

# Preventing Torture and Controlling Irregular Immigration: The role of the European Committee for the Prevention of Torture and its activities in Italy

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## Abstract

The measures adopted by many European States to control migratory flows do not always conform to international law. The European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) has paid special attention to the treatment of migrants, as demonstrated by the composition of a number of standards with which States Parties to the European Convention for the Prevention of Torture must comply. Effective action in this context is indispensable for the prevention of torture in view of the warnings international institutions have issued to Italy regarding management of immigration. In addition to the often precarious conditions of the centres in which immigrants are held, in recent months there has been an additional problem in the form of rejection in the Sicilian Channel: right of asylum and refugee status are, in effect, being denied to people who meet the conditions of the 1951 Geneva Convention on Refugees. Others are being sent back to places where there is a real risk that they will be tortured, in violation of the *non-refoulement* principle. The CPT's extensive experience puts it in strong position to promote even more incisive action aimed at preventing the torture of immigrants and affording them additional protections that prevent them from being deprived of their liberty in conditions that amount to ill-treatment.

## 1. Introduction

In one of its most recent General reports, the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) urged States to respect the fundamental principles of protection of human rights represented in international human rights conventions and treaties, stating that 'It is disturbing, at the beginning of the 21st century, to be obliged to recall basic principles long enshrined in both national and international law and which one had assumed would be inviolate'.<sup>1</sup>

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<sup>1</sup> CPT, 17<sup>th</sup> General Report, CPT Doc. CPT/Inf (2007) 39, 'Preface'. Available at <http://www.cpt.coe.int/en/annual/rep-17.htm>. Last accessed 10 May 2009.

Despite the CPT's recommendations, national and international laws that prohibit torture are still violated in Europe, including through non-compliance with the principle of *non-refoulement*. According to this principle, no-one should be expelled, returned or extradited to another State when there are substantial grounds for believing that he/she would be in danger of being subjected to torture.<sup>2</sup>

Italy was among the first signatories of the Council of Europe and United Nations (UN) treaties dealing with torture prevention. Nevertheless, many reports highlight the contradictions between Italy's political intention to support the promotion and defence of human rights, and actual results.<sup>3</sup> Italy's difficulties in controlling illegal immigration represent a key example of this issue. The fact that the Italian Government rejects migrants headed for Europe by sea under an agreement with the Libyan authorities demonstrates the gap between its rhetoric and practices.<sup>4</sup> There are two main reasons to examine Italy's present situation. First, policies implemented by Berlusconi's government against irregular migrants provide a useful example of the difficulties of balancing national security and border control requirements with the need to respect all people's dignity and to prevent torture and ill-treatment. Second, analysing the events that are taking place in the Mediterranean offers an insight into the consequences of European cooperation in the field of migration that is aimed at stopping the arrival of people from Africa. This is not just an Italian problem. However, due to its geographical position, Italy represents a key point of access to other States in Europe. Therefore, responsibility must be shared and a greater commitment to the prevention of torture and cruel, inhuman and degrading treatment is required.

This article analyses the Council of Europe's system of prevention of torture, focusing on a category of detainee – illegal and irregular migrants – that often receives little attention, despite the fact that migrants are often exposed to torture and inhuman and degrading treatment.<sup>5</sup> The CPT has dealt with the protection of migrants in Italy through (i) inspections of temporary stay centres to monitor detention conditions, and (ii) cooperation with the Italian authorities to achieve improvements in these conditions. The second part of the paper addresses the issues arising from the expulsions and rejections ordered by the Italian Government, especially in relation to deportation to Libya. A proposal for greater commitment on the part of the CPT in this area is offered. In light of its twenty years of experience, this institution is best placed to encourage greater protection of those who risk their lives trying to reach Europe without permits.

To explore the complexities of these issues, it is first necessary to define the terms 'illegal migrant' and 'irregular migrant'. In Italian legislation, these terms are generally used to refer to aliens who do not have permission to stay in Italy's territory. An illegal migrant is a person who has entered the State's territory without permission or, after entering, has not applied for a permit

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<sup>2</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), adopted by the United Nations General Assembly, Resolution 39/46, UN Doc. A/Res/39/46, 10 December 1984, entered into force 26 June 1987, Article 3.

<sup>3</sup> Patrizio Gonnella and Antonio Marchesi, *Onorare gli impegni: l'Italia e le norme internazionali contro la tortura* (Roma: Sinnos, 2006), pp.7-10.

<sup>4</sup> Commissioner for Human Rights of the Council of Europe, Report following his visit to Italy on 13-15 January 2009, Council of Europe Doc. CommDH(2009)16, 16 April 2009, para. III-IV.

<sup>5</sup> As this discussion will demonstrate, the Italian administrative measures of expulsion and detention considered in this article have the same effects on both torture and ill-treatment (i.e. cruel, inhuman or degrading treatment). For the sake of brevity, unless otherwise specified, torture is used to refer to both categories of abuse.

to stay. On the other hand, an irregular migrant is a person who originally obtained a permit that the authorities subsequently revoked or did not renew.

According to international law, an asylum seeker is someone who claims that he/she is a refugee (i.e. a person who, owing to a well-founded fear of being persecuted due to his/her race, religion, nationality, membership of a particular social group, or political affiliations or beliefs, is outside the country of his/her nationality, and is unable or afraid to avail him/herself of the protection of that country),<sup>6</sup> but whose request has not yet been evaluated by the authorities of the country the individual is applying for asylum in. Article 10.3 of the Italian Constitution guarantees the right of asylum to aliens who, in their country of origin, are prevented from effectively exercising the democratic freedoms guaranteed by the Italian Constitution. Therefore, under Italian legislation, fear of persecution is not required as a pre-condition for granting asylum: this ensures that a large number of people the option to exercise this right. However, the absence of a law enforcing Article 10 of the Constitution has led to confusion on this issue. Due to this confusion, illegal/irregular migrants (i.e. migrants who are not in need of asylum) have used asylum requests to obtain refugee status in Italy.<sup>7</sup> This is problematic for a number of reasons.

As the United Nations Refugee Agency has stated, applicants for refugee status are in a particularly vulnerable situation and they may experience psychological and technical difficulties in submitting their case to the relevant authorities in a foreign country.<sup>8</sup> Therefore, states must ensure that asylum seekers are afforded certain guarantees: first and foremost, the relevant authorities must respect the principle of *non-refoulement*. When migrants exercise the right to asylum to gain refugee status inappropriately, this complicates the situation with regard to ensuring that true asylum seekers are not expelled to their country of origin or a third country in violation of the *non-refoulement* principle. Achieving this requires differentiating between national measures concerning immigration in order to avoid treating illegal/irregular migrants and asylum seekers in the same way. However, this, in turn, requires effective differentiation between illegal/irregular migrants and asylum seekers. If the categories cannot be separated, how can a state ensure that the special rights that the UN Refugee Agency says should be granted to asylum seekers, such as the right not to be held in the same detention centres as illegal or irregular immigrants awaiting expulsion, are put into practice?

Italy, as a member of the European Union, has benefited from European policy concerning immigration and asylum.<sup>9</sup> However, the ongoing process of setting up a common system leaves

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<sup>6</sup> Convention Relating the Status of Refugees, Geneva, 28 July 1951, Article 1A(2). In Italy, this convention was ratified via Law no 772, 24 July 1954. Available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>. Last accessed 1 November 2009.

<sup>7</sup> For an in-depth explanation, see Bruno Nascimbene, 'Asilo e statuto del rifugiato', *Annual Convention of the Italian Association of Constitutionalists on the issue Lo statuto costituzionale del non cittadino*, Cagliari, 16-17 October 2009. See, for instance, Article 2(1) of Legislative decree no 140/2005, which clarifies that the term asylum seeker shall refer to an alien who requests recognition of refugee status under the 1951 Geneva Convention. However, this opinion is not shared by all, and some judges have underlined that the refugee condition represents a 'species' of the asylum right 'genus': see Consiglio di Stato, 11 July 2002, section IV, no 3874.

