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**DH-DD(2024)483**

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Meeting: 1501<sup>st</sup> meeting (June 2024) (DH)

Communication from an NGO (L'Altro Diritto ODV) (17/04/2024) concerning the group of cases J.A. and Others v. Italy (Application No. 21329/18).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1501<sup>e</sup> réunion (juin 2024) (DH)

Communication d'une ONG (L'Altro Diritto ODV) (17/04/2024) relative au groupe d'affaires J.A. et autres c. Italie (requête n° 21329/18) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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17 April 2024

COMMUNICATION OF L'**ALTRO DIRITTO ODV**, RESEARCH CENTRE ON PRISON, DEVIANCE, MARGINALITY AND THE MANAGEMENT OF MIGRATION (ADIR), PURSUANT TO RULE 9(2) OF THE RULES OF THE COMMITTEE OF MINISTERS FOR THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF THE TERMS OF FRIENDLY SETTLEMENTS WITH REGARD TO THE EXECUTION OF THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN **J.A. AND OTHERS VS. ITALY, No. 21329/18**.

Please find enclosed a communication made by L'Altro diritto ODV, pursuant to Rule 9(2) of the Rules for the supervision of the execution of judgments and of the terms of friendly settlements in respect of the execution of the above-mentioned judgment.

Should the Committee of Ministers have any queries regarding the enclosed communication, please do not hesitate to contact us.

Florence, 17/04/2024

Sofia Ciuffoletti,  
President of L'Altro diritto ODV



## ***Introduction.***

This communication aims to illustrate the normative framework concerning identification, first accommodation and cases of detention within the Italian reception system for asylum seekers. The 'Hotspot System' will be considered according to past and recent changes in legislation by focusing on practices of asylum seekers' illegal detention.

L'Altro diritto ODV is a Research Centre established in 1996 within the Department of Theory and History of Law of Florence University. It is an NGO actively engaged in theoretical reflection and sociological research in the fields of social marginality, deviance, prison, detention institutions, migration, exploitation and trafficking in human beings. Its mission is to produce and share knowledge with scholars, experts and key stakeholders and to support people in situation of marginality and vulnerability – especially migrants and detainees – in accessing fundamental rights through *pro bono* legal assistance. The main activities of l'Altro Diritto involve: research projects on the issues of prisoners' rights, the rights of asylum seekers and refugees, monitoring detention centres' conditions, labour migration, exploitation, trafficking in human beings, access to social rights by vulnerable people; advocacy on topics related to penitentiary law, migration policies, exploitation, trafficking in human beings; management of a second level legal counseling service for all the institutions dealing with migrants and ethnical minorities.

### ***1. The Hotspot System. 'Nothing has changed'.***

The execution of the *J.A. and Others vs. Italy* judgment concerns the legitimacy of the explicitly detention-related part of the complex Italian reception system for asylum seekers. This system, referred to in the literature<sup>1</sup> as 'humanitarian confinement', consists of a set of practices aimed at preventing the physical dispersion of asylum applicants with a view to their repatriation. The proceeding is particularly significant because it enforces a decision filed on 30 March 2023, a year and a few months after the execution of the *Grand Chamber's ruling*

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<sup>1</sup> Campesi, G. (2017). "Chiedere asilo in tempo di crisi. Accoglienza, confinamento e detenzione ai margini d'Europa" [Seeking asylum in times of crisis. Reception, confinement and detention at the margins of Europe], in C. Marchetti, B. Pinelli (eds.), *Confini d'Europa. Modelli di controllo e inclusioni informali* [Borders of Europe. Models of control and informal inclusions], Cortina, 1-24.



in the *Khlaifia and Others v. Italy* case, which had highlighted the illegitimacy of the detention part of this system under Article 5 of the Convention. On 2 December 2021, the Committee of Ministers of the Council of Europe (under Art. 46 ECHR) declared the procedure for monitoring the enforcement of the judgment closed, after having considered for about five years, most recently in March 2021, that it had to keep the monitoring open because of the **persistent inadequacy of the Italian hotspot system, due to the persistent practice of not informing migrants about the reasons for their detention and the procedures for lodging a judicial appeal against it**<sup>2</sup>.

Closing the execution, the Committee considered that, thanks to the legislative measures taken (all of which however, as we shall see, were adopted before March 2021 when it still considered the Italian system to be unsatisfactory), the legal framework provided a clear legal basis for administrative detention: it required the authorities to inform the persons concerned of their rights<sup>3</sup> and of the reasons for their detention and, finally, it provided for automatic judicial review of the lawfulness of any detention decision. Furthermore, given that in this particular case, the applicants had obtained compensation, the Committee considered the preventive and compensatory civil remedies under Article 700 c.p.c. [code of civil procedure]<sup>4</sup> and Article 2043 c.c. [civil code] guaranteed the possibility of bringing before the courts the living conditions during detention and obtaining appropriate compensation if they constituted a violation of Article 3 of the Convention, i.e. an inhuman or degrading treatment.

