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"Judicial Protection of Fundamental Rights in the European Area of Freedom, Security and Justice"

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NO ROOM FOR YOU IN HERE?
THE PAST AND THE FUTURE OF THE ASYLUM SEEKERS' RECEPTION
CONDITIONS IN ITALY*

Eugenio Zaniboni**

SUMMARY: 1. Objectives and method of the research. Scope of the study. – 2. The evolution of international, national and European reception conditions standards and the Italian approach. The *polycentric* control over the adequacy of national policies. – 3. The progressive emergence of “structural problems” in the Italian asylum seekers’ reception “system”. – 4. The case-law of national and supranational Courts facing migration issues with regard to reception procedures and standards. – 5. The compatibility of the Italian reception conditions with the European *acquis* through the lens of the inquiries on the asylum seekers’ reception conditions. – 5.1. The Chamber of Deputies inquiry on the asylum seekers’ reception conditions and the cases of criminal infiltrations encouraged by the revenues from the asylum seekers’ reception centres management. – 5.2. The “reception lottery”. – 6. Which prospects for the asylum seekers’ reception system? – 7. Concluding remarks. The jammed mechanisms of solidarity.

1. Objectives and method of the research. Scope of the study

The aim of this writing is to explore some aspects of the supranational legal framework on the reception of foreign citizens, with a particular view to their practical implementation in Italy. The analysis will be conducted mainly in a judicial and enforcement dimension for reasons that are both theoretical and practical.

From the first point of view, it should be noticed that the need to manage the European Union’s external borders with a common regulatory legal standard by all Member States has the ultimate aim of creating a single legal area. It follows that the

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** Researcher of International Law, University of Foggia. E-mail: eugenio.zaniboni@unifg.it

realization of common standards in this particular field cannot be considered discretionary. From the same standpoint, some implications should be added to these considerations, deriving from the shift taken from the former art. 63 of the Treaty establishing the European Community, which required to the Member States a kind of ‘light harmonization’, through the adoption of mere “minimum standards on the reception of asylum seekers”, to the different implications of the new art. 78 TFEU, requesting Member States to adopt measures for a common European asylum system (CEAS), comprising not only a “uniform status of asylum for nationals of third countries, valid throughout the Union” (art. 78, para 2 letter a) but also “standards concerning the reception conditions of applicants for asylum or subsidiary protection” (par. 1, letter f).

The new targets, “too often forgotten by the EU legislature”¹ represent a substantial change in approaching the question of asylum. The aim pursued by the Treaties is no longer just a *horizontal* legal integration, as processes of legislative harmonisation usually require. The establishment of the CEAS, indeed, needs such measures enabling the gradual achievement of a deeper *vertical* legal integration, at the end of which the *content* of the legislation and its *implementation* have to comply in full not only with the rules but also with the standards established by the EU *acquis*. According to the resources here collected and analyzed, those processes about the practical implementation of the reception standards in Italy seem far from be ultimate.

This point leads us to the second main aspect of our research, which is – as previously said – of a pragmatic nature. In fact, the relevant national and international case-law represents a useful tool also to understand the situation of the asylum seekers’ reception in Italy, as it shows the *material* conditions – as we shall see later – of individuals entitled by international and European law, as well as Italian constitutional law, to receive a special protection because of their personal situations. As we will try to demonstrate, the reception conditions have been affected by legally relevant phenomena: an emergency-based approach and the lack of transparency in order to speed up the administrative procedures. Far from the principles of efficiency and managerial planning, the widespread use of simplified administrative instruments gave room to the setting up of a rich business in the management of the reception centres, undermining the aim of making Member States reception procedures and standards progressively comparable and homogenous. Undergoing often passively and without negotiation the decisions taken at European level², an indispensable discussion has been eluded, not only with regard to the obligations deriving from the full and complete

¹ M. DI FILIPPO, *The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns*, in *Revista de Derecho Comunitario Europeo*, 2018, n. 59, 41 ff.

² G. CAGGIANO, *Alla ricerca di un nuovo equilibrio istituzionale per la gestione degli esodi di massa: dinamiche intergovernative, condivisione di responsabilità fra gli Stati membri e tutela dei diritti degli individui*, in *Studi sull’integrazione europea*, 2015, esp. pp. 466-467.

implementation of the principles recognized by the Italian Constitution³ and by the international agreements pre-existing EU law⁴, but also, and more generally, to the many issues raised by the increasing migratory pressure on Italy, which, according to the solidarity principle enshrined in art. 80 TFEU⁵, challenges the responsibility of all Member States and not only of those most exposed to crises⁶.

This scenario gave rise to parliamentary and judicial inquiries whose effects, combined with a general negative bias toward the migration flows, should be possibly further explored, even in order to answer in full to the question if and how they were able to affect the targets required by the mentioned processes of *vertical* legal integration imposed to the Member States by the establishment of the CEAS.

³ Article 10, par. 3 of the Italian Constitution states: "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".

⁴ See the recital 10 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast): «With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party».

⁵ According to which: «The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle». On the topic, see: M. GESTRI, *La politica europea dell'immigrazione: solidarietà tra Stati membri e misure nazionali di regolarizzazione*, in A. LIGUSTRO, G. SACERDOTI (eds.), *Problemi e tendenze del diritto internazionale dell'economia. Liber amicorum in onore di Paolo Picone*, Napoli, 2011, pp. 895-925.

⁶ I. G. LANG, *Is there solidarity on asylum and migration in the EU?*, in *Croatian Yearbook of European Law and Policy*, 2013, p. 1 ff. This issue clearly appeared during the refugee crisis of 2015, particularly showing that the Dublin regulation needed a crucial reform in order to enable a structured and dignified reception of asylum seekers in Europe, whilst allowing member states to effectively manage their borders. Conversely, in November 2017, the European Parliament approved a "Dublin IV" proposal that was far more respectful of the solidarity principle enshrined in art. 80 TFEU. It established a permanent and automatic relocation mechanism for applicants not having links (e.g. prior residence or study) with a particular member state. In this case, they could have chosen the state responsible for the examination of their applications among the four member states with the lowest number of asylum seekers, based on a quota principle that took into account both GDP and population. Harsh fines, as well as discouraging measures, could have been applied in case of non-compliance with the relocation system. During the negotiation at Council level, Italy – together with Spain, Greece and Malta – backed this proposal and opposed the one advanced by the Bulgarian presidency, that was more keen to accept derogations from the relocation mechanism, contemporary extending to 10 years the period of time in which the first country of arrival may be responsible for examining the applications. The following deadlock reached by member states at the Council meeting of 4-5 June 2018, was then ratified by an unusual 'axis' between Italy and the Visegrad group in order to rejecting Bulgarian proposal and halting the reforming process, but also to preventing the solidarity principle on migration policy from being effectively respected, at least in the near future (see ECRE, *Beyond Solidarity: Rights and Reform of Dublin*, Legal note n. 3, 2018; Politico.eu, *Southern rim rebels against EU migration proposal: Opposition lowers chances of a deal by June*, 5 June 2018, available at www.politico.eu/article/eu-migration-crisis-italy-spain-rebels-bulgaria-dublin-quotas-proposal/, last accessed 4 July 2018).

2. The evolution of international, national and European reception conditions standards and the Italian approach. The *polycentric* control over the adequacy of national policies

According to the prevailing thesis maintained by scholars and to the interpretation provided by the UNHCR, the special safeguards needed by aliens that invoke one (or more) form(s) of international protection when entering the territory⁷, lie on the fact that the recognition of refugee status is declaratory rather than constitutive. Therefore, because of the principle of *non-refoulement*, asylum seekers cannot be removed, at least until their personal situation has been examined, and the risk of being subject to illicit treatment excluded⁸. This is due to the provisions of the 1951 U.N. Geneva Convention⁹, which states the prohibition to expel or return “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”¹⁰. The Geneva Convention not only lays down restrictions on States conduct (the principle of *non-refoulement* establishes a negative obligation, as it imposes a *non facere* duty on the host State), but also positive obligations, the minimum content of which – in the writer’s opinion – consists of the right to access effective procedures for the recognition of refugee status¹¹. There are also other obligations, however, whose final goal is to promote, over time, the assimilation of the refugee

⁷ Unless the application is not considered manifestly unfounded by the State of arrival. On this point and on the risks of restricting the rooms of legal protection by the use of the so-called “accelerated procedures” in the EU, see E. ZANIBONI, *L’interpretazione del diritto ad un ricorso effettivo e del principio di autonomia procedurale degli stati nella recente giurisprudenza della Corte di giustizia*, in *Europeanrights Newsletter*, 2012, www.europeanrights.eu/public/commenti/Zaniboni.pdf.

