Special Issue
Constitutional Dimensions of the Refugee Crisis

The Refugee Crisis as a Challenge for Public Law: The Italian Case

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Abstract

Since 2014, the refugee crisis has determined a sharp increase in the number of unauthorized arrivals on the Italian shores. However, contrary to what happened in other less affected European Union countries, the Italian government has not reacted with an anti-immigration policy. Rather, it has tried to reconcile the overarching imperative of a full compliance with EU norms regulating external border controls with the observance of the most compelling humanitarian obligations. The results have been mixed. Both the functionalist bias that is inherent in the administrative action and the legislative inertia during the crisis have produced a detrimental impact on the fundamental freedoms of the migrants. The Article addresses four main constitutional challenges: (1) The lack of legislative authorization for the imposition of coercive means in the context of the "hotspot approach"; (2) the deficiencies of the Italian system for the reception of asylum seekers and refugees, which became a source of destabilization of the Dublin system and the Schengen area; (3) the low level of due process protection that is guaranteed to migrants that are subject to return procedures; and (4) the problematic need to cooperate with third countries that do not adequately protect human rights. The Italian case illustrates a distinctive, yet more general trend. For member states who are geographically exposed to migration flows and whose borders overlap with the external borders of the Schengen area, developing an anti-immigration or anti-EU policy would be short-sighted and self-defeating. Those states need more—rather than less—Europe because they cannot stop the migration inflow. And they need to effectively manage it because it is the only way to keep the Schengen area alive—and not to be excluded from it.

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A. Introduction

As geography suggests and statistics confirm, Italy constitutes the main port of entry to Europe for African migrants in search of a better life. In the 1990s, this fact was at the root of the reluctance of other European partners to accept Italy's accession to the Schengen area.[1] Today, it raises significant challenges both for the stability of that area and for the basic tenets of European constitutional traditions and the public law.

Since 2014, the refugee crisis has resulted in a sharp increase in the number of migrants arriving on the Italian shores. Contrary to what happened in other less affected European Union (EU) countries, the Italian government has not reacted with an anti-immigration policy. Rather, it has tried to combine the overarching imperative of a full compliance with EU norms regulating external border controls, with the observance of the most compelling humanitarian obligations—which explains the enduring Italian commitment in the search and rescue operations carried out in the Mediterranean Sea.[2]

From a constitutional perspective, the picture emerging from the crisis is not reassuring. With pressure from Brussels, the Italian system of reception has been rationalized and improved. However, insufficient attention has been paid to the fundamental rights of migrants. This is not only due to the functionalist bias inherent in the action of the Ministry of the Interior and the border police forces. It is also due to the inertia of the Italian legislature, which has done very little to address the major legal challenges emerging in the midst of the refugee crisis. Despite the systemic nature of such problems, the domestic judiciary—most notably, the Italian Constitutional Court—has so far adopted an attitude of benign neglect, leaving to the courts of Strasbourg and Luxembourg the responsibility to interfere in an area of public law which, in the national legal mindset, is still dominated by the paradigm of legislative and governmental discretion.

This analysis of the Italian case aims to better qualify the legal nature of the mentioned problems. First, the Article will engage in a brief assessment of the impact of the migration

[1] SIMONE PAOLI, THE ROLE OF SCHENGEN IN THE EUROPEANIZATION OF THE MIGRATION POLICY: THE ITALIAN CASE, IN THE BORDERS OF SCHENGEN 67 (A. Cunha, M. Silva & R. Federico eds., 2015).

[2] This commitment is most notably associated with *Mare Nostrum*, the autonomous Italian operation of search and rescue launched in October 2013. See, on this, PAOLO CUTTITTA, FROM THE CAP ANAMUR TO MARE NOSTRUM. HUMANITARIANISM AND MIGRATION CONTROLS AT THE EU'S MARITIME BORDERS, IN THE COMMON EUROPEAN ASYLUM SYSTEM AND HUMAN RIGHTS: ENHANCING PROTECTION IN TIMES OF EMERGENCIES 21 (Claudio Matera & Amanda Taylor eds., 2014). The Italian authorities are now involved, with a leading role, in two EU-sponsored joint operations: (1) The border security operation conducted by Frontex (Operation Triton); (2) the military operation aimed at neutralizing established refugee smuggling routes (EUNAVFOR Med, also known as Operation Sophia). On the resulting tensions with the rule of law, see SERGIO CARRERA & LEONHARD DEN HERTOG, WHOSE MARE? RULE OF LAW CHALLENGES IN THE FIELD OF EUROPEAN BORDER SURVEILLANCE IN THE MEDITERRANEAN (CEPS Papers on Liberty and Security in Europe, No. 70/2015).

crisis on the Italian administrative system of migrant's reception (Part B). Then it will address four groups of challenges in more detail: (1) The lack of legislative authorization for the imposition of coercive means by border police authorities (Part C); (2) the deficiencies of the Italian system for the reception of asylum seekers and refugees, which have become a source both of tension with Article 3 ECHR and of destabilization of the Dublin system (Part D); (3) the low level of due process protection guaranteed to migrants that are subject to return procedures (Part E); and (4) the problematic need to cooperate with third countries that do not adequately protect human rights (Part F). Overall, the Italian response to the crisis is a combination of administrative activism and legislative inertia, both producing a detrimental impact on relevant basic freedoms of the migrants. The State authorities, along with the European Commission, have developed a result-oriented agenda which overlooks the basic tenets of the rule of law and demonstrates their reluctance to "normalize" this area of public law.

B. The Impact of the Crisis on the Administrative System

Since 2014, Italy and Greece have been at the epicenter of the European refugee crisis. The sharp increase in migration flows from the Middle East and Africa has resulted primarily from the deterioration of the security conditions in Syria and the lack of political stability in Libya.

Between 2008 and 2013, the unauthorized sea arrivals to Europe never exceeded 60,000–70,000 persons per year. From January 2014 to September 2016, however, more than 1.5 million migrants crossed the Mediterranean sea and arrived on the European shores—marking, on average, an eightfold increase.[3] Two thirds of those migrants, nearly one million people, have landed on the Greek coast, whereas the remaining one third, almost 500,000 migrants, have reached Italian territory.[4]

[3] More accurately, 216,000 migrants arrived on the European shores in 2014, 1.015 million in 2015, and more than 300,000 in the first nine months of 2016. *See* UNCHR, REFUGEES/MIGRANTS EMERGENCY RESPONSE – MEDITERRANEAN, http://data.unhcr.org/mediterranean/regional.php.

[4] *See infra* Table 1 (providing statistics for the number of immigrants to Italy and Greece from 2014 to 2016).

