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Immigration policy, comparative law and legal translation: the case of Khlaifia and Others v. Italy

Relatore

Prof. Nicola Brutti

Laureanda

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Abstract

This dissertation examines the immigration policy in Italy at the beginning of 2011.

This aim has been pursued through the analysis of a European Court of Human Rights' Grand Chamber case, Khlaifia and Others v. Italy tackling issues as illegal detention, torture, inhuman and degrading treatment or punishment and collective expulsion.

The study has been carried out firstly by analyzing and comparing all the national, European and supranational human rights legal texts; secondly by examining the process of communicating rights to migrants; and thirdly by considering the legal translation of the Court as a tool for communicating and disseminating migrants' rights.

From a legal point of view, the research has shed light on the legislation and the mechanism of the Italian reception system through an in-depth study of the border and migration management, the stakeholders involved and the events characterizing Lampedusa in 2011, which shows that an adequate immigration policy is necessary to ensure that individuals or groups of individuals do not endure human rights' violations.

From a linguistic point of view, it emerges, instead, that human rights legal texts stand out for their vagueness, high register and technical terminology and consequently they may not be comprehensible to all migrants. Therefore, communication, in the form of mediation or translation, may turn out to be a tool to efficiently convey the contents and the rights of legal texts.

The analysis of the case has proved that migrants were not appropriately communicated with their rights, showing that when states are overwhelmed by large migration flows, authorities may be given more leeway to manage them, at the expense of the human rights enshrined in law.

Additionally, the translation analysis of the Khlaifia case has demonstrated the contribution of legal translation to the dissemination of contents in human rights legal texts, although further work aiming at simplifying legal texts for a wider public is necessary.

Introduction

Immigration has existed since prehistory, when *homo sapiens* moved from Africa to the Middle East and finally to Europe. Over the centuries, technological innovation and global connection have constantly changed the structure of migration processes. A significant turning point took place in 2011, where people from North Africa began seeking shelter in Europe as a consequence of the Arab Spring. This incoming flux put a strain on border and migration management in Italy, one of the main protagonists of this new scenario. The country was unexpectedly not ripe to face this situation, leading to a frequently violation of some of the rights enshrined in the European Convention on Human Rights.

The aim of this research is therefore to explain the Italian immigration policy at the very beginning of the uprisings of 2011 through the analysis of a specific case: Khlaifia and Others v. Italy. The case tackles the holding of irregular migrants in a reception center on the island of Lampedusa and their subsequent removal to Tunisia. The case was brought by three Tunisian in 2011 against the Italian Republic before the Grand Chamber of the European Court of Human Rights for the violation of some of the principles stated in the Convention: Article 5§1 "right to liberty and security", Article 5§2 "right to be promptly informed of the reasons for deprivation of liberty", Article 5§4 "right to a speedy decision on the lawfulness of detention", Article 3 "prohibition of inhuman or degrading treatment", and Article 4 of the Protocol No. 4 "prohibition of collective expulsion of aliens". The case is of worthiness as the issues raised by the complainants as well as the principles affirmed by the Grand Chamber are relevant to the migration and border management which involves not only Italy, but also the EU Member States and institutions. For the purpose of this dissertation, the Khlaifia's case has been analyzed both from a legal and a linguistic point of view.

Chapter 1 narrates not only the facts, but also the decisions taken by the Grand Chamber regarding the Khlaifia and Others v. Italy case, shedding light on the impact that the case had on the development in the human rights protection policies. Chapter 2 analyzes and compares, instead, all the national, European and supranational legal texts used by the Court for delivering the final judgment of the case. These texts concern issues as illegal detention, torture, inhuman and degrading treatment or punishment and collective expulsion. Chapter 3 investigates communication and mediation as a possible

solution to the shortcomings of Italian immigration policy. Therefore, the process and the actors involved in the migration and border management have been examined, as well as the events in Lampedusa at the time of Khlaifia case. Lastly, Chapter 4 sheds light on the role of translation in disseminating migrants' rights, with a particular regard to the translation activities and programs of the European Court of Human Rights. To ensure a better understanding, an analysis and a comparison of the translation from English (ST) into Italian (TT) of some parts of the judgment have been carried out.

Chapter 1

The Khlaifia and Others v. Italy case: an analysis of the legal narration

This dissertation sheds light on the Italian immigration policy at the beginning of the Arab Spring of 2011 through the analysis of an exemplary case lodged with the European Court of Human Rights: Khlaifia and Others v. Italy. Therefore, Chapter 1 will narrate the facts of the case and the judgments taken by the Second Section of the Chamber and by the Grand Chamber and explain its relevance in the migration management.

1.1. The facts

The Khlaifia and Others v. Italy case concerns the holding of irregular migrants in a reception center on the island of Lampedusa and on ships in Palermo and their subsequent removal to Tunisia[1]. The applicants are three Tunisian nationals, namely Mr Saber Ben Mohamed Ben Ali Khlaifia (Mr Khlaifia), Mr Fakhreddine Ben Brahim Ben Mustapha Tabal (Mr Tabal) and Mr Mohamed Ben Habib Ben Jaber Sfar (Mr Sfar), who left their home country in September 2011 heading for Italian coasts. After several hours at sea on board of rudimentary vessels, the applicants were intercepted on September 16 and 17 by the Italian coastguard, which escorted them to a port on the island of Lampedusa. They were first transferred to an Early Reception and Aid Centre (CSPA) in Contrada Imbriacola, where they were given first aid and were subjected to identification measures by the authorities. CSPAs, which are run by the European Union, are commonly known as migration hotspots and they have to be distinguished from Italy's Centers for Identification and Expulsion (CIE) which are run by Italy and authorized by Italian legislation[2]. On this occasion, individual information sheets were filled in for each of the migrants, although the applicants disputed this. The migrants

[1]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016). Judgements of the Court cited herein are available at its website: http://hudoc.echr.coe.int.
[2]Goldenziel J.I., "*Khlaifia and Others v. Italy"*, ed. Wuerth I., in *The American Society of International Law*, Cambridge University, April 25, 2018, pg. 274.

complained not only about the living condition and the overcrowd in the CSPA, but also about the permanent surveillance by the police. Actually, they claimed that they had not been allowed to leave the center and had never got into contact with the outside world. The applicants remained in the center until September 20, when a revolt broke out among the migrants. As the center was guttered by fire, the migrants were transported to a sport complex in Lampedusa for the night. At dawn on September 21, the applicants escaped from the police and they reached other migrants in the city center of Lampedusa, where they took part to a demonstration through the streets of the island with other 1.8000 migrants. After being stopped by the police, they were first taken to the reception center and then to Lampedusa airport. On September 22 they were transferred to Palermo and after their disembarkation they were moved onto two ships moored in the harbor. Mr Khlaifia was placed with other 190 migrants on the Vincent, while Mr Tabal and Mr Sfar were boarded on the Audace with other 150 migrants and they all remained there for a few days. Here too, the applicants denounced the bad conditions in which they were forced to live and the fact that they were allegedly insulted and ill-treated by police officers, who kept them under permanent surveillance and did not give them any information about the reasons of their detention. On September 27, Mr Tabal and Mr Safal were taken to Palermo airport and so was Mr Khlaifia on September 29, where they were all pending for their removal. Before boarding the planes for Tunisia, all the applicants were received by the Tunisian Consul who merely recorded their identities in accordance with the agreement between Italy and Tunisia of April 2011. This text, however, was secret to migrants and to the public. The migrants complained in their applications that they had not been issued with any documents regarding their status and the reasons of their detention during their stay in Italy. By contrast, in its observations the Government wrote that it issued three refusal-of-entry in respect of the applicants on September 27 and 29. Moreover, it wrote a record indicating that the applicants refused to sign or receive a copy of those orders. When they arrived at Tunis airport, they were released.

1.2. The Chamber judgment

On March 9, 2012 the applicants brought an action (application no.16483/12) against the Italian Republic before the European Court of Human Rights for the violation of

some of the principles stated in the Convention for the Protection of Human Rights and Fundamental Freedoms. The application was allocated to the Second Section of the Court (Rule 52§1 of the Rules of Court). Precisely, the accusation concerned articles 3,4,5 and 13. With regard to Article 5, they claimed that they had been deprived of their personal freedom in the absence of the legal requirements (Article 5§1, right to liberty and security), that they had not received any explanation for their detention (Article 5§2, right to be promptly informed of the reasons for deprivation of liberty) and they had not had the opportunity to contest such deprivation (Article 5§4, right to a speedy decision on the lawfulness of detention). Moreover, with reference to Article 3 and 4 Protocol No. 4, they claimed that they had been detained in inhuman and degrading conditions both in the Lampedusa CSPA and on board of the Vincent and Audace (Article 3, prohibition of inhuman or degrading treatment) and to have been subjected to collective expulsion (Article 4 Protocol No. 4, prohibition of collective expulsion of aliens). Lastly, invoking Article 13, they complained the lack of the possibility to have a judicial remedy against these violations (Article 13, right to an effective remedy, in conjunction with Article 3 and Article 13 in conjunction with article 4 Protocol no.4). On September 1, 2015 the Chamber delivered a judgment, finding unanimously that there had been a violation of Article 5§§1,2 and 4 of the Convention, while no violation of Article 3 resulted as to the conditions in which the applicants were held on board the ships Vincent and Audace. By five votes to two, the Chamber found a violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the reception center, a violation of Article 4 of Protocol No. 4, and a violation of Article 13 of the Convention, taken together with Article 3 and with Article 4 of Protocol No.4.

1.3. The Grand Chamber decision

On December 1, 2015 the Government requested the referral of the case to the Grand Chamber, which was accepted by its panel on February 1, 2016. The case attracted the attention of human rights groups: the Coordination Français pour le droit d'asile (French coalition for the right of asylum), the Center for Human Rights and Legal Pluralism of McGill University, the AIRE Centre and the European Council on Refugees and Exiles (ECRE) participated to the judgment with written comments. In

the following paragraphs we are going to present in detail the decision of the Grand Chamber in regard to the violation of the above-mentioned articles of the Convention.

1.3.1. Article 5§1 of the Convention

Article 5§1 shall guarantee liberty and freedom as a fundamental right to everyone[3] and consequently it shall protect the individual against the arbitrary interference by the States. However, the Convention covers a series of exceptions listed from subparagraph a) to f), by which a State is allowed to deprive the liberty of an individual. No deprivation of liberty is considered as lawful, unless it falls within one of those grounds, indeed. Moreover, the Convention states that the detention shall rest on a legal basis in domestic law[4]. As mentioned above, the applicants accused the Italian Government of having been detained unlawfully in CSPA and on Vincent and Audace ships. Here, the Court confirmed what had already been said in the Chamber judgment: the applicants' deprivation of liberty fell within subparagraph (f) of Article 5§1, as it is evidently aimed at controlling the entry of foreigners into the national territory: "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being with a view to deportation or extradition". However, this exception had no legal basis in Italian law at that time, but the Government was expected to present proof of it. Firstly, the Government provided the Court with Article 14 of the "Consolidated text of provisions concerning immigration regulations and rules on the status of aliens" which states that "the *questore* provides for the alien to be kept for the time strictly necessary at the nearest identification and expulsion center […][5]". However, it could not have constituted the legal basis for the applicants' case, since the applicants had been held in a CSPA, which is only aimed at first aid and identification, and not in a facility covered by that instrument, namely a CIE (identification and removal center). Secondly, the Government considered Article 10 of Legislative Decree no. 286 of 1998 as the legal basis for detention which refers to

[3]Cfr. Article 5§1 "Everyone has the right to liberty and security of person. […]".
[4]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §91).

[5]Cfr. Article 14, Legislative Decree no. 286 of 1998: https://www.refworld.org/pdfid/54a2c23a4.pdf.

the rejection of aliens[6]. However, the Court did not find any reference therein to detention or other measures regarding the deprivation of liberty, therefore it could not be considered as the legal basis for the applicants' detention. Thirdly, the Government regarded the bilateral agreement between Italy and Tunisia of April 2011 as the legal basis for detention. However, the Court noted that the full text of this agreement had not been made public and therefore it had not been accessible to the applicants, who accordingly could not have foreseen the consequences of its application. Because of scant information, the bilateral agreement could have not been considered as the legal basis for detention. The lack of legal basis for the applicants' detention was confirmed by the report of the Senate's Special Commission[7] . In addition, the PACE Ad Hoc Sub-Committee[8] had expressly recommended that the Italian authorities should "clarify the legal basis for the de facto detention in the reception centers in Lampedusa[9]". The Court added that the persons placed in CSPA could have not benefit from the safeguards applicable to placement in a CIE, which had to be validated by an administrative decision subject to review by the Justice of the Peace. In this regard, the Palermo preliminary investigations judge stated in his decision on June 1, 2012 that the police authority had merely registered the presence of the migrants both in CSPA and in their transfer to the ships, without ordering their placement. Consequently, the applicants were not only deprived of their liberty unlawfully, but also of the protection under fundamental safeguards of *habeas corpus* laid down in the Article 13 of the Italian Constitution[10]. The applicants' detention had not been validated by any judicial or administrative decision, which led a violation of important safeguards. To conclude, there had been a violation of article 5§1 of the Convention, because the applicants' deprivation of liberty had not been compliant with the general principle of legal certainty and it had not pursued the aim of protecting the individual against arbitrariness.

[6]Cfr. Article 10, Legislative Decree no. 286 of 1998.
[7]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §35).

[8]The Council of Europe's Parliamentary Assembly (PACE) set up an "Ad Hoc Sub-Committee on the larger-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores" which wrote a report after the visit to Lampedusa on 23 and 24 May 2011.
[9]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §40).
[10]*Ibidem,* §32.

1.3.2. Article 5§2 of the Convention

The Article 5§2 shall guarantee that "everyone who is arrested shall be informed promptly, in a language that he understands, of the reasons for his arrest and ay charge against him". The violation of this article is a consequence of the violation of Article 5§1: as the applicants' detention had no clear legal basis, the authorities could have not given them proper information on time. The migrants were aware that they had entered the country illegally, but still they had the right to know the legal and factual reasons for their detention. The Court stated that the Government did not write any official documents containing the information needed. Conversely, the Government said it had provided the migrants with the refusal-of-entry orders. Still, the Court noted that these orders could have not be considered as official documents capable of satisfying the requirements of Article 5§2 as they did not mention the legal and factual grounds for detention and they were given to the applicants belatedly[11]. Therefore, they did not satisfy the condition of "prompt" information and consequently there had been a violation of Article 5§2.

1.3.3. Article 5§4 of the Convention

According to the Article 5§4, everyone deprived of his/ her liberty has the right to lodge an appeal before a court, which has the duty to decide speedily whether the detention was lawful or not[12]. Since the applicants were not promptly given legal and factual information about the reasons of their detention, as a consequence, they could not have asked for a remedy before a court. Their right to let the lawfulness of their detention be checked have been deprived of all substance and the Italian legal system did not provide the applicants with any remedy, whereby they could have obtained a decision by a court on the lawfulness of their detention. Therefore, there had been a violation of Article 5§4.

[11]The refusal-of-entry orders were notified to the applicants only on September 27 and 29, 2011, but they had been placed in the CSPA on September 17 and 18, 2011.
[12]Cfr. Article 5§4: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

1.3.4. Article 3 of the Convention

The applicants accused the Italian Government of inhuman or degrading treatment during their detention in the CSPA at Contrada Imbriacola in Lampedusa and on board of the ships Vincent and Audace moored in Palermo harbor. Article 3 of the Convention[13] represents an important cornerstone in a democratic society, indeed. In order to determine whether a violation of this article had taken place, the Court needs to take into account its consolidated case-law[14]. Firstly, the Court's case-law states that ill-treatment must attain a minimum level of severity, which depends on all the circumstances of the case, such as: a) the purpose of an ill-treatment; b) the intention behind an ill-treatment and c) the context. Secondly, the case-law of the Court needs to analyze whether the victim is vulnerable, which is strictly connected to the status of the migrant. Thirdly, it is important to consider the consolidated case-law on prison overcrowding, which states that the violation of Article 3 of the Convention takes place not only when the allocation of a living space is less than 3 square meters, but also when there is a larger space devoid of access to the open air, minimum standards of confidentiality, adequate sanitary conditions, and convenient access to toilets. Lastly, the Court recalls that the parties have to support their allegations with clear evidence. After having cited its case-law, the Court found necessary to analyze the general context in which the facts arose: Italy had been facing a humanitarian crisis following the events related to the Arab Spring, which brought many migrants to leave their home countries heading for Italian coast. The increasing number of migrants created organizational, structural and logistical difficulties for the Italian authorities which declared a state of humanitarian emergency on the island of Lampedusa and appealed for solidarity from the Member States of the European Union. Therefore, Italy argued that the migrants were detained in an exceptional humanitarian emergency. Both in CSPA at Contrada Imbriacola and on ships Vincent and Audace, the Courts stated that the migrants were not considered vulnerable as they were neither asylum seekers nor children, but they

[13]Cfr. Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[14]As regards the Court's case-law of the judgment, it is interesting the online article by Giliberto A., "*La pronuncia della Grande Camera della Corte EDU sui trattenimenti (e i conseguenti respingimenti) di Lampedusa del 2011*", in *Diritto Penale Contemporaneo, archivio 2010-2019*, December 23, 2016.

were young and in good health[15] and that the duration of both confinements was relatively short[16]. In regard to the conditions of the CSPA at Contrada Imbriacola and on Vincent and Audace ships, the Court decided to analyze them separately. Regarding the reception center, the Court acknowledged that its conditions were far from being good. Problems of overcrowding, poor hygiene and lack of contact with the outside world were confirmed by the reports of the Senate's special Commission[17] and Amnesty International[18], which stated that the center was not suited to stays of several days. Also, in its report the PACE Ad Hoc Sub-Committee expressed in its concerns about the sanitary conditions as a result of overcrowding in the CSPA[19]. Nevertheless, the report[20] also stated that the general conditions could have not been as rough as those compared to other judgments in which a violation of this article had taken place[21]. In addition, a revolt broke out among the migrants and the center had been guttered by fire. Consequently, the migrants were taken to a sport complex in Lampedusa, which demonstrated that the authorities had not been inactive toward the situation and the migrants. In addition, the Court observed that there was any precise data of the capacity of the center and of the actual number of people in the CSPA, therefore the Court made approximate calculations noticing that the percentage of overcrowding did not exceed 75%, which allowed migrants to have a minimum freedom of movement within the center. Lastly, the Court observed that the applicants did not claim that they had been

[15]At that time, Mr Khlaifia was 28, Mr Tabal was 24 and Mr Sfar was 23: they were all relatively young.
[16]In the CSPA at Contrada Imbriacola, Mr Khlafia stayed from 16 September to 20 September (four days), whereas Mr Tabal stayed from September 17 to September 20(three days); the confinement on the ships began on September 22, 2011 and ended on 29 for Mr Khlaifia (seven days) and on September 27 for Mr Tabal and Mr Sfar (five days).
[17]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §35).
[18]*Ibidem,* §50.
[19]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§30,48.

[20]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§28,29,32,47: the associations of "Praesidium Project" (UNHCR, the IOM, the Red Cross and Save the Children) could remain permanently inside the reception center; there was cooperation among all participants with the aim of saving lives at sea; the reception conditions were decent, although basic; it was possible to ask for a medical visit and a regular inspection of the sanity facilities and food at the center was carried out by the Head of the Palermo Health Unit.

[21]Cfr. *M.S.S. v. Belgium and Greece* (no. 30696/09, §§ 223-34, November 21, 2011); *S.D. v. Greece* (no. 53541/07, §§ 49-54, June 11, 2009); *Tabesh v. Greece* (no. 8256/07, §§ 38-44, November 26, 2009); *A.A. v. Greece* (no. 12186/08, §§ 57-65, July 22, 2010): all these cases are cited in *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §§171, 173-175).

deliberately ill-treated by the authorities in the center, or that there had been insufficient food or water. To conclude, the treatment they complained of had not exceeded the level of severity and therefore there had been no violation of Article 3 of the Convention regarding the CSPA at Contrada Imbriacola. As regards the situation on the ships Vincent and Audace, the applicants alleged that they stayed in bad and overcrowded conditions, among which sleeping on the floor and waiting several hours to use the toilets, that they were occasionally insulted and ill-treated by the police and that they did not receive any information about the reason of their detention from the authorities. However, the Court replied that all these allegations were not based on any objective element other their own testimony, for example a document proving any signs, evident signs of the alleged ill-treatment or any third-party testimony. Although the case-law allocates the burden of the proof to the Government, in this case there had been any clear evidence of ill-treatment. Moreover, the Government referred to the judicial decision of the Palermo preliminary investigations judge dated June 1, 2012, which indicated that the migrants were provided with medical assistance, hot water, electricity, meals and hot drinks[22]. The judicial decision cited also a press agency note dated September 25, 2011, where a member of the parliament, T.R., with the deputy chief of police and police officers boarded on the vessels moored in Palermo harbor and he confirmed that the migrants were in good health conditions and that they had assistance, warm food and water. For the Court, there was no reasons to doubt such affirmations, and again the applicants did not produce any evidence capable of showing the ill-treatment. In conclusion, a violation of Article 3 had not taken place on the ships Vincent and Audace.

1.3.5. Article 4 of the Protocol No.4 to the Convention

The applicants claimed that they had been victims of collective expulsion[23]. According to the Court's case-law, the concept of expulsion is interpreted in the generic meaning of driving someone away from a place[24]. In this case, the applicants were undoubtedly subject to expulsion as they were on Italian territory, they were removed

[22]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §27).
[23]Article 4 of Protocol No. 4 of the Convention: "Collective expulsion of aliens is prohibited".
[24]Cfr. *Hirsi Jamaa and Others v. Italy* (no. 27765/09, February 23, 2012, §174).

from the State and then sent back to Tunisia. The Court needed thus to understand whether this expulsion was collective or not. In this regard, the Court cited the ILC (International Law Commission) which indicated that "collective expulsion means expulsion of aliens, as a group"[25] and the Court's case-law which sees collective expulsions as "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group[26]". The Article 4 Protocol No. 4 of the Convention did not explicitly require individualized processing, but what is important is that each person concerned has an effective possibility to individually submit arguments against deportation. The Court agreed with the Government's statements about the fact that the applicants had had many opportunities to explain the reason why they should have stayed in Italy or why they should have not returned back to their home country as they had undergone identification twice: by the Italian civil servants immediately after their arrival at the Contrada Imbriacola CSPA and by the Tunisia Consul before boarding the planes for Tunis. As to the conditions of the first identification, the Government argued that an individual interview had been carried out in the presence of an interpreter or cultural mediator and that "information sheet" containing personal data and specific circumstances had been then filled out by the authorities. Although this information sheet was destroyed by the fire in the reception center, the Court recognized that ninety-nine social operators, three social workers, three psychologists, and eight interpreters and cultural mediators were working at the center and thus they all were there in order to facilitate the cooperation and the communication between the migrants and the authorities. This demonstrated that the applicants could have talked about their situations to all of these operators at any time. This was also proved by the fact that seventy-two migrants applied for asylum during their stay in CSPA at Contrada Imbriacola, which demonstrated that the Italian authorities would have remained unreceptive to any request of legitimate and legally arguable impediments to their removal. As to the conditions of the second identification, the Court accepted the Government's submission, according to which the

[25]Cfr. Article 9§1 of the Draft Articles on the Expulsion of Aliens and the Commentary to that Article.
[26]Cfr. *Georgia v. Russia* (no. 13255/07, June 30, 2009); Vedran *Andric v.Sweden* (no.45917/99, February 23, 1999); *Davydov v. Estonia* (no. 16387/03, May 31, 2005); *Sultani* v. France (no. 45223/05, September 10, 2007); *Ghulami v. France* (no. 45302/05, April 7, 2009).

refusal-of-entry orders took into account the specific conditions of each migrant. Its simple and standardized format was just due to the fact that the applicants did not have their travel documents, they had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion[27]. Moreover, in this occasion some of the migrants listed by the Italian authorities had not been removed at all, which demonstrated again that the applicants could have had the last chance to put forward their application before the Tunisian Consul, but they did not do it. Therefore, the virtually simultaneous removal of the three applicants did not lead to the conclusion that their expulsion had been "collective" in nature. To sum up, as the applicants had undergone identification twice and their nationality had been established, they could have put forward their arguments against their expulsion, but they did not do it. Consequently, there had been no violation of Article 4 of Protocol No. 4.

1.3.6. Article 13 of the Convention taken together with Articles 3 and 5 of the Convention and with Article 4 of the Protocol No. 4

According to Article 13 of the Convention, everyone has the right to an effective remedy[28], which had not allegedly been granted to the applicants during their stay in Italy. The Court analyzed thus whether a violation of Article 13 of the Convention taken together with Articles 3 and 5 of the Convention and with Article 4 of the Protocol no. 4 had taken place. First of all, the Court stated that the violation of Article 13 taken together with article 5 was covered by the findings under Article 5§4. Secondly, although violation of Article 3 of the Convention and 4 of the Protocol No. 4 had not taken place, the applicants had the right to afford their remedy. This is because of the nature of the Article 13 of the Convention, which must be effective in practice and in law and the "effectiveness" of "a remedy" does not depend on the certainty of a favorable outcome for the applicant. As to the violation of Article 13 taken together with Article 3, the Court observed that the Government did not provide the applicants

[27]The applicants had unlawfully crossed the Italian border and they stay did not meet the conditions of Article 10§4 of Legislative Decree no. 286 of 1998 (political asylum, granting for refugee status or the adoption of temporary protection measures on humanitarian grounds). For all these reasons, the Court found reasonable that the refusal-of-entry orders had been justified merely by the applicants' nationality.
[28]Article 13 of the Convention*:* "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

with any remedy neither in the CSPA at Contrada Imbriacola nor on the ships Vincent and Audace. Therefore, there had been a violation of Article 13 of the Convention taken together with Article 3 of the Convention. As to the violation of Article 13 taken together with Article 4 Protocol No. 4, the Court observed that the refusal-of-entry orders indicated the opportunity to appeal an effective remedy against their expulsion before the judge[29]. As a matter of fact, the Agrigento Justice of the Peace had already accepted an appeal by two migrants, and he had examined the procedure of these orders and assessed the lawfulness of that procedure in the light of domestic law and the Constitution. However, what the applicants argued is that these refusal-of-entry orders had not had a suspensive effect[30]. The Court pointed out that the need for suspensive effect is not absolute, but it is strictly related to the risk of ill-treatment[31] or irreversible damage to the person[32] as a consequence of the return in their home country[33]. This principle can be applied to Article 4 Protocol No. 4 in case the applicants would be exposed to a harm of potentially irreversible nature. As Mr Khlaifia, Mr Tabal and Mr Sfar did not make an appeal against their expulsion before the Agrigento Justice of the Peace and they had not stated that their lives would have been in danger or exposed to ill-treatment back in Tunisia, there was no violation of Article 13 of the Convention taken together with Article 4 of the Protocol No. 4.

1.3.7. Article 41 of the Convention

By fifteen votes to two, the Court established that the Italian Government had to pay each applicant 2,500 euros in respect of non-pecuniary damage and, unanimously, that it had to pay 15,000 to the applicants jointly in respect of costs and expenses.

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[29]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §19).
[30]*Ibidem.*
[31]Cfr. Article 3 of the Convention, Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[32]Article 2 of the Convention, Right to life: "1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.".
[33]In this argumentation, the Court referred to the case of *Souza Ribero v. France* (no. 22689/07, December 18, 2012).

1.4. The relevance of the case in the migration flows management

Since January 2011 there has been an increasing number of arrivals on Lampedusa from North Africa, following the uprisings of Tunisia and Libya. However, the island was not equipped to serve as a large reception and accommodation center and the Italian authorities had to face logistical and organizational problems[34]. The Khlaifia and Others v. Italy case takes place in this context of humanitarian crisis. The issues raised by the complainants as well as the principles affirmed by the Grand Chamber are more relevant than ever to the current management of the "migration emergency" that the EU institutions and Member States are called upon to address even today. Particularly, it involves the so- called hotspot approach, adopted by Italy in the framework of the immediate actions provided for by the European Migration Agenda and the expulsion procedures negotiated by the agreements between Italy and non-European States. Using the words of Jill I.Goldenziel, this judgment is a "mixed result"[35]: on one hand progress has been made with regard to the protection of migrants under unlawful detention, on the other hand backward steps have been taken in regards to inhuman treatment and collective expulsion.

1.4.1. Steps forward regarding the protection of migrants' rights

The Khlaifia case represents a turning point in the protection of migrants' rights as the illegality of their detention was ascertained by a judicial body for the first time[36]. Indeed, the violation of Article 5 of the Convention sheds light on the importance to re-evaluate the lawfulness of detention in domestic laws and the cross-border practices to which migrants are subject when crossing European borders without any valid entry document. First of all, migrants must be informed about the legal basis for their detention and about effective opportunities to challenge the conditions of their

[34]According to a report by Amnesty International, the humanitarian crisis was created by the Italian authorities as they could have prevented the situation, but they did not do it. For further information, here the report: Amnesty International, Briefing Paper, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo"*, April 21, 2011: https://www.amnesty.org/download/Documents/28000/eur300072011en.pdf.
[35]Cfr. Goldenziel J.I., "*Khlaifia and Others v. Italy"*, ed. Wuerth I., in *The American Society of International Law*, Cambridge University, April 25, 2018, pgg. 278- 280.
[36]Carmelitano T., "*Migranti, gli hotspot italiani: storia di una prassi illecita"*, in *Voci globali*, April 25, 2018.

confinement and the legality of their detention, indeed. The Court pointed out that no *de facto* detention prevented from judicial review is in line with the purpose of Article 5 of the Convention, "even in a context of a migration crisis"[37]. Secondly, the Khlaifia precedent imposes Member States to change their laws regarding substantive conditions and procedural rights for migrants. While the judgment was pending, the CSPA of Lampedusa was being converted into a hotspot[38], without any clear legal measure in international and domestic laws. The idea behind the hotspots was to develop a system that could put an end to the Italian practice of not processing and identifying people after they had been rescued at sea or had landed on Italian shores[39].This approach became more systematical after the introduction of the Roadmap Italy[40] in the Italian legal system in 2015. However, it was again devoid of legal effects and that is why the European Commission expressly asked Italy to provide a more solid legal framework for the activities carried out within the hotspots[41]. It was only in 2017 that the Italian Government finally passed a legislation – Law 46/2017 - for regulating hotspots and their operations. Hotspots were thus identified as places where migrants were provided with first aid and where administrative procedures such as international protection or return were initiated[42]. In this way, the Government can manage the immigration flow

[37]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §106).

[38] The word hotspot refers to both a concept and a place. However, this dissertation refers to hotspot as a "*center for the identification, processing and first assistance of newly arrived refugees and migrants, usually taken to shore after search and rescue operations at sea*", cfr. Amnesty International," *Hotspot Italy, How EU's flagship approach leads to violations of refugee and migrant rights*", November 3, 2016.

[39] Immediately after their identification, the migrants were categorized into vulnerable individuals and economic migrants, indeed. Cfr. Santoro, G., "*The Contemporary Relevance of Khlaifia and Others v. Italy*", in *University of Oxford, Faculty of Law*, February 27, 2020: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/02/contemporary.

