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MIGRATIONS AND
FUNDAMENTAL RIGHTS:
THE WAY FORWARD

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INDEX

PREFACE	7
GIUSEPPE CATALDI , Migration in the Mediterranean Sea and protection of rights: some recent cases of Italian practice	9
MICHELE CORLETO , The responsibility of Italy in the effective prosecution against migrant smugglers and traffickers in the Mediterranean area	23
GIULIANA DORIA , Enforced disappearances and migration	41
ANGELA PACELLI , <i>Khlaifia and others v. Italy</i> : lights and shadows in the judgement of the Great Chamber of the European Court of the Human Rights	53
ANNA FAZZINI , “Are you really gay?”. Main criticalities in the protection of LGBT refugees within the European Union	67
ADELE DEL GUERCIO , Migration and fundamental rights. The case of Italy	81
MIGUEL MELLINO , La crise de l’antiracisme européen. L’Italie come observatoire de la nouvelle conjoncture politique européenne	115
LORENZO RICCIO , Foreigner and the condition of reciprocity	129
MARIANNA PACE , Human rights of migrants and refugees in the new international Agenda for sustainable development	139
VALERIA SAGGIOMO , The way forward is the civil society	169
ELISA FORMALÉ , Floating rights in times of environmental challenges	183
MARIANELLA PIRATTI , International migration and human rights in Africa: some main issues with particular reference to the ECOWAS space and Northern Africa	201

VALERIA SAGGIOMO , Understanding migrants' contribution to development. A case study from Somaliland	251
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MIGRATION AND FUNDAMENTAL RIGHTS.
THE CASE OF ITALY
*Adele Del Guercio**

SUMMARY: 1. Introduction: the space for human rights in contemporary European societies. – 2. European Union policy on migration and asylum. – 3. Law No. 132/2018: criticism of the adoption procedure. – 3.1. Law No. 132/2018: the abrogation of humanitarian protection. – 3.2. The new residence permits introduced by Law No. 132/2018. – 3.3. The reform of the national reception system for applicants for international protection. – 3.4. A new problematic exclusion clause. – 3.5. The introduction in the national legal order of the principles of “Safe Countries of Origin” and of “Internal Flight Alternative”. – 3.6. The detention of asylum seekers. – 3.7. Harder conditions to access Italian citizenship. – 4. Conclusion.

“In a racist society it is not enough to be non-racist.
We must be anti-racist”
(Angela Y. Davis)

1. Introduction: the space for human rights in contemporary European societies

It is not easy to speak about fundamental rights at a time when sovereignty is being revived, and xenophobic and racist governments are asserting themselves, bringing with them hard-nosed security policies on immigration and asylum. Europe is a privileged observation space of the aforementioned dynamics; take for instance the policies enacted by Hungarian President Viktor Orbán,¹ which have led the European Commission to start an infringement procedure,² the restoration of border controls by Austria, France, Germany, Denmark,

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¹ Committee for the Prevention of Torture, *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 18.09.2018.

² European Commission, *Migration: Commission steps up infringement against Hungary concerning its asylum law*, 7 December 2017, <https://www.refworld.org/docid/5a5376864.html>.

Sweden and Norway,³ and the rejection of migrants by Spanish authorities at the borders of Ceuta and Melilla.⁴ Italy is no exception and, indeed, undoubtedly constitutes at this moment in history one of the worst examples of the failure to comply with national and international human rights obligations.

In recent years, Italian governments (center-left, first, followed by the right) have been characterized by rather blameworthy political choices. In 2017, Italy resumed its cooperation with Libya,⁵ a country that is territorially divided and controlled by various armed militias in conflict,⁶ and with respect to which there is great perplexity as to whether it can be considered a subject of international law. The cooperation between Italy and Libya was immediately condemned by the United Nations⁷ and the Council of Europe,⁸ which denounced the torture, abuse and violence suffered by migrants in Libyan detention centers,⁹ bearing in mind moreover that, in many cases, State authorities

³ <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control>.

⁴ Amnesty International, *España: Nueve ONG piden al gobierno que ponga fin a las “devoluciones en caliente”*, 17 December 2018. See the judgment of 3.10.2017 of the European Court of Human Rights, *N.D. e N.T. v. Spain*, applications No. 8675/15 e 8697/15, and the decision of 22.2.2019 of the Human Rights Committee, *D.D. v. Spain*, App. No. 4/2016.

⁵ On the argument see A. Liguori, “The 2017 Italia-Libya Memorandum and its consequences”, in G. Cataldi, A. Liguori, M. Pace (eds.), *Migration In The Mediterranean Area And The Challenges For “Hosting” European Society*, Editoriale Scientifica, Napoli, 2018, p. 215 ff., http://www.jmcmigrants.eu/jmce/wp-content/uploads/2018/02/II-VOLUME_Migration-and-hosting-european-society.pdf; A. Palm, *The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?*, 2.10.2017, <http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>; M. Tazzioli, “Rethinking Migration And Autonomy From Within The “Crises””, in *Völkerrechtsblog*, 23.10.2017, <https://voelkerrechtsblog.org/rethinking-containment-through-the-eu-libya-migration-deal/>.

⁶ United Nations Support Mission in Libya. Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, 18.12.2018.

⁷ <http://www.un.org/en/sc/documents/sgreports/2017.shtml>; <http://undocs.org/S/2017/466>.

⁸ <https://rm.coe.int/letter-to-the-minister-of-interior-of-italy-regarding-government-s-res/168075baea>.

⁹ UNSMIL, OHCHR, “*Detained And Dehumanised*” *Report On Human Rights Abuses Against Migrants In Libya*, 13.12.2016, https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf. See also the *Thirteenth Report Of The*

and human traffickers coincide.¹⁰ The Italian cooperation with Libya also entailed the legitimization of the Libyan coastguard, which was delegated with search and rescue activities previously implemented by Italian naval units. This resulted in the return of migrants to the Libyan coasts, episodes of violence, and shipwrecks. It is no coincidence that 2018 saw more than 2,000 people lose their lives at sea. To the above facts we must also add the closure of ports by the Italian government¹¹ and the criminalization of NGOs,¹² which, alone in recent years, have ensured the implementation of international rules on search and rescue in the Mediterranean sea.

Another critical element of Italian policy is the restriction of the rights of asylum seekers, in particular of the right of appeal, was the effect of the adoption of Law No. 46/2017 (the so-called “Minniti decree”).¹³ This law changed the Italian asylum procedure, so that the asylum seeker to whom the Territorial Commission and the judge of first instance have denied international protection cannot apply to the

Prosecutor Of The International Criminal Court To The United Nations Security Council Pursuant To UNSCR 1970 (2011), 2017, <https://www.icc-cpi.int/iccdocs/otp/otp-rep-unsclib-05-2017-ENG.pdf>; the judgment of the *Corte di Assise* of Milan, 10.10.2017, http://questionegiustizia.it/articolo/il-caso-matammud-un-modello-terrorifico-di-gestione-dei-centri-d-accoglimento-profughi-in-libia_25-09-2018.php; and the *Human Rights Watch World Report 2017*, 12.12.2018.

¹⁰ Amnesty International, *Libya's Dark Web of Collusion. Abuses Against Europe-Bound Refugees And Migrants*, 2017; Limes, *Milizie, guardia costiera e trafficanti: come collaborano i gestori della nuova tratta degli schiavi*, 7.12.2017, <http://www.limesonline.com/cartaceo/milizie-guardia-costiera-e-trafficanti-come-collaborano-i-gestori-della-nuova-tratta-degli-schiavi?prv=true>.

¹¹ De Sena, F. De Vittor, *La “minaccia” italiana di “bloccare” gli sbarchi di migranti e il diritto internazionale*, in *SIDIBlog*, 1.07.2017, <http://www.sidiblog.org/2017/07/01/la-minaccia-italiana-di-bloccare-gli-sbarchi-di-migranti-e-il-diritto-internazionale/#comment-4621>.

¹² ASGI, *Position Paper On The Proposed “Code Of Conduct For NGOs Involved In Migrants’ Rescue At Sea”*, 24.07.2017, https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf; G. Cataldi, “Migranti nel Mediterraneo e tutela dei diritti. Alcuni recenti casi della prassi italiana”, in *Quaderni di economia sociale*, 2018, 2, p. 33-38; F. De Vittor, “Soccorso in mare e favoreggiamento dell’immigrazione irregolare: sequestro e dissequestro della nave Open Arms”, *Diritti umani e diritto internazionale*, 2, 2018, p. 443 ff.

¹³ Law 13 April 2017, No. 46, “Disposizioni urgenti per l’accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell’immigrazione illegale”.

court of second instance.¹⁴ The effect is that, while an Italian citizen has the right to appeal to the judge of second instance to challenge even the most petty forfeit, asylum seekers do not have the analogous right to exercise a fundamental right enshrined by the Constitution (the right of asylum, Art. 10). This is a serious form of discrimination. Furthermore, the court of first instance can decide on the application for international protection without even listening to the asylum seeker but only by viewing the video recording produced during the hearing before the Territorial Commission.

