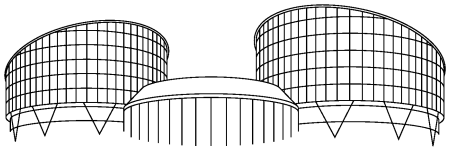

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KHLAIFIA AND OTHERS v. ITALY

(Application no. 16483/12)

JUDGMENT

STRASBOURG

1 September 2015

Referred to the Grand Chamber

01/02/2016

This judgment may be subject to editorial revision.

In the case of Khlaifia and Others v. Italy,

The European Court of Human Rights, sitting as a Chamber composed of:

Işıl Karakaş, *President,*
Guido Raimondi,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Robert Spano, *Judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 June 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 16483/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Tunisian nationals, Mr Saber Ben Mohamed Ben Ali Khlaifia, Mr Fakhreddine Ben Brahim Ben Mustapha Tabal and Mr Mohamed Ben Habib Ben Jaber Sfar ("the applicants"), on 9 March 2012.

2. The applicants were represented by Mr L. Masera and Mr S. Zirulia, lawyers practising in Milan. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora.

3. The applicants alleged that their placement in a reception centre for illegal entrants had been in breach of Articles 3 and 5 of the Convention. They also argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights.

4. On 27 November 2012 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1983, 1987 and 1988 respectively. Mr Khlaifia (the "first applicant") lives in Om Laarass (Tunisia); Mr Tabal

and Mr Sfar (the "second applicant" and the "third applicant") live in El Mahdia (Tunisia).

A. The applicants' arrival on the Italian coast and their removal to Tunisia

6. On 16 and 17 September 2011 the applicants – the first, then the second and third, respectively – left Tunisia with others on board rudimentary vessels heading for the Italian coast. After several hours at sea, their vessels were intercepted by the Italian coastguard, which escorted them to a port on the island of Lampedusa. The applicants arrived on the island on 17 and 18 September 2011 respectively.

7. The applicants were transferred to an Early Reception and Aid Centre (*Centro di Soccorso e Prima Accoglienza* – "CSPA") at Contrada Imbriacola where, after giving them first aid, the authorities proceeded with their identification.

8. They were accommodated in a part of the centre reserved for adult Tunisians. According to the applicants, they were held in an overcrowded and dirty area and were obliged to sleep on the floor because of the shortage of available beds and the poor quality of the mattresses. Meals were eaten outside, sitting on the ground. The centre was kept permanently under police surveillance, making any contact with the outside world impossible.

9. The applicants remained in that centre until 20 September, when a violent revolt broke out among the migrants. The premises were gutted by fire and the applicants were taken to a sports complex on Lampedusa for the night. At dawn on 21 September they managed, together with other migrants, to evade the police surveillance and walk to the village of Lampedusa. From there, with about 1,800 other migrants, they started a demonstration through the streets of the island. After being stopped by the police, the applicants were taken first back to the reception centre and then to Lampedusa airport.

10. On the morning of 22 September 2011 the applicants were flown to Palermo. After disembarking they were transferred to ships that were moored in the harbour there. The first applicant was placed on the *Vincent*, with some 190 individuals, while the second and third applicants were on board the *Audace*, holding about 150.

11. The applicants described the conditions as follows. All the migrants on each vessel were confined to the restaurant areas, access to the cabins being prohibited. They slept on the floor and had to wait several hours to use the toilets. They could only go outside onto the balconies twice a day for a few minutes at a time. They were allegedly insulted and ill-treated by the police who kept them under permanent surveillance and they claimed not to have received any information from the authorities.

12. The applicants remained on the ships until 27 and 29 September, respectively, when they were taken to Palermo airport pending removal.

13. Before being put on the aircraft, the migrants were received by the Tunisian Consul. According to the applicants, the Consul merely recorded their identities in accordance with agreements between Italy and Tunisia of April 2011 (see paragraphs 28-30 below).

14. On their application form the applicants claimed that at no time during their stay in Italy had they been issued with any document.

Annexed to their observations, the Government, however, produced three refusal-of-entry orders dated 27 and 29 September 2011 that had been issued against the applicants. Those orders, which were basically identical and drafted in Italian with a translation into Arabic, read as follows:

"The Commissioner of Police (*Questore*) for the Province of Agrigento

Having regard to the documents in the file, showing that

(1) on 17 [18] September 2011 members of the police force found in the province of Agrigento, near the border of island of Lampedusa, Mr [surname and forename] born ... on [date] ... Tunisian national ... not fully identified, being undocumented (*sedicente*);

(2) the alien entered the territory of the country by evading the border controls;

(3) the identification (*rintraccio*) of the alien took place on/immediately after his/her arrival on national territory, and precisely at: island of Lampedusa;

WHEREAS none of the cases [indicated in] Article 10 § 4 of Legislative Decree no. 286 of 1998 is at issue;

CONSIDERING that it is appropriate to proceed in accordance with Article 10 § 2 of Legislative Decree no. 286 of 1998;

ORDERS

that the above-mentioned person be

REFUSED LEAVE TO ENTER AND RETURNED

INFORMS [AS FOLLOWS]

- An appeal may be lodged against the present order within a period of sixty days from the date of its service, with the Justice of the Peace of Agrigento.

- The lodging of an appeal does not suspend the enforcement (*efficacia*) of the present order.

- The director of the Migration Office will proceed, for the enforcement of the present order, with its service, together with a summary translation into a language spoken by the alien or into English, French or Spanish; and with its transmission to the diplomatic or consular delegation of the State of origin, as provided for by Article 2 § 7 of Legislative Decree no. 286 of 1998; and with its registration under Article 10 § 6 of the said Legislative Decree.

To be escorted to the border at: Rome Fiumicino

[Issued at] Agrigento [on] 27[29]/09/2011 on behalf of the Commissioner of Police

[Signature]"

15. These orders were accompanied by a record of service, each with the same date, also drafted in Italian with an Arabic translation. In the space reserved for the applicants' signatures, both documents contain the handwritten indication "[the person] refused to sign or to receive a copy" (*si rifiuta di firmare e ricevere copia*).

16. On their arrival at Tunis airport, the applicants were released.

B. Decision of the Palermo preliminary investigations judge

17. Anti-racism associations filed a complaint about the treatment to which the migrants had been subjected, after 20 September 2011, on board the ships *Audace*, *Vincent* and *Fantasy*.

18. Criminal proceedings for abuse of power and unlawful arrest (Articles 323 and 606 of the Criminal Code) were opened against a person or persons unknown. On 3 April 2012 the public prosecutor sought to have the charges dropped.

19. In a decision of 1 June 2012 the preliminary investigations judge (*giudice per le indagini preliminari*) of Palermo granted the public prosecutor's request.

20. In his reasoning the judge emphasised that the purpose of placing the migrants in the CSPA was to accommodate them and to cater for their hygiene-related needs for as long as was strictly necessary, before sending them to an Identification and Removal Centre (*Centri di Identificazione ed Espulsione* – "CIE") or taking any measures in their favour. At the CSPA the migrants could obtain legal assistance and information about asylum application procedures.

The judge shared the public prosecutor's view that the interpretation of the conditions concerning the grounds for and duration of the confinement of migrants in a CSPA was sometimes vague. He found, however, that a range of factors were to be taken into consideration, leading to the conclusion that the facts of the case could not be characterised as a criminal offence ("*una tendenziale forzatura dei requisiti della 'strumentalità' e della 'ristrettezza temporale' è spesso causata da una molteplicità di fattori che escludono con sicurezza la possibilità di configurare, in tali fattispecie, illeciti di rilievo penale*").

He noted that the Office of the Commissioner of Police (*Questura*) of Agrigento had merely registered the presence of the migrants at the CSPA without taking any decisions ordering their placement.

21. According to the judge, the precarious balance on the island of Lampedusa had been upset on 20 September 2011, when a group of Tunisians had carried out an arson attack, seriously damaging the CSPA of Contrada Imbriacola and rendering it incapable of fulfilling its purpose of accommodating and assisting migrants. The authorities had then organised transfer by air and sea to evacuate migrants from Lampedusa. The following

day, clashes had taken place in the island's port between the local population and a group of foreigners who had threatened to explode gas bottles. There had thus been a situation which was likely to degenerate, and which was covered by the notion of "state of necessity" (*stato di necessità*) as provided for in Article 54 of the Criminal Code (see paragraph 32 below). It was thus an imperative, according to the judge, to organise the transfer of some of the migrants by using, among other means, the ships.

As to the fact that, in the emergency situation, no formal decision had been taken to place the migrants on board the ships, the judge found that this could not be regarded as an unlawful arrest and that the conditions for the migrants' transfer to CIEs were not satisfied. Firstly, the CIEs were overcrowded; secondly, the agreements with the Tunisian authorities suggested that their return was supposed to be prompt. The fact that a refusal-of-entry measure (*respingimento*) had been taken against the migrants, without judicial scrutiny, a few days after their arrival, was not unlawful in the judge's view. The calculation of a "reasonable time" for the adoption of that measure and for the migrants' stay in the CSPA had to take account of logistical difficulties (state of the sea, distance between Lampedusa and Sicily) and of the number of migrants concerned. In those circumstances, the judge concluded, there had been no breach of the law.

Moreover, the judge was of the view that no malicious intent could be attributed to the authorities, whose conduct had been prompted first and foremost by the public interest. The migrants had not sustained any unfair harm (*danno ingiusto*).

22. In so far as the complainants had alleged that the way in which the migrants had been treated had been detrimental to their health, the judge noted that the investigations had found that nobody on the ships had applied for asylum. Those who, at the Lampedusa CSPA, had expressed an intention to do so, together with any vulnerable individuals, had been transferred to the centres of Trapani, Caltanissetta and Foggia. Unaccompanied minors had been placed in temporary accommodation and no pregnant women were transferred to the ships. The migrants on board had been able to receive medical assistance, hot water, electricity, meals and hot drinks. Moreover, as recorded in a press agency note of 25 September 2011, a member of parliament had boarded one of the ships in the port of Palermo, and had observed that the migrants were in good health, that they were receiving assistance and were sleeping in cabins containing bed linen or reclinable chairs (*poltrone reclinabili*). Some of the Tunisians had been taken to hospital, others had been treated on board by medical staff. Accompanied by the Deputy Commissioner of Police (*vice questore*) and by police officers, the MP in question had talked with some of the migrants. He had thus been able to observe that they had access to prayer rooms, that the food was satisfactory (pasta, chicken, vegetables, fruits and water) and that the Civil Protection authority (*Protezione civile*) had provided them with

clothing. Some of the migrants had complained of a lack of razors, but the MP had observed that this could be explained by a measure taken to prevent self-harm.

23. The judge noted that, even though the migrants had not been in custody or under arrest, a photograph published in a newspaper had shown one of them with his hands bound by black ribbons and in the company of a police officer. He had been part of a small group of individuals who, fearing immediate removal, had engaged in acts of self-harm and had caused damage to buses. In the judge's view, the restraint in question had been necessary to guarantee the physical well-being of the persons concerned and to avoid aggressive acts against police officers who were neither armed nor equipped with any means of coercion. In any event, the conduct of the police officers had been justified by a "state of necessity", within the meaning of Article 54 of the Criminal Code (see paragraph 32 above).

24. In the light of the foregoing, the preliminary investigations judge took the view that the file contained no evidence of the physical and mental elements of the offences provided for in Articles 323 and 606 of the Criminal Code.

C. Decisions of the Agrigento Justice of the Peace

25. Two of the migrants against whom a refusal-of-entry order had been issued challenged those orders before the Justice of the Peace for Agrigento.

26. In two decisions (*decreti*) of 4 July and 30 October 2011, respectively, the Justice of the Peace annulled those orders.

In his reasoning the Justice of the Peace observed that the complainants had been found on Italian soil on 6 May and 18 September 2011, respectively, and that the orders at issue had been adopted only on 16 May and 24 September 2011. Admittedly, Article 10 of Legislative Decree no. 286 of 1998 (paragraph 27 below) did not indicate any time-frame for the adoption of such orders. Nevertheless, in his view, a measure which by its very nature restricted the freedom of the person concerned had to be taken within a reasonably short time after the identification (*fermo*) of the unlawful migrant. To find otherwise, concluded the judge, amounted to allowing *de facto* detention of the migrant in the absence of any reasoned decision of the authority, which would contravene the Constitution.

II. RELEVANT DOMESTIC LAW AND INSTRUMENTS

A. Legislation on the removal of unlawful migrants

27. Legislative Decree (*decreto legislativo*) no. 286 of 1998 ("Consolidated text of provisions concerning immigration regulations and

rules on the status of aliens"), as amended by Laws no. 271 of 2004 and no. 155 of 2005, and by Legislative Decree no. 150 of 2011, provided in particular as follows:

Article 10 (refusal of entry)

"1. The border police refuses entry (*respinge*) to aliens who seek to cross the border without meeting the conditions laid down in the present consolidated text governing entry into the territory of the State.

2. Refusal of entry combined with removal shall, moreover, be ordered by the Commissioner of Police (*questore*) in respect of aliens:

(a) who have entered the territory of the State by evading border controls, when they are arrested on entry or immediately afterwards;

(b) or who have been granted temporary leave to remain for purposes of public assistance.

...

4. The provisions of paragraphs 1 [and] 2 ... do not apply to the cases provided for in the applicable provisions governing political asylum, the grant of refugee status or the adoption of temporary protection measures on humanitarian grounds.

..."

Article 13 (administrative deportation and removal)

"1. For reasons of public order or national security the Minister of the Interior may order the deportation of an alien, even if he or she [does not reside] in the territory of the State, giving prior notice thereof to the Chair of the Council of Ministers and the Minister for Foreign Affairs.

2. The prefect shall give directions for removal where the alien:

(a) has entered the territory of the State by evading border controls and has not already been refused entry under Article 10 hereof;

...

