Centro Politiche Europee
ROMA

cepInput

No. 2 | 2024 18 January 2024

Risky Ways of Managing Migration Flows in Europe

Why current measures may weaken European migration policies and governments should reconsider them

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The pressure of public opinion and the successes of populist parties, also driven by anxiety and dissatisfaction at the presence of asylum seekers in Europe, is prompting EU institutions and various national governments to seek quick and possibly convenient solutions to the problems associated with the large numbers of migrants arriving on European soil. In particular, the possibility of outsourcing the procedures for examining asylum applications outside EU borders is being considered but such measures present serious problems of legitimacy, effectiveness and feasibility. This study aims therefore to stress that:

- The measures aimed at offshoring migrants and outsourcing the procedures for examining their asylum applications violate numerous national, European and international asylum laws.
- If challenged before national or European courts these measures are likely to be rejected, leaving governments without remedies having wasted time unnecessarily.
- Externalising asylum procedures confers enormous influence on the governments of third countries who detain migrants or allow the screening of asylum applications to be carried out by Member States on their territory.
- A willingness to compromise on respect for human rights weakens the capacity of the EU and its Member States to intervene in foreign policy by demanding that non-European States include respect for human rights in their own legislation.
- EU and Member States must ensure in advance that any proposed measures to improve the management of asylum applications are in line with their legal obligations and practical needs. First, therefore, a coherent European asylum law and its effective legal and practical enforcement is required, in order to rid the current policy of various institutional defects.

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Introduction

The increased number of migrants reaching the EU is increasingly causing difficulties relating to practical management and financing, as well as a political problem in terms of the rise of populist parties. The EU and its Member States are therefore looking for solutions to facilitate more effective management of the migratory streams heading for European Union territory. Data indicates the arrival of considerable numbers of migrants to the EU, especially in the territory of countries with an external EU border. European institutions and national governments have been working on a set of proposals to revise the European asylum framework, together forming what has been called the European Pact on Migration. In parallel, several European Member States and non-EU countries are exploring the possibility of reducing the pressure of migrants on their respective socio-economic systems by way of procedures to prevent them from entering their national territory. Asylum applications would then be assessed in external facilities and access only given to those who are granted asylum.

This analysis will assess the contents of the European Pact on Migration, as well as the attempts of some European states (such as the UK and Italy) to achieve the aforementioned goal. It aims to examine their feasibility from both a practical and a legal point of view, and to determine whether we are in the presence of strategies that could actually represent effective solutions to the problem of large numbers of migrants heading for Europe, or whether we are considering instruments that are ineffective in relation to the problems they are supposed to solve. In the latter case, rather than solving the problems related to migration flows, ineffective and inapplicable measures will end up betraying the expectations of the citizens to whom solutions have been promised, wasting precious time as well as economic and personnel resources. Thus, instead of deflecting the temptations being offered to the electorate by populist parties, misguided strategies would end up fuelling support for extreme political movements, which foment popular discontent in order to increase their support at the ballot box.

1. The European Pact on Migration

In September 2020, the European Commission presented a proposal to amend the asylum and migration regulations in order to replace the Dublin Regulation of 2013,[1] which is the instrument by which the EU currently regulates the responsibilities of Member States regarding the management of asylum applications. The New Pact on Migration and Asylum is a set of rules and strategies aimed at creating a fairer, more efficient and sustainable migration and asylum process for the European Union.[2] The Pact aims to manage and normalise the migration phenomenon in the long term by providing certainty, clarity and dignified conditions to people arriving on EU territory. Furthermore, the Pact aims to establish a common European approach to migration and asylum, based on solidarity, responsibility and respect for human rights.

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1 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

2 European Commission, What is the New Pact on Migration and Asylum of the EU?

As a consequence of the Pact, the following measures have been approved for the time being:

- Recommendation on an EU Mechanism for Migration Crisis Preparedness and Management,[3] aimed at the creation of an early warning and forecasting system that allows for the early identification of the formation of migratory flows, with the intention of providing effective preparation and response with respect to the phenomena to be managed on a case-by-case basis.
- Recommendation on search and rescue cooperation and indications on the non-criminalisation of search and rescue actions,[4] with the aim of improving cooperation between EU Member States in the management of private vessels involved in search and rescue (SAR) operations. The Recommendation is the starting point for the regular meetings of the European Contact Group on Search and Rescue operations, preventing the criminalisation of humanitarian SAR operations.
- The European Union Asylum Agency (EUAA)[5] replaced the European Asylum Support Office (EASO), being given more tools to help Member States bring asylum and reception practices up to the EU's high standards.[6]
- Return Coordinator, appointed on 2 March 2022[7] with the task of establishing an effective and common European return system and improving the coordination of actions between the EU and Member States.
- Voluntary Solidarity Mechanism, whereby as of 22 June 2022, 23 EU Member States and associated countries can provide support to Member States under pressure by intervening directly to acquire and relocate a share of asylum seekers from the states most affected by significant migration flows, and through financial contributions. In the mechanism's first six months of operation, after a less than encouraging start, it was used to relocate 2,808 migrants from the countries of first arrival to the other countries participating in the EU Voluntary Solidarity Mechanism.[8]

1.1. The agreement on the reform of the management of asylum seekers

On 8 June 2023, the European Council agreed on a common negotiating position for the Proposal for a Regulation on the Management of Asylum and Migration (Ramm)[9] and the Amended Proposal for a Regulation on the Procedure for International Protection (Apr)[10]: this understanding is to form the basis for the Council Presidency's subsequent negotiations with the European Parliament.

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3 Recommendation (UE) 2020/1366 of the Commission of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration.

4 Recommendation (UE) 2020/1365 of the Commission of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities.

5 Regulation (UE) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010.

6 New EU Agency for Asylum starts work with reinforced mandate, 19.1.2022.

7 Mrs. Mari Juritsch, https://op.europa.eu/en/web/who-is-who/organization/-/organization/HOME/COM_CRF_250480

8 Simone De La Feld, Il meccanismo Ue per la redistribuzione di persone migranti accelera. Ma l'obiettivo resta lontano, eunews.it, 8.9.2023.