In this framework, already disastrous in itself, there emerged another problematic legal intervention, Decree-law No. 113/2018, converted into Law No. 132/2018,¹⁵ which immediately aroused criticism from the United Nations,¹⁶ the Council of Europe,¹⁷ sectors of institutions,¹⁸ jurists,¹⁹ intellectuals²⁰ and civil society.²¹ Moreover, some Italian

¹⁴ Asylum seekers retain the right to apply to the *Corte di Cassazione*, which however does not rule on the merits of the case.

¹⁵ Law 1 December 2018, No. 132, “Conversione in legge, con modificazioni, del decreto-legge 4 ottobre 2018, n. 113, recante disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata. Delega al Governo in materia di riordino dei ruoli e delle carriere del personale delle Forze di Polizia e delle Forze Armate”.

¹⁶ UN Human Rights Council, *Legal changes and climate of hatred threaten migrants’ rights in Italy, say UN experts*, 21.11.2018.

¹⁷ <https://www.infomigrants.net/en/post/13382/council-of-europe-italian-security-decree-a-step-backwards>.

¹⁸ CSM, *Parere ai sensi dell’Art. 10 L. 24.3.1958, n. 195, sul decreto legge 113 del 4 ottobre 2018 recante: “Disposizioni urgenti in materia di protezione internazionale e immigrazione, pubblica sicurezza, nonché misure per la funzionalità del Ministero dell’Interno e l’organizzazione e il funzionamento dell’Agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata” (Delibera consiliare del 21 novembre 2018)*, <https://www.csm.it/documents/21768/92150/parere+decreto+sicurezza+%28delibera+21+nove+mbre+2018%29/b80ecce0-0d61-e4b4-183c-9e20b48aac55>. See the speech of the President of the Italian *Corte di Cassazione*, 25.01.2019, http://questionegiustizia.it/doc/requisitoria_proc_gen_cass.pdf.

¹⁹ ASGI, *Manifeste illegittimità costituzionali delle nuove norme concernenti permessi di soggiorno per esigenze umanitarie, protezione internazionale, immigrazione e cittadinanza previste dal decreto-legge 4 ottobre 2018, n. 113*, 15.10.2018; C. Padula, *Quale sorte per il permesso di soggiorno umanitario dopo il dl 113/2018?*, 21.12.2018, <http://www.asgi.it/>.

²⁰ See the appeal of Gustavo Zagrebelsky, Tomaso Montanari, Sandra Bonsanti,

Regions have challenged the Law in the Constitutional Court because of its unconstitutionality.²² However, there was no censure by the European Union and this circumstance, to tell the truth, was unsurprising, given that since 2001, as a consequence of the emergence of the terrorist threat, and more markedly in recent years, in relation to the so called “refugee crisis”, the migration management policies adopted at supranational level are increasingly marked by stigmatization of the migrant – seen as a threat to public order or, at the very least, as an impostor moved by the desire to abuse the European asylum system.²³ Among the concrete measures taken as a result of this are, as we have seen, the containment of arrivals, including through repressive measures, and the prevention of departures from countries of origin.

This paper proposes to verify the compatibility of Law No. 132/2018 with fundamental human rights to which Italy is bound by virtue of the Constitution, as well as international and European law. The analysis will focus exclusively on some of the problematic profiles concerning international protection, immigration and citizenship (Title I, Articles 1-14), although it should be noted that the Law, renamed the “security law”, includes various measures, among these the detention for up to 10 years of persons who occupy land and housing (in the case of groups of at least five people) and those blocking roads and tracks, the provision of equipping urban police with electric impulse weapons (TASER), and the extension of the hypothesis of urban DASPO.²⁴ In this regard, we take note of the fact that the Executive’s decision to intervene with the same legal instrument on issues of an extremely heterogeneous nature, in a repressive function that limits civil liberties and fundamental rights,

Lorenza Carlassare, Paul Ginsborg, Francesco Pallante, Valentina Pazé, Elisabetta Rubini, Salvatore Settis and Nadia Urbinati in *Libertà e giustizia*. See also CIR, *Approvazione c.d. decreto sicurezza un grave passo indietro per il diritto d’asilo, Comunicato stampa del 28.11.2018*; Giuristi democratici, *Decreto Legge “Sicurezza”, dopo un pessimo testo emendamenti ancora peggiori? No, grazie!*, 31.10.2018.

²¹ Many events took place throughout Italy to protest against the security decree. Among these we want to refer to the protest held in Rome on November 10, identified by hashtag #indivisible, organized by associations and movements, with tens of thousands of people marching through the streets of the capital.

²² Emilia Romagna, Toscana and Umbria, but others have declared they will do the same.

²³ I Atak and J. C. Simenon (*The criminalization of Migration*, McGill-Queen’s University Press, Montreal, 2018) speaks of “crimmigration”.

²⁴ Urban DASPO is a measure that prevents a person from accessing to the territory of a city.

does not appear to be coincidental nor does it respond to the real needs of society, with the risk of strengthening and spreading a climate of fear and social unease.²⁵

2. European Union policy on migration and asylum

Before analyzing the subject of the investigation, we consider it appropriate to reconstruct the European political and normative framework in which Italian immigration and asylum policy is inserted.

The European Union has relied on the “refugee crisis” for the adoption of measures explicitly aimed at blocking people in countries of origin and transit and preventing arrivals in the territory of the Member States, without paying any attention to those people’s rights. The “compact” has become the main instrument of the European strategy defined since the adoption of the Agenda on migration in 2015.²⁶ These are agreements (not real international agreements of a mandatory legal nature) to be stipulated with countries identified as *privileged partners*, which are delegated not only with the operations of border control and fight against the criminal organizations dedicated to the traffic of human beings, but also with the reception of people in transit to Europe, notwithstanding the difficulties these countries face in adequately equipping themselves with efficient asylum systems, given their situations of poverty, political instability and exposure to attacks by terrorist groups.

This is not a new strategy, since it is the basis of the well-known processes of Rabat²⁷ and Khartoum,²⁸ and of the Valletta Summit.²⁹ The partners are assisted in order to strengthen border controls, monitor the movement of people, combat human traffickers, and readmit their repatriated citizens. The priority is to ensure that asylum seekers remain as close as possible to their country of origin, avoiding dangerous

²⁵ See L. Pepino, “Le nuove norme su immigrazione e sicurezza: punire i poveri”, *Questione giustizia*, 12.12.2018, www.questionegiustizia.it.

²⁶ European Commission, *Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions. A European Agenda On Migration*, COM(2015) 240 final, 13.05.2015.

²⁷ <https://www.rabat-process.org/en/about/rabat-process/333-rabat-process>.

²⁸ <https://www.khartoumprocess.net/>.

²⁹ <https://www.consilium.europa.eu/it/meetings/international-summit/2015/11/11-12/>.

journeys. Although the European Union has established an *ad hoc* fund, the Emergency Trust Fund for Africa,³⁰ it has been shown that the sums allocated are not destined, as they should be, to projects that combat poverty in local communities, but rather to carrying out repatriations and controlling frontiers, in this manner negatively affecting development processes and creating distortions and corruption in local dynamics.³¹

It is emblematic and deeply worrying that the reference model of cooperation with third countries, in the context of the new partnership framework launched by the European Union in 2016,³² should be identified in the notorious EU-Turkey Declaration of 18 March 2016.³³ As is well known, the Declaration was intended to prevent entry into Greece, making Turkey the guardian of the eastern migration route. To this end, it was established that for every “bad” Syrian citizen repatriated to Turkey – bad because he or she entered Greece illegally – a “good” Syrian citizen would be transferred to Greek territory and given access to the asylum procedure. The EU-Turkey Declaration therefore determines a clear and illegal discrimination between asylum seekers, since only Syrian citizens can participate in the so-called “1:1 mechanism” and thus aspire to reach European territory and see their application for international protection examined according to EU law on asylum. Asylum seekers of other nationalities are instead destined to remain in Turkey.

This is in violation of the 1951 Geneva Convention, which, in Article 3, prohibits any differentiated treatment between asylum seekers. In the international refugee protection regime any person has the right to apply for international protection and to have it examined on an individual basis, without discrimination of any kind. In fact, refugee status is a

³⁰ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171207_eu_emergency_trust_fund_for_africa_en.pdf.

³¹ <http://www.concorditalia.org/wp-content/uploads/2017/11/rapporto-completo-EUTF.pdf>.

³² European Commission, *Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM (2016)385 final of 7.6.2016.

