

15 Country Focus

Italy

Luca Galli and Cecilia Siccardi

15.1 Introduction

Since 2014, 30,000 people have died crossing the Mediterranean: the Sicilian Channel, the stretch of sea between Libya and Lampedusa, is the world's deadliest route.¹ However, data show that only a few people have yet entered Italy through legal entry pathways: from 2015 to 2023, approximately 8,000 individuals have benefited from resettlement programmes² and private sponsorship mechanisms.³

Therefore, a reflection on legal entry routes and humanitarian visas in the Italian system is surely needed. This chapter aims indeed to analyse how humanitarian pathways work, how they have enabled protection seekers to enter Italy legally and safely and what their strengths and flaws are.

In particular, the existing pathways are based on three different sources. The first route is structured around a legislative instrument, adopted in 2023, which introduced limited possibilities to safely access the national territory (Article 1, section 5-*bis* of Legislative Decree No 20/2023). This pathway, however, does not fill the legislative gap that still exists in that respect.

A second pathway is administrative in its nature, as it ensures the legal entry of asylum seekers through the so-called Humanitarian Corridors, *ad hoc* protocols signed between the competent Ministries and a number of religious associations.

A third pathway has been instead opened by the judiciary in individual cases. In a series of rulings, the Court of Rome has recognised the right of entry aimed at applying for international protection in favour of applicants located abroad, under Article 10, section 3, of the Italian Constitution or Article 25 of the European Code on Visas (Regulation No 810/2009).

1 See IOM, *Missing Migrants Project* (2024) <<https://missingmigrants.iom.int/data>> accessed 4 December 2024.

2 See UNHCR, *Resettlement Data Finder* (2024) <<https://rsq.unhcr.org/>> accessed 4 December 2024.

3 The Community of Sant'Egidio reports 5,248 entries via humanitarian corridors by 2023 (press release 2023).

In the following paragraphs, these three pathways—the “legislative” (§ 15.3), the “administrative” (§ 15.4) and the “judicial” ones (§ 15.5)—will be analysed, after an overview of the constitutional framework (§ 15.2).

15.2 Constitutional Principles

The following constitutional principles come into play in this matter. Firstly, the principles related to the entry of foreigners into the territory of the State (Article 10, sections 2 and 3, of the Constitution) and to border control (Article 117, section 2, letter q, of the Constitution). Secondly, the principles concerning the entry of asylum seekers.

With regard to the entry of foreigners into the state’s territory, the Constitutional Court has long since made clear that the legal status of citizens differs from the legal status of foreign nationals. Unlike a citizen, ‘a foreigner may come to live in the [Italian] territory, as well as in other states, only with specific authorisations and for a period of time that is generally limited, unless he obtains the right to prolonged residence’.⁴

The Italian migration policy thus finds its constitutional foundation in the State’s “inescapable task” of safeguarding the borders within the ‘rules established for an orderly flow of migration and adequate reception’.⁵ In addition, border and migration control is designed to protect other constitutional principles elaborated in the constitutional jurisprudence, such as “defence of the national community”, security, public order and collective health.⁶

With regard to the entry of asylum seekers, the constitutional basis is to be found in Article 10, section 3, of the Constitution, which states that ‘a foreign national, who is denied—in his or her country—the enjoyment of the democratic freedoms established by this Constitution, shall be entitled to the right of asylum in the Republic under such conditions as shall be established by law’.

According to a widespread academic interpretation,⁷ this provision entrusts persons seeking protection with a full right to enter the territory of the State. Third country nationals have the right to enter the Italian territory to apply for asylum when they find themselves in a situation where their fundamental freedoms, as enshrined in the Italian Constitution, cannot be enjoyed.⁸ Following this reading, the Court of Cassation has defined the right to obtain

4 Italian Constitutional Court No 104-1969. On constitutional principles related to border control, see Marilisa D’Amico and Cecilia Siccardi, ‘La tutela dei diritti costituzionali ai confini’ in Marilisa D’Amico, Maurizio Ambrosini and Emilia Perassi (eds), *Confini, Migrazioni e Diritti umani* (Milano University Press 2022).

5 Italian Constitutional Court No 353-1997.

6 *Ex multis*, Italian Constitutional Court No 148-2008.

7 E.g. Marco Benvenuti, *Il diritto d’asilo nell’ordinamento costituzionale italiano. Un’introduzione* (Cedam 2007) 127; Paolo Bonetti and Livio Neri, ‘Il diritto d’asilo’ in Bruno Nascimbene (ed), *Diritto degli Stranieri* (Cedam 2004) 1140.

8 Carlo Esposito, ‘Asilo (diritto di) (dir. cost.)’, *Enciclopedia del Diritto* (1958) 224.

asylum under Article 10, section 3, as ‘a perfect subjective right’, from which it derives a right to ‘enter the territory of the State in order to be admitted to the procedure for examining the application for recognition’.⁹

Even based on these statements by the judiciary, scholars have questioned the consequences of the direct applicability of Article 10, paragraph 3 of the Constitution.¹⁰