[40] In May 2015, the European Commission adopted the *European Agenda on the Migration*, which set out a series of measures to address the challenges posed by the increasing migration flows. In this context, the *Roadmap Italy* was conceived and accepted thereafter by the Italian Government. The *Roadmap Italy* marks the beginning of the implementation phase of the hotspot approach in Italy. It includes appropriate measures to improve the capacity, quality and efficiency of the Italian system in the sectors of asylum, first reception and repatriation and to ensure the right measures for the implementation of the decision. Cfr. Ministero dell'Interno, "*Roadmap italiana*", September 15, 2015: https://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf .

[41] Cfr. One of the several communications that the Council of Europe sent to Italy is that on 15 December 2015; European Commission, "*Communication from the Commission to the European Parliament and the Council, Progress Report on the Implementation of the hotspots in Italy*", December 15, 2015, Strasbourg, pg. 2: https://www.statewatch.org/media/documents/news/2015/dec/eu-com-italy-hotspot-rep-com-679-15.pdf .

[42] The issue of the lawfulness of the hotspots is much more complicated and controversial than what is presented in this chapter and has also involved many human rights organizations. However, it is

more systematically guaranteeing to migrants more clarity on their legal status and on their rights.

1.4.2. Steps backwards in the protection of migrants' rights

The decision of the Court in Khlaifia case showed that Italy managed the mass influxes of migrants the way it wanted as it did not have enough resources to provide migrants with basic needs such as accommodations with basic standards. This led to a violation of human rights. Regarding the decision on Article 3 of the Convention, the Court focused on to the general context of the humanitarian crisis which Italy had to face rather than to the absolute character of the prohibitions within Article 3. This contradicted the case- law of the Court[43] and contributed to significantly aggravate the consequences of the humanitarian emergency in terms of overcrowding and poor sanitary conditions of the CSPA of Lampedusa. The decision regarding Article 4 Protocol No.4 was even more troubling as the Judge Serghides pointed out in his partly dissenting opinion[44]. The purpose of Article 4 Protocol No. 4 requires that individuals have the right to an individual interview before being expelled. However, the applicants had been sent back to their home country following the simplified procedures set out by the bilateral agreement between Italy and Tunisia. This procedure evidently aimed to avoid the individual examination of the migrant, excluding him/ her from legal assistance, and to promote the maximum procedural simplification of the expulsion once the national membership has been verified. Moreover, in the Government's opinion there was no obligation to conduct individual interviews, as no risk to the life or physical integrity of the complainants emerged under Articles 2 and 3 of the Convention. However, a personal interview is necessary, otherwise the police authorities would be discretionally allowed to carry out an approximate examination on migrants and the burden of the proof would be shifted to migrants, instead to the

important to mention the hotspot approach as it was one of the first alleged attempts to bring more clarity to the practice of migration management in Italy.

[43]This case-law marks a step backwards from the principles established in the *M.S.S. v. Belgium and Greece* (no. 30696/09, January 21, 2011, no. 27765/09, §223) and *Jamaa and Others v. Italy* (no. 27765/09, February 23, 2012, §§122, 176) precedents.

[44]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, Partly dissenting opinion of Judge Serghides).

Government. Lastly, the Judge pointed out the close logical-consequential link between the proof of the violation of Article 5§2 of the Convention and that of Article 4 Protocol No. 4: if the applicants were not informed about the reasons for their detention, the Government unlikely provided them with information regarding their rights to assert the reasons opposing the repatriation. The Judge Serghides did not also agree with the interpretation of Article 13 of the Convention taken together with Article 4 of Protocol No.4. According to him, the item "collective expulsion" does not refer to the number of migrants, but to the procedures and this applies to all migrants on the territory, regardless if they are economic migrants or asylum seekers. Moreover, Article 4 Protocol No. 4 is to be considered as an absolute right. It follows that the suspensive effect of the expulsion is the only effective internal remedy under Article 13 of the Convention to contrast the alleged collective expulsion. This interpretation is aimed to protect migrants without valid documents from possible abuses and arbitrary decisions by border authorities: in this perspective, therefore, it seems that the Strasbourg Court has missed an important opportunity to impose a high level of protection of fundamental rights within the current migration crisis that characterizes the European context. Indeed, with the Italian-Tunisian bilateral agreement and the refusal-of-entry orders, the Government has shown that it wants to proceed with a discriminatory policy towards migrant. Migrants are not considered individually as human beings, but their expulsion is based on mere nationality. In this way, migrants are deprived of their rights.

Chapter 1 has focused on the narration of the facts that had led the applicants to lodge the case with the European Court of Human Rights and of the decisions taken by the Grand Chamber. Additionally, it has explained the relevance of Khlaifia case in the development of human rights. Chapter 2 will therefore analyze and compare all the national, European and supranational legal texts considered by the panel of judges while delivering the judgment.

Chapter 2

The migration issues between Italian law and European Convention on Human Rights (ECHR): a comparison

As seen in the previous chapter, the judgment concerns migration - related issues, namely illegal detention, prohibition of torture, inhuman and degrading treatment or punishment and collective expulsion. In this chapter, we are going to analyze each of them in the light of the domestic law and the European Convention on Human Rights (ECHR).

2.1. Illegal detention

Etymologically, the meaning of the word detention is "holding back" or a "holding away", a condition of being "held" in custody, normally without a legal status or a possibility of referral. Although detention is institutionalized as a merely administrative measure, it often leads to a coercive deprivation of a person's most elementary liberties. This is because detention implies a hierarchical relationship, where a sovereign state imposes its power on the lives of non-citizens[45]. States have increasingly been using detention to govern migration. Aliens thus may be deprived of their liberty after a violation of the legislation of the territory in which they are, or they have entered. This is called "immigration detention", which is a form of administrative detention in most Council of Europe member states. In line with its administrative nature, immigration detention should not be punitive. On the contrary, it should be a measure of last resort taken after a careful and individual examination of each case[46].

2.1.1. Immigration detention in Italy

The increasing number of migrants after the events of the Arab Spring led Italy to boost its domestic detention system. The Khlaifia and Others v. Italy case was the first

[45]De Genova N., "*Detention, Deportation, and Waiting: Toward a Theory of Migrant Detainability"*, in *Global Detention Project*, Working Paper No. 18, 2016, pgg. 92-95.
[46]European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe, "*Factsheet: Immigration detention"*, 2017, pgg. 1, 2.

attempt to report the violation of liberties and securities as a consequence of this new system. The case also brought out how the language denoting detention in Italy can be misleading, which can have serious implications in guaranteeing the rights afforded to detainees and lead to confusion about practices in the country. In an e-mail Correspondence in 2017, Valeria Ferrari (Association for Juridical Studies on Immigration, ASGI[47]), wrote to Michael Flynn (Global Detention Project, GDP[48]) that "in Italian legislation, administrative detention is defined as administrative holding (*trattenimento amministrativo*). The word detention is not used. However, people are held in place and they cannot go out. Ironically, the fact that it is not defined as detention makes the condition and the accessibility to rights worse than in prison"[49]. Basically, authorities are not aware first that they are using in practice methods of detention as an instrument to prevent immigration, secondly that they do not see the gravity of the consequences on migrants' rights.

2.1.2. Reception and detention facilities in Italy

We will start by giving a look at the structure involved in the management of migrants illegally landed on Italian shores and how it has changed. Over the years Italy has developed a system of facilities for detaining or accommodating both irregular migrants and asylum seekers. There were three types of structure: CDAs (Reception or Welcome Centers)/ CPSAs (Center for First Aid and Reception), CARAs (Centers for the Reception of Asylum Seekers) and CIEs (Identification and Expulsion Centers)[50]. The CDAs/ CPSAs were intended as initial accommodation for new arrivals in order to provide them with first aid and medical care. Here, migrants were identified and photographed, and they could apply for international protection. As they were

[47]The Association for Juridical Studies on Immigration (ASGI) is a membership-based association focusing on all legal aspects of immigration. ASGI's members provide their contribution at various levels: administrative, policy-making and legal, both in national and European contexts.
[48]The Global Detention Project (GDP) is a non-profit research center based in Geneva, Switzerland, that investigates the use of immigration-related detention as a response to global migration: https://www.globaldetentionproject.org/.
[49]Global Detention Project, "*Italy Immigration Detention Profile"*, January 2018, pg.2.
[50]Commissione straordinaria per la tutela e la promozioni dei diritti umani, "*Rapporto sullo stato dei diritti umani negli istituti penitenziari e nei centri di accoglienza e trattenimento per migranti in Italia"*, March 6, 2012, pgg. 99- 102.

considered as transfer centers, migrants stayed there for as long as necessary to establish their identities and their status. The CARAs were facilities for undocumented asylum seekers. Here, they were identified for the initiation of the procedures required to apply for asylum. Their stay there could vary between 20 and 30 days. CDAs, CPSAs and CARAs are run by the European Union[51]. In 2015, this acronym-based reception system of CDAs, CPSAs and CARAs was replaced by another system composed by the so-called CPA (First reception center)[52] (Legislative Decree 142/2015) and the hotspot approach[53] (the Minniti-Orlando Decree - Law 46/2017). The hotspot approach was developed by the European Commission as part of the immediate action to assist EU Member States located at the external EU border and in the European Agenda on Migration in May 2015. Hotspots are located at arrival points in frontline member states (among which, of course, Italy). Migrants are here identified, registered, fingerprinted and properly processed[54]. Also, they are provided with first aid, reception, medical care and information on asylum[55]. However, hotspots in Italy were not regulated by any specific domestic laws, but only at a policy level through a Roadmap[56] developed by the Ministry of the Interior and standard operating procedures (SOPs)[57] drafted with the assistance of the European Commission, Frontex, Europol, the European Asylum Support Office, UNHCR and the IOM. Only with Article 17 of the Law 46/2017 (Minniti-Orlando decree), the concept of hotspots was introduced in the Italian legislation and converted into Article 10-ter of the Consolidated Immigration Act under the name *punti di crisi*[58]. Lastly, the CIEs were facilities destined to the detention of

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[51]Goldenziel J.I., "*Khlaifia and Others v. Italy*", ed. Wuerth I., in *The American Society of International Law*, Cambridge University, April 25, 2018, pg. 274.

[52]The CPAs have no reference in Italian legislation or policy.

[53] The hotspot approach was emphasized by the European Commission in its Agenda on Migration in 2015.

[54]Asylum seekers are channeled to the Centri di Prima Accoglienza (CPA), whereas economic migrants were transferred to CPRs.

[55]Ministero dell'Interno, "*Centri per l'immigrazione*", June 19, 2020: https://www.interno.gov.it/it/temi/immigrazione-e-asilo/sistema-accoglienza-sul-territorio/centri-limmigrazione.

[56]Ministero dell'Interno, "*Roadmap italiana*", September 25, 2015: https://www.meltingpot.org/IMG/pdf/roadmap-2015.pdf.

[57]Ministero dell'Interno- Dipartimento per le libertà civili e l'immigrazione, "*Standard Operating Procedures*", 2020: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_versione_italiana.pdf.

[58]Cfr. Article 10-ter of the Consolidated Immigration Act: *"Presso i punti di crisi il cittadino è sottoposto alle operazioni di rilevamento fotodattiloscopio e segnaletico, anche ai fini del rispetto degli articoli 9 e*

irregular migrants approved by the Justice of the Peace. According to Article 14 of the Consolidated Immigration Act, the aim of these centers was to avoid the dispersion of irregular migrants on the territory and to allow their expulsion. The length of detention was up to maximum 18 months. The CIEs are run and authorized by Italian legislation[59]. In 2017 the Minniti-Orlando Decree changed the name of Centers of Identification and Expulsion (CIEs) into Return Detention Centers (CPRs). Here, Italy has recently enacted a new decree on immigration (Legislative Decree 130/2020[60]) where Article 3§1 introduced modification into Article 14§§1,5 of the Consolidated Immigration Act. According to it, the length of detention in CPRs shall not exceed 90 days and shall be extended for another thirty days if the migrant is a national of a country with which Italy has signed agreements on removal[61].

Despite this varied number of these facilities, Italy officially recognizes only the Return Detention Centers (CPRs) as detention centers. However, also the other above-mentioned reception facilities resort in practice to *de facto* detention measures[62].

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14 del regolamento Eurodac. Al contempo, lo straniero riceve informazioni sulla procedura di protezione internazionale, sul programma di ricollocazione in altri Stati membri dell'Unione europea e sulla possibilità di ricorso al rimpatrio volontario assistito". However, Article 17 does not specify the functions of the hotspots.

[59]Goldenziel J.I., "*Khlaifia and Others v. Italy*", ed. Wuerth I., in *The American Society of International Law*, Cambridge University, April 25, 2018, pg. 274.

[60]The new decree on immigration has been enacted on October 22, 2020 and it has replaced the previous security and immigration decree of 2018 (the so- called Salvini's decree). There have been changes in some issues, among which the detention length for migrants in CPRs from 180 days to 90 days.

[61]Cfr. Article 3§1 of Legislative Decree 130/2020: "Al decreto legislativo 25 luglio 1998, n. 286 sono apportate le seguenti modificazioni: […] *c) all'articolo 14, sono apportate le seguenti modificazioni: 1) al comma 1, dopo il primo periodo, inserire il seguente: "A tal fine effettua richiesta di assegnazione del posto alla Direzione centrale dell'immigrazione e della polizia delle frontiere del Dipartimento della pubblica sicurezza del Ministero dell'interno, di cui all'articolo 35, della legge 30 luglio 2002, n. 189"; 2) dopo il comma 1, è inserito il seguente: "1.1. Il trattenimento dello straniero di cui non è possibile eseguire con immediatezza l'espulsione o il respingimento alla frontiera è disposto con priorità per coloro che siano considerati una minaccia per l'ordine e la sicurezza pubblica o che siano stati condannati, anche con sentenza non definitiva, per i reati di cui all'articolo 4, comma 3, terzo periodo e all'articolo 5, comma 5-bis, nonché per coloro che siano cittadini di Paesi terzi con i quali sono vigenti accordi di cooperazione o altre intese in materia di rimpatrio, o che provengono da essi."; 3) al comma 5: a) al quinto periodo le parole "centottanta giorni" sono sostituite dalle seguenti: "novanta giorni ed è prorogabile per altri trenta giorno qualora lo straniero sia cittadino di un Paese con cui l'Italia abbia sottoscritto accordi in materia di rimpatri."*:
https://www.money.it/IMG/pdf/decreto_immigrazione_testo.pdf.

[62]Global Detention Project, "*Italy Immigration Detention Profile*", January 2018, pgg.17-21.

2.1.3. The right to liberty in the Italian legislation and in the European Convention on Human Rights

Migrants' detention may lead to a deprivation of their liberties. Personal liberty is of the highest importance in a democratic society, indeed. It has a universal character as it is related to the "human being", regardless of his/ her nationality and any other element of discrimination. For these features, the right to liberty is considered the logical and the legal requirement to all other rights[63]. Both the Italian Constitution[64] and the European Convention on Human Rights[65] underline the importance of the right to liberty.

Article 13 of the Constitution

Personal liberty is inviolable.
No one may be detained, inspected, or searched, or otherwise subjected to any restriction of personal liberty, except by a reasoned order of a judicial authority and only in such cases and in such manner as provided by law.

In exceptional circumstances and under such conditions of necessity and urgency as shall be precisely defined by law, the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective.

Any act of physical or mental violence against persons subjected to a restriction of personal liberty shall be punished.

The law shall establish the maximum duration of any preventive measure of detention (carcerazione preventiva)."

Article 5 of the European Convention on Human Rights

Right to liberty and security
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[63]Edizioni Simone, "*La libertà personale: articolo 13 costituzione*", in *La legge per tutti*, November 25, 2016: https://www.laleggepertutti.it/140923_la-liberta-personale-articolo-13-costituzione.
[64]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §32).
[65]*Ibidem,* §55.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

According to the Italian Constitution, the right to liberty is the essential right of the person not to be subjected to coercion, physical restrictions and arrests and it protects individuals against the abuses of the authority. The importance of the article is strengthened by the use of the adjective "inviolable" which underlines the centrality of this right. Both the Constitution and the Convention contemplate the physical liberty of the person. The Convention also states that the right to liberty means that every person has the right to be protected against arbitrary detention[66]. Therefore, detention necessarily needs a both procedural and substantive legal basis[67]. The Constitution then goes further to explain in practice that deprivation of liberty means to "[…] be detained, inspected, or searched, or otherwise subjected to any restriction of personal liberty". There are only two exceptions on this deprivation: if there is an order by a judicial authority and only if it is due according to the law. In this provision, there are three types of guarantee: absolute legal reservation (*riserva di legge assoluta*), reservation of jurisdiction (*riserva di giurisdizione*) and reservation to state reasons (*obbligo della motivazione*). Firstly, the absolute legal reservation (*riserva di legge assoluta*) gives the competence to decide on the restriction of liberty to the legislative power[68]. Before proceeding in limiting the liberty, the Parliament has to bear in mind these principles: principle of determinacy and clarity (*principio di tassatività o determinatezza*)[69],

[66]Ktistakis Y., "*Protecting migrants under the European Convention on Human Rights and the European Social Character*", Council of Europe, February 2013, pg. 25.
[67]The violation to liberty of Article 5 is not to be confused with the restrictions on liberty of movement of Article 2 Protocol No. 4.

[69]The principle of determinacy and clarity (*principio di tassatività o determinatezza*) consists in formulating the law in a clear and concrete way to avoid misunderstanding. In this way, the judge who reads that law will not take a decision on a case arbitrarily.

principle of guilty (*principio di colpevolezza*)[70], principle of the personality of criminal liability (*principio della personalità della responsabilità pensale*)[71] and principle of the harmfulness of the offence (*principio di offensività e lesività del reato*)[72]. Secondly, the reservation of jurisdiction (*riserva di giurisdizione*) allows the judicial authority to limit the liberty. Lastly, reservation to state reasons (*obbligo di motivazione*) guarantees that every decision narrowing personal freedom is motivated[73]. In addition, the article also provides police officers with guidelines for restricting liberty in emergency cases: they are authorized to apply for interim measures, which are consequently submitted for validation to the judicial authority within 48 hours. The judicial authority has to validate (or not) this measure within the next 48 hours. This was exactly what the police officers did not do in the Khlaifia and Others v. Italy judgment. For these reasons, the detention was not considered as lawful. Unlike the Constitution, Article 5 of the Convention does not specify concretely the meaning of deprivation of liberty. According to the case-law, the starting point must be the concrete situation which takes into account criteria as the type, duration, effects and implementation of the measure in question[74]. The Convention is considered "a living instrument which […] must be interpreted in the light of present-day conditions[75]", indeed. This also means that the application of Article 5 must consider the national law and, where appropriate, other applicable legal standards in international law[76] or European law[77]. Indeed, Article 5 of the Convention states that in order to meet the requirement of lawfulness, detention must be "in accordance with a procedure prescribed by law". Afterwards in the Article, there is a set

[70]The principle of guilty (*principio di colpevolezza*) states that a penalty can be imposed only in case of a guilty conduct. The conduct may be both a malice and negligence.
[71]The principle of the personality of criminal liability (*principio della personalità della responsabilità penale*) enunciates that no one can be criminally responsible for acts committed by third parties.
[72]The principle of the harmfulness of the offence (*principio di offensività e lesività del reato*) reminds the legislator to take into account the real gravity of the damage.
[73]Edizioni Simone, "*La libertà personale: articolo 13 costituzione*", in *La legge per tutti*, November 25, 2016: https://www.laleggepertutti.it/140923_la-liberta-personale-articolo-13-costituzione.
[74]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2015, §71), *H.L. v. the United Kingdom* (no. 45508/99, October 5, 2004, §90), *H.M. v. Switzerland* (no. 39187/98, February 26, 2002, §§30 and 48), *Creangă v Romania* (no. 29226/03, February 23, 2012, §91).

[75]Garlicki L., "*Judicial Deliberations: The Strasbourg Perspective*", in N.Huls, M.Adam and J. Bomhoff (eds), "*The Legitimacy of Highest Courts' Ruling: Judicial Deliberation and Beyond*", The Hague, TMC Asser Press, pg. 390.
[76]Cfr. *Medvedyev and Others v. France* (no. 3394/03, March 29, 2010, §79); *Toniolo v. San Marino and Italy*, (no. 44853/10, June 26, 2012, §46).
[77]Cfr. *Paci v. Belgium* (no. 45597/09, April 17, 2018, §64) and *Pirozzi v. Belgium* (no. 21055/11, April 17, 2018, §§45-46).

of exceptions to the right of liberty. The case-law states that no deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5§1[78]. Clearly, these sub-paragraphs must be interpreted in the light of national law. In immigration detention issues, the Court has often to determine whether a violation of Article 5§1 f) has taken place. The sub-paragraph f) allows States to control the liberty of aliens in an immigration context in two different situations: the first one permits the detention of an asylum-seeker or other immigrant prior to the State's grant of authorization to enter[79], whereas the second one points out that states are entitled to keep an individual in detention for the purpose of his deportation or extradition[80]. With regard to the consequences on a person the restriction of liberty may lead, the Constitution punishes any act of physical or mental violence against that person. On the contrary, Article 5 of the Convention does not make mention of it. With reference to its length, detention must generally last for the shortest possible period. Article 13 of the Constitution establishes the "maximum duration of any preventive measures of detention", whereas Article 5 of the Convention points out the absence of a provision prescribing maximum time-limits. The case-law states that "the question whether the length of deportation proceedings could affect the lawfulness of detention under this provision thus depends solely on the particular circumstances of each case[81]". In addition, prolonged periods of detention or uncertainty as to the length of detention may lead to inhuman or degrading treatment in violation of Article 3 of the Convention[82]. Unlike the Constitution, the Convention provides procedural safeguards. Article 5§2 states that any person arrested must be promptly told in a comprehensible, simple and non-technical language the legal and factual grounds for his/ her deprivation of liberty. In this way, he/ she can lodge an appeal against the lawfulness of detention according to Article 5§4. Additionally, the Court points also out that migrants deprived of their liberties may have given legal advice[83]. In this regard, however, it is important

[78]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2015, §88).
[79]European Court of Human Right, "*Guide on the case-law of the European Convention on Human Rights- Immigration*", pg. 12: https://rm.coe.int/court-case-law-guide-immigration-eng/16809f1556.
[80]European Court of Human Right, "*Guide on the case-law of the European Convention on Human Rights- Immigration*", pg. 26: https://rm.coe.int/court-case-law-guide-immigration-eng/16809f1556.
[81]Cfr. *Auad v. Bulgaria* (no. 46390/10, October 11, 2011, §128).
[82]Ktistakis Y., "*Protecting migrants under the European Convention on Human Rights and the European Social Character*", Council of Europe, February 2013, pg. 33.
[83]*Ibidem*, pg. 30.

to mention the new decree on immigration in the Italian context (Legislative Decree 130/2020) whose Article 3§1 has modified the Article 10ter §3 of the Consolidated Immigration Act. This article states that a foreigner in a CPR must be informed about his/ her rights regarding detention in a language that he/ she has[84].

2.1.4. Legal detention according to the Return Directive and the International Law Commission

European and international law deal also with migration detention issue. In the Khlaifia judgment, the Court cited the Return Directive[85] with regard to Articles 15 (detention) and "draft articles on the expulsion of aliens" by the International Law Commission[86]. They both state that detention is only allowed for those people who are subjected to return processes. Particular attention is given to those cases where there is a risk of absconding or non- collaboration with the third-country national. Article 19 of ILC's draft refers particularly to detention of an alien for the purpose of expulsion, which shall be neither arbitrary nor punitive in nature. It adds that the alien detained for the purpose of expulsion shall be separated from other people condemned to penalties involving deprivation of liberty. With reference to its length, detention shall be as short as possible and for as long as the return processes are completed. The Directive of Return also imposes to Member States that detention shall not exceed six months. Only in particular circumstances, they shall extend the duration until twelve months[87]. Moreover, detention shall be ordered by a written decision of administrative or judicial authorities and take into account with in fact and in law reasons and it shall be reviewed

[84]Cfr. Article 3§1 of Legislative Decree 130/2020: "Al decreto legislative 25 luglio 1998, n.286 sono apportate le seguenti modificazioni: a) all'articolo 10-ter, comma 3, è inserito in fine il seguente periodo: *Lo straniero è tempestivamente informato dei diritti e delle facoltà derivanti dal procedimento di convalida del decreto di trattenimento in una lingua da lui conosciuta, ovvero, ove non sia possibile, in lingua francese, inglese o spagnola*": https://www.money.it/IMG/pdf/decreto_immigrazione_testo.pdf.
[85]In the European Union context, the return of irregular migrants is governed by 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".
[86]The International Law Commission (ILC) is an expert body, composed of "persons of recognized competence in international law", that works on the progressive development and codification of international law. In 2014, it adopted a set of "Draft articles on the expulsion of aliens". This text was submitted to the United Nations General Assembly.
[87]This extension of time shall be in line with the national law and it shall occur when there is a lack of cooperation by the concerned third- country individual and there are problems in getting the documentation from third countries.

regularly. If detention is unlawful, the third- country national should be released immediately. Article 16 of the Return Directive goes further with the legal conditions of detention. Firstly, detention shall take place in a specialized detention facility. As written above, Italy recognizes officially only the CIE (Identification and Expulsion Center) later converted into CPR (Return Detention Center) as a detention center. There, competent national, international and non-governmental organizations and bodies shall enter these facilities with an authorization. The migrants in CIEs have the right to ask for contact with legal representatives, family members and consular authorities. Additionally, they shall be always provided with information about the rules of the facility, their rights and obligations. Particular care should be given to vulnerable individuals. However, the situation is not exactly like that in the reality. As seen above, the Khlaifia case shows that other reception facilities had been used *de facto* as detention ones, instead. In this way, migrants could not only benefit from the legal safeguards provided by detention centers[88], but they were also subjected to the arbitrariness of police officers working in the CSPA both in terms of detention practice and its length. This led to a violation of migrants' rights.

2.2. Prohibition of torture, inhuman and degrading treatment or punishment

The European Convention on Human Rights establishes in its Article 3 that:

> *No one shall be subjected to torture or*
> *to inhuman or degrading treatment or punishment.*[89]

Despite its brief length, Article 3 entails a right of paramount significance under international human rights law. The case-law of torture, inhuman or degrading treatment or punishment has changed over time. This is due to the dynamic nature of the Convention and to the real importance of this article: some acts that were categorized in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in the future. What is important for the Court is the distinction between torture, inhuman treatment or punishment and degrading treatment or punishment. The UN Convention against Torture and other Cruel, Inhuman or

[88]The applicants were in a CSPA which is a transfer center and not a detention one.
[89]Cfr. Article 3, European Court of Human Rights, Council of Europe, "*European Convention on Human Rights*", November 04, 1950: https://www.echr.coe.int/documents/convention_eng.pdf.

Degrading Treatment or Punishment (UNCAT) of December 10, 1984[90]defines torture as any act by which severe pain or suffering whether physical or mental which has a purpose such as obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment[91]". Basically, torture shall have two elements: a severe inhuman treatment and a particular purpose. By contrast, there is no universally accepted definition of inhuman and degrading treatment or punishment. In the Greek case[92], "inhuman" treatment was described as a treatment which deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable[93], whereas "degrading" treatment is a treatment that grossly humiliates an individual before others or drives him/ her to act against his/ her will or conscience[94]. What distinguishes inhuman from degrading treatment is that the latter shall have two additional elements: a serious humiliation and a conduct which lowers the victim in his/ her eyes[95]. The Court distinguishes torture, inhuman and degrading treatment and punishment on the basis of the degree of severity of ill-treatment[96]. By the degree of severity, it is meant the duration of the treatment, its physical and psychological effects and, sometimes, the sex, age and state of health of the victims. Other decisive factors are the purpose of ill-treatment and the context[97]. Generally, by torture and inhuman treatment or punishment, the suffering caused must have reached a sufficient level of severity, whereas in the case of degrading treatment, the key element is the humiliation[98]. Additionally, the Court states that torture, inhuman or degrading

[90]The UNCAT was ratified by the Italian Government with the Law n.498/1988.
[91]Cfr. Article 1, UN Human Rights, Office of the High Commissioner, "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*", June 26, 1987: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.
[92]The Greek case concerns the finding of serious violations, among which torture, by the Greek junta. This case was lodged in 1967 by Denmark, Norway, Sweden and Netherlands against the Greek junta to the European Commission of Human Rights and it was one of the most famous ones in the Convention's history.
[93]Council of Europe, "*Yearbook of the European Convention on Human Rights*", Volume 12, 1 July 1972, paragraph 186.
[94]*Ibidem.*
[95]Duffy P.J., "*Article 3 of the European Convention on Human Rights*", in *International and comparative law quarterly*, 1983, pg. 319.
[96]"Conduct must attain a minimum level of severity if it is to fall within the scope of Article 3", cfr. *Ireland v. The United Kingdom* (no. 5310/71, January 18, 1978, §162*), Tyrer v. The United Kingdom* (no. 5856/72, April 25, 1978, §30).
[97]De Franceschini P., "*Divieto di tortura: dai principi internazionali alla Legge 110/ 2017*", in *Giurisprudenza penale*, February 18, 2016, pg.5: www.giurisprudenzapenale.com.
[98]Duffy P.J., "*Article 3 of the European Convention on Human Rights*", in *International and comparative law quarterly*, 1983, pg. 320.

treatment or punishment must be proved with strong evidence, and not with mere hypothetical speculations[99]. Another important feature of Article 3 is its absolute nature. The force of Article 3 of the ECHR comes from the fact that in the Court's own opinion it enshrines one of the fundamental values of the democratic societies making up the Council of Europe[100] and that there can never be under the Convention, or under international law, a justification for acts in breach of that provision[101]. Its absolute character has been codified in a wide range of universal and regional instruments and, today, is recognized as part of customary international law[102]. In order to give a practical effect to the prohibition, international law establishes both positive and negative obligations for States[103]. Briefly, in positive terms States must take effective legislative, administrative, judicial or other measures to prevent acts of torture and ill-treatment in every territory, whereas in negative terms States must abstain from any act of torture or ill-treatment[104]. In all their decisions, acts and omissions, States must interpret and perform their international obligations in good faith[105].

