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Meeting: 1324th meeting (September 2018) (DH)

Communication from an NGO (project In Limine) of 16/07/2018 in the case of Khlaifia and Others v. Italy (Application No. 16483/12)

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Réunion : 1324^e réunion (septembre 2018) (DH)

Communication d'une ONG (project In Limine) du 16/07/2018 dans l'affaire Khlaifia et autres c. Italie (Requête n° 16483/12) (**anglais uniquement**)

Informations mises à disposition en vertu de la Règle 9.1 et Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Observations by the *In Limine* Project on the current functioning of the Hotspot reception centre in Lampedusa in light of the ECtHR ruling in the case of *Khlaifia and Others v. Italy*

On 15 December 2016 the Grand Chamber of the ECtHR handed down its ruling in the case of *Khlaifia and Others v. Italy*, finding Italy in breach of Articles 5§1, 5§2 and 5§4 ECHR as well as Article 13 in relation to Article 3. Specifically, the Court found:

- that the applicants' detention had no clear and accessible legal basis, making it impossible for the authorities to notify them of the legal reasons for this deprivation of liberty, and that the Italian legal system had not offered the applicants the possibility of obtaining a judicial review of the legality of their detention (violations of Article 5 §§ 1, 2 and 4);
- lack of a remedy to complain about the conditions of reception (violation of Article 13 taken together with Article 3).

On 6 September 2017, the authorities submitted an action plan to the Committee of Ministers, followed by a revised version on 11 January 2018, concerning measures adopted or envisaged to prevent similar abuse. The Italian Government stated that legislative measures (Decree law No. 13/2017, converted into law (No. 46/2017) adopted on 13 April 2017 and Law No. 103 of 23 June 2017) were adopted in 2017 to speed up the procedure for examining applications for international protection and to facilitate access to judicial review of decisions taken in this context and that these reforms would shorten the detention period of migrants in pre-identification procedure. Moreover, the authorities affirmed that Law No. 103/2017 would facilitate access to judicial control. Lastly, the Government claimed that the creation of the institution of the national Guarantor for the rights of persons detained or deprived of their liberty (National Preventive Mechanism, NPM) gave migrants who had been deprived of their liberty the possibility of submitting complaints concerning reception conditions, representing an effective remedy for the violation of article 3.

The Committee of Ministers considered that the information provided by the authorities did not address the main issues raised by the judgment, and gave the Italian Government until the end of June 2018 to:

- provide details on the legislative framework governing the operation of "first aid and assistance centres", the average length of stay of persons placed in such centres before and after their identification and the practice followed regarding the freedom of movement of these applicants after their identification;
- indicate what measures have been adopted or envisaged to ensure that persons placed in such centres are not arbitrarily deprived of their liberty;
- clarify the powers of the national Guarantor to redress the individual situation of complainants and to provide, where appropriate, examples of measures adopted for this purpose.

The *In Limine* Project submits the following observations on the current functioning of the Hotspot centre in Lampedusa, highlighting the ongoing human rights' violations, which have similar characteristics to those identified by the Court with the *Khlaifia and Others v. Italy* decision.

A) The legislative framework governing the Hotspot centres and procedures and the detention of migrants before and after identification.

The introduction of hotspots in Italy



The Hotspot centres have been introduced in Italy by the Roadmap on migration. The Roadmap is a policy paper – which does not have the force of law – published by the Interior Ministry following the Council Decision (EU) 2015/1523 of 22 September 2015 “establishing provisional measures in the area of international protection for the benefit of Italy and Greece”. Article 8 of the Decision required Italy and Greece to “present a roadmap to the Commission which shall include adequate measures in the area of asylum, first reception and return, enhancing the capacity, quality and efficiency of their systems in these areas, as well as measures to ensure appropriate implementation of this Decision.”¹ The Council Decision was adopted on the basis of the European Agenda on Migration of May 2015 to “tackle the challenges related to increasing migration flows in the short, medium and long term”². It is in this context that the hotspot approach was developed, to support the States that were facing greater migration flows in identification and selection of irregular migrants arriving on their territory. The Italian Roadmap defines how to implement the hotspot approach to manage the incessant flows of third nationals reaching Italian shores. Basically the plan identifies five ports to channel arrivals and carry out disembarkation and identification procedures (health screening, pre-identification, registration, fingerprinting). In September 2015 the first four hotspots were identified: Pozzallo, Porto Empedocle, Trapani and Lampedusa. Later two more hotspots were opened in Taranto and Messina. The Roadmap defines the hotspots as “closed centres”.

