



AT THE LIMEN

The implementation of the return directive
in Italy, Cyprus and Spain

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THANKS TO

Thurid Gertich, Fàtima Vaca Ferrer, Andrea Dini Modigliani, Elettra Griesi, Harald Glöde, Judith Gleitze, Bechir Missaoui, Adel Laid, Doros Polycarpou, Mikel Araguas, Mikel Mazkieran, Loira Manzani, Manuel Lancha Muñoz, Peio Ayerbe, Valerio Serafini, Melissa Bonnie Morozzo della Rocca, Leandros Savvides, Emilie Dubuisson, Romanos Lyritsas, Constantinos Constantinou, IUC Torino, Prof. Emilio Santoro, Francesco Cianci e Stefania Palmieri, Studio legale Antartide, all migrants who let us try to understand what kind of places CIEs are.

A project by **EACEA** - EDUCATION, AUDIOVISUAL AND CULTURE EXECUTIVE AGENCY

Seminars and round tables. Europeanisation of asylum and immigration law: detention and detention centres after the return directive.

This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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Borderline Sicilia Onlus <http://siciliamigranti.blogspot.it/2011/01/borderline-sicilia-onlus.html>

Kisa Cyprus <http://kisa.org.cy/tag/cyprus/>

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Printed in December 2013 by bis500 Digitaldruck (www.bis500druck.de), Germany.

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Introduction

The migration phenomenon has been constant throughout the history of humanity. People have moved and have been moving for an infinite number of reasons: individual or social, economic or political. Such migrations may take place on different levels: within a city, between rural and urban areas, within a country or outside national borders. Although migration is a phenomenon that has always existed, it is historically determined: it has taken place and assumed different forms depending on economic, social and political conditions. Here, we restrict our analysis to the geopolitical area of Europe. Some historical analyses¹ have demonstrated how Europe has been characterized for centuries by the migration phenomenon and how it has actively contributed to the construction of nation states. Remembering our own history of migration helps us to better understand today's complex contemporary migration phenomenon and allows us to give a critical response to public and political discourses that interpret this phenomenon as a "mass invasion" and a "threat". Therefore, it is of benefit to briefly review the history of immigration policy in the European Union, in order to gain a context in which to examine today's Identification and Deportation Centres (CIE).

Establishing immigration policy at a European level has been a gradual and not always straight forward process. It is difficult to see it as a clearly defined project resulting from the decisions of a strong political authority. First of all, the nature of the European Union itself is constantly changing and developing on a legal, institutional and political level. However, the clear trend in recent years, oriented toward nation-states led by European directives, has been towards more restrictive immigration policy, with the militarization of external borders.

The change began in the mid-70s, after the oil crisis, when European states gradually imposed increasingly restrictive measures. Attempts to manage the immigration phenomenon began to be conducted collectively at a European level, as first seen with the Schengen Agreement². The two new general trajectories throughout Europe were to tighten measures for dealing with asylum seekers and to fight illegal immigration by closing borders. This sudden change of immigration policy took place as a result of the combination of three processes at a macro-social level: first, the geography of migration expanded and the countries traditionally importing and exporting labour forces changed³. Second, the policies of family reunification implemented during the 70s had led to a foreign population increase within European countries, which in turn, created new social problems⁴. Third, the progressive process that led to the establishment of the European Union.

Since the mid-70s, immigration policies at a European level have been characterized by a rather defensive approach to external and internal borders. Initially, states stipulated inter-governmental agreements and working groups to guarantee these policies at Community

1 Cfr. Sassen S., *Migranti, coloni rifugiati. Dall'emigrazione di massa alla fortezza Europa*, Feltrinelli, Roma 1996. English version: *Guests and aliens*, New York: New Press, 1999.

2 http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_migration/l33020_en.htm

3 Italy, Spain, Greece and Portugal turned from labor-exporting countries into destinations for immigration, while new countries have become labor-exporting (as such many African and Asian states and also East-European states).

4 Through family reunification the number of foreign has significantly increased, forcing European governments to face new social problems such as integration and the "problem" of the "Second-generations immigrants".

level; only later did Community institutions gradually develop competence in the field of immigration policies. One of the fundamental issues at the time was a growing tendency to equate immigrants with terrorists / criminals. This trend was strengthened in 1985, when the TREVI group⁵ expanded its mandate to the issue of immigration, initially limiting itself to examining cases where immigration was linked to terrorism, extremism and crime. In 1986, the European Council set up a working group on immigration based on TREVI reports, which only drew more attention to any links between immigration, crime and terrorism. This tendency to see immigration in such a negative light right from the start of the the “new European project” significantly contributed to the creation of a collective and cultural imaginary regarding immigrants.

The main outcomes of intergovernmental projects concerning the free movement of people between countries, after the ratification of the Single European Act, were the Dublin Convention on asylum in 1990 (which became the Dublin II Regulation in 2003 and then the Dublin III Regulation⁶ in 2013) and the Convention on External Frontiers signed in 1991, within the more general Schengen Agreement. The “Schengen Project” was initially concerned with ensuring the free and safe movement of goods, capital, and people. The 1992 Treaty of Maastricht both deals with the issue of the abolition of internal borders to allow for the free movement of capital and EU citizens, and also restores and strengthens external and internal borders for non-EU migrants. The treaty effectively works to restrict the entry of non-EU citizens and then to check their movements within EU territory. It was at this point that the issue of internal security and control of external borders became central to the EU agenda. The issue of security called for “common action” which was possible through the “technical harmonization” of Europe. Such “technical harmonization” came about thanks to the *network*, made possible by the use of information technology⁷ (Walters 2004). Gradually, the decision-making process on issues such as immigration, asylum seekers, security control, legal cooperation and crime prevention was delegated to a team of supranational and intergovernmental institutions. This was the objective of the Treaty of Amsterdam (1999), which aimed to transform the EU into an “area of freedom, security and justice” on both a legal and a conceptual level. Rather than replace individual national legal systems, it tried to find ways to connect them, to harmonize their policy operations and governments.

Following this, immigration policies were modernized in 1999 at the Tampere summit⁸ where the European Union and its member states developed policy along three separate lines: (1) to contain immigration for asylum reasons, (2) to fight illegal immigration and (3) to open up new channels for “labour migration”. At the Seville summit in 2002, a fourth issue was raised: the extension of European migration policies to any other migrants’ countries of origin and countries migrants have travelled through. Two of these issues highlight contradictory but parallel trends in EU policy regarding the migration phenomenon. The first is that the EU deals with the migration phenomenon depending on the requirements of its internal labour markets. In Europe, one of the determining factors influencing migration flows is the economic characteristics of the “host country”. The higher the

5 *Terrorisme, Radicalisme, Extrémisme et Violence Internationale.*

6 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF>

7 An example is the SIS (Schengen Information System), a huge database that allows police, intelligence, customs and immigration agencies to share information on various categories of persons considered dangerous.

8 http://ec.europa.eu/councils/bx20040617/tampere_09_2002_en.pdf

need for labour, the more immigrants are allowed to enter the country. The EU privileges an approach which reacts to the challenges posed by external migration with the necessary measures to cope with new internal social problems⁹. It follows a selective migration policy, which leads to a polarization between skilled jobs for the citizens of the member states and low-skilled work undertaken primarily by migrants¹⁰ (Düvell 2004). Regarding the second issue, the European Union has implemented a policy of progressive control and influence in the countries of transit and origin of migration flows. It is possible to read in the final conclusions of the Tampere Agreement that the EU's new approach should be a kind of «partnership with countries of origin» (or countries which the migrants have travelled through) with the prospective of building a “common path”. These operations have in some way shifted EU-borders to now mark not only the outer perimeter of the EU geopolitical area, but also to extended them to migrants' home countries and the countries they have travelled through. This is implemented with a dual action: firstly through bilateral cooperation agreements between individual European countries and transit countries, and secondly with the progressive militarization of borders, whereby «the European Council stresses the importance of controls, effective responses to future external borders by specialized trained professionals». This process led to the creation of Frontex¹¹ in 2005, an agency that coordinates between individual states about border security and its institutionalization. The most recent major policy intervention concerning immigration was the 2008 Return Directive (which favours the repatriation agreements)¹². As a matter of Communitarian law, it also incorporates the existing bilateral agreements between states, which, until then, had been the responsibility of individual states¹³. The Return Directive consequently formalised these bilateral agreements, making them legitimate tools for dealing with immigration¹⁴. The repatriation agreements were accompanied by measures both to formalise the structure of detention centres and to implement the use of the police forces in the “transit zones” – such as international airports and frontier posts.

From this brief analysis of immigration policies carried out by the European Union, it becomes clear that we can talk about a “global regime” of immigration control and governance. This European control system can be considered “global” thanks to the cooperation between states and secret services on specific issues – such as terrorism and immigration – which in turn is studied by other non-institutional groups, such as the IOM or UNHCR, who do not directly exercise any form of sovereignty. Therefore, a structurally mixed association of different political groups, such as nation states, supranational organizations such

9 Internal problems, such as the progressively aging population of European societies, the absence of some professional figures, the stagnation of the economy or the low mobility of the labor market.

10 Following the Tampere summit several EU-states have initiated migration policies in this direction by introducing green cards in Germany, or raising the odds reserved for migrant labor in Italy.

11 “The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”.

12 Directive 2008/115/CE 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.

13 The Tampere Agreement reminds nation-states that «The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission».

14 For further details in this regard, particularly about the agreement between Italy and Libya, read the article by Fulvio Vassallo Palaeologo, “Guantanamo in Europe”, and the article written by Rudvica Adriasevitc, of Lampedusa and Libya, in AA. VV. Internamenti, cpt e altri campi, in Conflitti Globali, n.4, ed. Agenzia X, Milano 2006.

as the European Union, and new global groups, begins to take shape (Mezzadra 2004). All this has modified the essential nature of national borders. A migrant's 'irregular' presence within a country means that, despite being physically inside that nation state, he or she remains outside that country in terms of access to social and political rights and welfare support. For this reason it can be claimed that the legal status of migrants represents a whole new national border within the European region. This new border is not restricted to a particular territory, but rather to a body of individuals. Migrant detention centres are another example as they are a sort of exceptional space within a nation where none of the detainees have the same rights as legal citizens. (Cuttitta 2007) .

Over the last few years, the use of two different forms of immigration control has increased: there are more centres (detention centres, or "reception" centres) and there has been a proliferation of different forms of temporary legal status. In both cases, these new immigration management and control measures are both characterised by their seemingly temporary nature and by the fact that both present immigration as an entirely temporary phenomenon.

Chapter I – The Return Directive

The 2008/115/EC Directive of the European Parliament and of the Council of 16th December 2008 touches on the most politically sensitive aspect of European immigration policy: the repatriation of third country nationals found without a European residency permit. The common European framework clearly limits member states' actions concerning the regulation of what is one of the most problematic issues concerning state sovereignty. Nevertheless, the Return Directive does not result in better treatment for the so-called “irregular migrants”. Despite the positive intentions expressed by the Commission during the drafting process, the final official text triumphs a “security-based” approach to immigration issues and identifies third country nationals with irregular residency status only as a risk to security¹⁵. There have been many problematic cases of repatriation where it has often seemed that respect, dignity and the fundamental human rights of the people involved have not been given priority. Since its implementation, this new European directive has been much criticized from many sides for its huge impact on the treatment and human rights of undocumented migrants in the European territory, even being defined as “the directive of shame”.

The deficiencies in the text are the result of a long and conflict-filled drafting process. Back in 2005, the European Commission drafted a directive proposal to standardise European repatriation procedures, but subsequent negotiations were particularly difficult both at Council level and at the European Parliament. The Return Directive constitutes the first major piece of legislation in the field of immigration and asylum seeking to be decided under the co-decision procedure (article 251 TCE), in which the European Parliament legislates on equal footing with the Council.

The political agreement reached in June 2008 was the result of prolonged and complex negotiations and pressure from the Council. The end result was a decrease in human rights protection and procedural safeguards and a directive which sought to either maintain or increase the discretion/power of national authorities in cases of repatriation – all substantially different from the initial draft drawn up by the Commission.

Although Article 1 of the Return Policy underlines “*fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations*”, the references to human rights in the text are vague and mostly limited to the introduction¹⁶. In the text, there is no recall to fundamental legal instruments and just three principles are mentioned: non-refoulement (articles 4(b), 5 and 9(1)(a)), family unity (articles 5(b) and 14(1)(a)) and the best interests of the child (articles 5, 10(1) and 17(5)). There is a complete lack of any reference to the prohibition of collective expulsion¹⁷. Right from the start, the Return Directive exposes the European Community's inability to set European immigration rules able to manage immigration efficiently at the same time

15 M. Borraccetti, *Il rimpatrio di cittadini irregolari: armonizzazione (blanda) con attenzione (scarsa) ai diritti delle persone*, op. cit., p.41

16 Twenty guidelines on forced return adopted on 4 May 2005 from the Committee of Ministers of the Council of Europe” (Recital 3), 1989 United Nations Convention on the Rights of the Child (Recital 22), Geneva Convention relating to the Status of Refugees of 28 July 1951 (recital 23), Charter of Fundamental Rights of the European Union (recital 24).

17 Anneliese Baldaccini, 'The EU Directive on Return: Principles and Protests' 28 Refugee Survey Quarterly, pg. 27

as protecting migrants' rights. The minimum standards imposed by the Return Directive leave plenty of freedom to member states and contravene its initial aim. Consequently, responsibility for respecting the minimal standards set by the Return Directive and by national legislation lies ultimately on individual national courts.

1. THE AIM OF THE RETURN DIRECTIVE.

The Return Directive sets out 'common standards and procedures to be applied in Member States for returning illegally staying third-country nationals'¹⁸ and defines illegal residency as the presence in the territory of a member state, of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as defined by the Schengen Borders Code (Article 5)¹⁹ or other conditions for the entry, stay or residency in that member state^{20,21} 6,7. Undocumented migrants can be deported to their country of origin, a transit country or another third country, to which the third-country national concerned voluntarily decides to return to and in which that person will be accepted²². The inclusion of the transit country as a return country guarantees effective safeguards for migrants. In fact, except for the voluntary compliance of the third-country nationals to return (to the country of origin or another state where the person would be accepted), repatriation could be enforced not just to the country of origin but also to a country of transit in accordance with Community or bilateral readmission agreements or other arrangements. This specification allows the states - without the consent of the affected person - to deport a migrant to a third country, different from their country of origin. This approach should act to dissuade migration, but it seems that it was mainly introduced as a tool for the European governments to overcome difficulties in identifying undocumented third-country nationals in cases where there is a lack of cooperation both from the migrant and with their home government. The migrant is considered personally responsible for his or her own "illegal" status and for this reason deportation without his or her consent is considered justified. One important tool which facilitates the Return Policy is cooperation with third countries: in the preamble of the Return Directive, great importance is given to the bilateral agreements which help "to facilitate the return process and to achieve a sustainable return"²³. In fact, a lack of information about the country of origin of the undocumented migrant and his or her lack of collaboration may make it impossible to repatriate them. Member states can use the bilateral agreements as an easy way to expel migrants although, as a consequence, the protection accorded to migrants in the Return Directive would be totally undermined.

