. Instead, the incidence of returnees from CPRs on the total number of returnees in Italy is subject to strong fluctuations largely dependent on variations in the absolute number of returnees[649]. Looking, on the other hand, at the degree of productivity of deprivation of liberty as a function of returns, i.e., the number of persons detained in the CPRs effectively returned, the National Guarantor notes how it remains more or less stable regardless of the duration of detention, standing at 50.1% in 2020, similarly to previous years when it fluctuated between a low of 43% in 2018 and a high of 59% in 2017[650]. Even before 2017, the degree of productivity has always averaged 50%: in 2016, 44%; in 2015, 52%; in 2014, 55%; and in 2013, 45%, even though in 2013 the maximum detention time was 18 months, as established by the Law-Decree No. 89/2011 in force until 2014[651].

Law-Decree 89/2011, implementing the EU Return Directive, also introduced alternatives to detention in Italy. Accordingly, three non-detentive measures are provided: surrendering a passport or similar document, the obligation to reside at a specified location, or fulfilling reporting obligations[652]. Thus, possession of a passport or other documents, often lacking, is necessary to be granted the alternative measures. Data on the employment of alternatives is very fragmented and discontinued. First, a study examining data from 2015 in the cities Bari and Torino, conducted by the Lexilium project, found no instances of alternative measures being authorized[653]. In contrast, an analysis of case law from Justices of Peace in Bologna and Prato (where no CPRs exist), during the same period, showed that alternative measures were utilized more frequently: in 92 percent and 16 percent of cases, respectively[654]. Regardless, even today, as underscored by Vitale, in reality, such possibility of adopting alternative measures is definitely underused, with the police authority usually preferring to proceed either with detention in the CPR or with the adoption of an expulsion decree with an order to leave Italy within seven days - leaving migrants with the obligation to self-expel, subject to a fine between six thousand and twenty thousand euro in case of violation[655]. Mazzuzi, on the other hand, reports how, according to data provided by the Ministry of the Interior, only 18% of the people who passed through the CPRs in 2021

[647] Campesi, G. (2023)
[648] *Ib.*
[649] The data analysed by Campesi also show how the growth of the total number of repatriations carried out in the period 2014-2017 is in no way to be correlated to the role played by the CPRs. *Ib.*
[650] Garante Nazionale dei diritti delle persone private della libertà personale (2021d)
[651] Borlizzi, F., & Santoro, G. (2021), 35 [translated]
[652] Law-Decree 89/2011 (June 24, 2011)
[653] Mastromartino, F., Rigo, E., Veglio, M. (2017), Lexilium. Osservatorio sulla giurisprudenza in materia di immigrazione del giudice di pace: sintesi Rapporti 2015, *Diritto, Immigrazione e Cittadinanza,* No. 2/2017.
[654] Global Detention Project (2019)
[655] Vitale, G. (2022), *Ieri Cpt poi Cie oggi Cpr.* In Accardo, Y., Mazzuzi, F., Vitale, G., & Bottazzo, R., *Dietro le mura. Abusi, violenze e diritti negati nei Cpr d'Italia*, LasciateCIEntrare, 117-132

and 2022 (up to May 31st) benefited from alternative measures to detention[656]. Most were applied in Lombardy and Lazio, while fewer or no alternatives were ordered in Sardinia, Molise, Basilicata, Friuli Venezia Giulia, and Calabria[657].

4. Human Rights inside the CPRs

It is necessary to recall here the introductory premise concerning the fragmentary nature of data on administrative detention. This section attempts to draw an overall picture of the practices observed in the Italian CPRs concerning the guarantee of detainees' rights by the managing bodies and, therefore, in simple words, the quality of the services provided to protect them. To draw such a picture, this section employs both institutional sources and reports of the associations dealing with the rights of detainees within the CPRs. The fragmentary nature of these data determines a fundamental aspect of what can be the account of life inside the centres, namely that, since these reports are based on interviews of lawyers who have assisted persons detained inside the centres, accounts of former detainees, questionnaires sent to the Police authority or the Prefectures or on occasional visits to the facilities, often the reported conducts reflect only the tip of the iceberg. For instance, when it is affirmed that a practice is ascertained in particular in relation to certain CPRs, this is not to mean that there is evidence that such a practice is not carried out in the others, but simply that evidence was found only in relation to those centres. This part, as introduced, deals with the services provided by CPR management bodies aimed at protecting the right to health, the right to normative information, and the right to defence, concluding with the types of critical events that have occurred in CPRs in recent years.

a. Healthcare

The right to health, provided in the Italian Constitution by Article 32, shall be guaranteed even in the case of administrative detention[658]. In particular, according to the relevant normative, essential, and urgent healthcare must be provided to foreigners without financial resources, even if they are irregular, and without any charges, except for a fee, which should be the same as for Italian citizens[659]. Although, as mentioned, healthcare assistance in CPRs is managed by private entities entrusted to the managing body, the National Health Service (NHS) should still be exclusively responsible for certain healthcare services for detainees in CPRs (for example, psychiatric assistance). A Protocol of Understanding between the Prefecture and the locally competent ASL (*Azienda Ospedaliera Locale,* meaning Local Health Authority, part of the NHS) should regulate this collaboration. As underscored by Borlizzi and Santoro, healthcare services in CPRs are mostly governed by secondary sources, such as regulations, tender specifications, and protocols of understanding, with no judicial remedies for their effective implementation[660]. Protecting the right to health in

[656] Mazzuzi, F. (2022), *Dati sul funzionamento dei Cpr: una sintesi.* In Accardo, Y., Mazzuzi, F., Vitale, G., & Bottazzo, R., *Dietro le mura. Abusi, violenze e diritti negati nei Cpr d'Italia*, LasciateCIEntrare, 210-236.
[657] *Ib.*
[658] Constitution of the Italian Republic (January 1, 1948), GU 298/27-12-1947
[659] Legislative Decree 286/1998, *Testo unico sull'immigrazione.* GU 191/18-08-1998, Article 35 (4).
[660] Borlizzi, F., & Santoro, G. (2021)

CPRs involves three elements: suitability certification for entry and detention, organisation and adequacy of private healthcare provided during detention, and the Memoranda of Understanding and collaboration between competent Prefectures and local ASLs mentioned above. These three elements will be separately addressed in this section, considering first the regulations governing them and then the practice related to their implementation within the facilities.

The medical examination for assessing suitability for entry and detention in CPRs is provided for in Article 3 of the so-called Unified CIE Regulation, according to which the foreigner accesses the centre following a medical examination carried out by a doctor of the competent ASL.[661] An NHS doctor must, therefore, carry out the examination to ensure the impartiality of the assessment and the actual knowledge of the health services available in the area. The examination must be conducted at entry to check for any physical or mental pathologies that may render the individual incompatible with life in a restricted community[662]. It should be repeated during detention whenever new elements emerge that could determine incompatibility, not identified during the initial examination[663]. Finally, it must be renewed upon entry into a new destination CPR if the detainee is transferred to a new facility. The need to renew the assessment whenever the foreigner is transferred to another CPR is because, in assessing suitability for detention, the doctor must take into consideration not only any pathologies of the individual detainee that may constitute reasons for relative incompatibility with detention in the specific facility but also the specificities of each centre, including the distance from an emergency room.

As highlighted by various reports, severe irregular practices occur in the CPRs in relation to the obligations mentioned above[664]. The National Guarantor states that in the CPR of Turin, the suitability certificate is issued, in the majority of cases, by a doctor not from the NHS but from the managing entity[665], and emphasizes the inadequacy of the visits carried out by the CPR personnel, which resulted in the admission to the CPR of individuals affected by psychiatric pathologies[666]. The same was affirmed by Senator Di Falco regarding the

[661] Ministry of the Interior (October 20, 2014), *Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall'Articolo 14 del Decreto Legislativo 25 Luglio 1998, n. 286 e le sue successive modificazioni [c.d. Regolamento Unico CIE],* Article 3 (1).

[662] In particular, the examination must ascertain 'the absence of evident pathologies that render entry and stay of the same in the structure incompatible, such as contagious or dangerous infectious diseases for the community; psychiatric states, acute or chronic degenerative pathologies that cannot receive adequate care in restricted communities'. *Ib.* [translated]

[663] In this case it is the medical staff employed in the CPR who is responsible, pending the new assessment by the ASL, for 'maintaining high and diligent attention to the manifestation of health conditions, overlooked or not present during the preliminary entry examination, which could result in incompatibility with staying within the CPR. The role appears particularly important with reference to the appearance of signs of mental distress [...] In such cases, the role of the healthcare professional is fundamental in preparing urgent protective measures, initiating appropriate specialist checks as quickly as possible, and promoting a new suitability assessment by the competent public health authority'. See Garante Nazionale dei diritti delle persone private della libertà personale (2021b), *Rapporto sulle Visite Effettuate nei Centri di Permanenza per i Rimpatri (CPR) (2019-2020),* 8.