³³ <https://www.consilium.europa.eu/it/press/press-releases/2016/03/18/eu-turkey-statement/>. On the EU-Turkey Statement see the report of Oxfam, *The reality of the EU-Turkey Statement*, 17.03.2017, <https://www-cdn.oxfam.org/s3fs-public/bn-eu-turkey-statement-migration-170317-en.pdf>; M. Marchegiani, L. Marotti, “L’accordo tra l’Unione europea e la Turchia per la gestione dei flussi migratori: cronaca di una morte annunciata?”, in *Diritto immigrazione e cittadinanza*, 1-2/2016, pp. 59-82.

subjective right, linked to the reasons for persecution referred to in art. 1A of the Geneva Convention. Moreover, even the European Court of Human Rights has consistently reiterated that State authorities must always guarantee an individual and rigorous examination of the circumstances emerging from the case, if a State hopes to avoid a violation of the ECHR. The EU-Turkey Declaration therefore institutionalizes a form of impermissible discrimination in the light of international obligations to which all EU Member States are bound.

Among other things, it should be noted that Turkey maintains the geographical reservation to the Geneva Convention; consequently, only European citizens can aspire to refugee status. Following the conclusion of the agreement with the EU, the Turkish government modified its internal legislation so as to allow only Syrian refugees access to a temporary form of refuge, which also allows access to work. No legislative intervention, on the other hand, concerned asylum seekers of other nationalities, who, therefore, do not have any possibility of obtaining asylum in Turkey and are repatriated, rejected at the borders or held in detention centers for migrants in conditions of irregularity. This is of deep concern, if we consider that the eastern route is used by people fleeing from Afghanistan and Iraq, or from countries in which there is a situation of generalized violence that would give the right to the recognition of a form of protection in Europe. Moreover, Human Rights Watch has denounced that the Syrian citizens themselves are more and more often blocked at the border and sent back to their country,³⁴ and even when they are able to obtain protection they are subjected to forms of serious labor exploitation.³⁵

The cooperation with Turkey in the fight against “irregular immigration” has been well financed by the European Union: according to data in the latest Commission report, by May 2018 two billion euros had been paid to the aforementioned country, with another 3 billion were allocated. The funding should cover the expenses for the reception of Syrian refugees in Turkish territory, in particular for the subsidy to be distributed to them and for the implementation of interventions aimed at guaranteeing the right to

³⁴ [https://www.theguardian.com/global-development/2018/oct/16/syrian-refugees-deported-from-turkey-back-to-wa r?CMP=share_btn_tw](https://www.theguardian.com/global-development/2018/oct/16/syrian-refugees-deported-from-turkey-back-to-wa-r?CMP=share_btn_tw).

³⁵ Human Rights Watch, *World Report 2019*, available at: <https://www.hrw.org/world-report/2019/country-chapters/turkey#331939>.

education and medical care.³⁶ In truth, the situation of asylum seekers in Turkey is deeply alarming.³⁷

The securitization of EU policies also emerges from the redefinition of the competences and powers of the new European Border and Coast Guard (EBCG),³⁸ which replaces FRONTEX, without distorting its original mission of controlling the borders and carrying out return operations of citizens of third countries in conditions of irregularity. The power of the new EBCG to cooperate with third countries by launching joint operations and deploying personnel is also strengthened. The FRONTEX reform also moves clearly in the direction of outsourcing migration management. Once again, therefore, little attention is paid to search and rescue competences: the priority of the EU continues to be the security of borders, not people's safety.³⁹

It should also be noted with regret that, despite the humanitarian rhetoric of the Agenda on Migration and of the documents subsequently adopted by the European Commission, a strategy for opening legal access routes to Europe,⁴⁰ which is the only effective instrument for combatting human trafficking organizations, has not been defined. This possibility is left to Member States and private parties, but not defined in a common European framework, although both visa and asylum policy are competences shared between the EU and Member States.

³⁶ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_annex-2-progress-report-european-agenda-migration_en.pdf.

³⁷ O. Ulusoy, H. Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*, VU Migration Law Series No 15, 2017, reperibile al link https://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf. See also Human Rights Watch, *EU: Don't Send Syrians Back to Turkey: Lack of Jobs, School, Health Care Spurs Poverty, Exploitation*, 2016, <https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey>.

³⁸ Regulation (EU) 2016/1624 of the European Parliament and of The Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

³⁹ F. Crépeau, *Regional Study: Management of the External Borders of the European Union and Its Impact on the Human Rights of Migrants*, 2013, Geneva, Office of the United Nations High Commissioner for Human Rights.

⁴⁰ See the document of the European Parliament, K. Luyten-S. González Díaz (eds.), *Legal Migration to the EU*, March 2019, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635559/EPRS_BRI\(2019\)635559_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635559/EPRS_BRI(2019)635559_EN.pdf).

Undoubtedly, in fact, as long as the visa policy remains restrictive and the EU and Member States lack a policy of legal entry into European countries, not only for asylum seekers but also for those who move for work reasons or other reasons, criminal organizations will continue to make money from people who, whether by choice or by coercion, leave their countries to reach Europe. The resettlement policy itself, although conceived in very modest terms, has been implemented with difficulty. Meanwhile, the scarce cooperation shown by the Member States in the relocation of asylum seekers from Italy and Greece shows that the crisis is primarily a crisis of solidarity, not only towards people coming from other countries, but also among States involved in the process of building a common membership.

Emblematic, in this sense, is also the stalemate in which the reform of the common European asylum system finds itself: it started in 2016⁴¹ and not yet concluded. This is due to the obstructionism of some Member States, particularly those of the Visegrad group (Poland, the Czech Republic, Slovakia and Hungary), although they are not alone. The most critical element of the package of measures presented by the European Commission is the reform of the Dublin regulation.⁴² One of the proposals, supported by the European Parliament, would overcome the criterion of first entry, which in recent years has produced disproportionate pressure on the Italian and Greek asylum systems, and to redistribute applicants between Member States in a balanced way.⁴³ However, the European Parliament's proposal was not approved by the Council and at the time of writing there are no developments in this regard.

3. Law No. 132/2018: criticism of the adoption procedure

Decree-law No. 113/2018 was adopted on October 5 and then converted into Law No. 132/2018. This was adopted by the Italian Senate (*Senato*),

⁴¹ European Commission, *Communication From The Commission To The European Parliament And The Council Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To Europe*, COM(2016) 197 final, 6.04.2016.

⁴² Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁴³ http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%29586639_EN.pdf.

with changes to the original text, on November 7, and subsequently by the Italian Chamber of Representatives (*Camera*) on November 27, without further intervention. In both cases, the Executive endorsed it, thus speeding up the process of approval, but preventing any discussion in Parliament.⁴⁴ Law No. 132/2018 has been in force since December 4.

This analysis will begin by looking at the questionable choice of the Executive to intervene, as we said, on extremely heterogeneous subjects (immigration, international protection, citizenship, public security, the fight against corruption and organized crime, administrative organization of national authorities and local public security) with a decree law, an instrument that, pursuant to Art. 77 of the Constitution and the guidelines of the Constitutional Court,⁴⁵ should be reserved for cases of extraordinary necessity and urgency. This choice is justified – according to the Executive – by necessity and the urgency “to provide measures to identify the cases in which special temporary residence permits for humanitarian needs are issued, as well as to guarantee the effective implementation of the deportation measures” and to adopt rules on the revocation of the status of international protection as a result of the establishment of the commission of serious offenses and rules suitable to avoid instrumental recourse to the international protection, to rationalize the use of the system of protection for beneficiaries of international protection and for unaccompanied minors, as well as provisions aimed at ensuring the proper conduct of the procedures for granting and recognizing citizenship (Introduction).

It is disputable whether we are faced with the stringent conditions imposed by the Constitution to decree a case of urgency,⁴⁶ also taking into account the heterogeneity of the rules contained in the decree, which do not respond to a unitary purpose of intrinsic coherence, unless the exercise of subjective rights, such as the right to asylum, is an issue connected with the maintenance of public order and the security of the country.⁴⁷

⁴⁴ The text of Decree-Law No. 113/2018 is available at the link http://www.gazzettaufficiale.it/eli/id/2018/10/04/8G_00140/sg. On the critical aspects of the adoption procedure see G. Azzariti, “A proposito della nuova normativa in materia di migrazioni: le incostituzionalità non discusse”, *Questione Giustizia*, 18.01.2019, www.questionegiustizia.it.

⁴⁵ Among others, Constitutional Court, judgement of 17-24 October 1996, No. 360

⁴⁶ See Art. 15, co. 3, of the Law No. 400/1988 and the judgment of the Constitutional Court No. 22/2012.

⁴⁷ See G. Azzariti, *cit.*; R. Nevola, *La decretazione d'urgenza nella giurisprudenza*

From the outset, therefore, it is possible to recognize the unconstitutionality of the measure under examination, given the choice of using the instrument of the decree law, the absence of urgent situations, the substantial heterogeneity of the subjects dealt with by the decree law, and the vagueness of the motivations to justify adoption of the decree.⁴⁸

3.1. *Law No. 132/2018: the abrogation of humanitarian protection*

Considering the contents of Law No. 132/2018 (converting decree-law No. 113/2018) in greater detail, the first element to underline is that it affects the national protection system for asylum seekers, first by abolishing humanitarian protection and, consequently, the residence permit for humanitarian reasons, then by introducing four new residence permits for “special cases” into the Italian regulatory framework and confirming three existing ones (renamed as permits for “special cases”).

