MIGRATION AND ASYLUM POLICIES SYSTEMS

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UNIVERSITÀ DEGLI STUDI DI NAPOLI
"L'Orientale"

Co-funded by the
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CHALLENGES AND PERSPECTIVES

edited by

GIUSEPPE CATALDI
ADELE DEL GUERCIO ANNA LIGUORI

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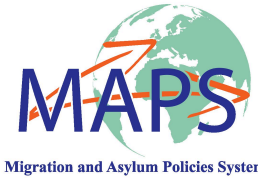

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THE RIGHT TO ASYLUM IN ITALY

ADELE DEL GUERCIO*

1. Introduction

The right to asylum is recognized by Italian law at a Constitutional level in a form that goes beyond the limits observed in other Constitutional traditions[1] and in International Law.[2] Article 10, para. 3, of the Italian Constitution states that: "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".

Such a broad formulation was desired by the Constituents, who had undergone exile due to their antifascist stance as dissidents and partisans, and who were therefore well aware of how essential is to find hospitality and asylum abroad when democratic freedoms were denied in one's own country, and one risked arrest, detention, torture, and other serious violations of one's rights.

Nevertheless, the Constitution refers to an *ad hoc* law, never adopted, for implementation of the right to asylum stipulated in Art. 10, para. 3. In the absence of any comprehensive framework, the Court of Cassation has had to provide guidance regarding application of the Constitutional right to asylum, specifying, with an important judgment in 1997, that this was a personal right that could be directly invoked by those who claimed they could benefit from it.[3] In the wake

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[1] For instance the French tradition, from which the Italian Constitution drew inspiration. See P. Bonetti, *Prospettive di attuazione del diritto costituzionale di asilo in Italia*, available at: <http://briguglio.asgi.it/immigrazione-e-asilo/1999/giugno/bonetti-asilo.html> (07/20).

[2] L. Neri, "Il principio di umanità alla prova dell'abrogazione del permesso di soggiorno per motivi umanitari", in Mariacristina Molfetta, Chiara Marchetti (eds.), *Il diritto di asilo. Report 2019*, Fondazione Migrantes, Editore Tau, Roma, 2019, p. 145 ff., in particular p. 146.

[3] Corte di Cassazione, judgement No. 4674, 26 May 1997.

of this judgment, numerous Constitutional asylum requests were registered from foreign citizens, among these the application submitted by the well-known leader of the PKK, Abdullah Ocalan, detained in a maximum security prison in Imrali, Turkey. In 1999 the Court of Rome recognized, *in absentia*, Ocalan's right to asylum as stipulated in Article 10, para. 3, of the Constitution.[4]

Without a comprehensive legal framework, the structuring of the Italian asylum system was made possible through the implementation of International Law, particularly the Geneva Convention[5] and the Schengen Agreements,[6] which introduced refugee status and the first form of humanitarian protection, as well as EC/EU law on asylum,[7] In particular we have to mention the directives 2004/83/EC (the so-called "Qualification Directive")[8] and 2005/85/EC (otherwise known as "Procedures Directive"),[9] which introduced subsidiary protection and regulated the procedures for examination of requests for international protection presented within Italian territory or at the borders.

2. The forms of protection of asylum seekers recognized by Italian law

In the light of the aforementioned normative framework, an asylum seeker has the right to enter and stay in Italian territory in order to have his or her situation examined by the appropriate authorities (Territorial Commissions: administrative bodies responsible for examining asylum requests in the first istance) sand may not be refused entry, in accordance with Article 19 of the Law on

[4] Court of Rome, judgement No. 49565, 1 October 1999.

[5] Incorporated into Italian law with Law 24 July 1954, No. 722.

[6] L. Neri, "Il principio di umanità", cit., pp. 149-150.

[7] P. Bonetti, "Il diritto d'asilo in Italia dopo l'attuazione della direttiva comunitaria sulle qualifiche sugli status di rifugiato e di protezione sussidiaria", *Diritto, immigrazione e cittadinanza*, 1, 2008, p. 14.

[8] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, implemented by Italy with legislative decree No. 251/2007.

[9] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

immigration.[10] Refusal of entry at the border is also forbidden in the case of unaccompanied minors, women who are either pregnant or have given birth within six months, and people who are ill, disabled, elderly, or who have experienced violence or torture.

Between 2017 and 2018, Italian government adopted normative security measures which narrowed the field of the right to protection and brought about a reorganization of the procedures for examination of asylum requests. Asylum seekers, following examination of their request by the Territorial Commissions,[11] may either obtain a form of international protection – refugee status or subsidiary protection – or fail in their request. In the latter case an applicant may challenge the decision by appealing to the court of first instance, although not to the court of appeal, as a result of the adoption of the "Minniti decree" in 2017,[12] which also established that the court of first instance could decide on a request for international protection without listening to the applicant, basing a decision exclusively on a video recording of the hearing before the Territorial Commission.

According to the Geneva Convention and the "Qualification Directive", the term "refugee" shall apply to any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country", or to a stateless person in the same conditions with regard to the country of former habitual residence.[13] Subsidiary protection can be recognized to a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or, in the case of a stateless person, to his or her country of former habitual residence,

[10] Legislative Decree, Coordinated Text 25 July 1998, No. 286.

[11] Administrative bodies currently formed of specialized personnel, hired through competitive exams, as well as a member of UNHCR.

[12] Decree-law 17 February 2017, No. 13, converted into Law 13 April 2017, No. 46.

[13] Art. 1, Geneva Convention on Refugees; art. 2, d), of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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.

would face a real risk of suffering serious harm as defined in Article 15 of the Qualification Directive. Serious harm consists of: the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; a serious and individual threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict.

It is worth noting that Italian legislators have wanted to align the content of subsidiary protection with refugee status, including analogous rights, such as the issue of a five-year residence permit, with all resulting implications concerning the fulfillment of the requirements for the issue of an EC residence permit for long-term residents,[14] and thus stability and integration, as well as the exercise of free movement in the Schengen zone. Beneficiaries of international protection are also granted the same right to healthcare as that enjoyed by Italian citizens, along with the right to family reunification, without needing to demonstrate income and housing requirements as in the case of other migrants.