Table 1. Sea arrivals to Italy, Greece and the EU (2014-2016)

	Italy	Annual variation	Greece	Annual variation	EU	Annual variation
2014	170,100	+396%	43,500	+381%	219,000	+ 365%
2015	153,842	- 10%	853,723	+1.962%	1,015,078	+463%
2016*	131,860	0%	166,824	- 58%	302,488	– 42%
Total	**455,802**		**1,064,047**		**1,536,566**	

* Until September 30, 2016. Annual variation is based on the corresponding period of 2015: from January 1, 2015 to September 30, 2015 there were 132,071 sea arrivals in Italy, 394,069 in Greece and 520,042 in the EU as a whole.[5]

The Italian case diverges from the Greek case in two important respects. First, there is a significant difference in terms of the continuity of immigration flows. After a considerable increase in early 2014, sea arrivals in Italy—mainly from Libya—have become stable, with a monthly average of 14,000 landings during the last thirty-three months. By contrast, in Greece the sudden escalation of arrivals in early 2015—mainly from Turkey—abruptly terminated one year later—due both to the closure of the Balkan corridor at the Macedonian border on March 8, 2016 and to the enactment of the EU-Turkey deal on migration on March 20, 2016. As a result, after a peak of 90,000 arrivals per month in the period from April 2015 to March 2016, the monthly average dropped to less than 2,500 in the last semester.[6]

Second, the compositions of the two flows are different. Italy is the port of entry to Europe for mixed flows from Africa. From January 2015 to February 2016, out of the 160,000 arrivals in Italy, 24.1% were Eritreans, 14.6% Nigerians, and 7.9 % Somalis. These three national groups (the largest ones), in total, account for less than half of the immigration flows to Italy.[7] Greece is the country of passage for more homogenous flows from the Middle East. In same period (January 2015 - February 2016), out of one million migrants that reached Greek territory by sea, 55% were Syrians, 24.7% Afghans, and 11.1% Iraqis, the three nationalities representing 90% of the total. Overall, 84% of arrivals on European shores in 2015 have come from the world's top ten refugee-producing countries,[8] but the proportion

[5] Elaboration on this chart is based on United Nations High Commissioner for Refugees (UNHCR) data.

[6] *See also* European Commission, *Third Report on the Progress Made in the Implementation of the EU-Turkey Statement* 634 (2016) (reporting average daily arrivals on the Greek coast of around eighty-one migrants in the period of June through September 2016, compared to an average of almost 2900 daily arrivals in June-September 2015).

[7] UNHCR, NATIONALITY OF ARRIVALS TO GREECE, ITALY AND SPAIN: JANUARY 2015 – FEBRUARY 2016 3, 5 (2016). The same document shows that 97.4 % of Syrian refugees and 100% of Afghans used Greece as port of entry to Europe, whereas 74.8% of Somalis and 99.7% of Nigerians used Italy for the same purpose.

[8] UNHCR, Global Trends 2015, 32.

is much higher for Greece—90%—than it is for Italy —42%.[9] Even six months after the enactment of the EU-Turkey agreement and the closure of the Balkan route, little has changed in the composition of flows towards Italy.[10]

The roots of this influx began with the Arab Spring, which represented the first important test for Italy. In 2011, the arrival of an unusually high number of migrants and asylum seekers exerted significant pressure on the domestic system of migrant reception and revealed its main weaknesses across various stages.

Problems appeared at the "first reception" stage, which occurs soon after disembarkation or rescue at sea and is aimed at providing first aid to migrants and at identifying them in order to prevent illegal entry. The increased inflow of 2011 emphasized several serious problems in the Italian system: the insufficient reception capacity, illustrated by the conditions of the *Centro di primo soccorso e accoglienza* (CPSA) in Lampedusa;[11] the non-systematic registration and fingerprinting of arrivals, which threatened the sound application of the Dublin regulation and triggered the temporary reintroduction of controls by bordering member states;[12] the opaque process of distinction between asylum seekers and other migrants, as well as the inadequate processing of return cases, both highlighted by the Court of Strasbourg in the *Khlaifia* case.[13]

With regard to the "second reception" stage, which is devoted to meeting the basic needs of asylum seekers while waiting for their application to be processed and to the subsequent initiation of the inclusion process, other problems emerged. These include a shortage of adequate reception facilities, the length of asylum procedures, and the concentration of host activities in few regions, due to the lack of solidarity between territorial entities. These problems were exacerbated by the difficult transition from an extraordinary centralized system of service provision based on the use of temporary reception structures, known as the *Centri di accoglienza straordinaria* (CAS), to an ordinary decentralized model based on a

[9] See my elaboration on data of the UNHCR, Nationality of Arrivals, *supra* note 7.

[10] Significantly, in the period of January through August 2016, the portion of Syrian (0.5%), Iraqi (0.3%) and Afghan (0.2%) arrivals to Italy has remained very low. UNHCR, Nationality of arrivals to Greece, Italy and Spain: January–August 2016 5 (2016).

[11] *See, e.g.,* Council of Europe, Committee on Migration, Refugees and Population, REPORT ON THE VISIT TO LAMPEDUSA 3 (23-24 May 2011).

[12] See the infringement proceeding initiated against Italy by the European Commission (EC) in December 2015 (procedure no 2015/2203).

[13] ECtHR, Khlaifia and Others v Italy, App. No. 16483/12 (Sept. 1, 2015). The details of the case are analyzed *infra*, §§ C and E.

network of territorial entities participating in the Protection System for Asylum Seekers and Refugees, known as the *Sistema di protezione per richiedenti asilo e rifugiati* (SPRAR).[14]

Italy has faced increasing pressure to reorganize and reform its immigration framework from the EU states—and the Schengen members in particular—since the spread of the crisis beginning in 2014. The most evident change concerns the processing of asylum requests. Over the last two years, the number of territorial commissions dealing with such requests have doubled,[15] with a significant reduction in both the backlog and the waiting time for initial decisions.[16] At the same time, the proportion of rejected requests has increased and is now above the EU average.[17] Favorable asylum decisions for humanitarian reasons or through the granting of subsidiary protection have helped to partially compensate for the relatively low number of decisions granting refugee status.[18]

[14] See *infra* § D.

[15] The Law-Decree no. 119 of 2014, converted in Law no. 146 of 2014, has increased the number of the competent territorial commissions from ten to twenty and the number of additional committees (or "Sezioni") from ten to thirty. Currently, twenty commissions and twenty-seven committees are operating. See ITALIAN MINISTRY OF THE INTERIOR, PIANO ACCOGLIENZA 34–35 (2016), and the updates at http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/area-i-commissioni-territoriali.

[16] The waiting time for the first decisions has now reduced to seven to eight months (*see* PIANO ACCOGLIENZA, *supra* note 15, at 35).

[17] Eurostat, *Distribution of First Instance Decisions on (Non-EU) Asylum Applications* (Apr. 18 2016), http://ec.europa.eu/eurostat/statistics-explained/images/d/d0/Distribution_of_first_instance_decisions_on_%28non-EU%29_asylum_applications%2C_2015_%28%C2%B9%29_%28%25%29_YB16.png.

[18] *See infra* Table 2.

Table 2. Asylum Requests and Their Outcome in Italy (2011-2106)[19]

	Sea Arrivals in Italy	Asylum Requests Submitted	Asylum Requests Processed	Outcome of Asylum Requests				
				Refugee Status	Subsidiary Protection	Humanitarian Protection	Rejection	Untraceable or other
2010	4,406	12,121	14,042	15%	13%	26%	33%	13%
2011	62,692	37,350	25,626	8%	10%	22%	44%	16%
2012	15,570	17,352	29,969	7%	15%	52%	17%	9%
2013	42,925	26,620	23,634	13%	24%	24%	29%	10%
2014	170,100	64,886	36,330	10%	22%	28%	37%	3%
2015	153,842	83,970	71,117	5%	14%	22%	58%	0%
2016*	115,068	72,470	60,021	5%	12%	19%	64%	0%

* Through August 31, 2016

Much progress has been made with regard to other administrative aspects. The adoption of the "hotspot approach" promoted by the EU Commission has helped Italian authorities to improve the first-reception procedures and make border controls more consistent. In particular, the identification and fingerprinting of migrants upon their arrival has become systematic, so that migrants can no longer enter the Schengen area through Italy without being identified and registered according to the Eurodac Regulation.[20] In addition, thanks to increased cooperation and burden-sharing at domestic level, Italy has significantly expanded the capacity of the reception infrastructure, although the system is still insufficient.

