

Maastricht University

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

Asylum in Italy between human rights and the Constitution

The abolition of the 'humanitarian protection' under Decree-Law n. 113/2018

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Abstract

Placed in the realm of human rights research, this thesis aims at assessing the abolition under Decree-Law n. 113/2018 of the Italian ‘humanitarian protection’ formerly provided under art. 5(6) of the Consolidated Immigration Act, on the basis of international human rights standards, EU law and constitutional fundamental rights. In the first part, it provides an overview of the recent Italian history of immigration and asylum, outlining the socio-political context in which the reform is inscribed. The second part addresses the multi-level legal framework on international protection, taking into consideration the 1951 Refugee Convention, the 1950 European Convention on Human Rights and EU law within a comparative legal assessment that identifies Italy’s core obligation related to the protection of aliens, highlighting the distinctiveness of the ‘humanitarian protection’. The core of the analysis, in the third part, grounds the ‘humanitarian protection’ within the right of asylum enshrined in art. 10(3) of the Italian Constitution. After pointing at formal and procedural flaws of D.L. n. 113/2018 through the Constitutional Court’s case-law, the case-study focuses on the assessment of art. 1 of the decree, assessing comparatively the former open-ended ‘humanitarian protection’ with the new strict categorization of cases eligible for protection.

Keywords: human rights, D.L. n. 113/2018, humanitarian protection, Italian Constitution

Acknowledgments

I would like to thank Professor Hildegard Schneider for encouraging me to conduct this legal research and for her advisorship throughout the process. I am grateful for her academic and personal support, essential for the realization of this work. I would also like to express my gratitude to Professor Ria Wolleswinkel who has ensured the highest learning and research experience, as well as the staff of UM Faculty of Law and Center for Human Rights. I extend my gratitude to the E.MA staff in Venice, particularly Dr. Chiara Altafin who assisted the initial steps of this research. I also thank all those who contributed with their comments to the realization of this project, in particular Dr. Giovanni Fassina, Dr. Manfredi Rasi Caldogno, Dr. Stefano Trevisan and Dr. Paola Zichi, for their friendly, competent suggestions. A special thank goes to my father for the knowledge he shared with me over the years, for his encouragement and for the valuable discussions we had about this research. Last but not least, I thank my mother and brother for their patience and support in the difficult times I encountered during this journey.

Contents

| | |
|--|----|
| Abstract | 3 |
| Acknowledgements | 4 |
| List of abbreviations and acronyms | 7 |
| Introduction..... | 9 |
| Chapter 1: The evolution of the Italian migration and asylum policy from 1989 to date..... | 15 |
| 1.1 Changing international migrations after 1989..... | 16 |
| 1.1.1 Towards the Consolidated Immigration Act..... | 18 |
| 1.1.2 An enhanced intergovernmental cooperation at the European level..... | 19 |
| 1.2 The consolidation of the security-immigration nexus..... | 20 |
| 1.2.1 Migrants' criminalisation under the Bossi-Fini law..... | 21 |
| 1.2.2 The communitarisation of European migration and asylum policies..... | 22 |
| 1.3 The impact of the Arab uprisings on migration fluxes and policies..... | 22 |
| 1.3.1 The Ministry of Interior's crackdown on asylum..... | 24 |
| 1.3.2 EU migration and asylum politics in light of the 'refugee crisis' | 25 |
| 1.4 Recent developments under the Yellow-Green Government..... | 26 |
| Chapter 2: The multi-level legal framework on international protection..... | 31 |
| 2.1 The adaptation of the Italian legal order to international law..... | 31 |
| 2.1.1 Adaptation and rank of customary international law..... | 33 |
| 2.1.2 Adaptation and rank of treaty law..... | 33 |
| 2.1.3 The special status of EU law..... | 35 |
| 2.2 Asylum under the international human rights framework..... | 35 |
| 2.2.1 Asylum in the Universal Declaration of Human Rights..... | 36 |
| 2.2.2 The 1951 Refugee Convention and the 1967 Protocol..... | 38 |
| 2.3 Asylum under European law..... | 41 |
| 2.3.1 The protection of aliens under the European Convention on Human Rights..... | 42 |
| 2.3.2 The right to be granted asylum under the EU Charter of Fundamental Rights..... | 44 |
| 2.3.3 The Common European Asylum System..... | 45 |
| 2.4 Concluding remarks..... | 49 |

| | |
|--|----|
| Chapter 3: The abolition of ‘humanitarian protection’ under D.L. 113/2018..... | 51 |
| 3.1 The constitutional right of asylum..... | 51 |
| 3.1.1 Protection under the Consolidated Act on Immigration..... | 53 |
| 3.1.2 The pluralist regime of protection..... | 55 |
| 3.1.3 Protection in the realm of human rights..... | 56 |
| 3.2 The abolition of ‘humanitarian protection’ under D.L. n. 113/2018..... | 57 |
| 3.2.1 Analytical overview of D.L. n. 113/2018..... | 57 |
| 3.2.2 Procedural flaws..... | 60 |
| 3.2.2.1 The improper use of the Decree-Law..... | 60 |
| 3.2.2.2 The conversion procedure and the use of maxi-amendments..... | 61 |
| 3.2.3 Substantial flaws..... | 63 |
| Conclusions..... | 69 |
| Bibliography..... | 73 |

List of abbreviations and acronyms

| | |
|-----------|---|
| Art. | Article |
| Cass. | Italian Court of Cassation |
| CEAS | Common European Asylum System |
| CFR | Charter of Fundamental Rights and Principles of the European Union |
| CJEU | Court of Justice of the European Union |
| Const. | Italian Constitution |
| Const. C. | Italian Constitutional Court |
| D.L. | Decree Law |
| D.P.R. | Decree of the President of the Republic |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |
| EEC | European Economic Community |
| EU | European Union |
| ILO | International Labor Organization |
| IOM | International Organization for Migration |
| L. | Law |
| L.D. | Legislative Decree |
| MS | European Union Member State |
| NGO | Non-Governmental Organization |
| SAR | Search and Rescue |
| SP | State Party |
| SSUU | Sezioni Unite (Grand Chamber) |
| TEC | Treaty on the European Communities |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| TUI | Testo Unico Immigrazione (Consolidated Immigration Act) |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations Organization |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| UNHRC | United Nations Human Rights Council |
| UNSC | United Nations Security Council |

N.B.: all translations from Italian into English are my own, unless otherwise stated.

Introduction

At the time when the introductory lines to the present work are being written, the case of the Sea Watch III is making headlines all over Europe and beyond. The Sea Watch III is a Dutch-flagged vessel operated by a German NGO that conducts SAR operations on the high seas in the Mediterranean, more precisely in the area between the North African coasts of Tunisia and Libya and the coasts of the EU, i.e. of Italy, Malta and Greece in particular. The Sea Watch operates under a humanitarian mission whose goal is to save the lives of as many human beings as possible, among those who, whether migrants or refugees, undertake the dangerous crossing of the Mediterranean, fleeing from contexts of indiscriminate violence, systemic violation of human rights and extreme poverty, looking for better conditions in order to lead a dignified life.

The work of NGOs conducting SAR operations in the Mediterranean became necessary as a result of the end of the of the Italian navy's SAR mission *Mare Nostrum* which saved around 130,000 people. Other military missions followed under the auspices of the EU, but with different objectives. While *Mare Nostrum*'s main goal was to save migrants' lives, EU missions focused on patrolling the Union's external borders, aiming explicitly at limiting the arrivals of migrants, while rescuing was only a secondary goal. Given the growing number of departures in recent years and the related increase in deaths at sea, civil society mobilized in an attempt to fill the void left by European governments.

The reasons why the Sea Watch case is generating heated debates at the political and social levels are manifold and offer a starting point to outline the multi-layered framework within which this work is inscribed. On 12 June 2019 the ship's crew rescued 53 people in distress off the Libyan coast and was successively ordered by the Italian authorities to disembark them in Tripoli, considered the nearest 'safe place'.¹ The captain refused to obey the order, denying the safe condition of Libya, a country where a civil war is underway. In the same days, the news of an air raid on a detention center for migrants in Libya, where reportedly 44 people died and 130 were wounded, has shown to the international community that Libya is patently *not* a 'safe place'. The country's leadership is contended between the UN-recognized government headed by Fayez al-Serraj and militias led by general Khalifa Haftar, supported by France and the United Arab Emirates. Even before such confrontation, however, Libya could hardly be considered a 'safe place' for migrants and asylum

¹ According to the IMO *International Convention on Maritime Search and Rescue* (27 April 1979, 1403 UNTS), the competent authority to coordinate a SAR operation is the one that is competent for a given SAR area. However, if the latter fails to act, the authority of the country which has first received the SOS should intervene and take over this responsibility until the rescued are disembarked in a place of safety. In the Sea Watch III case, the Libyan authorities failed to act and the Italian authorities, which had first received the SOS, took over such responsibility.

seekers. This country never signed the 1951 Geneva Convention and the 1967 Protocol on the Status of Refugees. Numerous reports from the UN and authoritative international NGOs have confirmed the inhumane conditions faced by migrants passing through Libya on their journey to Europe. As they cannot apply for asylum in that country and holding an irregular status, migrants are deprived of liberty indefinitely in detention centers and in many cases victims of torture, sexual violence, ill-treatment or slavery.

Hence the aforementioned decision of the Sea Watch's captain not to bring the rescued back to Tripoli. Of the 53 rescued, 11 were immediately recovered by the Italian Coast Guard due to critical health conditions, while 42 remained on the ship for the following two weeks, waiting in international waters the evolution of events. After having sailed towards Lampedusa island in Italy, the Sea Watch was forbidden access to Italian territorial waters by an order issued by the Interior Minister Matteo Salvini, on the basis of the competence attributed to him by the recently adopted 'Security decree *bis*', i.e. Decree-Law 14 June 2019 n. 53, a regulation promoted by the Minister himself.² This piece of legislation aims at preventing SAR NGOs to disembark migrants in Italian ports, based on the double assumption that they network with organized crime's human traffickers and that they contribute to the invasion of Italy by irregular migrants disguised as asylum seekers.

It should be stressed that while the Sea Watch was stuck in this impasse, on Lampedusa island dozens of migrants landed almost on a daily basis transported on private boats of all sorts that were not managed by NGOs. Ironically, this type of landing falls outside the scope of D.L. n. 53/2019 but it accounts for the highest number of migrants that reach Italy through the Central Mediterranean route. This circumstance highlights the hidden rationale of the decree, that is the criminalization of humanitarian civil society organizations on the one hand and on the other the communication strategy of showing the tough face of the Government.

D.L. n. 53/2019 is raising great concerns to the extent that, ahead of its adoption it became object of a letter addressed to the Prime Minister Giuseppe Conte and the Minister of Foreign Affairs Enzo Moavero Milanesi by the UNHRC's Special Procedures. As I write, the decree has however yet to be converted into law and the most recent developments suggest disagreement between the two governing parties over the methods used by Minister Salvini in dealing with the issue of migration. Regardless whether or not this decree will be converted into law, it is fundamental to go back to the first legislative act adopted by this Government within the framework of the declared fight against immigration. Four months after the installment of the Government, Minister Salvini, leader of the

² Decree-Law 15 June 2019, n. 53. In the Italian legal order, a decree-law is a legislative act adopted by the Government in derogation to the legislative power of the Parliament in cases of exceptional need and urgency and regulated by arts. 77 and 72 Const. It becomes immediately in force after publication in the Official Journal, but requires transformation into law by the Parliament within 60 days, failing which its effects cease retroactively.

League – a sovereigntist, anti-immigrant and Eurosceptic party – adopted a decree known as ‘Immigration and Security decree’ (also ‘Salvini decree’), i.e. Decree-Law 4 October 2018 n. 113, converted with modifications in Law 1 December 2018 n. 132, introducing highly restrictive measures with regard to, *inter alia*, international protection and immigration. This first decree is the object of the present research. Two main reasons have driven this choice: firstly, the decree is converted into law and has already produced effects in the legal, social and political spheres; secondly, it is a useful case-study to check Italy’s compliance with international human rights standards and Italian constitutional fundamental rights.

The restrictive policy towards migrants and asylum seekers of the Italian Government has escalated rapidly, highlighting its sovereigntist stance. This is accompanied by deliberate disrespect for supranational institutions at the EU level, where the Minister Salvini has been absent in all meetings dealing with the renegotiation of the Common European Asylum System (hereafter, CEAS) – an issue that he declared to be a top priority in his agenda. At the broader international level, Italy was one of the ‘great absentees’ at the Global Compact on Migration, signed in Marrakech, Morocco, on 11 December 2018 by 164 members of the international community.

The unprecedented migration flows witnessed in Europe in recent years have been addressed by governments with diverse policies and legislative measures, differently balancing the overarching goal of limiting arrivals and the need to integrate migrants within European societies. In this framework, the 2018 Italian elections have brought to power a coalition of populist parties, namely the 5 Star Movement and the League, that claimed to address migration more effectively than in the past by fighting irregular migration and the illegal businesses that flourished in the field of asylum seekers’ reception services. The adoption of the said D.L. n. 113/2018 represented the first legislative step of this policy. Under the new regulation, the restrictive measures adopted by the previous left-wing Government have been furthered to the point of challenging human rights commitments undertaken by Italy under both international and European law, as well as calling into question fundamental rights enshrined in the Italian Constitution.

This frame of events has determined the research design and methodology of this work, aimed at analyzing the first and most articulated article of D.L. n. 113/2018, abolishing the so-called humanitarian protection (an atypical form of protection provided by the Italian legal order), and replacing it with a predetermined list of protected categories. The core research question underpinning the analysis is therefore whether and to what extent can the abolition of the humanitarian protection be reconciled with international human rights standards, EU law and Italian constitutional principles. In order to answer this question, the following set of sub-questions required investigation: i) what are the drivers that led to the adoption of D.L. n. 113/2018; ii) how is the protection of aliens guaranteed

within universal and regional human rights instruments, EU law and the Italian constitution; iii) how do the international, EU and Italian legal orders interact with each other.

Accordingly, the following hypothesis and sub-hypotheses were formulated: the abolition of the humanitarian protection conflicts with the Italian constitution more patently than with international and EU law; i) D.L. n. 113/2018 was primarily driven by electoral considerations; ii) the highest protection of human rights of aliens is found at the Italian constitutional level rather than within international legal instruments; iii) the EU legal order's reliance on international law instruments ensures greater enforceability of the latter within the Italian legal order.

This work lies within the realm of human rights research, a field of studies that involves several disciplines. It has been noted that human rights research, especially within legal scholarship, often falls short of methodological rigor, undermining the credibility of the findings due to the risk of incurring in wishful thinking.³ I have tried to avoid this by reflecting since the outset on the most appropriate method. Since legal, political and social processes are all equally central to our issues, it was clear that all three dimensions had to be included. My academic background meets this need as I hold a BA in sociology and an MA in international relations, thanks to which I developed a set of research skills in the field of social sciences. I have completed two dissertations based on field research in which I applied both quantitative and qualitative methods and explored different theoretical approaches, finally heading to critical studies. This experience was followed by years of professional activity in international cooperation and European affairs, intertwined with a personal commitment as a human rights activist. I have then worked for two years within the Italian reception system for asylum seekers and refugees, an experience that prompted an interest in human rights research, especially related to immigration. This led me to be witness to an asylum regime that I came to consider paradoxical and, in some respects, inhuman. Although aspiring to the greatest possible objectivity, these considerations are biased to a certain extent by personal experience. For this reason, I deemed necessary to take a step back – and a detached view – from the world in which I had been immersed. The legal studies involved in the present work allowed me a more detached approach and a fruitful integration of my previous competences.

The adopted methodology reflects the above experiences by combining legal and social sciences methods. Should this thesis have been developed without the present limits of time and resources, the application of qualitative and quantitative surveys and interviews would have certainly represented valuable tools for expanding the sociological and political aspects of the analysis.

³ F. Coomans, F. Grünfeld, M. T. Kamminga, 'Methods of Human Rights Research: A Primer', *Human Rights Quarterly*, vol. 32, 2010, pp. 180-187.

The starting point in applying a multidisciplinary methodology was the tenet that a given regulation is always the product of a specific historical context. A sound analysis of any regulation and the assessment of its legal, political and social implications cannot neglect its historical and political background. I started out by retracing the recent history of immigration and asylum in Italy in relation to broader European experiences and the emergence of an international regulatory framework on asylum. This allowed to identify on one hand elements of continuity and change within migration and asylum policies, and, on the other, the relevant political and socio-economic dynamics that led to the adoption of D.L. n. 113/2018. These issues were addressed using historiographical methods, complemented with policy analysis on successive immigration law reforms. Although I mainly relied on secondary sources for the historical outline, the consultation of primary sources was necessary, especially with regard to some of the laws considered. As to the most recent events, I resorted to media sources, lacking scholarly contributions. This historical overview corresponds to the first chapter of this thesis.

The subsequent steps were based on methods of legal research. It was necessary to reconstruct the multi-level legal framework on international protection through an analysis of both legal instruments, jurisprudence and doctrine, applying comparative method when relevant. This was essential to clarify the relationships between the legal orders in play as well as similarities and differences in scope of the instruments guaranteeing the protection of aliens. Hence, in chapter 2, I address the universal and regional human rights frameworks related to asylum as well as relevant EU law and their interaction.

The chosen case-study, which represents the core object of this research, was tested in chapter 3 in light of the above, through analysis of primary and secondary sources, including legal texts, jurisprudence, and quickly developing doctrinal contributions. A conclusion presents the key findings in a critical perspective.

Chapter 1

The evolution of the Italian migration and asylum policy from 1989 to date

The so-called ‘refugee crisis’ that overwhelmed Europe since 2011 has had a major impact on Southern-European countries. The crisis has shown the inadequacy of the Common European Asylum System (CEAS), which provides that the EU Member State (MS) responsible for processing asylum applications is the one of first-entry of asylum seekers. As a consequence, Southern-European MSs, where asylum seekers arrive by boat through the Mediterranean route, are disproportionately affected.

While the D.L. n. 113/2018 is inscribed in these recent developments and is the result of the current political conjuncture that brought the far-right political party, the League, into power alongside the populist Five Star Movement, it is also important to look back to the historical developments of migration into Italy. The phenomenon of foreign immigration to Italy has often been misrepresented. A brief historical overview is therefore essential to shed light on time-long trends, understand the social perception of foreign immigration to Italy and assess the institutional and societal responses.

While certain aspects of Italian migration policies find their roots in the aftermath of WWII,⁴ this historical account starts in 1989: the end of the Cold War marks a turning point for international migrations; on the other hand, the increased foreign presence in Italy paved the way for the adoption of the first comprehensive immigration law (n. 38/1990), which abolished the geographic limitation of the asylum regime originally introduced by the 1951 Geneva Convention Relating to the Status of Refugees (hereafter, Refugee Convention).⁵ Since a complete historical overview is beyond the scope of this work, the chapter will build extensively on the periodization submitted by Michele Colucci in his *Storia dell’immigrazione straniera in Italia dal 1945 ai giorni nostri*.⁶

⁴ The foundations of Italian migration and asylum policies developed in the aftermath of WWII, when masses of people were on the move. The Italian Republic founded in 1946 adopted its constitution in 1948. Meanwhile, a human rights framework was being developed at the international level. Throughout the 1950s and 1960s, immigration was a limited phenomenon in Italy compared to Western European countries. By contrast, Italy witnessed important emigration flows, as high unemployment encouraged Italian governments to promote emigration into industrialized European countries, meeting their workforce demand. Immigration increased progressively throughout the 1970s and 1980s, attracted by the so-called ‘open doors’ policy, lacking a comprehensive immigration law. While the first institutional response to immigration came as soon as 1963 (a ministerial circular aimed at fighting immigration-related job market imbalances), only in 1986 sectorial regulations were codified within the Foschi law (L. n. 943/1986), prompted by the ratification of ILO’s Migrant Workers Convention n. 143 (ILO, *Migrant Workers (Supplementary Provisions) Convention, C143*, 24 June 1975). The 1980s enhanced cooperation at the EEC level aimed at harmonising border-control policies included Italy only in 1990.

⁵ UNGA, *Convention Relating to the Status of Refugees*, adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS (hereafter, Refugee Convention).

⁶ M. Colucci, *Storia dell’immigrazione straniera in Italia. Dal 1945 ai giorni nostri*, Roma, Carocci, 2018.

1.1 Changing international migrations after 1989

With the opening of former socialist regimes, new fluxes from Central and Eastern Europe begun to flow and those from Africa and Asia became more diversified. The foreign population already residing in Italy became stabilised so that immigration became a central feature of the public discourse, prompting new legislative initiatives.

