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The use of immigration detention: a human rights perspective on the phenomenon

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
CARA	Centro di Accoglienza per Richiedenti Asilo
CAS	Centro di Accoglienza Straordinaria
CAT	Convention Against Torture
CDI	Centro Di Identificazione
CIE	Centro di Identificazione ed Espulsione
CoE	Council of Europe
COVID-19	CoronaVirus Disease 2019
CPA	Centro di Prima Accoglienza
CRC	Convention on the Rights of the Child
CPT	Centro di Permanenza Temporanea
CPT	European Committee on the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment
CSPA	Centro di Soccorso e Prima Accoglienza
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICE	Immigration and Customs Enforcement agency
IOM	International Organization for Migration
LGBTI	Lesbian Gay Bisexual Transgender Intersex
NGO	Non-Governmental Organization
OPCAT	Optional Protocol to the Convention Against Torture
SPRAR	Sistema Protezione per Richiedenti Asilo e Rifugiati
SPT	Subcommittee on Prevention of Torture
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council

UNHCR	United Nations High Commissioner for Refugees
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations International Children's Emergency Fund
WGAD	Working Group on Arbitrary Detention

ABSTRACT

Il fenomeno della detenzione ammnistrativa di migranti e richiedenti asilo è diventato uno dei temi centrali riguardanti l'organizzazione dell'immigrazione negli ultimi anni.
Il numero di persone che decidono di emigrare, per i più svariati motivi, sia legalmente che illegalmente, sta crescendo anno dopo anno, portando il problema dell'organizzazione dei flussi migratori ad essere uno dei più discussi delle ultime decadi. Secondo i dati dell'UNESCO nel 2019, il numero totale di persone che ha emigrato dal proprio paese ha raggiunto i 272 milioni. Considerando che, seguendo le tendenze del passato che hanno visto il numero totale crescere di anno in anno, il bisogno degli stati di controllare i flussi migratori all'interno del loro paese diventerà sempre più importante e fondamentale. Questo si è visto chiaramente all'interno dei confini dell'Unione Europea con la crisi migratoria del 2015, quando un grande flusso di persone ha portato il sistema dell'immigrazione europeo al collasso, comportando gravi rischi per i diritti umani di migranti e richiedenti asilo e anche forti conseguenze per i paesi ai confini dell'Unione, tra gli altri Italia e Grecia. È chiaro come il problema risulti ancora molto sentito non solo in Europa ma anche in America quando con l'insediamento del presidente Trump, il tema dell'immigrazione e della detenzione dei migranti è tornato al centro dell'agenda politica, con la controversa promessa della costruzione del muro tra Stati Uniti e Messico, edificato con lo scopo di bloccare l'immigrazione irregolare.

Uno dei più importanti sistemi di controllo dell'immigrazione è rappresentato dall'uso della detenzione amministrativa. La detenzione di migranti e richiedenti asilo può essere definita come uno strumento di gestione del processo migratorio che permette ai paesi di deprivare della libertà queste categorie, in modo da determinare se possono legalmente rimanere nel paese o meno. Nel caso in cui la permanenza non sia considerata attuabile, i migranti vengono detenuti in attesa dell'espulsione e del rimpatrio, mentre nei casi in cui è stata fatta una richiesta d'asilo, la detenzione si rivela necessaria per eseguire il controllo dei documenti. Questo strumento viene utilizzato dai governi in modo da proclamare la propria sovranità all'interno del territorio e per dimostrare ai propri cittadini di avere sotto controllo la gestione dei confini, tema molto caro ai governi populisti e nazionalisti emersi negli ultimi anni in diverse aree del mondo.

In generale, i paesi giustificano l'uso della deprivazione della libertà di migranti e richiedenti asilo come unica soluzione di fronte a problemi come l'identificazione, il controllo dei documenti e i controlli relativi alla salute della singola persona. Tuttavia, per molti governi l'uso di questo strumento rappresenta anche un'importante possibilità per scoraggiare altri migranti ad intraprendere il processo di migrazione, anche se viene considerato dalla maggior part di organizzazioni e organismi, sia internazionali che regionali, illegale.
Lo scopo di questa tesi è quello di analizzare la detenzione di immigrati e richiedenti asilo sotto il punto di vista dei diritti umani, cercando di capire come i governi si stiano adattando alle diverse sfide poste dal numero sempre più alto di flussi migratori e come le organizzazioni e gli organi, sia internazionali che regionali, possano aiutare a regolare questo fenomeno offrendo un'ulteriore protezione a queste categorie nella prospettiva della salvaguardia dei diritti umani.

Nella prima parte del primo capitolo viene data una generale panoramica sulla definizione di detenzione amministrativa, cercando di analizzare i motivi che hanno spinto e tutt'ora spingono la maggior parte dei paesi del mondo ad usare questo strumento. Successivamente, tre differenti tipologie di detenzione verranno prese in considerazione e descritte per spiegarne le sostanziali differenze e i diversi scopi, la detenzione all'arrivo, la deprivazione della libertà per motivazioni legate alla richiesta di asilo e quella con lo scopo del rimpatrio.
Nella seconda parte, il sistema Europeo viene analizzato prendendo in considerazione il ruolo di diverse direttive sull'organizzazione della detenzione di migranti e richiedenti asilo all'interno dei Paesi Membri, tra le quali la Direttiva 2013/33/UE e la Direttiva 2013/32/UE, riguardati entrambe i richiedenti di protezione internazionale, e la Direttiva 2008/115/CE riguardo il rimpatrio di cittadini il cui soggiorno è irregolare. Inoltre, le differenze e le similitudini dei sistemi di detenzione tra i paesi dell'Unione sono analizzate, mettendo in luce le differenti necessità e le sfide comuni.
L'ultima parte del capitolo è dedicata all'organizzazione del sistema italiano, prendendo in considerazione come questo si sia evoluto negli ultimi 20 anni dal punto di vista legislativo e le diverse strutture che attualmente nel paese ospitano richiedenti asilo e migranti irregolari.

Il secondo capitolo si concentra sul ruolo delle Nazioni Unite e degli strumenti regionali che si occupano del tema della detenzione amministrativa di richiedenti asilo e migranti irregolari.
La prima parte è interamente dedicata alle Nazioni Unite, prendendo in considerazione il suo ruolo dal punto di vista legale. Infatti, tre convenzioni, la Convenzione Internazionale sui Diritti Civili e Politici, la Convenzione Internazionale sulla Protezione dei Diritti dei Lavoratori Migranti e dei Membri delle Loro Famiglie e la Convenzione sui Rifugiati verranno prese in considerazione, evidenziando in ognuna di esse l'importanza di alcuni articoli per il fenomeno della deprivazione della libertà di queste categorie, come la proibizione della tortura e dell'arresto arbitrario e il diritto d'asilo.
Ulteriormente, verrà evidenziata l'importanza di tre Procedure Speciali all'interno delle del sistema delle Nazioni Unite, il Gruppo di Lavoro sulla Detenzione Arbitraria, il Relatore Speciale sui Diritti Umani dei Migranti e il Relatore Speciale sulla Proibizione della Tortura di Altri Trattamenti o Pene Crudeli, Inumani e Degradanti, in quanto il loro lavoro ha portato importanti frutti nella la salvaguardia dei diritti umani di migranti irregolari e richiedenti asilo, attraverso la pubblicazione di diversi report e di visite in diversi Paesi Membri.
Nella terza parte dedicata al lavoro delle Nazione Unite, il focus sarà sull'Alto Commissariato delle Nazioni Unite per i Rifugiati e sul ruolo delle sue pubblicazioni in materia di detenzione amministrativa, come ad esempio "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention".
Nell'ultima parte del secondo capitolo, verranno analizzati tre strumenti regionali di protezione dei diritti umani, la Carta Africana dei Diritti dell'Uomo e dei Popoli, la Convenzione Americana sui Diritti Umani e la Convenzione Europea dei Diritti dell'Uomo, prendendo in considerazione gli articoli rilevanti nel caso di detenzione di migrati irregolari e richiedenti asilo.

Il terzo capitolo ha come scopo l'analisi di diversi concetti fondamentali per capire la detenzione amministrativa dal punto di vista dei diritti umani, come ad esempio il concetto di libertà, arbitrarietà, proporzionalità e limite temporale.
Inoltre, verrà presa in considerazione l'importanza della proibizione della tortura,

portando alla luce diverse situazioni che sono risultate in una violazione dei diritti umani nei centri di detenzione e nel processo di deprivazione della libertà, servendosi della consultazione della Convenzione delle Nazioni Unite Contro la Tortura, del suo Protocollo Opzionale e della Convenzione europea per la prevenzione della tortura e delle pene o trattamenti inumani o degradanti.

L'ultima parte del capitolo sarà dedicata al concetto dell'intersezionalità cioè il modo in cui diverse caratteristiche di una certa categoria, come il sesso, l'età, la religione e la nazionalità, possono influenzare il fenomeno della detenzione amministrativa.

INTRODUCTION

In 2019, the number of migrants around the world reached 272 million people. Between 1990 and 2019 it grew by 199 million[1]. On average the total number of migrants account to 3.5% worldwide, and specifically, in developed countries this level reaches the 12% of the entire population. These data show clearly that the quantity of people around the world that move from one country to another is increasing in the last decades. Moreover, they are fundamental to understand how the future of migration is going to be shaped, to identify correct policies, and to make decisions on how to manage this growing flow.

In the field of migration, irregular immigration is the one that poses the greater number of questions, and, therefore, it is considered by a several number of the countries as a matter of major concern. Immigration detention is one of the most common tool that countries adopt in the management of migration.

The main question that has driven the research of this thesis is whether human rights are respected during the whole process of immigration detention, from the identification to the removal or the assessment of the refugee status. Therefore, the principal aim of this thesis has been to assess how countries are managing their migration system and what regional and international bodies and organizations can do in order to make government respect human rights of the migrants and asylum seekers while deprived of their liberty.

All human rights treaties, covenants and conventions, both regional and international, are based on the principle of non-discrimination, and on the fact that all humans are equal, and no differences should be made on any ground, among others nationality.

In the last decades, due to the significant growth of migration flows, both governments had to adapt their legislation to the arrival of illegal migrants and asylum seekers, and international and regional organizations had to develop plans in order to both raise the awareness on the issue, and to highlight the concept of human right protection related to the phenomenon.

[1] UN Department of Economic and Social Affairs, Population Division, International Migration 2019: Report, 2019, ST/ESA/SER.A/438. Available at: https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/InternationalMigration2019_Report.pdf, last accessed 01 October 2020.

Immigration detention can be defined as a practice with which countries hold people that have to be subjected to immigration control, while they wait for either deportation or approval to legally enter the country[2]. Nevertheless, giving a precise definition might result complicated, as a matter of fact, it is a phenomenon that can have different shades, depending on the migrant and the different situations of every country according to how the migration system is managed.

Indeed, migrants entering a country can be either irregular migrants or asylum seekers, and, in many occasions, determining this difference results fundamental in the use of such immigration management tool. According to the definition of the UNESCO, an illegal/irregular migrant is whoever "enter a country, usually in search of employment, without the necessary documents or permits"[3]. Instead, the definition of asylum seeker might change from country to country, depending on each country's legislation on the topic, however, a broad definition might be given. Asylum seekers are people that apply for protection and they are awaiting the country of arrival to determine their status, if the state recognizes their need for protection, they become refugees[4].

Immigration detention started to gain more and more importance during the last years when its use became one of the main tools in the management of migration, and the number of people detained under administrative law skyrocketed. As a matter of fact, the majority of country in the world relies on deprivation of liberty as one of the principal ways to control the entrance of irregular migrants and asylum seekers.

In the first paragraphs of first chapter of this thesis, a broad and general overview of the meaning of immigration detention is given, taking into account in particular way the distinctions between different forms of deprivation of liberty of irregular migrants and asylum seekers.

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[2] Avid Official Website, What is immigration detention?. Available at: http://www.aviddetention.org.uk/immigration-detention/what-immigration-detention, last accessed 01 October 2020.

[3] UNESCO Official Website, Social and Human Science, Migrant/Migration. Available at: https://wayback.archive-it.org/10611/20171126022441/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/migrant/, last accessed 01 October 2020.

[4] UNESCO Official Website, Social and Human Science, Asylum Seeker. Available at: https://wayback.archive-it.org/10611/20171126022403/http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/asylum-seeker/, last accessed 01 October 2020.

As a matter of fact, according to different conditions, for instance, if detention is related to irregular migration or the asylum system, the final aim of detention or the moment in which the migrant is deprived of his/her liberty, the deprivation of liberty can have different characteristics. Detention upon arrival is adopted in the first stages of migration procedures, as a matter of fact, it is useful in order to determine the identity of the migrant, his/her health status and to assess if he/she can legally enter the country or not. Detention in the asylum procedures is the deprivation of liberty that allows the competent authorities to understand if the migrant that applied for asylum can remain in the country as a refugee or if he/she has to be removed. The third kind of detention is the one related to the process of removal in those cases in which the migrant is awaiting for his/her deportation, after the assessment of his/her irregular presence in the country.

In the second part of the first chapter is explored how immigration detention is organized in the European Union. Indeed, taking into account the Directive 2013/33/EU, laying down standards for the reception of applicants for international protection, and the Directive 2013/32/EU on common procedures for granting and withdrawing international protection, the European coordination on the phenomenon is analyzed. As a matter of fact, the two Directives together with the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegal staying third-country nationals, set the legal standards for all the Member State of the European Union on the matter of migration, and immigration detention in particular.

Moreover, an analysis on how the tool of immigration detention differs in the different countries has been conducted, taking into account both the similarities and the differences in the management of such phenomenon.

The last part of the chapter analyzes how the phenomenon of deprivation of liberty of migrants and asylum seekers is managed inside the European Union, taking into account the Italian experience. The first time in which immigration detention was taken into consideration in the Italian legislation dates back to 1998, when for the first time the tool of administration detention has been considered necessary in order to control the growing number of migrants. From that moment, many directives and legislative decrees had been made on the topic, according to the increasing number of migrants arriving in the territory, and several new types of detention centers had been created in order to manage the necessity to control the phenomenon of irregular migration.

The second chapter analyses which is the role of international and regional bodies on the protection of human rights of migrants and asylum seekers deprived of their liberty.

The United Nations, since its creation, has always devoted particular attention to the phenomenon of immigration detention, both from a legal point of view with many treaties, convention and covenants addressing the issue, but also, from a practical point of view with the creation of some bodies that addressed immigration detention in different occasions.

The first part of the chapter is focused on how from a legal standpoint, the United Nations have tackled the issue during the years. Starting from the Universal Declaration on Human Rights, the importance of the concept of equality and non-discrimination on the basis of, among others, nationality and religion, have been underlined with particular attention. Other three UN legal instrument have been taken into account, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Refugee Convention. Some Articles of these conventions and covenants might be significantly useful when dealing with immigration detention of irregular migrants, asylum seeker or refugees, as for instance the ones that condemn the use of arbitrary detention.

The second part of the chapter focuses on the United Nations Special Procedures that are related with deprivation of liberty of migrants and asylum seekers. As a matter of fact, the Working Group on Arbitrary Detention, the Special Rapporteur on the Human Rights of Migrants and the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment have all tackled the topic in various occasions issuing various reports on the matter. All the three Special Procedures can undertake country visits and act on individual cases, in order to assess, the conditions of irregular migrants and asylum seekers while in detention and, intervene to assure the respect of human rights.

The third part highlights the importance of the United Nations High Commissioner for Refugees and its work on the topic. It issued various reports on detention of asylum seekers as, among others, the “Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention” and the “Beyond Detention: A Global Strategy to support governments to end the detention of asylum-

seeker and refugees, 2014-2019". The aim of these documents, and of the UNHCR in general, is to make countries understand that immigration detention of refugee should be used only as a measure of last resort and when other kind of less coercive measures cannot be effective. As a matter of fact, the UNHCR highlights the importance of using alternative to detention for this particular category, in order to not provoke other traumas. The last part of the chapter is about three regional legal instruments, the African Charter on Human and People's Rights, the American Convention on Human Rights, and the European Convention on Human Rights. The main Articles referring both directly and indirectly to the use of immigration detention, and deprivation of liberty in general, are going to be analyzed in order to understand the role of these legal instruments in the regulation of such phenomenon from the point of view of human rights.

In the third and last chapter some fundamental concepts are going to be explained, and the issue of intersectionality is going to be analyzed more deeply, providing some examples.

In the first part the main focus is on the right to liberty of migrants and asylum seekers, as a matter of fact their detention is considered as a deprivation of their right of liberty and freedom of movement. Detention in order to be considered lawful has to respect some principles, indeed, it has to be proportionate, not arbitrary and it must have a limit. These three principles are going to be analyzed, giving further explanations and providing examples in order to better understand them.

In the following paragraph the prohibition of the use of torture or other cruel, inhuman or degrading treatment or punishment is highlighted. The Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and it Optional Protocol are going to be analyzed from the immigration detention perspective, highlighting the importance of the Subcommittee on the Prevention of Torture, an human rights mechanism of the UN which has the duty of assessing the prevention of torture in the process of detention. Furthermore, the European Committee for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment is going to be taken into consideration to understand how, from a regional point of view, bodies are dealing with the prevention of it. Some reports, both from the CPT and other international organizations, are going to be analyzed, together with some cases of the European Court

of Human Rights which specifically deal with torture during the process of immigration detention.

The last part of the chapter gives an overview on intersectionality, giving a definition of the concept, and explaining how it can affect the different categories of irregular migrants and asylum seekers detained. As a matter of fact, in the first subparagraph, the situation of women in detention is going to be analyzed, taking into consideration in particular the need of both, pregnant women and newly mothers, in order to understand how their specific necessities are interconnected with detention.

The second subparagraph is going to focus on the safeguard of children, taking into account how their fragile status can be affected by their deprivation of liberty and how organizations like UNICEF are acting in order to safeguard their condition as minors.

The third and last subparagraph takes in consideration how nationality and religion can influence on many aspects of immigration detention. The focus is going to be on how mostly after the terroristic attacks of 9/11 in the United States of America, the perception on specific nationality and religion changed drastically, having deep consequences in the way migrants and asylum seekers were treated in detention.

CHAPTER 1

IMMIGRATION DETENTION A GENERAL OVERVIEW

1.1 Definition of immigration detention at international level

Immigration detention in the last decades has become one of the main tools for countries to manage immigration inside their territories[5]. However, even if this instrument should not be considered as a common practice in immigration control, but, as a last resort measure, during the last years, due to many immigration crisis and the growing will of countries to manage their territories and borders, the use of this kind of tool became more and more frequent, evolving into a common practice and a large scale instrument[6]. Many definitions have been developed in order to fully understand what immigration detention is, and why it is so common among countries.

There are many ways in which immigration detention can be defined; in general, it is a form of deprivation of liberty adopted by countries to manage migration flows, and one of the possibilities states have in those cases in which a migrants violates the territorial sovereignty of the state, by entering the country illegally[7].

The European Migration Network, a network of migration and asylum experts coordinated by the European Commission, illustrates immigration detention as an "Administrative measure applied by the state to restrict the movement of an individual through confinement in order for an immigration procedure to be implemented"[8]. As a matter of fact, in majority of the countries in the world, immigration detention is regulated

5 IOM, Global Compact Thematic Paper, Detention and Alternatives to Detention, Immigration Detention and Alternatives to Detention, 2017, p. 1. Available at: https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf, last accessed 3 June 2020.

6 Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 24.

7 Guia, Maria João, Robert Koulish, and Valsamis Mitsilegas, eds. *Immigration Detention, Risk and Human Rights*. Cham: Springer International Publishing, 2016, p. 204.

8 European Commission, The use of detention and alternatives to detention in the context of immigration policies, Synthesis Report for the EMN Focussed Study 2014, p. 4, last accessed 3 June 2020

under the administrative law however, only in few among them, its management falls under the criminal law, even if this is generally considered a disproportionate measure[9].
Following the definition of the United Nations High Commissioner for Refugees, which specifically refers to asylum seekers and applicants for international protection, immigration detention is the deprivation of liberty or the confinement of a person in a closed space in which he/she cannot leave at his/her will[10].
Taking into account the phenomenon from another perspective, immigration detention clearly represents how the world is divided into territorial nation states, and how countries are willing to control the entry of migrants, in order to protect their sovereignty on their territory and, therefore, result in control of their borders. Moreover, in the last decades, countries' aim had been to distinguish the "inside" from the "outside", achieving the goal of unity[11].
When dealing with sovereign power of countries on management of migration inside their borders, the Working Group on Arbitrary Detention, a body of human right experts on arbitrary detention established by the former UN Commission on Human Right, recognizes the power of the state to make decisions on the topic. However, their sovereignty on the matter is not unlimited, since the respect of international laws on the topic and international human rights laws are fundamental[12].

In addition to the safeguard of national sovereignty on their territory, for governments, the general purpose of immigration detention, is the management of their borders and of the non-nationals present inside their territories, in order to prevent illegal entry of migrants, and if needed, to enforce a deportation order to expel irregular people from the country[13]. It is clear that the use of this tool is to prevent illegal immigration from

[9]Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 4.
[10] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 9.
[11] Cornelisse, Galina. "Immigration Detention and the Territoriality of Universal Rights." *The Deportation Regime*, 2010, 101–22.
[12] Bruycker, Philippe De, and Alice Bloomfield. "ALTERNATIVES TO IMMIGRATION AND ASYLUM DETENTION IN THE EU," 2015, 157, p. 16.
[13] IOM, Global Compact Thematic Paper, Detention and Alternatives to Detention, Immigration Detention and Alternatives to Detention, 2017, p. 1. Available at: IOM, Global Compact Thematic Paper, Detention and Alternatives to Detention, Immigration Detention and Alternatives to Detention, 2017, p. 1. Available at: https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf, last accessed 3 June 2020.

happening. To achieve the management of migration flows, the use of identification measures is necessary, in order to understand who they are and where they come from. As a matter of fact, their identification is useful to understand if they can legally stay in the country, if they can apply for asylum, or if a removal order is necessary.

Moreover, many countries believe that immigration detention, at its first stages, is crucial to have to possibility to do public health screening, to safeguard internal public order, and to prevent the entry of new illnesses in the territory[14]. This necessity is becoming clear in the last months with the insurgence of the global pandemic, caused by Corona Virus Disease 2019, all over the world. As a matter of fact, nowadays migrants are forced to undergo 14 days quarantine in order to assess, after the proper testing, if they have contracted the virus or not. This is highly needed by countries to manage the spread of the virus in their territories, in order to avoid the insurgence of new outbreaks inside the borders.

In some cases, it is clear that some governments consider the broad use of immigration detention as way to deter other migrants from entering their country. However, considering both the condition of illegal migrants and, in a particular way, refugees, their situation in their country of origin is so appalling to the extent that, they are prompt to undergo a long deprivation of liberty, with the hope that this would result in a possibility to have a better life and a better future after their release[15]. If the decision to migrate cannot be deterred by the use of detention in the majority of cases, what can change, according to the conditions of deprivation of liberty in every specific country, are the individual choices of the final destination, together with the route or the country of entry. It is necessary to underline that the rate of migrants awaiting for deportation and asylum seekers that after their release from detention disappear, is only of 10%. This means that 90 out of 100 of them do not abscond during this period of time, and keep observing the rules they have to follow according to their specific situations. However, even if the use of detention could be avoided with the use of several alternatives, which may result in a high saving of money, it is still largely used by the majority of countries[16].

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[14] Bruycker, Philippe De, and Alice Bloomfield. "ALTERNATIVES TO IMMIGRATION AND ASYLUM DETENTION IN THE EU," 2015, 157, p. 16.

[15] Edwards, Alice, Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series, April 2011, p. 2.

[16] *Ibid.*

The detention of illegal migrants and asylum seekers can take place in different facilities according to the different countries' organization on the issue. They might vary from immigration detention facilities, to police stations at the border, to prisons. In many countries there are facilities which purpose is the detention of migrants, however, it is not uncommon for non-nationals to be detained in prisons that should be employed just for people that are charged for criminal offences. Even if several guidelines of NGOs and bodies fighting for the protection of human rights state that migrants who enter the country illegally should not be treated as criminals and, therefore, be detained in specific detention facilities, their detention in common prisons is not unusual.