8. An appeal may be lodged against a deportation or removal order with the judicial authority ..."

Article 14 (execution of removal measures)

"1. Where, in view of the need to provide assistance to an alien, to conduct additional checks of his or her identity or nationality, or to obtain travel documents, or on account of the lack of availability of a carrier, it is not possible to ensure the prompt execution of the removal measure by escorting the person to the border or by refusing entry, the Commissioner of Police (*questore*) shall order that the alien be held for as long as is strictly necessary at the nearest Identification and Removal Centre [CIE], among those designated or created by order of the Minister of the Interior in collaboration (*di concerto*) with the Minister for Social Solidarity and the Treasury, the Minister for the Budget, and the Minister for Economic Planning.

..."

B. Bilateral agreement with Tunisia

28. On 5 April 2011 the Italian Government concluded an agreement with Tunisia on measures to control the flow of unlawful migrants from that country.

29. The text of the agreement has not been made public. According to a press release on the website of the Italian Ministry of the Interior dated 6 April 2011, Tunisia undertook to strengthen its border controls with the aim of avoiding fresh departures of clandestine migrants, using logistical resources made available to it by the Italian authorities.

30. In addition, Tunisia undertook to accept the immediate return of Tunisians who had unlawfully reached the Italian shore after the date of the agreement. Tunisian nationals could be returned by means of simplified procedures, involving the mere identification of the person concerned by the Tunisian consular authorities.

C. Italian Senate

31. On 6 March 2012 the Italian Senate's Special Commission for Human Rights (the "Senate's Special Commission") approved a report "on the state of [respect for] human rights in prisons and reception and detention centres in Italy". Visited by the Commission on 11 February 2009, the Lampedusa CSPA is described particularly in the following passages:

> "The reception at the Lampedusa centre should have been limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his presence in Italy or to decide on his removal. In reality, as already denounced by the UNHCR and a number of organisations operating on the spot, the duration of such stays has sometimes extended to over twenty days without there being any formal decision as to the legal status of the person being held. Such prolonged confinement, combined with an inability to communicate with the outside world, and the lack of freedom of movement, without any legal or administrative measure providing for such restrictions, has led to heightened tension, often manifested in acts of self-harm. Numerous appeals by organisations working on the island have been made concerning the lawfulness of the situation there."

> "The rooms measure about 5 x 6 metres: they are supposed to accommodate 12 persons. In them can be found, next to each other, bunk beds with four levels, occupied by up to 25 men per room ... In many of the blocks, foam-rubber mattresses are placed along the corridor. In many cases the foam-rubber from the mattresses has been torn away to be used as a cushion. In some cases, double mattresses, protected by improvised covers, have been placed on the landings, outside ... On the ceiling, in many rooms, the plastic shade around the light has been removed and the bulb has disappeared. At the end of the corridor, on one side, there are toilets and showers. There is no door and privacy is ensured by cloth or plastic curtains placed in an improvised and haphazard manner. There are no taps and water flows from the pipes only when centrally activated. The pipes sometimes get blocked; on the floor, water or other liquids run as far as the corridor and into the rooms where the foam-rubber mattresses lie. The smell from the toilets pervades the whole area. When it starts to

rain, those on the metal staircases, who have to go up to the floor above, get wet and take dampness and dirt into the living quarters."

D. Criminal Code

32. Article 54 § 1 of the Criminal Code reads, in its relevant part, as follows:

"Acts committed under the constraint of having to save [the perpetrator or a third party] from an instant danger of serious bodily harm shall not be liable to punishment, provided that such danger has not been voluntarily caused [by the perpetrator] and cannot otherwise be avoided, and provided that the said act is proportionate to the danger. ..."

III. RELEVANT INTERNATIONAL LAW MATERIAL

33. The facts of the case are connected with the large-scale arrival of unlawful migrants on the Italian coast in 2011 following, in particular, the uprisings in Tunisia and the conflict in Libya.

A. Council of Europe's Parliamentary Assembly

34. In that context the Council of Europe's Parliamentary Assembly (PACE) set up an "Ad Hoc Sub-Committee on the large-scale arrival of irregular migrants, asylum-seekers and refugees on Europe's southern shores" (the "PACE Ad Hoc Sub-Committee"), which carried out a fact-finding visit to Lampedusa on 23 and 24 May 2011. A visit report was published on 30 September 2011. Its relevant passages read as follows:

"...

II. History of Lampedusa as a destination for mixed migration flows

...

9. Because of its geographical location close to the African coast, Lampedusa has experienced several episodes in which it has had to cope with a large influx by sea of people wanting to go to Europe (31 252 in 2008; 11 749 in 2007; 18 047 in 2006; 15 527 in 2005).

10. The numbers arriving fell sharply in 2009 and 2010 (2 947 and 459, respectively) following an agreement between Italy and Muammar Gaddafi's Libya. This agreement drew strong criticism because of the human rights violations in Libya and the appalling living conditions of migrants, refugees and asylum-seekers in the country. It also drew criticism, subsequently validated by UNHCR, that it risked denying asylum seekers and refugees access to international protection. It did however prove extremely effective in halting the influx and as a result, the island's reception centres were then closed and the international organisations active in Lampedusa withdrew their field presence.

11. In 2011, following the uprisings in Tunisia and then in Libya, the island was confronted with a fresh wave of arrivals by boat. Arrivals resumed in two stages. The

first to arrive on the island were Tunisians, followed by boats from Libya, among which many women and young children. The influx began on 29 January 2011 and the population of the island was quickly multiplied by two.

12. Following these arrivals, Italy declared a humanitarian emergency in Lampedusa and called for solidarity from the European Union member states. The Prefect of Palermo was given emergency powers to manage the situation.

13. As of 21 September 2011, 55 298 people had arrived by sea in Lampedusa (27 315 from Tunisia and 27 983 from Libya, mainly nationals of Niger, Ghana, Mali and the Côte d'Ivoire.

...

V. The players on the ground and their responsibilities

26. The Prefecture of the province of Agrigento is responsible for all questions relating to the reception of persons arriving on the island until they are transferred elsewhere. The prefecture also oversees the *Accoglienza* private co-operative which manages the island's two reception centres. The immigration police office of the province of Agrigento is responsible for identifying new arrivals, transferring them and repatriating them if necessary. Since 13 April 2011, the Italian civil protection department has been co-ordinating the management of migration flows from North Africa.

27. The international community is also active on the ground. The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the Red Cross, the Order of Malta and the NGO Save the Children have teams on the spot.

28. UNHCR, the IOM, the Red Cross and Save the Children are part of the 'Praesidium Project' and are helping to manage the arrivals of mixed migration flows by sea on Lampedusa. These organisations are authorised to maintain a permanent presence inside the Lampedusa reception centres and have interpreters and cultural mediators available. They dispatched teams to Lampedusa straight away in February 2011 (as noted earlier, their operation had been suspended when the arrivals decreased). The Praesidium Project, which has since been extended to other centres in Italy, stands as an example of good practice in Europe and the organisations involved have jointly published a handbook on management of mixed migration flows arriving by sea (for the time being in Italian only, but soon to be translated into English).

29. The members of the Ad Hoc Sub-Committee found that all these players are working on good terms and are endeavouring to co-ordinate their efforts, with the shared priority of saving lives in sea rescue operations, doing everything possible to receive new arrivals in decent conditions and then assisting in rapidly transferring them to centres elsewhere in Italy.

VI. Lampedusa's reception facilities

30. It is essential for transfers to centres elsewhere in Italy to be effected as quickly as possible because the island's reception facilities are both insufficient to house the number of people arriving and unsuitable for stays of several days.

31. Lampedusa has two reception centres: the main centre at Contrada Imbriacola and the Loran base.

32. The main centre is an initial reception and accommodation centre (CSPA). The Ad Hoc Sub-Committee was informed by the director of the centre that its capacity varies from 400 to 1000 places. At the time of the visit, 804 people were housed there.

Reception conditions were decent although very basic. The rooms were full of mattresses placed side by side directly on the ground. The buildings, which are prefabricated units, are well ventilated because the rooms have windows and the sanitary facilities seem sufficient when the centre is operating at its normal capacity.

33. At the time of the Ad Hoc Sub-Committee's visit, the centre was divided in two. One part was reserved for persons arriving from Libya and unaccompanied minors (including unaccompanied Tunisian minors). The other part, a closed centre within the centre (itself closed), was reserved for Tunisian adults.

...

VIII. Health checks

41. The many health teams of the various organisations present (Red Cross, MSF, Order of Malta) and the numerous regional teams are co-ordinate by the Head of the Palermo Health Unit.

42. As soon as coastguards become aware of a boat arriving, they advise the medical co-ordinator and inform him of the number of people on board. All the persons concerned are then immediately informed and put on alert whatever the time of day or night.

43. Initial checks on the state of health of persons arriving are carried out in the port, as soon as they have disembarked. Prior to that, Order of Malta members/doctors accompany the coastguard or customs services on interception and rescue operations at sea. They inform the medical teams on hand at the port of any cases possibly requiring specific and immediate medical treatment.

44. On reaching the port, the new arrivals are quickly classified according to their needs using a clear colour-coding system. People requiring hospital treatment are transferred by helicopter to Palermo or elsewhere. The hospitals are obliged to accept these patients, even if their capacity is exceeded.

45. Sometimes there is not enough time to carry out initial checks on all those arriving at the port, and checks therefore have to be continued at the reception centres. Emphasis has been placed on the need also to achieve maximum standardisation of the procedures used at the centres.

46. The most common problems are: sea sickness, disorders of the upper respiratory tract, burns (fuel, sea water, sun or a combination of the three), dehydration, generalised pain (due to posture in the boat), psychological disorders or acute stress (because of the high risk of losing one's life during the crossing). Some people arriving from Libya were suffering from acute stress even before starting the crossing. New arrivals are extremely vulnerable people who may have suffered physical and/or psychological violence and their trauma is sometimes due to the way they have been treated in Libya. There are also many pregnant women who require closer examination. Some cases of tuberculosis have been detected. The persons concerned are immediately placed in quarantine in a hospital.

47. Only a general evaluation is made of the state of health of new arrivals in Lampedusa. An individual assessment is not possible on the island and is carried out elsewhere after transfer. Anyone wishing to be examined can be, and no request to this effect is refused. A regular inspection of the sanitary facilities and food at the centres is carried out by the Head of the Palermo Health Unit.

48. MSF and the Red Cross voiced concerns regarding health conditions in the centres when they are overcrowded. It was also pointed out that the Tunisians were

separated from the other new arrivals by a closed barrier and did not have direct access to the reception centre's medical teams.

IX. Information about asylum procedures

49. The UNHCR team provides new arrivals with basic information about existing asylum procedures, but it was stressed that Lampedusa was not the place to provide potential refugees and asylum seekers with exhaustive information on this subject. Relevant information and help with asylum application procedures are provided once the new arrivals have been transferred to other, less provisional reception centres elsewhere in Italy. If people express the wish to seek asylum, UNHCR passes on the information to the Italian police.

50. However, when large numbers of people arrive at the same time (which is increasingly the case) and transfers are carried out very quickly, the new arrivals are sometimes not informed about their right to request asylum. They receive this information at the centre to which they are transferred. This shortcoming in the provision of information about access to international protection may present a problem insofar as people of some nationalities are liable to be sent straight back to their countries of origin. As a rule, however, new arrivals are not in a position to be provided immediately with detailed information about access to the asylum procedure. They have other priorities: they are exhausted and disoriented and want to wash, eat and sleep.

X. Tunisians

51. In the recent spate of arrivals, they were the first to arrive in Lampedusa in February 2011. These arrivals were problematical for several reasons. As stated above, this was because arrivals by sea had decreased significantly in 2009 and 2010, and the island's reception centres had been closed. Tunisian migrants therefore found themselves on the streets, in appalling conditions. When the centres re-opened, they were immediately saturated. The Tunisians were subsequently transferred to holding centres elsewhere in Italy, then, once these were saturated, to open reception centres designed for asylum-seekers.

52. The fact that the vast majority of Tunisians are economic migrants and the difficulty of organising immediate returns to Tunisia, prompted the Italian authorities to issue a decree on 5 April 2011 granting them temporary residence permits valid for 6 months. Although 25 000 Tunisians had already arrived in Italy on that date, only 12 000 took advantage of this measure (the other 13 000 having already disappeared from the centres). The consequences of this measure are well-known: tensions with France and a serious re-assessment of freedom of movement in the Schengen area.

53. On 5 April 2011, Italy signed an agreement with Tunisia providing for a certain number of daily returns of Tunisian migrants arriving in Italy after that date. The text of the agreement has never been made public, but quotas of between 30 and 60 returns per day have been mentioned. At the time of the Ad Hoc Sub-Committee's visit, returns to Tunisia were suspended.

54. As a result of this suspension of returns, some 190 Tunisians were being held on the island at the time of the Ad Hoc Sub-Committee's visit. Some of them had been there for more than 20 days, in a closed centre inside the closed Contrada Imbriacola centre. Despite the authorities' claim that the Tunisians were not detainees because they were not in cells, the members of the Sub-Committee found that the conditions to which they were subjected were similar to detention and deprivation of freedom.

55. While the members of the Ad Hoc Sub-Committee appreciate the Italian authorities' concern to contain this wave of irregular immigration from Tunisia, some rules have to be observed where detention is concerned. The Contrada Imbriacola centre is not a suitable holding facility for irregular migrants. In practice, they are imprisoned there without access to a judge. As already pointed out by the Parliamentary Assembly in its Resolution 1707 (2010), '*detention shall be carried out by a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review*'. These criteria are not met in Lampedusa and the Italian authorities should transfer irregular migrants immediately to appropriate holding facilities, with the necessary legal safeguards, elsewhere in Italy.

56. Another key point made in this resolution is access to information. All detainees must be informed promptly, in a language that they can understand, '*of the essential legal and factual grounds for detention, their rights and the rules and complaints procedure in detention*'. While it is true that the Tunisians interviewed by the Ad Hoc Sub-Committee were perfectly aware that they had entered Italian territory illegally (in fact, it was not the first attempt for some of them and a number had already been sent back to Tunisia on previous occasions), the same is not true of information about their rights and procedures. The Italian authorities themselves were unable to tell the Ad Hoc Sub-Committee when returns to Tunisia would resume. As well as being a significant stress factor, this uncertainty highlights the inappropriateness of holding Tunisians on Lampedusa for long periods without access to a judge.