A number of shocking events, including the murder of a South African agricultural worker, brought the issue of migrant workers under attention.⁷ Many migrants left the country and others mobilized in political protest. Trade unions, associations, civil society and religious organizations mobilized, asking better treatment of migrant workers in the context of rising discrimination and intolerance.⁸ These pressures led socialist vice-premier Claudio Martelli to submit a comprehensive bill, including a mass regularisation, planning of fluxes and, most importantly, the abolition of the geographic limitation of the Refugee Convention.⁹

The case of the ship *Europa II*, carrying Asian asylum seekers, illustrates the climate of the time and presents similarities with the present. Repeatedly bounced between Italy and Greece, *Europa II* was allowed to dock in Bari only after days of hunger strike of the passengers. Asylum applications, however, were all rejected and the applicants transferred back to Greece. A new season had just begun and showed all its magnitude with the arrival in 1991 of thousands of desperate Albanians on all sorts of watercrafts, a phenomenon that crystalized in the collective imagination of Italians and has been described as “being for Southern Europe what the fall of the Berlin Wall had been for Northern Europe”.¹⁰ In response to these developments, Italian authorities opted initially for a policy aimed at promoting voluntary repatriation and later for a stricter policy of *refoulement*, offshore push-backs and forced repatriations.¹¹

Growing the international political instability, refugees started to flow in ever-greater numbers, particularly from the Balkans, where conflict had just begun, and Somalia, devastated by a civil war.¹²

⁷ Despite limited shows of solidarity, the local population frustrated by the worsening economy and politically maneuvered by far-right political groups, reacted aggressively towards the migrant community.

⁸ On 7 October 1989, 150.000 people marched through Rome asking for a new immigration law. The mobilizations of the 1990s took place in a very tense climate. Mass media irresponsibly narrated events with discriminatory rhetoric; right-wing parties conducted xenophobic and anti-immigrant campaigns in Italy and beyond. Growing intolerance towards migrants led to protests and violence. Meanwhile, civil society anti-racist demonstrations were triggered by the killing of a Turkish migrant along the Yugoslav border by the police. Migrant workers demanded a regularization after the stalemate in the issuing of residence permits that followed the Foschi law; foreign students asked for a facilitated access to higher education; asylum seekers, still under the limited regime, advocated the abolition of the geographic reservation. See M. Colucci, *Storia dell'immigrazione* cit., pp. 79-92.

⁹ D.L. n. 416/1989, converted with modifications in L. n.39/1990 (hereafter, Martelli law).

¹⁰ A. Leogrande, ‘Vicari e Sejko, due film sugli sbarchi albanesi’, *minima&moralia*, [website], 19 March 2013, <http://www.minimaetmoralia.it/wp/vicari-e-sejko-film-sbarchi-albanesi/>, (accessed 29 May 2019).

¹¹ Mechanisms for expulsion were enhanced by decree and the yearly flows-planning was limited to domestic sector workers. See in this regard M. Colucci, *Storia dell'immigrazione* cit., p. 98.

¹² *Ivi*, p. 99. In this context, UNHCR and IOM participation in refugees’ assistance and reception represented a novelty.

Due to the mentioned abolition of the geographic reservation, asylum seekers could apply for international protection. Applications though were systematically rejected based on a restrictive interpretation of the ‘refugee’ definition, whereby “the conception of asylum seeker as an individual persecuted in his home country prevails [...], and not as linked to groups of population fleeing [violence]”.¹³ Notwithstanding, Italian authorities adopted *ad hoc* measures, granting temporary work and residence permits to most asylum seekers with the aim of providing them with legal status.¹⁴ The issue of asylum seekers’ reception services acquired greater visibility, not least because also illegal business begun to flourish. Moreover, a direct consequence of the restrictive migration policies was the emergence of transnational organized crime networks that, besides traditional drugs and arms trafficking, begun benefiting from human trafficking. The Italian Government authorized the navy to oppose this phenomenon, a practice that attracted criticism from the UNHCR and resulted in major incidents in which hundreds of migrants died.¹⁵

The 1990s have been described as the decade of the consolidation of foreign immigration to Italy.¹⁶ The foreign population’s growth sped up to an average of 90.000 people per year. At the same time, the Italian population begun its decline generating debate over the importance of foreign immigration for the sustainability of the welfare-state and job market.¹⁷

Maurizio Ambrosini noted that the process took place in the absence of an effective mechanism for the economic integration of migrant workers.¹⁸ While foreign workforce concerned initially low-skilled sectors, the presence of migrants became increasingly important also in the industrial sector. Hence, it became clear that reforming both immigration and employment laws was desirable.¹⁹

The changing political framework brought the issue of immigration to the fore: the far-right Alleanza nazionale proposed a crackdown on the entry, reception and expulsion of migrants framed within a security discourse; in the Lega and Forza Italia, xenophobic, securitarian and relatively liberal positions coexisted; within the left, the Democratic party integrated securitarian and migration control instances alongside a right-based discourse, while the Greens and far-left parties got closer to the anti-racist positions. The anti-racist movement that until the end of the decade had been a

¹³ *Ivi*, p. 111. Applications were assessed by a Central Commission established by L. n. 943/1986.

¹⁴ However, the discretionary renewal of such permits left asylum seekers in a precarious legal status.

¹⁵ In 1997, when the Albanian economic crisis generated another wave of departures, the Prodi Government in agreement with Albanian authorities disposed a naval blockade in the Adriatic Sea that caused a series of shipwrecks. See in this regard M. Colucci, *Storia dell’immigrazione* cit., pp. 117-118.

¹⁶ I. Maciotti, E. Pugliese, *L’esperienza migratoria. Immigrati e rifugiati in Italia*, Roma-Bari, Laterza, 2006, p. 37; see also C. Bonifazi, *L’immigrazione straniera in Italia*, 2nd edn., Bologna, il Mulino, 1998, pp. 111 ff.

¹⁷ M. Colucci, *Storia dell’immigrazione* cit., p. 108.

¹⁸ M. Ambrosini, *Utiles invasori. L’inserimento degli immigrati nel mercato del lavoro Italiano*, Milano, FrancoAngeli, 1999, p. 121.

¹⁹ The later reforms of employment law were coordinated with reforms of immigration law (Treu employment law of 1997 followed by the Turco-Napolitano immigration law in 1998; Bossi-Fini immigration law of 2002 followed by the Biagi employment law of 2003).

privileged interlocutor of policy-makers, started to decline. Colucci identified three main factors that contributed to this: first, among the diverse actors of the coalition differences begun to prevail; symmetrically, the ethno-cultural differences within the immigrant community started to prevail over the shared migrant identity; and finally, the neo-liberal pattern of professionalisation within the non-profit sector diminished its political activism.²⁰

1.1.1 Towards the Consolidated Immigration Act

The Martelli law represented “an undoubtable turning point in the history of the Italian migration policy”.²¹ The main features of the new regulation were not only the abolition of the geographic reservation for asylum seekers but also a sounder resident permit regime, that included employment and self-employment, religion, healthcare, study and tourism. In continuity with previous practices, a mass regularization affected 225.000 people.²² The law also redefined the competence-sharing between central and regional governments, the latter being assigned integration policies, while the former was responsible for planning fluxes on an annual basis in order to overcome the necessity of emergency mass regularizations. The law received cross-cutting criticism and showed the inadequacy of the administrative bodies responsible for its implementation, to the extent that “the inability of the political and administrative class to manage in an orderly and planned manner all the implementing measures [...] brought to the failure of the law”.²³

A reform of citizenship was adopted with cross-party consensus in 1992.²⁴ The result however, instead of reflecting the changes occurring in the society, was everything but inclusive: only after 18 years of documented permanent residence in the country, children born in Italy to foreign nationals may be granted citizenship, while naturalization based on residence would only be possible after 10 years on a discretionary basis.

In 1995 two other regulations came about: a decree-law providing for a mass regularisation and a regulation enabling the use of the navy in offshore border-control operations and establishing a network of detention centres for the identification of irregular migrants.

Three years later the Parliament adopted the Turco-Napolitano law (L. n. 40/1998), which reformed the entry and stay criteria, introduced new integration measures and simplified expulsion mechanisms. Issues related to asylum, citizenship and voting rights for migrants were not part of the

²⁰ M. Colucci *Storia dell'immigrazione* cit., pp. 121-124.

²¹ *Ivi*, p. 87.

²² Migrants had to prove they were residing in Italy before 31 December 1989. Of the beneficiaries only 4% were employed, the remaining being granted a two-years job-seeking permit that they would lose if they couldn't find employment.

²³ L. Einaudi, *Le politiche dell'immigrazione in Italia dall'Unità ad oggi*, Roma-Bari, Laterza, 2007, pp. 155-156.

²⁴ L. n. 91/1992.

law, despite pressure by civil society groups. The main innovations were the residence permits for seasonal work and job-seeking, a quota system for the entry of migrant workers based on the job-market demand, a permanent residence card issued after 5 years of residence upon verification of financial standards, a permit for social protection issued to victims of violence, the extension of public healthcare to irregular migrants and also the possibility of entry-denial and push-backs at the border as well as the institutionalisation and multiplication of detention centres.²⁵ Finally, it encompassed a mass regularisation granting residency to 217.000 people.

A legislative decree in late 1998 reorganized all migration provisions within the *Unified text of provisions concurring the discipline of immigration and norms on the status of the foreigner*, which represented the Consolidated Immigration Act (hereafter, TUI), to which all successive immigration law reforms referred.²⁶

1.1.2 An enhanced intergovernmental cooperation at the European level

In the 1980s, the need for greater coordination among EEC MSs on migration policies became evident due to the increasing movements of EEC nationals across MSs and growing inflows of third-country nationals (hereafter, TCNs). The Schengen agreement had already been signed in 1985 by all EEC founding members except Italy, with the objective of harmonising border-control policies. Schengen signatories expressly excluded Italy to ensure a swift adoption of the agreement, on account of the lack of a comprehensive migration law in Italy, of its unrevised asylum regime (bound to the geographic limitation) and a friendly foreign policy towards its Southern Mediterranean neighbours, (precisely those whose flows Schengen aimed at limiting).²⁷ Notwithstanding such friendly policy, the Italian Government was invited to access the Schengen agreement eventually, on 27 November 1990, after the original signatories had approved an additional protocol aiming at the removal of internal borders and the strengthening of external ones.

In the same year, EEC members adopted the Dublin Convention, aimed at determining the MS responsible for examining an application for international protection. Hence, in 1990 Italy was fully integrated in the European migration and asylum policy coordination, although the Dublin Convention only entered into force in 1997 and the Schengen Convention 1998. It has been noted that Italy might have underestimated the magnitude of its commitments, which translated into an overload of both border-control and processing of asylum applications: it is only with the dramatic

²⁵ L. n. 40/1998.

²⁶ L.D. n. 286/1998, also known as *Testo unico sull'immigrazione*.

²⁷ S. Paoli, 'La legge Martelli su immigrazione e asilo politico: una scelta europea', *Storia e politica. Annali della Fondazione Ugo La Malfa*, vol. 29, 2013, pp. 311-32 as cited in M. Colucci, *Storia dell'immigrazione* cit., pp. 76-77. See also N. Petrovic, *Rifugiati, profughi, sfollati. Breve storia del diritto d'asilo*, Milano, FrancoAngeli, 2016, p. 56-58.

increase in asylum applications in the 2000s that Italian authorities realized the consequences of the Dublin Regulation in light of Italy's role as transit country.²⁸

At the broader international level, 1990 witnessed the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, one of the core UN human rights instruments, which however was never ratified by Italy.²⁹

1.2 The consolidation of the security-immigration nexus

Beginning the new millennium, the foreign population started to grow more steadily, reaching an average rate of 11,7% per year and approaching the levels of European neighbours, with a total foreign population of roughly 4.5 million people.³⁰ The Eastern-European route continued to grow, in particular from those countries that had just – or would soon – become EU MSs, with Romania on top. With regard to refugees, the relative stabilization of the Balkans resulted in declined asylum applications, while African refugees continued to flow and arrivals from the Middle East increased considerably in relation to the outbreak of new conflicts in Afghanistan and Iraq.

The political climate got more polarized due to growing criticism of foreign immigration within the public discourse.³¹ The alleged increase in micro-crimes was often attributed to irregular migration, fostering a heated debate that led to a restrictive reform of immigration law.³² In this context, the center-right coalition won the 2001 election after a campaign centred around security and immigration.³³ A few days after the 09/11 attacks, the Government approved a draft-law that entered into force a year later, the Bossi-Fini.³⁴ From an economic perspective, the weight of immigrants in the economy became more important and showed, in spite of the economic crisis starting in 2008, that foreign immigration was a consolidated reality, to the extent that 7,9% of 2009 tax-payers were migrants, detaining 5,1% of the revenues.³⁵

²⁸ M. Vitello, 'La crisi dei rifugiati e il sistema europeo comune di asilo: che cosa non ha funzionato', *Meridiana*, vol. 86, 2016, pp. 146-166.

²⁹ UNGA, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, (adopted 18 December 1990, entered into force 1 July 2013), A/RES/45/158.

³⁰ M. Livi Bacci, *In cammino. Breve storia delle migrazioni*, Bologna, il Mulino, 2010, as cited in M. Colucci, *Storia dell'immigrazione* cit., p. 133. Others remarked that such unprecedented growth was comparable to that of traditionally receiving countries North American; see in this regard A. Colombo, G. Sciortino, *Stranieri in Italia. Trent'anni dopo*, Bologna, il Mulino, 2008, p. 8.

³¹ M. Colucci, *Storia dell'immigrazione* cit., pp. 138-140.

³² *Ivi*, pp. 153-154. Criminal episodes involving both locals and foreigners, amplified by media and politics, contributed to the alarm regarding security and immigration. A look at the data, however, highlights a gap between perception and reality; see M. Barbagli, A. Colombo (eds.), *Ministero dell'Interno. Rapporto sulla criminalità e la sicurezza in Italia 2010*, Roma, Fondazione ICSA – Il Sole 24-Ore, 2011.

³³ *Ivi*, p.140. With regard to the security-immigration nexus in Italy see M. Barbagli, *Immigrazione e sicurezza in Italia*, Bologna, il Mulino, 2008.

³⁴ L. n. 189/2002.

³⁵ M. Colucci, *Storia dell'immigrazione* cit., p. 147.

1.2.1 Migrants' criminalisation under the Bossi-Fini law

In continuity with the Turco-Napolitano, the Bossi-Fini introduced restrictive measures. The entry of migrants became subordinated to the signature of a job contract within the annual quota, while entry by sponsorship was abolished. The residence permit, subordinated to a “residence contract”, was revoked in case of early termination of the job. Family reunification was restricted. More importantly, the maximum length of detention for identification and expulsion of irregular migrants was extended from 30 to 60 days and expulsion orders became immediately enforceable. If not directly expelled, the migrant was given a 5-days term to leave autonomously the country, disregard of which lead to arrest and sanctions. Offshore pushbacks of migrants' boats became lawful, if provided within bilateral agreements with countries of origin and transit. As to international protection, procedures for assessing asylum applications were reformed, the Central Commission being replaced by Territorial Commissions. Finally, the law provided what came to be known as ‘the great regularisation of 2002’, allowing 634.728 foreign nationals to receive a residence permit.³⁶

In this phase, the security-migration nexus became a *topos* of Italy's migration policy. Starting with the 2009 “security package” migration was regulated within decree-laws on public order and security. Law n. 94/2009, for instance, represents a dramatic exacerbation. The most striking feature was the introduction of a new crime: ‘illegal immigration’.³⁷ The maximum detention period for irregular migrants and asylum seekers was tripled to 180 days. Naturalization by marriage was subordinated to a 2-years lapse and new criteria were introduced for family reunification, including ‘adequate housing’ and ‘hygienic standard’ tests. Guarantees against expulsion were limited to migrants living with an Italian relative and the integration process required formal agreement to learn the language when applying for long-term residence.

An important debate over second-generation migrants, frustrated by the discriminatory and identitarian climate, took place in this decade and led to reform proposals on citizenship aimed at a more inclusive regulation. However, such proposals were never turned into law and were finally abandoned after the 2018 election.³⁸

³⁶ This was the major migrants' amnesty, in which 90,5% of applications were accepted. See C. Bonifazi, *L'immigrazione straniera* cit., pp. 94-5.

³⁷ The institution of this new crime type was the subject of the Constitutional Court's judgements n. 249/2010 (censoring ‘illegal immigration’ as an aggravating circumstance), and n. 250/2010 (rejecting the constitutionality question, on account of the prerogatives of the legislative).

³⁸ The network *Rete G2* has been advocating the extension of citizenship rights to foreigners born and raised in Italy. See M. Colucci, *Storia dell'immigrazione* cit., pp. 148-152. Since the 14th legislature (2001-6), different proposals were submitted, the latest involving a mix of *ius soli* and *ius culturae* (i.e. acquisition of citizenship through an Italian educational programme); see Camera dei Deputati, Commissione Affari Costituzionali, Temi dell'attività parlamentare, *Cittadinanza*, [website], 2018, http://www.camera.it/leg17/465?tema=integrazione_cittadinanza, (accessed 29 May 2019).

1.2.2 The communitarisation of European migration and asylum policies

The intergovernmental cooperation on the Area of Freedom, Security and Justice, formally introduced by the Maastricht Treaty in 1992 as one of the EU ‘three pillars’, was communitarised in relation to asylum, immigration and judicial cooperation by the Treaty of Amsterdam in May 1999. The Tampere European Council in October of the same year set out a work programme for the establishment of an EU asylum and migration policy around four main areas: fostering partnerships with countries of origin, developing a common asylum system, ensuring the fair treatment of TCNs and enhancing the management of migration flows.³⁹

In light of this programme and of Italy’s geography, the Berlusconi Government signed the so-called Bengasi Treaty with Muammar Ghaddafi’s Libya, aiming at outsourcing migration control in exchange of financial support framed in a broader securitarian approach.⁴⁰ The agreement attracted criticism due to the poor human rights records of Libya. The practice of offshore *refoulement* intensified as a result and led to Italy’s conviction by the European Court of Human Rights (hereafter, ECtHR).⁴¹ The above marked the beginning of a period in which the limitation of flows became priority in agreements between the EU, MSs and third countries.⁴²

1.3 The impact of the Arab uprisings on migration fluxes and policies

The transformations of our decade underpin recent legislative initiatives. The main disruptive factor is the political instability emerged in the Middle East and North Africa which, coupled with the economic crisis of 2008, had a crucial impact on migrations, generating a dramatic increase of arrivals from the Mediterranean route. In 2011 the uprisings in Tunisia pushed 64.261 people to seek refuge in Italy – a huge number if compared to the 4.406 of the previous year.⁴³ The phenomenon increased in subsequent years when the political crisis spilled over to Libya and Syria, turning into civil wars.

The figure decreased to 13.267 people in 2012, but grew considerably in 2013 reaching 42.925, and again 170.100 in 2014, 153.842 in 2015, peaking in 2016 with 181.436 people.⁴⁴ Since early 2017, when then Interior Minister Marco Minniti revived relationships with the UN-backed Libyan Government and local militias aiming at limiting flows, the figure started to decrease.

³⁹ Council of the EU, *Presidency Conclusions, Tampere European Council*, 15-16 October 1999, 16 October 1999.. See A. Wiesbrok, *Legal migration to the European Union*, Brill-Nijhoff, 2010, pp. 19-91; and D. Thym, ‘Legal Framework for EU Immigration Policy’, in K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law. Commentary*, 2nd edn., Beck/Hart/Nomos, 2016, pp. 271-299.

⁴⁰ Governo della Repubblica Italiana, *Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista*, (firmato 30 agosto 2008, ratificato dall’Italia 6 febbraio 2009).

⁴¹ ECtHR, *Hirsi Jamaa and Others v Italy*, App. No. 27765/09.

⁴² M. Colucci, ‘Per una storia del governo dell’immigrazione in Italia’, *Meridiana*, vol. 91, 2018, pp. 9-36, pp. 27-29.

⁴³ For a comprehensive data-based account on arrivals from the Mediterranean route, see ANCI, et al., *Rapporto sulla protezione internazionale in Italia 2017*, Roma (and preceding reports); see also Fondazione ISMU, *Ventesimo Rapporto sulle migrazioni*, Milano, FrancoAngeli, 2015.

⁴⁴ ANCI, et al., *Rapporto cit.*

The increase of arrivals from the Mediterranean route is parallel and intertwined with the raise of asylum applications from 37.450 in 2011 to 123.482 in 2016. Different social and political phenomena closely relate to this. The public debate focus shifted from ‘normal’ migration (i.e. employment, family, study, etc.) to asylum seekers and irregular migrants.⁴⁵ In this context, institutions proved unable to cope with the relatively high inflows. On the other hand, political instability in countries of origin and transit made bilateral repatriation agreements increasingly ineffective.