2.2.1. Torture, inhuman and degrading treatment or punishment in migration-related detention

In many parts of the world, migrants have been victims of torture and inhuman or degrading treatment or punishment in different ways[106]. The Khlaifia and Others v. Italy judgment sheds light upon the real conditions under which migrants are detained and it showed how reception facilities are *de facto* detention structures. Theoretically, any detention of migrants must take place in appropriate, sanitary, non- punitive facilities,

[99]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §208).
[100]Cfr. *Soering v. United Kingdom* (no. 14038/88, July 7, 1989, §88).
[101]Cfr. *Ireland v. The United Kingdom* (no. 5310/71, March 20, 2018, §162).
[102]Human Rights Council, "*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*", February 26, 2018, pg. 4.
[103]Positive obligations are "duties to ensure", whereas negative obligations are "duties to respect".
[104]*Ibidem,* pg. 5.
[105]The good faith concept comes from the Latin expression "*pacta sunt servanda*" which means "agreements must be kept".
[106]The above-mentioned "Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment" has described the violation of Article 3 ECHR towards migrants in different contexts such as in detention, in smuggling and trafficking of migrants and with reference to non-refoulment principle. In this paragraph, we are only going to deal with the detention issue, since it has been taken into account in the analyzed judgment Khlaifia and Others v. Italy. Due to its importance, the non-refoulement related to the crime of torture will be mentioned in the next paragraph.

but this is far from reality. Among the most common problems, numerous press and stakeholder reports have listed the awful physical and hygiene conditions, extreme overcrowding, solitary confinement, insufficient access to food, water and medical care. This is all complicated by deliberate abuse by State officials, private guards or fellow detainees, sexual abuse, enslavement and torture and ill-treatment of migrant children[107]. What emerges from the Khlaifia judgment is that the violation of Article 3 of the Convention is strictly connected to overcrowd. According to the case-law, both a 3 square meters space and a larger space with no open air and sanitary conditions can be considered a violation of Article 3[108]. Therefore, the conditions of the center play an important role: ill-treatment or grossly inadequate detentions can even turn into torture if intentionally imposed, encouraged or tolerated by States for reasons based on discrimination of any kind, among which that based on immigration status. Migrants with irregular status or other vulnerabilities are the most affected by torture and inhuman and degrading treatment and punishment, indeed. This is due to the prolonged and potentially indefinite duration of their detention causing them mental and emotional stress which is added to their already extremely vulnerable status of irregular migrants. Also, they are victims of arbitrary detention by the authorities who decide the length of migrants' detention according to their status (irregular or not) and not to the state of law.

2.2.2. The prohibition of torture and ill-treatment in the light of the principle of non-refoulement

The prohibition of torture and ill-treatment is further concretized by the principle of non-refoulement. Refoulement refers to every act of returning a person to a country where the migrant fears or risks his/ her life because of race, religion, nationality, membership of a particular social group or political opinion[109]. Refoulement includes

[107]For more detailed information, it is recommended to read the research carried out by Amnesty International in Italy. Amnesty International, *"Hotspot Italy: how EU's flagship approach leads to violations of refugee and migrant rights"*, November 03, 2016: https://www.amnesty.org/en/documents/eur30/5004/2016/en/%20/.
[108]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §§163-168).
[109]Lambert H., "*Protection Against Refoulement from Europe: Human Rights Comes to the Rescue",* in online *Cambridge University Press*, January 17, 2008, pg. 515.

acts of expulsion, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, namely persecution, torture, or inhuman treatment[110]. As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of non-refoulement is characterized by its absolute nature without exceptions[111]. The principle of non-refoulement imposes obligations on States: they cannot expel, return or extradite a person to another State when he/she would be in danger or subjected to torture if he/ she returned to his/ her home country. Therefore, States have the duty to analyze all relevant conditions of that State[112]. A refugee, an asylum seeker waiting for a decision in refugee status[113] or a person under risk of persecution if returned to his/ her home country[114]can benefit from the principle of non-refoulement. The protection against refoulement is thus closely related to protection against torture and inhuman or degrading treatment. Generous protection against refoulement from Europe lies in the development of the case law of the European Court of Human Rights. Indeed, Article 3 of the Convention has been interpreted by the Court as providing an effective means of protection against all forms of return to places where there is a risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment. Before the Court, an

[110]*Ibidem*, pg. 519.
[111]Human Rights Council, "*Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*", February 26, 2018, pg. 12.
[112]Cfr. Article 3§§1,2, UN Human Rights, Office of the High Commissioner*,* "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*", June 26, 1987: "1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.": https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

Cfr. Article 33§§1,2 Secretary-General of the United Nations, "*The Convention Relating to the Status of Refugee*", July 28, 1951*:* "prohibition of expulsion or return ("refoulement") 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.": https://www.unhcr.org/3b66c2aa10.

[113]Lambert H., "*Protection Against Refoulement from Europe: Human Rights Comes to the Rescue",* in online *Cambridge University Press*, January 17, 2008, pg. 516.
[114]*Ibidem*. The 1951 Refugee Convention applies the non-refoulement principle only to refugees and asylum seekers, whereas the 1950 European Convention on Human Rights is broader, and it refers to all those whose life is in danger if they came back.

asylum seeker (or whoever wants to be protected by the non-refoulment principle) must demonstrate the existence of "substantial ground" (whether he/ she would face ill-treatment in the event of expulsion) and the existence of a real risk[115] (whether he/ she is expected to face ill-treatment in the event of expulsion). On an international level[116], the European Court of Human Rights has recently demonstrated developments in the application of Article 3 of the Convention as it had a direct impact on the protection of asylum-seekers. Progress has been made at national level, too. Italy has recently taken steps further regarding the protection of migrants who may be at risk of torture if sent back in their home countries. In particular, we are making reference at Article 3§1of the new Legislative Decree 130/2020, which modified Article 19 of the Immigration Consolidated Act extending the cases in which refoulement, expulsion or extradition are prohibited[117]. To sum up, the principle of non-refoulement and the prohibition of torture

[115]The Court recognizes a "real risk" when "the foreseeable consequences" of the State party's decision to extradite (expel or deport) is that the applicant will be subject to treatment contrary to Article 3 in the requesting country. In assessing such foreseeability, the Court takes various considerations into account (e.g. the general and special circumstances of each individual case, the relevant national legislation and practice relating to expulsion, the situation in the country of destination, in particular the current probability of torture, persecution, inhuman or degrading treatment, according to the reports and conclusions of investigations carried out by the national authorities, the United Nations and even sometimes certain non-governmental organizations).

[116]On an international level, when dealing with the principle of non-refoulement, it is important to mention, the 1950 European Convention of Human Rights, the 1951 UN Refugee Convention, the 1966 UN International Covenant on Civil and Political Rights and the 1984 UN Convention against Torture.

- European Court of Human Rights, Council of Europe, "*European Convention on Human Rights*", November 04, 1950: https://www.echr.coe.int/documents/convention_eng.pdf.
- Secretary-General of the United Nations, "*The Convention Relating to the Status of Refugee*", July 28, 1951: https://www.unhcr.org/3b66c2aa10.
- UN Human Rights, Office of the High Commissioner*, "International Covenant on Civil and Political Rights",* December 16, 1966: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
- UN Human Rights, Office of the High Commissioner*, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"*, June 26, 1987: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx

For further reading about comparative studies among all these Conventions, it is interesting the above-mentioned article by Lambert:
Lambert H., "*Protection Against Refoulement from Europe: Human Rights Comes to the Rescue",* in online *Cambridge University Press*, January 17, 2008.

[117]Cfr. Article 3§1 of Legislative Decree 130/2020: "*Al decreto legislative 25 luglio 1998, n.286 sono apportate le seguenti modificazioni: […] f) all'articolo 19: 1) il comma 1.1 è sostituiti dal seguente: 1.1. Non sono ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondanti motivi di ritenere che essa rischi di essere sottoposta a tortura o a trattenimenti inumani o degradanti. Nella valutazione di tali motivi si tiene conto anche dell'esistenza, in tale Stato, di violazioni sistematiche e gravi di diritti umani. Non sono altresì ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondati motivi di ritenere che l'allontanamento dal territorio nazionale comporti una violazione del diritto al rispetto della propria*

and inhuman and degrading treatments or punishment impose to States to pay much more attention to the rights of migrants in the process of expulsion.

2.2.3. Prohibition of torture in the Italian legislation

At the time of Khlaifia case, the domestic law did not contain any reference to the crime of torture. It was only in 2015 that the Italian Government speeded up the process of alignment of Italian legislation to international and supranational law in this field and introduced the crime of torture into the Italian legislative system as suggested by the European Court of Human Rights judgment in the Cestaro case v. Italy[118]. Article 1 of Law 110/2017 introduced into the Penal Code[119] the crimes of torture (Article 613-bis) and the incitement to torture (Article 613-ter). Generally, the aim of this law is to protect citizens from the abuse of power by public officials. Article 13-bis[120] punishes with imprisonment from four to ten years whoever causes acute physical suffering or

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vita privata e familiare, a meno che esso non sia necessario per ragioni di sicurezza nazionale ovvero di ordine e sicurezza pubblica. Ai fini della valutazione del rischio di violazione di cui al periodo precedente, si tiene conto della natura e della effettività dei vincoli familiari dell'interessato, del suo effettivo inserimento sociale in Italia, della durata del suo soggiorno nel territorio nazionale nonché dell'esistenza di legami familiari, culturali o sociali con il suo Paese di origine":
https://www.money.it/IMG/pdf/decreto_immigrazione_testo.pdf.

[118]Cfr. *Cestaro v. Italy* (no. 6884/11, April 7, 2015). The case concerned events occurred at the end of the G8 summit in Genoa in July 2001 in the school Diaz – Pertini made available by the municipal authorities to be used as a night shelter by demonstrators. An anti-riot police unit entered the school around midnight, and they led acts of violence which amounted to torture within the meaning of Article 3 of the Convention. The judgment imposed the positive obligation to introduce a properly adapted legal framework the Italian Government including effective criminal-law provisions with regard to torture crime.

[119]Title XII (Crimes against the Person), Section III (Crimes against morality).

[120]Cfr. Article 613-bis, Penal Code: "*Chiunque, con violenze o minacce gravi, ovvero agendo con crudeltà, cagiona acute sofferenze fisiche o un verificabile trauma psichico a una persona privata della libertà personale o affidata alla sua custodia, potestà, vigilanza, controllo, cura o assistenza, ovvero che si trovi in condizioni di minorata difesa, è punito con la pena della reclusione da quattro a dieci anni se il fatto è commesso mediante più condotte ovvero se comporta un trattamento inumano e degradante per la dignità della persona.*
Se i fatti di cui al primo comma sono commessi da un pubblico ufficiale o da un incaricato di un pubblico servizio, con abuso dei poteri o in violazione dei doveri inerenti alla funzione o al servizio, la pena è della reclusione da cinque a dodici anni.
Il comma precedente non si applica nel caso di sofferenze risultanti unicamente dall'esecuzione di legittime misure privative o limitative di diritti.
Se dai fatti di cui al primo comma deriva una lesione personale le pene di cui ai commi precedenti sono aumentate; se ne deriva una lesione personale grave sono aumentate di un terzo e se ne deriva una lesione personale gravissima sono aumentate della metà.
Se dai fatti di cui al primo comma deriva la morte quale conseguenza non voluta, la pena è della reclusione di anni trenta.
Se il colpevole cagiona volontariamente la morte, la pena è dell'ergastolo".

psychological trauma using threats and violence to a person deprived of his/ her personal freedom or in conditions of impaired defense. The act shall be committed with more than one conduct or to involve inhuman and degrading treatment for the dignity of the person. Then afterwards, the Article added particular facts of the case: the first one refers to crimes committed by a public official or public service officer with abuse of power or other violations. For them, the imprisonment is from five to twelve years. The second group of particular facts consists of having caused common personal injuries (increase of up to 1/3 of the penalty), serious injuries (increase of 1/3 of the penalty) or very serious injuries (increase of 1/3 of the penalty). The aggravated offence is characterized by more than one conduct. The last specific case concerns death as a consequence of torture. If death is not intentional, the imprisonment is up to thirty years. If it is, the perpetrator is condemned to life imprisonment. Article 613-ter[121] punishes the incitement of public officials or public service officers to commit torture. For them, imprisonment varies from six months to three years. With regard to immigration, the Law 110/ 2017 introduced into article 19 of Consolidated Immigration Act [122] a new paragraph 1-bis which establishes that expulsion, removal and extradition are not allowed in case the migrant would be at risk of torture back in his/ her home country. Article 4[123] of the Law 110/ 2017 excludes any immunity to migrants who are investigated or convicted of the crime of torture in another State or by an international court. It refers to Heads of State or Government as well as diplomatic and consular members who may be accredited to Italy by a foreign State. Lastly, the article provides an obligation to extradite the migrants suspected or convicted of the crime of torture to the requesting State. In case of a proceeding before an international court, the migrant is

[121]Cfr. Article 613-ter, Penal Code: "*Istigazione del pubblico ufficiale a commettere tortura. Il pubblico ufficiale o l'incaricato di un pubblico servizio il quale, nell'esercizio delle funzioni o del servizio, istiga in modo concretamente idoneo altro pubblico ufficiale o altro incaricato di un pubblico servizio a commettere il delitto di tortura, se l'istigazione non è accolta ovvero se l'istigazione è accolta ma il delitto non è commesso, è punito con la reclusione da sei mesi a tre anni.*"

[122]Cfr. Article 19, Consolidated Immigration Act: "*Non sono ammessi il respingimento o l'espulsione o l'estradizione di una persona verso uno Stato qualora esistano fondati motivi di ritenere che essa rischi di essere sottoposta a tortura."*

[123]Cfr. Article 4, Law 110/ 2017: "Esclusione dall'immunità. Estradizione nei casi di tortura. *1. Non può essere riconosciuta alcuna forma di immunità agli stranieri sottoposti a procedimento penale o condannati per il reato di tortura in altro Stato o da un tribunale internazionale. 2. Nel rispetto del diritto interno e dei trattati internazionali, nei casi di cui al comma 1, lo straniero è estradato verso lo Stato richiedente nel quale è in corso il procedimento penale o è stata pronunciata sentenza di condanna per il reato di tortura o, nel caso di procedimento davanti ad un tribunale internazionale, verso il tribunale stesso o lo Stato individuato ai sensi dello statuto del medesimo tribunale*".

extradited according to the international law. Although criticized[124], Law 110/2017 can be considered a little step further regarding the protection of human rights. To conclude, Article 3 of the Convention focuses more on the absolute character of the prohibition of torture and its application depends on the context and on the national law in which the crime has taken place, whereas Law 110/2017 provides more clear legal remedies for those who have committed the crime.

2.3. Collective expulsion

The word expulsion comes from Latin *expulsion*, stem of the verb *expellere* which means "drive out, drive away"[125]. Indeed, according to the IOM, expulsion is an act by an authority of a State with the intention and with the effect of securing the removal of a person or persons (non-nationals or stateless persons) against his/ her will from the territory of that State[126]. This leads a State to exercise a sovereign prerogative on the presence of foreigners in its territory. However, this power is not unlimited and arbitrary because of national and international law which regulate the process of expulsion. From the Khlaifia case, we have seen domestic and international laws regarding expulsion, namely the Consolidate Immigration Act and Article 4 of Protocol No.4 which we are going to analyze in the next sub- paragraphs.

[124]Law 110/ 2017 has been criticized by many organizations engaged in human rights issues, among which Amnesty International and Antigone. Through its legislative process, this law has been modified a lot in comparison to what was proposed at the beginning. Firstly, the first draft concerned the crime only by public officials or public service officers, whereas the new law concerns everyone who commits a torture. For some, it is in contrast with the meaning of torture according to UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ratified by Italy in 1989. In international law, the offence of torture was considered a typical crime by public officials and therefore the law should have been referred to them and not to private citizens in general. More generally the law against torture should have been meant to protect citizens from the abuse of power. Secondly, the new law punishes a crime of torture trough more than one conduct and thus it excludes a single act of violence. Thirdly, the new law refers to torture as an act causing acute physical suffering or verifiable psychic trauma. The adjective "verifiable" potentially excludes many acts from being classified as torture. Therefore, the law could be much less effective.
[125]Expulsion, Online Etymology Dictionary: https://www.etymonline.com/word/expulsion [28/10/2020].
[126]IOM (International Organization for Migration), Perruchoud R. and Redpath-Cross J. (eds.), "*Glossary on Migration",* 2nd Edition, n°25 in International Migration Law, 2011, pg. 35.

2.3.1. The Consolidated Immigration Act

According to the Italian law, there is a distinction between refusal-of-entry and expulsion. Refusal-of-entry has two different procedures: refusal of entry at the border and differed refusal of entry. The first one refers to the immediate rejection of those migrants who, after border police checks, are found not to have the requirements[127] to enter the territory[128]. Conversely, the differed refusal of entry, is not immediate and it refers to all those foreigners who are arrested upon the entrance of a territory or immediately afterwards and to all those who have been temporarily allowed to remain for purposes of public assistance[129]. For as long as migrants are in Italy, they are

[127]The requirements stated in Article 4 §§1,3,6 and Articles 5 and 13 of Schengen Border Code[127] are the following:
1) possession of a valid travel document or equivalent document,
2) possession of an entry visa, unless there is an exemption prescribed,
3) documentations confirming the purpose and the conditions of the stay,
4) sufficient means of subsistence both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted or are in a position to acquire such means lawfully,
5) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry,
6) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds,
7) they are not recipient of an expulsion order,
8) they are not subjected of a re-entry ban, unless they did not obtain the authorization by the Ministry of the Interior according to Article 12 of the Consolidated Immigration Act.

Legislative Decree No. 286 of 1998 (Consolidated Act of Provisions concerning immigration and rules on the status of aliens) amended by Laws no.271 of 2004 and no. 155 of 2005, and by Legislative Decree no.150 of 2011, 27 July 1998: https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals [28/10/2020].

European Parliament of the Council of 15 March 2006, Regulation (EC) No. 562/2006 (Schengen Borders Code): https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R0562&from=EN [28/10/2020].

[128]Cfr. Article 10§1, Consolidated Immigration Act: *"La polizia di frontiera respinge gli stranieri che si presentano ai valichi di frontiera senza avere i requisiti richiesti dal presente testo unico per l'ingresso nel territorio dello Stato*": https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals
[28/10/2020].

[129]Cfr. Article 10 § 2, Consolidated Immigration Act: *"Il respingimento con accompagnamento alla frontiera è altresì disposto dal questore nei confronti degli stranieri: a. che entrando nel territorio dello Stato sottraendosi ai controlli di frontiera, sono fermati all'ingresso o subito dopo; b. che, nelle circostanze di cui al comma 1, sono stati temporaneamente ammessi nel territorio per necessità di pubblico soccorso."*

detained in a CIE and after a careful examination, the Chief of Police accompanies them to the border, since they are considered to have entered and stayed in the territory irregularly. Both the refusal of entry at the border and the differed refusal of entry do not prevent migrants to re-try to enter in the territory and it does not involve an alert in the Schengen Information System. Therefore, the foreigner who is refused to entry for the lack of some requirements can at any time afterwards try again to enter regularly, provided that is in the possession of the previously missing requirements. Regarding expulsions, they are divided into administrative and judicial according to the authority who issues them. Administrative expulsions are ordered by the administrative authority who has three obligations: this authority shall justify his/ her choices in fact and in law, communicate them to the addressee and finally sign officially the act of expulsion. The obligation of translation plays an important role, too[130]. Administrative expulsions can be ordered by the Ministry of the Interior against foreigners who are considered dangerous for the public order or the security of the State[131] or by the Prefect against migrants whose stay is irregular[132]. Judicial expulsions are ordered by the judicial authorities as a consequence of criminal proceedings. On the basis of the reasons, judicial expulsions are classified in expulsions as a security measure[133], expulsions as

https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals [28/10/2020].

[130]ASGI, *"Espulsioni e respingimenti: i profili sostanziali",* scheda pratica a cura dell'avv. Savio, G., giugno 2016, pgg. 19-23: https://www.asgi.it/wp-content/uploads/2016/09/2016_DEF_ESPULSIONI-E-RESPINGIMENTI-_-I-PROFILI-SOSTANZIALI-stampabile.pdf.

[131]Cfr. Article 13§1, Consolidated Immigration Act*:* "*Per motivi di ordine pubblico o di sicurezza dello Stato, il Ministro dell'interno può disporre l'espulsione dello straniero anche non residente nel territorio dello Stato, dandone preventiva notizia al Presidente del Consiglio dei Ministri e al Ministro degli affari esteri.*": https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

[132]Cfr. Article 13§2, Consolidated Immigration Act: "2. *L'espulsione è disposta dal prefetto quando lo straniero: a. è entrato nel territorio dello Stato sottraendosi ai controlli di frontiera e non è stato respinto ai sensi dell'art. 10; b. si è trattenuto nel territorio dello Stato senza aver chiesto il permesso di soggiorno nel termine prescritto, salvo che il ritardo sia dipeso da forza maggiore, ovvero quando il permesso di soggiorno è stato revocato o annullato, ovvero è scaduto da più di sessanta giorni e non è stato chiesto il rinnovo; c. appartiene a taluna delle categorie indicate nell'art. 1 della legge 27 dicembre 1956, n. 1423, come sostituto dall'art. 2 della legge 3 agosto 1988, n. 327, o nell'art. 1 della legge 31 maggio 1965, n. 575, come sostituito dall'art. 13 della legge 13 settembre 1982, n. 646.*" https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

[133]Cfr. Article 15§1, Consolidated Immigration Act: "1. *Espulsione a titolo di misura di sicurezza e disposizioni per l'esecuzione dell'espulsione (Legge 6 marzo 1998, n. 40, art. 13) 1. Fuori dei casi previsti dal codice penale, il giudice può ordinare l'espulsione dello straniero che sia condannato per taluno dei delitti previsti dagli articoli 380 e 381 del codice di procedura penale, sempre che risulti socialmente pericoloso.*": https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-

an alternative measure to detention[134] and expulsions as an alternative sanction of the pecuniary penalty decided by the Justice of the Peace[135] in case the migrant was condemned for illegal entry or stay or he/ she did not respect the refusal of entry orders by the Chief of the Police. Both administrative and judicial expulsions have the same effects: they oblige the migrant to leave the territory (immediately or within a certain period of time), inform the Schengen Information System about the expulsion so that he/ she cannot enter Italy or one of the other States of the Schengen area for a certain period of time and suspend any eventual penal proceeding of the migrant[136].

2.3.2. Article 4 of the Protocol No.4 to the European Convention on Human Rights

Unlike the Italian law, the European Convention of Human Rights provides neither a distinction between the concepts of refusal of entry and expulsion nor a specific classification of each of them. In the Convention there are two articles in which expulsion of aliens is mentioned: Article 1 of Protocol No.7 and Article 4 of Protocol No.4. If the first one dwells only on some procedural safeguards of those aliens lawfully resident in a State[137], the second one represents a specific type of expulsion, namely the

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no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

[134]Cfr. Article 16§5, Consolidated Immigration Act: "5. *Nei confronti dello straniero, identificato, detenuto, che si trova in taluna delle situazioni indicate nell'articolo 13, comma 2, che deve scontare una pena detentiva, anche residua, non superiore a due anni, è disposta l'espulsione. Essa non può essere disposta nei casi in cui la condanna riguarda uno o più delitti previsti dall'articolo 407, comma 2, lettera a), del codice di procedura penale, ovvero i delitti previsti dal presente testo unico.*" https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

[135]Cfr. Article 16, Consolidated Immigration Act: "*Espulsione a titolo di sanzione sostitutiva o alternativa alla detenzione*": https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

[136]ASGI, "*Espulsioni e respingimenti: i profili sostanziali*", scheda pratica a cura dell'avv. Savio, G., giugno 2016, pg. 23: https://www.asgi.it/wp-content/uploads/2016/09/2016_DEF_ESPULSIONI-E-RESPINGIMENTI-_-I-PROFILI-SOSTANZIALI-stampabile.pdf.

[137]Cfr. Article 1 of Protocol No.7, European Court of Human Rights, Council of Europe, "*European Convention on Human Rights*", 4 November 1950: *"Procedural safeguards relating to expulsion of aliens 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1. (a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."* https://www.echr.coe.int/documents/convention_eng.pdf.

collective one. Protocol No. 4 was drafted in 1963 and it was the first international treaty to address collective expulsion. The purpose of Article 4 Protocol No. 4 is to prevent States from having the authority to remove a certain number of aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority[138]. The Article states:

Collective expulsion of aliens is prohibited.

Generally, collective expulsion refers to any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group[139]. The Court has developed its case-law on the meaning of "collective" and "expulsion". Collective refers neither to the number of people involved in the expulsion nor to a membership of a particular group[140], but it rather addresses to the modality of the expulsion. It means that Article 4 Protocol No. 4 offers a procedural guarantee to migrants, namely an individual interview. Thus, collective expulsions take place when two constitutive elements are simultaneously present: the aliens are expelled together with other aliens in a similar situation, without due examination of their own individual situations. With regard to expulsion, the drafters of Protocol No. 4 meant it "in the generic meaning[141], in current use (to drive away from a place)[142]". Moreover, expulsion refers to any forcible removal of an alien from a State's territory and it does not depend on the lawfulness of the person's stay, the length he/ she spent in the territory, the place in which he/ she was arrested, his/ her legal status as or his/ her

[138]Cfr. *Hirsi Jamaa and Others v. Italy* (no. 277765/09, February 23, 2012, § 177).
[139]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, § 237); *Georgia v. Russia (I)* (no. 13255/07, July 3, 2014, §167); *Čonka v. Belgium* (51564/99, February 05, 2002, §59); *Sultani v. France*, (no. 45223/05, September 20, 2007, §81).
[140]Cfr. *N.D. and N.T. v. Spain* (no. 8675/15, February 13, 2020, §§193-199).
[141]This is in contrast to what the *Khlaifia and Others v. Italy* case: indeed, the Italian Government emphasized that the procedure which the applicants had been subjected to was classified in domestic law as refusal of entry" and not as "expulsion". However, the Court saw no reason to depart from its earlier established definition and it observes that there is no doubt that the applicants, who were in the Italian territory, were removed from that State and returned to Tunisia against their will, thus constituting an expulsion within the meaning of Article 4 Protocol No.4: *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §244).
[142]European Court of Human Rights, "*Guide on Article 4 of Protocol no. 4 to the European Convention on Human Rights- Prohibition of collective expulsions of aliens*", April 30, 2020, pg.6: https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf.

conduct crossing the border[143]. Additionally, expulsion is not only a territorial notion, but also extraterritorial[144].

In conclusion, expulsion is dealt by the Italian law and the case-law of the European Court of Human Rights differently. On one hand, in the domestic law, expulsions are dealt detailly as the legislation provides a clear distinction between the refusal of entry and expulsion and a clear classification in terms of meaning, legal procedures and people involved. On the other hand, Article 4 of Protocol no. 4 is much shorter and quite vague. This is due to the nature of the Convention which not only has to be interpreted in the light of the present- day conditions, but also in the light of the domestic law to which the case refers.

2.3.3. Expulsion according to the Return Directive and the International Law Commission

In Khlaifia and Others v. Italy, the judges of the Court took into account other EU and international sources when they had to decide whether a collective expulsion had taken place or not. These are the Return Directive and the draft articles on the expulsion of aliens approved by the International Law Commission (ILC). Now, we are going to briefly explain the structure of each of them.

On a European law level, the Return Directive was approved by the European Parliament on December 16, 2008 as the result of a long process of negotiation between the Parliament and the Council. The purpose of the legislation was to lay down EU-wide rules and procedures on the return of irregular migrants that Member States have to apply in order to respect migrants' fundamental rights[145]. Indeed, the Directive applies to third- country nationals staying illegally in the territory of a Member State[146].

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[143] *Ibidem.*

[144] It refers to the removal of aliens carried out in the context of interception of migrants on high seas by the authorities in the case Hirsi Jamaa and Others v. Italy: *Hirsi Jamaa and Others v. Italy* (no. 277765/09, February 23, 2012, §§169-182).

[145] Cfr. Article 1, The European Parliament and the Council of the European Union, Directive 2008/115/EC, December 19, 2008: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN.

[146] However, there are some exceptions in Article 2§1,2: "Scope: 1. This Directive applies to third-country nationals staying illegally on the territory of a Member State. 2. Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent

Due to their vulnerabilities, children, third-country nationals whose family members are citizens of the Union, asylum seekers and refugees[147]have been given particular attention. The Directive contains the key provisions governing the removal process which involves a return decision[148] and measures to enforce return[149]. In this time lapse, migrants have the opportunity to leave the country voluntarily[150] which is considered more humane and dignified than the enforced return. If migrants refuse the voluntary departure, the Member State involved is required to issue an entry ban[151] whose length will depend on all relevant circumstances of the individual case and shall not exceed five years, unless he/ she is a serious threat to public policy, public security and national security. Moreover, the Member State issuing an entry ban is expected to enter an alert in the Schengen Information System (S.I.S.) which enables all the Member States to exchange information on persons who are to be refused entry. Additionally, the Directive guarantees the procedural safeguards during the removal process: firstly, return, removal and entry ban decisions must contain written reasons in fact and law as well as information on remedies, and translation of the main elements[152]; secondly, migrants have the right to appeal or review of return, removal and entry ban before a judicial or administrative authority[153]; thirdly, migrants can benefit from legal

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authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorization or a right to stay in that Member State; (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. 3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.": https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN.

[147]Cfr. Article 5 and Article 3§9, The European Parliament and the Council of the European Union, Directive 2008/115/EC, December 19, 2008: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN.

[148]*Ibidem*, Article 6§§1-6. Article 3§4 defines return decision as an administrative and judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.

[149]*Ibidem,* Article 6§§1-6. Return means the process of a third-country national going back, whether in voluntary compliance with an obligation to return or enforced, to: 1) his/ her country of origin; 2) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; 3) another third-country, to which the third-country national concerned voluntarily decides to return and in which he/ she will be accepted (Article 3§3).

[150]*Ibidem*, Article 7§§1-4. Article 3§8 defines voluntary departure as compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.

[151]Cfr. Article 11§§1-5. An entry ban is an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision (Article 3§6).

[152]Cfr. Article 12§§1,2.

[153]Cfr. Article 13§§1,2.

assistance[154]; fourthly, while removal is pending for those in detention, Member States are obliged to respect the principle of family unity, and ensure emergency health care and essential treatment of illness, access to basic education for minors, and special need of vulnerable people[155]. Lastly, the Directive gives also guidelines for its implementation: Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive and they shall communicate to the Commission all the measures and laws adopted in the field covered by the Directive[156]. The Commission has also some duties, namely that to report every three years to the European Parliament and the Council on the application of the Directive and propose amendments if necessary[157].

On an international level, the Court cited the draft articles on the expulsion by a State of aliens present in its territory[158] adopted by the International Law Commission in 2014 and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The draft has two purposes: defining both *ratione materiae* and *ratione personae*. The first one relates to all the concrete expulsion measures[159], whereas the second one refers to aliens present in the territory[160] without any distinction of their legal status. In defining these concepts, the draft can more precisely provide obligations to States during the process of removal with the aim of protecting migrants' fundamental rights[161]. Indeed, an alien can be expelled only in pursuance of a decision reached in accordance with law[162] and the State shall motivate the reasons for expulsion in good faith and reasonably, taking into account all the specific circumstances[163]. In all the phases of the process of expulsion, migrants' rights

[154]Cfr. Article 13§§3,4.
[155]Cfr. Article 14§1.
[156]Cfr. Article 20§§1,2.
[157]Cfr. Article 19.
[158]Cfr. Article 1§1, International Law Commission, "*Draft articles on the expulsion of aliens, with commentaries*", 2014: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_12_2014.pdf.
[159]The meaning of expulsion to which the scope *ratione materiae* refers is defined by Article 2 (a) of the draft: "Expulsion means a formal act or conduct attributable to a State by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State." In this way no other interpretations of the meaning of expulsion are possible.
[160] Following the above-mentioned reasoning, the meaning of aliens of the *ratione personae* is described by Article 2(b) of the draft: "alien means an individual who does not have the nationality of the State in whose territory that individual is present".
[161]Cfr. Article 3.
[162]Cfr. Article 4.
[163]Cfr. Article 5 §§1-4.

are protected both in terms of dignity[164] and procedural rules[165].Additionally, the draft prohibits specific types of expulsion among which expulsion of refugees[166] and stateless persons[167], collective expulsion[168], disguised expulsion[169] and expulsion for the purpose of confiscation of assets[170]. The States cannot also deprive the nationality of a migrant for the purpose of expulsion[171]. Lastly, the draft sets out the legal consequences of expulsion: if an expulsion is considered unlawful, the alien can be readmitted in the expelling State[172]. Indeed, both the expelling State[173] and the State of nationality of an alien subject to expulsion[174] have the responsibility toward that alien.