[664] Borlizzi, F., & Santoro, G. (2021); Campesi, G. (2023); Global Detention Project (2019); Garante Nazionale dei diritti delle persone private della libertà personale (2021b), *Rapporto sulle Visite Effettuate nei Centri di Permanenza per i Rimpatri (CPR) (2019-2020)*

[665] Garante Nazionale dei diritti delle persone private della libertà personale (2021c), *Rapporto sulla Visita Effettuata nel Centro di Permanenza per i Rimpatri (CPR) Di Torino Il 14 Giugno 2021.*

[666] Garante Nazionale dei diritti delle persone private della libertà personale (2021b)

CPR of Milan following his visit to this centre[667]. The examinations are said to take place at police headquarters, and the certificates are prepared on the letterhead of the public entity but signed by doctors contracted with the centre, drafted on pre-printed forms, without indicating the factors on which the compatibility is determined[668]. Also, in the CPRs of Bari, Brindisi, Caltanissetta, Trapani, and Macomer, according to lawyers assisting individuals detained there interviewed by Borlizzi and Santoro, it is rare for the suitability certificate to be issued by an NHS doctor[669]. Furthermore, the Guarantor reports how, in the majority of cases, the doctors employed by the managing entity, who are, in any case, not tasked with carrying out the suitability examination, refrain from visiting individuals already detained in other facilities, such as prisons or hotspots[670]. Moreover, the Guarantor denounced the presence in the centres of numerous detainees with pathologies declared by the Guarantor itself incompatible with detention[671]. In particular, the presence of several detainees undergoing methadone therapy or suffering from insulin-dependent diabetes is noted by the Guarantor in the CPRs of Milan and Bari[672]. The Guarantor also emphasizes how, in all CPRs, medical examinations are 'mostly conducted without the evaluation of clinical documentation or the completion of investigations beyond the control of infectious diseases and a rapid physical examination.'[673] As for the first element substantiating the right to health of detainees, Article 3(1) is manifestly not complied with in the vast majority of cases[674]. This blatant violation of the right to health of detainees is connected, as emphasized by Borlizzi and Santoro, to a grave infringement of their right to defense as well[675]. The judiciary must be aware of the suitability certificate, which is to be considered a condition for evaluating the validation or extension of detention. However, 90% of the lawyers interviewed by Borlizzi e Santoro noted that such a suitability attestation was absent from the validation and extension files of the judicial authorities.

Regarding the second element, the managing entity of the CPR is required to ensure the adequate presence of medical staff, the establishment of an internal health unit, and specific healthcare services for the detainees. The tender specifications determine the minimum number of hours required for the relevant professional figures, varying according to the capacity of the centres[676]. The 2021 tender specified the presence of: a nurse twenty-four hours a day; a doctor three hours every day for centres with a capacity of up to 50 places, eight

[667] De Falco, G. (2021).
[668] *Ib.*
[669] Borlizzi, F., & Santoro, G. (2021)
[670] Garante Nazionale dei diritti delle persone private della libertà personale (2021b). This is noted, in particular, in the CPRs of Turin, Gradisca d'Isonzo, Ponte Galeria (Rome), Palazzo San Gervasio (Potenza), Trapani, Caltanissetta, and Brindisi.
[671] *Ib.*
[672] *Ib.*
[673] Garante Nazionale dei diritti delle persone private della libertà personale (2021c), 6. [translated]
[674] In the Black Book on the CPR of Turin, compiled by the ASGI (Association for Immigration Law Studies), some episodes highlight the tragic consequences resulting from an inadequate assessment of suitability for life in a restricted community of detainees. Although they exceed the scope of this thesis, these stories are crucial for understanding the human and extremely physical dimension of the violations suffered by detainees in the CPRs. If interested, consult ASGI (2021), *Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human. The Black book on the Pre-Removal Detention Centre (CPR) of migrants in Turin – Corso Brunelleschi.* Torino
[675] Borlizzi, F., & Santoro, G. (2021).
[676] For an analysis of the trends highlighted by the tender specifications from 2017 to 2021, see Borlizzi, F., & Santoro, G. (2021), 136

hours for centres with a capacity of up to 150 places, and twelve hours every day for those with a capacity of up to 300 places; and a psychologist eight hours a week for centres with a capacity of up to 50 places, sixteen hours a week for those with a capacity of up to 150 places, and 24 hours a week for centres with a capacity of up to 300 places[677]. The internal health unit at the CPR should be set up following specific provisions of the Unified CIE Regulation and equipped with supplies expressly required by the said Regulation and the tender specifications. The latter, in 2021, prescribed that areas designated for medical examinations should include, in addition to the room designated for the medical examination, spaces for isolation and short observation and that such areas should be equipped with dedicated sanitary facilities, as well as windows and adequate equipment (e.g., examination beds; common medications and life-saving equipment), and comply with the structural standards of outpatient clinics open to the public[678]. As for the specific healthcare services for the detainees and the duties of the CPR staff, the first step is the medical screening of the detainee by the doctor of the CPR in order to conduct a comprehensive assessment of their health status and ascertain any need for specialist consultations, diagnostic, or any therapy at public healthcare facilities[679]. Moreover, in the presence of elements that may determine incompatibility with detention not identified during the initial suitability assessment, the detainee must be placed in a health observation room for the time strictly necessary for a new suitability assessment by the ASL. Medical examinations in the CPR must be conducted within the health unit 'in a way that ensures respect for privacy and protection of personal dignity' [680]. Finally, the doctor of the CPR must prepare and keep a medical record for each guest updated about the healthcare provided, medications administered, and examinations conducted, to be handed over to the foreigner upon exiting the centre and to the doctor of any other detention facilities where the detainee is transferred[681].

In general, the Guarantor has highlighted the lack of healthcare personnel adequately trained in migration medicine and the total lack of risk prevention protocols, notwithstanding the numerous instances of self-harm that occur in the centres[682]. In particular, the next paragraphs will serve to verify the practices in the centres related to the presence of healthcare personnel, the provision of psychiatric assistance (and the use of psychotropic drugs by the centre's staff), the obligations related to the compilation and sharing of the aforementioned medical record of detainees, and the manner of conduct of medical examinations. Regarding the presence of staff in the centres, various practices violating the above-defined requirements can be identified within the CPRs. It is noted that some centres not only refer to outdated tender specifications but also establish

[677] Borlizzi, F., & Santoro, G. (2021)
[678] *Ib.*
[679] *Ib.*
[680] Ministry of the Interior (October 20, 2014), *Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall'Articolo 14 del Decreto Legislativo 25 Luglio 1998, n. 286 e le sue successive modificazioni [c.d. Regolamento Unico CIE],* Article 3 (3)
[681] The Guarantor has emphasized that the record should contain a detailed account of the examination conducted on the person, relevant statements made by the person for the medical examination, including any reports of maltreatment and beatings suffered, their own observations regarding the compatibility of the reported maltreatment and beatings with the objective findings identified during the medical examination and, in any case, the presence of injuries indicative of beatings. See Garante Nazionale dei diritti delle persone private della libertà personale (2021c).
[682] Garante Nazionale dei diritti delle persone private della libertà personale (2021a)

the presence of staff not based on the regulatory capacity of the centre, but on an unspecified, periodic average of actual attendance at the CPR[683]. In particular, the visits by the Guarantor, that of Senator De Falco to the CPR of Milan, and interviews with lawyers of detainees have highlighted the actual absence during the prescribed hours of healthcare personnel, especially but not exclusively regarding doctors and psychologists, in the CPRs of Milan, Turin, Rome, Macomer, Bari, Brindisi, Caltanissetta[684]. Additionally, the environments in which the staff operate have been found to be in serious neglect or not in line with the obligation to ensure adequate hygiene standards prescribed by the Lamorgese Decree, especially in the CPRs of Turin and Caltanissetta[685].

Furthermore, Borlizzi and Santoro ascertained several improper uses of the sanitary isolation measure, which should be aimed solely at health observation in case new elements arise questioning the detainee's compatibility with detention, for the time strictly necessary for a new evaluation by the ASL doctor[686]. The use of such isolation for presumed security reasons, constituting a genuine detention isolation, with a variable duration from a few hours to several months, is confirmed both by the National Guarantor and by the CPT which, in the visits conducted to the CPRs in 2017, noted the complete absence of a reference regulation and urged the Italian authorities to establish clear procedures, with adequate guarantees, regarding the isolation practices of detainees for security reasons, highlighting how the presence of grey areas risks leading to an unofficial and uncontrolled system[687]. Moreover, the National Guarantor highlighted significant critical issues regarding the establishment of such health observation rooms, which, simply put, as 'sanitary environments under the supervision of medical and paramedical staff,' do not exist[688]. According to the Guarantor, in principle, the facilities only have ordinary detention rooms of one or two places to separate individuals or couples from the rest of the detained population[689].