⁸ See the UNHCR Executive Committee, e.g. Conclusion No. 6 (XXVIII) “Non-refoulement” (1977), and in doctrine, inter alia, E. LAUTERPACHT, D. BETHLEHEM, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, <http://www.refworld.org/docid/470a33af0.html>, pp. 126-127; G. S. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, Oxford, 2007, p. 232; R.L. NEWMARK, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, in *Washington University Law Quarterly*, 1993, n. 71, pp. 833-865.

⁹ Adopted in Geneva on 28 July 1951 and entered into force internationally on 22 April 1954. Ratified by Italy with the Law 24 July 1954, No. 722, and entered into force on national level on 13 February 1955. Italy also ratified the New York Protocol of 31 January 1967, which entered into force internationally on 4 October 1967, with the Law 14 February 1970, No. 95; the Protocol, eliminating the temporal and geographic limits of the Convention, entered into force internally on 26 January 1972. In doctrine see, among many contributions, J. HATHAWAY, *The Rights of Refugees under International Law*, Cambridge, 2005; P. WELCOME, *The Geneva Convention on the Status of Refugees*, in L. PINESCHI (ed.), *The International Protection of Human Rights. Rules, guarantees, practices*, 2006, p. 153 ff.; G. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law*, cit.

¹⁰ By refugee is meant any person “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Geneva Convention, art. 1.A).

¹¹ The argument cannot be further examined here. But see: E. ZANIBONI, *La tutela dei richiedenti asilo tra politiche restrittive e garanzie procedurali*, in *Europa e Mediterraneo. Le regole per la costruzione di una società integrata*, Atti del Convegno di Bari della Società Italiana di Diritto Internazionale del 18 e 19 giugno 2009, Napoli, 2010, p. 207-233. T. GAMMELTOFT-HANSEN, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge, 2011; C. COSTELLO, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, in *Human Rights Law Review*, 2012, p. 287 ff. We will return to this point in the conclusions.

status with the citizenship¹². This circumstance contributes to putting asylum seekers in a situation that is quite different from any other legal category of aliens who show up themselves at the State borders.

The wide catalogue of Convention rights related to reception and the dense treaties framework made of bilateral and multilateral obligations limiting States' sovereignty on asylum matters (which does not exclusively include the prohibition of *refoulement* – that is peremptory, as it will be seen below) has found in Italy a progressively full enforcement after the entry into force of the EU norms¹³. More specifically, the relevant EU rules on reception have not been met with an already well developed and coherent national legal framework¹⁴, resting on principles established by the Italian Constitution¹⁵. On the contrary, in most cases the CEAS acquis has been implemented *ex novo* into the Italian law¹⁶. Thus it entered into force according to the timing and the methods set by the relevant EU institutions¹⁷.

What is more, the EU legislation is often the result of the needs of some States to the detriment of others. For instance, the distortions created by the Dublin system¹⁸ for

¹² In this regard, some Scholars spoken of a «system of incremental entitlement established by the Refugee Convention». J. HATHAWAY, *What's in a Label*, in *European Journal of Migration & Law*, 2003, p. 2. See also: ID., *The Rights of Refugees*, cit.; J.Y. CARLIER, *Droit d'asile et des réfugiés: de la protection aux droits*, in *Collected Courses of the Academy of International Law*, vol. 332, 2007; S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD (eds.), *EU Immigration and Asylum Law*, (Text and Commentary), 2nd Revised Edition, Leiden/Boston, 2015.

¹³ The main relevant EU rules are currently set in the Directive 2013/33/EU, cit.; the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*; the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 *on common procedures for granting and withdrawing international protection (recast)*. Although never applied, it is worthy here at least to mention the Directive 2001/55/EC *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons*. See: M. INELI-CIGER, *Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean*, in C. BAULOZ, M. INELI-CIGER, S. SINGER, V. STOYANOVA (eds.), *Seeking Asylum in the European Union*, Leiden Boston, 2015, p. 225 ss.

¹⁴ On the topic, see at least: B. NASCIBENE, *La condizione giuridica dello straniero. Diritto vigente e prospettive di riforma*, Padova, 1997. Recently: C. FAVILLI, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, in *Questione Giustizia*, n. 2, 2018, pp. 28-43.

¹⁵ See above, n. 3

¹⁶ See E. ZANIBONI, *La tutela dei richiedenti asilo*, cit., particularly at p. 219 ff.; C. FAVILLI, *L'Unione che protegge e l'Unione che respinge. Progressi, contraddizioni e paradossi del sistema europeo di asilo*, cit., underlining that the level of protection of the asylum seekers rights can be lower or higher according to the interactions among different legal systems in the course of time.

¹⁷ The Italian normative framework on asylum includes the Legislative Decree no. 286 of 25 July 1998 *concerning dispositions on immigration*; the Legislative Decree no. 251 of 19 November 2007 *on the qualification of third-country nationals or stateless persons as beneficiaries of international protection*, the Legislative Decree no. 25 of 28 January 2008 *on procedures for granting and withdrawing international protection*, the Legislative Decree no. 142 of 18 August 2015 on reception.

¹⁸ The reference is made to the so-called Dublin III Regulation: Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*. The Dublin

Southern European countries – with the so-called ‘country of first entry’ criterion – “has made the burden of examining the applications for international protection (and of post-recognition reception) untenable and unreasonable for border countries”¹⁹, because of the periodic migration crises. The distortive effect of the Dublin system, added to the fragmented and poor Italian pre-existing EU legislation, is also due to the proverbial inaction of the Italian parliament about immigration. The Italian legislator, in fact, maximizing the returns deriving from the well-known effect of the primacy of the UE law on national norms, avoided for years a serious public (and parliamentary) debate on issues related to the reception of migrants²⁰.

This already problematical scenario is further complicated by the multiplicity of Actors and Bodies scrutinizing, in their respective sphere of activity, the implementation of the *acquis* by the national enforcement bodies. Indeed, the evaluation of the legislative adequacy and of the suitability of State actions aimed at its implementation is reached not only through the incessant work of national Courts, but also by the interesting case-law of the two supranational Courts, the one in Strasbourg and the other in Luxembourg²¹. In brief, it can be said that judicial review of national initiatives and policies about reception acquired a *polycentric* character, as a result of regulatory claims stemming from at least three distinct legal systems, being often in conflict with each other. Describing the current way of asylum seekers protection as having a *polycentric* character, instead of the widely used definition of *multilevel protection*, seems to be more fruitful to the present writer, at least in the topic at stake.

Multilevel is a notion that implies multiple layers especially one above the other, but this is not the case hereof: the protection of human rights can be often a source of tension among different legal systems²², and national enforcement authorities have

regime was originally established by the Dublin Convention of 15 June 1990, which was replaced for the EU Member States by the Dublin II Regulation (Council Regulation (EC) no. 343/2003 of 18 February 2003), then reformed by the Regulation no. 604/2013. See: O. FERACI, *Il nuovo regolamento “Dublino III” e la tutela dei diritti fondamentali dei richiedenti asilo*, in *Osservatorio sulle fonti*, 2013, n. 2, pp. 1-37, www.osservatoriosullefonti.it/mobile-note-e-commenti/note-e-commenti-n-2-2013/633-o-feraci/file; G. GAJA, *La compétence des États dans l'examen des demandes d'asile*, in B. BONAFÈ et al. (eds.), *The limits of international law - Essays in honour of Joe Verhoeven*, Brussels, 2014, pp. 139-145; S. FRATZKE, *Not Adding Up: The Fading Promise of Europe's Dublin System*, Brussels, 2015, www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system; F. MUNARI, *The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime*, in *Diritti umani e Diritto internazionale*, 2016, pp. 517-547; C. FAVILLI, *La crisi del Sistema Dublino: quali prospettive?*, in M. SAVINO, *La crisi migratoria tra Italia e Unione europea: diagnosi e prospettive*, Napoli, 2017; M. DI FILIPPO, *The allocation of competence*, cit.

¹⁹ See G. CAGGIANO, *Alla ricerca di un nuovo equilibrio*, cit. p. 468.

²⁰ See for instance C. HEIN (ed.), *Vent'anni di storia del diritto d'asilo in Italia*, Roma, 2010.

²¹ “According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law”, *N. S. v Secretary of State for the Home Department and Others*, 21 December 2011, C-411/10, par. 77.

²² See: E. BENVENISTI, A. HAREL, *Embracing the tension between national and international human rights law: The case for discordant parity*, in *International journal of Constitutional Law*, 2017, vol. 15, n. 1, pp. 36-59.