As mentioned above, with the judgment *J.A. and Others v. Italy*, filed on 30 March 2023, the Court affirmed again that the Italian system of detention of asylum seekers is contrary to Article 5 §§ 1, 2 and 4, and again challenged the *modus operandi* of the Italian authorities in

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<sup>2</sup> Cancellaro, F. (2020). “Dagli hotspot ai “porti chiusi”: quali rimedi per la libertà “sequestrata” alla frontiera?” [From hotspots to 'closed ports': what remedies for freedom 'seized' at the border?]. *Diritto penale contemporaneo. Rivista trimestrale*, f. 3, 428-443. Asgi *Trattenimento in hotspot: c'era un giudice a Strasburgo. Nota di approfondimento*, in *asgi.it*. Asgi; Massimi, A., Ferri, F. (2019). “L'attualità del caso *Khlaifia*. Gli hotspot alla luce della legge 132/2018: la politica della detenzione extralegale continua” [The relevance of the *Khlaifia* case. Hotspots in the light of Law 132/2018: the politics of extralegal detention continue]. *Questione giustizia (online)*, 12 June 2019.

<sup>3</sup> To evaluate the existing legal framework to ensure that detained asylum applicants would be provided with information on their rights and of the reasons for their detention, the Committee was probably prompted by the last sentence added by the “Lamorgese reform” (d.l. 21 October 2020, no. 130, conv. with amendments in l. 18 December 2020, no. 173) to paragraph 3 of art. 10 *ter* T.U.I. according to which: “The foreigner shall be promptly informed of the rights and faculties arising from the validation procedure of the detention decree in a language he or she knows, or, where this is not possible, in French, English or Spanish”.

<sup>4</sup> On the inadequacy of this remedy, in law and in terms of effectiveness, to guarantee the automatic judicial review of the limitation of liberty provided for by Article 13 of the Constitution, we refer to our Third Part Intervention in *J.A. and Others v. Italy*.



the Lampedusa centre. It should be noted that, despite the apparent contrast between this decision and the closure of the *Khlaifia procedure*, the Italian Government did not request that the case be referred to the Grand Chamber. This assessment may have been influenced by the circumstance that the Court considered facts that took place in October 2017, at a time when there had been only a first partial change in the legal framework compared to that in force when the facts at issue in the *Khlaifia case* occurred. However, as we pointed out in our Third-Party Intervention, and as we will try to argue in this memorandum, **even with the subsequent legislative innovations introduced before the ruling, "nothing had changed" at the time of the Court's consideration of the dispute.**

We are convinced that the contradictory assessment of the Italian system of asylum seekers' detention is due to the fact that it is paradoxically marked by a strong and clear unified intention and by a fragmented, chaotic and jagged regulatory framework, characterised by formal regulatory vacuums and substantive regulatory gaps, created by extremely general, confusing and sometimes contradictory provisions. The problem stems from the fact that the political intention seems to be difficult to translate into regulatory provisions capable of coming to terms with fundamental rights and international and EU rules on asylum, so that the regulatory framework has not been conceived, in the Enlightenment style, as a unified legislative project, but has been constructed through provisions that have attempted to 'patch up' the illegitimacies identified, without compromising the political design.

## **2. Analysis of the national normative framework.**

The detention of asylum seekers was first introduced in 2002 by Law 189 ('Bossi-Fini'), with the aim of deterring 'false' asylum seekers who, lawmakers hoped, would not take the path of international protection to enter the country knowing that they would have to spend their time in Italy in 'detention' and then be deported. This strategy has never been abandoned, even though the facts have proved the fallacy of this belief, both because 'detention' in Italy is certainly not a deterrent for many asylum seekers, and because the system of systematic expulsions and, consequently, of detention pending their execution, preventing them from settling "as free" in the national territory, is impossible to operate. These two elements are so well known that they have led the European Union lawmakers to abandon the path of forced



repatriation and, with the Returns Directive (2008/115/EC), to adopt a policy of encouraging the voluntary return of irregular migrants.

**'Humanitarian confinement' has been progressively articulated through various provisions placed in separate but interlinked legislative texts (Articles 10 and 13, Legislative Decree No. 142 of 18 August 2015, 23-bis, Legislative Decree No. 25 of 28 January 2008) and has 'leaned' on the need to comply with the 2015 European Migration Agenda, which articulated the hotspot method.** These provisions draw a discipline of international protection that tends to bind the permanence of asylum seekers within centres intended to host them until the conclusion of the procedure initiated by their application, subordinating not only the granting of material reception conditions, but also the examination of the application for protection to the actual residence (and permanence) of the foreigner there.

According to the system designed, both in the Regional Hubs and in the Emergency Reception Centres (*centri di accoglienza straordinaria*, CAS), the asylum seeker has the right to leave during the day but cannot leave for more than twenty-four hours without the Prefect's authorisation (Article 10, Legislative Decree no. 142/2015). In case of unjustified departure from the first reception centre or emergency reception centre before the applicants' individual interview with the territorial commission, Art. 13, Legislative Decree no. 142/2015 provides for the withdrawal of reception measures. Furthermore, according to Article 23-bis of Legislative Decree No. 25 of 28 January 2008 (introduced in 2015), in the case of unjustified departure, the examination of the asylum application can be suspended. The disincentive to leave the reception centre has been reinforced by Art. 3 paragraph 2 of Law No. 173 of 18 December 2020, which amended Art. 5-bis of Legislative Decree No. 18 August 2015, no. 142, and introduced the cancellation of residence with immediate effect if the person in charge of the reception facility (centres referred to in Articles 9 and 11 of the same Legislative Decree 142/2015 and other facilities of the reception and integration system), notifies the unjustified departure of the asylum seeker.