Italian Courts intervened to specify the field of application of international protection, developing a highly advanced case law for some sectors, in compliance with obligations deriving from other International Treaties to which Italy adheres. Although this is not the place for a detailed reconstruction of the jurisprudential approaches that have emerged in the last few years, they are worth mentioning.

We will first highlight the judgements handed down by the Court of Cassation in May[15] and November 2017,[16] which recognized the right of international protection for asylum seekers who were victims of gender violence, on the basis of the Istanbul Convention of the Council of Europe,[17] implemented by Italy in 2013. The cases dealt with by the Supreme Court involved two women asylum seekers, the first, of Moroccan citizenship, domestically abused by her husband, and the other, of Nigerian citizenship, abused by her husband's family after his death. In both cases the Supreme Court held that gender-based violence should be counted as persecution, and thus qualifying

[14] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[15] Corte di Cassazione, order of 17 May 2017, No. 12333.

[16] Corte di Cassazione, judgement of 24 November 2017, No. 28152.

[17] Istanbul Convention Action against violence against women and domestic violence, 7 April 2011, implemented in Italy with Law 27 June 2013, No. 77.

for refugee status, as stipulated in Article 60 of the Convention of Istanbul and in the UNHCR guidelines.[18]

In spite of such significant judgements, in the GREVIO latest report on Italy,[19] it is highlighted that practices vary widely depending on the geographical area and on the Territorial Commission sexamining the application, and that asylum seekers who are victims of gender-based violence tend not to receive international protection in Italy.

The case-law on the recognition of international protection for victims of trafficking in human beings, and in particular for women asylum seekers from Nigeria exploited in the prostitution market, is particularly notable [20] too. However, in spite of progress made following the adoption of the Warsaw Convention,[21] GRETA has underlined that the number of people identified and assisted in Italy as victims of human trafficking remains small, and a large number of unaccompanied minors continue to disappear.[22]

Another sector worthy of note is the international protection of asylum seekers fleeing persecution because of their sexual orientation, with regard to which Italy, in comparison to the EU other European

[18] Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002.

[19] Group of Experts on Action against Violence against Women and Domestic Violence, *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), ITALY*, 15 November 2019.

[20] On this topic, see, among others: D. Belluccio, "Status di rifugiato e vittima di tratta: note a margine del decreto del Tribunale di Bari del 10 novembre 2018", and L. Minniti, "La tutela delle vittime di tratta davanti? al giudice della protezione internazionale. Le peculiarità, le possibilità, le necessità, gli obblighi", both published on <https://www.asgi.it/> (07/20), 27 February 2019. See also M. Massari, *Il corpo degli altri. Migrazioni, memorie, identità*, Orthotes, Napoli-Salerno, 2017; B. Pinelli, *Migranti e rifugiate*, Raffaello Cortina Editore, Milano, 2019; E. Rigo, "Donne attraverso il Mediterraneo. Una prospettiva di genere sulla protezione internazionale", *Notizie Di Politeia*, XXXII(124), 2016, pp. 82-94; E. Santoro, "Asilo e tratta: il tango delle protezioni", *Questione Giustizia*, 2018.

[21] Council of Europe Convention on Action against Trafficking in Human Beings, 1 February 2008, implemented in Italy with law 29 November 2010, No. 108.

[22] Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy*, 25 January 2019.

Countries systems, has assumed the position of pioneer.[23] The Court of Cassation,[24] established the principle, confirmed by subsequent case law, that any law criminalizing homosexuality constitutes a justifiable reason for granting international protection to an asylum seeker, without the necessity of demonstrating that the rule in question is applied, as established, however, by the EU Court of Justice in the *X.Y. and Z. case* of 2013. Indeed, criminal sanction for homosexual relations "constitutes on its own a general condition of deprivation of the fundamental right to lead one's own sexual and emotional life freely", and "has automatic repercussions on the individual condition of homosexual people, placing them in a situation of objective persecution that justifies granting protection".

The Court of Cassation, due to the fundamental nature of the right of sexual orientation, also rejected discretionary tests, and more recently sustained that for recognition of refugee status it is not necessary that the asylum seeker's country of origin criminalize relations between people of the same sex. The Territorial Commission or the judge of first instance must evaluate the possible risk that a person may face in respect of his or her mental and physical wellbeing,[25] risks that, as the UNHCR guidelines[26] state, may derive from a climate in the country of origin that is particularly discriminatory and oppressive for homosexuals, even in the absence of criminalization.

Mention should also be made of the third hypothesis of serious harm envisaged by the Qualification Directive. As is well known, migrants who reach Italy come predominantly from the African continent, and in particular from sub-Saharan countries. As such, they are often classified as "economic migrants" based on nothing more

[23] On this subject, see C. Danisi, "Crossing borders between International Refugee Law and International Human Rights Law in the European context: Can human rights enhance protection against persecution based on sexual orientation (and beyond)?", *Netherlands Quarterly of Human Rights*, 2019. See also: <https://www.sogica.org> (07/20).

[24] Corte di Cassazione, order of 29 May 2012, No. 15981, *T.T. vs. Interior Ministry*.

[25] Corte di Cassazione, judgement of 23 April 2019, No. 11176.