As already mentioned, non-nationals can be detained in different kinds of structures and in different moments of their stay in the country; these locations can be international zones at airports, when migrants are catch at the border, boats, closed refugee camps, when dealing with asylum seekers, common prisons or specific structures devoted to the detention of migrants.

In all of these cases freedom of movement is limited indeed the only possibility these people have to leave the detention areas is by leaving the country itself[17].

1.2 Different forms of immigration detention

There are different kinds of detention procedures that may vary depending on the situation, the moment in which the migrant is detained, the final aim of the detention, and on the nationality and personal condition of the migrant. Indeed, detention can be applied in different moments and in different facilities, upon arrival, when the migrant is already in the territory, in specialized detention facilities, prisons, airport transit zones or police stations at the borders.

Immigration detention can be divided into three different subcategories, detention upon arrival, detention of asylum seekers and detention aimed at removal.

[17] Guia, Maria João, Robert Koulish, and Valsamis Mitsilegas, eds. *Immigration Detention, Risk and Human Rights*. Cham: Springer International Publishing, 2016, p. 204.

Detention upon arrival is exercised when the migrant or the asylum seekers is detained at the border of the country (airport, port transit zones, facilities placed at the borders) to allow the process of identification and health screening; the detention related to the asylum procedure has the aim of assessing if the migrant can have the right to remain in the country by applying for international protection, lastly, the detention for the purpose of removal is applied in those cases in which migrants are detained waiting be to expelled by the country because they are not allowed to stay legally.

1.2.1 Upon arrival

This kind of detention is the one authorities adopt in the first stage, right after the arrival of the migrants. The main purpose is to identify them, check their documents and understand if they can enter the country legally or not. This form of detention is employed to safeguard the national borders and to prevent unauthorized entry of people in the country. This process is usually held at the borders, airport transit zones, border crossing zones or police stations placed in strategic places, and it is ordered by board guards[18]. This kind of detention can be overlapped with other forms of detention, indeed, in many cases people that are detained are also requesting to enter the country through the asylum system.

In many cases, migrants cannot enjoy enough legal guarantees in this stage of detention, since most of the times their status is not clear. During detention upon arrival, migrants should be informed in a language they can understand of the whole situation, and of the possibilities they have, however, this is not always respected. As a matter of fact, they cannot easily accede legal aid also due to the impossibility for them to communicate with the outside world. Even if migrants should remain in these facilities for the shortest period and be transferred in proper facilities as soon as possible, the respect of human rights standards is needed, as a matter of fact, these accomodations should represent an healthy and safe environment for non-nationals.

[18] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 8.

In France, for example, detention upon arrival is held in zones that they called *zones d'attente* which can be, as already mentioned, in airports, ports and train stations subjected to international traffic[19]. There are three different situations in which migrants are obliged to stay in these zones, if they cannot enter the country legally, if they are illegally transiting in France, and if they are requesting asylum protection. The custody in these zones cannot exceed 26 days, and it might end if the migrant can enter the country with a temporary permit or if he/she has to leave the country both willing to do it or forced by the authorities[20].

The access inside the *zones d'attente* is forbidden to the majority of people, only lawyers, parliament members, certain NGOs and associations (as for instance United Nations High Commissioner for Refugees) are allowed to enter[21].

As a report of 2015 by Anafé (Association Nationale d'Assistance aux Frontières pour les Étrangers) stated that the *zone d'attente* of Beauvais airport does not represent an healthy environment for migrants, as a matter of fact, the status of the zone does not respect the reception standards which by law should be similar at the ones of an hotel accommodation. The access to food is limited, indeed, the quantity is not enough for all migrants living there and the hygienic basic standards are not respected. Moreover, the migrants are not provided with enough knowledge on their rights and there is no information on the rules of the *zone.* The telephonic contacts of the lawyers, who can help them deal with their situation, are not present, and, therefore, the possibility to challenge their situations is limited[22].

In many cases migrants reported situation of physical and psychological violence and even of discrimination on the basis of their race and country of origin. These *zones* represent a blind spot on human rights defense, indeed, for the migrants is difficult or even impossible to denounce situations of violence and discrimination, due to lack of legal aid, and to the lack of access to a proper information in an understandable language for them[23].

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[19] Republique Française, Service-Public.fr, Maintien d'un étranger en zone d'attente. Available at: https://www.service-public.fr/particuliers/vosdroits/F11144, last accessed 06 July 2020.
[20] *Ibid.*
[21] Anafé, Voyage au centre des zones d'attente, Rapport d'observations dans les zones d'attente, Rapport d'activité et financier 2015, November 2016, p.13. Available at: http://www.anafe.org/spip.php?article363, last accessed 05 June 2020.
[22] *Ibid.,* p. 14.
[23] *Ibid.,* p. 43.

1.2.2 Asylum system

Another subcategory of immigration detention is the one related to the asylum procedure. These migrants are detained in order to assess if they can enjoy the asylum protection or not. As a matter of fact, this type of detention is necessary for countries to determine, by identification procedures, whether a migrant can legally enter and stay in the country and if his/her application is admissible, and therefore assess his/her refugee status[24]. However, the detention has to last as short as possible to establish the identity of the migrant, and this should be done in the fastest way possible in order to avoid long periods in detention. In many cases the access to legal aid is not enough and, therefore, the access to asylum procedure is limited, moreover, many cases of racial discrimination are common when facing asylum procedures.

Detention of asylum seekers, as for administrative detention in general, should be a measure of last resort, and since seeking asylum is not an unlawful act, detention have normally to be avoided and any form of deprivation of liberty should be circumscribed and reviewed rapidly and periodically[25]. Moreover, considering their fragile status, their detention has to be necessary, reasonable and have a legitimate purpose and it should not be used by any means as a punitive measure or to dissuade future asylum seekers or those who have already started their claim for international protection. Alternatives to detention must be taken into account, since the use of detention should be devoted only in those cases in which other less coercive measure are impossible to apply.

As the UNHCR Guidelines on the Detention of Asylum Seekers states, detention of asylum seekers might be necessary only on specific ground and situations. For instance, in the cases in which, they can result in a problem for public order for the risk of absconding, in an issue for public health, or in a possible threat for the security of the nation.

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[24] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 12.

[25] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 6.

Other factors that are needed to be taken into account when dealing with detention of asylum seekers, are that, most of the times, these people have experienced traumatic events in their lives and they could have faced several difficulties when trying to collect the necessary documentation because of fears of being persecuted or because they left the country in hustle without having the possibility to request these papers.
Moreover, another key aspect related to detention of asylum seekers is the fact that the staff working with the detainees has to be prepared to sustain them psychologically, thus they might be more likely subjected to traumas and/or post-traumatic stress[26].

1.2.3 Detention and Removal

The last subcategory of immigration detention analyzed is the one related to detention with the aim of removing irregular migrants from the country. This is the so-called detention in preparation for deportation, and it is needed to safeguard removal[27]. In the European Union system the Return Directive of 2008 sets the common rules for Member States in the field of removal and deportation of third-country nationals[28].
Detention in preparation for expulsion is usually held in facilities where migrants spend a significant period of time. The amount of days or months should be regulated by national laws, however, in a great number of cases, the time migrants spend in detention exceeds the limits. In several occasions, the detention period is punctuated by short periods of freedom, because, even if the removal appears impossible to organize, migrants keep being subjected to detention in the wait of actual expulsion and, in order to not exceed the limits, in some cases, the authorities released them, even only for some minutes, to detain them again.
As for the other two form of detention, previously explained, detention with the aim of removal has to be revised periodically by the competent authorities to asses if it is still

[26] *Ibid.,* p. 31
[27] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 15.
[28] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed 06 July 2020

necessary and lawful. However, it is difficult for migrants to enjoy legal support and to contest the unlawfulness of their detention since the possibilities for them to meet lawyers are really inadequate. In addition to this, the lack of clear understanding of the reasons of detention and rights are two of the main reasons that make legal support difficult.

Detention in preparation for deportation can be held in different places and facilities. Humanitarian organizations highlight the importance of a safety and healthy environment, which should not be, in any circumstances, an actual prison devoted to people who are guilty of criminal offences. However, in many countries, migrants are detained in prisons and, in some occasions, they even share the same parts of the facility, being in this way, treated as common criminals. This might happen because of overcrowding conditions in the structures that should be devoted only to immigration detention.

Indeed, in many cases, the conditions in the detention centers for migrants are worse than the ones of the actual prisons. In several cases overpopulation represents an important issue and hygienic and sanitary standards are not respected. However, in immigration detention closed facilities, security procedures are more restrictive than those applied in common prisons, even if the people detained in the centers are not charged for any criminal offence, and their detention should be related with administrative and not criminal law[29].

Immigration detention centers can be different types of structures, for instance, traditional ones as facilities built for the specific purpose of detention of migrants and asylum seeker, ware-houses, prefabs or prisons but even informal centers where people are detained under the pretext of emergency, as for example, police stations, army barracks or even car parks and stadiums[30].

Migrants detained in these centers should have the right to communicate periodically with their family and friends, NGOs and competent consular authorities but, most of the times, the communication with outside is not permitted or not easily accessible.

[29] *Ibid.,* p. 31.

[30] Arbogast, Lydie. "Migrant Detention in the European Union: A Thriving Business," 2016, 63, p. 12.

1.3 An example on how Immigration Detention is regulated: the European Union

During the last decades the debate on the topic of immigration detention grew inside the borders of the European Union. The migration crisis of the last decade forced Member States to implement common measures on migration policies, placing more and more importance on the issue of detention of third-country nationals, in order to control efficiently external borders and manage migrants inside the territory of the European Union[31].

The importance was placed not only on irregular migrants but also on asylum seekers with the aim of establishing standards for their reception and guarantee of their refugee status.

Taking into account the detention of third-country nationals applying for international protection, two European Union Directives are worth to be mentioned, the Directive 2013/33/EU laying down standards for the reception of applicants for international protection and the Directive 2013/32/EU on common procedures for granting and withdrawing international protection[32] [33]. The two Directives are linked one to the other and, in many cases, they refer to each-others Articles.

The issue of detention is addressed specifically in Article 26 of the Directive 2013/32/EU, which states that third-country nationals, applying for international protection, cannot be detained by Member States for the sole reason that they are applicants and that, all norms regarding the condition and the guarantees of the applicants detained are set down in the Directive 2013/33/EU[34]. Moreover, Article 26(1) highlights that a judicial speedy review has to be ensured by Member States.

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[31] European Council, Council of the European Union, EU migration policies. Available at: https://www.consilium.europa.eu/en/policies/migratory-pressures/, last accessed 01 July 2020.

[32] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033, last accessed: 30 June 2020.

[33] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection*. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032, last accessed: 30 June 2020.

[34] Directive 2013/33/EU. *Supra note 26*, Art 26.

Article 8 *"Information and counseling in detention facilities and at border crossing points"* states the importance for Member States to provide every kind of necessary information to people that may apply for international protection in detention facilities and in border crossing points. Moreover, countries have the duty to provide all the arrangements necessary for interpretation in order to make the process of application for asylum easier[35].

Article 23(2) of the Directive makes clear that Member States have to ensure the access to the detention facilities and the transit zones to legal advisers and other counsellors to consult the applicant, following the principle set in Articles 10(4) and 18(2)(b) and (c) of the Directive 2013/33/EU[36].

Concerning the Directive 2013/33/EU Articles 8,9 and 10 are the ones that most specifically address the detention of people who apply for international protection, however, the notion of detention is discussed in the Preamble as well[37]. From paragraph 15 to paragraph 20, detention of third-country nationals represents the main focus. It is underlined that applicants cannot be detained for the mere fact that they applied for international protection, as already mentioned in the Directive 2013/32/EU, and that detention can be held only under exceptional circumstances, and it have to be subjected to the principles of proportionality and necessity. Moreover, the applicants must have the possibility to access procedural guarantees, as for instance, judicial remedy.

Paragraph 16 of the Preamble is focused on the concept of length of detention to verify its necessity and the fact that deprivation of liberty has to be as short as possible, and it should not exceed the time needed to complete the procedure of asylum. Whereas, paragraph 18 is concerned with the respect for human dignity and with the fact that applicants have to be treated with full respect.

Paragraph 19 and 20 state respectively the importance on derogation to certain detention guarantees that can be taken into consideration only in exceptional situations, and the necessity to consider detention as a measure of last resort, taking into account previously

[35] *Ibid.,* Art 8.
[36] *Ibid.,* Art 23(2).
[37] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection,* Preamble Art. 8-9-10. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033, last accessed: 30 June.

other non-custodial alternatives, that have to respect the fundamental human right of the third-country national[38].

In Article 8 the principles of detention are explained, highlighting, in the first two paragraphs, that a third-country national cannot be held in detention only because they are applying for international protection in accordance with the Directive 2013/32/EU, previously analyzed, and that other alternatives have to be taken into account before detention. As a matter of fact, this should be used only in specific cases in which the other forms of control cannot preform effectively[39].

Article 8(3) is focused on those cases in which detention of an applicant is allowed, determining the situations in which Member States can use immigration detention legally:

"(a) in order to determine or verify his or her identity or nationality;

(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

(d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for

[38] *Ibid.,* Preamble Paragraphs(19)(20).
[39] *Ibid.,* Art 8(1)(2).

international protection lodged in one of the Member States by a third-country national or a stateless person

The grounds for detention shall be laid down in national law[40]*."*

Article 9, "*Guarantees for detained applicants*", refers to the rights third-country nationals have while in detention. They have to be detained for the short amount of time possible and according to those cases set out in Article 8(3). Detention has to be ordered by judicial or administrative authority and revised, as early as possible, by judicial authorities if ordered by the administrative ones.

If with the judicial review, the detention is declared unlawful, the applicant has to be released immediately[41]. Article 9(5) underlines the importance of judicial periodical reviews, which is even more fundamental if a decision for prolongment of detention has to be taken.

Furthermore, paragraph 4 states that the applicants have to be informed immediately in a language they can understand of the reasons of detention, the procedures for challenging it, and the possibility to request legal aid.

As written in paragraph 6, in cases of judicial review the applicants have the right to access to free legal assistance and representation in the cases highlighted in paragraph 7 and 8.

"7. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants[42]*."*

"8. Member States may also:

(a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;

[40] *Ibid.,* Art 8(3).
[41] *Ibid.,* Art 9(3).
[42] *Ibid.,* Art 9(7).

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance[43]*."*

Article 10, *Conditions of detention*, is focused on the circumstances of the period of detention. Paragraph 1 is concerned with the fact that applicants should be detained in specific facilities, and, in the case in which this is not possible, they should be separated by common criminals, if detained in prisons, or from third-country nationals that did not apply for international protection, in immigration detention facilities.
The following paragraphs of Article 10 highlight the importance of having access to an open air space, and that the communications between applicants and UNHCR (or another associations with the same role in the territory), family members, legal advice or counselors, and the person representing the state have to be permitted and guaranteed.
Moreover, Article 10(5) states that the applicants have to be provided with understandable information on the rules of the structure and on their rights[44].
Article 11 of the Directive 2013/33/EU addresses the issue of detention of vulnerable persons and of applicants with special reception needs, with particular attention on minors, families and women[45]. How immigration detention regards specific groups of people, as children and women, is going to be analyzed more in depth in the third chapter when discussing if detention can be different according to different needs and characteristics of detainees.

Another important EU legal document on the matter, regarding immigration detention and considering, not only, migrants that applying for international protection but to all kinds of irregular migrants inside the borders of the of the European Union is the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegal staying third-country nationals, referred in many documents as the Return Directive[46].

[43] *Ibid.,* Art 9(8).
[44] *Ibid.,* Art 10.
[45] *Ibid.,* Art 11.
[46] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals.*

As it is stated in the Preamble the aim of this Directive is to provide a common ground for all Member States when dealing with return, removal policies, coercive measures and detention in order to respect human rights of third-country nationals, and to make the process easier and common among the different countries[47].

Paragraph 16 of the Preamble addressed directly the use of detention in the process of removal; it highlights the importance of the principle of proportionality, and the fact that detention can be used only when the process of removal or return are about to take place[48].

Paragraph 17 focuses on the importance on how third-country nationals, illegally staying in the country, must be treated, placing attention in the concept of protection of human rights and in the fact that they should be detained in specific detention facilities and not in prisons or in other facilities not specifically devoted to administrative detention.

The Chapter IV, *Detention for the purpose of removal*, constituted of articles 15, 16, and 17 of the Return Directive is the one that address more deeply the notion of detention. As a matter of fact, it regulates the cases in which detention is lawful, specifies the requested condition of detention, and refers to specific categories of people held in detention, for instance, minors and families.

Article 15 of the Directive, titled *Detention*, sets the basic rules of detention, addressing the grounds in which it can be held and how it has to be managed by Member States. Detention can be used only when other less coercive measures cannot be applied, and only in two specific cases, when there is the risk of absconding or when there is no cooperation by the third-country national who "avoids or hampers the preparation of return or removal process", and, in any case, the period of detention has to be as short as possible[49]. As it is stated in Chapter II Article 3(7), the risk of absconding means that there is a possibility that the third-country national may try to escape in order to avoid the process of removal or return[50].

Furthermore, Article 15 stresses the idea that detention has to be ordered either by judicial or administrative authority; in the second scenario a speedy judicial review is requested to decide on the lawfulness of detention. In the cases in which it appears that deprivation

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Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed: 6 July 2020.

[47] *Ibid.,* Preamble(20).

[48] *Ibid.,* Preamble(16).

[49] *Ibid.,* Art 15(1)(b).

[50] *Ibid.,* Art 3(7).

of liberty is not lawful the third-country national has to be released immediately. In any case, detention has to be reviewed at reasonable intervals[51].

Another important matter, that is addressed in this Article, is the length of detention. In paragraph 6 is written that detention "may not exceed six months", however, the following paragraph states that this period may be extended up to 12 more months only in two cases, if the detainee is not cooperating or if there are delays due to obtain documents from third countries. Some concerns have been expressed by the Working Group on Arbitrary Detention and some NGOs, since they believe that 18 month could cause a lowering in the standards on time detention in many European countries[52]. Therefore, in several EU countries the time limit set by law was under 18 months.

Article 16 is focused on the conditions of detention. According to the standards set out in the Directive, third-country nationals should be detained in specific facilities and, when it is not possible, they can be detained in prisons but, in any case, they have to be divided by common criminals. They have the right to be in contact with families, consulate and access legal aid. Furthermore, authorities must give them adequate information about their rights and rules of the detention facility.

Competent national and international organizations, NGOs should have the right to visit the detention facilities with authorization[53].

The detention of minors and families is addressed in Article 17. The main concept is that children should not be divided by their families if they arrive together, and they should be detained only as a measure of last resort. Member States have the duty to provide to them access to education and leisure activities depending on the length of the detention[54]. In any moment of their deprivation of liberty, it has to be clear that the interest of the minors is the primary interest, and, therefore, every action should be done taking into account this concept.

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[51] *Ibid.,* Art 15(3).

[52] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 271.

[53] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*, Art 16(4). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed 06 July 2020.

[54] *Ibid.,* Art 17(3).

In 2018 a Proposal for a recast of the Return Directive had been made by the European Commission; since more and more pressure on the field of return policies appeared in the following years, with the migration crisis of 2015, the topic needed to be addressed more deeply. Specifically detention must be ensured in a more effective way in order to support the return enforcement[55].

One of the main issues regarding detention is the use of such tool in cases of risk of absconding. Indeed the definition of this concept is not enough clear and not always well and easily interpreted[56].

Furthermore, concerning the ground in which detention is considered lawful and necessary, the Commission suggested the idea of adding the situation in which the third-country national might be a risk for public order, public security and national security[57].

Moreover, the Commission expressed some concern on the length of detention. As it was previously mentioned, the time limit set up by the Return Directive is 6 months with the possibility of extending it of other 12 months, if necesary. The limit of 18 months is in several cases higher than the ones every Member State has established by national law. The Commission was not proposing of changing the maximum time limit, but, to establish a minimum time of detention of 3 months, which should be the appropriate amount of time to "successfully carry out return and readmission procedures with third countries"[58].

Focusing more deeply on the Member Countries the European Union, it is possible to notice some variations, for example, the time limit of detention, the categories of third-country nationals that can be deprived of their liberty, the immigration detention facilities, the material conditions, and the possibility of leaving the centers or the surface area available per detainee. However, there is a common ground on many topics, for example the assessment procedures, the condition of vulnerable people, the access to legal aid and medical care or the language support. These common grounds are provided by common

[55] European Commission, Proposal for a Directive of the European Parliament and of the Council *on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018*, p 2. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634, last accessed 06 July 2020.
[56] *Ibid.,* p.1.
[57] *Ibid.,* p.15.
[58] *Ibid.,* p 8.

Directives as the ones already mentioned, the Return Directive of 2008 (2008/115/EC)[59] and the Recast of the Reception Condition Directive of 2013 (2013/33/EU)[60].

From a practical point of view detention is organized differently according to the Member State, indeed, there are different kinds of immigration detention facilities.

The only Member State in which third-country nationals are detained in normal prisons is Ireland, even if they are always kept separated from ordinary prisoners. Whereas all other countries have created specific facilities devoted to their detention, which can be defined as "a specialized facility used for the detention of third-country nationals in accordance with national law"[61]. The total number of detention facilities among the Member States is 128 according to the data of 2014.

Usually, immigration detention facilities are located outside of big cities, where there is in the majority of the cases the highest quantity of people waiting for the return procedures, or near the borders where there is an high rate of control procedures, as for instance airports or portions of borders that are considered zones at risk.

The division of the detainees vary from country to country depending on the different organizations for detention; however, in many Member States, third-country nationals are detained in the same facilities and are not separated according to different needs and different situations. For instance, applicants for international protection are detained in the same detention centers as the irregular migrants. Whereas, in some Member Countries such as Hungary, the migrants, depending on their situation and status, are held in different facilities. In some other cases, the detention center is the same but the migrants are divided inside the structure according to their status[62].

In all Member States' detention facilities, the detainees have the possibility to spend some time outdoor on a daily basis. However, the quantity of time allowed may vary from

[59] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed: 06 July 2020.

[60] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection,* Preamble Art. 8-9-10. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033, last accessed: 30 June

[61] European Commisson, *The use of detention and alternatives to detention in the context of immigration policies*, Synthesis Report for the EMN Focused Study 2014, p. 28. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf, last accessed 3 June 2020.

[62] *Ibid.,* p. 29.

country to country. On the contrary, the possibility to leave the structure is not guaranteed by all Member States, and there are some cases in which it is not permitted at all or others in which the restriction is just related to some moments of the day (lunch and dinner time and/or night)[63].

As it is stated in Article 16 of the Return Directive, "third country national shall be allowed – on request – to establish in due time contact with legal representatives" and so they have the right to have access to legal advice in detention centers; this principle is respected in all Member States[64].

1.4 Inside the European Union: the Italian legislation on the topic

1.4.1 The Italian Legislation: from 1998 to 2018

Inside the European Union Italy is one of those countries which had to deal with migration flows more than the others considering its geographical position and characteristics. Indeed, being one of the countries in the Mediterranean Sea, it has been one of the most affected by the migration crisis of 2015 when in Europe arrived more than 1 million migrants and refugees, according the data of IOM (International Organization for Migration) being the highest migration flow from the Second World War[65]. In Italy, thorough the Mediterranean Sea, in 2015 arrived 150,314 migrants and refugee, placing Italy in the second place for the number of arrivals, behind Greece which had to deal with 821,008 thousands of people arriving both through land and sea[66].

The first time in which the idea of administrative detention of migrants appeared in the Italian legislation was in 1998 with Directive n. 40 of the 6 March 1998, "Immigration

[63] *Ibid.,* p. 31.
[64] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*, Art 16. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed: 06 July 2020.
[65] IOM, UN Migration, Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM. Available at: https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom, last accessed 13 July 2020.
[66] *Ibid.*

Discipline and Standards on the Condition of the Foreigner", even called *"Legge Turco-Napolitano"*[67].