Humanitarian residence permits were governed by Art. 5, co. 6, of the national law on immigration (*Testo unico sull’immigrazione*),⁴⁹ which, together with refugee status and subsidiary protection, implemented the right to asylum referred to in Art. 10, co. 3, of the Italian Constitution. This article states: “a foreigner who is prevented in his country from the effective exercise of democratic freedoms guaranteed by the Italian Constitution has the right to asylum in the territory of the Republic, according to the conditions established by law”.⁵⁰

Prior to the adoption of law-decree No. 113/2018, the Italian Territorial Commissions for the examination of applications for international protection could grant applicants the status of refugee, where there is a risk of persecution in the applicant’s State of origin, for

costituzionale, September 2017, https://www.cortecostituzionale.it/documenti/convegni_seminari/STU_304_Decretazione_urgenza.pdf.

⁴⁸ For a more detailed examination of the profiles of unconstitutionality of the decree-law No. 113/2018 see the opinion of the CSM VI Commission, the Minister of Justice on the security law decree, *cit.*, and the documents of ASGI, *Manifeste illegittimità costituzionali*, *cit.*, and C. Padula, *Quale sorte per il permesso di soggiorno umanitario*, *cit.* See also N. Tomeo, “I presupposti costituzionali per l’approvazione del decreto legge n. 113/2018”, *Immigrazione.it*, No. 323, 1 November 2018.

⁴⁹ *Testo unico on immigration*. Legislative decree, 25/07/1998 n° 286.

⁵⁰ On the right of asylum granted by the Italian Constitution see M. Benvenuti, “La forma dell’acqua. Il diritto di asilo costituzionale tra attuazione, applicazione e attualità”, *Questione giustizia*, 2, 2018.

reasons of race, religion, nationality, belonging to a specific social group or political opinions. Alternatively, if it was not possible to recognize the status of refugee but, in light of the personal situation of the applicant and that of the country of destination, the Territorial Commission considered that the applicant was in danger of suffering serious harm (capital punishment, torture and inhuman and degrading treatment and punishment, a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict), the Territorial Commission could grant subsidiary protection.⁵¹ Article 32, co. 3, of Legislative Decree No. 25/2008 then stated that "in cases where the Territorial Commission doesn't admit the application for international protection and believes that there may be serious humanitarian reasons, it will forward the application to the *Questore* for the granting of a residence permit pursuant to Article 5, co. 6, of the legislative decree 25 July 1998, n. 286".

The aforementioned provision linked the issue of the residence permit for humanitarian reasons to serious motivations, in particular of a humanitarian nature or resulting from Constitutional or international obligations of the Italian State. The Italian Court of Cassation specified that "the legal situation of the foreigner that applies for the issue of permission for humanitarian reasons has a consistency of subjective right, to be counted among fundamental human rights",⁵² and that the competent body to decide on the release should be the Territorial Commission, not the *Questore*.⁵³

The Constitutional right to asylum was therefore implemented through three forms of protection: refugee status, subsidiary protection and humanitarian protection. The latter, in case law,⁵⁴ was used to protect people in heterogeneous situations of *vulnerability*, not rigidly typified and not part of the international protection framework. It was used to regularize, *inter alia*, the legal situation of victims of torture, violence and rape when they were in Libya or during the migration process, of single women with children, of persons whose application for international protection was pending and that had completed a

⁵¹ Art. 23, legislative decree No. 251/2007.

⁵² Corte di Cassazione, order No. 19393/2009 and judgment No. 4455/2018.

⁵³ Corte di Cassazione, order No. 19393/2009.

⁵⁴ Corte di Cassazione, order No. 10686/2012; order No. 12270/2013 and order No. 26887/2013.

process of integration, of ill persons, or even of persons that in case of return in their country of origin would have found themselves in conditions of extreme poverty.⁵⁵ Therefore, humanitarian protection was “a residual form of protection that completes the overall system governing the international protection of foreigners in Italy”.⁵⁶

The residence permit for humanitarian reasons lasted two years and involved the recognition of many of the rights associated with international protection, as well as the convertibility to residence permits for work reasons and family reunification.

The normative framework preceding the adoption of decree-law No. 113/2018, illustrated above, was completed with permits “for special protection” for victims of trafficking (Article 18 of *Testo unico* on immigration), “for victims of domestic violence” (Article 18 bis) and for victims “of particular labor exploitation” (Article 22, paragraph 12-quater), not abolished by the aforementioned decree-law.

The need to intervene on humanitarian protection was justified, according to the Explanatory Report of decree-law No. 113/2018,⁵⁷ by referring to the instrumental use of international protection by Territorial Commissions and by the judges. The residence permit for humanitarian reasons, in fact, introduced by Law No. 40/1998 as a form of complementary and residual protection, to be used in situations of exceptional and temporary gravity, became in practice “the most widely recognized form of protection in the national system”, according to the Executive, because of a legal definition with uncertain contours and of an “excessively extensive” interpretation, that would be proved by the “anomalous disproportion” between the rates of recognition of

⁵⁵ See the circular of the *National Commission for the right of asylum (Commissione nazionale per il diritto d'asilo)* No. 3716/2015. On the residence permit for humanitarian protection, see M. Acierno, “La protezione umanitaria nel sistema dei diritti umani”, *Questione giustizia*, 2, 2018; M. Benvenuti, “Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini”, in *Diritto immigrazione e cittadinanza*, 1, 2019; G. Cataldi, “La distinzione tra rifugiato e migrante economico: una dicotomia da superare?”, in G. Nesi (ed.), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?*, Editoriale Scientifica, Napoli, 2018, pp. 585-601; C. Favilli, “La protezione umanitaria per motivi di integrazione sociale. Prime riflessioni a margine della sentenza della Corte di cassazione n 445/2018”, *Questione giustizia*, 1, 2018; N. Zorzella, “La protezione umanitaria nel sistema giuridico italiano”, *Diritto immigrazione e cittadinanza*, 1, 2018.

⁵⁶ Corte di Cassazione, judgment No. 4455/2018.

⁵⁷ https://www.adnkronos.com/r/Pub/AdnKronos/Assets/PDF/Decreto_SALVINI_migranti_scheda.pdf.

international protection and recognition of humanitarian protection.⁵⁸ The Executive therefore seems to find the cause of the aforementioned disproportion in what, in truth, is rather the consequence of an extremely restrictive visa policy and of the absence of legal entry channels; of the malfunctioning of the old Territorial Commissions prior to the reform, composed of unskilled personnel not inclined to the recognition of international protection even where the requisites established by law existed; as well as of the rigidity of the conditions attached to refugee status and subsidiary protection. It is not a coincidence that twenty of the twenty-eight Member States of the European Union have introduced complementary or charitable forms of protection in their legal system,⁵⁹ a possibility also admitted by EU law, as confirmed by the Court of Justice.⁶⁰

3.2. *The new residence permits introduced by Law No. 132/2018*

Decree-Law No. 113/2018, in force since October 5, then converted into Law No. 132/2018, abrogates the residence permit for humanitarian reasons, provides for new types of residence permits and renames others that previously contained the words “humanitarian reasons”.⁶¹

First of all, there is the residence permit “for special protection”, with an annual duration; it is renewable but not convertible into other types of residence permits. The Territorial Commission transmits the documents to the *Questore* for the issue of this type of residence permit when he hasn’t accepted the application for international protection but there is a risk of persecution pursuant to Art. 19, co. 1, or the risk of torture pursuant to Art. 19, co. 1.1, of the Legislative Decree No. 286/98 in the case of expulsion of the asylum seekers.

⁵⁸ *Ibidem*. In this regard, please refer to the data published by the Ministry of the Interior on the recognition of forms of protection to asylum seekers. It also highlights the high rate of recognition of protection (international or national ones) by judges, which would amount to around 50% of the appeals presented. See <http://www.libertaciviliimmigrazione.dlci.interno.gov.it/documentazione/statistica/numeri-dellasilo>.

⁵⁹ EASO, *The Annual Report on the Situation of Asylum in the European Union*, 2016.

⁶⁰ EU Court of Justice, joined cases C-57/09 e C-101/09, *Germany v. B. e D.*, judgment of 9.11.2010.

⁶¹ Art. 1, Law No. 132/2018. On this issue see ASGI, *Le principali novità sui permessi di soggiorno introdotte dal decreto legge n. 113/2018*, 31.10.2018, www.asgi.it.