The increase in applications is also linked to what has been described as the “crisis of migration policies”.⁴⁶ A look at the figures on residence permits in the period between 2011 and 2016 shows an increase in asylum permits (from 11,8% to 34%), a dramatic downfall in work permits (from 34,4% to 5,7%), a slight increase in family reunification (from 38,9% to 45,1%) and substantial stability in study permits (from 8,7 to 7,5%).⁴⁷ The increase in family reunifications indicates a consolidation of foreign immigration to Italy, while the hike in asylum permits and the decrease in work permits highlights the inadequacy of ‘legal’ migration policies:⁴⁸ besides study and family reunification, asylum applications have become the only legal means into the country. The quota for migrant workers regulated by *ad hoc* annual decrees, dropped dramatically since the end of the previous decade, shifting from the 172.000 in 2008 to 0 in 2009 (with the exception of seasonal work), and then increased to 17.850 in 2012. Since then the quota remained substantially unchanged (with the exception of 13.000 permits in 2015) and decreased to 13.850 since 2017.⁴⁹

With regard to the economic crisis, three main dimensions should be highlighted. Firstly, unemployment rates increased in both local and foreign population, yet the latter was disproportionately affected. Secondly, the precarisation of working conditions resulted in foreign workforce downgrading, workloads increase, contracts precarisation and employment segregation. Thirdly, the erosion of the welfare-state had a stronger impact on the foreign community. The effects of the crisis are also related to a rising fear among local and migrant communities, the former

⁴⁵ Discussions concerned the distinction between forced and economic migration, and the allocation of funds to the reception system, leaving regular migration virtually forgotten. On migrants’ categorisation see F. Pastore, ‘The Forced, the Voluntary and the Free. Migrants’ categorisation and the tormented evolution of the European migration and asylum regime’, *Studi Emigrazione*, n. 200, 2015, pp. 569-86.

⁴⁶ F. Pastore, ‘Zombie policy. Politiche migratorie inefficienti tra inerzia politica e illegalità’, *il Mulino*, vol 4, 2015, pp. 593-600; and M. Bojadzjev, S. Mezzadra, “‘Refugee crisis’ or crisis of European migration policies?”, *Focaal Blog*, [web blog], 12 November 2015, <http://www.focaalblog.com/2015/11/12/manuela-bojadzjev-and-sandro-mezzadra-refugee-crisis-or-crisis-of-european-migration-policies/>, (accessed 29 May 2019).

⁴⁷ Source: ISTAT, *Cittadini non comunitari regolarmente soggiornanti*, Statistiche report, Roma, ISTAT, 26 July 2012; and ISTAT, *Migrazioni interne e internazionali della popolazione residente*, Statistiche report, Roma, ISTAT, 29 November 2017.

⁴⁸ M. Colucci, *Storia dell’immigrazione* cit., pp. 176-177.

⁴⁹ *Ibidem*. These figures exclude the quota for seasonal work (around 18.000 per year along this period) but they include both new entries and conversion of short-term resident permits of foreigners already residing and working in Italy.

considering foreigners a threat in the job market and an unfair burden for the welfare-state,⁵⁰ the latter worried to lose the hard-earned socio-economic and legal status.⁵¹

The tensions that aroused are not unexpected. The asylum seekers' reception system in particular has turned into a critical issue. Having been operated throughout the whole decade in a constant 'state of emergency', the system triggered the mobilization of different stakeholders: migrants denounced poor reception conditions (often not compliant with the minimum legal standards); social workers reported precarious and heavy working conditions;⁵² local communities protested against the creation of new reception centres under the influence of far-right political groups;⁵³ and local authorities complained against the central government and among each other.⁵⁴

1.3.1 The Ministry of Interior's crackdown on asylum

From an institutional point of view, the recent years are marked by the growing role of the Ministry of Interior and a minor one of the Ministry of Labour and Foreign Affairs in the management of migration. Specialized migration units were nevertheless established throughout the public administration.

Under the influence of the Ministry of Interior and on account of the 'state of emergency', a major reorganisation of the reception system took place during the 'refugee crisis'. In order to cope with the unprecedented level of arrivals, Italian authorities integrated the existing system, previously composed by the SPRAR and CARA networks, with ENA and CAS.⁵⁵

⁵⁰ While this may be true in the short-term, it has been highlighted that, because of the ageing population, foreign immigration is essential for the sustainability of the welfare-state. See for instance the opinion of the former president of the National Institute of Social Security (INPS): E. Marro, 'Boeri: «Migranti, senza i regolari non c'è futuro per il nostro welfare». E su Salvini: parlano i dati, non si fanno intimidire', *Corriere Economia*, [website], 4 July 2018, https://www.corriere.it/economia/18_luglio_04/boeri-sui-migranti-bisogna-dire-verita-senza-quelli-regolari-non-c-futuro-il-nostro-welfare-22bd0d52-7f6b-11e8-8b30-21507ef7c055.shtml, (accessed 29 May 2019).

⁵¹ M. Colucci, *Storia dell'immigrazione* cit., p. 169.

⁵² Initiatives and mobilizations have taken place in solidarity of migrants but also in relation to the social workers' risk to lose the job as a result of the cut in public spending for the reception system. See for instance 'Reggio Emilia. Presidio degli operatori e delle operatrici dell'accoglienza', *ADL COBAS*, [website], 24 February 2018, <http://www.adlcobas.it/Reggio-Emilia-Presidio-degli-operatori-e-delle-operatrici-dell-accoglienza.html>, (accessed 29 May 2019); and D. Corneo, 'Il dl Salvini "licenzia" 700 persone: il grido dall'arme delle cooperative', *Corriere di Bologna*, [website], 30 January 2019, https://corrieredibologna.corriere.it/bologna/cronaca/19_gennaio_30/02-bologna-mixtxcorrierebologna-web-bologna-c3685b6e-23fb-11e9-adce-2c885654615a.shtml?fbclid=IwAR0rtUtyiGrfuzwAXhMhsJilb8MLc_LR-dX-rev6CRKMkCRUpYy95-TazTc, (accessed 29 May 2019).

⁵³ See for instance these media reports: Nove da Firenze, 'Campi Bisenzio: gli slogan di CasaPound davanti allo SPRAR', *Nove da Firenze*, [website], 22 September 2018, <https://www.nove.firenze.it/campi-bisenzio-stamani-gli-slogan-di-casapound-davanti-allo-spar-per-gli-immigrati.htm>, (accessed 29 May 2019); L. Romano, 'Tensioni a Rocca di Papa, proteste di CasaPound al centro di accoglienza', *il Giornale*, [website], 29 August 2018, <http://www.ilgiornale.it/news/cronache/tensioni-rocca-papa-proteste-casapound-centro-accoglienza-1569402.html>, (accessed 29 May 2019).

⁵⁴ M. Colucci, *Storia dell'immigrazione* cit., p. 179.

⁵⁵ SPRAR stands for *Sistema di protezione per richiedenti asilo e rifugiati* (System of protection for asylum seekers and refugees); CARA for *Centri di accoglienza per richiedenti asilo e rifugiati* (Reception centers for asylum seekers); ENA

The SPRAR, jointly managed by the Ministry of Interior and local authorities, was centred around an individually-tailored support to asylum seekers and refugees aimed at facilitating their integration. The CARA system was instead meant to host asylum seekers when SPRAR centres reached their full capacity, providing basic reception services and also limiting movements in the territory.

The ENA, later renamed CAS, is instead a network of reception facilities established during the 2011 ‘emergency’ in order to flexibly deal with high inflows, becoming then institutionalized. These structures are under the authority of Prefectures (i.e. territorial branches of the central government) and outsourced to the private sector. They provide housing and basic services renouncing to the individualized integration of SPRAR. The involvement of the private sector in the reception system resulted in widespread practices of mismanagement and corruption.⁵⁶

Consequently, the right of asylum has been targeted by increasingly restrictive reforms. The erosion of the right to asylum is ongoing, but reached a peak with D.L. n. 113/2018. Said decree is to be seen in continuity with the Minniti-Orlando decree,⁵⁷ which modified asylum procedures and the access to justice for asylum seekers, abolishing one step of the judicial review process. New specialized immigration sections were established in 26 courts around the country. The network of temporary detention centres raised from 4 to 20, changing name from ‘Identification and Expulsion Centres’ to ‘Repatriation Centres’. Finally, the employment of asylum seekers in virtually unpaid works of social utility was introduced, although on a voluntary basis.

1.3.2 EU migration and asylum politics in light of the ‘refugee crisis’

Despite the existence of alternative migratory routes, Italy and Greece experienced more structural and sustained arrivals of asylum seekers and irregular migrants. This triggered a debate over the CEAS within the EU. It was clear that the Dublin system needed reform. Far from constructive, the debate dwelled in accusations exchange: Italy blamed the EU and MSs for lack of solidarity and required a burden-sharing; the EU and MSs blamed Italy’s inability to effectively fulfil its border-control responsibilities.⁵⁸

for *Emergenza Nord Africa* (North Africa Emergency); and CAS for *Centri di accoglienza straordinaria* (Extraordinary reception centers).

⁵⁶ The most notorious case being the *Mafia Capitale* investigation, involving organized crime, public authorities and entrepreneurs. See V. Martone, ‘Mafia Capitale: corruzione e regolazione mafiosa nel “mondo di mezzo”’, *Meridiana*, vol. 87, 2016, pp. 21-39, pp. 32-34.

⁵⁷ D.L. n. 13/2017, converted in L. n. 46/2017.

⁵⁸ The situation got tense to the extent that some EU MSs adopted measures in derogation of the Schengen agreement, reintroducing systematic border controls, building fences and displacing the military along borders (France, Austria, Hungary, etc.).

As to the Southern border, different military missions have been carried out with the double aim of carrying out SAR operations and contrasting arrivals.⁵⁹ Yet, with ever-more people attempting the crossing, the number of deaths at sea increased dramatically, peaking to over 5.000 estimated deaths in 2016.⁶⁰ This critical situation brought several NGOs to get involved in SAR operations, governmental initiatives proving insufficient.⁶¹

The European migration policy's aim of limiting the inflows pushed the Italian government and the EU to seek agreements with third countries for the externalisation of migration control. The resulting agreements between Italy and the Libyan militias and between the EU and Turkey have attracted the criticism of humanitarian agencies and civil society, concerned over the respect of human rights in those countries. In Libya, migrants are reportedly kept in inhumane detention centres, subjected to torture and ill treatment.⁶² In Turkey, criticism concerned in particular the mistreatment of Syrian refugees, not fully guaranteed their rights as refugees. More recently, initiatives aiming at controlling flows were taken in cooperation with Sub-Saharan countries, including MISIN, an Italian military mission in Niger.⁶³

1.4 Recent developments under the Yellow-Green Government

The 4 March 2018 election brought into power a coalition of two political forces, the Five Star Movement and the League, that have been widely described as populist in the public and scientific debate.⁶⁴ It should be noted that the League, which in the distribution of the different

⁵⁹ The first operation, *Mare Nostrum*, was deployed by the Italian navy between 2013 and 2014 and was followed by FRONTEX operation *Sophia* in 2015. In November 2014, FRONTEX operation *Triton* became operational, with the aim of patrolling EU Southern, substituted by operation *Themis* in 2018. See Agenzia Nazionale Stampa Associata, 'Da Mare Nostrum a Sophia, il profilo delle missioni di salvataggio tra Italia e Ue', *ednHUB*, [website], 27 March 2019, <https://www.ednh.news/it/da-mare-nostrum-a-triton-il-profilo-delle-missioni-di-salvataggio-tra-italia-e-ue/> (accessed 29 May 2019).

⁶⁰ ANCI, *et al.*, *Rapporto cit.*, p. 68. The curb in deaths at sea since 2017, claimed as a major achievement by the Italian Government, has been attributed to a decrease of departures rather than to a safer Mediterranean crossing resulting from European migration policies. A look at the figures of deaths at sea pondered on attempted crossings shows instead a greater incidence of deaths. In the first five months of 2019, 257 migrants lost their lives, i.e. 6.7% of attempted crossings. See in this regard *Missing Migrants*, [website], <https://missingmigrants.iom.int>, (accessed 29 May 2019).

⁶¹ The involvement of NGOs triggered the Italian Government, under the guidance of Minister of Interior Marco Minniti, to adopt a "Code of Conduct" to be signed by all SAR NGOs, aimed at preventing SAR operations in Libyan territorial waters. The highly criticized code, however, was initially widely boycotted by NGOs. See Ministero dell'Interno, *Codice di condotta per le Ong impegnate nelle operazioni di salvataggio in mare*, http://www.interno.gov.it/sites/default/files/codice_condotta_ong.pdf, (accessed 29 May 2019).

⁶² See Human Rights Watch, *No Escape From Hell. Eu Policies Contribute to Abuse of Migrants in Libya*, 2019, available at https://www.hrw.org/sites/default/files/report_pdf/eu0119_web2.pdf, (accessed 29 May 2019).

⁶³ Approved in early 2018, *MISIN* aims at fighting migration and the trafficking of human beings towards the EU through the deployment of 470 troops in support of Niger's army. See Scherer S., Pomeroy R., 'Italy approves military mission in Niger, more troops in North Africa', *Reuters*, [website], 17 January 2018, <https://www.reuters.com/article/us-italy-diplomacy-niger-libya/italy-approves-military-mission-in-niger-more-troops-to-north-africa-idUSKBN1F6270>, (accessed 29 May 2019).

⁶⁴ See *inter alia* M. Tarchi, 'Italy: the promised land of populism?', *Contemporary Italian Politics*, vol. 7, no. 3, 2015, pp. 273-85; and L. Manucci, M. Amsler, 'Where the wind blows: Five Star Movement's populism, direct democracy and ideological flexibility', *Italian Political Science Review*, vol. 48, no. 1, 2018, pp.109-32.

ministries managed to pick the Ministry of Interior, has undergone a major transformation after the poor results of the 2013 election. The new leader, Matteo Salvini, has transformed the party's ideology from regionalist, xenophobic and anti-establishment into nationalist-sovereignist, anti-immigrant and anti-EU, aiming at attracting voters from other parties.⁶⁵ Salvini conducted a personalistic campaign, applying populist communication strategies.⁶⁶ On migration the electoral programme centered around three main policy objectives:⁶⁷ i) a complete crackdown on foreign immigration by means of banning the docking of migrants' boats and limitation of NGOs' SAR operations; ii) the reduction of public expenditure on asylum seekers' reception and integration services and the abolition of 'humanitarian protection'; iii) the renegotiation of the CEAS with the aim of establishing a fairer distribution among MSs; iv) a criminalization of irregular migrants, extending the length of detention and simplifying expulsion mechanisms.

It did not take long after the installment of the new government (1 June 2018) for Interior Minister Salvini to show his determination.⁶⁸ On 10 June 2018 the Minister denied docking authorization to Aquarius, a SAR vessel operated by SOS Méditerranée, carrying 629 migrants.⁶⁹ This had a double purpose: to avoid the entry of migrants in the country and redirect them towards other EU MSs; and to urge the EU and the MSs to reform CEAS, failing which would result in Italy's ban on the docking of any and all ships. The arm-wrestling with the EU continues to date on a case-by-case level.⁷⁰ Another notable case involved the Diciotti, a vessel of the Italian Coast Guard that arrived in Catania on 20 August 2018 carrying 177 migrants rescued four days earlier off the Maltese coast. Salvini ordered the migrants not to disembark. Only a week later, under increasing pressure at both the national and international level, the Government allowed the disembark of 29 unaccompanied minors and 17 more passengers in precarious health conditions three days later. Finally, after the Vatican, Ireland and Albania offered to welcome asylum seekers on 15 August, the remaining passengers were allowed to land. This case costed Salvini a judicial investigation on counts of kidnapping, abuse of office and unlawful arrest, later blocked by parliamentary vote upholding the Minister's immunity.⁷¹

⁶⁵ D. Albertazzi, A. Giovannini, A. Seddone, "No regionalism please, we are *Leghisti!*" The transformation of the Italian Lega Nord under the leadership of Matteo Salvini', *Regional & Federal Studies*, vol. 28, no. 5, pp. 645-671.

⁶⁶ G. Bobba, F. Roncarolo, 'The likeability of populism on social media in the 2018 Italian general election', *Italian political Science*, vol. 13, no. 1, 2018, pp. 51-62.

⁶⁷ Lega Nord, *Elezioni 2018 – Programma di Governo Lega Salvini Premier*, pp. 6-8, available at <https://www.leganord.org/programma-politiche>, (accessed 29 May 2019).

⁶⁸ Among Salvini's electoral commitments there was the deportation of 500.000 irregular migrants. However, lack of funds and legal guarantees undermined this goal.

⁶⁹ 'Cosa è successo ieri con la nave Acquarius', *il Post*, [website], 11 June 2018, <https://www.ilpost.it/2018/06/11/aquarius-migranti-sbarco/>, (accessed 29 May 2019).

⁷⁰ A. Camilli, 'Tutto quello che c'è da sapere sul caso Diciotti', *Internazionale*, [website], 18 february 2019, <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/02/18/diciotti-matteo-salvini>, (accessed 29 May 2019).

⁷¹ Salvini's reaction to the investigation highlights the authoritarian attitude and the disrespect of the rule of law. Opening the investigation's notification during a live streaming on social media, he declared that "this minister [i.e. himself] is

The announced abolition of ‘humanitarian protection’ announced during the summer attracted the criticism of both asylum seekers, social workers and advocacy groups. On 4 October 2018, the President Sergio Mattarella signed D.L. n. 113/2018 on “*Urgent dispositions relating to international protection and immigration, public security and to the functioning of the Ministry of Interior and the organization and functioning of the National Agency for the administration and distribution of properties seized to the organized crime*”, warning however that “Constitutional and international obligations must be respected”.⁷² On 1 December 2018, in a context of rising divisions between the ruling parties, the decree was transformed in law with a trust-vote by the Parliament.⁷³

The decree, duly analyzed in chapter 3, was celebrated by Salvini as a major success and was followed by a number of ministerial circulars containing interpretation guidelines and further implementing measures. Nevertheless, many observers raised concerns over the compliance of the new regulation with human rights obligations. In subsequent months and up to date, the Minister, encouraged by political polls, intensified his anti-immigration policy increasingly targeting SAR NGOs with executive orders mandating authorities to ‘keep an eye’ on potential wrongdoings. More recently, this has been the subject of mentioned D.L. n. 53/2019.⁷⁴ The regulation provides *inter alia* for the criminalization of SAR NGOs through the introduction of financial and criminal sanctions and transfers the power of limiting or prohibiting foreign vessels’ transit and stay in Italian territorial waters from the Minister of Transport to the Minister of Interior.

Many observers, including civil society organizations, NGOs and the UN, have raised human rights concerns over Salvini’s criminalization of civil society and the crackdown on asylum seekers. In response to the UNHRC Special Procedures’ letter mentioned in the introduction,⁷⁵ Salvini accused the UN of being ideologically motivated and interfering with Italian sovereign power, calling on the

elected by you, [...] others [i.e. judges] are not elected by anyone and are not accountable to anyone”. The National Council of the Judiciary firmly reacted to the declaration, recalling the separation of powers principle. See G. Bernardini, ‘Diciotti. Salvini indagato stempera con i pm: li rispetto ma non sono un sequestratore’, *Avvenire*, [website], 7 September 2018, <https://www.avvenire.it/attualita/pagine/salvini-riceve-comunicazione-atti-indagine-diciotti>, (accessed 30 May 2019).

⁷² ‘Decreto Salvini, Mattarella firma ma ricorda a Conte gli obblighi fissati dalla Costituzione’, *la Repubblica*, [website], 4 October 2018, https://www.repubblica.it/politica/2018/10/04/news/dl_sicurezza_mattarella_firma_lettera_a_conte_obblighi_costituzio-ne-208148167/, (accessed 29 May 2019).

⁷³ ‘Il decreto Sicurezza approvato con la fiducia: 336 sì alla Camera’, *la Repubblica*, [website], 27 November 2018, https://www.repubblica.it/politica/2018/11/27/news/dl_sicurezza_salvini-212760016/, (accessed 30 May 2019).

⁷⁴ A. Camilli, ‘Tutte le critiche al decreto sicurezza bis’, *Internazionale*, [website], 24 May 2019, <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/05/24/decreto-sicurezza-bis-critiche>, (accessed 30 May 2019).

⁷⁵ UNHRC, Special Procedures, <http://www.statewatch.org/news/2019/may/un-it-sr-letter-directive-sar-libya-human-rights-5-19.pdf>, (accessed 30 May 2019).