It is important to underline that the hotspot approach was not introduced through new legal provisions, and was supposed to be integrated into the current legislative framework. Nevertheless, the approach has produced profound changes in migration management that have led to dangerous restrictions on migrants’ rights without a legal basis. Several investigations that accompanied the creation of the hotspot approach raised the issue of the lack of a legal basis for the opening and functioning of the hotspot centres, especially with regard to the detention of migrants³.

In February 2017 the hotspot centres were given partial legal endorsement by Decree law No. 13/2017, which states that third-country nationals who are found illegally crossing the borders or arriving as a result of SAR operations at sea shall be transferred to hotspot centres for first aid and assistance and for fingerprinting and identification procedures in accordance with the requirements of articles 9 and 14 of Regulation (EU) No. 603/2013. In the hotspot centres third-country nationals shall also receive information about international protection, the relocation process and the assisted voluntary return and reintegration programme.⁴

¹Council Decision (EU) 2015/1523 of 22 September 2015 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D1523&from=EN>

²Italian Roadmap on Migration, <http://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf>

³For further details see http://www.meltingpot.org/IMG/pdf/relazione_minoranza_hotspot_palazzotto_2_.pdf; Amnesty international: https://d21zrvtkxtd6ae.cloudfront.net/public/uploads/2016/11/18155810/Report_Hotspot_Italia.pdf; Oxfam: https://www.oxfamitalia.org/wp-content/uploads/2016/05/Rapporto_Hotspots_Il-diritto-negato_Oxfam_19mag16.pdf ; ASGI: http://www.asgi.it/wp-content/uploads/2016/01/2016_asilo_puglia_11.pdf

⁴ Decree law No. 13 of 17 February 2017, converted into Law No. 46/2017, introduced article 10^{ter} of legislative decree No. 286/98, the so-called Consolidated text on migration.

In the hotspot centres two kinds of procedures are carried out: on the one hand, those designed to assist, help and accommodate asylum seekers; on the other, police operations aimed at identifying and repatriating “economic migrants”. This mixing of humanitarian and police procedures creates an unclear situation that can affect the migrants’ understanding of procedures and can lead to the restriction of their rights as a result.⁵

As highlighted by the Commission for Human Rights of the Italian Senate at the end of 2017, “The legal status of the Hotspot centres is still to be defined: are they first reception centres or identification and return centres (CPR), considering that the latter are the only places where irregular migrants can be detained – and only following judicial endorsement?”⁶

The detention of foreign nationals

It is essential to stress that foreign nationals can be detained only in specific situations expressly provided for by law and that they cannot be detained for the sole purpose of identification or fingerprinting. Detention may take place only in centres conceived for the purposes of repatriation (*Centri di permanenza per il rimpatrio* CPR) – “designated by interior ministry decree in conjunction with the ministry of economic affairs”⁷ – with respect to a foreign national who has already received a repatriation order (article 14 of Legislative decree No. 286/1998), or to an asylum seeker under the circumstances set out in article 6 of Legislative decree No. 142/2015⁸. Decree law No. 13/2017 introduced detention in the event that a foreign

⁵For more details see the report of the National Guarantor (NPM)

<http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/bbb00eb9f2e4ded380c05b72a2985184.pdf>

⁶ Report of the Commission for Human Rights of the Italian Senate, December 2017.

http://www.asylumineurope.org/sites/default/files/resources/rapporto_cie_cpr.pdf

⁷ Article 14 of Legislative decree No. 286/98: “When it is impossible to expel the irregular migrant immediately by escorting him to the border or pushing him back, due to temporary conditions that hinder repatriation, the police commissioner may order the detention of the foreign national in the local repatriation centre (CPT), designated by decree by the ministry of the interior in conjunction with the ministry of economic affairs, only for as long as is strictly necessary”; Article 21§4 of the Decree of the President of the Republic No. 349/1999: “The detention of the foreign national can take place exclusively in the repatriation centres designated in accordance with article 14§1 of Legislative decree No. 286/1998 or in the treatment or therapy centres where the foreign national is admitted for medical emergencies.”