On the one hand, it has been claimed that the right of entry, thus, constitutes the minimum necessary content of the constitutional right of asylum.¹¹ In order to make this right effective, some scholars have argued that the application for asylum could also be made from abroad, since the prerequisite for the recognition of the right under Article 10, section 3, is not the presence of the foreigner on the territory, but the condition of being unable to exercise democratic freedoms as guaranteed by the Italian Constitution.¹² Other scholars, while confirming the direct applicability of Article 10, paragraph 3 of the Constitution, argue that this does not mean that Italy is bound to examine applications submitted from all over the world by foreigners invoking the impediment of constitutional freedoms.¹³ This issue was first addressed by the Court of Rome in the late 1990s. The Kurdish *leader* Ocalan, by then imprisoned in Turkey,¹⁴ applied for asylum in Italy by invoking direct application of Article 10, paragraph 3 of the Italian Constitution, despite the absence of a national law implementing that. The Court of Rome affirmed his right to asylum, considering his presence on the territory ‘not a necessary condition for obtaining the right itself’.¹⁵

On the other hand, the right to apply for asylum abroad is no longer consistent with the Common European Asylum System (CEAS), which generally requires physical presence within the territory or at the border of a Member State, being notoriously based on a strictly territorial approach to asylum.¹⁶

9 Italian Court of Cassation No 4674-1997 and No 25028-2005.

10 All constitutional principles are directly applicable in court, even in the absence of implementing legislation, as the Constitutional Court has clarified since its first ruling: Italian Constitutional Court No 1-1956.

11 E.g. Marco Benvenuti (n 7); Paolo Bonetti and Livio Neri, ‘Il diritto d’asilo’ in Bruno Nascimbene (ed), *Diritto degli Stranieri* (Cedam 2004) 1140.

12 This is a thesis supported by many, see again Carlo Esposito (n 8) 222. According to the author, the impediment of the guaranteed freedoms of the Italian Constitution is sufficient for ‘Italy to open the doors to allow them to enjoy those same freedoms in our country’. See also Benvenuti (n 7) 125.

13 Paolo Morozzo della Rocca, ‘Sul diritto al rilascio del visto per motivi umanitari’ in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023) 222.

14 Reference is made to the well-known case No 49565-1999 (Court of Rome). The text of the judgment is published in *Rivista di diritto internazionale* (2000) 249. See also Italian Court of Cassation Nos 26720-2019; 16362-2016; 10686-2012.

15 Ibid.

16 See the following Section 3 of this chapter, and especially notes n 26 and 27. In doctrine, on the application and the recognition procedure of the application for protection, see Gianluca Famiglietti, *Il richiedente protezione davanti ai suoi “giudici”* (Giappichelli 2021).

Accordingly, the Italian Court of Cassation made clear that the constitutional right of asylum is now fully implemented by the instruments of protection derived from the EU asylum law (refugee *status* and subsidiary protection) and the national residual protection (special protection).¹⁷

Therefore, today it is no longer possible to apply for asylum from abroad, as Ocalan's lawyers had done in the 1990s, since the Italian judges consider Article 10, paragraph 3 of the Constitution to be completely implemented by the forms of protection provided by the CEAS, which can only be applied for within the territory of one of the EU states.

In order to allow asylum seekers to safely arrive in Italy and avoid long and dangerous journeys to the European borders, the legislator must provide for instruments that are consistent with the CEAS. These instruments include the humanitarian pathways described in the following paragraphs, which do not have an organic discipline in the Italian legal system.

15.3 The Issuance of Humanitarian Visas as an Exercise of Public Power: Is the Principle of Legality Satisfied?

Moving from the constitutional perspective to the concrete actions of public administrations needed to grant humanitarian visas, the existence of specific tools provided by the legislator assumes a critical importance. The possibility for Article 10, section 3, of the Italian Constitution to serve as an adequate basis for diplomatic services to recognise the right of entry into the Italian territory for asylum purposes remains a contested issue.

On the one hand, the Italian Cassation court, as mentioned, has held that Article 10, section 3, finds full realisation in the forms of protection established under domestic law (refugee status, subsidiary protection and the national residual protection). Consequently, additional protections for asylum seekers might not be directly connected to this Article of the Italian Constitution which also explicitly requires the legislator to specify the conditions and the modalities in which the right to asylum can be articulated within the national jurisdiction.¹⁸

17 Since 2012, the jurisprudence of legitimacy has come to affirm that the right to asylum 'is entirely implemented and regulated through the provision provided for by the refugee *status*, subsidiary protection and the right to the issuance of a humanitarian permit'; see Italian Court of Cassation Nos 10686-2012; 16362-2016; 28015-2017; 4455-2018.

18 'A foreign national, who is denied—in his or her country—the enjoyment of the democratic freedoms established by this Constitution, shall be entitled to the right of asylum in the Republic *under such conditions as shall be established by law*' (emphasis added). On this topic, see Paolo Morozzo della Rocca, 'Sul diritto al rilascio del visto per motivi umanitari' in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023); Paolo Morozzo della Rocca and Mirko Sossai, 'Chiedere asilo da lontano' (2022) <<https://www.questionegiustizia.it/articolo/chiedere-asilo-da-lontano>> accessed 23 November 2024; Giulia Del Turco and Mario Savino, 'Chi è

On the other hand, the principle of legality dictates that any exercise of administrative power must be grounded in a specific legal provision, which expressly assigns the power to the public body and defines its terms and contents.¹⁹ Consequently, this principle implies that the issuance of humanitarian visas—representing an exercise of authorising power—requires an explicit regulation.

15.3.1 *The Lack of Foundations for Humanitarian Visas in EU Law*

Article 25 of Regulation No 810/2009²⁰ ‘exceptionally’ authorises the issuance of a visa with limited territorial validity ‘when the Member State concerned considers it necessary on *humanitarian grounds*, for reasons of national interest or *because of international obligations*’ (emphasis added).