If observed from a rule of law perspective, however, these developments have added new challenges. The most relevant constitutional and administrative problems are analyzed below.

C. The First Reception: Illegal Coercion

Immediately after their unauthorized arrival on Italian shores, Italy accommodates all incoming migrants in temporary reception facilities—the aforementioned *Centri di primo soccorso e accoglienza* (CPSA). In these places—where the hotspot approach is enforced[21]—

[19] Elaboration based on data of the Italian Ministry of the Interior (http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/i-numeri-dellasilo).

[20] EU Regulation 603/2013 of June 26, 2013, 2013 O.J. (L 180/1).

[21] Although there are only four facilities formally operating as "hotspots" in Italy (Lampedusa, Pozzallo, Taranto and Trapani), the standardization of the first reception procedures implies that the same approach is applied in all the Italian CPSAs. *See* ITALIAN MINISTRY OF THE INTERIOR, STANDARD OPERATING PROCEDURES (SOPS) APPLICABLE TO ITALIAN HOTSPOTS 6–7 (June 2016) http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf [hereinafter ITALIAN SOPS].

migrants receive initial medical aid and information about their options regarding application for asylum and they are subject to a process of identification, involving photo fingerprinting.[22]

This preliminary stage of the first reception process is crucial. Although every migrant may exercise his right to seek international protection as soon as he or she arrives on Italian soil, a primary distinction between prospective asylum seekers and alleged economic migrants takes place soon after the disembarking within the CPSAs. Migrants who manifest their intention to apply for asylum remain in the reception path; they are transferred to a governmental facility of first reception, a *Centro di prima accoglienza* (CPA) specifically devoted to house asylum seekers while they complete their application and are channeled to the second reception stage, if they so request.[23] By contrast, migrants who do not declare the intention to apply for asylum while in the CPSA are assumed to be illegal migrants—unless and until they manifest the asylum-seeking intention later—and therefore enter a different path that primarily results in their expulsion or return to their country of origin.[24]

Despite the sensitive nature of these activities, domestic legislation is strikingly incomplete. No legislative provision has been enacted to regulate the situation in which a migrant might refuse to be fingerprinted and the police must resort to coercive means. Italian Standard Operating Procedures (SOPs), while acknowledging this discrepancy, reassure the police force that, according to an obscure ministerial act, a proportionate use of force employed for the purpose of achieving the aforementioned purpose is appropriate.[25] Even recent Legislative Decree No. 142—the long-awaited reform enacted in September 2015 to frame the activities of migrant reception—fails to regulate the activities of identification and information performed in the CPSAs, nor does it make clear which restrictions can be imposed on the migrants temporarily hosted in those facilities.[26]

This latter legislative "void" is particularly worrisome. CPSAs are managed as "closed" reception structures, where migrants are deprived of their personal freedom and liberty of

[22] ITALIAN SOPs, *supra* note 21, at 7–8.

[23] Legislative Decree no. 142, art. 9 (4) of 2015.

[24] *See infra* § E.

[25] *See* ITALIAN SOPs, *supra* note 21, at 15 (referring to an unpublished circular 400/A/2014/1.308 of the Ministry of the Interior, adopted by the Head of the Italian Police on September 25, 2014).

[26] With regard to the CPSAs and the treatment of migrants therein, Legislative Decree no 142 of 2015 is silent; its Article 8(2) simply provides that the tasks of first aid, reception, and identification continue, as in the past, to be carried out in the existing CPSAs, as established by the pertinent legislation (Law-decree no 451 of 1995). That legislation, adopted in the midst of another migration emergency, limited itself to allocating the financial resources necessary to realize the mentioned facilities, without qualifying their legal nature as either "closed" or, alternatively, "open" centers.

movement without any legal basis. In the absence of legislative provisions, border authorities *de facto* detain all recently arrived migrants in the CPSAs until the hotspot procedures are accomplished without issuing any individual detention orders and, consequently, without any judicial oversight, in patent violation of the most basic habeas corpus guarantees.

This *incommunicado* detention is radically at odds with the Italian Constitution. It admits administrative detention only "in exceptional cases of necessity and urgency" that should be "strictly defined by law."[27] It also prescribes that this temporary measure must be communicated to the judicial authorities within two days and, if not validated in the next two days, loses all effect.[28] Although police authorities assert that the liberty deprivation imposed on the migrants accommodated in the CPSA does not last more than twenty-four to forty-eight hours, in practice, migrants experience much longer periods of detention in those facilities without the requisite legislative authorization and judicial review.[29]

In a ruling on the forced repatriation of migrants handed down in 2001, the Italian Constitutional Court held that any form of detention, even if aimed at giving assistance, infringes upon personal liberty.[30] It also solemnly affirmed that all the guarantees of Article 13 of the Constitution should be fully available to non-citizens, insofar as the protection of other constitutionally relevant matters, such as security and public order, which may be affected by uncontrolled immigration, "cannot undermine the universal nature of liberty, which, like the other rights that the Constitution proclaims inviolable, pertains to the individual as human being, not as participant in a given political community."[31] Since then, though, the Italian Constitutional Court has not issued any further rulings concerning the legislation on migrants' administrative detention.[32]

Article 5 of the European Convention on Human Rights (ECHR) provides that a non-citizen may be detained not only to accomplish a return procedure—when "action is being taken with a view to deportation"—but also "to prevent his effecting an unauthorized entry into

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[27] Article 13 (3) of the Italian Constitution.

[28] Article 13 (3) of the Italian Constitution.

[29] *See* Senate of the Italian Republic – Extraordinary Commission for the Protection of Human Rights, Rapporto sui centri di identificazione ed espulsione in Italia 22 (2016). *See also* Luca Masera, Il "caso Lampedusa": una violazione sistemica del diritto alla libertà personale, Diritti umani e diritto internazionale 83 (2014); Médecins Sans Frontières, Rapporto sulle condizioni di accoglienza nel CPSA di Pozzallo 9 (Nov. 17 2015).

[30] Italian Constitutional Court (ItCC), judgment no 105 of 2001, § 4.

[31] Italian Constitutional Court (ItCC), judgment no 105 of 2001, § 4.