To reinforce the confinement mechanism, a complex and obscure detention-on-arrival mechanism for asylum seekers, linked to the so-called "crisis points" formalised for the first time by Article 6 of Legislative Decree 142/2015 was grafted onto this framework as a matter of practice. This detention mechanism was first enshrined in law by the "Minniti Decree" in 2017, then the legislative framework was articulated and corrected by the "Salvini Decree" in



2018, the "Lamorgese Decree" in 2020 and most recently, in March 2023, by the "Cutro Decree": the fact that they are all four emergency measures makes it plastic that the current legislative framework was produced by successive corrections.

The emblem of the practical functioning of the system was (and still is) the First Aid and Support Centre (CPSA) in Lampedusa: a formally open centre dedicated to migrants' first aid, but for many years managed as if it were a closed centre. In the "Monitoring report on migrants' forced-return operations" (December 2017-June 2018)<sup>5</sup>, the National Guarantor of persons deprived of their liberty, an "independent authority" which, as the Italian government recalls in its reply to the NGOs in the *Khlaifia case*<sup>6</sup>, was entrusted with the monitoring of the hotspots, had pointed out that the widespread practice of not allowing people to leave the facilities was contrary to the TUI [Legislative decree no. 286/1998, Consolidated Text on Immigration and provisions on the legal condition of foreigners], as well as to the principle enshrined in Article 13 of the Italian Constitution. Already at the beginning of 2017, the National Guarantor described the structure as follows: "The Lampedusa hotspot is located in the premises of the former Identification and Expulsion Centre (Cie), in an isolated place, far from the town. It therefore has all the characteristics of a Cie, with bars, gates, metal nets. The general environment is shabby and unkempt. The only common areas are concrete shelters with benches, also made of cement, where newly arrived migrants wait to be identified and photographed. This happens in every season, rain or shine<sup>7</sup>. The same 2017 report also mentions what the Prefect said about the reason why migrants were not allowed to leave the hotspot premises: 'The island lives on tourism and their presence could create problems. However,' he added, 'if they want to, they can get out through a hole in the net'<sup>8</sup>. The Guarantor therefore concluded that **the Lampedusa hotspot should be considered to all intents**

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<sup>5</sup> *Parere del garante nazionale dei diritti delle persone detenute o private della libertà personale sul decreto-legge 4 ottobre 2018 n. 113 [Opinion of the National Guarantor of the Rights of Persons Detained or Deprived of their Liberty on Decree-Law No 113 of 4 October 2018]*, in *garantenazionaleprivatiliberta.it*, 15 October 2018.

<sup>6</sup> Communication from Italy concerning the case *Khlaifia and Others v. Italy*, 15 Cot. 2021: ([https://hudoc.exec.coe.int/eng#%7B%22execidentifier%22:%5B%22DH-DD\(2021\)1062E%22%7D%7D](https://hudoc.exec.coe.int/eng#%7B%22execidentifier%22:%5B%22DH-DD(2021)1062E%22%7D%7D))

<sup>7</sup> Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia (2016/2017: primo anno di attività) [Report on Visits to Identification and Expulsion Centres and Hotspots in Italy], 1 January 2017, par. 8.1.2, available at the following link: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6f1e672a7da965c06482090d4dc44f9c.pdf>

<sup>8</sup> See above, Rapporto sulle visite, 1 January 2017, para. 8.1.4.



**and purposes as a closed facility, which in fact did not allow the detainees to leave freely, in a totally unjustified and illegitimate manner.**

As is well known, the 'Lampedusa model' came under the scrutiny of the European Court of Human Rights, with the Grand Chamber's ruling in the *Khlaifia and Others v. Italy* case in December 2016. In its decision, the Court recalled (104) that "even the report of the Senate's Special Commission 'noted that stays at the Lampedusa centre', which in principle should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his or her presence in Italy, sometimes extended to over twenty days 'without there being any formal decision as to the legal status of the person being held'". The Court therefore found that the *modus operandi* of the Italian reception system was in breach of Article 5 ECHR. In particular: for the lack of a legal basis; for the absence of adequate information on the reasons for detention and for the impossibility of challenging the lawfulness of the measure of deprivation of liberty before a judge; and also because the applicants could not enjoy the guarantees of *habeas corpus* applicable to detention, since then judicial review was only provided for when detention in the CIE was used to ensure the effective removal of the migrant.

Since 2017-2018, under the impetus of the *Khlaifia* judgment, the Italian domestic legal system has attempted to provide itself, at least on paper, with a body of rules designed to regulate detention upon arrival (in compliance with Art. 13 Const. and Art. 5 ECHR). However, this intention has been thwarted by the fact that the system of the status of accommodation centres for asylum seekers and of the judicial guarantees has been made so complex that the practice of considering detention as the ordinary method of dealing with asylum seekers on arrival has been left essentially undisturbed.

