

WORKING GROUP MIGRATION AND TORTURE

**Submission by the World Organization Against Torture in the case of *Angelo APETOFIA*
against Italy and *Joseph NKONTCHOUA TCHOUMBOU* against Italy
Applications nos. 60154/19 and 60161/19**

before the European Court of Human Rights

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Members of the Working group:

- **DIEYE Aminata** (Chair Person) Organisation Mondiale Contre la Torture (OMCT)
- **OYAMTA BALDAL** Ligue Tchadienne des Droits de l'Homme (réseau) /Tchad
- **ALAA TALBI** Forum Tunisien pour les Droits Économiques et Sociaux (FTDES) /Tunisie
- **MWANGI KEVIN** Independent Medico-Legal Unit (IMLU) /Kenya
- **ESTHER NABWIRE** African Centre for Treatment and Rehabilitation of Torture Victims / Uganda
- **ELMEHDI AG WAKINA** Association Malienne pour la Survie au Sahel (AMSS) /Mali
- **BADAMASSI YAHAYA** Alternative Espaces Citoyens/ Niger
- **MOUSAPHA KEBE** Réseau Migration développement (REMIDEV) / Sénégal
- **MOHAMMED BADAWI** Africa Centre for Justice and Peace Studies (ACJPS) /Soudan
- **MAITE PAREJO SOUSA** Asociación Pro Derechos Humanos de España (APDHE)/Spain
- **SUSANNA MARIETTI** Antigone/Italy

The SOS-Torture Migration and torture Working in group in Africa, is a group of 10 experts from the OMCT SOS-Torture network, which aims to analyze first-hand information in order to set out authoritative research and recommendations for the protection of migrants against torture and other punishments or cruel, inhuman or degrading treatment. The group is sponsored by the World Organization Against Torture (OMCT) and the Collectif des Associations Contre l'Impunité au Togo (CACIT).

Introduction

The World Organisation Against Torture (OMCT) is today the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. In the framework of its activities, OMCT **submits individual communications and alternative reports** to the United Nations Treaty Bodies mainly, the Committee Against Torture.

This intervention is submitted on behalf of OMCT by its Working group on Migration and Torture. The Working group has met with migrants that have been hosted in the Lampedusa Hotspots and have documented testimonies of detention conditions.

This intervention also draws on the privileged position of OMCT, as the main coordinator of Civil Society Organisations (CSOs) engaging with the UN Committee Against Torture (UNCAT). The views expressed are therefore based on a review of successive reports from States parties and CSOs alternative reports, the examination of individual communications, and monitoring of developments before the Committee. Our knowledge of the UN CAT jurisprudence and Concluding Observations put us in a position to share with the European Court of Human Rights the recent updates, discussions and reports shared by CSOs with on the Hotspots approach in receiving and identifying migrants in Europe.

The current submission aims to reply to the following question asked by the Court:

*Have the applicants been subjected to inhuman or degrading treatment, in breach of Article 3 of the Convention during their stay in the Hotspot of Lampedusa, having regard in particular to the material conditions of their detention (see *M.S.S. v. Belgium and Greece [GC]*, no. 30696/09, ECHR 2011 and *Tarakhel v. Switzerland [GC]*, no. 29217/12, ECHR 2014 (extracts))?*

1. Substandard living conditions in Italian Hotspots

Hotspots are open facilities where newly arrived migrants and or asylum seekers are temporarily housed before being transferred to other centres at the earliest convenience. They perform the function of first reception centres for migrants. The establishment of hotspots in Italy and Greece in the respective framework of Council Decisions 2015/1523 and 2015/1601 of 14 and 22 September 2015 aimed at favoring a screening procedure to identify the migratory status and nationality and record the data of migrants and asylum seekers.

The establishment of these emergency reception centers has created important concerns in both countries mainly regarding the material conditions of detention of migrants. The United Nations Committee Against Torture has raised concerns on hotspots both in Italy and Greece

respectively during their last reviews in 2017 and 2019. The mainly observations of the Committee focused on the material conditions of living in these detention centers.