As for psychiatric assistance, this should be under the sole responsibility of the competent ASL, which provides it under specific requests for specialist consultations made by the facility's healthcare personnel[690]. In the almost total absence of Protocols between Prefectures and ASLs, psychiatric assistance in the CPRs is almost completely absent, and it is the psychologists and nurses working in the CPRs that monitor psychiatric

[683] In particular, with reference to the CPRs of Milan, Turin, and Rome. See Borlizzi, F., & Santoro, G. (2021).
[684] In the case of Milan, Senator De Falco reports that not only were psychologists not present but also that the two individuals indicated as psychologists of the centre were Federico Bodo, Director of the CPR, and Andrea Montagnini, a member, along with Bodo, of the board of directors of a company belonging to the temporary grouping of companies managing the centre. Furthermore, Senator De Falco noted that the presence of the aforementioned psychologists, theoretically regular on paper, was completely nonexistent (especially that of Dr. Montagnini, whose name was unknown even to some doctors). See De Falco, G. (2021); Borlizzi, F., & Santoro, G. (2021); Garante Nazionale dei diritti delle persone private della libertà personale (2021a, 2021b, 2021c).
[685] Borlizzi, F., & Santoro, G. (2021)
[686] *Ib.*
[687] Council of Europe (April, 2018), *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*, paragraph 66.
[688] Garante Nazionale dei diritti delle persone private della libertà personale (2021b), *Rapporto sulle Visite Effettuate nei Centri di Permanenza per i Rimpatri (CPR) (2019-2020)*, 23.
[689] *Ib.*
[690] Borlizzi, F., & Santoro, G. (2021)

cases and administer psychotropic drugs[691]. The National Guarantor observed during the visits conducted to the CPRs in the period 2019-2020 the frequent presence of individuals suffering from psychiatric distress and a high number of drug addicts present in the facilities[692]. The percentage of the detained population undergoing therapies, including the administration of mind-altering drugs and tranquilizers, is always very high in the CPRs[693]. Senator De Falco has underlined, regarding this situation, that it is undeniable that precisely the living conditions within the CPR induce detainees to make use of heavy tranquilizers[694].

Regarding the obligations related to the clinical record of detainees, they are crucial to ensure therapeutic continuity, a correct assessment of the subject's suitability for restricted life, adequate access to any external medical consultations, and the detection of any pathologies that could allow the subject to enter the institutional reception system after release from the CPR[695]. However, even with respect to these obligations, numerous divergent practices are observed. Detainees often do not have the opportunity to view their medical records, which in several cases are not provided at the time of release or sent to the new hosting facilities, and whose consultation is not even permitted to the lawyers delegated by the detainees[696]. Finally, a grave but systematic practice in the CPRs is, as attested by Borlizzi and Santoro, the presence of law enforcement personnel during medical visits, particularly with reference to the CPRs of Potenza, Turin, and Milan[697].

Another element of protection of the right to health of detainees is the Protocol of Understanding between the competent Prefecture and the local ASL, expressly provided for by the Unified CIE Regulation (which also provides a specific scheme for their drafting), aimed primarily at ensuring adequate and timely access to ASL healthcare facilities for emergency events as well as specialist consultations, periodic inspection activities by technical-health personnel of the hospital company to verify the quality both of the healthcare services provided in the CPRs and of the food administered, and adequate data collection on epidemiological surveillance for the control of infectious diseases in the CPRs[698]. The National Guarantor has highlighted how, ‘with few exceptions, the provision for the signing of a specific cooperation platform between the Prefecture

[691] *Ib.*
[692] Garante Nazionale dei diritti delle persone private della libertà personale (2021b)
[693] In the CPR of Milan, according to the managing entity itself, this condition affects 80% of the population. In 2019, Fulvio Pitanti, medical manager of the CPR of Turin, declared that in that facility, 'psychotropic drugs are used in liters.' In the CPR of Gradisca, the Guarantor attests a rate of 70%. The lawyer of several detainees inside the CPR of Gradisca even declared that several of his clients appeared sedated during hearings. In the CPR of Ponte Galeria, the ASL of Rome has highlighted how 65%-70% of the detained population undergoes therapies requiring the administration of psychotropic drugs and tranquilizers. Regarding the CPR of Macomer, a lawyer of detainees inside the centre stated that it is 'evident that detainees are pacified with the administration of psychotropic drugs'. See Garante Nazionale dei diritti delle persone private della libertà personale (2021a, 2021b, 2021c); Borlizzi, F., & Santoro, G. (2021); De Falco, G. (2021).
[694] De Falco, G. (2021).
[695] Borlizzi, F., & Santoro, G. (2021).
[696] This is confirmed with regard to the CPRs of Turin, Milan, Gradisca, Rome, Brindisi. *Ib.*; De Falco, G. (2021).
[697] Borlizzi, F., & Santoro, G. (2021).
[698] Ministry of the Interior (October 20, 2014), *Criteri per l’organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall’Articolo 14 del Decreto Legislativo 25 Luglio 1998, n. 286 e le sue successive modificazioni [c.d. Regolamento Unico CIE]*

and the locally competent ASL has remained unimplemented everywhere' – when they exist, such protocols are formal understandings only, lacking effective operationality[699].

b. Information

Article 2 of the Unified Regulation, as well as the tender specifications of 2021, provide that, upon entry into the centre, a linguistic-cultural mediator assists the staff of the centre in informing detainees of their rights and duties, the detention procedures, and the rules applied within the facility (paragraph 1)[700]. Consequently, the managing body must make available, through posting and delivery, the Charter on the Rights and Duties of the Detainee, the internal regulation of the centre, the list of lawyers providing legal assistance at the state's expense, and a dedicated informational brochure for international protection applicants (paragraph 2). All informational material must be provided in a language comprehensible to the detainee and, in any case, must be available into English, French, Spanish, and Arabic. The tender specifications also mention the need for adequate legal information services for detainees[701]. Like all services provided to individuals by managing bodies, tender specifications from 2017 to 2021 have progressively and drastically reduced the minimum amount of hours, varying with the capacity of the centres, provided for the regulatory information service, reaching 8 hours per week for centers with a capacity of up to 50 places and 16 hours for centers with a capacity of up to 300 places[702]. The National Guarantor highlights how to make the right to information effective, every place of deprivation of liberty must necessarily be equipped to offer adequate understanding tools, ranging from basic literacy to support in accessing the various possibilities that the institution itself or, more generally, the legal system, can offer[703]. In this context, continues the Guarantor, understanding one's status in the legal system is a crucial part of that inclusive process that institutions of administrative deprivation of liberty must have as an objective[704].

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[699] Garante Nazionale dei diritti delle persone private della libertà personale (2021b), 20 [translated]. For a further analysis of the characteristics of the lack of protocols for each CPR, see Borlizzi, F., & Santoro, G. (2021), 181-192.

[700] Ministry of the Interior (October 20, 2014), *Criteri per l'organizzazione e la gestione dei centri di identificazione ed espulsione previsti dall'Articolo 14 del Decreto Legislativo 25 Luglio 1998, n. 286 e le sue successive modificazioni [c.d. Regolamento Unico CIE],* Article 2. The European Committee for the Prevention of Torture (CPT) as well has highlighted how irregular migrants detained in a facility must be explicitly informed, without delay and in a language they understand, of their rights and the procedures that may be applied. Detained migrants must systematically receive an information sheet containing such information, available in the languages most commonly spoken by the individuals concerned, and, if necessary, interpreter services must be provided. Individuals must be able to confirm in writing in a language they understand that they have been informed of their rights. See Council of Europe (March, 2017), European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Factsheet on Immigration detention.*

[701] This service, in addition to what is provided for in Article 2 of the Unified CIE Regulation, must include the employment of personnel qualified on immigration regulations, international protection, protection of trafficking victims, assisted voluntary returns, access to social and health services, related rights based on legal status, guarantees for unaccompanied minors, and the rights and duties of foreigners, also through the dissemination of informational material, also translated into the main languages spoken by foreigners in the Center. See Borlizzi, F., & Santoro, G. (2021). Regarding the detention of asylum seekers, the law itself explicitly establishes that the applicant must be informed of the rules applicable in the Centre as well as of his rights and obligations in the first language indicated by him or in a language that the detainee is reasonably expected to understand. See Legislative Decree 142/2015, Article 7(4).

[702] For an analysis of the trends highlighted by the tender specifications from 2017 to 2021, see Borlizzi, F., & Santoro, G. (2021), 201. [translated]

[703] Garante Nazionale dei diritti delle persone private della libertà personale (2021a)

[704] *Ib.*

The aims highlighted above are not fulfilled within individual CPRs, which adopt practices significantly divergent from what is prescribed. In particular, as with the healthcare service, some CPRs refer to outdated tender specifications and/or base the presence of the staff on a periodic average of the actual attendance, especially in the Milan and Rome centres[705]. The Rights and Duties Charter and the material dedicated to international protection are not delivered or are delivered in an incomplete form in the CPRs of Milan, Turin, and Gradisca[706]. In his visits to the CPR of Milan, Senator De Falco noted the general disorientation of detainees regarding the possibility of seeking protection and the duration and reasons for their detention[707]. Furthermore, the CPR Regulations appeared anomalous or non-existent in many cases, especially in the CPRs of Turin, Gradisca, Brindisi, Bari, and Potenza. For example, there is no internal Regulation in the Brindisi and Bari Centers, and 'the rules are learned through word of mouth'[708]. Regarding Gradisca, the National Guarantor had expressed numerous concerns about the presence, within the Regulation, of some provisions relating to the application of disciplinary sanctions (warning or pecuniary sanction) in the event of a violation of the rules in force in the structure, noting the absolute arbitrariness and inadmissibility of such provisions that remain devoid of legal basis and necessary procedural guarantees[709]. In the Gradisca CPR, the lawyer who performed the regulatory information service between 2020 and 2021 denounces the almost total absence of interpreters[710]. In conclusion, the National Guarantor attests to a significantly deficient regulatory information service, particularly in the CPRs of Milan, Turin, Trapani, and Gradisca[711].

c. Defence

[705] In the latter, hosting 210 detainees, the information assistance service is guaranteed 16 hours a week, i.e., 4 minutes per detainee. See Borlizzi, F., & Santoro, G. (2021).