<sup>8</sup> United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/Rev.1, Geneva, January 1992, p.190.

<sup>9</sup> Daniela Consoli and Gianfranco Schiavone, 'Verso una migliore tutela dello straniero che chiede asilo? Analisi delle principali novità in materia di diritto d'asilo introdotte a seguito del recepimento della direttiva 2005/85/CE con il d.lgs. 25/2008 e il d.lgs. 159/2008', in *Diritto immigrazione e cittadinanza* Vol. X, no 3-4/2008, p.88.

space for individual governments to act according to their own political orientation on immigration issues. For this reason, the European Union should take measures to prevent member States from putting into effect policies of rejection through bilateral cooperation with other states, especially those not bound by European (or equivalent) human rights instruments; Italy's partnership with Libya is a case in point. When the Lisbon Treaty enters into force it will strengthen the European Union's commitment to building a common policy in the field of migration and asylum.<sup>10</sup> In the new system that this treaty will create, responsibility must be shared and a greater commitment to the prevention of torture and cruel, inhuman and degrading treatment will be required. It is likely that the CPT will play a key role to play in the creation of this new system.

## 2. Prevention of Torture in Europe

The most effective weapon against any form of abuse is strong prevention. The 1984 United Nations Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) already requires States Parties to play an active role through the adoption of measures – legislative, educational and information – characterised by a preventive focus. These include (i) requiring, under Article 10 of the UNCAT, all States Parties to include programmes in their formal police training on the protection of human dignity, (ii) prohibiting, under Article 15 of the UNCAT, of the use of confessions obtained through torture, and (iii) requiring, under Article 13 of the UNCAT, that States Parties respect the *non-refoulement* principle. However, the UNCAT does not delegate any preventive action to the Committee against Torture (CAT), except issuing recommendations after reviewing State reports; in these recommendations, the CAT can suggest focused measures to be taken in relation to specific instances of torture.<sup>11</sup> This focus on prevention came about during the drafting of the UNCAT. Some members of the Working Group realised that the draft provisions were inadequate in the field of prevention and envisaged, instead, a far stronger system, based on inspection of places of detention.<sup>12</sup> The suggestion, supported by Costa Rica, was then abandoned due to lack of consensus. Although no further action on this issue was pursued by the United Nations until the drafting of the Optional Protocol to the UNCAT (OPCAT),<sup>13</sup> which entered into force in June 2006, the Council of Europe devised and put into action an extremely successful model of prevention for European countries.<sup>14</sup>

<sup>10</sup> Treaty on the Functioning of the European Union, Article 67. Available at <http://www.consilium.europa.eu/uedocs/cmsUpload/st06655-re01.en08.pdf>. Last accessed 30 October 2009.

<sup>11</sup> For an in-depth analysis of the UNAT, see Manfred Nowak and Elizabeth McArthur, *The United Nation Convention Against Torture* (Oxford: Oxford University Press, 2008), Part I; J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: An Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, (Dordrecht: Martinus Nijhoff, 1988); Boulesbaa Ahcene, *The U. N. Convention on torture and the prospects for enforcement*, (The Hague: Nijhoff, 1999).

<sup>12</sup> Ingelse Chris, *The UN Committee against Torture: an assessment*, (The Hague: Kluwer Law International, 2001), p.17.

<sup>13</sup> Adopted by the United Nations General Assembly Resolution 57/199, UN Doc. A/RES/57/199, 18 December 2002. The OPCAT establishes the Subcommittee on Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT): this body is mandated to visit places in the jurisdiction of the States Parties where persons are deprived of their liberty.

<sup>14</sup> Antonio Cassese, *The International Fight against Torture* (Baden-Baden: Nomos, 1991), pp.135-152.

The CPT's work, defined by the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment (ECPT), is based on the firm belief that 'the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits'.<sup>15</sup> In fact, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms already contained explicit condemnation of torture and Article 3 prohibited its use by States Parties in absolute terms. Nevertheless, the European Court can only punish ascertained violations: in other words, this earlier treaty only provided for action after torture had taken place. Thus, prior to the ECPT, and the establishment of the CPT, there was no system focusing on the prevention of torture. According to Article 2 of the ECPT, which establishes the CPT, the CPT may conduct inspections of any places within the States Parties' jurisdiction where persons are deprived of their liberty by a public authority. Besides actual prison establishments, visits can be conducted to (among other places) detention centres for asylum seekers and illegal immigrants awaiting expulsion.<sup>16</sup> If deemed necessary, the CPT is further mandated to suggest improvements for protection against the possibility of future torture or inhuman or degrading punishment or treatment.

Since the goal of the CPT is not to identify violations, but to help States Parties ensure that those that do occur are not repeated, in the various annual reports submitted to the Council of Europe under Article 12 of the ECPT, the CPT has outlined a list of guidelines for national authorities concerned with deprivation of liberty. These rules set forth the minimum standards of protection that each State Party must guarantee to persons deprived of their freedom in order to minimise the incidence of torture or inhuman and degrading treatment. The CPT has taken into consideration many different aspects of detention and detention conditions, which are sometimes subject to very detailed regulations. Far from mentioning general issues only, the Committee has, for example, carefully outlined the requirements for cells (in relation to width, lighting and ventilation) and the conditions for enrolling members of public order forces, preferring those showing 'an attitude for interpersonal communication based on respecting human dignity'.<sup>17</sup> However, as guidelines, these rules are not binding. It is up to individual States Parties to abide by these guidelines; if they fail to do so, the Council of Europe's Committee of Ministers may issue ad hoc recommendations urging members to follow the CPT's suggestions, but they cannot enforce these recommendations.<sup>18</sup>

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<sup>15</sup> Council of Europe, ECPT, ETS no 126, Strasbourg, 26 November 1987, Preface. Text amended according to the provisions of Protocol no 1 (ETS no 151) and no 2 (ETS no 152), which entered into force on 1 March 2002. Further details concerning the ratification of the ECPT are available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=1&DF=&CL=ENG>. Last accessed 6 June 2009.

<sup>16</sup> Council of Europe, Explanatory Report on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, para. 28, 30 and 32. Available at <http://www.cpt.coe.int/en/documents/explanatory-report.htm>. Last accessed 31 May 2009.

<sup>17</sup> CPT, Second General Report, CPT Doc. CPT/Inf (92) 3, 1992, para. 60.

<sup>18</sup> For instance, Council of Europe, Committee of Ministers Recommendation 1257 on the adoption of the measures for detention by police outlined by the CPT. See CPT, Sixth General Report, CPT Doc. CPT/Inf (96) 21, 1996.

## 2.1 *The CPT's activities and the protection of immigrants*

Among the topics addressed by the CPT, for our purposes, the guidelines concerning detention by the police, and those concerning the treatment of immigrants being imprisoned for various reasons by public authorities, merit discussion. As far as detention is concerned, the CPT requires that each person imprisoned by the police shall be granted the following rights: (i) the right to communicate their condition, (ii) the right to be able to contact a lawyer, and (iii) the right to ask to be examined without the presence of police personnel and by a different doctor from the one chosen by the authority. It is of foremost importance that these rights be granted right from the beginning since, according to the CPT and the CAT, the chances of torture occurring are particularly high during the first few hours of detention.<sup>19</sup> Any limitation of these rights should take place according to the law and for a precise amount of time.