Premier and the Minister of Foreign Affairs to review financial contribution to the UN in order to send a strong message.⁷⁶

Meanwhile, Salvini conducted a Eurosceptic EU election campaign in alliance with other European far-right parties, including Viktor Orbán's Fidesz and Marine Le Pen's Front National, grounded on a nationalist-sovereignist discourse. In the May 2019 election, the League scored an unprecedented result of 34,3% of votes casted in Italy, while the Five Star Movement governing partner lost a considerable number of votes. EU election results are starting to show their effects, Salvini being determined to strengthen his anti-immigrant policy. At the domestic level, the 2019 EU election highlights the risk of a future success of the League in the next Italian election and requires opposition forces – the left in the first place – to develop strategies to stem the League, for the sake of human rights guaranteed not only by international instruments but also by the Italian Constitution.

⁷⁶ A. Gennaro, 'Decreto sicurezza bis, Salvini chiede a Conte "una ricognizione" dei fondi all'Onu – La lettera', *Open*, [website], 29 May 2019, <https://www.open.online/2019/05/29/decreto-sicurezza-bis-salvini-chiede-a-conte-la-revisione-dei-fondi-allonu/>, (accessed 30 May 2019).

Chapter 2

The multi-level legal framework on international protection

The protection of aliens is guaranteed in Italy by article 10(3) of the Constitution, which provides the right of asylum to any “foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution”.⁷⁷ As such, the scope of this provision immediately appears particularly broad. However, international protection is regulated at the international and regional level by a number of human rights instruments to which Italy is bound, as well as by EU law. In order to analyze the case-study addressed in the chapter 3 and answer the research question that guided this work (i.e. whether and to what extent can the abolition of the humanitarian protection be reconciled with international human rights standards, EU law and Italian constitutional principles), it is essential to understand the relationship between the Italian, international and EU legal orders and, most importantly, the different scopes of protection provided by the relevant instruments.

Starting from the constitutional principles that govern the relationship between the Italian and international legal orders, this chapter will move on to survey international and EU law substantive provisions on international protection, referring when appropriate to the case law of international and EU courts. Chapter 3 will then return to the Italian constitutional right of asylum and the transposition of international obligations on protection into domestic law, in order to examine the compliance of D.L. n. 113/2018 with the aforementioned obligations.

2.1 The adaptation of the Italian legal order to international law

The relationship between two distinct legal orders, i.e. international and domestic, acquires particular significance in relation to the legal status of foreigners within a given domestic jurisdiction. While State sovereignty stands a fundamental principle of international law, allowing States to control their borders and determine who is allowed to enter and stay, such discretionary power is increasingly limited by international obligations relating to the treatment of non-nationals, deriving from customary international law, treaty law, and particularly from international human rights instruments. Since the means available to the international community to enforce international law are not very effective, the primary mechanism through which international law is enforced within a domestic jurisdiction is its transposition into national law.⁷⁸ Two questions therefore arise as to (i) how international norms are given force within a domestic order and to (ii) what rank they are given with

⁷⁷ Art. 10(3) Const.

⁷⁸ B. Conforti, *Diritto Internazionale*, 7th edn., Napoli, Editoriale Scientifica, 2006, pp. 275-276.

respect to constitutional and legislative norms. These questions have no easy answers and it is beyond the scope of this work to provide a comprehensive theoretical account of the views that emerged within the doctrine. This section will instead address the Italian mechanisms of adaptation to international law, pointing specifically at the law and practice, only referring to the most authoritative doctrinal opinions.

Two main theories emerged about the relationship between different legal orders: monism and dualism. Monism conceptualizes the existence of single legal space aimed essentially at regulating the relationships among individuals. According to monist theorists – a minority within international law scholars – the international legal order is native and therefore hierarchically superior, while the different domestic legal orders are derived from the former and enjoy consequently a lower rank.⁷⁹ They posit that international norms, despite the mediation of States, are directly aimed at individuals, understood as the primary subjects of the overall legal system. As a consequence they assume that international norms are directly applicable within a domestic jurisdiction, without need to adopt further legislation.⁸⁰ On the contrary, the prevailing dualist theory, conceptualizes the international and domestic legal orders as equally native, distinct and independent from one another.⁸¹ Hence, in order to be applied by the national judge, international norms, which apply to States – and not to individuals – as subjects of international law, need to be transposed into national legislation, this being the only source of law within the domestic order.⁸²

In practice, however, it appears that some aspects of dualism and monism may coexist with respect to adaptation mechanisms of domestic legal orders to international law. This is particularly true for the case of Italy where, as the following paragraphs illustrate, two different mechanisms apply

⁷⁹ Another branch of monist theory argues for a State-based monism, i.e. the primacy of domestic law. This theory, which has been referred to as “inverted monism”, is however problematic because it leads to the denial of the very existence of international law. See R. P. Schaffer, ‘The inter-relationship between public international law and the law of South Africa: An overview’, *The International and Comparative Law Quarterly*, vol. 32, no. 2, 1983, pp. 277-315, pp. 282.

⁸⁰ A prominent theorist of monism is Hans Kelsen. See F. Rigaux, ‘Hans Kelsen on International Law’, *European Journal of International Law*, vol. 9, 1998, pp.325-343. For a comprehensive account of Kelsen’s theoretical approach see H. Kelsen, *Principles of International Law*, New York, Rinehart & Company, 1952.

⁸¹ Pluralist theory understands all legal orders, be they domestic or international, as separate. This conceptualization justifies the absence of relationships between different legal systems, each one recognizing only its own norms as producing legal effects, while disregarding the norms of others. A prominent Italian dualist is Dionisio Anzilotti. See G. Gaja, ‘Positivism and Dualism in Dionisio Anzilotti’, *European journal of International Law*, vol. 3, 1992, pp. 123-138. For a comprehensive account of Anzilotti’s dualism see D. Anzilotti, *Cours de droit international*, Paris, Lgdj, 1999.

⁸² A further specification is noteworthy: while for monists the State is conceptualized as a legal sub-order of the broader international order, whose norms are aimed at individuals and thus hierarchically superior to domestic norms, for dualists the State is instead the subject of the international legal order. Hence, international legal norms apply to States, which are generally free to choose the appropriate means to ensure compliance with their international obligations (generally doing so by adopting domestic laws translating such obligations in the domestic order). Dualism is nevertheless problematic in two regards: on the one hand, it falls short in explaining the different nature of the clear-cut separation of different domestic legal orders and the nuanced separation between the international and domestic orders; on the other, it does not consider that international law, and particularly human rights law, increasingly addresses individuals as subjects (and not only States). See B. I. Bonafé, ‘Adattamento del diritto interno al diritto internazionale’, in S. Cassese, *Dizionario di diritto pubblico*, Milano, Giuffrè, 2006, pp. 98-111, pp. 110-111.

depending on whether the norms to be given effect derive from customary international law (automatic adaptation) or treaty law (legislative adaptation).⁸³ Nevertheless, this should not be understood as if there were both monist and dualist approaches to international law in Italy: no matter how automatic it is, the Italian legal order needs to operate an ‘adaptation’ to international law and it is therefore essentially a dualist system.

2.1.1 Adaptation and rank of customary international law

The adaptation of the Italian legal order to customary international law is governed by Art. 10(1) Const., which provides that “The Italian legal system conforms to the generally recognised principles of international law”.⁸⁴ This constitutes a special adaptation mechanism, whereby the national judge is directly entrusted with the interpretation of customary international law, having to establish (i) which are the norms to be included and (ii) how they apply. Essentially, this constitutional device operates as a “permanent transformer”,⁸⁵ adapting the domestic order automatically, completely and continuously to customary international norms, giving them effect as long as they are in force within the international order.⁸⁶

Hence, by virtue of art. 10(1) Const., customary international law acquires constitutional rank. As a consequence, when a law of lower rank conflicts with customary international law, the latter prevails.⁸⁷ However, when a conflict arises between an international customary norm and a constitutional norm, it is generally accepted that, in spite of their equal rank, the international norm should prevail, especially when it constitutes a fundamental principle of the international order, while it should succumb only when it conflicts with the fundamental principles (arts. 1 to 12) enshrined in the Constitution.⁸⁸

2.1.2 Adaptation and rank of treaty law

The adaptation to treaty law is certainly more relevant for the case at hand, as most human rights provisions, including those on international protection, are enshrined in international treaties.

⁸³ The adaptation to derivative international law, i.e. regulations and decisions of lower rank derived indirectly from a treaty, will not be addressed. It suffices to note that such type of legislation, including for instance binding UNSC’s Resolutions adopted under Title VII of the UN Charter, are given effect in practice by means of *ad hoc* ‘orders of execution’. However, if they are transposed into EU law, they shall have direct effect.

⁸⁴ Art. 10(1) Const.

⁸⁵ T. Perassi, *Lezioni di diritto internazionale*, Padova, 1957, p. 29, as cited in B. Conforti, *Diritto cit.*, p. 286.

⁸⁶ B. Conforti, *Diritto cit.*, pp. 286-287. According to minority doctrine, the scope of art. 10(1) Const. should also include, derivatively, treaty law, as customary international law principle *pacta sunt servanda* would imply that treaties are to be given direct effect in the domestic order (R. Quadri, *Diritto internazionale pubblico*, Napoli, Liguori, 1968, pp. 64 ff.). Nevertheless, this view is not shared by jurisprudence nor majoritarian doctrine, objecting that the wording of art. 10(1) Const. only refers to “generally recognised principles” and that it is meant to include substantive norms, not functional norms like *pacta sunt servanda*. See B. I. Bonafé, ‘Adattamento’ cit., p. 110.

⁸⁷ *Ivi*, p. 287.

⁸⁸ *Ivi*, p. 287-288.

Differently from customary international law, there is no constitutional provision that offers an adaptation mechanism to treaty law. In accordance with art. 80 Const.,⁸⁹ virtually all treaties need the authorization of the Parliament in order to be ratified, following in this practice the ordinary legislative procedures in accordance with art. 72(4) Const.⁹⁰ However, two categories of treaties are provided with the constitutional guarantee that they shall prevail over ordinary laws, namely (i) the treaties dealing with the legal status of foreigners and (ii) those establishing international organisations aimed at the promotion of peace and justice within the international community.⁹¹

Yet the question remains as to what adaptation mechanisms ensure Italy's compliance with its treaty-based obligations and give effect to their substantive provisions within the domestic order. Two different procedures provide such adaptation and are generally operated contextually to the adoption of the law authorizing ratification, namely (i) the ordinary procedure and (ii) the special procedure. The special procedure, which is most frequently used particularly when treaty provisions are self-executing, consists in the adoption of an 'order of execution', which usually is directly embedded in the law authorizing ratification and limited to the formula "the treaty is given full and entire execution" (the text of the treaty being attached). The ordinary procedure, on the contrary, is used when the norms contained in the treaty are non-self-executing, i.e. when they lack clarity and precision and thus they need to be translated into substantive legal provisions. Such procedure consists in the adoption of an additional law – which in principle could be both constitutional, ordinary or regulatory – that translates the provisions of a treaty into national law.

With regard to the rank of treaty law, considering that the adaptation is operated by means of a law, it follows that it shall have the same rank of the law that gives it effect. Nonetheless, the jurisprudence has developed some criteria in order to give primacy to treaty law, with the aim of ensuring the compliance of the State with its international obligations.⁹² A special mechanism has been developed by the Constitutional Court with regard to human rights instruments, as these give effect to fundamental constitutional principles and are therefore protected by an indirect constitutional guarantee.⁹³ Hence they should prevail over conflicting ordinary laws but only after a constitutional judicial review and not directly within the proceedings of an ordinary court. However, the 2001 constitutional reform⁹⁴ has ensured a further guarantee to treaty law by virtue of art. 117(1) which

⁸⁹ Art. 80 Const.: "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation."

⁹⁰ Art. 75(2) Const. also ensures that laws authorizing ratification of international treaties shall not be the object of an abrogative referendum.

⁹¹ B. I. Bonafé, 'Adattamento' cit., pp. 104-105. They are addressed respectively by art. 10(2) Const. and art. 11 Const.

⁹² *Ivi*, pp. 107-108. Such criteria are: interpretation in conformity, speciality principle, a-typic competence, speciality of the intention, presumption of conformity and presumption of operativity.

⁹³ Const. C. n. 388/1999, n. 10/1993.

⁹⁴ Const. L. n. 3/2001. The reform concerned the distribution of competences between the central state and regional and local authorities.

provides that “Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations”.⁹⁵ This means that the legislative power must adopt laws in conformity with international obligations and if a conflict arises the national judge should remit a constitutional question to the Constitutional Court, which assesses the constitutionality of the domestic legislative act. Hence, while art. 117(1) requires the legislative power to comply with treaty-based obligations (therefore conferring them a primacy of sorts), the adaptation law itself maintains an inferior rank with respect to constitutional norms.

2.1.3 The special status of EU law

The relationship between the Italian and the EU legal orders, given the *sui generis* character of the latter, needs a separate explanation, as it does not follow the same adaptation mechanisms applicable to broader international law. A comprehensive account on the adaptation and rank of EU law within the MSs cannot be offered here, but it is of utmost importance to recall the basic principles that regulate such relationship. While the aforementioned article 117(1) does provide the constitutional guarantee that the domestic legislative activity shall comply with the limits imposed by EU law, the high rank given to the latter is further ensured by the principle of ‘primacy of EU law’⁹⁶ and the doctrine of ‘direct effects’⁹⁷ established by the Court of Justice of the EU (hereafter, CJEU) and accepted by the Italian Constitutional Court. Accordingly, not only EU law enjoys the highest rank among the domestic sources of law, but it is also requires direct application by the national judge, provided that it has the necessary clarity and precision.

2.2 Asylum under the international human rights framework

Originated in ancient times in the realm of religion as the ‘sanctuary’ right, the concept of asylum detached itself from its canonic dimension following the historical developments of the nation-state. Hence, in the Westphalian order it developed as a right of States to grant political protection to aliens,

⁹⁵ Art. 117(1) Const.

⁹⁶ In the *Costa v. Enel* case (C-6/64), the Constitutional Court had relied on the principle of *lex posterior abrogate priori* in order to give effect to a 1963 domestic law that was conflicting with the 1957 Treaty of Rome. The CJEU answered by arguing in favor of the primacy of EU law over national law, stating that the EU law would lose completely its efficacy if it weren’t given a higher rank with respect to domestic law, i.e. if citizens could not challenge a domestic law on the basis of EU law, and added that by ratifying the treaty, MSs have transferred their sovereignty to the supranational organization, within the limit of the separation of competences provided by the treaty itself.

⁹⁷ The doctrine of direct effects, which concerns a specific type of EU secondary law, namely the Directive (which needs to be transposed into national law, the Decisions and Regulations being *ipso iure* directly applicable), was developed by the CJEU in the landmark *van Gend en Loos v. Nederlandse Administratie der Belastingen* case (C-26/62), establishing that, whenever a Directive is clear and precise enough to enable the identification of subjective rights and obligations contained therein, these shall be directly applied by the national judges even if the MS fails to transpose it within the given delay.

with a consequent obligation on other States to respect it. More recently, in connection with the emergence of the human rights regime, asylum came to be understood as a subjective right to be protected from persecution and harm.⁹⁸ Nevertheless, there is no universal human rights instrument that ensures individuals the right to be granted asylum in a foreign country, essentially due to the intrinsic tension between such right and the principle of State sovereignty.⁹⁹ In other words, despite the shift of asylum from a political nature to a humanitarian one, the international community failed to translate it into an actual individual right *to* asylum.

Since the early development of the international human rights regime the concept of asylum and the connected right(s) have been integrated in a number of instruments, including the foundational 1948 Universal Declaration of Human Rights (hereafter, UDHR), which provides an extensive list of aspirational human rights, i.e. rights to which every human being is entitled by virtue of being human. Subsequently, the right of asylum has been codified into other universal and regional binding instruments – most notably the 1951 Refugee Convention – and, despite the limited scope of such instruments, it has been increasingly extended by international and domestic courts which established the fundamental principle of *non-refoulement* (i.e. the prohibition of returning a person to a country where he/she might suffer persecution or harm) in connection with other human rights: the right to be free from torture, inhumane or degrading treatment or punishment, the right to life, the right to private and family life, the right to liberty of person, the right to a just process and the right to an effective remedy.

2.2.1 Asylum in the Universal Declaration of Human Rights

The UDHR is essentially the bedrock of the international human rights regime. Despite its non-binding character, the declaration contains a comprehensive list of fundamental human rights, both civil and political and economic, social and cultural, which are presented as humanitarian aspirations to be progressively achieved by the international community.¹⁰⁰ Written in the post-war context, the Declaration is influenced by the willingness of its drafters to firmly react to WWII atrocities and

⁹⁸ For an account of the historical evolution of asylum see F. Rescigno, *Il diritto di asilo*, Roma, Carocci, 2011, pp. 19-43.

⁹⁹ There is also virtually no case law of international courts at the universal level on the issue of asylum, with the exception of the so-called *Asylum case* (ICJ, *Colombia v. Peru*, 20 November 1950). This deals however with diplomatic asylum – not particularly relevant for this work. The right to be granted asylum is enshrined, however, in human rights instruments of regional scope, including in the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123, art. 22; and the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, art. 12(3).

¹⁰⁰ A multitude of human rights scholars, practitioners and supervisory bodies have argued in favor of the binding character of the UDHR or at least of some provisions contained therein. It is argued that it has become a matter of customary international law, thus binding all members of the international community, except for the so-called persistent objectors, i.e. states that consistently manifested their refusal to be bound by a certain customary international norm. See H. Hannum, 'The UDHR in National and International Law', *Health and Human Rights*, vol. 3, n. 2, 1998, pp. 144-158.

ensure that they happen never again. In the occasion of the UDHR's fiftieth anniversary, Mary Robinson, at that time the UN High Commissioner for Human Rights, argued that despite its historical materialization, the UDHR should be seen as "a "living document" – one which speaks directly to today's world, demanding greater reflection and more committed implementation. The alternative [she adds] is that Declarations, covenants and conventions become little more than transitory snapshots of rights as understood at a particular time and space".¹⁰¹ In fact, it is precisely its living character that underpins its inspirational value for all subsequent binding human rights instruments adopted at the universal, regional and national level.

In principle, as all human rights should be enjoyed by all human beings, the need to adopt instruments aimed at protecting particular vulnerable groups has been periodically questioned. However, it is precisely the specificities of such vulnerabilities that have highlighted the need to reaffirm the universality of human rights and ensure a reinforced protection to vulnerable groups by means of *ad hoc* treaties and conventions. This is particularly evident in the case of post-war refugees: the huge masses on the move around Europe where confronted with a high degree of discrimination in host countries and it was deemed necessary to provide them with special protection and ensure their enjoyment of fundamental human rights, wherever they happened to find refuge.

Asylum is directly addressed by art. 14 UDHR, which states in its first paragraph that "Everyone has the right to seek and to enjoy asylum in other countries from persecution".¹⁰² It appears clear that while individuals are entitled "to seek and to enjoy asylum" in other countries, no corresponding obligation to grant asylum is imposed on States, with the consequence of reducing the effectiveness of such right in relation to States' arbitrary power to decide who to grant protection or whether not to grant it altogether. The lack of effectiveness is reinforced in the reading of the article in conjunction with art. 13 UDHR, which guarantees the right to freedom of movement "within the borders of each states"¹⁰³ and further stresses that "Everyone has the right to leave any country, including his own, and to return to his country" *only*.¹⁰⁴ It seems therefore that while human beings are entitled without any discrimination of sort (art. 2 UDHR) to leave their country and seek and enjoy asylum in others, it is only the country of nationality that has a duty to readmit its own nationals while other States, owing to the principle of State sovereignty, are free to establish their immigration and asylum policies as they wish.

¹⁰¹ M. Robinson, 'Welcoming the downtrodden', *Refugees Magazine*, Issue 111, 1998.

¹⁰² Art. 14(1) UDHR.

¹⁰³ Art. 13(1) UDHR.

¹⁰⁴ Art. 13(2) UDHR.

It has been noted that the failure to include a subjective right *to* asylum was not accidental.¹⁰⁵ An analysis of the *travaux préparatoires* highlighted the unwillingness of States to undertake “a moral obligation to grant asylum, let alone a legal one”.¹⁰⁶ As a consequence, art. 14 UDHR reflected instead the idea of asylum as being essentially a right *of* States. Nevertheless, it has inspired the subsequent evolution of the right of asylum in both international refugee law and human rights law, to the extent that “today it also connotes protection against harm, specifically violations of fundamental human rights, and is implicitly linked to the goal of *solution*”.¹⁰⁷ The protection against harm is exactly the subject of the first – and to date the only – legally binding instrument on asylum of universal scope, the Refugee Convention.

2.2.2 The 1951 Refugee Convention and the 1967 Protocol

With the aim of implementing art. 14 UDHR and under concerns over the treatment of WWII international refugees, the Refugee Convention was adopted under the auspices of the UN in Geneva the 18 July 1951 and entered into force the 22 April 1954, founding a new branch of international law known as ‘international refugee law’.¹⁰⁸ At the time of writing, 146 States are Parties to the Convention, making it the most ratified binding instrument on international protection. The convention has several merits but also a number of flaws, to the extent that it fostered in recent years a debate on its adequacy to the specificities of our time – a time in which the underlying causes of forced migration and the connected need of ensuring international protection have considerably changed.