The Return Directive regulations often have a non-binding effect: according to art. 2, member states can avoid applying the Return Directive to third-country nationals in two

18 Article 1 Return directive.

19 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.

20 Article 3.2 Return directive.

21 This definition in the practice is vague. One of the main critics lays on the difficulties to define precisely the content of "irregularity", being the irregular status the consequence of an irregular entry in the country or the loss of the permission to stay. The European Court of Justice tried in many occasions to clarify the extension field of the terms. One of those was the applicability of the Return Directive toward asylum seekers. The problematic was cleared out in the Kadzoev judgement (C-357/09) where the Court stated that asylum seekers fall outside of the scope of the directive.

22 Article 3.3 Return directive.

23 Considering 7 Return directive.

cases: (1) when migrants have been refused entry (in accordance with Article 13 of the Schengen Borders Code), or when they are apprehended or intercepted by the competent authorities during an attempt to irregularly cross the external border of a member state by land, sea or air and have not subsequently obtained an authorization or a permit to stay in that member state, or (2) when they are subject to repatriation as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or extradition procedures.

The vagueness of these exceptions described as “irregular border crossing”²⁴ and “criminal law sanction” constitute a much criticized and debated issue and also, recently, an object of a judgement of the European Court. In particular, the possibility of providing a criminal law sanction – for example as the penalty for irregular entry or residence – might feasibly be considered a way to avoid addressing the issue of regulating mass immigration²⁵.

The EU Court of Justice intervened on the issue in the *El Dridi* and the *Achughbabian* cases²⁶. In the first judgement (case C-61/11) delivered on 28th April 2011, the Court, examining the admissibility of criminalizing the non-compliance of a repatriation order following a period for voluntary departure, recalls that member states are free to adopt measures – including criminal law measures – aimed at avoiding the irregular presence of third-country nationals in their respective countries²⁷. Nevertheless, the Court specifies that although criminal law, in principle, is the responsibility of the individual member state, this particular branch could be governed by European Union law. For this reason “States may not apply rules, even criminal law rules, which may jeopardize the achievement of the objectives pursued by the directive, depriving it of its effectiveness” (par. 55). This decision has been interpreted as a way of balancing the State’s power with regards to matters of criminal law (included matters regarding undocumented third-country nationals under deportation orders) and the need to ensure “the *effet utile* of the directive”²⁸.

The *Achoughbabian* judgement, a similar case in France (case C-329/11), in December 2011, confirmed the findings of the *El Dridi* judgement. The court reaffirmed that the Return Directive 2008/115 does not preclude penal sanctions in line with national criminal legal procedure with regards to undocumented third-country nationals who are residing in the territory of a member state without any justified grounds for non-return (par. 48). In fact, penal sanctions can be applied only if the return procedures have already been requested²⁹ – included coercive measures under article 8 – but where the third-country

24 According to Steve Peers: “The optional exclusion for irregular border crossing should only apply where a person was stopped at or near the border, in principle by border guards carrying out border surveillance as part of their border control obligations, and not when a clandestine entrant was later detected on the territory”. Steve Peers, EU Justice and Home Affairs Law, Oxford Eu law library, 2011, p.565

25 Steve Peers, EU Justice and Home Affairs Law, Oxford Eu law library, 2011, p.565: “if Member states provide in their national law for expulsion as penalty for the criminal law offence (if one is established) of most or all cases of irregular entry and/or irregular residence, then the intention of the directive of applying to all irregular migrants who are third-country nationals would be clearly circumvented”

26 Confront other two further cases C-430/11 (**Sagor**) related to the compatibility of Italian national legislation imposing certain penal sanctions (assignment to stay at home; immediate expulsion) for illegal staying with the Return Directive and case C-297/12 (**Filev and Osmani**) related to provisions in German law criminalizing non-compliance with an entry ban, are currently still pending.

27 Paragraph 52

28 The returns directive in light of the El Dridi judgment by Rosa Raffaelli*

29 Case note: the *Achughbabian* case. Impact of the return directive on national criminal legislation. Rosa Raffaelli. Electronic copy available at: <http://ssrn.com/abstract=1998324>: “States are not allowed to delay the commencement of the return procedure: as soon as a person is identified as an irregular immigrant, a return decision must be

nationals nonetheless remain illegally in that territory. The content of “*justified ground for non return*” is still largely undefined: it is not clear if the Court refers to reasons for non-return which are out of the returnee’s control (e.g. lack of cooperation by third countries; respect of *non-refoulement* principle, safeguards for minors) or within their control (e.g. obstruction of removal efforts by returnee, non-cooperation in obtaining travel documents, destruction of papers, etc).

At the end of the first Chapter, the Return Directive specifies that member states can adopt or maintain further national immigration laws, as long as they are compatible with the Return Directive (art. 4.3). Bearing this in mind, it is clear that the primary aim of the Return Directive is to grant a better standards for third-country citizens. It attempts to align member states’ respective legislation on immigration, therefore possibly creating higher levels of protection for undocumented migrants³⁰. Because of this, the Return Directive would have been the perfect opportunity for the European Community to enforce a decent level of dignity and human rights protection for undocumented migrants. With regards to this issue, much has been written about the real impact and purpose of the Return Directive: “It is therefore clear that the compatibility of national legislation with EU law will have to be examined by making reference to the objectives pursued by the latter. With regard to the Return Directive, it had been argued that its aim is not only to establish an effective return policy but also to ensure full respect for the immigrants’ fundamental rights and dignity. (...) while the directive’s sole objective and purpose seems to be the establishment of an effective return policy (see in particular recital 20), the common procedures it sets are limited by the need to ensure respect for the immigrants’ fundamental rights and dignity.”³¹.

2. RETURN PROCEDURES AND DETENTION

2.1 VOLUNTARY DEPARTURE VERSUS FORCED RETURN

According to the Directive the return procedure must be gradual. Undocumented third-country nationals should be granted a period ranging between seven and thirty days to voluntarily organize their departure, before measures are taken to carry out forced return³². Nevertheless, the Return Directive allows states to refrain from granting a period for voluntary departure - or granting a shorter period – in cases where there is a “*risk of absconding*”. The definition of this exception refers to “*the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject to return procedures may abscond*” (article 3(7)). In fact “*the reasons which might induce the authorities to believe that such a risk exists need not be substantial in any sense and the objective criteria which domestic law may lay down might not necessarily lead to a full appreciation of all relevant facts*”³³. In fact, a wide application of these exceptions can radically change the application of the Return Directive, giving member states every excuse to

issued. Thus, irregularly-staying third-country nationals must first of all be subjected to the procedure set out in the return directive, unless they have also committed crimes unrelated to their immigration status.”

30 C. Favilli, *La direttiva rimpatri ovvero la mancata armonizzazione dell'espulsione dei cittadini dei paesi terzi*, op. cit., p.2

31 Case note: the Achughbabian case. Impact of the return directive on national criminal legislation. Rosa Raffaelli

32 Article 7.

33 Anneliese Baldaccini, 'The EU Directive on Return: Principles and Protests' 28 Refugee Survey Quarterly, pg. 127

pursue forced return in most cases.

The Return Directive refers to human rights protection during the deportation process and the possibility to postpone removal when it would violate the principle of *non-refoulement*³⁴. This regulation is rarely applied and the reality is one of daily abuse and oppression.

The situation concerning unaccompanied minors is dramatic. Although special measures are mentioned, the Return Directive allows deportation to their country of origin or to a transit country. In fact, according to article 10, assistance should be granted by the appropriate bodies or authorities before a deportation decision is made - since due consideration should be given to the best interests of the child. Therefore, before removing an unaccompanied minor from the territory of a member state, the authorities of that member state must be sure that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the state of return. International organizations for the protection of children have noticed that many of the provisions are quite general and don't require special procedures to ensure that the principles they describe are respected, even though the Return Directive reinforces national legislation concerning international human rights obligations^{35,36}.

2.2 DETENTION

The most controversial aspect of the Return Directive concerns the detention of third-country nationals under repatriation order. With the innovations introduced by the Return Directive, in particular the 18-month detention period, the detention of migrants has become a massive part of immigration management in Europe.

The EU Court of Justice³⁷ has already clarified that the detention period must be limited solely to instances where immigrants are awaiting repatriation. However, this requirement doesn't seem to be respected and the extension of the detention period leads to increasing difficulties for immigrants in the detention facilities waiting to be deported.

The Return Directive specifies safeguards to avoid illegitimate detention under international law and states that detention must not be standard procedure in cases of repatriation. In fact, detention is permitted only in certain cases, according to article 15: *“unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process”*.

Those safeguards ought to limit mass detention as a solution to the immigration issue. However, the wider interpretation which allows for justifications like *“risk of absconding”*, make the specification *“unless other sufficient but less coercive measures can be applied effectively in a specific case”* redundant.

The most problematic issues regarding detention concern the lack of mandatory legal assis-

34 Article 8 and 9, Return directive.

35 About proposals on the return directive on the child rights cfr. Comparative study on best practices in the field of return of minors HOME/2009/RFXX/PR/1002

36 For a careful analysis of the article 10 confront: Save the Children - EU Returns Directive Contact Committee February 11 2010 Implementation of Article 10 (2): Points for Reflection.

37 Kazdov v. Bulgaria

tance and the duration of detention, both of which are the result of the changes made due to Council pressure during the draft process³⁸. In fact, according to the Return Directive, detention can be ordered by legal or administrative authorities with appropriate motivation in fact and in law. In the case of administrative decisions, member states must provide for a speedy legal review of the lawfulness of the detention and must inform the third-country national of their right to take proceedings against that decision (article 15.2).

Detention shall be reviewed at reasonable intervals of time and, in the case of prolonged detention periods, shall be subject to the supervision of a legal authority. The period of detention has to be as short as possible and it may not exceed the 6 months, although if the third-country national concerned does not cooperate, or when there are delays in obtaining the necessary travel documentation from the migrant's home country, detention can last for twelve months more. Detention cannot exceed 18 months. The obligation for member states not to exceed the maximum duration of 18 months was clearly underlined by the Court of Justice in the Kadzoev case³⁹. In that decision, the Court intervened concerning the conditions of detention under article 15 of the Return Directive. The Court first specified that to calculate whether the maximum duration of detention laid down in Directive 2008/115/EC has been exceeded, it is necessary to calculate any period of detention carried out before the Return Directive was applied. Furthermore, the decision underlines that being a threat to public order or public safety cannot be invoked as grounds to detain a person under the Return Directive if the 18-month period has expired. **Even if 18 months have not passed, in case of no reasonable prospect of removal, or if there are irregularities in the procedures, the detention ceases to be justified and the person concerned shall be released immediately**⁴⁰.

The Return Directive sets some minimum conditions⁴¹ regarding detention facilities and access to legal aid (article 16 and 17). **Detention should take place in specialized detention facilities but where there are none, member states can place third-country nationals in prison accommodation, on the condition that they are separate from ordinary prisoners.** The specialized detention facilities often have even poorer conditions than prisons facilities and do not have the specialized facilities and staff to take care of the inmates, particularly in case of vulnerable individuals. Furthermore, using ordinary prisons to de-

38 Cfr. Anneliese Baldaccini, 'The EU Directive on Return: Principles and Protests' 28 *Refugee Survey Quarterly*, pg. 130: "Under the original draft of the Returns Directive, a detention order had to be issued by the courts, except for urgent cases where an order by the administration had to be confirmed by a court within 72 hours of the start of detention. There was further a requirement that detention had to be reviewed by the courts once a month, and could be extended by the courts for up to a maximum of six months. See Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals, above n. 54, draft art. 14."

39 C-357/09 PPU Said Shamilovich Kadz oev (Huchbarov), judgment of 30 November 2009. January 2010 http://ec.europa.eu/dgs/legal_service/arrets/09c357_en.pdf

40 Case C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov) - Summary of the Judgment Article 15(4) of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods. (see para. 67, operative part 5)

41 Taking into consideration conditions of detention; including detention of minors and families (Article 17 of the Directive), see: judgment of Conseil d'État of 18 November 2011, N° 335532; for discussion of detention or measures used according to the Article 7(3) of the Directive (Voluntary Departure), see; judgment of Conseil d'État of 23 May 2012, N° 352534.

tain immigrants simply reaffirms their depiction as criminals in the public imagination. Third-country nationals in detention must be allowed to request contact with legal representatives, family members and competent consular authorities, they should also be systematically provided with information about the rules in the facility and have their rights and obligations clearly stated. Such information should include information concerning their entitlement under national law to contact the organizations and bodies which can visit them in the detention facilities. Specific provisions are set for vulnerable persons (Article 17), with detention considered as a short-term last resort. The needs of individuals facing repatriation and the best interests of any juvenile migrants are taken into consideration. The conditions described can be derogated by member states in emergency 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*”. In this situation, the member state has to inform the Commission and continue to ensure the fulfilment of its obligations under the Return Directive (article 18). The minimum conditions set by the Return Directive and an emergency approach to migration management lead to grave violations of the dignity of people detained for months and months. The vagueness of EU regulation on this matter allows different countries to treat migrants as they see fit and often exposes migrants to inconsistent treatment and the abuse of power.

2.3 ENTRY BAN

Another highly criticized element of the Return Directive is the Europe-wide re-entry ban imposed on all those undocumented migrants who have been forced to return to their home country. The length of the re-entry ban should be determined with due regard to all the relevant circumstances of each individual case and should not, in principle, exceed five years - unless the third-country national represents a serious threat to public or national security. Moreover, member states should consider withdrawing or suspending the ban in cases where a third-country national can demonstrate that he or she has left the territory of a member state in full compliance with a return decision (Art. 11). According to the legal doctrine, entry bans are double-edge sword: “*They are attractive from a public policy point of view because they are believed to be a major deterrent to irregular stay. It is arguable, however, that the opposite might be the case, namely that the lack of any prospect of coming back as legal entrants might push people into prolonging their irregular stay for as long as detection can be avoided (or regularization achieved), while those who are deported and banned are likely to swell the numbers of illegal entrants in the future.*”⁴²

3. PROCEDURAL SAFEGUARDS

The Return Directive provides a number of procedural safeguards which are defined in paragraph 11 of the preamble: “*We need to establish common minimum legal safeguards on decisions related to return, for the effective protection of the interests of the persons concerned. You should provide the necessary legal assistance to those who lack sufficient resources. Member States should determine in national legislation the cases in which legal assistance is to be con-*

42 Baldaccini, 133.

sidered necessary.”

In the case of a return decision, procedural safeguards are limited. Under art. 12, return decisions, decisions banning re-entry and decisions to repatriate must be issued in writing. They have to be motivated by fact and law and they must provide information about the availability of legal assistance. Member states shall provide, upon request, a written or oral translation of the main elements of these decisions, including information on the available legal assistance in a language the third-country understands - although this rule does not apply in cases of third country nationals who have illegally entered the territory of a member state and who have not subsequently obtained an authorization or a permit to stay in that member state. In such cases, decisions relating to repatriation should be given by means of a standard form, according to national legislation. Member states should make generalized information sheets available explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by undocumented migrants entering the member state concerned. This regulation runs the risk of ‘standardizing’ return decisions, instead of encouraging individualized acts based on the circumstances of each the single case⁴³.