57. As mentioned earlier, on 20 September a fire severely damaged the main reception centre. It is reported that Tunisian migrants carried out the arson in protest to their detention conditions and their forthcoming forced return to Tunisia. It should be noted that on 20 September, more than 1 000 Tunisians were kept in detention on the island, 5 times more than at the time of the visit of the ad-hoc Sub-Committee.

58. With less than 200 Tunisians on the island, the ad hoc Sub-Committee was already not allowed to visit the closed part of the reception centre in which the Tunisians were kept. The authorities informed the members of the ad hoc Sub-Committee that for security reasons such a visit was not possible. They reported tensions inside this part of the Centre, as well as attempt of self harm by some of the Tunisians.

59. Considering that the authorities were already worried by a tense situation with less than 200 Tunisians in the Centre, the question occurs as to why more than 1 000 were kept in this very Centre on 20 September. As a matter of fact, this centre is neither designed nor legally designated as a detention centre for irregular migrants.

...

XIV. A disproportionate burden for the island of Lampedusa

77. The inadequate and belated management of the crisis early 2011 as well as the recent events will unquestionably have irreparable consequences for the inhabitants of Lampedusa. The 2011 tourist season will be a disaster. Whereas 2010 had seen a 25% increase in the number of visitors, from February 2011 onwards all advance bookings were cancelled. At the end of May 2011, none of the island's hotels had a single booking. Tourism industry professionals conveyed their feeling of helplessness to the Ad Hoc Sub-Committee. They had incurred expenditure on renovating or improving tourist facilities using the money paid for advance bookings. They had had to repay these sums when the bookings were cancelled and now find themselves in a precarious position, in debt and with no prospect of little money coming in for the 2011 season.

78. The members of the Ad Hoc Sub-Committee also saw the work involved in cleaning and in removal of the boats (or what remains of them, which is clogging up the harbour) and the potential danger that these boats or wrecks pose to water quality around the island, which has to meet strict environmental standards. These operations are also very costly (half a million euros for the 42 boats still afloat at the time of the visit, not to mention the 270 wrecks littering the island). Steps have been taken by the civil protection department to ensure that the boats are dismantled and any liquid pollutants are pumped out.

79. The dilapidated state of these boats reflects the degree of despair felt by people who are prepared to risk their lives crossing the Mediterranean on such vessels. The coastguards told the Ad Hoc Sub-Committee that only 10% of the boats arriving were in a good state of repair.

80. During the delegation's visit, representatives of the island's inhabitants (in particular people representing the hotel and restaurant trade) and the Mayor of Lampedusa put forward their ideas for remedying this disaster for the local economy. At no time did they say that they no longer intended to take in people arriving by boat - on the contrary. They did however ask for fair compensation for the losses entailed by their island's role as a sanctuary.

81. They therefore drew up a document containing several proposals, which they forwarded to the delegation. The key proposal is for the island to be recognised as a free zone. The delegation took due note of this proposal and of that concerning a one-year extension of the deadline for the inhabitants' tax payments. While recognising that these matters fall outside its mandate, the Ad Hoc Sub-Committee calls on the relevant Italian authorities to consider these requests in view of the heavy burden borne by the island and its inhabitants in the face of the influx of irregular migrants, refugees and asylum-seekers arriving by sea.

XV. Conclusions and recommendations

...

92. On the basis of its observations, the Ad Hoc Sub-Committee calls on the Italian authorities:

i. to continue to comply immediately and without exception with their obligation to rescue persons in distress at sea and to guarantee international protection, including the right of asylum and nonrefoulement;

ii. to introduce flexible measures for increasing reception capacities on Lampedusa;

iii. to improve conditions at the existing centres, and in particular the Loran base, while ensuring as a matter of priority that health and safety conditions meet existing standards – even when the centres are overcrowded – and carrying out strict and frequent checks to ensure that the private company responsible for running the centres is complying with its obligations;

iv. to ensure that new arrivals are able to contact their families as quickly as possible, even during their stay on Lampedusa, particularly at the Loran base, where there are problems in this regard;

v. to provide appropriate reception facilities for unaccompanied minors, ensuring that they are not detained and are kept separate from adults;

vi. to clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa;

vii. where Tunisians in particular are concerned, only to keep irregular migrants in administrative detention under a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review;

viii. to continue to guarantee the rapid transfer of new arrivals to reception centres elsewhere in Italy, even if their number were to increase;

ix. to consider the requests by the population of Lampedusa for support commensurate with the burden it has to bear, particularly in economic terms;

x. not to conclude bilateral agreements with the authorities of countries which are not safe and where the fundamental rights of the persons intercepted are not properly guaranteed, as in Libya."

B. Amnesty International

35. On 21 April 2011 Amnesty International published a report with the title "Amnesty International findings and recommendations to the Italian authorities following the research visit to Lampedusa and Mineo". The relevant passages of the report read as follows:

"**A humanitarian crisis of the Italian authorities' own making**

...

Since January 2011, there has been an increasing number of arrivals on Lampedusa from North Africa. As of 19 April, over 27,000 people had arrived in Italy, mostly on the small island. Despite the significant increase in arrivals, and the predictability of ongoing arrivals in light of unfolding events in North Africa, the Italian authorities allowed the large number of arrivals on Lampedusa to accumulate until the situation on the island became unmanageable. Lampedusa is dependent on the mainland for provision of almost all basic goods and services and is not equipped to be a large reception and accommodation centre, albeit it does have the basics to function as a transit centre for smaller numbers of people.

...

Lack of information about or access to asylum procedures

Given that, at the time of Amnesty International's visit on the island, UNHCR estimated that there were around 6,000 foreign nationals on Lampedusa, the number of people tasked with providing information regarding asylum was totally inadequate. As far as Amnesty International could determine, only a handful of individuals were providing basic information regarding asylum procedures, which was totally inadequate given the number of arrivals. Further, those arriving were provided with only a very brief medical assessment and a very basic screening. Moreover, there appeared to be an assumption that all Tunisian arrivals were economic migrants.

The fact that, at the time of Amnesty International's visit, foreign nationals had not been given proper information about access to asylum procedures, and were not being properly identified or screened, is a particular concern. The delegation spoke with people who had been given no, or very inadequate, information about asylum processes; in many cases they had been given no information about their situation at all. They had not been told how long they would have to stay on the island or what their eventual destination would be once moved off the island. Given that many of those arriving on Lampedusa had already endured extremely dangerous sea voyages,

including some whose fellow travellers had drowned at sea, the appalling conditions on the island and the almost total absence of information were clearly leading to considerable anxiety and mental stress.

In Amnesty International's view the asylum and reception systems had completely broken down due to the severe overcrowding caused by the total failure to organize timely and orderly transfers off the island.

Conditions in the 'Centres' of the island

In Lampedusa, the Amnesty International delegation visited both the main centre at Contrada Imbriacola, registering and accommodating male adults, mainly from Tunisia, and the Base Loran Centre, accommodating children and new arrivals from Libya.

The main centre at Contrada Imbriacola is equipped to function as a transit centre for relatively small numbers of people; its full capacity is just over 800 individuals. On 30 March, Amnesty International delegates spoke with people being accommodated at the centre, as they entered and exited. The delegation was not able to access the centre itself at that time, but was given access the following day when the centre had just been emptied, as all individuals were being moved off the island.

Those who had been living at the centre described appalling conditions, including severe overcrowding and filthy, unusable sanitary facilities. Some people told Amnesty International delegates that they had chosen to sleep on the streets rather than in the centre because they considered it so dirty as to make it uninhabitable. Amnesty International subsequently spoke to the centre's Director who confirmed the overcrowding stating that, on 29 March, it accommodated 1,980 people, more than double its maximum capacity.

Although Amnesty International was only able to visit the centre after it had been emptied, the conditions that the delegation witnessed corroborated the reports of former inhabitants. Notwithstanding an ongoing clean-up operation at the time of the visit, there was an overwhelming smell of raw sewage. The remains of makeshift tents were observed in the centre. Piles of refuse were still evident around the centre.

...

COLLECTIVE SUMMARY REMOVALS, REPORTEDLY OF TUNISIAN NATIONALS, FROM LAMPEDUSA, FROM 7 APRIL 2011 ONWARDS, FOLLOWING THE SIGNING OF AN AGREEMENT BETWEEN THE ITALIAN AND TUNISIAN AUTHORITIES

Amnesty International is extremely concerned by the enforced removal that began on 7 April from Lampedusa, following the recent signing of an agreement between the Tunisian and Italian authorities. At the time of writing these forcible returns were ongoing and had reportedly been carried out twice a day by air since 11 April.

On 6 April, the Italian Ministry of Interior announced that Italy had signed an agreement with Tunisia pursuant to which the latter committed itself to strengthening border controls with a view to preventing departures, and to accepting the speedy readmission of people who had recently arrived and who will be arriving in Italy. Amnesty International is particularly concerned that, according to the above-mentioned announcement, Tunisian migrants arriving onto Italian shores may be 'repatriated directly' and with 'simplified procedures'.

In the light of this announcement, and given, in particular, Amnesty International's findings in relation to the total inadequacy of asylum procedures on Lampedusa, the

organization believes that those people who have been subjected to 'direct repatriations' following 'simplified procedures' have been victims of collective summary removals.

As far as Amnesty International could ascertain, people have been removed from the island within one or two days of arrival. Thus, it appears highly unlikely that they would have had access to any meaningful or adequate opportunity to assert that they should not be returned to Tunisia on international protection or other grounds. In the circumstances those removals would amount to summary expulsions (cf. the judgments of the European Court of Human Rights in the case of *Hassanpour-Omrani v Sweden* and *Jabari v Turkey*). Such practices are strictly prohibited under international, regional and domestic human rights and refugee law and standards. Additionally human rights and refugee law and standards require that the removing State must provide an effective remedy against removal. Removing people without giving them the chance of exercising their right to challenge their removal through an effective procedure gives rise *per se* to a human rights violation. This is independent of whether removal would place the individuals concerned at a real risk of serious human rights violations, which, in turn, would constitute a breach of the *non-refoulement* principle.

..."

THE LAW

I. PRELIMINARY QUESTION

36. In a document of 9 July 2013 containing additional observations and submissions on just satisfaction, the Government for the first time raised an objection that domestic remedies had not been exhausted. They drew attention to the provision of Article 13 of Legislative Decree no. 286 of 1998, to the effect that: "an alien may ... lodge an appeal against a deportation or removal order with the Justice of the Peace for the place where the authority ordering the measure is based" (see paragraph 27 above). In their submission, the applicants had not availed themselves of that remedy.

37. In their observations of 23 May 2013, in reply to the Government's first observations, the applicants noted that in the last paragraph of the latter document of 25 September 2012, the Government had merely asked the Court to "declare the application inadmissible within the meaning of Article 35 § 1" without indicating the remedies that should have been exhausted. Under those circumstances, the applicants argued, the Government were precluded from raising an objection as to non-exhaustion.

In any event, the applicants claimed that they had never had the possibility of challenging the lawfulness of their deprivation of liberty in the Italian courts.

As to the possibility of filing a criminal complaint for a breach of their Convention rights in the criminal courts, they argued that such a remedy was not an effective one because it had no suspensive effect.

38. The Court reiterates that, under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Contracting Party, in so far as the nature of the objection and the circumstances so allow, in its written or oral observations on the admissibility of the application (see *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). In the present case, the Government did not clearly raise an objection as to the non-exhaustion of domestic remedies in their observations of 25 September 2013 on the admissibility and merits, because they merely argued therein that the Court should declare the application "inadmissible within the meaning of Article 35 § 1" without indicating the ground of inadmissibility or, at that stage, the remedy that should have been used. The question of a failure by the applicants to lodge an appeal before the Justice of the Peace against the refusal-of-entry orders was raised only in the document containing additional observations and submissions on just satisfaction. The Government did not provide any explanation for that delay and the Court cannot find any exceptional circumstance capable of exempting them from their obligation to raise any objection to admissibility in a timely manner (see, *mutatis mutandis*, *Dhahbi v. Italy*, no. 17120/09, § 24, 8 April 2014, and *G.C. v. Italy*, no. 73869/10, § 36, 22 April 2014).

39. It follows that the Government are precluded from relying on a failure to exhaust domestic remedies.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

40. The applicants complained that they had been deprived of their liberty in a manner that was incompatible with Article 5 § 1 of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

41. The Government contested that argument.

A. Admissibility

1. *Compatibility* ratione materiae *of the complaint with the Convention*

(a) The Government's objection

42. The Government began by arguing that Article 5 was inapplicable in the present case. They asserted that the Italian authorities had identified the applicants in accordance with the relevant Italian and European rules. That fact had not been disputed by the applicants. Secondly, the migrants had been accommodated in a CSPA, which was not a detention centre, but a centre for initial rescue and assistance (particularly in terms of health and personal hygiene) for all the migrants who had arrived in Italy in 2011. Legal advice, including on the asylum application procedures, had been provided by the organisations present in the CSPA. The applicants had subsequently been transferred to the ships *Vincent* and *Audace* – which had to be regarded as the "natural extension of the CSPA" of Lampedusa – on account of the arson attack that other migrants had carried out in the CSPA two or three days after the applicants' arrival there. Faced with a situation of humanitarian and logistical emergency, the Italian authorities had been forced to find new reception facilities, which in the Government's view could not be regarded as places of detention or arrest.

43. In the light of the foregoing, the Government contended that the applicants had not been arrested or detained, but "merely [rescued] at sea and taken to the island of Lampedusa to assist them and to ensure their physical safety". They explained that the law had obliged the authorities to rescue and identify the applicants, who were in Italian territorial waters when their vessels had been intercepted by the coastguard. Any measure taken against the applicants could not, in the Government's view, be regarded as an arbitrary deprivation of liberty. They argued that, quite the contrary, the measures had been necessary to deal with a humanitarian emergency and to strike a fair balance between the safety of the migrants and that of the local inhabitants.