The historicity of the Refugee Convention can be appreciated already by a reading of article 1 which, after qualifying as ‘refugees’ all those who were considered so in the framework of pre-existing agreements, subordinates the definition of ‘refugee’ to events occurred before 1 January 1951, with implicit reference to WWII. Besides this temporal limitation, the convention also allowed SPs to make a declaration (at the time of signature, ratification or accession) with the aim of limiting its geographical scope to events occurred, within the aforementioned timeframe, in the territory of Europe only. This refugee regime, restricted in both time and space, lasted until the adoption of the 1967 New York Protocol that, although being a separate and independent instrument, provides that the substantial articles of the Refugee Convention (arts. 2 to 34) shall be applied by SPs without any

¹⁰⁵ J. McAdam, ‘Asylum and the Universal Declaration of Human Rights’, *Refugee Survey Quarterly*, vol. 27, no. 3, 2008, pp. 3-12, p. 4.

¹⁰⁶ H. Lauterpacht, *International Law and Human Rights*, London, Stevens, 1950, p. 421, as referenced in J. McAdam, ‘Asylum’ cit., p. 4.

¹⁰⁷ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn., Oxford, Oxford University Press, 2007, p. 422, as cited in J. McAdam, ‘Asylum’ cit., p. 5.

¹⁰⁸ Refugee Convention cit.

limitation whatsoever, except for those countries that would decide to maintain the geographical reservation that they had previously deposited under the Convention.¹⁰⁹ It is important to recall here that although Italy had acceded the Protocol in January 1972, the geographical limitation continued to apply in the country until the adoption of the Martelli law in 1989.

Despite these circumstances, the Convention has the merit of providing the most widely acknowledged definition of ‘refugee’, a set of core rights connected to the *status* and a number of additional rights of incremental nature (i.e. granted on the basis of length of residence in, and level of attachment to, the host country), as well as cessation and exclusion criteria. Accordingly, a refugee is defined as:

[...] 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, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, unwilling to return to it.¹¹⁰

A few observations are in order, because European – and thus also domestic – asylum law is not merely influenced by the Convention but it actually assigns to it the highest relevance. First, it follows from the definition that a person is a refugee once he/she meets the criteria. Hence, the official recognition of the ‘refugee *status*’ (i.e. the complete set of rights granted to a ‘refugee’ by the host country) has only declaratory value,¹¹¹ but the core rights enshrined in the Convention should be granted to any person as soon as he/she claims to be a refugee and until determination of his/her actual *status*.¹¹² Another important feature is that in order to qualify as refugee a cross-border element is required, in that a person (whether national of a State or stateless person) needs to be outside his/her country of origin (or habitual residence) in order to claim the rights granted under the Convention. Finally, the definition implies the existence of a persecutor as well as a connection between the acts of persecution and their reasons. This in turn means that all persons that flee their countries for reasons such as famine, poverty, natural disasters and other circumstances that do not imply the presence of

¹⁰⁹ UNGA, *Protocol Relating to the Status of Refugees*, adopted 31 January 1967, entered into force 4 October 1967, 606 UNTS.

¹¹⁰ Art. 1A(2) Refugee Convention. Art. 1C to F provide for cessation and exclusion clauses. The definition provided here is the one resulting from the modifications brought about by the 1967 Protocol, i.e. once eliminated the temporal and geographical limitations.

¹¹¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, available at <https://www.unhcr.org/4d93528a9.pdf> [accessed on 24 March 2019], para 28.

¹¹² P. Boels, M. d. Heijer, G. Lodder, K. Wouters, *European Migration Law*, 2nd edn., Cambridge-Antwerp-Portland, Intersentia, 2014, p. 298.

a persecutor are excluded *de iure* from the refugee status. Further, the required connection between acts and reasons of persecution excludes in principle those that flee from situations of indiscriminate violence.

This restrictive scope is however mitigated, within EU law, by a complementary form of international protection, i.e. subsidiary protection, whose criteria are not as restrictive as those of set out in the Refugee Convention. Nevertheless, the definition of a ‘person entitled to subsidiary protection’ is also somewhat restrictive. As it will be illustrated in the following, this is precisely why the atypical form of protection that was granted in Italy prior to the entry into force of D.L. n. 113/2018 (i.e. ‘humanitarian protection’) was particularly relevant, in that it filled the gap left by the other two forms of protection on account of its broader scope.

It should also be noted that differently from most international human rights treaties that establish a monitoring body to which individuals can, in many cases, claim a violation of the human rights enshrined therein, the Refugee Convention does not provide any judicial or quasi-judicial body to which individuals may report a violation of their rights. The Convention does however entrust under art. 38 the International Court of Justice with a judicial role, but only on disputes that may arise between SPs on its interpretation and application. More importantly, art. 35 mandates the UNHCR with a supervisory role on the implementation of the Convention.¹¹³

Ultimately it should be stressed that, similarly to the UDHR, the Refugee Convention does not grant an individual right *to be granted* asylum but it establishes for the first time within an international binding instrument the principle of *non-refoulement*, i.e. the prohibition of returning a person to a country where his/her life would be in danger, owing to the same reasons defined in art. 1A(2).¹¹⁴ The principle of *non-refoulement*, which has arguably become a matter of customary international law – and for some even of *jus cogens*¹¹⁵ – is a fundamental principle of international refugee and human rights law, and is enshrined in a number of other international and regional instruments,¹¹⁶ and transposed into EU law and national legislations.

¹¹³ The UNHCR, under art. 8 of its Statute, has also the responsibility of promoting accession to the Convention and adoption of additional legal instruments to ensure the protection of refugees worldwide, as well as elaborating guidelines, advisory opinions and providing assistance and training to governments and authorities regarding in particular asylum procedures and refugee status determination. See UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V).

¹¹⁴ Art. 33 Refugee Convention. Moreover, art. 32 also sets a general prohibition of expulsion, derogations being possible only on grounds of national security or public order. It also provides the procedural guarantee that expulsion should only be implemented after a final decision in the framework of a due process. Differently from art. 32 however, the principle of *non-refoulement* is virtually absolute, with the only exception of persons that are convicted by a final judgement for a particularly serious crime and are deemed a danger to national security.

¹¹⁵ J. Allain, ‘The *Jus Cogens* Nature of *Non-Refoulement*’, *International Journal of Refugee Law*, vol. 13, no. 4, 2002.

¹¹⁶ Provisions on *non-refoulement* have been explicitly included in the 1984 UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (art. 3), as well as in regional instruments and most notably in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (November 2014; hereafter, Istanbul Convention), which requires SPs under art. 60 to adopt appropriate measure to ensure

2.3 Asylum under European law

The Refugee Convention sets the basis of international refugee law and is, therefore, a core reference document also for the European asylum regime.¹¹⁷ The latter is rather complex due to the overlapping legal frameworks that apply. As a matter of international law, there are the regional human rights treaties adopted under the auspices of the Council of Europe and most notably the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereafter, ECHR), but also other relevant instruments such as the Istanbul Convention.¹¹⁸ The ECHR protects from expulsion virtually all aliens, not just asylum seekers and refugees, provided that certain conditions are met.

On the other hand, there is the EU legal order which is:

founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹¹⁹

With the Tampere European Council and the subsequent Amsterdam Treaty in 1999, the EU brought migration and asylum policies in the realm of competences that it shares with the MSs.¹²⁰ Since then, it adopted a number of legislative acts aimed at establishing criteria for determining the MS responsible for the assessment of asylum applications and setting, in the initial phase, minimum standards on asylum qualification, procedures, reception conditions and returns, and later it raised them to higher common standards aiming at developing an effective and uniformed Common European Asylum System (hereafter, CEAS). Furthermore, the EU Charter of Fundamental Rights (hereafter, CFR) adopted in 2000 in Nice as a non-binding instrument, became legally binding and upgraded to the same rank of sEU treaties with the entry into force of the Treaty of Lisbon in 2009.¹²¹

the extension of the refugee status to gender-based asylum claims and under art. 61 provides for the prohibition of *refoulement*. The ECHR, on the contrary, does not mention *non-refoulement* explicitly, the principle having been developed in the case-law of the ECtHR as stemming most notably from article 3 (prohibition of torture and ill-treatment).

¹¹⁷ European asylum regime is intended here as both EU and Council of Europe legal frameworks. In the case of the EU, the obligation to respect the Refugee Convention was laid down already in the Maastricht Treaty with art. 63 TEC, replaced by art. 78 TFEU.

¹¹⁸ Of these instruments, however, only the Istanbul Convention refers directly to refugee protection as enshrined in the Refugee Convention. The European Convention for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment, differently from the UN Convention Against Torture, does not provide protection from *refoulement*. However, it is relevant for asylum seekers and 'irregular' migrants insofar as it establishes a Committee with unlimited monitoring power of places of detention, police custody and deprivation of liberty in general.

¹¹⁹ Art. 2 TEU.

¹²⁰ The competence of the Union on this subject matter, its objectives, and decision-making mechanisms are laid down in art. 78 TFEU, which explicitly requires such policy to comply with the Refugee Convention, the principle of *non-refoulement*, and other relevant treaties. The reference to "other relevant treaties" leaves the scenario open to obligations under future treaties on international protection ratified by all MSs. Further, the Lisbon Treaty has ensured the ordinary legislative procedure as the applicable decision-making mechanism for this subject matter.

¹²¹ Art. 6(1) TEU.

The two different legal frameworks are however strongly interconnected, as the Treaty of Lisbon and the CFR gave a prominent role to the ECHR, to the extent that EU accession to the ECHR became an obligation under art. 6(2) TEU and the ECHR was complemented to this end in 2010 with Protocol n. 14, enabling EU accession.¹²² In addition, art. 6(3) TEU provides that fundamental rights as enshrined in the ECHR and in the constitutional traditions common to the MSs shall be general principles of EU law. Further, with regard to the judiciary of the two systems, it appears that although both the ECtHR and the CJEU rely – more or less consistently – on the independent interpretation of their own legal instruments, they also refer to each other’s case-law, developing what has been referred to as a “judicial ‘integrated European approach’”.¹²³

In the following, a survey of the substantive provisions enshrined in selected legal instruments relevant for asylum will illustrate the complexity of the European asylum regime and identify the core obligations to which Italy is bound under these frameworks. Case-law will only be addressed when immediately relevant.

2.3.1 The protection of aliens under the European Convention on Human Rights

The ECHR is known as one of the most effective regional systems of human rights protection. Its comprehensive set of civil and political human rights apply to everyone within the jurisdiction of a High Contracting Party.¹²⁴ Although the ECHR does not contain any provision on the right to asylum as such, the ECtHR has nonetheless developed through its case-law a number of principles related to the protection of aliens in general and asylum seekers and other vulnerable groups in particular, that SPs have to comply with in order to ensure the effective protection of human rights as enshrined in the Convention.

Most notably, the Court has derived from art. 3 – the prohibition of torture, inhumane or degrading treatment or punishment – the principle of *non-refoulement*, which constitutes a barrier to removal.¹²⁵ Essentially, SPs cannot return anyone to a country where they might be subjected to a treatment that conflict with this provision, nor to a country where there is no guarantee that the person would not be further deported without an individual assessment of his/her asylum claims, as such

¹²² This process was however hindered, for the time being, by the CJEU, as the Draft Accession Agreement failed the required legal assessment. See CJEU, Opinion C-2/13.

¹²³ F. Ippolito, S. Velluti, ‘The relationship between the CJEU and the ECtHR: the case of asylum’, in K. Szehtsiarou *et al.*, (eds.), *Human Rights Law in Europe. The Influence, Overlaps and Contradictions of the EU and the ECHR*, Abingdon-New York, Routledge, 2014, pp. 156-187, p. 180. Such relationship is strengthened by the CFR’s obligation under art. 52(3) to interpret corresponding rights of the two instruments as having the same meaning and scope as those laid down by the ECHR, derogating to such obligation only if that is for granting more favorable provisions.

¹²⁴ Art. 1 ECHR.

¹²⁵ Other barriers from removal stem from ECHR’s art. 5 (right to liberty and security of person), art. 6 (right to a fair trial), art. 8 (right to private and family life) and art. 13 (right to an effective remedy). For an account on *non-refoulement* and the ECHR, see UNHCR, *Manual on Refugee Protection and the European Convention on Human Rights*, (April 2003, updated August 2006).

expulsion may result in a violation of art. 3.¹²⁶ Further, the prohibition of torture and ill-treatment under art. 3 is absolute – not only under the ECHR but also as a matter of international human rights law.¹²⁷ This means that, differently from other ECHR’s rights that allow striking a balance between the individual right and the rights of the collective (usually on grounds of public order, national security, public health, etc.), this right cannot be restricted on any ground, not even in times of emergency.¹²⁸ SPs are therefore under the obligation to ensure protection from torture and ill-treatment always, including in the event of expulsion.¹²⁹ This is true not only for a person that is already in the territory of a SP, but also for those asylum seekers that are at its borders or intercepted at high seas.¹³⁰

The protection from expulsion is however subordinated to the assessment of the existence of “substantial grounds [...] for believing that the person concerned, if extradited, faces a *real risk* of being subjected to” ill-treatment,¹³¹ the applicant having to demonstrate that the risk is foreseeable and personal. Moreover, a breach of art. 3 is verified only if ill-treatment meets a “minimum level of severity”.¹³² This does not mean that there is an absolute threshold applying to everybody in the same way. The ECtHR held that it depends on the specific circumstances of the case, including age, sex and health of the applicant.¹³³

As this section briefly illustrated, ECHR SPs retain their sovereign power to determine immigration policies and laws. Nevertheless, their obligations under the Convention imply a limitation, under certain circumstances, of their power to expel aliens, aiming at ensuring the effective protection of human rights. Under EU law, however, MSs are further bound to a number of fundamental principles and regulations directly related to asylum and, although they enjoy a certain level of discretion in assessing individual asylum claims, they must ensure protection once a person meets the criteria set out in the relevant Directives.

¹²⁶ ECtHR, *T.I. v. The United Kingdom*, Appl. No. 43844/98, 7 March 2000, p. 15. In this decision related to the Dublin Convention the ECtHR held that in no circumstances the obligation of a SP under art. 3 is lifted, including in case of multilateral international agreements such as the Dublin Convention, nor, by analogy, bilateral readmission agreements (see in this regard UNHCR, *Manual on Refugee Protection cit.*, Part 2.1 – Fact Sheet on Article 3, p. 3, para 2.5).

¹²⁷ Art. 15(2) ECHR prohibits any derogation to art. 3. Similarly, ICCPR art. 4(2) prohibits any derogation from art. 7, i.e. the prohibition of torture.

¹²⁸ ECtHR, *Sufi and Elmi v. United Kingdom*, Apps. No. 8319/07 and 11449/07, 28 June 2011.

¹²⁹ However, they may seek trustworthy diplomatic assurances from the country of destination that the returned person will not be subjected to such treatment as established in ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, App. No. 8139/09, 17 January 2012.

¹³⁰ ECtHR, *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, 23 February 2012. Further, art. 4 of Protocol 4 to the ECHR, of which the ECtHR found a breach in the *Hirsi* case, provides for the prohibition of collective expulsion, which translates into the obligations of allowing individuals under the jurisdiction of a State Party to lodge an application for international protection and assessing such application individually. In *Hirsi* the court further recalled that on a vessel at high seas applies the jurisdiction of the State whose flag the vessel is flying.

¹³¹ ECtHR, *Soering v. The United Kingdom*, 1/1989/161/217, 7 July 1989, para 91. Reaffirmed in ECtHR, *Chahal v. The United Kingdom*, 70/1995/576/662, 15 November 1996, para 74.

¹³² ECtHR, *Ireland v. The United Kingdom*, 5310/71, 13 December 1977, para 162.

¹³³ *Ibidem*.

2.3.2 The right to be granted asylum under the EU Charter of Fundamental Rights

Differently from international refugee and human rights law, the EU legal order appears to provide for an individual right *to be granted* asylum, namely under art. 18 CFR.¹³⁴ Maria-Teresa Gil-Bazo has analyzed in depth the legal nature of the CFR and the scope of its art. 18.¹³⁵ While recognizing the limited scope of CFR's provisions as a matter of EU law only – and not of international law – and their limited applicability in the MSs “only when they are implementing Union law”,¹³⁶ she argues that a comparative analysis of the “constitutional traditions and international obligations common to the Member States”¹³⁷ suggests that the right to asylum as enshrined in art. 18 CFR shall be interpreted, despite the lack of a clear subject, as an individual right to be granted asylum.¹³⁸ As for the criteria upon which this right shall be granted, she suggests that they “are *necessarily* those established by the Union's law, rather than Member States themselves [my emphasis]”.¹³⁹

The question however arises as to who are the categories of persons entitled to this right. While the Protocol on Asylum to the Treaty of Lisbon expressly excludes EU nationals from international protection as stemming from EU law,¹⁴⁰ Gil-Bazo suggests that the reference made within the Explanations on the Charter to art. 63 TEC (now art. 78 TFEU) and to the value given therein to the Refugee Convention, indicates that “as a minimum, individuals who meet the criteria in article 1A of the Refugee Convention would have a right to be granted asylum”.¹⁴¹ However, given that art. 78 TFEU also refers to “other relevant treaties” (and that the term ‘asylum’ is used inconsistently in EU and MSs legal orders and it should not be given, therefore, the same legal meaning as ‘refugee status’), as a consequence:

asylum in the Charter is to be construed as the protection to which all individuals with an international protection need are entitled, provided that their protection grounds are established by *international law*, irrespective of whether they are found in the Refugee Convention or in any other international human rights instrument.¹⁴²

¹³⁴ Art. 18 CFR states: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”.

¹³⁵ M-T Gil-Bazo, ‘The EU Charter of Fundamental Rights and the Right to be Granted Asylum in the Union's Law’, *Refugee Survey Quarterly*, vol. 27, no. 3, 2008, pp. 33-50.

¹³⁶ Art. 51(1) CFR.

¹³⁷ Preamble CFR. Art. 52(3) CFR further stresses that “In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”.

¹³⁸ M-T Gil-Bazo, ‘The EU Charter’ cit., pp. 40-41.

¹³⁹ *Ivi*, p. 48.

¹⁴⁰ Prot. (No 24) on asylum for nationals of Member States of the European Union 2008/C 115/1, 9 May 2008, pp. 305–306.

¹⁴¹ M-T Gil-Bazo, ‘The EU Charter’ cit., p. 49.

¹⁴² *Ivi*, p. 50.

Yet, insofar as the CFR applies in the MSs only when they are implementing EU law, it follows that in order to enjoy the right to be granted asylum as enshrined in the Charter, a person needs to meet the criteria set out in the relevant Regulations and Directives, i.e. the acts that form the CEAS. This in turn implies the right to have one's international protection application assessed thoroughly and individually by the authorities of the competent MS, a right that has been codified within the CEAS.

2.3.3 The Common European Asylum System

The Tampere's political programme on immigration and asylum found implementation in the adoption of a set of interrelated Directives and Regulations forming the CEAS.¹⁴³ The aim of this paragraph is not to examine in detail the CEAS functioning, but rather to highlight the substantive provisions that are most relevant for the analysis of chapter 3. After pointing at the early steps of an international protection application, the criteria necessary for granting the two forms of international protection available in the EU, i.e. the refugee status and subsidiary protection status, will be addressed. It is important to note that while EU law sets out common standards, the competence to determine the actual international protection status of an asylum seeker is reserved to the designated authorities of the MS responsible for assessing the application in accordance with Regulation (EU) No 604/2013, also known as Dublin Regulation.

The application for international protection can be lodged, under EU law, by a third-country national within the EU territory, at its borders or in transit zones,¹⁴⁴ and the early procedures are governed by Regulation (EU) No 603/2013 and Regulation (EU) No 604/2013. Pursuant to art. 9(1) of Regulation (EU) No 603/2013, the competent national authorities shall, as soon as possible once an application is lodged, take the fingerprints of the applicant, record them electronically together with the additional personal data provided for in art. 11, and transmit them to the Central System for comparison within the database. The purpose of this mechanism is to determine which MS is competent to assess the application. The Central System verifies whether or not the applicant had lodged an earlier application in another MS by comparing the data. The principle set out in Regulation (EU) No 604/2013 is that only one MS should – and must – process an international protection application and, as a general rule, this shall be “the first Member State in which the application for

¹⁴³ Reference is made in this section only to legislative acts into force at the time of writing. The CEAS is composed of: Temporary Protection Directive (Directive 55/2001/EC); Reception Condition Directive (Directive 2013/33/EU); Eurodac Regulation (Regulation EU 603/2013); Dublin Regulation (Regulation EU 604/2013); Qualification Directive (Directive 2011/95/EU); Procedures Directive (Directive 2013/32/EU).