The third-country national concerned should be afforded assistance (art. 13) to appeal against or to seek a review of decisions related to repatriation before a competent legal or administrative authority or a competent body of impartial and independent members. The immigrant should have the possibility to obtain legal advice and representation - free of charge - and, where necessary, language assistance. The authority has the power to review decisions related to repatriation, including the possibility to temporarily suspend its enforcement, unless a temporary suspension is already applicable under national legislation. The duty to guarantee free legal aid creates some difficulties for many member states and, for this reason, it is one of the elements that must be reviewed by the Commission by the end of the 2013⁴⁴.

43 Cfr. Favilli.

44 Cfr. Favilli.

Chapter II – The cases of Italy, Spain and Cyprus

PART I. THE IMPLEMENTATION OF THE RETURN DIRECTIVE

Each country reacted in a different way after the approval of the Return Directive. The Spanish parliament voted a constitutional law to adapt its pre-existing immigration laws (LO 2/2009). At first, Italy didn't approve any new legal instruments, but was sentenced in 2010 by the Court of Justice of the EU (*El Dridi* case) because some of its legal procedures (in particular the long period of imprisonment as punishment for refusing to leave the country after receiving a deportation order *ex art. 14.5-ter* and *quarter T.U.Imm.*) were in contrast with the Return Directive. Only after that decision a new law was introduced (l.n. 129/2011). Cyprus reformed the older colonial law (the Aliens and Immigration Law CAP 105) which was approved with a delay of one year (the Aliens and Immigration Amendment l.n. 152(I)/2011) after the deadline given by the EU to implement the Return Directive.

There are substantial differences between these three countries concerning the specific regulation, management and conditions of detention facilities for undocumented immigrants. There is, however, one important element which Spain, Cyprus and Italy ought to have in common: according to the European Directive, it is very clear that detention facilities for immigrants must be kept separate from the prison system, in particular in relation to its juridical warranties. The laws⁴⁵ and jurisprudence⁴⁶ of those countries reiterate several times that the detention of immigrants awaiting repatriation is not in any way comparable to imprisonment as criminal punishment. Nevertheless, the comparison between criminal punishment and “administrative detention” continues to be one of the main problem areas in all these countries when discussing detention facilities for migrants awaiting deportation.

II POLITICAL REACTIONS

The approval of the Return Directive in 2008 provoked the beginning of a wide-spread debate in several member states. The Return Directive can be read either as an instrument of protection and a guarantee for immigrants who are under a deportation order, or alternatively, as the definitive approval by the EU of a system of immigration management based solely on the restriction of personal freedoms in order to deport the largest number of undocumented people possible.

The main contents of the Return Directive are, in comparison to domestic immigration laws, for some countries more favourable and for some others less⁴⁷. A clear example of this can be seen in the maximum period of detention allowed by the Return Directive for the purpose of removal (art. 15), which is fixed at 18 months. Before the Return Directive,

45 i.e. art. 16 2008/115/CE; Spain: art. 60.2 Ley Organica de Extranjería; Italy: relation to the d.lgs. 286/1998.

46 One of the most important juridical decisions for the Spanish administrative detention system is the STC 7/1985.

47 In any case art. 4 of the directive states that “*This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive*”.

many countries – such as the UK, Denmark, Sweden, Holland, Finland, Estonia, Latvia and Lithuania – allowed a longer maximum period of detention for migrants waiting to be deported, some others – such as Cyprus – hadn't a fixed maximum at all, but there were other countries like Italy and Spain where the law allowed a lower period (6 months in Italy and 40 days in Spain).

In Spain, when the Return Directive was approved, the left-wing Government, led by J.L. Rodríguez Zapatero, received a lot of criticism from other left-wing parties, activists and NGOs who considered the vote in favour of the Return Directive by the Spanish government contradictory to its principles and damaging to the rights of immigrants. They referred to the Return Directive as the “directive of shame”. On the contrary, the prime minister thought, as he said in Parliament, that “*The directive constitutes a step forward since it includes guarantees which didn't exist before for migrants and limits of time where there weren't any. [...] It will introduce European mechanisms of control which didn't exist before to guarantee the *aquis communautaire*, enriched by new rights: infringement procedures, competence of the Court of Justice of the EU, controls by the European Parliament*”.

With regards to the maximum period of detention, the LO 2/2009 extended the maximum period of detention to 60 days.

The Italian government at that time, led by S. Berlusconi and with Home Affairs Minister, R. Maroni from the Lega Nord party, promoted a non-apologetically rigid approach towards immigrants. After the approval of the Return Directive, members of the Italian government described this new regulation enthusiastically: R. Maroni declared that “*it makes stronger and effective the vision we had about the crime of illegal migration, that is an effective instrument to aid deportation [...] the directive we voted in favour of today confirms that our vision is the right one*”⁴⁸. After the decision of the Court of Justice in 2011 about the El Dridi case, the same minister changed his opinion about the Return Directive, stating that “*the EU hasn't helped us and also today, as it is clear, it complicates our life. Why do they just pick on us? Since now illegal migrants who won't be expelled will increase their presence on the territory and will affect those behaviours which the local regulations now seem unable to stop*”⁴⁹. In the case of Cyprus, it must be said there was no significant debate and the Return Directive was not only transposed with a long delay, but also it has never been properly applied.

As the Return Directive leaves member states a lot of room to manoeuvre in terms of its implementation, each government has tried at times to switch focus onto either its stricter aspects or its more protective parts. Nonetheless, in the three countries under observation in this report, it appears that the stricter aspects were the most commonly applied, in spite of the formal declarations to the opposite made by political forces.

II. NEW LEGAL INSTRUMENTS

1. ITALY

As already mentioned, the Italian government didn't do anything to implement the Return Directive (the deadline was 24th December 2010) until the Court of Justice of the EU re-

48 These declarations are reported at http://www.immigrazioneoggi.it/daily_news/2008/giugno/06_2.html

49 <http://www.lastampa.it/2011/04/28/blogs/straneuropa/l-inutile-urlo-di-maroni-PORzQYOiny3B3RiMvImEfK/pagina.html>

leased, on 28th April 2011, the decision C-61/11 known as the *El Dridi* case. This decision regarded European regulation of the crime *ex art. 14.5-ter* T.U.Imm. (D.lgs. 286/1998) in which an undocumented migrant refuses to leave a country after having received an expulsion order and can be sentenced from 1 to 4 years imprisonment. The EU Court of Justice stated that this kind of ruling was damaging to the quick and effective repatriation of undocumented migrants as it prolongs the process of the deportation for no reason, in contrast with the main aims of the Return Directive which limit the maximum period of detention to 18 months.

After this sentence, the Italian government decided to approve the d.l. 89 of 23th June 2011, later converted to l.n. 129/2011 to adapt – with a significant delay – the previous legislation to the Return Directive. With this new regulation, the legislator changed the punishment for *ex art. 14.5-ter* T.U.Imm. from imprisonment to a very high fine (up to €20,000 in some cases) and modified some important aspects of the older version of the T.U.Imm.

According to the Return Directive, repatriation should be voluntary, whereas forced repatriation and detention for the purpose of removal should be considered exceptional measures. The l.n. 129/2011 introduced the measure of “*partenza volontaria*”⁵⁰, which, however, is difficult to apply thanks to the lack of clarity in arts. 13.5.2 and 5.1 and because its limits of application are highly restricted by the wide interpretation of the “risk of absconding” which the legislator decided to use and that excludes the application of voluntary departure⁵¹. Voluntary departure is less common in Italy than other means of repatriation and the same ex- Home Affairs Minister, R. Maroni, has been quite open about favouring this approach. In an interview released in May 2011 he said: “*we overturned the principle: compulsory expulsion is the rule and the simple order to leave the country is the exception*”⁵².

1.1 DETENTION

The new regulation also increased the number of cases in which it is possible to detain undocumented migrants, including when there are “*transitory situations which prevent the preparation of the deportation*”⁵³ - situations which can sometimes be out of the control of the immigrant. The administrative authority can also turn to alternative measures such as the obligation to ‘check in’ at the police station at certain hours of the day, or to live in a certain place before leaving the country.

A significant change was the extension of the maximum period of detention, from 6 to 18 months, the limit allowed by the Return Directive.

The act which leads to detention is an administrative decision which must be validated during the first 48 hours by a judge⁵⁴. However, the judge must re-examine the case every 30 days and then again after 60 days⁵⁵. No procedure exists to request this case re-exami-

50 Art. 13.5.1 and 13.5.2 T.U.Imm., it consists in an order to the irregularly staying third country national to leave Italy within a short period of time, without using the instrument of detention.

51 A critical vision of this new rule is exposed in G. Savio, *La nuova disciplina delle espulsioni risultante dalla legge 129/2011* www.asgi.it/public/parser_download/.../savio_relazione_firenze.pdf

52 http://www.stranieriinitalia.it/attualita-maroni_fermero_per_decreto_i_verdetti_libera-clandestini_13157.html

53 Art. 14.1 T.U.Imm.

54 A lay judge *ex art. 14* T.U.Imm.

55 Art. 14.5 T.U.Imm.

nation (either by the administrative authorities, or by the detained person) before the end of those periods, which runs contrary to art. 15 of the Return Directive. The only way to appeal against this kind of decision is by appealing to the *Corte di Cassazione* (Supreme Court) and the duration of trials in this Court is very long (generally more than one year). For this reason, detainees' rights can be seriously jeopardized.

The Italian legislator hasn't introduced art. 15.4 of the Return Directive which states that "*When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately*".

2. SPAIN

Spain implemented the Return Directive in accordance with the time frame stated by the EU, approving a new "*Ley Orgánica*" (LO 2/2009) in 2009 which reformed the older migration law (*Ley Orgánica de Extranjería*, LO 4/2000). The LO/2009 is different from the original law in many ways. First, it introduced some general regulations (art. 2-*bis*) for public authorities who deal with the repatriation of undocumented migrants: coordination with the EU policies, management of the migration flows connected to the labour market of each member state, the issue of irregular immigration and coordination with the countries of origin and transit through bilateral treaties.

The conditions for being detained in a CIE (*Centro de Internamiento para Extranjeros / Internment Centre for Foreign Immigrants*) awaiting the deportation are still the same. Undocumented migrants must be facing one of the following: (1) expulsion (considered both as an administrative and as a criminal measure), (2) re-entry ban after an expulsion order (which after the implementation of the Return Directive entails a maximum of 5 instead of 10 year re-entry ban⁵⁶).

Expulsion (which is one of the prerequisites for detention pending the deportation of illegal immigrants) **is still considered**, according to the interpretation of the Spanish legal system⁵⁷, **a special measure while the rule is to give a fine**. This is in line with Spanish law (art. 57.1 LOEX) and in accordance with the interpretation of the Court of Justice of the EU⁵⁸, which asserted that member states are not obliged to remove undocumented migrants from their territory, instead they can choose other kinds of measures against irregular immigration.

The LO 2/2009 also improved the warranties and efficiency of the repatriation procedures and its legal safeguards. It reinforced the mechanism of "*voluntary departure*" which should be the standard way to repatriate undocumented migrants (*ex art. 63-bis* LOEX) and subjects the infliction of restrictive measure such as expulsion to the principle of proportionality (art. 57 LOEX).

Authors and lawyers⁵⁹ criticized the way art. 63-*bis* LOEX pretends to implement art. 7 of the Return Directive. Many claim that the high number of exceptions to the *salida voluntaria* (voluntary departure) risk nullifying its positive effects. In fact, beyond the exceptions

56 Art. 58.1 LOEX.

57 Although a recent decision of the Supreme Court (12nd of march 2013) announced a possible change of this interpretation.

58 Decision of the 22.10.2009.

59 For instance critics came by the Subcomisión de Extranjería del Consejo General de la Abogacía (CGAE).

outlined in the Return Directive itself, or those directly deriving from it (the participation in serious criminal activities, activities damaging to national security which could harm international relations, or activities which deal with traffic of “illegal” immigrants), the new Spanish law also outlines other circumstances which may exclude the possibility of voluntary departure. The LOEX law establishes that the period granted for voluntary departure won't be granted if (1) the foreigner has criminal records (art. 57.2) – implying a general presumption of a threat to society – and, (2) in compliance with art. 53 LOEX, when there's a risk that the expelled immigrant may manage to avoid contact with the authorities, for example if he/she doesn't have a fixed address or an identity document, (3) when the foreigner actively tries to prevent being expelled and finally (4) when the foreigner violates a security measure.

As a result of this wide range of circumstance where it's possible to deny undocumented migrants the chance to voluntarily return home, there is a significant growth in the number of cases where immigrants face being detained while awaiting deportation.

Another aspect of the Return Directive which caused a debate in Spain is connected to the return of unaccompanied minors. Art. 10 of the Return Directive allows this practice which, however, many NGOs and organizations see as going against international law principles. In the preamble of LO 2/2009 it states that the new regulation reinforces the rights of minors and their integration also by returning them to their country of origin.

2.1 DETENTION

Since 1987⁶⁰, the decision to detain foreigners who don't have a valid residency permit must be taken by an ordinary judge (*ex art. 62.6 LOEX*, the judge local to the place of detention).

The implementation of the Return Directive provoked important changes to the LO 4/2000 regarding the regulation of immigrant detention: the maximum period of detention was extended from 40 to 60 days; NGOs and other public entities were granted the right to visit the centres (NGOs claim that this right has yet to become reality); a limit was set on security measures inside the centres⁶¹ in order to respect the fundamental rights and dignity of detained immigrants⁶². The “*Juzgado de control*” was set up (to implement n. 17 and art. 15.3 of the Return Directive) – this is a judge who decides whether or not to detain immigrants and who has the duty to examine detainees' complaints. He can also visit detention facilities to ensure that detainees' rights are being upheld.

3. CYPRUS

Cyprus is the only country in the European Union which has never adopted any regularization policy towards undocumented migrants. This country adopted a strict immigration management model which has been followed since the 1990's and has inefficient and poor asylum procedures. Detention and deportation of undocumented migrants has always

60 STC 115/1987

61 About this theme see the decision of the Constitutional Court STC n. 17/2013, 31st of January 2013.

62 We are speaking of the possibility to make registers of people and objects inside the center to maintain the order and safety of the center and to use physical restraint tools and separation from the other detainees using single rooms.

been (more than ever now due to the current economic crisis) the only policy aggressively pursued by the government concerning undocumented migrants. The process of adjusting national law to bring it in line with the Return Directive could have been an opportunity to discuss the introduction of regularization policies, as the Return Directive provides for the discretion of member states to regularize the residency of irregular third country nationals for compassionate, humanitarian or any other reasons. However, no substantial consultation or discussion ever took place before the adoption of the law transposing the Return Directive.

The Cypriot Parliament approved a new law (the **Aliens and Immigration Amendment Law n. 153(I)/2011**) which amended the older migration law (the Aliens and Immigration law that derives from the colonial legal system⁶³, approved during the 1950's, before the emanation of the Constitution itself). However, a part of the text of the Return Directive was simply transcribed into the older law and it had very few practical effects on the Cypriot immigrant detention system because it is not fully applied in practice. The enduring refusal of the immigration authorities and the Ministry of Home Affairs to put the new law into practice can be seen in the ongoing application of the old colonial sections of immigration law concerning detention for the purpose of deportation. This old law allows an indefinite period of detention and is clearly in conflict with the principles of the Return Directive. In fact, this was the case described by a detainee in Block 9 & 10 (prison of Nicosia) interviewed by the members of KISA: **during his interview (17.06.2013) he affirmed that some months before he had been released and immediately re-arrested and he knew people who had been in detention for more than 18 months.** A huge issue in Cyprus in fact, is the problem of re-arresting immigrants.