It is well known that two landmark decisions—one by the Court of Justice of the European Union (CJEU)²¹ and the other by the European Court of Human Rights (ECtHR)²²—have significantly restricted the possibility for a

stato illegittimamente respinto ha diritto di rientrare in Italia?’ (January 2020) <<https://www.adimblog.com/2020/01/31/chi-e-stato-illegittimamente-respinto-ha-diritto-di-rientrare-in-italia/>> accessed 23 November 2024; Esposito (n 8). *Contra*, Claudio Panzera, ‘L’accesso al diritto d’asilo. Problemi e prospettive’ (2023) 1 *Diritto immigrazione e cittadinanza* 22 who affirms that ‘the constitutional provision does not become “crystallized” once and for all in the specific forms of protections through which it is (partially) implemented; rather, it retains an inexhaustible nomogenetic capacity’.

19 The principle of legality finds expression in Article 1 of Law No 241/1990, which states that administrative activity must pursue the objectives established by law. It is also indirectly derived from constitutional provisions. Specifically, Article 113 of the Italian Constitution, concerning the justiciability of administrative acts, assumes that the judiciary must find in the law an objective standard against which to review the contested acts. The principle of legality also receives implicit recognition in the European Treaties (Article 19 TEU and Article 262 TFEU). See, *ex pluribus*, Marcello Clarich, *Manuale di diritto amministrativo* (il Mulino 2024).

20 Parliament and Council Regulation No 810/2009 [2009] OJ L 243/2009 establishing a Community Code on Visas (“Visa Code”).

21 Case C-638/16 PPU *X and X v Belgium* [2017] OJ C 38/2017. On this decision, see Francesco L. Gatta, ‘I visti umanitari tra l’immobilismo dell’Unione europea, l’attesa per Strasburgo e l’esempio (da replicare) dell’Italia’ (2020) *Rivista di Diritti Comparati* 152; Francesco L. Gatta, ‘La “saga” dei visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell’Unione europea e le prassi degli Stati membri’ (2019) *Diritti fondamentali* 11; Chiara Favilli, ‘Visti umanitari e protezione internazionale: così vicini così lontani’ (2017) *Diritti umani e Diritto internazionale* 553; Adele Del Guercio, ‘La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un’occasione persa’ (2017) *European Papers* 271.

22 *M.N. and Others against Belgium* App No 3599/18 (ECtHR, 5 May 2020). On this decision, see *ex pluribus* Adele Del Guercio, ‘Canali di accesso protetto al territorio dell’Unione europea: un bilancio alla luce del nuovo Patto su immigrazione e asilo’ (2021) *Diritti umani e diritto internazionale* 129, 159; Anna Liguori, ‘Two Courts But A Similar Outcome—No Humanitarian Visas’ in Giuseppe Cataldi, Adele Del Guercio and Anna Liguori (eds), *Migration And Asylum Policies Systems Challenges And Perspectives* (Editoriale Scientifica 2020);

Member State to rely on Article 25 as a ground for its consulates to recognise diplomatic asylum.

According to the European Court of Justice, the wording of that provision should preclude any mandatory visa issuance even in the presence of an individual with protection needs. Furthermore, an authorisation of entry to apply for asylum would exceed the scope of Regulation No 810/2009, as it regards only short-term visas.²³ Consequently, Article 25 neither obliges nor could be used to ensure protected pathways for asylum seekers, being left to the States the option to regulate the matter.²⁴

Moreover, according to the ECtHR, no obligation to grant humanitarian visas abroad could be grounded on the ECHR, since States cannot be considered to have jurisdiction abroad. According to Article 1 of the Convention, jurisdiction has essentially a territorial nature. Therefore, embassies and consulates in third States are beyond its reach: extraterritorial jurisdiction could be found only in the presence of an element of connection between the individual and the State, such as his nationality or the exercise of *de facto* control over the person by public officials. These elements are all considered non-existent in the case of third country nationals demanding visas on humanitarian grounds at embassies, where diplomatic officers do not exercise control over their ability to enter and leave the office.²⁵

Neither the 2024 Pact on Migration and Asylum has altered this framework. The new Asylum Procedure Regulation,²⁶ replacing Directive 2013/32/EU,²⁷ reiterates the 2013 approach that the requests for international protection must be submitted ‘in the territory of the Member States, including at the

Fabrizia Camplone, ‘La sentenza M. N. e al. C. Belgio alla luce di X e X: la conferma della prudenza delle Corti o impulso allo sviluppo di canali di ingresso legali europei?’ (2020) Diritto immigrazione e cittadinanza 240; Alice Riccardi, ‘Falsa partenza per i visti umanitari di fronte alla Corte europea dei diritti umani’ (June 2020) <<https://www.adimblog.com/2020/06/30/falsa-partenza-per-i-visti-umanitari-di-fronte-alla-corte-europea-dei-diritti-umani/>> accessed 23 November 2024.

23 For an opposing view see, *ex pluribus*, Adele Del Guercio (n 22), according to whom it remains opportune to distinguish between the short-term entry needed to apply for protection and the eventual subsequent long-term stay that might be a consequence of the acceptance of the asylum application.

24 Paras 44 and 51 of the Decision.

25 For a different opinion on the existence of state jurisdiction, see Cecilia Siccardi, ‘La giurisprudenza ordinaria sull’accesso dei richiedenti asilo al territorio nazionale’ in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023) and Flavio V Virzi, *L’extraterritorialità nel diritto amministrativo. Una ricerca sulla regolazione delle attività oltre il territorio dello stato* (Jovene 2023) 138.