The first indication of a legal regulation of the "detention" of asylum seekers occurred, as mentioned, the year after the *Khlaifia* judgment with the 2017 "Minniti reform" (law 46/2017), whose Art. 17 para. 1 introduced Art. 10-ter in the TUI. However, this provision is very ambiguous in that it groups and then distinguishes two types of foreigners arriving at the borders and mentions two types of centres, a situation which, as all commentators had



immediately pointed out<sup>9</sup>, has by no means made it possible to overcome the defect in the legal basis of most of the *de facto* "detentions" denounced by the Court.

In fact, Article 10-ter, in its first paragraph, identifies the "crisis points" (the hotspots) through a normative reference to types of centres - those mentioned by the "Apulia Law" of 1995 and the regional hubs referred to in Legislative Decree no. 142 of 2015 (the so-called "Reception Decree") - which, as mentioned above, are configured by the aforementioned provisions as formally open (and therefore not as places of detention). The same first paragraph provides that foreigners "traced on the occasion of the irregular crossing of the internal or external border or arrived in the national territory as a result of rescue operations at sea" are to be placed in these centres. The provision, therefore, stipulates that migrants who arrive in Italy, regardless of their qualification as asylum seekers or job seekers, will be taken to hotspots, i.e. open centres. However, the last sentence of the first paragraph implicitly distinguishes asylum seekers from all migrants to be taken to 'crisis points'. In fact, it reads: 'At the same crisis points, fingerprinting and forensic identification procedures shall also be carried out, *also* for the purposes of Articles 9 and 14 of EU Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013'. Thus, apparently, by virtue of that 'also' which we have emphasised, at 'crisis points' all foreigners must be subject to 'fingerprinting and forensic identification procedures' but asylum seekers must be subject to the specific detection procedures provided for by the aforementioned EU regulation known as EURODAC.

The picture drawn by the first paragraph seems to be contradicted by the second paragraph of the same article which, again implicitly by referring to the EURODAC regulation, seems to provide that in crisis centres identification procedures should be carried out only for asylum seekers. In fact, the second paragraph states: 'Fingerprinting and forensic identification procedures shall also be carried out in respect of foreigners found to be irregularly present in

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<sup>9</sup> Cf. Cassibba, F. (2017). "Il 'trattenimento' del migrante irregolare nei «punti di crisi» ex art. 10-ter d.lgs n. 286 del 1998 nel prisma della convenzione europea" [The "detention" of irregular migrant in the "crisis points" ex art. 10-ter d.lgs n. 286 of 1998 in the prism of the European Convention]. *Questione giustizia (online)*, 24 July 2017; Scomparin, L. (2017). "Domande inevase, occasioni mancate e singolari novità procedurali: Governo e Parlamento alla ricerca dell'efficienza nella gestione dei flussi migratori e dei procedimenti per il riconoscimento della protezione internazionale" [Unanswered questions, missed opportunities and singular procedural novelties: Government and Parliament in search of efficiency in the management of migration flows and procedures for the recognition of international protection]. *La legislazione penale*, 17 July 2017, 1-12.



the national territory, in order to fulfil the obligations set out in Articles 9 and 14 of the EU Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013<sup>10</sup>.

The issue is relevant for the purpose of determining who can be subjected to the detention regulated by the third paragraph of the article. It is important to stress that this paragraph, as we pointed out in our third-party intervention, allows the detention only of foreigners who have "repeatedly refused" to submit to identification procedures. It is the first sentence of the paragraph that defines, again indirectly, when detention is lawful: "The repeated refusal of a foreigner to submit to the checks referred to in paragraphs 1 and 2 constitutes a risk of flight for the purposes of detention in the centres referred to in Article 14". The sentence implies a twofold argument. The first equates detention on entry, on arrival, with detention on exit, during the expulsion phase regulated by Article 14 of the TUI, which, according to the aforementioned "Returns Directive", is possible *only* in case of risk of flight. The second establishes an absolute legislative presumption whereby "the repeated refusal of a foreigner to submit to identification" "constitutes a risk of flight". If one emphasises the recalled "also" of the second sentence of the first paragraph, both "job seekers" and international protection seekers can be detained, if one emphasises the second paragraph of the article only the latter. It seems necessary to adopt the broad interpretation of migrants subject to detention (in fact, contrary to the principle of the predominance of the restrictive interpretation of the provisions on the limitation of personal liberty), since the third paragraph goes on to specify that the detention of asylum seekers will be validated by the Specialised Immigration Sections of the courts, while that of irregular migrants will be validated by the competent Justice of the Peace.

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<sup>10</sup> Article 9 *Collection, transmission and comparison of fingerprints*: 1. Each Member State shall promptly take the fingerprints of all fingers of every applicant for international protection of at least 14 years of age and shall, as soon as possible and no later than 72 hours after the lodging of his or her application for international protection, as defined by Article 20(2) of Regulation (EU) No 604/2013, transmit them together with the data referred to in Article 11(b) to (g) of this Regulation to the Central System. Non-compliance with the 72-hour time-limit shall not relieve Member States of the obligation to take and transmit the fingerprints to the Central System. Where the condition of the fingertips does not allow the taking of the fingerprints of a quality ensuring appropriate comparison under Article 25, the Member State of origin shall retake the fingerprints of the applicant and resend them as soon as possible and no later than 48 hours after they have been successfully retaken.