This problem results from the fact that it is impossible, in a large number of cases, to achieve the concrete repatriation of detained immigrants. It's quite common practice (confirmed by many immigrants interviewed during this and other investigations) for the police to release detainees before the 18 months expire, only to immediately re-arrest them right in front of the detention centres. This practice has also been confirmed by members of the police itself, as the chief of Block 10 did during the interview made by KISA on the 17.06.2013 when he said: *"The maximum detention period is less than two years. I think it is not necessary to re-arrest people who have already been detained. There are people who are released after two years and then they are arrested again. Then, the period of time begins from the beginning"*.

The Return Directive should have some positive effects on Cypriot immigration law:

- the maximum period of detention fixed by the directive of 18 months is an improvement since the older law outlined an indefinite period of detention⁶⁴;
- the Return Directive entails the creation of detailed procedures to execute the repatriation of illegally resident third country nationals, which didn't exist before in Cyprus.

But these positive effects are compromised since the Return Directive, while incorporated

63 As it is known Cyprus was a colony under the control of the United Kingdom.

64 The Supreme Court appreciated this new rule but however the administrative authorities use to re-detain immediately migrants who are released after the 18th month of detention on the basis of the emanation of a new expulsion act.

into domestic law, is in no way fully applied in reality.

In any case, Cypriot immigration law and the Return Directive are not at all compatible: in Cypriot law there are no safeguards or checks that question administrative decisions to detain immigrants pending their deportation, the kind laid out in art. 13 of the Return Directive. In fact, the only recourse which can be used by detained immigrants to appeal against the detention act consists in an appeal to the Supreme Court (without suspensive effects). The Supreme Court can only decide about the legitimacy of an administrative act, compared with the general principles of administrative law. Moreover, an appeal to the Supreme Court has a long duration (from one year to a year and a half). Cyprus was in fact condemned for this defect by the European Court for Human Rights in the case *M.A. c. Cyprus* (23th July 2013, application n. 41872/2010)⁶⁵. The access to this, already weak, procedure is hampered by the behaviour of the immigration authorities and of the police inside the detention centres who don't help or encourage immigrants to apply for it.

3.1 DETENTION

According to the original Aliens and Immigration Law, the Home Affairs Minister could issue a deportation order against any foreigner who is declared a “**prohibited immigrant**”⁶⁶ and in the meantime, the Minister could fix his/her detention in order to carry out the deportation. Section 14 of the immigration law, does not provide for a maximum period of detention and does not state anything about the place or the conditions of detention. Courts do not have jurisdiction to decide the deportation of any immigrants, either as a penalty or as an additional consequence of criminal conviction. However, the immigration authorities have the power to declare any immigrant convicted for a criminal offence a “prohibited

65 The Court found that Cypriot law violated Art. 13 taken together with Art. 2 and 3 due to the lack of an effective recourse for the applicant to challenge his deportation, and Article 5 § 1 and 4 due to the unlawfulness of the entire period of detention pending deportation without an effective recourse to challenge the legality of his detention. The Court took into consideration the lack of automatic suspensive effect of a recourse to the Supreme Court, the length of judicial proceedings, the lack of readily available legal aid and criticized the limited scope of judicial review of the Supreme Court.

66 A prohibited immigrant is (a) any destitute person; (b) any insane or feeble-minded person or any person who for any other cause is unable to take proper care of himself; (c) any person certified by a medical officer to be suffering from a contagious or infectious disease which, in the opinion of the medical officer, is a danger to public health (d) any person who, not having received a free pardon, has been convicted of murder or an offence for which a sentence of imprisonment has been passed for any term and who, by reason of the circumstances connected therewith, is deemed by the immigration officer to be an undesirable immigrant; (e) any prostitute or any person living on the proceeds of prostitution; (f) any person who, from official Government records or from information officially received by the Governor from a Secretary of State or from the Governor of any British Colony, Protectorate of Mandated Territory or from the Government of any foreign State or from any other trusted source is considered by the Governor to be an undesirable person; (g) any person who is shown by evidence which the Governor may deem sufficient, to be likely to conduct himself so as to be dangerous to peace, good order, good government or public morals or to excite enmity between the people of the Colony and Her Majesty or to plot against Her Majesty's power and authority in the Colony; (h) any member of an unlawful association as defined in section 63 of the Criminal Code or any Law amending or substituted for the same; (i) any person who has been deported from the Colony either under this Law or under any enactment in force at the date of his deportation; (u) any person whose entry into the Colony is prohibited under any enactment for the time being in force; (k) any person who enters or resides in the Colony contrary to any prohibition, condition, restriction or limitation contained in this Law or any Regulations made under this Law or in any permit granted or issued under this Law or such Regulations; (l) any alien who, if he desires to enter the Colony as an immigrant, has not in his possession, in addition to a passport bearing a British Consular visa for the Colony, an immigration permit granted by the Chief Immigration Officer in accordance with any Regulations made under this Law; (m) any person who is deemed to be a prohibited immigrant under the provisions of this Law.

immigrant” and to order his/her detention and deportation immediately after the prison sentence is served. Thereby migrants convicted are not normally released after they serve their sentence but continue to be detained on the basis of the administrative detention. Detention for the purpose of deportation may only be decided by the Minister or another authorized person, normally the General Director of the Ministry of Home Affairs or the Director of the Civil Registry and Immigration Department⁶⁷.

Until 2012, the administrative detention of migrants took place exclusively in Police Detention Centres. They were settled in different police stations all over Cyprus, normally buildings designed to house people for a very short period. Those detention centres are in poor and often inhumane conditions and have been heavily criticized and condemned by national and international human rights organizations as well as by the monitoring bodies of the Council of Europe⁶⁸. At the beginning of 2011 a special law and regulations about detention facilities for “prohibited” migrants were approved the **Mennogia Detention Centre**⁶⁹ was built as a consequence. The new immigration law establishes that undocumented migrants must be detained in specialized detention facilities. However, the authorities continue to detain migrants in police stations (the Mennogia Detention Centre is, in fact, the only specialized centre in the whole the country), mixing illegal immigrants with other kinds of prisoners, which goes against the Return Directive, and the Cypriot new law itself. The detailed regulation approved by the Cypriot legislator, which was adopted with the purpose of underlining the distance between normal jails and detention centres for migrants, is not applied as a large number of detained migrants denounced it in an attempt to stop the serious violations of their fundamental rights⁷⁰. A few months later, these regulations were approved (with a delay of almost one year from the deadline envisaged) and the Return Directive 2008/115/EC was transposed into national law⁷¹ by amending the Aliens and Immigration Law. The Return Directive was basically copied almost verbatim into the older law without amending any other sections of the law, such as Section 14 of deportation and detention in order to align these provisions with the new harmonized legislation. As a result, the immigration authorities continue to use their old colonial powers to deport and detain migrants without respecting the new provisions. It can be said that in many respects, the Return Directive remains largely unimplemented.

67 After the election of the new Government in February 2013, the Minister of Interior as of May 2013 assigned his powers for detention and deportation to the Director of the Civil Registry and Migration Department.

68 Amnesty International, *Punishment without a crime*, 2012 <http://www.amnesty.org/fr/library/asset/EUR17/001/2012/en/36f06387-9ce6-43df-9734-a4550fa413d6/eur170012012en.pdf>

Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2008: <http://www.cpt.coe.int/documents/cyp/2012-34-inf-eng.pdf>

Ombudsman's report on detention centres: http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentationsArchive_gr?OpenDocument

Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to the Republic of Cyprus on 7-10 July 2008: <https://wcd.coe.int/ViewDoc.jsp?id=1385749&Site=CommDH&BackColorIntranet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

69 The Law on the Places of Detention for Prohibited Immigrants (Law No 83(I)/2011) and the Places of Detention for Prohibited Immigrants Regulations of 2011 (I.P. 161/2011).

70 Testimony of Ali Asgari: http://www.youtube.com/watch?feature=player_embedded&v=AhDxz_7EKcg

Discontent brew at new detention centre: <http://ffm-online.org/2013/04/02/>

71 The Aliens and Immigration (Amendment) Law No 153(I)/2011

METHODOLOGY

Detention centres for immigrants pending deportation are one of the main instruments of control used to monitor immigration in the European territories.

This investigation was developed – with some discrepancies due to different levels of freedom permitted to research groups in different countries – following ethnographic methodology during visits to actual detention centres.

Carried out five years since the approval of the Return Directive, which is at the heart of all European immigration policies, this research had two different focus points:

- to check how the Return Directive has been implemented in three different EU countries, in particular with regards to detention centres for immigrants;
- to analyse the nature of the centres;

The use of a multidisciplinary approach allowed the researchers to observe the cases where criminal and administrative law overlap and undocumented migrants are “criminalised”. Researchers were able to study the “hybrid” nature of this phenomenon: when the processing of immigrants becomes a legal anomaly with much left open to interpretation and to the discretion of the institutional and non-institutional actors involved in immigration management.

The ethnographic investigation has been divided into two parts: first, a period of observation allowed the researchers to analyse the informal relations inside these centres, in particular between the staff, the “guests” and the police. Second, in-depth interviews with immigrants enriched the collected material, helping to provide a more subjective look at the nature of the centres. The interviews helped to gain insight into the consequences of the legal and spatial borders surrounding the subjects and their perception of the centres. The interviews with the staff and the informal chats with members of the security forces showed the ambiguity of these two groups, in particular of their tasks and roles inside the centres. Furthermore, the vast differences found in the management and conditions of every single centre proved the high degree of discretion used in the running of these structures, particularly when they’re managed by private companies (such as in Italy) and administrative authorities (such as the police).

1. ITALY

In this country CIEs (*Centri di identificazione ed espulsione / Identification and Deportation Centres*) were introduced in 1998 as a result of the Turco-Napolitano law (D.lgs. 286/1998). Presently the web page of the Ministry of Home Affairs states that in Italy there are 13 CIEs:

- Bari-Palese, area aeroportuale – 196 places
- Bologna, Caserma Chiarini – 95 places⁷²
- Brindisi, Loc. Restinco - 83 places
- Caltanissetta, Contrada Pian del Lago – 96 places

72 Closed in march 2013 for maintenance works, probably it will reopen in january 2014, although it seems to be still in bad conditions <http://www.ilfattoquotidiano.it/2013/10/16/bologna-cie-verso-riapertura-a-gennaio-cgil-condizioni-inaccettabili/746175/>

Catanzaro, Lamezia Terme – 80 places
Crotone, S. Anna – 124 places⁷³
Gorizia, Gradisca d'Isonzo – 248 places⁷⁴
Milano, Via Corelli – 132 places
Modena, Località Sant'Anna – 60 places⁷⁵
Roma, Ponte Galeria – 360 places
Torino, Corso Brunelleschi – 180 places
Trapani, Serraino Vulpitta – 43 places⁷⁶
Trapani, Loc. Milo - 204 places

It must be underlined how many of these centres (such as Crotone and Modena) were closed during Spring and Summer 2013, after clashes and protests between security forces and detainees, or for economic problems connected to their management by private companies.

Some members of Borderline Sicilia Onlus and borderline-europe visited five centres (Bari, Caltanissetta, Modena, Rome and Trapani) from February 2013 to May 2013⁷⁷ and a further two structures (Turin and Milan) will be visited in Autumn 2013. During the visits BordEu. was able to interview the staff working in the centre (director, social workers, doctors, psychologists, cultural mediators etc.) and the detainees. They were also able to visit the area in which the detainees were living (with the exception of the CIE in Bari and, partially, in Rome), take pictures and video and have informal conversations with the security forces. These CIEs housed a mix of so-called “economic” immigrants and asylum seekers⁷⁸.

1.1 ACCESS TO THE CENTRES

NGOs, journalists, researchers etc. have to pass through two different stages before gaining authorization to visit the CIEs. First, it's necessary to make a request to the local *Prefettura* (the local government representative), the *Prefettura* then forward this request to the Ministry of Home Affairs who investigate the applicant, before finally sending the authorization back to the *Prefettura*. It is a very long and arbitrary procedure which leaves a lot of room for the authorities to limit access to the camps. It's often very difficult to obtain a reply from the *Prefettura*. It's important to underline that in 2011, the Ministry of Home Affairs released an internal act (*circolare* n. 1305 del 01.04.2011) which prohibited journal-

73 Closed in August 2013 after the violent revolts spread after the death of a young detainee. See http://www.corrriere.it/cronache/13_agosto_19/crotone-chiuso-cie-isola-caporizzuto_90e8eb9a-08e0-11e3-abfd-c7cdb640a6bb.shtml

74 Temporarily closed after violent clashes between the detainees and the security forces in November 2013.

75 Closed in August 2013 because of the impossibility for the cooperative “Oasi”, who manages the centre, to pay its workers; see <http://www.ilfattoquotidiano.it/2013/08/05/modena-chiude-cie-da-tre-mesi-lavoratori-senza-stipendio/677693/>.

76 Closed for works of maintenance.

77 Bari, Palese: 15.02.2013; Caltanissetta, Contrada Pian del Lago: 17.02.2013; Trapani, Milo: 18.02.2013; Modena, Strada Sant'Anna: 06.03.2013; Roma, Ponte Galeria: 14.05.2013.

78 Asylum seekers can be detained in Italy at certain conditions, established by the D.lgs. 25/2008. The practice of detaining asylum seekers has been declared illegitimate by the Court of Justice of the EU, C-534/2011 of the 30th May 2013, but is still existing in the country. That happens also because it's very difficult that the justices of the peace (who decide about the continuation of the detention of asylum seekers) take into account the European jurisprudence.

ists from entering CIEs, as the government had declared a “state of emergency” to handle the increase in immigration during the “Arab Spring”. This act was later withdrawn by the new government in 2012. The precise criteria with which the authorities allow or don’t allow the entrance of external subjects to the centres is still not clear.

1.2 MANAGEMENT OF THE CENTRES

Regarding the actual management of the centres, art. 22 of the *regolamento attuativo* (implementation law) of the T.U.Imm., states that the government representative (the *Prefetto*) of the province in which the camp is placed has to run the camp, but he or she can – and this is what is commonly done – stipulate agreements to assign the management and maintenance of the centres to private or public companies. The manager is chosen by the *Prefettura* who have the duty to ensure the centre is run correctly. The law on this theme is very generic. In 2008 the Ministry of Home Affairs emanated a decree (*decreto ministeriale* 21.11.2008) which made the system of presenting a bid to run a CIE more transparent, but which also ultimately leads to prioritising the most economically advantageous bid, therefore potentially reducing the quality of the services provided inside the centres. The winner of the tender must guarantee: maintenance and assistance, healthcare, social and psychological assistance, food supply, legal assistance, cleaning services, distribution of clothes and other comfort goods.

At the same time, the public authorities are responsible for security and policing inside the centres. In fact, different kinds of security forces are often found to be working inside CIEs, including police, *Carabinieri*, *Guardia di Finanza* and the army.