[32] Since then, the only relevant judgment of the Italian Constitutional Court on migrants' personal freedom concerned the coercive execution of expulsion orders: see Italian Constitutional Court (ItCC), judgment no 222 of 2004.

the country."[33] Yet, the same provision requires that the detention be "lawful" and that the person affected is "entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court."[34]

Accordingly, the practice of liberty deprivation occurring in the CPSAs has been sanctioned in Strasbourg. The 2015 ruling in the *Khlaifia* case by the European Court of Human Rights (ECtHR) stigmatized this gross violation of habeas corpus rights. The case concerned the detention of a group of Tunisian nationals who, during the events of the Arab Spring in 2011, had landed on the Italian coast and were then detained in a CPSA on the island of Lampedusa and subsequently on ships moored in the Palermo harbor. The applicants were detained for a period ranging between nine and twelve days without any administrative measure reviewable by a court. The Italian government admitted that the only form of migrant detention authorized by domestic law is one that takes place within the Centers of Identification and Expulsion (CIE) when it is necessary to carry out the deportation.[35] At the same time, however, the Italian government denied that migrants are deprived of their liberty in the CPSAs. Rather, it argued that the migrants are "accommodated" in such facilities, which are established by the law not to detain, but to offer first assistance and medical aid after a sea arrival.

In the judgment, the ECtHR rejected the Italian government's formalistic approach, holding that what matters are the concrete conditions of liberty deprivation imposed on the migrants in the CPSA on Lampedusa—which was, and still is, a closed center, just like the other Italian CPSAs.[36] Accordingly, the Court unanimously held that there had been a triple violation of Article 5 of the European Convention on Human Rights (ECHR). First, the detention occurred without a statutory basis, in breach of the right to liberty and security.[37] Second, in the absence of any administrative measure, the Italian government had not notified the applicants of the reasons for their detention, in violation of the right to be informed protected by Article 5 § 2. Third, and consequently, the applicants had been unable

[33] Article 5 (1.f) ECHR. The same two grounds of migrant detention are permitted in EU law. Article 15 of EU Directive 2008/115/UE (Returns Directive) regulates the case of detention with the aim to return, in relation to which the Court of Justice of the European Union (CJEU) has made clear that the detention is only permitted when there is a real prospect of executing the removal. CJEU, Case C-357/09 PPU, Kadzoev, 2009 E.C.R. § 65 (Nov. 30 2009). The Court of Justice also held that detention is lawful when it is aimed to establish whether the stay is legal. CJEU, Case C-329/11, Achughbabian, 2011 E.C.R § 32 (Dec. 6, 2011).

[34] Eur. Convention on Human Rights, art. 5 (1.f), (4).

[35] Article 14 (1) of Legislative Decree no 286 of 1998 (hereinafter, Italian Immigration Act).

[36] *Khlaifia*, App. No. 16483/12 at § 50.

[37] Article 5 § 1.

to challenge the administrative decision, in violation of Article 5 § 3, which establishes the right to a speedy decision by a court on the lawfulness of detention.[38]

Even though the appeal before the Grand Chamber is still pending, the final decision on this point is easy to predict. Five years after the facts to which the *Khlaifia* ruling refers, the Italian legal framework still ignores the systematic deprivation of migrants' liberty taking place in the CPSA areas. Less predictable is whether the legislative inertia will continue despite the ECtHR's ruling and whether the Italian Constitutional Court will break its silence.

D. The "Second" Reception: From the Emergency Approach to Systemic Challenges

Following identification and the preliminary distinction between migrants who seek international protection and those who do not manifest that intention, the former group is transferred to a governmental center of first reception, known as a *Centro governativo di prima accoglienza* (CPA). CPAs, which were known as *Centri di accoglienza per richiedenti asilo* (CARA) until 2015, are "open" facilities,[39] operating as regional hubs where migrants remain for the time necessary to formalize the request for international protection.[40]

Once this step is accomplished, the asylum seekers in need may request to be channeled to a second reception stage. In principle, this transition implies the transfer to the 'ordinary' reception facilities provided by the nation-wide Protection System for Refugees and Asylum Seekers (SPRAR), that is, by the network of local entities that accept to host asylum seekers. In practice, the transfer depends on the availability of space. Although the number of asylum seekers hosted in the SPRAR system has significantly increased—from 8,000 in 2012 to almost 30,000 in 2015[41]—the capacity of the network is still far behind the current needs. Despite the generous funding distributed by the Italian state through periodic SPRAR calls, a consistent number of cities and municipalities, the key public actors, are still reluctant to bear the social and political costs that hosting asylum seekers and refugees involve.[42]

If an asylum seeker cannot be immediately channeled into the decentralized SPRAR system, he or she is sent to one of the 'extraordinary' facilities set up directly under the responsibility of the State—the so-called *Centri di accoglienza straordinaria* (CAS). The crucial task to fill

[38] *Khlaifia*, App. No. 16483/12 at §§ 83–84, 95–97.

[39] Pursuant to Article 10(2) of Legislative Decree no 142 of 2015, exit from the CPAs is allowed during daytime, whereas it is prohibited during the night, unless a special authorization is requested and granted. In practice, the exercise of the freedom of movement is conditioned by the fact that most CPAs/regional hubs are big facilities located in secluded areas, at 'safe' distance from cities and residential areas.

[40] Article 9(4) of Legislative Decree no 142 of 2015.

[41] *See infra* Table 3.

[42] SPRAR calls currently provide coverage of 95% of the reception costs.

the gap between the reception capacity of the SPRAR and the actual number of asylum seekers in need of accommodation falls on the Ministry of the Interior. The Ministry, in turn, relies on its territorial arms—the prefects, representatives of the central state in the periphery—to negotiate, coordinate, and ensure that each territory has its own CAS and shares the required burden.[43]

The resulting picture is, at best, mixed. On the one hand, the overall capacity of the second reception stage has significantly expanded over the last few years, to the extent that the Italian system can substantially meet reception needs in terms of numbers and migrants are more evenly distributed within the national territory. On the other hand, quantity is not reconciled with quality. Currently, more than 70% of the migrants in the second reception path are hosted in extraordinary, and often extemporary, reception facilities, the aforementioned CASs,[44] which are more expensive than the ordinary facilities of the SPRAR and are often totally inadequate for a medium or long-term reception. Therefore, even though public spending (on the SPRAR and CASs) has almost tripled since 2013, mainly due to the increase in reception costs,[45] the use of those financial resources remain largely suboptimal.

Table 3. Migrants in Reception Facilities[46]

	Migrants in Reception Facilities	**Of Which**		
		First Reception Facilities (CPA)	***Ordinary* Second Reception Facilities (SPRAR)**	***Extraordinary* Second Reception Facilities (CAS)**
2011*	63,080	32,000	6,882	24,198
2012*	34,855	10,159	7,823	16,873
2013**	39,402	7,771	12,631	19,000
2014**	66,066	9,592	20,975 (22,961)	35,449
2015**	103,792	7,394	19,715 (29,698)	76,683
2016**	145,900	N.A.	N.A.	111,061

* Presences registered during the entire year, including turnover.

** Presences detected at a fixed data: December 31 of each year; August 31 with regard to 2016. Where available, the data on the overall presences during the year, including turnover, are mentioned in brackets.

[43] Article 9(5) of Legislative Decree No. 142 of 2015.

[44] *See infra* Table 3.

[45] *See infra* Table 4.

[46] The data have been collected and elaborated by Flavio Valerio Virzì, whom I thank, from the following sources: Italian Ministry of the Interior, http://www.interno.gov.it/it/sala-stampa/dati-e-statistiche/presenze-dei-migranti-nelle-strutture-accoglienza-italia; Centro Studi e Ricerche IDOS, *Dossier statistico immigrazione 2016*, http://www.dossierimmigrazione.it.