9 Regulation proposal of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU).

10 Amended proposal for a Regulation proposal of the European Parliament and the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

The proposal for a Regulation on the asylum procedure establishes a common procedure for the entire EU, which Member States are called upon to follow when receiving an application for international protection. To this end, the proposal aims to streamline procedural measures (such as the length of the asylum application examination process), while laying down rules to protect the rights of asylum seekers (e.g. to have the services of an interpreter or the right to legal assistance and representation in the processing of the application). The proposal also provides for compulsory border procedures at the EU's external borders to quickly assess whether asylum applications are unfounded or inadmissible. Persons subject to the border asylum procedure are not allowed to enter the territory of the Member State.

The border procedure would apply if an asylum seeker applied for protection at an external border crossing point following a detention in connection with the illegal crossing of the external border itself, or following disembarkation after a search and rescue operation. The procedure is compulsory for Member States when the applicant represents a danger to national security or public order, has misled the authorities by presenting false information or by withholding information, and when the applicant is a national of a country whose rate of recognition of entitlement to international protection is less than 20%. The proposal provides that the total duration of the asylum and return procedure at the border should not exceed six months.[11]

Furthermore, in order to adequately carry out border procedures, Member States must indicate an adequate capacity in terms of reception and human resources, which is necessary to properly process a defined number of applications and to execute return orders at any time. At EU level, the proposal sets this adequate capacity at 30,000 asylum seekers, while the adequate capacity of each Member State will be established on the basis of a formula taking into account the number of irregular border crossings and rejections over a three-year period.

Once approved, the Asylum and Migration Management Regulation is expected to replace the current Dublin Regulation, which defines the criteria for identifying which Member State is responsible for examining an asylum application, aiming to rationalise the current framework and reduce the time taken to examine applications.

In order to bring more balance to the current situation, whereby a few Member States are responsible for the majority of asylum applications, a new mechanism of solidarity between Member States has been proposed. This aims to be simpler and more workable by linking compulsory solidarity with flexibility in the forms of contribution that Member States can offer to states in which migratory flows exceed the capacity to receive and manage asylum applications. The forms of contribution that States can choose from include the relocation of asylum seekers from one Member State to another, the provision of financial contributions, or alternative solidarity measures, such as the deployment of support staff to help local staff engaged in the management of asylum applications, or the implementation of measures aimed at building capacity to manage protection requests. It should be emphasised that Member States have full discretion as to which solidarity measures they actually implement, and that no Member State is ever obliged to carry out relocation.

The proposal sets the minimum annual number of relocations, from Member States forming the main EU gateway to Member States less exposed to arrivals, at 30,000, while the minimum financial

[11] European Council, Migration policy: Council reaches agreement on key asylum and migration laws, press release, 8.6.2023.

contribution to be made is set at EUR 20,000 per relocation. These figures may be increased if necessary, also taking into account cases where no need for solidarity is foreseen in a given year.

The proposal for a Regulation on asylum and migration management also contains measures to prevent abuse by asylum seekers, and to avoid so-called secondary movements, i.e. cases where a migrant moves from the country of first arrival to seek protection or permanent resettlement elsewhere. The proposal reaffirms the obligation for asylum seekers to apply in the Member State of first entry or legal residence, as already provided for in the current Dublin Regulation. It also aims to discourage secondary movements by limiting the possibilities for the EU State of first entry to abdicate responsibility, as well as by limiting the possibilities for transferring responsibility between Member States, in an attempt to restrict the applicant's ability to choose the Member State in which to apply. In this regard, changes are envisaged with respect to the time limits for States to be responsible for the assessment of asylum applications: the Member State of first entry will be responsible for the asylum application (even if the applicant has moved to the territory of another Member State) for a period of two years, as opposed to the current 12 months; in cases where an asylum applicant is to be transferred to the Member State actually responsible for the migrant, and the latter becomes unavailable (e.g. the migrant has moved to the territory of another Member State), the Member State of first entry will be responsible for the asylum application for a period of two years, as opposed to the current 12 months. In the event that a Member State intends to transfer an asylum seeker to the Member State actually responsible for the migrant, and the migrant becomes untraceable (e.g. if the migrant goes into hiding in order to evade a transfer), responsibility will only pass to the Member State intending to carry out the transfer after three years; if a Member State rejects an applicant under the border asylum procedure referred to below, its responsibility for that person will end after 15 months, if the application is renewed.

1.2. The controversial "border asylum procedure"

One of the main novelties of the proposal, as already mentioned, involves making it mandatory to use the so-called "border asylum procedures" for all asylum seekers who are nationals of a country with a recognition rate of less than 20% for international protection. Not even minors or other categories of vulnerable applicants can be exempted from this procedure, while the so-called "fiction of non-entry" is maintained, i.e. the obligation to consider migrants to whom these procedures apply as not yet approved to enter EU territory, thus allowing them to be detained near border locations, in conditions that would in fact closely resemble those of detention.[12]

This special regime also makes it possible to oblige applicants only to reside in a certain location, as long as it is near border or transit areas. In any case, persons subject to such a residence obligation will not be allowed to enter the territory, as the APR proposal would remove portions of the territory from the area of the jurisdiction of the Member State concerned, allowing these areas to be considered extraterritorial for the purposes of immigration and asylum law. Asylum seekers to whom the border procedure applies who have their applications rejected must be returned directly from the border, again without being allowed to enter EU territory. The border asylum procedure must be concluded within 12 weeks, extendable to 16 weeks, with a further 12 weeks available for states to conclude the

[12] Giuseppe Campesi, Le conseguenze economiche e politiche dell'accordo raggiunto in sede europea su migrazioni e asilo per i Paesi di primo accesso. E quelle in termini di diritti umani per i migranti, Il Mulino, 15.6.2023.

subsequent border return procedure, with a consequent possibility of detaining migrants affected by these procedures in de facto detention for up to seven months.