⁸ Article 6 of Legislative decree No. 142/2015: “1. The applicant cannot be held in detention for the sole purpose of examining his application. 2. The applicant is detained, whenever possible in designated areas, in the centres referred to in article 14 of Legislative decree No. 286/1998, on the basis of an individual assessment of each case, when: a) he/she is in the conditions set out in article 1, paragraph F of the Convention relating to the status of refugees approved in Geneva on 28th of July 1951, endorsed in Italy by Law No. 722 of the 24th July 1954 and amended by the New York Protocol the 31st of January 1967 endorsed in Italy with Law No. 95 of the 14th February 1970; b) he/she is in the conditions set out in article 13§1 and 13§2 letter c) of the legislative decree 286/1998 and in the conditions laid down in article 3§1 Decree law No. 144/2005, converted into law on 31st July 2005, No 155; c) he/she is a threat to national security or public order. In the evaluation of threat, previous convictions, also when the sentence is not definitive and if it has been adopted following the implementation of the penalty requested in accordance with article 444 of the Code of criminal procedure, for crimes stated in article 380§1 and 380§2 of the Code of criminal procedure or for crimes related to drugs, sexual freedom, facilitation of illegal migration or for crimes related to trafficking and sexual exploitation or child exploitation, are to be taken into account; d) there is a risk that the applicant might abscond. Assessment of the risk of absconding is undertaken for each case when the applicant has constantly provided false declarations about his/her identity for the sole purpose of avoiding the adoption or implementation of an expulsion order or he/she has not fulfilled an order set out in article 13§5, 5,2 and 13 and in article 14 of Legislative

national refuses to be identified through fingerprinting procedures, stating that such conduct constitutes the “risk of absconding of the applicant”. This detention must be carried out in a CPT as required by article 14 of Legislative decree No. 286/1998. These types of deprivation of liberty must always be endorsed by a justice of the peace.

In addition to the above-mentioned issues, police custody in the event of refusal to be identified (article 11 of Decree law No. 59/1978 converted into Law No. 191/1978)⁹ and arrest for the purposes of identification must also be considered. Such cases must be referred without delay to the public prosecutor and can last no more than 24 hours.

Any other form of detention, implemented in different ways, in different places and for purposes other than the ones mentioned above, is unlawful, in compliance with article 13 of the Italian Constitution which enshrines the inviolability of personal freedom.

It follows that any form of detention inside a hotspot centre is unlawful: as reported by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), article 10ter of the Consolidated Text on migration does not provide a legal basis for the deprivation of personal liberty in the hotspots, which are not conceived as places of detention by law. In this respect, the CPT recommends that the Government draw up a legal framework clarifying in which circumstances migrants can be detained in hotspots.¹⁰

Notwithstanding the legal framework described above, the Standard operating procedures (SOPs) applicable to Italian Hotspots¹¹ – a document that does not have the force of law – state that “Unless there

decreed No. 286/1998. 3. Except for the cases provided for in paragraph 2, the applicant detained in a centre referred to in article 14 of Legislative decree No. 286/1998, who is waiting for the implementation of an expulsion order in accordance with article 13 and 14 of the same legislative decree, remains in the centre if there are well-founded reasons to believe that the application was submitted only to postpone or avoid the implementation of a repatriation order”.

⁹ Article 11 of Decree law No. 59/1978: “Police officers can drive to and detain in their offices those persons who, when asked, refuse to provide their identification. Police can hold the persons in detention for the time needed to identify them, but in any event for a period of time that shall not exceed 24 h. The provisions contained in the previous paragraph shall also be applied when there is sufficient evidence to show that the statements and documents provided by the person are false. The police officer refers the case immediately to the public prosecutor who, if the circumstances set out in the previous paragraph are considered not to exist, orders the person’s release”.

¹⁰“At the outset, the CPT notes that “hotspots”, in law, are not conceived as places of deprivation of liberty. Section 17 of Decree law No. 13/2017, converted into law by Law No. 46/2017, introduces a new Section 10-ter in Legislative decree No. 286/1998 (Consolidated Immigration Act or *testo unico dell’immigrazione*, TUI), which provides for designated “crisis spots” (*punti di crisi*) to be established within first-line reception facilities for rescue and first aid purposes, where those newly arrived undergo pre-identification procedures and where they are provided with assistance and information. However, the new legislation does not provide a legal basis for deprivation of liberty in the “hotspots”. 8. Nevertheless, the Italian NPM, in its thematic report of June 2017, observed that foreign nationals are deprived of their liberty in the “hotspots”; for this reason, it recommended that a legal framework be developed for holding persons there.” 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.

<https://rm.coe.int/16807b6d56>

¹¹The SOPs for ITALIAN HOTSPOTS have been drafted by the Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and the Department of Public Security. The European Commission, Frontex, Europol, EASO,

are exceptional inflows calling for the adoption of different initiatives, the person can leave the Hotspot only after having been photo fingerprinted as envisaged by current regulations and if all the security checks in national and international police databases have been completed.”¹² This provision, which refers to migrant detention during identification procedures and does not clarify what kind of initiatives can be adopted in the event of “exceptional inflows” – measures such as the extension of deprivation of liberty after the identification period or, conversely, lack of detention during these procedures? – appears to be unlawful in light of the observations presented above.