[26] Guidelines On International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012.

than an evaluation of their nationalities,[27] making it difficult for them to have access to fair and efficient asylum procedures, especially in the *hotspots* established in implementation of the European Agenda on immigration. [28] However, in many cases Italian judges granted subsidiary protection to Malian citizens fleeing from a situation of general violence linked to war, initially only to people from the north of the country, but more recently to applicants from other zones as well, since, given the intensification and spread of the conflict, "social tensions and terrorist threats, while less intense than in the north of the country, have alarming features that, insofar as they are growing and uncontainable, lead us to define the conflict as one of high intensity."[29]

The approach has become even more restrictive with the adoption of an Italian list of safe countries of origin, identified as Albania, Algeria, Bosnia-Herzegovina, Cape Verde, Ghana, Kosovo, Northern Macedonia, Morocco, Montenegro, Senegal, Serbia, Tunisia, and Ukraine, and the instruction that any request for international protection from citizens of these countries be evaluated in light of information regarding the countries of origin.[30] The asylum request evaluation scheme is therefore inverted; the assumption is that any applicant from one of the countries on the list runs no risk of persecution or serious harm in the event of return, and it is the applicant's responsibility to prove otherwise.[31]

2.1 Humanitarian protection before the 2018 security decree

Prior to the reform introduced by the 2018 security decree, in addition to the two forms of international protection, a third form of

[27] On the distinction between economic and humanitarian migrants see G. Cataldi, "La distinzione tra rifugiato e migrante economico: una dicotomia da superare?", in Giuseppe Nesi (ed.), *Migrazioni e diritto internazionale: verso il superamento dell'emergenza?,* Editoriale Scientifica, Napoli, 2018, p. 585 ff.

[28] European Commission, *A European Agenda On Migration*, COM(2015) 240 final, 13 May 2015.

[29] Court of Perugia, order of 24 April 2020, <https://www.meltingpot.org> (07/20).

[30] <https://www.asgi.it/wp-content/uploads/2019/11/decreto_paesi_sicuri.pdf> (07/20).

[31] <https://www.asgi.it/asilo-e-protezione-internazionale/richiedenti-asilo-elenco-paesi-sicuri> (07/20).

protection was envisaged – humanitarian protection – which in practice found wide application, thanks also to the clarification of the Italian Courts.

Article 32, para. 3, of Legislative Decree No. 25/2008 stated that "in cases where the Territorial Commission does not admit the application for international protection and believes that there may be serious humanitarian grounds, it will forward the application to the *Questore* [the Chief of the Police] for the granting of a residence permit pursuant to Article 5, para. 6" of the Law on immigration.

The aforementioned provision linked the issue of the residence permit for humanitarian reasons to serious grounds, in particular of a humanitarian nature or resulting from the Constitutional or International obligations Italy's. The Italian Court of Cassation specified that "the legal situation of foreigners who apply for the issue of a permit for humanitarian reasons has a consistency of subjective right, to be counted among fundamental human rights",[32] and that the competent body to decide on the release should be the Territorial Commission, not the *Questore*.[33]

Furthermore, the Supreme Court clarified that this was a form of residual and temporary protection, to be taken into consideration only if the conditions for granting refugee status or subsidiary protection did not exist,[34] and that it constituted an open catalogue to be used in varied hypotheses.[35]

These hipotheses were systematized by the National Commission for the recognition of international protection. They included: exposure to torture or inhuman and degrading treatment in case of the expulsion of the applicant, in accordance with the case law of the Court of Strasbourg on the basis of Article 3 ECHR regarding the expulsion of foreigners; serious psycho-physical conditions or serious pathologies that cannot be adequately treated in the country of origin; the temporary impossibility of return due to the insecurity of the country or area of origin; serious natural disasters or other serious local factors impeding repatriation with dignity and in safety; and the family situation of the asylum seeker, which must be assessed in

[32] Corte di Cassazione, order No. 19393/2009 and judgment No. 4455/2018.
[33] Corte di Cassazione, order No. 19393/2009.
[34] Corte di Cassazione, judgment of 21 April 2009, No. 11535.
[35] Corte di Cassazione, order 13 January 2009, No. 19393.

accordance with the provisions of Article 8 of the ECHR concerning the right to respect private and family life.[36]

In practice, humanitarian protection was used to regularize, *inter alia*, the legal situation of asylum seekers in the following situations: victims of torture, violence and rape when they were in Libya or during the migration process; single women with children; people whose application for international protection was pending and who had completed a process of integration; ill people; and even people who, upon return to their country of origin, would have found themselves in conditions of extreme poverty.

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.[37]

The normative framework preceding the adoption of decree-law No. 113/2018 was completed with permits "for special protection" for victims of trafficking in human beings (Article 18 of the Law on immigration), "for victims of domestic violence" (Article 18 bis of the Law on immigration) and for victims "of particular labour exploitation" (Article 22, para. 12 quarter, of the Law on immigration), not abolished by the aforementioned decree-law.

Decree-law No. 113/2018, in force since October 5, 2018, later 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". In the case of "special" residence permits, the issuing authority is the *Questore*, rather than the Territorial Commission for the examination of the application for international protection. It should be noted that these are short-term residence

[36] Ministerial Circular No. 00003716 of 30 July 2015, available at: <http://briguglio.asgi.it/> (07/20).

[37] 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", *Diritto immigrazione e cittadinanza*, 1, 2019; G. Cataldi, "La distinzione tra rifugiato e migrante economico", cit; L. Neri, "Il principio di umanità", cit.; 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.

permits (six months to one year), which are not always renewable due to expiry and not always convertible into work reasons, unlike the residence permit for humanitarian reasons, which, as we have seen, had a duration of two years and guaranteed beneficiaries the possibility of its being converted into a work permit upon expiry.

The need to intervene on humanitarian protection was justified, according to the Explanatory Report of decree law No. 113/2018, with reference to the instrumental use of it by Territorial Commissions and by the judges. The residence permit for humanitarian reasons 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 an "excessively extensive" interpretation that could be demonstrated by the "anomalous disproportion" between the rates of recognition of international protection and recognition of humanitarian protection. The Executive therefore seemed to find the cause of the aforementioned disproportion in what, in truth, was actually the consequence of following: an extremely restrictive visa policy; the absence of legal entry channels; the malfunctioning of the old Territorial Commissions prior to the reform, which had been composed of unskilled personnel disinclined to recognise international protection even where the requisites established by law existed; and the rigidity of the conditions attached to refugee status and subsidiary protection.