(quickly) to deal with evolving international sources of law whose interpretation of new cases can bring to different (or even conflicting results). Indeed, we are dealing with one of those “dialogues” (but in some cases we should say “confrontations”²³) between the Court of Strasbourg and the Court of Luxembourg that has been maintained for years²⁴ even on the ground, as recently noticed, of the interpretation of the standards established at the European level for the reception of asylum seekers. The latter, it must be recalled, is bound to apply rights protected by the ECHR (in their living interpretation) through the art. 6(3) TEU and the art. 52 of the European Charter of Fundamental Rights, which acquired after the Lisbon Treaty the same legal value as the Treaties and contains, in turn, provisions which may affect State obligations in the field of reception, such as articles 4 and 18²⁵.

As regards the EU acts of secondary legislation, in the context of this research the “Reception Directive” (Directive 2013/33/EU) is an obligatory reference. It laid down principles that, for the reasons explained above, are presumed to belong to the aforementioned baskets of supranational obligations²⁶. Last but not least, it stems from the judgments that we are going to examine how the overall critical picture of the Italian reception conditions has been brought to light, in many cases, also thanks to the reports produced by international agencies for human rights protection, whose procedural relevance is strongly increased during the years. Among the first decisions of the European Court of Human Rights that have benefited in the development of their reasoning of the important contribution of these reports, we can mention the *M.S.S. case*²⁷. Even through an unusual appreciation of this type of reports, the Court of Strasbourg on that occasion condemned Greece in relation to art. 3 ECHR for the conditions to which the applicant had been subjected, both in the detention centres, and

²³ See recently, M. CARTABIA, *Convergenze e divergenze nell'interpretazione delle clausole finali della carta dei diritti fondamentali dell'Unione europea*, in *Rivista AIC*, 22 May 2018, n. 2 (available online), p. 17: “[I] giudici parlano per sentenze, che sono atti di decisione che optano per una soluzione, escludendone altre: le loro modalità di azione sembrano non lasciare spazio all'interlocuzione e allo scambio reciproco; sicché, quelli che normalmente sono definiti dialoghi giurisdizionali in realtà non sono che monologhi”.

²⁴ See recently: B. DE WITTE, *The Preliminary Ruling Dialogue: Three Types of Questions Posed by National Courts*, in B. DE WITTE, J. MAYORAL, U. JAREMBA, M. WIND, K. PODSTAWA (eds.), *National Courts and EU Law: New Issues, Theories and Methods*, Cheltenham 2016, pp. 15-25.

²⁵ On this point it is interesting a dictum of the Italian Constitutional Court that, with the sentence No. 63 of 2016, stated that “in order for the EU Charter of Rights to be invoked [...] it is therefore necessary that the particular matter subject to internal legislation [...] be ruled by European law - as pertaining to Union acts, national acts and conducts that implement EU law [...] and not just national norms without any relation to this law” (our translation).

²⁶ Some of the obligations under the Reception Directives include: recognition of a dignified standard of living; highly circumscribed freedom of movement rights; the right to be provided with some form of shelter, material reception conditions, a circumscribed right to education for children under 18; protection of particularly vulnerable asylum seekers; a limited right to work.

²⁷ European Court of Human Rights, Grand Chamber, judgment of 21 January 2011, application no. 30696/09, *M.S.S. v. Belgium and Greece*. The application refers to a case dated 2008; since October 2010 Belgium has suspended transfers to Greece (as previously done by Germany, the United Kingdom, Sweden, Holland, Iceland and Norway). See: V. MORENO-LAX, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece*, in *European Journal of Migration and Law*, 2012, n. 14, pp. 1-31.

once released (forced to live on the streets, without any assistance), as well as in relation to art. 13 (in conjunction with art. 3), for the serious inadequacies of the asylum procedure; and Belgium, in relation to art. 3 ECHR, for having exposed the applicant to such a risk, as he had been transferred there in application of the Dublin II Regulation, and in relation to art. 13 ECHR, being absent any effective remedy against this transfer.

3. The progressive emergence of “structural problems” in the Italian asylum seekers’ reception ‘system’

The rulings, as well as the analysis of other legally relevant sources, as we better will see further, contribute to shedding light on the damages produced on the Italian reception system by a management of migratory flows conceived, according to the words of the Chamber of Deputies Inquiry Commission on the Reception and Identification System²⁸, as a “permanent emergency”, because of its implementation ignoring any planning and despite the fact that the increase in incoming migrations has become structural in Italy since over thirty years²⁹. Moreover, the emergency-based management system, publicly reported at least since 2007³⁰, has contributed to a range of administrative and criminal issues, especially in terms of lowered controls in the procedures for awarding tenders, monitoring reception facilities, etc. The lack of transparency has also allowed, in some cases, organized crime to infiltrate the management of the structures, lowering the levels of services offered by Italy (even if often paid dearly) and stealing useful resources for the assistance of the most vulnerable people.

Without going too far back in time, the problems already emerged in 2011, the year of the massive waves of migrants coming from the Maghreb towards the coasts of the Mediterranean EU countries, caused by the harsh repression of the uprisings known as

²⁸ The complete title of the report made by the Inquiry Commission of the Chamber of Deputies is: CAMERA DEI DEPUTATI, XVII legislatura, *Relazione della Commissione monocamerale di inchiesta sul sistema di accoglienza e di identificazione, nonché sulle condizioni di trattenimento dei migranti nei centri di accoglienza, nei centri di accoglienza per richiedenti asilo e nei centri di identificazione ed espulsione*, 3 maggio 2016, Atti Parlamentari 47, disegni di legge e relazioni - documenti - doc. XXII, p. 148 (from now on: INQUIRY COMMISSION). See below, para 6.1.

²⁹ Among others, C. HEIN (ed.), *Vent'anni di storia del diritto d'asilo*, cit.

³⁰ See, for instance, the “Annual report” of the Italian *Corte dei Conti* of 2007: “Si ripropone ormai dal 2002 il ricorso alla gestione straordinaria attraverso le ordinanze di protezione civile [...] diventato l'ordinario strumento attraverso il quale opera l'amministrazione sia per realizzare le strutture necessarie a fronteggiare l'afflusso di clandestini [sic] sia per assumere, con contratti di lavoro a tempo determinato, unità di personale anche con riferimento all'espletamento degli adempimenti connessi al riconoscimento dello status di rifugiato. [...] Il ricorso generalizzato alle ordinanze di protezione civile, anche per risolvere problematiche che dovrebbero essere affrontate con gli ordinari strumenti normativi [...]. Appare non conforme ai principi generali l'utilizzo delle ordinanze di emergenza, alle quali si dovrebbe fare ricorso solo per affrontare situazioni realmente imprevedibili, per governare avvenimenti che ormai hanno acquisito un carattere ripetitivo ed atteso. [...] Al di là delle finalità proprie delle deroghe [...] la disciplina di settore appare inadeguata alla complessità dei compiti attribuiti all'Amministrazione”. CORTE DEI CONTI, *Relazione annuale per l'esercizio finanziario 2007*, Roma, 2008, p. 121.

“Arab spring”. In fact, in the first half of February 2011, following the “Jasmine Revolution”, thousands of Tunisians disembarked on Italian coasts (some of them were looking for a job, some other people also “left the country because of the violence, the instability of the legal system and the precarious public order in Tunisia”³¹). This wave was then followed by other massive inflows of migrants from Egypt and Libya, and it was at that time that national and supranational Courts began to face migration issues with regard to reception procedures.

Thus State responsibilities emerged at different levels and on different fields: from the procedures for asylum applications – so superficial to materialize inadmissible risks of pushback in the countries of origin – to the difficult detention conditions reserved to migrants³². These decisions also affected States that, despite the allocation system of the applications created by the Dublin Regulation, based on a presumption of conformity of Member States reception conditions to the standards established at European level, automatically applied procedures for transferring migrants to the first country responsible for examining the applications, regardless of the material conditions of the applicants in these States³³. At least in the beginning, in fact, these proceedings did not directly concern Italy. They were initiated before supranational Courts, which quickly (and incisively) ended up impacting the Italian administrative system and putting pressure on the Governmental Authorities of some Member States pushed to rethink and improve the standards of reception. From another standpoint, the analysis of some lawsuits arisen in that period shows how they gradually “unmasked” the shortcomings of the Southern European countries reception systems, certainly in difficulty because overloaded and penalized by the well-known mechanisms determining the State responsible for an asylum application requested by the Dublin Regulation.

4. The case-law of national and supranational Courts facing migration issues with regard to reception procedures and standards

To appreciate the evolution in case-law, as well as the level of supervision upon the material adequacy of the standards, according to the aim of our research, it is sufficient to remember that already in 2009, in *S.D. v. Greece*³⁴, the European Court of Human Rights found a violation of article 3 for the degrading conditions and the excessive length of detention suffered in Greece by a Turkish refugee victim of torture in his country. In addition to the responsibility of Greece for this kind of violations, and

³¹ See UNHCR Press Release, 15 February 2011, at <http://www.unhcr.org/4d5a92b56.html>.