In short, the draft by the ILC is much more specific in providing a list of all the rights to be protected in comparison to the Return Directive which is, by contrast, clearer on the part of the procedures for the expulsion. Despite these differences, the texts have some features in common: firstly, they give a detailed terminology related to expulsion; secondly, they recognize the right of a State to expel a third-country national, but at the same time they impose them obligations to protect migrants' rights and dignity in all the phases of the process of expulsion; thirdly, they pay particular attention to vulnerable people; and lastly, they take into account conditions of aliens in detention to be expelled guaranteeing them protection of their rights.

In this chapter, we have analyzed and compared all the laws present in the Khlaifia and Others v. Italy case related to migration detention, torture, inhuman and degrading treatment or punishment and collective expulsion. In the next chapter, we are going to see the immigration policy, namely how and if the above-mentioned laws are concretely put into practice.

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[164]Part Three of the draft provides a specific list of migrants' rights that have to be protected in the expelling State (Chapter II), in relation to the State of destination (Chapter III) and in the transit State (Chapter IV). Particular care is given to vulnerable persons (Article 15§§1,2).
[165]Part Four of the draft deals with specific procedural rules: procedural rights of aliens subject to expulsion (Article 26), suspensive effect of an appeal against an expulsion decision (Article 27) and international procedures for individual recourse (Article 28).
[166]Cfr. Article 6.
[167]Cfr. Article 7.
[168]Cfr. Article 9.
[169]Cfr. Article 10.
[170]Cfr. Article 11.
[171]Cfr. Article 8.
[172]Cfr. Article 29.
[173]Cfr. Article 30.
[174]Cfr. Article 31.

Chapter 3

Immigration policy: from theory to practice

In this chapter we are going to analyze the immigration policy in Italy, i.e. how the laws mentioned in the previous chapter are put into practice. To achieve this goal, firstly, we are going to examine the actors involved in the migration and border management and their role in communicating migrants' rights, secondly, we are going to provide some concrete examples of law migration policy application in Italy.

3.1. Human rights and language: an introduction

The legal texts we have analyzed in the previous chapter have dealt with some human rights and prohibitions related to them such as right to liberty, prohibition to torture, inhuman and degrading treatment or punishment and prohibition of collective expulsions. Human rights are legally guaranteed by substantive law in the form of national constitutions or national constitutional law or internationally in the form of treaties, customary international law, bodies of principles and case-law[175] which all pursue the aim to protect individuals and groups against actions which interfere with fundamental freedoms and human dignity. Consequently, human rights law imposes obligations on States to refrain them from certain acts (negative rights), or to act in a certain way (positive rights). In this way, promotion and protection of human rights and fundamental freedoms of individuals or groups can be guaranteed[176]. Generally speaking, human rights are commonly understood as being those rights which are inherent to all human beings, whatever their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These rights must be guaranteed to every person as a consequence of being human[177] and they

[175]European Judicial Training Network*, "English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pg. 24.
[176]*Ibidem*, pg. 24.

[177]Office of the High Commissioner for Human Rights, United Nations Staff College Project, "Human Rights: A Basic Handbook for UN Staff", 2020, pgg.2,3.

are based on the respect for the dignity and worth of each person and are universal[178], inalienable[179], indivisible, interrelated and interdependent[180]. As shown in the Khlaifia case, human rights have a crucial role in the protection of migrants. In this regard, the Global Migration Group has recently listed some specific rights [181] which must be taken into account when dealing with migration issues, among which: right to life, to security and to liberty from arbitrary detention and right to enjoy asylum; right to be free from discrimination based on race, sex, language, religion, origin or other conditions; right to be protected from abuses, exploitation and torture; right to a fair trial and legal remedies; right to enjoy economic, social and cultural rights; lastly, all the other rights guaranteed by international treaties which the Member States have ratified. Human rights law shall be in written form and it requires a specific language. As human rights law is a branch of the law, it is necessarily written in legal language which is a language for specific purposes. Shortly, the language for special purposes is a functional variety of ordinary language related to a specific topic and therefore it requires specific linguistic features both in terms of lexicon and morpho-syntax. In this way, communication in that specific field of knowledge can be fulfilled successfully with all the participants[182]. As it resides in the legal system, legal language is also a technical language[183]. As a consequence, not all people may understand the high register of legal texts, although their content dealing with human rights should be available for everyone[184]. Moreover, migrants coming on European shores may not be familiar with the legal system in the Member State in which they have entered, or the norms related to the application for international protection. Some migrants arrive at the destination country with no or little information, while the majority of them is incorrectly informed. To ensure that the contents and the rights of these legal texts are applied concretely,

[178]Universal means that they are applied equally and without discrimination to all people.
[179]Inalienable means that no one can have his/ her human rights taken away other than in specific situations.
[180]In the sense that it is insufficient to respect some human rights and not others.
[181]International Commission of Jurists, "*L'immigrazione e la normativa internazionale dei diritti umani- Guida per operatori del diritto n.6*", Switzerland, 2012, pgg. 30-31.
[182]Cortelazzo M., "*Lingue speciali- La dimensione verticale*", Studi linguistici applicati, Unipress, Padova, 1994, pg. 6.
[183]There have been different opinions about the technical nature of legal language. Some argue that legal language does not exist in itself, but it is a part of ordinary language, whereas others think that legal language is an identifiable technical language. The latter is the mostly accepted theory. Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pgg. 15-18.
[184]In this chapter, we have given a broad overview of legal language, but we are going to deeply analyzed its linguistic features in chapter four.

cooperation between all the people involved in the practice of immigration management is necessary. It is indeed a duty of the authorities to guarantee adequate reception services in order to provide assistance and information for both migrants who wish to apply for asylum or enter and stay in a Member State[185]. If cooperation works well, the communication of migrants' rights can be effective, despite the difficulty of legal texts and their language.

3.2. Communicating migrants' rights

Communication must be regarded as a fundamental tool for ensuring rights to migrants. It is a process involving local, national and international actors which provide migrants with widely different support. In order to better understand how the process of communicating rights works, it is noteworthy to understand what happens concretely when migrants land on Italian coasts. Therefore, the next sub-paragraphs will deal with first immigration and border management and second the actors involved in this process. Eventually, particular attention will be given to intercultural mediators who play a fundamental role in passing information and making it understandable.

3.2.1. Immigration and border management

When intercepting migrants on boats at sea, the Italian Coast Guard advises the Prefect's office and the Provincial Police Headquarters, more specifically the Immigration Office, providing them with the right number of people on board, their gender, age and health conditions, especially if there are people who are in need of urgent medical attention. Civil Protection Department and local health authorities, associations and organizations are also alerted in order to provide first aid to and advise migrants during the landing. International organizations' staff among which Praesidium Project partners and the Sovereign Order of Malta are among those helpers. Upon their arrival at Lampedusa port, migrants are subjected to an initial check on their state of health by medical staff. Healthcare should indeed be given absolute priority over all

[185]Cfr. Article 11§6, Consolidated Immigration Act: https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals [20/11/2020].

other interventions benefitting newly arrived migrants. Trained cultural mediators are also present to help the actors involved in healthcare interventions, rescue and first aid[186]. If possible, they provide migrants with general information about what happens after landing, including contacting their families, applying for asylum and the importance of providing correct personal details. However, due to the significant number of incoming migrants, there is normally little time both for health checks and giving information which are carried out soon after in the reception centers. After being landed, migrants are classified according to their needs through a color-coding system[187] and are transferred to dedicated reception centers by the buses organized in cooperation with the competent Prefect's office, by the police authorities or by the managing body of the referred centers. At the time of Khlaifia's case[188], the practice of receiving migrants was developed on three levels: a phase of first aid and assistance, a first reception phase and a second-line reception phase. In each phase, generic assistance (e.g. accommodation, food and provision of personal supplies), healthcare and psychological care, linguistic and cultural mediation, cleaning services and environmental hygiene were provided[189]. In the first stage, migrants were put in CDAs (Reception or Welcome Centers) or CSPAs (Centers for First Aid and Reception) which were centers set up in the principal places of disembarkation. In Lampedusa, there was a CSPA in Contrada Imbriacola. As seen in the previous chapter, here migrants were given first aid and identified and they were allowed to stay for as long as necessary to

[186]Ministero dell'Interno, "*Praesidium Project- Recommendation and good practices in the management of mixed migratory flows by sea*", 2012, pg. 17.
[187]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §44.
[188]As mentioned in chapter two, in 2015, the acronym-based reception system of CDAs, CPSAs and CARAs was replaced by another system composed by the so-called CPA (First reception center) (Legislative Decree 142/2015) and the hotspot approach which was first implemented by the Italian Roadmap in 2015 and was then inaugurated by a Circular of the Ministry of the Interior[188] addressed to the Prefects and the Chief of Police and by the Standard Operating Procedures to be followed in the reception centers. However, this Roadmap did not provide a legal basis in the domestic legislation and for this reason in 2017 the Article 17 of Minniti-Orlando decree (Law 46/2017) was introduced and converted into the Article 10-ter of the Consolidated Immigration Act. In this way, the word hotspot was mentioned in the Italian legislation under the name *punti di crisi.* In the same law, CIEs (Identification and Expulsion Centers) were also converted into CPRs (Return Detention Centers). As the Khlaifia case took place in 2011, the hotspot approach was not implemented yet and therefore the applicants experienced the acronym-based reception system composed by CDAs, CPSAs, CARAs and CIEs. For this reason, the analysis of immigration policy of this dissertation will be based on the previous reception system.
[189]Ministero dell'Interno, "*Praesidium Project- Recommendation and good practices in the management of mixed migratory flows by sea*", 2012, pg. 18.

establish their identities and status, normally for 24/ 48 hours. The center was supervised, monitored and controlled by the relevant Prefect's office, and run by institutions, associations or cooperatives[190]. The Immigration Offices of the relevant Provincial Police Headquarters had their own representatives within the facilities to carry out preliminary identification procedures for migrants, including fingerprinting, photographing and recording arrival date and landing number. Before undergoing identification procedure, migrants shall receive a general medical checkup. The most urgent cases were transferred to adequate facilities of the National Health System (SSN) or were treated at the center's medical station[191]. In the phase of identification, the police authorities recorded personal data and they entered them into the European EURODAC database, the SDI Investigation System and AFIS (the Automated Fingerprint Identification System) and they also checked whether the migrant had already applied for asylum in another European country and whether he/ she had a criminal record[192]. Personal details and any statements about family relationships were included in the Police's database. Before the identification procedure, the Police's Immigration Office with the help of a cultural mediator provided migrants with general information on Italian legislation about migration and asylum, with particular regard to the right to apply for international protection. Immediately after entering the reception center, all migrants should be given an information leaflet translated into several languages containing basic guidelines on their stay in their destination country, protection and guardianship schemes provided under national law[193]. Moreover, they should be informed about the rules of coexistence and of services offered by the center. After being identified, migrants were transferred to CARAs (Centers for the Reception of Asylum Seekers) if beneficiary of humanitarian protection, subsidiary protection or political asylum or to CIEs (Identification and Expulsion Centers) if irregular.

Unaccompanied minors as well as asylum seekers with vulnerabilities were directly transferred to Base Loran in Lampedusa[194]. Transfers were centrally coordinated by the Ministry of Interior. The CARAs covered the first reception phase where migrants can

[190]*Ibidem*, pg. 20.
[191]*Ibidem*, pg. 26.
[192]*Ibidem*, pg. 21.
[193]*Ibidem*, pg. 24.
[194]Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", April 21, 2011, pg. 1.

stay from 20 to 35 days. Thereafter, they are subjected to a second-line reception phase and thus sent to SPRAR (System of Protection for Refugees and Asylum Seekers)[195]. In case of unavailability of places due to a large influx of arrivals, first reception could be implemented in temporary structures also known as CAS (Emergency Reception Centers), established by Prefectures. When reception was provided in CAS, it was normally limited to the time strictly necessary for the transfer of the applicant in the first reception centers. By contrast, migrants in the CIEs could stay up to 180 days and they were subjected to removal or expulsion.

So far, we have explained the process to which migrants were subjected after landing, whereas the next paragraph will emphasize the role played by all the stakeholders involved in the border and migration management.

3.2.2. Stakeholders involved in the border and migration management

The Khlaifia case listed many local and international stakeholders involved in the process of managing in coming migrants that play a different role according to their mandate. The Coast Guard, the Customs and Revenue Police, the Carabinieri, the Civil Protection Department and the Border Police are in the first line for rescue operations and landings. Provincial Police Headquarters are in charge of all matters related to the legal situations of migrants, such as international procedures or entitlement to residence permits[196]. Prefects' offices-central government branch offices are responsible for all the questions related to the reception of migrants arriving on the island until they are transferred elsewhere[197]. Moreover, together with the management bodies of the reception centers, they are the supervisors of migrants' and asylum seekers' reception centers of CSPA in Contrada Imbriacola and Loran base as well as centers for identification and expulsion (CIEs). The head of the Palermo unit coordinated local and

[195]The SPRAR (System of Protection for Refugees and Asylum Seekers) is a network of local authorities which implements integrated reception projects through the National Fund for Asylum (AMIF) and it was introduced into the Italian legislation by the Bossi-Fini Law (Law no. 189 of July 30, 2002). In 2018, SPRAR was changed into SIPROIMI (System of Protection for Beneficiaries of Protection and Unaccompanied Minors) through the decree on immigration and security (Salvini Decree). Again, in 2020 SIPROIMI turned into SAI (Reception and integration system) by the Ministry of the Interior Luciana Lamorgese.
[196]Ministero dell'Interno, "*Praesidium Project- Recommendation and good practices in the management of mixed migratory flows by sea*", 2012, pg. 9.
[197]*Ibidem.*

mental health authorities dealing with vulnerable cases, whereas local associations and the civil society provide other services to migrants and asylum seekers[198]. International stakeholders are also active on Italian soil as Médecins Sans Frontières (MSF) and the Sovereign Order of Malta. Médecins Sans Frontières[199] is a private, international, independent medical humanitarian organization made up mainly of doctors and health sector workers, but it is also open to all other professionals which might help in achieving its aims. With 25 associations around the world, it works according to some ethical principle, among which impartiality, independence, neutrality, bearing witness, transparent and accountable. In Lampedusa, it provides migrants and asylum seekers not only with mental healthcare across multiple reception centers, but also with cultural mediators and psychologists who screen migrants and asylum seekers for psychological vulnerabilities, and they provide medical treatments to those in need. The Sovereign Order of Malta[200] is one of the oldest institutions of Western and Christian civilization and it is based on principles such as neutrality, impartiality and apoliticality. It runs programs independently or within a framework of partnership with governments and international agencies in 120 countries. On the island of Lampedusa, it works with the Italian Coast Guard and the Customs and Revenue Police during rescue operations and landings.

The other international organizations working on the island of Lampedusa are partners of the Praesidium project titled "Strengthening of reception capacity in respect of migration flows reaching the island of Lampedusa" launched in 2006 by the Ministry of the Interior- Department for Civil Liberties and Immigration.

Through individual partnerships agreements signed with the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR), the Italian Red Cross (CRI) and with Save the Children Italy, the Praesidium project aims at tackling the growing flow of migrants by enhancing humanitarian receptions and assisting irregular migrants.

These organizations were chosen as project partners because they are internationally recognized for their commitment in the field of managing migration-related

[198] *Ibidem.*
[199] Médecins Sans Frontières (MSF) International : https://www.msf.org/ [22/11/2020].
[200] The Order of Malta- Sovereign Order of Malta: https://www.orderofmalta.int/sovereign-order-of-malta/ [22/11/2020].

humanitarian and social emergencies as well as for their role in promoting and defending the human and civil rights of migrants, asylum seekers or beneficiaries of international protection, victims of trafficking and minors.

At the beginning, this project was co-funded by the European Commission and by the Department for Civil Liberties and Immigration as part of the "Argo 2005 and 2006" and "Security in action" programs respectively, but thereafter it was funded only by the Italian Ministry of the Interior[201]. The services provided by these organizations vary from giving legal information and counselling, to monitoring and identification of individual vulnerable cases, monitoring of migrants' health conditions and monitoring of reception centers. The Praesidium project stands out thus for the multi-agency cooperation of all its below-mentioned partners.

The Italian Red Cross (CRI)[202] is the Italian national Red Cross society. Internationally, the Red Cross is known as International Federation of Red Cross and Red Crescent Societies (IFRC) where the latter is used in place of the Red Cross in many Islamic countries. The IFRC is an international humanitarian movement which is based on the principles of humanity, impartiality, neutrality, independence, voluntary work, unity and universality and it is present in 192 countries all over the word. On the island of Lampedusa, the Italian Red Cross mainly provides social and medical assistance to refugees and migrants, carrying out activities such as reception, advocacy, support to family reunification efforts, providing information, education health risk prevention and psychological support.

The International Organization for Migration (IOM)[203] is the leading intergovernmental organization in the field of migration and is committed to the principle that human and orderly migration benefits migrants and society. IOM is part of the United Nations system as a related organization. As such, IOM is guided by the principles enshrined in the Charter of the United Nations including upholding human rights for all, including migrants. Within the Praesidium, IOM provides information and legal counseling to migrants and displaced people on Italian immigration regulations, on human trafficking and on the consequences of anyone staying in the country

[201]Ministero dell'Interno, "*Praesidium Project- Recommendation and good practices in the management of mixed migratory flows by sea*", 2012, pg. 5.
[202]Italian Red Cross-IFCR: https://www.ifrc.org/en/what-we-do/where-we-work/europe/italian-red-cross/ [22/11/2020].
[203]International Organization for Migration (IOM): https://www.iom.int/ [22/11/2020].

irregularly. IOM is particularly focused on identifying and providing assistance to vulnerable persons, among which victims of trafficking for sexual and labor exploitation. Lastly, IOM monitors landing and reception procedures at immigration centers and it provides technical assistance to institutions and local authorities on immigration issues.

Save the Children[204] is the leading independent international non-profit organization that sheds light on the way the world treats children and it carries out projects in Italy and abroad. Indeed, it is a global membership organization made up of Save the Children International and 29 national members based on principles of accountability, ambition, collaboration, creativity and integrity. In the Praesidium project, Save the Children Italy provides information and legal advice to migrant children arriving by sea, monitors reception conditions of migrant children and supports the development of an operating system for the identification and assistance of migrant children which respects their rights. The United Nations High Commissioner for Refugees[205] is the UN agency for refugees created by the UN General Assembly in 1950 headquartered in Geneva. Working in 135 countries, the UNHCR's mandate is to aid and protect refugees, forcibly displaced communities and stateless people and assist in irregular migrants' voluntary repatriation, local integration or resettlement to a third country. In the Praesidium Project, its duty is to improve the immigrant reception system and guarantee access to asylum procedures, for example by providing cultural mediators in the disembarkations points and in the CSPA center of Contrada Imbriacola. Moreover, it provides reception centers and host associations for unaccompanied minors with information and legal advice. Lastly, it monitors the adequate functioning of the reception system and contributes to the identification of vulnerable people.

All these international organizations strongly cooperate with all the above-mentioned local authorities during all stages of the migration process in order to save lives, receive migrants and transfer them to other centers throughout Italy in the best conditions[206]. They are authorized to maintain a permanent presence inside the Lampedusa reception

[204]Save the Children Italy: https://www.savethechildren.it/ [22/11/2020].
[205]UNHCR-The UN Refugee Agency: https://www.unhcr.org/ [22/11/2020].
[206]This cooperation was stated in the "Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores" set up by the Council of Europe's Parliamentary Assembly (PACE). Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §29).

center and have interpreters and cultural mediators available, whose role emphasize the following sub-paragraph.

3.2.3. The importance of providing migrants with correct information: the role of the intercultural mediators

As stated in Article 11§6 of the Consolidated Immigration Act, the Italian authorities shall give proper information to asylum seekers who want to apply for asylum or migrants who want to enter and stay in the territory. The provision of information to migrants is a key activity within the management of mixed flows as, in most cases, migrants have little or no information or they are wrongly informed about asylum or protection procedures or about their rights[207]. When they arrive on Italian shores, migrants not only have expectations and needs, but also they may feel disoriented as they come from countries with different languages, cultures, religions, social, practical and legal norms. Mediation turns out thus to be an be indispensable tool to resolve communication obstacles between newly arrived migrants and authorities. In its broadest sense, mediation is an intermediary act occurring in a conflict between parties in order to help bring about an agreement. Of course, language plays a fundamental role in this process as mediation uses language to achieve an efficient communication between two or more parties. In this regard, the Common European Framework of Reference for Languages (CEFR)[208] has provided an exhaustive definition as follows: "the written and/or oral activities of mediation make communication possible between people who are unable, for whatever reason, to communicate with each other directly. Translation or interpretation, a paraphrase, summary or record, provides for a third-party a (re)formulation of a [spoken or written] source text to which this third party

[207]Ministero dell'Interno, "*Praesidium Project- Recommendation and good practices in the management of mixed migratory flows by sea*", 2012, pg. 32.
[208]The Common European Framework of Reference for Languages (CEFR) is an international standard for describing language ability. It describes language ability on a six-point scale, from A1 for beginners, up to C2 for those who have mastered a language. This makes it easy for anyone involved in language teaching and testing, such as teachers or learners, to see the level of different qualifications. It also means that employers and educational institutions can easily compare our qualifications to other exams in their country.

does not have direct access. Mediating language activities – (re)processing an existing text- occupy an important place in the normal linguistic functioning of our society[209]".

Indeed, the most common problems related to linguistic communication between migrants and authorities may lie upon language, its register and terminology for example in understanding technical legal texts concerning migrants' rights and duties or upon the unfamiliarity with certain concepts or processes of the Member State migrants have enter, for example related to its legal system and procedures. The mediator is thus someone who acts as a dynamic bridge between Italian authorities and migrants arriving on the island of Lampedusa. Given the heterogeneity of professional experiences and the lack of a homogeneous definition on an international, European and national level, the mediator is designed with several names which goes from[210]social interpreter, communication facilitator, mother-tongue mediator, linguistic mediator, technician of linguistic mediation for immigrants, linguistic-cultural mediator, intercultural mediator, cultural mediator to social mediator and intercultural operator[211]. However, the concept of intercultural mediator better summarizes and expresses all the meaning of the role: the prefix "inter" refers to a relationship, an interaction and a dynamic dialogue of different cultures where the language is the primary means of communication[212].

An intercultural mediator is indeed a social operator able to carry out linguistic-cultural mediation, non-professional interpretation and translation and social mediation, promoting intercultural mediation as a systemic device in integration policies. In doing so, he/ she optimizes the network, improves the organization and delivery of services and strengthens the professional role of the mediator[213]. This definition highlights the added value of intercultural mediators in which they combine linguistic, cultural and

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[209]Council of Europe, "*Common European framework of reference for languages: learning, teaching, assessment,* pg. 14*:* https://www.coe.int/en/web/lang-migrants/linguistic-and-cultural-mediation [24/11/2020].

[210]Baldwin J.R., Coleman R.R.M., González A., Shenoy-Packer S., "*Intercultural Communication for Everyday Life*", Wiley Blackwell, 2014, pg. 5.

[211]These names are listed in descending order from the one more related to the "linguistic factor" to the one related to the "cultural factor" where for culture is meant the way of life of a group of people including symbols, values, behaviors, artifacts, and other shared aspects.
Cfr. AA.VV., "*Linee di indirizzo per il riconoscimento della figura professionale del mediatore interculturale- del Gruppo di Lavoro Istituzionale per la promozione della Mediazione Interculturale*", December 21, 2009, pg. 9.

[212]*Ibidem*, pg. 22.

[213]AA.VV., "*La qualifica del mediatore interculturale- Contributi per il suo inserimento nel futuro sistema nazionale di certificazione delle competenze*", 2014, pg. 15.

social elements found separately in interpreters and social operators[214]. Indeed, to achieve their goals, intercultural mediators require relational, interpersonal, intercultural, linguistic skills. Firstly, he/ she stands out for his/ her clear communication skills which allow him/ her to collaborate and work well with others and to manage and solve conflicts. As they may be confronted with unjust situations, discriminations, racism and prejudices towards migrants, it is important that they can monitor and manage the emotional impact of these phenomena on their professional performance and try to be as objective as possible. His/ her forthcoming and caring attitude is a requirement for analyzing and better understanding migrants' needs. Intercultural mediators should be thus empathetic, trustworthy, respectful and have a non-judgment attitude. Secondly, intercultural mediator shall be aware of cultural differences. Indeed, among the principles of deontological ethics, we can find neutrality, respect for others, confidentiality, equidistance, objectivity and transparency[215]. Thirdly, he/ she needs a good knowledge of migrants' culture and language and therefore he/ she should preferably be a migrant himself/herself who has also already first-hand experienced migration. Indeed, most intercultural mediators are themselves migrants or belong to an ethnic minority[216]. Not only, an intercultural mediator shall possess a B1 level of Italian, too, especially when tackling with technical terminology, for example with legal one. Terminology is a field of knowledge where regular upskilling is needed. Moreover, given that the removal of linguistic barriers is essential to the function of intercultural mediator, interpreting skills are also considered of a great importance. In addition, intercultural mediators are required to deepen their knowledge in migration channels, history and immigration rules and legislation on an international, European and national level. Intercultural mediators intervene in different contexts such as in schools, in healthcare, in justice, in criminal institutes, in social service offices, in helping migrants find a job, in public administration, in phases of first

[214]Morniroli A., Cipolla A., Fortino T. (eds.), "*Dialoghi- Metodologie e strumenti di mediazione linguistica e culturale*", pg. 13.
[215]Cfr. AA.VV., "*La qualifica del mediatore interculturale- Contributi per il suo inserimento nel futuro sistema nazionale di certificazione delle competenze*", 2014, pg. 28; and European Union, "*Intercultural Mediator Profile and Related Learning Outcomes*", TIME Project, pg.10.
[216]European Union, "*Intercultural Mediator Profile and Related Learning Outcomes*", TIME Project, pg. 6.

aid and assistance, first reception and second-line reception phases[217]. In Khlaifia case, we have seen the role of intercultural mediators in cases of emergency, namely in rescue operations and landings and in the CSPA in Contrada Imbriacola on the island of Lampedusa in order to smooth communication between actors involved in healthcare interventions in rescue and healthcare interventions and first aid to migrants.

3.3. Immigration policy in Lampedusa

The legal texts analyzed in the previous chapter set the goal to protect human rights and more precisely those of migrants. Despite the varied personnel engaged in the migration management supposed to put into practice what written laws state, this was not however what happened in Lampedusa in 2011. In the Khlaifia case, the judges of the European Court of Human Rights examined three reports describing the real situation on the island, namely the report on the state of human rights in prisons and reception and detention centers in Italy by the Italian Senate's Special Commission for Human Rights, the fact-finding of the Council of Europe's Parliamentary Assembly Ad Hoc Sub-Committee and Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo.

3.3.1. Lampedusa and the humanitarian crisis

Because of its geographical location 167 kilometers off Tunisia coasts and 355 kilometers off Libyan ones[218], Lampedusa has been destination of a large flux of

[217]Since this dissertation mainly focuses on the analysis of the Khlaifia case, I will restrict myself to dealing with the role of intercultural mediators in the judgment, namely in the phases of first aid and assistance. For further readings about the role of intercultural mediators in other fields, I recommend these reports:

- AA.VV., "*Linee di indirizzo per il riconoscimento della figura professionale del mediatore interculturale- del Gruppo di Lavoro Istituzionale per la promozione della Mediazione Interculturale*", December 21, 2009, pgg. 12-18.
- AA.VV., "*La qualifica del mediatore interculturale- Contributi per il suo inserimento nel futuro sistema nazionale di certificazione delle competenze*", 2014, pgg. 15-19.
- Consiglio Nazionale dell'Economica e del Lavoro- Organismo Nazionale di Coordinamento per le politiche di integrazione sociale degli stranieri, "*Mediazione e mediatori interculturali: indicazioni operative*", 29 October 2009, pg. 7.
- Morniroli A., Cipolla A., Fortino T. (eds.), "*Dialoghi- Metodologie e strumenti di mediazione linguistica e culturale*", pgg. 25-34. [27/11/2020].

[218]IsoladiLampedusa.it: http://www.isoladilampedusa.it/wp/ [02/01/2021].

incoming migrants, following the uprising in Tunisia and in Libya, which led the island to declare the status of humanitarian emergency in February 2011. With its scarce dimension of around 20 km², the island was not equipped to receive the 55.298 people who arrived on September 2011[219]. It was in this period that the applicants were illegally detained, as the ECHR sentenced. The reception system was indeed collapsed: migrants were sleeping on streets or in makeshift tents, they had no access to toilets or washing facilities and piles of garbage and human waste were in public areas. Moreover, the stakeholders involved in the migration management was not sufficient and inadequate to face such an immigration wave. However, this humanitarian crisis was exacerbated by Italian authorities' indolent decision-making processes. Indeed, Italian authorities were unable to promptly and effectively re-open reception centers effectively, and to ensure transfers of meaningful numbers of people off the island onto Sicily or to other Italian regions[220]. The inadequate and belated management of the crisis had bad consequences not only for the migrants and the actors involved in this process, but also for the inhabitants and the tourism of Lampedusa[221].

3.3.2. Lack of information for migrants

Cooperation between all parties involved in migration management ensures that rights are communicated efficiently to all subjects of law. According to a study carried out by the Parliamentary Assembly, a number of critical issues concerning the management of migration flows have emerged. Theoretically, migrants should be informed soon after their landings, but due to consistent number of them coming at the same time, their transfer is made quickly, risking that some of them are sent back to their home countries without being informed about the possibility of obtaining international protection[222]. After their disembarkation, the applicants of Khlaifia case

[219]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", 30 September 2011, §13.
[220]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", 30 September 2011, §15-19; Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", 21 April 2011, pg. 2.
[221]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", 30 September 2011, §§77-81.
[222]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §50.

were transferred to CSPA where ninety-nine social operators, three social workers, three psychologists and eight interpreters and cultural mediators were working[223]. According to the Italian Government, cultural mediators and interpreters were there to facilitate communication and mutual understanding between the migrants and the Italian authorities[224], for example in conducting first identification procedures and in filling out information sheets containing personal data and regarding any circumstances specific to each migrant. It is to remember that in Khlaifia case these forms were destroyed thereafter in the fire[225]. Moreover, they were supposed to provide migrants with information on Italian legislation about migration and asylum, about the rules of coexistence and the services offered by the center, such as medical, psychological and legal assistance in the initiation of asylum or protection legal procedures. The number of interpreters and cultural mediators may not have been sufficient in order to attend to all the needs required[226]: the interpreters and the cultural mediators were eight, whereas the migrants were more than 1000[227].