We want to highlight that the Territorial Commissions often adopt unreasonably restrictive approaches, denying protection or recognizing the least guaranteed form of protection (before the reform put in place by the security decree of 2018, a residence permit for humanitarian reasons). This approach causes a large number of judicial appeals, and thus an overloading of the judicial system and further delays to asylum procedures, with detrimental consequences for applicants, and onerous additional costs to the State.

2.2 The new residence permits

The first new residence permit introduced by decree law No. 113/2018, converted into Law No. 132/2018, is the permit "for special protection", with an annual duration, which is renewable but not convertible into other types of residence permits. The Territorial Commission transmits the documents to the *Questore* for the issuance

of this type of residence permit when it has not accepted the application for international protection but there is a risk of persecution pursuant to Article 19, para. 1, or the risk of torture pursuant to Article 19, para. 1.1, of Legislative Decree No. 286/98, in the case of expulsion of asylum seekers.

Law No. 132/2018 then provides for a residence permit "for medical treatment", 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 that provided for by Article 36 of the Law on immigration, which allows entry into Italian territory of a third country citizen who needs medical treatment. The residence permit "for medical treatment" has a duration equivalent 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 whether it is convertible.

In addition to the residence permit for medical treatment, the new security decree introduces a residence permit "for disasters", 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.[38]

Finally, we must mention the permit "for acts of particular civic value", to be issued, upon authorization of the Minister of the Interior, as proposed by the Prefetto, to foreigners who have exposed themselves 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 towards 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 which comes from their issue, 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 permits to other

[38] See E. Fornalé, "Floating rights in times of environmental challenges", in Giuseppe Cataldi, Michele Corleto, Marianna Pace (eds.), *Migrations and Fundamental Rights: The Way Forward*, Editoriale Scientifica, Napoli, 2019, p. 183 ff., <http://www.jmcemigrants.eu/jmce/wp-content/uploads/2019/06/CATALDI-CORLETO-PACE_Collected-File.pdf> (07/20).

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 security decree limits the right of the beneficiaries of the new types of residence permits to healthcare (this also having Constitutional recognition in Article 32), as it does not provide for automatic enrolment in the national health service, but only for access to urgent and essential medical care.[39]

It is clear, therefore, that the new provisions limit 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. Moreover, the competent body to issue the authorization to stay is no longer the Territorial Commission, with the decision left instead to the discretion of the *Questore* and the *Prefetto*.

3. Reception of asylum seekers

Decree law No. 113/2018 also affected the reception system, establishing that applicants for international protection are not allowed 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 are not asylum seekers), and beneficiaries of residence permits for special cases (for reasons of health, domestic violence, violence and severe exploitation, labour exploitation, natural disaster, civic value) if they do not already receive accommodation in the protection systems dedicated to them.

The applicants for international protection, on the other hand, can find accommodation exclusively in the Centres of First Reception (CPA) and in Extraordinary Reception Centres (CAS), a system with serious failures in terms: of the quality of the services offered, the

[39] 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 October 2018.

training of staff, the adequacy of the facilities (which are in most cases overcrowded, located in remote areas and distant from transportation), and support for asylum procedures. Moreover, there have been many episodes of speculation by private companies – and in some cases by criminal organizations – which do not have profiles compatible with the social activities implemented in the centres.

The SPRAR, then SIPROIMI, is a system characterized by the provision of an "integrated reception", that goes well beyond the mere provision of accommodation, but includes orientation measures, access to Italian languages courses, legal and social assistance as well as the development of personalised programmes for the social-economic integration of individuals. 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 an exemplary practice, studied and taken as a model by other European countries.

The dismantling process had already begun with Law No. 142/2015,[40] which institutionalized the reception of asylum seekers in extraordinary centres (CASs), most often hotels, opened during the so-called "North Africa Emergency" of 2011, following the Tunisian "Jasmine Revolution". 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, over time this type of accommodation became the norm, as demonstrated by the data from the Ministry of the Interior, according to which 80% of those who are currently hosted in Italy are accommodated 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,[41] especially when dealing with persons falling

[40] Legislative decree 18 August 2015, No. 142.

[41] 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.

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 favour of whom the European Directive provides for specific support services (for example, psychological assistance).

Even the decisionof the Government to reserve social inclusion projects (for example, access to training projects) exclusively for beneficiaries of international protection and special permits for unaccompanied minors interferes with the social inclusion of asylum seekers. As no social inclusion measures are provided for them, 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 years in Italy.

The latest data confirm that at the moment there are about 60,000 people accommodated in the CPSA and CAS, and only about 20,000 in SIPROIMI. This distribution, however, has resulted in severe consequences during the emergency period caused by the COVID-19 pandemic, since in CASs it has been more difficult to guarantee physical distancing and the isolation of people who have tested positive for the disease, or who are suspected of being positive, and to provide healthcare, given the lack of government guidelines. The response has been improvised and there have been many difficulties in managing the situation. This is yet another demonstration of a system that does not work.

4. Detention of asylum seekers

Italian law provides for the detention of both irregular migrants pending expulsion and asylum seekers. Over time there has been an increasing use of administrative detention, which, it seems appropriate to recall, is not connected to the commission of a crime, but rather performs a deterrent function. There has been a growth in the number of cases of deprivation of the freedom of asylum seekers and an expansion of places and detention facilities for migrants pending

expulsion, even though detention should constitute a measure of *extrema ratio*.

An asylum seeker shall be detained in pre-removal detention centres (CPR), on the basis of a case by case evaluation, when he or she:

(a) falls under the exclusion clauses laid down in Article 1F of the 1951 Geneva Convention;

(b) is issued an expulsion order because he or she constitutes a danger to public order or state security, or is suspected of being affiliated with a mafia-related organisation, has conducted or financed terrorist activities, has cooperated in selling or smuggling weapons, or habitually conducts any form of criminal activity, including with the intention of committing acts of terrorism;

(c) may represent a danger for public order and security;

(d) presents a risk of absconding.[42]

Law No. 132/2018 provided a new option for the detention of asylum seekers: they may be detained in hotspots or first reception centres for the purpose of establishment of their identity or nationality. If the determination or verification of identity or nationality is not possible on those premises, they can be transferred to a CPR. The duration of detention is up to 210 days (an initial 30 in CPAs or hotspots, 110 plus 180 in CPR if identification is not possible).