On many of its visits, the CPT comes into contact with detained persons who are foreigners to the State Party being visited; often they are illegal immigrants, and/or asylum seekers, who have committed no crime and whose freedom has been limited in some way. The Committee explained its position on the modes of application of measures to protect the rights of such detainees in the seventh General Report to the Council of Europe. First of all, such individuals shall not be detained in centres similar to prisons in terms of structure and living conditions: buildings designed to host immigrants should have enough space and must not be overcrowded. Social activities must be organised and access to informational media must be ensured. Once detained, foreigners should be informed of their rights, including the right to contact a lawyer and a doctor, and to engage with these professionals in a language they can understand, if necessary via staff with adequate linguistic skills and suitable cultural awareness. If these precautions are not taken, there is the risk that an insensitive approach may be adopted towards people who have not been sentenced for, or accused of, a crime and who may find it hard to accept that they are being deprived of their freedom.<sup>20</sup>

According to the CPT, women and minors should be detained in different places from men and these places should be age-appropriate; they should also be assisted by skilled personnel able to respond to their needs, acting as teachers, educators and psychologists. Particular care should be given to methods of questioning/ interviewing and also to the provision of healthcare, which should include an initial medical examination. Another basic requirement is the presence of staff of both genders, since a preponderance of men may give rise to psychological (or physical) violence. Furthermore, minors should be deprived of their liberty by States Parties only when strictly necessary and in no case for long periods of time. This principle has already been stated worldwide in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice<sup>21</sup> and the United Nations Convention on the Rights of the Child.<sup>22</sup> The goal is to reduce the risk of people being ill-treated by other detainees and by staff, and also to avoid the danger of future social maladjustment. The risks are even higher if these recommendations are disregarded in the treatment of immigrants arriving in a new country and then, immediately, being secluded in detention centres for long periods of time. As the CPT affirmed in its last general report, it intends to develop the standards outlined for the detention of immigrants further in view of the

<sup>19</sup> CPT, Sixth General Report, CPT Doc. CPT/Inf (96) 21, 1996, para. 39.

<sup>20</sup> CPT, Seventh General Report, CPT Doc. CPT/Inf (97) 10, 1997, para. 28-9.

<sup>21</sup> UN General Assembly Resolution 40/33, 'Beijing Rules', 29 November 1985. See especially rule no 13 and no 19.

<sup>22</sup> UN General Assembly Resolution 44/25, 20 November 1989. See especially Article 37(b).

growing number of arrivals in Europe and the debatable countermeasures taken by States Parties to the ECPT.<sup>23</sup>

### 3. Italy's Provisions on Illegal Immigration

Before assessing the CPT's experience in Italy, it is useful to explore a general, yet concise picture of the Italian regulations regarding limitation of illegal immigration. The main legislative instrument is the consolidated law regulating immigration and the status of foreign citizens (Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero<sup>24</sup>). According to Article 4.1, aliens (non-EU citizens) can enter Italy only if they have a valid passport, and an entrance visa granted by the diplomatic or consular Italian authorities in the alien's State of origin or permanent residence. Unless *force majeure* is involved, entrance is allowed only through the specifically provided border posts. According to Article 10, aliens not meeting the requirements for entering Italy shall be rejected by border police authorities. Similarly, aliens who have entered Italy without undergoing proper border controls, or have been temporarily allowed in after being rescued, are escorted to the border and then expelled. This provision does not apply to asylum seekers: people requesting political asylum, people asking for refugee status or people claiming the adoption of temporary protective measures on humanitarian grounds.

If aliens enter Italy illegally without being rejected or reside in Italy without applying for a residence permit within the prescribed term (i.e. illegal migrants), or if their permit of stay is revoked, cancelled or not renewed (i.e. irregular migrants), the Prefect may issue a decree of expulsion.<sup>25</sup> After being validated by a judge, the expulsion decree becomes effective immediately, even if the expelled person exercises his/her right of appeal against the decision of the administrative authority. Nevertheless, if expulsion cannot take place immediately, the head of the police administration (*Questore*) orders the alien's detention for the shortest possible time in a detention centre provided specifically for this purpose. According to article 14.5, the foreign national may stay at the centre a maximum of thirty days, following the validation of detention by the judge, though extensions are possible.

Assistance centres (*Centri di assistenza*) were set up in Italy in 1995 to provide first aid for illegal aliens. A few years later, in view of the growing number of immigrants, mostly coming from Albania, temporary stay and assistance centres (CPTAs: *Centri di permanenza temporanea e assistenza*) were set up for the detention of all non-EU immigrants awaiting expulsion. Nonetheless, as the work of the Commission set up in 2006 to examine the situation in these centres clearly shows, many illegal aliens stayed for the maximum allowed period of sixty days, after which they were ordered to leave Italy within the following five days.<sup>26</sup> As these orders were usually not fulfilled, aliens caught for the second time were, once again, detained at a CPTA. The Commission's report describes the living conditions in these centres. The

<sup>23</sup> CPT, 18<sup>th</sup> General Report, CPT/Inf(2008) 25, 2008, para. 20.

<sup>24</sup> Legislative Decree of 25th July 1998, no 286 (Turco-Napolitano Law), published in the Official Journal of Italian Republic no 191, 18 August 1998.

<sup>25</sup> Legislative Decree of 25th July 1998, Article 13(2). See fn.24.

<sup>26</sup> Rapporto della Commissione per le verifiche e le strategie dei Centri, 31 January 2007, pp.16-17. Available at [www.interno.it/mininterno/export/sites/default/it/assets/files/1/2007131181826.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/1/2007131181826.pdf). Last accessed 1 September 2009.

information collected reveals that different kinds of people were detained in them: ex-prisoners, illegal immigrants, asylum seekers, and also workers who had been unable to renew their residence permit after many years in Italy. The extent of the socio-demographic diversity of these detainees, the high degree of surveillance by security forces, and the inadequacy of access to even the most basic services (e.g. to a refectory, leisure activities, language services, and legal advice) all contributed to create a climate of tension and made these centres similar to actual prisons.

This situation has worsened as a result of new measures that were adopted after the election of the right wing government led by Berlusconi, which is allied with a party that has an intolerant attitude towards immigrants. First, temporary assistance centres have been converted to identification and expulsion centres (CIEs: *Centri di identificazione ed espulsione*) in order to highlight their merely executive role and to speed up the execution of expulsion orders.<sup>27</sup> Furthermore, according to a law dated 15 July 2009, the maximum permitted stay at the CIEs has been extended from 60 to 180 days: if the alien's State of origin fail to cooperate in his/her repatriation, the competent authority is entitled to ask the judge to extend the sixty day period for a further 120 days.<sup>28</sup>

Modification of the maximum periods of detention may appear to be justified by the provisions of Directive 2008/115/EC of the European Parliament and the Council; this contains common standards and procedures for returning a migrant staying in a European State illegally to his/her country of origin.<sup>29</sup> According to Article 15 of the Directive, detention shall be for a maximum period of one year and six months. Thus, Italy appears to be abiding by these provisions, having set a maximum detention period of six months. However, the directive specifies a whole series of pre-conditions for detention of this length that are not represented in the Italian system. First, under the Directive detention is to be considered as an *extrema ratio*. According to Article 7, the decision to return person to their country of origin should involve a period of between seven and thirty days to allow voluntary departure, taking into account the specific circumstances of the individual. If there is a risk of the migrant absconding, measures such as regular reporting to the authorities or the obligation to stay at a certain place may be imposed by the relevant authorities; these measures shall be proportionate and shall not exceed reasonable force. These provisions are intended to ensure respect for the fundamental rights of the individual, as affirmed in Article 8 of the Directive. Second, detention shall be as short as possible and only for the time needed in order to prepare for the migrant's return and/or carry out the removal process.