As seen above, intercultural mediators are of enormous importance for an effective communication between migrants and local authorities. Since these professional figures are needed at different stages of the migration flow management in order to help all the actors involved varying from police authorities to doctors, from asylum seekers to irregular migrants, their presence must be consistent. The Khlaifia case demonstrated how the lack of their presence or their small presence led to a violation of migrants' rights: the breach of Article 5§4 "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" is due to the impossibility of the applicants to appeal the reasons of their detention in the CSPA of Contrada Imbriacola which was not equipped with the

[223]Cfr. *Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §152).
[224]*Ibidem*, §246.
[225]*Ibidem*, §§224, 246.
[226]*Ibidem*, §192. According to the applicants, the maximum capacity in the center was 804 (§142), whereas the Government replied that the center could host up to 1000 (§153). Moreover, the applicants added that on September 16,17,18,19 and 20, the center housed 1.357, 1.325, 1.399, 1.265 and 1.017 migrants respectively. Those figures do not correspond to the indications provided by the Government, which at the hearing before the Court stated that at the time of the applicants' stay there had been 917 migrants in CSPA.
[227]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §35 of Partly dissenting opinion of judge Serghides).

adequate number of cultural mediators and interpreters who could have translated for them the information needed. Given that the applicants were not been informed about the reasons for their detention, violating thus Article 5§2 which states "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him", most likely they were not even informed about their rights or about the procedures for requesting asylum or protection or anything else. It is a duty of the authorities to establish the status of migrants, hence whether they are irregular or not[228]. In its report describing its visit on the island of Lampedusa in 2011, Amnesty International reported that the number of people responsible for providing information regarding asylum was totally inadequate and only a handful of individuals were providing basic information about asylum procedures and, in many cases, even about the consequences of their illegal arrival. For example, some migrants did not even know for how long they would have to stay on the island or what their eventual destination would be once moved off the island [229], which led to considerable anxiety, loss and mental stress.

3.3.3. Conditions at Contrada Imbriacola

Lampedusa has two reception centers: the Loran base and the main reception center in Contrada Imbriacola[230]. The first one is located on the premises of an old NATO base and it is meant for vulnerable migrants among which children and pregnant women.

The second one is a Center for First Aid and Reception (CSPA) whose capacity is up to 800-1000 places[231] and divided into two parts, one for people coming from Libya and unaccompanied minors, and the other which consisted of a closed center within the center itself reserved only for Tunisian adults. They are both run by private companies

[228]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §56.
[229]Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", April 21, 2011, pg. 2.
[230] Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§33-35; Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", April 21, 2011, pg. 3.
[231]According to the Ad Hoc Sub-Committee the capacity was up to 1000 places, whereas according to MSF and Amnesty International was up to 800, instead.

under the surveillance of the Prefect and neither of them is designed for lengthy stays[232].

Despite in Khlaifia case the violation of Article3 of ECHR "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" had not attained the minimum level of severity, reportedly bad conditions both in the base Loran and in the CSPA in Contrada Imbriacola cannot be denied.

The base Loran is considered a satellite facility and it does not satisfy capacity standards, nor sanitary or safety international requirements: among the problems, the Parliamentary Assembly lists overcrowding, mattresses placed on the ground, few and inadequate sanitary facilities. Moreover, people complained not to be able to communicate by telephone with their relatives because the mobile phone signal was very weak[233]. Regarding the CSPA reception center in Contrada Imbriacola, at the time of the applicants 'arrival, the conditions were far from ideal: overcrowding, poor hygiene and lack of contact with the outside world. The rooms of the center contained four-tier bunk beds placed side by side which hosted up to 25 persons. Torn foam-rubber mattresses were along the corridors or outside on stairs, light bulbs were absent, and rainwater carried dampness and dirt into living quarters. Toilets and showers were smelly and unusable, and privacy was ensured only by cloth or plastic curtains and water pipes were sometimes blocked or leaking[234]. MSF and the Italian Red Cross expressed their concerns regarding health conditions in the center because of overcrowding conditions[235], which was confirmed by the center's Director interviewed by Amnesty International[236]. The judgment also demonstrated that when states are overwhelmed by large migration flows, they may not have resources to provide migrants with the basic standards provided by the law, which may lead the police

[232]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§36, 37.
[233]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§36, 37.
[234]Italian Special Commission for Human Rights, report on "*the state of human rights in prisons and reception and detention centers in Italy*", February 11, 2009, pgg. 152,153; Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", April 21, 2011, pg. 3.
[235]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", September 30, 2011, §§47,48.
[236]Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", April 21, 2011, pg. 3.

authorities to take more leeway to manage mass influxes of migrants[237]. First of all, detention was not lawful according to domestic law and the principles of the Convention, violating thus the real aim of Article 5§1 which is that to avoid arbitrary detention[238]. Indeed, no one shall be deprived of his/ her own liberty[239], unless detention falls under specific circumstances[240] or in conditions of necessity and urgency justified by law[241]. In this latter case, the police shall inform a judicial authority about the provisional measures within 48 hours and receive an answer in the following 48 hours[242]. Nevertheless, detention shall be a measure of last resort[243]. In Khlaifia case however, the Agrigento Chief of the Police merely registered the presence of the migrants in the CSPA without taking any decisions about their detention[244] and thus without informing any judicial authorities[245]. Secondly, migrants should have been brought to CIEs as being the only center allowing detention according to Italian legislation[246]: in this way, not only the applicants were detained illegally, but also they could not benefit of the safeguards of *habeas corpus* applicable to a placement in a

[237]Goldenziel J.I., *"Khlaifia and Others v. Italy*", ed. Wuerth I., in *The American Society of International Law*, Cambridge University, April 25, 2018, pg. 279.
[238]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §64).
[239]Cfr. Article 13 of the Italian Constitution and Article 5§1 of the Convention.
[240]Cfr. 5§1 of the Convention "[…] *No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*".
[241]Cfr. Article 13 of the Italian Constitution *"In exceptional circumstances and under such conditions of necessity and urgency as shall be precisely defined by law, the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective".*
[242]*Ibidem.* Cfr. Article 13 of the Italian Constitution *"In exceptional circumstances and under such conditions of necessity and urgency as shall be precisely defined by law, the police may take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective".*
[243]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §86).
[244]*Ibidem,* §25.
[245]*Ibidem*, §78.
[246]Cfr. Article 14 of the Consolidated Immigration Act: "[…] *il questore dispone che lo straniero sia trattenuto per il tempo strettamente necessario presso il centro di permanenza per i rimpatri più vicino, tra quelli individuati o costituiti con decreto del Ministro dell'interno, di concerto con il Ministro dell'economia e delle finanze*".

CIE[247]. Indeed, the CSPA was meant to be a transfer center and therefore stays were supposed to be limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his/ her presence in Italy or to decide his/ her removal. However, many organizations working on the spot, among which the UNHCR, reported extended stays up to over twenty days, without any formal decision as to the legal status of the person held. Together with the inability to communicate with the outside world, the lack of freedom of movement and of any legal or administrative measure providing for such restrictions, this all brought tension, often manifested in acts of self-harm[248]. Moreover, the revolt that broke out on September 21 showed that migrants wanted to escape from Italian authorities in CSPA as they were under their surveillance[249] and they were there against their will[250]. Lastly, the Italian authorities did not fulfill their duties to communicate migrants of their legal and factual grounds for detention throughout their stays in Italy. The refusal-of-entry orders could have not indeed been considered satisfying as they did not mention any reasons for it[251] and were notified to the applicants very belatedly[252]. The information needed should have been provided by the authority carrying out the arrest or the placement in detention or from official sources[253].

3.3.4. Collective expulsion

The non-violation of collective expulsion in Khlaifia case is another demonstration of how states arbitrarily managed the migration flow. On April 5th, 2011, the Italian and the Tunisian Governments entered into agreements: Tunisia was in charge of undertaking measures to strengthen its border controls with the aim of avoiding departures of irregular migrants, by using logical resources provided by Italy. In addition, Tunisia committed itself to accepting the immediate return of Tunisians who had unlawfully reached the Italian shores after the date of the agreement. Tunisians

[247]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §105).
[248]Italian Special Commission for Human Rights, report on "*the state of human rights in prisons and reception and detention centers in Italy*", February 11, 2009, pgg. 103, 104.
[249]*Khlafia and Others v. Italy* (no. 16483/12, December 15, 2016, §65).
[250]*Ibidem,* §66.
[251]*Ibidem*, §119.
[252]*Ibidem,* §120.
[253]*Ibidem,* §112.

were sent back through simplified measures[254], namely through the mere identification of the citizenship of the person before the Tunisian consular authorities without any proper examination of his/ her personal situation[255]. This agreement has been criticized[256] as violating migrants' rights for the following reasons. Firstly, the text of the agreement has never been made public, only quotas of between 30 and 60 returns per day have been mentioned. Therefore, migrants could have not known the real consequences of crossing the Mediterranean Sea, and landing on Italian shores[257]. Secondly, this agreement goes against the real aim of Article 4 of Protocol No. 4 which is to prevent States from having the authority to remove a certain number of aliens without examining their personal circumstances and consequently without enabling them to put forward their arguments against the measures taken by the relevant authority[258]. The word collective refers indeed not to the number of people involved in the expulsion, not to a membership of a particular group[259], but rather to the modality of the expulsion. This means that migrants can benefit from procedural guarantees, namely an individual interview. This is an absolute right for everyone regardless whether they reside or domiciliate or not in the territory of the State they have entered[260]. According to Serghides, one of the judges taking part to the Grand Chamber in Khlaifia's case, the nature of collective expulsions of aliens presumes that these expulsions are carried out arbitrarily and in a discriminatory manner, and therefore the prohibition of them is aimed at avoiding arbitrariness and discrimination[261]. Professor James Crawford, judge of the International Court of Justice, observes that collective expulsion of aliens is a serious breach of international law and Article 4 of Protocol No. 4 is an absolute and non-derogable prohibition[262]. As a consequence, all Member State that had accepted the Convention shall respect its principles, even in a context of a migration crisis[263].

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[254]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §74).
[255]*Ibidem,* §§36-38.
[256]*Ibidem,* §8 of Partly dissenting opinion of judge Serghides.
[257]Parliamentary Assembly, "*Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores*", 30 September 2011, §53.
[258]Cfr. *Hirsi Jamaa and Others v. Italy* (no. 277765/09, February 23, 2012, §177).
[259]Cfr. *N.D. and N.T. v. Spain* (no. 8675/15, February 13, §§193-199).
[260]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §56 of Partly dissenting opinion of judge Serghides).
[261]*Ibidem,* §11 of Partly dissenting opinion of judge Serghides).
[262]Crawford J., "*Chance, Order, Change: The Course of International Law*", in *Collected courses of the Hague Academy of International Law*, vol.365, Leiden/Boston, 2013, pg.208, §350).
[263]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §106).

Also Amnesty International states in its report that collective expulsions are strictly prohibited under international, regional and domestic human rights and refugee law and standards which shall guarantee an effective remedy against the removal of migrants, otherwise a violation of human rights could take place[264]. Before the Court, the Italian Government stated that individual interviews had been taken place twice, namely in CSPA in Contrada Imbriacola and before boarding on Tunisian planes. In CSPA in Contrada Imbriacola, police officers and cultural mediators or interpreters carried out personal interviews with all the applicants, filling also information sheets with personal information which, according to the Government, were thereafter destroyed in the fire and thus not available anymore. The applicants replied that the Italian authorities should have made a fresh record as being of an absolute importance and also an obligation of the State[265]. In his partly dissenting opinion, the judge Serghides doubted about the fact that an individual interview had taken place in the presence of cultural mediators and interpreters: first, the Government did not name the persons involved in carrying out the interview,[266], and second it did not specify whether the interview was done by a cultural mediator or by an interpreter[267]. These all show that the Italian authorities did not know exactly who and if someone was working in the CSPA. The second identification was conducted by a Tunisian consular before boarding on the plane heading for Tunisia and not by Italian authorities, instead[268]. The personal interview should have been conducted by the authorities of the State the applicants have entered and thus by Italian ones. Moreover, the applicants were given the refusal-of-entry orders which according to the Government could have been considered as documents providing personal interview, but, on the contrary, they did not contain any reference of it, but rather they just mentioned the general personal information and citizenship of the applicants. The negative consequences of the bilateral agreement between Italy and Tunisia have mainly affected Tunisians landed on Italian soil. Even if most of them fall into the category of economic migrants and therefore subject to repatriation, this does not mean

[264]Amnesty International, "*Italy: Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo*", 21 April 2011, pg. 6.
[265]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §29 of Partly dissenting opinion of judge Serghides).
[266]*Ibidem,* §31 of Partly dissenting opinion of judge Serghides.
[267]*Ibidem,* §35 of Partly dissenting opinion of judge Serghides.
[268]*Ibidem*, §250.

that their rights must not be respected. During their visit to Lampedusa, PACE Ad Hoc Sub-Committee members found that the Italian authorities were not themselves able to tell them when they could resume repatriations to Tunisia, which demonstrated the inadequacy and the illegality of Tunisians' detention on the island for long periods, without the possibility of a judge. This was not only a significant stress factor for migrants, but also a violation of Article 5§§1,2,4 of the Convention. Collective expulsion is thus an absolute prohibition and authorities should not be given the power to decide as they want, even though they are in a humanitarian crisis. In this regard, the PACE Ad Hoc Sub-Committee and Amnesty International firstly recommended Italian authorities not to conclude bilateral agreements with the authorities of countries which are not safe and where fundamental rights are not properly guaranteed. If these agreements are necessary, the parties involved shall at least make them public. Secondly, the reception and detention conditions shall not violate migrants' rights and provide an adequate screen to assess any potential protection needs and information about their right to challenge removal on international protection or other human rights grounds. Moreover, detention shall have legal basis and subjected to periodic judicial review. Thirdly, Italian authorities shall desist from any further collective expulsions.

In this chapter, we have seen how cooperation between all stakeholders involved in the migration management is vital for communicating and ensuring human rights. Indeed, human rights laws are specialized texts written in legal language which may be not comprehensible to all subjects of law. Therefore, Italian authorities with the help of other actors among which intercultural mediators shall render those principles available in a simple and non-technical language to everyone. This is not what happened in the analyzed judgment of Khlaifia and Others v. Italy, though, where the applicants were victims of the violations of some rights enshrined in the ECHR. Indeed, in the Khlaifia's judgment, the report on the state of human rights in prisons and reception and detention centers in Italy by the Senate's Special Commission, the fact-finding of the Council of Europe's Parliamentary Assembly Ad Hoc Sub-Committee and Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo show concretely how migration flow is

managed arbitrarily, although there are laws to be respected. The case sheds also light on the importance of communicating human rights properly, which is one of the activities promoted by the European Court of Human Rights through translation in different languages. Indeed, in order to avoid incomprehension between parties and to allow access to legal texts to readers from different countries, legal translation turns out to be an effective solution which has also been used by the European Court of Human Rights. In the next chapter, we are going thus to analyze firstly the general role of the European Court of Human Rights in ensuring human rights to all individuals, secondly its translation activities in spreading human rights, thirdly, we will provide concrete examples of legal translation taken from the Khlaifia case.

Chapter 4

The European Court of Human Rights and legal translation

This chapter sheds light on the role of translation in disseminating migrants' rights. For this purpose, a first glance will be given at the role of the European Court of Human Rights with particular regard to the translation activities and programs, secondly legal translation and legal language theory will be broadly exposed, and thirdly concrete examples of legal translation of the cross-references taken from the Khlaifia's case will be provided.

4.1. The European Court of Human Rights

When dealing with human rights, we cannot forget to talk about the role of the European Convention and the Court of Human Rights. After the serious human rights violations that Europe had witnessed during the Second World War, the forty-seven Member States of the Council of Europe decided to sign an international treaty[269] in 1950 in Rome whose aim was to defend democracy, the rule of law, human rights and fundamental freedoms in Europe[270]. The creation of the European Convention on Human Rights (ECHR) led to the establishment of its Court in 1959 in Strasbourg, France. The European Court of Human Rights (ECtHR) is an international court, a "supranational judicial body[271]" whose duty is to protect individuals from violations of those rights established in the ECHR by a Contracting Party. In doing so, the Contracting States have negative and positive obligations arising from the ECHR. Negative obligations place duty on national authorities to refrain from acting in a way that unjustifiably interferes with ECHR rights. Most of the ECHR rights are framed in

[269]The Convention was signed by forty-seven Member States of the Council of Europe in Rome in 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding upon states. However, it was only in 1959 that the first member of the Court was elected by the Consultative Assembly of the Council of Europe (Parliamentary Assembly).

[270]Cfr. Letsas G. (2009), in Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 14.

[271]Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 13.

this way. In some circumstances, however, the ECHR also imposes positive obligations on the state to ensure that the rights are protected. Therefore, a right can be violated by the state's failure or omission to act.

4.1.1. The internal structure of the Court

The Court consists of a number of judges equal to the number of Member States of the Council of Europe that have ratified the Convention, namely forty-seven, who are elected by the Council's Parliamentary Assembly. Although judges are elected in respect of a state, they examine cases in their individual capacity and do not represent that state. They are totally independent and cannot engage in any activity that would be incompatible with their duty of independence and impartiality. The mechanism of protecting human rights at the Court is exemplary: the Court can rule in law on alleged violations of the European Convention, and the Committee of Ministers supervises the execution of judgments delivered by the Court whose compliance must be assured on domestic level. This complementarity is a guarantee of effectiveness, since the judicial body has the power to deliver judgments while the policy body monitors their enforcement[272]. The structure of the Court can be analyzed both according to administrative and judicial formations.

The administrative formations are the Plenary Court and the Sections, where the first one is the highest formation of ECtHR which has jurisdiction to examine administrative and organizational matters related to the working of the ECtHR; whereas the second one is, instead, divided into five administrative units where the judges are grouped into. Each section is composed by the ordinary panels of judges (judicially called chamber)[273]. Each section is presided over by a President and a Vice-President and is assisted by a number of lawyers who may be defined administratively as staff members and functionally as part of the Registry. The composition of the Section is designed to ensure, as far as possible, geographical and gender balance.

[272]Renucci J. F., "*Introduction to the European Convention on Human Rights- The rights guaranteed and the protection mechanism*", Council of Europe Publishing, 2005, pgg. 95-96.
[273]The word section indicates an administrative entity, whereas a chamber is a judicial formation of the ECtHR within a given section.

As far as judicial formations are concerned, according to Article 26 of the Convention, the Court may sit in four different judicial panels: single judge, committee of three judges, chamber of seven judges and Grand Chamber.

Of great importance is the role of the Registry which supports the ECtHR by providing legal and administrative support in the exercise of judicial functions. Indeed, the Registry is composed of case-law lawyers, administrative and technical staff and translators that are grouped into several sectors of activity. Additionally, a Section Registrar and a Deputy Section Registrar assist each of the Court's five judicial Sections while delivering a judgment. The head of the Registry is the Registrar who holds overall responsibility for its judicial and administrative activities.

4.1.2. The Convention as a "living instrument"

Given the heterogeneity of the legal and linguistic systems of the Member States composing the Council of Europe, both the Convention and the Court do not represent a single identity, but they are rather "a merger of different traditions arising from different legal systems[274]". Therefore, the Convention cannot be applied statically, but dynamically as it is a "living instrument" which the Court must be able to keep up to date, interpret, and apply in the light of the present-day conditions[275]. Indeed, the Convention contains generic notions evolving necessarily over time, which means that the precise content of the rights may change according to the circumstances and the domestic legal system of the Member State taken into account. Consequently, in guaranteeing the rights secured by the Convention, the ECtHR will have regard to the developments in the Contracting States and changing circumstances.

4.1.3. Language regime, translation activities and programs of the Court

Although the effect of the ECtHR's case-law is formally limited to the concrete circumstances of one single case, the principles it promotes should be considered as fundamental rights to be safeguarded in all the Contracting States. Both the need for

[274]Cfr. Garlicki L. (2009), in Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 14.
[275]*Ibidem*.

judgments to be executed by domestic justice systems and the desire to disseminate the principles beyond the national boundaries of the State involved in the specific case have a significant impact on the linguistic choices of the ECtHR. Despite the fact that the official languages of the Court are only English and French[276], legal translation from and into different non-official languages plays a fundamental role in the daily agenda of the Court and for the protection of human rights. Translation has become more and more an activity of utmost importance to make human rights widely accessible[277]. The Court makes use of translation in two stages: in the drafting and in the dissemination of its case law and principles.

The phase of drafting a case-law is a collegial activity[278]: during the delivering of a judgment, the President appoints a drafting committee composed by the Registry lawyer who drafts the judgment, the Judge Rapporteur[279], and the Registrar assigned to the case who both accept or amend the text drafted. All judgments are given either in English or in French, unless the Court decides they have to be written in both official languages[280]. In this case, the translation from English into French or vice versa can be carried out before delivery when both texts are to be authoritative (as is the case for Grand Chamber judgments), or otherwise after delivery purely for publication on the on-line HUDOC database and more rarely in printed reports[281]. In case applicants, Contracting Parties involved in the case, witnesses, experts and other persons appearing before the Court do not speak either English or French, they may be allowed by the President of the Chamber to communicate their submission orally or in written form in their

[276]Cfr. Article 34 of the Rules of Court: https://echr.coe.int/Documents/Rules_Court_ENG.pdf [18/12/2020].
[277]Cfr. Popović D. (2007), in Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 34.

[279]The Judge Rapporteur is the highest expert in national law and in national context appointed within a Chamber during a judgment. Cfr. Garlicki L. (2009), in Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 25.
[280]Cfr. Article 76 of the Rules of Court: https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [22/01/2021].
[281]Cfr. Garlicki L. (2009), in Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 38.

languages and the Registrar has to make the necessary arrangements for their interpretation and translation into English or French[282].

The same cannot be said of the dissemination phase of the case-law and related materials, which the Court has only recently dealt with. A significant turning point came from the Interlaken Process, namely a series of conferences in Interlaken (2010), Izmir (2011), Brighton (2012), Brussels (2015) and Copenhagen (2018) where the future of the Court was discussed and from which it emerged that the principles, standards and case-law of the Court needed to be disseminated and thus translated into the non-official languages of the Member States. This would facilitate the implementation of these principles at the national level and thus ensure greater protection of human rights. Several projects were initiated including "Bringing the Convention Closer to Home: Translation and dissemination of key ECHR case-law in target languages[283]" whose aim is to translate the Court's key judgments, and decision in order to further disseminate its case law via HUDOC (the Court's database) and partners at national level. The project was launched by the Court and funded by the Human Rights Trust Fund (HRTF) where 70 translator-freelancers were hired, and 3,500 texts were translated into twelve languages. Not only the case-law of the Court was translated, but also case-law guides, factsheets, legal summaries and the Rules of Court. However, the Court points out that the responsibility for translation into non-official languages lies with the national authorities[284].

Thus, translation challenges appear at all stages of the Court proceeding, ranging from submitting documents to judgment delivering and disseminating and it has been proved an important means in enhancing the role of the Court in protecting and promoting human rights.

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[282]Cfr. Article 34 of the Rules of Court: https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf [22/01/2021].
[283]European Court of Human Rights, "*Bringing the Convention Closer to Home. The Court 's Case-Law Translations Project (2012-2016): Achievements and Remaining Challenges*": https://www.echr.coe.int/Documents/HRTF_standards_translations_ENG.pdf [21/12/2020].
[284]Cfr. Peruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pgg. 34-40; and Kjær A.L., "*Translation of Judgements of the European Court of Human Rights into Non-official Languages: The Politics and Practice of European Multilingualism*", iCourts-The Danish National Research Foundation's Centre of Excellence for International Courts, in *Oxford University Press (Oxford Studies in Language and Law),* October 2019, pg. 24.

4.2. Legal translation and legal language: an overview

Legal translation is a technical translation, a specialized area of translational activity involving special language use, that is, the language for special purposes (LSP) in the context of law[285]. The linguist Cortelazzo has provided a detailed definition of LSP as follows:

"Per lingua speciale si intende una varietà funzionale di una lingua naturale, dipendente da un settore di conoscenze o da una sfera di attività specialistici, utilizzata, nella sua interezza, da un gruppo di parlanti più ristretto della totalità dei parlanti la lingua di cui quella speciale è una varietà, per soddisfare i bisogni comunicativi (in primo luogo quelli referenziali) di quel settore specialistico; la lingua speciale è costituita a livello lessicale da una serie di corrispondenze aggiuntive rispetto a quelle generali e comuni della lingua e a quello morfosintattico da un insieme di selezioni, ricorrenti con regolarità, all'interno dell'inventario di forme disponibili nella lingua[286]".

As shown, the LSP is a functional variety of ordinary language which is related to a specific topic and therefore it addresses to a specific target and it requires specific linguistic features both in terms of lexicon and morpho-syntax in order to make communication clear with all the subjects involved. Legal language is a language for special purposes as it refers to a specific topic: the language of and related to law and legal process[287]. Many scholars have provided different definitions of legal language[288]. In her definition, the linguist Kalinowski[289] uses "legal language" as a superordinate terms including the "language of Law", i.e. the language used by legislator to express a legal rule and the "language of Jurists[290]", i.e. the language used in legal literature and legal science. Similarly, the linguist Trosborg[291] (1997) sees "legal language" as a

[285]Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 8.
[286]Cortelazzo M., "*Lingue speciali- La dimensione verticale*", Studi linguistici applicati, Unipress, Padova, 1994, pg. 6.
[287]Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 9.
[288]The classification of legal language is wide because of the multiple perspectives that can be adopted when observing the interaction between language and law. Some scholars have focused on legal language, whereas others on legal genres or legal texts. However, in this dissertation I will not delve into all the literature regarding legal language, but I will only provide few general definitions. For further readings, I vividly recommend the research conducted by Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pgg. 41-50.
[289]Cfr. Kalinowski G. (1965), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 42.
[290]The word "jurists" is used to encompass whoever speaks about the law: experts other than legal scholars (for example historians, sociologists, psychologists), legal practitioners (such as legal counsels, judges, prosecutors, businesspeople, etc).
[291]Cfr. Trosborg A. (1997), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 47.

superordinate category including all the sublanguages within the legal domain one of which is the "language of the law" referring to legal documents. On the contrary, the linguistic Kurzon[292] points out that lawyers and linguistics have erroneously used the terms as synonyms as, according to him, "legal language" is the "language used when people talk about the law", which can be both written (including judgment and textbooks) and spoken (including formal speech, witness questioning and other types), whereas the "language of the law" is "the language or the style used in documents that lay down the law, in a very broad sense" and it includes both legislation and private law documents such as contracts, wills and deeds[293].

Interestingly, as Cortelazzo states in his above-mentioned definition, LSP is a variety of natural language appropriate to different occasions and situations of use and, in the case of legal language, a variety of language appropriate to the legal situations of use which the linguistic Cao defines as "register". It follows that legal texts refers to the texts produced or used for legal purposes in legal setting and, according to Cao, they may be classified into four variants in written form: legislative texts (e.g. domestic statues, international treaties or multilingual laws), judicial texts produced in the judicial process by judicial officers and other legal authorities, legal scholarly texts produced by academic lawyers or legal scholar and private legal texts including texts written by lawyers (e.g. contracts, leases, wills) or non-lawyers (e.g. private agreements or witness statements)[294].

However, legal language does not just cover the language of law alone, but all the communications in legal settings[295]. It follows that legal translation is an activity of translating law and other communication in legal setting with the aim of rendering legal texts from the SL into the TL. Some scholars, among which the linguistics Cao and Šarčević, have stressed the importance of taking into account the function of both SL and TL texts when translating. Cao distinguishes legal translation according to the purpose of TL: normative, informative and for general legal or judicial purposes. Translation for

[292]Cfr. Kurzon D. (1989), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 45.
[293]Cfr. Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pgg. 41-47.
[294]Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 9.
[295]*Ibidem*, pg. 10.

normative purpose refers to translation of the law, or better translation of law itself[296], where both SL and TL texts have equal force[297]. Translation for informative purposes has descriptive functions as it translates texts written by legal professionals from source enforceable language into a target non-forceable one. Lastly, legal translation for general legal or judicial purpose is yet descriptive, but written by laypeople. This does not mean that it is of less noteworthiness, on the contrary, it can be of vital importance for example in court proceedings as part of documentary evidence. By contrast, the linguistic Šarčević classifies translation according to the functions of the SL texts. Firstly, primary prescriptive texts containing rules of conduct or norms (e.g. laws, regulations, codes, contracts, treaties or conventions); secondly, primarily descriptive but also prescriptive used to carry on judicial and administrative proceedings such as actions, pleadings, briefs, appeals, requests or petitions, which are also called "hybrid texts"; thirdly, purely descriptive texts (e.g. scholarly works written by legal scholar such as legal opinions, law textbooks or articles). According to this classification, the translation of Khlaifia case has been carried out for informative purposes, because it aims to disseminate the principles of the judgment to a wider readership including specialists and laymen.

The complexity of translating legal texts resides in the nature of law, the language that law uses, and the associated differences found in intercultural and interlingual communication[298]. Firstly, the nature of the law is normative as it shall give guidelines about ideals and standards that citizens shall follow in a society in order to live on the basis of principles such as equity, justice, rights, liberty, equal protection and general welfare[299] and therefore legal language is related to creation, production and expression of norms[300]. Secondly, legal language is a technical language[301] because it resides in a

[296]Cfr. Šarčević S. (1997), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 10.
[297]Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 10.
[298]*Ibidem*, pg. 13.
[299]Cfr. Jenkins I. (1980), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 13.
[300]Cfr. Jori M. (1994), in in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 13.
[301]There have been different opinions about the technical nature of legal language. Some argue that legal language does not exist in itself, but it is a part of ordinary language, whereas others think that legal language is an identifiable technical language. The latter is the mostly accepted theory, and the one which we refer to in this dissertation. Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pgg. 15-18.

specific legal system and thus it requires a specific lexicon which is different from that of the ordinary language[302].

Due to its important function to guide human behavior and regulate human relations, law governs all areas of social life and therefore legal language shall be addressed to a wide target, namely the whole population: from professional layers to citizens with different ages or levels of education. When dealing with human rights, this concept is more intensified as human rights are commonly understood as being those rights which are inherent to every person as a consequence of being human[303].