³² See for ex. European Union Agency for Fundamental Rights (FRA), *Fundamental rights at Europe's southern sea borders*, Vienna, 2013, p. 49.

³³ In such circumstances, the use of the sovereignty clause to prevent transfers, provided for by art. 3, par. 2 of the so called “Dublin II” Regulation (see above n. 8) as an expression of a right reserved to States party to instruct the application notwithstanding the criteria established by that Regulation, is now compulsory.

³⁴ European Court of Human Rights, judgment 11 June 2009, application no. 53541/07, *S.D. v. Greece*.

especially by reason of structural deficiencies in the Greek reception system, the European Court stated later, in *M.S.S. v. Belgium and Greece*³⁵ (January 2011), in which were both held responsible of violations of the Convention. According to the Court, in fact, Belgium should have refrained from applying the rules contained in the “Dublin II” Regulation (at that time in force) transferring to Greece an asylum seeker in a situation at risk such as in that case.

The Court of Justice of the European Union (which had been given powers on this subject only by the Lisbon Treaty) then agreed on the same principle by the judgment of 21 December 2011 in the case of *N.S. and others*³⁶ (where *M.S.S.* is expressly quoted). On that occasion, the Court stated that the systemic weaknesses in asylum procedures and asylum seekers’ reception conditions are grounded reasons for EU Member States to believe that the applicant, if transferred, would be in danger of suffering inhumane and degrading treatments pursuant to article 4 of the EU Charter of Fundamental Rights (and that, as recently recalled by the Court of Justice³⁷, finds correspondence in article 3 ECHR, by virtue of the clause contained in article 52 of the Charter)³⁸.

After a large number of judgments seeing Greece as respondent, the international Courts then turned, quite predictably, their spotlights on Italy. The first applications were introduced in the national Courts of some EU Member States, and they had the purpose of obtaining a sentence against Italy on the basis of the reasoning and the principles formulated in the judgments given against Greece. If, at the end of 2012, a Court of the United Kingdom affirmed that the Italian system did not show any particular shortcomings³⁹, a kind of “crossfire” of national decisions has caught Italy since 2013, with the acceptance of some applications introduced in German administrative Courts. The Gelsenkirchen Administrative Court (on 17 May and 11 April 2013) and the Frankfurt am Main Administrative Court (on 9 July 2013) ruled against the return of asylum seekers to Italy under the Dublin Regulation, irrespective of whether they belonged to categories deemed to be vulnerable. In particular, in its judgment of 9 July 2013⁴⁰, the Frankfurt Administrative Court held that the shortage of places in Italian reception centres and the living conditions would have entailed a violation of article 3 of the Convention if a 24-year-old Afghan asylum seeker had been sent back from Germany to Italy⁴¹.

³⁵ European Court of Human Rights, Grand Chamber, *M.S.S. v. Belgium and Greece*, cit.

³⁶ Court of Justice of the European Union, judgment of 21 December 2011, *N.S. v Secretary of State for the Home Department and Others*, case C-411/10.

³⁷ Court of Justice of the European Union, judgment of 16 February 2017, *C. K. e a. c. Republika Slovenija*, case C-578/16, par. 67.

³⁸ This principle has been then codified in the “Dublin III” Regulation.

³⁹ “The evidence does not demonstrate that Italy’s system for the reception of asylum seekers and refugees, shortcomings or casualties”. *Court of Appeal for England and Wales*, dec. 17 Oct. 2017.

⁴⁰ No. 7 K 560/11.F.A.

⁴¹ In its judgment the Administrative Court held as follows: “25. The court is convinced that systemic deficiencies exist in the asylum seekers’ reception conditions in Italy which constitute substantial grounds for believing that the applicant, if he were to be transferred to that country under the Dublin Regulation, would run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article

In February 2014, an interesting ruling by the Supreme Court of the United Kingdom⁴² then followed, by which the principle has been expressed according to which, regardless of the existence of “systemic deficiencies in the asylum seekers reception system in Italy”, English Courts should examine applicant situation on a case-by-case basis when a transfer to Italy is involved, with a consequent risk of violation of article 3 of the Convention. This is because, according to judges, “It is self-evident that a violation of article 3 rights is not intrinsically dependent on the failure of a system”.

On 4 November 2014, the European Court of Human Rights gave its judgment against Switzerland on the well-known *Tarakhel* case⁴³, where, among other things, it meant to give particular importance to the assessment of the best interests of the children, considered in a particular situation of vulnerability also by virtue of the Directive 2013/33 (see articles 21-23). It should be noted that the Swiss Federal Administrative Court in three cases decided in 2013⁴⁴, after having expressed some reservations about the status of asylum seekers - “in particular for individuals accompanied by a child” - arrived in Switzerland from Malta and to be returned there in application of the Dublin system, had been able to critically address the issue of referrals to Italy⁴⁵. In an interesting case concerning the removal from Italy of a Somalian family with three young children, it held that Switzerland should apply the “sovereignty clause” provided for by the Dublin Regulation, which allows States to suspend transfers on humanitarian grounds, on account of the conditions in which the applicants would be taken charge of in Italy – considered inadequate – and the parents’ state of health.

4 of the EU Charter of Fundamental Rights (see the Court of Justice of the European Union, *N. S. v Secretary of State for the Home Department and Others*, cit., EuGRZ 2012 24, par. 94)”.

⁴² Judgment of 19 February 2014, *UKSC 12*.

⁴³ European Court of Human Rights, Grand Chamber, judgment of 4 November 2014, application no. 29217/12, *Tarakhel v. Switzerland*. The application concerned Switzerland because, although not a State party of the EU, it ratified an agreement for the application of the mechanism created by the Dublin Regulation. In this case, the attention of the Court of Strasbourg has been put on the conduct of the Swiss authorities for organizing the transfer of the Afghan *Tarakhel* family, composed of 6 members (4 of them were children), not taking care of its fate once arrived in Italy. For some comments by Italian scholars, see E. PISTOIA, *Lo status del principio di mutua fiducia nell'ordinamento dell'Unione secondo la giurisprudenza della Corte di giustizia. Qual è l'intruso?*, in *Freedom, Security & Justice: European Legal Studies*, 2017, n. 2, p. 10 ff.; R. PALLADINO, *La “derogabilità” del “sistema Dublino” dell'UE nella sentenza Tarakhel della Corte europea: dalle “deficienze sistemiche” ai “seri dubbi sulle attuali capacità del sistema” italiano di accoglienza*, in *Diritti umani e diritto internazionale*, 2015, vol. 9, n. 1, pp. 226-232, according to which, even in the absence of “systemic shortcomings”, the Italian system for the reception of asylum seekers is considered affected by problems of overall stability; S. BOLOGNESE, *Il ricorso a garanzie individuali nell'ambito dei c.d. “trasferimenti Dublino”: ancora sul caso Tarakhel*, in *Diritti umani e diritti fondamentali*, 2015, vol. 9, n. 1, pp. 233-237; M. PASTORE, *La sentenza della Corte EDU Tarakhel c. Svizzera e le sue implicazioni per l'Italia e per il controverso rapporto tra sistema Dublino e rispetto dei diritti fondamentali*, in *Diritto immigrazione e cittadinanza*, 2014, nn. 3-4, p. 115 ff.; S. FACHILE, L. LEO, *La Corte EDU e la tutela dei diritti fondamentali dei migranti e dei richiedenti asilo*, in *Questione giustizia*, 2014, n.3, pp. 121-134.

⁴⁴ See: E-5194/2012 of 15 February 2013, E-1341/2012 of 2 May 2012 and D-1689/2012 of 24 April 2012.

⁴⁵ See: E-1574/2011 of 18 October 2013.

The *Tarakhel* case involved an Afghan asylum-seeking family that had initially entered Italy and then moved irregularly to Switzerland, where it applied for asylum. In condemning Switzerland for not having paid attention to the fate of the Afghan family after its return to Italy, especially because no guarantees had been given on a common accommodation, the Court of Strasbourg indirectly disapproved the reception conditions of asylum seekers in Italy even going beyond the “systemic deficiencies” criterion of the M.S.S. decision. In particular, it focused on children conditions, as subjects in a situation of particular vulnerability, notably when separated from the rest of the family.

Compared to what it had stated only a few months earlier in *Mohammed Hussein*⁴⁶ – where, despite some flaws in the Italian reception system, their “systemic” character had not been recognized – the European Court formulated a partially different reasoning in *Tarakhel*. Yet, the decision was taken by a majority of 14 judges against 3 and in the joint partially dissenting opinion some doubts are expressed about the arguments put forward in the judgement, particularly concerning the lack of evidences sufficient to prove a risk of violation of art. 3. To sum up, the decisions mentioned so far indicate that the Dublin Regulation does not apply when the referral is made to a Member State whose reception standards are not adequate, especially if it involves children.