Table 4. Public Expenditure for the Migration Crisis in Italy.[47] Years 2011-2016 (In Millions of Euro)

	Total Expenditure	Of which			EU Contribution	Expenditure of Italian Government
		Rescue at Sea	Reception	Health and Education		
2011	1,326.88	25.13%	42.97%	31.90%	86.74	1,240.14
2012	1,326.88	25.13%	42.97%	31.90%	86.74	1,240.14
2013	1,326.88	25.13%	42.97%	31.90%	86.74	1,240.14
2014	2,668.84	30.76%	45.94%	23.29%	160.20	2,508.65
2015	3,326.53	26.58%	53.58%	19.84%	120.1	3,206.34
2016*	3,302.33	24.39%	55.62%	19.99%	112.06	3,190.27

* Estimates based on a constant scenario.

This administrative failure—the factual predominance of the extraordinary model of CASs over the ordinary model of SPRAR—undermines in at least two ways the Dublin rules on which the common system of asylum still relies. First, it creates an indirect, yet powerful, incentive for migrants to move to another member state, thereby hampering the Dublin system of allocating responsibility for asylum requests. Unless the asylum seekers enter the SPRAR system—which generally ensures proper housing in the form of apartments in residential areas and daily activities to promote integration—the prospect of spending several months in hotels or in isolated, inadequate facilities with no organized activities—as it is often the case with the CASs—is less appealing than exploiting the opportunity of free movement within the Schengen area. During the time required for their asylum requests to be processed, which typically takes no less than seven months, migrants are thus induced to abandon this second reception channel and to move to other countries.

Second, the deficiencies of the Italian reception system have prompted the ECtHR to question the safety presumption on which the Dublin system is based[48] and to sanction the Member States that have carried out transfers to Italy without assessing the risk of violation of the European Convention.[49] The risk pertains—in the Court's view—in particular to the right not to be subject to an inhuman or degrading treatment under Article 3 of the ECHR,

[47] ITALIAN MINISTRY OF ECONOMY AND FINANCE, DOCUMENTO PROGRAMMATICO DI BILANCIO 2016 18, http://www.mef.gov.it/inevidenza/documenti/DOCUMENTO_PROGRAMMATICO_DI_BILANCIO_2016-IT.pdf.

[48] See Recital no 3, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (*Dublin III*) ("Member States, all respecting the principle of *non-refoulement*, are considered as safe countries for third-country nationals.").

[49] The first Dublin case concerned Greece (M.S.S. v. Belgium and Greece, App. No. 30696/09 (Jan. 21, 2011). With regard to Italy, see Tarakhel v. Switzerland, App. No. 29217/12, §§ 106–15 (Nov. 4, 2014).

due to "the possibility that a significant number of asylum seekers may be left without accommodation, may be accommodated in overcrowded facilities without any privacy, or may even be accommodated in unhealthy or violent conditions."[50]

Hosting asylum seekers in inadequate and overcrowded facilities involves, first and foremost, the risk of inhumane and degrading treatment of migrants, in violation of Article 3 of the ECHR. In addition, it accentuates the ineffectiveness of the mechanism of Dublin transfers which is provided as the main remedy to the secondary movements of asylum seekers.[51] This flow of migrants between different SPRAR facilities ultimately affects the stability of the Schengen area and induces bordering member states to reintroduce internal border controls *de jure* or, more often *de facto*, by resorting systematic police checks in the border zone.[52]

E. Returning Migrants: With or Without Due Process?

The *Khlaifia* case pending before the Grand Chamber of the ECtHR highlights another intricate legal issue, which concerns due process guarantees in procedures aimed at returning landed migrants to countries of origin or countries of transit.

The 2011 migration influx following the Arab Spring presented the following questions: In the case of illegal arrivals on the Italian coast from a third country that is considered safe, is it lawful to quickly return those migrants to that country by means of a simplified procedure that is essentially based only on the identification of the concerned persons? Or, alternatively, is it necessary to fully respect due process guarantees, and, in particular, to make sure that each migrant is given a chance to be heard and individually assessed, as well as to obtain a specific statement of the reasons on which the measure of repatriation is based and have an effective possibility to challenge that decision before a court? The current refugee crisis has only made these questions more pressing.

In the *Khlaifia* case, the Italian State subjected the Tunisian applicants, following their arrival on the island of Lampedusa, to a preliminary identification and collection of fingerprints. After a few days of detention, the applicants were identified by a Tunisian diplomat. They

[50] *Tarakhel*, App. No. 29217/12 at § 115.

[51] In 2014, for instance, only 8% of these transfers were actually enforced: see European Commission, *Evaluation of the Dublin III Regulation Final Report* 6 (4 Dec. 4, 2015).

[52] The list of notifications on the temporary reintroduction of border controls is available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm. The conditions of compatibility of police checks in the border zone within the Schengen area are set by Article 23 of Regulation No 399/2016 (Schengen Borders Code). On this issue, see CJEU, Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10), Judgment of 22 June 2010. A new request for a preliminary ruling, now pending, has been lodged by the Amtsgericht Kehl (Germany) on 7 January 2016 (Case C-9/16).

then boarded a plane that brought them back in Tunis. This 'delayed' *refoulement*[53] followed a simplified procedure established by a bilateral agreement between Italy and Tunisia—the details of which were kept confidential—and was based on administrative measures that were individually addressed to each migrant, but had an identical content and statement of reasons.

In the Chamber judgment, the ECtHR held that the conduct of the Italian authorities complied neither with the guarantees enshrined in Article 4 of Protocol No. 4 to the ECHR, which prohibits collective expulsion and is aimed to ensure "a reasonable and objective examination of the particular case of each individual alien of the group,"[54] nor with the duty to provide an effective remedy, according to Article 13 of the ECHR.

This latter finding of the Court, concerning Article 13 of the ECHR, points to another persistent gap in the Italian legislative framework. The Italian Immigration Act is silent on the possibility of challenging the measure of 'delayed' *refoulement*.[55] Moreover, it seems to exclude, in case of appeal to a court, the possibility to suspend the execution of expulsion orders.[56]

More innovative is the former finding, pertaining to Article 4 of Protocol No. 4 and due process rights. The ECtHR had already inferred from that provision that the parties to the Convention cannot expel settled migrants on the ground that they belong to the same ethnic minority[57] and cannot repatriate illegal migrants intercepted on the high seas without any assessment of the individual needs for international protection.[58] Both in the *Hirsi* case, concerning the push-back operations carried out in 2009 in agreement with Libya, and in the subsequent *Sharifi* case, regarding the immediate return to Greece of migrants landed on

[53] Article 10 of the Italian Immigration Act provides that a measure of *refoulement* can be adopted not only when non-citizens arrive at the land border without qualifying for the entry (Italian Immigration Act Art. 10 § 1), but also when they are stopped while entering the territory illegally or immediately after (Italian Immigration Act Art. 10 § 2(a)) or when they are admitted into the territory for the sole purpose of offering them the required assistance (Italian Immigration Act Art. 10 § 2(b)). These latter provisions are relevant in the case of sea arrivals.