With regard to these types of residence permit, there is a certain perplexity, since, even at first glance, it is clear that the circumstances contemplated are similar to those that lead to recognition of refugee status or subsidiary protection, and there is a conceivable risk that the Territorial Commissions, which are influenced by the central government's political orientations, may choose not to issue international protection and opt for a residence permit that guarantees fewer rights for the individual.

Nevertheless, some authors have highlighted the potential of this type of residence permit, which is substantially similar to the abrogated one, and which would guarantee protection to persons in situations not covered by the regulation on international protection.⁶²

Law No. 132/2018 then provides for a residence permit “for medical treatment”,⁶³ issued by the *Questore* to the foreigner who is in a “particularly serious” health condition, assessed by suitable documentation from a hospital or a doctor affiliated with the national health system (*Sistema sanitario nazionale*, S.S.N). This is a different case from the one provided for by Art. 36 of the *Testo Unico* on immigration, which allows entry into the Italian territory of a third-country citizen who needs medical treatment. The residence permit “for medical treatment” has a duration equal to the time attested by the health certification, but not exceeding one year, and is renewable. The law does not specify whether it allows work or is convertible.

In addition to the residence permit for medical treatment, the new law introduces a residence permit “for disasters”,⁶⁴ issued, again by the *Questore*, to foreigners who would return to a country in which there is a situation of exceptional calamity – not defined by law – which makes return in safe conditions impossible.⁶⁵

Finally, we must mention the permit “for acts of particular civic value”,⁶⁶ to be issued, upon authorization of the Minister of the Interior, as proposed by the *Prefetto*, to foreigners who have exposed themselves

⁶² M. Benvenuti, “Il dito e la luna”, cit., p. 30 ff.; A Marasacchia, “La protezione speciale sostituisce il permesso per motivi umanitari”, in *Guida al diritto*, 2018, p. 24.

⁶³ Art. 19, co. 2, lett. d-bis, Legislative Decree No. 286/98, introduced by law-decree No. 113/2018.

⁶⁴ Art. 20 bis, Legislative Decree No. 286/98, introduced by law-decree No. 113/2018.

⁶⁵ On the argument see E. Fornalé in this *book*.

⁶⁶ Art. 42 bis, Legislative Decree No. 286/98, introduced by Law-Decree No. 113/2018.

to a real risk to save people in imminent and serious danger, to prevent or diminish the damage of a serious public or private disaster, to restore public order, to participate in the arrest of criminals, to contribute to the progress of science or generally for the good of humanity, or to honor the name and prestige of Italy.

A critical note regarding the new residence permits concerns the precariousness of the legal status, both with regard to the duration of the residence permit issued (six months for the permit for disasters, one year extendable in other cases), and with regard to the non-convertibility of some of these in other types, in particular to residence permits for work reasons. The shorter duration also affects the exercise of other rights, such as access, on equal terms with citizens, to social assistance benefits (when the residence permit lasts less than one year) and to public housing (in the case of a residence permit with a duration of less than 2 years). Furthermore, the new law limits the right of the beneficiaries of the new types of residence permits to healthcare (this also having constitutional coverage in Article 32), as it does not provide for automatic enrollment in the national health service, but only for access to urgent and essential medical care.⁶⁷

It is clear therefore that the legislation introduced by the new law limits the exercise of rights that are guaranteed by the Constitution, determining a different treatment for similar situations previously protected under the umbrella of humanitarian protection.⁶⁸ Moreover, the competent body to issue the authorization to stay is no longer the Territorial Commission; the decision is instead left to the discretion of the *Questore* and the *Prefetto*. If the intentions declared by the Executive were to reorganize and rationalize the Italian asylum system, giving greater certainty to the applicable law,⁶⁹ *de facto* the reform splits humanitarian protection into a multiplicity of legal status categories, each with its own regulation, without however covering the heterogeneous circumstances that fell under humanitarian protection before the approval of the law under examination.

⁶⁷ Article 35 of Legislative Decree No. 286/1998. On this topic see ASGI, *Manifeste illegittimità costituzionali*, cit., p. 14.

⁶⁸ Regarding the temporal application of the new law, see the judgment of the Italian *Corte di Cassazione* of 19.02.2019, No. 4890.

⁶⁹ Dossier, *Decreto-legge immigrazione e sicurezza pubblica. Con gli emendamenti approvati dalla Commissione Affari costituzionali in sede referente. Dossier per l'Assemblea. D.L. 113/2018 - A.S. n. 840*, November 2018.

Furthermore, we want to point out that the most favorable regulation provided by the new law refers to those persons who perform acts of civic value. This choice is in line with a discursive rhetoric – which was already echoed in Law No. 46/2017 with reference to activities of unpaid social work that asylum seekers have to perform in favor of the Municipalities that host them⁷⁰ – according to which the foreign citizen must merit the residence permit, in a compensatory logic⁷¹ that isn't compatible with the exercise of fundamental rights such as the right to asylum and the right not to be rejected to a country where one's life would be at risk.

Returning to the examination of Law No. 132/2018, fortunately it does not prejudice the granting of some types of residence permits for special cases. In this regard, we wish to highlight that these types of residence permits meet the need to offer prompt protection to the victims of crimes like human trafficking, domestic violence and labor exploitation, but which must not prevent, where the conditions are met, the recognition of international protection.

In general, the new regulation introduced by Law No. 132/2018 does not have as broad a scope as the residence permit for humanitarian reasons pursuant to Art. 5 co. 5 *Testo Unico* on immigration, which, as we have said, allowed full implementation of Article 10 of the Constitution and of international obligations. Therefore, we are faced with a manifest constitutional illegitimacy since the Italian legal system does not allow for the possibility of reducing the scope of the forms of protection already provided for by law, where they implement Constitutional or international obligations.⁷² However, as has been pointed out, the new provisions must be given a constitutionally oriented interpretation;⁷³ so, where the foreigner's humanitarian needs have a constitutional or international juridical base, they must continue to receive protection, through old and new tools of Italian law, including the right to asylum enshrined in the Constitution at Art. 10.⁷⁴

In any case, the *Corte di Cassazione*⁷⁵ specified that the applications for international protection submitted by 5 October 2018 should be

⁷⁰ Law 13 April 2017, No. 46.

⁷¹ See C. Marchetti, "I diritti: né privilegi, né meriti", *Gli asini*, 57, 2018, pp. 9-13.

⁷² ASGI, *Manifeste illegittimità costituzionali*, cit., p. 7; *Opinion of CSM*, cit.

⁷³ M. Benvenuti, "Il dito e la luna", cit., p. 19.

⁷⁴ *Ibidem*, p. 27 ff.

⁷⁵ Corte di Cassazione, judgment No. 4890/2019.

examined according to the previous legislation, therefore the Territorial Commissions can issue a two-year renewable and convertible residence permit. Nevertheless, the percentages of recognition of humanitarian protection have decrease significantly.⁷⁶

3.3. The reform of the national reception system for applicants for international protection

In addition to the precariousness deriving from the abolition of humanitarian protection, which, according to an initial estimation, will condemn about 60,000 people to a condition of irregularity in the next two years,⁷⁷ we have to consider the precariousness deriving from the reform of the reception system of asylum seekers.⁷⁸ Law No. 132/2018 does not allow applicants for international protection to receive accommodation within the SPRAR (System of Protection for Asylum Seekers and Refugees), renamed “System for holders of international protection and unaccompanied minors” (SIPROIMI), which is reserved only for beneficiaries of international protection, unaccompanied minors (even if they aren’t asylum seekers)⁷⁹ and beneficiaries of some residence permits for special cases (for reasons of health, domestic violence, violence and hard exploitation, labor exploitation, natural disaster, civic value) if they do not already receive accommodation in the protection systems dedicated to them. The new law does not provide reception for beneficiaries of special protection permits.

The applicants for international protection, on the other hand, can find accommodation exclusively in the Centers of First Reception (CPA), in Reception Centers for asylum seekers (CARA) and in Extraordinary Reception Centers (CAS),⁸⁰ a system with serious failures in terms of the quality of the services offered, the training of staff, the adequacy of the facilities (in most cases overcrowded, in remote areas and distant from transportation), and support in the asylum procedures. Moreover, there have been many episodes of speculation by private

⁷⁶ http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/febbraio_2019_0.pdf.

⁷⁷ <https://openmigration.org/analisi/approvato-il-decreto-sicurezza-migliaia-di-stranieri-rischiano-di-diventare-irregolari/>.

⁷⁸ Art. 12 of Law No. 132/2018.

⁷⁹ See the document of Ministry of Interior of 3.01.2019.

⁸⁰ See the press release of the central office of the SPRAR, *Operatività SPRAR, Decreto legge n. 113/2018*, 24.10.2018.

companies – and in some cases by criminal organizations – without any profile compatible with the social activities implemented in the centers.⁸¹ In addition to shocking cases that have led the judges to start investigations and close some centers, there are known cases of CASs managed by private companies that, until a few months before this was written, produced refrigerators, or by hoteliers affected by the economic crisis, who responded to the call of the Prefecture, offering services far below required standards – already minimal – established by national regulation with regard to the extraordinary reception system.