The main aim of this directive was to regulate migration from abroad, in order to favor regular migration and to discourage the irregular one. For the first time, the concept of a center for the detention of migrants was developed with the creation of immigration detention centers called *Centri di Permanenza Temporanea* (Centers for Temporary Stay)[68]. These centers were regulated following Article 12 of the *Legge Turco-Napolitano*. They could be used in the cases in which a direct expulsion on the border was not possible, or when there was the need to have more time to identify and/or to assist the migrant before proceeding with the expulsion. The maximum period for detention was set at 20 days which could be prolonged to 30 days maximum, if needed, and if the expulsion was about to be carried out[69]. The migrants could not leave the structures, however, they could have access to communication with the outside world[70].

In 2002 a new directive was approved, Directive n. 189 of the 30 July 2002, called also *Legge Bossi-Fini*, which aim was to modify the standards on immigration and asylum in the Italian legislation. Some modifications have been made compared to the directive of 1998. The first one is that the time limit of detention changed from a maximum of 30 days to a maximum of 60 days, if needed to carry out the process of identification and expulsion, as stated in Article 13 of the Directive[71].

Moreover, concerning those migrants applying for international protection a new structure was created, the CDI, *Centro di Identificazione*, (Center for Identification), in which asylum seekers could be detained only under certain situations, as, for example, to allow their identification in specific cases, or if they have been caught crossing the border illegally before requesting for international protection. In these centers delegates of the United Nation High Commissioner for Refugees were allowed to enter together with other

[67] Parlamento Italiano, Legge 6 marzo 1998, n. 40, "Disciplina dell'immigrazione e norme sulla condizione dello straniero". Available at: https://www.camera.it/parlam/leggi/98040l.htm, last accessed 13 July 2020.
[68] *Ibid.,* Art 12.
[69] *Ibid.,* Art 12.
[70] *Ibid.,* Art 12.
[71] Gazzetta Ufficiale della Repubblica Italiana, Legge 30 luglio 2002, n. 189, "Modifica alla normativa in materia di immigrazione ed asilo". Available at: https://www.gazzettaufficiale.it/eli/id/2002/08/26/002G0219/sg , last accessed 13 July 2020.

organizations dealing with asylum seekers. Moreover, the access was permitted to lawyers to take care, from a legal point of view, of the asylum seekers living there.
As it is highlighted in Article 32 of the Directive, if the asylum seeker would left the Center for Identification this would be recognized as a renounce for the request of international protection[72].

Furthermore, the Regulation of 16 September 2004 on the procedures for the recognition of refugee status focuses more deeply on the functioning of the Centers for Identification (CDI); indeed, it is stated that detention has to last for a maximum of 20 days and that the condition inside the centers have to be respectful of dignity and health of asylum seekers[73]. Moreover, it was highlighted the possibility for the asylum seekers to receive visits from the outside, for instance from family members, lawyers, members of specific organizations and UNHCR and also the chance for them to leave the center from 8 in the morning to 8 at night[74].
In 2008 the Legislative Decree n. 25 represented the document with which the Italian government incorporated in their legal system the Directive 2005/85/CE on the minimum procedure on the recognition of the refugee status[75][76]. The CDI's name was changed into CARA, *Centri di Accoglienza Richiedenti Asilo*, (Centers for Reception of Asylum Seekers) to stress the importance and the respect of human rights in those administrative detention centers and, it was acknowledge that leaving the structure represented the end of the reception.
The same year, the Directive n.125 of the 9 July, which refers to urgent measures on public security, stated, in Article 9, that the name of Centri di Permanenza Temporanea

[72] *Ibid.,* Art 32.
[73] Decreto del Presidente della Repubblica 16 Settembre 2004, n. 303, "Regolamento relativo alle procedure per il riconoscimento dello status di rifugiato". Available at: https://www.unhcr.it/wpcontent/uploads/2015/12/Decreto_16_settembre_2004_n._303.pdf, last accessed: 11 July 2020.
[74] *Ibid.,* Art 8.
[75] Council Directive 2005/85/EC of 1 December 2005, *on minimum standards on procedures in Member States for granting and withdrawing refugee status*. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005L0085, last accessed: 13 July 2020.
[76] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legislativo 28 gennaio 2008, n. 25, "Attuazione della diretttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati Membri al fine del riconoscimento e della revoca dello status di rifugiato". Available at: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2008-02-16&atto.codiceRedazionale=008G0044&elenco30giorni=false, last accessed 13 July 2020.

(CPT), Center for Temporary Stay, would change name in Centro di Identificazione ed Espulsione (CIE), Centers for Identification and Expulsion[77].

The complete transposition of the Return Directive, approved by the European Union in 2008, happened only in 2011 with the Legislative Decree n. 89 of the 23 June 2011[7879]. In this document it is established that detention in one of the Centers for Identification and Expulsion (CIE), in the waiting for expulsion, can be held only if other less coercive measures cannot be taken into account, as for example, the migrant must provide his/her documents every day to specific authorities and/or he/she has the obligation to sign daily in police station. All these alternatives could be considered only if the migrant would provide information about his income and about the place where he/she is going to live in the period before the expulsion.

In 2015, the European Union Directive 2013/33/EU was transposed by the Italian Parliament with the Legislative Decree n.142 of the 18 August 2015[8081]. Article 9 of the Legislative Decree was focused on the rules applied on the first moments of reception of people asking for international protection. It stated that the applicants were going to be held initially in facilities in which the identification process was going to be carried out, to understand the vulnerability of the applicants, together with health check-up to determine their health status. The applicants were detained in these centers in the case in which there was not enough space for them in other centers defined in Article 14 of the

[77] Parlamento Italiano, Legge 24 luglio 2008, n. 125, "Conversione in legge, con modificazioni, del decreto-legge 23 maggio 2008, n.92, recante misure urgenti in materia di sicurezza pubblica", Art 9. Available at: https://www.camera.it/parlam/leggi/08125l.htm, last accessed 06 July 2020.

[78] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed: 06 July 2020.

[79] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legislativo 23 giugno 2011, n. 89, "Disposizioni urgenti per il completamento dell'attuazione della direttiva 2004/38/CE sulla libera circolazione dei cittadini comunitari e per il recepimento della direttiva 2008/115/CE sul rimpatrio dei cittadini di Paesi terzi irregolari". Availble at: https://www.gazzettaufficiale.it/eli/id/2011/06/23/011G0128/sg, last accessed 13 July 2020.

[80] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legislativo 18 agosto 2015, n. 142, "Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonche' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale". Available at: https://www.gazzettaufficiale.it/eli/id/2015/09/15/15G00158/sg, last accessed 13 July 2020.

[81] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 *laying down standards for the reception of applicants for international protection,* Preamble Art. 8-9-10. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033, last accessed: 30 June

Legislative Decree. Article 10 referred to the conditions of the reception centers; inside the facilities human rights had to be respected and the applicants were free to leave the center in the day time; moreover, the UNHCR and other competent organizations had the right to have access to the structure to determine the conditions.

In Article 14 the concept of SPRAR, Sistema di Protezione per Richiedenti Asilo e Rifugiati, (Protection System for Asylum Seeker and Refugees), was explained. The system appeared for the first time in the text of the *Legge Bossi-Fini* of 2002[82]. The aim was to provide applicants in the process of requesting international protection or already possessing the right for international protection with an healthy and safe environment, and to empower the possibilities of integration in the community. The goal of this system was not the one of a mere reception system, indeed, their projects were customized on people in order to offer them more concrete possibilities of integration[83].

In 2017 the Legislative Decree n. 13 was approved by the Italian Parliament and it redefined the rules of administrative immigration detention taking urgent measures on the topic in order to strengthen the centers already existing and to reinforce the expulsion system[84].

The first change in the system was the name of the detention centers which changed from CIE (Center for Identification and Expulsion) to CPR, Centro di Permanenza per il Rimpatrio (Center for Stay and Rempatriation)[85].

Moreover, in order to make the expulsion system more efficient, the aim of this Legislative Decree was to develop more efficiently the centers network, even with the creation of new ones among the territory, using already existing public facilities. These new centers should have been right outside cities in order to make easier to get there[86]. It is highlighted again the importance of protection of human rights, that should be preserved during all moments of permanence in these structures.

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[82] Gazzetta Ufficiale della Repubblica Italiana, Legge 30 luglio 2002, n. 189, "Modifica alla normativa in materia di immigrazione ed asilo". Available at: https://www.gazzettaufficiale.it/eli/id/2002/08/26/002G0219/sg , last accessed 13 July 2020.

[83] Open Polis, Che cosa sono i Cas, lo Sprar e gli Hotspot. Available at: https://www.openpolis.it/parole/che-cosa-sono-i-cas-lo-sprar-e-gli-hotspot/, last accessed 18 July 2020.

[84] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legge 17 Febbraio 2017, n. 13, "Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegale". Available at: https://www.gazzettaufficiale.it/eli/id/2017/02/17/17G00026/sg, last accessed 18 July 2020.

[85] *Ibid.,* Art 19.

[86] *Ibid.,* Art 19.

Article 17 is focused on the new hotspots created to face the issue of irregular immigration at the borders. These *punti di crisi* have to aim to identify the migrants and to provide them first assistance when illegally entering the country[87]. In the cases in which the migrant would refuse for more than once the process of identification, this refusal would be considered as a signal of a risk to escape and, for this reason, the migrant would be detained in one of the administrative detention centers.

In 2018 a new Legislative Decree was signed and approved by the Parliament based on the proposal of Matteo Salvini, the Legislative Decree n. 113 of the 4 October[88].
Article 3 of the Decree refers to applicants for international protection and, it states that if it is not possible to identify the applicant immediately, the detention in one of the immigration centers is possible for a maximum of 180 days. Until that moment, the maximum period of detention was established to 90 days in the CPR.
Moreover, in the same article it is established that migrants, when crossing the border illegally, can be detained in those centers called hotspots for no longer than 30 days to asses their identity.
Article 4 provides that migrants, who are found to cross the border illegally, can be detained in police stations placed at the borders if there is not enough space available in one of the CPR[89].
This Legislative Decree was often criticized due to the fact that it eliminated completely the SPRAR which represented one of the national excellences on the field of asylum; indeed, if before even asylum seekers waiting for their documents to be processed could have the access to this programme, aimed at social integration, from 2018 only unaccompanied minors and migrants who are entitled to international protection can take part of the programme and enjoy the benefits.

[87] *Ibid.,* Art 17.
[88] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legge 4 ottobre 2018, n. 113 "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonchè misure per la funzione del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione beni sequestrati e confiscati alla criminalità organizzata". Available at: https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg, last accessed 18 July 2020.
[89] *Ibid.,* Art 4.

However, the asylum seekers could only have access to the CAS (Centri di Accoglienza Straordinaria) which are devoted to host them in case of necessity[90].

1.4.2 How administrative detention is organized now, the different centers

According to the website of the Ministry of Interior, nowadays, in Italy there are two forms of administrative detention for those people who entered the country illegally.
The first one refers to those people who did not apply for international protection and, thus, are waiting for their expulsion whereas, the second one is related to those who applied for international protection and they are waiting for their documents to be processed by the competent authorities, to know if they can enter the country legally and if international protection is provided, or if they have to leave.

The first kind of structure are related to the first aid and reception, called the *hotspots.* These structures were introduced by the European Agenda on Migration on 2015, and their aim was helping Member States that are facing disproportionate migratory pressure. In particular, the organizations that are concerned with the hotspot approach are Frontex, the European Asylum Support Office and Europol, and they should provide their help to those countries. In particular, the European Asylum Support Office should deal with those migrants who are applying for international protection whereas Frontex should take into account those cases in which international protection is not required and needed, facilitating the process of removal and expulsion[91].
This hotspot system should also been useful for the reallocation of refugees among the Member States of the European Union.
These centers are placed in those areas of Italy more exposed to the illegal entrance of people from abroad by sea, even if many disembarkations happen in other non-hotspot areas[92]. In these areas, migrants can disembark safely and they can undergo the beginning

[90] Pepino, Livio, Le nuove norme su immigrazione e sicurezza: punire i poveri, *Associazione per gli Studi Guiridici sull'Immigrazione*, December 20, 2018. Available at: https://www.asgi.it/asilo-e-protezione-internazionale/le-nuove-norme-su-immigrazione-e-sicurezza-punire-i-poveri/, last accessed 18 July 2020.
[91] Dutch Council for Refugees, The implementation of the hotspots in Italy and Greece, a study, 5 December 2016, p. 10. Available at: https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf, last accessed 18 July 2020.
[92] *Ibid.,* p. 16.

of the process of identification, health check-ups and receive the basic information about how to apply for international protection[93]. In the cases in which they decide to apply for protection, they are moved to other kinds of structures where they are going to stay during the process of assessment of their status[94].

The four hotspot centers in Italy which are right now working are placed all in the Southern part of the country, the one more exposed to illegal entrance of migrants. Three of them are in Sicily whereas only one is in Taranto (Apulia). The hotspot center in Lampedusa is the oldest one and it can host around 500 migrants, even if in 2016 it lost 180 places due to a fire which happened in the structure.

The general condition inside the hotspots is controversial. Indeed, in many cases they host more people of what they should creating a mix environment in which women, men and children are placed together. Due to the overcrowding situation, the hygienic conditions are not as decent as they should be. Moreover, in some cases, authorities in the centers do not even provide people with basic necessary objects, as for example bed sheets[95].

Furthermore, in many cases the time limit of detention in these centers is exceeded, and the information about the asylum system and procedures are not provided before the identification process, and even if the duty to explain their rights should be provided by the national authorities, in the majority of the cases, the international organizations are the ones that deliver this information to the migrants.

After the identification procedures there are two different scenarios, those who apply for international protection and those who do not.

In the first case, the asylum seekers are moved to specific structures called *Centri di Prima Accoglienza* (Centers for First Reception), where they are staying until the process to

[93] "Hotspot immigrazione: ecco cosa sono i centri di prima accoglienza", *The Italian Times*, February 7, 2020. Available at: https://www.theitaliantimes.it/economia/hotspot-immigrazione-rifugiati-diritto-asilo-clandestini_070220/, last accessed 13 July 2020.

[94] Ministero dell'Interno, Centri per l'immigrazione. Available at: https://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione, last accessed: 13 July 2020.

[95] Bova, Marco, Lampedusa: dentro l'hotspot che va a pezzi tra rifiuti e sovraffollamento: "Condizioni disumane", *Il Fatto Quotidiano*, December 6, 2019. Available at: https://www.ilfattoquotidiano.it/2019/12/06/lampedusa-dentro-lhotspot-che-va-a-pezzi-tra-rifiuti-e-sovraffollamento-condizioni-disumane/5596286/, last accessed 23 July 2020.

assess if they can get international protection is carried out. In Italy, nowadays there are 9 CPA, located along the territory from north to south[96].

In the cases in which the CPA cannot host other migrants, due to their overcrowding situation, the applicants for international protection are going to be moved to CAS, *Centri di Accoglienza Straordinaria,* where they are going to be hosted for the minimum time possible before transferring them into the CPAs. These private facilities are not structures built with the aim of hosting migrants but, other kind of buildings with different purposes that have been converted into centers for asylum seekers, as for instance, hotels. In the area near Trapani, one of the most affected by arrival of asylum seekers and migrants, there are 32 structures of this kind.

In April 2018, the 80% of applicants for international protection was hosted in these structures[97]. One of the main issue is the lack of integration in these kind of facilities; indeed, language courses are not provided and the conditions of detention are completely different from the ones of the SPRAR system which represented an important way to boost integration among the community.

According to the Ministry of Internal Affairs, nowadays in Italy there are five thousands structures which can host eighty thousands people[98].

The second scenario is related to the migrants who do not apply for international protection and, for this reason, they are considered to be illegal in the country and therefore, waiting for their removal.

These people are detained in the CPR, *Centri di Permanenza per il Rimpatrio* where they are waiting for their expulsion to be carried out[99]. These strucutres were created in 1998 under the name of CPT (Centri di Permanenza per il Rimpatrio), then from 2008 and 2017 their name changed in CIE (Centri di Idenficiazione e Espulsione). In the CPR the

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[96] Ministero dell'Interno, Centri per l'immigrazione. Available at: https://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione, last accessed 13 July 2020.

[97] Gagliardi, Andrea. "Sprar, Cara e Cas: dove sono distribuiti i 135mila migranti accolti in Italia." *Il Sole 24 Ore*, January 24, 2019. Available at: https://www.ilsole24ore.com/art/sprar-cara-e-cas-dove-sono-distribuiti-135mila-migranti-accolti-italia--AEma7ELH, last accessed 14 July 2020.

[98] Ministero dell'Interno, Centri per l'immigrazione. Available at: https://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione, last accessed 13 July 2020.

[99] *Ibid.*

migrants can be detained for a maximum of 180 days after the Legislative Decree n. 113 of 2018[100].

Nowadays in Italy there are 9 CPR in different cities, all of them are located at the borders like Gradisca D'Isonzo in Friuli Venezia Giulia, and in crucial cities like Rome.

According to the data of 2019, in the first six months of the same year 2.267 people had been detained in CPR but only 45% of them had been repatriated[101].

The Garante Nazionale dei diritti delle persone detenute o private della libertà personale in its CPR report of 2018 highlighted that the conditions in the centers do not comply with the basic standards these structures should respect and, in many occasions, the conditions of the centers are not respectful of human rights. Indeed, in several cases, in the CPR there are not common spaces and the structure is composed only by rooms and bathrooms, not giving the possibility to the migrants to have rooms where they could spend their free time, pray or do recreational activities, for instance, language courses. Moreover, in some cases even the condition of the rooms is not acceptable, as a matter of fact, in some CPR the basic hygienic standards are not respected[102].

[100] Gazzetta Ufficiale della Repubblica Italiana, Decreto Legge 4 ottobre 2018, n. 113 "Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonchè misure per la funzione del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione beni sequestrati e confiscati alla criminalità organizzata". Available at: https://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg, last accessed 18 July 2020.

[101] Camera dei Deputati, Documentazione parlamentare, I Centri di permanenza per i rimpatri, Available at: https://temi.camera.it/leg18/post/cpr.html, last accessed 13 July 2020.

[102] Garante Nazionale per i diritti delle persone detenute e private della libertà personale, 6 settembre 2018 Rapporto sulle visite tematiche effettuate nei Centri di Permanenza per il Rimpatrio (CPR) in Italia, febbraio-marzo 2018. Available at: http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/c30efc290216094f855c99bfb8644ce5.pdf, last accessed 18 July 2020.

CHAPTER 2

INTERNATIONAL AND REGIONAL HUMAN RIGHTS FRAMEWORK ON IMMIGRATION DETENTION

2.1 Immigration Detention at the United Nation Level

Since immigration detention has been one of the most discussed topics in the last decades, on the field of human rights protection, the United Nations started to place more and more attention to the matter.

Even if the international organization does not have a specific body addressing the issue of immigration detention, being international peace and security its main aims, and having a particular attention on human rights protection, many bodies and instruments are concerned with the regulation of detention of migrants and asylum seekers. Therefore, the topic had been discussed in various occasions and ways[103].

Since the beginning of the UN activities on the field of human rights, the right to liberty had had a relevant role. Articles that can be related with immigration detention can be found in the Universal Declaration of Human Rights of 1948. As a matter of fact, even if not directly, many of them can be useful when dealing with the topic of deprivation of liberty of migrants and asylum seekers[104].

Even if the Declaration is a non-binding instruments, it can be considered as the one of the main pillars and the milestone of human rights protection, and it represented the beginning of the development of an international legal framework based on the protection of human rights[105]. Since the beginning, the importance of considering all humans equal is depicted as fundamental and it is addressed in Article 1 of the Declaration whereas,

[103] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.Available at: https://www.refworld.org/docid/3ae6b3930.html, last accessed 18 July 2020.

[104] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). Available at: https://www.refworld.org/docid/3ae6b3712c.html, last accessed 18 July 2020.

[105] Chetail, Vincent. "The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights." *Migrants and Rights*, 2017, 3–34, p. 235.

Article 2 highlights the fact that all humans have the same rights and freedoms without distinctions on the basis of, among others, nationality and social origin[106].
Other articles of the Declaration can be considered important when addressing the topic of immigration detention, as for instance, Article 3 which is related with the protection of the right to liberty, or Article 5 which deals with the protection of people from torture or inhuman or degrading treatment or punishment[107].
However the Articles which are more related with immigration detention are Articles 9 and 14, respectively the ones addressing arbitrary detention and the topic of asylum protection.
Article 9 states that "no one shall be subjected to arbitrary arrest, detention and exile", therefore it is clear that can be applied to immigration detention since one of the main issues when dealing with detention of migrants and of asylum seekers is if their deprivation of liberty is arbitrary or not and therefore if it is legal or not to detainee them[108].
Article 14 underlines that asylum is a right that everyone has to enjoy when dealing with persecution, therefore it is related with immigration detention since many of the migrants detained are people asking for asylum and international protection[109].

From the legal point of view, as already mentioned, even if there are no specific conventions or covenants on the topic, many of them have some links to detention and immigration detention specifically.
In addition to The Universal Declaration of Human Rights, which set up the first ground for human rights protection, there are other treaties in the UN field that are more linked to immigration detention. These conventions and covenant are going to be more deeply discussed and analyzed in the following paragraphs of this chapter to give a better overview of what, from a legal point of view, the United Nations is doing to effectively tackle the issue. The legal instruments are the followings, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of

[106] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art 1-2. Available at: https://www.refworld.org/docid/3ae6b3712c.html, last accessed 18 July 2020.
[107] *Ibid.,* Art 5-7.
[108] *Ibid.,* Art 9.
[109] *Ibid.,* Art 14.

All Migrant Workers and Members of Their Families and the Refugee Convention[110] [111] [112].

In order to have a better understanding on how these instruments work, their main articles on the topic are going to be analyzed.

Taking into account deprivation of liberty of migrants and asylum seekers at the United Nation level, it is important to underline the role of the United Nations Human Security Council and in more depth the creation of the so called Special Procedures. These Special Procedures are independent human rights experts which focus their work on a specific field and topic[113].

Focusing on immigration detention, there are three Special Procedures that are worth to be mentioned, in order to better understand the efforts the UN is making to regulate the phenomenon, the Working Group on Arbitrary Detention, the Special Rapporteur of the Human Rights of the Migrants and the Special Rapporteur on Torture or other Inhuman or Degrading Treatment or Punishment. All these three Special Procedures are deeply involved with the protection of migrants and asylum seekers during their period of detention. As a matter of fact, they issue reports on their situation in the countries of the world, address the phenomenon visiting detention facilities and issue of recommendations on the matter.

Finally the United Nations High Commissioner for Refugees is worth to be mentioned, since one of the main target of such phenomenon are asylum seekers and refugees. Immigration detention is becoming more and more frequent among countries and the UNHCR is becoming more and more concerned about the protection of human rights. Many guidelines have been issued on how detention of asylum seekers and refugees

[110] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.
[111] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158. Available at: https://www.refworld.org/docid/3ae6b3980.html, last accessed 30 July 2020.
[112] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Available at: https://www.refworld.org/docid/3be01b964.html, last accessed 30 July 2020.
[113] United Nations Human Rights, Office of the High Commissioner, Special Procedures of the Human Rights Council, Introduction. Available at: https://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx, last accessed 30 July 2020.

should be performed and also a Global Strategy Beyond Detention 2014-2019, has been created in order to support governments to eradicate detention of refuges and asylum seekers from their immigration systems.

2.2 UN legal framework on immigration detention

As already mentioned in the previous paragraph, this section of the chapter is going to be devoted to how, from a legal point of view, the United Nations is trying to regulate and deal with the topic of immigration detention, with the aim of safeguarding human rights of migrants and asylum seekers.
Even if the following covenants and conventions do not directly approach the issue, many of their articles can be applicable in cases of immigration detention, mostly when dealing with deprivation of liberty, torture or other inhuman or degrading treatment or punishment and the arbitrariness of detention.