The hotspots were established in Italy and Greece pursuant to the 2015 European Agenda on Migration. They are "structures of reception and first reception", aimed at "ensuring prompt identification, registration and acquisition of migrants' fingerprints ('crisis points')", with the support of the following EU agencies: EASO, FRONTEX, and EUROPOL. It will thus be possible "to distinguish between those who are in need of international protection and those who are not"[43] immediately after disembarkation, using standardized procedures, guiding the former group into procedures for relocation to other EU member states, one of the tools of European solidarity aimed at alleviating the pressure of migrants on Italy and Greece. The "hotspots" thus constitute "a device for the

[42] AIDA, *Country Report: Italy*, 2019 update.

[43] European Council meeting (25 and 26 June 2015) – Conclusions, EUCO 22/15, 26 June 2015.

determination of differentiated juridical status",[44] which pose a series of problems regarding the effective exercise of asylum rights and fundamental human rights. The process of "sifting" asylum seekers from economic migrants, often based on little more than nationality, is problematic in itself, since, according to the international system of refugee protection, and to the EU law, only through prior and meticulous examination of the individual situation of each person it is possible to determine whether someone is at risk of persecution, of serious harm, or of violation of human rights in the event of repatriation, and thus whether someone may obtain a form of international or national protection. What is relevant is not simply nationality, but also a person's general situation, and the fear he or she expresses.

To these issues can be added the fact that neither the "Minniti decree"[45] nor the 2018 security decree have provided hotspots with a precise legal basis within Italian law, which stipulates that asylum seekers may be held for up to thirty days in order to verify identity and citizenship, although it does not prescribe the procedure, and thus leaves room for discretional practices by the police without recognition of the procedural guarantees envisaged by Article 13 of the Constitution, for instance validation by a judge.

In light of what has been stated above, it is not clear whether the hotspots constitute closed or open centres, from which people may leave freely, and therefore whether these are intended as centres for reception or detention. Practices vary widely, as has been reported by the National Guarantor for the Rights of Persons Detained.[46] The Chief of police himself admitted that the Lampedusa hotspot, for example, is not a detention centre, but a reception centre, which also functions as a detention centre.[47]

[44] ASGI, podcast "I Centri di permanenza per il rimpatrio", <https://inlimine.asgi.it/ombre-in-frontiera-il-secondo-audio-documentario-racconta-i-centri-di-permanenza-per-il-rimpatrio/> (07/20).

[45] Article 14 Law on immigration.

[46] National Guarantor for the Rights of Persons Detained, *Rapporto sulle visite nei Centri di identificazione ed espulsione e negli hotspot in Italia*, 2017.

[47] CIE was the current CPR. A. Pansa, in AP Camera, XVII legislatura, *Commissione parlamentare di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei Centri di accoglienza, nei Centri di accoglienza per richiedenti asilo e nei Centri di identificazione ed espulsione*, 20 January 2016, p. 17.

The lack of legal regulation for hotspots is undoubtedly a point of concern, since, pursuant to Article 13 of the Constitution, the deprivation of liberty, a fundamental right, may only be ordered with a warrant from the judge and only in cases and according to the conditions provided by law. In the case of the hotspots, therefore, these terms are respected. People find themselves in legal *limbo*, often in a condition of *de facto* detention, in precarious hygienic conditions,[48] in facilities that have not been planned as detention centres, and in which asylum seekers haven't access to legal assistance.[49]

Moreover, although the detention of asylum seekers is expressly permitted by Article 8 of Directive 2013/33/EU and by Article 5 of ECHR, both the Court of Justice of the European Union[50] and the European Court of Human Rights[51] established stringent conditions for the deprivation of liberty of asylum seekers; people, it should be pointed out, who 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 a lack of identity and travel documents is a typical and 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 Article 31, which states that an asylum seeker cannot be penalized for having entered a State's territory illegally.

[48] The Ministry of the Interior ordered the temporary closure of the Lampedusa hotspot in March 2018 following an inspection. See: <https://www.asgi.it/asilo-e-protezione-internazionale/hotspot-lampedusa-diritti-minori/> (07/20). Then, in December 2019, following several urgent appeals put forward by the ASGI, the European Court of Human Rights asked Italy to supply adequate information on the living conditions within the Lampedusa hotspot, particularly with regard to minors. See <https://www.asgi.it/asilo-e-protezione-internazionale/lampedusa-migranti-cedu/> (07/20).

[49] ASGI, podcast "I centri hotspot", 2020, available at: <https://inlimine.asgi.it/wp-content/uploads/2020/04/Audio-documentario-3-I-centri-Hotspot.mp3> (07/20).

[50] Among others, EU Court of Justice, case C -601/15, *J. N. c. Staatssecretaris van Veiligheid en Justitie*, judgment of 15 February 2016.

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

As stated previously, migrants pending expulsion may also be deprived of their freedom. The 2018 security decree has introduced somewhat problematic possibilities, having envisaged that a detention may not only take place in the CPR, which have been set up expressly for this purpose, but also in other places, such as hotspots and facilities at the border. The conditions of the centres vary considerably, access to legal assistance is not always guaranteed, and more generally police authority is characterized by a certain arbitrariness, which is also due to the lack of legislation regulating the detention of migrants.[52]

The Law on immigration specifies that detention is excluded in the cases of unaccompanied minors and vulnerable people, including those with health problems. Nevertheless, there are cases in which unaccompanied minors, victims of torture and trafficking, and other vulnerable asylum seekers have been deprived of their liberty.