4.2.1. European legal English

In the European multilingual context, English is the cross-linguistic or international medium of communication[304] to respond to the need for simplification in increasingly globalized legal and economic transactions[305]. Because in this multilingual area it is used by both native and non-native speakers, English has lost its role as an exclusively native language, becoming thus Europe's *lingua franca* whose main function is to enable intelligibility, comprehensibility and interpretability among speakers of mutual unintelligible languages[306]. By European English it is meant indeed a variety of English developed mainly in continental Europe not only within the institutions of the European Union, but also by other international organizations of European interest, such as the Council of Europe and the European Court of Human Rights[307]. Linguistically, on the one hand European legal English shares features with legal English, on the other it stands out for its own particular characteristics, especially with regard to terminology. We are going now to list all of them with concrete examples taken from the Khlaifia and Others

[302]Cfr. Jackson B. S. (1985), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 16.
[303]Office of the High Commissioner for Human Rights, United Nations Staff College Project, "Human Rights: A Basic Handbook for UN Staff", 2020, pgg.2,3.
[304]Cfr. Seidlhofer B., Breiteneder A. & Pitzl M. (2006), in Peruzzo K., "*European English terms for Italian legal concepts: the case of the Italian Code of Criminal Procedure*", in *Rivista internazionale di tecnica della traduzione*, 2014, pg. 147.
[305]Brutti N., "*Diritto privato comparato-Letture disciplinari*". G.Giappichelli Editore, 2019, pg. 52.
[306]Cfr. Berns M. (2008), in Peruzzo K., "*European English terms for Italian legal concepts: the case of the Italian Code of Criminal Procedure*", in *Rivista internazionale di tecnica della traduzione*, 2014, pg. 147.
[307]Peruzzo K., "*European English terms for Italian legal concepts: the case of the Italian Code of Criminal Procedure*", in *Rivista internazionale di tecnica della traduzione*, 2014, pg. 147.

v. Italy case. Generally speaking, what distinguishes European legal English from legal English is its slightly lower level of formality[308].

4.2.1.1. The syntactical features of the European legal English

As far as syntax is concerned, European legal language and legal English have in common the following features:

1) **Complex and long sentences**: in legal texts, sentences are longer and more complex than in other types[309] as found in Article 14 of the Consolidated Immigration Act which is composed by 127 words: "Where, in view of the need to provide assistance to an alien, to conduct additional checks of his or her identity or nationality, or to obtain travel documents, or on account of the lack of availability of a carrier, it is not possible to ensure the prompt execution of the deportation measure by escorting the person to the border or of the refusal-of-entry measure, the Chief of Police (*questore*) shall order that the alien be held for as long as is strictly necessary at the nearest Identification and Removal Centre, among those designated or created by order of the Minister of the Interior in collaboration (*di concerto*) with the Minister for Social Solidarity and the Treasury, the Minister for the Budget, and the Minister for Economic Planning" (found in §33 of the Khlaifia judgment, cfr. Article 14 of the Consolidated Immigration Act).
2) **Auxiliary- main verb separation:** grammatically, the auxiliary verb must not be separated by the verb to which it is referred. This grammatical rule is often not maintained in legal texts as provided in the following examples: "the Court shall, if necessary, afford just satisfaction to the injured party (as in § 282 of Khlaifia and Others v. Italy judgment, cfr. Article 41 ECHR); "An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of

[308]European Judicial Training Network, English for Human Rights EU Law- Handbook, pg 10.
[309]Cfr. Salmi-Tolonen T. (2004), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 21.

liberty (as in Article 19§3, b) of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case).

3) **The use of the third person singular:** "it is not possible to ensure the prompt execution of the deportation measures by escorting the person to the border or of the refusal-of-entry measure, […]" (found in §33 of the Khlaifia judgment, cfr. Article 14 of the Consolidated Immigration Act).
4) **Things rather than people as subjects of sentences:** "Personal liberty is inviolable" (found in §32 of the Khlaifia judgment, cfr. Article 13 of the Italian Constitution); "This Directive applies to third-country nationals staying illegally on the territory of a Member State. […]" (found in §41 of Khlaifia's case, cfr. Article 2§1 of the Return Directive).
5) **Passive form of the verb:** passive form is functional to obscure the agent or to render the register higher[310]as in the following examples: "2. Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. […] The third-country national concerned shall be released immediately if the detention is not lawful" (found in §41 of the Khlaifia judgment, cfr. Article 15 of the Return Directive).
6) **Nominalization:** it is the process of word formation by way of conversion from verb or adjective to noun[311]:
    - with no change of form: "to remedy" and "remedy" (found in §§3,41, 50, 126,130, 133, 256, 260, 268, 272, 274, 276, 278, 279,280 of Khlaifia judgment)and "to stay" and "a stay" (found in §§19, 26, 35, 41, 42, 45, 87, 104, 109, 143, 153, 182, 190, 192, 195, 197, 221, 226, 260, 261of Khlaifia judgment);
    - with morphological derivation: "application" (found in §4 of the judgment) deriving from the verb "to apply", "admissibility" (found in §7 of the judgment) deriving from the verb "to admit", and "procedure" (found in §§25, 38, 40, 41, 43, 44, 55, 74, 77, 80, 83, 91, 96, 102, 104, 131, 213, 214,

[310]Cfr. Cortelazzo M.A. (eds.), "*La comunicazione nelle pubbliche amministrazioni*", EDK Editore, 2010, pg. 6.
[311]European Judicial Training Network*, "English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pg. 11.

223, 226, 230, 233, 235, 242, 243, 247, 272, 279 of the judgment) deriving from "to proceed".

7) **Modal verbs expressing obligations:** in legal texts, the modal verbs occurring the most are:

6.1. shall: it is perhaps the most used modal verb in legal texts. The primary function of "shall" in general English is to express that an action is intended to take place in the future[312]. However, in legal texts, "shall" is used for several purposes as to impose a duty ("a person shall"), to prohibit a conduct ("no person shall/ shall not"), to create formal or substantive conditions precedent ("to achieve x, a person shall…"), and to declare legal effects ("the contract shall be deemed valid", or "[a particular word] shall mean…")[313]. Some examples taken from Khlaifia case are: "The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature" (found in §46 of Khlaifia's case, cfr. Article 19§1, a) of the draft article on the expulsion of aliens by the International Law Commission); and "The ground for expulsion shall be assessed in good faith and reasonably, […]" (found in §46 of Khlaifia's case, Cfr. Article 5§3 of the draft article on the expulsion of aliens by the International Law Commission). As in recent years many efforts to simplify legal language to make it more accessible to the general public have been made, "shall" has been substituted by "must" for compulsory obligations and "must not" for prohibitions. The linguist Garzone has stated that the modal function can be also replaced by the use of simple present ("this Directive applies to third-country nationals[314]") or by the semi-modal "is to" ("the respondent State is to pay to each applicant, within three months, EUR 2,500[315]")[316];

6.2. may: of no less importance is the modal "may" signifying permission and indicating discretionary obligations. According to Sullivan, "may" is used to

[312]Cfr. Thornton G.C. (1996) and Butt P./Castle R. (2006), in Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 72.
[313]Cfr. Sullivan R. (2002), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 116.
[314]Article 2§1 of the Return Directive: *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §41).
[315]Cfr. *Khlaifia and Others v. Italy* (no. 16483/12, December 15, 2016, §41).
[316]Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 75-77.

confer an authority or a power ("a person may lawfully do something that would otherwise be unlawfully"), confer a right ("a person may claim a benefit or protection under the law"), impose conditions on a grant of authority or a right ("the authority is exercisable, the right can be claimed only if certain conditions are met"), impose procedural limitations ("a person may do something only by proceeding in a stipulated way"), and refer to future actions or events[317]. Some examples taken from Khlaifia case are: "An alien may be expelled only in pursuance of a decision reached in accordance with law." (found in §46 of Khlaifia's case, cfr. Article 4 of the draft article on the expulsion of aliens by the International Law Commission); and "2. Member States may decide not to apply this Directive to third-country nationals […]" (found in §41 of Khlaifia's case, cfr. Article 2§2 of the Return Directive).

8) **Conditional clauses:** according to Crystal and Davy[318], a common linguistic formula in legal texts is "if X, then Z shall be Y" or "if X, then Z shall do Y" which is found for example in Article 13 of the Italian Constitution (cfr. §41 of Khlaifia's case): " […] the police take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective.". However, there are many variations of conditional expressions including conjunctions as "unless" as in "unless a temporary suspension is already applicable under national legislation." (found in §41 of Khlaifia's case, cfr. Article 13 of the Return Directive), or "in the case" as in "In case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority" (found in §41 of Khlaifia's case, cfr. Article 15§3 of the Return Directive)[319].
9) **Provisos:** they are qualifications and expressions used to narrow the effect of the relevant sections. As the linguistic Bennion cited, provisos are verbal

[317]Cfr. Sullivan (2002), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 116.
[318]Cfr Crystal D. and Davy D. (1969), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 121-122.
[319]*Ibidem.*

formula usually constructed as operating to qualify that which precedes[320]. Some of the provisos found in Khlaifia case are "provided that" as in "A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles." (found in §46 of Khlaifia's case, cfr. Article 9§3 of the draft article on the expulsion of aliens by the International Law Commission), "subject to" as in "All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process." (found in §46 of Khlaifia's case, cfr. Article 13§1 of the draft article on the expulsion of aliens by the International Law Commission), and "notwithstanding" as in "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." (found in §32 of Khlaifia's case, cfr. Article 13 of the Italian Constitution).

4.2.1.2. The terminological features of the European legal English

As far as terminology is concerned, European legal English and legal language terminology can be broadly divided into three categories[321].

1) **Technical terminology**: they are words that are not employed in everyday speech outside the legal context. As Khlaifia judgment mainly deals with immigration issues, technical words found in the Khlaifia's case may be classified into technical law-related words as "coercive measures" (found in §41 of Khlaifia and Others v. Italy judgment) and immigration-related words such as "extradition" (found in §41 of Khlaifia and Others v. Italy judgment).

[320]Cfr Bennion F.A.R. (2002), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 117-122.
[321]The following classification of both European legal English's vocabulary and syntax is based on the guidelines provided by the European Judicial Training Network*, "English for Human Rights EU Law-Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pgg.8-13. All the examples provided are taken from the analyzed judgment Khlaifia and Others v. Italy, instead.

2) **Semitechnical words**: they are words whose meaning in legal contexts differs from the one they have in general language[322]: "action" meaning "proceeding[323]" as in "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition" (found in §55 of the judgment, cfr. Article 5§1 (f)), or "service" meaning "notification[324]"as in "An appeal may be lodged against the present order within a period of sixty days from the date of its service, with the Justice of the Peace of Agrigento" (found in §19 of the Khlaifia judgment).
3) **General words**: they are words used in legal contexts, but that they can be understandable for everyone[325] such as "police", "border police" or "prefect".

Both European legal English and legal English have been strongly influenced by French and Latin, as we can see in the below-mentioned examples.

4) **Latin-based words**: legal texts have a large amount of Latin words that have been borrowed, among which "*inter alia*" (found in §33 of Khlaifia's case), meaning "among other things[326]", "*ratione materiae*" (found in §73 of the judgment and §12 of partly dissenting opinion of judge Serghides), meaning "determination of competence based on the subject of controversy[327]", "*ratione personae*" (found in §12 of the judgment and in §53 of partly dissenting opinion of judge Serghides), meaning "immunity given to a person not for the act(s) committed but for the qualities of the delinquent person such as official rank or other[328]", "*mutatis mutandi*" (found in §§68,71, 96, 120, 133, 193, 195, 201, 269, 279, 288 of Khlaifia's case), meaning "change where change is needed[329]" and "*de facto*" (found in §31 of the judgment), meaning "literally, in reality[330]".

[322]European Judicial Training Network, *"English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pg. 6.
[323]*Ibidem.*
[324]*Ibidem.*
[325]*Ibidem.*
[326]Online etymology dictionary: https://www.etymonline.com/search?q=inter+alia [13/01/2021].
[327]European Judicial Training Network, *"English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pg. 9.
[328]*Ibidem*.
[329]*Ibidem*.
[330]Online etymology dictionary: https://www.etymonline.com/search?q=de+facto [13/01/2021].

Other words have been translated literally as "good faith" (found in §46 of Khlaifia's case, cfr. Article 5 of the draft articles on the expulsion of aliens) from the Latin expression "*bona fides*", meaning "good faith, fair dealing, freedom from intent to deceive[331]".

5) **French-based words:** according to the linguistic Tiesma, legal English has been impacted by a large amount of technical vocabulary deriving from French[332] which have been translated into English differently. Some words have been borrowed as in "*non-refoulement*" (found in §§50, 222,230,247 of the judgment and §§12,15,20, 25, 37 of the partly dissenting opinion of judge Serghides"), meaning "having entitlement to conditions of non- expulsion from a sovereign state[333]" and "*surveillance*" (found in §14 of the judgment) meaning "oversight, supervision[334]"; others have been anglicized, instead, such as in "court" in meaning "formal assembly held by a sovereign[335]"or in "judge" meaning "public officer appointed to administer the law[336]".

Other common constructions present in legal texts are:

6) **Use of here/ there adverbs:** "whereby" (found in §§80, 133, 214, 221, 226 of the Khlaifia case) meaning "by which way or method[337]", "thereof" (found in §§30, 33, 59, 74 of the Khlaifia case) meaning "from the time of the cited item[338]", "thereto" (found in §§100-128 of the Khlaifia case) meaning "actors or parties included[339]", "thereunder" (found in §269 of the Khlaifia case) meaning "under that[340]", "thereby" (found in §269 of the Khlaifia case) meaning "in

[331]Online etymology dictionary: https://www.etymonline.com/search?q=bona+fides [13/01/2021].
[332]Tiesma P.M. (1999), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 56.
[333]European Judicial Training Network, *"English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pgg.8-13.
[334]Online etymology dictionary: https://www.etymonline.com/word/surveillance [13/01/2021].
[335]Online etymology dictionary: https://www.etymonline.com/search?q=court [13/01/2021].
[336]Online etymology dictionary: https://www.etymonline.com/search?q=judge [13/01/2021].

[337]Cambridge Dictionary: https://dictionary.cambridge.org/it/dizionario/inglese/whereby [19/01/2021].
[338]European Judicial Training Network, *"English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016, pg. 12.
[339]*Ibidem*.
[340]Merriam-Webster Dictionary: https://www.merriam-webster.com/dictionary/thereunder [19/01/2021].

connection with[341]", "therein" (found in §§100-128 of the Khlaifia case) meaning "somewhere in the document cited".

7) **Prepositional phrases:** "with the purpose of" (§91 of the case), "in accordance with" (§§18, 19, 41 of the case), "in respect of" (found in §§19, 30 of the case), "in the light of the foregoing" (in §29 of the case), "on behalf of" (in §19 of the case), "within the meaning of" (in §29 of the case), "in view of" (in §33 of the case), "without prejudice to" (in §46 of the case) and "pursuant to" (in §§24,50 of the case).
8) **Acronyms and abbreviations:** ECtHR for European Court of Human Rights, ECHR for European Convention on Human Rights, ECRE for the European Council on Refugees and Exiles (in §8 of Khlaifia's case), CSPA for Early Reception and Aid Center (Centro di Soccorso e Prima Accoglienza, in §12 of Khlaifia's case), CIE for Identification and Removal Center (Centro di Identificazione ed Espulsione, in §25 of the case), and MP for member of parliament (in §27 of the case).
9) **Formulaic conventions:** they signal the different structural components of EU acts:
    - whereas: "whereas none of the situations [provided for in] Article 10 § 4 of Legislative Decree no. 286 of 1998; […]" (found in §19 of Khlaifia's case);
    - considering that: "considering that is appropriate to proceed in accordance with Article 10§2 of Legislative Decree no. 286 of 1998" (found in §19 of Khlaifia's case);
    - having regard to: "having regard to the particular circumstances of the case and to the conclusion it has reached as to applicants' various complaints, the Court [..] (found in §285 of the Khlaifia case), and "having regard to the documents in the file […] (in §19 of the case).

As said at the beginning of the Chapter, European legal English has some specific terminology which differ from properly legal English. In particular, the terminology

[341]European Judicial Training Network*, "English for Human Rights EU Law- Handbook",* European Union Agency for Fundamental Rights and Council of Europe, 2016*,* pg. 12.

adopted by the ECtHR is unique in its genre as it is affected by its role of supervising human rights protection under the 1950 Convention, with the right of individual petition, its broad territorial jurisdiction covering diverse legal systems, and its limited number of official languages[342]. For this reason, another terminological classification has been proposed by the linguistic Brannan who has grouped the terminology of the Court in two groups, namely supranational terms and national terms.

1) **Supranational terms:** they have evolved in general international law or are specific to the Court itself, being enshrined in its basic texts or case-law. They are further subdivided into:
   - convention-specific terms which derived from the European Convention on Human Rights such as "just satisfaction" (Article 1 ECHR), or "exhaustion of domestic remedies";
   - jurisprudential creations which are unfamiliar in national legal contexts and, therefore, they do not appear in the texts of the ECHR, but they are rather created and developed in ECtHR case-law. An example could be the doctrine of the "margin of appreciation";
   - linguistic precedents which comprise other terms and expressions that are commonly used in the ECtHR case-law, but they are not unknown in national contexts, such as "practical and effective";
   - generic terms which are used because of their capacity to serve as umbrella terms, i.e. to cover a variety of (quasi-)equivalent national legal concepts. For example, the English text of Khlaifia uses "refusal of entry" to indicate "*respingimento*" in general, although the Italian legislation makes a different between "*respingimento alla frontiera*" and "*respigimento in differita*".
2) **National terms:** they have developed on the legislation of the Member State taken into account in a judgment.

So far, we have listed all the syntactical and terminological characteristics of the European legal English which have to be taken into account when translating a judgment

[342]Brannan W.S. (2013), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 79.

of the European Court of Human Rights, and which we are going to see into context in the next chapter.

4.3. Khlaifia and Others v. Italy: a legal translation analysis

As explained in paragraph 4.1.1. (Language regime, translation activities and programs of the Court), in 2017 the Court launched the project "Bringing the Convention Closer to Home: Translation and dissemination of key ECHR case-law in target languages*",* thanks to which the principles, standards and case-law of the Court have been translated into non-official languages under the responsibility of the national authorities. The aim of this project was (and is) to facilitate the implementation of the principles of the Convention and the case-law of the Court at the national level and thus ensure greater protection of human rights. It follows that translation has been carried out for informative purposes[343].

The Khlaifia and Others v. Italy case has been translated and revised into Italian by the linguistic assistant Rita Carnevali and the linguistic officer Dr Martina Scantamburlo and published on the institutional website of the Ministry of Justice and on the Court's HUDOC site.

The next sub-paragraphs are thus devoted to framing ECtHR judgment as a legal genre, and to analyzing and comparing some parts of the translation in English and in Italian of Khlaifia case.

4.3.1. Grand Chamber judgment as a legal genre

The judgments of the ECtHR follow a formulaic and prefabricated structure which shall be borne in mind when translating, and which will be exposed by using the multidimensional approach adopted by the GENTT research group[344]. The group defined the judgments of the ECtHR as a "genre" meaning a notion that includes formal

[343]Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 11.
[344]The GENTT (Géneros Textuales para la Traducción/Textual Genres for Translation) group is a research group of the Department of Translation and Communication at Universitat Jaume I, Castellón de la Plana, Spain. It is directed by Isabel García-Izquierdo. More information can be found on www.gentt.uji.es.

aspects (conventionalized forms), sociocultural aspects (social occasions) and cognitive aspects (purposes of the participants). On this basis, the group proposed a model of genre analysis in order to describe the judgments of the ECtHR. This genre characterization system comprises blocks of data regarding the sub-genre, the communicative situation and the macro-structure of ECtHR judgments.

Regarding the sub-genres, the ECtHR judgment can be further classified according to two criteria: one is the judicial formation delivering the judgment (the Committee, the Chambers or the Grand Chamber), the other comprises the Articles of the Convention that the respondent State has allegedly violated. The sub-genres considered in Khlaifia case consists in a judgment rendered by the Grand Chamber only for the alleged violation of Article 5§§1,2,4, Article 3, Article 4 of Protocol No. 4, Article 13 (taken together with Article 5§§1,2,4, Article 3, Article 4 of Protocol No. 4) of the ECHR.

With reference to the communicative situation, instead, the GENTT's system provides data subsumed under three subheadings: register, participants and function. Delving into its register, the Khlaifia's judicial decision falls into the socio-professional field of law whose mode is written and whose level of formality is high[345].

Concerning the communicative setting, the ECtHR judgments are characterized by a plurality of participants: the "sender" is the Grand Chamber, i.e. panel of seventeen judges expressing a shared view when delivering a judgment, whereas the "receivers" are the parties to the case such as States as respondent (in Khlaifia'case the Italian Government is represented by its Agent, Ms E. Spatafora), and natural persons (three Tunisian nationals, Mr Saber Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar represented by their lawyers Mr L.M. Masera and Mr S. Zirulia). The Khlaifia case sees other parties involved influencing the communicative situation of the genre which are four associations submitting written comments according to Article 36 of ECHR: Coordination Française pour le droit d'asile (French coalition for the right of asylum), and the Center for Human Rights, and Legal Pluralism of McGill University, the AIRE Center and the European Council on Refugees and Exiles (ECRE), and the

[345]Cfr. Borja Albi A. et al. (2009), in Petruzzo K., *National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*, EUT Edizioni Università di Trieste, 2019, pg. 57.

whole population of the Member States of the Council of Europe. Because their different backgrounds in terms of legal, cultural and linguistic settings and knowledges, all these parties can influence differently the communicative situation as proposed by Cloître and Shinn[346]. According to them, the communication setting can be distinguished on the basis of the senders' and receivers' levels of education and therefore on the basis of the specialization into 1) intra-specialist communication (from specialist to specialist in the same field; 2) inter-specialist communication (from specialist to specialist across field; 3) didactic/ pedagogical communication (from specialist to non-specialist, e.g. pupil, trainee, student); 4) popular communication (from specialist to laypeople, i.e. the largest audience possible). According to this classification, the Khlaifia case is an intra-specialist communication as it involves specialists in the same field.

As far as the function is concerned, the judgments of the Grand Chamber go in two directions: one is in line with the real function of the Court, which is to protect individuals against those Member States violating the human rights and the principles of the Convention, and thus the Grand Chamber judgments must declare the violation and grant remedies; the other responds to the need of disseminating and enforcing the principles enshrined in the ECHR and in the ECtHR case-law to all other Member States that are not parties to the case.

The variety of functions and of the direct and indirect participants in the communicative situation taken together with the characteristics of the supranational arena make the judgments of ECtHR composite and unique in their kinds. This complexity is due to the shift from a national cultural and legal dimension to a supranational one, which lead not only changes in the different types of law (national, international and supranational), but also in the linguistic regime (English, French and all non-official languages of the Member States)[347].

Concerning their macro-structure, the ECtHR Grand Chamber judgments are divided into sections and subsections: the opining section, the procedure section, the facts section, the law section, the operative part of the judgment, the closing section and the

[346]Cfr. Cloître M. and Shinn T. (1985), in Petruzzo K., *National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*, EUT Edizioni Università di Trieste, 2019, pg. 59.
[347]Cfr. Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 57-60.

separate opinions section[348].

1) **The opening section**: it is composed by the logo of the Court, the title of the judgment ("case of Khlaifia and Others v. Italy"), the case application number ("Application no. 16483/12"), date of delivery ("15 December 2016") and the list of judges composing the Chamber ("The European Court of Human Rights, sitting as a Grand Chamber composed of Luis López Guerra, *President,* Guido Raimondi, Mirjana Lazarova Trajkovska, Angelika Nußberger, Khanlar Hajiyev, Kristina Pardalos, Linos-Alexandre Sicilianos, Erik Møse, Krzysztof Wojtyczek, Dmitry Dedov, Mārtiņš Mits, Stéphanie Mourou-Vikström, Georges Ravarani, Gabriele Kucsko-Stadlmayer, Pere Pastor Vilanova, Alena Poláčková, Georgios A. Serghides, *judges,* and Johan Callewaert, *Deputy Grand Chamber Registrar*").
2) **The procedure section**: it provides information about the parties involved ("three Tunisian nationals, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar", §1), the denomination of the respondent State ("against the Italian Republic lodged with the Court under Article 34 of the Convention", §1) as well as information about their representatives and advisers ("The applicants were represented by Mr L.M. Masera and Mr S. Zirulia, lawyers practicing in Milan. The Italian Government ("the Government") was represented by its Agent, ("Ms E. Spatafora")", §2). It follows the number of the relevant Article(s) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("The applicants alleged in particular that they had been confined in a reception center for irregular migrants in breach of Articles 3 and 5 of the Convention. They also argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights", §3). The following information is part of this section: information on the allocation of the case to a Chamber / the Grand Chamber (§§4-7), other parties involved in the case according to Article 36§2 of the Convention and Rule 44§3 ("Coordination Française pour le droit d'asile -French coalition for the right of asylum, the

[348] *Ibidem*, pg. 60-69.

Center for Human Rights -and Legal Pluralism of McGill University, the AIRE Center and the European Council on Refugees and Exiles (ECRE)", §8) and whether a hearing has taken place ("A hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 2016 […]", §9).

3) **The facts section**: it is made up of three parts, namely the circumstances of the case, the relevant domestic law and other relevant provision. In the subsection known as circumstances of the case, further information on the applicants is provided ("The applicants were born in 1983, 1987 and 1988 respectively. Mr Khlaifia -the first applicant- lives in Om Laarass, Tunisia; Mr Tabal and Mr Sfar- the second and third applicants- live in El Mahdia, Tunisia", §10) together with the explanation of the events that led to the legal action before a national court ("A. The applicants' arrival on the Italian coast and their removal to Tunisia", §§11- 21) and the legal proceedings before the domestic courts ("B. Decision of the Palermo preliminary investigations judge", §§22-29 and "C. Decision of the Agrigento Justice of the Peace", §§30-31). In the subcategory on domestic law, the relevant legal provisions of the respondent State are specified ("A. The Constitution", §32; "B. Legislation on the removal of irregular migrants", §33; "C. Criminal Code", §34; "D. Italian Senate", §35). The third subsection contains other relevant provisions ("III. Bilateral agreements with Tunisia", §§36-40; "IV. The Return Directive", §§41-45; "V. Other relevant international law material: A. International Law Commission", §§46- 45; "B. Council of Europe's Parliamentary Assembly", §§48- 50).
4) **The law section**: it contains the grounds for the Court's decision expressed in the subsequent operative part whose content is merely based on the Articles of the ECHR. Although this section does not have a fixed structure, it generally begins with the description of the Government's preliminary objection (§§51-54) followed by the Court's legal reasoning and argumentation for each alleged violation encompassing the parties' submissions (applicants, the respondent Government and the intervening parties) and the Court's assessment of every issue raised ("II. Alleged violation of Article 5§1 of the Convention", §§55-108; "III. Alleged violation of Article 5§2 of the Convention", §§109- 122; "IV. Alleged violation of Article 5§4 of the Convention", §§123- 135; "V. Alleged

violation of Article 3 of the Convention", §§136- 211; "VI. Alleged violation of Article 4 of Protocol No. 4 to the Convention", §§212- 255; "VII. Alleged violation of Article 13 of the Convention taken together with Articles 3 and 5 of the Convention and with Article 4 of Protocol No.4", §§256-281). The final part of this section is composed by the Court's assessment of any damages and the costs and expenses claimed by the applicants and the relevant default interest ("VIII. Application of Article 41 of the Convention", §§282- 289).

5) **The operative section**: it entails the final decisions on each alleged violation of the Articles of the Convention by the Court. Here standard verbs ("holds" or "dismisses") and expressions ("unanimously" or "by [no.] votes to [no.]") are used (§289).
6) **The closing section**: it is very formulaic as it contains the date and the place and the language of the hearing ("Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 December 2016", §289) as well as the name and surname of the Registrar and the President ("John Callewaert -Deputy of the Registrar; Luis López Guerra- President", §289).
7) **Separate opinions section**: here judges are entitled to submit separate opinions which can be concurring or dissenting. In Khlaifia case three judges have written their own opinion: judge Raimondi ("Concurring opinion of judge Raimondi", §§1-19), judge Dedov ("Partly dissenting opinion of judge Dedov"), and judge Serghides ("Partly dissenting opinion of judge Serghides", §§1-77).

The GENTT characterization template sheds light on the complexity of the Grand Chamber's judgment which can entail in itself a variety of text types, be constitutional, legislative and jurisprudential[349]. For the purpose of this dissertation, the next paragraph will focus on the translation analysis (ST: EN-TT:IT) of those constitutional and legislative texts that had been taken into account by the Grand Chamber for delivering the Khlaifia's judgment and that had been compared and analyzed in the chapter two of this work. I decided to analyze the translation of these texts, since they are the best manifestation of the interaction between the Italian and the ECtHR legal system.

[349]Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 36.

Thusly, we can understand how communication between national and supranational courts is translated into practice.

4.3.2. Translation assessment of the external cross-references of the case of Khlaifia and Others v. Italy

In the Grand Chamber judgment, it is inevitably that national and supranational courts interact with each other. This interaction is called "transjudicial legal communication[350]" and one of its possible linguistic manifestations in the judgments delivered by the European Court of Human Rights (ECtHR) is the "external cross-references", i.e. references that point to sources of legislative or judicial law other than the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols or the ECtHR case law[351]. Indeed, in Khlaifia's case, beside the Article 5§§1,2,4, Article 3, Article 4 of Protocol No. 4, Article 13 (taken together with Article 5§§1,2,4, Article 3, Article 4 of Protocol No. 4) of the ECHR, the panel of judges took into account domestic constitutional texts (Article 13 of the Italian Constitution), domestic legal texts (Legislative Decree no. 289 of 1998- also called the Consolidated Immigration Act), European legal texts (Directive 2008/1157EC of the European Parliament and of the Council of 16 December 2008- also called the Return Directive) and international legal texts (draft articles on the expulsion of aliens by the International Law Commission). All these legal texts are contained in the facts section of the Khlaifia's case under the sub-sections "II. Relevant domestic law and material" (found in §§32-35), "III. Bilateral agreements with Tunisia" (found in §§36-40), "IV. The Return Directive" (found in §§32-35), and "V. Other relevant international law material" (found in §§46-50). The sub-paragraphs 4.2.1.1. (The syntactical features of the European legal English) and 4.2.1.2. (The terminological features of the European legal English) have emphasized specific syntactical, morphological and lexical features of legal texts which must be considered while translating external cross-references, and which we are going to see now in detail.

[350]Peruzzo K., "5. *Finding traces of translational legal communication: cross-referencing in international case law*", in *Testi, corpora, confronti interlinguistici: approcci qualitativi e quantitativi*, Palumbo G. (eds.), 2017, pg. 87.
[351]*Ibidem.*

4.3.2.1. Translating syntactical features

In the sub-paragraph 4.2.1.1. we have seen some syntactical features of the European legal English. Now we are going to see whether or not some of these characteristics have been maintained in the Italian TT. Legal texts are characterized by complex and long sentences as seen in Article 18 of the Return Directive[352] and Article 14 of the Consolidated Immigration Act[353].