26 Parliament and Council Regulation No 2024/1348, [2024] OJ L 2024/1348 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

27 Directive of the Parliament and of the Council 2013/32/EU [2013] OJ L 180/2013 on common procedures for granting and withdrawing international protection.

external border, on the territorial sea or in the transit zones of the Member States' (Article 2, section 1). It further specifies that 'this Regulation does not apply to applications for international protection and to requests for diplomatic or territorial asylum submitted to representations of Member States', confirming that Union law does extend to extraterritorial claims for asylum.²⁸

More relevant, from the perspective of creating safe entry routes for asylum seekers, is Regulation No 2024/1350, establishing a 'Union Resettlement and Humanitarian Admission Framework'. While this Regulation introduces a first common set of procedures, admission criteria and planning mechanisms for resettlement,²⁹ it expressly denies the establishment of 'a right for third-country nationals or stateless persons to request admission, or to be admitted, to the territory of a Member State' (Article 1, section 2), as well as any new 'obligation on Member States to admit a third-country national or a stateless person' (Article 1, section 2). Rather than commanding the issuance of visas to individuals in a state of need, the new Regulation only refers to entry mechanisms "octroyed" by the Member States. It is up to them to decide if, when and where to contribute to the Union Resettlement and Humanitarian Admission Plan on a voluntary basis.³⁰

15.3.2 *The Regulatory Vacuum on the National Level*

At domestic level, the general provisions governing (long-term) visas are set out in Article 4 of Legislative Decree No 286/1998 and Article 5 of Presidential Decree No 394/1999, which define visas as authorisations granted by diplomatic offices to allow entry into Italian territory.³¹

28 In the same sense, see also Parliament and Council Regulation No 2024/1351, [2024] OJ L 2024/1351 on asylum and migration management, amending Regulations No 2021/1147 and No 2021/1060 and repealing Regulation No 604/2013, whose Article 16 equally admits that 'Member States shall examine an application for international protection by a third-country national or a stateless person *who applies on the territory of any one of them*, including at the border or in the transit zones' (emphasis added).

29 See in particular Articles 5 (Eligibility for admission), 6 (Grounds for refusing admission), 8 (Union Resettlement and Humanitarian Admission Plan) and 9 (Admission procedure).

30 Several factors, indeed, confirm this "granted from above" nature—and not "asked from below", as the visas—of the tools addressed by Regulation No 2024/1350: from the *ex ante* planning of the number of entries allowed (Article 8), to the predetermination of regions or third countries from which Union resettlement or humanitarian admission is to occur (Article 4), without overlooking the express responsibility of Member States to identify beneficiaries, in cooperation with international bodies, and inform them of the pending admission procedure (Article 9).

31 On the Italian regulation of visa, see Guido Savio, 'Il diritto amministrativo dell'ingresso e del soggiorno' in Paolo Morozzo della Rocca (ed), *Immigrazione asilo e cittadinanza* (Maggioli 2023).

Another secondary source (Interministerial Decree No 850/2011) lists the types of visas corresponding to the different reasons for entry.³² The list confirms that asylum needs are not considered *per se* by the Italian regulation. Humanitarian reasons could have some relevance only for medical treatment and tourism visas. In the first case, the visa—granted to foreigners in need of medical treatment provided by Italian public or private health care institutions—could also be issued in the context of the so-called ‘humanitarian programs’ (*sub* Article 36, section 2, Legislative Decree No 286/1998), addressed to help individuals living in countries with inadequate medical facilities.³³ In the second case, Decree No 850/2011 refers to minors participating in ‘hospitality programs of tourist-humanitarian nature’, which are generally aimed at a short-term presence of the minors in Italy, where the grant of the visa presupposes their return to the nation of origin.³⁴ As a consequence, neither of these visas can be used for asylum seekers, whose safety is threatened in their State of origin.

A missed opportunity to address this gap arose with the so-called “Cutro Decree”.³⁵ In re-designing the normative framework for the definition of economic migrants’ entry quotas, it admitted the possibility that a portion of these entries could be reserved for refugees and stateless persons recognised by UNHCR or the competent authorities in the countries of first asylum/transit (Article 1, section 5-*bis*). However, this innovative choice has many fragilities: first of all, the inclusion of refugees’ quota is not mandatory, nor is there a minimum number of humanitarian entries to be ensured.³⁶ Furthermore, the Cutro Decree makes a substantial assimilation between economic and humanitarian migrants, denying the specificities (and the legal regime of greater protection) peculiar to the latter category:³⁷ the entry and the stay in Italy are allowed through the release of a visa (first) and a residence permit (then) which is provided only for “work reasons” and not for international protection.

32 According to Article 1 of the Decree, a visa could be granted for the following reasons: adoption, business, medical treatment, diplomatic, sports, invitation, self-employment, subordinate employment, mission, family reasons, religious reasons, re-entry, elective residence, research, study, airport transit, transit, transportation, tourism, working holiday, volunteer.

33 Interministerial Decree No 850/2011, Attachment A, section 3.

34 Interministerial Decree No 850/2011, Attachment A, section 19.

35 Legislative Decree No 20/2023. For an analysis of the topics relevant to this study, see Panzera (n 18) 25.

36 In the first “legal entry flows decree” (Decree of the President of the Council of Ministers of 27 September 2023) adopted to implement the Cutro Decree for the 2023-2025 period, only 750 of the 452,000 total entries were reserved for individuals in need of international protection.