¹⁴⁴ Art. 3 Regulation (EU) No 604/2013.

international protection was lodged”.¹⁴⁵ This Regulation also establishes an individual right to have one’s application thoroughly examined by a MS, pursuant to art. 3(1). The system therefore enables the transfer of asylum seekers to the MS that results to be responsible under the Regulation. However, additional guarantees are provided in order to protect the best interest of the child and family unity when considering the so-called Dublin transfer.

While the Dublin system establishes the criteria and mechanisms for determining the MS responsible for assessing an asylum application and transferring asylum seekers to such MS, Directive 2013/32/EU and Directive 2013/33/EU establish respectively common procedures for granting and withdrawing international protection and common standards of reception of asylum seekers.

The most important Directive containing substantive provisions on the two forms of international protection is however the so-called Qualification Directive, i.e. Directive 2011/95/EU “on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection [...]”. The entitlement of an asylum seeker to international protection, is based on the criteria and procedural requirements laid down therein. Accordingly, it should be verified in the first place whether an applicant qualifies for the ‘refugee status’, and only failing this qualification, it should be assessed whether he/she qualifies for the ‘subsidiary protection status’.

Pursuant to article 2(d) of the Directive, an applicant qualifies as a ‘refugee’ if he or she is:

a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.¹⁴⁶

It is immediately clear that the wording of this article is essentially identical to the definition of the Refugee Convention, with the only exception that its scope is limited to third-country nationals. Hence, the above observations on the Refugee Convention apply also to this definition. Nevertheless, other articles of the Qualification Directive provide further guidance on some aspects on which the Refugee Convention is silent – albeit non-legally binding guidance is provided under the UNHCR Handbook. Accordingly, art. 4 specifies how the assessment of facts and circumstances shall take

¹⁴⁵ Art. 3(2) Regulation (EU) No 604/2013. However, it should also be noted that MSs retain the right to process any application for international protection, but once they make use of this right, they undertake full responsibility for carrying on the whole procedure until a final determination of the applicant’s status.

¹⁴⁶ Art. 2(d) Directive 2011/95/EU.

place,¹⁴⁷ while arts. 6 to 10 define, *inter alia*, the actors of persecution and protection,¹⁴⁸ the acts of persecution and the reasons thereof.¹⁴⁹

The essential criteria to be established in order to grant the refugee status are therefore as follows: (i) whether the fear of being persecuted is well-founded; (ii) whether fear of persecution is linked to one of the grounds laid down in the definition; (iii) whether the persecution is carried out by actors listed in art. 6; (iv) whether the applicant is actually unable or unwilling, *owing to such fear*, to seek protection in the territory (or part of the territory) of his or her country of origin. Once the match with said criteria is established, it remains to be verified whether the applicant falls under the exclusion clauses of art. 12.¹⁵⁰

Failing to meet the conditions necessary to qualify as a ‘refugee’, an applicant might still qualify as a ‘person eligible for subsidiary protection’, if pursuant to article 2(f) he/she is 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, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.¹⁵¹

As anticipated, the definition of a person eligible for subsidiary protection has a broader scope than that of a refugee. In fact, it is not restricted by the acts and reasons of persecution listed in art. 2(d) of the Directive. In order to enjoy this status, it suffices to demonstrate a real risk of suffering serious harm in the country of origin or habitual residence. The real risk is to be understood, pursuant

¹⁴⁷ Pursuant to article 4(3)(a) of the Directive, all relevant facts relating to the situation in the country of origin, including the laws and regulations and the manner in which they are applied shall be taken into account. Guidance in this regard is provided in UNHCR, *Handbook* cit., para 42-43. Reports issued by UN bodies and other relevant sources, including NGOs, should serve as a tool to assess the human rights situation in countries of origin. Furthermore, having already been subjected to persecution is a circumstance that under article 4(4) would reinforce the claim of having a well-founded fear of being persecuted again in the future.

¹⁴⁸ The actors of persecution (art. 6) are: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory; (c) non-State actors. The actors of protection (art. 7) are: (a) the State; (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory.

¹⁴⁹ A non-exhaustive list of acts of persecution (art. 9(2)) includes: (a) physical or mental violence; (b) discriminatory legal, administrative or judicial measures; (c) disproportionate or discriminatory prosecution or punishment; (d) denial of judicial redress; (e) prosecution or punishment for refusing to serve in the military, when in a conflict this would result in committing crimes against peace, war crimes and crimes against humanity; (f) acts of gender-specific or child-specific nature. Art. 10 provides guidance on the reasons for persecution as listed in the definition of art. 2(d).

¹⁵⁰ Art. 12 Directive 2011/95/EU provides that a person that otherwise qualifies as a refugee, shall be excluded from such status if he or she is protected under other UN organs or agencies; qualifies for citizenship in the country of residence; or when he or she has committed, incited or participated crimes against peace, crimes against humanity, war crimes, serious non-political crimes or acts contrary to the purposes of the UN.

¹⁵¹ Art. 2(f) Directive 2011/95/EU.

to art. 15, as consisting of: “(a) death penalty or execution; (b) torture or inhumane or degrading treatment or punishment [...]; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.¹⁵² Clauses (a) and (b) are essentially the translation into a positive obligation of the principle of *non-refoulement*. Clause (c) deserves instead a separate observation: while refugee status requires provable personal persecution, subsidiary protection shall be granted also when serious harm may result from a situation of indiscriminate violence, therefore encompassing situations of internal or international armed conflict.

Once the eligibility is established, just as for the refugee status it shall be assessed whether the applicant falls in the exclusion clauses, which are essentially the same but with one important exception. Under art. 17(1)(b) it suffices to have committed a serious crime, whether politically motivated or not. Furthermore, pursuant to art. 17(3), a MS may decide to exclude an applicant from subsidiary protection if, before entering that MS, he/she “has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes”.¹⁵³

Competent authorities of the MS responsible for the assessment of the application are entrusted to take a decision based on the conditions mentioned above. While the risk of being excluded on the aforementioned grounds remain valid until national authorities take a final decision, it should be recalled that under EU law, the ECHR and the Refugee Convention, any person is entitled to protection from *refoulement*, if the legislation and the factual circumstances in the country of origin show well-founded indications that, if *refouled*, the person’s right to life and right to be free from torture and inhumane and degrading treatment or punishment, which are non-derogable human rights, are at serious risk of being violated.¹⁵⁴ Such principle is codified in art. 21 of the Qualification Directive, which reaffirms the need to respect international obligations of the MSs, but it also derogates to the *non-refoulement* principle under paragraph 2, should such international obligations allow it, when the applicant is considered as a danger to national security or has been convicted by a final judgement for a particularly serious crime. On these grounds, MSs can revoke, end or refuse to

¹⁵² Art. 15 Directive 2011/95/EU.

¹⁵³ Art. 17(3) Directive 2011/95/EU.

¹⁵⁴ The principle of *non-refoulement* is a well-established principle of international law and has been arguably become a matter of customary law. It is enshrined in several instruments including most notably in the Refugee Convention (art. 33), as well as in the ECHR (art. 3), the CFR (art. 4) and Directive 2011/95/EU (art. 21). The ECtHR has reaffirmed such principle in relation to article 3 ECHR in a number of judgements relating to returns operated both within and outside EU territory, including *Tarakhel v. Switzerland*, App. No. 29217/12; *Salah Sheekh v the Netherlands*, App. No. 1948/04; *Chahal v. United Kingdom*, App. No. 222414/93. On the ‘real risk’ of ill-treatment in the context of *refoulement* see also ECtHR, *Jabari v Turkey*, App. No. 40035/98.

renew or to grant a residence permit. The set of rights that MS shall guarantee to refugees or persons who are granted subsidiary protection is provided for in Chapter VII of the Directive and are essentially all human rights that are not directly linked to citizenship, including both civil and political and economic, social and cultural rights, plus a number of functional rights related to access to information and the granting of residence and travel documents.

2.4 Concluding remarks

This chapter has illustrated the complexity of the multi-level legal framework related to international protection. Starting from the broadest human rights and refugee law instruments, it has been shown that there is no individual right to be granted asylum at the universal level. Individuals are granted a mere right to seek and to enjoy asylum in countries other than their own, while it appears that States enjoy, as a matter of international law, a right to grant asylum at their own discretion. The other side of the coin is represented however by the negative obligation upon States stemming from the principle of *non-refoulement*, a principle that has been derived by other fundamental human rights (most notably the right to be free from torture and ill-treatment), and that has arguably become a fundamental principle of customary international law. Hence, regardless of whether a person qualifies as a refugee under the Refugee Convention or whether a State is willing to grant to such person asylum, there is an obligation upon all States not to return a person to a country where there is a real risk that the person faces persecution, serious harm or ill-treatment.

This principle has been integrated in the European regional human rights framework and most notably through the ECtHR's jurisprudence, as well as in EU law. Nonetheless, within the EU legal order there is an individual right to asylum by virtue of art. 18 CFR. The EU right to asylum is strongly based on the criteria set out in the Refugee Convention, but it goes beyond the latter thanks to the reference to "other relevant treaties", leaving it open to future developments. In practice, however, it is articulated at the time of writing in two forms of international protection enshrined in the Qualification Directive, i.e. the 'refugee status' and 'subsidiary protection status'.

The relevance of this survey for the case-study under examination in chapter 3 relies on the prominence of the international, regional and EU legal frameworks in defining, to a great extent, the domestic legal framework of the MSs with regard to international protection. Yet under EU law MSs retain the right to grant more favorable standards, and in fact in several cases, including Italy, they do so.¹⁵⁵

¹⁵⁵ Art. 3 Directive 2011/95/EU.

Chapter 3

The abolition of ‘humanitarian protection’ under D.L. 113/2018

Having addressed the historical and political context in which the recent Italian reform took place (chapter 1) and defined the international and European obligations to which Italy is bound (chapter 2), we now have all the elements to address our case-study.

This chapter takes a legal perspective and proceeds from an examination of the right to asylum as guaranteed by the Italian Constitution, to an overview of the forms of protection provided in the Consolidated Immigration Act (hereafter, TUI), finally addressing how D.L. n. 113/2018 has operated in this framework, pointing at its procedural and substantial flaws. The Court of Cassation, the Constitutional Court and, when relevant, the Ordinary Courts case-law, will be analyzed as it evolved over time in parallel with the legislation. This approach on one hand helps to clarify the distinctiveness of the different forms of protection and, on the other, highlights how the D.L. n. 113/2018 represents a dramatic step back.

3.1 The constitutional right of asylum

The right of asylum is constitutionally guaranteed in Italy to “A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution [...] under the conditions established by law”.¹⁵⁶ It has been observed in chapter 2 how this provision is extremely broad. It is widely acknowledged by the doctrine that the right of asylum shall apply whenever “it is verified that the foreigner is denied the fundamental civil and political freedoms in his home country”.¹⁵⁷ It appears therefore that the refugee status and subsidiary protection status strict criteria (i.e. the presence of a persecutor and acts of persecutions or well-founded fear thereof in the first case, and an individual serious risk of irreparable harm in the second) do not apply to the Italian constitutional right of asylum. According to the authoritative opinion of constitutionalist Antonio Cassese, the right of asylum applies in Italy to all foreigners who hold “repugnant to their civil and moral conscience to live in an authoritarian State”.¹⁵⁸

In order to be entitled to the constitutional right of asylum, two conditions must be satisfied: (i) an effective illiberal situation in the country of origin and (ii) that such situation determines the foreigner to seek asylum in Italy. The constitutional norm is therefore clear enough as to allow the

¹⁵⁶ Art. 10(3) Const.

¹⁵⁷ C. Esposito, ‘Asilo (diritto di)’, *Enciclopedia del Diritto*, vol. III, Milano, 1958. In the same sense, see F. Rescigno, *Il diritto cit.*

¹⁵⁸ A. Cassese, ‘Il diritto di asilo territoriale degli stranieri’, in G. Branca, (ed.), *Commentario della Costituzione: principi fondamentali art. 1-12*, Bologna, Zanichelli, 1975, p. 536.

identification of the subjects, i.e. all foreigners (and stateless persons by analogy), and the criteria for its application, i.e. the actual denial of the Italian constitutional freedoms in the country of origin. Essentially, the Italian Constitution holds a universalistic perspective according to which the freedoms granted therein should be enjoyed by all human beings.¹⁵⁹

Nevertheless, this constitutional norm is subject to a reservation of law, which means that the legislator should adopt an implementing law regulating the procedures for granting and withdrawing asylum (and the residence conditions). However, the legislator can neither alter the rationale of the constitutional norm, nor its scope. Hence, it appears that the potential consequence of such broad scope implies, theoretically, that Italy may have to welcome millions of people fleeing the many States where the Italian constitutional freedoms are not guaranteed.¹⁶⁰ Since such implementing law was never adopted, the right of asylum was left non-justiciable, because the ordinary judge can only assess legislative norms, not constitutional ones. Given the historical omission of adopting such implementing law, and under the obligation to transpose international protection measures into national legislation, the legislator has incurred in the ambiguity of equating the concepts of ‘asylum’ and ‘refugee’.¹⁶¹

In spite of the inaction of the legislator, the Court of Cassation established back in 1997 that art. 10(3) Const. “assigns directly to the foreigner who is in the situation described by this rule a real subjective right to obtain asylum” and this because the constitutional norm “outlines with sufficient clarity and precision the case that gives rise to the right of asylum [...] identifying in the impediment to the exercise of democratic freedoms the ground justifying the right and indicating the effectiveness as a criterion for ascertaining the hypothesized situation”.¹⁶² The case concerned the disputed Martelli law which was deemed to assimilate the constitutional right of asylum to the refugee status (as suggested by the title of the law itself which referred to ‘political asylum’). In this regard, the Court clarified the distinctive character of the two institutes arguing that:

¹⁵⁹ The Constituent Assembly’s debates on the right of asylum highlight a polarization, where communists advocated the entitlement of such right only for those foreigners “persecuted due to their actions in favor of freedom” (delegates Basso, Nobili *et al.*), similarly to the Preamble of the French Constitution; the prevailing position, however, led to the broad wording of art. 10(3), suggesting the legislator’s intention not to subordinate asylum to any condition except the actual denial of democratic freedoms. See N. Petrovic, *Breve storia del diritto d’asilo* cit., 2016, p. 21-22.

¹⁶⁰ This was already object of concerns within the Constituent Assembly: delegate Umberto Nobili envisaged setting quotas on the basis of economic considerations. See *Atti dell’Assemblea Costituente*, 11 April 1947, p. 2725, available at http://legislature.camera.it/_dati/costituente/lavori/Assemblea/sed083/sed083nc.pdf (accessed 12 July 2019). In this sense, the legislator may limit the entry and residence of asylum seekers, balancing asylum with other constitutional principles aiming, for instance, at safeguarding public health or national security; see M. Benvenuti, *Il diritto d’asilo nell’ordinamento costituzionale italiano. Un’introduzione*, Padova, CEDAM, 2011, p. 148.

¹⁶¹ See for instance the use of ‘asylum’ referring to ‘refugee status’ in art. 1(11) L. n. 39/1990 and throughout L. n. 189/2002. This ambiguous use however is common at the broader international level: see for instance the fourth ‘Considering’ of the Refugee Convention’s Preamble.

¹⁶² Cass. SSUU n. 4674/1997.

The constitutional precept and the legislation on refugees, in fact, do not coincide from the subjective point of view, because the category of refugees is less extensive than that of those entitled to asylum, as the aforementioned Geneva Convention provides as a determining factor for the identification of the refugee, if not the persecution in practice, a well-founded fear of being persecuted, that is a requirement that is not considered necessary by Article 10, third paragraph of the Constitution.¹⁶³

Having established the distinction of the two institutes, the Court stressed that while the administrative jurisdiction applied to disputes on the refugee status by law, the constitutional right of asylum was instead under the jurisdiction of the ordinary judge.

3.1.1 Protection under the Consolidated Act on Immigration

The Court of Cassation in subsequent years confirmed some of the aforementioned arguments, but progressively changed its approach in relation to two legislative innovations, namely (i) the adoption of the TUI in 1998, which introduced the so-called humanitarian protection codified in art. 5(6) and assimilated the procedure for granting it with that for obtaining the refugee status; and (ii) the transposition into Italian law of two EU Directives, i.e. the Qualification Directive and the Procedure Directive (respectively in 2007 and 2008), introducing subsidiary protection in addition to the refugee status.

The TUI codified in a single document all previous provisions on the status of foreigners.¹⁶⁴ While L. n. 39/1990 had abolished the geographic limitation of the refugee status, just a few months before the adoption of the TUI, the L. n. 40/1998 had codified the principle of *non-refoulement*, later integrated in art. 19(1) TUI.¹⁶⁵ Most importantly the TUI introduced the so-called humanitarian protection, provided for in art. 5(6) as follows:

The refusal or revocation of the residence permit can also be adopted on the basis of international conventions or agreements, rendered enforceable in Italy, when the foreigner does not satisfy the residence conditions applicable in one of the Contracting States, *unless there are serious reasons, in particular of a humanitarian nature or resulting from constitutional or international*

¹⁶³ *Ibidem*.

¹⁶⁴ Provision on refugee status and subsidiary protection deriving from EU law remain codified in separate acts, including most notably L.D. n. 251/2007 (Qualification Directive), L.D. n. 25/2008 (Procedure Directive).

¹⁶⁵ “Under no circumstances may expulsion or *refoulement* be made to a State where the foreigner may be subjected to persecution for reasons of race, sex, language, citizenship, religion, political opinion, personal or social conditions, or may risk being returned to another state in which he is not protected by persecution”. The article was integrated in 2017 by sub-paragraph (1.1) providing for the absolute prohibition of expulsion “when there are substantial grounds for believing that [the person] risks of being subjected to torture”, owing to the introduction of the ‘crime of torture’ by L. n. 110/2017.

*obligations of the Italian State. The residence permit on humanitarian grounds is issued by the Quaestor according to the procedures set out in the implementing regulation [my emphasis].*¹⁶⁶

Until the EU Directives transposition took place, two forms of protection were regulated by law in Italy, i.e. the refugee status and humanitarian protection.¹⁶⁷ While the refugee status has a restrictive definition, the wording of art. 5(6) TUI appears broad, insofar as it does not define the ‘serious humanitarian reasons’ giving rise to the right to humanitarian protection. The humanitarian protection could be obtained either by a direct request to the Quaestor or else within the procedure for obtaining international protection, when the competent authority could not determine refugee status but nonetheless it considered that, for humanitarian reasons, the applicant should not be returned to the country of origin.

Moving within this legal framework, the Court of Cassation reaffirmed that the absence of an implementing law on the constitutional right of asylum could “in no way be an obstacle to its binding force” and that “the provisions governing the recognition of political refugee status cannot be applied to the asylum seeker [meant as the claimant of the constitutional right of asylum]”.¹⁶⁸ However, the Court also held that the distinctiveness of the two subjective rights “corresponds to a difference in treatment, in the sense that the foreigner who requests the right of asylum is granted nothing else than the entry into the State”, whereas the refugee enjoys a more favorable treatment deriving from the Refugee Convention.¹⁶⁹ In subsequent case-law,¹⁷⁰ the Court stated that art. 10(3) Const. represented, lacking the implementing law, simply the right of entry into Italy with the aim of acceding the procedure for obtaining the refugee status, indicating, as a consequence, that applicants awaiting refugee status determination had to be considered asylees.¹⁷¹

¹⁶⁶ Art. 5(6) TUI, before the entry into force of D.L. n. 113/2018.

¹⁶⁷ Besides the properly *international* protection, since L. n. 40/1998 the ‘social protection’ (art. 18 TUI) is offered to foreigners that are victims of exploitation, violence and criminal activities, whose safety is endangered owing to escaping such situation and/or to their collaboration with authorities in investigations or judicial proceedings. This was integrated after the ratification of the Istanbul Convention in 2013, with art. 18-*bis* TUI, which grants protection to the victim of domestic violence. Additionally, art. 20 TUI provides the Government with the possibility to adopt temporary humanitarian measures on occasion of exceptional inflows related to conflicts, natural disasters or other serious events, in derogation of other TUI’s norms. This however does not represent a subjective right but rather an emergency device to be enacted at the discretion of the executive.

¹⁶⁸ Cass. civ. Sez. I, n. 8423/2004.

¹⁶⁹ *Ibidem*.

¹⁷⁰ Cass. civ. Sez. I, n. 18941/2006, n. 23352/2007. See L. Melica, ‘La Corte di Cassazione e l’asilo costituzionale: un diritto negato? Note alle recenti sentenze della 1a sezione della Corte di cassazione’, *Diritto, Immigrazione e Cittadinanza*, n. 4/2006, pp. 57-62.