[54] This principle, first affirmed in the case *Henning Becker v. Denmark*, App. No. 7011/75 (Oct. 3, 1975), has been reiterated in ECtHR (First Section), case Andric v Sweden, App. No. 45917/99, § 1 (Feb. 23, 1999).

[55] *See* Article 10 of the Italian Immigration Act.

[56] This claim is based on the predominant judicial interpretation of Article 13 of the Italian Immigration Act, which prescribes the "immediate execution" of expulsion measures, even if they are challenged before a court. This provision is applied by analogy to the case of appeal against measures of 'delayed' *refoulement*. In fact, in the *Khlaifia* case, the ECtHR limited itself to stating that the orders of *refoulement* "expressly stipulated that the lodging of an appeal with the Justice of the Peace would not have suspensive effect." *Khlaifia*, App. No. 16483/12 at § 172.

[57] *See* Čonka and others v Belgium, App. No. 51564/99 (Feb. 5, 2002); Georgia v Russia (I), App. No. 13255/07 (July 3, 2014).

[58] Hirsi Jamaa and Others v Italia, App. No. 27765/09 (Feb. 23 2012).

Italian shores, the Court found Italy to be in violation of the prohibition of collective expulsion in Article 4 of Protocol No. 4 because the applicants were denied the possibility to apply for asylum and, with few exceptions in the *Sharifi* case, had not been identified.

In the *Khlaifia* case, on the contrary, the Italian border authorities had registered the identities of the applicants and taken their fingerprints immediately after their arrival on Lampedusa. Despite this distinction, the Court ruled that Italy violated the obligation of individual assessment resulting from the prohibition of collective expulsions on two main grounds: First, the applicants did not have the chance to be individually interviewed prior to their return to Tunisia and, second, the return measures, although addressed individually to each migrant, were motivated in an identical manner, without regard to their personal, individual situations.[59]

Interestingly, in the *Khlaifia* case, two judges of the bench explicitly dissented from the majority on this point. In their joint opinion, they recalled that Article 4 of Protocol No. 4 was introduced to prevent ethnic, religious, and national discrimination against groups of immigrants, and they maintained that the provision is exclusively aimed to prohibit "the expulsion of a group *qua* group," rather than "the expulsion of a large number of individuals in similar situations."[60] The two judges concluded that this latter form of expulsion, typically occurring when migrants are subjected to an identification procedure, is legal.

The complexity of this issue deserves additional elucidation. On the one hand, the argument that due process guarantees, being the corollaries of general principles of EU law, should also apply to return procedures is convincing. Repatriation is an administrative measure that affects primary individual liberties, namely the freedom of movement, and personal liberty as well, being that measure implemented by coercive means. The idea that such freedoms may be curtailed without due process is, in principle, at odds with the basic tenets of the rule of law. In this respect, an expansive reading of Article 4 of Protocol No. 4, proposed by the Court in *Khlaifia*, should be welcome: It ensures the protection of procedural rights—such as the right to be heard, the right to a motivated act—that are often neglected in the name of border control, public order, or even the *raison d'etat*.

On the other hand, the concrete provision of a due process guarantee, such as the opportunity to be heard prior to an administrative decision, might become pointless when the margins of discretion left to the public authority are very narrow or absent at all. If a decision is prescribed by the law or by the specific circumstances of the case, it could be argued that the right of the concerned person to be heard becomes pointless and can be

[59] *Khlaifia*, App. No. 16483/12 at § 156.

[60] *Khlaifia*, App. No. 16483/12, Joint partly dissenting opinion of Judges Sajó and Vučinić, § 10.

legitimately disregarded.[61] This might be the case for an illegal migrant who does not seek asylum and comes from a safe third country that is willing to readmit the migrant. In that situation, which corresponds to the situation in *Khlaifia*, it may be argued—as the two judges did in the dissenting opinion—that, whatever the result of the interview, the expulsion is statutorily commanded. In the context of high migratory pressure, would it make any sense to divert significant administrative resources to secure each migrant a hearing that cannot change the outcome of the return proceedings?

To add to the complexity of the issue, however, one might be tempted to rebut that, in the context of a return procedure, the guarantee of an interview can hardly be understood as useless. Such an interview can help the competent authority assess the accuracy of the facts and assumptions upon which the decision is based and to exclude the existence of grounds of *nonrefoulement* linked to the situation of the concerned person. It also allows the authority to ascertain whether the migrant has received adequate legal assistance and is aware of the possibility of applying for asylum.

The legal murkiness of the prohibition on collective expulsion emerging from the *Khlaifia* case might have a significant impact on the daily operations of borders guards. More broadly, it could have a significant effect on the return and repatriation policy that Italy, and the EU as a whole, has enacted to tackle the current refugee crisis. If confirmed by the Grand Chamber, the ECtHR's holding that the requirement of individual assessment arising from Article 4 of Protocol No. 4 involves full due process guarantees, rather than the mere identification of the migrant, would set a new standard that goes well beyond the Italian constitutional law.[62]

F. The Challenge of Readmission Agreements

Recent history shows that cooperation with countries of origin or transit is the most effective way to stem unauthorized immigration flows. An agreement with the Albanian government halted the refugee arrivals on the Italian coast in 1991. An agreement with Libya helped to reduce the flow of migrants from Sub-Saharan countries in the late 2000s. The EU agreement with Turkey and the cooperative stance of Macedonia suddenly closed the Balkan corridor

[61] *E.g.* Article 21-*octies* (2) of the Italian Law on Administrative Procedure (law no 241 of 1990, as amended in 2005). According to Article 21, a measure adopted in violation of procedural rules cannot be annulled when, for the bound or non-discretionary nature of the measure, it is obvious that its content could not have been different. A similar pragmatic stance is adopted in other legal orders and by the CJEU. *See* Case 30/78, Distillers Company v Commission, 1980 E.C.R. § 26 (July 10, 1980); Case C-301/77, France v Commission, 1990 E.C.R. § 31 (Feb. 14, 1990); Case T-206/07, Foshan Shunde Yongjian v Council, 2008 E.C.R. § 71 (Jan. 29, 2008). In the context of control of illegal migration, see also Case C-383/13 PPU, M.G. & N.R., 2013 E.C.R. (Sept. 10, 2013).

[62] There is no constitutional provisions concerning migrants, expulsions, and related due process right and the Italian Constitutional Court (ItCC) has never ruled on the lawfulness of the legislative discipline of *refoulement* (Article 10 (2) (a) of the Italian Immigration Act).

and saved Central Europe from the uncontrolled influx of millions of Syrian refugees. Cooperation with third countries has thus been one of the core Italian responses to the current crisis. While waiting for a stronger commitment on the part of the EU with regard to immigration from Africa,[63] Italy has continued to weave a network of cooperation with key third countries, primarily following the general trend of negotiating readmission agreements on an informal basis.[64]

These agreements, however, pose major legal problems. The first legal issue is procedural and regards parliamentary involvement. Article 80 of the Italian Constitution requires that Parliament authorize the ratification of international agreements of a political character. The fact that the agreement is qualified as technical rather than political, and therefore is signed by the administrative authorities directly involved in its implementation (e.g. police authorities) in the form of a memorandum, cannot justify the exclusion of the Parliament. On the contrary, these agreements touch upon rights of constitutional relevance, which can only be limited by means of a legislative act.