Law No. 132/2018 dismantles the SPRAR, a system characterized by the provision of an “integrated reception”⁸² and the attention placed on the process of self-autonomy and social inclusion of the person, made possible by the small size of the reception facilities and by the high degree of specialization of the legal and social operators. The involvement of the local authorities, which entrusted the implementation of the services to third sector entities with consolidated and proven experience in the asylum sector, guaranteed high quality standards of reception and transparency in the management of the public funds. These features made SPRAR a good practice, studied and taken as a model by other European countries.⁸³

In reality, the process of dismantling had already begun with Law No. 142/2015,⁸⁴ which institutionalized the reception of asylum seekers in extraordinary centers (above all hotels) opened during the so-called “North Africa Emergency”. However, the law at issue specified at least that the accommodation of asylum seekers in the CASs was to be temporary and exceptional. Despite the law, this type of accommodation over time became the norm, as demonstrated by the data of Ministry of the Interior, according

⁸¹ On the critical aspects of the system of extraordinary reception, please refer to the site www.lasciateCIEntrare.it and to the report of In Migrazione, *Straordinaria accoglienza*, 2017. See also F.V. Virzi, “L’accoglienza dei richiedenti protezione internazionale: un’indagine sulle procedure di gara”, *Diritto immigrazione e cittadinanza*, 2, 2017, www.dirittoimmigrazionecittadinanza.it.

⁸² That goes well beyond the mere provision of accommodation, but includes orientation measures, legal and social assistance as well as the development of personalised programmes for the social-economic integration of individuals.

⁸³ See the report *Atlante SPRAR 2017*, www.sprar.it.

⁸⁴ Legislative decree 18 August 2015, No. 142, “Attuazione della direttiva 2013/33/UE recante norme relative all’accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale”.

to which 80% of those who are currently hosted in Italy are in the extraordinary reception system. Law No. 132/2018, restricting the possibility of accommodation in the ordinary system, goes so far as to deny a dignified reception to applicants for international protection, in this manner denying them *de facto* any possibility of social inclusion. The reception standards guaranteed within the extraordinary system appear to be far below those, already minimal, established by Directive 2013/33/EU,⁸⁵ especially when dealing with persons falling within the so-called “vulnerable groups” (minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, people suffering from serious illness or mental disorders, or those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence), in favor of which the directive provides for specific support services (for example, psychological assistance).

In this regard, it is important to point out that the Court of Justice has reiterated one of the principles on which the directive is based, namely that reception measures must guarantee a dignified level of life, adequate health and livelihood of the person.⁸⁶ There is strong doubt that the reception standards of the CAS, as illustrated in numerous reports made public in recent years and as can be deduced from the tenders of the Ministry of the Interior,⁸⁷ are compatible with the instructions of the Court of Justice and the European Court on Human Rights, according to whom asylum seekers are persons who are “particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously”,⁸⁸ even more so when they are unaccompanied minors or people in psychological distress.

⁸⁵ Directive 2013/33/EU of the European Parliament and Council, of 26 June 2013, laying down standards for the reception of applicants for international protection.

⁸⁶ EU Court of Justice, case C-79/13, *Saciri*, judgment of 27.02.2014.

⁸⁷ <http://www.interno.gov.it/it/amministrazione-trasparente/bandi-gara-e-contratti/schema-capitolato-gara-appalto-fornitura-beni-e-servizi-relativo-alla-gestione-e-funzionamento-dei-centri-prima-accoglienza>. The tender established for example that the availability of a psychologist in a facility that can accommodate from 50 to 150 people is of 16 hours per week, which means little more than 6 minutes in a week for asylum seeker.

⁸⁸ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, application no. 30696/09, judgment of the Grand Chamber of 21 January 2011, para. 232. On the concept of “vulnerability” see F. Ippolito, S. Iglesias Sanchez, *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, Oxford, 2015.

Even the choice to reserve social inclusion projects (for example access to training projects) exclusively to beneficiaries of international protection and special permits and to unaccompanied minors interferes with the social inclusion of asylum seekers. As no social inclusion measures are provided for these, they will find themselves in a situation of social marginality, with the consequence of being more exposed to exploitation by employers and to episodes of racism and violence, such as have often been recorded in the last few months in Italy.⁸⁹

Furthermore, the situation of the beneficiaries of humanitarian protection seems particularly problematic. Until now they have received accommodation in the SPRAR as well as support measures at the conclusion of the reception period, for example in the search for housing. However, since Law No. 132/2018 came into force, several Prefectures⁹⁰ have already informed CAS Directors of the cessation of services for beneficiaries of humanitarian protection, who, although in conditions of vulnerability, have been left to fend for themselves on the street. This appears even more questionable when vulnerable people are involved, such as pregnant women or women with children, victims of human trafficking and minors. It is clear that the measures contained in the law we are discussing give little attention to the *vulnerability* of the individual. If, in fact, the consequences of Law No. 132/2018 will be felt in general by asylum seekers and beneficiaries of humanitarian protection, nevertheless it cannot be said that its effects will be felt in particular by vulnerable persons.

3.4. *A new problematic exclusion clause*

The abrogation of humanitarian protection and the reform of the reception system for asylum seekers are not the only critical aspects of Law No. 132/2018. Although there is not space here to examine the entire text of the Law in detail, a reference is obligatory, also in view of the precariousness produced by the new measures regarding the personal and legal status of people, to the new cases of denial of international protection related to criminal proceedings, disproportionate with respect to the exclusion clauses from refugee status provided for by the Geneva Convention. The European Union Court of Justice, while confirming that it is not possible to accord refugee status to those persons guilty of the

⁸⁹ LUNARIA, *Un'estate all'insegna del razzismo*, October 2018.

⁹⁰ Among others the Prefectures of Potenza, Crotone, Cosenza.

crimes listed under Art. 12 para. 2 of Directive 2011/95/EU, has nevertheless specified that a prior individual examination must be carried out that takes into account both the subjective and objective elements, in order to verify whether the application of the exclusion clause is legitimate or not.⁹¹ In particular, the competent authorities must assess “the role actually played by the asylum seeker in carrying out the acts contested, his position within the organization, the degree of knowledge of the activities of the organization, and any pressures or other factors capable of influencing his behavior”.⁹²

In any case, it should be noted that the aforementioned directive provides as grounds for exclusion from international protection – in addition to the assumptions already covered by the 1951 Geneva Convention (international crimes and acts contrary to the purposes and principles of the United Nations) – only for the commission of “particularly cruel acts” that integrate the hypothesis of “*serious crimes of common law*” (the emphasis is ours), in the case of refugee status, or of “serious crimes”, in the case of subsidiary protection. It is doubtful whether violence or threats directed at a public official, theft aggravated by the use of arms or narcotics or domestic burglary constitute a danger to the security of the State or can be considered as particularly cruel acts. Rather, as it emerges from the dossier that accompanies the normative act under examination,⁹³ these are criminal hypotheses “that cause social alarm”, and that therefore can easily be the object of repressive and propagandistic exploitation.

Moreover, in some cases it is established that the appeal against the refusal of international protection has no suspensive effect, and this is particularly serious, since, besides compressing the right of defense, which is one of the fundamental principles of both the Italian⁹⁴ and European Union⁹⁵ legal systems, it could expose the person to the risk of suffering harmful treatment in the event of immediate removal from the territory.

⁹¹ EU Court of Justice, *Germany v. B. e D.*, cit, para. 96.

⁹² Ivi, para. 97.

⁹³ Dossier, *Decreto-legge immigrazione e sicurezza pubblica*, cit., p. 4.

⁹⁴ Art. 24 of the Constitution.

⁹⁵ Art. 13 ECHR and Art. 47 of the Charter of Fundamental Rights of the European Union.

3.5. *The introduction in the national legal order of the principles of “Safe Countries of Origin” and of “Internal Flight Alternative”*

The notion of “safe country of origin” is an instrument used in international practice to expedite review of applications for international protection, placing the burden of proof on the asylum seeker and in most cases refusing protection. The existence of a list of “safe countries of origin” and the possibility of transferring an asylum seeker to a different region of the country of origin, although admitted by European law, aren’t accompanied by the guarantees provided by directive 2013/32/EU⁹⁶ and the case law on immigration adopted by the Court of Strasbourg.

With respect to the first hypothesis, Law No. 132/2018 establishes that the application for international protection presented by an applicant coming from one of the countries included in the list of “safe countries of origin” must be declared manifestly unfounded and processed in an expedited manner. The list of safe countries of origin will be drafted and updated by the Ministry of Foreign Affairs, in consultation with the Ministries of the Interior and Justice, on the basis of information provided by the National Asylum Commission and by EASO, UNHCR and the Council of Europe.