Different approaches and practices have been registered inside the hotspot centres during the last three years, but in all of them the detention of migrants before and during identification procedures is practiced. In some hotspots at specific times the authorities carry out identification procedures quickly, while in other situations detention can last several weeks. As we will see later in our analysis of the conditions at the hotspot on Lampedusa, it is alleged that in many cases detention extends beyond the end of identification procedures. Furthermore, many cases of detention of asylum seekers in hotspots have been reported. The SOPs state that “persons who have expressed the intention to submit an application for international protection or relocation will be photo-fingerprinted and recorded [...] and will then be transferred to a regional hub in the shortest possible time”, where they “must formalize their request through the filing of the standard “C3” form”¹³. The SOPs do not specify the duration of the “shortest possible time”, but seeing as it is impossible to formalize asylum applications in hotspot centres, and that the relevant legislation (article 26 of Legislative decree No. 25/2008) establishes that the formalization must take place within a maximum of three days – or 10 days in the event of huge migration flows and a large number of asylum applications – from the declaration of intent, it follows that under no circumstances can an asylum seeker be held in a hotspot for more than the above-mentioned three or 10 days. Conversely, the absence of formalization and, consequently, of the issuing of the temporary residence permit, causes unlawful restriction on freedom of movement (even in the event of an open hotspot) and an obstacle to accessing rights related to the status of asylum seeker.

It is important to point out that “when we are talking about possible restrictions to personal liberty – which is what happens in these centres – to establish rules that legitimise this power is not a choice but an imperative obligation and a fundamental guarantee under article 13 of the Constitution and article 5 of the European Convention on Human Rights. Compliance with these provisions requires a clear legal framework and a predictable implementation of the law supporting and legitimising the deprivation of personal liberty or enshrining the abolition of detention in hotspot centres, transcending the *de facto* detention of the individuals hosted in the centres”, as declared by the National Guarantor (NPM) in his Annual report to parliament¹⁴.

UNHCR and IOM provided valuable contributions to the preparation of this document. The SOPs should be used as an operational guide for activities organised within Hotspots.

¹² SOPs, p. 8. http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf

¹³ SOPs, p. 19. http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf

¹⁴ Annual Report to Parliament. National Guarantor, 2018.

<http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/bbb00eb9f2e4ded380c05b72a2985184.pdf>

The ambiguity concerning the nature of the Lampedusa *hotspot* as a place of detention

The Lampedusa hotspot continues to host, albeit under reduced operating conditions, foreigners who manage to approach the island on makeshift boats and are rescued a few miles off the coast. Although it is not officially a closed centre or a place of detention, foreigners are allegedly prevented from leaving the structure through the gate. On some occasions foreigners have allegedly been told explicitly that they were not allowed to leave the centre. However, this does not amount to standard procedure, and the police who guard the center allegedly just prevent guests from leaving from the main gate, without providing information on whether the hotspot is a place of detention. The **National Guarantor** for the rights of **persons** detained or **deprived** of their **liberty** reported following his visit on 14 January 2017 that:

"Even after identification procedures have been completed, the migrants hosted at the Lampedusa hotspot are not allowed to leave. This entails a deprivation of personal liberty that is not regulated by a primary source of law, or submitted for consideration by a judge, given that hotspots represent a sort of limbo in terms of legal protection, in which people are detained *de facto* without the approval of a judge and with no possibility of appeal".¹⁵

In practice, some people leave and enter the centre through openings in the perimeter fence, which are periodically closed by the authorities and opened by the foreigners. Entry and exit take place clandestinely, without authorisation from the authorities or the centre management. For this reason, many people allegedly do not dare to leave the centre, in fear of violating an order that is apparent in the gate being closed and in the impossibility of passing through. All those who, for physical or other reasons, are unable to take the somewhat difficult path leading from the centre across the mountain to the town also find themselves in a similar condition of detention. This critical issue was highlighted by the national Guarantor who, in the above-mentioned report, points out that:

"Once identified and photographed, the migrants are still unable to exit the hotspot, unlike, for example, in the Taranto hotspot [...]. When asked why the individuals at the Lampedusa Centre are not allowed to leave, the Prefect explained that the island lives on tourism, and that their presence could create problems. However - he added - if they want, they can leave through a hole in the fence."¹⁶