Art. 14 *Collection and transmission of fingerprint data*: 1. Each Member State shall promptly take the fingerprints of all fingers of every third-country national or stateless person of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back or who remains physically on the territory of the Member States and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn him or her back.



As mentioned above, the same third paragraph provides for detention in a type of facility other than crisis points: those provided for by Article 14 of the TUI, which, as the heading of the same article – "Execution of expulsion" – makes clear, are designed for the detention of foreigners who are the recipients of a deferred expulsion or expulsion order. These centres have been renamed "Return Preparation Centres" (CPR) by the same "Minniti reform" of 2017; they used to be called "Identification and Expulsion Centres" (CIE) and even earlier (denomination of the "Security Package" of 2008, law 24 July 2008, no. 125), "Temporary Residence and Assistance Centres" (CPTA).

On the one hand, this legal framework creates confusion by equating what we can call 'incoming' detention with 'outgoing' detention; on the other hand, it gives a clear signal. Let us start with the clear signal: both the asylum-seeking foreigner and the job seeker who 'repeatedly' refuse to be identified are treated as foreigners to be forcibly deported. There are different preconditions for the judge to assess. In the case of "outgoing" detention, the assessment is whether there is evidence that the expulsion must be carried out by means of escort (rather than an invitation to leave voluntarily) and that less coercive measures than detention are not sufficient for its execution. In the case of "incoming" detention, the fact that the foreigner has "repeatedly refused" identification is sufficient.

**The unification of the place and procedures of incoming and outgoing detention contributes significantly to the ambiguity of the regulatory framework outlined in Article 10-ter of the Legislative Decree no. 286 of 25 July 1998.** It should not be forgotten that the general category of foreigners outlined in its first paragraph is made up of those who have been detected "on the occasion of the irregular crossing of the internal or external border or arrived in the national territory as a result of rescue operations", i.e. foreigners who, if they do not apply for international protection, are detained in the same centres in order to be forcibly removed because they have entered the national territory irregularly. However, **those who express the will to apply for asylum are in a different situation, by virtue of the Geneva Convention and European Union normative framework: they cannot and must not be considered as migrants who have entered the national territory irregularly.** Their 'irregular' entry is somehow considered to be instrumental to the exercise of the fundamental right to protect one's life and to escape torture and inhuman and degrading treatment. Recital 15 of the recast Reception Conditions Directive states that "the detention of applicants should be applied in accordance



with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. Where an applicant is held in detention, he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority".

**Behind the ambiguity of Art. 10-ter TUI hides the fact that its provisions leave the practice of detention at hotspots, or "crisis points" whatever they may be called, completely uncovered.** Reading the second paragraph of Art. 28-bis of Legislative Decree no. 25 of 2008 ("Procedures Decree") introduced in 2020 by Law Decree no. 130 (converted into Law 173/2020, the "Lamorgese Decree"), it seems that even the legislator has fallen victim to the ambiguity of the constructed legal framework. In identifying the asylum seekers eligible for the accelerated procedure, the aforementioned provision actually cites as the first case that of the "applicant for whom detention has been ordered in the facilities referred to in Article 10-ter of the Legislative Decree no. 286 of 25 July 1998, or in the centres referred to in Article 14 of the Legislative Decree no. 286 of 25 July 1998". This text seems to suggest that Article 10-ter provides for a detention other than that carried out "in the centres referred to in Article 14 of Legislative Decree no. 286 of 25 July 1998", whereas its third paragraph, the only one that provides for detention, as we have seen, states that the same detention must be carried out "in the centres referred to in Article 14 of Legislative Decree no. 286 of 25 July 1998". Thus, in the same centres as the asylum seekers who, having applied for international protection while already in a CPR and awaiting the execution of a rejection or expulsion order, as provided for by Art. 6 paragraph 3 of Legislative Decree no. 142 of 2015 ("Reception Decree"), must remain "in the centre when there are reasonable grounds to believe that the application [for protection] has been submitted for the sole purpose of delaying or preventing the execution of rejection or expulsion"<sup>11</sup>. Reading the wording of the second paragraph of Art. 28-bis of Legislative Decree no. 25 of 2008 in the light of the

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<sup>11</sup> In this case, the duration of detention is twelve months. This considerably downsizes the importance of the shortening of the maximum duration of outgoing detention (of Art. 14 T.U.I.) to ninety days operated by the "Lamorgese reform" (d.l. no. 130 of 2020, conv. with amendments by l. no. 173 of 2020).



distinction between "facilities referred to in Art. 10-ter" and "centres referred to in Art. 14 of Legislative Decree no. 286 of 25 July 1998", one is led to think that, according to the 2020 legislator, foreigners brought to the crisis points under the first paragraph of art. 10-ter can be detained there.