2.2.1 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Right was established by the General Assembly resolution 2200A of the 16 December 1966 and it entered into force only 10 years later the 23 March 1976[114].
This treaty addresses specifically the protection and safeguard of civil and political rights and its aim is to preserve human dignity, as for instance right to life, freedom from torture and equity in front of the law[115]. Indeed, even if the issue of migration detention is not addressed with specific articles, many of them can be used in order to regulate such phenomenon and to safeguard the protection of those rights that also migrants and asylum seekers must enjoy while in detention.

[114] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.
[115] ACULU, FAQ: The Covenant on Civil and Political Rights (ICCPR). Available at: https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr, last accessed 01 August 2020.

Indeed, since the Covenant applies to all people despite their nationality and race, every human right safeguarded in the Covenant has to be applied to everyone without any kind of discrimination[116].

First of all, following the idea of non-discrimination, it is important to focus on Article 2 which sets out this principle. Indeed Article 2(1) states that no discrimination can be made in any kind of condition "such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[117].

This means that the articles set out in the Covenant must be applied to both citizens of the country but also aliens without making any difference on the ground of nationality[118].

Another important matter which is discussed in the ICCPR, precisely in Article 7, is the prohibition of torture or other inhuman or degrading treatment or punishment[119]. As a matter of fact, conditions inside immigration detention center in many occasions does not respect human dignity, and the way in which migrants and asylum seekers are treated by the competent authorities can be seen as an inhuman treatment or even, in some cases, torture[120].

Indeed, if the country does not secure the well-being and health of the migrants and asylum seekers detained in its centers, providing periodical medical attention and, if needed, specialized health care solutions, it can be alleged with violation of Article 7 of the Covenant[121]. As addressed in a report from the Special Rapporteur on Torture or other Inhuman or Degrading Treatment or Punishment, which is going to be analyzed later on in the chapter, the difficult conditions during the deprivation of liberty, and the indefinite duration of detention, summed up with serious psychological harm, can be considered as

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[116] Chetail, Vincent. "The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights." *Migrants and Rights*, 2017, 3–34, p. 244.

[117] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art 2. Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.

[118] Chetail, Vincent. "The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights." *Migrants and Rights*, 2017, 3–34, p. 244.

[119] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art 7. Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.

[120] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 259.

[121] IOM – International Migration Unit, International Migration Law Information Law Information Note, Appendix B, International Standards on Immigration Detention and non-custodial measures, November 2016, p. 5. Available at: https://www.iom.int/sites/default/files/our_work/ICP/IML/IML-Information-Note-Immigration-Detention-and-Non-Custodial-Measures.pdf, last accessed 30 July 2020.

a substantial violation of Article 7 of the Covenant since they can be seen as degrading treatment, or even a form of physical but mostly, psychological torture[122].

Regarding specifically the situations of prohibition of liberty, Article 10(1) of the Covenant states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", reinforcing even more what Article 7 states about the prohibition of inhuman or degrading treatment and torture[123].

Article 9 specifically addresses detention and arrest. It states that deprivation of liberty can be possible only if detention is not arbitrary which means that it must have a legal basis and, in the specific cases of migrants and refugeed held in detention, their deprivation of liberty must be reviewed by judicial or administrative authority[124]. Indeed, administrative detention in general cannot be considered arbitrary if it is used for necessary purposes, as for instance, the processes of identification, or the facilitation of the expulsions[125].

Even if, it is not specified by the Article of the Covenant, every kind of detention is taken into account, from the criminal one to the administrative one.

In the first drafts of the Covenant the idea was to establish some fixed and specific grounds in which detention should be considered arbitrary. However, in order to release a document which could get the highest level of agreement possible, it became clear that listing the situation would have produce the opposite effect[126]. Indeed, what the Article states is a general prohibition of arbitrary detention.

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[122] UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* 26 February 2018, A/HRC/37/50, p. 9. Available at: https://www.asgi.it/wp-content/uploads/2018/03/2018_report_tortura_onu_A_HRC_37_50_EN.pdf, last accessed 30 July 2020.

[123] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art 10. Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.

[124] UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 24 December 2012, A/HRC/22/44, p. 16. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf, last accessed 30 July 2020.

[125] IOM – International Migration Unit, International Migration Law Information Law Information Note, Appendix B, International Standards on Immigration Detention and non-custodial measures, November 2011, p. 3. Available at: https://www.iom.int/sites/default/files/our_work/ICP/IML/IML-Information-Note-Immigration-Detention-and-Non-Custodial-Measures.pdf, last accessed 30 July 2020.

[126] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 251.

Another principle which is made clear in the second paragraph of Article 9 is the importance of giving exhaustive information to the people that are detained; it states that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him"[127]. However in several cases, NGOs and humanitarian associations have underlined that adequate information is usually not promptly given to these migrants and asylum seekers.

2.2.2 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is a UN treaty which had been adopted the 18 December 1990 and that entered into force only 13 years later, the 1 July 2003[128]. It represents the most complete international treaty when dealing with the rights of migrants and the members of their families and it sets the rights that they have when they found themselves in another country, but also the duties the country that hosts them has. This Convention was created in order to underline the situation of vulnerability of migrants and to underline the need to put more attention on their conditions, creating a new legal instrument.

However this Convention, compared to other UN international treaties, has been less recognized by the states; indeed, only 55 countries ratified the Convention up to this date[129]. Indeed, the vast majority of western countries, which are ones of the most subjected to the phenomenon of migration, did not ratify the Convention[130].

It is a fundamental treaty in the field of migration because since its adoption more and more countries are looking at movement of people as a situation that might create a certain

[127] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Art 9(2). Available at: https://www.refworld.org/docid/3ae6b3aa0.html, last accessed 30 July 2020.

[128] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158. Available at: https://www.refworld.org/docid/3ae6b3980.html, last accessed 30 July 2020.

[129] United Nation Human Rights, Office of the High Commissioner, Status of ratification. Available at: https://indicators.ohchr.org, last accessed 03 August 2020.

[130] Desmond, Alan, ed. *Shining New Light on the UN Migrant Workers Convention*. Hatfield, Pretoria: Pretoria University Law Press, 2017, p. 73.

risk in their national security, and they are making the phenomenon of detention of migrants a common practice in the management of migration flows.

For the Convention as it is set out in Article 2, migrant worker is the one "who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". This means that the concept of migrant worker is very broad and it takes into account those who are expected to work in the future, those who are working and those who worked, encompassing the moment of the working experience[131].

Article 16 of the Convention is the one that addresses more specifically the tool of detention of migrants; it states that migrant workers and their families have the right to liberty and security. In paragraph 4 of Article 16 the issue of detention is addressed directly, stating that individual migrants and their families must not be subjected to arbitrary detention and that detention is allowed only in lawful cases[132].

Moreover, in Article 16 it is specified that migrants and their families must have access to all the information about their detention, in a language that they can understand, during all the stages of the process, and they should have the possibility to take proceedings before a court to understand if their detention is lawful or not[133]. Furthermore, those who have been victim of unlawful arrest have the right to receive a compensation.

Article 17 deals with the condition of migrants and their families when deprived of their liberty[134]. In the article it is highlighted that, in the cases in which they are detained, there is the need for them to be in a different structure or in a different part of the same structure from the one devoted to people pending trial or convicted, since their status is of crimeless people.

Furthermore, Article 17(5) underlines the importance of having an equal treatment to the one offered to nationals when dealing with visits by members of their family during detention, and paragraph 7 stresses the concept again, stating that migrant workers and their families have to enjoy the same treatment as nationals[135].

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[131] *Ibid.,* p. 79.

[132] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, Art 16(4). Available at: https://www.refworld.org/docid/3ae6b3980.html, last accessed 30 July 2020.

[133] Desmond, Alan, ed. *Shining New Light on the UN Migrant Workers Convention*. Hatfield, Pretoria: Pretoria University Law Press, 2017, p. 80.

[134] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, Art 17. Available at: https://www.refworld.org/docid/3ae6b3980.html, last accessed 30 July 2020.

[135] *Ibid.,* Art 17(5)(7).

Paragraph 6 places further attention on the conditions the families of the detained migrant and it gives the responsibility to state authorities to take care of them and to have a more deep attention especially to minor children and spouses[136].

2.2.3 The Refugee Convention

The Refugee Convention of 1951 represents the milestone for human rights protection of asylum seekers and refugees worldwide. The main purpose of the Convention is in the definition of the word refugee and it sets out the rights this category of people has, but also the duties and legal obligations that the host countries have towards them[137].

The most important concept is the one of non-refoulement which means that the countries where the refugees are cannot return them to their country of origin where they might face threats to their lives or freedoms[138].

The Refugee Convention is really important when dealing with immigration detention since one of the main categories of migrants held in administrative detention are asylum seekers. Being this category of migrants already more vulnerable than the others, due to their particular condition, the necessity of having a guideline on how to deal with their needs is clear. As for the ICCPR, the issue of detention of refugees is not specifically addressed but there are two articles in particular that can regulate the phenomenon.

Article 31 of the Refugee Convention states that Contracting States cannot impose penalties on refugees just because of their refugee status, since they are coming from countries in which their lives are at stake, moreover host countries cannot restrict their freedom of movement[139].

Paragraph 2 of Article 31 implies that only in an initial period it is possible to use the tool of detention, but later on the restriction of movement can be imposed only if "necessary", for instance, for security grounds or organizational issues[140].

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[136] *Ibid.,* Art 17(6).

[137] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Available at: https://www.refworld.org/docid/3be01b964.html, last accessed 30 July 2020.

[138] *Ibid.*

[139] *Ibid.,* Art 31.

[140] Goodwin-Gill, Guy S. 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection'. In *Refugee Protection in International Law*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 1st ed., 185–252. Cambridge University Press, 2003, p. 37.

This means that refugees should not be held in detention and deprived of their freedom of movement inside the Contracting State only because of the fact that they are refugees. However, as it is going to be discussed more deeply on the paragraph devoted to the United Nation High Commissioner for Refugees, the tool of immigration detention is common among the countries that ratified the Convention since they do not take into account, as they should, the principles set up in Article 31[141].

Moreover, another Article that might be applied when dealing with immigration detention is Article 26 of the Convention.

Article 26 is specifically about freedom of movement and it states that "each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances"[142]. Eight countries of the Contracting States have made a reservation on the Article and, six among them decided to have the right to designate specific places of residence[143].

2.3 United Nations Human Rights Council Special Procedures related with Immigration Detention

The Human Rights Council is an inter-governmental body of the United Nations, it is made up of 47 countries and it has the aim to protect human rights around the world. It was created in 2006 by resolution 60/251[144]. The 47 countries are elected by the UN General Assembly by a majority vote but all the countries part of the UN are part of the Human Rights Council, even if they cannot take part of the decisional system. It replaced the former Commission on Human Rights.

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[141] *Ibid.,* p. 1.

[142] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art 26. Available at: https://www.refworld.org/docid/3be01b964.html, last accessed 30 July 2020.

[143] Goodwin-Gill, Guy S. 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection'. In *Refugee Protection in International Law*, edited by Erika Feller, Volker Türk, and Frances Nicholson, 1st ed., 185–252. Cambridge University Press, 2003, p. 37.

[144] United Nations Human Rights Council, Welcome to the Human Rights Council. Available at: https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx, last accessed 03 August 2020.

The Council meets for at least 10 weeks per year in Geneva, and, during the last years, its importance has risen and its Agenda expanded in order to meet all the necessities our world is experiencing.

In order to manage the amount of work, the UNHRC has established through the Council Resolution 5/1 the Advisory Committee. This has the aim to provide expertise to the Council, presenting studies and research to the Council.

Another important way in which the UNHRC organizes its work, research and actions is through the, so called, Special Procedures.

The Special Procedures are made of independent human rights experts which have a specific field of action being either a country or a determined theme. Their main characteristics are their impartiality, transparency, accountability and independence, which make them a real important tool in the safeguard of human rights[145].

They might be called with different names, as Working Groups, Special Rapporteurs or Independent Expert on the basis of their composition. The first one, as the name suggest, is a group of five experts each one from one of the five UN regional groupings, whereas the other two are represented by a single expert. All of them are independent, indeed they are not United Nations members and do not receive financial remuneration and the limit of their mandate is 6 years[146].

Their role is to investigate more deeply on a specific topic and their function is vital for the work of the Human Rights Council since their area of expertise covers all human rights, civil, cultural, social, economic and political, and they make easier for the Council to deal with different human rights situations[147]. Indeed, the Special Procedures undertake country visits, act on individual cases, develop thematic research, in this way contributing to the development of human rights standards, and providing help to the Council[148].

There are 56 Special Procedures, of which 44 are thematic and 13 are country mandates.

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[145] United Nations Human Rights, Office of the High Commissioner, Special Procedures of the Human Rights Council. Available at: https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx, last accessed 10 August 2020.

[146] *Ibid.*

[147] UNHCR, UNHCR Global Strategy, Beyond Detention 2014-2019, A global strategy to support Governments to end the detention of asylum seekers and refugees, Engaging with the Working Group on Arbitrary Detention, 2014, p. 1. Available at: https://www.unhcr.org/protection/detention/5be2bea74/engaging-working-group-arbitrary-detention.html., last accessed 10 August 2020.

[148] United Nations Human Rights, Office of the High Commissioner, Special Procedures of the Human Rights Council. Available at: https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx, last accessed 10 August 2020.

Among these procedures there are three of them which discussed in different occasions on detention of migrants and asylum seekers, giving an important contribution in the regulation and end of such practice, The Working Group on Arbitrary Detention, The Special Rapporteur on Human Rights of Migrants and The Special Rapporteur on Torture or Other Inhuman or Degrading Treatment or Punishment.

2.3.1 The Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention was established by the former Commission on Human Rights in 1991 and it had been renewed initially by the Commission itself and then by the Human Rights Council for three times. The renewal of their mandate nowadays is every 3 years, and it was renewed for the last time in September 2019[149].
The main aim of the WGAD is to investigate in cases of deprivation of liberty which are imposed in an arbitrary way, and its work is based on the fundamentals of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Refugee Convention, previously analyzed in the chapter[150].
The Working Group on Arbitrary Detention has 3 different types of actions depending on the necessity and on the matters, individual complaints, urgent appeals and country visits[151]. Moreover, every year it issues an annual report on the global situation of arbitrary detention.
First of all, the WGAD is the only non-treaty based body which accepts individual complaints, this means that every individual in the world can address the Working Group in cases in which he/she is deprived of liberty in an arbitrary way. The complaints can be send by the individual, by member of the family, NGOs, governments, and also

[149] UN Human Rights Council, Methods of work of the Working Group on Arbitrary Detention, 4 August 2015, A/HRC/30/69. Available at: https://www.refworld.org/docid/55f7f8f4d.html, last accessed 17 August 2020.
[150] *Ibid.*
[151] UNHCR, UNHCR Global Strategy, Beyond Detention 2014-2019, A global strategy to support Governments to end the detention of asylum seekers and refugees, Engaging with the Working Group on Arbitrary Detention, 2014, p. 1. Available at: https://www.unhcr.org/protection/detention/5be2bea74/engaging-working-group-arbitrary-detention.html., last accessed 10 August 2020.

intergovernmental organizations[152]. In order to make the process easier both for individuals and the WGAD itself, a model questionnaire was developed[153]. Approximately every year the Working Group on Arbitrary Detention issues from 70 to 90 opinions; these opinions are public documents in which the case of arbitrary detention is analyzed and it recommends the country, in the majority of the cases, to release the victims and, in some cases, to compensate them. The opinions are followed by follow-up sections, in which the government must inform the Working Group on the measures taken. Since the WGAD receives many individual complaints a year, it is frequent that it addresses similar situations in one opinion in order to cover the majority of cases possible. If needed, an urgent appeal can be issued in the cases explained in the next type of action. Urgent appeals are represented by those cases in which the arbitrary deprivation of liberty might constitute a problem which is sensitive in time, and might result in loss of life, or damage of very grave nature, as for instance, health, physical and/or phycological harm. After investigating on the situation of the urgent appeal, and communicating to the government the urgency of the matter, the WGAD might issue also an opinion following the regular procedure (individual complaint)[154].

The third way in which the WGAD can intervene, in cases of arbitrary detention, is through country visits. These country visits take place with the invitation of the government and their aim is to assess how the countries are dealing with detention and deprivation of liberty; usually two visits per year are carried out by the Working Group. In order to understand the situation, the WGAD visits different places in which people are deprived of liberty, prisons and immigration detention centers for instance, conducting interviews to both detainees and people working in the field of detention. This work results in a full report in which the situation of the country is described and analyzed[155]. Two years after the country visit, the government should issue a report on how the situation of the state has changed in the field of arbitrary detention and, if needed, the

[152] United Nations Human Rights, Office of the High Commissioner, Individual Complaints and Urgent Appeals. Available at: https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx, last accessed 10 August 2020.

[153] UNHCR, UNHCR Global Strategy, Beyond Detention 2014-2019, A global strategy to support Governments to end the detention of asylum seekers and refugees, Engaging with the Working Group on Arbitrary Detention, 2014, p. 1. Available at: https://www.unhcr.org/protection/detention/5be2bea74/engaging-working-group-arbitrary-detention.html., last accessed 10 August 2020.

[154] *Ibid.*

[155] *Ibid.*

WGAD might request a follow up visit in order to assess the progress and the general situation[156].

According to the WGAD, there are 5 categories in which detention has to be considered arbitrary, one of these grounds might be the imposition of administrative detention of migrants and/or asylum seekers in some specific cases; indeed, following the forth category, administrative detention is arbitrary "when asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy"[157]. Indeed, holding migrants and asylum seekers in detention for excessive period of time, without a real necessity of depriving them of their liberty, in detention facilities which are not specifically devoted to administrative detention, might represent a case of arbitrary detention[158]. As already mentioned various times in the previous chapter, detention should be a measure of last resort and migrants and asylum seekers should not be considered as regular criminals, furthermore, if deportation cannot be held in a reasonable period of time, the migrant has to be released, in the case in which he or she does not constitute a problem of public security[159].

Moreover, the fifth category related to the arbitrariness of detention can be associated with detention of migrants and asylum seekers, indeed, deprivation of liberty might be considered arbitrary when it "constitutes a violation of the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights."[160]

Already in 1997 the Human Rights Commission, through the resolution 1997/50 requested the Working Group to put more and more attention on the issue of immigration

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[156] UN Human Rights Council, Methods of work of the Working Group on Arbitrary Detention, 4 August 2015, A/HRC/30/69. Available at: https://www.refworld.org/docid/55f7f8f4d.html, last accessed 17 August 2020.

[157] UNHCR, UNHCR Global Strategy, Beyond Detention 2014-2019, A global strategy to support Governments to end the detention of asylum seekers and refugees, Engaging with the Working Group on Arbitrary Detention, 2014, p. 3. Available at: https://www.unhcr.org/protection/detention/5be2bea74/engaging-working-group-arbitrary-detention.html, last accessed 10 August 2020.

[158] Weissbrodt, David S., and Brittany Mitchell. 'The United Nations Working Group on Arbitrary Detention: Procedures and Summary of Jurisprudence'. *Human Rights Quarterly* 38, no. 3 (2016), p. 695.

[159] *Ibid.,* p. 696.

[160] *Ibid.* p. 667.

detention, stating that it was necessary to report the situation of migrants and asylum seekers deprived of their liberty[161].

In 1999, the WGAD adopted the deliberation No. 5 which set the criteria for the determination of arbitrary detention of migrants and asylum seekers[162]. There are some guarantees that they must enjoy when their detention is lawful, and these are exposed in this document as "guarantees concerning detention". These guarantees determine that the decision of detention of migrants and asylum seekers must be taken by a competent authority and must be legal according to the law, furthermore, they must be informed of the custodial measure and of the possibility of a judicial review, in a language they can understand.

Moreover, a maximum period of detention must be set by law and this limit must not be exceeded. Migrants and asylum seekers must be detained in specific facilities or, in the cases in which this is not possible, separated from criminals. The Office of the United Nation High Commissioner for Refugees and other authorized non-governmental organization must have the possibility to visit such facilities[163].

In 2018 the deliberation No. 5 had been revised and it consolidates the importance immigration detention has in the action of the Working Group of Arbitrary Detention[164]. It underlines some important principles as for instance, the fact that arbitrary detention of migrants and asylum seekers is unlawful and that seeking asylum and migration, in general terms, cannot be seen as a crime and therefore cannot be criminalized. Detention and deprivation of liberty should be considered measures of last resort, but, in the cases in which it is necessary for the purpose of identification, for instance, it must be reviewed periodically by a judicial authority. The Revised Deliberation underlines, as already mentioned in the original version of 1999, that a maximum period of detention must be set by law but, moreover, it highlights that indefinite detention is arbitrary[165].

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[161] UN Commission on Human Rights, Question of arbitrary detention., 15 April 1997, E/CN.4/RES/1997/50. Available at: https://www.refworld.org/docid/3b00f0ba5c.html, last accessed 20 August 2020.

[162] UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4. Available at: https://www.refworld.org/docid/3b00f25a6.html, last accessed 23 August 2020.

[163] *Ibid.,* p. 30.

[164] Majcher, Izabella. 'Immigration Detention under the Global Compacts in the Light of Refugee and Human Rights Law Standards'. *International Migration* 57, no. 6 (December 2019), p. 92.

[165] UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018. Available at: https://www.refworld.org/docid/5a903b514.html, last accessed 23 August 2020.

Furthermore, it focuses on the situation of migrants in vulnerable conditions or at risk, highlighting the issue of detained children, pregnant women, person with disabilities, lesbians, gays, elderly people and it states that their detention must not take place since they already find themselves in a vulnerable position[166].
It also deals with the principle of non-refoulement stating that it must always be respected.

2.3.2 The Special Rapporteur on the Human Rights of Migrants

The Special Rapporteur on the Human Rights of the Migrants had been established by the former Commission on Human Rights in 1999 and its mandate had been extended by the United Nations Human Rights Council each time for a period of three years[167].
The Special Rapporteur has the possibility to act in every country even if the states have not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, previously analyzed, and its intervention does not require the exhaustion of the domestic remedies.
The aim of the Special Rapporteur on the Human Rights of the Migrants is to protect migrants and their families, taking into consideration vulnerable categories specifically children and women, and to promote effective measures, communicating with migrants themselves and relevant sources on violations of human rights[168]. Since immigration detention represents one of the most important issues when dealing with safeguard of rights of migrants, the Special Rapporteur often referred to the topic in its communications, country visits and annual reports.
There are different ways in which the Special Rapporteur works in order to reach its goals. The first one is through communications and urgent appeals, indeed the Special Rapporteur collects the information it receives on alleged violations of rights of migrants, and it sends communications or urgent appeals to the governments in order to solve the issue as soon as possible[169].

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[166] *Ibid.*
[167] United Nations Human Rights, Office of the High Commissioner, Special Rapporteur on the human rights of the migrants. Available at: https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx, last accessed 20 August 2020.
[168] *Ibid.*
[169] *Ibid.*

Another function the Special Rapporteur has, are country visits. Indeed, on invitation of the government, it visits the country in order to understand and research on how the government is doing on the safeguard of human rights of the migrant. At the end of such country visit, the Special Rapporteur has the duty to submit a report of the visit to the Council in order to give a perspective on the country, but also recommendations on how it could improve the condition of migrants.

The Special Rapporteur on Human Rights of the Migrants also issues annual reports on the global topic to give to the Human Rights Council a better idea of the conditions of migrants around the world.

In 2008, the Human Rights Council issued the Resolution 9/51 in which it requested the Special Rapporteur on Human Rights of the Migrants to give more importance on the issue of arbitrary detention of migrants, specifically of children and adolescents[170].