(b) The applicants' reply

44. The applicants acknowledged that, under Italian law, the CSPA was not designed for detention but for reception. They argued, however, that this fact did not preclude the conclusion that, *in concreto*, they had been

deprived of their liberty in the Lampedusa CSPA and on the ships *Vincent* and *Audace*. In that connection, they observed that they had been prohibited from leaving those facilities, which had been under constant police surveillance. This had been confirmed by the reports of the PACE Ad Hoc Sub-Committee (see paragraph 34 above) and by the Senate's Special Commission (see paragraph 31 above). The latter had reported prolonged periods of confinement, an inability to communicate with the outside world and a lack of freedom of movement.

(c) The Court's assessment

(i) General principles

45. The Court reiterates that, in proclaiming the right to liberty, Article 5 § 1 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. (see *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 125, 22 September 2009). The difference between deprivation of liberty and restrictions on freedom of movement under Article 2 of Protocol No. 4 is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task, in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39). In order to determine whether someone has been deprived of his liberty, the starting-point must be his or her concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, ECHR 2012).

(ii) Application of those principles in the present case

46. The Court begins by noting that the Government have not disputed the applicants' allegation (see paragraphs 8 and 44 above) that they were prohibited from leaving the Lampedusa CSPA and the ships *Vincent* and *Audace*, which had been under constant police surveillance. Moreover, in paragraph 54 of its report published on 30 September 2011 (see paragraph 34 above), the PACE Ad Hoc Sub-Committee found that "[d]espite the authorities' claim that the Tunisians were not detainees because they were not in cells, ... the conditions to which they were subjected [in the Contrada Imbriacola centre] were similar to detention and deprivation of freedom". It also stated that the migrants were, "[i]n practice, ... imprisoned there without access to a judge" (see paragraph 55 of the report).

47. The Senate's Special Commission, for its part, referred to the "prolonged confinement", "inability to communicate with the outside world" and "lack of freedom of movement" of the migrants placed in the Lampedusa reception centres (see paragraph 31 above). The applicants rightly emphasised these points (see paragraph 44 above).

48. The Court notes that the Government did not provide any evidence to suggest that the applicants were free to leave the CSPA of Contrada Imbriacola. In this connection it observes that the applicants pointed out that after the fire of 20 September 2011 they had managed to evade the police surveillance and reach the village of Lampedusa. However, they had then apparently been stopped by the police and taken back to the reception centre (see paragraph 9 above). The Government did not deny that version of events, according to which the applicants were being held at the CSPA involuntarily (see, *mutatis mutandis*, *Stanev*, cited above, § 127).

49. Similar considerations apply to the ships *Vincent* and *Audace*, which, according to the Government themselves, were to be regarded as the "natural extension of the CSPA" (see paragraph 42 above).

50. In the light of the foregoing, the Court cannot agree with the Government's argument that the applicants were neither arrested nor detained but "merely [rescued] at sea and taken to the island of Lampedusa to assist them and to ensure their physical safety" (see paragraph 43 above). The Court finds, on the contrary, that the applicants' placement in the CSPA of Contrada Imbriacola and on the ships can be regarded as a "deprivation of liberty" having regard to the restrictions imposed on the applicants by the authorities and in spite of the nature of the classification of that placement under domestic law (see, *mutatis mutandis*, *Abdolkhani and Karimnia*, cited above, §§ 126-127). It thus finds that the applicants were deprived of their liberty.

51. It follows that Article 5 of the Convention is applicable and that the Government's objection as to the incompatibility *ratione materiae* of that complaint with the Convention must be dismissed.

2. Other admissibility conditions

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

53. The applicants observed that for 12 days, or 9 days, depending on the case, they had been held in closed facilities under constant police surveillance with the aim of "preventing them from unlawfully entering" Italy. However, they argued that the authorities had not acted in accordance with the law, because no refusal-of-entry or removal procedure compliant with domestic law had been initiated against them; instead they had been returned using a simplified procedure provided for by an agreement of 2011 between Italy and Tunisia (see paragraphs 28-30 above). They emphasised that their deprivation of liberty had not been based on any judicial decision.

54. The applicants explained that under Italian law (Article 14 of Legislative Decree no. 286 of 1998 – see paragraph 27 above), the only legal form of deprivation of liberty of an unlawful migrant was placement in a CIE, subject to judicial supervision, as required by Article 5 of the Convention. By using the CSPA of Contrada Imbriacola as a detention centre Italy had removed the applicants' deprivation of liberty from any judicial supervision. The same could be said of their confinement on board the ships.

55. The applicants also observed that the treatment to which they had been subjected could not be justified on the basis of Article 10 § 2 of Legislative Decree no. 286 of 1998 (see paragraph 27 above), which provided for so-called "deferred" refusal of entry when an alien had entered Italy "for purposes of public assistance". The above-cited Article 10 made no mention of deprivation of liberty or of any procedure for a possible confinement measure. In the applicants' submission, unlike the system provided for in other States, in Italy only confinement in a CIE had a legal basis (Article 14 of Legislative Decree no. 286 of 1998). Any other form of confinement of an unlawful migrant, as in the present case, had to be regarded as illegal and therefore as incompatible with Article 5 § 1 of the Convention.

56. In so far as the Government had argued that the situation complained of had been prompted by an emergency or a state of absolute necessity, the applicants claimed that the real source of the problems on the island had been the political decision to concentrate the confinement of aliens on Lampedusa. In their view there was no insurmountable organisational difficulty preventing the authorities from organising a regular service for the transfer of migrants to other places in Italy. Moreover, they explained that to deprive aliens of their liberty without judicial supervision was not permitted by any domestic legislation, even in an emergency, adding that Italy had not exercised its right of derogation under Article 15 of the Convention.

57. The applicants lastly argued that, in spite of repeated criticisms from various national and international institutions, the processing of arriving migrants as described in the application was still the practice of the Italian authorities, with the result that there was a structural violation of the migrants' fundamental right to liberty.

(b) The Government

58. In the Government's view, the facts of the case did not fall within the scope of sub-paragraph (f) of Article 5 § 1 of the Convention, as the applicants had not been held pending deportation or extradition, but had on the contrary been temporarily allowed to enter Italy. In that connection, the Government pointed out that they had been accommodated in a CSPA, and not sent to a CIE. They explained that the legal conditions for placing the applicants in a CIE had not been fulfilled; accordingly, no additional verification of their identity had been necessary.

59. The Government acknowledged that, as the preliminary investigations judge of Palermo had indicated in his decision of 1 June 2012 (see paragraphs 19-24 above), the applicable domestic provisions did not expressly provide for the adoption of a measure of confinement against migrants placed in a CSPA (such a measure, under the supervision of a Justice of the Peace, was applicable, by contrast, to migrants in a CIE). However, they explained that the presence of the migrants in the CSPA had been duly registered. Moreover, each of the migrants had been issued with a refusal-of-entry and return order, mentioning the date of their unlawful entry into Italy. Those decisions had been duly notified to the applicants. They had not been subject to review by a Justice of the Peace because such review was provided for only in cases of removal and deportation (not refusal of entry).

2. The Court's assessment

(a) General principles

60. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Moreover, only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, among many other authorities, *Giulia Manzoni v. Italy*, 1 July 1997, § 25, *Reports* 1997-IV, and *Velinov v. the former Yugoslav Republic of Macedonia*, no. 16880/08, § 49, 19 September 2013).

61. One of the exceptions, contained in subparagraph (f), permits the State to control the liberty of aliens in an immigration context (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008; *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-163, ECHR 2009; and *Abdolkhani and Karimnia*, cited above, § 128).

62. Article 5 § 1 (f) does not require the detention to be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. However, any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1 (f) (see *A. and Others v. the United Kingdom*, cited above, § 164).

63. The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. It requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244, and *L.M. v. Slovenia*, no. 32863/05, § 121, 12 June 2014). In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5 § 1 primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law. They also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention (see *Amuur*, cited above, § 50, and *Abdolkhani and Karimnia*, cited above, § 130).

64. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009).

65. In addition, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public

interest which might require that the person concerned be detained. That means that it is not sufficient for the deprivation of liberty to be executed in conformity with national law, it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III, and *Stanev*, cited above, § 143).

(b) Application of those principles in the present case

66. The Court begins by noting the Government's view that the applicants were not awaiting deportation or extradition and that the facts of the case did not therefore fall within sub-paragraph (f) of Article 5 of the Convention, authorising a person's "lawful arrest or detention ... to prevent his effecting an unauthorised entry into the country" or against whom "deportation or extradition" proceedings are pending (see paragraph 58 above).

The Government did not, however, indicate under which other sub-paragraph of Article 5 the deprivation of the applicants' liberty could be justified.

67. As the Court has previously had occasion to find (see paragraph 60 above), the list of permissible grounds on which persons may be deprived of their liberty is exhaustive. This means that any deprivation of liberty which does not fall within any of the sub-paragraphs of Article 5 § 1 of the Convention will inevitably breach that provision.

68. However, in spite of the Government's allegations, the Court is in the present case prepared to accept that the deprivation of the applicants' freedom fell within sub-paragraph (f) of the Article 5 § 1. In that connection it observes that the applicants had unlawfully entered Italy and that a procedure was initiated to identify and return them.

69. The Court further notes that the parties agree in saying that Italian law does not expressly provide for the confinement of migrants who, like the applicants, are placed in a CSPA (see paragraphs 54-55 and 59 above). It is true that Article 14 of Legislative Decree no. 286 of 1998 (see paragraph 27 above) provides for a measure of confinement. But that type of confinement applies only when it is necessary to provide assistance to the alien, to conduct additional identity checks, or to wait for travel documents or the availability of a carrier. That was not the situation in the present case. Furthermore, the aliens to which such confinement is applicable are placed in a CIE by an administrative decision under the supervision of the Justice of the Peace. The applicants, however, were placed in a CSPA and no formal decision to hold them in confinement had been taken. On that point, it is noteworthy that in his decision of 1 June 2012, the preliminary investigations judge of Palermo stated that the Office of the Commissioner of Police of Agrigento had merely recorded the presence of the migrants in the CSPA without ordering their placement and that the same was true for the migrants' transfer to the ships (see paragraphs 20-21 above).

70. The Court concludes from the foregoing that the deprivation of liberty in question was devoid of legal basis.

This finding is corroborated by the Senate's Special Commission, which, in its report approved on 6 March 2012 (see paragraph 31 above), noted that stays at the Lampedusa centre, which in principle should be limited to the time strictly necessary to establish the migrant's identity and the lawfulness of his presence in Italy, sometimes extended to over twenty days "without there being any formal decision as to the legal status of the person being held". According to the Special Commission, such prolonged confinement, "without any legal or administrative measure" providing for such it, had led to "heightened tension". It should also be noted that the PACE Ad Hoc Committee expressly recommended that the Italian authorities "clarify the legal basis for the *de facto* detention in the reception centres in Lampedusa", and where Tunisians in particular were concerned, that they should only "keep irregular migrants in administrative detention under a procedure prescribed by law, authorised by a judicial authority and subject to periodic judicial review" (see paragraph 92, points (vi) and (vii), of the report published on 30 September 2011 – paragraph 34 above).

71. Lastly, even supposing that the applicants' confinement had been provided for by a bilateral agreement with Tunisia, the Court notes that the agreement in question could not give that confinement a sufficient legal basis for the purposes of Article 5 of the Convention. The content of that agreement has not been made public (see paragraph 29 above) and was not accessible to those concerned, who could not therefore have foreseen the consequences of its application (see, in particular, the case-law cited in paragraphs 63-64 above). In addition, there is nothing to indicate that the said agreement provided for satisfactory guarantees against arbitrariness (see, for example and *mutatis mutandis*, *Nasrulloyev v. Russia*, no. 656/06, § 77, 11 October 2007).

72. It follows that the deprivation of the applicants' liberty did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. It cannot therefore be regarded as "lawful" within the meaning of Article 5 § 1 of the Convention. Accordingly, there has been a violation of that provision in the present case.

73. This finding dispenses the Court from having to ascertain whether the deprivation of the applicants' liberty was necessary in the circumstances of the case (see, in particular, the case-law cited in paragraph 65 above).

III. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

74. The applicants complained about the lack of any kind of communication with the Italian authorities throughout their stay in Italy.

They relied on Article 5 § 2 of the Convention, which reads as follows:

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

75. The Government disputed that allegation.

76. The Court noted that the present complaint is related to that examined above and must therefore also be declared admissible.

A. The parties' submissions

1. The applicants

77. The applicants observed that the refusal-of-entry orders had been adopted only at the time of the enforcement of their return, and thus only at the end of the period of detention. Consequently, they took the view that, even supposing that those orders had been notified to them, the guarantee of being informed "promptly" under Article 5 § 2 of the Convention had not been observed. In addition, they explained, those orders had merely set out in a summary and standardised manner the legal basis for the return, but made no mention, not even implicitly, of the reasons for their detention.

78. The applicants further took the view that the information provided for in Article 5 § 2 had to emanate from the authority carrying out the arrest or placement in detention – or, in any event, from official sources. The fact that members of non-governmental organisations had been able to communicate with the migrants on this subject could not, in their view, satisfy the requirements of that provision.

2. The Government

79. The Government claimed that the applicants had been informed in a language which they understood, by police officers present on the island, assisted by interpreters and cultural mediators, of their status, which was that of Tunisian citizens temporarily admitted to Italian territory for reasons of "public assistance", in accordance with Article 10 § 2 (b) of Legislative Decree no. 286 of 1998 (see paragraph 27 above). In their view, that status had automatically entailed the applicants' return to Tunisia, as provided for, they argued, in the refusal-of-entry and return order. In any event, the members of the organisations which had access to the CSPA of Contrada Imbriacola had informed the migrants about their situation.

B. The Court's assessment

1. General principles

80. Paragraph 2 of Article 5 lays down an elementary safeguard: any person arrested should know why he is being deprived of his liberty. This

provision is an integral part of the scheme of protection afforded by Article 5: any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his deprivation of liberty, so as to be able to apply to a court to challenge its lawfulness in accordance with paragraph 4 (see *Van der Leer v. the Netherlands*, 21 February 1990, § 28, Series A no. 170-A, and *L.M. v. Slovenia*, cited above, §§ 142-143). Whilst this information must be conveyed "promptly", it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 40, Series A no. 182).