The CIEs visited by BordEu were all managed by private companies and the way the centres were managed was very different from place to place and from manager to manager, highlighting the high level of inconsistency with which camps are ruled. Two of the CIEs Borderline visited, in Trapani and Modena, were managed by the same company – the “Oasi” cooperative – which is also managing the CIE in Bologna (temporarily closed for maintenance). These two centres, in particular the one in Trapani, were extremely lacking in services offered to the detained immigrants, often compromising their fundamental rights. This situation was mainly caused by “Oasi” not paying its own staff: in Trapani – at the time of the visit – just one doctor remained (the other two who worked for the cooperative had resigned)⁷⁹. The police working inside the CIE in Trapani complained about the weak sanitary assistance available: during informal chats they told to members of BordEu. that the lack of activity during the day and the extremely bad quality of the services provided by the cooperative to the detained migrants (from the distribution of food to social and health care) was causing a very tense and violent atmosphere in the camp.

1.3 RELATIONS INSIDE THE CENTRES

During their visits, members of BordEu paid close attention to relations between the different people inside the CIEs (detainees, social workers and members of the security forces) in an attempt to better understand the nature of this particular kind of institution. The

79 From the interview to the doctor in Milo, Trapani - 19th february 2013: «Actually I’m the only doctor, since two months, for several reasons. The other resigned all together. Since Christmas the “guests” are less than 150 and because of the tender, the doctor is requested for 8 hours a day. In fact it’s only me working here.»

nature of relations changed a lot from one centre to the next, increasing the sense of inconsistency which seems typical in the management and running of the CIEs. Below are three examples which highlight this aspect: Caltanissetta, Trapani (Milo) and Rome.

The first CIE, in Caltanissetta, was unusually empty at the time of the visit (only 10 detainees) due to maintenance works being carried out inside (to reinforce barriers and prevent escapes). Detained immigrants could move freely around a large area including the accommodation blocks, the canteen and the football field. The resident social worker and doctor etc. also worked and moved around inside this large area. The police remained outside to secure the external barrier and the director of the management company (*Albatros 1973*) repeated many times that relations between the security forces and cooperative staff were very relaxed and harmonious. Social workers called detainees by name and they could easily make requests or simply speak to the staff, mostly because there were so few detainees at that time.

The centre in Trapani (Milo) was organised in a totally different way. Detainees were always locked inside accommodation blocks (each block had rooms, toilets, a common room and, sometimes, a TV and a yard) and social workers never went inside the blocks. The police would bring the detainees to the infirmary and to the other spaces (for visits, psychological therapy etc). The security forces would patrol the areas between the different blocks and would go inside (as affirmed by immigrants interviewed by BordEu) to do searches and in case of revolt. In those cases, the detainees interviewed told BordEu that the policemen would bring immigrants inside their rooms, where there are no video cameras, to beat them. The same was reported by detainees in Modena. The cooperative staff and the members of the security forces would call the detainees by number (a number is assigned to every detained person at the moment of detention).

Relations between the cooperative and the security forces were very tense. During informal chats, members of the police explained how bad the cooperative employees' working conditions were and underlined the bad quality of the services provided by "Oasi".

In Rome, detainees are also called by number. One of the immigrants interviewed by BordEu explained: *«I've been in jail many times and I've seen many jails, I would prefer 10,000 times to go back to prison. Here you forget your name. You become a number. They give you a number and from that moment everything works with that. It reminds me of the Second World War! I was surprised coming here. We are in a zoo.»*

In this centre, social workers only go frequently inside the accommodation blocks in the female sector, whereas in the male sector one almost no-one is allowed to enter. The cleaning service is allowed inside for a just very limited time and not very often, and journalists don't usually receive permits to enter. Social services and psychologists receive people in their own offices outside the blocks. All this segregation and alienation causes an increase in the level of frustration and rage between the "guests"⁸⁰. The quality of relations between cooperative staff and detainees was vastly different in the female sector compared to the male sector.

It is important to note that during the interview with "Oasi" staff during the visit to the CIE In Modena, it was mentioned that in this centre, the security forces always accompany social workers when they have to enter the accommodation blocks - for instance during the distribution of meals, so there's constant contact and interaction between them and the

80 As detainees are called by the workers and also by the police in the Italian CIEs

detainees. This element was, in the opinion of the cooperative staff and the policemen who were listening to the interview, one of the reasons for the relaxed atmosphere in the centre. However, BordEu saw at least two tense moments in which policemen started to shout and get very angry at the detainees for no particular reason, alternated with moments of rather forced good behaviour toward them.

1.4 DETENTION FACILITIES

The structures of the centres visited by BordEu have some common traits: first, they were built specifically to detain immigrants awaiting for deportation, but they were mostly built when the maximum period of detention was 60 days, therefore they're not designed to host people for longer periods (with the exception of Trapani-Milo which was built in 2011, but which in any case doesn't seem appropriate to house immigrants for longer periods). Secondly, the CIEs visited by BordEu (Modena, Roma, Trapani, Caltanissetta and Bari) have at least 2 walls to prevent the detainees from escaping. When BordEu was allowed inside, its members had to pass through a first high wall – usually patrolled by the army – which was followed by a yard and then the administrative buildings, which housed the cooperative offices and immigration office of the *Questura*, plus the infirmary, the rooms of the psychologists and social workers etc. After this first wall and buildings there are the accommodation blocks (in Turin they call them “islands”), containing what can be described as small cages in which there are rooms for detainees. «*We are in a zoo. Every cage has two rooms. The cages have barriers almost 5-6m high and we are in that little yard of 10x8m. Every cage has two rooms... we are left there like savage beasts*»⁸¹.

The conditions inside the centres were all very different. BordEu wasn't allowed to photograph the rooms or the bathrooms, while in Bari the visitors weren't even allowed to see them. In Rome, Trapani and Modena the buildings seemed very old (although, for instance, the centre in Trapani was only built in 2011) and decaying. In all these centres, every cage is home to two or more rooms, a common space to eat and (when it is not broken) a TV, the toilets and a yard. Furniture is always made of concrete or fixed to the ground to prevent the “guests” from using it as a weapon against the police or against the social workers. Often (for example, in Trapani and Rome) many windows had been broken during previous revolts and had never been repaired, making it very cold inside the rooms in the Winter. The high level of violence that characterizes life inside these centres can clearly be seen by the state of the buildings, the damage they have suffered and also by the very restrictive rules about the objects that detainees can bring with them inside the accommodation blocks. For instance, in Rome immigrants can't have pens, in Modena they can't have their mobile phones (while in all the other centres they can use them as long as the phones don't have a camera). In Modena the showers don't have any protruding metal parts which could be taken down and used as a weapon, so the water falls (when the shower works) directly from the ceiling - with no way of changing the temperature. In Trapani, detainees can't have books as they could burn them and in Torino there aren't any wall sockets, so detainees can't recharge phones or other electronic devices by themselves. Every centre adopts its own written and unwritten rules.

81 From the interview to one “guests” in the CIE of Roma, Ponte Galeria. The comparison between the CIE and the zoo was made also by one important member of the cooperative ruling the CIE of Rome.

The uncertain nature of the CIEs also means that there aren't (or they are not used) large common spaces equipped for recreational activities – with the exception of the football fields in Roma, Bari and Caltanissetta – due to the potential security threat that these kind of activities could cause.

Since the CIE network is clearly separated from the prison system and the CIEs were designed to host people for max 60 days, it is very difficult for the security forces to both maintain public order and to understand their own role⁸². In Trapani in 2012, as reported by MEDU⁸³, 1161 immigrants were detained and 837 were able to escape by simply climbing over the badly designed walls. The police in the CIEs don't have the same powers as the prison police force when faced with a detainee attempting to break free and they can be extremely violent against people who try to escape from the centre (using the technical language, we should say that they arbitrarily leave the centre). There are many depositions made by detainees and ex detainees about the abuses of the police inside the CIEs, as we will see later.

1.5 DETENTION CONDITIONS

The low level of regulation aimed at the management of detention centres also affects conditions on the inside of CIEs.

- **Communications:** the rules are different from one centre to the next. The detainees are usually allowed to bring their mobile phones but – and the reasons aren't clear – they have to physically break the cameras or they have to buy a new phone without camera if they want to have it in the blocks. In Modena, having a mobile phone is prohibited so immigrants have to buy calling cards and use public telephones inside the blocks. The staff at this CIE told BordEu that this rule helps to prevent disorder⁸⁴, while the effect on the immigrants is an increase in their already high level of frustration. Visiting procedures also change from centre to centre: normally detainees have to make a formal request to receive visits, but the answer can come too late and sometimes only relatives are allowed to visit people inside the CIE. This can cause big problems for common law-couples and in general to the social life of the detainees (particularly when they are detained in a centre far from their city).

- **Health care:** when a new immigrant enters a CIE, the medical staff carry out a preliminary screening of his/her health to be sure that he/she is fit for life inside the CIE. Usually, this kind of test analyses the physical and not the psychological conditions of the detainee. A high level of frustration, non-acceptance of the situation and rage is always observed by psychologists and this is often treated with psycho-pharmacological

82 Police inside the centres is not part of the penitentiary police, they have different duties and powers, **in Trapani the responsible for the maintenance of the public order complained the ambiguity of the juridical nature of the CIE: migrants inside are not real detainees, so during an attempt to escape the police can't intimidate the runaway, the rules aren't clear and there's confusion about what policemen can and cannot do and how do they have to behave, this generates frustration between both migrants and the security forces, and it increase the arbitrary power.**

83 MEDU, Arcipelago CIE. *Indagine sui centri di identificazione ed espulsione italiani*, Infinito edizioni, Modena, 2013.

84 From the interview with social and sanitary workers and the police, 6th march 2013: doctor: «*In Bologna it's different, mobile phones can be brought in the blocks, the important thing is that the camera is broken. Here they can't be brought and actually the centre which works better is Modena, it's a long time since the last revolt, thanks also to the security forces who are always present.*»

drugs. In Rome, the psychologist told BordEu that «*at the beginning [of the detention] there are symptoms of maladjustment. Those symptoms get better and better, because the situation is similar to the situation in jail, at the beginning. The non acceptance doesn't go away and it's not easy for us either, we don't know when they'll go out*». In Trapani, the “guests” complained that the doctors were giving them sedative drugs against their will. The doctor interviewed told BordEu that the request for sedatives amongst immigrants was very high and in general it could be said that a large quantity of these drugs was used in that centre. «*Do you know what do the doctor does? At the infirmary only injection or drops, the doctor was giving the therapy while she was smoking! A veterinarian doesn't work like this*»⁸⁵.

Despite this initial health screening, BordEu found a number of people suffering major diseases and pathologies: for instance, in Trapani there was a detainee who couldn't walk (he used a wheelchair) and considering that the healthcare workers rarely go inside the blocks, it is safe to say that he wasn't receiving adequate assistance and no help in his daily life. The infirmaries inside the centres usually only deal with first aid and are provided with basic drugs and medicines. For more specific analysis and medicines, the companies managing the CIEs establish conventions with local hospitals and health centres.

- **Legal assistance:** legal assistance constitutes an important element in the Italian CIE system. Lawyers are often court-appointed and meet their clients for the first time during the preliminary hearing in front of the Justice of the Peace right inside the CIE (an important point of fact is that the first hearing to validate detention, as well as subsequent ones to up-date this decision are held inside the CIEs. This is the same as if criminal hearings were held inside prisons – something which would never happen). Lawyers are often not specialized⁸⁶, they are not familiar with the subject and they don't know their clients at all. Furthermore, the judges who examine the issues connected with immigrant detention and deportation are the Justices of the Peace. These judges are a special judicial body, separate from ordinary judges, they have different and less in-depth legal skills and don't have the authority to sentence anyone to imprisonment. They judge less serious crimes in order to free the ordinary tribunals of their excessive work load. Their role in the CIE system is a massive exception to this rule and the fact that they can hand out a sentence of imprisonment in a detention centre remains a breach of this principle – a breach which can only be ignored because of the clear separation between criminal detention and “administrative detention” which single countries and the EU continue to underline.

- **Activities:** a huge problem observed by BordEu during their visits to the detention centres was the lack of day time activities. Every interviewee complained about the difficult conditions inside the centres and underlined that the forced inactivity made the general situation much worse. Inactivity leads to increased frustration amongst the detainees and a heightened sense of injustice concerning their detention. The cooperatives running the centres across Italy cited three main obstacles to organizing daily activities:

85 From the interview to “guest” 1, 19th February 2013.

86 A good number of interviewed told BordEu about this problem, the psychologist in Modena told BordEu about the case of a court-appointed lawyer who was convinced of being in a jail, he had no idea of the kind of institute he was inside. BordEu observed the lack of attention given to their clients also in Trapani speaking with the lawyer of a “guest” who was under a Dublin procedure, he was in detention since more than 1 year.

public order (the police and the cooperatives thought that it was dangerous to allow a large number of detainees to stay together in the same space as this may lead to revolts), lack of continuity (it's rarely clear how long each single detainee will remain in the CIE) and a lack of interest from the immigrants (many suffer depression or have difficulties accepting their forced detention). Research seems to indicate that the conditions inside the CIEs themselves are not conducive to a good standard of life. People will always try to escape from a condition they can't accept (such as detention without a crime) and since repatriation requires a very complex procedure, detainees begin their period of detention without knowing how long they will be detained. In any case, some CIEs have a football pitches (Rome and Bari), some have a library (Modena and Rome, although "guests" don't use it frequently) and Italian language courses are available in some centres (teaching Italian to people who are awaiting deportation – which includes a return ban lasting several years – might seem slightly paradoxical). However, the principal activity in CIEs, as the director of the CIE in Rome, Ponte Galeria, told to BordEu, is «*carrying out services*». This means going to the infirmary, to the barber, to the psychologist, to the social worker, making phone calls and receiving visits. Each time a detainee does one of these things, he or she must be accompanied by one or more members of the security forces, which makes every movement very slow and complicated⁸⁷.

- **Rules:** every single centre has his own written and unwritten rules. BordEu asked immigrants and staff about the centre's regulations. The situation is very different from one centre to another. Trapani and Modena are run by the same cooperative and attempts are being made to align the regulations at both the centres. In Rome and in Bari, the cooperative prepared a short paper with a description of the services, rights and duties of detainees.

- **Food and religion:** in every CIE BordEu were told that detainees' specific dietary requirements were all being met. BordEu visited the kitchens (although they are not used since usually food is distributed by an external catering service) and the canteens. Normally, "guests" have their meals in the common rooms in the blocks (to avoid a large gathering of detainees). However, for instance in Rome they use two canteens: one for men and the other for women. The difference between these two spaces is especially marked: while the second is similar to a normal school canteen, the first has plexiglass and metal barriers to protect staff against detainees venting their frustrations about the quality of the food and the conditions inside the centre. In Trapani, the detainees complained a lot about the quality of food and the quantity of water they received. They complained of dirty salad, milk with water, a lack of variety (they eat a lot of pasta) and members of BordEu witnessed the meals that the cooperative distributes and confirmed that that these complaints were legitimate.