Furthermore, in regional study on the condition of migrants in the European Union, issued in 2013 by the Special Rapporteur François Crépau, the topic of immigration detention had been addressed deeply, in order to analyze the situation in every country of the Union[171]. Indeed, since detention was becoming, and still is, one of the main tool of border control used by these countries, it was important to analyze how it was used and if human rights of migrants were effectively respected. It underlined that in the previously ten years the use of detention became more and more frequent, this also caused by an harmonization of the countries of the European Union in matters of immigration control, as for instance with the Return Directive of 2008[172].

The Special Rapporteur focused its action on assessing how countries were dealing with immigration detention and noted that in some of them, like Italy and Greece, detention centers were not respecting human rights standards since basic human living conditions were not guaranteed. As a matter of fact, the migrants while detained might have experienced lack of health and psychological support. Furthermore, the time limit of detention in many countries was not respected since removal was difficultly implemented.

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[170] UN Human Rights Council, Resolution 9/51: Human rights of migrants, September 2008. Available at: https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_5.pdf, last accessed 20 August 2020.

[171] Human Rights Council, Report of the Special Rapporteur on Human Rights of the Migrants, François Crépau, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, 24 April 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf, last accessed 20 August 2020.

[172] *Ibid.,* p. 12.

Moreover, the concern was placed on how the European Union was dealing with immigration detention even outside of its borders. Indeed, the Special Rapporteur highlighted that the European Union was promoting, even financially, the construction of immigration detention centers in those countries at the border, as for instance Libya, Albania, Turkey, in order to stop the migrants before they could reach the countries of the EU[173].

In addition, another issue, underlined by the regional study, was the difficulty for migrants and asylum seekers to have complete information on their situation, indeed a lack of access to legal aid and knowledge in a language they could understand was found.

2.3.3 The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment was created in 1985 by the Commission on Human Rights through the Resolution 1985/33 and its mandate was later on extended by the Human Rights Council for the last time in 2017[174].

As its name underlines the Special Rapporteur addresses those cases in which people are at risk or are already subjected to torture or other treatment or punishment that are cruel, inhuman or degrading. Among these situations there might be violations related to the practice of immigration detention.

It addresses issues from all countries even the one that have not ratified the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984, and furthermore, it is not necessary to exhaust all the domestic remedies in order to address to the Special Rapporteur[175]. In the Convention, Articles 10 and 11 refers to detention in broader way, not specifying the type of deprivation of liberty, however, they

[173] *Ibid.,* p. 13.
[174] United Nations Human Rights, Office of the High Commissioner, Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Available at: https://www.ohchr.org/en/issues/torture/srtorture/pages/srtortureindex.aspx, last accessed 23 August 2020.
[175] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. Available at: https://www.refworld.org/docid/3ae6b3a94.html, last accessed 23 August 2020.

state that the personnel trained for cases of law enforcement, as detention, must be aware and informed of the prohibition of torture in any situation and that governments have the duty to avoid cases of torture of people while these are detained in their territory[176].

Moreover, its legal framework is based not only on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment but also on the Universal Declaration on Human Rights, the ICCPR and when dealing with torture in condition of immigration detention, the Refugee Convention and the Convention on Migrant Workers and Their Families.

As already mentioned, the Special Rapporteur deals also with torture or cruel, inhuman or degrading treatment or punishment, while people found themselves deprived of their liberty. As a matter of fact, in the General Recommendations issued in a Report of 2002 the Special Rapporteur addresses directly the topic of detention[177]. It stated that governments have the duty to assess how the situation is in all of those places in which detention is practiced, including centers for administrative detention and they should inform people of the rights they have when held in detention.

In particular in section (h) of paragraph 26, administrative detention is discussed. It is important to underline the importance of giving the same amount of rights to both people under administrative detention and people under the criminal one. Moreover, it was suggested, if possible, to end all forms of administrative detention[178].

As the Special Rapporteur on Human Rights of the Migrants, the one on torture has three fields of action country visits, urgent appeals and allegation letters.

The first one are the country visits, that as it happens for the Special Rapporteur for the Human Rights of the Migrants, can occur only when the Special Rapporteur is invited, and usually it visits two countries per year. The aim of the visits is to assess how countries deal with prevention of torture, through meetings with government authorities, NGOs working in the field and victims or people related with them.

Urgent appeals, as the ones of the Special Rapporteur on the Rights of the Migrants, are sent to governments in situation in which the use of torture or cruel, inhuman or degrading treatment or punishment is in place in the country. Indeed, people experiencing torture,

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[176] *Ibid.,* Art 10-11.

[177] Commission on Human Rights, Civil and Political Rights, Including the Questions of Torture and Detention, Torture and other cruel, inhuman or degrading treatment, Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, 17 April 2002.

[178] *Ibid.,* p. 11.

their relatives, NGOs or legal representatives can fill a model questionnaire in order to address to the Special Rapporteur and to make the process as fast as possible.

When the situation with which the Special Rapporteur is dealing does not require such a level of urgency, the communication with the governments are made through the use of allegation letters. These are used in order to verify the alleged violation of the prohibition of torture and, for instance, they might be used in cases of detention condition which might lead to ill-treatment[179].

Among the reports of the Special Rapporteur, the one of the 26 February 2018 is worth to be mentioned. In this document torture and ill-treatments related to migration were researched. Indeed, one of the paragraphs is specifically devoted to immigration detention[180]. It highlights how, even if migrants should be protected from violation of human rights while in detention, the circumstances of immigration detention centers, most of all the hygienic and physical conditions that migrants have to face, might be considered as ill-treatments. For instance, the problems might be overcrowding, insufficient access to food and sexual abuse.

Furthermore, the report analyzed how prolonged and indefinite detention can be considered as a form of ill-treatment. This procedure is often used by many countries in order to maximize uncertainty among migrants, who in some cases withdraw their requests for asylum or agree to "voluntary" return to their countries in order to be released[181].

In addition to this, another topic that the Special Rapporteur took in consideration researching on the matter of immigration detention is the fact that deprivation of liberty of migrants might be arbitrary, being based only on the fact that these people are migrants. Indeed, many times even if the reasons for detention are not valid, as for instance, the risk of absconding, migrants keep being detained in these facilities. The arbitrariness of detention has an important link with torture or ill-treatment, indeed it might create serious psychological harm. Moreover, the more detention is prolonged for no valid reasons the

[179] United Nations Human Rights, Office of the High Commissioner, Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Allegation Letters. Available at: https://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Allegation.aspx, last accessed 23 August 2020.

[180] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, A/HRC/37/50.

[181] *Ibid.,* p. 7.

more migrants are going to suffer having psychological consequences. The categories that might be more affected by the arbitrariness of detention and its consequences are children, women and elderly people.

2.4 The United Nations High Commissioner for Refugees

The United Nations High Commissioner for Refugees was created in 1950 by the United Nations General Assembly, in order to face the refugee crisis after the Second World War[182]. Since that moment the UNHCR never stopped working for the protection of refugees all around the world trying to face all the biggest refugee crisis of the last 70 years.

During the last ten to fifth teen years the problem of immigration detention has been taken into consideration increasingly from the UNHCR since the number of refugees and asylum seekers experiencing administrative detention increased. However, already since 1999, the Commissioner gave a relevant spot to the topic with the introduction of a document entitled "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers 1999"[183].

This document in 2012 has been replaced by the 2012 "Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention"[184].

In this document the definition of detention is given as "deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities"[185]. It also underlines that detention can take place in different

[182] UNHR, History of UNHCR. Available at: https://www.unhcr.org/history-of-unhcr.html, last accessed 23 August 2020.
[183] UN High Commissioner for Refugees (UNHCR), *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999. Available at: https://www.refworld.org/docid/3c2b3f844.html, last accessed 26 August 2020.
[184] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. Available at: https://www.refworld.org/docid/503489533b8.html, last accessed 26 August 2020.
[185] *Ibid.,* p. 9.

kinds of facilities, among which some devoted entirely to this scope, or other which originally had different aims, as airport transit-zones, boats, closed refugee camps.

The guidelines set out in the document are ten and they take into considerations many aspects of detention.

First of all, the UNHCR underlines that the right to seek for asylum must be respected, indeed, as it is stated in Article 31 of the Refugee Convention of 1951, the fact of applying for asylum cannot be criminalized and therefore asylum seekers cannot be penalized for their status[186]. Moreover, there is the need to acknowledge that asylum seekers are not in the same situation of irregular migrants and, for them, it might be difficult to collect the necessary documents. The second guideline is related to the fact that asylum seekers must enjoy the same rights of freedom of movement, liberty and security then other citizens, as it is expressed on Article 31 of the same Convention[187].

One of the main points is related with arbitrariness of detention, indeed, as every other UN body, the UNHCR is highly concerned with arbitrary detention of asylum seekers. In fact, following its guidelines, deprivation of liberty must be in accordance with the law, and the different circumstances of every asylum seeker held in detention must be considered individually in order to understand if this form of deprivation of liberty is necessary. Taking into account the individual consideration of every case, it is important to underline the different categories of asylum seekers held in detention, as for instance, women, children, people victim of trafficking, trauma or torture, elderly people, people with disabilities or people being part of the LGBTI community, that might have different necessities[188]. The difficulties that these particular categories of people experience while in detention must be acknowledged, since either they already experienced abuses or they might be at higher risks of experiencing them.

Another important guideline, related with arbitrariness of detention, is the indefinite time in which asylum seekers are detained, indeed, a maximum time limit of detention should be set by law in order to not make it indefinite and therefore arbitrary. Moreover, it is

[186] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Art 31. Available at: https://www.refworld.org/docid/3be01b964.html, last accessed 30 July 2020.

[187] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. Available at: https://www.refworld.org/docid/503489533b8.html, last accessed 26 August 2020.

[188] *Ibid.,* Guideline 9, p.33.

important that the decision to detain and, if needed, extend the period of detention, is subjected to minimum procedural safeguard.

In 2006, the UNHCR issued a document called "Alternatives to detention" to outline the possible alternatives that governments might use instead of detaining asylum seekers[189]. This document is fundamental in understanding what governments might do since the majority of countries continues to use detention as a frequent tool in the management of flows of asylum seekers, even if it should be used as a measure of last resort. Indeed, governments report the necessity of such measure to avoid the risk of absconding and due to the lack of cooperation of asylum seekers[190].

The alternatives proposed vary from those that are less intrusive in the life of the asylum seekers to those that are more enforcement oriented, moreover, they can be used during all the asylum determination process but even only for a portion of it.

For instance, some of the alternatives reported in the document were the release of separated children to entrust them to local social services in order to prevent their detention, electronic monitoring or satellite tracking and, release to another individual, family members or organization with a different level of supervision according to the individual case.

According to the UNHCR, countries have the duty to research better on these new methods in order to prevent the indiscriminate use of detention and, moreover, they must assess individually all the cases to understand which option is most suitable according to the different situations. Furthermore, it is important to analyze the issue of separated children who need to be protected and safeguarded, and try to find new structures and ways to control their movement in the country[191].

In 2014 another important document was issued by the UNHCR on deprivation of liberty of asylum seekers and refuges, "Beyond Detention", which was a global strategy developed between 2014 and 2019[192]. The aim of the strategy was to support governments

[189] UN High Commissioner for Refugees (UNHCR), Alternatives to Detention of Asylum Seekers and Refugees, April 2006, POLAS/2006/03. Available at: https://www.refworld.org/docid/4472e8b84.html, last accessed 26 August 2020.
[190] *Ibid., p. 24.*
[191] *Ibid.*
[192] UN High Commissioner for Refugees (UNHCR), Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019, 2014. Available at: https://www.refworld.org/docid/536b564d4.html, last accessed 26 August 2020.

in order to find new solutions, and, therefore, end the detention of asylum seekers and refugees, since this migration tool became increasingly used by many countries in the last decades.

The strategy addressed three main goals, the end of detention of children, the development of alternative measures of detention and it aimed to ensure that, in the cases in which detention is inevitable, it met international standards.

In order to reach these goals, the UNHCR and its partners had to develop plans of action that may differ from country to country. The first two years of the project, from June 2014 to June 2016, were focused on twelve focus countries, which had to develop tools compatible with the global strategy for the development of action plans[193]. Each national plan needed to focus on one of the global goals in order to reach the objective, through the use of campaigns to raise awareness and research in order to analyze the topic.

In 2018, a progress report on the Global Strategy was developed in order to assess if the countries were progressing towards the achievement of the three goals[194].

Taking into account the first goal, the end of children detention, the majority of focus countries have implemented some measures in order to reduce or even end this phenomenon in their territory. For instance, Canada, Malta, the United Kingdom and Mexico prohibited by law their detention and, in most of the other countries, the number of children detained had decreased during the years. However in some countries, as USA and Hungary, the worsening situation of the migration scenario led to an aggravation of their conditions[195].

The second goal was the strengthening of alternatives to detention of asylum seekers and refugees. Even if some steps forward had been made on the field, in the majority of the countries, detention of asylum seekers and refugees, even when not necessary, was still largely used. However, some focus countries were trying, with the use of policies and legislation tools, to implement some measures in order develop such alternatives.

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[193] *Ibid.*

[194] UN High Commissioner for Refugees (UNHCR), *Progress Report 2018: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers & Refugees, 2014 - 2019*, February 2019. Available at: https://www.refworld.org/docid/5c9354074.html, last accessed 28 August 2020.

[195] *Ibid.,* p. 14.

In some countries, better results could not be achieved because of strong political position in the governments which advocated the importance of national security, as for instance Hungary and the United States[196].

Finally the third goal, the assurance that, when detention is inevitable, it meets international standards. In many countries it is fundamental the work of UNHCR, together with non-governmental organizations, in order to monitor the conditions of asylum seekers when in detention. However in some cases, it is still really difficult for the UNHCR itself and other NGOs to access detention facilities, which results to be fundamental to assess the situation of these people. In order to face the issue the Commissioner prepared recommendations on the topic to make governments more aware of the problem and to stress the importance of respecting human rights international standards.

2.5 Regional Instruments on Immigration Detention

In the previous paragraphs the importance of the role that international instruments have in the development of common standards on the topic of immigration detention has been analyzed deeply, taking into account how both a common legal framework and international tools, as the United Nations, are useful in solving this global issue.

In the following paragraphs, the importance of a regional form of protection of migrants and asylum seekers when deprived of their liberty and, to some extents, regulations of the tool of detention are going to be analyzed more deeply.

Taking into account different regions of the world, different instruments had been developed to prevent violation of human rights in their territories. The instruments that are going to be analyzed are not precisely referring to detention of asylum seekers, migrants and/or refugees, however, they play a fundamental role in the protection of human rights in general, therefore addressing the problem indirectly.

These three instruments are related to three different regions of the world and their aim is to protect human rights of every person staying in their territory, the African Charter on

[196] *Ibid.,* p. 18.

Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights.

When dealing with detention of migrants and asylum seekers some rights need to be underlined in order to understand to what extent their human rights have to be protected, as for instance, the right to liberty and freedom and the right to not experience torture or other cruel, inhuman or degrading treatment or punishment.

These in particular are going to be the topics on which the chapter is going to focus more deeply, taking into account the regional perspective on immigration detention.

2.5.1 The African Charter on Human and People's Rights

In the African continent the regional human rights instrument is represented by the African Charter on Human and People's Rights[197]. This has been adopted in 1981 and entered into force in 1986; it represents the most important legal instrument of human rights protection in the continent. Indeed, it sets the standards through which the promotion and protection of human rights should take place[198].

In the Charter, no specific article refers to detention of migrants and asylum seeker, however, three of them might be applied in this specific situation.

Article 5 of the Charter focuses on human dignity, highlighting the importance of the prohibition of slavery, slave trade, torture, cruel, inhuman or degrading treatment or punishment[199]. This article, even if not directly, is really important in the field of detention of migrants and asylum seekers; indeed, an higher number of migrants in the continent is experiencing situation in which they face inhuman treatments and even forms of torture while detained in detention facilities in the continent.

One of the most important cases is represented by the situation in Libya, indeed, the high number of migrants, coming for across the continent in order to reach Europe borders through the Mediterranean, have created an unsustainable situation for the country. As a report from Amnesty International of 2017 states, in Libya the use of torture or the risk

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[197] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: https://www.refworld.org/docid/3ae6b3630.html, last accessed 28 August 2020

[198] *Ibid.*

[199] *Ibid.,* Art 5.

of sexual abuses, in cases of women, and cruel, inhuman or degrading treatment, while in immigration detention is very high, both in centers managed by the Ministry of Interior and in informal detention facilities run by criminal groups[200].

Moreover, in some cases migrants are subjected to forced labor in these camps, going against Article 5 of the Charter, and in the majority of detention facilities, it is really difficult for international organization, as UNHCR, to enter and therefore assess the conditions of the migrants.

Article 6 of the African Charter focuses on the issue of arbitrary detention in general, indeed, it states that everyone must enjoy the right to liberty and security according to the law. Therefore, the arbitrary arrest and detention are not permitted[201].

A report of the International Detention Coalition of 2015-2016 underlines how frequent is for migrants and asylum seekers detained to experience arbitrary arrest and detention. Indeed, the Coalition taking into account 6 African countries (Libya, Egypt, South Africa, Kenya, Tanzania and Zambia) found out that arbitrary detention is common, most of all in Egypt and South Africa where documents of local NGOs reported mass arrest of undocumented migrants[202].

Article 12 of the African Charter on Human and People's rights addresses in paragraph 3 the topic of asylum. As a matter of fact, it states that "every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions"[203].

However, not in all African countries this right is respected; indeed, in Libya, as the United Nations Office of the High Commissioner of Human Rights have assessed in one of its reports of 2018, there is no asylum system. The country did not ratify the United Nations Convention on Refugees of 1951 and therefore, it does not recognize the United

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[200] Amnesty International, Italy Submission to the United Nations Committee Against Torture, 62nd session, 6 November – 6 December 2017, October 2017. Available at: https://www.amnesty.org/download/Documents/EUR3072412017ENGLISH.pdf, last accessed 28 August 2020.

[201] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: https://www.refworld.org/docid/3ae6b3630.html, last accessed 28 August 2020.

[202] International Detention Coalition, Alternatives to Immigration Detention in Africa, A summary of member findings from six countries, 2015 – 2016, p. 6. Available at: https://www.refworld.org/pdfid/5a5f55e04.pdf, last accessed 28 August 2020.

[203] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art 12(3). Available at: https://www.refworld.org/docid/3ae6b3630.html, last accessed 28 August 2020.

Nations High Commissioner for Refugees[204]. The absence of the asylum system in the country ends up in the fact that no difference is made between irregular migrants and asylum seekers, with the consequence of not taking into account their different needs and situations.

Article 30 of the African Charter establishes the African Commission on Human and People's Rights (ACHPR) with the goal of promoting and protecting humans and people's rights in the continent[205]. As for the United Nations, the Commission has some special mechanism, indeed, there are some Working Groups and Special Rapporteurs researching on specific fields.

A joint statement made by the UN experts, the Inter-American Commission on Human Rights Rapporteur on the Rights of Migrants and the African Commission on Human and People's Rights Special Rapporteur on Refugee, Asylum Seekers, Internally Displaced Persons and Migrants in 2012, focused on migrant's human rights, precisely on the topic of detention[206]. Indeed, they expressed their concern on the use of such tool by some States and they underline the fact that detention should not be the rule but the exception, as a matter of fact, they stressed the idea that countries should abolish administrative detention and promote the use of some alternative measures, in order to not violate migrant's right of liberty.

2.5.2 American Convention on Human Rights

The American Convention on Human Rights was adopted in 1969 but it entered into force only in 1978[207]. It represents an important document, for those countries which have ratified it since it defines the human rights those states have agreed to respect.

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[204] United Nations Office of the High Commissioner of Human Rights, United Nations Support Mission in Libya, Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya, 20 December 2018. Available at: https://www.ohchr.org/Documents/Countries/LY/LibyaMigrationReport.pdf, last accessed 28 August 2020.

[205] African Commission on Human and People's Rights, History. Available at: https://www.achpr.org/history, last accessed 28 August 2020.

[206] African Commission on Human and People's Rights, Joint Statement by UN Experts, the IACHR Rapporteur on the Rights of Migrants and the ACHPR Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants. Available at: https://www.achpr.org/pressrelease/detail?id=272, last accessed 28 August 2020.

[207] Organization of American States (OAS), American Convention on Human Rights,"Pact of San Jose,

The Convention created the Inter-American Court on Human Rights and described the functions and procedures of both the Court and the Inter-American Commission on Human Rights.

Taking into account the text of the Conventions, there are some articles that are worth to be mentioned in order to understand its role in violation of human rights in situation of deprivation of liberty of migrants and asylum seekers. As for the African Charter and the European Convention, no specific articles address the topic of immigration detention however there are some that might be useful when dealing with it.

For instance, Article 7 is focused on the right to personal liberty[208]. Paragraph 3 is related to arbitrary detention, indeed, it states that "no one shall be subjected to arbitrary arrest or imprisonment", and paragraph 4 underlines the importance for the person detained to be informed of the reasons of his/her deprivation of liberty. Moreover, Article 7(6) highlights the fact that if detention is unlawful the person detained must be promptly released. Even if deprivation of liberty of asylum seekers and refugees is not addressed directly, it is clear that these principles can be applied in this situation as well.

Furthermore, Article 5, "Right to Humane Treatment", is considered useful in cases of deprivation of liberty[209]. As it was already analyzed in the previous paragraphs of the chapter, migrants and asylum seekers when detained are exposed at the risk of being subjected to cruel, inhuman or degrading treatment or punishment, or in the worst cases, to torture. This article of the American Convention on Human Rights stresses the importance of the protection of people when dealing with torture or inhuman or degrading treatment or punishment, as a matter of fact, it prohibits it and it adds the fact that everyone who is deprived of his/her liberty must be treated with respect.

Finally, paragraph 7 of Article 22, "Freedom of movement and residence", the right to asylum is made clear, expressing that everyone has the right of seeking asylum in cases of which he/she is pursued for political offenses of related common crimes[210].

Even if the American Convention on Human Rights is recognized to be one of the most important documents for the protection of human rights in the American continent, it have not been ratified by many countries. Indeed, only 25 countries ratified the Convention, 22

Costa Rica", 22 November 1969. Available at: https://www.refworld.org/docid/3ae6b36510.html, last accessed 28 August 2020.

[208] *Ibid.,* Art 7.

[209] *Ibid.,* Art 5.

[210] *Ibid.,* Art 22(7).

recognized the jurisdiction of the Inter-American Court on Human Rights and only 10 recognized the competences of the Inter-American Commission on Human Rights[211]. Among the countries that did not ratify the Convention and recognized both the Court and the Convention, United States and Canada are important to be mentioned.

The Inter-American Commission on Human Rights, which is regulated by Chapter VII of Part II of the American Convention on Human Rights, tried to discuss more deeply the phenomenon of immigration detention.

Indeed, it expressed its concern on the conditions of migrants deprived of their liberty in the United States on a press release of August 2017[212]. This document refers to the death of ten migrants detained under custody of the US Immigration and Custom Enforcement authorities and, in general, on the condition of immigration detention centers and detainees. The Commissions stressed the concept of exceptionality of the use of immigration detention and that it could be used only after assessing its necessity based on the situation of the individual; in the cases in which it is necessary, the country should ensure to detainees the better condition possible and avoid the use of isolation measure that, if prolonged, could constitute cruel, inhuman or degrading treatment or punishment. Moreover, migrants cannot be detained with the purpose of discouraging others from entering the country.

2.5.3 European Convention on Human Rights

The European Convention on Human Rights is an international human right treaty between the 47 countries that are members of the Council of Europe, it was signed in Rome in 1950 and it entered into force in 1953[213]. It is considered one of the most important documents for the protection of human rights in the European Continent and a milestone in the field.

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[211] Inter-American Commission on Human Rights, B-32: *American Convention on Human Rights "Pact of San José, Costa Rica"*. Available at: http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm, last accessed 29 August 2020.

[212] Organization of American States, Press Release, IACHR Expresses Deep Concern for Deaths and Detention Conditions at Migrant Detention Centers in the United States. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2017/119.asp, last accessed 29 August 2020.

[213] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available at: https://www.refworld.org/docid/3ae6b3b04.html, last accessed 29 August 2020.