The purpose of this special procedure is clearly to speed up the processing of asylum applications as much as possible, while at the same time preventing applicants from officially gaining access to EU territory. However, the fear of migrant organisations is that this procedure would in fact result in a compression of the rights of asylum seekers, who would enjoy fewer protections than those provided by the normal asylum procedure and would at the same time risk ending up in a lengthy condition of administrative detention.[13] This has given rise to concerns that the real aim of the Border Procedure may not so much be to speed up the processing of asylum applications, but rather to restrict access to the legal protections ordinarily provided for international protection seekers.[14]

1.3. The negotiations of October 2023

Finally, on 4 October 2023, EU Member States reached an agreement on the proposed Regulation on migration crisis management,[15] a crucial element of the European Pact on Migration. The agreement was reached during a meeting of national ambassadors in Brussels, who were charged with completing the work that the interior ministers had failed to conclude the week before, due to a disagreement that had arisen between Germany and Italy over the role of NGOs, which had temporarily blocked negotiations.[16] The stalemate between Rome and Berlin at the end of September had temporarily blocked the Spanish EU Presidency's attempt to find a compromise, but after consultations with the respective governments, the ambassadors managed to break the impasse. In the end, the part of the text requiring that "humanitarian operations should not be considered as instrumentalization of migrants" was expunged from the agreement, but remained in the form of a "recital", i.e. a preamble to the Regulation, which reads: "humanitarian operations should not be considered as instrumentalization of migration, when there is no attempt to destabilise a Member State".[17] The wording succeeded in satisfying the demands of both the Italian and German governments, giving a more balanced structure to the final version of the agreed version of the regulation that was then approved. At the same time, Hungary and Poland voted against the proposal, while Austria, the Czech Republic and Slovakia abstained. The EU Council will now use this preliminary agreement as a common position in negotiations with the European Parliament in order to arrive at a final version of the regulation.[18]

1.4. "Immediate protection" deleted

The outcome of the European negotiations drew criticism from various NGOs, who argued that the changes would jeopardise the rights of migrants between detention, result in a lack of guarantees in asylum processes, and refoulement to unsafe countries.[19] On the other hand, the regulation in its

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13 Judith Sunderland, EU Migration Deal Will Increase Suffering at Borders, Human Rights Watch, 9.6.2023.

14 Jens Vedsted-Hansen, Border Procedure: Efficient Examination or Restricted Access to Protection?, eumigrationblog.eu, 18.12.2020.

15 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum - Mandate for negotiations with the European Parliament, 4.10.2023.

16 Crispian Balmer, Italy says migrants must go to charity boats' home nations, reuters.com, 29.9.2023

17 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, cit., Recital 6c.

18 Jorge Liboreiro, Vincenzo Genovese, In new breakthrough, EU countries agree new rules to manage future migration crises, euronews.com, 10.10.2023.

19 Benjamin Bathke, Talking continues in Europe to resolve EU migration pact deadlock, infomigrants.net, 23.9. 2023.

original proposal foresaw the possibility of accelerating the asylum claims of people fleeing a special situation of extraordinary danger, such as an armed conflict. This special protection regime would make it possible to bypass the conventional system of assistance to asylum seekers, which is often long and cumbersome, by granting immediate protection to certain categories of persons: something very similar to the Temporary Protection Directive,[20] first activated in March 2022 for Ukrainians and renewed until March 2025.[21] In the text agreed by the Member States, however, there is no mention of 'immediate protection'.

1.5. The "flexible compulsory solidarity" between Member States in the case of a crisis

Regarding the request for support and solidarity, the October vote reaffirmed the structure that "a Member State facing a crisis situation may request solidarity contributions from other EU countries".[22] The other states can make their contribution to the state in crisis by implementing a so-called "flexible compulsory solidarity", freely choosing between the three possible modes of intervention mentioned above: relocation of asylum seekers or beneficiaries of international protection to other supporting Member States; transferring to the available Member State the responsibility for examining asylum applications, that would otherwise be the responsibility of the state in crisis, in order to alleviate its stressful conditions caused by massive arrivals of migrants; or making financial contributions or alternative solidarity measures. The Council made it clear that the implementation of these exceptional solidarity support measures requires the authorisation of the Council, in accordance with the principles of necessity and proportionality and in full respect of the fundamental rights of third-country nationals and stateless persons.

The agreement reached makes it possible to start negotiations with the European Parliament, opening up the possibility of a conclusion of the comprehensive European Pact on Migration, the reform of EU migration policy that the European institutions hope to finalise before the European elections in 2024, while European Commission President Ursula von der Leyen called the agreement "decisive" and expressed her conviction that she would be able to conclude the migration reform by the end of her term.[23]

1.6. The New EU Pact on Migration and Asylum

After negotiations began in the afternoon of Monday 18 December, it was announced on the morning of Wednesday 20 December that a provisional agreement had been reached between the Member States and the European Parliament on a comprehensive reform of the EU migration policy, concluding

[20] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[21] Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

[22] European Council, Migration policy: Council agrees mandate on EU law dealing with crisis situations, press release, 4.10.2023.

[23] European Commission, Statement on the political agreement in the Council on the Crisis Proposal - New Pact on Migration and Asylum, 4.10.2023.

a long negotiation process that began in 2020 and was repeatedly undermined by resistance from some national governments.[24]

The tough negotiations covered numerous issues related to the management of migration flows, where both the Parliament and the Council had to compromise on their initial positions regarding issues such as the length of detention for asylum seekers, racial profiling of migrants, the treatment of unaccompanied minors, the management of search and rescue operations and the surveillance of external borders. In addition, a number of measures that had been agreed in previous months were finally confirmed.

For many, much of the Union's credibility was at stake in the Pact on Migration and Asylum, since after three years of confrontation between Member States, the Commission and Parliament, failure would have meant the absence of a European solution to the management of migratory flows, which has been the most frequent criticism levelled at Europe in recent years. It was therefore clear to the Parliament, the Commission and the Member States that the EU needed to achieve a reform of European asylum law by the end of the current legislature: an impossible goal without an agreement by the end of the Spanish six-month presidency, which expired at the end of 2023.[25]

On the one hand, the Council wanted to give Member States as much room for manoeuvre as possible to manage migratory flows by extending the accelerated asylum procedure as far as possible, but at the cost of reducing guarantees for the protection of migrants' rights; on the other hand, the Parliament set itself the other objective of ensuring full respect for the fundamental rights of applicants for international protection. In between, the European Commission provided technical support to the negotiations.[26]

The negotiations, which took place in a "jumbo trilogue" to avoid some of the negotiated measures being left out of the final agreement, enabled an agreement in principle to be reached on five separate but interrelated legislative proposals to redefine the rules for the collective reception, management and relocation of irregular migrants on EU territory.[27]

When the European institutions started working on the new Pact on Migration and Asylum in 2020, the aim was to put an end to the isolated and often ad hoc initiatives with which individual Member States had in the past tried to respond to the increase in migratory flows towards the EU: initiatives which, precisely because they were isolated, were often inefficient, if not counterproductive, as they prevented a joint EU response to a problem of global dimensions, which instead requires strategies capable of binding all Member States, irrespective of their geographical location and economic importance. Supporters of the new pact argue that it will succeed in intervening where it has not been possible before, for example by alleviating the burden of migratory flows on states with external European borders that receive a significant proportion of asylum seekers, such as Greece, Italy and Spain, through a genuine network of European solidarity that concretely involves all Member States.