Though briefly, other important limits to the application of the Dublin Regulation should also be stressed. The Court of Justice has specified on several occasions that not even the reception conditions of the referring State can be below the minimum threshold established by the Reception Directive⁴⁷. Recently, this obligation has been better clarified by the Court of Luxembourg with regard to the interesting case of an asylum seeker in a “particularly serious physical or mental illness”, whose transfer would result in a real and proven risk of a significant and permanent deterioration in his/her state of health, regardless of the quality of reception and healthcare systems available in the Member State responsible for examining the application⁴⁸. Therefore, according to the Court of Justice, the State addressing a request to take charge to another Member State in application of the Dublin III Regulation has the obligation to assess whether the transfer could result in a risk of inhuman or degrading treatment for the person concerned in accordance with article 4 of the Charter.

The emphasis placed by the EU Court on the assessment of the consequences of the transfer (although in the rather exceptional hypothesis of a seriously ill asylum seeker) can be considered a rapprochement between divergent positions previously expressed in the case-law of the two supranational Courts. As far as article 3 ECHR is concerned, in

⁴⁶ *Mohammed Hussein and Others*, 3 April 2013.

⁴⁷ See Court of Justice of the European Union, judgment of 27 September 2012, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, case C-179/11, according to which a Member State where an asylum application has been lodged is obliged to grant the minimum reception conditions set out in that Directive also to an asylum seeker for whom the State decides to address a request to take charge or take back to another Member State considered responsible for examining the application for international protection.

⁴⁸ Court of Justice of the European Union, judgment of 16 February 2017, *C.K. et al. v. Republika Slovenija*, case C-578/16, par. 73 and 74.

the general reasoning of the European Court of Human Rights the element of the individual risk, and consequently the need to assess the situation on a case-by-case basis, is often emphasized⁴⁹. Therefore, the aforementioned assessment on the existence of a reception “systemic deficiency” is put on the background. On the contrary, the Court of Luxembourg has repeatedly referred to the latter. It is worthy to note that the reference to the parameter of “systemic deficiency” in the reception conditions as “the only way in which the applicant for asylum can call into question the choice of that [the Dublin Regulation] criterion”, it is clearly stated in the CJEU *Shamso Abdullahi* case⁵⁰. The consequence of this diversity of approach is not of little significance. In the opinion of the writer the situations of “systemic deficiencies” can be harder to prove than that (subjective) conditions of “individual risk”. As a consequence, the threshold required by the first kind of scrutiny could be uneasy to reach.⁵¹

If our reasoning can be deemed correct, that different approaches seem to confirm what we called above the *polycentric* character of the settled mechanisms offering international protection to the asylum seekers⁵². Moreover – not to mention the rest – in this different construction the principle of “mutual trust”, which is crucial for the Dublin mechanism and considered a general principle of the EU law⁵³, is in no way questioned, and therefore there are no (negative) effects on the solidity of the system.

Turning to the ‘material’ reception conditions and facilities, article 18 of the Directive provides the possibility of derogating from the standards set out in the same article (which contribute to define what the Italian legislator has qualified as integrated reception) only “exceptionally”, “in duly justified cases” and, anyway, “for a reasonable period which should be as shorter as possible” when “housing capacities normally available are temporarily exhausted” (article 18, paragraph 9). In *Saciri*⁵⁴, the Court of Justice set out the principle according to which assistance and services guaranteed to the received person must assure an adequate quality of life to asylum seekers in terms of health and subsistence. In fact, “the general scheme and purpose of Directive 2003/9

⁴⁹ Court of Justice of the European Union, *Tarakhel*, cit., parr. 103-104.

⁵⁰ Court of Justice of the European Union, Grand Chamber, judgment of 10 December 2013, *Shamso Abdullahi v. Bundesasylamt*, case C-394/12, par. 60 (italic added). An interesting standpoint from which the decision can be examined, concerning its implications on the principle of ‘direct effect’ of the EU Law and the potential limitations to the fundamental right to an effective remedy that could stem from the reasoning of the Court, in E. CANNIZZARO, *Interessi statali e interessi individuali nella politica dell’Unione relativa a visti, asilo e immigrazione*, in G. CAGGIANO (ed.), *I percorsi giuridici dell’integrazione*, Torino, 2014, pp. 235-38.

⁵¹ Significantly, before analyzing the applicants’ individual position in the *Tarakhel* case, the Court ruled that the “current situation in Italy can in no way be compared to the situation in Greece at the time of the MSS judgment”, where only a small fraction of asylum-seekers could be accommodated and “the conditions of the most extreme poverty...existed on a large scale” So there could not be “a bar to all removals of asylum seekers to that country”. Having said that, the Court decided not to consider unfounded “the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions” (*Tarakhel*, cit., parr. 114-115).

⁵² See above, par. 3.

⁵³ E. PISTOIA, *Lo status del principio di mutua fiducia*, cit.

⁵⁴ Court of Justice of the European Union, judgment of 27 February 2014, *Federaal agentschap voor de opvang van asielzoekers c. Selver Saciri and others*, case C-79/13.

and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected”, the European Court said, “preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive” (§ 35). It follows that “the amount of the financial aid granted must be sufficient to ensure an adequate standard of living for the health of applicants and capable of ensuring their subsistence” (§ 37). Moreover, “it is apparent from recital 7 in the preamble to that directive that the directive seeks to lay down minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States” (§ 39).

The quoted judgement lays down another principle, which is decisive in evaluating the compatibility of the Italian system with the European legal framework concerning the relation between extraordinary and ordinary reception measures. In fact, the Court of Justice, while recognizing a margin of appreciation to States in choosing the concrete measures to be adopted, clarifies that compliance with the minimum standards provided by the Directive must be in any case guaranteed at national level (§ 49), since “it must be pointed out that it is up to Member States to ensure that those bodies [i. e. bodies part of the general public assistance system] meet the minimum standards for asylum seekers’ reception, saturation of the reception networks not being a justification for any derogation from meeting those standards” (§ 50).

5. The compatibility of the Italian reception conditions with the European *acquis* through the lens of the inquiries on the asylum seekers’ reception conditions

The wide body of laws deriving from the European Union ‘building blocks’ of Regulations and Directives in the Asylum field found a kind of legislative *vacuum* in the Italian legal system. That empty space has been progressively filled by the implementation of the European *acquis*⁵⁵, but, moving from the theory to the practice, a comparison of the legal framework with the conditions in national reception facilities seems to give to the interpreters some interesting findings. Thus, decisions by some

⁵⁵ It could be worthy to note that the national acts of implementation in some cases spread the ‘room for manoeuvre’ of the Italian administrative bodies in determining and managing potentially new categories of asylum seekers not protected by the EU law, as in the case of flows of the so called ‘environmentally induced migration’. Displaced persons seeking asylum for reasons of “natural disasters”, indeed, are potentially entitled in Italy to receive protection (see the art. 20 of the Legislative Decree no. 286 of 25 July 1998), but that particular situation is not covered by the already quoted Directive 2001/55/EC *on minimum standards for temporary protection* (see above n. 8). A special chance to get a permit of stay even for reasons of environmental degradation has been (incidentally) mentioned in an interesting recent decision of the *Tribunale ordinario di Firenze (XY v. Ministero dell’Interno – Commissione territoriale per il riconoscimento della protezione internazionale*, n. 14046/2016, 19 February 2018) broadening the interpretation of article 10 par. 3 of the Italian Constitution (see above n. 3).

nationals and international Courts have contributed to the development of a greater awareness of the unsustainability of the reception conditions in Italy, duly reported by judges. In a significant paragraph in the *Tarakhel* judgement we read: “The reception and accommodation system in Italy is *very confusing* and *the Italian authorities themselves seem to lack a full overview of its capacity and effectiveness*”⁵⁶.

Article 28 of the Directive 2013/33 states that Member States shall put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of reception conditions level are established. Yet, a report published in 2017 by the European Agency for Fundamental Rights (FRA) on the mechanisms established at national level to ensure appropriate oversight on the standards applied in reception facilities stressed the wide diversification of reception conditions among (and even within) Member States⁵⁷. The survey, conducted through interviews with national stakeholders, showed that no good practice has been identified in Italy, as well as in Greece and Poland, where there isn't any independent body responsible for the oversight of reception conditions⁵⁸. In fact, the settlements of the different standards applied – that may vary depending on the type of reception facility existing in Italy – are left to the bilateral negotiation between the Interior Ministry and the facilities operators. Additionally, in Italy, France and Greece, asylum seekers cannot lodge a complaint against poor living standards in reception facilities, despite the fact that living conditions, capacity constraints and unequal standards within the country are considered to be the main challenges of the Italian reception system⁵⁹.

