In accordance with Rule 9.2. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements by the AIRE Centre, DCR, ECRE and ICJ

KHILAIFIA AND OTHERS v. ITALY (Application No. 16483/12)

1. The Khilaifia and Others v. Italy case concerns the detention of three Tunisian nationals in an Early Reception and Aid Centre (CSPA) and on ships in the port of Palermo. The European Court of Human Rights (ECtHR) found violations of Article 5 §§ 1, 2 and 4 of the Convention in that the detention had no clear publicly articulated and accessible legal basis, and consequently the applicants were not informed of the basis for their detention and were unable to judicially challenge their detention. The Court also found a violation of Article 13 in conjunction with Article 3 regarding the lack of effective remedy to complain about detention conditions.

2. The AIRE Centre and the European Council on Refugees and Exiles (ECRE) were interveners in this case. They, together with the Dutch Council for Refugees (DCR) and the International Commission of Jurists (ICJ), wish to bring to the attention of the Committee their ongoing concerns with regard to detention in Italy since the judgment, particularly in the context of the Committee’s duty to satisfy itself that Italy has taken the General Measures necessary for it to comply with this judgment.

EXECUTIVE SUMMARY

3. The detention of third-country nationals in “hotspots” and in pre-removal centres (Centri di permanenza per il rimpatrio, CPR) continues to be an issue in Italy. Key areas of concern include:
   - the de facto detention of third-country nationals upon arrival for the purposes of identification without any formal detention order and an assessment of necessity and proportionality;
   - the lack of information provision and access to effective remedies to review detention;
   - and the lack of an effective remedy concerning detention conditions.

GENERAL MEASURES

I. Lawfulness and judicial review of migrant detention in “hotspots”

4. The “hotspot” approach in Italy was implemented with the purported aim of efficiently identifying migrants with international protection needs and streamlining asylum and returns procedures. Following the enactment of the latest legislative reforms set out in Decree No. 113/2018, as implemented by L 132/2018, asylum seekers may be detained for up to 30 days in “hotspots” or first reception centres in order to establish their identity or nationality. If identity is not established within this period, detention can be extended for up to 180 days in pre-removal centres (CPRs), despite the fact that the detainees are not subject to a removal procedure. Those who are identified as irregular migrants can be held in “suitable facilities” in “hotspots” or first reception centres, as well as in CPRs pending their removal from the state.

5. The detention of third-country nationals in the “hotspots” occurs before an individual is identified as an asylum seeker or as an irregular migrant, without an assessment of necessity or proportionality of such detention. There is a practice of classification of individuals according to nationality, with certain nationalities, presumably less likely to be in need of international protection, being more prone to detention, often without assessment of individual circumstances or vulnerability requirements.

6. The current domestic legislation establishes a process of “judicial validation” of a detention order by the competent Court of Cassation, which must be issued within 48 hours of detention. In practice, however, detention in the
“hotspots” still regularly occurs without detention orders. As reported by the European Union Agency for Fundamental Rights (FRA), in the Lampedusa “hotspot”, those who arrive irregularly are detained upon arrival without any detention order and for a prolonged period of time, including after the conclusion of identification proceedings. Indeed, in June 2019, those rescued by Sea Watch 3 were detained in the Lampedusa “hotspot” without a detention order from 29 June to 4 July 2019 and subsequently transferred to the Messina “hotspot”, where they were detained for a further seven days. Additionally, there are cases of unaccompanied children who are detained and only identified as minors at a later date. In Lampedusa, the FRA found that unaccompanied minors had been detained for prolonged periods of time, with a case of a child detained in the “hotspot” for eleven days.

7. Further issues arise with the refusal of authorities to permit disembarkations from Search and Rescue vessels. As a result, third-country nationals are de facto and arbitrarily detained aboard ships. In a letter to the Attorney General from the National Ombudsman for Persons Detained or Deprived of Liberty regarding the refusal to permit the Sea Watch 3 vessel to disembark in June 2019, the Ombudsman warned that an extended prohibition on disembarkation amounts to a de facto deprivation of liberty. The same position was adopted by the Tribunal of Ministers of Catania when it requested the Senate to authorise the prosecution of Vice-President of the Council of Ministers and Minister of Interior, Matteo Salvini, for aggravated abduction, for the unlawful deprivation of liberty of the passengers (migrants, including refugees) of the Diciotti Italian navy boat, in dereliction of his duties and in breach of Italy’s obligations under international and domestic law, by his refusal to allow their disembarkation.

8. Judicial review of detention, while provided for in Italian law, in practice, cannot be seen as an effective remedy due to the absence of formal detention orders and the consequent impossibility of an appeal for which an actual reasoned order is required. As previously submitted to the Committee, in cases where a detention order is issued, it is often only issued at the end of the detention period and thus hindering appeals. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stressed in its March 2017 Report on the “hotspots” that: “Every instance of deprivation of liberty should be covered by a proper individual detention order, readily available in the establishment where the person concerned is being held; and the detention order should be drawn up at the outset of the deprivation of liberty or as soon as possible thereafter.” A further obstacle to exercising an effective remedy is the reported lack of sufficient and quality legal assistance, along with a shortage of interpreters.

9. Access to information and to asylum procedures remains limited. The FRA highlighted that not all persons upon arrival were able to understand the information provided by national authorities, United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM), including with regard to accessing asylum. In detention, those who wish to submit an asylum application are not always provided with the necessary information and in some cases, requests to claim asylum are disregarded.