In the last decades, immigration have been one of the main issues that some European countries had to tackle in order to establish a control on the situation. For this reason, in many occasion the European Court of Human Rights which bases its work on the European Convention on Human Rights had to deliver many judgements on the topic, taking into account, in several occasions, the detention of migrants and asylum seekers.
Some articles of the Convention have been taken into account in these cases, since they were highly related with the deprivation of liberty of such categories.
For instance, Article 5 "Right to liberty and security" had been used in different occasions by the Court when dealing with cases of detention of migrants. It states that everyone has the right to liberty and security, moreover, taking into account migrants situation, it focuses on the fact that deprivation of liberty might be lawful towards a person in order to "prevent his effecting an unauthorized entry into the country", and, in the cases in which, this person has to be deported or extradited[214]. Their detention must be lawful and conform with the national laws, however, the compliance with domestic laws does not exclude the fact that detention might be arbitrary, indeed, detention should be closely related to the purpose of preventing illegal entry in the country.
An important case of the Court, to take into account when dealing with detention of migrants, is the case Amuur v. France[215]. In this case, the European Court of Human Rights found a violation of Article 5(1) of the Convention, since the applicant was kept in detention in an airport transit-zone in a situation which was not respectful of the right to liberty. In fact, his detention was prolonged for twenty days turning a restriction on his liberty to a deprivation of liberty. During the whole period, the applicant did not have the possibility to have legal and social assistance, which should be provided, and he was placed under strict police surveillance.
In some cases the Court found violations of Article 5 in conjunction with Article 3 of the Convention. Article 3 of the Convention is related with the prohibition of torture and it states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.". The Court expressed in different occasions that if the facility in which migrants or asylum seekers are detained is not appropriate, from the point of view of a clean, healthy and safe environment, and/or detention is prolonged, it might result in a

[214] *Ibid.,* Art 5(1).
[215] Amuur v. France App. no 19776/92 (ECtHR, 25 June 1996).

violation of Article 3 of the Convention[216]. Moreover, also overcrowded facilities and their very poor conditions, as for instance lack of ventilation and light might be considered cruel, or inhuman or degrading treatment or punishment[217].

[216] Charahili v. Turkey App. no 46605/07 (ECtHR, 13 April 2010).
[217] M.S.S. v. Belgium and Greece, App. no 30696/09 (ECtHR, 21 January 2011).

CHAPTER 3

VIOLATION OF HUMAN RIGHTS IN IMMIGRATION DETENTION, THE ISSUE OF INTERSECTIONALITY

3.1 Is the right of liberty safeguarded?

The right of liberty represents one of the fundamental and oldest recognized rights that every human being should enjoy during his/her life, regardless of his/her situation[218].

As the Working Group on Arbitrary Detention stated in its Revised Deliberation No. 5 on the deprivation of liberty of migrants, the right to personal liberty must be enjoyed by all persons, in all times and circumstances, comprehending migrants and asylum seekers without discriminations related to their citizenship, nationality or migratory status[219]. However, this is not an absolute right, and there are some cases in which derogations to the right of liberty are allowed and, therefore, deprivation of liberty can be considered as a form of allowed state control.

The right of liberty is one of those rights that is included in both international and regional instruments on human rights[220].

Starting from Article 3 of Universal Declaration of Human Rights of 1948 and Article 9 of the International Covenant on Civil and Political Rights, moving to regional treaties as, for instance, Article 6 of the African Charter on Human and People's Rights, Article 7 of the American Convention on Human Rights and Article 5 of the European Convention on Human Rights. Every of these documents has as one of its main pillars the

[218] Edwards, Alice, Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, Legal and Protection Policy Research Series, April 2011, p. 16.

[219] The Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018. Available at: https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf, last accessed 1 September 2020.

[220] Wilsher, Daniel, Immigration Detention the Right to Liberty, and Constitutional Law, Global Detention Project Working Paper, no. 22, March 2017, p. 1.

recognition that every individual should enjoy the right of liberty. It is irrelevant where the deprivation of liberty is exercised and if it is described as detention or not.

However, even if the right is recognized to be one of the most important and it is at the basis of every liberal democracy, when countries have to deal with deprivation of liberty of irregular migrants or/and asylum seekers the protection of their right to liberty is very limited, and their precarious status makes them vulnerable to irregularity and therefore for detention.

Moreover, the mass use of immigration detention is justified by governments as the only way they have to manage migration flows in their territory and to control their borders, in order to not let enter in the country potential risks for the security of the nation. In the last decades, many countries started a process of "criminalization" of irregular immigration and therefore began using detention as their main tool. Even if, immigration violation in the majority of countries still fell into administrative law, many of them exercise their sovereignty when dealing with immigration detention[221]. The high employment of such a tool raises the question, is the right of liberty safeguarded in the use of administrative detention?

Immigration detention, as many of the international and regional human rights instruments have stated, can be applied only when lawful[222].

Detention to not be a unlawful deprivation of the right of liberty has to respect some principles; as a matter of fact, countries have to take into account the concept of proportionality for the use of detention indeed, the assessment of the personal situation of the individual must be considered when determining if detention is the necessary measure or other, less coercive measures can be taken.

Moreover, it is worth mentioning the issue of time limit. As a matter of fact, administrative detention is considered lawful when it does not exceed time limits. For the Members of the European Union, the time limit have to be set in their legislations and the EU itself with the Return Directive set up the maximum time limit for detention of migrants, asylum seekers and refugees to 6 months with the possibility to extend it of other 12 months. Detention cannot be indefinite, indeed in the cases in which a limit is

[221] Flynn, Michael, Immigration Detention and Proportionality, Global Detention Project Working Paper, no. 4, February 2011, p. 10.

[222] Edwards, Alice, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, Legal and Protection Policy Research Series, April 2011.

not set, it is considered unlawful because it might led to psychological consequences in those migrants that are detained without a clear limit.

Related with the principle of proportionality and the concept of time limit, the arbitrariness of the use of detention must be taken into account. Indeed the Working Group on Arbitrary Detention set out some criteria through which it is possible to understand if detention should be considered arbitrary or not, for instance among others one of those parameters is the importance for the detainee to be promptly informed of the reasons why he/she is held in detention in a language he/she can understand[223].

In the following paragraphs these three concepts, arbitrariness, proportionality and time limit of detention, are going to be analyzed, in order to understand if countries are respecting the right to liberty of migrants and asylum seekers in their territory, taking into account cases in which those principles were not respected.

3.2 Arbitrariness of detention

The concept of arbitrariness of detention of migrants and asylum seekers had been deeply discussed in the last decades, nonetheless, the broad concept of prohibition of arbitrary arrest and detention has always been part of the international and regional human rights framework, from Article 9 of the ICCPR and Article 9 of the UDHR, to Article 5 of the ECHR, Article 6 of the ACHPR and Article 7 of the ACHR. However, in none of these documents, a specific definition of when detention is arbitrary is given.

Not even the Human Rights Commission gave an exhausting explanation of what arbitrary detention is, when defining the role of the WGAD. One the other hand, it had examined deprivation of liberty as arbitrary when it is contrary to international provisions laid down in international human rights instruments ratified by countries[224].

The Human Rights Committee in one of its views highlighted the fact that arbitrary detention does not only mean "against the law" however it has different shades and

[223] UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4. Available at: https://www.refworld.org/docid/3b00f25a6.html, last accessed 23 August 2020.

[224] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 26, The Working Group on Arbitrary Detention, May 2000, No. 26. Available at: https://www.refworld.org/docid/479477440.html, last accessed 4 September 2020.

different elements inluding due process to law, inappropriateness, lack of predictability and injustice[225].

Since 1997, when the former United Nations Commission on Human Rights gave the Working Group on Arbitrary Detention the task to research more deeply on arbitrary detention in the field of immigration, the focus on the topic became more and more important and different international and regional organizations started to tackle the issue. Moreover, the use of detention of migrants and asylum seekers became more and more frequent among countries, therefore the need to find solutions in order to end arbitrary detention of these particular category became urgent.

The principle of the prohibition of arbitrary detention is highly linked with safeguard of the right to liberty and with the concepts of proportionality and time limit of detention. Indeed, these two are important criteria are useful in assessing if detention is arbitrary or not, as a matter of fact this form of deprivation of liberty must be proportionate to the individual situation of the migrant or asylum seeker and there has to be a time limit set by law, in order to not become indefinite.

In 1999 the WGAD addressed the issue of arbitrary detention of migrants and asylum seekers adopting its Deliberation No. 5, in which it set out the criteria to assess if immigration detention is arbitrary. In 2018, to consolidate its work on the field, the Revised Deliberation No. 5 was issued with the goal of strengthening the role of the Working Group in the fight again the arbitrary use of immigration detention, underlining the fact that the document was issued on the 70th anniversary of the Universal Declaration on Human Rights[226].

As highlighted in the document, arbitrary detention is absolutely prohibited and its prohibition is a non-derogable norm of international law, defined as *jus-cogens*. Indeed it is impossible to justify arbitrary detention of migrants and asylum seekers even in situations of national emergency, public security risk or large migratory movements.

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[225] UN Human Rights Committee, *Communication No. 458/1991*, U.N. Doc. CCPR/C/51/D/458/1991 (1994). Available at: https://www.refworld.org/cases,HRC,4ae9acc1d.html, last accessed 03 September 2020.

[226] UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018. Available at: https://www.refworld.org/docid/5a903b514.html, last accessed 23 August 2020.

In the Revised Deliberations No. 5, the WGAD underlines the fact that detention should be applied as a measure of last resort and that countries should first assess if there is the possibility to use less coercive measures before resorting to detention.

Moreover, this document lays down the principles countries must follow in cases of deprivation of liberty of asylum seekers and refugees. Detention, to not result arbitrary, has to be approved by a judge or a judicial authority and it must be reviewed periodically in order to assess if it is still lawful and needed. Furthermore, the migrant or asylum seeker detained should have the possibility to access a court which might decide on his/her release if necessary[227].

Every migrant has to have the possibility to have legal representation, and if needed, to access to an interpreter. As a matter of fact, one of their most important rights and, consequently duties of the states, is to be promptly informed on their situation and status in a language they can understand and, in the cases in which they request for international protection, the process of application for asylum has to be clear in order to give them the possibility to apply. While deprived of their liberty, they have to have the possibility to communicate with the outside world, as for instance, their families, or even representatives of their country ,of NGOs or of specific bodies, as the UNHCR.

Detention does not have to be based on discrimination, indeed, any form of prejudice and inequity is not accepted on the basis of sex, religion, nationality or other kind of status[228].

Moreover, as already underlined before, the use of proportionality and the fact that detention should be used for the shortest period possible, establishing by law a maximum limit for the length period of detention, are going to be deeply analyzed in the following two paragraphs.

In order to better understand the concept of arbitrariness of detention the case Saadi v. United Kingdom might be useful[229]. Indeed the ECtHR in its merits, defined some common grounds that have to be respected in order to avoid the use of arbitrary deprivation of liberty, indeed detention must be carried out in good faith, the facilities and the condition in which migrants and asylum seekers are detained must be appropriate and that the decision of detention must be closely related with the purpose of preventing unauthorized entry in the country. Moreover it underlined the fact that this category of

[227] *Ibid.*
[228] *Ibid.*
[229] Saadi v. United Kingdom, App. no. 13229/03 (ECtHR 28 January 2008).

people is not detained for criminal offences but because they decided to leave their country, fearing for their lives.

3.2.1 The concept of proportionality in the use of detention

Proportionality is one of the key concepts when dealing with deprivation of liberty of migrants and asylum seekers and, as already mentioned, it is highly linked with the concept of arbitrariness, indeed, the decision to detain or not must be based on this principle. In matters related with detention of migrants and asylum seekers, the concept determines that the decision of depriving of liberty someone is based on the fact that it must be proportionate to the administrative aim of it, which is established by law[230].

In order to better understand if the decision to detain is proportionate, it is important for the authorities to take a test, which might be useful with both the initial decision of deprive of liberty and any extension of the period of detention[231].

Some points that should be taken into account and that should influence the decision to detain are firstly the possibility that the migrant might be removed and the time that the removal needs, if there are evidences that the person might abscond, if there is a risk for national security of the country, how old the migrant or asylum seeker is and if he/she experienced torture or has psychological problems[232]. Indeed, what government should do, more than assessing if the use of deprivation of liberty is respectful of national law, is to apply the principle of proportionality relying on the individual situation and condition of the migrant or asylum seeker to detain, trying to balance public interest and sovereignty with individual rights[233].

The very important question, is if detention is proportionate for the administrative aim of immigration policies, as a matter of fact, all international organization and NGOs working

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[230] O'Nions, Helen, No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience. European Journal of Migration and Law. 10, 2008, 149-185.

[231] UN High Commissioner for Refugees (UNHCR), Alternatives to Detention, Module 3 – Decision making on ATDs. Available at: https://www.refworld.org/pdfid/5bfd3f6d2.pdf, last accessed 26 August 2020.

[232] European Union Agency For Fundamental Rights (FRA), Detention of third-country nationals in return procedures, 30 November 2010.

[233] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 258.

on the topic underline that the use of detention should be reduced at the minimum and applied only in those cases in which it is undoubtedly necessary, promoting, in the other cases, alternative to detention[234]. In one of the reports of the European Parliament Committee on Civil Liberties of 2007 about the Return Directive, it is stated that the use of detention should be highly linked with the principle of proportionality and used only after assessing that it is necessary in the situation, to prevent the risk of absconding or in order to reach other objectives, as for instance identification of the individual[235].

As already mentioned, proportionality is highly linked with the individual assessment of the cases, however, there are also some common indicators on how detention is held that can help understand if its use is disproportionate for its administrative aim. In particular, the different detention facilities and the way they are run might be a way to understand if the principle of proportionality is respected[236].

For instance, proportionality can be determined from the type of detention facility, considering if it is a center built for the only purpose of detention of migrants and asylum seekers, an establishment improvised to become a detention accommodation (as an hotel, military base) or a facility that is commonly used for detention of criminal suspects or convicts. The difference between these facilities and the way countries use one instead of the other might give an idea on how governments perceive migrants and asylum seekers, and if the use of detention is proportionate. Indeed, in many documents of NGOs and also of bodies of the United Nations, the need of using specific detention facilities for migrants and asylum seekers is underlined and suggested, however, in the cases in which this is not possible, they should be detained in a separated areas of prisons and not be in contact with the criminal that are detained there.

Another indicator which could be useful in understanding if the concept of proportionality is applied is the security level of the facilities. Indeed, different centers, prisons, immigration detention centers, hotel, airport transit zones, have different level of security according to their purpose and their structure. This raises the question if this level is

[234] Amnesty International, Migration-Related Detention: A Research Guide on Human Rights Standards Relevant to the Detention of Migrants, Asylum-Seekers and Refugees, November 2007, POL 33/005/2007. Available at: https://www.refworld.org/docid/476b7d322.html, last accessed 07 September 2020.
[235] Flynn, Michael, Immigration Detention and Proportionality, Global Detention Project Working Paper, no. 4, February 2011, p. 11.
[236] Flynn, Michael, Immigration Detention and Proportionality, Global Detention Project Working Paper, no. 4, February 2011, p. 16.

adequate to the degree of risk that migrants and asylum seekers pose during their time in detention. Indeed, it is not uncommon that migrants and asylum seekers are detained in secure facilities, similar to prisons, in which they cannot leave the center in any moment with a complete deprivation of liberty[237]. This would not respect the principle of proportionality, indeed, they do not represent, except in some cases, such an important risk for the national security to detain them in such "closed" facilities and, therefore, detention in this kind of secure facilities is not necessary for the aim of administrative detention. Indeed, in order to reach the goal of removal in cases of migrants and of assessment of refugee status for asylum seeker this strict deprivation of liberty is not needed.

3.2.2 Time Limit of Detention

Establishing a time limit for detention of migrants and asylum seekers is crucial for countries in order to prevent the arbitrary use of detention.

Indeed, as the Working Group on Arbitrary Detention stated in many of its reports, a maximum period of detention must be set by law, and when the limit expired, migrant and asylum seekers must be automatically released[238]. Indefinite detention is considered arbitrary and cannot be justified even in those situations in which there is no cooperation from the part of the consular representation of the country of origin or when it is not possible for the lack of means of transport to proceed with the removal, as a matter of fact, migrants or asylum seekers have to be released in the shortest amount of time possible in order to avoid the use of indefinite detention[239].

Moreover, as the Human Rights Committee addressed in one of its communications, the duration of deprivation of liberty does not have to exceed the time for which the government can give appropriate justification of the purpose of detention, for instance, in

[237] *Ibid.*, p. 22-23.

[238] European Union Agency For Fundamental Rights (FRA), Detention of third-country nationals in return procedures, 30 November 2010.

[239] The Working Group on Arbitrary Detention, Revised Deliberation No. 5 on deprivation of liberty of migrants, 7 February 2018, p. 4. Available at: https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf, last accessed 1 September 2020.

the cases in which it is clear that the removal of migrants cannot be carried out within a justifiable period of time, they have to be released. Furthermore, if detention is adopted in order to assess the identity of the migrant or the asylum seeker, it must last the short time possible in order to assess the identity and used only in those cases in which less coercive measures would not be effective[240]. Indeed, in the UK the House of Lords and House of Commons Joint Committee on Human Rights in a report on the treatment of asylum seekers and refuges on 2006-07, highlighted that the maximum time for detention that should be accepted in cases of asylum seekers is no longer than 28 days, since it found that this period of time can be justifiable in order to prepare the documents for the removal[241]. Furthermore, it highlighted that this period of time could not be acceptable for children who should not be detained and, in rare cases of detention, they should be released in the shortest time possible[242].

Taking into consideration the situation in the European Union, the Return Directive of 2008 established the time limit for detention of migrants and asylum seekers. Indeed, it stated that their deprivation of liberty cannot exceed 6 months, but, in specific cases, as in ones in which the migrants are not cooperating with the authorities or in which it results difficult to get information from the country in which they are supposed to go after the expulsion, it can be extended for other 12 months, resulting at a maximum of 18 months[243]. This decision raised some critiques, indeed, even if countries can have a shortest maximum time of detention, many of them like Italy, Spain and Greece, implementing the Directive in their national law, have increased their detention time setting it to 18 months[244].

However, even if they implemented the Directive, many countries member of the European Union are not respecting such standards and, in some cases, migrants and

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[240] Cornelisse, Galina. *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*. Immigration and Asylum Law and Policy in Europe, v. 19. Leiden ; Boston: Martinus Nijhoff Publishers, 2010, p. 255.

[241] HL and HC Joint Committee on Human Rights, *The treatment of asylum seekers,* Tenth Report of session 2006-07, Volume I – Report and formal minutes, 30 March 2007. Available at: https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf, last accessed 5 September 2020.

[242] *Ibid.*

[243] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *on common standards and procedures in Member States for returning illegally staying third-country nationals*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0115, last accessed 06 July 2020

[244] Costello. «Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law». *Indiana Journal of Global Legal Studies* 19, n. 1 (2012): 257, p. 14.

asylum seekers are detained either for periods of time longer than 18 months or for an interval of time longer than the one needed to the aim of administrative detention.

An example on how countries member of the EU are not always respecting the time limit set by the Return Directive are the amount of cases brought before the European Court on Human Rights in which migrants and asylum seekers are detained for long period of time, without any kind of guarantee. One case worth to be mentioned is the case of *M and Others v. Bulgaria* of 2011 in which an Afghan father has been detained for two years and eight and a half months pending expulsion without the possibility of challenge their situation. Indeed, the applicant stated that the Bulgarian government did nothing in order to implement the deportation order[245]. The Court found a violation of Article 5(1) of the European Convention on Human Rights, and it stated that detention is lawful and not arbitrary when the length of the deprivation of liberty does not exceed the limits for the achievement of its purpose. In this case, the Bulgarian authorities deprived of liberty the applicant declaring that the aim of the detention was deportation, however, the Court found that no actions in order to reach the expulsion were pursued at that time and, therefore, his detention has to be considered arbitrary[246].

When dealing with time limit of detention of migrants and asylum seekers, it is important to underline the use of re-detention after release. Indeed, many countries in order to circumvent the time limit of detention set in their national laws, release the person to re-detain immediately after in this way prolonging the detention period[247]. In others, as for instance, Belgium the time depends on detention facilities indeed every time a migrant is transferred, the new structure starts counting anew the period of detention, therefore, exceeding in this way the limits[248].

Finally, another aspect to take into account is the review of detention, indeed, a periodical review of the lawfulness of detention is required and, in the cases in which detention is prolonged, it requires the intervention of a judicial authority. This tool is considered useful because it is necessary in keeping detention as short as possible, indeed, with periodical review of the specific case, migrants and asylum seekers have to possibility to

[245] M. and Others v. Bulgaria, App. no. 41416/08 (ECtHR, 26 July 2011).
[246] *Ibid.*
[247] John v. Greece. App. no. 199/05 (ECtHR, 10 May 2007).
[248] European Union Agency For Fundamental Rights (FRA), Detention of third country nationals in return procedures, 30 November 2010, p. 33.

assess if their detention is still valid or not. However, in some cases, as in Italy when the judicial authority in the review found that detention is lawful and, therefore, have to be prolonged, it prolongs it of other 90 days without taking into account the individual case and situation of the migrant and asylum seekers. Therefore, the aim of reducing detention period to the minimum cannot be achieved[249].

3.3 Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment represents one of the main principles of every treaty on human rights protection, from the international to the regional ones, every one of them prohibits the use of such forms of violence.

From the UN point of view in 1987 the Convention on the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment came into force, placing more and more attention on the prohibition on such practices[250]. Moreover, the Committee Against Torture was created. It is made of 10 independent experts whose role is to supervise in State parties of the CAT on its implementation. As a matter of fact, countries have to submit annually reports to the Committee in order to assess their efforts on the matter.

An Optional Protocol to the Convention Against Torture (OPCAT) entered into force in 2007, establishing the creation of the, so called, Subcommittee on the Prevention of Torture (SPT). It is an human rights mechanism of the UN composed on 25 independent experts from different backgrounds. Their main task is to assess if prohibition of torture is implemented during the process of detention[251]. The OPCAT gave the SPT role of assessing how State parties are doing with the deprivation of liberty of people in their

[249] *Ibid.,* p. 38.
[250] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
[251] UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199.

territory, examining their treatment towards detainees[252]. One of the main focus of the SPT, in the last years, have been placed on immigration detention, as a matter of fact, it might visit places of detention, as for instance, police stations and immigration detention centers.

In one of its report after a visit in Italy in 2016, the detention of migrants and asylum seekers was investigated in detail in order to assess if the authorities were putting enough efforts in the prohibition of the use of torture and other cruel, inhuman or degrading treatment or punishment[253]. However, some fragilities in the Italian system where found, throughout the whole process of immigration from the disembarkation to the expulsion. As a matter of fact, the Subcommittee highlighted that the State should ensure better standards of nutrition to detainees, indeed, the supply of food in some cases was poor and not adequate to the necessities of migrants and asylum seekers, moreover, it underlined that water should always be available. Attention was also placed on the facilities of detention, as a matter of fact, the mediocre situation of bathroom in both CIEs and CARAs was highlighted, suggesting Italy to take adequate measures in order to solve the problem. Furthermore, the SPT recommended that the State Party should place more attention in the assessment of the status of migrants and refugee arriving in its country, indeed, the recognition of people that already experienced torture, sexual abuses, violence or trauma in their past is fundamental in order to provide them specific physical and psychological protection and care[254]. Concerning sexual abuses, the Subcommittee highlighted the importance of avoiding structures in which men and women are detained together since this might result in an higher risk of being subjected to sexual abuses for women. In addition to this, even the situation of children held in detention was highlighted several times in the report, since their condition as minors is particularly delicate, moreover, it stressed the fact that protection from the competent authorities is necessary.

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[252] United Nations Human Rights, Office of the High Commissioner, Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Prevention of Torture. Available at: https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Factfile.aspx, last accessed 5 September 2020.