Moreover, the 2013 Reception Directive – while admitting exceptions to the ordinary reception system in particular situations (for example, due to the geographical situation or to the specific structure of the reception centre) – specifies that “any exception to these guarantees is temporary”. This excludes the stabilization over time of extraordinary measures, which “should only be applied in exceptional circumstances and should be duly justified” (see recital 19 of the Preamble). The acknowledgment of many asylum seekers' particular situation upon their arrival in Italy also touched the public opinion and led the Italian Parliament to set up the already mentioned Inquiry Commission on the reception and identification system, as well as on migrants' detention conditions. Before looking at the main findings of that report, it is important to underline, from another standpoint, that the mentioned inadequacies in practical implementation of the general principles established by the Treaties and specified in their content and scope in the case-law, provide useful elements in order to understand the reasons of the aspirations of many asylum seekers to stay in Italy as little as possible, and try to reach Northern Europe countries by all means. To the desire to reunite with relatives or acquaintances already integrated in those societies, it should be

⁵⁶ INQUIRY COMMISSION, cit. above, n. 29, par. 28 (italic added).

⁵⁷ European Union Agency for Fundamental Rights (FRA), Current migration situation in the EU: Oversight of reception facilities, Vienna, September 2017.

⁵⁸ See also below, par. 6.1.

⁵⁹ *Ibid.*

added, in fact, the wish to move away from a State that is not always able to ensure an adequate and decent reception, especially when compared to that offered by the Member States in Northern Europe. Last but not least the well-known weakness of the national reception system must also be related to the widespread phenomenon of foreign workers illegal exploitation in the agricultural sector⁶⁰. The many cases of exploitation, in fact, are eased by the long period of time that exists between the moment the application is lodged and the decision from the relevant institutions, exceeding one year in some areas of the country.

5.1. The Chamber of Deputies inquiry on the asylum seekers' reception conditions and the cases of criminal infiltrations encouraged by the revenues from the asylum seekers' reception centres management

According to article 82 of the Italian Constitution, “[e]ach House of Parliament may conduct enquiries on matters of public interest ... [The] Committee of Enquiry may conduct investigations and examination with the same powers and limitations as the judiciary”.

The decision of a house of the Italian Parliament to establish an inquiry commission on the reception system⁶¹, in order to ascertain whether in the CDA [Centri di accoglienza], in the CARA [Centri di accoglienza per richiedenti asilo] and CIE [Centri di identificazione ed espulsione] such misconducts and acts have been committed infringing the fundamental rights or the dignity of hosted migrants⁶² was taken a few weeks after the publication of the *Tarakhel* judgement. The final report, published in May 2016, is full of inspiring suggestions, even in legal terms. For example, it stresses “the clear difference between the theoretical model drawn by the legislative decree n. 142 of 2015 and the material current configuration of the reception system that, also taking into account a transitional phase of gradual approximation, is still very far from the legal framework”. Rather, according to the Commission, there remains a situation in which some larger structures (the new “C.A.R.A.” or the old government centres) are joined by smaller ones (including a very high number of Extraordinary reception centres – CAS), which does not respond to the allocation desired by the legislator into “first level” and “second level” reception⁶³. Under the legal scheme, instead, the distinction between first reception structures (available to provide initial care at the arrival of

⁶⁰ The problem, which does not concern Italy alone, has recently been brought to the attention of the European Court of Human Rights that with an interesting sentence condemned Greece for the violation of article 4 of the Convention on the prohibition of slavery and forced labour. See European Court of the Human Rights, judgment of 30 March 2017, application no. 21884/15, *Chowdury et al. v. Greece*.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 8.

⁶³ This set-up of the reception system is provided by the Legislative Decree no. 142/2015, which transposed EU Directives no. 2013/33 and no. 2013/32 into the Italian legal system.

migrants) and second reception centres (equipped for medium and long-term stays, pending the decision on the application) should play a key role.

Actually, people often enter a reception centre even before the identification and remain there well after the submission of their application for international protection, sometimes until the final decision. “The unsuccessful realization of the theoretical model of reception drawn by the legislative decree n. 142 of 2015”, it is noted, “also hinder the concrete definition of the nature and the characteristics of the centres set out in the mentioned law”. CASs, which are “temporary centres”, according to “the investigation and the data acquired ... absorb about eighty percent of the migrants hold in official structures”.

The last part of the report by the parliamentary inquiry commission analyses the results of judicial proceedings involving many directors of reception centres. Some recent investigations, known to the public as “Mafia capitale”, have brought to light corruption in Rome and, more generally, a system of hidden political and economic connections between local administrators and entrepreneurs in the management of every type of tenders. Trials also involved directors of some important centres entrusted by the State with the migrant reception management not only in the area around Rome, but also in other Regions of Italy. The parliamentary inquiry highlighted how the criminal infiltrations emerged after a lengthy investigation in a large structure in the surroundings of Rome and another one in Mineo, Sicily, should be considered, “because of their complexity and the wide media interest, .. a sort of paradigm of the criminal business link in the management of migratory emergency, and they are not isolated cases”⁶⁴.

An even more recent investigation concerned the CAS of Camigliatello (Cosenza), where about thirty refugees of various nationalities were taken to work the land in the morning receiving a pay of twenty euros for 11 hours. The investigations led to the arrest of 14 people accused on various grounds of illicit brokering and exploitation of migrant work⁶⁵. In another investigation conducted in Calabria, an entrepreneur, director of a reception centre and winner of a tender for € 12,5 million, in excellent relations with some well-known politicians including the former Italian Minister of the Interior, was strongly suspected of being in a friendship and business relationship with prominent members of the local mafia⁶⁶. Other episodes show how short is the step from economic speculation to real acts of violence upon individuals that should be provided by the State with maximum protection⁶⁷ instead.

⁶⁴ INQUIRY COMMISSION, cit. (above n. 29), p. 148.

⁶⁵ I. SESANA, *La buona accoglienza passa anche dal lavoro. L'Italia non l'ha capito*, in *Altraeconomia*, 1 October 2017, n. 197, available *on line*.

⁶⁶ See the journalistic inquiry on the magazine *L'Espresso* of 12 February 2017, p. 44.

⁶⁷ A few months ago, a 19 years-old asylum seeker from Gambia, hosted in a CAS in Gricignano d'Aversa (Naples), Alagiee Bobb, after working in the countryside with shifts from 7 AM to 7 PM for 15 euro a day and with serious problems of health due to the consequences of an accident, in an act of extreme despair, set fire to the structure to protest against the poor life conditions and the lack of material and health assistance. At that point, he was faced by one of the members of the consortium that runs some CAS in the Campania Region, which put the barrel of a gun in his mouth and then pulled the trigger

5.2. The “reception lottery”

These examples, taken from a rich headlines list which sometimes got an international media coverage⁶⁸, are expressive of administrative and social dysfunctions that the mentioned parliamentary report highlighted giving an important contribution in order to shaping the real framework of the reception system in Italy. It seems that the widespread organizational and planning flaws have been used as a pretext in order to allow the trigger of emergency procedures derogating from the ordinary tender schemes for the reception centres management. With the almost absolute certainty of not undergoing any form of administrative control, organized crime had little difficulty in grabbing a significant part of the rich budgets allocated by the Ministry of Interior to cooperatives dedicated to assisting migrants, thus infiltrating their management. “Improvised entrepreneurs of the sector”, according to the report of the Inquiry Commission, “taking advantage of a management in permanent emergency, succeeded in winning many tenders for the opening of CASs”. Therefore, substantial resources have been drained without any consideration for the conditions suffered by many asylum seekers.

In a recent report by the NGO Oxfam, it is recommended, among other things, to improve the traceability of public funds destined to migrants “also through their clear reporting”⁶⁹. The report in question was called, not surprisingly, “The reception lottery in Italy”: the research has revealed wide differences in reception levels within the country, for example between the centres located in the North regions and those in the South⁷⁰. At the same time, according to reports recently issued by other NGOs, the number of people stranded at the borders and living in unofficial settlements, with limited access to basic needs and healthcare is increasing⁷¹.

twice. Arrived at the hospital in very serious conditions, the young man will remain with a mangled jawbone and a bullet positioned a few centimetres from the spine.