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[24] European Commission, Commission welcomes the major progress achieved by Parliament and Council on the New Pact on Migration and Asylum, Statement, 20.12.2023.

[25] Jorge Liboreiro, 'Historic day': EU strikes major deal to reform migration policy after years of bitter debates, Euronews.com, 20.12.2023.

[26] Nicolas Camut, Eddy Wax, EU strikes 'historic' migration deal, politico.eu, 20.12.2023.

[27] Federico Baccini, The (possibly) decisive trilogue on the EU Migration and Asylum Pact begins; negotiations to continue until the bitter end, eunews.it, 18.12.2023.

As mentioned above, the new Pact on Migration and Asylum aims to comprehensively regulate all aspects of migration management, from the moment migrants enter the territory of the Union to the assessment of their applications for international protection. Specifically, the Pact aims to regulate the so-called European "internal dimension" of migratory phenomena, while the so-called "external dimension" should be managed through specific agreements with neighbouring countries such as Turkey, Tunisia and Egypt, and possibly others in the future.

In detail, the New EU Pact contains five measures:

- The Screening Regulation, which introduces a pre-entry procedure for the rapid profiling of asylum seekers and the collection of basic information such as nationality, age, fingerprints and facial image, as well as health and security checks.
- The amended Eurodac Regulation, which updates Eurodac, the large-scale database that will store biometric data collected during the screening process. The database will no longer count individual applications, but the number of applicants in order to avoid multiple applications under the same name.
- The amended Asylum Procedures Regulation (APR) provides for two possible stages for asylum seekers: an accelerated border procedure, which lasts up to 12 weeks, and the traditional asylum procedure, which is longer and can take several months before a final decision on the asylum application is made.
- The Asylum and Migration Management Regulation (AMMR), which creates a system of so-called "compulsory solidarity", but on a flexible and voluntary basis, to be triggered when one or more Member States are subject to "migratory pressure". Member States will thus be obliged to come to the aid of other EU countries affected by large migratory flows, but will be able to choose between three concrete options for intervention: relocating a certain number of asylum seekers, paying a contribution of €20,000 for each asylum seeker they refuse to relocate, or financing operational support.
- The Crisis Regulation provides for exceptional rules to be applied in cases where the EU asylum system is threatened by a sudden massive arrival of refugees, such as during the 2015-2016 migration crisis, or by a situation of force majeure, such as the COVID-19 pandemic. In these cases, national authorities will be able to apply stricter migrant management measures, including longer detention periods.

The provisional agreement still needs to be translated into legal texts and approved first by the Parliament and then by the Council. Last-minute requests for amendments to the texts by the governments of some Member States, which have been very critical of the Pact's approach in the past, cannot be ruled out: however, as approval in the Council will be by qualified majority, it will not be possible for individual countries to veto it. It will be the task of the Belgian Presidency in the first half of 2024 to ensure that the Pact is implemented before the work is suspended in the run-up to the European elections in early June.

1.7. The weak points of the EU Pact

The news of the success of the trilogue was announced with great fanfare in Brussels in the early hours of 20 December: it was said that the EU had fulfilled one of its promises made at the beginning of the current legislature, that the Pact would put an end to the isolated actions of individual Member States

in the management of migratory flows by establishing a genuine European solidarity process for the management of migrants,[28] and that failure would play into the hands of the Union's critics.[29]

It is certainly true that arriving at a European arrangement is a considerable achievement, given the strong resistance both of the Parliament and, above all, of the Member States to a truly unified regulation of the issue. On the other hand, this system of European solidarity is defined in the Pact itself as "compulsory", but flexible and voluntary in the way it is implemented: a concept that sounds like an oxymoron, and one that betrays a certain weakness in the system, since, as already mentioned, each Member State will be able to choose how to provide solidarity to the others. The option of a contribution of 20,000 euros for each migrant that a country refuses to resettle, or the other alternative of financing other forms of support (yet to be defined), shows that the real problem, i.e. the persistence of large masses of migrants in a few Member States, which are forced to bear the bulk of migratory flows mainly because of their geographical location, is not really resolved by the new Regulation. It therefore remains dependent on the goodwill of individual countries, whereas, in order to create a real network of solidarity within the Union, just the option of forced relocation of migrants in all 27 Member States, on the basis of specific demographic and economic conditions, would have been more appropriate.

Another weakness of the agreement concerns the guarantee of respect for the fundamental rights of migrants.[30] The possibility of using the accelerated procedure for examining asylum applications for those who seem to have little chance of receiving protection has been criticised by various NGOs involved in humanitarian aid for migrants heading to Europe.[31] In an open letter of 18 December, 56 of them warned that by speeding up the procedures for assessing asylum applications, the new pact risks violating the fundamental rights of migrants and betraying the values and principles of respect for life and human dignity on which the European construction and integration process is based.[32]

A similar criticism can be made of another of the Pact's pillars, namely that the external dimension of migration management should be based on specific agreements with countries outside the EU, along the lines of the one with Turkey, in order to intervene to prevent migrant departures to European borders. In addition to Turkey, countries such as Tunisia and Egypt are mentioned in Brussels, but in reality, it is well known that fundamental rights are not currently guaranteed in these countries.[33] A system that provides economic support to the governments of Tunis and Cairo, and perhaps in the future to other states willing to work in this direction, risks not only being an economically very costly investment and suppressing the rights of the migrants detained there, but is also dangerous from a strategic point of view, as it would put a very powerful weapon, i.e. the ability to put pressure on Europe, in the hands of these governments should economic or political disputes arise between the EU and the countries concerned. Erdogan's example should be well remembered in Brussels and in the

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[28] No EU country will be 'left alone' to cope with irregular migration, says Ylva Johansson, Euronews.com, 20.12.2023.

[29] Jorge Liboreiro, EU countries need to curb irregular migration to prevent far-right surge, says Manfred Weber, Euronews.com, 29.11.2023.

[30] Judith Sunderland, EU's Migration Pact is a Disaster for Migrants and Asylum Seekers, Human Rights Watch, 21.12.2023.

[31] Eleonora Vasques, EU ministers propose walls, fences, surveillance for migration 'solidarity' mechanism, Euractive.com, 19.12.2023.