81. In addition, the Court has previously held that the requirement of prompt information is to be given an autonomous meaning extending beyond the realm of criminal law measures (see *Van der Leer*, cited above, §§ 27-28, and *L.M. v. Slovenia*, cited above, § 143).

2. Application of those principles to the present case

82. The Court notes that the applicants left Tunisia on rudimentary vessels heading for the Italian coast (see paragraph 6 above). They had no entry visas and the very nature of their journey to Italy reflected their intention to circumvent immigration laws. Moreover, the PACE Ad Hoc Sub-Commission observed that the Tunisians with whom its members had spoken "were perfectly aware that they had entered Italian territory illegally" (see paragraph 56 of the report published on 30 September 2011 – paragraph 34 above). In addition, the applicants did not expressly contradict the Government's statement (see paragraph 79 above) to the effect that they had been informed, in a language they understood, about the status they were supposed to have in the view of the national authorities, namely that of Tunisian citizens temporarily admitted to Italy for purposes of "public assistance" within the meaning of Article 10 § 2 (b) of Legislative Decree no. 286 of 1998.

83. The Court would note, however that mere information as to the legal status of a migrant does not satisfy the requirements of Article 5 § 2 of the Convention, in accordance with which the legal and factual grounds for deprivation of liberty have to be notified to the person concerned. The Court has already concluded, under the first paragraph of that Article, that in the present case the deprivation of the applicants' liberty had been devoid of legal basis in Italian law (see paragraph 70 above).

84. In any event, the Government failed to produce any official document addressed to the applicants indicating the factual and legal grounds for their confinement (see, *mutatis mutandis*, *Abdolkhani and Karimnia*, cited above, § 138; *Moghaddas v. Turkey*, no. 46134/08, § 46, 15 February 2011; *Athary v. Turkey*, no. 50372/09, § 36, 11 December

2012; and *Musaev v. Turkey*, no. 72754/11, § 35, 21 October 2014). On this point it should be noted that the refusal-of-entry orders (see paragraph 14 above) merely stated that the applicants had "entered the territory of the country by evading the border controls" and that they had been refused leave to enter. The orders made no mention of the confinement to which they had been subjected. Lastly, those orders were apparently addressed to the applicants on 27 and 29 September 2011, respectively, although they had been placed in the CSPA on 17 and 18 September. Consequently, not only was the information incomplete and insufficient for the purposes of Article 5 § 2, it had not been provided "promptly" (see, in particular and *mutatis mutandis*, *Shamayev and Others*, cited above, § 416, and *L.M. v. Slovenia*, cited above, § 145, where the Court found that an interval of four days had to be regarded as falling outside the constraints of time imposed by the notion of promptness for the purposes of Article 5 § 2).

85. There has therefore been a violation of Article 5 § 2 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

86. The applicants alleged that at no time had they been able to challenge the lawfulness of their deprivation of liberty.

They relied on Article 5 § 4 of the Convention, which reads as follows:

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

87. The Government disputed that allegation.

88. The Court notes that the present complaint is related to those examined above and must therefore also be declared admissible.

A. The parties' submissions

1. The applicants

89. The applicants did not deny that there had been a possibility of appealing against the refusal-of-entry orders, but claimed that they had not been able to challenge the lawfulness of their detention. No decision justifying their deprivation of liberty had been notified to them; accordingly, it had not been open to them to challenge any such decision in a court. In addition, the refusal-of-entry orders had not concerned their liberty, but rather their removal, and had been adopted at the end of their period of detention.

2. The Government

90. The Government claimed that the refusal-of-entry orders had indicated that it was open to the applicants to lodge an appeal with the Justice of the Peace in Agrigento. Some other Tunisian migrants had in fact used that remedy, and in 2011 the Justice of the Peace had annulled two refusal-of-entry orders (see paragraph 26 above) as a result. The Government concluded that the applicants had certainly had the possibility of applying to a court to challenge the lawfulness of their alleged deprivation of liberty.

B. The Court's assessment

1. General principles

91. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, such that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181-A). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports* 1996-V; and *A. and Others v. the United Kingdom*, cited above, § 202).

92. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukaturov v. Russia*, no. 44009/05, § 123, ECHR 2008, and *Stanev*, cited above, § 169).

93. The existence of the remedy must nevertheless be sufficiently certain, not only in theory but also in practice, failing which it will lack the

requisite accessibility and effectiveness (see *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII, and *Abdolkhani and Karimnia*, cited above, § 139).

94. Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a court (see, for example, *Baranowski*, cited above, § 68). While one year per level of jurisdiction may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning as it does issues of liberty, requires particular expedition (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79, ECHR 2003-IV, and *Moiseyev v. Russia*, no. 62936/00, § 160, 9 October 2008).

2. Application of those principles in the present case

95. The Court has established that the applicants were not informed of the reasons for their deprivation of liberty (see paragraphs 83-85 above). In its view, that fact in itself meant that the applicants' right to appeal against their detention was deprived of all effective substance (see *Shamayev and Others*, cited above, § 432; *Abdolkhani and Karimnia*, cited above, § 141; *Dbouba v. Turkey*, no. 15916/09, § 54, 13 July 2010; and *Musaev*, cited above, § 40).

96. This finding suffices for the Court to conclude that the Italian legal system did not provide the applicants with a remedy whereby they could obtain judicial supervision of the lawfulness of their deprivation of liberty (see, *mutatis mutandis*, *S.D. v. Greece*, no. 53541/07, § 76, 11 June 2009, and *Abdolkhani and Karimnia*, cited above, § 142). This normally dispenses the Court from having to determine whether the remedies available under Italian law could have afforded the applicants sufficient guarantees for the purposes of Article 5 § 4 of the Convention (see, for example and *mutatis mutandis*, *Shamayev and Others*, cited above, § 433).

97. Furthermore, the Court would point out that the refusal-of-entry orders did not mention the legal or factual basis for the applicants' confinement (see paragraph 84 above). Those orders cannot thus be regarded as constituting the decisions on the basis of which the confinement measure was implemented. In addition, those orders were apparently not notified to the applicants until 27 and 29 September 2011 (see paragraphs 14-15 above), shortly before they were returned by plane and therefore at a time when their deprivation of liberty was about to end. It follows that, even supposing that in certain cases the lodging of an appeal with the Justice of the Peace against a refusal-of-entry order could be regarded as providing an indirect review of the lawfulness of the restriction of liberty imposed on the alien concerned, in the present case such a review, if it had been sought, could not have taken place until after the applicants' release and return to Tunisia.

98. There has therefore been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

99. The applicants argued that they had sustained inhuman and degrading treatment during their detention in the CSPA of Contrada Imbriacola and on board the ships *Vincent* and *Audace*.

They relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

100. The Government disputed that allegation.

A. Admissibility

1. Complaint under procedural head of Article 3 of the Convention

101. In their observations of 23 May 2013, in response to those of the Government, the applicants raised for the first time a complaint under the procedural head of Article 3 of the Convention. They claimed that at the relevant time the ships had been converted into floating detention centres moored in the port of Palermo and cut off from the public and the media. Access to the vessels was prohibited not only to journalists, but also to humanitarian organisations, and the judicial authorities had failed to take statements from the migrants. The applicants submitted that this was incompatible with the obligation to carry out an effective investigation into allegations of a violation of Article 3 of the Convention.

102. The Court notes that the present complaint was not raised until 23 May 2013, whereas the situation at issue had ended on 27 and 29 September 2011, when the applicants were returned to Tunisia (see paragraph 12 above). It does not therefore comply with the six-month rule under Article 35 § 1 of the Convention (see, *mutatis mutandis*, *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001, and *Adam and Others v. Germany* (dec.), no. 290/03, 1 September 2005).

103. It follows that this complaint is out of time and must be dismissed pursuant to Article 35 §§ 1 and 4 of the Convention.

2. Complaint under substantive head of Article 3 of the Convention

104. The Court notes that the complaint under the substantive head of Article 3 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) thereof. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

105. The applicants alleged that the CSPA was overcrowded and that at the material time it housed over 1,200 persons, that is, three times its normal capacity (381 places) and more than its maximum capacity in case of necessity (804 places). Those figures were not contradicted by the Government, which indicated the presence of 1,357 persons on 16 September 2011, 1,325 on 17 September, 1,399 on 18 September, 1,265 on 19 September and 1,017 on 20 September. In addition, the conditions of hygiene and sanitation were unacceptable in the applicants' view: owing to a lack of space in the rooms, they had been obliged to sleep outside, directly on the concrete floor to avoid the stench from the mattresses. The CSPA had no canteen and the bathrooms were overcrowded and often unusable. In the applicants' opinion, their statements on these points had not been contradicted by the Government.

106. The applicants also alleged that they had endured mental distress on account of the lack of information about their legal status, the duration of their detention and their inability to communicate with the outside world. They referred in this connection to the report of the Senate's Special Commission (see paragraph 31 above). That document indicated, among other things, that some migrants had been detained for over twenty days without any formal decision being taken as to their status. The Commission had also visited the Lampedusa CSPA on 11 February 2009 and had heavily criticised its conditions of accommodation and hygiene.

107. The applicants pointed out that they were not complaining of physical injury, but about the conditions of their detention in the CSPA. Accordingly, the Government's argument that they should have produced medical certificates (see paragraph 116 below) was not pertinent.

108. The applicants alleged that the media and the national and international human rights organisations had established that the crisis situation on Lampedusa had started well before 2011. It had continued in the following years, creating in their view a situation of structural and systematic violation of migrants' rights under Article 3 of the Convention. In those circumstances, they argued, it could not be concluded that the situation complained of had mainly been caused by an urgent need to deal with the significant influx of migrants following the "Arab Spring" uprisings.

109. As to their confinement on the vessels *Vincent* and *Audace*, the applicants asserted that they had been placed in an overcrowded lounge, that they had not had proper access to bathroom and toilet facilities, that meals had been distributed by throwing the food on the floor, that they had only

been allowed outside in the open air for a few minutes each day, that they had not received any information or pertinent explanations, and that the security forces had sometimes ill-treated or insulted them. In the applicants' view, those conditions were the logical consequence of the events on Lampedusa. They argued that their allegations could not be ruled out by the 1 June 2012 decision of the preliminary investigations judge of Palermo (see paragraphs 19-24 above), asserting that the ships had suitable facilities, with hot water and electricity, and that the migrants had been provided with full assistance in terms of health and hygiene. They pointed out that the judge had based his decisions on, among other things, the statements of an MP who had visited the ships accompanied by the authorities.

(b) The Government

110. The Government began by setting out a number of preliminary observations.

They claimed that they had monitored the situation on Lampedusa in the period 2011-2012 and had intervened on a factual and legislative level to coordinate and implement the measures required for providing the migrants with aid and assistance. The active presence on the island of the ACNUR, the IOM, Save the Children, the Order of Malta, the Red Cross, Caritas, the ARCI and the Community of Sant'Egidio had been placed within the framework of the "Praesidium Project", financed by Italy and by the European Union. The representatives of those organisations had had unrestricted access to the migrants' reception facilities. In addition, on 28 May 2013 the Government had signed a memorandum of agreement with the Terre des hommes Foundation, which provided a service of psychological support at the Lampedusa CSPA. On 4 June 2013 the Ministry of the Interior had signed an agreement with the European Asylum Support Office (EASO) to coordinate the reception arrangements for migrants. Since July 2013, the association Doctors without Borders had begun to help train the staff at the CSPA and on the ships responsible for rescue at sea.

111. According to the Government, the rescue of migrants arriving on the Italian coast was a problem not only for Italy but for all the member States of the European Union, which had to establish a proper common policy to deal with it. The local institutions in Lampedusa had financed the construction of new aid and assistance centres (6,440,000 euros (EUR) had been invested to create facilities capable of receiving 1,700 persons). During his visit on 23 and 24 June 2013, the delegate from the UNHCR for Southern Europe had expressed his satisfaction with the work carried out by the national and local authorities in order to improve the general situation on the island.

112. In 2011 the massive influx of North African migrants had created a situation of humanitarian emergency in Italy. From 12 February to 31

December 2011, 51,573 nationals of countries outside the European Union ("third States") had landed on the islands of Lampedusa and Linosa. That situation was well explained in the report of the PACE Ad Hoc Sub-Committee (see paragraph 34 above), which had also reported on the efforts of the Italian authorities, in cooperation with other organisations, to create the necessary facilities for the reception and assistance of migrants, among whom were vulnerable individuals.

113. The Government stated that, during the relevant period, the CSPA of Contrada Imbriacola had been fully operational and had had the necessary human and material resources to provide aid and initial accommodation to migrants. In addition to the director and two deputy directors, the centre employed ninety-nine "social operators" and cleaning staff, three social workers, three psychologists, eight interpreters and intercultural mediators, eight administrative employees and three division managers responsible for supervising activities in the facility. Three doctors and three nurses provided medical assistance in a temporary unit. According to the results of an inspection carried out on 2 April 2011 by the health services of Palermo, the conditions of hygiene were satisfactory, and so was the quality and quantity of the food provided. A further inspection immediately after the fire of 20 September 2011 reported that drinking water was provided in bottles and that the canteen was serving meals.

114. In the Government's view the applicants, like all the other migrants, had definitely been informed of the possibility of applying for asylum, but had merely decided not to make use of it. Seventy-two other migrants on Lampedusa at the time of the fire had, by contrast, expressed a wish to apply and on 22 September 2011 they had been taken to the reception centres of Trapani, Caltanissetta and Foggia pending determination of their status.

115. The Government further noted that in his decision of 1 June 2012 (see paragraphs 19-24 above), the preliminary investigations judge of Palermo had found that the measures taken to cope with the presence of migrants on Lampedusa had been compliant with national and international law, and had been adopted with the requisite promptness in a situation of emergency. The judge had also taken the view that the reception conditions on the ships *Audace* and *Vincent* had been satisfactory. The Government emphasised that international cooperation in matters of unlawful migration was governed by Article 11 of Legislative Decree no. 286 of 1998 in compliance with multilateral treaties and bilateral agreements.