¹⁷¹ From a procedural perspective, the Court further noted in Cass civ. Sez. I, n. 8423/2004 that “the indications that emerge from positive law [...] converge in the sense of bringing the two institute together under the procedural profile, while leaving unchanged the substantive features that differentiate them.”

3.1.2 The pluralist regime of protection

As anticipated, the Italian legal framework on protection changed as a result of the transposition, *inter alia*, of the Qualification Directive and the Procedure Directive. These pieces of legislation introduced subsidiary protection into the Italian legal order. The implementing regulation provided that the Territorial Commission entrusted with the processing of international protection applications shall proceed first to assess criteria for granting either form of international protection. If the criteria were not met by the applicant, the Commission could, when ‘serious reasons of humanitarian nature’ were identified, request to the Quaestor the issuing of a residence permit for humanitarian reasons as a residual category.¹⁷²

Summing up, three forms of protection were available: refugee status, Subsidiary protection and humanitarian protection. The question therefore arose as to whether there was still margin for claiming the right of asylum as derived from art. 10(3) Const. Questioned about this issue, the Court of Cassation answered in the negative, by arguing in the landmark judgement N. 10686/2009 that the pluralist protection regime resulted from the transposition of EU law in connection with art. 5(6) TUI, gave full implementation to the constitutional provision.¹⁷³ This position was reaffirmed in subsequent case-law, most recently in 2016 when the Court held that, “The right to asylum is fully implemented and regulated through the provision of the final situations envisaged by the three institutes of refugee status, subsidiary protection and the right to the issuance of a humanitarian permit”.¹⁷⁴

Given the approach of the Court, it can be assumed that the constitutional right of asylum has been fully implemented through the pluralist protection regime thanks, specifically, to the atypical form of protection of the Italian legal order, the humanitarian protection. In fact, given the broad scope of art. 10(3) Const., only the open-ended humanitarian protection could ensure the full implementation of the constitutional norm. The refugee status and subsidiary protection, are too restrictive to cover the scope of the constitutional provision. In other words, it is thanks to the fact that the ‘serious reasons of humanitarian nature’ are not exhaustively defined by law that the full enactment of the constitutional norm can be affirmed.

¹⁷² Art. 6 D.P.R. n. 21/2015.

¹⁷³ Cass. civ. Sez. V n. 10686/2009. In the Court’s words: “the right of asylum is today [...] fully implemented and regulated, through the provision of the final situations envisaged in the three protection institutes, thanks to the exhaustive legislation of L.D. n. 251/2007 (implementing Directive 2004/83/EC) and of art. 5(6) TUI approved by L.D. n. 286/1998, so that no margin of residual direct application of the constitutional provision can be seen [my emphasis].”

¹⁷⁴ Cass. civ. Sez. VI-1, ord. n. 16362/2016.

3.1.3 Protection in the realm of human rights

Summing up the problem, the Court of Cassation's judgement N. 19393/2009 shall be briefly addressed. In the judgement, the Court provides guidance on the interpretative tools available to ascertain the serious humanitarian reasons on which the humanitarian protection is grounded. Pointing at the explicit reference made by art. 5(6) TUI to constitutional and international obligations, the Court provides a list of instruments that shall integrate the domestic legislative framework on protection. Accordingly, it mentions arts. 2¹⁷⁵ and 10(3) Const., and it refers to the Refugee Convention, the ECHR and the CFR, stressing the absolute character of the principle of *non-refoulement* derived by art. 3 ECHR¹⁷⁶ and art. 19 CFR. The Court establishes the human rights nature of humanitarian protection stating:

Besides the generic reference to the discipline of international humanitarian law, [...] it is beyond doubt that the reasons of a humanitarian nature must be identified by referring to the cases provided by the universal or regional conventions that authorize or impose on our Country to adopt protective measures to guarantee fundamental human rights and which find expression and guarantee also in the Constitution, not only for the value of the recognition of the inviolable human rights under the art. 2 of the Constitution, but also because, beyond the coincidence of the catalogues of these rights, the different formulas that express them are complementary, completing each other in the interpretation.¹⁷⁷

The Court recalls the procedural convergence of the three forms of protection and the equivalence, by virtue of art. 34 L.D. n. 25/2008, of the effects of subsidiary and humanitarian protection. In relation to the applicable jurisdiction the Court highlights that, because of the human rights nature of humanitarian protection, art. 2 Const. "excludes that such situations can be degraded to legitimate interests as a result of discretionary assessments entrusted to the administrative power", the latter having only a technical discretion on the assessment of facts.¹⁷⁸ It adds that "The jurisdiction over fundamental human rights, in the absence of an express provision that provides otherwise, rests with the ordinary judge".¹⁷⁹

¹⁷⁵ Art. 2 Const.: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."

¹⁷⁶ The Court refers in particular to ECtHR, *Saadi v. Italy*, App. No. 37201/06.

¹⁷⁷ Cass. SSUU, ord. n. 19393/2009.

¹⁷⁸ *Ibidem*.

¹⁷⁹ *Ibidem*.

3.2 The abolition of ‘humanitarian protection’ under D.L. n. 113/2018

The legal framework described above changed with the adoption of D.L. n. 113/2018, converted with modifications in Law n. 132/2018. The act addresses a number of heterogeneous issues including international protection, public security, the organization of the Ministry of Interior and the Agency for properties seized to organized crime.

As anticipated in chapter 1, a Decree-Law is a temporary legislative instrument available to the Government in times of emergency. It is provided in art. 77(2) Const. in derogation of the institutional separation of power assigning the legislative function to the Parliament (art. 70 Const.). This is particularly important because, as section 3.3 below illustrates, such derogation requires certain criteria, the fulfillment of which has been questioned in regard to this decree. The misuse of Decree-Laws has come under scrutiny of the Constitutional Court which, however, has been extremely cautious in censoring altogether acts adopted through this procedure in order to avoid interference with the legislator.

In the following paragraphs, I will address on one hand the decree’s procedural flaws and, on the other, the substantial flaws related to the abolition of the humanitarian protection. Although the substantial flaws are not limited to humanitarian protection and many other measures of the decree have raised questions over human rights implications, the focus of this analysis will be on humanitarian protection owing to the centrality, in our discussion, of the constitutional right of asylum.

3.2.1 Analytical overview of D.L. n. 113/2018

D.L. n. 113/2018 is titled “Urgent dispositions regarding international protection and immigration, public security, as well as measures for the functioning of the Ministry of Interior and the organization and functioning of the National Agency for the administration and destination of the goods seized and confiscated to the organized crime”.¹⁸⁰ During the process of conversion into law, a maxi-amendment presented by the Government replaced the whole text of the decree and added another subject matter, i.e. a “delegation to the Government for the reorganization of roles and careers of the staff of law enforcement and armed forces”.¹⁸¹

The heterogeneity of the act is self-evident: in fact, it contains a number of different subjects that are not directly linked to one another. These subjects are divided into three titles (four after the conversion into law), respectively (Title I) on temporary residence permits for humanitarian reasons,

¹⁸⁰ D.L. n. 113/2018.

¹⁸¹ L. n. 132/2018.

international protection and immigration; (Title II) on public security, prevention and fight against terrorism and organized crime; and (Title III) on the functioning of the Ministry of Interior and the organization and functioning of the National Agency for the administration and destination of the properties seized and confiscated to the organized crime. While the latter two titles and the additional one integrated in the conversion will only justify the procedural flaws, the core analysis focuses on Title I, art. 1. Title I is however composed of fifteen articles whose provisions have been criticized and deserves a review of the most controversial aspects. Under art. 1, discussed in detail in section 3.4, all references to the humanitarian residence permit in existing legislation are abolished and a restricted categorization of ‘special cases’ is provided instead of the pre-existing open-ended protection.

Arts. 2 to 6 deal with the detention and expulsion of foreigners and asylum seekers. Under this rubric, the maximum length of detention of foreigners in the Repatriation Centers is raised from 90 to 180 days (art. 2). Further, by referring to “suitable places” and “suitable facilities”, the law essentially extends the places of detention to any law enforcement facility at the border. Foreigners can be held there while waiting for the judicial confirmation and subsequent execution of an expulsion order, if Repatriation Centers have reached their full capacity (art. 4). In this regard an aspect that has acquired particular significance under the Yellow-Green Government (and that relates closely to the reference to “suitable places” of detention) is the increased practice of holding migrants and asylum seekers on ships that are denied entry in Italian ports (see chapter 1). It has been noted that all these measures appear to conflict with a number of international, EU and constitutional obligations, including most notably arts. 5 and 13 ECHR and art. 13 Const.¹⁸²

The detention of asylum seekers for purposes of identification is also foreseen to up to 180 days, including maximum 30 days in “suitable places” within the hotspots and maximum 180 days in Repatriation Centers (art. 3). It has been noted that the measure is confusing, because it does not clarify whether the overall maximum detention is 180 days or, instead, 210 days as it may appear by adding the 30 days in hotspots to the 180 in Repatriation Centers.¹⁸³ Furthermore, doubts have been raised over the compliance of this measure with EU law (Procedure Directive and Reception

¹⁸² See G. Santoro, (ed.), *I profili di illegittimità costituzionale del Decreto Salvini*, Roma, Antigone Edizioni, 2019, in particular ‘Parte terza. Le nuove forme di trattenimento e la possibile violazione dell’art. 5 Cedu’. Art. 13 Const.: “Personal liberty is inviolable. / No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. / In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void. / Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished. / The law shall establish the maximum duration of preventive detention.”

¹⁸³ *Ivi*, p. 67.

Directive) and human rights obligations regarding the requirement of detaining international protection applicants in *ad hoc* facilities and ensuring the unity of families.¹⁸⁴

Arts. 7 to 12 reform, *inter alia*, the procedures for granting, withdrawing and revoking international protection, the provisions relating to reiterated applications, the fast-assessment procedure of protection claims, in case of ongoing criminal proceedings against the applicant,¹⁸⁵ as well as the rules governing the asylum seekers' reception system.

Moreover, art. 12 prohibits the use of the residence permit issued to international protection applicants to subscribe in Civil Registries. This measure was initially interpreted as preventing international protection applicants from being inscribed in Civil Registries and, as a consequence, from accessing public and private services for which residency is required.¹⁸⁶ This attracted the criticism of mayors and regional governments. Five regional governments challenged the measure in front of the Constitutional Court, claiming a violation of competences under art. 117 Const. and, additionally, the indirect violation of fundamental rights of international protection applicants in relation, *inter alia*, to the right to health and the right to housing.¹⁸⁷ On 20 June 2019, however, the Constitutional Court declared the case inadmissible, in the part relating to international protection, arguing that the subject matter was under the exclusive competence of the Government.¹⁸⁸ Furthermore, the most recent case-law of ordinary Courts and doctrinal contributions have clarified that the way this measure is worded does not entail a prohibition of inscribing applicants into Civil Registries. It only excludes the use of a specific document (the mentioned residence permit issued to international protection applicants) for such purpose, leaving the possibility to use other official documents such as, for instance, the police identification report issued in the context of the application.¹⁸⁹

Finally, art. 14 introduces citizenship deprivation for naturalized citizens that have been found guilty, in a final judgement, of acts of terrorism. This type of measure is being increasingly adopted

¹⁸⁴ *Ivi*, pp. 66-68.

¹⁸⁵ The denial of protection measures shall result in immediate expulsion even in the absence of a final judgment. Possible conflicts with art. 27(2) Const. (presumption of innocence) and art. 24 Const. (right to a defense). See G. Santoro, (*ed.*), *I profili cit.*, p. 26. Within international and regional human rights law, it may conflict with the right to a fair trial under arts. 14 ICCPR and 6 ECHR; with the right to an effective remedy under arts. 2 ICCPR and 13 ECHR; and with both such rights under art. 47 CFR, if the expulsion is carried out under EU law.

¹⁸⁶ Camilli A., 'La stretta sulla residenza è uno dei problemi del decreto sicurezza', *Internazionale*, [website], 9 January 2019, <https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/01/09/residenza-anagrafe-decreto-sicurezza>, (accessed 30 May 2019).

¹⁸⁷ Villafrate A., 'Decreto Sicurezza: le Regioni ricorrono alla Consulta', *Studio Cataldi*, [website], 9 January 2019, <https://www.studiocataldi.it/articoli/33144-decreto-sicurezza-le-regioni-ricorrono-alla-consulta.asp>, (accessed 30 May 2019).

¹⁸⁸ On another aspect, however, the Court censured a measure of the decree allowing Prefects to assume powers attributed to mayors. The judgment has not been published at the time of writing but a press release is available at https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20190620203711.pdf, (accessed 15 July 2019).

¹⁸⁹ See G. Santoro, (*ed.*), *I profili cit.*, pp. 91-99

by a multitude of EU MSs and has raised a number of concerns in regard to arts. 2 and 22 Const. as well as the fundamental human right not to be discriminated on the basis of nationality.¹⁹⁰ It has been also the subject of litigations in front of European Courts, in relation to the loss of EU citizenship as a consequence of nationality deprivation.

3.2.2 Procedural flaws

A first set of flaws of D.L. n. 113/2018 has to do with the type of legislative act, i.e. the Decree-Law, as well as the subsequent procedure of conversion into law. In this regard, the Constitutional Court established back in 1959 that within its jurisdiction on disputes over the constitutional legitimacy of laws enshrined in art. 134 Const. “there is undoubtedly and in the first place that of checking compliance with the provisions of the Constitution on the procedure for the formation of laws”.¹⁹¹

The parliamentary system set up by the Constitution provides the basic rules underpinning the separation of powers. In this regard, the Court more recently highlighted that:

It is a widely shared opinion that the structure of legislative procedures is one of the main elements that characterize the form of government in the constitutional system. *It is related to the protection of fundamental values and rights* [my emphasis]. In States inspired by the principle of the separation of powers and the subjection of jurisdiction and administration to the law, the adoption of primary norms lies with the organs or body whose power derives directly from the people.¹⁹²

Hence, in order to safeguard the fundamental principle of popular sovereignty¹⁹³ and the constitutional order itself, institutions shall respect their roles and derogate to the ordinary procedures only when extraordinary circumstances are established and within the limits of the law.

3.2.2.1 The improper use of the Decree-Law

As anticipated, the new regulation was adopted through a legislative act that derogates to the constitutional provision on the legislative function, which “is exercised collectively by the two chambers”¹⁹⁴ of the Parliament following the ordinary procedure defined in art. 72 Const.¹⁹⁵ Vice versa, art. 77 Const. provides that “The Government may not, without an enabling act from the

¹⁹⁰ Art. 2 UDHR, art. 2 ICCPR, art. 21 CFR, art. 18 TFEU.

¹⁹¹ Const. C. n. 9/1959, para 2.

¹⁹² Const. C. n. 171/2007, para 3.

¹⁹³ Art. 1 Const.

¹⁹⁴ Art. 70 Const.

¹⁹⁵ In a judgement dealing with a Decree-Law, the Constitutional Court referred to all procedures that do not fall under art. 71 as “special procedures” (Const. C. n. 391/1995, para 6).

Houses, issue a decree having force of law”.¹⁹⁶ However, a derogation to such principle is possible “in case of necessity and urgency” but the Government, who under its own responsibility adopts a temporary measure (i.e. the Decree-Law), shall immediately “introduce such measure to Parliament for transposition into law” in order to safeguard its legislative function.¹⁹⁷ In fact, if the measure fails parliamentary confirmation within sixty days, it shall lose its effects retroactively.¹⁹⁸

Two principles are enshrined in the aforementioned articles: first, that the Parliament exercises the legislative function exclusively; second, that in order to adopt an act having force of law, the Government shall ensure that the requirements of necessity *and* urgency are met. In this regard the Constitutional Court “with constant jurisprudence since 1995 (sentence n. 29/1995), affirmed that the existence of the requirements of the extraordinary nature of the case of necessity and urgency can be subjected to scrutiny of constitutionality”.¹⁹⁹ Looking at the context in which D.L. n. 113/2018 was adopted, it could be argued that, in light of the dramatic decrease of asylum seekers’ flows (a circumstance stressed by the Minister of Interior himself), such requirements were not met.²⁰⁰

A further requirement is implied in art. 77 Const. and made explicit in the implementing law n. 400/1988, art. 15(3), i.e. that “the content [of a Decree-Law] must be specific, homogeneous and corresponding to the title”.²⁰¹ In other words, as the Constitutional Court has clarified, the norm imposes “a connection of the decree-law in its entirety with the extraordinary case of necessity and urgency”,²⁰² lack of which should result in the unconstitutionality of the whole act.

As a consequence, it is legitimate to doubt the compliance of D.L. n. 113/2018 with the requirements of urgency and homogeneity, since migration flows had decreased as from 2017 and therefore the urgency is questionable; moreover, because the decree contains disparate provisions, the connection of which could be argued only through a conceptual stretching, resulting from the arbitrary and ideologically-oriented nexus between immigration and security.

3.2.2.2 The conversion procedure and the use of maxi-amendments

A further constitutionally questionable element stems from the conversion procedure. Fearing that the reform could have been hindered by Parliamentary amendments introduced by opposition parties,

¹⁹⁶ Art. 77(1) Const.

¹⁹⁷ Art. 77(2) Const. The importance of Parliamentary confirmation is evident in the part of the article requiring that “During dissolution, Parliament shall be convened within five days of such submission”.

¹⁹⁸ Art. 77(3) Const.

¹⁹⁹ Const. C. n. 171/2007, para 4. The Court stressed, however, that “the lack of the conditions of legitimacy of the urgent decree, in the constitutional scrutiny, must be evident and that is why it [the Constitutional Court] intervened positively only once in the presence of the specific phenomenon, become chronic, of the reiteration of non-converted decree-laws (Const. C. n. 360/1996)”. This cautious approach of the Court is itself essential to safeguard the constitutional order.

²⁰⁰ G. Santoro, (*ed.*), *I profili cit.*, p. 20.

²⁰¹ Art. 15(3) L. n. 400/1988.

²⁰² Const. C. n. 22/2012, para 3.3.

the Government used a highly controversial mechanism, i.e. the introduction of a maxi-amendment and the contextual trust-vote in the Parliament. In other words, while the law was being discussed in the Senate, the Government proposed an amendment that replaced entirely the text of the decree, adding a new title to the original text and calling for a trust-vote. Once approved by the Senate, the Government then called the trust-vote in the lower Chamber as well, preventing the parliamentary debate on the individual provisions of the law and excluding altogether the amendments discussed by the Constitutional affairs committee of the Senate.

The Government's possibilities to introduce amendments and call for a trust-vote are established by law. However, it appears that the Parliament's legislative function is seriously marginalized through this mechanism. In light of the ordinary legislative procedure enshrined in art. 72 Const. that requires a bill to "be scrutinized by a Committee and then by the whole House, which shall consider it section by section and then put it to the final vote"²⁰³, it is not surprising that the Constitutional Court had referred to such mechanism as a "problematic practice"²⁰⁴ and the doctrine, in the same sense, defined it a "procedural expedient".²⁰⁵ Although the Court held that the respect of parliamentary rules cannot be subjected to a constitutional check, in judgement n. 22/2012 it also stressed that such rules shall abide by the limits imposed by the Constitution.

Moreover, the Court affirmed, in a case concerning a Decree-Law converted with the same 'expedient', that "Such a penetrating and incisive reform [i.e. on the list of illegal drugs], involving delicate political, legal and scientific choices, would have required an adequate parliamentary debate, possible [only] in the ordinary procedures", namely a "specific discussion and a reasonable deliberation on the individual aspects of the discipline thus introduced."²⁰⁶ It is beyond doubt that D.L. n. 113/2018 represents a "penetrating and incisive reform", to the extent that it involves the fundamental human rights of individuals.

In the most recent constitutional case-law on the issue of Decree-Laws and the use of maxi-amendments and trust-votes, the Court argued that, although the Parliament enjoys a high degree of flexibility, "This cannot justify, however, any practice that is established in the parliamentary Chambers, including those conflicting with the Constitution. Indeed, it is necessary to contain the uses that lead to a progressive deviation from constitutional principles".²⁰⁷ It affirmed also that the way parliamentary proceedings have been carried out in recent years "have aggravated the problematic aspects of the practice of maxi-amendments approved with a vote of trust" and, although

²⁰³ Art. 72 Const.

²⁰⁴ Const. C. n. 351/2014, para 5.

²⁰⁵ G. Piccirilli, *L'emendamento nel processo di decisione parlamentare*, Padova, CEDAM, 2008, p. 260. In this regard, Piccirilli stresses that it is not the maxi-amendment in itself to be problematic, but rather its functionality to the trust-vote.

²⁰⁶ Const. C. n. 32/2014, para 4.4.