As mentioned above, Article 10-ter, that establishes the "crisis centres", configures them, through regulatory references, as centres from which it is possible to leave and does not authorise, let alone regulate, "detention" within them. This issue was addressed at the end of 2018 by the so-called "Salvini Decree" (Decree-Law no. 113 of 4 October 2018, converted with amendments by Law no. 132 of 1 December 2018). The decree, intended to increase the use of "detention", did not intervene on Article 10-ter but on Article 6 of Legislative Decree no. 142 of 2015, by introducing paragraph 3-bis. In this way, the law creates a third hypothesis of detention on arrival and a new place where it can be carried out, at least temporarily, namely the "crisis centres". To the outgoing detention in the CPR provided for by Art. 14 TUI, and to the incoming detention (for a maximum of thirty days) provided for by Art. 10-ter par. 3 TUI in the event that the international protection seeker repeatedly refuses to submit to fingerprinting, a new type of detention is added, that of asylum seekers in a crisis centre. As stated in paragraph 3 bis of Art. 6 of Legislative Decree no. 142 of 2015, this new type of detention can be ordered for the purpose of "determining or verifying their identity or nationality" and must be carried out for the first thirty days inside the hotspots, and then possibly extended, inside the CPR, for a maximum period of ninety days (extendable for another thirty days if the foreigner is a citizen of a country with which Italy has signed repatriation agreements)<sup>12</sup>. Given that we are dealing with a hypothesis of administrative detention that risks making the restriction of personal liberty derive from the mere fact that the migrant does not have his documents with him (a situation easily encountered by people forced to flee their country), we have emphasised the *disjunction* 'or' between identity and nationality because it underlines that the treatment of the asylum seeker is not justified when, although the identity of the person cannot be established, his nationality can be. This subtlety would require detention orders to carefully examine the basis for detention in order to verify its legitimacy. However, years after the insertion of paragraph 3-bis into Article 6 of the

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<sup>12</sup> Doubts about the tightness of the new rules with the superordinate principles were pointed out in the mentioned *Parere del garante nazionale dei diritti delle persone detenute o private della libertà personale sul decreto-legge 4 ottobre 2018 n. 113*, in *garantenazionaleprivatiliberta.it*, 15 October 2018, pp. 5 and 8.



'Reception Decree', neither the legal clinics connected to the Inter-University Centre L'altro diritto, of which the NGO drafting this memorandum is the operational arm, nor the literature on the subject<sup>13</sup> have become aware of detention orders for identification purposes issued against asylum seekers. It also appears emblematic that in the last communication (in the execution of *Khlaifia*) between the Committee and the Italian Government, the latter, while insisting on the suitability of its legal apparatus, limited itself to presenting a case of use of art. 700 c.p.c., contained in a judgment of the Court of Milan which, however, concerned a foreigner detained in a CPR, whereas **no judicial decision concerning hotspot detention orders was reported.**

It should also be pointed out that, once again, the legal basis for detention, i.e. the lack of certain identification of the person or his/her nationality, is similar to that provided as an indicator of the risk of evading repatriation (lack of a passport or equivalent document) for foreigners who must be removed from the territory because they do not have a residence permit, and thus as a justification for their detention and forced removal. It should be added that, on entry, this reason for detention, unlike that provided for in Article 10-ter, is only foreseen for asylum seekers, not for irregular migrants. The legitimacy of this provision therefore appears even more doubtful than that of Art. 10-ter, since, contrary to the international and EU legal framework on international protection, it not only equates international protection seekers with irregular migrants, thus nullifying the limits on the detention of the former but extends the grounds for their detention. Indeed, according to Article 14 of the TUI, irregular migrants can only be detained for the purpose of their removal, i.e. only after a removal decision has been made, whereas asylum seekers can be detained pending the assessment of their application for protection.

### **3. From 'Nothing has changed' to 'Even worse'.**

It is in the light of this framework, here reconstructed with a level of details that the limits of the third-party intervention did not allow, that we argued in November 2020, before

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<sup>13</sup> Fachile, S., Massimi, A., Leo, L. (2019). Le nuove procedure accelerate: lo svilimento del diritto di asilo. [The new accelerated procedures: the debasement of the right to asylum], *Questione giustizia (online)*, 3 November 2019. Felici, G., Gancitano, M. (2022). La detenzione dei migranti negli *hotspots* italiani: novità normative e persistenti violazioni della libertà personale. [The detention of migrants in Italian *hotspots*: regulatory novelties and persistent violations of personal freedom], *Sistema penale*, f. 1, 45-71.



the 'Lamorgese reform' that entered into force the following month, that **despite the new legal provisions, "nothing has changed" with respect to the lack of legality of the detention of asylum seekers upon disembarkation condemned in *Khlaifia***. Even today, no legislative provision regulates the detention to which rescued asylum seekers are always subjected upon disembarkation, even those who do not resist identification and whose 'identity *or* nationality' should not be difficult to establish (and in any case, if it were, the difficulty could not be attributed to them and thus justify detention).

The provision for rescued migrants being located in the 'crisis centres' (both for public assistance and for identification purposes) continues to be accompanied, as the constant media reports on the situation in the (open) Lampedusa centre show, by a *de facto* detention for days and sometimes weeks, even of unaccompanied minors. This is aimed at preventing the dispersal of foreigners on the territory and has no legal basis, however vague and uncertain.