⁶⁸ See, for example: *Mafia controlled Italy migrant centre, say police*, in *BBC news* (online), 15 May 2017; www.bbc.com/news/world-europe-39922085 and *Migrants are more profitable than drugs’: how the mafia infiltrated Italy’s asylum system*, in *The Guardian* (online), 1 February 2018, www.theguardian.com/news/2018/feb/01/migrants-more-profitable-than-drugs-how-mafia-infiltrated-italy-asylum-system An interesting list of the cooperatives working in the migration field in the different Italy’s regions, and the relative public funds they managed, can be found in: *Le 15 coop dalle “uova d’oro”*: 100 milioni lucrati sui profughi, in *Il Giornale*, 12 luglio 2017, www.ilgiornale.it/news/cronache/ecco-i-conti-segreti-delle-coop-ricche-grazie-ai-migranti-1418973.html.

⁶⁹ OXFAM, *La lotteria dell’accoglienza in Italia*, in *Oxfam briefing papers*, 8 November 2017, available *on line*.

⁷⁰ The issue of the contrasts in the reception system is also stressed by P. MORI, *Profili problematici dell’accoglienza dei richiedenti protezione internazionale in Italia*, in *Il Diritto dell’Unione Europea*, 2014, n. 1, pp. 127-144.

⁷¹ See: MÉDECINS SANS FRONTIÈRES (MSF), *Out of Sight: Informal settlements, social marginality, obstacles to access to healthcare and basic needs for migrants, asylum seekers and refugees*, II ed., 13 February 2018, https://www.msf.fr/sites/default/files/out_of_sight_130218.pdf

It is important to note, anyway, that the question of the reception gap is not only expressing an Italian failure. In insisting on the urgency of “establishing a common asylum system”, the European Parliament has made it clear that there are still too many differences among Member States in the procedures for international protection applications, as well as too much bureaucracy and risks for the protection of vulnerable people⁷². The same Resolution “recommends that the necessary measures be taken to support those Member States which, for geographical reasons, are involved more intensively in initial reception”.

After the implementation of the Legislative Decree n. 142 of 2015, access to the labour market for asylum seekers (albeit with fixed-term contracts) doubled between 2015 and 2016⁷³, and the overall prospects of the SPRAR network (the Italian Protection System for Asylum Seekers and Refugees) – established thanks to the collaboration of local authorities for the implementation of reception projects spread throughout the national territory, and considered an example of excellence – seem encouraging. However, to date, the available places are not sufficient and many applicants risk, as we said, to remain in the reception centre until the outcome of the administrative procedure. Some extraordinary resources to deal with those problems have been recently allocated, but the same day in which the new Italian Government was to be sworn, the new Minister of the Interior promptly affirmed that “‘Go home’ to migrants will be one of our priorities”. He also declared the will “to give a nice cut to those 5 billion euro for migrant reception”⁷⁴. Then, only a few days after those statements, he got down to business and, adopting a clear strategy aimed to weaken the degree to which humanitarian organisations are involved in the reception of migrants arriving by sea, turned away a humanitarian rescue vessel carrying 629 migrants (included 123 minors, 11 young children and seven pregnant women) and threatened to do the same to other rescue ships of NGOs patrolling the Mediterranean Sea⁷⁵.

6. Which prospects for asylum seekers' reception systems?

⁷² The EP Resolution on “Refugees: social inclusion and integration into the labour market” of 5 July 2016 “Stresses that significant differences exist in the times and modalities of processing requests for international protection within Member States; highlights that slow and excessively bureaucratic procedures may hinder refugees and asylum seekers’ access to education and training, employment guidance and the labour market, the activation of EU and Member States’ programmes, and the effective and coordinated use of funds in this field, as well as increase the refugees and asylum seekers’ vulnerability to undeclared work and precarious working conditions”.

⁷³ It passed from 11.775 (4.473 of which started after 30 September) to 25.584. See I. SESANA, *La buona accoglienza*, cit.

⁷⁴ See: www.ansa.it/english/news/2018/05/31/conte-gets-mandate-for-govt-of-change_31f14d59-a014-44ce-aced-ff0d53c863f6.html. About the annual forecast of the Italian budget for the reception conditions, see below.

⁷⁵ New York Times, *Italy's New Populist Government Turns Away Ship With 600 Migrants Aboard*, 11 June, www.nytimes.com/2018/06/11/world/europe/italy-migrant-boat-aquarius.html

Making predictions for the future is always a very risky operation in the legal field, and even more in the European and international law's context. Nevertheless a careful analysis of the recommended policy inferable from some EU documents on the common management of migratory flows towards the borders of the Mediterranean Member States gives some remarkable indicators in order to better understand the evolving frameworks and prospects for the asylum seekers' reception systems. For example, the *Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*⁷⁶ reveals interesting data about the possible effects of its implementation on the current Italian legal framework on reception. In fact, it assumes that the financial support for Italy is subject to the adoption of a (further) change in approaching the issue of asylum seekers. In short, Italy can count on the European solidarity only if, on the one hand, it guarantees significant improvement of the overall structural reception capacity and, on the other hand, it implements a tightening of the administrative and procedural aspects linked to the examination of asylum applications. First of all, Italy is required to increase "Hotspots" capacity in order to reach 100% of "identification, registration and fingerprinting of all migrants". Secondly, it is invited to "prolong the current maximum duration of detention by making full use of the period allowed under EU legislation". This a quite interesting declaration, given that the Directive 2013/33 makes clear that Member States may not hold a person in detention for the sole reason that he has made an application for international protection. Furthermore, detention may be ordered only on the basis of an individual assessment of each case, if other less coercive alternative measures cannot be applied effectively⁷⁷.

Paradoxically, the European Court of Justice stated only a few of weeks later that, about the reception Directive, "the competent national authorities" have to ensure that detention measures "are proportionate to the aims pursued. Such a determination involves ensuring that all of the conditions referred to in paragraphs 44 to 46 of the present judgment are satisfied and, in particular, that, in each individual case, detention is used only as a last resort. Moreover, it must be ensured that that detention does not exceed, *in any case, as short a period as possible*".⁷⁸

In the abovementioned *Action plan*, it is also required to Italy to "[e]nsure sufficient capacity of judicial authorities and significantly speed up the examination of applications at both first instance and the appeal stage ... [to u]se rapid procedures, whereby the application is examined while the applicant is kept in closed centres, to prevent migrants absconding and to facilitate the return of those with inadmissible or manifestly unfounded claims". These results can be reached making a "wider use of

⁷⁶ European Commission, Brussels, SEC(2017)339 of 4 July 2017.

⁷⁷ Directive 2013/33, cit., article 8.

⁷⁸ See Court of Justice of the European Union, judgment of 14 September 2017, *K. v Staatssecretaris van Veiligheid en Justitie*, case C-18/16, par 48. (italic added).

inadmissibility grounds possible in appropriate cases”⁷⁹, and a “wider use of accelerated procedures”⁸⁰.

As it can be noted, the implementation of these measures makes the risk of a streamlining use of inadmissibility decisions very likely, especially since these would be applied in conjunction with increasingly common accelerated procedures (that statistically end with a denial of protection in a very high percentage, so that they could constitute an illicit anticipation of the decision on the merit). It is also stated in the document that “[d]etention capacity [should] be substantially increased to reach urgently at least 3,000 places”.

The European approach, therefore, leaves no room for misunderstanding: the main goal is to reduce as much as possible the new entries of aliens and to speed up the procedures for returning applicants not entitled to stay. That strategy must be realized in absence of serious initiatives allowing an adequate number of legal arrivals, and while very embarrassing news on the situation of the refugee camps in Libya are also revealed in important decisions issued by the Italian Courts⁸¹.

7. Concluding remarks. The jammed mechanisms of solidarity

The reception of asylum seekers falls, from the legal point of view, within the scope of what has been defined as “solidarity contributions”⁸². The first expression of solidarity towards migrants is rescue; the second is, strictly speaking, reception; the third is the adoption of inclusion and integration strategies⁸³. I would also add a fourth and further expression of solidarity, which consists in implementing advanced forms of “assisted voluntary return”⁸⁴. These are repatriation procedures – in the clear interest of

⁷⁹ “...notably to declare applications inadmissible based on first country of asylum/safe third country concepts”. *Ibid.*, p. 4.

⁸⁰ “...notably when an applicant comes from a “safe country of origin”, or misled the authorities. Give consideration to developing a national list of “safe countries of origin”, prioritising the inclusion of the most common countries-of-origin of migrants arriving in Italy. To give European coverage, Council conclusions identifying safe countries of origin could be beneficial”. *Ibid.*

⁸¹ On the *Matammud Osman* decision by the Assize Court of Milan, issued on 1 October 2017 and registered on 1 December 2017, which recognizes the existence of very serious acts of torture in Libya in the camps hosting migrants that try to leave the country, see P.G. PANICO, *La sentenza della Corte d’Assise di Milano riconosce le condizioni disumane nei campi libici*, available on-line at www.meltingpot.org/La-sentenza-della-Corte-d-Assise-di-Milano-riconosce-le.html#.WucXhbiVOz5.