116. The Government lastly challenged the applicants' allegations about ill-treatment by the police, pointing out that they were not based on any evidence such as medical certificates.

2. The Court's assessment

(a) General principles

117. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX; and *Naumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004). Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, cited above, § 161 *in fine*, and *Labita v. Italy* [GC], no. 26772/95, § 121, ECHR 2000-IV).

118. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, 16 December 1997, § 55, *Reports* 1997-VIII; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; and *Price*, cited above, § 24). Measures depriving a person of his liberty inevitably involve an element of suffering and humiliation. Although this is an unavoidable state of affairs which, in itself and as such, does not infringe Article 3, this provision nevertheless requires the State to ensure that detainees are held in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI, and *Rahimi v. Greece*, no. 8687/08, § 60, 5 April 2011).

119. While States are entitled to detain would-be immigrants under their "undeniable ... right to control aliens' entry into and residence in their territory" (see *Amuur*, cited above, § 41), this right must be exercised in accordance with the provisions of the Convention (see *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, 8 December 2005). The Court must have regard to the particular situation of the person concerned when reviewing the manner in which the detention order was implemented against the yardstick of the Convention provisions (see *Riad and Idiab v. Belgium*,

nos. 29787/03 and 29810/03, § 100, 24 January 2008, and *Rahimi*, cited above, § 61).

120. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). In particular, the length of the period during which the applicant was detained in the impugned conditions will be a major factor (see *Kalashnikov v. Russia* no. 47095/99, § 102, ECHR 2002-VI; *Kehayov v. Bulgaria*, no. 41035/98, § 64, 18 January 2005; and *Alver v. Estonia*, no. 64812/01, § 50, 8 November 2005).

121. Where overcrowding reaches a certain level, the lack of space in an institution may constitute the key factor to be taken into account in assessing the conformity of a given situation with Article 3 (see, in respect of prisons, *Karalevičius v. Lithuania*, no. 53254/99, § 39, 7 April 2005).

122. Thus, in examining cases of severe overcrowding, the Court has found that this aspect suffices in itself to entail a violation of Article 3 of the Convention. As a general rule, although the space considered desirable by the CPT for collective cells is 4 sq. m, the personal space available to the applicants in the relevant cases was less than 3 sq. m (see *Kadikis v. Latvia*, no. 62393/00, § 55, 4 May 2006; *Andrey Frolov v. Russia*, no. 205/02, §§ 47-49, 29 March 2007; *Kantyrev v. Russia*, no. 37213/02, §§ 50-51, 21 June 2007; *Sulejmanovic v. Italy*, no. 22635/03, § 43, 16 July 2009; and *Torreggiani and Others*, cited above, § 68).

123. However, in cases where the overcrowding was not significant enough to raise, in itself, an issue under Article 3, the Court noted that other aspects of detention conditions had to be taken into account in examining compliance with that provision. Those aspects included the possibility of using toilets with respect for privacy, ventilation, access to natural air and light, quality of hearing and compliance with basic hygiene requirements (see also the points developed in the European Prison Rules adopted by the Committee of Ministers, as cited in paragraph 32 of the judgment in *Torreggiani and Others*, cited above). Thus, even in cases where each detainee had had 3 to 4 sq. m of personal space, the Court found a violation of Article 3 where the lack of space went together with a lack of light and ventilation (see *Torreggiani and Others*, cited above, § 69; see also *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; *Vlasov v. Russia*, no. 78146/01, § 84, 12 June 2008; and *Moiseyev*, cited above, §§ 124-127); limited access to outdoor exercise (see *István Gábor Kovács v. Hungary*, no. 15707/10, § 26, 17 January 2012) or a total lack of privacy in the cell (see *Novoselov v. Russia*, no. 66460/01, §§ 32 and 40-43, 2 June 2005; *Khudoyorov v. Russia*, no. 6847/02, §§ 106-107, ECHR 2005-X (extracts); and *Belevitskiy v. Russia*, no. 72967/01, §§ 73-79, 1 March 2007).

(b) Application of those principles in the present case

124. The Court would first observe that it is not in dispute that in 2011 the island of Lampedusa was facing an exceptional situation. As the PACE Ad Hoc Sub-Committee noted on 30 September 2011 (see paragraph 34 above –in particular, §§ 9-13 and 27-30 of the report), following uprisings in Tunisia and Libya there was a fresh wave of arrivals by boat, as a result of which Italy declared a state of humanitarian emergency on the island and appealed for solidarity from the member States of the European Union. By 21 September 2011, when the applicants were on the island, 55,298 persons had arrived there by sea. As indicated by the Government (see paragraph 112 above), between 12 February and 31 December 2011, 51,573 nationals of third States landed on the islands of Lampedusa and Linosa.

125. The state of emergency created organisational and logistical difficulties for Italy. The accommodation capacity available in Lampedusa was both insufficient to receive such a number of new arrivals and ill-suited to stays of several days. There is no doubt that the local authorities and international community deployed significant efforts to cope with the humanitarian crisis of 2011.

126. In addition to that general situation, there were some specific problems that arose after the applicants' arrival. On 20 September a violent revolt broke out among the migrants being held at the CSPA of Contrada Imbriacola and the premises were gutted by an arson attack (see paragraphs 9 and 21 above). On the next day, about 1,800 migrants started protest marches through the island's streets (paragraph 9 above) and clashes occurred in the port of Lampedusa between the local community and a group of aliens threatening to explode gas bottles. Acts of self-harm and vandalism were also perpetrated. Those incidents contributed to exacerbating the existing difficulties and creating a climate of tension, which led the preliminary investigations judge of Palermo to take the view that the immediate transfer of the migrants was justified under Article 54 of the Criminal Code, which provided that actions taken to protect a third party from an instant danger of serious bodily harm, among other reasons, were not liable to punishment (see paragraphs 21, 23 and 32 above).

127. The Court does not under-estimate the problems encountered by the Contracting States when faced with exceptional waves of immigration such as that which underlies the present case. It is also aware of the many duties that the Italian authorities had to assume, obliged as they were to take measures to provide, simultaneously, for rescue at sea, for the health and accommodation of the migrants, and for the prevention of disorder on an island inhabited by a small community.

128. Those factors cannot, however, exempt the respondent State from its obligation to guarantee conditions that are compatible with respect for human dignity to all individuals who, like the applicants, find themselves deprived of their liberty. In that connection, the Court points out that

Article 3 must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161). In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention (see *M.S. v. Belgium*, no. 50012/08, § 122, 31 January 2012).

129. In order to determine whether the applicants were victims of a violation of Article 3, the Court finds it appropriate to examine separately the two situations at issue, namely the reception conditions both in the CSPA of Contrada Imbriacola and on the ships *Vincent* and *Audace*.

(i) Conditions in the CSPA of Contrada Imbriacola

130. The Court notes that the applicants were placed in the CSPA of Contrada Imbriacola on 17 and 18 September 2011 (see paragraphs 6 and 7 above), and that they were held there until 20 September, when, after a fire, they were transferred to a sports complex on Lampedusa (see paragraph 9 above). Their stay there lasted between three and four days.

131. The applicants complained, in particular, about serious problems of overcrowding, poor hygiene and lack of outside contact in the CSPA. The Court observes that their allegations about the general state of the centre are corroborated by the reports of the Senate's Special Commission and Amnesty International (see paragraphs 31 and 35 above). That non-governmental organisation referred to "appalling conditions" of detention, with severe overcrowding, a general lack of hygiene, smells and unusable toilets. The Special Commission, for its part, reported as follows:

> "The rooms measure about 5 x 6 metres: they are supposed to accommodate 12 persons. In them can be found, next to each other, bunk beds with four levels, occupied by up to 25 men per room ... In many of the blocks, foam-rubber mattresses are placed along the corridor. In many cases the foam-rubber from the mattresses has been torn away to be used as a cushion. In some cases, double mattresses, protected by improvised covers, have been placed on the landings, outside ... On the ceiling, in many rooms, the plastic shade around the light has been removed and the bulb has disappeared. At the end of the corridor, on one side, there are toilets and showers. There is no door and privacy is ensured by cloth or plastic curtains placed in an improvised and haphazard manner. There are no taps and water flows from the pipes only when centrally activated. The pipes sometimes get blocked; on the floor, water or other liquids run as far as the corridor and into the rooms where the foam-rubber mattresses lie. The smell from the toilets pervades the whole area. When it starts to rain, those on the metal staircases, who have to go up to the floor above, get wet and take dampness and dirt into the living quarters."

132. The Court has no reason to doubt the accuracy of these findings, emanating as they do from an institution of the respondent State itself. Moreover, it has often attached weight to information in recent reports from independent human rights associations such as Amnesty International (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 131, ECHR 2008).

133. Furthermore, according to the PACE Ad Hoc Sub-Committee (see paragraph 33 of the report published on 30 September 2011 – paragraph 34 above), the accommodation capacity of the CSPA of Contrada Imbriacola ranged between 400 and 1,000 places (800 places according to Amnesty International). The Government did not dispute the applicants' figures, which showed that from 17 to 20 September 2011, between 1,399 and 1,017 individuals had been held there (see paragraph 105 above). Even though the personal space allotted to each migrant is not known, that information can only corroborate the applicants' allegations of overcrowding. In addition, the situation of rapid saturation of the Lampedusa reception centres was emphasised by the PACE Ad Hoc Sub-Committee, which also reported the concern expressed by Doctors without Borders and the Red Cross as to the conditions of hygiene in the event of overcrowding in the centres (see §§ 48 and 51 of the report published on 30 September 2011 – paragraph 34 above).

134. In sum, the foregoing information shows that the conditions of detention fell short of the standards prescribed by the international instruments in such matters and, in particular, of the requirements of Article 3 of the Convention (see, *mutatis mutandis*, *Rahimi*, cited above, §§ 81-85).

135. It is true that the applicants stayed in the CSPA for only a short period, such that the alleged lack of contact with the outside world could not have had serious consequences for their personal situations (see, *mutatis mutandis*, ibid., § 84). The Court does not, however, overlook the fact that the applicants, who had just undergone a dangerous journey on the high seas, were in a situation of vulnerability. Their confinement in conditions which impaired their human dignity thus constituted degrading treatment in breach of Article 3.

136. There has thus been a violation of that Article on account of the conditions in which the applicants were held in the CSPA of Contrada Imbriacola.

(ii) Conditions on board the ships Vincent *and* Audace

137. As regards the reception conditions on board the two ships, the Court notes that the first applicant was placed on the *Vincent*, with some 190 individuals, while the second and third applicants were transferred to the *Audace*, which held about 150 (see paragraph 10 above). The confinement on the ships began on 22 September 2011; it lasted about eight days for the first applicant (until 29 September 2011) and about six days (until 27 September 2011) for the second and third applicants.

138. The applicants claimed that they had been grouped together in the restaurant areas, access to the cabins being prohibited. They also alleged that they had slept on the floor and had had to wait several hours to use the toilets. They could only go outside onto the balconies twice a day for a few minutes at a time (see paragraphs 11 and 109 above).

139. The Court observes, however, that those allegations are at least partly contradicted by the decision dated 1 June 2012 of the preliminary investigations judge of Palermo (see paragraph 22 above), who established that the migrants were in good health, were receiving assistance from medical staff and were sleeping in cabins containing bed linen or reclinable chairs (*poltrone reclinabili*). Moreover, they had access to prayer rooms, the food was satisfactory and clothing had been provided. The ships were supplied with hot water and electricity, and meals and hot drinks were available.

140. The judge's findings were partly based on the observations of a member of parliament who had visited the ships in the port of Palermo and had talked with some of the migrants. In the Court's view, the fact that the MP had been accompanied by the deputy commissioner of police and police officers did not, in itself, cast doubt on his independence or on the veracity of his account.

141. The foregoing elements preclude a finding that the reception conditions on the ships were incompatible with Article 3 of the Convention.

142. Moreover, the Court is prepared to admit that the alleged lack of pertinent information or explanations on the part of the authorities during the applicants' confinement on the ships might have provoked in them feelings of anxiety and distress. Those feelings were not, however, such as to reach the minimum threshold of gravity required for treatment to fall within the scope of Article 3 of the Convention.

143. It should lastly be noted that the applicants' allegations that they were insulted and ill-treated by the police or that meals were distributed by throwing the food on the floor (see paragraphs 11 and 109 above) are not based on any objective reports, merely their own statements. Those complaints cannot therefore be upheld by the Court.

144. In the light of the foregoing, the Court takes the view that the conditions in which the applicants were held on the ships *Vincent* and *Audace* did not infringe Article 3 of the Convention. There has therefore been no violation of Article 3 on that account.

VI. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

145. The applicants claimed to have been victims of collective expulsion. They relied on Article 4 of Protocol No. 4, which reads as follows:

> "Collective expulsion of aliens is prohibited."

146. The Government disputed that argument.

A. Admissibility

147. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

148. The applicants alleged that they had been expelled collectively solely on the basis of their origin and without any consideration of their individual situations. They took the view that the fast-track removal procedures introduced by the Italian authorities pursuant to the bilateral agreements with Tunisia (see paragraphs 28-30 above) did not comply with the guarantees enshrined in Article 4 of Protocol No. 4. Those procedures, in their submission, entail only the establishment of the alien's nationality, without any broader examination of his or her personal situation.

149. The applicants observed that immediately after they had landed on Lampedusa, the Italian border authorities had registered their identity and taken their fingerprints. They had subsequently had no oral contact with the authorities in question until they boarded the plane to be returned to Tunis. At that point they had again been asked to give their identity and the Tunisian Consul was then present. In those circumstances, the applicants had difficulty understanding at what point in time the Italian authorities could have gathered the information required for a careful assessment of their individual situations. The refusal-of-entry orders did not, moreover, contain any indication of such an assessment; they were standardised documents indicating only their date of birth and nationality and containing a set phrase to the effect that "none of the cases [provided for in] Article 10 § 4 of Legislative Decree no. 286 of 1998 [was] at issue".