5. Cooperation with Libya

Another problematic chapter in Italian policies regarding immigration and asylum is the cooperation with third countries, and in particular with Libya.[53] The European Court's judgement in the case *Hirsi Jamaa and Others vs. Italy*,[54] which condemned Italy for returning migrants to Libya by sea, and the killing of Qadhafi and the accompanying civil war, had led to the suspension of relations between the two countries. These relations entered a new phase in 2016 with the establishment of the Fund for Africa, which provides for a budget of €200 million for measures "aimed at relaunching dialogue and cooperation with the African countries of priority importance for migration routes", funds which are added to the €338 million of the Union Emergency Trust Fund for Africa (EUTF), launched by the European Union in 2014.[55] The Italian Fund finances a joint

[52] ASGI, podcast 'I Centri di permanenza', cit.

[53] On this theme, see also: M. Veglio, "Amiche, nemiche, complici. L'Italia, la Libia e un secolo di caccia agli stranieri", in Mariacristina Molfetta, Chiara Marchetti (eds.), *Il diritto asilo. Report 2019*, cit., p. 77 ff.

[54] European Court of Human Rights [GC], *Hirsi and others v. Italy*, application No. 27765/09, judgement of 23 February 2012.

[55] M. Veglio, "Amiche, nemiche, complici", cit., p. 95.

management system for borders and immigration, including the southern border of Libya.

On 2 February 2017 the centre-left Italian government, following an initiative proposed by the Minister for the Interior, Marco Minniti, concluded with the President of the Council of the Libyan Government of National Accord, Fayez Mustafa Serraj, a Memorandum of Agreement [56] aimed at collaborating on the management of "illegal immigration". In line with the new European Commission's Migration partnerships framework with third countries launched in 2016, the goal of this agreement was "to guarantee the reduction of illegal migratory flows", in other words to prevent departures towards Europe. One of the solutions identified in this document for the "issue of illegal migrants crossing Libya to reach Europe by sea" is the creation of temporary reception camps in Libya, locations under the exclusive control of the Libyan Ministry of the Interior, in which the *de facto* detention of "illegal migrants" is envisaged until repatriation to their countries of origin. In addition to this, the Italian government commits to supply technical and technological support to Libya, and in particular to the Libyan Coastguard, in order for the latter to collaborate in the fight against "illegal" immigration.

On the basis of the Memorandum, Italy trained the Libyan Coastguard and provided resources to use in the fight against migration, and, in the absence of a Libyan Maritime Rescue Coordination Centre (MRCC), offered the coordination of the Italian operational centre, which ceded its place to the Libyan equivalent when the North African country informed the IMO of the establishment of its own SAR (search and rescue) zone, identifying its own coordination centre as well.

According to the Italian Admiral Enrico Credendino, the Memorandum has enabled the creation of "a Libyan system capable of stopping migrants before they reach international waters, [and] as a result it will no longer be considered a push-back because it will be the

[56] Italian text available at <http://www.governo.it/sites/governo.it/files/Libia.pdf> (07/20); unofficial translation in English at <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf> (07/20). On this subject, see also: A. Liguori, *Migration Law and the Externalization of Border Controls*, Routledge, London-New York, 2019, p. 9 ff.

Libyans who will be rescuing the migrants and doing whatever they consider appropriate with the migrants".[57]

What is questionable at this point is the fact that the Italian government, in a sector with significant repercussions for the rights of the people involved, has attempted to re-launch cooperation with a country whose adherence to International Law has been placed in doubt by the civil war underway between various armed militias, and its disastrous humanitarian consequences. Furthermore, the United Nations[58] and Prosecutor of the International Criminal Court[59] have denounced the violence, torture, rape, abuse, and exploitation that migrants suffer both in detention centres controlled by the government and those controlled by armed militias, as well as the return of migrants on boats directed from Libya to Europe, which are stopped by the Libyan Coastguard and carried out to detention centres. The Prosecutor of the ICC, in turn, has initiated an enquiry into the Libyan Coastguard, which includes members of the militias, among them people involved in human trafficking, and the violence perpetrated by the organization against migrants. Along with the UN and Council of Europe[60], both the UNHCR and IMO have asked Italy and Europe to suspend cooperation with Libya in matters of immigration until the country has reached institutional stability[61].

Libya is not party to the 1951 Convention Relating to the Status of Refugees and its Protocol, there is no asylum legislation. Libyan laws criminalize irregular entry, stay, or exit of all migrants, asylum-seekers and refugees, victims of trafficking. Violations are penalized with an undefined prison sentence with "hard labour". UNHCR estimates that 2,500 foreign nationals are held in the detention centres.

[57] The video is available at https://www.internazionale.it/video/2017/05/04/ong-libiamigranti (07/20). The quotation starts at 3.51.

[58] United Nations Support Mission in Libya, *Report of the Secretary-General, S/2020/41*, 15 January 2020.

[59] Prosecutor of the International Criminal Court, *Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011)*, 2017; *Seventeenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)*, 8 May 2019.

[60] CoE Commissioner for Human Rights, *Letter to Italy*, 13 February 2020, <https://rm.coe.int/letter-to-mr-luigi-di-maio-minister-of-foreign-affairs-and-internation/16809c8262> (07/20).

[61] <https://www.unhcr.it/news/dichiarazione-congiunta-unhcr-oim-necessario-cambiare-lapproccio-internazionale-nei-confronti-rifugiati-migranti-libia.html> (07/20).

Currently there are various cases pending before the European Court of Human Rights regarding the cooperation between Italy and Libya, and there is no lack of initiatives from civil society aimed at convincing Italy and the EU to suspend this cooperation.