[253] Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Italy, 23 September 2016, CAT/OP/ITA/1. Available at:https://www.atlas-of-torture.org/entity/qoj8mykkd5adlr4g5wil1h5mi?file=1535003700094h5wll5rut69y8ktzls37q4cxr.pdf, last accessed 5 September 2020.

[254] *Ibid.,* p. 18.

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment was addressed in several occasions even at a regional level. As a matter of fact the European Convention on the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987 by the 47 State Members of the Council of Europe which entailed the creation of the Committee for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment[255]. In Article 2 of the Observation on the provisions of the Convention, it is stated clearly that the Convention is applicable even to those people that are held in administrative detention, therefore, the prohibition of torture of migrants and asylum seekers is included.

The CPT, in the years, has issued many reports and factsheets on the condition of migrants and asylum seekers held in administrative detention, in order to safeguard them and to assess if the prohibition of torture was respected during the whole process. As a matter of fact, one of the activities of the Committee for the Prevention of Torture are visits of places where people are deprived of their liberty and, therefore, it had the possibility to visit immigration detention centers in the Member States of the CoE to have a better overview of the situation in this kind of facilities, through consultations with the staff of the detention centers, interviews with detained persons and direct assessment[256].

In one of its reports of 2019, the CPT highlighted the difficult situation of "immigration detainees" stating that in many cases they are more vulnerable to different forms of ill treatments during the whole immigration procedures, including their detention[257]. The Committee found during its visits that, in the majority of Member States, detention structures were not respecting the minimum standards and that they were not adequate for administrative detention, indeed, it is highlighted that in many countries irregular migrants were detained in regular prisons, where, for admission of very own staff, they are not enough prepared to accommodate this category of people[258]. Moreover, even if migrants where detained in specific detention centers, the facilities were not adequate to

[255] Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126.
[256] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), About the CPT. Available at: https://www.coe.int/en/web/cpt/faqs#what-does-the-cpt-do, last accessed 07 September 2020.
[257] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Safeguards for irregular migrants deprived of their liberty, Extract from the 19th General Report of the CPT, published in 2009, CPT/Inf(2009)27-part. Available at: https://rm.coe.int/16806cce8e, last accessed 07 September 2020.
[258] *Ibid.,* p. 2.

the basic standards. Furthermore, the importance of decent health-related safeguards is highlighted, as a matter of fact, Member States have the duty to assess migrants health state during deprivation of liberty in their facilities, taking into account both physical and phycological health problems. In addition to this, every person that might be victim of ill-treatment inside the facility, must be brought to a doctor in order to assess if there are injuries and report the case to the competent judicial or prosecuting authorities[259].

In 2017, the CPT issued a factsheet on immigration detention with the aim of presenting its standards on the issue[260]. The factsheet highlights the importance of using detention only as a last resort measure, after assessing the individual situation, favoring alternative non-custodial measures, moreover, indefinite detention is considered by the Committee as a form of inhuman treatment. Migrants should be safeguarded during the whole process of detention, giving them the possibility of accessing legal aid and of communicating with an interpreter if needed, indeed, they must be informed promptly on their rights and the procedures of detention and the decision of their deprivation of liberty must be reviewed periodically by a judicial authority. Furthermore, they must have the possibility to see a doctor in every moment and to communicate freely with the outside (families, national counselor). The factsheet addresses the conditions of detention centers, stating that the accommodations must be adequate, clean and in a good state, and that overcrowded situations are not permitted. Moreover, a space outside the facility is required in order to have access to outdoor exercise and also a zone in which detainees can meet with family and friends should be present[261]. A specific treatment should be reserved to all those people that are part of a vulnerable category, for instance, migrants that were already subjected of torture, indeed, following the recommendations of the CPT they should not be detained but alternatives to detention should be preferred in these cases.

As mentioned in the paragraph, many regional instruments are active in the prohibition of torture in their territory, as for instance the European Union. Indeed Article 3 of the ECHR specifically refers to the prohibition of torture and other inhuman or degrading treatment or punishment. During the years, the European Court of Human Rights in

[259] *Ibid.,* p. 5.
[260] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet, Immigration Detention, March 2017, CPT/Inf(2017)3. Available at: https://rm.coe.int/16806fbf12, last accessed 05 September 2020.
[261] *Ibid.,* p. 5.

different occasions had to deal with cases of torture or ill-treatments of migrants held in detention inside the territory.

An important case to take into account is *Khlaifia and Others v. Italy*[262]; the case deals with Tunisian clandestine migrants who arrived in Italy, in Lampedusa, during the events of the "Arab Spring" of 2011 and with their expulsion. These migrants stayed initially in a *Centro di Soccorso e di Prima Accoglienza* (Center of Rescue and First Reception) in Lampedusa, specifically in Contrada Imbiacola, and then on a ship moored in the port of Palermo. The applicants stayed in the detention center for some days in Contrada Imbriacola and they stated that the conditions of the facility were appalling, as a matter of facts, the basic hygiene standards were not respected, doors dividing bathrooms and the other rooms were not present and water supplies were insufficient. Moreover, due to the growing number of migrants that were reaching the island in that period, the center was overcrowded and many migrants were forced to sleep on the floor in the corridors, due to lack of space in the rooms. The applicants said that they had to eat outside on the ground since there was no other space where to consume the meals. In addition, the center was under strict surveillance and, therefore, it was impossible for migrants to leave the structure. After a riot in the CSPA, migrants were moved to two ships moored in the port of Palermo where they stayed some days more; in the ships the entrance to the cabins were forbidden and they were forced to sleep on the floors, moreover, they had to wait hours to use the toilet and the access on the deck was allowed only twice per day. Then their removal was carried out from the airport of Palermo.

The applicants alleged, for the conditions inside the center and the ships, a violation of Article 3 of the ECHR, on the prohibition of torture and ill-treatments, moreover a violation of Article 5 (1), (2) and (4), Article 13 and Article 4 of the Protocol no. 4. Taking into account the violation of Article 3 the Court stated that dealing separately with the period in the center and the one in the boat would be more appropriate. Moreover, it highlighted that, even if the moment in which the migrants arrived was a period of intense stress for the facilities in the Lampedusa due to the "Arab Spring" and the high quantity of people reaching the borders, the government should have taken more measures in order to assess if the condition of the center was respectful of human dignity. In addition to this, some reports from Amnesty International, the Senate's Special Commission and the

[262] Khlaifia and Others v. Italy, App. no. 16483/12 (ECtHR, 15 December 2016).

PACE Ad Hoc Sub-Committee, underlined the inhuman condition of the center. Therefore, even if detention lasted only for some days, the Court found a violation of Article 3 of the ECHR. However, for the violation of Article 3 on the conditions of detention in the ship, the Court stated that the poor conditions had been contradicted by a visit of a Member of the Parliament who had talked with some migrants and visited the ship at the time. Therefore, no violation of Article 3 was found on the period the migrants spent on the ships[263].

Many reports have been issued throughout the years on the situation of detention centers in Italy, and on how their condition might amount to an ill-treatment for migrants staying there. For instance, in the report of 2016 the International Federation of Action by Christians or the Abolition of Torture and the Action by Christians for the Abolition of Torture in Italy, they investigated on the topic, reporting the information collected by LasciateCIEntrare, an Italian organization active on the field of immigration detention, during a campaign in different detention facilities, carried out with the goal of assessing the conditions of the centers and the migrants and asylum seekers detained[264].

In the majority of the cases the facilities were overcrowded, consequently with lack of privacy, and placed in isolated areas, far from services, in this way making difficult the social inclusion of migrants and asylum seekers in the society. Moreover, the time of detention, that should be as shortest as possible, in many cases lasts even months. In several occasions, migrants claimed that the situation in the centers resulted to be even worse than the one of actual prisons. In cases of asylum seekers and more vulnerable categories, as women and children, the government should provide an higher degree of attention, however, during an illegal expedition in the CARA of Borgo Mezzanone in Apulia, a journalist of the Italian newspaper *L'Espresso* one night noted that some girls, living inside the center, had been forced by Nigerian criminals who entered illegally, to prostitute[265].

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[263] *Ibid.*

[264] International Federation of Action by Christians or the Abolition of Torture, the Action by Christians for the Abolition of Torture in Italia, Joint alternative report by FIACAT and ACAT Italy on the implementation by Italy of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, 62nd session, November 2017.

[265] Gatti, Fabrizio, Sette giorni all'inferno: diario di un finto rifugiato nel ghetto di Stato, L'Espresso, September 12, 2016. Available at: https://espresso.repubblica.it/inchieste/2016/09/12/news/sette-giorni-all-inferno-diario-di-un-finto-rifugiato-nel-ghetto-di-stato-1.282517#gallery-slider=undefined, last accessed 06 September 2020.

3.4 How Immigration Detention can affect different categories, the concept of intersectionality

When detention of migrants and asylum seekers is taken into account, the differences between the various categories that are held in detention are worth to be mentioned. As it was already made clear in the previous chapter, not all migrants are the same and according to their background, sex, nationality or age, they live the experience of detention in a different way.

It is important to underline the differences between these categories since they might influence the way detention is experienced and, in particular way, it should regulate the way in which they must be treated when deprived of their liberty, indeed, different categories have different necessities.

This concept has been underlined many times by many regional and international bodies that focused on the topic of detention of migrants and asylum seekers. As a matter of fact, the concept of vulnerability had been used in several occasions by the European Court of Human Rights since the 80s; the Court, by the use of this term in its judgement, acknowledges that some categories of people result to be more vulnerable than others because of specific circumstances and characteristics, as for instance, children, pregnant women, elderly people, LGBTI persons and victims of torture[266]. Since for the ECtHR the condition of detention can be described, per se, as a situation that might presuppose humiliation and suffering, in cases of more vulnerable categories, countries should have more positive obligations towards them with the aim of making detention less humiliating as possible, and they should take the adequate measures to provide better care and protection. Moreover, in some cases the condition of vulnerability of a particular category or individual can be crucial in determining the lawfulness and arbitrariness of detention, indeed, an assessment of the individual situation is necessary to assure that the concept of proportionality is applied[267].

[266] Steering Committee for Human Rights (CDDH), Human Rights and Migration, Legal practical aspects of effective alternatives to detention in the context of migration, 07 December 2017. Available at: https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f, last accessed 10 September 2020.

[267] *Ibid.,* p. 36.

To better understand this concept, it is important to give a definition of intersectionality. The definition of the Oxford Dictionary of the term is "the interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping and interdependent systems of discrimination or disadvantage"[268]. Intersectionality was a world coined in 1989 by Kimberlé Crenshaw, a legal scholar active in civil rights matters and it refers to the way in which people's social identities can overlap and the aim is to describe how different kinds of inequalities can operate together and make each other worse, indeed, in the case of migrants detained, the immigration status cannot be taken separated from the gender, the age and the nationality[269]. As a matter of fact, all of these conditions work together and, only by taking into account them as a whole, the situation of every category can be analyzed more deeply.

In the following paragraphs different categories are going to be analyzed in detail. How women face detention compared to man, taking into account also the matter of pregnancy while in detention, the condition of children in detention and the general principle that every country should protect child from being detained and mostly when they found themselves alone without their families and lastly, how nationality and religion can affect detention, placing attention on how after 9 September 2001, some nationalities and religions have been targeted more than others.

3.4.1 Women in detention

In every dimension of a woman's life it is clear that her gender is going to influence many events of her life, detention cannot be considered an exception. According to some research made in the United States in the last decades, in 2008 women detained in immigration detention procedures amounted to 9-10% of the entire community and, usually their average period of stay was longer than men's in 18% of cases[270]. In 2016,

[268] Oxford English Dictionary, Intersectionality. Available at: https://www.oed.com/view/Entry/429843, last accessed 12 September 2020.
[269] Steinmetz, Katy, She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today, Time, February 20, 2020. Available at: https://time.com/5786710/kimberle-crenshaw-intersectionality/, last accessed 12 September 2020.
[270] Brané, Michelle and Wang, Lee. "Women: The Invisible Detainees," 2013, 3, p. 37.

the percentage of women detained compared to men grew reaching 14.6%[271]. This makes clear that women represent a minority of the migrants and asylum seekers detained and therefore, in many occasions, as a minority, they face several problems since the system of detention is designed almost completely for men. For this reason, even the particular needs they have being women cannot be addressed properly by the system, for example, their sanitary ones.

For instance, it is common that women, since they represent a small part of the community of migrants and asylum seekers held in administrative detention, found themselves detained in small parts of the facilities, indeed, the division of men and women in detention has to be assured, or even mixed with criminals in common prisons, since their small number do not permit to fill an entire house unit in an administrative facility. This results in an higher level of stress and a renewed trauma, indeed, it is difficult for them to understand why they should be held in small parts of the facilities, losing the possibility to access to basic services that are assured to men, for instance, libraries, religious services or visitation rooms, or why they should stay together with people that have committed a crime, since they are not guilty of anything, except coming to another country to seek for help.

All of this situation may lead to problems related with depression and anxiety even because women are more vulnerable to psychological problems than men. As a matter of fact, the majority of women held in administrative detention in the USA suffered from depression, anxiety and post-traumatic stress disorder due to the indefinite time of detention and the lack of proper phycological support[272].

Moreover, in a several number of cases, women are "forced" to live their countries of origin because they experienced situations of abuses, both psychological and physical. In the United States, in the last years, a large number of the women held in administrative detention were seeking asylum, as a matter of fact, they are five times more likely than men to be asylum seekers. According to a research made by the Women's Refugee Commission, a large number of women coming from the Northern Triangle of Central America (El Salvador, Guatemala and Honduras) sought asylum in the USA after

[271] Women's Refugee Commission, The Detention of Women Seeking Asylum in the United States, October 2017, p. 16.
[272] Ibid., p. 19.

experiencing physical violence in their country of origin[273]. As a matter of fact, the governments of those country could not control the humanitarian crisis and this resulted in an uncontrolled growing gang violence and gender based violence. Therefore, women, in some cases, together with their children found as the only opportunity they had to save their lives, the possibility to seek asylum in the United States.

In other cases, women are victim of trafficking with the purpose of prostitution. As some research in Italian detention centers stated, many women coming particularly from Nigeria are part of a big system of human trafficking in which, in order to reach Europe with the promise of a better life, women are forced to prostitute during their journey and particularly in Libya where they can remain even for years "prisoners" of this system[274]. In these cases, medical and psychological support is highly required to allow the survivors to overcome their previous traumas, however, the competent authorities in the majority of the cases did not provided any service to detainees in order to face the problem.

Another fundamental aspect is the violence that women have to experienced once in detention, indeed, not only many of them experienced physical and psychological violence before crossing the borders but for many the violence kept being alive even in those detention centers that are supposed, in some ways, to protect them[275]. These kind of violence that can result in sexual abuse and rape in some cases, are committed by both jail guards and other inmates. In many cases, women do not report the violence to which they have been subjected, due to their culture since for many of them talking about rape and violence is a taboo. Moreover, the lack of legal aid and protection inside the facilities lead women to not ask for support, so in the majority of the cases they remain silent and their rapists not charged. Some detainees are also intimidated by the jail guards working in the centers since they threaten of even greater violence, of being transferred away from their families and, in some cases, deportation[276].

Jail guards are not the only perpetuators of violence against women held in detention but, in some cases, also other inmates perform both physical and verbal violence against them.

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[273] Ibid.

[274] Esposito, Francesca, José Ornelas, Silvia Scirocchi, and Caterina Arcidiacono. "Voices from the Inside: Lived Experiences of Women Confined in a Detention Center." *Signs: Journal of Women in Culture and Society* 44, no. 2 (January 2019): 403–31, p. 410.

[275] National Immigrant Justice Center, The Situation of Immigrant Women Detained in the United States, 16 April 2007.

[276] Ibid., p. 8.

Indeed, as already underlined, considering that women amount for the minority of people in detention, in many cases are detained in jails where criminals are. This creates the perfect environment for sexual violence.

In some cases women detained find themselves to think that they only option they have to avoid this kind of violence is to leave the center dropping in this way their request for asylum because the condition in the centers were hopeless and they could not stand the situation of abuses for any longer.

Another fundamental aspect, that is important to underline when dealing with administrative detention of women, is pregnancy, as a matter of fac,t a considerable number of women are pregnant while deprived of their liberty in the detention facilities. In the USA 2,100 pregnant women approximately were detained during immigration procedures in 2018, but the number spiked under Trump administration up to 52%, due to the government's policies having the aim of discouraging any kind of irregular migrant to cross the American border. Indeed, if the Obama administration was concerned on the situation of pregnant women in administrative detention, due to the lack of health care and the quality of food, with the election of President Trump the system changed and the main policy was to detain and deport every irregular migrant without any exception[277].

As stated by many international and regional organizations and bodies, pregnant women should not be detained due to their particular condition of vulnerability. For instance, the UNHCR in its Guidelines for the detention of asylum seekers of 2012, highlighted the importance of avoiding detention for pregnant women and nursing mothers, providing alternatives to it in order to protect them in that particular moment of their lives[278].

The European Court of Human Rights in 2012 delivered a judgement regarding an Afghan family detained in Greece in the island of Lesbo, which included an eight months pregnant mother and four minors[279]. The Court found a violation of Article 3 of the Convention, since the ONG *Médicins sans frontières* previously issued a report in which it defined the condition in the center as inhuman for pregnant women, indeed, they were not under

[277] Sacchetti, Maria, Pregnant immigration detainees spiked 52 percent under Trump administration, The Washington Post, December 5, 2019. Available at: https://www.washingtonpost.com/immigration/pregnant-immigration-detainees-spiked-52-percent-under-trump-administration/2019/12/05/610ed714-16bb-11ea-8406-df3c54b3253e_story.html, last accessed 12 September 2020.

[278] UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, p. 37.

[279] Mahmundi and Others v. Greece, App no. 14902/10 (ECtHR, 31 July 2012).

medical supervision and no information was given to them on where they were supposed to give birth to their babies and which destiny they would face after the childbirth. This resulted in phycological stress for the uncertainty of the situation.

However, in many countries the detention of pregnant women is still a common practice. Moreover, in a several number of cases health care is considered inadequate and treatments insufficient, as a matter of fact, no regular visits with specialists are provided to the detainees and the food is not adequate to their particular status. In some occasions women were forced to give birth in the detention facilities with the presence of the nurse only, causing danger for the life of the mother and in the worst cases miscarriage. Forced by the terrible conditions and by the fear of the insufficient protection, some women in the United States accepted to be deported to their country of origin with the aim of providing better care to their babies with an healthy pregnancy[280].

In addition to all these concepts, there is the issue of medical expenses related to both antenatal and postnatal care. As a matter of fact, according to a report of the European Union Agency for Fundamental Rights only 10 EU countries have a policy on the matter[281]. Only a few European countries among which Spain and Portugal provide free access to all services as for their citizens, however, others as for instance Sweden present a bill (that can reach up to 2,600 euros) to mothers who just gave birth, making the process in some cases unaffordable.

Recently some newspapers in the USA released a news about alleged hysterectomies procedures performed in an ICE detention center in Georgia against the will of the Spanish speaking immigrant women detained in the facility[282]. The allegations come from a nurse working in the facility, who stated that 5 women between October and December 2019 had undergone this medical procedure. It consists in a surgery to remove a woman's uterus, leading to the impossibility to having children, it is usually performed to cure serious illnesses, as for instance cancer, for which no other alternatives are possible. This news raised high concern in the community since the procedure of mass sterilization

[280] National immigrant justice center, The Situation of Immigrant Women Detained in the United States, 16 April 2007, p. 6.

[281] European Agency for Fundamental Rights (FRA), Fundamental rights of migrants in an irregular situation in the European Union, 2011.

[282] Donegan, Moira, Ice hysterectomy allegations in line with US's long and racist history of eugenics, The Guardian, September 17, 2020. Available at: https://www.theguardian.com/commentisfree/2020/sep/17/ice-hysterectomy-allegations-us-eugenics-history, last accessed 13 September 2020.

reminded both the medical atrocities performed in the Nazi camps during the Second World War and also the programme of sterilization of people of color and incarcerated people in the USA in the 60s[283].

3.4.2 Are children safeguarded while in detention?

The migration of children is a very common phenomenon in our present days, indeed, the number of children on the move is raising year after year, with the consequence that the topic is being researched in a more deep way in the last decades.

There are various reasons that might push them to move from their countries, for instance, violence, poverty and abuse. Indeed, they see illegal migration as the only solution for their problems and as a measure of last resort that they are willing to take to save their lives. In some cases they travel together with their families, however, on others many are forced to move alone, making them easy victims of smugglers. When they reach their final destination, in many cases after suffering from a long journey scattered by abuses, violence and in some cases exploitation of child labor, the receiving countries are not able to provide them an adequate environment and protect them from consequently abuses and violence both physical and psychological. As a matter of fact, a considerable number of child migrants suffer physical abuse when detained, for instance, they get beaten with sticks, burned with cigarettes and in the worst cases they are victims of the electric shock. In other cases the abuse is both physical and psychological; there are cases in which children are abused by other detainees, in this way causing both physical consequences, as physical harm but also anxiety[284].

Children obviously represent the category of detainees that can be negatively influenced the most during administrative detention. Every document of every governmental, international, regional body has a part devoted to detention of children and in every one of them the procedure is highly discouraged and advise against.

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[283] Wallace, Danielle, DHS investigates forced sterilization, hysterectomy allegations of illegal immigrants, Fox News, September 18, 2020. Available at: https://www.foxnews.com/politics/ice-hysterectomy-sterilization-dhs-investigations, last accessed 15 September 2020.

[284] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 March 2015, A/HRC/28/68, p. 13.

However, the practice is still common in almost every country that has to manage migration flows and that uses immigration detention as one of the main tools for managing immigration inside its territory. As a matter of fact, 100 countries in the world use immigration detention of children in their migration management system.

The main instrument for the protection of children is the Convention on the Rights of the Child of 1989[285]. Since Article 2 of the CRC the prohibition of discrimination on every ground is established, for instance language, religion, national, ethnic or social origin. Therefore, every child, taking into account also children on the move, independently of his/her characteristic has to enjoy the same rights and protections.

Article 9 of the Convention refers to a common practice when children arrive together with their families, as a matter of fact, in many occasions children are forced to stay separated from their families, living the period of detention in different facilities. The Article refers to the importance of not separating the children from their parents against their will, indeed children must enjoy the right of family unity. A report from the ONG Human Rights Watch of 2018, on the situation of women and their children in immigration detention in the United States has highlighted the inhuman condition of detention, and the frequent practice of separating the children from their families[286]. As a matter of fact, adolescent boys and girls are placed in different part of the facilities or in other centers with respect to their parents. Moreover, in the majority of the cases, adult men are placed in different centers therefore producing the separation of the family. This situation of fragmentation of the family is one of the main causes of anxiety, post traumatic disorders and depression.

In addition to the previous articles, Article 37 is particularly focused on the matter of detention. Indeed, it is stated that no child have to be deprived of his/her liberty in an unlawful and arbitrary way and that in any case, detention must be used for the shortest period possible and as a measure of last resort. As every other people in detention, children must have the possibility to challenge detention and to have access to legal assistance, however, the Article underlines the importance of taking into account the

[285] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Available at: https://www.refworld.org/docid/3ae6b38f0.html, last accessed 20 September 2020.

[286] Human Rights Watch, In the Freezer, February 28, 2018. Available at: https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells, las accessed 5 September 2020.

necessities and respect the people of their age and to provide them the possibility to have contact with their families[287].

After the Second World War, in 1946, the United Nations General Assembly brought to life the United Nations Children's Fund, in order to provide to all children without discrimination health aid and help in general[288]. Since then the UNICEF keeps working to defend the rights of children in more than 190 countries, regardless of any difference like sex, race, economic background, in order to provide them a better future.

In the last decades, due to the growing use of immigration detention the number of children in administratively deprived of their liberty grew significantly, therefore the UNICEF started focusing more on the topic.