Nevertheless, Directive 2013/32/EU specifies, in Annex I, that a country can be defined as being of safe origin when it is governed by a democratic regime, is not characterized “in general and in a stable manner” by situations of persecution, torture or generalized violence, respects the rights – among others, the principle of *non-refoulement* – contemplated by the 1951 Geneva Convention, the ECHR, the Covenant on Civil and Political Rights and the UN Convention against Torture, and provides for internal remedies against the violation of these rights. It is disputable whether these cumulative criteria established by the Annex are sufficient to guarantee “effective protection” to a person, as required by the case law of the Court of Strasbourg. Moreover, as has been noted, an analysis limited to political factors, which disregards legal or social factors, can lead to a country being considered safe for the member of a specific minority persecuted in that country, such as LGBT+ persons in Senegal or women in countries like Nigeria.⁹⁷

⁹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

⁹⁷ A. Acosta Sanchez, “The notion of ‘Safe Country’ v. Prima Facie Presumption of

The hypothesis of the list of safe countries of origin is in clear contrast with the case law of the European Court on Human Rights, according to whom it is not sufficient that a State ratifies human rights treaties for it to be considered safe⁹⁸ and that an examination of the individual case must always be carried out in order to establish whether the destination country is safe for that specific individual.⁹⁹

Moreover, the above hypothesis is incompatible with Art. 3 of the 1951 Geneva Convention on the recognition of refugee status, which expressly prohibits differentiated treatments of asylum seekers based on the country of origin. Any refugee, regardless of citizenship, has the right to have his or her application for international protection examined and not be dismissed before the examination has taken place.¹⁰⁰

To demonstrate how controversial the notion of “safe country of origin” is, we want to point out that the lists of safe countries of origin adopted differ from Member State to Member State: Albania is considered a safe country of origin in 8 Member States of 12 who have adopted a list; Kosovo in 6 of 12; Serbia in 9 of 12; the United States in 4 of 12.¹⁰¹ An emblematic example is Turkey, designated as a safe country by only one Member State, but included by the European Commission in the European list of safe countries of origin (not yet adopted);¹⁰² Turkey is the country with which the European Union concluded the contested statement in 2016 that we discussed previously.

It is important to note that national judicial authorities have

Entitlement to International Protection”, *Diritti umani e diritto internazionale*, 3, 2018, pp. 511-522, p. 513.

⁹⁸ European Court of Human Rights [Grand Chamber], *Saadi v. Italy*, app. No. 37201/06, judgment of 28.2.2008.

⁹⁹ European Court of Human Rights [Grand Chamber], *Hirsi et. al. v. Italy*, app. No. 27765/09, judgment of 23.2.2012.

¹⁰⁰ See ECRE, *Safe countries of origin: a safe concept?*, September 2015, www.ecre.org.

¹⁰¹ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_it.pdf.

¹⁰² European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, COM(2015)452 final of 9.9.2015.

sometimes disagreed with a political decision designating a third country as safe.¹⁰³

Similarly, the rates of recognition of international protection of asylum seekers from the same third country vary considerably: for example, between January and September 2015, the rates of recognition of asylum seekers from Afghanistan ranged from almost 100% in Italy to 5.8% in Bulgaria.¹⁰⁴ On the other hand, it should be kept in mind that the European Commission itself justified the need to transform the 2011/95/EU directive into a regulation (process still underway) because of the different rates of recognition of international protection, as well as of the incongruity in the type of protection granted (refugee status or subsidiary protection), depending on the Member State in which the applicant submits the application.¹⁰⁵

Moreover, according to the UNHCR, a country of origin cannot be considered safe if a significant number of habitual citizens or residents apply for international protection in another State.¹⁰⁶ How can this position be reconciled with the designation of Albania and Turkey as safe countries of origin by some EU Member States, taking into account the large percentage of citizens of these countries seeking asylum in Europe?

From what has been said, it is understandable that it is not easy to determine in concrete whether a country of origin is safe or not in all circumstances for all individuals coming from a specific country.

Similarly, if it is possible, on the basis of both the ECHR and directive 2013/32/UE, to transfer an applicant to a safe region of the country of origin, this transfer must be subject to a number of conditions: the person must be able to move and stay in conditions of safety in the specified region, without taking risks with respect to the

¹⁰³ See M. A. Acosta Sanchez, *cit.*, p. 514.

¹⁰⁴ European Commission, *Proposal for a Regulation Of The European Parliament And Of The Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM(2016)466 final of 13.07.2016, p. 4.

¹⁰⁵ *Ibidem*.

¹⁰⁶ UNHCR, *UNHCR's proposals in light of the EU response to the refugee crisis and the EU package of 9 September 2015*, 10.09.2015.

values protected by Art. 3 ECHR.¹⁰⁷ According to the UNHCR guidelines, therefore, the person should be able to resume a relatively normal life, which should at least lead to access to the labor market, the health system and stable living conditions.¹⁰⁸

In both cases a rigorous examination of the personal situation of the applicant should be guaranteed. It seems to us that also in this light Law No. 132/2018 presents obvious critical aspects. For example, in the case of applicability of the hypothesis of origin from a safe country, the law provides that the applicant must demonstrate the existence of “serious reasons” that prevent him from considering it as safe. This provision causes the inversion of the burden of proof, in contrast with the general principle that provides for a burden shared between the State and the applicant.¹⁰⁹ Furthermore, still regarding the case of an applicant coming from a safe country of origin, the Law established that the application will be considered manifestly unfounded, meaning that it will be treated with an accelerated procedure, with the effect of limiting procedural guarantees and making the right to protection less effective. Moreover, if generally the decision rejecting the application for international protection must be justified in fact and in law, in the present case it is sufficient that the applicant has not shown that there are serious reasons to believe that the country is unsafe in its specific situation.

In terms of failure to comply with the procedural guarantees and the principle of *non-refoulement*, the new law is extremely problematic, given that it contemplates a series of provisions, such as the non-suspension of the removal of those who submit a repeated asylum application, and the extension of the hypothesis of non-suspension of the expulsion procedure pending an appeal on the decisions of the territorial commissions, a new cause of inadmissibility of the application. Even though this is not the place for a thorough examination, we must point out that in Law No. 132/2018 the numerous hypotheses in which accelerated procedures for examining the application are admitted are problematic, such as, for example, when the

¹⁰⁷ European Court of Human Rights, *Salah Sheekh c. Paesi Bassi*, app. No. 1948/04, judgment of 23.05.2007.

¹⁰⁸ UNHCR, *Guidelines on International Protection: 'Internal Flight or Relocation Alternative within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees*, 2003.

¹⁰⁹ See the document of the Consiglio italiano per i rifugiati (CIR), *Nota legale sul Disegno di Legge - A.S. N. 840/2018: problematiche e limiti*, 8.11.2018, p. 1.

person presents an application at the border after trying to circumvent the controls, with the risk that he will not benefit from a careful evaluation of the circumstances that emerge in the case in point and that he will be repatriated in disregard of the dangers he would face.

3.6. *The detention of asylum seekers*

Particularly detrimental to individual rights are the extension from 90 to 180 days of detention in the Centers for Detention and Repatriation (*Centri di permanenza per il rimpatrio – CPR*) for migrants without a residence permit and the introduction of the new hypothesis of detention of the applicant for international protection to determine their identity or citizenship for a period of up to 210 days (an initial 30 in CPAs or hotspots,¹¹⁰ plus 180 in CPR if identification is not possible).

Although this hypothesis of detention is expressly permitted by Art. 8 of Directive 2013/33/EU, we know, however, that both the Court of Justice of the European Union¹¹¹ and the European Court of Human Rights¹¹² have established severe conditions for the deprivation of liberty of asylum seekers, persons who, we point out, have not committed any crime and with regard to whom the use of the detention instrument seems debatable at the very least. Furthermore, it should be noted that the lack of identity and travel documents is a typical and

¹¹⁰ As underlined by the National Guarantor of the rights of persons detained or deprived of liberty, no primary rule fully regulates hotspots, whose discipline remains entrusted into communications from the European Commission, circulars of the Ministry of the Interior and documents such as the Standard Operating Procedures (SOP), which cannot be considered suitable for regulating a measure that limits a fundamental right (personal freedom of an individual). See Opinion of the National Guarantor of the rights of persons detained or deprived of personal liberty on the Decree-Law of 4 October 2018, n. 113 entitled: “*Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell’interno e l’organizzazione e il funzionamento dell’agenzia nazionale per l’amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata*”, 10.10.2018, p. 9. The decree law states only that detention to verify the identity and citizenship of the asylum seeker takes place in the hotspot. On the legal nature of the hotspot see M. Benvenuti, “Gli *hotspot* come chimera. Una prima fenomenologia dei punti di crisi alla luce del diritto costituzionale”, *Diritto immigrazione e cittadinanza*, 2, 2018.

¹¹¹ Among others, EU Court of Justice, case C -601/15, *J. N. c. Staatssecretaris van Veiligheid en Justitie*, judgment of 15.02.2016.