From a theoretical perspective, there is debate as to whether it is possible to hold Italy responsible for violating migrant rights in its collaboration with Libya, in accordance with Article 16 of the International Law Commission (ILC) Draft Articles on the Responsibility of States, which provides that a State that aids or assists another State in the commission of an internationally wrongful act the latter is internationally responsible for doing so if that State does so with knowledge of the circumstances of the internationally wrongful act; and the act would be internationally wrongful if committed by that State. In the case in question, there is no doubt that Italy was aware of the situation that migrants would encounter in Libyan detention centres, of the violence carried out by the Libyan Coastguard, and of the situation in Libya in general, since International Organizations, NGOs and various Agencies had documented it thoroughly.[62]

There is also cause for concern regarding the procedures followed for the adoption of the Memorandum, which, despite its political nature and the onerous finances involved, was not ratified by the Italian Parliament, as is required by Article 80 of the Constitution.[63]

In spite of these various issues, the agreement between Italy and Libya was renewed automatically on 2 February 2020,[64] without any of the modifications. New funds for the Libyan coastguard were also allocated.

6. The criminalization of NGOs and Italian case law

Another aspect of Italian asylum policies that should be pointed out is the relationship between Italian authorities and the NGOs that

[62] On the responsibility of Italy for collaboration with Libya, see A. Liguori, *Migration Law and the Externalization,* cit., p. 18 ff.

[63] See F. De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", *Diritti umani e diritto internazionale*, 1, 2018, p. 5 ff., pp. 9–10.

[64] As stipulated in Article 8 of the agreement itself.

have organized search and rescue operations in the Mediterranean[65] over the last few years to compensate for the lack of activity on the part of the coastal States.

As is well known, and without wishing to expand too much on the subject,[66] the last maritime operation in the Mediterranean aimed at protecting human life at sea was *Mare Nostrum*, initiated by the Italian government following the dramatic shipwreck on 3 October 2013, a few miles off Lampedusa, which cost the lives of 368 people. After the conclusion of the *Mare Nostrum* operation in October 2014, the European Union launched various maritime operations in the Mediterranean Sea, coordinated by Frontex, the European Border and Coast Guard Agency, some of which are still underway at the time of writing; however, these were maritime operations aimed primarily at border control, and only marginally at search and rescue. [67] Furthermore, the coastal States gradually withdrew from the obligations placed on them by International Maritime Law, and no longer helped vessels in difficulty in the Mediterranean, delegating the Libyan Coastguard to intervene in cases of boats in distress, and denying any ports of disembarkation on their own territories.

The trajectory described above concerned the Italian government as well; the centre-left government, after having re-launched cooperation with Libya in 2017,[68] supplying the country with patrol craft and training personnel, gradually withdrew from any sort of search and rescue activity in the Mediterranean. The centre-right government then endorsed a "closed ports" policy, accompanied by recognition of the competence of the Libyan Coastguard, to which the

[65] On this theme, see: G. Bevilacqua, "Italy versus NGOs: The controversial Interpretation and Implementation of Search and Rescue Obligations in the context of Migration at Sea", *Italian Yearbook of International Law*, 2018, p. 11 ss.; P. Cuttitta, "Repoliticization Through Search and Rescue? Humanitarian NGOs and Migration Management in the Central Mediterranean", *GEOPOLITICS*, 3, 2018, pp. 632-660; C. Heller, L. Pezzani, *Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Across the Mediterranean. A Report by Forensic Oceanography*, affiliated with the Forensic Architecture Agency, Goldsmiths, University of London, 7 May 2018; V. Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm", *Journal of Common Market Studies,* 56, 2018, pp. 119-140.

[66] For more on this topic, see the article by G. Cataldi in this collection.

[67] <https://www.consilium.europa.eu/en/policies/migratory-pressures/sea-criminal-networks/> (07/20).

[68] See also A. Liguori, *Migration Law and the Externalization,* cit., p. 9 ff.

MMRC in Rome delegated the responsibility of identifying disembarkation ports in the event of rescues carried out by NGOs in the Libyan SAR zone. The centre-right government also initiated a process of criminalizing NGOs, accusing them of participating in human trafficking and violating immigration laws, and assisting the illegal entry of migrants to Italian territory.[69]

Therefore, the centre-left government had tried to reduce NGOs' margin of action by proposing adherence to a code of conduct (the so-called *Codice Minniti*), the subsequent centre-right government initiated a media campaign aimed at discrediting the NGOs that undertook rescue operations for migrants at sea.

On 14 June 2018 the Italian centre-right government adopted a second security decree,[70] which gave the Ministry of the Interior, along with the Ministry for Infrastructure and the Justice Ministry, powers "to limit or deny the access, transit, or stopover of ships in territorial waters" for reasons related to public order and security, or rather when it is presumed that there has been a violation of the law on immigration, and in particular that a crime has been committed "that furthers illegal immigration". The second security decree also includes financial penalties imposed on the shipmaster in the event of non-compliance with the ban on entry to Italian territorial waters. It is quite evident that the measures in question, which follow the model of emergency security laws that have been a constant in Italian policies regarding immigration since law No. 189/2002 (the "Bossi-Fini" law), were adopted with the aim of targeting NGOs involved in search and rescue operations in the Mediterranean. It is no coincidence that the first punitive action, taken the day after adoption of the decree, was against the *Sea Watch 3*, a humanitarian ship flying under a Dutch flag,

[69] The "war" against NGOs involved in assisting migrants is not a prerogative of the Italian government; as has been documented by the European Agency for Fundamental Rights (FRA), investigations and administrative or criminal proceedings against private entities involved in SAR operations have been opened in Germany, Greece, Malta, the Netherlands, and Spain. FRA, *2019 update – NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, 19 June 2019, available at: <https://fra.europa.eu/en/publication/2019/2019-update-ngo-ships-involved-search-and-rescue-mediterranean-and-criminal> (07/20).