150. The applicants lastly argued that the following aspects led to the conclusion that there had been a collective expulsion (they referred, in particular, to *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 183, ECHR 2012, and *Čonka v. Belgium*, no. 51564/99, §§ 61-63, ECHR 2002-I):

– the large number of Tunisians for whom the outcome had been identical;

– the fact that prior to the impugned operation the Ministry's note of 6 April 2011 (see paragraph 29 above) had announced operations of that kind;

– the identical wording of the refusal-of-entry orders;

– the difficulty for the applicants to contact a lawyer.

(b) The Government

151. The Government contended that there had been no collective expulsion. They observed that the refusal-of-entry orders at issue had been individual documents drawn up separately for each of the applicants. Those orders had been adopted after a careful examination of each applicant's situation; they had been translated into Arabic and handed to the applicants, who had refused to sign the record of service. The Government pointed out that, in his decision of 1 June 2012 (see paragraphs 19-24 above), the preliminary investigations judge of Palermo had taken the view that the refusal-of-entry measure was lawful and that the time-limit for the adoption of the orders had to be interpreted in the light of the particular circumstances of the case. The first applicant, who had entered Italy unlawfully on 17 September 2011, had been issued with the order on 29 September 2011; the two others, who had arrived on 18 September, had been returned on 27 September. In the Government's view, those periods of twelve and nine days, respectively, could not be regarded as excessive.

152. Individual laissez-passers had been issued to ensure the applicants' return to Tunisia. The agreements between Tunisia and Italy had contributed to the repression of migrant smuggling, in line with the United Nations Convention against Transnational Organized Crime. In addition, the Government explained, upon their arrival on Lampedusa all the unlawful migrants had been identified by the police in individual interviews with each one, assisted by an interpreter or a cultural mediator. Photographs had been taken and fingerprints recorded.

2. The Court's assessment

153. The Court observes that in the present case the applicants were issued with individual refusal-of-entry orders. Those orders nevertheless contained identical wording and the only differences were to be found in the migrants' identities.

154. As the Court has previously found, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion, if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis. The Court has also ruled that there is no violation of Article 4 of Protocol No. 4 if the lack of an expulsion decision made on an individual basis is the consequence of the person's own culpable conduct (see *Hirsi Jamaa and Others*, cited above, § 184).

155. The Court further notes that, unlike the migrants in *Hirsi Jamaa and Others* (cited above, § 185), the applicants in the present case, together with the other migrants who had arrived on Lampedusa in September 2011, were subjected to an identification procedure. The Government rightly

emphasised this point (see paragraph 152 above). The applicants in fact acknowledged that immediately after their arrival on Lampedusa, the Italian border authorities had registered their identities and taken their fingerprints (see paragraph 149 above).

156. The Court is, however, of the opinion that the mere introduction of an identification procedure is not sufficient in itself to rule out the existence of a collective expulsion. It further observes that a number of factors lead to the conclusion that in the present case the impugned expulsion was indeed collective in nature. In particular, the refusal-of-entry orders did not contain any reference to the personal situations of the applicants; the Government failed to produce any document capable of proving that individual interviews concerning the specific situation of each applicant had taken place prior to the issuance of the orders; a large number of individuals of the same origin, around the time of the facts at issue, were subjected to the same outcome as the applicants; and the bilateral agreements with Tunisia (see paragraphs 28-30 above), which have not been made public, provided for the return of unlawful migrants through simplified procedures, on the basis of the mere identification of the person concerned by the Tunisian consular authorities.

157. Those factors suffice for the Court to rule out the existence of sufficient guarantees demonstrating that the personal circumstances of each of the migrants concerned had been genuinely and individually taken into account (see, *mutatis mutandis*, *Čonka*, cited above, §§ 61-63).

158. Having regard to the foregoing, the Court finds that the applicants' expulsion was collective in nature in breach of Article 4 of Protocol No. 4. Accordingly there has been a violation of that Article.

VII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 3 AND 5 OF THE CONVENTION AND ARTICLE 4 OF PROTOCOL No. 4

159. The applicants complained that they were not afforded an effective remedy under Italian law by which to lodge their complaints under Articles 3 and 5 of the Convention and Article 4 of Protocol No. 4.

They relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

160. The Government disputed that allegation.

161. The Court would first observe that, according to its settled case-law, Article 5 § 4 of the Convention provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 69, ECHR 1999-II, and *Ruiz Rivera v. Switzerland*, no.

8300/06, § 47, 18 February 2014). In the present case, the facts giving rise to the applicants' complaint under Article 13 of the Convention in conjunction with Article 5 are identical to those already examined under Article 5 § 4, and are thus covered by the Court's findings under the latter provision (see *De Jong, Baljet and Van den Brink v. the Netherlands*, 22 May 1984, § 60, Series A no. 77, and *Chahal*, cited above, §§ 126 and 146).

162. In so far as the applicants relied on Article 13 of the Convention in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4, the Court notes that these complaints are related to those examined above and must also therefore be declared admissible.

A. The parties' submissions

1. The applicants

163. The applicants noted that the refusal-of-entry orders had provided for the possibility of an appeal against them, within a period of 60 days, to the Justice of the Peace of Agrigento, but had also indicated that such a remedy would not suspend enforcement. The applicants argued that it was clear from the Court's case-law (they referred in particular to the case of *Hirsi Jamaa and Others*, cited above, § 206) that the suspensive nature of a remedy was, in such matters, a condition of its effectiveness. In addition, the applicants denied having received copies of the orders, as was proven, in their view, by the fact that their signatures did not appear on the records of service. Nor had they been able to contact lawyers because, according to them, lawyers had no access to holding facilities and could not be contacted by telephone from inside such premises.

164. As regards, lastly, the decisions of the Justice of the Peace of Agrigento annulling two refusal-of-entry orders (see paragraph 26 above), the applicants observed that they had concerned two migrants who had not yet been removed and who, in accordance with Article 14 of Legislative Decree no. 268 of 1998 had been placed in a CIE (see paragraph 27 above). The migrants in question, they explained, had challenged the lawfulness of the refusal-of-entry measures as the legal basis for their detention in the CIE, and they had been able to do so because they were still on Italian soil. The applicants observed that, unlike those migrants, they themselves could only have challenged their refusal-of-entry orders as the legal basis for their removal, and then only after their return to Tunisia.

2. The Government

165. The Government maintained their argument that the applicants were entitled to appeal against the refusal-of-entry orders to the Justice of the Peace of Agrigento (see paragraph 90 above).

B. The Court's assessment

1. General principles

166. Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint. However, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI, and *Hirsi Jamaa and Others*, cited above, § 197).

167. The Court would further point out that in *De Souza Ribeiro v. France* ([GC], no. 22689/07, § 82, ECHR 2012) it held that the effectiveness of the remedy for the purposes of Article 13 required imperatively that the complaint should be subject to close and independent scrutiny and that the remedy should have automatic suspensive effect, in respect of: (a) complaints concerning a removal measure entailing a real risk of treatment contrary to Article 3 and/or of a violation of the person's right to life safeguarded by Article 2 of the Convention; and (b) complaints under Article 4 of Protocol No. 4 (see also *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).

2. Application of those principles in the present case

168. The Court would first observe that it declared admissible the applicants' complaints under the substantive head of Article 3 of the Convention and under Article 4 of Protocol No. 4. It has also found a violation of the latter Article, together with a violation of Article 3 on account of the conditions in which the applicants were held in the CSPA of Contrada Imbriacola. The complaints lodged by the applicants on these points are therefore "arguable" for the purposes of Article 13 (see, *mutatis mutandis*, *Hirsi Jamaa and Others*, cited above, § 201).

169. It further observes that the Government have not indicated any remedies by which the applicants could have complained about the

conditions of their accommodation in the CSPA or on the ships *Vincent* and *Audace*. An appeal to the Justice of the Peace against the refusal-of-entry orders would have served only to challenge the lawfulness of their removal to Tunisia. Moreover, those orders were issued only at the end of their period of confinement in those facilities.

170. Accordingly, there has been a violation of Article 13 taken together with Article 3 of the Convention.

171. In so far as the applicants complained about the lack of any effective remedy by which to challenge their expulsion from the perspective of its collective aspect, the Court finds that it is not established that such a complaint could not have been raised in an appeal to the Justice of the Peace against the refusal-of-entry orders. It transpires from the decisions of the Agrigento Justice of the Peace adduced by the Government (see paragraph 26 above) that the magistrate examined the procedure followed for the issuance of the refusal-of-entry orders in question and assessed the lawfulness of that procedure in the light of domestic law and the Constitution. There is nothing to suggest that any complaint about a failure to take account of the personal situation of those concerned would have been disregarded by the Justice of the Peace.

172. In the present case, however, the orders expressly stipulated that the lodging of an appeal with the Justice of the Peace would not have suspensive effect (see paragraph 14 above). It follows that the remedy in question did not meet the requirements of Article 13 of the Convention, since it did not satisfy the criterion of the suspensive effect, as established in *De Souza Ribeiro* (cited above). The Court reiterates that the requirement under Article 13 that execution of the impugned measure be stayed cannot be regarded as a subsidiary aspect (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 388, ECHR 2011, and *Hirsi Jamaa and Others*, cited above, § 206).

173. Accordingly, there has also been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

174. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

175. The applicants claimed 70,000 euros (EUR) each for the non-pecuniary damage that they alleged to have sustained. They argued that this

amount was justified on account of the seriousness of the violations of which they were victims. The second and third applicants (Mr Tabal and Mr Sfar) requested that this sum be paid into their own bank accounts. As to the first applicant, any sum awarded by the Court would have to be paid into the bank account of one of his representatives, Mr S. Zirulia, who would hold it pending its transfer to Mr Khlaifia.

176. The Government took the view that the applicants' requests for just satisfaction were "unacceptable".

177. The Court finds that it is appropriate to award each applicant EUR 10,000 in respect of non-pecuniary damage, amounting to a total of EUR 30,000 for all three applicants.

B. Costs and expenses

178. The applicants also sought EUR 9,344.51 for the costs and expenses incurred by them in the proceedings before the Court. That sum was to cover their representatives' fees (EUR 4,000 each) and travel expenses for a visit to Tunisia to see their clients (EUR 432.48), together with the translation of the observations in reply (EUR 912.03). The applicants' representatives stated that they had advanced the relevant funds and requested that the sum awarded by the Court on that basis be paid directly into their own bank account.

179. The Government made no observations on this point.

180. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award, to all the applicants jointly, the total sum claimed for the costs and expenses incurred in the proceedings before it (EUR 9,344.51).

C. Default interest

181. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaint concerning Article 3 of the Convention under its substantive head, and those concerning Article 13 of the Convention and Article 4 of Protocol No. 4, admissible;

2. *Declares*, unanimously, the complaints concerning Article 5 of the Convention admissible, and the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds*, unanimously, that there has been a violation of Article 5 § 2 of the Convention;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention;

6. *Holds*, by five votes to two, that there has been a violation of Article 3 of the Convention on account of the conditions in which the applicants were held in the CSPA of Contrada Imbriacola;

7. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention on account of the conditions in which the applicants were held on the ships *Vincent* and *Audace*;

8. *Holds*, by five votes to two, that there has been a violation of Article 4 of Protocol No. 4 to the Convention;

9. *Holds*, by five votes to two, that there has been a violation of Article 13 of the Convention taken together with Article 3;

10. *Holds*, by five votes to two, that there has been a violation of Article 13 of the Convention taken together with Article 4 of Protocol No. 4;

11. *Holds*, by four votes to three,

(a) that the respondent State is to pay within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) to each applicant EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; the said award in respect of the first applicant (Mr Khlaifia) is to be kept in trust for him by his representative, Mr S. Zirulia;

(ii) to the applicants jointly, EUR 9,344.51 (nine thousand three hundred and forty-four euros and fifty-one cents), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

12. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 1 September 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

(a) concurring opinion of Judge Keller;
(b) joint partly dissenting opinion of Judges Sajó and Vučinić;
(c) partly dissenting opinion of Judge Lemmens.

CONCURRING OPINION OF JUDGE KELLER

(Translation)

1. Although I am able to agree fully with the majority's findings as to the various violations of the Convention in the present case, I consider it useful to clarify a point that was overlooked in the discussion.

2. In paragraph 126 of the judgment, the Court finds that the preliminary investigations judge of Palermo took the view that "the immediate transfer of the migrants was justified under Article 54 of the Criminal Code, which provided that actions taken to protect a third party from an instant danger of serious bodily harm, among other reasons, were not liable to punishment", with reference to what is commonly known as the state of necessity (*stato di necessità*). The Article in question reads as follows:

> "Acts committed under the constraint of having to save [the perpetrator or a third party] from an instant danger of serious bodily harm shall not be liable to punishment, provided that such danger has not been voluntarily caused [by the perpetrator] and cannot otherwise be avoided, and provided that the said act is proportionate to the danger. ..."

3. The Court then states immediately afterwards, in paragraph 127, that it "does not under-estimate the problems encountered by the Contracting States when faced with exceptional waves of immigration such as that which underlies the present case" and that "[i]t is also aware of the many duties that the Italian authorities had to assume, obliged as they were to take measures to provide, simultaneously, for rescue at sea, for the health and accommodation of the migrants, and for the prevention of disorder on an island inhabited by a small community."

4. I fear that the connection made by the Court in passing directly from paragraph 126 to paragraph 127 may give a false impression as regards the pertinence of Article 54 in the context of its examination in the present judgment. I thus find it important to point out that the proceedings before the preliminary investigations judge of Palermo concerned only the individual criminal liability of certain officials. The "state of necessity" and Article 54 of the Criminal Code are therefore not relevant in assessing the State's responsibility under the Convention. Admittedly, there are various circumstances under international law which preclude the wrongfulness of an act of a State even where it is not in conformity with an international obligation. The International Law Commission, in Chapter V of its Draft articles on the Responsibility of States for Internationally Wrongful Acts (submitted to the General Assembly as part of the Commission's report covering the work of its fifty-third session, *Yearbook of the International Law Commission, 2001*,

vol. II (Part Two)) includes in its enumeration of such factors the notion of "distress", for which Article 24 provides as follows:

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
>
> 2. Paragraph 1 does not apply if:
>
> (*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
>
> (*b*) the act in question is likely to create a comparable or greater peril."