37 May it suffice to mention that a residence permit for refugee status or subsidiary protection is valid for five years (Article 23 Legislative Decree No 251/2007), while a permit for subordinate work reasons is valid for a maximum of two years (Article 5, section 3-*bis*, Legislative Decree No 286/1998).

An amendment proposed at the time of the conversion of the Cutro Decree into Law No 50/2023³⁸ provided for the introduction of a specific regime (a new Article 4-*ter* would have been added within the Legislative Decree No 286/1998) on entry visas for humanitarian reasons, to be issued to foreigners or stateless persons satisfying certain requirements (substantially coinciding with the requisites for international protection or for the other forms of protection offered by the Italian legislation) who had applied for it. These visas would have become the ordinary tool to allow entry for the beneficiaries of public (and private) resettlement and urgent evacuation programmes, allowing individuals to apply for protection.³⁹ The amendment has been rejected, leaving the Italian authorities without a discipline empowering them to issue visas capable of ensuring a safe entry route to third country nationals in need of asylum.

15.4 Humanitarian Corridors as a Public-Private Solution

Despite this context of regulatory vacuum, Italy has issued, on several occasions, visas to asylum seekers so that they could safely reach its territory. For instance, three “informal” resettlement operations took place from Libya between 2007 and 2010, allowing 150 Eritrean refugees to arrive in Italy, while in 2009 160 Palestinian refugees living in the *Al Tanf* camp at the Syrian-Iraqi border were safely transferred, in all these cases through a “flexible” release of visas for tourism/courtesy.⁴⁰

However, the most stable and widespread use of humanitarian visas is that associated with the experiment of “Humanitarian Corridors”, which originated in Italy itself.

In particular, the Humanitarian Corridors project refers to a specific manifestation of the private sponsorship system, which itself falls within the broader framework of “safe pathways” for asylum seekers. Specifically, private sponsorship represents a subset of the category of resettlements, with its primary distinguishing feature being that, unlike resettlements where the public authorities of the host state directly manage all necessary actions (such as selecting beneficiaries in the third country, organising their transfer to the

38 Senate of the Republic, 19th Legislature, 1st Committee on Constitutional Affairs, sitting No 44 (afternoon), 28 March 2023, amendments 6.0.6 and 6.0.7 <www.senato.it/leg/19/BGT/Schede/FascicoloSchedeDDL/ebook/55280.pdf> accessed 23 November 2024.

39 See section 4 of the proposed Article 4-*bis*.

40 Unlike the cases mentioned above, in March 2011, two humanitarian evacuations were held from Libya to ensure safety for 108 refugees originating from Eritrea and Ethiopia but, due to time constraints, no visa was issued to these individuals who applied for asylum upon arrival. On this and the other mentioned experiences, see Katia Bianchini, ‘Humanitarian Admission to Italy through Humanitarian Visas and Corridors’ in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Nomos 2020).

host state and preparing reception and social inclusion pathways), sponsorships involve a substantial “outsourcing” to private entities.⁴¹

The main goals of the Humanitarian Corridors clearly derive from their just-described nature: in addition to saving human lives, by avoiding the dangerous boat-crossing of the Mediterranean Sea, they could also allow for more efficient regulation of migration flows, thereby permitting a better organisation of reception and integration services. Furthermore, they ensure a saving of public resources by transferring costs and investments to private entities. Finally, there is also the aim of guaranteeing a more direct involvement of civil society in managing the migration phenomenon. This active participation is intended to create a closer connection between migrants and local communities, thereby improving the outcomes of inclusion processes.⁴²

Focusing on the concrete experiences, the Corridors have been firstly introduced through an agreement (the so-called “memorandum of understanding”) signed in 2015 between a small group of faith-based organisations and the Ministries of the Interior and Foreign Affairs. Without any prior amendment or integration of the existing legal framework but relying almost exclusively on the already mentioned Article 25 of Regulation No 810/2009, this agreement defined the legal and operational structure of the Humanitarian Corridors. This structure involved, on the one hand, the State’s commitment to issue one thousand humanitarian visas to Syrian refugees located in Lebanon under Article 25; on the other hand, the commitment of private entities to handle the identification of beneficiaries, their transfer and their reception and integration into Italian society.⁴³ The success of this initial memorandum led to its replication, in favour of vulnerable individuals located in other geographic areas: these included evacuations from Ethiopia (2017), Libya (2018), the Greek island of Lesbos (2020) and Afghanistan (2021).

41 For a broader analysis of resettlement and sponsorship mechanisms, see Cecilia Siccardi, ‘Quali vie di ingresso legali per i richiedenti protezione in Europa? Contesto europeo e costituzionale’ (2022) *Diritto immigrazione e cittadinanza* 74; Francesco L. Gatta, ‘Vie di accesso legale alla protezione internazionale nell’Unione europea: iniziative e insufficienti risultati della politica europea di asilo’ (2018) *Diritto immigrazione e cittadinanza* 1; Suasan Fratzke, ‘Engaging communities in refugee protection. The potential of private sponsorship in Europe’ (2017) Migration Policy Institute Europe <https://migrant-integration.ec.europa.eu/library-document/engaging-communities-refugee-protection-potential-private-sponsorship-europe_en> accessed 23 November 2024.