The substantial dimension of the issue—how, and to what extent, migrants' rights are affected—must not be ignored. Such bilateral agreements are primarily aimed at carrying out the expedited removal of groups of migrants identified as nationals of the cooperating third country. They can be implemented only if readmission is carried out without any serious inquiry into the risk that the return would inflict on the migrant. Yet, the presumption of the safety of the cooperating third country—a necessary prerequisite for the deal to be effective—constitutes a questionable legal shortcut, because it is clearly at odds with the principle of nonrefoulement, a cornerstone of asylum and international refugee law. By assuming that the cooperating country is safe, the rights that would arise from asylum applications are bypassed by "neutralizing the constraining effect that the nonrefoulement guarantee may exert on the stringency of borders."[65]

The Italy-Sudan Memorandum of Understanding (MoU), agreed upon by the police authorities of the two countries in August 2016, is the latest example of such bilateral

[63] See the Italian non-paper—Migration Compact, Contribution to an EU Strategy for External Action on Migration (Apr. 15, 2016) and the EU response to it in the Communication from the Commission, Establishing a new Partnership Framework with Third Countries Under the European Agenda on Migration 385 (June 7 2016).

[64] Jean-Pierre Cassarino, *Informalising Readmission Agreements in the EU Neighbourhood*, 42 INT.L SPECTATOR 179 (2007); Jean-Pierre Cassarino, *A Reappraisal of the EU's Expanding Readmission System*, 49 INT.L SPECTATOR 130 (2014).

[65] Marion Panizzon, *Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?*, 31 REFUGEE SURV. Q. 101, 102 (2012). *See also* Silja Klepp, *Italy and its Libyan Cooperation Program: Pioneer of the European Union's Refugee Policy?*, *in* UNBALANCED RECIPROCITIES: COOPERATION ON READMISSION IN THE EURO-MEDITERRANEAN AREA 77 (Jean-Pierre Cassarino ed., 2010).

agreement.[66] It aptly illustrates the Italian policy of refoulement, based on informal agreements with third countries, where the return procedure does not provide adequate procedural protections for the migrants.

The most relevant provisions of the memorandum concern, not surprisingly, readmission. Sudanese authorities assist Italian authorities in identifying Sudanese citizens who are illegally present in Italy with the aim to repatriate them. In particular, the diplomatic authorities of Sudan, when requested by the Italian police, proceed "without delay" to "interviewing" the persons of concern in the reception centers where they are held, "in order to establish their nationality and, based on the results of the interview, without further investigation on their identity, issue, as soon as possible, the Sudanese emergency travel documents, thus enabling the competent Italian authorities to organize and carry out return operations."[67] Given the expedited nature of this procedure, the possibility of errors cannot be ruled out: according to the memorandum, when, on a closer examination, it appears that the repatriated person is not a citizen of Sudan, the Italian government must readmit him or her to its territory."[68]

As the *Khlaifia* case and the Italy-Sudan MoU show, the shaping of a speedy and simplified procedure has questionable implications. The crucial step of an identification interview is carried out by foreign diplomats, albeit on Italian soil, and is explicitly reduced to ascertaining the nationality of groups of migrants. These kind of agreements usually fail to refer to the need of an individual assessment of the personal situation of each migrant or to the procedural and substantive rights that should be guaranteed to the migrant. The concerned person is thus at risk of being returned to a country, like Sudan, where the level of safety and human rights protection is particularly low.[69] In addition, one cannot fail to observe that this procedure, which touches upon fundamental rights, is not disciplined by domestic law, but by an instrument of 'soft' international law agreed upon by police authorities without parliamentary oversight. The standard clause requiring full compliance with national, EU, and international law that is usually embodied in these texts cannot be taken as sufficient reassurance.

To complete the picture, the relevance of these readmission agreements should be put in context. Italy is able to repatriate illegal migrants only if they are nationals of third countries

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[66] Memorandum of Understanding between the Department of public security of the Italian Ministry of the Interior and the National Police of the Sudanese Ministry of the Interior on combating crime, on managing borders and migration flows, and on repatriation (Aug. 3, 2016) [hereinafter Italy-Sudan MoU].

[67] *Id.* at Article 9 (2).

[68] *Id.* at Article 9 (4).

[69] *See, e.g.*, *World Report 2016: Sudan*, HUM. RIGHTS WATCH, https://www.hrw.org/world-report/2016/country-chapters/sudan (last visited Oct. 19, 2016).

which have accepted such agreements. The number of these agreements is limited, however, largely due to the financial commitment that is required to persuade reluctant African governments to accept.[70] Lacking such costly bilateral agreements and with few places available in the facilities used for the temporary reception of migrants subject to the repatriation procedure (the Centers of Identification and Expulsion-CIE), most migrants, following their identification and photo-fingerprinting, are served by the border police with an order to leave the country within seven days.[71] This is an order that the recipient migrants are predictably unwilling to execute and that the Italian authorities cannot enforce. Voluntary departure schemes do exist, but the incentives provided are hardly effective with people who have risked a sea passage across the Mediterranean. The result is that most migrants remain illegally in the territory.

The impact of this structural failure in the control of external borders transcends Italian territory. Illegal migrants, if not deported, can freely move within the Schengen area and into other EU countries. Even if they are apprehended elsewhere, the probability of failure of a new return procedure is high, as the statistics on the effectiveness of expulsion measures in the EU-28 confirm.[72] The lack of a common EU policy on return, based on an extensive networks of EU-wide agreements with third countries, means that the return policy of each member state typically meets the same impediments.

The functionalist bias underlying the Italian approach to repatriation resurfaces at the EU level. The same logic, in fact, inspires the notorious EU-Turkey agreement enacted in March 2016. That agreement shares with the mentioned Italian agreements with African countries some common features. It is built on a non-binding bilateral act—a "Statement"—adopted without parliamentary involvement. It enshrines the commitment of a third party country with a dubious human rights record "to accept the rapid return of all migrants not in need of international protection."[73] It promises that the administrative procedure upon which the repatriation mechanism relies "will take place in full accordance with EU and international law, *thus excluding any kind of collective expulsion*."[74] The latter specification confirms the EU's awareness about the recent development in Strasbourg.[75] Yet the agreement with

[70] Currently, in addition to the mention MoU with Sudan, the Italian government can rely on four main operating readmission agreements, respectively with Egypt, Morocco, Nigeria and Tunisia.

[71] ITALIAN SOPS, *supra* note 21, at 8.

[72] *See Statistics on enforcement of immigration legislation*, Eurostat, http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation (last visited Oct. 29, 2016).

[73] EU-Turkey Statement, 18 March 2016, available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

[74] *Id.* (emphasis added).

[75] The reference is to Khlaifia, App. No. 16483/12, discussed *supra* §§ C and E.

Turkey does not make any explicit reference to the implications concerning due process guarantees.

Although questionable in terms of protection of migrants' rights and effective readmissions,[76] the agreement with Turkey has successfully contributed—along with the decision of Macedonia to close its border with Greece and push back the refugees that had entered the country after March 8, 2016[77]—to stopping the migration flows from Middle Eastern countries into Greece and the Schengen area. This is what matters in a time of crisis. For this reason, the EU has now proposed following this model in relations with Libya and other Mediterranean countries. This demonstrates the reluctance of European governments to normalize this area of public law and accept the price that their result-oriented agenda should pay to the rule of law.