⁸² A. RUGGERI, *Il principio di solidarietà alla prova del fenomeno migratorio*, in *Consulta online*, 2017, n. 3, p. 451. About “the tension between the principles of responsibility and solidarity in the management of the asylum seekers’ admission in the EU in the case of large-scale flows involve challenges both to the Schengen free movement space and to the Dublin system”, see: S. MORGADES-GIL, *Forced Migration Management and the Right to Access to an Asylum Procedure in the Area of Freedom, Security and Justice: Human Rights between Responsibility and Solidarity*, in *Freedom, Security & Justice: European Legal Studies*, 2017, n. 1, p. 145.

⁸³ A. RUGGERI, *ibid.*

⁸⁴ See for instance: R. HOFMANN, *Voluntary Repatriation and UNHCR*, in *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, 1984, J. R. ROGGE, J.I. AKOL, *Repatriation: Its Role in Resolving Africa’s Refugee Dilemma*, in *International Migration Review*, 1989, n. 9, pp. 184-199; *European*

the proceeding State – that are quite common among the international community but not in Italy. By virtue of those fruitful policies, people returned are not abandoned to their fate but accompanied and monitored afterwards in their Country, under assistance projects which are functional to the real needs of local populations⁸⁵.

In the dominant view of the current migratory phenomenon in Italy, however, the services in favour of aliens in need of international protection are mostly conceived with a purely dependency logic, as costs (to be quickly reduced) in charge of the communities⁸⁶. This is highly questionable, given that many aliens, who came to Italy, also thanks to the above mentioned mechanisms of the international protection, have become, over time, well integrated and economically self sufficient. Moreover, many migrant workers, in addition to taxes, pay social security contributions uselessly: in many cases those accumulated sums will not be sufficient to get a retirement fund⁸⁷.

Twenty years ago, a thorough research on the European approach to the management of forced migrations⁸⁸, identified, in its conclusions, the progressive formation of a “broadly discernible European regional response to forced migration”, even then characterized by a “paradigm shift ... from the ‘exilic model’ towards a ‘root causes/preventive model’”⁸⁹.

As we tried to show, the current model is undergoing another significant change. Indeed, under the pressure of the supranational and national Courts decisions mentioned above (the latter, indeed, in order to evaluate the transfers to Italy and Greece according to the mechanisms created by the Dublin system, quickly adopted the same criteria elaborated by Strasbourg and Luxembourg), it can be said that Italy has undertaken a first effort to finally make the reception policies for asylum seekers compliant with the obligations incurred at European and supranational level⁹⁰, and we should eventually

Council on Refugees and Exiles (ECRE), The Return of Asylum Seekers whose Applications have been Rejected in Europe, PP3/06/2005/EXT/PC, September 2005.

⁸⁵ Some recent projects for international cooperation with the sending States in North Africa is a step toward that approach. See for example: EUROPEAN COMMISSION, *Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration*, Brussels, 6.9.2017, COM(2017) 471 final.

⁸⁶ See M. SAVINO, *La risposta italiana alla crisi: un bilancio*, in ID., (ed.). *La crisi migratoria* cit., p. 15.

⁸⁷ Besides, a rapidly aging country like Italy should soon begin to think how to block the increasing outflows of young people and, at the same time, to see the migratory inflows – even making a necessary selection – as an opportunity heralding many benefits, like inhabitants of rural communities and villages at risk of extinction well know.

⁸⁸ C. HARVEY, *Regionalism, Asylum and solidarity in Europe*, in C. HARDING, C.L. LIM, *Essays and Commentary on the European and Conceptual Foundation of Modern International Law*, Cambridge, 1999, pp. 219-272.

⁸⁹ *Ibid.*, p. 254. For some consideration on the ‘exilic model’ of the right to asylum see, E. ZANIBONI, *Verso l’erosione dell’elemento territoriale dell’istituto dell’asilo nel diritto internazionale?*, in U. LEANZA (ed.), *Le migrazioni, una sfida per il diritto internazionale, comunitario ed interno*, Atti del Convegno annuale della Società italiana di Diritto internazionale di Roma, 17-18 giugno 2004, Napoli, 2005, pp. 291-301.

⁹⁰ See the Law Decree no. 13 of 17 February 2017, *Disposizioni urgenti per l’accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell’immigrazione illegale*, subsequently converted into Law no. 46 del 2017; the Law n. 47 of 7 April 2017, *Misure di protezione dei minori stranieri non accompagnati*; the Directives of the Ministry of the Interior Piano Nazionale di

see the results in the coming years⁹¹ if they are not going to be undermined by the Italian turning point in migration policies⁹². The annual main instrument of economic and financial programming in Italy, to be approved in autumn 2018, forecast a growth of the public budget for migration, from 4,3 billions of 2017, to 5 billions of 2018 (without taking into account the European Union contributions')⁹³.

As we tried to demonstrate above, without a strict control on the uses of the resources and clear and proactive strategy of asylum seekers integration, this does not mean that these funds will have a real positive rebound on the *quality* of the reception conditions whose budget is even slightly reduced as such⁹⁴.

At the same time, interesting elements of analysis on the solidarity between EU Member States emerge from the European migration strategy: in the opinion of the present writer, the paradigm shift that can be observed in this context – by virtue of which solidarity measures within the European system are not unconditional, but bound to specific obligations – is quite clear: according to the recent strategy papers, aid will only be granted to those countries showing the adoption of procedural solutions whose main effect is the reduction (or complete elimination) of solidarity services towards migrants.

As we said at the beginning, however, there are legal obligations set out in the EU Directives and Regulations and in the mentioned case-law, which, even under the conditions established by treaties, must ensure a “dignified standard” for the reception to those who are entitled to receive international protection.

Those who will be able to reach Europe will find, this way, a tightening of the procedures for examining the application and minimum chances to appeal. Instead, for those who do not (or no longer) have a title to stay, the only likely outcome is forced repatriation. The question, therefore, from the point of view of interstate relations, is the fate of solidarity obligations, whose fulfilment, if conditioned to the implementation of specific duties, constitutes itself a denial of solidarity at its very roots⁹⁵. Given the progressive impoverishment of the category of solidarity in terms of legal obligations that have asylum seekers as beneficiaries, we may wonder if current trends are not leading to an (inadmissible) limitation of the principle of *non-refoulement*, which should be completed in its ‘negative’ scope by a ‘positive’ meaning, whose minimum

ripartizione richiedenti asilo e rifugiati, (11 October 2016) and *Piano nazionale d'integrazione dei titolari di protezione internazionale*, (26 September 2017).

⁹¹ See for example, F. STRATI, *Asylum seekers and migrants in Italy: are the new migration rules consistent with integration programmes?*, in *ESPN Flash Report*, 2017, n. 16, available *on line*.

⁹² See above, nn. 75 and 76.

⁹³ “Documento di economia e finanza” of 26 aprile 2018, www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_programmazione/documenti_programmatici/def_2018/DEF_2018_-_Sez.1_-_Programma_di_Stabilitx.pdf, p. 55 ff.

⁹⁴ *Ibid.*, p. 56.

⁹⁵ See widely S. RODOTÀ, *Solidarietà. Un'utopia necessaria*, Roma-Bari, 2014.

content should be the right to access impartial and effective procedures for the recognition of refugee status⁹⁶.

ABSTRACT: Italy has been particularly exposed to migration flows for more than thirty years. Nevertheless, the development of an asylum seekers' reception system in compliance with the standards set forth by the Reception Conditions Directive (RCD) has been very slow. After a brief overview of Member States obligations under international and EU law on asylum-seekers' reception, the article particularly focuses on the national and European case-law, giving a contribution to the reconstruction of the material reception conditions in Italy (quite critical in some cases). Moreover, it will be highlighted how, according to recent inquiries by national enforcement Authorities and even by the Italian Parliament, the organized crime learned to profit from refugees' reception. As a consequence, hosting asylum-seekers in Italy can be sometimes a *business*, riddled with corruption and illicit taking of public resources. Yet, under the pressure of the Courts decisions, Italy has undertaken an effort to finally make the reception policies for asylum seekers compliant with the obligations incurred at European and supranational level and recent data show that projects based on the politics of integration by small numbers and in small cities (so called SPRAR) can be fruitful, for both refugees and some local communities. The growing European efforts to contain the migratory flows and a general bias to the tightening of the financial, administrative and procedural aspects linked both to the reception and to the examination of asylum applications put into question the fate of national and international solidarity legal obligations.

KEYWORDS: CEAS and Italy refugees' reception conditions – Directive 2013/32 – Judicial control – Infiltrations of organized crime – Solidarity.

⁹⁶ See already E. ZANIBONI, *La tutela dei richiedenti asilo tra politiche restrittive e garanzie procedurali*, cit.