[32] Over 50 NGOs pen eleventh-hour open letter to EU on human rights risks in Migration Pact, picum.org, 18.12.2023.

[33] Tunisia: No Safe Haven for Black African Migrants, Refugees, Human Rights Watch, 19.7.2023; Torture in Egypt a 'crime against humanity', say rights groups, France24.com, 2.10.2023. On the difficulties of classifying Tunisia as a safe country with respect to the outsourcing of asylum seekers s. Mariagiulia Giuffré, Chiara Denaro, Fatma Raach, On 'Safety' and EU Externalization of Borders: Questioning the Role of Tunisia as a "Safe Country of Origin" and a "Safe Third Country", European Journal of Migration and Law, 4/2022, 570–599.

European chancelleries.[34] Concerns have also been raised about the legality of the border procedure introduced by the European framework, which as it is conceived risks producing serious violations of humanitarian law.[35]

Finally, a systemic observation. It has been said that by approving the pact, the EU is taking space away from the sovereignists, who would have liked to see the negotiations fail in order to revive nationalist strategies in the next European election campaign. That is why it was so important to reach an agreement, and it took a strong dose of pragmatism on everyone's part to reach a compromise. It is true that it will be necessary to wait for the adoption of the implementing rules of the Pact, expected in spring 2024 under the Belgian Presidency, so that some specific aspects of the agreement cannot be evaluated before then. It is also true that the adoption of a European approach to the management of migration policies will make individual solutions obsolete: it will be interesting to see, for example, what will happen at this point with the Italy-Albania pact described below,[36] according to which some of the asylum seekers rescued by the Italian navy will be detained in centres built on Albanian territory from 2024 onwards. But it is equally true that Europe also remains a community of principles and values, the full respect of which is required of countries applying to join the Union as a precondition for their accession to be considered. It would be very damaging to the Union's credibility if, in order to solve a problem as urgent as the management of migratory flows, it gave the impression that it was prepared to depart from the principles and values of which it claims to be the proud defender.[37]

2. National migrant outsourcing agreements

Recently, some European countries, EU and non-EU members alike, have tried to set up agreements with non-European countries to outsource the procedures for examining the asylum applications of migrants already within their national territory, or intending to enter it. This is the case with the agreement that the British government tried to conclude with Rwanda in 2022, and the Memorandum of Understanding announced in November 2023 between the governments of Italy and Albania. Following are the details of the two agreements and the serious problems that have already prevented, or are likely to prevent, their concrete implementation.

2.1 The UK Government's Rwanda asylum plan

The so-called Rwanda Asylum Plan (officially "Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement"[38]) was issued by the British government in April 2022.

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34 Bernd Riegert, EU-Turkey tensions set to continue after Erdogan's victory, dw.com, 29.5.2023.

35 Janna Wessels, Gaps in Human Rights Law? Detention and Area-Based Restrictions in the Proposed Border Procedures in the EU, European Journal of Migration and Law, 3/2023, 275–300.

36 S. below, Par. 3.

37 Claudio Francavilla, EU's migration obsession is killing its commitment to human rights, politico.eu, 21.9.2023.

38 Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement.

2.1.1. The contents of the plan

The plan provided that those identified by the UK as illegal immigrants or asylum seekers would be transferred to Rwanda, where they would be taken care of solely by the Rwandan government, with no involvement by UNHCR or the UK government. Those granted refugee status would not have been allowed to return to the UK anyway, but could have been transferred by the Rwandan government to a third country where they would have a right to reside.[39] In return for Rwanda's willingness to accept migrants from the UK, London pledged to make an initial contribution of £120 million, pending a full determination of the cost of the whole operation once it was up and running.

The first flight of the Migrant Transfer Plan to Rwanda received approval from the British High Court, and was scheduled for 14 June 2022. However, a last-minute interim measure (Interim Measure) of the European Court of Human Rights blocked the execution of the Plan until the conclusion of the judicial procedures in the UK.[40] Usually, the Court applies such measures in very limited circumstances, when there is an imminent risk of irreparable harm, such as in cases of threat to life (Art. 2 ECHR) or ill-treatment (prohibited by Art. 3 EHCR).[41] In its deliberation the Court had regard to the concerns expressed in the material before it, in particular by the United Nations High Commissioner for Refugees (UNHCR), that asylum-seekers transferred from the United Kingdom to Rwanda would not have access to fair and effective procedures for the determination of refugee status, and to the High Court's finding that there were "serious questions of law" as to whether the decision to treat Rwanda as a safe third country was irrational or based on inadequate investigation.[42]

2.1.2. The predicted response of the Courts

In late 2022, the British High Court then ruled that although the plan was legitimate, the individual cases of eight asylum seekers who were to be deported that year still needed to be reviewed.[43] The Court of Appeal subsequently ruled that the Plan was unlawful in a decision of 29 June 2023, which was followed by an appeal by the British government to the UK Supreme Court: on 15 November 2023, the latter issued a judgment[44] in full concurrence with the lower court's decision,[45] effectively decreeing the Plan's unworkability, at least in its current form.

In particular, the five Supreme Court judges unanimously ruled that asylum seekers transferred to Rwanda face a real risk of being sent back to their home countries without a proper assessment of their claims.[46] Under current British immigration rules, asylum seekers whose life or freedom is

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39 According to paragraph 16 of the Memorandum, "a proportion of the most vulnerable refugees from Rwanda" would be settled in the UK.

40 The European Court grants urgent interim measure in case concerning asylumseeker's imminent removal from the UK to Rwanda, ECHR 197 (2022), N.S.K. v. the United Kingdom, application no. 28774/22, Press Release ECHR 112 (2023), 11.04.2023.

41 Lena Riemer, The Costs of Outsourcing, Verfassungsblog.de, 5.7.2022.

42 Press Release ECHR 112 (2023), 11.04.2023, cit. In favour of a jurisprudential interpretation that safeguards respect for the basic core of human rights of refugees Isaac Brock Muhambya, UK-Rwanda agreement versus legal framework on the protection of refugees: primacy of minimum guarantees of human rights, Cahiers de l'EDEM, September 2022.

43 Caitlyn Doherty, Zoe Crowther, Home Office Rwanda deportation policy is legal, court rules, Civil Service World, 19.12.2022.