This is not the case in Italy, where detention is the ordinary answer to expulsion orders. Moreover, longer detention terms are not tantamount to greater effectiveness in expulsions and actually contribute to making living conditions in the centres even worse, as evidence by the repeated escape attempts and episodes of rebellion.<sup>30</sup> What is more, the competent judge

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<sup>27</sup> Law Decree no 92 of 23 May 2008, converted into Law no 125, 24 July 2008, entitled *Misure urgenti in materia di sicurezza pubblica*. Published in the Official Journal of the Italian Republic 173, 25 July 2008.

<sup>28</sup> Law no 94, 5 July 2009, *Disposizioni in materia di sicurezza pubblica*, Article 22(1), *Official Journal of the Italian Republic* 170, 24 July 2009.

<sup>29</sup> European Parliament and Council, Directive 2008/115/CE, 16 December 2008, *Official Journal of the European Union*, L 348/98, 24 December 2008.

<sup>30</sup> See, for example, 'Fortress Europe', *Rivolta a Gradisca. Tensione e pestaggi dopo una tentata evasione*, 22 September 2009. Available at <http://fortresseurope.blogspot.com/2009/09/rivolta-gradisca-tensione-e-pestaggi.html>. Last accessed 4 October 2009. See also 'rivolta nel centro di accoglienza', *La Repubblica*, 18 February 2009, and

validating the detention measures does not always ensure a proper legal review. In fact, the judge's review is often limited to assessing formal requirements, and validation is often issued only after great delay and in such a way that it is impossible to effectively exercise any right of defence.<sup>31</sup>

Article 15a of Italy's Law dated 15 July 2009<sup>32</sup> made illegal stay in Italy a criminal offence: under this law, aliens illegally entering or staying in Italy can be expelled or sentenced to pay a fine. The aim is clear: to make expulsions easier. In fact, the actual execution of the expulsion measure directed at an alien who is being investigated for illegal entry or stay does not require any validation by the judicial authorities. It does not entail an assessment of the possible risks of torture and ill-treatment connected with expulsion to the State of origin or a third State: there is thus a conflict with the prohibition of *non-refoulement*. Indeed, none of these measures entail an assessment of the possible risks of torture and ill-treatment connected with expulsion to the state of origin or a third state. Moreover, according to Article 2.2 of Directive 2008/115/EC, member States are permitted to decide not to apply this Directive to third country nationals who are subject to return as a consequence of a criminal law sanctions. Following the introduction of the new criminal offence of illegal entry and stay, Italy will be able to use Article 2.2 of the Directive in order to avoid providing the guarantees and protections required at the European level for illegal immigrants.

These measures may also affect genuine asylum seekers by making legal entry difficult, if not impossible. Although asylum seekers are supposed to apply in person to the relevant authorities in order to have their requests evaluated, the entering Italy's territory without permission is considered a criminal offence. Thus, legitimate asylum seekers risk being subject to expulsion orders and detention in a CIE. Theoretically, this procedure should be interrupted as soon as the asylum seeker makes his/her request. However, the law in questions has been in force for only a short time and the effectiveness of this procedure has not yet been proven. What is more, the fact remains that persons in need of international protection may, initially, be treated as criminals.

Having implemented the relevant European Directives, Italy has filled a gap in its legislation by establishing a minimum standard of protection for asylum seekers.<sup>33</sup> In particular, adoption of Directive 2005/85/EC has led to significant changes in the detention of asylum seekers, including the creation of specific reception facilities (*Centri assistenza richiedenti asilo*: CARAs).<sup>34</sup> Detention for asylum seekers is generally much shorter than for illegal migrants awaiting expulsion, and lasts only as long as is needed to complete the asylum procedure. However, it is still vital that good conditions are guaranteed in CARAs given these migrants' status as potential refugees; specialised services, delivered by appropriately trained staff, should be provided to ensure (i) that all those who are entitled to protection are identified, (ii) that their

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'Quarto giorno di sciopero della fame per 114 immigrati del CIE di Ponte Galiera', *Corriere della Sera*, 1 October 2009.

<sup>31</sup> Fulvio Vassallo Paleologo, 'Il respingimento differito disposto dal questore e le garanzie costituzionali', in *Diritto, Immigrazione e Cittadinanza*, Vol. XI, no 2-2009, p.17.

<sup>32</sup> Law no 94, 5 July 2009. See fn.28.

<sup>33</sup> Legislative decree no 251/2007 concerning the implementation of European Directive 2004/83/CE, *Official Journal of the Italian Republic* 3, 4 January 2008; legislative decree no 25/2008 concerning the implementation of European Directive 2005/85/CE, *Official Journal of the Italian Republic* 40, 16 February 2008.

<sup>34</sup> European Council, Directive 2005/85/EC, 1 December 2005, laying down minimum standards on procedures in Member States for granting and withdrawing refugee status; legislative Decree no 25/2008, *Official Journal of the Italian Republic* 40, 16 February 2008.

needs are assessed effectively, and (ii) that information about their rights and obligations is provided in a timely, accessible and sensitive manner. In other words, the effectiveness and fairness of the national asylum system must be ensured by making asylum available and accessible to those who require this type of protection.

### 3.1 *The CPT's experience in Italy*

The methods used to detain illegal immigrants in temporary detention centres are still not entirely satisfactory. The results of visits conducted by the CPT reveal deficiencies in the entire system, even though the situation seems to have improved since the CPT's first visit. In order to ensure the protection of immigrants' rights, the CPT made an ad hoc visit in June 2006, according to Article 7.1 of the ECPT, to assess the treatment of foreign immigrants through visits to reception and temporary detention centres located in Sicily, Calabria and Apulia. The report issued following the mission defined the cooperation of Italian authorities as excellent on both the central and local levels.<sup>35</sup>

The CPT visiting team was able to observe the identification and health procedures adopted upon the immigrants' arrival firsthand at the detention centres. It observed that the initial medical examination, an essential step in order to assess any kind of ill-treatment, was not provided to all people detained in the centres, mainly owing to limited resources. Furthermore, the CPT delegation deemed both the number of female staff and the training offered to existing staff (especially interpreters, cultural mediators, nurses) to be insufficient. However, there were relatively few reported cases of violence compared with the number of detainees; the cases that were reported generally related to an excessive use of force by the police following attempts to escape from the detention centres.<sup>36</sup>

Overall, the judgement offered by the visiting team's report was positive, not least because the measures taken by the Government to improve the infrastructures were appreciated. Speaking of immigrants' access to information concerning their rights, including the procedure for requesting asylum, great improvements were noted thanks to the presence of staff from the office of the United Nations High Commissioner for Refugees and the Italian Red Cross. Nevertheless, in some cases, asylum requests had not been properly registered by the authorities and thus certain individuals had been denied an opportunity to stay in Italy.<sup>37</sup>

The CPT also highlighted that too often foreigners in Italy are deprived of their freedom in ways similar to those applied in relation to people who have committed crimes. In their inspections of temporary detention centres (currently CIEs), the CPT delegation met irregular immigrants who had been arrested for criminal activities and were awaiting expulsion, illegal immigrants who had only just arrived in Italy, and also potential refugees who had not been granted the special assistance required under the Geneva Convention.<sup>38</sup> According to the CPT, this approach can

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<sup>35</sup> CPT, Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie du 16 au 23 juin 2006, CPT Doc. CPT/Inf (2007) 26, para. 3.

<sup>36</sup> CPT, Rapport au Gouvernement de l'Italie, pp.36-37. See fn.35.

<sup>37</sup> CPT, Rapport au Gouvernement de l'Italie, p.30. See fn.35. See also CPT, Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie du 21 Novembre au 3 Décembre 2004, CPT Doc. CPT/Inf (2006) 16, p.56.