The 'banality' of detention on arrival is enshrined in the Standard Operating Procedures (SOPs) developed by the Ministry of the Interior in 2016, according to which 'the person may leave the hotspot only after having been photographed in accordance with the regulations in force'. The Ministry introduces the SOPs with the warning that 'In the event of discrepancies between this document [the SOPs, ed.] and the legislation in force, the latter shall apply'. Since no current legislation allows detention for the purpose of identification, no foreigner could be detained in a hotspot for this purpose. In fact, it is not possible to justify detention for identification on the basis of Article *10-ter* of the TUI, either because, according to the third paragraph of the aforementioned provision, detention could not take place in a "crisis centre" but only in a CPR, or because detention is not allowed "pending the identification procedure" but only in the case of repeated refusal to submit to it. Nor is it plausible to argue that failure to be photographed impairs the establishment of identity *or* nationality and is therefore covered by paragraph *3-bis* of Art. 6 of Legislative Decree 142/2015.

In conclusion, in addition to being (or perhaps because they are) cumbersome, difficult to read and seemingly aimed more at enabling detention than strictly regulating it, the rules resulting from the combined provisions of Articles *10-ter* of the TUI and Article 6 of Legislative Decree no. 142 of 2015 leave a huge gap in the regulation of the deprivation of personal liberty.



Today, we have to say that the situation has worsened: not only has the gap in the legal coverage and provision for judicial review of detention in 'crisis centres' not been filled, but the so-called 'Cutro Decree' has further weakened the binding and effective nature of the legal provisions regulating the restriction of asylum seekers' personal freedom.

**Decree-Law no. 20 of 10 March 2023**, converted with amendments by Law no. 50 of 5 May 2023, is the last act of the strategy aimed at creating a *continuum* of detention of asylum seekers through three phases: detention on arrival (in a hotspot or a CPR), detention, in as many cases as possible, of the asylum seeker during the processing of the application (both of these detentions are contrary to the Geneva Convention and the EU regulatory framework), and executive exit detention aimed at deportation following the rejection of the asylum application.

In particular, the latest amendment modifies point (d) of the second paragraph of Art. 6 and adds Arts. 6-*bis* and 6-*ter* to Legislative Decree 142 of 2015. The amendment of letter d) of Art. 6, second paragraph, has increased confusion about the limits within which administrative detention is permitted. Although it does not really affect the scope of the rule, the repetition of provisions with different wording gives the impression that detention has no limits.

First of all, it should be noted that even this provision does not legitimise detention in 'crisis centres', since it requires that it to be carried out in the CPRs.

The provision stipulates that detention is legitimate whenever it is "necessary to establish the elements on which the application for international protection is based, which could not be obtained without detention, and there is a risk of absconding", adding that the risk of absconding must be assessed "case by case" based on the indices of art. 14, paragraph 4-*bis*, TUI. Once again, reference is made to the indices foreseen for detention "on exit" aimed at removal under escort, from which only the case of unavailability of a private accommodation is excluded. Thus, the indices of this flight risk are the following "not possessing a valid passport or other equivalent document"; "having previously made false statements or attested false personal data"; "not having complied" with a removal order or a re-entry ban; or, finally, having violated a precautionary measure established during voluntary removal. It is clear that most of these indicators are often not useful when it comes to asylum seekers; in particular, the last two can only be applied in the case of an applicant who has been previously removed from the national territory, and, as the provision states, must be assessed with caution on a



case-by-case basis, since the violations they imply can be traced back to the need for protection. The second indicator seems to add a very limited casuistry with respect to the detention for the purpose of verifying identity *or* nationality, which is already provided for in paragraph 3-bis of the same Article 6: perhaps it can be considered a special provision compared to those already existing, which establishes that the migrant can be detained if he/she has provided false general information, even if his/her identity *or* nationality has been established. However, the first indicator seems worrying and again at risk of becoming another circumvention of the principle of the exceptionality of asylum seekers' detention. We have already pointed out that the possibility of detention for a specific purpose, provided for in paragraph 3-bis, could slip into the provision for detention of persons without a passport, similar to what is provided for persons who have to be removed from the country under escort. The new amendment to Article 6 explicitly provides for this condition as a ground for detention. The illegitimacy of this provision seems obvious when one considers that a person fleeing persecution, a threat to his or her survival and the possibility of torture, who often cannot or will not seek the protection of his or her own country out of fear (to quote the Geneva Convention on Refugees), is so likely not to have or be able to obtain a passport that it is almost the only case in which he or she can be granted a residence permit (for protection) even in the absence of a passport.