44 UK Supreme Court, [2023] UKSC 42, 15.11.2023.

45 Dominic Casciani, Sean Seddon, Supreme Court rules Rwanda asylum policy unlawful, bbc.com, 16.112023.

46 Joelle Grogan, Unpacking the Supreme Court's Rwanda Decision, UK in a changing Europe, 16.11.2023.

threatened in their country of origin can only be removed from the UK if they do not risk being returned, in accordance with the principle of "non-refoulement".[47]

The Rwandan government had assured that it would respect this principle, and that it was a safe third country to which asylum seekers could be transferred. But the UN Refugee Agency strongly opposed the agreement, and the British Supreme Court had to determine whether there were "substantial grounds" for believing that asylum seekers sent to Rwanda would risk being forcibly returned to their home countries, despite the risk of mistreatment or even risk to their lives at home. The Supreme Court ruled that in this respect the memorandum of understanding between the British and Rwandan governments on asylum seekers was not legally binding.

The UN Refugee Agency warned that there were "serious and systematic flaws" in the covenant with respect to Rwanda's procedures[48] for processing asylum claims, inferring non-compliance with the 1951 Geneva Refugee Convention.[49] According to the Supreme Court, the High Court that had initially heard the case had not "given due consideration" to the evidence provided by the UN, and the Court of Appeal was therefore right to overturn the High Court's decision. The Supreme Court also noted how Rwanda had failed to comply with the principle of "non-refoulement" in a similar agreement reached with Israel in 2013.[50] The United Nations also provided evidence that the Rwandan government had rejected 100 per cent of asylum applications submitted by applicants from countries at war, such as Afghanistan, Syria and Yemen,[51] while the NGO Human Rights Watch sent an open letter to the British Home Secretary highlighting how Rwanda could not be considered a safe third country due to ongoing human rights violations in that State.[52] The legitimacy of the Rwanda Memorandum was also strongly contested by asylum pressure groups,[53] the UN High Commissioner for Refugees and the UN Special Rapporteur on Trafficking in Persons,[54] but also by the European Commission,[55] who questioned not only the compatibility of the policy with the UK's international law obligations, but also its effectiveness in preventing human trafficking. The British Supreme Court

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47 Cornelis Wolfram Wouters, International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture. Intersentia, Antwerpen 2009. The prohibition of refoulement is a principle that has now risen to the level of customary international law (according to some, even jus cogens) and is enshrined both in Article 33 of the 1951 Geneva Convention relating to the Status of Refugees, to protect refugees from the risk of persecution, and in Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to protect those who would be in danger of serious violations of their psychological and physical integrity as a result of removal. The principle applies to all forms of forcible removal, including deportation, expulsion, extradition, informal transfer and refoulement. Exceptions to this principle are only possible where there are serious grounds for considering a refugee a danger to the security of the country in which he or she resides or a threat to the community. These obligations are uniformly interpreted to mean that the sending country has an obligation not only to ensure that these rights are not violated in the country of first destination, but also that the latter does not transfer the person to another country where the same risk may exist (so-called "indirect refoulement").

48 UN Refugee Agency, UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement, 8.6.2022.

49 UN Refugee Agency, Written evidence submitted by the UNHCR, 18.8.2022.

50 Anat Guthmann, The "Voluntary" Departure and Israel's plan for deportation to third countries, The Hotline for Refugees and Migrants (HRM), June 2018.

51 UK Supreme Court, [2023] UKSC 42, cit., para. 85.

52 Human Rights Watch, Public Letter to the UK Home Secretary on Expulsions to Rwanda, 11.6.2022.

53 Amnesty International, Rwanda: Commonwealth leaders must oppose UK's racist asylum seeker deal, 17.6.2022.

54 United Nations, UN expert urges UK to halt transfer of asylum seekers to Rwanda, 17.6.2022.

55 In a Tweet on 14 April 2022, EU Home Affairs Commissioner Ylva Johansson commented: "Sending asylum seekers more than 6000 km away and outsourcing asylum processes is not a humane and dignified migration policy. I have been informed of the UK Government's new migration strategy, which I think raises fundamental questions about asylum and protection".

therefore concluded that there was "serious doubt" as to whether Rwanda's commitments could be "relied upon".[56] It is also curious to recall that prior to the MoU with Rwanda, the UK had unsuccessfully attempted to enter into international agreements with Albania and Ghana on the outsourcing of migrants. Albania had at the time denied any intention of entering into such agreements with the UK, describing the possibility as "totally unacceptable" and "contrary to international law".[57] Similarly, Ghana had categorically denied reports of a migrant processing and resettlement agreement with the UK.[58] In this context, it is worth noting that the African Union recently condemned a similar policy by Denmark,[59] accusing it of abdicating its international asylum responsibilities and describing such a policy as worrying, xenophobic and completely unacceptable.[60] The UN Committee against Torture has also expressed grave concern about the Danish attempt and believes that there are good reasons why Rwanda cannot be considered a safe third country.[61]

2.1.3. The British government is not giving up yet - and risks its very existence

Although the Court left open the possibility that the changes needed to eliminate the risk of refoulement could be made in the future, many experts said the ruling would effectively scuttle the plan prepared by the Sunak government.[62] The British Prime Minister announced his intention to transform the Memorandum of Understanding with Kigali into a binding treaty, taking into account the judges' findings on Rwanda's asylum process, and to pass an emergency law that would consider Rwanda a "safe country", nullifying different assessments of the country.

However, it has been pointed out that in any case it will take months before a new treaty is ratified by Parliament in London, and that any attempt to remove migrants again will almost certainly face further legal battles that could last more than a year. Jeremy Bloom, an immigration lawyer at Duncan Lewis Solicitors, had judged Sunak's proposal to be legally unworkable, noting that its implementation would make it impossible for asylum seekers' lawyers "to provide legal assistance to the extent necessary to people facing deportation under the Illegal Immigration Act".[63]

Right-wing MPs in the Conservative Party have called on the government to go further, and to use emergency legislation to disapply domestic human rights law and international treaties to eliminate the possibility of further legal challenges, while the Tories' more extremist wing even announced that it will support the UK's exit from the ECHR in the next election campaign if migrant flights to Rwanda continue to be blocked by the Strasbourg judges.[64] Meanwhile, Sunak's promise to "stop the boats" of migrants from the French coast for the time being seems to have been abandoned, while during 2023

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56 UK Supreme Court, [2023] UKSC 42, cit., para. 76.

57 May Bulman, Albanian ambassador strenuously denies country will hold Britain's asylum seekers, The Independent, 18.11.2021.

58 Ghana completely rejects claims that it would be willing to receive asylum seekers from the UK for offshore processing, electronic immigration network, 18.1.2022.