With regards to religion, some CIEs - for instance in Rome - have pastors who visit regularly. The availability of this kind of religious assistance depends on the willingness

87 From the interview to Mr. Di Sangiuliano, director of the CIE of Roma, Ponte Galeria: «*We can say that the real activity of the guest inside the CIE is the realization of the services, of those services he has the right to benefit. Going to the canteen (it starts at 12:30), it takes one hour and a half because they can go inside only in groups of 20. So the operation is slow. After that there's the daily appointment with the doctor (there are 3 every day) although it is not necessary, specially in the evening. They can go to the doctor in groups of 3 people, you can imagine, to bring everyone takes 2 hours (there are 68 men). But at the same moment we have also another problem because in the afternoon the lawyers come (they can come whenever they want during the afternoon) and to bring people to the lawyer can take also 2 or 3 hours. The real activity is the benefit of the services*».

of the local religious communities and of the administration of the centres. Usually the “guests” organize their own worship by adapting a part of their block and using it as a place for prayers⁸⁸. Problems can arise between detainees with different beliefs, especially when there’s a minority group. In Trapani, for example, BordEu members were told about this complicated problem by some detainees.

1.6 CIE AND PRISON

One fundamental aspect of the Italian CIE system is the presence, in the centres, of ex-prisoners⁸⁹. It’s common practice for prison authorities to call the local immigration office when an illegal immigrant is about to be released. The immigrant is then often met outside the prison, taken directly to the police station and then on to the local CIE – regardless of how long he or she has been in prison (authorities could have had years to identify the prisoner).

This treatment and never-ending imprisonment is the cause of great anger, frustration and pain. Furthermore, this particular part of the CIE population has a big affect on life inside: according to staff at Caltanissetta, the periods in which there are more ex-prison amongst the detainees are the most troubled. Staff at the CIE in Bari described how, “guests” coming from prison suffered the highest levels of frustration, since they found their continued imprisonment intolerable when they hadn’t committed any further crime. The psychologist and the other social workers in Bari noticed differences in the behaviour of the group of ex prison detainees: they were more used to following rules and more likely to accept them.

A constant element observed by BordEu during the interviews and the informal chats with immigrants who had previously spent a period in prison, was that life in prison was definitely considered more acceptable. The main reasons were:

- in prison, a restriction of personal freedom is a clear and direct result of having committed a crime, therefore prison is an understandable consequence of criminal conduct;
- imprisonment has a clear and fixed duration;
- in prison the rules are clearer and life is in some way easier (detainees can work, study, cook, have a number of personal objects in their cells etc. The only decent condition of life in a CIE, according to the interviewees is being allowed to have a mobile phone). This situation is due to the lack of legislation about immigrant detention centres. In Italy there aren’t any regulations outlining the rights of the “guests” or liv-

88 From the interview to the workers of the cooperative Oasi in the centre of Modena, 06.03.2013: Doctor: «For what concerns the pastors, they are almost all muslims. Our director and one of the mediators went to meet the Imam who also gave them a Koran and they spoke about the situation in the centre, so he can come whenever he wants but he hasn’t come. There’s an Orthodox pastor who comes sometimes, but there’s not many Orthodox... maybe 3. There are no Catholics at all, just 2 Christians... they say they’re Christians, I don’t know of which church. There’s a guest who 5 times a day dresses in white and makes the muezzin... he shouts, I mean... he sings.». Cultural Mediator: «We tell them the times for the prayers and then they organize themselves, also with the recall». Doctor: «Yes, it’s very nice to hear it». Cultural Mediator: «They also do the Friday prayer with the speech at midday».

89 In Bari the director said it was 20% and members of the immigration office spoke instead of a percentage of the 80%; in Caltanissetta – according to the data of MEDU it’s the 50%; in Modena, according to the opinion of the members of the cooperative, about one third of the migrants detained came from the jail; in Roma the director said the percentage is about 50%; in Trapani (Milo) the workers of the cooperative told that the percentage was higher than the 80%.

ing standards inside a CIE, whereas life in the prison system is clearly regulated (l.n. 354/1975);

- prison detainees are called by name and in general, or at least theoretically, they don't feel their dignity is disrespected.

2. SPAIN

In Spain, detention centres for immigrants pending deportation are also known as CIEs (*Centros de internamiento de Extranjeros*). They were specifically introduced for the first time in 1985 by the Ley Orgánica n. 7/1985 sobre derechos y libertades de los extranjeros en España. At the moment the working centres are:

Sangonera la Verde (Murcia)

“La Piñera”, Algeciras (Cádiz). Con un “Anexo” en Tarifa.

“Aluche” (Madrid).

“Zona Franca”, Barcelona.

“Zapadores”, Valencia.

“Hoya Fría”, Santa Cruz de Tenerife (Islas Canarias)

“Barranco Seco”, Las Palmas de Gran Canaria (Islas Canarias)

Article 60.2 of the LOEX⁹⁰ states: “*Detention centres for foreign people have no criminal nature and will be provided with social, juridical, cultural and medical services. Foreigners will be deprived only of their freedom of movement*”, in order to keep the CIE system – which by nature remains merely administrative – separate from the prison one.

Members of the organizations SOS Racismo-Mugak and Andalucía Acoge visited the CIEs in Zapadores (Valencia) and Sangonera la Verde (Murcia), on 14th and 15th May 2013.

In Valencia, members of these two organizations first interviewed the head of security while he was showing around them the centre. They then spoke to the medical staff and, towards the end, with the detainees. Since this visit didn't leave much time or freedom to speak to the detainees properly, during the second visit to Murcia, they decided to split into two groups in order to be able to speak to the detainees with more freedom and privacy. SOS Racismo-Mugak and Andalucía Acoge weren't allowed to record the interviews or take pictures. The administrative authorities of these centres refused to provide to SOS Racismo-Mugak and Andalucía Acoge with the written statistical data they had requested, instead they referred them to the central authority in Madrid.

2.1 ACCESS TO THE CENTRES.

Art. 62-*bis* LOEX implements art. 16.4 of the Return Directive, which affirms the right of immigrants detained in CIEs to contact NGOs and national and international bodies who work to protect the rights of immigrants. The same article states that NGOs have the right to visit detention facilities. However, this regulation remains vague and is very difficult to apply due to the absence of clarity in its wording. Government hasn't approved any decree

⁹⁰ LOEX: Abbreviation of *Ley Orgánica de Extranjería*, Organic Law on Aliens. This Law is the Organic Law 4/2000, of the 11th of January.

to explain the specific conditions necessary to get inside the centres. These decrees have to be approved within 6 months after laws are created, in this case the law was approved in 2009 (LO2/2009), but more than 3 years later no application decree has been set. This means that granting permits to visit detention centres is entirely up to the discretion of the authorities at that time and can lead to inconsistencies - causing a breach of the principles established by the Return Directive.

Currently, a request to visit a CIE in Spain has to be sent to the Ministry of Home Affairs in Madrid to be evaluated. Mugak and Andalucía Acoge found that being part of a European project made it easier to obtain authorization than when they were working independently.

2.2 MANAGEMENT OF THE CENTRES

The CIEs in Spain are the responsibility of the Ministry of Home Affairs⁹¹ and the day-to-day running is down to the security forces. The members of the security forces working inside the detention facilities for immigrants awaiting deportation don't receive any specific training.

The director of each centre is nominated by the *Director General de la Policía* (the chief of police), with a recommendation from the *Delegado del Gobierno* (representative of central government), and is usually a high level civil servant - very often a police officer with experience of working with the immigration office.

Inside the centres, policemen are identified by their registration number. In Valencia there are five policemen working each shift, plus the director and head of security. In Murcia they try to use eight policemen to cover each shift, plus the director, the head of security and the administrator. **Policemen are the only professional figures who are in contact with detainees.**

The centres follow different procedures when the immigration office is ready to repatriate one of their detainees. In Valencia, they inform the person concerned 12 hours before the repatriation, but without giving any information about the destination. In Murcia, they give no such warning. They justify this practice by explaining that providing information in advance about repatriation can provoke tensions inside the CIE and frustration if there are any complications – such as a last-minute change in the flight. It appears that repatriations are usually held early in the morning.

2.3 DETENTION FACILITIES

CIEs are often placed in older buildings, prisons or barracks, such as the centres in Aluche (Madrid) and Algeciras (Cadíz). It is nevertheless true that the CIEs visited by SOS Racismo and Andalucía Acoge, which were placed in or next to older police stations, have been repaired and vastly improved.

In the detention facilities in Valencia and Murcia, detainees sleep in groups, in rooms which are locked at night. Detainees have to ask a police guard if they need the bathroom in the night and – as the detainees interviewed explained – the guards often aren't interested in carrying out this task. Detainees can use common rooms during the day (where

91 The C.E.T.I., another particular kind of centres for migrants placed in Ceuta and Melilla, are under the control of the *Ministerio de Empleo y Seguridad Social*.

there's usually a TV) and finally there's also a yard. In the centre in Valencia there are two yards, one for men and one for women, but the female one was empty at the time of the visit. The explanations for this provided by immigrants and by the authorities were very different. The immigrants claimed they weren't allowed to use the yard, whereas the authorities stated that the women weren't interested in going outside or preferred to share the men's yard. In Murcia, the authorities told to SOS Racismo and Andalucía Acoge that there weren't any restrictions on the use of the yard, whereas the detainees explained that they were only allowed to use the yard for 15-20 minutes a day. All the areas inside the centres, with the exception of the bedrooms and bathrooms, are constantly filmed by CCTV. The footage is kept for approximately one month. This is a rather short period of time, considering that it may be necessary to use the recordings as evidence of any possible abuse on the part of security forces or from detainees.

2.4 DETENTION CONDITIONS (ART. 16 AND SS. 2008/115/CE)

- **Communication:** detainees aren't allowed to bring their mobile phones into either of the centres. In order to get in contact with the outside world, they only have the use of some public phones, none of which offer the privacy of a cabin. In Valencia, detainees can both receive and make phone calls, while in Murcia they can only make phone calls. Visiting times in both centres are limited: in Valencia there can only be visits from 12:00 to 14:00 and in Murcia from 16:00 to 18:00. Physical contact is not allowed, even for families with young children. In particular, in Valencia the detainee and the visitor are separated by a room divider with small holes (20cm diameter) which are opened just for short moments; families can communicate in another room but under the supervision of the police. In Murcia, detainees and visitors (also in the case of families) can't have any kind of physical contact.

- **Health and social care:** although Spanish law⁹² orders that detention facilities for "illegal" immigrants must provide **social assistance**, neither of the two CIEs visited for this report provided any such service. With regards to **healthcare**, both centres have healthcare services provided by external companies. In Valencia, there is one doctor and two nurses working at the centre, but at night they have to use the local hospital. In Murcia, there is only a doctor and a nurse working from 7:30 to 14:30.

No **psychological support** is provided by the staff in the centres in Murcia and Valencia, although the latter allows the NGO *Psicólogos sin Fronteras* to enter and give psychological assistance to the detainees.

When they first arrive at the detention centre, detainees are given a **general health check**. Neither of the centres provide an interpreter or cultural mediator during medical checks with the doctor, so often they use other detainees as translators. By doing so there is still a risk of misunderstandings, which may lead to a decrease in the quality of the service and a lack of intimacy and privacy for the patient.

- **Legal assistance:** regarding complaints made by detained immigrants addressed to authorities outside the centre: the privacy of the content of any complaints is not respected in either Murcia or Valencia. Inspections have improved with the introduction of a *Juzgado de Control* (Control Judge) in the same district as the CIE, but there is

92 See art. 13 OM (Ministerial Order) 22.02.1999 and art. 62.1.d *bis* LO 2/2009.

still no way for the detainees to contact him and keep the content of their complaints private. In Murcia, this Judge visits the CIE every 10-15 days. Unfortunately, no similar information was available about the centre in Valencia.

During the interviews conducted with detained immigrants, SOS Racismo and Andalucía Acoge found that none of them had a clear idea of their own legal status or situation and they explained that they weren't in contact with legal representatives. They said that lawyers didn't visit their clients inside the CIE and that the staff of the centres gave no assistance in solving their legal problems.

- Activities: in both centres there isn't any space – with the exception of the TV room – for recreational activities. There's no library and no place to practice any sports.

- Rules: in both CIEs, detained immigrants receive a document with information about their rights and duties. This document is written in several different languages and includes an explanation of the complaints procedure. After speaking with detainees, it appeared that some of them hadn't understood the content of this document. It would be better if information were given personally to every detainee in his/her mother tongue. For instance, a lot of detainees didn't know they had the right to contact the Judge or an NGO.

Policemen are permitted to use security measures in order to maintain order inside the centres. Both in Murcia and in Valencia there were isolation cells - although, as the policemen told to our researcher - they were seldom used and in rare cases of them being used, the maximum seclusion period was four hours. In Valencia, the policemen explained that the aim of those cells was just to calm the individual down.

- Food and religion: Neither the centre in Murcia nor in Valencia provided any specific place for the detainees to practice their own religion. It seems that only the CIE in Murcia, makes provision for any special dietary requests for religious or health reasons.

2.5 CIE AND PRISON

In Spain there's an ongoing debate regarding the composition of the population detained in the country's CIEs. According to the Ministry of Home Affairs, the majority of the detainees have criminal records and are awaiting so-called "qualified expulsion". This means they have committed serious crimes connected with terrorism, criminal conspiracy, gender violence and other crimes which entail a threat to society. Creating categories such as "qualified expulsion" reinforces the idea, in public opinion, that expulsion is a measure only taken against criminals. In practice however, expulsion is commonly used to punish the infringement of immigration law.

It is important to note that a large number of detainees are people stopped while they were trying to cross the border, people who couldn't reach the Spanish territory. According to a report released by the "*Defensor del Pueblo*" (the Public Ombudsman) in 2012⁹³, 11,325 people were detained in Spanish CIEs that year and 6.645 of those had been stopped at the border. The majority of these people are usually sent straight to CIEs and CETIs. Someone who has been stopped on the border, who has never officially stepped foot in the country cannot physically have committed a crime there.

93 Which can be downloaded at http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/annual/contenido_1361960815343.html.

Another problem lies in the mixing of immigrants who've been in Spanish prison and immigrants detained for the first time and only as a consequence of a breach of immigration laws. In the report of the *Defensor del Pueblo* released in 2011, the Public Ombudsman explained that detainees often complained about this forced cohabitation. Mugak and Andalucía Acoge didn't witness this kind of problem because in the CIEs they visited the population was rather homogeneous: in Valencia the majority of the detainees had criminal records while in Murcia they didn't.

3. CYPRUS

The first specialized detention facility for immigrants awaiting deportation in Cyprus was opened in February 2013 and is called the **Mennogia Detention Centre**. However, this centre has a limited capacity (max 256 detainees) and so both in the past and today, immigrants detained in Cyprus are also held in police stations and prisons all over the country. Between 14th and 26th June 2013 some members of KISA visited seven detention facilities: Mennogia, the High Security Centre at Lakatamia, Blocks 9 & 10 of Nicosia central prison and police stations in Nisou, Aradippou, Limassol and Paphos. These centres housed a mix of "economic" immigrants, refugees, asylum seekers and a few minors.

The members of KISA were able to interview the detainees, the staff of the centres and the police officers working inside, but they weren't allowed to take pictures.

KISA members were body-searched in two centres (Mennogia and Nicosia). They weren't permitted to visit the living areas in any of the visited centres and they were always accompanied during the visits by members of the security forces who, at times, were also present during interviews. This obviously effected the answers given and altered the whole tone of the interviews, as detainees may have been fearful of reprisals by the police⁹⁴.