Article 18 **Emergency situations** "1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2)."	**Articolo 18** **Situazioni di emergenza** "1. Nei casi in cui un numero eccezionalmente elevato di cittadini di paesi terzi da rimpatriare comporta un notevole onere imprevisto per la capacità dei centri di permanenza temporanea di uno Stato membro o per il suo personale amministrativo o giudiziario, sino a quando persiste la situazione anomala detto Stato membro può decidere di accordare per il riesame giudiziario periodi superiori a quelli previsti dall'articolo 15, paragrafo 2, terzo comma, e adottare misure urgenti quanto alle condizioni di trattenimento in deroga a quelle previste all'articolo 16, paragrafo 1, e all'articolo 17, paragrafo 2."
Article 14 **Execution of removal measures** 1. Where, in view of the need to provide assistance to an alien, to conduct additional checks of his or her identity or nationality, or to obtain travel documents, or on account of the lack of availability of a carrier, it is not possible to ensure the prompt execution of the deportation measure by escorting the person to the border or of the refusal-of-entry measure, the Chief of Police (*questore*) shall order that the alien be held for as long as is strictly necessary at the nearest Identification and Removal Centre, among those designated or created by order of the Minister of the Interior in collaboration (*di concerto*) with the Minister for Social Solidarity and the Treasury, the Minister for the Budget, and the Minister for Economic Planning.	**Articolo 14** **Esecuzione dell'espulsione** 1. Quando non è possibile eseguire con immediatezza l'espulsione mediante accompagnamento alla frontiera ovvero il respingimento, perché occorre procedere al soccorso dello straniero, ad accertamenti supplementari in ordine alla sua identità o nazionalità, ovvero all'acquisizione di documenti per il viaggio, ovvero per l'indisponibilità, il questore dispone che lo straniero sia trattenuto per il tempo strettamente necessario presso il centro di permanenza temporanea e assistenza più vicino, tra quelli individuati o costituiti con decreto del Ministro dell'interno, di concerto con i Ministri per la solidarietà sociale e del tesoro, del bilancio e della programmazione economica. (...).

[352]Cfr. Article 18§1 of the Return Directive, §41 of Khlaifia's case.
[353]Cfr. Article 14§1 of the Consolidated Immigration Act, §33 of Khlaifia's case.

Both articles stand out for their remarkable length: the ST of Article 18 is 98 words, whereas the TT 98, and the ST of Article 14 is 127 and the TT is 94, both containing complex sentences whose main clause is in the middle of the extracts, namely "such Member State, […], decide to […]"- "*detto Stato membro può decidere* […]" and "the Chief of Police (questore) shall order that the alien […]"- "*il questore dispone che lo straniero* […]". Another syntactical feature is the separation between the auxiliary and the main verb which has been maintained in the translation of TT, as provided in some Article 10§2 of the Consolidated Immigration Act[354] and Article 19§1, b) of the draft article on the expulsion of aliens by the International Law Commission[355]:

Article 10 **Refusal of entry**	**Articolo 10** **Respingimento**
"2. Refusal of entry combined with removal shall, moreover, be ordered by the Chief of Police (questore) in respect of aliens: […]"	"2. Il respingimento con accompagnamento alla frontiera è altresì disposto dal questore nei confronti degli stranieri: […]"
Article 19 **Detention of an alien for the purpose of expulsion**	**Articolo 19** **Detenzione dello straniero ai fini dell'espulsione**
(b) An alien detained for the purpose of expulsion shall, save in exceptional circumstances, be separated from persons sentenced to penalties involving deprivation of liberty.	b) Uno straniero detenuto ai fini di espulsione deve, salvo in circostanze eccezionali, essere separato delle persone condannate a pene privative della libertà.

Despite being typical characteristics of legal texts, both the length of the Articles and the separation between auxiliary and main verb may influence negatively the readability, rendering the text more difficult to understand and less fluent.

Another typical feature of legal texts is the technique of nominalization which is, according to Cortelazzo, the use of nouns indicating, in an abstract way, actions more commonly represented by verbs[356]. Rita Carnevali and Dr Martina Scantamburlo translated these constructions differently. In some cases, they have maintained literally the nominalization of the ST as in the following examples: "restriction of personal

[354]Cfr. Article 10§2 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[355]Cfr. Article 19§1, b) of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[356]Cfr. Cortelazzo M.A. (eds.), "*La comunicazione nelle pubbliche amministrazioni*", EDK Editore, 2010, pg. 29.

liberty"-"*restrizione della libertà personale*[357]", "grant of refugee status"-" *riconoscimento dello status di rifugiato*[358]", "adoption of temporary protection measures on humanitarian grounds"-"*adozione di misure di protezione temporanea per motivi umanitari*[359]", "for the prevention, investigation, detection and prosecution of criminal offences"-" *per la prevenzione, le indagini, l'accertamento e il perseguimento di reati*[360]", and "for the purpose of expulsion"-" ai fini di espulsione[361]".

In other circumstances, nominalization has been used only in the TT, causing thus a level shift verb (EN) → noun (IT), namely a shift from a grammatical category into another one[362], as follows: "to obtain"-"*all'acquisizione*[363]", "by escorting"-"*mediante l'accompagnamento*[364]", "staying illegally"-"*il cui soggiorno* […] *è irregolare*[365]", "after the period has expired"-" *alla scadenza di tale periodo*[366]", and "in obtaining the necessary documentation"-"*nell'ottenimento della necessaria documentazione*[367]". Other examples are provided in Article 13 of the Italian Constitution[368] as follows: "No one may be detained, inspected, or searched […]"- "*Non è ammessa forma alcuna di detenzione, di ispezione o perquisizione personale* […]". From this list, it emerges that the Articles translated into Italian uses nominalization more frequently than the ones in English. The nominalization of the TT may have two implications: on one hand it may render the register of the text higher and more formal, and it can contribute to the syntactic condensation[369], on the other hand nominalization may be associated with slower comprehension processes, because considered less natural[370].

Another interesting syntactical aspect emerging from the comparison of the above-mentioned legal texts, is the frequent use of modal verbs, namely "shall" and "may".

[357]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.
[358]Cfr. Article 10§4 of the Immigration Consolidated Act, §33 of Khlaifia's case.
[359]*Ibidem*.
[360]Cfr. Article 12§1 of the Return Directive, §41 of Khlaifia's case.
[361]Cfr. Article 19§1 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[362]Cfr. Translation shifts, Catford J.C. (1965), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 96.
[363]Cfr. Article 14§1 of the Immigration Consolidated Act, §33 of Khlaifia's case.
[364]*Ibidem*.
[365]Cfr. Article 2§1 of the Return Directive, §41 of Khlaifia's case.
[366]Cfr. Article 8§2 of the Return Directive, §41 of Khlaifia's case.
[367]Cfr. Article 15§6, b) of the Return Directive, §41 of Khlaifia's case.
[368]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.
[369]Cortelazzo M.A. (eds.), "*La comunicazione nelle pubbliche amministrazioni*", EDK Editore, 2010, pg. 6.

[370]*Ibidem*, pg. 29.

"Shall" has been often considered as "the bigger troublemaker[371]" in legislative drafting, being, according to some scholars, uncertain, context-depending[372], ambiguous and promiscuous in meaning[373], which consequently affects translation. The Khlaifia case demonstrates indeed the difficulty of translating "shall" into Italian TT. The above and below- mentioned articles taken from the Khlaifia's judgment have proved indeed the difficulty of translating "shall" into Italian TT. In legal texts, "shall" has both a deontic meaning as laws are normative in nature, imposing rules which incontestably influence people's behavior[374], and a performative one, contributing crucially to the realization of the speech acts that constitute a legal text's pragmatic force and legal validity[375]. It follows that its primary function in legal texts is to impose duty (positive form: "shall") or to prohibit a conduct (negative form: "shall not") [376]. In the Italian TT, however, "shall" has been rendered in three different ways: with the two modal verbs "*dovere*" and "*potere*", or with the present simple. "*Dovere*" is perhaps the most suitable Italian modal verb as represents a strong obligation ("*deve essere valutato*") or a strong prohibition in its negative form ("*non deve essere arbitraria*"), as in the examples provided below:

Article 5 of the draft articles on the expulsions of aliens **Grounds for expulsion[377]**	**Articolo 5 del progetto di articoli in materia di espulsione** **Motivi di espulsione**
3. The ground for expulsion shall be assessed in good faith and reasonably, […]	3. Il motivo di espulsione deve essere valutato in buona fede e in modo ragionevole, […]
Article 19 of the draft articles on the expulsions of aliens **Detention of an alien for the purpose of expulsion [378]**	**Articolo 19 del progetto di articoli in materia di espulsione** **Detenzione dello straniero ai fini dell'espulsione**
1. a) The detention of an alien for the purpose of expulsion shall not be arbitrary nor punitive in nature.	1. a) la detenzione di uno straniero ai fini di espulsione non deve essere arbitraria, né avere un carattere punitivo.

[371]Cfr. Wydik R.C. (1998), in Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 72.
[372]Cfr. Asprey M.M. (1992) and Bennion F. (2001), in Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 72.
[373]Cfr. Garner B.A. (1995), Nunberg G. (2001), Lauchman R. (2005), Triebel V. (2009), in Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 72.
[377]Cfr. Article 5§3 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[378]Cfr. Article 19§1, a) of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.

In Khlaifia case, the verb "shall" has also been translated with the Italian modal verb "*potere*", as provided below. However, the latter means ability or possibility to do something or a permit. As it does not refer to an obligation, perhaps "*potere*" does not fully correspond to the real meaning of "shall".

Article 17 of the draft articles on the expulsions of aliens **Prohibition of torture or cruel, inhuman or degrading treatment or punishment**[379]	**Articolo 17 del progetto di articoli in materia di espulsione** **Proibizione della tortura e dei trattamenti o pene crudeli, inumani o degradanti**
"The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment."	«Lo Stato che espelle non può sottoporre lo straniero oggetto dell'espulsione a tortura, né a pene o trattamenti crudeli, inumani o degradanti.»

Lastly, "shall" has also been rendered into TL with the use of present simple which renders the legal texts more fluent in reading at the expense of the modulation function "shall" performs.

Article 15 of the Return Directive[380]	**Articolo 15 della Direttiva Rimpatri**
[…] 2. Detention shall be ordered by administrative or judicial authorities. Detention shall be ordered in writing with reasons being given in fact and in law. […] The third-country national concerned shall be released immediately if the detention is not lawful.	[…] 2. Il trattenimento è disposto dalle autorità amministrative o giudiziarie. Il trattenimento è disposto per iscritto ed è motivato in fatto e in diritto. […] Il cittadino di un paese terzo interessato è liberato immediatamente se il trattenimento non è legittimo.

As seen, "*dovere",* "*potere*" and the present simple do not share the same meaning, which can lead to a misunderstanding of the real function of "shall". The modal verb "*dovere*" is apparently the most appropriate translation, whereas "*potere*" and present simple are too weak to express obligation and prohibition. Therefore, "shall" into Italian should have been expected to be translated more consistently, using "*dovere*" in all cases.

[376]Cfr. Sullivan R. (2002), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 116.
[377]Cfr. Article 5§3 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[378]Cfr. Article 19§1, a) of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[379]Cfr. Article 17 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[380]Cfr. Article 15§2 of the Return Directive, §41 of Khlaifia's case.

By contrast, "may" has been translated coherently with the modal verb "*potere*": they both refer to a discretionary obligation, a possibility, and not an absolute duty. Interestingly, in the below-mentioned articles, "may" is often accompanied with the adverb "only" translated into TT with "*solo*" or "*solamente*". Perhaps, the use of this adverb is meant to strengthen the discretionary obligation "may" performs.

Article 4 of the draft articles on the expulsions of aliens **Requirement for conformity with law**[381]	**Articolo 4 del progetto di articoli in materia di espulsione** **Obbligo di conformità alla legge**
"An alien may be expelled only in pursuance of a decision reached in accordance with law."	"Uno straniero può essere espulso solo in ottemperanza ad un provvedimento adottato conformemente alla legge."
Article 5 of the draft articles on the expulsions of aliens **Grounds for expulsion**[382]	**Articolo 5 del progetto di articoli in materia di espulsione** **Motivi di espulsione**
2.A State may only expel an alien on a ground that is provided for by law.	2.Uno Stato può espellere uno straniero soltanto per un motivo previsto dalla legge.
Article 2 of the Return Directive[383] **Scope**	**Articolo 2 della Direttiva Rimpatri** **Ambito di applicazione**
2. Member States may decide not to apply this Directive to third-country nationals who: […]	2.Gli Stati membri possono decidere di non applicare la presente direttiva ai cittadini di paesi terzi: […]

Lastly, as the linguist Garzone states, modulation can be also expressed by the present simple[384]. The fortunes of modal verbs, particularly of "shall", in legal discourse have deteriorated in parallel with the growing success of the Plain Language movement and with the consequent decline of its use in standard English[385]. On one hand this change may make the reading of legal texts more fluent, on the other hand the use of present simple may not perform modulation as a modal verb could do. However, we must bear in mind that the legal texts taken into consideration in this analysis have all a

[381]Cfr. Article 4 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[382]Cfr. Article 5§2 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[383]Cfr. Article 2§2 of the Return Directive, §41 of Khlaifia's case.
[384]Garzone G., "*Variation in the use of modality in legislative texts: Focus on shall*", in *Journal of Pragmatics 57*, 2013, pg. 75.
[385]*Ibidem*, pg. 72.

normative function and are, per se, prescriptive. In the TT, the present simple has been maintained as provided below:

Article 2 of the Return Directive **Scope**[386] 1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.	**Articolo 2 della Direttiva Rimpatri** **Ambito di applicazione** 1. La presente direttiva si applica ai cittadini di paesi terzi il cui soggiorno nel territorio di uno Stato membro è irregolare.
Article 13 of the Italian Constitution[387] Personal liberty is inviolable. […]	**Articolo 13 della Costituzione** La libertà personale è inviolabile. […] .

Another common linguistic characteristic in legal texts is the frequent use of conditional clauses, particularly in the formula "if X, then Z shall[388]". There are many variations of this, but in most cases "if X, then Z" is essential: every action of requirement, from a legal point of view, is hedged around with and even depends upon, a set of conditions that must be satisfied before anything can happen[389]. We can find conditional constructions in the cross-references of Khlaifia case, as provided below:

Article 13 of the Italian Constitution[390]	**Articolo 13 della Costituzione**
[…] the police take provisional measures that shall be referred within 48 hours to a judicial authority and which, if not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective.	[…] l'autorità di Pubblica sicurezza può adottare provvedimenti provvisori, che devono essere comunicati entro quarantotto ore all'Autorità giudiziaria e, se questa non li convalida nelle successive quarantotto ore**,** si intendono revocati e restano privi di ogni effetto.
Article 8 of the Return Directive[391]	**Articolo 8 della Direttiva Rimpatri**
2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.	2. Qualora uno Stato membro abbia concesso un periodo per la partenza volontaria a norma dell'articolo 7, la decisione di rimpatrio può essere eseguita unicamente alla scadenza di tale periodo, a meno che nel periodo in questione non sorga uno dei rischi di cui all'articolo 7, paragrafo 4.

[386]Cfr. Article 2§1 of the Return Directive, §41 of Khlaifia's case.
[387]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.
[388]Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 121.
[389]Cfr. Crystal D. and Davy D. (1969), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 121.
[390]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.
[391]Cfr. Article 8§2 of the Return Directive, §41 of Khlaifia's case.

Firstly, we see the formula "if X, then Z shall" in the Article 13 of the Italian Constitution "if [it is] not validated by the latter in the following 48 hours, shall be deemed withdrawn and ineffective." which is translated into "*se questa non li convalida nelle successive quarantotto ore, si intendono revocati e restano privi di ogni effetto*.". As we can see, despite the same use of the "if"-"*se*" conjunction, in TT the modal verb "shall" has not been maintained which may not properly convey the strong condition the ST performs. The present simple is used, instead. Thusly, the function of modulation may be lost in the TT.

Secondly, in order to express conditions, legal texts make use of first conditional clauses. In English, this construction is expressed with the conjunction "if" followed by a verb in indicative form ("if [it is] not validated by the latter in the following 48 hours" and "If a Member State has granted a period for voluntary departure in accordance with Article 7, […]"). In the TT, however, "if" has been translated with two different conjunctions: "*se*" and "*qualora*". Despite having the same meaning, the two Italian conjunctions require different verb forms: in the first conditional clause, "*se*" is followed by an indicative verb form, whereas "*qualora"* by a subjunctive form. The latter is perhaps used for rendering the Article of a higher register at the expense of the readability which may turn out to be less fluent. Generally, the Italian TT may tend to adopt constructions of a higher level, but, at the same time, less natural. Examples cited above are the frequent use of nominalization and the use of less frequent conjunctions as "*qualora*" followed by a subjunctive form.

4.3.2.2. Translating terminology

Of no less importance, terminology is the most visible and striking linguistic feature of legal language as a technical language, and it is also one of the major sources of difficulty in translating legal texts[392].

Indeed, when translating the judgments of the Court, systematic differences between the national statute law elements and judicial ones of the Court must be taken into

[392]Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 53.

account. The linguistic Peruzzo refers to these elements as "system-bound elements[393]", whereas the linguist Weisflog calls them "legal concepts" meaning "authoritative categories to which types or classes of transactions, cases or situations are referred, in consequences of which a series of principles, rules and standards become applicable[394]". Thus, translating these elements implies a process of recontextualization where elements originally embedded in a national legal and judicial system migrate from their natural context into a different environment, risking that many legal words in one language do not find ready equivalents in another, causing both linguistic and legal complications[395]. For this reason, it is unlikely to find absolute equivalent between words of the ST and those of the TT. Given the vast differences and diverse situations between different language pairs and different legal systems, various methods may be utilized. The linguistic Cao has proposed literal translation[396] (or formal equivalence/ formal correspondence[397] or word-for-word translation[398]), dynamic/functional equivalence[399] (or sense-for-sense translation[400]), and descriptive equivalence[401] (where the meaning of elements of one legal system are explained in several words). For the analysis of the cross-references in Khlaifia's case, the direct and oblique translation by Vinay and Darbelnet[402] and the translation shifts technique by Catford[403] have also been used.

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[393]Cfr. Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 71.
[394]Cfr. Weisflog W.E. (1987), in Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 54.
[395]Cfr. Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 71
[396]Cfr, direct translation, Vinay J.P. and Darbelnet J. (1995/2004), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 92
[397]Cfr, formal equivalence (formal corresponding) and dynamic equivalence (functional equivalence), Nida E. (1964), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 67-68.
[398]Cfr. word-for-word and sense-for-sense translation, Cicero (46 @AC), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 31.
[399]Cfr. formal equivalence (formal corresponding) and dynamic equivalence (functional equivalence), Nida E. (1964), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 67-68.
[400]Cfr. word-for-word and sense-for-sense translation, Cicero (46 @AC), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 31.
[401]Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 56.
[402]Cfr. supplementary translation procedures, Vinay J.P. and Darbelnet J. (1995/2004), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pgg. 88-95.
[403]Cfr. Catford J.C. (1965), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 95-97.

The cross-references of Khlaifia's case contain many law- related and immigration-related words which are considered technical as they occur only in legal texts. Technical law-related words are for example "criminal law sanction", "coercive measures" and "any preventive measure of detention (*carcerazione preventiva*)" which are found respectively in Articles 2 and 8 of the Return Directive and Article 13 of the Italian Constitution, and which have been translated using different methods.

Firstly, "criminal law sanction" has been rendered into "*sanzione penale*[404]" using the technique of economy[405] as less words have been used. However, "criminal law sanction" may not be often found in legal texts, but rather "criminal sanction" or "penal sanction" which are more frequent[406]. Perhaps the syntagma "criminal law sanction" is the outcome of the process of drafting the case-law of the Court which is a collegial activity inside the Grand Chamber composed by a panel of judges with different languages and culture having an influence on their English. The multilingualism of the Court may lead indeed to the creation of a European legal English which is, according to Brannan, considered to be unnatural[407]. The sub-paragraph 4.1.1. (Language regime, translation activities and programs of the Court) has indeed shed light on the determining role of the drafting committee in translating the case-law of the Court. By analyzing further cross-references in the Khlaifia's case, we will see a large number of examples as such.

By contrast, the syntagma "coercive measures" has been translated word-for-word into "*misure coercitive*". A corpus-based research has demonstrated that both "coercive measures" and "*misure coercitive*" are almost used with the same frequency[408]. The fact

[404]Cfr. Article 2 of the Return Directive, §41 of Khlaifia's case.
[405]Cfr. Supplementary translation procedures, Vinay J.P. and Darbelnet J. (1995/2004), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 89.
[406]The frequency of the syntagma "criminal law sanction" has been looked for through a corpus-based research on sketch engine: https://www.sketchengine.eu/. From the analysis of the corpus Eur-Lex English 2/2016, it emerges that the most frequent syntagma is "criminal sanction". "Criminal sanction" appears 1545 times on the corpus, whereas "penal sanction" 241. Moreover, "criminal law sanction" is, instead, the least frequent: it appears only 9 times out of 600 tokens with "criminal sanction". To conclude, eve tough "criminal law sanction", "criminal sanction" and "penal sanction" share the same meaning, the most frequent is "criminal sanction".
[407]Cfr. Brannan J. (2013), in Petruzzo K., *National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*, EUT Edizioni Università di Trieste, 2019, pg. 82.
[408]The frequency of "coercive measures" and "*misure coercitive*" has been looked for through a corpus-based research on sketch engine: https://www.sketchengine.eu/. The analysis of the corpus Eur-Lex

that they are used with the same frequency in legal texts may mean that "coercive measures" corresponds in meaning to "*misure coercitive*" in Italian and it is, thus, an example of equivalence in legal translation.

Of particular interest is the translation pairs "any preventive measure of detention (carcerazione preventiva)" – "*carcerazione preventiva*[409]". As its source text is found in Article 13 of the Italian Constitution, it may mean that, during the phase of drafting the Khlaifia's case, the drafting committee of the Court had to translate the Article from its source text (IT) into the target text (EN). Probably, while translating the text into English, the committee preferred to explain the meaning of "*carcerazione preventiva*" in English, adopting thus the technique of descriptive equivalence, and to insert the original source text terminology in brackets in order not to lose the real meaning of the syntagma. Another translation may have also been "preventive detention" which, according to Law Britannica[410], Legal Dictionary[411] and Brocardi[412], shares the same meaning of "*carcerazione preventiva*".

The same problem arose for the translation of "Legislative Decree (*decreto legislativo*) no. 286 of 1998 ("Consolidated text of provisions concerning immigration regulations and rules on the status of aliens")" which again the drafting committee had to translate from Italian into English, as the text belongs to the Italian legal system. For the syntagma "*decreto legislativo*", the drafting committee adopted a literal translation technique "Legislative Decree", inserting the corresponding Italian form in brackets "Legislative Decree (*decreto legislativo*)", whereas for "*testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*[413]", the drafting committee used the technique of the functional equivalence, translating thus into "Consolidated text of provisions concerning immigration regulations and rules on the status of aliens". In cases as such, the Italian translator maintained the original names of the directive as a legal domestic text has been used.

English 2/2016 and Eur-Lex Italian 2/2016 shows that "coercive measures" is fond 726 times, whereas "*misure coercitive*" 625.

[409]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.

[410]Law Britannica: https://www.britannica.com/topic/preventive-detention [14/01/2021].

[411]Legal Dictionary-The free dictionary: https://legal-dictionary.thefreedictionary.com/Preventive+Detention [06/02/2021].

[412]Brocardi.it: https://www.brocardi.it/dizionario/58.html [14/01/2021].

[413]Cfr. Consolidated Immigration Act, §33 of Khlaifia's case.

By contrast, the names of legal texts emanated by the European Union have been rendered into the TT word-for-word as in the following examples: "Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (Return Directive)" – "*Direttiva 2008/115/CE del Parlamento europeo e del Consiglio del 16 dicembre 2008* (*direttiva rimpatri*)[414]"; and "Schengen Borders Code"- "*Codice frontiere Schengen*[415]".

Regarding immigration-related technical words, as already explained in sub-paragraph 4.2.1.2. (The terminological features of the European legal English), one of the most difficult challenges in translating the case-law of ECtHR relies on what the linguistic Brennan calls "supranational terms" and "national terms"[416]. The following syntagma belong to the first category: "right to liberty and security" (cfr. Article 5§1 of the Convention), "prohibition of torture or cruel, inhuman or degrading treatment or punishment" (cfr. Article 3 of the Convention) and "collective expulsion" (cfr. Article 4 of Protocol no.4), which are all convention-specific terms and have respectively been literally translated into "*diritto alla libertà e alla sicurezza*[417]", "*proibizione della tortura e dei trattamenti o pene crudeli, inumani o degradanti*[418]"and "*espulsione collettiva*[419]".

By contrast, national terms have been translated with different techniques. For their translation analysis, we took into account the work carried out by the drafting committee of the Grand Chamber who, in the phase of drafting the judgment, had to translate domestic legal texts, among which the Consolidated Immigration Act.

The first term is "*respingimento*" rendered into "refusal of entry" through the technique of modulation (effect<>cause)[420]. Modulation belongs to the oblique translation techniques by the linguistic Vinay and Darbelnet and it represents a change in semantics and point of view of the SL. In this case, "*respingimento*" (literally: pushback) is a consequence of the fact that migrants are refused to enter the territory

[414]Cfr. Return Directive, §41 of Khlaifia's case.
[415]Cfr. Article 2§2 of the Return Directive, §41 of Khlaifia's case.
[416]Cfr. Brannan J. (2013), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 80.
[417]Cfr. Article 5§1 of the Convention, §55 of Khaifia's case.
[418]Cfr. Article 3 of the Convention, §136 of Khaifia's case.
[419]Cfr. Article 4 of Protocol no.4 to the Convention, §212 of Khaifia's case.
[420]Cfr. oblique translation, Vinay J.P. and Darbelnet J. (1995/2004), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 90.

("refusal-of-entry"). However, the words share the same meaning: Article 10 of the Immigration Act refers to "*respingimento*" saying that "1. *La polizia di frontiera respinge gli stranieri che si presentano ai valichi di frontiera senza avere i requisiti richiesti dal presente testo unico per l'ingresso nel territorio dello Stato.* […][421]", whereas the official European Migration Network (EMN) Glossary of terms relating to the Asylum and Migration states that "in the EU, refusal-of-entry of a third-country national at the external EU border because they do not fulfil all the entry conditions laid down in Art. 5(1) of Regulation (EU) 2016/399 (Schengen Borders Code) […][422]".

Lastly, another national term found in the Consolidated Immigration Act is "*espulsione amministrativa*" which is, once again, a legal concept belonging to the Italian legal system. In order to translate "*espulsione amministrativa*" found in the Article 13 of the Immigration Consolidated Act, the drafting committee translated it into "administrative deportation[423]" through the technique of modulation (general<>particular). If we look up the definitions of "*espulsione*" and "deportation", the first term is polysemic applicable in different contexts and circumstances[424], whereas "deportation" only refers to the action of forcing someone to leave a country, especially if he/she has no legal right to stay[425]. The modulation refers thus to the fact that "*espulsione*" is more general in meaning than "deportation". As regard to the whole syntagma "*espulsione amministrativa*" translated into "administrative deportation", some considerations have to be taken into account. As described in sub-paragraph 2.3.1. (The Consolidated Immigration Act), the Italian legislation classifies the concept of expulsion into administrative and judicial one according to the authority who issues it, respectively by the Ministry of the Interior or by the Prefect, and by a judicial authority. However, the readership of the English version of the judgement includes all Member States which may not have this distinction in their legal system. Instead of "administrative deportation", an alternative translation could have been "a deportation emanated by an administrative authoritative" using thus a descriptive equivalence.

The cross-references of Khlaifia's case contain also technical words taken from the

[421]Brocardi.it: https://www.brocardi.it/testo-unico-immigrazione/titolo-ii/capo-ii/art10.html [05/02/2021].
[422]European Migration Network (EMN), EMN Glossary: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/refusal-entry_en [14/01/2021].
[423]Cfr. Article 13 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[424]Enciclopedia Treccani: https://www.treccani.it/vocabolario/espulsione/ [15/01/2021].
[425]Cambridge Dictionary: https://www.treccani.it/vocabolario/espulsione/ [15/01/2021].

European context mostly translated literally as the pairs "extradition"- "*estradizione*[426]" in Article 2 of the Return Directive and "voluntary departure" – "*partenza volontaria*[427]" in Article 8 of the Return Directive. Instead, other pairs have been translated through a class shift[428], i.e. a shift from one part of the speech to another as in the pair "entry-ban"- "*divieto di ingresso*[429]" where the pre-modifying noun "entry" is translated by the adverbial qualifying phrase "*di ingresso*", and level shift[430], i.e. a shift where something expressed by a non-finite verb in a language ("absconding") is a noun in another ("*fuga*") as in the pairs "risk of absconding"-"*rischio di fuga*".

Lastly, other technical words present in domestic documents, but whose meaning is also known and used on an European and international level, are "political asylum" (Article 10 of the Consolidated Immigration Act) translated into "*asilo politico*[431]" and "refugee status" and "refugee protection" both rendered respectively with a class shift into "*status di rifugiato*" and "*protezione dei rifugiati*[432]". As these expressions have a concrete reference in both Italian and European legislation, their translation does not give rise to doubts.

Semitechnical words are also part of the European legal English, considered as words whose meaning in legal contexts differs from the one they have in general language. The first example is "alien" contained in the Consolidated Immigration Act, in the Return Directive and the drafts by the International Law Commission. According to the Cambridge Dictionary, "alien" has three main meanings[433], but, in legal contexts, it is a high register word only indicating someone coming from a different country, race or group, a foreigner, which has been rendered into the Italian TT with its formal equivalent: "*straniero*[434]".

"Detention" is also considered a semi-technical word as, according to the Cambridge

[426]Cfr. Article 2 of the Return Directive, §41 of Khlaifia's case.
[427]Cfr. Article 8 of the Return Directive, §41 of Khlaifia's case.
[428]Cfr. Catford J.C. (1965), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 95-97.
[429]Cfr. Article 12 of the Return Directive, §41 of Khlaifia's case.
[430]*Ibidem.*
[431]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[432]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[433]Cambridge Dictionary: https://dictionary.cambridge.org/dictionary/english/alien [15/01/2021].
[434]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.

dictionary, has several meanings, but legal texts narrow down its definition to the act or condition of being officially forced to stay in a place[435]. The translation of the Khlaifia's case brought out how the language denoting detention in Italy can be misleading, which can have serious implications in guaranteeing the rights afforded to detainees: in the draft by the International Law Commission and in Articles 5§1, 4 of the Convention, the word "detention" has been translated into "*detenzione*[436]", whereas in the Return Directive into "*trattenimento*[437]". Despite the fact that "*detenzione*" and "*trattenimento*" may seem synonyms, according to Enciclopedia Treccani, the first is a "legal punishment restricting personal liberty[438]", whereas the second one generally refers to "the act of holding someone or something[439]". The case demonstrates that the applicants- and all migrants present in the CSPA in Contrada Imbriacola in September 2011- had been held in reception facilities which were *de facto* detention measures and not holding ones. For these reasons, the most suitable translation for "detention" would be "*detenzione*" and not "*trattenimento*", adopting thus an absolute equivalence.