In a letter dated 24 February 2018, the Prefect of Agrigento invites the centre management to "coordinate the right of free movement with the general requirements for a regular and orderly management of the activities of the Hotspot" and to provide guests with "suitable identification systems" allowing monitoring of entry and exit. It should also be noted that in his letter the Prefect says that such mechanisms are needed exclusively for applicants for international protection, claiming that "this circumstance [application for international protection] gives those concerned the possibility of moving freely once pre-identification and photographing have been completed by the Police Authorities present in the centre". It can easily be

¹⁵ National Guarantor of the rights of persons detained or deprived of their personal liberty, Report on the visits in the Identification and Expulsion Centres and hotspots in Italy (2016/2017: first year of work). <http://www.garantenazionaleprivatiliberta.it/gnpl/it/rapporti.page>

¹⁶ *Ibid.*

inferred from this communication that, by the very admission of the Prefecture, at the time of writing there were no systems in place to regulate the exit and entry of guests - and which have still not been introduced. Moreover, it emerges that foreigners must be detained prior to pre-identification activities - which have a variable duration depending on the number of arrivals, according to the framework outlined by the Prefect. Lastly, the letter makes no mention of provisions for regulating the entry and exit of foreigners who have not applied for international protection who are in the hotspot.

The time spent in the structure

The time spent inside the structure has been found to be extremely variable, depending on conditions that are not always clear. Though Italy has seen a major reduction in arrivals by sea since summer 2017, towards the end of last year and at the beginning of this year foreign nationals remained on Lampedusa for over two months.¹⁷ The duration of stay described does not represent an exception, although some people did stay in the centre for just a few days. In fact, similar time-frames were also reported to the national Guarantor during his October 2016 visit:

"According to the information gathered by the delegation, the average time spent at the structure is 7/8 days. When the delegation spoke with the Nigerian girls (unaccompanied minors), they said they had been there for over a month. The staff confirmed this and, from what they said, it was not a one-off case. In particular, the worker from Save the Children explained that the number of unaccompanied minors is constantly growing. As in the rest of the country, primary reception centres for minors are now full, meaning that the minors remain in the hotspot illegally, in conditions of promiscuity with adults, in breach of the law."

This condition, which applies both to those who express the desire to request international protection and to other people at the centre, represents a strong limitation of the freedom of movement even for those who actually sneak out of the centre. The impossibility of formalising the request for protection within the hotspot, repeatedly stressed by the authorities, does not allow applicants for protection to obtain a residence permit and enjoy the related rights. Furthermore, those who express their desire to seek protection do not receive additional identification documents, such as a receipt or a voucher certifying their expression of intent. This is why they cannot buy a ticket to leave the island, and are therefore confined to an area of 20 sq km, although by law they are entitled to move freely across the entire country.¹⁸

It is also useful to clarify that the detention of citizens who do not apply for international protection is unlawful: in fact, it leads to a situation of non-definition of their legal status, since on the one hand they do not initiate regularisation procedures, and on the other they undergo a limitation of their personal liberty that is completely illegitimate.

With regard to the material living conditions in the Lampedusa hotspot, it is useful to briefly stress the existence of structural problems, such as the lack of common areas and of a dining area, the poor

¹⁷ <https://cild.eu/blog/2018/03/09/nellhotspot-di-lampedusa-condizioni-disumane-e-violazioni-dei-diritti-umani/>

¹⁸ Please refer to the attached communication of the Siremar company of 19 March 2018 on this issue.

sanitation and the lack of adequate control of the space designated for men, women, children and families. These critical issues are exacerbated when numbers exceed capacity. In December 2017, an open call for tenders was launched for the centre to be renovated and the contract was awarded last month. However, this renovation work, which is due to start in the coming weeks, will be limited to changes in the kitchen area, as well as to the reactivation of the video surveillance system and renovation of the external fence.¹⁹ For more information about the material conditions at the centre, please refer to the several reports published by the national Guarantor, CPT, Human Rights Commission of the Italian Senate and independent organisations.²⁰

B) Effective remedies against detention in the hotspot

The detention in the hotspot centres, both before and after identification, that is allegedly used for significantly longer periods for certain groups – who are arbitrarily considered deportable because of their specific nationalities – would therefore amount to informal detention that is not regulated by any legal provision, is implemented without a formal detention order being issued, without a judge validating that order and without the detainees being able to exercise the right to appeal in order for the legitimacy of their detention to be assessed in the short term. As pointed out by the Court, in fact, the possibility of appealing against an expulsion order before a justice of peace cannot in any way represent an effective remedy. Firstly, this is because these decrees contain no reference to the deprivation of liberty; secondly, because they are generally notified to foreign nationals only at the end of their detention.