<sup>38</sup> International Federation for Human Rights, Right of asylum in Italy: access to procedures and treatment of asylum-seekers, report no 419/22005, para. 3-6 and 8-12.

only generate confusion and lead to violence; it must, therefore, be reviewed.<sup>39</sup> In line with the prior observations of the CAT, the CPT considered that the period of detention allowed under law was too long.<sup>40</sup> Moreover, this type of detention is supposed to be limited to exceptional circumstances, but the CPT had observed that this was not the case in Italy. In view of the legislative reform that established a longer permissible period of detention, the situation is not improving.

Finally, the CPT suggested that an autonomous and independent authority carry out regular and unexpected visits to detention centres: the authority envisaged would replicate the functions of the CPT on a national level, embodying the national mechanism required by the OPCAT.<sup>41</sup> In fact, under the OPCAT, States Parties must establish an independent national preventive mechanism for the prevention of torture that has a mandate to inspect places of detention. Italy does not have such a system, but its creation is currently proposed in a draft law.<sup>42</sup> If approved by Parliament, a special guarantor (*Garante dei diritti delle persone detenute o private della libertà personale*) will be set up to carry out the following tasks: mediation, collection and organisation of data, prevention of ill-treatment, and monitoring of compliance with treatment standards through inspections. The guarantor would comprise an expert (or experts), appointed by the Council of Ministers on the basis of suggestions from its President, with the power to receive detainees' claims and verify the conditions in immigration centres through unauthorised and unexpected visits. At the end of each year of activity, the *Garante* would present a general report to the Italian Parliament and also to the CPT. However, in the draft law there is no reference to the OPCAT. It seems that the monitoring tasks of the national mechanism required by the OPCAT will be assigned to the national human rights institution, the creation of which is being considered by the competent Ministers.<sup>43</sup>

The CPT is still focusing its attention on Italian immigration centres. The ad hoc visit was followed by two more missions (from 14 to 26 September 2008 and from 27 to 31 July 2009). On these occasions, most of the inspections took place in CIEs. Even though a year has already passed since the first CPT inspection, neither the preliminary observations nor the reports have been published.<sup>44</sup> Coverage of the latest CPT mission in Italy in the press has focused on its commitment to evaluating the consequences of Italy's policy of refusing entry to illegal migrants travelling from Libya by sea. The CPT's examination primarily concerned the system of

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<sup>39</sup> CPT, Rapport au Gouvernement de l'Italie, pp.79-80. See fn.35. See also CPT, 19<sup>th</sup> General Report, CPT Doc. CPT/Inf (2009) 27, p.77.

<sup>40</sup> CAT, Conclusions and recommendations of report submitted by Italy under art. 19 of the Convention, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, para. 9-10 and 16.

<sup>41</sup> Italy signed the OPCAT on 20 August 2003 but has not ratified it yet. See United Nations Treaty Collection, Status of ratifications of the OPCAT. Available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9-b&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en). Last accessed 10 September 2009.

<sup>42</sup> Senate of the Italian Republic, XVI Legislature, Draft Law no 343 on initiative of senators Fleres, Ferrara and Piscitelli, 6 May 2008.

<sup>43</sup> Information received by email from the Human Rights Office – II DGAP of the Italian Ministry of Foreign Affairs on 22 April 2009.

<sup>44</sup> For other States Parties, on the other hand, they were published immediately: for example, the report on the visit to Sweden in June 2009. Available at <http://www.cpt.coe.int/documents/swe/2009-07-23-eng.htm>. The news reports concerning the visits in Italy are available at <http://www.cpt.coe.int/documents/ita/2009-04-08-eng.htm> and <http://www.cpt.coe.int/documents/ita/2008-10-02-eng.htm>. Last accessed 5 October 2009.

safeguards aimed at ensuring that no one is sent to a country where there are substantial grounds for believing that there is a real risk of torture or ill-treatment.

### 3.2 *Expulsions and rejections: The battle against illegal immigration*

The CPT's tasks also include assessing whether rejecting an immigrant would expose him or her to torture in the destination country. Should the Committee be notified about such a case, it must inform the European Court for Human Rights and autonomously estimate the correctness of the expulsion procedure. Key aspects explored during this assessment include (i) whether the persons concerned were offered a real opportunity to denounce the risk of torture should they be sent back to their countries of origin, (ii) whether the officials entrusted with handling expulsions had been provided with appropriate training and had access to objective and independent information about the human rights situation in the destination countries, (iii) whether the expelled persons were granted the right of appeal against the decision, (iv) and whether such a claim would suspend the expulsion. Furthermore, the CPT points out that expulsions should never be accomplished through excessive use of force: independent control bodies can represent an effective tool in avoiding any form of violence in these situations.<sup>45</sup>

Today, this matter is of foremost importance, following the events that led Italy to be reprimanded by prominent international organisations and accused by NGOs of violating a basic principle of international law: *non-refoulement*.<sup>46</sup> Although in recent years the problem of its violation concerned individual and collective expulsions made by Italy to the countries of origin, since May 2009 the situation has been made even worse owing to some rejections occurring at sea, resulting in people being sent back to Libya. The United Nations Human Rights Committee, in its considerations on the last report submitted by Libya, highlighted that it has not adhered to the 1951 Geneva Convention on Refugees.<sup>47</sup> Thus, there is a very real danger of *non-refoulement* when individuals refused entry to Italy are sent back to Libya.

Furthermore, many migrants who are declared illegal *a priori* are potential asylum seekers in need of international assistance. This claim is supported by data on aliens disembarking in Sicily in 2007 and 2008;<sup>48</sup> these data led to Italy being ranked the industrialised country with the fourth

<sup>45</sup> CPT, Seventh General Report, CPT Doc. CPT/Inf (97) 10, 1997, para. 32-4.

<sup>46</sup> United Nations Refugee Agency, 'Stop ai respingimenti in Libia' 15 May 2009; Commissioner for Human Rights of the Council of Europe, 'Europe must respect the rights of migrants', 26 September 2009, CommDH/Speech (2009) 7; Human Rights Watch, 'Pushed Back, Pushed Around', New York, September 2009; Amnesty International, 'Vite in pericolo. I governi europei negano protezione ai rifugiati', CS082, 20 May 2009; Clandestini, il Consiglio d'Europa contro l'Italia: basta respingimenti, *La Stampa*, 11 May 2009; Immigrati, l'Onu attacca l'Italia, 'Respingimenti violano diritti umani', *La Repubblica*, 14 September 2009. See also European Council on Refugees and Exiles, Pushbacks to Libya. Available at [http://www.ecre.org/topics/access\\_to\\_europe/pushbacks\\_to\\_libya](http://www.ecre.org/topics/access_to_europe/pushbacks_to_libya). Last accessed 5 October 2009.

<sup>47</sup> See Human Rights Committee, Considerations of Report submitted by Libyan Arab Jamahiriya, 15 November 2007. UN Doc. CCPR/C/LBY/CO/4, para. 12-21. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/G07/453/27/PDF/G0745327.pdf?OpenElement>. Last accessed 15 September 2009.