²⁰⁷ Const. C. ord. n. 17/2019, para 4.3.

in that specific case it considered that the Decree-Law could not be declared unconstitutional – due to time constraint deriving from the obligation towards the EU of adopting of the financial law – it warned that “In other situations, a similar compression of the constitutional function of members of the Parliament could lead to different outcomes”.²⁰⁸

Summing up, D.L. n. 113/2018 raises constitutionality questions in regard of two procedural dimensions, that is i) the lack of the constitutional requirements of necessity, urgency and homogeneity, and ii) the use of the ‘expedient’ combining the maxi-amendment and the trust-vote.

3.2.3 Substantial flaws

The abolition of the ‘humanitarian protection’ and its substitution with a list of categories entitled to protection raises substantive constitutionality questions. In light of the broad constitutional right of asylum, the atypical humanitarian protection enshrined in art. 5(6) TUI had come to represent the norm that, according to the Court of Cassation, gave full implementation to art. 10(3) Const., due to its complementarity with the other two forms of international protection and to its open-ended character. Hence, the question arises as to whether such restrictive categorization hinders the full implementation of the constitutional norm and, possibly, the compliance with international obligations. In order to answer it, it is essential to examine the new categorization introduced by art. 1 D.L. n. 113/2018. The article operates modifications of both the TUI and the L.D. n. 25/2008, i.e. the act implementing the Procedure Directive. It should be recalled here that the humanitarian protection could be obtained either by means of a direct request to the Questor, or, pursuant to art. 32(3) L.D. n. 25/2008, through the Territorial Commission in charge of assessing international protection applications when the criteria for refugee status and subsidiary protection were not met, and yet the Commission considered that the applicant could not be returned to the country of origin on the basis of art. 19 TUI (*non-refoulement*).

Art. 1(1)(b)(2) D.L. n. 113/2018 abolished the second part of art. 5(6) TUI (i.e. “[...] unless there are serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian State. The residence permit on humanitarian grounds is issued by the Quaestor according to the procedures set out in the implementing regulation.”) that was the legal basis for conferring humanitarian protection.

It also modified art. 32(3) L.D. n. 25/2008, replacing the reference to the ‘humanitarian protection residence permit’ with a reference to a newly devised ‘special protection residence permit’. All other references to humanitarian protection in existing legislation have been abolished.

²⁰⁸ *Ivi*, para 4.5.

The decree has instead introduced a number of specific cases entitled to protection, restricting for most of them the possibility of transforming the corresponding residence permit into a long-term work and residence permit. The resulting categorization is reported in Table 1.

Table 1: Categorization of protection grounds pursuant to D.L. n. 113/2018

| Type | Legal basis | Grounds | Length | Work | Convertibility into work permit |
|---------------------------------------|----------------------------|--|---|------|--|
| <u>Special protection</u> | Art. 32(3) L.D. n. 25/2008 | <i>In cases where the application for international protection is not accepted and the conditions set forth in art. 19(1) and (1.1) TUI [non-refoulement] are satisfied (unless the expulsion to a state that grants a similar protection can be arranged).</i> | 1 year (renewable until the circumstances cease to exist) | Yes | No |
| <u>Calamity</u> | Art. 20-bis TUI | <i>When the country to which the foreigner should return is experiencing a situation of contingent and exceptional calamity that does not allow the safe return and stay.</i> | 6 months (renewable until the circumstances cease to exist) | Yes | No |
| <u>Healthcare</u> | Art. 19(2)(d-bis) TUI | <i>For foreigners who are in particularly serious health conditions, ascertained by appropriate documentation issued by a public health facility or by a doctor affiliated with the National Health Service, such as to cause a significant prejudice to their health, in case of return to the country of origin or provenance.</i> | 1 year (renewable until the circumstances cease to exist) | No | No |
| <u>Acts of particular civic value</u> | Art. 42-bis TUI | <i>If the foreigner has performed acts of particular civic value, in the cases referred to in art. 3 L. n. 13/1958, unless there are grounds for believing that the foreigner is a danger for public order and State security, pursuant to art. 5(5-bis) TUI.</i> | 2 years (renewable) | Yes | Yes |
| <u>Social protection</u> | Art. 18(1) TUI | <i>When, during police operations, investigations or proceedings for some of the crimes referred to in art. 3 L. n. 75/1958, or those provided for in art. 380 of the Criminal Procedure Code, or in the course of welfare interventions of the local institutions' social services, situations of violence or serious exploitation towards a foreigner are ascertained, and concrete dangers emerge for his/her safety, as a result of attempts to avoid the constraints of a criminal organization involved in one of the aforementioned crimes, or as a result of statements made during preliminary investigations or proceedings.</i> | 6 months (renewable until the circumstances cease to exist) | Yes | No (it can be extended only if at the time of expiring the holder has an ongoing job contract) |
| <u>Victims of domestic violence</u> | Art. 18-bis(1) TUI | <i>When, during police operations, investigations or proceedings for any of the crimes provided for in arts. 572, 582, 583, 583-bis, 605, 609-bis and 612-bis of the Criminal Code, or for one of the crimes provided for in art. 380 of the Criminal Procedure Code, committed in the national territory in the field of domestic violence, situations of violence or abuse against a foreigner are ascertained and a concrete and actual danger for his/her safety emerges, as a consequence of the choice to escaping such violence or as a result of statements made during preliminary investigations or proceedings.</i> | 1 year (convertible after it expires) | Yes | Yes |
| <u>Victims of work exploitation</u> | Art. 22(12-14) TUI | <i>The foreigner who has filed a complaint and cooperates in the criminal proceedings against the employer, when the employed workers are subjected to particularly exploitative [sic] working conditions as per art. 603-bis(3) of the Penal Code.</i> | 6 months (renewable until the circumstances cease to exist) | Yes | Yes |

An assessment of the new discipline needs to be based on a comparison with the cases in which humanitarian protection was previously granted. It needs to be verified whether the cases in which humanitarian protection was granted are all encompassed by the new categorization, in order to highlight the cases that now fall outside it. However, this approach may be misleading insofar as it does not cover all other conceivable cases in which humanitarian protection could *potentially* be granted. The new categorization in fact contrasts *per se* with the open-ended character of the humanitarian protection.²⁰⁹

The humanitarian protection, before the integration in L.D. n. 25/2008 (arts. 32/33) as a residual form besides refugee and subsidiary protection statuses, was introduced by the TUI as an autonomous institute. It has been pointed out that the legislator intentionally formulated the humanitarian protection in general terms, avoiding to provide an exhaustive list precisely with the aim of providing broad and effective protection of fundamental rights as required by the legal order (arts. 2 and 10(3) Const.).²¹⁰ It appears that the intention of the legislator in TUI was to provide an open catalogue, able to evolve and not directly linked or limited to international human rights instruments. Instead, the atypical protection constituted a separate class. In this sense, it represents a flexible safeguard clause, complementary to the international protection system yet autonomous. It encompasses all situations deserving protection on the principle of solidarity enshrined in art. 2 Const.

When the requisites deriving from international and constitutional obligations are not verified,²¹¹ it is necessary to assess the existence of ‘serious humanitarian grounds’, taking into consideration both objective and subjective elements proving the vulnerability of the applicant.²¹² In a recent judgement, the Court of Cassation has excluded that the circumstance of having been subjected to ill-treatment in transit countries can be relevant for determining the right to humanitarian

²⁰⁹Cass. civ. Sez. I n. 4455/2018: "[the humanitarian protection] constitutes one of the forms of implementation of constitutional asylum (Article 10, third paragraph of the Constitution), according to the constant orientation of this Court (Cass. n. 10686/2012; n. 16362/2016), together with the refugee status and subsidiary protection, highlighting also in this function the open and not fully typable nature of the conditions for its recognition, consistent with the wide configuration of the right of asylum contained in the constitutional provision, expressly referring to the impediment in the exercise of democratic freedoms. "

²¹⁰ C.L. Cecchini, L. Leo, L. Gennari, *Il permesso di soggiorno per motivi umanitari ai sensi dell'art. 5, comma 6, D.Lgs. n.268/98*, Torino, ASGI, 2018, p. 4.

²¹¹ In this case the Court of Cassation reaffirmed that humanitarian protection “covers a number of situations, to be identified on a case-by-case basis, in which, despite the requirements for the typical protections are not met, the expulsion cannot however be ordered and consequently the reception of the applicant that find him/herself in a condition of vulnerability shall be guaranteed”. See Cass. civ. Sez. VI - 1, ord. 15466/2014, sent. 26566/2013, ord. 23604/2017, Cass. civ. Sez. I, ord. 14005/2018.

²¹² See Trib. Milano, Civ. sez. I, 31/03/2016, Trib. Milano, ord. 16/09/2015. Among the subjective circumstances should be included age, time of emigration, difficult social and economic integration in the country of origin, young age at the time of emigration, the exposure to ill-treatment in transit countries, social vulnerability in the host country, etc. See C.L. Cecchini, L. Leo, L. Gennari, (eds.) *Il permesso cit.*, p. 11.

protection.²¹³ However, first instance case-law did consider such circumstance when it represented proof of the applicant's vulnerability.²¹⁴ Among the situations in which the humanitarian protection was granted are, for instance:

- political instability in the country of origin, in a context of serious humanitarian crisis that integrates, in case of return, a condition of specific extreme vulnerability likely to hinder the possibility of exercising fundamental rights;²¹⁵
- precarious public security situation;²¹⁶
- social vulnerability related to the inability to enjoy an adequate standard of living and as a consequence the exercise of fundamental rights;²¹⁷
- need to extinguish the debt contracted with traffickers for the travel.

In this framework, two circumstances have received increased consideration in the case-law of ordinary and last instance tribunals, namely (i) the level of poverty in the country of origin and (ii) the social integration in the host country, circumstances that now fall outside the scope of the new categorization.

The landmark judgement of the Court of Cassation n. 4455/2018, has reaffirmed the openness of the atypical form of protection:

The "serious reasons" of humanitarian nature or resulting from constitutional or international obligations of the Italian State [art. 5(6) TUI], on whose occurrence the foreigner is the holder of a subjective right to the issuance of the residence permit for humanitarian reasons (Cass., section a., n. 19393/2009 and Cass., section a., n. 5059/2017), are not typified or predetermined, not even by way of example, by the legislator, so that they constitute an open catalogue (Cass. n. 26566/2013), being they all equated in their aim to protect current or ascertained situations of vulnerability [...] in the presence of a requirement that can be qualified as humanitarian, that is concerning fundamental human rights protected at the constitutional and international level (see Cassation, section a., 19393/2009, par. 3).²¹⁸

²¹³ Cass. civ. Sez. I, ord. 2861/2018.

²¹⁴ Trib. Napoli 22/06/2017, Trib. Genova 6/12/2017 in M. Flamini, N. Zorzella, 'Asilo e protezione internazionale', *Diritto, Immigrazione e Cittadinanza*, n. 1/2018.

²¹⁵ Court of Appeal, Milano, Sez. minors, 07/03/2017.

²¹⁶ Trib. Trieste, n. 169, 21/09/2012, as cited in C.L. Cecchini, L. Leo, L. Gennari, (eds.) *Il permesso cit.*, p. 11.

²¹⁷ Trib. Perugia, ord. 16/08/2016, as cited in C.L. Cecchini, L. Leo, L. Gennari, (eds.) *Il permesso cit.*, p. 12.

²¹⁸ Cass. civ. Sez. I n. 4455/2018.

The Court clarified the criteria and method to assess the vulnerability deriving from the aforementioned circumstances (situation in the country of origin and social integration in the host country) that would entitle to humanitarian protection:

The recognition of humanitarian protection [...] to the foreign citizen who has developed an adequate degree of social integration in our country, cannot exclude the specific and current examination of the subjective and objective situation of the applicant with reference to the country of origin, to be based on an effective comparative evaluation between the two dimensions in order to verify if the repatriation can determine the deprivation of the holding and the exercise of human rights, below the non-derogable core, constituting the status of dignity of the person, in comparison with the integration level achieved in the host country.

The principle set out in this judgement is that the level of social integration reached in the host country cannot *per se* constitute the entitlement to humanitarian protection, which requires a specific situation of vulnerability in order to be granted. It is however a circumstance that needs to be part of the assessment, which in turn should always start out from the consideration of the reasons behind the departure from the country of origin.

The vulnerability can also derive from the “the lack of minimum conditions to lead an existence in which the possibility of satisfying the inescapable needs and requirements of personal life, such as those strictly connected to one's livelihood and to the achievement of the minimum standards for a dignified existence, is not radically compromised”.²¹⁹ The assessment needs to be based on a comparison of the situation in the country of origin and the potential consequences of an expulsion on the enjoyment of human rights. Hence, “The serious reasons of humanitarian nature can positively be found in the case in which, as a result of this comparative judgment, there is an effective and unbridgeable disproportion between the two contexts of life in the enjoyment of fundamental rights”.²²⁰

²¹⁹ Cass. civ. Sez. I n. 4455/2018. The Court further explains that “The vulnerability can be the consequence of a serious exposure to the damage to the right to health, [...] or it can be consequent to a very serious political-economic situation with effects of radical impoverishment concerning the lack of basic necessities, also not strictly contingent in nature, or even deriving from a geo-political situation that offers no guarantee of a dignified life within the country of origin (drought, famine, situations of poverty that cannot be changed).”

²²⁰ This method, in the words of the court, “allows, in practice, to verify that the person concerned has moved away from a condition of actual vulnerability, from the specific profile of the violation or the impediment to the exercise of inalienable human rights. Within a comparative investigation it can and indeed it must be evaluated, as a factor of concurrent relevance, the effectiveness of social and labor integration and/or the significance of personal and family ties based on their duration in time and stability. The objective evaluation of the situation in the country of origin and the subjective condition of the applicant in that context, in light of the peculiarities of his personal history, constitute the inescapable starting point of the assessment to be made (see Cass. No. 420/2012, No. 359 / 2013, No. 15756/2013)” (Cass. civ. Sez. I n. 4455/2018).

In light of the above, it can be argued that D.L. n. 113/2018 does not encompass all situations that previously gave rise to a subjective right to humanitarian protection. In particular, besides the catalogue of ‘special cases’ provided by D.L. n. 113/2018, the open-ended humanitarian protection previously enshrined in art. 5(6) TUI is restricted under the new regulation (renamed ‘special protection’) to those cases only in which, by virtue of art. 19(1) TUI, an applicant cannot be returned to the country of origin, i.e. when the prohibition of *refoulement* applies. On the other hand, the autonomous humanitarian protection not resulting from the negative obligation of *non-refoulement* (i.e. positively grounded on “serious humanitarian grounds”, encompassing protection based on social integration in the host country), is no longer provided under the new scheme.

Consequently, albeit the abolition of the humanitarian protection does not conflict with international and EU obligations, the same cannot be said of Italian constitutional obligations, especially in light of the Court of Cassation’s inclusion of humanitarian protection in the realm of human rights. In fact, D.L. n. 113/2018 excludes from the subjective right to protection individuals that were previously entitled to such guarantee. In this regard, the Constitutional Court admonished that the discretionary power of the legislator is limited in regard to the norms that give efficacy to fundamental rights. The Court held, in a judgement related to employment law, that “The methods and forms of the implementation of constitutional protection are obviously left to the discretion of the legislator [...]. As they are aimed at making a fundamental right of the person effective, [the laws] once they have come into existence can be codified or replaced by another discipline by the same legislator, but they cannot be purely and simply repealed, so to eliminate the protection previously granted, on pain of direct violation of the same constitutional precept, of the implementation of which they represent an instrument”.²²¹

²²¹ Const. N. 49/2000, para 3.

Conclusions

This research aimed at analyzing the ‘humanitarian protection’ (*nota bene*, an exclusively Italian measure), abolished under D.L. n. 113/2018, and replaced with a restricted list of cases eligible for protection. It addresses the question of whether and to what extent can such abolition be reconciled with international human rights standards, EU law and Italian constitutional principles.

An overview the recent Italian immigration history (chapter 1) highlights that the long-term trends of Italian migration and asylum policies have been characterized by an emergency approach (underlined by the increased use of Decree-Laws) in part rooted in the fact that Italy was not until relatively recently an immigration country. With the end of the Cold War, migrants and asylum seekers began to flow in greater numbers. Italy adopted in this framework the first comprehensive immigration law, abolishing the geographic reservation of the Refugee Convention ratified in 1954. For a long time after the withdrawal of such reservation, however, asylum seekers were rarely granted refugee status due to the Italian authorities’ strict interpretation, thus being left in a precarious legal status. Moreover, in the 1990s Italian authorities contrasted the arrival of thousands of asylum seekers from the Balkans, with a naval blockade resulting in deadly incidents condemned by humanitarian agencies, a practice presenting similarities with the ‘closed ports’ policy of the current Government, furthered to the point of criminalizing SAR NGOs under the so-called ‘Security decree-*bis*’ (not yet converted into law at the time of writing). Across different Governments, a progressive securitization of migration policies consolidated the security-immigration nexus.

In 1998 immigration law was codified by L.D. n. 286/1998 in the Consolidated Immigration Act (TUI), introducing the so-called humanitarian protection, an open-ended form to be granted to foreigners owing to “serious reasons of humanitarian nature”. At this time migration and asylum policies developed within the ongoing process of European integration. The Schengen and Dublin agreements were complemented since the 1999 Tampere programme with the CEAS, providing common standards to be applied by MSs on the refugee status and subsidiary protection. Italy’s protection regime came to include refugee status, subsidiary protection *and* humanitarian protection.

The so-called ‘migration crisis’ starting in 2011 highlighted the inadequacy of the Dublin system, generating in Southern European countries a sense of frustration within the public opinion and political circles alike, in relation to the difficult management of asylum seekers arriving from the Mediterranean route. This all paved the way to power to the sovereignist, Eurosceptical and anti-immigrant parties of the Five Stars Movement and the League. Matteo Salvini, leader of the latter, has built his broad (and to date growing) consensus on the fight to migrants and asylum seekers, rising widespread concerns about human rights.

After having established the socio-political context in which D.L. n. 113/2018 was adopted, the different forms of international protection provided under the applicable multi-level legal framework have been assessed comparatively. This analysis has highlighted the absence of a subjective right to asylum within international law, mitigated however by the fundamental principle of *non-refoulement*. At the broadest universal level, the Refugee Convention provides for the most widely recognized definition of ‘refugee’ and the related *status*, establishing nevertheless strict criteria that exclude all situations not entailing an individual risk of persecution. At the regional level, in spite of the lack of any provision on asylum within the ECHR, the ECtHR has established *non-refoulement* as an absolute principle, i.e. not balanceable with any other human right, in relation most notably to art. 3 (prohibition of torture).

On the contrary, EU law does provide a subjective right to be granted asylum stemming from the CFR and implemented within the CEAS, that ensures the right to have one’s application for international protection assessed thoroughly and individually by one single MS. While EU asylum law is grounded in both the Refugee Convention and the ECHR, it goes a step further by providing, alongside the refugee status, an additional form of protection, i.e. subsidiary protection, the scope of which includes situations of indiscriminate violence resulting from armed conflicts and civil wars in countries of origin.

Approved in the aftermath of WWII, the Italian Constitution stands on a universalistic human rights approach that far exceeds the international protection regime in that “a foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian Constitution shall be entitled to the right of asylum under the conditions established by law” (art. 10(3)). Although an implementing law has never been adopted to date, the Supreme Court of Cassation established the immediate applicability of the constitutional right of asylum as a separate institute from the refugee status, which only grants entry in the State. Following legislative developments resulting in the pluralist protection regime composed of refugee status, subsidiary protection and humanitarian protection, the Court held that the right of asylum had been fully implemented, “so that no so that no margin of residual direct application of the constitutional provision can be seen” (Cass. civ. Sez. V n. 10686/2009).

An in-depth analysis of the humanitarian protection, placed by the Court of Cassation in the realm of human rights, has determined that the full implementation of the constitutional right of asylum can only be argued on the basis of the broad scope and open-ended character of such form of protection, encompassing situations of vulnerability related (but not limited) to the level of poverty in the country of origin and the level of social integration in the host country (Cass. civ. Sez. I n. 4455/2018). The comparison of the protection regime as reformed by D.L. n. 113/2018 established

that the aforementioned situations of vulnerability, as well as all other situations that could potentially fall under the “serious reasons of humanitarian nature”, have been excluded from protection.

Not a few provisions of D.L. n. 113/2018 are clearly in contrast with human rights standards (notably those regarding detention, and the expulsion of migrants before a final judgement). However, by maintaining unchanged the discipline on international protection derived from international and EU law, including the *non-refoulement* principle (art. 19 TUI), the abolition of the humanitarian protection, being an exclusively Italian institute, does not conflict with international and European human rights standards. On the opposite, it does conflict with the broad formulation of the right of asylum enshrined in the Italian Constitution, raising the question of whether individuals might in the future claim in courts the direct application of the constitutional norm.

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