Most recently in 2019, during the review of Greece, the Committee Against Torture expressed its concerns at the reports of deplorable conditions in some of hotspots, including overcrowding and a lack of basic facilities. The Moria Reception Centre on the island of Lesbos, for example, housed some 9,000 refugees, which was three times more than its intended capacity.¹ “The Committee also observed that migrants and asylum seekers were exposed to appalling and unsanitary living conditions, especially in the case of those held in overcrowded reception and identification centres at “hotspots”².

During Italy’s periodical review before the “Committee was concerned by reports of poor conditions and unethical practices at such hotspots, but also but reports of ill-treatment and excessive use of force by the police when taking the fingerprints of newly arrived asylum seekers and migrants”³. In its concluding observations the Committee pointed out “the overall substandard living conditions in several reception centres for asylum seekers and irregular migrants, including “crisis centres” and centres for unaccompanied children, and the fact that women and minors are not always provided with separate accommodation, due to limited facilities”⁴.

Although the Committee recommended to Italy in December 2017 to take the measures necessary to ensure appropriate reception conditions for asylum seekers and irregular migrants”; the situation did not change in 2019. Italian Human Rights Non-Governmental Organisations that submitted their follow up alternative report to the Committee against torture revealed that in 2019 “the Hotspots were often overcrowded and characterized by poor hygiene standards. People there were in a *de facto* detention”⁵.

In Italy, all of the facilities related to migration detention operated previously as either Immigration detention centers (CIEs) or reception centres. The United Nations Subcommittee on Prevention of Torture (SPT) also visited Italy in 2015 and 2016 and was concerned by the CIE and their capacity to accommodate migrants in respect of the human dignity. In its final report, the SPT emphasized that « with the material, organisational, infrastructure and security structure of these facilities, they would be entirely inappropriate to be reconfigured

¹ Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention (continued), Seventh periodic report of Greece (continued), Sixty-seventh session, CAT/C/SR.1764, Summary record of the 1764th meeting, Held at the Palais des Nations, Geneva, on Thursday, 25 July 2019, §49

² Committee against Torture, Concluding observations on the seventh periodic report of Greece, CAT/C/GRC/CO/7, 3 September 2019, §20

³ Committee against Torture, Concluding observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 18 december 2017

⁴ Idem

⁵ Refugee Rights Europe, “ITALY. Submission to the United Nations Committee Against Torture (CAT) Pre-Sessional Working Group. 9 November – 4 December 2020”, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ITA/INT_CAT_ICSI_ITA_42519_E.pdf, p. 14

and established as 'hotspots', failing to meet international human rights laws and standards required to prevent arbitrary detention, inhuman and degrading treatment. »⁶ Despite its warnings the CIE of Lampedusa was used as a 'hotspot'. It was further closed for remodeling on March 2018, following complaints of inhumane living conditions⁷. Despite its reopening the National Guarantor for the Rights of persons detained or deprived of their Liberty holding the National prevention mechanism, after visiting the center stressed there were serious structural deficiencies⁸.

It was clear that the material conditions of the center were not favorable to a decent human life. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) that visited the center also recommended to **increase structurally the bed capacity** and concluded that "sanitary annexes in the two buildings required some repair and two out of three ovens in the kitchen area were out of order (the third working only at a much reduced capacity) – a situation that had a direct impact on the provision of food at the centre"⁹.

In Italy the occupancy at all "hotspots" regularly exceeds the official capacity and are severely congested. The Lampedusa Hotspots is criticized for been an overcrowded immigration detention center hosting between 260 and 300 people in September 2019¹⁰, compared to 96 official places in August 2019¹¹.

"During the 120-day period between 1 February and 1 June 2017, the center operated in excess of its 250-person capacity, which was based on the number of available beds, for more than 75% of the time (i.e. 93 days); during almost half of the time (i.e. 56 days), the occupancy was even more than double the bed capacity, with a peak in April and early June, when over 1,000 new arrivals stayed for several days in the "hotspot". In the case of large-scale arrivals, additional mattresses would be placed on the floors throughout the establishment."¹²

⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Italy*, CAT/OP/ITA/1, 23 September 2016, §81

⁷ ASGI et al., *Scenari di frontier: il caso Lampedusa*, October 2018

⁸ National Guarantor for the Rights of persons detained or deprived of their Liberty, *Report to the Parliament*, June 2018, p. 233.

⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Italian Government on the visit to Italy carried out from 7 to 13 June 2017*, CPT/Inf (2018) 13, Strasbourg, 10 April 2018, §20

¹⁰ Melting pot <https://www.meltingpot.org/Il-confine-Lampedusa-Prassi-illegittime-indifferenza-e.html#nb2>

¹¹ Lampedusa, l'hotspot è sovraffollato. I migranti di Open Arms in 8 in una stanza, https://palermo.repubblica.it/cronaca/2019/08/22/foto/lampedusa_1_hotspot_e_sovraffollato_i_migranti_di_open_arms_8_in_una_stanza-234093874/1/

¹² European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Italian Government on the visit to Italy carried out from 7 to 13 June 2017*, CPT/Inf (2018) 13, Strasbourg, 10 April 2018, §19

In this regard, the Committee Against Torture noted that in Lampedusa Hotspot, women and minors are not always provided with separate accommodation, due to limited facilities¹³. This impact their private life and certainly increases their vulnerability.

According to Civil Society organizations that submitted alternative reports to the UN CAT after visiting the center in 2018 and 2019, sanitary facilities at the hotspot did not have doors, there was no cafeteria, and mattresses were "dirty and in poor condition." They reported that people were sleeping "in large rooms that can host up to 36 people without any separation between men, women, and children," and that hot water "is only ensured for one hour per day, while running water in the bathrooms is suspended between the hours of 9pm and 7am "and security practically non-existent"¹⁴. The Italian NPM confirmed that in 2016/2017 the hygienic conditions of the center were barely acceptable¹⁵. Given these conditions the CPT, estimated that "even if one accepts that overcrowding is hard to avoid in the days immediately following large- scale arrivals, these figures suggest that the current capacity is *structurally* too low and should be increased"¹⁶.

2. Material conditions of detention as violation of article 3 of the ECHR

Substandard detention conditions may potentially amount to inhuman or degrading treatment either and may increase the risk of further violations of economic, social and cultural rights, including the right to health, food, drinking water and sanitation¹⁷. The violation of the article 3 of the ECHR can be characterized by either a simple lack of basic services necessary for a decent human life and dignity or when these substandards deliberately inflict sufferings to the persons under their control and ignore through omission and negligence their obligations. The qualification of violation of article 3 of the convention can obey to either one or both criteria.

A- Material conditions of detention as absence of dignity

The Standard Minimum Rules for the Treatment of Prisoners provide that material conditions of detention should include, inter alia, accommodation, personal hygiene, clothing, bedding, food, exercise, access to newspapers, books and religious advisers, communication with the

¹³ Idem

¹⁴ Rights violations, "violence against migrants" at Lampedusa, <https://www.infomigrants.net/en/post/8565/rights-violations-violence-against-migrants-at-lampedusa>, 2018/04/11

¹⁵ National Guarantor for the Rights of persons detained or deprived of their Liberty, Report on visits to CIEs and Hotspot in Italy 2016/2017, pp. 30-38, <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/6f1e672a7da965c06482090d4dca4f9c.pdf>

¹⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Report to the Italian Government on the visit to Italy carried out from 7 to 13 June 2017, CPT/Inf (2018) 13, Strasbourg, 10 April 2018, §19

¹⁷ François Crépeau, Report of the Special Rapporteur on the human rights of migrants, Human Rights Council Twentieth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, A/HRC/20/24, 2 April 2012

outside world and medical services. The absence or insufficient fulfilment of these material conditions in detention facilities irrespective of their consequences or the intention of the duty bearers could be qualified as a violation of article of the convention simply because they are inappropriate for human dignity.

An important number of decisions by several treaty bodies at UN and regional level simply show that material conditions of detention could amount to either torture or ill-treatments when basic services are not provided and the standards in detention facilities are very low. The UN CAT in its General Comments N°4 stressed the obligation for States parties to not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods¹⁸.