<sup>48</sup> According to the Ministry of the Interior sources, 50% of the immigrants who arrived in 2007 requested asylum. See Minister of the Interior, Rapporto annuale del sistema di protezione per richiedenti asilo e rifugiati. Available at <http://www.interno.it/mininterno/export/sites/default/it/temi/asilo/>. Last accessed 1 October 2009. The same percentage was confirmed for the year 2008 by the United Nations High Commissioner for Refugees (UNHCR). See UNHCR, Asylum Levels and Trends in Globalized Countries 2008. Available at

highest number of asylum seekers. Since 2004, large numbers of immigrants disembarking in Lampedusa have been expelled, in some cases to Libya.<sup>49</sup> In many cases, as this was not their country of origin, they were later deported to sub-Saharan countries using methods that could be described as torture under Article 1 of the UNCAT.<sup>50</sup> The CAT itself commented on this topic in its conclusions on the fourth periodic report submitted by Italy in May 2007. While the Italian Government continued to claim that repatriation through Libya did not pose any danger, the CAT was concerned and recalled that Italy

should ensure that the relevant alien policing authorities carry out a thorough examination, prior to making an expulsion order, in all cases of foreign nationals who have entered or stayed in Italy unlawfully, in order to ensure that the person concerned would not be subjected to torture, inhuman or degrading treatment or punishment in the country where he/she would be returned to [...]<sup>51</sup>

The situation in Libya remains unchanged. A recent report by Human Rights Watch gathered testimony about the violence suffered by aliens rejected by Italy and those travelling through Libya on their way to Europe: torture and degrading treatment were inflicted not only by police and military forces, but also by local profit-seeking criminals, due to a general climate of impunity fostered by the Government.<sup>52</sup> The situation in centres where aliens are detained is even worse. In addition to general conditions that are far from meeting European standards, detainees are not granted the right to see a lawyer or to challenge their detention in court. Testimony also points to frequent episodes of violence inflicted by guards on women and minors. Thus, the risk of arbitrary detention and torture is high in Libya.<sup>53</sup>

Despite the accusations against Libya, on 30 August 2008, Italy signed a Treaty of Friendship, Partnership and Cooperation with this country, effective as of 19 February 2009, in which cooperation with respect to illegal immigration plays a critical role. It puts into effect the First Protocol, signed in Tripoli on 19 December 2007, establishing a joint maritime patrol for the purposes of control, search and rescue at points of departure, and identification of boats used for the transport of illegal migrants in Libyan and international waters. The cooperation between Italy and Libya is strengthened by the activities of Frontex: an agency established by the

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<http://www.unhcr.org/49c796572.html>. Last accessed 5 October 2009. Moreover, according to the Ministry of the Interior, 76% of the immigrants who arrived in Sicily in 2008 obtained protection. See Minister of the Interior, *Rapporto annuale del sistema di protezione per richiedenti asilo e rifugiati 2008-2009*, pp.84. Available at [http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/00008\\_rapporto\\_sprar\\_2008\\_2009.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/17/00008_rapporto_sprar_2008_2009.pdf). Last accessed 17 December 2009.

<sup>49</sup> CPT, *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie du 16 au 23 juin 2006*, CPT/Inf (2007) 26, para. 82. See also Gennaro Santoro, 'Prevenzione e inosservanza del non-refoulement', in Patrizio Gonnella and Antonio Marchesi, *Onorare gli impegni: l'Italia e le norme internazionali contro la tortura* (Rome: Sinnos, 2006), pp.26-42.

<sup>50</sup> Human Rights Watch, *Libya – Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, (2006) Volume 18:5 (E), p.57. For an analysis of the definition of torture, see Nigel S. Rodley, 'The definition(s) of torture in international law', (2002) *Current Legal Problems* 55, pp.467-93, and Manfred Nowak, 'What practices constitute torture?', (2006) *Human Rights Quarterly* 28, p.817.

<sup>51</sup> CAT, para. 11-2. See fn.40. See also Implementation of article 3 of the Convention in the context of article 22, in General Comment no 1, UN Doc. A/53/44, Annex IX, 21 November 1997, para. 6.

<sup>52</sup> Human Rights Watch, *Pushed Back, Pushed Around - Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (New York, September 2009), pp.48-68.

<sup>53</sup> Human Rights Watch, *Pushed Back, Pushed Around*, pp.75-91. See fn.52.

European Union to work in the field of border security.<sup>54</sup> Through joint coordination of operations between the member States in the Mediterranean, the Agency ensures the presence of a higher number of patrol boats on the routes followed by immigrants headed to Europe.<sup>55</sup> The recent increase in financial resources for Frontex will strengthen monitoring of maritime borders with inevitable consequences for the number of rejections.<sup>56</sup> Despite the obligation to abide with the *Schengen border code on the rules governing the movement of persons across borders*, which directly draws attention to the *non-refoulement* principle,<sup>57</sup> the work carried out so far reveals a trend of ignoring the principle.

The outcome of Italy's cooperation with Libya and Frontex was the subject of a recent report to the Italian Parliament by Roberto Maroni, minister of internal affairs, alleging that disembarkations in Lampedusa dropped by 90% in 2009 in comparison with the corresponding period in 2008: 'In four months, nine joint return operations in Libya were carried out, concerning 834 people found at sea. According to estimates, such an approach prevented 17,000 migrants leaving Libya, thus diminishing the risk of fatal accidents at sea'.<sup>58</sup> Nevertheless, the picture outlined by the Minister must not be misunderstood. Many migrants travelling via Libya to Italy are prevented from entering Italy by Libyan forces acting in cooperation with Italian ones. If they do not choose to leave Libya, these individuals are often detained in special centres, built in Libya with Italian and EU funding, or are forcibly deported to other countries where there is a significant risk that they will be ill-treated.<sup>59</sup> Among these migrants are many refugees who are fleeing civil war and/or persecution: Italy is obligated to host them. These manoeuvrings allow Italy to dodge its obligations without flouting the letter of the laws and treaties it is bound by. There is, at present, no guarantee that the Libyan Government will respect the principle of *non-refoulement*, even if it is regarded as a peremptory norm of international law.<sup>60</sup> Thus, under its obligation to respect this principle, Italy can be held accountable for its attempts to circumvent its responsibilities.

However, the Italian Government has claimed that it is not violating any international obligation since, in its opinion, the principle of *non-refoulement* does not apply in international waters and, thus, it cannot be held accountable for violations of this principle that relate to rejection

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<sup>54</sup> Council of the European Union, Regulation (EC) 2007/2004, 26 October 2004, *Official Journal of the European Union*, L 349/1, 25 November 2004.

<sup>55</sup> For example, the operation (Nautilus) was conducted to tackle the migration flow in the Central Mediterranean region, particularly Malta and Italy. The operation, in which 5 member States (Malta, Italy, Greece, France and Germany) participated by contributing aerial and maritime resources, took place between 5 and 15 October 2006. In 2007, another Nautilus joint operation to strengthen the control of the Mediterranean maritime border began.

<sup>56</sup> Frontex, *General Report 2008*, pp.21-26. Available at [http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex\\_general\\_report\\_2008.pdf](http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2008.pdf). Last accessed 23 September 2009.

<sup>57</sup> European Parliament and Council of the European Union, Regulation (EC) 562/2006, 15 March 2006, *Official Journal of the European Union*, L105/1, 13 April 2006, Article 3b and 'Preamble' para. 20.

<sup>58</sup> Ministry of the Interior, Reply to questioning in parliament, 23 September 2009. Available at [http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0064\\_Cota\\_3-00669.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0064_Cota_3-00669.pdf). Last accessed 5 October 2009.

<sup>59</sup> On this point, see also Sara Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', (2008) *Journal of Refugee Studies* 21(1), pp.19-42.

<sup>60</sup> On the peremptory character of *non-refoulement*, see Jean Allain, 'The *jus cogens* nature of *non-refoulement*', (2001) *International Journal of Refugee Law* 13(4), pp.533-558. In relation to the general prohibition of torture, see also Erika De Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law', (2004) *European Journal of International Law* 15(1), pp.97-121.

operations in international waters. However, the United Nations Refugee Agency (UNRA) has claimed that the principle of *non-refoulement* does not entail any geographical limitation: the obligations deriving from this principle apply to all government officials acting both inside and outside national borders.<sup>61</sup> This point of view was reaffirmed by the European Court of Human Rights in a recent decision: actions carried out at sea by boats belonging to a State Party to the European Convention on Human Rights (ECHR) may entail specific responsibilities.<sup>62</sup> On these grounds, twenty-four immigrants from Somalia and Eritrea filed a claim against Italy for being rejected in Libya, in violation of Article 3 of the ECHR.