In Cyprus the practice of re-arresting immigrants immediately after their release – especially those who cannot be either repatriated or regularized - is very frequent. This practice has also been confirmed by the police officers interviewed by KISA⁹⁵ and constitutes a breach of the rules contained in the Return Directive concerning the maximum period of detention.

3.1 ACCESS TO THE CENTRES

To get authorization to visit the detention facilities, NGOs have to send a request to the Chief of the Cypriot Police, although, in order to underline the validity of their request, KISA also requested authorization from the Ministry of Justice and Public Order, who run the security forces in Cyprus. KISA got the impression that it was easier to receive an authorization being part of a European project. The authorization received stated that its members could conduct interviews with the detainees only in the presence of a police of-

94 The members of KISA could always chose the people to interview except in Mennogia, there they had to negotiate with the police to speak to the people they wanted to interview and they had the impression that there were some people they didn't want to speak with KISA. In those cases the members of KISA discovered that those people were victims of physical and verbal abuses by the police officers.

95 See the interviews to the police officers in Blocks 9 & 10, the chief if the detention facility interviewed affirmed: «*There are people who are released after two years and then they are arrested again. Then the calculation of the period of detention starts again from the beginning*».

ficer and, in fact, during the visits they were always accompanied by at least two members of staff. They were however, able to conduct some interviews alone with the detainees.

3.2 MANAGEMENT OF THE CENTRES

KISA visited a variety of detention facilities: the Mennogia administrative detention centre (the only purpose-built detention centre in Cyprus), a section of an ordinary prison (blocks 9 & 10 in Nicosia prison) and detention spaces inside police stations which are normally used to detain people under trial (in Nisou, Aradippou, Limassol and Paphos and the High Security Centre in Lakatamia). The police force are usually responsible for both the security and general management of the centres.

- *Mennogia*: this is the only purpose-built detention centre in Cyprus, specifically designed to hold immigrants awaiting deportation. It was opened in February 2013. In accordance with changes in the law, as it has recently been modified. Mennogia is the only centre where immigrants can legally be detained while awaiting deportation – which means that in reality all the other detention structures used are essentially illegal.
- *Blocks 9 & 10*: this detention area is part of the central prison, the rules inside are very rigid because criminal detainees and illegal immigrants are housed together and the rules for the first group must also be upheld by the latter. This structure is no longer used.
- *Police stations*: these are smaller structures in which illegal immigrants and prisoners who are on trial and who are considered a potential threat to society are held together.
- *The High Security Centre in Lakatamia*: prisoners on trial are housed together with illegal immigrants here and the two groups share the same space and rules. Juvenile detainees are also held here, but in special wings. The high security nature of this centre means that its rules are very rigid and life inside is harder than in the other police stations.

Many of these structures don't have cleaning services, so detainees must clean their own cells and the toilets. The management doesn't provide cleaning products, so they have to use water which leads to obvious hygiene problems in the detention facility. A detainee in Block 9 & 10 reported: «*I asked for a product to clean them [the toilets] and a policewoman told me: "we are in financial crisis"*».

Members of the police are almost the only professional figures to have contact with detainees inside the centres as no medical, social or psychological staff work there⁹⁶.

3.3 DETENTION FACILITIES

Detainees generally divide their time between the cells and a shared area, with wide variations depending on the detention facility.

Detainees usually spend a lot of time in their cells (alone or in groups) and the cells almost always have a window – although these windows often have metal bars which block much of the light. In some structures, like in Mennogia and Lakatamia, detainees are locked in their cells for several hours a day without being allowed to go out.

The communal or outdoor areas are very limited, as is access to them. In the police station, the only communal area is normally the yard. There is neither a dining room, nor a TV

96 There are some exceptions, for example in Block 9 & 10 a doctor comes to make the visits every Tuesday.

room (while in Mennogia there are both). In Aradippou and Nisou, detainees can spend all their time in an external yard, whereas this is not the case in others, for instance Mennogia and Block 10. In Lakatamia, detainees don't have access to any outdoor space at all and in the police station in Limassol, there is a yard but it's inside the building, meaning that detainees see very little natural light.

3.4 DETENTION CONDITIONS (ART. 16 AND SS. 2008/115/CE)

- Communication: contact with the outside world is highly limited almost everywhere. In the police stations and in the central prison (Block 9 & 10), mobile phones are kept in lockers and detainees can use them for a maximum of one hour a day. In Mennogia, detainees can have their phones with them but the networks are cut off several times a day. Moreover, there are no phone boxes in the detention facilities. Detainees are allowed to receive one visit a day. The duration of the visit is dictated by the police officer working that particular shift (usually from 10 to 30 minutes, maximum 1 hour). Visitors must receive authorization before visiting. In Mennogia, detainees are systematically handcuffed when they are brought to the visitors' room (in fact the detainees interviewed were surprised because they weren't handcuffed when KISA met with them). In the High Security centre in Lakatamia, detainees sit behind a glass wall and speak to their visitors on the phone (although this wasn't the case during KISA visit). To contact NGOs, international bodies or to receive legal assistance, detainees can usually use a fax but this way of communicating absolutely doesn't ensure privacy.

- Health care: some detention facilities carry out a health screening when detainees arrive. This consists of a blood test and a vaccine against tuberculosis. Irregular migrants sent to Mennogia always receive this medical screening. **It's very important to underline that in detention facilities for migrants awaiting deportation, there is NO medical staff** and to receive medical care, the detainees have to make a request to the police to be sent to the local hospital. The police have the enormous responsibility of deciding who to take to hospital and who not to take. There are some medicines available inside the centres which are distributed by the police without a medical prescription⁹⁷. The main drug used is a medicine called Panadol – information confirmed by a large number of detainees. No psychological support is provided in the centres. A police officer always attends doctor's appointments with detainees in Mennogia, which is a serious breach of their right to privacy. An interpreter is only sometimes present.

- Legal assistance: the detention facilities visited by KISA didn't facilitate contact between lawyers and detainees, for instance the administration doesn't provide a list of local lawyers or NGOs so detained migrants have to find names and contacts by themselves and, moreover, they have to pay for any legal assistance. Many of the depositions gathered by KISA quote very high prices for low quality legal services. As can be inferred by reading the interviews of the detainees, most of them don't have a clear idea about their own legal situation. Another important breach of migrants' right to be legally represented at a fair trial is caused by how difficult it is to appeal against the detention act. Any appeal must be presented personally in front of the Supreme Court

97 Sometimes it's so difficult to receive specific medical therapies that for instance a detainee in Block 9&10 had to ask a relative to send medicines from her very far country of origin.

which it's impossible to do while being held in detention. Finally, detained migrants can't take advantage of free defence lawyers which prevents them from exercising their rights.

- **Activities:** activities are really restricted, although the situation in each of the detention facilities is different. In Mennogia, detainees have a TV and some books at their disposal, but the same cannot be said about the other detention centres (except Aradippou, where there is a TV in the yard and in Block 9 where the men also have a ball to play with). In the administrative detention centre in Mennogia, only the detainees living in a one particular wing have a ball to play with in the yard. No sports material is provided in the police stations.

- **Rules:** to quote one of the detainees in block 10 in Nicosia *«we don't have rules like in prison. We have some general, verbal rules»*. The authorities running the centres sometimes provide written information about the rights and duties of the detainees and about the rules of the centre, but this changes from one detention facility to another. A practice used by the police, that has been pointed out by several interviewed detainees, is to force them to sign documents which they don't really understand because of they are not written in their mother tongue. These documents may declare that the detainee renounces certain rights, such as the right to legal representation. For instance, an ex-detainee at the Nisou police station confirmed: *«They gave us a booklet called “communication rights of detained persons”. Most of the time they don't allow us to read it and ask us directly to sign a paper which indicate that we “don't want to exercise our rights” and that we “no longer want the services of a lawyer”. I am lucky because I know my rights and I speak English so even if they forced me to sign it, I didn't. But most of the detainees here don't know their rights, are afraid about the consequences or don't understand what the booklet's about»*.

- **Food and religion:** Detainees are particularly unhappy about the food, especially in Mennogia where diet constitutes one of their biggest problems. Despite the protests against the bad quality of the food there, nothing has changed. Some detainees also mentioned that their dietary requirements are not respected. In Block 10, several detainees reported on the lack of hygiene concerning the food. With regards to religion, there are no special places to worship in the detention facilities. Detainees mostly pray in their cells or in the corridors. It doesn't seem to be a big problem for them as they reported that there is a lot of respect amongst the detainees. Nevertheless, a woman detained in Block 9 reported that since there aren't any places set aside for worship, she has to pray in her head.

3.5 RELATIONS INSIDE THE CENTRES AND COMPARISON WITH PRISON

It is important to discuss relations between the different people inside detention facilities at the same time as drawing a comparison between detention centres and prison, because in Cyprus the two institutions are often one and the same.

All the centres visited by KISA, with the exception of Mennogia, were both detention/deportation centres and prisons (for people still under trial). The most extreme example of this is Blocks 9 & 10 which are wings of Nicosia central prison.

The clear overlap between detention centres for undocumented migrants and prisons is more radical than in Spain or in Italy: the same structures (with the same tight restrictions for all detainees) are used both to punish people condemned for having committed a crime

and to detain undocumented migrants under a deportation order.

To detain migrants for the purpose of deportation in facilities which are not specialized, or to house them with people who are serving a criminal sentence is against art. 16.1 of the Return Directive which clearly states that “*Detention shall take place as a rule in specialized detention facilities. Where a Member State cannot provide accommodation in a specialized detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners*”.

The mixing of undocumented migrants and condemned criminals or people awaiting trial has many consequences both on public opinion and on life inside the centres. It goes without saying that treating undocumented migrants in the same way as those condemned for criminal behaviour creates an inaccurate association between migrants and illegality in the public perception. This is a worrying trend right across Europe. Public opinion will inevitably tend to associate migrants with criminals, which in turn legitimises extremely rigid anti-immigration policies and tough conditions in migrant detention centres.

From a migrant’s perspective, this kind of treatment can be very hard to accept and contributes to an increasing sense of injustice which results from the loss of personal freedom despite not having committed a crime.

Also, undocumented migrants in these centres inevitably have to follow the same rules as “normal” criminal detainees, which are normally more rigid for obvious reasons. For example: in Lakatamia, detainees are made to remain in their cells for several hours a day and the police use isolation cells to punish socially unacceptable behaviour. When undocumented migrants have to be brought from the detention centre to the hospital they are handcuffed. These living conditions cause undocumented migrants serious discomfort, anxiety and fear. One detainee interviewed in the police station in Limassol said: «*Now I feel secure because it has been a long time that I am here; but before I didn't feel safe because we are mixed with people who are here for criminal offences*». A juvenile detainee in the police station in Paphos stated «*I don't speak with the adults as they smoke. I don't know them, maybe they are criminals?*».

Policemen are almost the only professionals which undocumented migrants have contact with inside the detention facilities (since there are no doctors, nor psychologists or social workers). Sometimes they address migrants by name, although sometimes they call them by their country of origin or even by number⁹⁸.

Police were often present during the interviews and so the information gathered by KISA cannot be considered totally genuine. However, during an interview outside the centre, an ex-detainee from the centre in Nisou claimed that she didn't feel safe inside the centre because «*I saw deportation and how they do it. They use violence in order to deport people. A Vietnamese girl was beaten by an Immigration Officer. There were two Immigration Officers and a policewoman around her. The immigration officers wore civilian clothes and they weren't identified by name. Once, a detainee from Romania tried to defend herself, she didn't want to go back. They were using force. She was so strong that her clothes fell apart, she was naked and there were men around her*». And a detainee in Mennogia said «*They are nasty. Their behaviour is hostile*».

On the contrary, the police officers who were interviewed described relaxed relations be-

98 For example in the police station of Nisou and in Mennogia.

tween themselves and the detainees⁹⁹ and were more inclined to focus on cases of tension between detained migrants themselves.

Other interviewees mentioned cases of violence suffered by migrants and the tough repression of their protests by the security forces. They described the high tension and repressive atmosphere typical to the detention facilities – an atmosphere also mentioned by a police officer working at Mennogia: «*Here there are many violent incidents. Once there was a rebellion from the Syrians at the centre. We had to go inside and use gas to retain order. I pull the trigger myself [...] Usually when we want to punish a detainee for breaking the rules of the centre we send them at Aradippou police station, or we deprive him from his mobile or we don't allow him to go out in the yard*».

In any case, in some centres¹⁰⁰ policemen entering the detainees' living areas regularly wore weapons or truncheons, which doesn't help to create a relaxed climate between themselves and the detainees.

99 With a paternalistic attitude, observed also in some cases between policemen in the Italian CIEs, the Head of the police station of Limassol said, talking about his relation with the detainees: «*We have good relations, I am like a father to them. We provide them with clothes, we try to make it easy for them*».

100 For instance in Mennogia and Lakatamia.

Chapter III – Conclusions

As a result of this field research and to conclude we can affirm that – with regards to the countries we have focused on, Spain, Cyprus and Italy – the main aims of the Return Directive have only been partly reached: the alignment of national policies on migration and deportation and the acceleration and increase in efficiency of deportation procedures. Moreover, guarantees to protect basic human rights often remain unobserved, as was made clear during the visits to detention facilities and subsequently underlined throughout this report.

There are some common traits between the migration policies of the three sample countries, in particular regarding the important role of administrative detention.

Although the formulas vary from country to country, in particular with regards to the management of detention facilities and the concrete conditions of detention, the instruments are the same and their inherent contradictions are visible in Spain, Cyprus and Italy.

THE AMBIGUOUS NATURE OF THE CIES/DETENTION FACILITIES

The unclear nature of administrative detention (the name itself sounds like an oxymoron) doesn't make it any easier to find a homogeneous solution. **Using a measure which is traditionally used as a punishment in criminal law (the deprivation of personal freedom: the ultimate consequence of reclusion in detention facilities) for an administrative procedure (deporting migrants or sending them back home) has varied and significant consequences.**

The nature of this measure falls somewhere between a formally administrative measure and a substantially criminal one, and is typical of the criminalizing practices which often involve migrants. The hybrid nature of deportation can sometimes have a purely administrative value (as a consequence of being an undocumented resident in a country) or a criminal one (as an *ad hoc* punishment for irregular migrants when it's used as an alternative to prison).

- The criminalization of migrants. As has been underlined by the extreme case of Cyprus, there's a definite risk of undocumented migrants being portrayed as criminals in the public perception. The case of Cyprus is extreme because there's often no difference between the "administrative detention" facilities and ordinary prisons and, moreover, people serving a criminal sentence in jail share the same spaces and rules with undocumented migrants awaiting deportation. The problem of the criminalization of migrants as a result of their detention in the CIEs is cause for concern in Italy and Spain too, mainly due to the use of administrative detention and also to the type of detainees found in the CIEs (especially in Italy where a high percentage of the detainees come directly from prison. In Spain this data is not so clearly given by the public authorities and there's an on-going debate on this matter). Criminalizing migrants doesn't help to improve immigration policies in member states, doesn't help integration (on the contrary, it makes it harder) and doesn't even work as a deterrent. On the contrary, the marginalization and criminalization of migrants in European countries is damaging to security and public order, while integration policies and more rational and clear systems of regularization could prevent the creation of criminal and dangerous situations.