¹¹² AIDA, *The detention of asylum seekers in Europe Constructed on shaky ground?*, 2017; FRA, *Guidance on detention of asylum seekers and migrants*, 2017.

fairly general condition for those seeking international protection, since it is possible that the person is persecuted by the authorities of his own State of citizenship and has not been able to obtain the documents, or that he has lost them during the journey. In this regard, it is imperative to reiterate that one of the fundamental principles enshrined in the 1951 Geneva Convention is Art. 31, which states that an asylum seeker cannot be penalized for having entered illegally in the State territory.

On the provisions concerning detention of decree-law No. 113/2018, converted into Law No. 132/2018, the National Guarantor of the rights of persons detained or deprived of personal liberty considered that both the hypothesis of detention of asylum seekers and the possibility of detaining migrants to be repatriated for an exceptionally long period of time, “in suitable structures in the availability of the Public Security Authority” or even at the border,¹¹³ are very problematic. These places arouse perplexity, in his opinion, “in terms of their structural inadequacy or their complete indeterminacy with the consequent objective impossibility of the National Guarantor to exercise its power and duty of access, visit and control”. Moreover, the Guarantor has recognized the risk of a general use of detention, in violation of the principles of necessity, proportionality and recourse only as a measure of last resort. In this regard we want to recall that, if it is true that Art. 8 of the “reception” directive admits the deprivation of liberty to verify the identity and citizenship of the applicant for international protection, nevertheless articles 8 and 9 of the same directive subordinate it to certain conditions: a rigorous and case-by-case examination of necessity and proportionality,¹¹⁴ the requirement that less coercive measures have been taken into consideration prior to the adoption of a detention measure; the shortest possible duration; and the respect of human dignity.

Furthermore, a judicial review of the detention system must be guaranteed at regular intervals. In fact, among the reasons for concern for the Guarantor there is precisely the failure to define an instrument of appeal by migrants to submit complaints about the conditions of detention, which has led the Court of Strasbourg to condemn Italy in the *Khlaifia* case¹¹⁵ for violation of Art. 13 (right to an effective remedy) in conjunction with Art. 3 ECHR.¹¹⁶

¹¹³ *Parere del garante nazionale dei diritti delle persone detenute*, cit.

¹¹⁴ EU Court of Justice, case C -601/15, *J. N.*, cit.

¹¹⁵ European Court of Human Rights [Grand Chamber], *Khlaifia and Others v. Italy*, app. No. 16483/12, judgment of 15.12.2016.

¹¹⁶ *Parere del garante nazionale dei diritti delle persone detenute*, cit., p. 14.

3.7. *Harder conditions to access Italian citizenship*

Finally, we want to point out that law No. 132/2018 modifies the discipline regarding Italian citizenship, extending the time of acquisition by marriage and providing for the revocation of this in the event of a definitive conviction for crimes committed related to terrorism or subversion, thus leading to discrimination among citizens, in violation of Art. 3 of the Constitution. Moreover, this choice goes against the obligations deriving from the Convention on the reduction of statelessness of 1961, of which Italy is a Contracting State,¹¹⁷ in particular of its Art. 8, under which “a Contracting State will not deprive a person of his or her citizenship, if such deprivation would make such a person stateless”, and of Art. 9, which prohibits depriving a person of citizenship for racial, ethnic, religious or political reasons. We believe that a provision such as the one introduced by the law in question leads to discrimination on an ethnic or racial basis, since the revocation of citizenship applies only to foreigners who have acquired it and not to citizens by birth.

4. *Conclusion*

At the conclusion of an analysis that inevitably can only be partial, it is important to underline that Law No. 132/2018, based in essence on the association between immigration and security, cannot be seen as an isolated element with respect to the normative actions that have taken place in Italy in the last twenty years, and which have always been characterized, with different gradations, and regardless of the political color of governments, by the thematization of the migratory matter in terms of urgency and emergency.¹¹⁸ Law No. 132/2018 should not be seen as an isolated element in the context of the discursive rhetoric and the policies of the current government, which, since the election campaign, has identified its priority in managing migration, in a security function. It is also important to recall, in this regard, actions such as the

¹¹⁷ Adopted on 30.08.1961, in force since 13.12.1975.

¹¹⁸ On this argument see M. Colucci, *Storia dell'immigrazione straniera in Italia. Dal 1945 ai giorni nostri*, Carocci, Roma, 2018; C. Marchetti, A. Molteni, “La ragione securitaria”, in V. Borghi, O. de Leonardis, G. Procacci (eds.), *La ragione politica. 2. I discorsi delle politiche*, Liguori, Napoli, pp. 47-82; N. Tomeo, *cit.*

declared closure of ports to the disembarkation of migrants rescued at sea and the criminalization of NGOs carrying out search and rescue activities in the Mediterranean and of civil society actors that practice solidarity and the good reception of asylum seekers. Furthermore, we refer to the discursive practice of some institutional representatives, which is characterized by its strong racist content towards non-citizens and has been the object of reproach even by the UN High Commissioner for Human Rights, who said it would not be specious to link the episodes of discrimination and violence against migrants and Roma people registered in Italy in recent months to hate speech by State representatives.¹¹⁹

We assume that the security law-decree, later converted into Law No. 132/2018, can be easily viewed as a form of “institutional racism”, understood as that set of policies, norms and administrative practices that perpetuate, reinforce or produce the inequality and social malaise of disadvantaged minorities.¹²⁰ It is no coincidence that the expression “institutional racism” was coined by two members of the American Black Panthers, a movement that fought the regime of discrimination and oppression of the black minority in the United States. Today in Italy we are not only witnessing a markedly discriminatory discursive practice by representatives of the institutions, but, with the adoption and conversion into law of the security decree, we are facing, in some ways, the institutionalization of racist practices through law, denying essential rights on the basis of nationality (ergo, ethnicity), and which, by not carrying out a careful examination of the application for protection, rejecting applicants and sending them to unsafe countries, designate persons as either first or second class citizens. These provisions cannot fail to produce inequality and social malaise, as well as marginality and vulnerability to racist attacks and exploitation. Thousands of people, finding themselves without a defined legal status and without material resources to sustain themselves, will become precarious. Ultimately, the effect will be the strengthening of an emergency climate around a social phenomenon – immigration – which is not in itself something particularly out of the usual. Moreover, these are measures that are not justified by “necessity and urgency”, if one takes into account the sharp decline in disembarkation in 2018¹²¹ – due, among other reasons, to the

¹¹⁹ *Legal changes and climate of hatred*, cit.

¹²⁰ C. Bartoli, *Razzisti per legge. L'Italia che discrimina*, Laterza, Roma, 2012.

¹²¹ According to data published by the Ministry of the Interior, in 2018 23,009 people

ambiguous agreements signed by Italy with Libya and the closure of Italian ports – and the low rates of recognition of international protection registered in Italy in recent years.

The provisions contained in Law No. 132/2018 should therefore be seen as a litmus test of the global policies of the current government, whose priorities undoubtedly fall under the management of migration, but not from the point of view of intervening where the need is most felt, for example with the creation of legal entry channels, the revitalization of channels for migrant workers, the downsizing of the extraordinary reception system, or even improving the standards of protection in favor of vulnerable people.

Moreover, it should be emphasized that the normative intervention we are discussing will not only make the lives of migrants more precarious, but places potentially anyone – even Italian citizens – in a condition of marginality, which may be punishable in the event of occupation of buildings or, for example, begging, defined by the law as “harassment”. It is clear that the instrument to combat poverty is not to be found in social housing and income support policies, but in criminal repression measures. In this political security perspective, therefore, decree-law No. 113/2018, converted into Law No. 132/2018, was presented, by the same representatives of the government and the political forces that support it, as a “security decree”. It should be noted in this regard that the interpretation of the themes of immigration and asylum from a security perspective has been the *leitmotiv* of Italian politics since at least 2002, year of the adoption of Law No. 189 (“Legge Bossi-Fini”). The securitization of immigration and asylum was then particularly critical in the years 2008-2009, when the “Security Package” was adopted, which has required a marked intervention by the Constitutional Court to remedy its serious illegality profile.¹²²

Decree-law No. 113/2018 is therefore a decree of *insecurity*, which undermines the Italian asylum system and generates fear and social alarm. In light of the above reflections, we hope that the Italian Constitutional Court and supranational supervisory bodies will intervene promptly to correct the Law’s incompatibility with fundamental rights.

arrived in Italy, compared with 117,042 in 2017 and 172,708 in 2016. See http://www.interno.gov.it/sites/default/files/cruscotto_statistico_giornaliero_29-11-2018.pdf.

¹²² See the articles published in the review *Diritto immigrazione e cittadinanza*, 4, 2009, and A. Esposito, L. Melillo, *A distanza d’offesa*, *A Est dell’Equatore*, Napoli, 2010.

It is essential to remember in this historical moment that human rights either belong to everyone or belong to no one.