42 On the role of active citizenship in migrant integration, also with regard to Humanitarian Corridors, Luca Galli, *La coprogrammazione e la coprogettazione dei servizi di integrazione dei migranti Paradigmi di coinvolgimento della società civile nei percorsi di inclusione sociale* (Giappichelli 2022).

43 For a reconstruction of the history and features of Humanitarian Corridors, see Donata Boronovo Re, ‘I visti con validità territoriale limitata: l’esempio dei corridoi umanitari nella Provincia autonoma di Trento’ (2019) *Le Regioni* 1725; Paolo Morozzo della Rocca, ‘I due protocolli d’intesa sui “Corridoi umanitari” tra alcuni enti di ispirazione religiosa ed il Governo ed il loro possibile impatto sulle politiche migratorie’ (2017) *Diritto immigrazione e cittadinanza* 1.

However, the limited scope—both in terms of sponsors and beneficiaries (restricted to specific geographic areas and amounting to approximately 5,000 individuals after nearly ten years since the program’s inception)⁴⁴—confirms the exceptional nature of private sponsorship within the Italian legal system. It is typically implemented only in response to international situations of extreme severity and significant media attention. Nor can the 2023 amendments to Article 1-*sexies*, paragraph 1-*bis*, of Legislative Decree No 416/1989 (introduced by the already mentioned Cutro Decree) be seen as a step towards normalising private sponsorship. The Decree merely acknowledged (for the first time by the legislator) the existence of the Humanitarian Corridors, just granting the possibility for ‘applicants for international protection who entered the national territory pursuant to memoranda for the implementation of Humanitarian Corridors’ to access the public “migrant reception and integration system” (*Servizio di Accoglienza e Integrazione*—SAI), but missing the opportunity to introduce an effective regulation of the mechanism, which remains solely based on the obligations set each time by the public-private agreements.

Regarding the specific contents of the memoranda, they define the characteristics of the private sponsors, legitimising their role as interlocutors with the Government in proposing projects. Sponsors must be third sector organisations with specific expertise in migration matters, prior experience in reception and integration activities for asylum seekers and refugees and a presence in areas with significant transit of displaced persons heading to Europe. Additionally, the agreements determine the geographic areas of operation, outline the commitments of central administrations (such as the Ministry of the Interior’s responsibility for security checks to ensure the conditions for issuing visas under Article 25 of Regulation No 810/2009, and the Ministry of Foreign Affairs’ responsibility for granting these visas) and set forth the obligations of private organisations.

The latter are primarily tasked with identifying beneficiaries according to the criteria outlined in the memoranda: (a) the need for international protection, as evidenced by *prima facie* recognition of refugee status by UNHCR under the 1951 Geneva Convention or by being a person forced to leave their country due to a well-founded fear of severe harm; or (b) additional conditions of vulnerability. While these are essential criteria, further “preferential” factors may contribute to successful selection. These include, above all, pre-existing ties with Italian society, deemed indicative of genuine prospects for stable integration within the host community (in other words, the presence of

44 The actual significance of this number becomes clear when compared, for instance, to the landings on Italian shores, which in 2023 amounted to approximately 158,000 migrants and in 2024 to over 60,000; see Ministero dell’Interno, ‘Sbarchi e accoglienza dei migranti: tutti i dati’ (22 November 2024) <www.interno.gov.it/sites/default/files/2024-11/cruscotto_statistico_giornaliero_22-11-2024.pdf> accessed 23 November 2024.

family or social networks in Italy is viewed favourably as a support for migrant integration).

Shifting from the criteria to their application, the initiative is primarily driven by organisations such as UNHCR, UNRWA, IOM, the Italian Red Cross, religious communities and local associations, which identify potential candidates to be included in the selection process and present them to the sponsor organisations. This is followed by an investigative phase, during which the third sector organisations verify the candidates' vulnerability through interviews, truth-checking of their statements and background checks on their judicial records. Subsequently, a list of selected beneficiaries is prepared, based on which the ministerial authorities carry out the additional verifications required before issuing visas under Article 25 of Regulation No 810/2009. The sponsor organisations are then responsible for coordinating pre-departure activities and organising the transfer to Italy of the selected individuals,⁴⁵ who—after landing—will have to apply for international protection and begin the integration pathways, again entrusted to private sponsors.⁴⁶

Overall, while the outcome of the Humanitarian Corridors is undoubtedly commendable—having translated into the rescue of thousands of individuals—certain critical issues arise regarding the legal compliance of this system.

Firstly, the application of Article 25 of Regulation No 810/2009 made within the Corridors seems in contrast with European jurisprudence. As seen before, the CJEU has clearly denied that that legal basis could be used to allow the entry of asylum seekers, pertaining to the competence of Member States to introduce *ad hoc* instruments within their domestic law.

Secondly, private sponsors are entrusted with a *de facto* “filtering power” to determine which individuals will benefit from the right of asylum in Italy. This has given rise to concerns regarding the “opacity” of the process, as it appears to be exempt from the principles of due process and procedural fairness.⁴⁷ For instance, exclusion from the selection procedure for access to the Humanitarian Corridors may occur simply through non-consideration in the list of beneficiaries, without the need for such a decision to be accompanied by specific, reasoned explanations. Furthermore, there is no formalised legal

45 For a more detailed description of the procedure, see Comunità di Sant'Egidio, ‘Corridoi Umanitari: le procedure di implementazione per la loro estensione su scala europea (2019)’ <www.humanitariancorridor.org/wp-content/uploads/2019/12/REPORT_ITA_WEB.pdf> accessed 30 July 2025.