In May 2017 the UNICEF issued a report on children on the move, that means those who are migrating to other countries from situations of conflict, violence, poverty and disaster, in order to find a better life[289]. In some cases they move with their family, however, in a growing number of cases, they move alone facing risks of human trafficking on the way but also of deprivation of human rights during their stay in detention, indeed, in many cases they are left alone in inhumane conditions that would never be accepted by countries for native-born children.

As already mentioned previously, detention of children is still a common phenomenon and even if its use is discouraged by many bodies working in the field, the practice is still used in many countries. For children, detention, even in those cases in which their interests are valued and their rights protected, is a cause of serious harm, in particular in those cases in which the standards of living are poor, that nowadays still represent the majority.

The UNICEF states that alternatives to detention must be found. In some countries the use of alternatives is already in place, as for instance foster care or facilities that are community-based where children can stay together with their families. However, even if it has been demonstrated that in the majority of cases these alternatives are both better for

[287] Ibid., Art 37.
[288] UNICEF website, UNICEF : 70 years for every child. Available at: https://www.unicef.org/about-us/70-years-for-every-child, last accessed 15 September 2020.
[289] UNICEF. A Child Is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation, 2017. Available at: https://www.unicef.org/publications/index_95956.html, last accessed 15 September 2020.

mental health of the children and less costly for governments, their use is still not common.

In the cases in which children are detained in those facilities that do not respect the necessary standards for the detention of minors, abuses and violence are common, mostly when children are not together with their families but with other adults, in particularly of the opposite sex[290]. Moreover, the conditions in the centers are in the majority of the occasions are inhuman, the facilities are overcrowded, the food is poor and inadequate for children's needs and drinking water is not always disposable. Basic necessities, for instance, appropriate accommodations are not respected and hygiene products and minimum access to sanitary facilities are inadequate[291].

In some cases detention of children is even adopted by governments as a deterrent for the arrival of other irregular migrants, however ,is it clear from the data that this phenomenon does not have the results the authorities expect from it.

Detention in all its forms is a cause of serious harm and damage for all children, indeed, the Special Rapporteur on Torture in a report of March 2015, gave relevance to the matter of immigration detention of children, since it might result in a violation of the prohibition of torture[292]. As a matter of fact, in the majority of the cases in which children are unaccompanied their stay in detention centers and police station is ordinary and other alternatives are difficultly provided due, in most of the situation, for a lack of space in those facilities which could be more suitable seen their vulnerability. It is frequent that children are not informed promptly and properly on the possibility to ask for asylum or on their rights as migrants.

Since the migration crisis in the European Union, the ONG Human Rights Watch focused more on how detention of children is held in the specific European countries placed at the border of the Union, for instance Greece[293]. Many child migrants ended up in what is called "protective custody", which instead of protecting children from abuses, makes

[290] UNICEF. A Child Is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation, 2017, p. 31. Available at: https://www.unicef.org/publications/index_95956.html, last accessed 15 September 2020.
[291] UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 March 2015, A/HRC/28/68, p. 13.
[292] *Ibid.*
[293] Cossé, Eva, Ending Child Detention in Greece is Possible, Human Rights Watch, August 04, 2020. Available at: https://www.hrw.org/news/2020/08/04/ending-child-detention-greece-possible, last accessed 12 September 2020.

them stay in police stations or detention center, where the risk of both physical and psychological violence is really high. Indeed, children are forced to stay in these facilities for weeks or even months, which usually are overcrowded and not suitable for the presence of minors, since often they have to share the spaces with adults who are not part of their families.

3.4.3 Can nationality and religion make a difference?

In every international and regional treaty about human rights, from the UDHR and ICCPR to the ECHR and the ACHPR, one of the main principles set out in the first articles, is the principle of non-discrimination, on any ground from sex and age, to nationality and religion.

However, discrimination on many grounds is still in place nowadays and immigration detention does not make an exception. Indeed, being from one country or another can make the difference, as the same way as professing one religion or another.

The nationality of people detained might influence the perception of the authorities, indeed, there are some characteristics that are conferred to people from specific countries. In Italian detention centers, it is common to separate the migrants between good and evil, according, in some cases, to their nationality[294]. As a matter of fact, immigrant women coming from East Europe, Russians, Georgians or Ukrainians are seen as good and vulnerable women, that are quiet and willing to work hard as domestics. On the other hand, Nigerian women are depicted as aggressive and dangerous to the community, since in some cases they were working as sex workers or before they were detained for crimes. These differentiations and stereotypes are also common among detainees, who classify themselves according to the different nationalities. This creates both a sense of belonging inside the center according to the different communities that are created, but also, a situation of tension between the different group.

[294] Esposito, Francesca, José Ornelas, Silvia Scirocchi, and Caterina Arcidiacono. "Voices from the Inside: Lived Experiences of Women Confined in a Detention Center." *Signs: Journal of Women in Culture and Society* 44, no. 2 (January 2019): 403–31, p. 419.

Mainly in the USA, after the terrorist attack of New York and Washington DC on 11th September 2001 many thighs changed regarding immigration. As a matter of fact, in the weeks and months that followed 9/11 many counter-terroristic measures were adopted by the Bush Administration, that led to an expansion of the government authority to investigate and detain non-citizens[295]. These new initiatives conducted to the growth of the number, of both citizens and politicians, that supported more strict immigration measures. During those months around 760 people, mostly Muslim men, were detained as special interest detainees, even if they were not charged with any crime and they were not related to the terroristic attacks of 9/11, indeed, several of them were forced to leave the country only months or years later due to an order of deportation for visa violations.
During their period of detention, their relationship with the attacks was investigated and the policy on their detention was "hold until cleared", which meant that they had to stay in detention until their position on the attacks was cleared. However, in several cases they were hold in detention for longer periods. The majority of them were Muslim and Arabs, coming from Middle East, Arab countries, or South East Asia.
The detention of these migrants was considered arbitrary and raised an important concern on human rights protection. As a matter of fact, for many migrants detention was indefinite and prolonged even if there were no charges against them. Immigrant detainees in the months and years following 9/11 found themselves in facilities in which the conditions were appalling and they were often victims of abuses both physical, like twisting fingers and arms, and psychological, like impeding them to sleep and prohibiting them to communicate with their families[296].
As it is already clear, not only nationality can have consequences on immigration detention but also religion can affect the way in which migrants are treated.
In the USA many Muslims detainees have highlighted that in several occasions their needs are not listened by the authorities, since they impede them to practice their religion. In a detention center in Florida, some migrants alleged the fact that the authorities in many ways were prohibiting them to practice their faith, not giving them the possibility to consume proper meals, according to their religion, or not providing them praying rugs or

[295] The Pennsylvania State University School of International Affairs, Penn State Law, The 9/11 Effect and Its Legacy On U.S. Immigration Laws, 16 September 2011, p. 8.
[296] *Ibid.,* p. 10.

copies of the Quran[297]. As a matter of fact, no specific space where migrants could make their Friday prayer all together, named Jumma, was provided and in some occasions, authorities in the center prohibited them to celebrate on Friday together. Moreover, in another immigration detention facility, authorities gave for years to Muslim migrants pork as food, which is considered prohibited by their religion, moreover, several cases some already expired halal meals have been given to them, making them sick[298].

However, discriminations on the ground of religion is not something related only to Muslim detainees, as a matter of fact, other detainees of different religions have complained to the fact that professing their religion was often prohibited in the facilities, causing a violation to the right of freedom of religion. For instance, Sikh detainees complained about the fact that they were forced to pray on the floor next to dirty toilets. It is important to acknowledge that religion, for many migrants, might be one of the ways to escape from the brutality of detention and, therefore, freedom of religion and the possibility of professing one's faith must be always protected.

[297] Saleh, Maryam, Muslim Immigrants sue Ice For Getting in the Way Of Religious Observance, The Intercept, February 27, 2019. Available at: https://theintercept.com/2019/02/27/ice-detention-center-muslim-immigrants-glades/, last accessed 20 September 2020.

[298] Voytko, Lisette, Muslim ICE Detainees Reportedly Fed Pork, Told By Chaplain: 'It Is What It Is', Forbes, August 19, 2020. Available at: https://www.forbes.com/sites/lisettevoytko/2020/08/19/muslim-ice-detainees-reportedly-fed-pork-told-by-chaplain-it-is-what-it-is/#505046df6cc5, last accessed 20 September 2020.

CONCLUSION

The aim of this thesis was to understand if and to what extent human rights where respected during the process of immigration detention, analyzing how international and regional instruments were dealing with the phenomenon and the actual violations of human rights.

As it is clear, even if every international document states that immigration detention should be used only as a measure of last resort, and only in those cases in which it is impossible to use less coercive measures, it keeps being adopted by the majority of countries in the world. It is considered as an "easy" tool and, for many governments, as a way to deter, in the most efficient way possible, the arrival of new irregular migrants, that, according to the idea of the authorities, should be dissuaded by how other migrants were treated.

Even if in the last years, the awareness on the topic had been raised by many reports and many research made on the topic, by both NGOs and other regional and international bodies, the influence that the countries and governments have on the topic is still significant. Their decisions on migration policies have important consequences on how immigration detention is managed and also on how the citizens perceive it.

The raise of nationalistic and populistic movements of the last years, all over the world, even worsened the situation of migrants and asylum seekers and therefore, it made the use of immigration detention even more common. From the European Union, to the United States of America, more and more nationalistic governments took the power, strengthening their immigration measure in order to contrast irregular migration.

From the first months after the election of President Orbán in Hungary, it was evident that his ideas on how dealing with migrants would have changed the way in which immigration detention was perceived in the country, and how immigration flows were organized in all countries of the European Union. Even if for its geographic position, Hungary always found itself as a crossroad of different cultures and different populations coming from both inside and outside Europe, Orbán policies, since his election, are based on the safeguard of Hungarian heritage. In order to protect his population for external

"aggressors", his policies on migration have always been tough and coherent with his nationalistic nature[299].

Since 2015, both from the Hungarian government and medias supporting the authorities a campaign against immigration was developed, in order to convince the citizens that the only solution to get rid of terrorism was not let enter in the country migrants or asylum seekers. In the same year, a "National Consultation on Immigration and Terrorism" started, with the aim of understanding Hungarians point of view on the topic. The consultation was composed of a letter from President Orbán to the citizens and a survey on the matter[300]. In the letter, the Hungarian President used strong words in order to convey his idea and to convince the citizens on the danger that migrants can pose to people for an economic point of view, enjoying their welfare, and from a security point of view, recalling the terroristic attacks of Paris[301].

Nonetheless, Orbán after strongly advocating against migration and linking it with terrorism in the letter, posed some questions to Hungarians on the matter. Some of them were about detention of migrants and asylum seekers. Two proposals of new policies were made on the topic, the first one was about detention of migrants and asylum seekers at the border in case of illegal entry, and the other one about their return to their countries of origin. Almost 100% of Hungarians agreed on the topic with the government, advocating, therefore, for more strict measures on the topic in order to "save" their economy and country from the potential risk of migrants.

The strong anti-immigration position of the authorities combined with the support of the majority of the population led to strongest migration policies, concerning obviously also immigration detention. During the years, Hungary was condemned by different authorities on the condition of migrants and asylum seekers held in detention in their territory. As for the 14th May of 2020, over 300 migrants are detained in transit zones in the Serbia-Hungary border, where fences were built in order to "protect" the borders[302].

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[299] M. Gozdziak, Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary Built on Cultural Diversity, Migration Policy Institute, October 10, 2019. Available at: https://www.migrationpolicy.org/article/orban-reshapes-migration-policy-hungary, last accessed 5 September 2020.

[300] Bocskor, Ákos. "Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015," *Sociology* 52, no. 3 (June 2018): 551–68, p. 559.

[301] *Ibid.,* p. 561.

[302] EU court censures Hungary over migrant detentions, BBC, May 14, 2020. Available at: https://www.bbc.com/news/world-europe-52663910, last accessed 10 September.

Their deprivation of liberty is considered, by many regional and international organization, as arbitrary. As a matter of fact, several among them have been detained for more than one years, and in conditions that are inhumane and unacceptable, also because a significant number of detainees are children[303].

This feeling of "fear" against the arrival of migrants and of protection of "heritage" of the country were and still are really common not only in Hungary but also in other countries part of the, so-called, Visegrad Group, composed of Poland, Slovakia, Czech Republic together with Hungary.

In 2015, during the migration crisis, that strongly hit the European Union, the European Members were asked to adopt quotas for the reallocation of 120,000 refugees among the countries[304]. Slovakia, Hungary, Czech Republic, with the support of the right-wing party of Poland, which lately came into power, voted against the allocation of quotas, stating that for their countries this could result in a growing risk of terrorism, and in an subsequent increase in the number of migrants and asylum seekers[305].

This anti-migration atmosphere, which is still present nowadays in many European country due to the growing of nationalistic and populist parties all across the continent, has terrible consequence on the migrants, and even on their condition in immigration detention.

During the last weeks of September 2020, the President of the European Commission, Ursula von der Leyen raised again the attention on migration inside the European Union. She announced the will to replace the Dublin Regulation with a new European migratory system, in order to boost solidarity among Member States[306]. The Dublin Regulation was a system that was established in 1990 and that underwent two reforms, the most recent on July 2013[307]. The aim was the establishment of which country of the Union was

[303] Ibid.

[304] I. Traynor, P. Kingsley, EU governments push through divisive deal to share 120,000 refugees, The Guardian, September 22, 2015. Available at: https://www.theguardian.com/world/2015/sep/22/eu-governments-divisive-quotas-deal-share-120000-refugees, last accessed 11 September 2020.

[305] López-Dóriga, Elena, Refugee crisis: The divergence between the European Union and the Visegrad Group, Universidad de Navarra. Available at: https://www.unav.edu/web/global-affairs/detalle/-/blogs/refugee-crisis-the-divergence-between-the-european-union-and-the-visegrad-group, last accessed 11 September 2020.

[306] France 24, Dublin rule for asylum seekers to be replaced, EU's von der Leyen says, September 16, 2020. Available at: https://www.france24.com/en/20200916-dublin-rule-for-asylum-seekers-to-be-replaced-eu-s-von-der-leyen-says, last accessed 30 September 2020.

[307] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013

responsible to examine the asylum application of a migrant. However, the system had been widely criticized as non-effective, mostly from the Member States at the border, since all the burden of the arrivals in the European Union had been placed on their shoulders. As a matter of fact, the first country in which the asylum seekers found themselves was the country responsible for the whole asylum procedure with the duty to provide protection and accommodation[308]. This resulted in a great responsibility, for those countries, as for instance, Italy and Greece, which had to manage the greatest flow of migrants trying to enter in the European Union.

As already made clear in the previously chapters, this resulted and still results, in a significant difficulty for them in the management of such a great number of arrivals. Obviously, this problem resulted in terrible consequences for migrants and asylum seekers. For instance, as already mentioned, overcrowded facilities, violation of human rights, torture, indefinite and arbitrary detention are all consequences of the bad management of the significant migratory flows and also, of the bad political decision of governments.

For this reason, President von der Leyen proposed a new system that should give all Member States the responsibility of migrants and asylum seekers arriving in the European Union, without putting under pressure those countries that still are experiencing significant difficulty in the management of their borders[309]. This New Pact on Migration and Asylum should result in a better management of the borders, with the consequence of shortening both the assessment of the asylum status and the identity, health and security checks, which represent one of the main reasons for detention. Moreover, this New Pact addresses the topic of detention of children underlining the importance of finding less coercive solutions and to boost the reunification of families in order to protect the minors.

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establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/;jsessionid=jHNlTp3HLjqw8mqGbQSpZh1VWpjCyVQq14Hgcztw4pbfSQZffnrn!557467765?uri=CELEX:32013R0604, last accessed 13 August 2020.

[308] Bačić, Nika Selanec. "A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation," *Croatian Yearbook of European Law and Policy* 11, no. 11 (December 30, 2015), p. 85.

[309] European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum, September 23, 2020. Available at: https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v7_1.pdf, last accessed 29 September 2020.

Crossing the Atlantic Ocean, the situation in the United States of American can give the idea on how the perception of migrants and the governments thoughts on them can influence how immigration detention is managed, and how it is perceived by the community.

As already previously mentioned, in the United States in the last years, after the election of President Donald Trump, the situation of migrants and the perception of immigration changed completely. As a matter of fact, Trump, since its electoral campaign, showed a clear anti-migrants perspective on foreign policies. In many occasions, he used strong words to describe migrants and migration, as a matter of fact, according to a research made by the newspaper USA Today, on 64 rallies of 2017, President Trump frequently used terms like "aliens", "invasion", "criminal" and "hell out of our country"[310]. This gives a clear overview on his idea on the phenomenon, shaping in this way a clear policy on the topic.

The narrative of the US authorities became based on the idea of the need of "securing" the borders and protecting American citizens from threats coming from migration, both considering the public security and the welfare of Americans. Indeed, in order to meet with the goal of protection, the Department of Homeland Security stated that illegal immigration would be prosecuted, developing different projects of securitization of the border[311].

One of this project is the promise to build a wall at the border between Mexico and the USA, which became the center of Trump's political programme on immigration. What the President of the United States of America is building is not only a real wall but also an invisible one, which is making more difficult for migrants to cross the border, visit their families and escape from violence.

Many measures have been taken together with the decision to boost the construction of the wall, for instance, the government decided to reduce the number of refugees, that can stay in the country, to 30'000, with the consequence of a lowering in the level of

[310] Fritze, John, Trump used words like 'invasion' and 'killer' to discuss immigrants at rallies 500 times: USA TODAY analysis, USA Today, August 8, 2019. Available at: https://eu.usatoday.com/story/news/politics/elections/2019/08/08/trump-immigrants-rhetoric-criticized-el-paso-dayton-shootings/1936742001/, last accessed 25 September 2020.

[311] Official Website of the Department of Homeland Security, Stopping Illegal Immigration and Securing the Border, July 1, 2020. Available at: https://www.dhs.gov/stopping-illegal-immigration-and-securing-border, last accessed 25 September 2020.

protection that the country can offer to those people that are fleeing from violence and poverty[312]. Moreover, following Trump's policies, in 2018, parents who were found crossing the border with their children, would be separated by them. The numbers amounted to 1.600 children divided by their families[313]. As it was underlined in the third chapter, the separation of children from their families might result in high risk of strong psychological consequences, like depression and anxiety. Moreover, children should be detained in facilities that are suitable for their needs, however, they were found in cages created by metal fencing.

As a matter of fact, since 2017 the immigration detention system in the USA has grown at a really fast rate and the conditions in the new detention centers, created to support the growing system, can, without any doubt, be considered inhuman[314].

During the last months, the world pandemic caused by the spread of Corona Virus Disease 2019 affected, in many ways, the phenomenon of detention of migrants and asylum seekers and migration in general. When almost all countries around the world were worried in saving their National Health Services from the big threat of COVID-19, another tragedy was happening inside the immigration detention centers.

As a matter of fact, as it was already clear by the previously chapters, the situation of overcrowding in the immigration detention facilities, and the common lack of hygienic measures represented the perfect combo to spread the virus inside the centers, which affected, and it still affecting, both the migrants detained but also the staff, and, therefore, the whole community[315]. Many protests have been held in different facilities around the world to raise the awareness on their fragile situation; moreover, due to the impossibility of carry out removals, because of the closure of the borders, many migrants are forced to stay in detention for longer periods of time, creating the premises for indefinite detention.

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[312] Holpuch, Amanda, 'People will die': Obama official's warning as Trump slashes refugee numbers, The Guardian, September 19, 2018. Available at: https://www.theguardian.com/us-news/2018/sep/19/people-will-die-obama-official-warns-after-trump-slashes-refugee-numbers, last accessed 25 September 2020.

[313] Associated Press in Mc Allen, Separation at the border: children wait in cages at south Texas warehouse, The Guardian, June 17, 2018. Available at: https://www.theguardian.com/us-news/2018/jun/17/separation-border-children-cages-south-texas-warehouse-holding-facility, last accessed 25 September 2020.

[314] ACLU, Human Rights Watch, National Immigrant Justice Center, Justice Free Zones the US Immigration Detention Under the Trump Administration, April 2020, p. 4.

[315] Unicef Official Website, COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do? Statement by the United Nations Network on Migration, April 29, 2020. Available at: https://www.unicef.org/press-releases/covid-19-immigration-detention-what-can-governments-and-other-stakeholders-do, last accessed 30 September 2020.

In Italy, during August, in the province of Treviso, an outbreak in an immigration detention centers caught the attention of the media. As a matter of fact, in a period in which Italy had the control on the number of cases in the country, more than 200 migrants and staff, living and working in the center tested positive to COVID-19[316]. This news raised two different kinds of reactions, on one hand many scholars and NGOs working on the field underlined the conditions inside the detention centers, which most of the times are appalling and inhumane. On the other hand, some politicians who always proclaimed themselves against migration, as for instance, Matteo Salvini took the occasion to publicly declare themselseves against migration, and to blame the migrants about the outbreak in the structure. However, in many stated that the overcrowding situation in the centers was the result of the "Decreto Sicurezza" of 2018, signed by Salvini, which resulted in a confluence of the majority of the migrants in few detention centers, raising the risk of overcrowded facilities[317].

A document released by the United Nations Network on Migration underlines the importance of prevention and of the process of improvement of the conditions in the centers, in order to adjust to the new situation brought by spread of the virus.
It suggests to guarantee to the migrants a regular access to all information on COVID-19 as for all the other citizens, to improve hygiene and sanitation inside the center, and to create adequate spaces for isolation and quarantine in order to avoid a fast spread of the virus in the facility. All of this can be possible, only if appropriate detention centers are present and, in the cases in which the authorities are willing to take the proper measures in order to prevent overcrowding structures[318].

As mentioned earlier, the debate on immigration detention became really important in the last decades. Many regional and international organizations and bodies discussed about

[316] Ferro, Enrico, Treviso, aumentano i migranti positivi nel centro di accoglienza, La Repubblica, August 06, 2020. Available at: https://www.repubblica.it/cronaca/2020/08/06/news/treviso_aumentano_i_migranti_positivi_nel_centro_di_accoglienza-263955901/, last accessed 01 October 2020.
[317] Russo, Lucia, Proteste dei migranti all'ex caserma Serena: "Quello che sta accadendo è colpa di Salvini", Treviso Oggi, June 15, 2020. Available at: https://www.oggitreviso.it/atalmi-calesso-su-ex-caserma-serena-quello-che-sta-accadendo-è-colpa-di-salvini-231531, last accessed 01 October 2020.
[318] United Nations Network on Migration, WORKING GROUP ON ALTERNATIVES TO IMMIGRATION DETENTION, COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?, April 30, 2020.

the phenomenon of deprivation of liberty of migrants and asylum seekers, defining it as tool that countries need to eliminate from their system of migration control.
However, even if in many countries some steps towards the elimination had been taken, in others, due to the insurgence of anti-migration thoughts, its use grew significantly.
It is important to acknowledge that the role of the UN and regional bodies, and the important background of the protection of human rights, boosted by the several treaties on the matter, have a serious significance in the prevention of an inadequate use of immigration detention. As a matter of fact, the monitoring system, the growing awareness of NGOs, and also the spreading of interest of the theme in the community have proven to be fundamental in the achievement of many goals in the field of deprivation of liberty of migrants and asylum seekers.
However, it is impossible to deny that still a major role is played by governments and national authorities. As it was previously analyzed, taking into account the examples of the European Union, specifically Hungary, and the United States, the actions of the authorities are still fundamental in the future of immigration detention.

In conclusion, the future of immigration detention is going to be shaped by different factors, that are going to be interlinked one another, from the insurgence of new situation of world crisis, as COVID-19 is showing, to the political powers that are going to take the control of the countries around the world. Even if, without a strong commitment from countries to take adequate measures to end this procedure in the field of migration, not real important milestones are going to be achieved on the topic, the role of the UN, the NGOs and the one of all of those scholars that are researching on the topic is going to be significantly important to raise the awareness on the topic and to make understand to people that migrants, before being migrants, are human beings as everyone else.

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content/uploads/2015/12/Decreto_16_settembre_2004_n._303.pdf, last accessed: 11 July 2020.

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