That being said, in so far as they are applicable in the present case, the Articles of that text which concern circumstances precluding wrongfulness are superseded by the special rules of the Convention (see draft Article 55, "*lex specialis*"). A certain number of the substantive Articles of the Convention already enshrine a "necessity" test, through which the possible need to protect others against an instant danger may have to be taken into account. However, only Article 15 of the Convention enables a Contracting Party to derogate from its Convention obligations in time of emergency. Italy had not relied on Article 15 and, even more importantly, the possible derogations in that context can never pertain to Article 3 of the Convention (see Article 15 § 2), as the Court has also rightly noted in the present case (see paragraph 128 of the judgment).

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ AND VUĊINIĊ

1. We voted with the majority in finding a violation of Article 5 §§ 1, 2 and 4, but, to our regret, we are unable to follow them on two points.

2. First, we would conclude that, with respect to the applicants, the conditions at the CSPA (first reception centre) on Lampedusa did not reach the threshold of Article 3.

3. It is well-established case-law that the duration of ill-treatment is an important factor in determining whether the threshold of Article 3 has been reached, particularly with respect to conditions of detention. Citing extensive case-law, the Grand Chamber recently reiterated as follows (see *Tarakhel v. Switzerland* [GC], no. 29217/12, § 94, ECHR 2014):

> "The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim."

4. In the past, the Court has found that conditions of detention did not reach the threshold of Article 3 on the grounds that the duration of the detention was too brief (see *Slivenko and Others v. Latvia* (dec.) [GC], no. 48321/99, ECHR 2002-II; *Sakkopoulos v. Greece*, no. 61828/00, 15 January 2004; and *Hinderberger v. Germany* (dec.), no. 28183/06, 30 March 2010). Indeed, the Court has found no violation or has declared inadmissible a number of applications related to conditions of detention of much longer duration than that of the applicants in the present case on the grounds that the short stay in question did not reach the Article 3 threshold (see *Gorea v. Moldova*, no. 21984/05, 17 July 2007 (14 days); *Terziev v. Bulgaria*, no. 62594/00, 12 April 2007 (10 days); and *Karalevičius v. Lithuania*, no. 53254/99, 7 April 2005 (6 days)).

5. Although the Court has in some cases found violations of Article 3 notwithstanding the fact that the duration of the treatment was short, those cases contained other significant factors (not present in the instant case) which outweighed that fact. The aggravating factors which have allowed the Court to find that the severity of the harm outweighed its short duration include the following: the presence of a particularly vulnerable individual, such as a sick or mentally ill detainee (see *Brega v. Moldova*, no. 52100/08, § 42-43, 20 April 2010, and *Parascineti v. Romania*, no. 32060/05, § 53-55, 13 March 2012); exceptionally egregious conditions, such as overnight stays in confined areas with no place to lie down or lack of access to sanitary facilities (see *T. and A. v. Turkey*, no. 47146/11, § 95-99, 21 October 2014; *Gavrilovici v. Moldova*, no. 25464/05, § 42-44, 15 December 2009; *Aliev v. Turkey*, no. 30518/11, § 81, 21 October 2014; and

Burzo v. Romania, no. 75240/01, § 99-100, 4 March 2008); or confinement in a locked cell unsuited for habitation or otherwise dangerous (see *Koktysh v. Ukraine*, no. 43707/07, § 93-95, 10 December 2009; *Căşuneanu v. Romania*, no. 22018/10, § 61-62, 16 April 2013; *Ciupercescu v. Romania (no. 2)*, no. 64930/09, 24 July 2012; *Tadevosyan v. Armenia*, no. 41698/04, § 55, 2 December 2008; and *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, § 198, 27 January 2015). It should be noted that many of these cases involved more than one aggravating factor, such as confinement in a cell and lack of sanitary facilities. The situations at issue in those cases (in which the Court specifically noted the short duration) lasted between two and twelve days. Even with their aggravating factors, only three cases (*Brega*, *T. and A. v. Turkey*, and *Neshkov*) involved detention periods as short as those of the present applicants.

6. In the present case the applicants are healthy young men; they did not allege ill-treatment by the Italian officials, and during their stay they were able to move relatively freely within the Centre: they had access to food and necessary facilities; and their stays in the Centre lasted less than four days. Furthermore, it should not be overlooked that the applicants' temporary placement in the CSPA was in response to an emergency situation in which an unexpected influx of migrants had arrived on an island that lacked the infrastructure to properly accommodate all the newcomers.

7. To be sure, the reports cited by the majority (see paragraph 131) show that the conditions on Lampedusa at the time were distressing and unfit for long-term accommodation. However, in situations where the conditions of detention might otherwise reach the threshold of Article 3 for anyone subjected to long-term confinement, a short duration may minimise the harm caused by those poor conditions, with the result that the measure falls short of the Article 3 threshold. Such was the case here. Therefore, we conclude that there has been no violation of Article 3.

8. Second, we find that we are unable to join the majority's conclusion that there has been a violation of Article 4 of Protocol No. 4.

9. The term "collective expulsion" has a specific meaning in international law, stemming as it does from the historical roots of mass expulsions[1]. As Jean-Marie Henckearts wrote in his seminal book on the topic of mass and collective expulsions, when Article 4 of Protocol No. 4 was drafted in 1963, it was the first international treaty to address collective expulsion. Its explanatory report defines the meaning of "collective

[1] The terms "collective expulsion" and "mass expulsion" are often used interchangeably, although the former emphasises non-individualisation, while the latter refers to the scale of the expulsion. See International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, "Expulsion of aliens", Memorandum by the Secretariat, § 985 (available at: http://legal.un.org/ilc/documentation/english/a_cn4_565.pdf).

expulsion" with reference to the recent past. As Henckearts notes, "[t]he phrase 'collective expulsions of aliens of the kind which have already taken place' alludes to the expulsion of Germans and others in the wake of World War Two and of the forced movement of peoples in Europe during the Interbellum."[2]

10. International law prohibits targeting a group for removal from a territory without regard for the individual members of that group. As the International Law Commission has explained, "[t]he decision concerning expulsion is made with respect to the group of aliens as a whole. The procedure is conducted with respect to the group of aliens as a whole. The implementation of the decision is carried out with respect to the group of aliens as a whole."[3] Although Article 4 of Protocol No. 4 is not limited to mass expulsion of an *entire* ethnic community, it retains the core principle of individual treatment. Therefore, in order to understand what is and is not covered by the prohibition in Article 4 of Protocol No. 4, it is vital to distinguish between the expulsion of a large number of individuals in similar situations (which is permitted) and the expulsion of a group *qua* group (which is prohibited).

11. It is extremely rare for the Court to find a violation of Article 4 of Protocol No. 4. It is with good reason that only four violations of this Article have ever been found. The Court has, primarily, adhered to the historically rooted concept of collective expulsion in international law. Therefore, prior to this case, the Court has only found a violation of Article 4 of Protocol No. 4 where expulsion took place on the basis of group removal rather than on an individual basis.

12. In this connection, the Court has addressed two sets of circumstances in which Article 4 of Protocol No. 4 applies, neither of which are present in this case. First, there are cases in which members of a group are targeted for expulsion from a State's territory purely on the basis of their membership of that group. The second situation is one in which an entire group of people

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[2] Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice*, Martinus Nijhoff, The Hague: 1995, p. 11. The book contains a list of collective or mass expulsions, referring to, from earlier history: "the expulsion of the Jews from England in 1290, the expulsion of the Jews from Spain in 1492, the expulsion of Moslems from Spain in 1610, the expulsion of the Huguenots from France in 1685, the expulsion of Protestants from Salzburg in 1731, the expulsion of Jews from Bohemia in 1744, the expulsion of Spaniards from Mexico around 1830, the expulsion of Armenians from the Ottoman empire (Turkish Armenia) in 1915-1916, and the expulsion of Jews from Nazi Germany in the period up to 1939" (p. 2). From the post-World War Two period, Henckearts cites the removal of ethnic Germans from Eastern Europe in 1945-1949, expulsion of Poles from Ukraine, Belarus, and Lithuania in 1946-1949, many expulsions of population groups from Africa and the Middle East throughout the 1960s-1980s, and ethnic expulsions in the former Yugoslavia in the 1990s (p. 205).

[3] See ILC, "Expulsion of aliens", Memorandum by the Secretariat, *op. cit.*, § 990.

are "pushed back" from a territory without consideration of the individual identities of the group members.

13. In the cases of *Čonka v. Belgium* (no. 51564/99, § 62-63, ECHR 2002-I) and *Georgia v. Russia (I)* ([GC], no. 13255/07, § 175, ECHR 2014), the Court found that there were official policies of targeting a certain minority group for removal (Roma and Georgian nationals respectively). The Court determined that those removals had been ordered on the basis of group membership, rather than individual factors, notwithstanding the judicial approval of the deportations. In both cases the expulsions involved the forced removal of a minority population living within the member State's territory.

14. The only other two cases in the Court's history in which a violation of Article 4 of Protocol No. 4 has been found involve the return of an entire group of people without adequate verification of the individual identities of the group members. In *Hirsi Jamaa and Others v. Italy* ([GC], no. 27765/09, § 185, ECHR 2012), the Court found that "the transfer of the applicants to Libya [had been] carried out without any form of examination of each applicant's individual situation", adding: "It has not been disputed that *the applicants were not subjected to any identification procedure* by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil" (emphasis added). The Court found similar problems with identification in *Sharifi and Others v. Italy and Greece*, no. 16643/09, 21 October 2014, where the applicants' identities had not been individually verified before they were returned to Greece.

15. The situations in *Hirsi Jamaa* and *Sharifi* correspond to the ILC's definition of collective expulsion: "The decision concerning expulsion is made with respect to the group of aliens as a whole. The procedure is conducted with respect to the group of aliens as a whole. The implementation of the decision is carried out with respect to the group of aliens as a whole." Indeed there can be nothing but collective treatment when a group is returned or deported without so much as *identification* of the individuals (such as passengers on a boat). It is also important to note that, in both of the above-cited cases, at least some individuals on board were asylum-seekers, who were unable to state their asylum claims before they were returned.

16. The case-law therefore shows that there are two ways in which a collective expulsion can be carried out. First, individuals may be identified for expulsion based on their membership of a group; such was the case in *Čonka* and *Georgia v. Russia*. Alternatively, a group – by virtue of being physically together – can be targeted for expulsion without consideration of the individual people who make up the whole; this was the case in *Hirsi Jamaa* and *Sharifi*. Conversely, in the case of *M.A. v. Cyprus* (no. 41872/10, § 254, ECHR 2013), the Court found that there had *not* been a collective

expulsion where unsuccessful asylum-seekers had received identical deportation orders. The Court found that "the fact that the deportation orders and the corresponding letters were couched in formulaic and, therefore, identical terms and did not specifically refer to the earlier decisions regarding the asylum procedure is not itself indicative of a collective expulsion".

17. In the present case the applicants were not expelled on the basis of membership of an ethnic, religious, or national group. They were returned to a safe country and were not, in any event, asylum-seekers; thus there was no issue of *non-refoulement*. Asylum-seekers, unaccompanied minors, and other vulnerable individuals were treated differently, as their status so required (the treatment of such individuals is not at issue in the present case). The applicants in this case fit into none of these categories. The fact that the applicants were not eligible for leave to enter Italy rendered unnecessary any further examination besides establishing their identity, nationality, and the existence of a safe country of return. That examination was carried out individually. Each applicant was identified upon arrival in Italy and later by the Tunisian consular authority and was provided with an individual removal order written in a language that he could understand. In the applicants' cases, there were no other individualised factors to be considered. Whether there had been one or one thousand migrants, the process would have been the same. After having their identities and nationalities verified by the Italian and Tunisian authorities, they were returned home in accordance with a treaty between the Italian and Tunisian governments. The return was ordered for each individual applicant by an Italian judicial authority. The streamlined process created by the two countries to deal with the sudden change in migratory flow did not disregard the individual migrant, but rather took into account the necessary considerations when deciding on removal.

18. By labelling as "collective expulsion" Italy's attempts to police its borders during an unforeseen emergency, the majority do a grave disservice to an intentionally focused and narrow concept in international law, which is meant to apply only in the most severe of circumstances. To find a violation here misrepresents the reality of the situation faced by the Italian authorities and by the migrants in question. It necessarily dilutes a clear prohibition under international law that has its roots in the national homogenisation and genocidal policies of the twentieth century. Article 4 of Protocol No. 4 has no place in the present case of non-discriminatory and procedurally regular removal.

In view of our position regarding both Article 3 of the Convention and Article 4 of Protocol No. 4 (no violation), we conclude that there has been no violation of Article 13 either; in fact an effective remedy was available.

For the reasons set out above we also conclude that the just satisfaction award is excessive.

PARTLY DISSENTING OPINION OF JUDGE LEMMENS

(Translation)

1. The significance of the present judgment extends far beyond the case of the three applicants. Even though it concerns facts dating from a specific period in the past, 17 to 29 September 2011, its lessons remain highly relevant today.

I fully agree with all the findings concerning the applicants' complaints.

2. With regret, however, I am unable to follow my colleagues in the majority in determining the amount of just satisfaction awarded to the applicants. The judgment awards each applicant the sum of 10,000 euros, making a total of 30,000 euros (see paragraph 191 of the judgment).

Such amounts are, in my opinion, excessive. To prevent just satisfaction from taking on the appearance of a system of punitive damages, it would be appropriate, in my view, to give greater consideration to the actual situation of the victims. I believe that the majority have failed to take sufficiently into account the fact that these are individuals living in Tunisia, a country where much more can be done with 10,000 euros than would be the case, for example, in Italy[4].

[4] According to the International Monetary Fund's *World Economic Outlook Database* of April 2015, the Gross domestic product based on purchasing-power-parity (PPP) per capita GDP at constant prices, was 35,811.443 US dollars for Italy and 11,623.652 US dollars for Tunisia (source: http://www.imf.org/external/pubs/ft/weo/2015/01/weodata/index.aspx).