59 "Proposal for law on changes to the Aliens Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)" (Forslag til Lov om ændring af udlændingeloven (Indførelse af mulighed for overførsel af asylansøgere til asylsagsbehandling og indkvartering i tredjelande) - Aliens Act, Consolidation Act no. 1513 of 22 October 2020, as last amended by Act no. 2230 of 29 December 2020.

60 African Union, Press Statement On Denmark's Alien Act provision to Externalize Asylum procedures to third countries, 2.8.2021.

61 Johannes Birkebaek, UN committee criticizes Denmark on third country plans for asylum seekers, reuters.com, 28.11.2023.

62 Valsamis Mitsilegas, Expert Analysis: The Supreme Court rules the UK-Rwanda Policy Unlawful, University of Liverpool, Blog, 17.11.2023.

63 Diane Taylor, Boosted UK legal aid rates 'not enough' to deal with Rwanda asylum cases, theguardian.com, 5.7.2023.

64 Nick Eardley, Tories could campaign to leave European human rights treaty if Rwanda flights blocked, bbc.com, 9.8.2023.

more than 27,000 people crossed the Channel from France.[65] The government was prepared to deport 350 people, although the hope was that the Rwanda plan would operate mainly as a deterrent for people intending to reach the UK in the future. With the blocking of the plan, it is unclear what will happen to migrants arriving on British shores in small boats, who are technically barred from obtaining refugee status under the terms of the Illegal Migration Act, passed in July 2023. Since leaving the EU, the UK has no repatriation agreements with EU Member States, and without a safe third country to send them to it is likely that migrants will remain stuck in limbo in the UK's migration and detention system indefinitely.[66]

Meanwhile, the British government has quietly admitted that Rwanda will receive an additional £150 million under the new version of the London-Kigali pact to save the agreement on funds for asylum seekers. This will bring the total cost of the programme to £290 million without a single asylum seeker being transported to the East African state, and without any certainty that the pact will ever actually be implemented.[67]

The attempt to make the agreement with Rwanda enforceable in spite of everything could, moreover, jeopardise the very existence of the government. Since the Supreme Court decision was made public, Rishi Sunak has been under intense pressure from the more conservative wing of his party to further tighten his bill to make it "watertight" against external legal restrictions. Otherwise, the more extremist wing of the Tories might vote against the bill in the upcoming parliamentary votes. If this were to happen, Sunak would risk receiving such a heavy rejection in the House of Commons that his own leadership of the party, and consequently his ability to effectively lead the government, would be called into question.[68] In any case, it is not clear how a tightening of a domestic rule, however strict, would exempt the UK from complying with the supranational legal obligations to which the country is subject.[69]

Meanwhile, British Home Secretary James Cleverly travelled to Kigali on 5 December to sign a second agreement on the transfer of asylum seekers from the UK to Rwanda, in an attempt to revive the Sunak government's project.[70] The bill to implement the new agreement was narrowly passed by the House of Commons on 12 December,[71] while a close debate is expected in the House of Lords, where the measure is still awaiting its first two readings, which could again put Sunak's leadership of the Conservative Party in jeopardy. Either way, the passage of the bill is expected to be a long one, with two readings in the Lords followed by committee consideration of any amendments and a third reading in both Houses.[72]

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65 Emily Jane Davies, French rescuers 'allowed migrant boat with engine failure to continue to the UK after asylum seekers managed to restart the motor' - as figures show 27,000 migrants have crossed the Channel so far this year, dailymail.co.uk, 13.11.2023.

66 Alistair Gray, Anna Gross, William Wallis, Why the UK Supreme Court ruled against Rishi Sunak's Rwanda policy, Financial Times, 15.11.2023.

67 Benjamin Fox, The Brief – The high price of failure will drive an EU migration deal, euractiv.com, 8.12.2023.

68 Charles Hymas, Dominic Penna, Sunak risks Commons revolt unless he toughens up Rwanda Bill, The Telegraph, 10.12.2023.

69 Rather sceptical about the possibility of the British government disregarding its asylum obligations under current international law Francesca Romana Partipilo, The UK – Rwanda Migration Partnership under the scrutiny of the Strasbourg Court: Externalising asylum while bypassing refugee law?, AdiM Blog, August 2022.

70 UK home secretary signs new Rwanda treaty to resurrect asylum plan, cnn.com, 5.12.2023.

71 Safety of Rwanda (Asylum and Immigration) Bill.

72 Hannah White, Safety of Rwanda Bill: What happens next in parliament?, Institute for Government, 14.12.2023.

The second version of the memorandum states that Rwanda must comply with international law and cannot return migrants to states where they would be considered at risk. Rwanda itself has been declared a "safe country" by the British parliament, through a law rushed through by the Conservatives. In addition, according to the African country's authorities, a tribunal of British and Rwandan judges will be set up in Kigali to ensure that no asylum seekers are unfairly deported. In fact, the new version of the agreement merely declares that many of the conditions on the basis of which the High Court in London declared the first UK-Rwanda pact illegal have been amended. However, it does not seem possible that a simple national law - necessary for the official ratification of the pact - could be sufficient to declare a bilateral agreement compatible with the rules of international law: instead, it is therefore to be expected that the new version of the pact with Rwanda will also be challenged before the competent national and supranational courts, raising again the difficulties that the London government hopes to have eliminated.[73] It is not surprising therefore that an inquiry into the UK-Rwanda Asylum Partnership Agreement was launched by the House of Lords International Agreements Committee on 13 December 2023. The inquiry will consider how the agreement protects people resettled in Rwanda and whether it addresses the issues raised by the Supreme Court.[74]

2.2. The Italy-Albania Migration Protocol

On 6 November 2023, Italian Prime Minister Giorgia Meloni and Albanian Prime Minister Edi Rama announced the signing of a protocol to strengthen cooperation on migration.[75] The agreement, currently available only as a scan of a printed text even on the government's institutional websites, envisages the transfer of asylum seekers rescued at sea by Italian military vessels to two centres that would be built in Albania, capable of accommodating up to 3,000 people. This initiative is part of a broader trend whereby European governments have, for some time, been looking for ways to transfer the execution of asylum procedures outside their own territory. On the other hand, the agreement contains some innovations compared to similar previous proposals, and the Italian prime minister called this initiative "a model and an example for other cooperation agreements of this kind".[76]