[706] Regarding Gradisca, the Regional Guarantor of Friuli Venezia Giulia specified that information on asylum requests takes place only orally, without delivering any material to the foreigner. Furthermore, the lawyer who handled the regulatory information service for the managing body between 2020 and 2021 reported a serious violation of the right to defense against Tunisian detainees: 'In the last four months of activity, [...] throngs of people arrived from Tunisia and, within a few days, were distributed to CPRs throughout Italy. They also arrived at the Gradisca CPR, and after three days, magically, they were repatriated. [...] We understood they were not informed of their right to request international protection when they arrived in Italy. Many knew nothing. We demanded to know if the person wanted to submit such a request or not and demanded to have paper and pen during the interviews with the detainees because if the person wanted to make a request, we worried about formalizing the request immediately in order to avoid that the next day we would not find them in the CPR because they had been repatriated.' In the Gradisca centre, even 20 people from Tunisia arrived in a single day: 'We tried to make rapid appointments to talk to as many people as possible, but often we could not, and the next day we would not find them inside the CPR'. See Borlizzi, F., & Santoro, G. (2021), 209 [translated]. For a discussion on the appropriateness of considering Tunisia a safe country, as both the EU and Italy continue to do, see Bottazzo, R. (2022), Uno sguardo sulla Tunisia, Paese "sicuro". Intervista con Majdi Kerbai. In Accardo, Y., Mazzuzi, F., Vitale, G., & Bottazzo, R., *Dietro le mura. Abusi, violenze e diritti negati nei Cpr d'Italia*, LasciateCIEntrare, 136-141.

[707] In particular, it was noted how some foreigners who waited to be released due to reaching the maximum detention term were unaware that the international protection request would lead to the suspension of the same term. Similarly, many people transferred directly from prison to CPR were unaware of the reasons for their entry into the centre. De Falco, G. (2021), 27. [translated]

[708] Borlizzi, F., & Santoro, G. (2021), 212 [translated].

[709] Garante Nazionale dei diritti delle persone private della libertà personale (2021b)

[710] Borlizzi, F., & Santoro, G. (2021)

[711] In the Gradisca centre, the lawyer who handled the information service between 2020 and 2021, interviewed by Borlizzi and Santoro, reported how the already few hours dedicated to regulatory information were further compromised by the failure to transmit the detainees' files to the operators, with the impossibility of understanding the reason for their detention. When obtained upon request via PEC, these only included the expulsion order. The lawyer also reported to the Prefecture of Gorizia and the National Guarantor the severe limitations imposed on the service during the pandemic, in particular, the failure to distribute informational brochures and how the operators in charge of carrying out the regulatory information service were not allowed to conduct remote interviews with detainees. Borlizzi and Santoro note that it was precisely on the day of the lawyer's complaint that the revocation of the appointment from the regulatory information service occurred. See Borlizzi, F., & Santoro, G. (2021), 209-210. [translated]

As the Constitutional Court highlighted in ruling no. 105/2001, 'the detention of foreigners in temporary stay and assistance centers is a measure affecting personal freedom, which cannot be adopted outside the guarantees of Article 13 of the Constitution'.[712] The right to defence protected by the Constitution (Articles 24 and 111) and the ECHR (Article 6) is regulated by ordinary law within CPRs, starting from the validation hearing[713]. Therefore, detention can only take place in cases provided for by law and must be validated by the judicial authority within strict deadlines, which, if not respected, results in the nullity of the detention. As outlined by Borlizzi and Santoro, the right to defence is guaranteed when the assisted person has the opportunity to confer with their lawyer in order to organize the best defence from the validation hearing of the detention onwards[714]. Concerning the right of the detainee to confer with their representative, the Decree states that 'the detention procedures must guarantee, in respect of the regular conduct of communal life, freedom of conversation within the Centre and with visitors from outside, in particular with the lawyer assisting the foreigner' (paragraph 1), and then reiterates the right of access of lawyers (paragraph 7), but without specifying anything regarding the modalities of their appointment, and the transmission of the appointment or revocation to the interested representative[715].

Concerning the validation of the detention decree by the judicial authority within strict deadlines, this is the responsibility of the Justice of Peace[716]. The total deadlines within which validation must take place are 48 hours for the request of validation by the Chief of Police to the judicial authority and an additional 48 hours, from the receipt of the documents, for the actual issuance of the validation by the Judge, by reasoned decree. The validation hearing of the detention takes place 'in closed session with the necessary participation of a timely notified lawyer'[717]. The interested party has the right to participate in the validation and detention hearing free and with the assistance of a lawyer[718]. Even the hearings for the extension of detention, temporally

[712] Corte Costituzionale, March 22, 2001 (April 10, 2000), 105/2001.
[713] Borlizzi, F., & Santoro, G. (2021)
[714] Borlizzi, F., & Santoro, G. (2021)
[715] Decree of the President of the Republic 394/1999 (November 18, 1999) [translated]. The Unified CIE Regulation also does not provide detailed provisions in this regard, limiting itself to providing that the supervisory staff must verify that the foreigner has conferred the mandate. See Ministry of the Interior (October 20, 2014), Article 7.
[716] The total deadlines within which validation must take place are 48 hours for the request of validation by the Questore to the judicial authority and an additional 48 hours from the receipt of the documents for the actual issuance of the validation by the Judge, 'by reasoned decree'. Legislative Decree 286/1998, *Testo unico sull'immigrazione,* Article 14 [translated]. The Justice of the Peace is attributed the competence of validation except for two exceptions in which the ordinary Tribunal is competent. These exceptions concern asylum seekers and those who have pending a judgment concerning the right to family unity or authorization for the entry and/or stay of a minor foreign family member. Borlizzi, F., & Santoro, G. (2021). Justices of the peace (*giudici di pace*) are honorary, not professional, judges, who should hear only minor civil and criminal matters. Therefore, their selection and professional career diverge from the norms set for regular judges. They are not mandated to possess extensive legal training or professional background. At the same time, though, in this case, they deal with highly intricate issues, impacting individual freedoms directly, which would require a solid legal foundation and impartiality towards the administrative bodies responsible for implementing the decisions. See Di Pascale, A. (2020). Can a Justice of the Peace be a good Detention Judge? The case of Italy. In M. Moraru, C. Galina, & P. De Bruycker (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union;* European e-Justice Portal (n.d.), *National justice systems- Italy.*
[717] Legislative Decree 286/1998, *Testo unico sull'immigrazione,* Article 14 [translated].
[718] *Ib.*

predefined, and for review are subject to the same guarantees provided for the validation hearing[719]. In practice, however, review and extension hearings are subject to fewer guarantees and are often adopted without difficulties and without holding a hearing with adversarial proceedings between the parties[720]. In addition to this, with respect to almost all of the aforementioned provisions, differing practices are noted, both regarding the defence interviews between lawyers and detainees within the CPRs and both regarding the modalities of validation and extension hearings.

Regarding defence interviews, as stated by the CPT, the right to access a legal representative includes the right to have confidential discussions with the representative and to have access to legal advice on issues related to residence, detention, and expulsion[721]. This is not always assured within CPRs. In particular, lawyers' access to the facilities is restricted in the CPRs of Rome, Bari, Turin, Gradisca, Milan, Brindisi, San Gervasio, and Macomer[722]. The last two constitute quite problematic cases. In the CPR of Palazzo San Gervasio, lawyers are checked before accessing the facility and must leave their cell phones in special lockers at the guardhouse. It is impossible to have interviews with their clients if a PEC has not been sent at least 24 hours in advance with an express request for an interview indicating the precise time of entry[723]. In the CPR of Macomer, the lawyers of the detainees reported being unable to bring cell phones, pens, paper, or computers inside the centre, and the managing entity did not provide a dedicated room for interviews[724]. These limitations are entirely illegitimate, especially the most recurring one of confiscating lawyers' cell phones since the Unified CIE Regulation only provides thorough control for visitors to the facility[725]. Furthermore, Borlizzi and Santoro denounce a recurring lack of confidentiality in defence interviews in the CPRs of Rome, Brindisi, and Milan[726]. In the latter case, in particular, several associations have reported the constant presence of public security authorities[727]. As for the assistance of interpreters, 90% of lawyers interviewed by CILD stated that this was not present during defence interviews[728]. In particular, in the CPRs of Macomer[729] and Gradisca, the practice

[719] Although the aforementioned Article 14 of the Testo Unico Immigrazione only regulates the guarantees of the validation hearing of detention, this is supplemented by the Return Directive, whose Article 15 provides that 'in the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority'. See Directive 2008/115/EC, Article 15.
[720]Borlizzi, F., & Santoro, G. (2021)
[721] Council of Europe (March, 2017), European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
[722] In Rome, the lawyers of detainees within the CPRs reported having experienced limitations during the COVID-19 pandemic. The lawyers of detainees in the CPR of Turin cannot enter during police operations. In the CPR of Bari, access limitations concerned the presence of unspecified public order problems. In the CPR of Brindisi, lawyers are not allowed to access the centre with their mobile phones. Furthermore, ASGI and Associazione Naga have reported to the national Guarantor that in the CPR of Milan, following some cases of positivity among detainees, access to lawyers had been completely denied, with the risk of a generalized and undue compression of the right to defence. See Borlizzi, F., & Santoro, G. (2021).
[723] *Ib.*
[724] *Ib.*
[725] Ministry of the Interior (October 20, 2014)
[726] Borlizzi, F., & Santoro, G. (2021)
[727] ASGI, Naga, LasciateCIEntrare & Mai più Lager – No ai CPR (2021, January 5). *Violato il diritto di difesa e alla comunicazione nel centro di detenzione per migranti di Milano*. ASGI
[728] Borlizzi, F., & Santoro, G. (2021)
[729] The lawyer of some detainees in the CPR of Macomer told CILD: 'I had the case of a Palestinian boy who spoke only Arabic. Also considering the delicate legal position of the detainee, I asked to be able to have the assistance during defence interviews of an interpreter or to allow me to bring in a mediator from outside but it was denied to me. Consequently, I sent this request to the

of using the support of other detainees in the absence of interpreters is quite systematic[730]. In this regard, the Charter of Rights and Duties of Detainees, provided and attached to the Unified CIE Regulation, about the right to normative information expressly states that the detainee has a right to express in their own language in interviews with their representative, possibly using the linguistic mediation service[731].