- The non-acceptance of detention. There are two elements in particular that make

accepting detention more difficult (without considering for the moment the concretely inhumane living conditions in many detention facilities): first, **being deprived of personal freedoms despite not having committed an actual crime**¹⁰¹ and second, the **lack of knowledge about the duration of the detention** (since it's impossible to know at the moment of the arrest how long it will take to identify the migrant and organise travel documents)¹⁰². The non-acceptance of detention causes the detainees to develop psychological problems, as was confirmed by a number of psychologists and other health operatives interviewed during the field research in the detention facilities in Spain, Cyprus and Italy. It also makes it more difficult to run the centres, increasing both the possibility of protests and revolts and the level of tension between the detainees and the security forces.

- The difficulties in running detention centres and human rights violations. The fact that detainees find it impossible to accept such a rigid 'punishment' for having broken an administrative, not criminal law (which most migration laws are) affects the day-to-day management of detention facilities thanks to the frustration and anger felt by the detainees. However, it's equally important to underline that the security forces responsible for maintaining order inside the centres also lack a clear mandate and this makes their task much more difficult than, say, police working in the prison system whose behaviour is governed by strict and clear rules.

- The long period of detention. The ambiguity of "administrative detention" is increased by the **long period** of detention allowed by the Return Directive. Although the maximum period detainees can be held in detention centres has decreased in some countries thanks to the Return Directive (Cyprus), it's equally true that **18 months total deprivation of personal freedom is comparable to the kind of punishment handed out for serious criminal offences in many countries.**

It's important to question whether such a long period of detention can be considered useful and, above all, fair for migrants awaiting repatriation or deportation.

The biggest problem in analysing how **useful** such a long period of detention is the difficulty in gathering data about detained migrants and statistics on deportation. The authorities in charge of these matters in Italy, Spain and Cyprus are very reticent about giving out that kind of data.

In Italy a research project developed in 2013 by Lunaria, (*Costi disumani. La spesa pubblica per il "contrasto dell'immigrazione irregolare"*, Open Society Foundations, Roma, 2013) underlined the disproportionate relationship between the high cost of migrant detention policies and their actual effectiveness. For example, from 27th December 2008 to 13th April 2013, the Italian Ministry of Home Affairs spent €108,091,578 on running detention "services" in the country's CIEs, with a very low percentage of effective repatriations: 41,0% in 2008, 38,0% in 2009, 48,3% in 2010, 50,2% in 2011 and 50,5% in 2012 (the

101 A crime which gravity is socially felt. In any case the mere fact of being undocumented somewhere is considered a crime by the criminal law (for instance in Italy) but its punishment has no relation with the administrative detention.

102 Out of the rhetoric, H. Arendt, speaking about the nazi concentration camps, identified as characterizing elements of that kind of measure the placement of the detention outside the sphere of criminal law, its disconnection from the commitment of crimes and the lack of awareness about its duration. See H. Arendt, *Le origini del totalitarismo*, Einaudi, 2009, p. 612.

total % of repatriated migrants between 1998 and 2012 is 46,2%). This situation contrasts starkly with the spirit of art. 4 of the Return Directive.

During interviews with detention facility staff, one of the questions regarded the maximum period of detention: staff in the centres and those involved in the repatriation process were asked if, in their opinion, such a long period of detention helped facilitate deportation. Almost all the answers were negative in Italy¹⁰³ and in Cyprus – with only one exception¹⁰⁴ – they were also basically negative¹⁰⁵.

What those answers had in common was that they often included complaints about the significant delays in the identification process and in the time it takes to obtain the correct travel documents. This is due to the lack of collaboration of the embassies and consulates.

The Italian authorities were particularly clear in blaming foreign embassies for the long delays over repatriations, accusing them of inefficiency also of not identifying undocumented migrants who spent time in prison.

It's completely illogical and utterly unfair to deprive undocumented migrants of their freedom, for such a long period, simply because foreign embassies and consulates are unable to do their job properly – migrants should not be held for problems which are beyond their own power and which are no fault of their own. Sadly, the present version of the Return Directive (art. 15), allows these breaches in the fundamental human rights of third country nationals detained all over the EU.

After having strongly criticized the creation and management of so-called “administrative detention”, we strongly believing that it should be immediately removed from European and national law. To follow are some further critical aspects relating to the application of the Return Directive:

THE DETENTION OF “VULNERABLE PERSONS”: ASYLUM SEEKERS AND MINORS

With regards to the problem of detaining **asylum seekers**, it's important to note in advance that the following analysis regards all the countries which were studied during this research. Different rules and laws apply across Europe for dealing with the detention and possible deportation of asylum seekers.

In fact, arts. 2.1 and 9 of the Return Directive state that no asylum seeker should be regarded as being an illegal migrant in the territory of member states (implying that there is no legal reason to detain them) and a recent decision of the EU Court of Justice (30.05.2013 C-534/2011) confirms this position by stating that the detention of asylum seekers is only allowed when they asked for asylum after being detained. However, the Dublin III regulation seems to declare quite the opposite.

Art. 28 of the Dublin III regulation (which will soon be brought into force) allows the

103 From the interview to the administrative staff and the police in the CIE of Modena, 06.03.2013: b-e: “*So in your experience, the extension to 18 months of the maximum period of detention wasn't useful?*” Policeman: “*No, absolutely. Once, when it was 2 months there were less protests*” Second Policeman: “*A person can stand 2 months, but 6 months!* [it's the medium period of detention in Modena] *Without having committed any crime!*”

104 It was the case of the Chief of the detention facility of Block 9 & 10 in the prison of Nicosia, he said during the interview that a longer period of detention can have a positive deterrent effect.

105 From the interview to one of the security officers in the police station of Nisou: “*If a person is hold for a longer period this does not mean that his expulsion case becomes easier. Each case is different and the function of their case is usually determined by the papers they have and their request, not by the duration of the period in which they are held.*”

detention of asylum seekers in cases where there's a "significant risk of absconding". According to Italian law, there are certain conditions which can lead to the administrative detention of asylum seekers (art. 21 of the D.lgs. 25/2008).

This situation needs to be clarified as soon as possible. Asylum seekers are part of a vulnerable and fragile category of migrants whose fundamental human rights must be respected. Another controversial point of the Return Directive is arts.10 and 14. These articles allow for the removal and detention of **unaccompanied minors**, although they do stipulate that their fundamental rights must be respected and they aim to keep the best interests of the child at heart.

It is true that not every country has changed its laws concerning the possibility of detaining under-age migrants. In Italy, for instance, art. 19 of the T.U.Imm. law still forbids the deportation (and consequently also the administrative detention) of minors.

This aspect of the Return Directive was highly criticized at the time of its implementation in Spain, as was reported by many Spanish NGOs who drew attention to the obvious contradiction between claiming to keep the best interests of the child at heart at the same time as allowing for the possibility of detention and deportation.

As Amnesty International states in one of its reports¹⁰⁶, however "*the status of the minor must prevail on his administrative situation, as the international standards and the Ley de Extranjería affirm*" in many cases ascertaining a migrant's age is still often a big problem and this, in turn, leads to uncertainty on whether to send a migrant to a detention centre or not.

The old and imprecise methods often used to determine young migrants' ages often lead to huge errors and can cause breaches of the fundamental rights of children. This is a big problem in the Italian system.

In Cyprus, members of KISA observed that many minors were being held under administrative detention. A clear example is Pafos police station which, at the time of the visit, housed five juvenile migrants. One further juvenile was detained in Lakatamia High Security Centre, while Nisou police station had some cells ready prepared for under age migrants - although at the time of the visit, they were empty. It's important to remember that these facilities are used to detain individuals who have broken not only administrative, but also criminal law; it's hard to justify housing juvenile migrants together with convicted adult criminals. Furthermore, KISA observed that the detention of undocumented minors in Cyprus is not used as a last resort measure, but rather as a routine and automatic measure.

THE RETURN DIRECTIVE: DOES IT ACHIEVE ITS AIMS?

Paraphrasing the introduction of the Return Directive, this regulation was drafted to establish shared European rules concerning the repatriation of so-called "*third country nationals*", whose residence in the EU territory is considered "illegal", with the purpose of forcing member states to adopt "***an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity***" (w. n. 2).

106 <http://www.es.amnesty.org/noticias/noticias/articulo/el-internamiento-indiscriminado-de-inmigrantes-como-politica-de-control-migratorio/>

The Return Directive aims to make the repatriation process more effective and to protect the human rights of those being repatriated. A “*well managed migration policy*” entails an “*effective return policy*” which must be carried out through a “*fair and transparent procedure*”.

“*It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement*” (w. n. 8) and it’s important to take into account that “***a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State***” (w. n. 9)

Regarding the detention of migrants for the purpose of removal, this instrument, which should guarantee an effective repatriation process and at the same time protect the rights of expelled migrants, should be “*subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued*” (w. n. 13) and, in any case, “*voluntary return should be preferred over forced return and a period for voluntary departure should be granted*”. Finally: “*Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient*” (w. n. 16) and “***Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities***” (w. n. 17).

The field research carried out for this report clearly shows that in the three countries analysed, the use of detention does not facilitate either the effectiveness of the repatriation procedure, nor protect the human rights of undocumented migrants.

Not only have Italy, Spain and Cyprus not fully respected the principles and regulations established by the Return Directive, as was explained in the first part of this report, but the Return Directive itself also cannot achieve its original aims as long as it recommends administrative detention as a legitimate tool in European migration policies.

The execution of an administrative law can never justify such a denial of personal freedom and the facts show that detention does not lead to a more effective repatriation process in the studied countries. In Italy, official data demonstrates that less than half of the total number of detainees are actually deported; in Spain the fact that this data is not made readily available leads us to suspect that not many returns are effectively carried out; in Cyprus the common practice of re-arresting migrants before the end of the maximum 18 month period shows that obstacles to repatriation can’t even be overcome by adopting a longer period of detention.

Detention centres for migrants awaiting repatriation are controversial and difficult to define, as well as being expensive and difficult to run – both for state and private companies. The aim of these centres is to facilitate repatriation, although this aim is usually not achieved and, worst of all, not only are detainees fundamental human rights severely compromised, but they also live in a state of anger, frustration and fear. This all seems rather far from the sense of fairness and respect theoretically sought by the Return Directive.

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Below: CIE of Bari, Palese. February 2013.





CIE of Caltanissetta. February 2013.



CIE of Rome, Ponte Galleria. May 2013.



*CIE of Modena, Strada
Sant'Anna. Marzo 2013.*



*CIE of Modena, Strada
Sant'Anna. Marzo 2013.*



*CIE of Rome, Ponte
Galleria. May 2013.*



CIE of Turin. October 2013.



CIE of Trapani, Milo. February 2013.

*CIE of Trapani, Milo.
February 2013.*



*CIE of Trapani, Milo.
February 2013.
After a police search.*



*CIE of Trapani, Milo.
February 2013.*





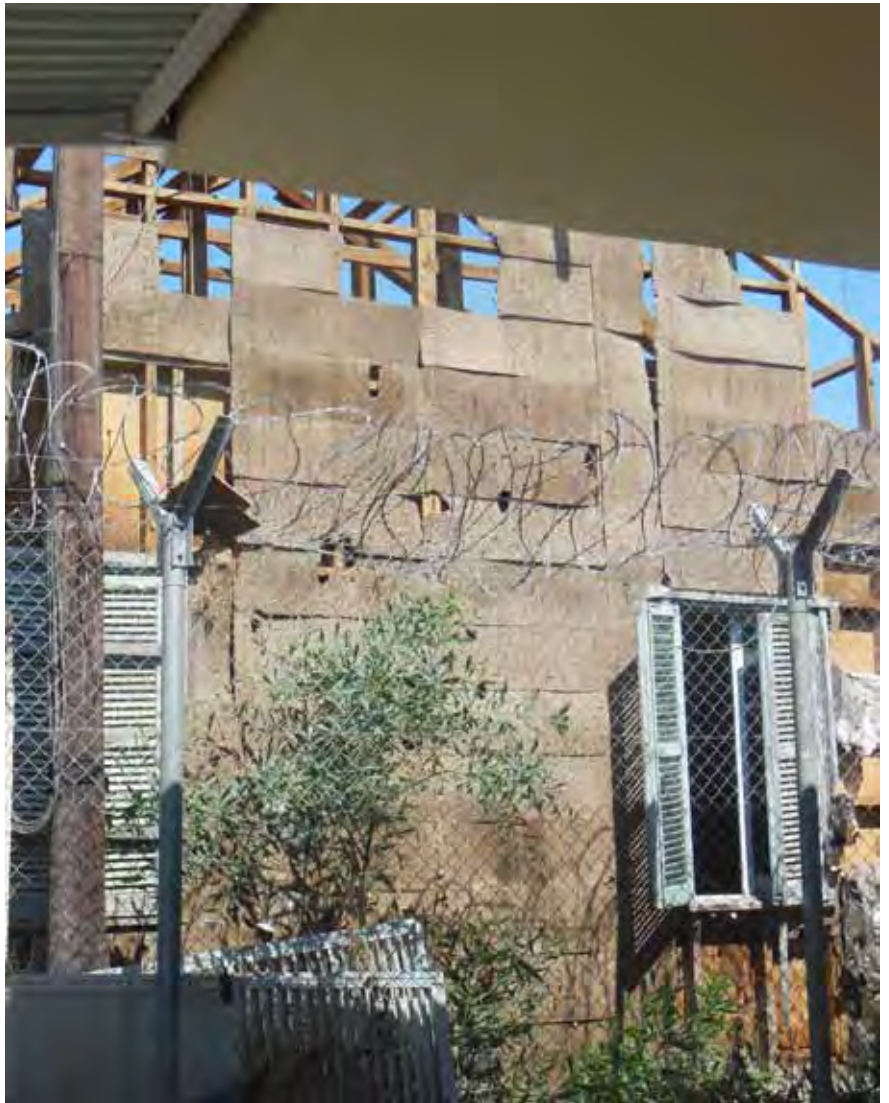
Above: Detention Center of Mennogia, Cyprus, 2013.

Below: Mennogia, a detention cell.

*Opening ceremony of
the detention center in
Memogia.*



*Nicosia, central prison.
Waiting place.*





Above: Detention Center of Mennogia, Cyprus, 2013.

Below: CIE of Valencia. Entrance gate.

CIE of Valencia. Entrance gate.



CIE of Valencia.



*CIE of Valencia.
June 2013.*

In December 2013 the European institutions have to evaluate the implementation of the so-called Return Directive (2008/115/CE), which regulates the repatriation procedures of undocumented migrants and the standards which must be respected to protect their rights.

A group of associations from Cyprus (Kisa Cyprus), Spain (Andalucía Acoge, Mugak-SOS Racismo) and Italy (Borderline Sicilia Onlus) coordinated by the German one borderline-europe, started a research about its effects in particular on the detention centres for migrants pending their deportation.

A juridical and sociological analysis which aim tends to a better understanding of how such a legal instrument can affect the concept of border, impact on people's lives in the bigger context of the EU migration policies and reinforce the controversial institution of the "administrative detention".



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Andalucía

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This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.



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