The United Nations Subcommittee for the Prevention of Torture (SPT) has long considered that high rate “of overcrowding is tantamount to cruel, inhuman or degrading treatment, or even to a form of torture when it is prolonged and when it is combined with an absence of minimum acceptable material conditions, in the sight and knowledge of state authorities”¹⁹.

The African Commission on Human and People’s Rights frequently concluded in its recommendations that the conditions of overcrowding in prisons²⁰ and the situation of overpopulated cells lacking in hygiene and access to medical care contravened the article 5 of the Convention²¹.

Last, the European Court of Human Rights itself constantly corroborated this conclusion as illustrated in th case *Karalevičius v. Lithuania*, where it considered “the extreme lack of space as a central factor in its analysis of compliance of the applicant’s detention conditions with Article 3”²² and this jurisprudence has been applied to immigration detention cases.

B- Material conditions of detention repercussions on human rights

The second criteria to meet the threshold of the violation of article 3 lies on severity of the context, the purpose of the detention, the effects on the victim and the actual status and vulnerability of the victim. In clear the violation of the article 3 is justified by the consequence of the living condition conditions on the mental or physical health of prisoners. This has been confirmed by the UN Committee against Torture that has identified “serious overcrowding”

¹⁸ Committee against Torture, General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, , CAT/C/GC/4, 4 September 2018, §14

¹⁹ *Visite au Togo du 1^{er} au décembre 2014 : observations et recommandations adressées à l’Etat partie, Rapport établi par le SPT, 28 Avril 2017, CAT/OP/TGO/1, §30*

²⁰ *Affaire Achutan (au nom de Banda) et Amnesty International (au nom de Orton et Vera Chirwa) c. Malawi* (1995), CADHP, Communications N°s 64/1992, 68/1992, et 78/1992, 18e session, 2 –11 octobre 1995, §7

²¹ *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), §115

²² *CASE OF KARALEVIČIUS v. LITHUANIA* (Application no. 53254/99), JUDGMENT STRASBOURG 7 April 2005

as one of the “[p]oor prison conditions that affect the health of both inmates and wardens”²³. The United Nations Special Rapporteur on Torture has also addressed the impact of poor environmental conditions, noting that “overcrowding, inadequate sanitation and hygiene, lack of food and medical assistance, not only may put at risk the physical integrity of detainees, but have far-reaching consequences on their mental integrity”³²⁴.

The Human Rights Committee has a long jurisprudence that concludes that: “*inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.*”²⁴ In a number of individual applications including *Kelly v. Jamaica*²⁵; *Shaw v. Jamaica*²⁶; *Bozize v. Central African Republic*²⁷; *Leslie v. Jamaica*²⁸, the Human Rights Committee has estimated that the impact of unhygienic conditions could be qualified as cruel, inhuman or degrading treatment because of their impact on the health of the applicants. The reasoning was convoked by the UN Human Rights Committee who estimated that the ‘Lack of’ or ‘poor’ sanitary facilities in prisons contributed to both deaths in custody and high rates of infectious diseases²⁹. It has also identified “lack of . . . sanitation” as a condition that might “damage prisoners’ health”³⁰.

C- Vulnerability: Migrants, Women and Children more at risk of ill-treatments

Both criteria are not contradictory but rather complementary especially when they are applied to the vulnerable groups like migrants and asylum seekers. In its General Comment N°2 the UN CAT estimated that people deprived of liberty including migrants and asylum seekers are the most at risk of ill-treatment and should not only protected but also prevented through the implementation of positive measures³¹.

²³ RICK LINES, “The right to health of prisoners in international human rights law”, in *International Journal of Prisoner Health*, March 2008; 4(1), p. 33

²⁴ *Brough v Australia*, HRC Communication No. 1184/2003, 17 March 2006, §9.2.