Turning to validation and extension hearings, as seen in the section dedicated to the right to health, during such hearings, the judicial authority should verify the existence of a certificate of suitability for detention before validation, as this medical certification is an indispensable condition for the validity of the detention. Despite this, 90% of lawyers interviewed by CILD affirmed that, in the validation and extension file of the judicial authority, the certificate of suitability for their client's detention is not always present[732]. In particular, the absence of said certificate was attested in Rome, Brindisi, Bari, Turin, Trapani, Caltanissetta, Potenza[733], Gradisca d'Isonzo[734], and Macomer[735]. Regarding the location where such hearings occur, 63.6% of the lawyers interviewed by CILD affirmed that they mainly take place on the premises of the CPR, and 36.4% responded that they take place only in the CPR[736]. This is decidedly problematic since, as highlighted by ASGI, the centres are not accessible to the public, prejudicing the publicity of hearings, and are subject to the invasive and armed presence of the State Police, *Carabinieri*, *Guardia di Finanza*, and Army[737]. Another issue worth addressing is the presence of interested non-nationals at the hearing. In this regard, 9.1% of lawyers

Prefecture and the Police Headquarters, without -however- receiving a response. In the end, the operators inside the centre allowed me to have the support of the roommate'. Borlizzi, F., & Santoro, G. (2021), 217 [translated]

[730] In this regard, the European Committee for the Prevention of Torture has highlighted how detained foreigners must be able to use, if necessary, the intervention of qualified interpreters, avoiding using other detainees in the centers as interpreters. Council of Europe (March, 2017).

[731] Ministry of the Interior (October 20, 2014)

[732] Borlizzi, F., & Santoro, G. (2021)

[733] Regarding the CPR of Palazzo San Gervasio, it is important to cite the story of Omar Mohammed, a twenty-four-year-old citizen of Niger who, in October 2019, was detained at the CPR of Palazzo San Gervasio, despite suffering from psychological vulnerability characterized by memory loss and post-traumatic psychological disorders and who, on November 30 of the same year, was repatriated to Nigeria. The campaign LasciateCIEntrare had denounced how the boy's lawyers were not allowed to have a copy of the suitability certificate for detention and that the repatriation to Nigeria was based on a declaration issued by the Nigerian Consulate recognizing him as its citizen. See LasciateCIEntrare (December 10, 2019), *La storia di Omar, nigerino di 24 anni recluso nel CPR di Potenza e rimpatriato in Nigeria*. Lasciatecientrare.

[734] In particular, in the CPR of Gradisca d'Isonzo, it is difficult for lawyers to obtain this certificate of suitability, and the lawyers interviewed were uncertain regarding its presence in the file of the judicial authority. A lawyer from the centre reported that the managing entity holds such certificates and not the police authority (*questura*), and that access requires a request for access to the files, even for trusted clients: 'The latter must issue a consent declaration because it concerns sensitive data, after which a copy of this certificate is issued for the subjects who have been admitted to the CPR. These certificates are not present in the validation or extension file. [...] In fact, I do not have the possibility to verify what is in the file. Because if I request access to the files, I cannot do it physically; I must send a request via PEC, and the documents are sent to me. Usually, I am sent the expulsion decree and the detention decree, I do not know if there are other documents. There probably are but they do not allow me to have a copy.' See Borlizzi, F., & Santoro, G. (2021), 219. [translated]

[735] Borlizzi, F., & Santoro, G. (2021)

[736] *Ib.*

[737] ASGI (2021), Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human. The Black book on the Pre-Removal Detention Centre (CPR) of migrants in Turin – Corso Brunelleschi. The *Consiglio Superiore della Magistratura as well, highlighted that it is necessary to fully implement the principle of 'jurisdictionalization' of the validation phase 'by holding the hearing in the proper premises of the court, which guarantee an exercise of the jurisdictional function that also appears externally impartial and endowed with all the prerogatives that characterize it'. See* Consiglio Superiore della Magistratura, Risposta a quesito del 21 luglio 2010, *Convalida dei provvedimenti di allontanamento dei cittadini comunitari emessi dal Questore ai sensi dell'art. 10 c. 11 e 12 dlvo 30/07 (come modificato dal dlvo 32/08): locali da utilizzare e criteri da adottare per la individuazione di quelle esigenze residuali che giustifichino il ricorso al supporto logistico delle questure per la organizzazione della suddetta udienza*. [translated]

interviewed by CILD declare that they are seldom present, 45.5% that they are not always present, and 45.5% that they are always present[738]. As already stressed, by rule, the same adversarial guarantees provided for validation must be available in extension hearings, consisting mainly of the participation of the representative and the hearing of the interested party. However, the absence of the detainee at the extension hearing is a consolidated practice in the CPRs of Turin and Gradisca[739]. As for the defence activity itself, its conduct encounters several difficulties, resulting in the lawyer of trust not being able to participate in the validation proceedings of the detention measure, often due to a failure to notify the appointed lawyer of the date set for the relevant hearing[740]. This occurs, in particular, in the CPRs of Palazzo San Gervasio, Macomer[741], and Rome[742]. In the CPR of Potenza, in particular, there is a consolidated practice of sending the appointment to the trusted lawyer only after the validation hearing of the detentions[743]. Furthermore, always in the CPR of Palazzo San Gervasio, it has been found that, on each extension, the communication is sent to a lawyer different from the trusted one and that, despite this being underscored by the detainee during the hearing, the judge proceeds with an appointment *ex officio*[744]. The duration of the hearings is mostly attested between five and ten minutes, with only 30% of lawyers interviewed by CILD indicating a duration between ten and twenty minutes[745]. In particular, in Turin, half of the validation hearings and 80% of the extension hearings of the detention conclude in no more than 5 minutes[746]. Finally, 100% of representatives affirm that the motivation for the validation and extension of the detention is not well reasoned, reducing to mere stylistic formulas[747]. The Lexilium research found that in the Turin office, in 60% of the proceedings, the minutes of the hearing do not give any account of any defence activity[748]. The research also notes a 'considerable number' of orders without reasons or in which the examination of facts decisive for the judgment is omitted: 'the hearing record

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738 Note that the Court of Cassation established that if the judge considers that the health reasons of the interested party are so serious as not to allow the petitioner to appear at the hearing, validation of the detention cannot proceed precisely to allow the foreigner to be able to be treated in a suitable place. Borlizzi, F., & Santoro, G. (2021)

739 *Ib.*

740 *Ib.*

741 Here [Macomer], the lawyers are warned with very short notice of the validation or extension hearing of the detention. Indeed, a lawyer from the centre mentions an episode in which she was notified half an hour before the hearing. Borlizzi, F., & Santoro, G. (2021).

742 In Rome, lawyers have stated that a few days before the validation hearing of the extension, a pre-printed form is given to detainees, and if they do not indicate there the name of the trusted lawyer appointed for the previous validation hearing, a new office lawyer is appointed for the subsequent extension. Furthermore, this happens even when a trusted lawyer is expressly mentioned to the centre staff. Borlizzi, F., & Santoro, G. (2021).