G. Conclusion

The Italian response to the refugee crisis has been functionally oriented. Facing the greatest influx of migrants ever experienced in its history, the Italian government has been able to adapt its administrative system to meet the concerns of the other member states of the Schengen area. The deficiencies in the registration of arrivals has been fixed with the adoption, under the guidance of the Commission, of the "hotspot approach," making the registration of arrivals systematic and compliant with the EURODAC regulation. The procedures of first reception have been rationalized and generalized through the adoption of Standard Operating Procedures that are applied at every point of landing. Increasing the number of competent committees has accelerated the processing of asylum requests and has helped to reduce the backlog. The second reception capacity, dedicated to the asylum seekers awaiting a decision on their requests and almost completely funded with State resources, has been significantly expanded, both in its ordinary channel—the SPRAR system has increased its capacity by four times in three years—and in its extraordinary channel—

[76] The total number of migrants that have been returned to Turkey from March 2016 to September 2016, following the EU-Turkey Statement, is 578—a poor result in comparison with the number of arrivals in the same period. As the Commission admits, the goal of ensuring returns has been so far hampered by the high percentage of migrants that have applied for asylum and by the slow pace of processing their requests both in the first instance by the Greek Asylum Service—even with the help of the European Asylum Support Office—and on appeal by the newly established Greek Appeals Authority. More encouraging is the pace of resettlement of refugees from Turkey; 1,614 Syrians have been resettled to the EU under the 1:1 framework as of September 26, 2016. *See* European Commission, *Third report on the progress made in the implementation of the EU-Turkey Statement*, *supra* note 6, at 5, 8.

[77] On September 13, 2016, eight migrants from Syria, Iraq, and Afghanistan took action against Macedonia in front of the ECtHR, asserting that their collective expulsion from the Macedonian territory without an examination of individual circumstances and without access to an effective remedy is in breach of Art. 4 of Protocol 4 and Article 13 of the Convention. *See* EUR. CTR. FOR CONSTITUTIONAL AND HUMAN RIGHTS, PUSH-BACKS AT THE GREEK-MACEDONIAN BORDER VIOLATING HUMAN RIGHTS, https://www.proasyl.de/wp-content/uploads/2016/09/CaseReport_Idomeni_ECtHR_20160914.pdf.

the CASs set up by the State via territorial prefects still host a greater proportion of asylum seekers. Moreover, a burden-sharing is gradually taking place among regions and territories at the domestic level, in contrast with the very poor enactment of the solidarity principle among EU member states.[78]

Nonetheless, the Italian response to the migration crisis has left four relevant constitutional problems unsolved and has instead exacerbated them. First, Italian law is silent with regard to the coercive means which the border police may employ in the initial stage of the reception procedure. No statutory provision regulates the temporary detention of migrants in the CPSA areas or the possible use of force if migrants refuse to be fingerprinted. The passivity of the Italian legislature is, in a way, difficult to understand: both EU law and the European Convention allow a limitation on personal liberty in such cases, if domestic law provides for this limitation. When lacking legislative authorization, however, these administrative practices violate the constitutional and conventional norms enshrining the principle of *habeas corpus*, as the ECtHR recently confirmed.[79]

Second, the inadequate qualitative standards of the second reception in the CASs, where most asylum seekers are hosted, determine broader systemic consequences. Those administrative inefficiencies not only incentivize migrants' secondary movement to other Schengen area countries, in a search for a more concrete perspective of social and economic integration that is not compatible with the Dublin system. They also further weaken the halting mechanism of Dublin transfers, due to the possibility—highlighted by the ECtHR—that asylum seekers, after their transfer to Italy, may be left without accommodation or may be accommodated in overcrowded or unsafe facilities.[80]

Third, the ECtHR also revealed the insufficient due process protection afforded by Italy to migrants in the context of return procedures. The prohibition of collective expulsion in Article 4 of Protocol No. 4 and the related right to an individual assessment of return cases require that each migrant, before being returned, is: (1) Interviewed on her/his personal situation, (2) is the addressee of a decision with a specific statement of the reasons for the decision, and (3) is able to effectively challenge the lawfulness of the return measure. While pending the final decision of the Grand Chamber, the Second Section of the ECtHR ruled in the *Khlaifia* case that Italy does not meet such standard of protection.

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[78] The most tangible example is provided by the substantial failure of the relocation scheme's temporary and exceptional relocation mechanism for 160,000 people from Greece and Italy, established by Council decision number 2015/1523 and decision number 2015/1601, both adopted in September 2015. One year later, halfway through the implementation of the Council Decisions, only 5,651 people have been relocated (1,196 from Italy and 4,455 from Greece). See European Commission, *Sixth report on relocation and resettlement* 636 (Sept. 28, 2016).

[79] See the Khlaifia, App. No. 16483/12, discussed *supra* § C.

[80] See the Tarakhel, App. No. 29217/12, discussed *supra* § D.

Fourth, a functionalist bias drives the Italian government to promote, via its police authorities, informal agreements aimed at the speedy readmission of migrants in their countries of origin. Absent any legislative oversight, such deals infringe upon procedural and substantive rights. They constrain the right of nationals of cooperating countries to apply for international protection and expose them to the risk of being returned to countries where their basic liberties are not adequately protected.

Therefore, the Italian response to the refugee crisis—although driven by the overarching imperative of a full compliance with EU norms regulating external border controls—had a detrimental impact on relevant fundamental rights of the migrants: namely, the right to personal liberty, the right not to be subjected to inhuman and degrading treatments, the right to due process, and the right of asylum. Nevertheless, the Parliament has not intervened, leaving the government with free hands in dealing with the crisis.

The Italian case, thus, confirms that compliance with EU law is not sufficient to protect the rights of the migrants. EU law is primarily "aimed at ensuring, at all stages, the efficient management of migration flows."[81] Moreover, it regulates only part of the asylum and immigration policy. The remaining part is—or should be—regulated by domestic law in strict adherence to the relevant international obligations, including the European Convention on Human Rights.

Moreover, it also confirms that, in the realm of immigration law, the power-checking mission typically entrusted with the legislative branch is particularly weak, if not absent at all. This happens because Parliaments represent their citizens, whose interest might well be at odds with the full protection of migrants' liberties. And it also happens because the Italian Constitutional Court has traditionally carried out a "weak" scrutiny over the legislation aimed at the control of migration flows.[82]

From the Italian case a final lesson can be learned. For member states who are geographically more exposed to migration flows and whose borders overlap with the external borders of the Schengen area, developing an anti-immigration or anti-EU policy would be short-sighted and self-defeating. Those states need more—rather than less—Europe because they cannot stop the migration inflow. And they need to effectively manage it because it is the only way to keep the Schengen area alive—and not to be excluded from it.

In short, for states like Italy, directing their administrative authorities to fully comply with EU law is probably the only option available: a pragmatic way both to regain the control over the state territory and to build the political credit that is necessary to ask for more solidarity

[81] Article 79 (1) TFEU.

[82] See MARIO SAVINO, LE LIBERTÀ DEGLI ALTRI (2015).

at European Union level. This continental solidarity, in turn, is probably the only option available to build the administrative and financial capacity that is required to manage immigration in a way that is both more effective and more consistent with the rule of law.