Other European Court of Human Rights (ECtHR) decisions provide further evidence of Italy's difficulties in respecting the *non-refoulement* principle: for instance, in relation to Tunisian citizens who were waiting to be sent back to their State of origin despite a risk of torture.<sup>63</sup> In particular, the *Saadi* decision revealed the lack of foundation of the Italian Government's arguments that the granting of diplomatic assurances justified the expulsion; this confirmed the orientation the ECtHR as noted in the case of *Chahal vs. UK*.<sup>64</sup> The Court did not deem the international treaties Tunisia is signatory to, and the agreements made with the European Union and (on a bilateral basis) with Italy, sufficient to ensure respect of fundamental rights by the Italian authorities.<sup>65</sup>

### 3.2.1 Case study: *Saadi v. Italia*

The ECtHR judgment on the *Saadi* case is a landmark decision for Italy: it is the first judicial condemnation of its new policy on rejection that specifically addresses Italy's obligations to prevent torture. The application concerned Mr Saadi's expulsion decree from Italy; this was the result of his suspected involvement in a terrorist organisation. Applying the provisions of the Pisanu decree,<sup>66</sup> the Minister of the Interior ordered Saadi to be deported to his country of origin. The applicant asked the ECtHR to stop the enforcement of the expulsion order because he alleged that he had been sentenced in Tunisia, during his absence, and he feared he would be subject to torture, and political and religious persecution. For this same reason, he requested political asylum, but the Italian authorities refused to grant him protection since he was considered a danger to national security.

Acting against the ECtHR request to stop the expulsion to Tunisia, the Italian authorities declared that the order must be enforced because there were not sufficient grounds for believing that he would be exposed to torture or other ill-treatment. The United Kingdom (UK) exercised its right to intervene in order to support the Italian Government's position and asked the Court to change the reasoning adopted in 1996 when the *Chahal* case was decided and the UK was

<sup>61</sup> United Nation High Commission for Refugee, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 24.

<sup>62</sup> European Court of Human Rights, *Al-Saadoon and Mufdhi v. UK*, case no 61498/08, 30 January 2009, para. 85.

<sup>63</sup> European Court of Human Rights, *Sellem v. Italy*, case no 12584/08, 5 May 2009; *O. v. Italy*, case no 37257/06, 24 March 2009; *Ben Khemais v. Italia*, case no 246/07, 24 February 2009; *Saadi v. Italia*, case no 37201/0628, 28 February 2008.

<sup>64</sup> European Court of Human Rights, *Chahal v. Regno Unito*, case no 70/1995/576/662, 15 November 1996.

<sup>65</sup> European Court of Human Rights, *Al-Saadoon and Mufdhi v. UK*, para. 58-94. See fn.62.

<sup>66</sup> 'Urgent measures to combat international terrorism', legislative decree no 144, 27 July 2005.

condemned for violation of Article 3. According to the comments presented by the British Government,<sup>67</sup> the risk that an individual will be tortured cannot be considered of equal importance to national security; these comments recalled Article 33 of the Convention on the Status of the Refugee, which clearly states that a State may deny asylum to people who are considered to be a threat to the nation. Britain also argued that diplomatic assurances given by the host state that the persons who are expelled will not be exposed to torture or other ill-treatment should be recognised as an important, valid tool that allows European countries to enforce expulsion orders without violating Article 3 of the ECHR.

In order to achieve its final decision, the Grand Chamber identified four key considerations.<sup>68</sup> First, international treaties ratified by the receiving States cannot provide sufficient guarantees on the respect of fundamental rights. Second, the personal situation of the applicant is paramount in determining whether there is a significant danger that he/she will be tortured if expelled to the state or origin. Third, reports issued by international organisations and NGOs on the general human rights situation in the states in question should be taken into account; concerning Mr Saadi's country of origin, several international sources had recently denounced cases of torture and illegal detentions. Fourth, diplomatic assurances are not sufficient to ensure respect of the prohibition of torture. On these grounds, the ECtHR decided that the expulsion of Mr Saadi might breach Article 3 of the ECHR. Thus, the ECtHR reaffirmed the absolute nature of the international prohibition of torture.

The line of reasoning of the ECtHR's judges can also be applied to the case of migrants sent back to Libya: the articles in the Treaty of Friendship with Italy that mention respect for human rights in joint operations,<sup>69</sup> Tripoli's adherence to the UNCAT and to the African Charter on Human and Peoples' Rights, and the assurances granted by the Libyan Government, are not sufficient to ensure proper treatment of migrants returned to Libya. What is needed is monitoring by independent bodies, and cooperation with Libyan authorities aimed at improving the general conditions in detention centres.

#### 4. A Proposal to Protect Immigrants

An essential element of the European preventive mechanism established by the ECPT is the cooperation between the CPT and States Parties, as required by Article 3. The purpose of the CPT is not to condemn States but to work to improve protection of people deprived of their liberty.<sup>70</sup> To this effect, national authorities should try to make the work of the CPT easier by granting visiting teams access, without interference, to all places of detention in their territory and to all related information. Moreover, the CPT should also be offered the opportunity to meet individuals deprived of their liberty without witnesses, and to come into contact with persons who may possess useful information, but who have not been previously identified as potential interviewees.

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<sup>67</sup> *Saadi v. Italia*, ECtHR, para. 117-123. See fn.63.

<sup>68</sup> *Saadi v. Italia*, ECtHR, para. 58-94. See fn.63.

<sup>69</sup> Bruno Nascimbene, *Il respingimento degli immigrati e i rapporti tra Italia e Unione Europea*, Doc. IAI0922, Istituto Affari Internazionali.

<sup>70</sup> As Mauro Palma, Chairman of the CPT, pointed out at the *Conferenza sul Divieto Internazionale di Tortura*, Bologna University (Forlì campus), 9 May 2008.

A meaningful sign of the intention to maintain good relations with States, while respecting the boundaries of national sovereignty, is the CPT's approach to the confidentiality of the information exchanged during, and the results derived from, missions. This is the reason why the public is not admitted to Committee meetings and the CPT may publish reports on the basis of observed facts only if the State Party agrees. On these grounds, the CPT was able to establish dialogue even with countries that are not inclined to limit their sovereignty or to undertake to employ controls in the domain of national security. The CPT has only decided to use the primary sanction at its disposal a few times: the option of making a public statement on a State Party that refuses to cooperate and/or to improve a certain situation according to the CPT's non-binding recommendations. The effectiveness of making a public statement obviously depends on the importance the individual country concerned assigns to international public opinion. So far this power has been exercised only with respect to two member States of the Council of Europe: Turkey<sup>71</sup> and the Russian Federation (the latter, in relation to the situation in Chechnya).<sup>72</sup>

In view of its twenty years of experience, the CPT is in a strong position to use its powers to strengthen protection of immigrants, including those detained in centres in the territory of States Parties to the ECPT and those being rejected, expelled or sent back to countries where they risk torture or cruel, inhuman or degrading treatment. To this end, the CPT should consider organising repeated visits to European detention centres for immigrants. The CPT should also play a bigger role in evaluating the 'safety' of States to determine whether immigrants are likely to face torture or inhuman or degrading treatment if sent back to their country of origin or to a third State. Although the importance of taking appropriate measures to regulate illegal immigration is recognised, these considerations cannot justify the rejection or the expulsion of people to States that independent monitoring bodies, such as the CPT, do not consider safe.<sup>73</sup>

As of 1 March 2002, under the first Protocol to the ECPT, any non-member State can join the Convention on invitation from the relevant Committee of Ministers. The member States most affected by migration flows, such as Italy, could suggest that the Committee of Ministers invite the primary transit countries for illegal immigrants heading for Europe to join the ECPT in order to offer greater protections, including via monitoring by the CPT, to the persons it rejects or expels.