743 *Ib.*

744 In this regard, a lawyer from the centre interviewed by Borlizzi and Santoro reports: 'In the first few days, which are also the most important in terms of the right to defence because they are the ones in which the validation hearing takes place, these boys disappear from the radar because they have no possibility of communicating with the outside. They cannot appoint a trusted lawyer because they are prevented from speaking, perhaps with their Sicilian or Roman lawyer, who can direct them to some lawyer on the spot. [...] So basically it happens that the detainees are brought before the Justice of Peace for validation and only after the validation of the detention is magically able to use a mobile phone, which is always that of the managing entity', adding 'not having a trusted lawyer who knows the story of the individual detainee and who also has the possibility to produce a series of defense documents, makes the whole process of validation of the justice of the peace much faster.' See Borlizzi, F., & Santoro, G. (2021), 226-227. [translated]

745 *Ib.*

746 Mastromartino, F., Rigo, E., Veglio, M. (2017), Lexilium. *Osservatorio sulla giurisprudenza in materia di immigrazione del giudice di pace: sintesi Rapporti 2015*, Diritto, Immigrazione e Cittadinanza, No. 2/2017

747 Borlizzi, F., & Santoro, G. (2021)

748 *Ib.*

consists of a pre-printed form with reasons already inserted, to which in 50% of the cases the judge adds a simple style formula, without adding arguments in response to the reasons opposed by the defence'[749].

d. Deaths, self-harm and revolts

CPRs are often the scene of critical events such as episodes of self-harm, fights, fires, riots, damage, consumed or attempted suicides, hunger strikes, and deaths[750]. Concerning such events, the National Guarantor made recommendations to centralize and standardize the system of registration of these events and of the consequent behaviours in such a way as to allow an assessment of the regularity of the detention, to prevent arbitrariness and to examine individually each subject involved, and the overall number and type of such episodes in different periods[751]. Despite the recommendations, to date the centres still lack a uniform system for recording critical events that can be considered reliable, effective, and complete. Borlizzi and Santoro report how the register of the Caltanissetta-Pian del Lago CPR prepared by the managing body consists of a series of loose sheets where hunger strikes, protests, injuries, and hospital admissions are indicated monthly, but without details and helpful information to understand the events and the people they refer to[752]. In Milan, as pointed out by Senator De Falco and recently confirmed by Naga, there is no register of critical events[753].

As far as deaths are concerned, Ousmane Sylla, a 22-year-old Guinean who committed suicide in the Rome CPR on 4 February, already mentioned in the introduction of the thesis, is only the latest of about 40, according to the *No Ai CPR* network, of migrants who have committed suicide inside a centre since 1998[754]. According to Borlizzi and Santoro, only between 2019 and 2021, six foreign nationals lost their lives while serving an administrative detention measure[755]. The causes and circumstances of the specific events dieffre, but what they often have in common is the lack of clarity about what happened. The National Guarantor points out that it is difficult not to consider such a series of unfortunate events as at least a symptom of 'seriously and physiologically problematic detention realities that are not always able to protect and safeguard the safety and life of persons in custody'[756]. In this regard, it is necessary to refer to the criticalities outlined in the section dedicated to health care in the CPRs, which determine the severe violations of the detainees' right to health and increase the risk of critical events. One thinks, in particular, of the inadequate certificates of suitability at

[749] Mastromartino, F., Rigo, E., Veglio, M. (2017), 4 [translated]. The same research has highlighted the very high percentage of validations and extensions in the three Justice of the Peace offices analysed: in Bari, validations stood at 86% and extensions at 71%; in Rome, validations stood at 76% and extensions at 68%; also in Turin, validations reached 98% and extensions 97%.
[750] Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018, 2021a, 2021b, 2021c); Borlizzi, F., & Santoro, G. (2021); De Falco, G. (2021); Accardo, Y., Mazzuzi, F., Vitale, G., & Bottazzo, R., *Dietro le mura. Abusi, violenze e diritti negati nei Cpr d'Italia*, LasciateCIEntrare; ASGI (2021), *Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human. The Black book on the Pre-Removal Detention Centre (CPR) of migrants in Turin – Corso Brunelleschi.* Torino.
[751] This system should be updated daily at the local and central level and remotely accessible on a national basis by the managing bodies and the guarantee bodies, in order to have rapid knowledge of the most relevant episodes affecting the life of the facility. Garante nazionale dei diritti delle persone detenute o private della libertà personale (2018)
[752] Borlizzi, F., & Santoro, G. (2021)
[753] De Falco, G. (2021); Naga (February 12, 2024), *Accesso al Cpr di Milano il giorno dopo le proteste e i pestaggi,* Naga.
[754] Santi, S. (February 6, 2024), *C'è un grave allarme suicidi nelle carceri italiane e nei Cpr,* Lifegate.
[755] Borlizzi, F., & Santoro, G. (2021)
[756] Garante Nazionale dei diritti delle persone private della libertà personale (2021b), 3.

the entrance of the CPR, the lack of observation rooms, the illegitimate practices of isolation, the absence of psychiatric assistance, and the abuse in the administration of psychopharmaceuticals and anxiolytics. Although many are the stories of deaths that can be traced back to this problematics, two cases in particular are emblematic of this dynamic.

Harry, a 20-year-old Nigerian youth, died on 2 June 2019 in the CPR of Brindisi-Restinco[757]. He had arrived in Italy at just over 18 years old in the summer of 2017, after crossing the desert and being imprisoned in Libya. Displaced in the province of Bolzano, he had shown signs of strong vulnerability that led him to undergo specialist visits and constant drug therapy at the Mental Health Centre of Bolzano, which had also reported previous episodes of self-harm and suicide attempts, highlighting Harry's incompatibility with the restrictions of the CPR. Various organisations had also reported his extreme vulnerability, but despite this, he was considered suitable for detention in the Brindisi CPR after losing his residence permit. Despite numerous requests, Harry never met with a psychiatrist during his two-month detention. He was subjected to a drug therapy whose nature and origin of the prescription is unknown. He committed suicide by hanging himself after a period of alternating moments of apathy, catatonic states, strong aggression, and depression.

Orgest Turia, a 28-year-old Albanian, died on 14 July 2020 in the CPR of Gradisca D'Isonzo, a few days after his entry[758]. On that date, Orgest had stolen a bicycle left unattended and was subsequently arrested for resisting the police, reaching a plea for a suspended sentence. However, shortly after his release, he was immediately transferred to the CPR because his documents had expired, to be placed with five other detainees in a solitary confinement cell, where he was found dead four days later. The autopsy revealed that the cause of Orgest's death was a methadone overdose. His defence lawyer raised questions as to how the young man could have obtained this substance, especially in quantity sufficient to cause his death[759].

Episodes of self-harm are also commonplace in CPRs, as are suicide attempts[760]. The National Guarantor has specifically pointed out, as seen above, the total lack of protocols or risk prevention interventions despite the numerous episodes of self-harm occurring in the centres[761]. As stressed by Borlizzi and Santoro, although they have different motivations (abuse of psychopharmaceutical drugs in the absence of psychiatric personnel, protest against detention conditions, or repatriation), these gestures are, in all cases, severe manifestations of discomfort and suffering. Here again, a few of many illustrative cases are selected[762].

[757] This is a summary of the story, which is reported in greater detail by Borlizzi and Santoro and by the campaign *LasciateCIEentrare.* See Borlizzi, F., & Santoro, G. (2021); LasciateCIEntrare (June 3, 2019), *Morire di "malaccoglienza". La storia di Harry. Arrivato come invisibile, morto da invisibile.* Lasciatecientrare.
[758] This is a summary of the story, which is reported in greater detail by Borlizzi, F., & Santoro, G. (2021).
[759] In this regard, the National Guarantor has repeatedly declared the incompatibility with restricted life of subjects undergoing treatment requiring precisely methadone. See Garante Nazionale dei diritti delle persone private della libertà personale (2021b).
[760] Garante Nazionale dei diritti delle persone private della libertà personale (2021b).
[761] *Ib.*
[762] Borlizzi, F., & Santoro, G. (2021).

The first case concerns A.O. and occurred in the Milan CPR[763]. During his visit to the CPR of Via Corelli in Milan, Senator De Falco saw A.O. in a courtyard performing acts of self-harm by cutting himself on his arms and torso. A group of officers in riot gear headed in his direction but then turned back at the signal of a superior officer. Senator De Falco met and spoke to A.O. in front of the access to the infirmary. Mr. A.O. was bare-chested, with long and numerous bleeding cuts covering the entire abdomen and both arms. There were also suture marks on his lips. He repeated that he wanted to leave the centre, threatening suicide, also reporting that the acts of self-harm that day were not the first he had inflicted on himself since his arrival, and the list of drugs he was taking to sleep but which, given the massive dosage, had now made him dependent[764]. Another case, reported by ASGI, concerns E.M., a Egyptian asylum seeker of 21 years old detained in the CPR of Turin[765]. After the validation hearing, E.M. repeatedly committed acts of self-harm, injuring his arms, legs, and chest, swallowing stylus batteries and razor blades. Five times in eleven days, he was taken to the hospital for self-harming acts. Medicated and stitched up, each time, he was discharged and punctually sent back to the CPR, in solitary confinement. Following an altercation involving five police officers, E.M. was arrested. While the judge overseeing the initial inquiry approved E.M.'s arrest, they opted against pre-trial detention due to concerns about his vulnerable state and specific psychological distress. It is also worth mentioning the numerous cases of non-suicidal self-harm in the CPR of Bari, where it is often complex, if not impossible, to carry out the transfer to the emergency room due to the small number of staff at the centre and the impossibility of ensuring surveillance[766].