[70] Decree law 14 June 2019, No. 53, converted into Law 8 August 2019, No. 77. On this theme, see: G. Cataldi, "L'impossibile "interpretazione conforme" del decreto "sicurezza bis" alle norme internazionali sul soccorso in mare", *Questione Giustizia*, 2020.

which assisted a vessel in distress in the SAR zone off Libya, refused to disembark the survivors in Libya, since the country could not be considered safe, and sent a request to the MMRC in Rome for a disembarkation port in Italian territory, which was then refused. The shipmaster, Carola Rackete, took rescued migrants to an Italian port, in spite of the order forbidding entry to Italian territorial waters issued by the Ministry of the Interior in implementation of the second security decree. Moreover, following this episode, while the decree was being converted into law, the penalties for ships in violation of the measures were strengthened, with the stipulation of a fine between €150,000 and one million euros for any failure to observe the new rules, along with the confiscation of the vessel, and compulsory arrest of shipmaster, Carola Rackete, caught resisting or committing violence against Italian military ships.

It should nonetheless be noted that, in spite of the process of criminalization being conducted by Italian institutions, Italian judges, rather than confirming the accusations directed at NGOs, in fact underlines the merits of these organizations, insofar as they are currently the only entities fulfilling the obligation of rescue at sea. A rescue can only be considered complete once the survivors have disembarked in a place of safety, which is hardly the case of Libya, given its civil war and reports of abuse of migrants. The rescuing vessel on which shipwreck survivors are taken on-board cannot be considered a place of safety either, given the temporary nature of its facilities. Indeed, a place of safety is a place where people's basic needs may be met, but also where their safety may be guaranteed in a way that respects human rights, and in particular the principle of *non-refoulement*. This view was shared by the Italian Supreme Court, which reiterated these principles in the judgment[71] with which it rejected the appeal of the Public Ministry of Agrigento requesting the annulment of the order that the judge of preliminary investigations (GIP)[72] had adopted to avoid validating the arrest of Carola Rackete, shipmaster of the aforementioned humanitarian ship *Sea Watch 3*.

It should also be noted that the emergency health situation has prompted the Italian government to declare that Italy cannot provide a place of safety, at least not "for instances of rescues carried out by naval vessels under foreign flag outside the Italian SAR zone", because

[71] Corte di Cassazione, judgement of 6 January 2020, No. 6626.
[72] Court of Agrigento, Gip, order of 2 July 2019.

it has to preserve the "performance of national health, logistics and security structures dedicated to the containment of the spread of contagion and the assistance of patients with COVID-19". This is, once again, a measure whose only targets are the NGOs involved in rescue operations in the Mediterranean. It should be specified that the restriction of individual rights must comply with the limits provided for by the Italian Constitution, which, moreover, not only does not envisage a situation of extraordinary emergency, apart from a state of war, but in admitting a balance of rights – in this instance the right to health on one hand, and the right to life and right to asylum on the other – also makes clear that any restriction must happen with due regard for principles of legality and proportionality. What we are witnessing is instead a measure that impinges on fundamental and constitutionally protected rights, which are being restricted through an administrative action that is seriously flawed insofar as it lacks a legal basis, thus violating the principle of legal certainty. [73]

Afterwards, it was established that migrants rescued at sea and brought to Italian shores would have to spend a period of fourteen days in quarantine on board purpose-equipped ships, and not on land.[74] In practice, this plan has been put into action, and raises doubts from the perspective of respect of fundamental rights of the individual, above all the right to personal freedom, since it may be construed as *de facto* detention, without the procedural guarantees provided by the Italian constitution.

7. Conclusions

This analysis has tried to give an overview of the Italian system of asylum, examining the relevant laws, case law, and praxis, highlighting the most noticeable aspects of the system, as well as those that are most problematic. As the preceding pages have shown, since the 1990s policies concerning asylum – and immigration in general – have been characterized by security measures that have restricted the right to asylum, making the exercise of this right more difficult as such they

[73] Ministerial Decree R.0000150 of 7 April 2020. For commentary, see: A. Algostino, "Lo stato di emergenza sanitaria e la chiusura dei porti: sommersi e salvati", *Questione giustizia*, 2020.

[74] Decree of the Head of Department, No. 1287, 12 April 2020.

have progressively limited the right to have one's case examined on individual merits and limited access to judges. The cooperation with Libya and the "war" with NGOs carrying out search and rescue operations at sea have made it more difficult to enter Italian territory, an essential condition for one to be able to exercise the right to asylum. Finally, the measures adopted to confront the public health emergency have markedly impacted the subjective legal positions of asylum seekers.

As we approach the date of publication of this book, the Italian government has adopted changes to the security decrees, which has not been abolished, as we hoped. Some changes are remarkable, including those relating to humanitarian protection, renamed "special protection", which is extended to other cases in addition to those already envisaged by the security decree. The residence permit will be recognized by Territorial Commission, not by Police, and will last two years; upon expiry it will be converted into a residence permit for work reasons.

Another positive element is the restoration of the former reception system (renamed "Reception and Integration System") to be managed by the municipalities as the priority system for the accommodation not only of the most vulnerable persons, minors and beneficiaries of international protection, but also of asylum seekers.

Moreover, the prohibition of registration of asylum seekers in the municipal registers, declared to be unconstitutional by Italian Constitutional Court in July 2020, is cancelled and the issue of an identity document valid for three years is provided.

However, the provisions relating to NGOs carrying out search and rescue activities at sea remain problematic. The Minister of the Interior can still prohibit non-military vessels from entering the territorial waters unless the navy carrying out the rescue complied with international conventions and reported the operations to the competent authorities and to the flag State. Otherwise, NGOs can be criminally sanctioned by the judge with fines ranging from 10 thousand to 50 thousand euros.

It is necessary to wait for the implementing regulations to understand the consequences of these changes on the Italian asylum system.

Anyway, while the situation has some welcome elements, as we have shown, it is hoped that Italian policies in this field change

trajectory, and that any changes are rooted in the values protected by the Constitution and International human rights law. We have to be aware that refusing to asylum seekers rescue at sea and a safe port of disembarkation, sanctioning the shipmasters of the humanitarian ships who carry out the search and rescues operations in the Mediterranean Sea constitute violations of international and national law. Italy, other Member States and European Union are responsible of these violations.

As scholars we call for a more appreciable coherence between the values that Italy and European Union affirm to be the basis of our society and the political and normative choices, which have severe consequences on human beings.