The current situation is therefore the same as the one observed by the Court with respect to the 2011 events considered in the Judgment.

C) Effective remedies for the reception conditions in the hotspot

The role of the national Guarantor for the rights of persons detained or deprived of their liberty:

With regard to effective remedies for reporting reception conditions inside the hotspot, it should be noted that, although the national Guarantor plays a key role in allowing a general improvement in the conditions of detention and progress in respecting the rights of persons subject to restrictive measures of personal liberty, the tasks of this office are not such as to make it possible to define an effective means for lodging complaints with it. More specifically, as provided for in Decree Law No. 146 of 23 December 2013,

¹⁹ <https://gareappalti.invitalia.it/sourcing/tenders/resume/id/14913>

²⁰ <http://www.garantenazionaleprivatiliberta.it/gnpl/it/rapporti.page> ; <https://rm.coe.int/16807b6d56> ; <https://cild.eu/wp-content/uploads/2018/04/Dossier-Lampedusa.pdf> ; http://www.asylumineurope.org/sites/default/files/resources/rapporto_cie_cpr.pdf .

"The National Guarantor, besides promoting and fostering collaboration with the local guarantors, or with other institutional figures however denominated that have competence in the same fields: a) ensures that the implementation of custody for detainees, hospital psychiatric detainees, persons subject to precautionary pre-trial detention or to other forms of limitation of personal liberty are implemented in compliance with the norms and principles enshrined in the (Italian) Constitution, the international conventions on human rights ratified by Italy, national laws and regulations; b) visits - without the need for prior authorisation - to prison accommodation; judicial psychiatric hospitals and healthcare facilities designed to accommodate persons subject to custodial security measures; therapeutic and host communities or in any case public and private facilities that host individuals subject to alternative measures or to the precautionary measure of house arrest; juvenile correctional institutions and host communities for minors subjected to orders by the judicial authority; as well as - with notice and without hampering ongoing investigative activities - police security rooms, accessing without restriction all places intended for or otherwise functional to restrictive requirements; c) examines, with the consent (including verbal approval) of the individual concerned, the acts contained in the file of the person detained or deprived of personal liberty and in any case the acts concerning the conditions of detention or deprivation of liberty; d) asks the administrations responsible for the structures referred to under b) for the necessary information and documents; in the event that the administration does not respond within thirty days, (the Guarantor) informs the parole officer in charge and may request that an exhibition order be issued; e) verifies compliance with the obligations related to the rights provided for in articles 20, 21, 22, and 23 of the regulation referred to in the Presidential Decree of 31 August 1999, n. 394, and subsequent amendments, in the identification and expulsion centres provided for in Article 14 of the Consolidated Text referred to in Legislative Decree 25 July 1998, n. 286, and subsequent amendments, by accessing without restriction any space; f) makes specific recommendations to the administration concerned, if it establishes that any laws have been breached or considers the requests and complaints lodged pursuant to article 35 of the law of 26 July 1975, n. 354 to be valid. The administration concerned, in the event of rejection, communicates the motivated dissent within thirty days; g) annually transmits a report on the activities carried out to the Presidents of the Senate of the Republic and of the Chamber of Deputies, as well as to the Minister of the Interior and the Minister of Justice."²¹

The duties assigned to the Guarantor are also set out on the authority's website:

"This is an independent body able to visit and monitor places of deprivation of liberty (in addition to prisons, police sites, centres for immigrants, residences for the execution of security measures, that have been recently established following the closure of Judicial Psychiatric Hospitals, mandatory health treatments). The purpose of the visits is to identify critical issues and, with respect to the collaboration with the competent authorities, to resolve them. Moreover, within the institutions over which it exercises its control, the National Guarantor is responsible for resolving those situations that generate hostility or cause those who are restricted to lodge complaints, while the judicial authority is responsible for the jurisdictional claims that require an intervention by the parole officer. Italy has conferred two other tasks on the National Guarantor. The first concerns an obligation arising from the ratification of the UN Optional Protocol on the Prevention of Torture. The accession to this Protocol provides that States must establish an independent

²¹ <http://www.gazzettaufficiale.it/eli/id/2013/12/23/13G00190/sg>

national mechanism to monitor - through visits and access to documents - places of deprivation of liberty, in order to prevent any situation in which people are treated without respect for their dignity. For this task, the National Guarantor coordinates the regional Guarantors, providing them with "forms" and common procedures. The second task concerns the monitoring of the repatriation of non-EU nationals that are irregularly present on the Italian territory and must be brought back to their countries of origin. The EU Return Directive (2008) requires every country to monitor the situation with an independent body."²²

Therefore, it seems clear that this independent authority mainly has the role of promoting the legality and democratic development of the institutions in the field of deprivation of liberty, having been given the power to report on the critical issues found and to propose solutions with a view to collaborating with the authorities. With regard to intervention concerning possible individual cases, the National Guarantor has the power to file complaints before the responsible administration and present reports, which however are not binding on the government.