The section closes by discussing the use of force in riot situations. As attested by the National Guarantor, between June 2019 and July 2020, protests, rebellions, and damage to facilities occurred relentlessly in the CPRs, often in protest against the inhuman and degrading conditions[767]. In July 2019, tensions occurred in the Turin CPR following the death of Hossain Faisal, a Bengali citizen who died on 8 July 2019: small fires were set, and tension also broke out outside the facility[768]. Always in the Turin CPR, at the end of November of the same year, a group of detainees set fire to eight housing units[769]. The same people had called a hunger strike to protest against the facility's conditions, food, length of stay, and health care[770]. The most recent case concerns the CPR in Macomer. Here, on the night of 17 February 2024, as reported by the NO Ai CPR network, several critical issues that had been present for months (including the malfunctioning of the heating, the

[763] The case here summarized is reported in detain by Senator DeFalco and Borlizzi and Santoro. See Borlizzi, F., & Santoro, G. (2021); De Falco, G. (2021).
[764] On 13 June 2021, Senator De Falco then sent a letter of formal notice to the managing body, the Prefecture and the ATS, and for information to the National Guarantor and the Mayor of Milan with details of A.O.'s condition, asking them to proceed immediately with a new assessment of his suitability for detention. On the same day that the notice was sent, A.O. was released from the centre. Borlizzi and Santoro note that the drugs prescribed to A.O. (Rivotril, Lyrica, Quietiapine) are those generally administered to detainees and whose possible side effects include suicidal effects. Such drugs would require close and constant monitoring of the patient, which does not take place in the CPR. See De Falco, G. (2021); Borlizzi, F., & Santoro, G. (2021).
[765] The case, here summarized, is reported in detail by ASGI (2021).
[766] Garante Nazionale dei diritti delle persone private della libertà personale (2021b).
[767] *Ib.*
[768] Rocci, C. (July 8, 2019), *Un migrante muore al Cpr di Torino, scattano le proteste.* La Repubblica.
[769] Borlizzi, F., & Santoro, G. (2021).
[770] *Ib.*

absence of chairs, the canteen having been unfit for use for some time, and the staff's violence towards a Somali boy then placed in solitary confinement) led to a protest by detainees and the burning down of a housing sector[771].

5. Conclusion

This case study underscores the numerous criticalities regarding the protection of migrants' rights within the Italian system of immigration detention pending removal. Regarding the protection of the right to health, it resulted clear how the crucial problem is the very decision to entrust healthcare provision to the managing bodies of the CPRs. This aspect had been underscored already in 2007 by the Parliamentary Commission De Mistura, which recommended entrusting only the ASLs with the provision of health services in the then CPTAs[772]. In 2012, the association of the doctors operating within the centres made the same recommendation to eliminate what they defined a situation of 'extraterritoriality' within the NHS[773]. The following year, the National Committee of Bioethics defined the provision for healthcare within CPRs elementary, recommending once again that the NHS take charge for healthcare services in the centres[774]. As outlined by Ruotolo when, in 2008, competence for the administration of healthcare within prison passed from the Ministry of Justice to the NHS, this reform was prompted by a fear that allowing the prison administration control over health services could result in the manipulation of medical care within prisons to advance particular interpretations of the purpose of imprisonment, 'risking bending medical and pharmacological intervention to the needs of the discipline and security of the institution.'[775] Given the criticalities observed in the section on healthcare, such fear becomes incredibly realistic when applied to the system of administrative detention of foreigners.

The concerns regarding the right to normative information seem, instead, to be more of a normative nature. A first element is undoubtedly the severe reduction of the number of hours dedicated to the service. Already before this, though, too much leeway is left to the managing bodies due to the absence of a primary source of legislation regulating the contents of the Charter of the Rights and Duties of Detainees and of the internal regulations of the CPRs, their dissemination, and translation. The practices observed in the dedicated section resulting from these elements can determine severe violations of the rights of detainees, such as, crucially, the lack of proper communication on the possibility of detainees to apply for international protection.

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[771] NO ai CPR [@noaicpr] (February 17, 2024), *Proteste a Macomer, incendiato un settore.* Other cases that occurred towards the end of the writing of this thesis concern the CPR in via Corelli in Milan. See Naga (February 12, 2024), *Accesso al Cpr di Milano il giorno dopo le proteste e i pestaggi,* Naga; Dazzi, Z. (February 17, 2024), *"Migrante picchiato al Cpr di via Corelli e sulla pista dell'aeroporto": dopo la denuncia del Naga arriva l'ispezione del Pd regionale.* La Repubblica.

[772] Ministry of the Interior (February 1, 2007), *Rapporto della Commissione per le verifiche e le strategie dei Centri di Permanenza Temporanea per immigrati.*

[773] Medici per i Diritti Umani (MEDU) (2012), *Le sbarre più alte: apporto di Medici per i Diritti Umani sul centro d'identificazione ed espulsione di Ponte Galeria.* MEDU.

[774] Presidenza del Consiglio – Comitato Nazionale per la Bioetica (2013*), La salute 'dietro le mura'*.

[775] *Ruotolo, M. (2012). Salute e carcere. In Chieffi L. (ed.), Bioetica pratica e cause di esclusione sociale, Mimesis Edizioni, 55-65, [tranlsated]*

The important criticalities reported in relation to the right of defence regard the possibility to conduct defence interviews and the modalities through which validation and extension hearings are conducted. On the former, the dedicated section underlined numerous shortcomings within CPRs, among which an excessive discretionary power left to the administration of the centre to impose limits on the access of lawyers, the modalities and the time accorded for communications between the detainees and their lawyer, and the modalities and timing in which lawyers are notified about validation and extension hearings. On the latter, the Legislative Decree 286/1998 establishes that, in the hearings of validation or extension of the detention, the Justice of Peace must consider compliance with the deadlines for validation, whether the requisites provided for in Article 13 for issuing an expulsion order are present, and whether the requirements provided for in Article 14 for ordering administrative detention are presents or continue to be present[776]. In particular, the Constitutional Court stressed that the validating judge has a duty to conduct a comprehensive judicial review, exceeding a mere examination of form, of the expulsion order, which serves is an indispensable condition for the restrictive measure[777]. In light of this, the practices observed in the validation and extension hearings of detention reveal an incorrect exercise of the complex judicial oversight to which the Justice of Peace is called, in particular the extremely short duration of such hearings, the frequent lack of interpreters, and, most crucially, the employment of standardized (sometimes even pre-printed) reasonings in the decisions.

This case study also underscored the limited impact that administrative detention has on the efficacy of the repatriation system. Specifically, the data show how, independent of the applied detention terms, the ratio between deportations following administrative detention and the number of detained individuals remains around 50%. Conversely, the observable trends indicate that deportations from Italy are decreasing in number, while becoming increasingly coercive in nature. The human cost determined by this inefficiency becomes evident when the focus turns on the constant 50% of individuals who spend months in detention without being subsequently repatriated. On this point, the National Guarantor observes: ‘the question remains open as to the significance of the time taken for the remaining part, even considering that in many cases, these are individuals from countries with which no bilateral agreements have been established, and the outcome of the period spent in detention is a removal order that, remaining ineffective due to non-compliance by the individual, opens the door to subsequent returns to other centres and, therefore, to further detention time’[778]. With regards to the data on the employment of alternatives by judicial authorities, the Head of the Deprivation of Liberty and Migrants Unit of the National Guarantor commented: 'The system appears to be entirely misaligned from the principle of residual application of detention clearly expressed by the law and by all the soft law standards that prescribe the use of the most afflictive coercive measure as an *extrema ratio*. In this regard, the National Guarantor has on several occasions referred to the principle of proportionality, which must always guide the

[776] Legislative Decree 286/1998, *Testo unico sull'immigrazione.*
[777] Corte Costituzionale, March 22, 2001 (April 10, 2000), 105/2001.
[778] Garante Nazionale dei diritti delle persone private della libertà personale (2021d), *18.* [translated]

decisions of public authorities on the application of coercive measures, even more so in the context of deprivation of liberty of an administrative nature. In fact, the execution of the ablative measure with accompaniment to the frontier and possible restriction of the personal liberty of the addressee is an option that, as a general rule, the public security authority should exercise on an exceptional basis, and the possibility of adopting alternative measures should always be considered, as also highlighted by the supranational control bodies'[779].

Nonetheless, all political configurations that have governed Italy since 2017 have treated administrative detention as a fundamental aspect of an effective return policy, without questioning the effectiveness of the coercive measure and its adherence to the principle of proportionality. In fact, no comprehensive analysis has ever been conducted on the costs and benefits of resorting to measures depriving individuals of personal liberty within the framework of migration policies[780]. It is no coincidence that the only parliamentary commission ever created with the specific purpose of investigating detention in CPRs (then CPTA) was the De Mistura Commission, dating back to 2007. The Commission, after a detailed enquiry into the centres active in 2007, had concluded that it was necessary to proceed with their progressive emptying and dismantling, in order to eventually overcome such form of deprivation of liberty[781].