In order to manage migration from Africa, the European Union Member States have signed agreements with transit countries, in effect outsourcing control of their borders.<sup>74</sup> These cooperation programmes include technical and financial aid, training of local police forces and

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<sup>71</sup> CPT Public Statement on Turkey, CPT Doc. CPT/Inf (96) 34, 6 December 1996. Available at <http://www.cpt.coe.int/documents/tur/1996-34-inf-eng.htm>. Last accessed 15 May 2009. The CPT also issued a public declaration (under Article 10.2) in 1992: see CPT Doc. CPT/Inf (93) 1.

<sup>72</sup> CPT Public statement concerning the Chechen Republic of the Russian Federation, CPT Doc. CPT/Inf (2007) 17, 13 March 2007. Available at <http://www.cpt.coe.int/documents/rus/2007-17-inf-eng.htm>. Last accessed 15 May 2009. The CPT also enforced the power granted by Article 10.2 with regard to the Russian Federation in 2003 and 2001: CPT Doc. CPT/Inf (2003) 33 and CPT Doc. CPT/Inf (2001) 15, respectively.

<sup>73</sup> María-Teresa Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', (2006) *International Journal of Refugee Law* 18(3-4), pp.571-600.

<sup>74</sup> Fulvio Vassallo Paleologo, *La frontiera mediterranea* (Rome: Associazione Studi Giuridici sull'Immigrazione, 2007), p.3.

creation of identification and detention centres.<sup>75</sup> Since these agreements are promoted by States that have signed and ratified the ECPT, it might be reasonable to affirm that responsibility for the treatment of migrants detained in the transit countries cannot lie solely with these countries. So why not extend the CPT's mandate to these centres? Even though the process of joining the ECPT is a difficult one (according to Article 18.2), it is an important tool for granting greater protection to people who may be exposed to torture and other forms of cruel, inhuman and degrading treatment.

It is true that Libya and other North African countries have demonstrated little interest in this issue, and have yet to sign the OPCAT, but their close economic relationships with European countries may lead to the agreements needed to extend the CPT's mandate in North Africa, thus strengthening protection of immigrants' fundamental rights. It is the duty of European States to promote such agreements and involve the CPT in actions aimed at controlling illegal immigration, especially in terms of securing the safety of migrants from torture and inhuman or degrading treatment, even outside European borders.

Although it might seem counter-intuitive to focus on encouraging non-European States to ratify a European convention, there are several advantages to encouraging ratification of the ECPT. Ratification of the ECPT should not be understood as an alternative to the OPCAT, but rather a more limited step towards the protection against torture. At present, the flow of people trying to migrate to Europe has to be supervised from a different point of view than the one that currently prevails in order to use the expertise and experience available in bodies such as the ECPT to ensure that the rights of these persons are protected and that they do not suffer torture and other ill-treatment. Ratification of the ECPT, although complicated, is arguably less so than the OPCAT: thus if prompt help for the protection of immigrants from torture is looked for, the ECPT may offer advantages over the OPCAT in the short term. By contrast, the OPCAT requires States Parties to designate or establish a national preventative mechanism to undertake monitoring of all places of detention, as well as to cooperate with the Sub-Committee on Prevention of Torture (the equivalent of the CPT). This additional duty is problematic not only in terms of funds, but also in terms of requiring appropriate legislation and a national commitment to independent monitoring to support human rights.

Ratification of ECPT can be viewed as pursuing two aims. The first is to provide for independent monitoring of the human rights situation in the ratifying States – above all Mediterranean States in Africa – in order to prevent the torture or ill-treatment of migrants who are detained on behalf of European States. In this way, the European standard of protection can be assured to those states that European countries regularly deal with when expelling or rejecting migrants. The second aim is to set the stage for the ratification of OPCAT. As the ECPT does not require States Parties to set up national prevention mechanisms, ratification of this convention may help states to transition to a model that allows for monitoring in relation to human rights issues. At this point, OPCAT ratification might be more fruitfully encouraged.

However, there may be advantages to promote early OPCAT ratification: countries with especially close ties to the UN, especially those relating to economic and other aid, may be more willing to consider ratification of the OPCAT if aid and political support are contingent upon it

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<sup>75</sup> Migreurop, Les camps d'étrangers en Europe et dans les pays méditerranéens. Available at <http://www.migreurop.org/IMG/pdf/carte-fr07.pdf>. Last accessed 8 October 2009.

or, at least, may increase after ratification. The key issue is that when European States expel or reject persons, it is important that they recognise that they still have duties and obligations in relation to these persons' human rights: encouraging ratification of human rights treaties and conventions, especially those with a monitoring mandate, by the countries that they most commonly deport or expel people to is an important step in fulfilling these obligations.

## 5. Conclusions

The work of the CPT so far has made a fundamental contribution to establishing rules for the protection of illegal and irregular migrants, and also asylum seekers, and to reducing their exposure to ill-treatment. Though these rules concern minimum basic standards, they offer greater levels of protection than other international instruments. As far as visits are concerned, the CPT has managed to overcome the wariness of the States Parties to the ECPT and also victims' distrustfulness.<sup>76</sup> The election of Silvia Casale, the former CPT President, as the first president of the UN Subcommittee on Prevention of Torture (SPT) demonstrated the extent of the CPT's world-wide reputation.<sup>77</sup> Now, it is important that the experience and skills acquired by the CPT are used to improve the protection of migrants deprived of their liberty in those transit countries where the risk of torture and exposure to inhuman and degrading treatment is high. As the CPT has recognised, new rules will have to be established in relation to migrants, especially those at greatest risk, including illegal and irregular migrants, and asylum seekers.

Not only should measures be adopted to reinforce compliance with the principle of *non-refoulement*, but it is also necessary to establish independent and effective preventive mechanisms where there are none. The extension of the CPT's mandate to regions bordering Europe, such as Libya and other North African countries, according to Article 18.2 of the ECPT, offers one potential solution. This may also encourage European States not to shirk their responsibilities in the field of prevention of torture through (i) funding detention centres within the jurisdiction of states that are not covered by the ECPT, and (ii) cooperating, in other ways, with countries that do not adhere to the European Convention on Human Rights.

Too often states' national security interests have prevailed over the need to respect the dignity of all people, including illegal/irregular immigrants and asylum seekers. Although national authorities often speak only about illegal immigrants when discussing expulsion orders and rejection policies, a sizeable number of those affected by these measures are in need of protection that states (at least in Europe) are obligated to provide. Moreover, combating illegal and irregular immigration by passing legislation that could compromise the effective protection of people applying for asylum cannot be considered to enhance national security unless it can be demonstrated that these persons individually – and not as a category – constitute a threat to the primary interests of the state concerned. Recalling the contributions of the European Court of Human Rights and UN human rights bodies, security needs cannot justify any individual's

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<sup>76</sup> Antonio Cassese, *Umano – Disumano. Commissariati e prigionieri nell'Europa di oggi* (Roma, Bari: Laterza, 1994), pp.189-191.

<sup>77</sup> As Mauro Palma – the current CPT President – observed during his speech to the Parliamentary Assembly of the Council of Europe on 18 April 2007, in a Parliamentary Assembly debate on the State of Human Rights and Democracy in Europe: CPT Doc. CPT (2007) 30. Dr Casale resigned her post as President of the CPT shortly before running for President of the SPT to ensure that there was no conflict of interest. In 2009, she retired from her post in the SPT and also left the CPT, after completing the maximum possible term as a member.

exposure to the risk of being tortured or subjected to cruel, inhuman, cruel or degrading treatment. Asylum seekers, and illegal and irregular immigrants, are human beings and, as such, they are entitled to be treated with dignity, both in detention centres and in the event of expulsion.