"Removal" can be also used in different contexts[440], but in legal contexts it refers to "the act of a state in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain[441]" which has been rendered into Italian with the functional equivalence "*allontamento*[442]". The latter is also found in the official glossary of European Migration Network (EMN) of the European Commission[443]. Moreover, "*allontanamento*" is in the "Titolo II: disposizioni sull'ingresso, il soggiorno e l'allontanamento dal territorio dello stato[444]" of the Immigration Consolidated Act, and,

[435]Cambridge Dictionary: https://dictionary.cambridge.org/it/dizionario/inglese/detention [15/01/2021].
[436]Cfr. Return Directive, §41 of Khlaifia's case; Cfr. draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case; Cfr. Article 5§1 of the Convention, §55 of Khaifia's case.
[437]Cfr. Article 15,16 of the Return Directive, §41 of Khlaifia's case.
[438]Enciclopedia Treccani: https://www.treccani.it/vocabolario/detenzione/ [15/01/2021].
[439]Enciclopedia Treccani: https://www.treccani.it/vocabolario/trattenimento/ [15/01/2021].
[440]Cambridge Dictionary: https://dictionary.cambridge.org/dictionary/english/removal [18/01/2021].
[441]European Migration Network (EMN), EMN Glossary: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/removal_en [18/01/2021].
[442]Cfr. Article 8, 12, 15 of the Return Directive, §41 of Khlaifia's case.
[443]European Migration Network (EMN), EMN Glossary: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/removal_en [18/01/2021].
[444]Cfr. Consolidated Immigration Act: https://ec.europa.eu/migrant-integration/librarydoc/legislative-decree-2571998-no-286-on-consolidated-act-of-provisions-concerning-immigration-and-the-condition-of-third-country-nationals.

according to a practical sheet published by ASGI, "*allontanamento*" is a superordinate category including both "*respingimento*" and "*espulsione*"[445].

Another example of semitechnical word is "return", which, despite being used in many contexts[446], legally means "the movement of a person going from a host country back to a country of origin, country of nationality[447]", and which has been translated into Italian into "*rimpatrio*[448]" through a functional equivalence. "*Rimpatrio*" is also found in the official glossary of European Migration Network (EMN) of the European Commission[449].

Lastly, legal terminology is also made up of general words whose meanings are understandable also for laymen such as "police" rendered with the syntagma of higher register "*autorità di Pubblica sicurezza*[450]" through the technique of the amplification and elevating the register, "border police" translated with a class shift into "*polizia di frontiera*[451]", "prefect" into its absolute equivalent "*prefetto*[452]" as well as the translation pair "judicial or administrative authority"- "*autorità giudiziaria e amministrativa*[453]".

Legal texts have also a large amount of words coming from Latin. In the ST, these expressions have maintained their original form as in "*inter alia*" and "*ex officio*". In the TT, on the contrary, they have been rendered with the target language as in "*tra l'altro*[454]" and "*d'ufficio*[455]".

At lexical level, the extensive use of prepositional phrases is prevalent. In some

[445]ASGI, *"Espulsioni e respingimenti: i profili sostanziali",* scheda pratica a cura dell'avv. Savio, G., 2016, pg. 5: https://www.asgi.it/wp-content/uploads/2016/09/2016_DEF_ESPULSIONI-E-RESPINGIMENTI-_-I-PROFILI-SOSTANZIALI-stampabile.pdf.
[446]Cambridge Dictionary: https://dictionary.cambridge.org/dictionary/english/return [18/01/2021].
[447] European Migration Network (EMN), EMN Glossary: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/return_en [18/01/2021].
[448]Cfr. Return Directive, §41 of Khlaifia's case.
[449]European Migration Network (EMN), EMN Glossary: https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/removal_en [18/01/2021].
[450]Cfr. Article 13 of the Italian Constitution, §32 of Khlaifia's case.
[451]Cfr. Article 10§1 of the Immigration Consolidated Act, §33 of Khlaifia's case.
[452]Cfr. Article 13§1 of the Immigration Consolidated Act, §33 of Khlaifia's case.
[453]Cfr. Article 13§1 of the Return Directive, §41 of Khlaifia's case.
[454]Cfr. Introduction to the Immigration Consolidated Act, §33 of Khlaifia's case.
[455]Cfr. Article 15§3 of the Return Directive, §41 of Khlaifia's case.

cases, the form has been maintained as in "in pursuance of" – "*in ottemperanza a*"[456], and "in the light of all the circumstances"- "*alla luce di tutte le circostanze*[457]".

Other expressions have been translated both literally and with a class shift noun (EN)-verb (IT): "for the purpose of expulsion" – "*ai fini dell'espulsione*[458]", "for the purpose of bringing him before the competent legal authority- "*per essere tradotto dinanzi all'autorità giudiziaria competente*[459]"; and "on the basis of" – "*sulla base di*[460]"- "*fondato su*[461]".

The prepositional phrase "in accordance with"has been also translated differently: both word- for-word as "*a norma di*[462]", "*nel rispetto di*[463]", "*ai sensi di*[464]" and "*in conformità di*[465]", or using a class shift from noun (EN)→ adverb (IT) as in "*conformemente a*[466]",

Interestingly, uncommon adverbs are frequent in English legal texts, but they do not have a correspondent into Italian and for this reason they are not translated. Among these adverbs we find "thereof" meaning "of or about the thing just mentioned[467]" as in "[…] the deportation of alien[…], giving prior notice thereof to the Prime Minister and the Minister for Foreign Affairs[468]" and "hereof" meaning "of the thing or document that is being talked about[469]" as in "under Article 10 hereof[470]".

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[456]Cfr. Article 4 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[457]Cfr. Article 9 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[458]Cfr. Article 19 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[459]Cfr. Article 5§1 of the Convention, §55 of Khlaifia's case.
[460]Cfr. Article 9 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[461]Cfr. Article 19§3, a) of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[462]Cfr. Article 8§1 of the Return Directive, §41 of Khlaifia's case.
[463]Cfr. Article 1 of the Return Directive, §41 of Khlaifia's case; and Article 3 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[464]Cfr. Article 13§4 of the Return Directive, §41 of Khlaifia's case.
[465]Cfr. Article 16§4 of the Return Directive, §41 of Khlaifia's case.
[466]Cfr. Article 2§2, a) of the Return Directive, §41 of Khlaifia's case; Article 15§6 of the Return Directive, §41 of Khlaifia's case; and Article 4 of the draft article on the expulsion of aliens by the International Law Commission, §46 of Khlaifia's case.
[467]Cambridge Dictionary: https://dictionary.cambridge.org/dictionary/english/thereof.
[468]Cfr. Article 13§1 of the Immigration Consolidated Act, §33 of Khlaifia's case.
[469]Cambridge Dictionary: https://dictionary.cambridge.org/dictionary/english/hereof.
[470]Cfr. Article 13§2 of the Immigration Consolidated Act, §33 of Khlaifia's case.

Lastly, legal English texts contain many acronyms and abbreviations: Khlaifia's cross-references shortened "International Law Commission" into (ILC) which have been left out in the TT.

4.3.3. Final remarks

The Grand Chamber judgment is a complex genre, unique in its kind as not only it comprises different legal texts and characteristics which have to be taken into account when translating, but also represents the interaction between national and supranational courts. The case of Khlaifia and Others v. Italy has been translated, according to Cao's words, for informative purposes of the target text of the target legal system[471] in line with the aim of the project "Bringing the Convention Closer to Home: Translation and dissemination of key ECHR case-law in target languages[472]".

However, some difficulties need to be considered while translating Grand Chamber's judgment.

Firstly, according to Reiss's text types theory[473], ST and TT may be different text types: the ST drafted by the drafting committee of the Grand Chamber is both operative and informative as not only it declares violations and grants remedies, but also it disseminates and enforces the principles enshrined in the ECHR and in the ECtHR case-law. On the contrary, the TT translated and revised into Italian by Rita Carnevali, linguistic assistant, and Dr Martina Scantamburlo, linguistic officer is only informative. This may influence the other elements of the communicative situation of the judgment. Despite the register is the same[474], and in some cases higher in the Italian version, ST and TT involve different participants in the communicative situation: in the ST, the sender is the Grand Chamber, the receivers are the parties involved in the case namely

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[471]Cfr. Cao D., "*Translating law*", Multilingual matters LTD, Cleventon, Buffalo, Toronto, 2007, pg. 11.

[472]European Court of Human Rights, "*Bringing the Convention Closer to Home. The Court 's Case-Law Translations Project (2012-2016): Achievements and Remaining Challenges*": https://www.echr.coe.int/Documents/HRTF_standards_translations_ENG.pdf [21/12/2020].

[473]Cfr. Reiss K. (1971), in Munday J., "*Introducing Translation Studies- Theories and Applications*", Routledge, Fourth Edition, 2016, pg. 89.

[474]Cfr. Borja Albi A. et al. (2009), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 57.

the Italian Government, the three Tunisian nationals and their agents and lawyers, and other third parties such as Coordination Française pour le droit d'asile (French coalition for the right of asylum), and the Center for Human Rights, and Legal Pluralism of McGill University, the AIRE Center and the European Council on Refugees and Exiles (ECRE); in the TT, the sender is again the Grand Chamber, but the receiver is wider, being the whole population of the Member States of the Council of Europe, so we would have expected the register of the ST to be higher.

Secondly, another problem relies on the use of the language for delivering judgments. One of the official languages of the Court is English. However, the multicultural and multilinguistic context of the European Court of Human Rights leads to the creation of the European legal English which, according to the linguistic Brannan, is considered as a "hidden third (non-official) language" and which may sound unusual and unnatural to native speakers of the official languages of the Court. This variation of English may lead to misunderstandings while translating.

Thirdly, the intercultural and interlingual differences between national and supranational courts may have an impact on linguistic features. From the analysis, it emerges that terminology is the most striking linguistic feature to translate. The cross-references of Khlaifia's case are indeed a mixture of national, international and supranational system-bound elements and their translation implies a process of recontextualization where elements originally embedded in a national legal and judicial system migrate from their natural context into a different environment. The analysis of these terms has been conducted grouping cross-references in technical and semi-technical law-related words, immigration-related word, and general words used in legal contexts that are understandable to laymen. From the study, it emerges that one of the most difficult challenges in translating the case-law of ECtHR relies on what the linguistic Brennan calls "supranational terms" and "national terms"[475].

Words belonging to the first category have been mostly translated literally as in "right to liberty and security"- "*diritto alla libertà e alla sicurezza*[476]", "prohibition of torture

[475]Cfr. Brannan J. (2013), in Petruzzo K., "*National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*", EUT Edizioni Università di Trieste, 2019, pg. 80.
[476]Cfr. Article 5§1 of the Convention, §55 of Khaifia's case.

or cruel, inhuman or degrading treatment or punishment"-"*proibizione della tortura e dei trattamenti o pene crudeli, inumani o degradanti*[477]", "collective expulsion"- "*espulsione collettiva*[478]"

By contrast, national ones have been translated with different techniques. For example, "*respingimento*" has been rendered into "refusal of entry[479]" through the technique of modulation (effect<>cause), as "*respingimento*" (literally: pushback) is a consequence of the fact that migrants are refused to enter the territory ("refusal of entry"). Another example is "*espulsione amministrativa*" rendered into "administrative deportation[480]" through the technique of modulation (general<>particular), because "*espulsione*" is polysemic and applicable in different contexts and circumstances[481], whereas "deportation" only refers to the action of forcing someone to leave a country, especially if he/she has no legal right to stay[482].

The cross-references of Khlaifia's case contain also technical words taken from the European context which have been translated with different techniques. Most of them have been rendered literally as in "extradition"- "*estradizione*[483]", "voluntary departure" – "*partenza volontaria*[484]" or "political asylum" - "*asilo politico*[485]", whereas other ones through class shifts as in the pairs "entry-ban"- "*divieto di ingresso*[486]", "refugee status"- "*status di rifugiato*" and "refugee protection"- "*protezione dei rifugiati*[487]", or a level shift, as in the pairs "risk of absconding"-"*rischio di fuga*[488]". As these expressions have a concrete reference in both Italian and European legislation, their translation does not give rise to doubts.

Despite the above-mentioned legal translation challenges, the translation of Khlaifia case has contributed to convey the principles of the judgments into an Italian audience.

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[477]Cfr. Article 3 of the Convention, §136 of Khaifia's case.
[478]Cfr. Article 4 of the Protocol No.4 to the Convention, §212 of Khaifia's case.
[479]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[480]Cfr. Article 13 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[481]Enciclopedia Treccani: https://www.treccani.it/vocabolario/espulsione/ [15/01/2021].
[482]Cambridge Dictionary: https://dictionary.cambridge.org/it/dizionario/inglese/deport [15/01/2021].
[483]Cfr. Article 2 of the Return Directive, §41 of Khlaifia's case.
[484]Cfr. Article 15§3 of the Return Directive, §41 of Khlaifia's case.
[485]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[486]Cfr. Article 12 of the Return Directive, §41 of Khlaifia's case.
[487]Cfr. Article 10 of the Consolidated Immigration Act, §33 of Khlaifia's case.
[488]Cfr. Article 15§1, a) of the Return Directive, §41 of Khlaifia's case.

The translators Rita Carnevali and Dr Martina Scantamburlo have translated the TT as faithful as possible to the ST, using in most cases direct or oblique translation techniques, especially as regards terminology. Thusly, the informative purpose of translation has been achieved successfully.

The translated text still makes use of a technical language and register, maintaining all the characteristics of the so-called "intra-specialist communication[489]" which is a communication destined for specialists in the same field. It follows that all subjects of law, including migrants, may not comprehend their legal content. Albeit the translation project of the Court has contributed to the improvement of disseminating the contents of human rights legal texts, there may be still a need of simplification in order to reach a wider readership.

Therefore, it is hope that this study is a good starting point to open up new paths for further work to simplify legal texts not only for specialists, but also for laymen.

[489]Cfr. Cloître and Shinn (1985), in Petruzzo K., *National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*, EUT Edizioni Università di Trieste, 2019, pg. 59.

Conclusion

La migrazione è un fattore sociale che esiste da sempre e che pervade il nostro tempo. Una svolta significativa è avvenuta nel 2011, quando, a seguito delle primavere arabe, l'Europa è diventata una meta ambita da molti migranti provenienti dal Nord Africa. L'Italia è stata tra le protagoniste principali di questo nuovo scenario, dimostrando tuttavia un'inadeguata preparazione nella gestione di un flusso migratorio particolarmente elevato.

Ciò si è tradotto in una frequente violazione di alcuni dei diritti e dei principi stabiliti nella Convenzione Europea dei Diritti dell'Uomo, c.d. CEDU. La seguente tesi si è posta dunque l'obiettivo di analizzare la politica d'immigrazione in Italia agli albori di questo nuovo fenomeno attraverso l'analisi di un caso esemplare, Khlaifia e Altri c. Italia, il quale affronta temi come la detenzione illegale, la proibizione alla tortura, alle pene o trattamenti inumani e degradanti e le espulsioni collettive.

Prima di tutto, abbiamo approfondito le dinamiche che hanno portato i ricorrenti, tre uomini di origine tunisina, a presentare ricorso alla Corte Europea dei Diritti dell'Uomo, c.d. Corte EDU, contro la Repubblica Italiana. Essi lamentavano di essere stati privati della propria libertà personale in assenza dei presupposti legali nei centri di primo soccorso e di accoglienza e di non avere ricevuto alcuna giustificazione per tale trattamento. Non solo, i tre tunisini ritenevano di essere stati soggetti a condizioni disumane e degradanti culminate poi in un'espulsione collettiva verso la loro madrepatria senza essere stati sottoposti a dei colloqui individuali. Infine, essi denunciavano anche il mancato beneficio di un ricorso giurisdizionale contro queste violazioni.

Data la rilevanza del caso, la Corte EDU, riunita nella Gran Camera, ha concordato con i querelanti la violazione della libertà personale senza giustificato motivo. Altresì, ritenendo il sistema di accoglienza italiano lacunoso, ha colto l'occasione per imporre agli Stati Membri l'adozione e l'effettivo rispetto delle leggi che disciplinano in maniera chiara le procedure necessarie della prassi di frontiera a cui sono sottoposti i migranti che sbarcano in Europa.

Al fine di comprendere la politica d'immigrazione in Italia, il caso è stato analizzato sia dal punto di vista giuridico che da quello linguistico.

Ci siamo dunque focalizzati sull'analisi e sulla comparazione di tutti quei testi di legge nazionali, europei e sovranazionali inerenti ai temi principali del caso e presenti nella sentenza stessa, tra cui il Testo Unico sull'Immigrazione, la Direttiva Rimpatri e il Progetto di articoli in materia di espulsione degli stranieri. Nonostante i diversi ambiti di applicazione, in generale questi testi di legge si prefiggono l'obiettivo di garantire il diritto alla libertà e sicurezza, di proibire la tortura, i trattamenti e le pene disumane e degradanti e le espulsioni collettive, nel rispetto della dignità umana e dei diritti fondamentali. D'altro canto, invece, essi presentano dei punti critici comuni. Tra questi, la loro generalità di contenuto meglio nota come vaghezza, caratteristica tipica dei testi giuridici, i quali sono stati elaborati con il fine di coprire in modo esaustivo diversi atti e situazioni future concepibili o possibili (cfr. Cao 2007:121). A tal proposito si pensi, ad esempio, alla Convenzione Europea sui Diritti dell'Uomo stessa, la quale rappresenta "*a merger of different legal systems*" ed è quindi un "*living instrument*" (Peruzzo 2019: 14) da applicare e interpretare in modo più dinamico e ampio, alla luce delle circostanze e del sistema giuridico dello Stato Membro considerato. Un'altra difficoltà riguarda il linguaggio utilizzato: i testi legali si inseriscono in un sistema culturale, legale e giuridico del Paese o dell'istituzione che li emette, e di conseguenza si servono di un lessico specializzato e di un registro elevato (cfr. Cao 2007: 15-18). Tuttavia, tali testi trattano tematiche relative ai diritti umani, il cui obiettivo è quello di proteggere gli individui e/ o gruppi di individui da azioni che interferiscono con le libertà fondamentali e la dignità umana. Essi dovrebbero quindi essere accessibili e comprensibili a tutti i soggetti di diritto, tra cui i migranti. Dalla ricerca è emerso che, una volta in Italia, i migranti troppo spesso non hanno alcuna familiarità con il sistema legale, hanno scarsa se non nessuna informazione circa la procedura da intraprendere per effettuare una domanda d'asilo o di protezione.

Da questo consegue che la comunicazione e la mediazione sono una possibile e concreta soluzione alle lacune della politica d'immigrazione italiana. Non di meno, la comunicazione è anche un obbligo delle autorità nei confronti di tutti coloro che desiderano chiedere asilo o entrare e soggiornare in uno Stato membro (cfr. articolo 11§6, Testo Unico dell'Immigrazione). Attraverso l'analisi del processo di gestione del

flusso migratorio, degli attori coinvolti (con particolare attenzione alla figura del mediatore interculturale) e degli eventi che hanno caratterizzato Lampedusa nel 2011, si è poi cercato di capire come e se, nel caso specifico di Khlaifia, le informazioni contenute nei testi di legge siano state comunicate ai migranti in modo efficace.

Dalla lettura di alcuni documenti tra cui "Raccomandazioni e buone prassi per la gestione dei flussi migratori misti in arrivo via mare" del Progetto Praesidium e a cura del Ministero degli Interni e il rapporto "Conclusioni e raccomandazioni di Amnesty International alle autorità italiane a seguito della missione di ricerca a Lampedusa e Mineo" è emerso che il sistema di accoglienza di Lampedusa, nel 2011, era al collasso. I migranti non venivano informati correttamente né sui loro diritti, né sulle ragioni del loro trattenimento, e, di conseguenza, non avevano possibilità di presentare ricorso davanti a un giudice. Nei centri di accoglienza, il personale ingaggiato era esiguo in confronto alla presenza numerosa dei migranti, mentre condizioni di insalubrità e di sovraffollamento regnavano. Il caso Khlaifia dimostra che quando gli stati sono sopraffatti da grandi flussi migratori, e non hanno risorse necessarie per fornire ai migranti gli standard di base previsti dalla legge, le autorità possono concedersi più libertà d'azione nella gestione dell'afflusso, e, spesso, a discapito dei diritti sanciti dalla legge.

In ultimo, ci siamo prefissi l'obiettivo di fornire uno strumento linguistico per la diffusione dei diritti umani a tutti i soggetti di diritto: la traduzione legale. Il progetto *Bringing the Convention Closer to Home: Translation and dissemination of key ECHR case-law in target languages,* lanciato dalla Corte EDU con l'aiuto degli Stati Membri, ha permesso la divulgazione dei principi e della giurisprudenza della Corte in dodici lingue, rendendoli accessibili a una vasta platea di lettori. Si noti che, tra i documenti tradotti, vi è proprio la sentenza del caso Khlaifia. In generale, la traduzione della sentenza (ST: EN-TT:IT) ha contribuito a trasmettere i principi del caso presso l'opinione pubblica italiana. Il testo è stato tradotto nel modo più fedele possibile al ST, utilizzando per lo più tecniche di traduzione diretta. Dall'analisi traduttologica, emerge tuttavia che la difficoltà maggiore risiede nella terminologia in quanto espressione culturale di un sistema giuridico, con particolare riferimento ai "*supranational terms*" e ai "*national terms*" (Brannan, 2013 in Peruzzo 2019: 80).

Altresì, i testi tradotti hanno utilizzano ancora un linguaggio e un registro tecnico, mantenendo le caratteristiche della "*intra-specialist communication*" (cfr. Cloître and Shinn, 1985 in Peruzzo 2019: 59). Ne consegue che, n*o*nostante il grande contributo della traduzione legale della Corte per la divulgazione dei diritti umani, il TT risulta ancora di difficile comprensione per un pubblico più vasto, tra cui i migranti.

L'analisi del caso Khlaifia e Altri c. Italia ha permesso non solo di fare chiarezza sulla legislazione che regola il sistema di accoglienza, ma anche di capirne i meccanismi, attraverso uno studio approfondito della gestione del flusso migratorio, dalla legge alla prassi. Dall'analisi emerge infatti che un'adeguata politica migratoria è necessaria per far sì che gli individui o i gruppi di individui non siano soggetti a costanti violazioni dei diritti umani. Altresì, la seguente tesi può essere un utile approfondimento di tematiche come la detenzione illegale, la tortura e trattamenti disumani e degradanti e le espulsioni nel contesto dell'immigrazione, non giustificabili dalla situazione emergenziale.

La difficoltà maggiore della ricerca, tuttavia, è stata quella di reperire delle fonti chiare, puntuali e adeguate che permettessero di fare luce sulla prassi migratoria, con particolare riguardo all'iter a cui sono sottoposti i migranti appena sbarcati sul suolo italiano, a quali sono le strutture di accoglienza secondo il diritto nazionale, e, infine, a come essi vengono informati sui loro diritti, sulla procedura di richiesta di asilo e di protezione. In generale, la prassi rimane una zona grigia, poco trasparente e sottoposta ad interpretazione individuale e ad azioni arbitrarie.

Per quanto concerne l'aspetto linguistico della ricerca, la difficoltà maggiore è stata quella di trovare un'esaustiva letteratura sull'attività di traduzione della Corte. A tal proposito, fondamentali sono stati soprattutto i lavori di Deborah Cao e di Katia Peruzzo, attraverso i quali è stato possibile condurre l'analisi traduttologica del caso. Il confronto delle "*cross-references*" ha fornito un esempio concreto di traduzione di testi legislativi, esempio che non solo ha permesso di trasmettere i principi del caso in lingua italiana, ma che può essere un utile punto di partenza per ulteriori ricerche e approfondimenti. Rimane comunque la necessità di partire da queste traduzioni fedeli e specialistiche per attuare dei progetti di semplificazione che possano essere indirizzati a un pubblico più vasto possibile

Glossary

1. Technical law-related words

abuso di potere	abuse of power
al di là di ogni ragionevole dubbio	beyond a reasonable doubt
arbitrarietà	arbitrariness
arresto illegale	unlawful arrest
base legale	legal basis
buona fede	good faith
carcerazione preventiva	preventive detention
codice penale	penal code
colpa	negligence
comma	paragraph
condotta colpevole	guilty conduct
danno	damage
decreto legislativo	legislative decree
delitti contro la persona	crimes against person
delitto contro la libertà morale	crimes against morality
diritti culturali	cultural rights
diritti sociali	social rights
diritto alla libertà e alla sicurezza	right to liberty and security
diritto economici	economic rights
dolo	malice
effetto sospensivo	suspensive effect
equo processo	fair trial
ergastolo	life imprisonment
fattispecie	particular facts
Fondo Asilo Migrazione e Integrazione (FAMI)	Asylum, Migration and Integration Fund (AMIF)
forma di immunità	legal immunity
garanzie procedurali	procedural safeguards
giudice di Palermo per le indagini preliminari (GIP)	Palermo preliminary investigations judge
giudice di pace di Agrigento	Justice of the Peace of Agrigento
giurisprudenza	case-law
il principio di tassatività o determinatezza	principle of determinacy and clarity
iter legislativo	legislative process
legittimità	lawfulness
Marina Militare Italiana	Italian Navy
minorata difesa	impaired defense
misure coercitive	coercitive measures

misure preventive - prendere misure preventive verso qualcuno/ qualcosa	preventive measures - take preventive measures against someone/ something
obbligazioni negative	negative obligations
obbligazioni positive	positive obligations
obbligo di motivazione	obligation to state reasons
onere della prova	burden of the proof
principio della personalità della responsabilità penale	the principle of the personality of criminal liability
principio di colpevolezza	principle of guilty
principio di offensività e lesività del reato	principle of the harmfulness of the offence
privazione della libertà	deprivation of liberty
provvedimenti provvisori - adottare provvedimenti provvisori	interim measures - to apply for interim measures
ragioni/ motivi di diritto e di fatto	legal and factual reasons/ grounds
reati di tortura	crimes of torture
reato banale	trivial offence
reclusione	imprisonment
ricorrenti	applicants
ricorso	appeal
ricorso: accettare un ricorso	to accept an appeal
ricorso: presentare un ricorso	to lodge an appeal
rimedio legale	legal remedy
riserva di giurisdizione	reservation of jurisdiction
riserva di legge assoluta	absolute legal reservation
salvaguardia fondamentale	paramount safeguard
sanzione	penalty
dare una sanzione	impose a penalty
Sistema Sanitario Nazionale (SNN)	National Health System (SSN)
soggetto di diritto	subject of law
stato di diritto	state of law
stato di emergenza (umanitaria)	state of (humanitarian) emergency
tortura	torture
tortura: istigazione alla tortura	incitement to torture
più condotte (cfr. tortura)	more than one conduct (cfr. torture)
trattamenti degradanti	degrading treatment
trattamenti disumani	inhuman treatment

2. Immigration-related words

accordo bilaterale Italia -Tunisia	the bilateral agreement between Italy and Tunisia

allontanamento	removal
Alto Commissariato delle Nazioni Unite per i Rifugiati	United Nations High Commissioner for Refugees (UNHCR)
asilo politico	political asylum
Assemblea parlamentare del Consiglio d'Europa (APCE)	Council of Europe's Parliamentary Assembly (PACE)
Associazione per gli studi giuridici sull'immigrazione (ASGI)	Association for Juridical Studies on Immigration (ASGI)
Banca dati europea di dattiloscopia in materia di asilo (Eurodac)	European Asylum Dactyloscopy database (Eurodac)
Centri di Accoglienza (CDAs)	Reception or Welcome Centers
Centri di Accoglienza dei Richiedenti Asilo (CARAs)	Centers for the Reception of Asylum Seekers
Centri di Accoglienza Straordinaria (CAS)	Emergency Reception Centers
Centri di Espulsione e di Identificazione (CIEs)	Identification and Expulsion Centers
Centri di Permanenza per i Rimpatri (CPRs)	Return Detention Centers
Centri di Prima Accoglienza (CPAs)	First reception centers/ regional hub
Centri di Primo Soccorso e Accoglienza (CPSAs)	Centers for First Aid and Reception
Croce Rossa Italiana (CRI)	The Italian Red Cross (CRI)
Croce Rossa: Federazione internazionale delle Società della Croce Rossa e della Mezzaluna Rossa (FICR)	International Federation of Red Cross and Red Crescent Societies (IFRC)
decreti respingimento	refusal-of-entry orders
decreto sicurezza e immigrazione (decreto Salvini)	decree on immigration and security (Salvini Decree)
Dipartimento per le Libertà Civili e l'Immigrazione	Unit for Civil Liberties and Immigration
direttiva rimpatri 2008/115/CE	Return Directive 2008/115/EC
espulsione	expulsion
espulsione amministrativa	administrative expulsion
espulsioni giudiziarie	judicial expulsion
estradizione	extradition
facilitatore della comunicazione	communication facilitator
foglio notizie	information sheet
gestione dei flussi migratori	migration flows management
interprete sociale	social interpreter
La Convenzione contro la tortura e altre pene o trattamenti crudeli, inumani o degradanti	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)
maltrattamento	ill-treatment
grado di gravità del trattamento	degree of severity of the treatment

mediatore culturale	cultural mediator
mediatore di madre lingua	mother-tongue mediator
mediatore interculturale	intercultural mediator
mediatore linguistico	linguistic mediator
mediatore linguistico- culturale	linguistic-cultural mediator
mediatore sociale	social mediator
migrante irregolare	irregular migrant
minori accompagnati	unaccompanied minors
Nuova Sistema di Accoglienza (SAI)	Reception and Integration System
operatore interculturale	intercultural operator
Ordine di Malta	The Sovereign Order of Malta
Organizzazione Internazionale per le Immigrazioni (OIM)	International Organization for Migration (IOM)
partenza volontaria	voluntary departure
pene degradanti	degrading punishment
pene disumane	inhuman punishment
prima accoglienza	first reception
principio di non-refoulement	non-refoulement principle
procedure semplificate	simplified procedures
Progetto Praesidium	Praesidium Project
protezione sussidiaria	subsidiary protection
protezione umanitaria	humanitarian protection
punti di crisi	hotspot
Questura Provinciale- Ufficio Immigrazione	Provincial Police Headquarters- Immigration Office
respingimento	refusal of entry
respingimento alla frontiera	refusal of entry at the border
respingimento differito	deferred refusal of entry
rilocazione	relocation
rimpatrio	return
rischio di fuga	risk of absconding
roadmap italiana	Italian roadmap
Save the Children	Save the Children
seconda accoglienza	second reception
Sistema Automatizzato di Identificazione delle Impronte	Automated Fingerprint Identification System (AFIS)
Sistema D' Indagine (SDI)	Investigation System (SDI)
Sistema d'informazione Schengen (SIS)	Schengen Information System (SIS)
Sistema di protezione per richiedenti asilo e rifugiati (SPRAR)	System of Protection for Refugees and Asylum Seekers
sottocommissione ad hoc sull'arrivo massiccio di migranti in situazione	Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants,

irregolare, di richiedenti asilo e di rifugiati sulle rive del sud dell'Europa	asylum seekers and refugees on Europe's southern shores (PACE Ad Hoc Sub-Committee)
status di rifugiato	refugee status
strutture temporanee	temporary structures
tecnico della mediazione linguistica per immigrati	technician of linguistic mediation for immigrants
Testo unico sull'Immigrazione	Consolidated Immigration Act
traffico e tratta di migranti	smuggling and trafficking of migrants

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