Moreover, another issue concerns effective access to the possibility of filing complaints before the National Guarantor. In fact, although the law regulating the prison system explicitly foresees the possibility for detainees to lodge complaints before this authority,²³ there are no specific procedures or mechanisms for migrants held in hotspot centres to file complaints and reports; foreign nationals who find themselves in this situation actually do not even have access to information about the Guarantor itself.

D) On the positive influence of Law n. 46 of April 13, 2017 in preventing violations found by the Court

With regard to the changes introduced by Law No. 46 of 13 April 2017, first of all it is necessary to distinguish between provisions concerning acceleration of procedures for granting international protection; provisions regarding border control and the acceleration of procedures for the identification of foreign nationals who arrive in Italy following sea rescue or are in any event traced in Italy; measures to strengthen the network of detention centres for repatriation and the effectiveness of the measures to deport and remove irregular foreign nationals.

Regarding the first set of provisions, the law provides for new measures to simplify the procedures before the territorial commissions for granting international protection; it introduces 26 specialised sections on immigration and asylum without, however, providing for an increase in staff; it expunges the appeal judgment by establishing that it is possible to appeal against first instance decisions only before the Supreme Court (*Corte di Cassazione*); it provides for new non-binding deadlines for rulings concerning appeals against the decision of the territorial commission.

With regard to the second category, Law No. 46/2017 gives a partial legal basis to the "Crisis Points", providing that foreign nationals who are tracked down when irregularly crossing internal or external borders or while being saved in rescue operations be brought to such Points for first assistance needs. It also establishes that these Crisis Points are the venue for photographing and fingerprinting, also for the

²² <http://www.garantenazionaleprivatiliberta.it/gnpl/it/chisiamo.page>

²³ Art. 35 l. 345/1975 <http://www.procuragenerale.trento.it/attachments/article/31/Ordinamento%20penitenziario.pdf>

purposes of articles 9 and 14 of EU regulation No. 603/2013 of the European Parliament and of the Council of 26 June 2013, and that information on the international protection procedure, on the resettlement programme in other EU Member States and on the possibility of accessing assisted voluntary repatriation is ensured.

The hotspot centres are to be established within the structures referred to in Law No. 563/1995 - the so-called "Puglia Law" - which merely provided for the creation of first aid centres along the Apulian coast in order to cope with the massive influx of migrants coming from Albania in the early 1990s, without however establishing the open or closed nature of such centres. The obvious consequence of this legal vacuum is that any restriction of liberty that may occur in these centres lacks any legal basis.

As mentioned in the previous paragraphs, the law also establishes that the repeated refusal of a foreign national to submit to the checks referred to in paragraphs 1 and 2 amounts to the risk of absconding for the purposes of detention in the centres referred to in Article 14 of Legislative Decree No. 286/98.

From the above, it is clear that although the provisions contained in the law may lead in the long term to a reduction in the time taken to examine applications for protection, to the detriment of the full right to defence, as detailed by numerous analyses,²⁴ this reduction does not necessarily imply a reduction in the time spent in the hotspots.

In this regard, it should be noted that the time spent in the hotspots is not generally linked to the identification procedures but, as highlighted by the National Guarantor for the rights of prisoners and persons deprived of their liberty, foreign nationals continue to be held for several weeks even after the end of identification operations. While, until last year, it was possible to affirm that delays in transferring applicants for international protection, unaccompanied foreign minors and people with specific vulnerabilities to other structures were caused by the shortcomings of the national reception system, in the current situation, characterised by a reduction in flows of over 80%, it is no longer possible to put the long time spent in the hotspots down to these causes.