46 On the integration pathways subsequent to the arrival of Corridors' beneficiaries, Luca Galli, ‘Quale ruolo degli attori pubblici nella sponsorship private dei rifugiati? Una riflessione sull'esperienza italiana alla luce di quella canadese’ (2022) *Diritto immigrazione e cittadinanza* 134.

47 In this sense Siccardi (n 41) 103 and Michela Tuozzo, ‘Corridoi umanitari: chiaroscuri del processo selettivo e della tutela dei diritti’ (February 2024) <<https://www.adimblog.com/2024/02/29/corridoi-umanitari-chiaroscuri-del-processo-selettivo-e-della-garanzia-dei-diritti/>> accessed 23 November 2024.

mechanism that guarantees transparency in the decisions made by the promoting entities—such as, among others, the right to access procedural documents. Nor is the outcome of these procedures subject to challenge before Italian courts.

Analysing the reasons behind these shortcomings, two main circumstances emerge. On the one hand, the lack of a normative framework governing the Humanitarian Corridors is evident. As mentioned, no primary or secondary legal provisions exist to detail (and constrain) the operation of this mechanism. On the other hand, the delegation of selection procedures to private entities seems to allow these processes to escape the rules and principles that must govern the action of public administrations. While acknowledging the difficulties of guaranteeing rights and remedies for procedures conducted outside national borders,⁴⁸ a realistic understanding of the Humanitarian Corridors should view them not as an (impermissible) instance of “border privatization” but rather as a mechanism of public-private shared border governance.

This would legitimise framing the selective actions of sponsors within the context of “private exercise of public functions”,⁴⁹ thus making necessary the introduction of legislative solutions ensuring the establishment of a visa that actually allows entry of asylum seekers, an effective and informed participation of candidates in the procedures and at least a tangible administrative oversight of the definition of the list of beneficiaries, if not the possibility of challenging the choices made by the private sponsors in front of the national courts.

15.5 The Role of Judges and the Recognition of Entry Visas for Humanitarian Reasons

Judges have actively promoted the issuing of humanitarian visas by Italian authorities. The relevant case law on the subject has developed in two stages, examined below: the first one, aimed at identifying the legal basis for the adoption of humanitarian visas; and the second one, aimed at defining the limits of this jurisprudential ‘path’.

15.5.1 The Recognition of Humanitarian Visas by Judges

The first set of rulings of the Court of Rome that have authorised the legal and safe entry into Italy of applicants for protection located abroad,⁵⁰ concern persons requesting entry into Italy for various “humanitarian” reasons, such as vulnerable persons, persons unjustly rejected at the border by Italian

48 On this topic, recently, Virzi (n 25).

49 Lately, Leonardo Parona, *L'esercizio privato di funzioni pubbliche: limiti e regime nel diritto italiano e statunitense* (Giappichelli 2023).

50 On this topic, please refer to Siccardi (n 25) and Virzi (n 25) 138.

authorities, Afghan citizens whose freedoms are in danger or human rights defenders persecuted in their countries of origin.

In this jurisprudence, it is appropriate to distinguish at least two strands: some rulings have recognised humanitarian visas under Article 25 of Regulation No 810/2009, whereas others have granted or denied the right to enter the territory of the State in order to seek protection under Art. 10, section 3, of the Italian Constitution.

Within the first strand of rulings, the Court of Rome allowed the entry into Italy of individuals, including minors, who are in a particularly vulnerable situation,⁵¹ as well as persons at serious risk of persecution, mainly located in Afghanistan. In those cases, the Court of Rome affirmed that situations of vulnerability or risk to human rights trigger ‘what—if for the state authorities constitutes a mere faculty—for the judge of fundamental rights represents instead *a dutiful activity*’.⁵² Therefore, the Court of Rome ordered the Ministry of Foreign Affairs to grant humanitarian visas under Article 25 of the Visa Code.

In a second strand of rulings, the Court of Rome authorised the entry of applicants for protection directly on the basis of Article 10, section 3, of the Italian Constitution. The *leading case* is the November 2019 judgment on the claim for damages of a group of persons pushed back at sea to Libya by the Italian authorities.⁵³

The Court motivated its decision considering that ‘the right of asylum referred to in Article 10, section 3, of the Italian Constitution can be declined in terms of a right to enter the territory of the State in order to be admitted to the procedure for the recognition of international protection’. Once the right of entry has been established, the Court left to the competent administrative authority the task to ‘identify, in the exercise of its discretion, the most appropriate means to protect the reasons of the plaintiffs (including the granting of a visa under Article 25 of Regulation No 810/2009)’.⁵⁴ Therefore, the Court of Rome identified in Article 10, paragraph 3 of the Constitution the basis of the right of entry of applicants for protection in the territory of the State and in Article 25 of the Visa Code a suitable legal basis for the issuing of the visa.

Those rulings have been criticised for two main reasons: because the court ordered the administration to issue a type of visa that is not expressly regulated in national law; and because, by relying on the general clause of Article 10 of the Constitution, this jurisprudence has a very broad scope, potentially allowing entry into Italy to all those who apply for a humanitarian visa abroad.⁵⁵

51 See Court of Rome No 4290-2019; on which see Morozzo della Rocca and Sossai (n 18) 4.

52 See Court of Rome No 62652-2021. On the matter, let us refer to Siccardi (n 41).

53 See Court of Rome No 22917/-2019.

54 Ibid. This reading of Article 10, section 3 has also been taken up in other cases, such as Court of Rome No 15094-1-2022.