10. In accordance with ECHR jurisprudence and EU law, the grounds for detention should be narrowly applied and detention under Article 5.1 of the Convention must be compatible with the overall purpose of Article 5, namely, to safeguard liberty and ensure that no person is deprived of his or her liberty arbitrarily. The de facto detention of migrants including asylum applicants on arrival, and, often without detention orders, does not conform to the Convention standards as interpreted by case law of the ECHR. Moreover and importantly, under Article 8 (2)
of the recast Reception Conditions Directive 2013/33/EU, with which Italian legislation must comply, detention may only be used as a measure of last resort and only if no less coercive measure can be applied.\textsuperscript{21}

11. The AIRE Centre, DCR, ECRE and ICJ call on the Committee of Ministers to urge the Italian authorities to provide evidence on the steps they have taken to eliminate \textit{de facto} and arbitrary detention and to ensure that detention is used as a measure of last resort with a prior examination of non-coercive alternatives. The Italian authorities must also clarify how effective access to clear and accessible information, including on asylum procedures in a language the applicant can understand, as well as access to legal assistance, are safeguarded. They must also indicate the steps they have taken to ensure that the relevant state officials are aware of the content of this judgment and that repeating such behaviour constitutes further violations of Italy’s obligations under the Convention.

II. \textit{Lack of an effective remedy concerning the conditions of migrant detention in “hotspots”}

12. As stated above, the new domestic legislative framework foresees the possibility of detention for identification purposes in “suitable facilities”. However, the places of detention and the conditions that must be fulfilled for them to be considered “suitable” and the location of the facilities are not specified in law.\textsuperscript{22} The operation of the “hotspots” is instead governed through Standard Operating Procedures (SOPs), which are not legally binding instruments.\textsuperscript{23} Current detention conditions remain inadequate, including, \textit{inter alia}, limited access to healthcare,\textsuperscript{24} insufficient toilet and shower facilities,\textsuperscript{25} and a lack of guarantees for the protection of unaccompanied minors.\textsuperscript{26}

13. The Italian government submits that complaints regarding conditions can be lodged through civil procedures.\textsuperscript{27} However, there remains no \textit{ad hoc} remedy available in the “hotspots” and first reception centres to submit complaints regarding conditions.\textsuperscript{28} Additionally, there remains a lack of information provided to applicants on how to pursue such procedures,\textsuperscript{29} there is no available list of lawyers in “hotspots”,\textsuperscript{30} and lawyers have reported difficulties in accessing the facilities.\textsuperscript{31} While the National Ombudsperson has the power to file complaints and submit reports to the responsible authority on detention conditions, its opinions are non-binding and typically not followed by those authorities and the ECtHR has previously held that such a mechanism cannot be considered to be an “effective remedy” for the purposes of Article 13.\textsuperscript{32} As regards complaints procedures, the CPT has also stressed that “immigration detainees should have avenue open to them, both internally and externally, and be entitled to confidential access to an appropriate complaints authority.”\textsuperscript{33}

14. The AIRE Centre, DCR, ECRE and ICJ submit that there remains no effective remedy to complain about detention conditions under the current legislation and calls on the Committee of Ministers to require the Italian authorities to define in law minimum detention conditions and procedural guarantees in line with Articles 9 - 11 of the recast Reception Conditions Directive, and to provide an individual complaints mechanism with binding rulings in order to meet its obligations under Article 13 as identified in the \textit{Khlaifia} judgment.

\textsuperscript{21} Where Contracting Parties to the ECHR are also bound by EU law, the Convention rights must be interpreted and applied in a manner which does not diminish the rights guaranteed under the applicable EU law. The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected right must be “in accordance with the law”. The Court has consistently held that the ordering and carrying out of detention must adhere to the criteria and process of national law. See: Nabil and others v. Hungary (No. 62116/12), 22 September 2015, para. 30: “detention must conform to the substantive and procedural rules of national law”; O.M. v Hungary (No. 9912/15), 5 July 2016, para. 41.

\textsuperscript{22} National Ombudsperson for Persons Detained or Deprived of Liberty, “Address to Parliament on the Year 2018”, April 2019.

\textsuperscript{23} AIDA (n 9) p 120.

\textsuperscript{24} ActionAid, ASGI, Cild, IndieWatch, In Limine, Scenari di frontiera: il caso Lampedusa. L’approccio hotspot e le sue possibili evoluzioni alla luce del Decreto legge n. 113/2018, October 2018.


\textsuperscript{26} National Ombudsperson for Persons Detained or Deprived of Liberty, “Rapporto sulle visite effettuate nei centri di permanenza per il rimprataggio (Febbraio – Marzo 2018)”, 8 September 2018, available at: http://www.garantenazionaleprivatiliberta.it/gpnl/resources/cms/documents/c30efc290216094855c99b68644ce5.pdf, and AIDA (n 9).

\textsuperscript{27} As detailed in the submission of the Italian Authorities to the Committee of Ministers, 31 May 2019.

\textsuperscript{28} National Ombudsperson for Persons Detained or Deprived of Liberty (n 26).

\textsuperscript{29} European Union Agency for Fundamental Rights (n 9) p 36, and Committee of Ministers, Communication from an NGO (project In Limine) of 16/07/2018 in the case of Khlaifia and Others v. Italy (Application No. 16483/12).


\textsuperscript{33} European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): Immigration Detention – Factsheet (March 2017) https://rm.coe.int/16806bf12 p 7.