²⁵ *Kelly v. Jamaica* (2 April 1991) UN Doc CCPR/C/41/D/253/1987, § 3.8

²⁶ *Shaw v. Jamaica* (2 April 1998) UN Doc CCPR/C/62/D/704/1996, § 7.2;

²⁷ *Bozize v. Central African Republic* (7 April 1994) UN Doc CCPR/C/50/D/428/1990, §2.2

²⁸ *Leslie v. Jamaica* (31 July 1998) UN Doc CCPR/C/63/D/564/1993, § 3.8

²⁹ Human Rights Committee ‘Concluding Observations: Togo’ (2002) UN Doc A/58/40 vol I 36, §78(15); Human Rights Committee ‘Concluding Observations: Nigeria’ (1996) UN Doc A/51/40 vol I 37, §285.; Human Rights Committee ‘Concluding Observations: Georgia’ (1997) UN Doc A/52/40 vol I 40, §243.

³⁰ Human Rights Committee ‘Concluding Observations: Portugal’ (2003) UN Doc A/58/40 vol I 56, § 83(11); Human Rights Committee ‘Concluding Observations: Cambodia’ (1999) UN Doc A/54/40 vol I 57, § 306; Human Rights Committee ‘Concluding Observations: Congo’ (2000) UN Doc A/55/40 vol I 43, § 282; Human Rights Committee ‘Concluding Observations: Mongolia’ (2000) UN Doc A/55/40 vol I 49, §332; Human Rights Committee ‘Concluding Observations: Syrian Arab Republic’ (2001) UN Doc A/56/40 vol I 70, §81(13)

³¹ Committee against torture, Convention against torture and other cruel, inhuman or degrading treatment or punishment, General Comment N° 2, Implementation of article 2 by States parties, CAT/C/GC/2 24 January 2008, §21

In its Concluding observations regarding Italy's implementation of the Convention, the UN CAT noted that "there is also a lack of clear guidelines, clear procedures and a clear division of responsibilities as regards the identification of vulnerable people and of individuals in need of international protection"³². The protection of vulnerable groups is essential and should be subjected to specific measures, procedures, guidelines and mechanisms.

In the context of migration, respect for family unity and the right to family life requires States not only to refrain from actions which would result in family separations but also to take measures to maintain family unity and reunite separated family members³³. In any case detention of children is very complex especially when many migrants' families are put together in facilities that are not separated. The Special rapporteur on human rights of migrants notes that "when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to provide alternative measures to detention for the entire family"³⁴.

Moreover, detention of migrant children whether separated or not from their families often occurs in appalling physical and grossly inadequate conditions. Overcrowding, restriction of movement within the facility, insufficient access to food, water and sanitation, medical care and other essential services, and lack of recreation and educational activities are among the most common issues. Children can victims or witnesses of abuses by State officials, private guards or fellow detainees, including torture and ill-treatment, systematic extortion, sexual abuse and even enslavement. Detention conditions may also have a gendered impact. The Special rapporteur notes that "Immigration detention, even in the most amenable conditions and for a short duration, can have a profound and negative impact on children and may constitute a form of cruel, inhuman or degrading treatment of migrant children (A/HRC/28/68, para. 80)"³⁵

Conclusion

In conclusion, based on the reports, concluding observations and recommendations and individual complaints submitted to the CAT and other treaty bodies as well as the views of special mechanisms of the Human Rights Council, the material condition of detention in immigration facilities can be qualified as ill-treatments. The reality in hotspots in Italy and Greece during the last years, shows that this is even more relevant. "it is clear that any detention regime which, as a matter of deliberate policy or as a consequence of negligence, complacency or impunity, subjects or exposes migrants to treatment or conditions of

³² Committee against Torture, Concluding observations on the combined fifth and sixth periodic reports of Italy, CAT/C/ITA/CO/5-6, 18 december 2017

³³ Felipe González Morales, Report of the Special Rapporteur on the human rights of migrants, Ending immigration detention of children and providing adequate care and reception for them, Seventy-fifth session, Item 72 (b) of the preliminary listA/75/183, 20 July 2020 § 23

³⁴ Idem

³⁵ Idem

detention grossly inconsistent with universally recognized standards, most notably the "Nelson Mandela Rules", is incompatible with the prohibition of torture and ill-treatment, regardless of economic or budgetary considerations"³⁶.

³⁶ Rapport du Rapporteur spécial sur la torture et autres peines ou traitements cruels, inhumains ou dégradants, A/HRC/37/50, Conseil des droits de l'homme Trente-septième session, 26 février-23 mars 2018, §20,