55 See Savino and Del Turco (n 18).

Among the various arguments, a crucial one was related to the impossibility of judicial application of Article 25 of the Visa Code, in the absence of national implementing legislation. The Court of Rome itself acknowledged, also in light of the judgment of the Court of Justice *X and X v. Belgium*, that humanitarian visas ‘cannot be said to exist in practice under Italian law, nor to be provided for or imposed by European Union legislation’.⁵⁶

15.5.2 *The Limits to the “Jurisprudential” Recognition of Visas for Humanitarian Reasons*

Whereas the first set of cases recognised the right to enter on humanitarian grounds without any particular conditions, subsequent case law began to identify specific requisites for granting a humanitarian visa and to set limits on judicial review in this area.

A preliminary question that has arisen in doctrine and jurisprudence concerns when Italian jurisdiction can be deemed to exist and in which cases an Italian authority abroad should be held responsible for granting a humanitarian visa.⁵⁷

It became apparent in the case-law that the applicability of the right of entry for the purpose of seeking asylum necessarily presupposes the issue of jurisdiction and ‘therefore the acquisition of a position of responsibility by the Italian State over the person of the asylum seeker’.⁵⁸

Contrary to the rulings referred to in the previous subparagraph, judges also come to realise that Article 10, section 3, of the Italian Constitution and Article 25 of the Visa Code cannot impose, as such, ‘the recognition *tout court* of an undifferentiated duty of protection against anyone who turns, wherever and however, to the Italian State’. Italian jurisdiction cannot ‘arise on the basis of the mere choice of the applicant to turn to one rather than another diplomatic authority’.⁵⁹ Accordingly, ‘appropriate criteria must be identified to define the minimum conditions’ both for the right of entry to be claimed in a court, and for the State’s corresponding duty to grant it.⁶⁰

In order to identify these criteria, the Court of Rome relied on the notion of jurisdiction, as elaborated by the European Court of Human Rights with regard to Article 1 ECHR, as well as on the notion enshrined in Article 51 of the EU Charter of Fundamental Rights. Briefly put, in order for the Italian jurisdiction (and therefore liability) to be found, it is necessary that ‘additional factors, other than the mere request for the issue of a visa, exist’ and ‘these factors must be capable of determining a qualified relationship between the State

⁵⁶ Court of Rome No 75658-2022. In a similar sense, Court of Rome Nos 73550-2022; 13480-2022; 11276-2022.

⁵⁷ See Morozzo della Rocca and Sossai (18) 4.

⁵⁸ See Court of Rome No 23824-2022.

⁵⁹ Ibid.

⁶⁰ Ibid.

(as the party obliged) and a specific individual (holding a right) in a particular context'.⁶¹ Such a 'qualified relationship' may be established in different ways: through 'effective control' (typically, after access to national borders), through 'the use of force or authority' or through 'the impact of a regulation, even external, which implies the emergence of a duty to intervene' (see the duties arising from the "law of the sea").⁶² Following those criteria, a series of rulings either recognised⁶³ or denied⁶⁴ the entry of applicants for protection in Italy.

In addition to the requirement for the existence of jurisdiction, the Court of Rome has identified substantial conditions for the recognition of the visa, such as family ties in Italy,⁶⁵ condition of vulnerability,⁶⁶ minor age,⁶⁷ unlawful refoulement.⁶⁸

These decisions have, on the one hand, had the merit of drawing the boundaries of the Italian State's responsibility for the protection of individuals in vulnerable situations; on the other hand, they set additional conditions that are not expressly provided for either by law (including Article 25 of the Visa Code) nor by the Italian Constitution (according to its Article 10, the only prerequisite for requesting asylum is the obstruction of constitutional freedoms).

15.6 Conclusion

The persisting absence of a national (and European) legal framework on humanitarian visas is the most evident result of this analysis. The only (contested) legal basis for the issuance of humanitarian visas is the general clause of Article 10, section 3, of the Italian Constitution: according to some lower courts (and legal scholars), it recognises the right to enter the territory of the State to those who find themselves in a situation of violation of his or her basic freedoms. Indeed, apart from the attempt proposed by the Cutro Decree in 2023, protected entry routes have never been recognised within the national law.

The other pathways, namely the "administrative" and the "judicial" ones, while occasionally granting humanitarian visas to vulnerable people outside Italy, cannot fill the legislative vacuum. In the absence of a legislative legal basis, public administrations and judges risk going beyond their role, exceeding what is currently allowed by law. This not only involves tensions with the principle of legality—and with the legislative power—it also compromises

61 Ibid.

62 Ibid.

63 Court of Rome No 17732-2023.

64 See Court of Rome No 23824-2022.

65 Court of Rome Nos 34336-2023; 52019-2023; 18757-2024.

66 Court of Rome No 477-2024.

67 Court of Rome No 21667-2023.

68 Court of Rome No 18757-2023.

the position of protection seekers. With regard to the “administrative route” (humanitarian corridors), the lack of a legislative framework deprives them of procedural guarantees.⁶⁹ With regard to the “judicial route”, the admission itself depends on the different sensitivities of judges, entailing the risk of unequal treatment.⁷⁰

As a result, for asylum seekers outside Italy, the Italian territory resembles a “distant mirage”, attainable only at the cost of endangering their own

69 See Galli (n 46).

70 See Siccardi (n 25).