Ultimately, it is clear how administrative detention does not fulfil its objective. Despite this, Italian lawmakers continue to intervene on administrative detention, most frequently on detention terms, notwithstanding the fact that the available data make clear how such investments do not affect the effectiveness of the return policy. Indeed, the system continues to expand, with the increasing introduction of forms of immigration detention, from hotspots, to quarantine ships, to the vague provision of suitable premises[782]. All of this, neglecting considerations regarding the human and social cost of such policies, which would delineate a system that is unnecessarily and unproportionately burdensome. On the one hand, over the past twenty years, available data have consistently demonstrated that the administrative detention of migrants is not even functional in achieving the goal which, according to the law, should justify its explicit rationale (which is for itself difficult to share), namely making the deportation of detainees easier. On the other the measure becomes excessively costly not only from an economic[783], but most crucially from a human perspective, given the critical violations of human rights resulting, as shown, from the attribution of competence over this type of detention to the Justices of Peace, a deficient regulatory framework primarily contained in secondary sources,

[779] Massimiliano Bagaglini as cited in Mazzuzi, F. (2022). [translated]
[780] Campesi, G. (2023).
[781] Ministry of the Interior (February 1, 2007), *Rapporto della Commissione per le verifiche e le strategie dei Centri di Permanenza Temporanea per immigrati.*
[782] Borlizzi, F., & Santoro, G. (2021).
[783] An investigation of the economic cost of the administrative detention system exceeds the scope of this thesis. According to CILD, the cost of the management of CPRs between 2018 and 2021 was of 44 million euros, excluding VAT and the costs for the cleaning and maintenance of the facilities. Ikonomu, M., Leone, A., Manda S., Borlizzi, F., Costa, E., & Obasuyi, O., (2023); and Campesi, G. (2023)

and, finally, the crucial decision to entrust private entities with the management of the facilities and the care of detainees, which dilutes responsibility and prevents standardization towards services of higher quality.

Conclusion

As outlined in the thesis introduction, the focus was on determining the root cause of the severe consequences experienced by migrants subjected to administrative detention in Europe. In particular, the question addressed is whether the issue stems from the single states' implementation of administrative detention pending removal or from insufficient standards of human rights protection at the supranational level. For this reason, the thesis investigated the narrative surrounding immigration in Europe, the protection of migrants in administrative detention afforded at the EU level, and the protection afforded at the ECHR level to conclude with a case study on the system of administrative detention in Italy.

The first chapter contextualised the measure of immigration detention pending removal within the broader tendencies that characterise the current European approach to migration. In this perspective, administrative detention is the natural outcome of the narrative adopted towards migrants in the last fifty years, following the logic of *crimmigration*, securitization, and massification. The second chapter analysed EU norms on administrative detention and the jurisprudence of the CJEU. Such analysis drew attention to the critical role played by judicial dialogue between the CJEU and domestic courts in safeguarding the human rights of migrants, illustrating how such a cooperative framework proved instrumental in extending the protection of migrants' rights accorded by a deficient norm, which was not designed to prioritize migrants' rights. The third chapter carried out a similar analysis of the ECHR provisions relevant to immigration detention and the pertinent ECtHR jurisprudence. It revealed how the Court reviews immigration detention pending removal, employing exclusively the principle of legality while neglecting a clear review of the proportionality and necessity of detention, undermining in practice the protection afforded to migrant detainees. The rejection of a necessity requirement for immigration detention and the absence of individual circumstance considerations result in a test of arbitrariness only requiring that a nexus between the measure and its objective exist, without evaluating whether such a nexus is substantial enough to justify a deprivation of liberty. The chapter also stressed the inappropriateness of such a test in light of the general approach adopted by the Court regarding other instances of non-penal detention, the principle of proportionality embedded in the Convention, and the interpretations of the prohibition of arbitrary detention offered by other human rights bodies. Finally, in chapter four, the case study on Italy underlined how the legislator neglected considerations of proportionality and necessity by ignoring the clear violations occurring within the CPRs and the data on the inefficiency of the measure. This results in a system that is currently expanding, which poses an unnecessary and disproportional burden on the lives of migrants. Note that the observations made regarding the data about the ratio between detained and effectively repatriated migrants in Italy can easily be extended to other European countries. The ratio remains below 50%, for example, in France, Greece, Spain, and the UK[784].

[784] In France, in 2014, 2015, and 2016, the rate was below 50%; in 2017, it was 40.4%; in 2018, 40.5%. In the UK, in 2019, only 30% of the persons detained were actually repatriated. For Spain, in 2019, the rate was precisely 50%. Between 2014 and 2017, it

This thesis aims to understand whether the human rights consequences suffered by those living in administrative detention were determined at the domestic or supranational levels. Given the results outlined above, both hypotheses can be considered correct.

The analysis of the Italian case has undoubtedly highlighted how the problem lies both in a flawed and ineffective norm and in the divergent practices that occur within individual CPRs. However, it is indisputable that such a significant number of divergent practices within CPRs is precisely due to the fragmented nature of national norms and to the decision to entrust the protection of detainees' rights to unfit authorities, referring certainly to the managing bodies but also to the Justices of Peace, part of the Italian honorary judiciary.

We have seen how the activism of judges at the national level demanding dialogue with the CJEU on the validity of laws, as is currently happening with the Cutro Decree, can somehow limit the most illiberal implications of such regulations. At the same time, however, the fact that the CJEU has been able to use European legislation to guarantee greater rights to detainees awaiting removal does not erase the fact that the same EU legislation is defective in the protection of the human rights of migrants. Such a conclusion refers not only to the unnecessarily excessive limit of 18 months of detention but also to the fact that a measure is allowed, which, from all points of view, is unnecessary and disproportionate. We have seen how, in the years between the enactment of the Return Directive and today, on the one hand, significant violations of detainees' rights have been documented in Italy and other European states, and, on the other hand, the absolute ineffectiveness of this measure has been demonstrated, precisely by the data on detainees repatriated. Therefore, the EU legislator errs in the same way as the Italian legislator, namely by continuing to treat the coercive element as a necessary part of an efficient repatriation policy, ignoring both the disproportionate human cost and the unsuitability of the measure for the objective to be achieved. European legislation on migration adopts, as shown at the end of the second chapter, a securitarian and emergency logic that depends on and is fuelled by the dynamics highlighted in the first chapter. This approach determines a lack of protection for migrants regarding the application of administrative detention. Judicial activism and cooperation between the CJEU and national courts can remedy this only to a limited extent.

Regarding the body primarily responsible for human rights protection in Europe, the ECtHR, the adoption of an approach that places the power of states to control their borders above migrant protection appears not only, as we have seen, inadequate and unjustified but also in complete contradiction with the Court's own function. As explained, the Court should ensure a fair balance between any human rights

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was consistently below 50%; in 2017, it even reached 37.28%. In 2018, the rate grew to 58.8%, but this was due to police targeting especially irregulars from Algeria and Morocco. Finally, the Greek rate was attested between 2008 and 2013, at 24.5%. In 2014, during the economic crisis, forced returns were ceased due to their excessive cost. Also, in subsequent years, forced returns continued to decrease, paralleled nevertheless by an increase in the number of people detained. See Borlizzi, F., & Santoro, G. (2021); Falsone, L. (2020). The Effectiveness of Administrative Detention of Migrants in Relation to Return Rates: A Compared Analysis along States of EU South Frontier: Italy, France, Greece and Spain as Cases Study. *Global Jurist*, *21*(1), 143-164.

restriction and its objective. The fact that, only for the detention of migrants, the test used by the Court to verify the legitimacy of a deprivation of liberty is exclusively the likelihood that repatriation can be carried out finds no justification in any instrument except, in a completely circular manner, in the Court's own case law. In this regard, the reasoning put forward by Spalding is exceptionally relevant. Exporting Bosniak's conclusions on the approach of US courts to irregular immigrants to the European context, Spalding observes how the identity of migrants as human beings is being denied, not so much at a formal level since the Court continues to assert that the human rights protected by the Convention are universal and not accorded based on citizenship, but at a practical level, in its case law where the Court's approach means that migrants' human rights are 'diminished in its effect, evaded, effaced, diluted, displaced.'[785]

In conclusion, the marginalization of migrants' human rights within the European protection system, which, as seen, occurs in different ways at the EU, ECHR, and individual state levels, creates an unequal law condoning a structural state of exception. This state of exception is justified by the emergency and securitarian logic adopted by national and European lawmakers regarding migration and, at the same time, escapes, by the ECtHR's own will, a more thorough examination. The scrutiny of a court specialized in human rights should highlight the triviality of the function (not) performed by administrative detention in the face of the extraordinariness of subjecting migrants to detention without a crime having been committed, which results in often long-lasting deprivation of one's liberty without the attribution of guarantees and principles (habeas corpus, due process, legality, reasonableness, proportionality) that in criminal matters provide protection against the arbitrariness of detention.

[785] Spalding, A. (2022). See Chapter 2 ‘Moving Beyond Criminalisation: A Two-Tier System’, Section I ‘A Two-Tier System’.

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
APD	Asylum Procedures Directive (2005)
ASL	*Azienda Ospedaliera Locale* (local health authority)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CIE	*Centri di Identificazione e Espulsione* (centre for identification and expulsion)
CJEU	Court of Justice of the European Union
CPR	*Centro Per il Rimpatrio* (centre for repatriation)
CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment
CPTA	*Centri di Permanenza Temporanea ed Assistenza* (temporary stay and assistance centres)
Dublin II	Dublin II Regulation (2003)
Dublin III	Dublin III Regulation (2013)
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
HRCttee	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NHS	National Health Service
RCD	Reception Conditions Directive (2003)
RD	Return Directive
Recast APD	Asylum Procedures Directive – recast (2013)
Recast RCD	Reception Conditions Directive – recast (2013)
TFEU	Treaty on the Functioning of the European Union
Tuimm	*Testo Unico sull'Immigrazione* (Single text on immigration)
Tulps	*Testo Unico delle Leggi di Pubblica Sicurezza* (Unified text of public security laws)
UN	United Nations
UNCMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UNHCR	High Commissioner for Refugees of the United Nations

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