In summary, although the law in question is aimed at impacting the time taken for identification and determination of the status of incoming foreign nationals, it is necessary to highlight some critical issues:

- first of all, it is fundamental to note that, a year after the Decree came into force, it has been found, as mentioned above, that the time spent in the Lampedusa hotspot can be more than two months, although the duration of stay is extremely variable;
- although the crisis points are mentioned in some provisions, these are extremely limited in scope, providing no indications concerning the functioning of the centres in question, the procedures to be implemented within them, the protection of vulnerable groups during their stay in the hotspots and above all, the legal basis of their detention - a matter that is not mentioned at all. The indications concerning the procedures to be implemented in the crisis points are included only in

²⁴ <https://www.asgi.it/english/lorenzo-trucco-asgi-minniti-orlando-decree-not-reform-but-wall-of-laws-that-limit-the-right-to-asylum/> ; https://www.asgi.it/wp-content/uploads/2017/07/Scheda-pratica-legge-Minniti-DEF_2.pdf .

the Standard Operating Procedures, which, as we have seen, do not have the force of a primary source.

E) Concerning the positive effect of some provisions contained in Law No. 103 of 23 June 2017.

It should be noted that, contrary to what is claimed by the Italian Government, Law No. 103 of 23 June 2017 does not seem to have any effect on the subject-matter of dispute and to the issues analysed above.

Lampedusa, 27 June 2018

For the project In Limine:
Maria Adelaide Massimi
Francesco Ferri
inlimine@cild.eu

DH(DD(2018)754 : Communication from an NGO (project In Limine) of 16/07/2018 in the case of Khlaifia and Others v. Italy (Application No. 16483/12).
Documents distributed at the request of a Representative shall be under the sole responsibility of the said Representative, without prejudice to the legal or political position of the Committee of Ministers.

20/3/2018

Gmail - POSTA CERTIFICATA: FWD: informazioni in merito a mancato rilascio del titolo di trasporto. Riscontro

Cc:
Bcc:
Date: Tue, 20 Mar 2018 16:16:46 +0100 (CET)
Subject: FWD: informazioni in merito a mancato rilascio del titolo di trasporto. Riscontro

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----- Messaggio inoltrato -----

Da: Siremar

Data: 19 Mar 2018 17:05:14

Oggetto: informazioni in merito a mancato rilascio del titolo di trasporto. Riscontro

A: giuliacrescini@ordineavvocatiroma.org

----- Messaggio inoltrato -----

From: Siremar <ctisoleminori@pec.it>
To: <giuliacrescini@ordineavvocatiroma.org>
Cc:
Bcc:
Date: Mon, 19 Mar 2018 17:05:14 +0100
Subject: informazioni in merito a mancato rilascio del titolo di trasporto. Riscontro
Gentile Avvocato,

riscontriamo la Sua email del 7 marzo 2018.

Il tragitto Lampedusa/Porto Empedocle eccede le 20 miglia nautiche.

20/3/2018

Gmail - POSTA CERTIFICATA: FWD: informazioni in merito a mancato rilascio del titolo di trasporto. Riscontro

In tale situazione, ed ai sensi del DM n. 251 del 25.10.1999 (*Recepimento della direttiva 98/41/CE del Consiglio del 18 giugno 1998, relativa alla registrazione delle persone a bordo delle navi da passeggeri che effettuano viaggi da e verso i porti degli Stati membri della Comunità*), l'armatore è obbligato a rilevare i dati identificativi dei passeggeri all'atto dell'acquisto del titolo di viaggio.

Sebbene tale operazione astrattamente potrebbe non comportare necessariamente l'esibizione di un documento di identità da parte del passeggero, Le è però noto che, ai sensi dell'art. 3.3.2. del Programma Nazionale di Sicurezza Marittima approvato dal Comitato Interministeriale per la Sicurezza dei Trasporti Marittimi e dei Porti, "*la Società di navigazione verifica che il passeggero all'imbarco sia munito di titolo di viaggio e documento di identità o passaporto in corso di validità, ai fini dell'eventuale riscontro*", sì che l'acquisto del titolo di viaggio da parte dei Suoi assistiti (sprovvisti di documento identificativo) si sarebbe risolto per costoro in un inutile esborso, posto che gli stessi giammai sarebbero stati nella condizione di poter essere ammessi a bordo della nave poiché privi del documento di identità.

Certi di aver chiarito ogni Suo dubbio, rimaniamo a Sua disposizione per eventuali, ulteriori chiarimenti a Lei occorrenti.

Distinti saluti.

Caronte&Tourist Isole Minori S.p.A.
Via dei Mille, 20
98057 Milazzo (ME)
ph 090 9236300

3 allegati

 **msg.eml**
10K

 **postacert.eml**
12K

 **dati-cert.xml**
1K