Furthermore, the 2023 reform also introduced two entirely new provisions: Arts. 6-bis and 6-ter of Legislative Decree 142/2015, both equally intended to broaden the operational scope of the administrative detention of asylum seekers. Article 6-ter regulates the detention of asylum seekers subjected to the "Dublin procedure" by describing the hypotheses of "significant risk of absconding" that are suitable to determine the entry into a closed centre of the migrant awaiting transfer to another EU country. Once again, the list of indicators appears more than dubious, given that we are talking about asylum seekers. The indicators enumerated are in fact: lack of a travel document (on which it is pleonastic to repeat oneself); lack of a reliable address (which, in relation to an asylum seeker, almost makes one smile, so much so that by introducing letter d) in paragraph 2 of art. 6 the legislator had removed the reference to the availability of accommodation from the indicators of flight risk); lack of financial resources (which the EU *Reception* Directive sees as a reason to require states to guarantee the applicant with what it defines as "material reception conditions"); and finally, failure to



report to the competent authorities, which can be seen as a necessary precondition for the activation of the Dublin procedure.

More worrisome is given by Art. 6 *bis*, which introduces what we can define as a fourth case of detention, in addition to the detention for removal from the country and to those provided for by art. 10-*ter* TUI and by art. 6 paragraph 3-*bis*, which can be carried out in the context of the "border procedure" provided for by art. 28-*bis* of Legislative Decree no. 25 of 2008. This hypothesis of specific detention can last up to thirty days, a period that ideally corresponds to the exhaustion of the individual steps required by the "border procedure" to reach a final decision on the asylum application. The provision is worded in a way consistent with the intention to extend the use of detention to - at least - all migrants coming from a 'safe country' who apply for international protection in transit areas or at the border. This form of detention can be ordered "for the sole purpose of ascertaining the right to enter the territory of the State", i.e. to determine whether the application for international protection entitles the person concerned to *non-refoulement*, for aliens who have evaded or attempted to evade border controls and for those who come from a safe country. Detention may also be ordered "if the applicant has not surrendered a valid passport or equivalent document", a provision whose manifest illegitimacy we shall not dwell on again, or if "*he does not provide an appropriate financial guarantee*". This last provision is in clear contrast with the provision of the *Reception Directive* which presumes by default unless proven otherwise, that asylum seekers are destitute and obliges states to guarantee them material reception conditions, and which is currently being examined by the ECJ in the context of a request for a preliminary ruling on its applicability.

Finally, the amendment introduced in Article 10-*ter* TUI paragraph 1-*bis*, according to which: "In order to carry out the tasks provided for in this article in the best possible way, foreigners accommodated in the crisis centres referred to in paragraph 1 may be transferred to similar facilities in the national territory in order to carry out the activities referred to in the same paragraph. To ensure the coordinated implementation of the fulfilments of their respective competencies, the identification of the facilities referred to in this paragraph for border procedures with detention and their capacity shall be carried out in agreement with the Ministry of Justice". This provision, like the one introduced in 2020, seems to take legitimate detention in crisis centres for granted, or at least to create the confusion that makes it possible.



In the first place, it is very difficult to define the "fulfilments" to which the provision refers; in fact, the first sentence of the first paragraph of Article *10-ter* provides that migrants are to be taken "for the needs of rescue and first aid at specific locations"; the second sentence of the same first paragraph provides, as already mentioned, that asylum seekers are to be identified in the crisis centres; finally, the third paragraph provides for the detention of those who have repeatedly refused to be identified. The general wording of the new paragraph *1-bis* ("carrying out the fulfilments provided for in this article") does not allow for a distinction between the three fulfilments provided for in the article, and yet it prescribes that to facilitate their implementation, persons arriving at the crisis centres may be transferred "to similar facilities in the national territory". A new problem arises here: the limits of the analogy. They do not seem to be very narrow, because the next sentence seems to identify similar facilities those 'intended for border procedures *with detention*'. This provision seems to favour not only the practice and the idea that crisis centres are detention centres like the CPRs, but also, far beyond the identification of crisis centres by legislative reference in the first paragraph of Art. *10-ter*, the proliferation of confinement and detention centres (the imaginary border facilities) beyond the respect of the statutory reserve. It obviously takes advantage of the introduction, through the aforementioned Art. *6-bis* added by the same Cutro Decree to the Legislative Decree 142/15, of a new case of "detention" of asylum seekers, "for the sole purpose of ascertaining the right to enter the territory of the State", when the application is presented at the border or in transit zones by a foreigner who has been apprehended for having evaded or attempted to evade controls or who comes from a designated safe country of origin. By providing for this new form of detention, the new paragraph *1-bis* of art. *10-ter* TUI configures the existence of "facilities [...] intended for border procedures *with detention*", although art. *6-bis*, paragraph 4, does not provide for the creation of new facilities, but rather that the detention of asylum seekers at the border must take place "in special premises of the facilities referred to in article *10-ter*, paragraph 1, of Legislative Decree no. 286 of 25 July 1998", i.e. in the crisis centres, "or, in the case of mass arrivals, in the centres referred to in article 14 of the same Legislative Decree no. 286 of 25 July 1998, located near the border or in the transit zone", i.e. in the CPRs.

In conclusion, even the recent regulatory amendments intended to broaden the operational scope of administrative detention for asylum seekers do not legitimise restrictions to personal freedom to be carried out in places different from repatriation centres for more



than thirty days (only for specific reasons) and, in any case, not without the substantial and procedural guarantees of *habeas corpus* applicable to all detention situations.

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