For the right-of-centre Italian government that took office in October 2022, the management of migration flows has always been a central issue: in the election campaign prior to the 2022 vote, Meloni had promised to limit immigration once in power, even threatening to impose naval blockades against migrant boats. Nevertheless, in 2023 migrant arrivals in Italy increased compared to the previous year: according to data provided by the Minister of the Interior, as of 29 December 2023, 155,754 migrants had arrived by sea on Italian shores, compared to 103,846 and 67,040 in the same period in 2021 and 2022.[77]

These figures represent a serious problem for the government, and Meloni has looked for possible solutions to reduce landings. At the beginning of 2023, agreements were renewed to provide Italian support for the patrolling action of the Libyan coastline by the so-called coast guard in Tripoli,[78] while in July, on Meloni's initiative, Tunisia and the European Union signed an agreement based on a

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73 Sir Jonathan Jones, What is in the government's new Rwanda asylum plan?, Institute for Government, 7.12.2023.
74 Lords Committee launches inquiry into Rwanda asylum treaty, UK Parliament, 13.12.2023.
75 Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Abania per il rafforzamento della collaborazione in materia migratoria.
76 Migranti, accordo Meloni-Rama: "Realizzeremo in Albania due centri per quelli salvati in mare". Palazzo Chigi: "Sostegno per ingresso di Tirana in Ue", lastampa.it, 6.11.2023.
77 Ministero dell'Interno, Cruscotto statistico del 29 dicembre 2023.
78 Giulia Tranchina, Italy Reups Funding to Force Migrants Back to Libya, Human Rights Watch, I.2.2023.

European contribution of 105 million Euros offered to support border control operations by the Tunisian government.[79] In early October, however, Tunisian President Kais Saied rejected the European contribution linked to the July agreement, specifying that "Tunisia rejects what the EU announced, not because of the small amount... but because the proposal conflicts with the memorandum of understanding signed in July".[80] This complicated Italy's situation, since many of the migrants heading to Italy from North Africa were leaving from the Tunisian coast.

On 6 November 2023, therefore, came the announcement of the signing of the Protocol for the Strengthening of Cooperation on Migration between Italy and Albania: a memorandum of understanding similar to the one signed between the EU and Tunisia, agreed by just the two heads of government, Meloni and Rama, without prior parliamentary scrutiny,[81] and without involving European institutions or the UNHCR, which were informed shortly before the public announcement of the agreement.

2.2.1. The contents of the agreement

The agreement consists of 14 articles,[82] has a duration of five years, and is scheduled for automatic renewal unless one of the parties decides to withdraw. The MoU establishes the creation of two facilities managed by the Italian authorities on Albanian territory, which should be operational by spring 2024, and capable of holding up to 3,000 people at the same time. The Italian government has specified that the agreement will concern persons rescued in international waters only, and therefore not those rescued once they have already entered Italian national waters, by means of the Italian rescue authorities (Coast Guard, Guardia di Finanza and Navy); moreover, minors, pregnant women and other persons considered vulnerable will be excluded from the application of the agreement.[83] Migrants rescued by NGOs would not be covered by the agreement. Furthermore, according to the agreement, the reception facilities built on Albanian territory will have to operate under exclusive Italian jurisdiction.

One of the two facilities will be built near the port of Shengjin, about 70 kilometres north of Tirana. The procedures for disembarking and identifying migrants will take place there, and a centre for asylum seekers will also be built in the same area. In Gjader, twenty kilometres further north and in the Albanian hinterland, a facility will be set up with functions similar to those of the existing Return Centres in Italy, . Only those persons who do not appear to qualify for some form of asylum will be placed in this second centre, where they are to be able to lodge any appeals against the first denial of protection and await its outcome. At the end of the process, should it be confirmed that they do not qualify for asylum, the migrants detained here would have to be repatriated.

On the economic level, within 90 days from the entry into force of the protocol, Italy will have to pay Albania 16.5 million euro as a lump sum, and since the agreement should last five years (renewable

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79 Eleonora Vasques, EU to pay Tunisia €785m in 2023 as part of 'cash for migrants' deal, euractiv.com, 17.7.2023.

80 European Council on Refugee and Exiles, EU External Partners: Tunisia 'Rejects' EU Funding Casting Doubt on Deal as Reports of Abuse Continue to Mount, New Attack by So-called Libyan Coast Guard, 6.10.2023.

81 However, on 21 November 2023, the Chamber of Deputies approved a motion that a special bill ratifying the Protocol should be submitted to Parliament, since an agreement between the two Heads of Government of Italy and Albania alone evidently could not suffice. The procedure by which the Italian Government agrees on the contents of such an important measure without involving Parliament from the outset remains questionable.

82 Protocollo tra Il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria.

83 Governo Italiano, President Meloni's press statement with the Prime Minister of Albania, governo.it, 6.11.2023.

for another five unless either party terminates it), the total sum could become 82 million euro in five years. In addition, there would also be a fund of EUR 100 million to be paid into a current account, as a guarantee to cover the costs related to the activities in the two centres.

2.2.2. The attempted externalisation of asylum application procedures

The implementation of this agreement raises the question of whether extraterritorial processing of asylum claims is legally permissible. In this regard, UNHCR has pointed out that "under international refugee law, the primary responsibility for assessing asylum claims and granting international protection rests with the State in which the asylum seeker arrives, whether at land or sea borders, and seeks such protection. This obligation remains unaffected in the event of the transfer of asylum seekers or extraterritorial processing".[84] According to Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees,[85] as already mentioned, States are bound by the principle of non-refoulement, and according to the UNHCR's interpretation of the article, if States do not grant temporary admission to those claiming to be refugees, they would effectively be placing themselves in a position where they cannot fulfil their treaty obligations. Therefore, migrants would effectively enter Italian territory as soon as they set foot on Italian ships and their asylum applications would have to be processed by Italy, with all corresponding rights and obligations. The forced transfer of asylum seekers to another country as provided for in the agreement between Italy and Albania could therefore constitute a violation of this fundamental principle of international asylum law.

According to the Italian authorities, this would not be a violation of the law, because the applications would be examined by Italian officials according to Italian and EU law, and Italian judges would be responsible for handling the disputes. In this respect, there would be a difference with the attempted agreement between the UK and Rwanda, since in that case the asylum applications transferred to Rwandan territory would be handled by local authorities. Instead, in the present case, the operations would be handled from start to finish by Italian authorities on Albanian territory, with the planned transfer to Italy of migrants who would be granted asylum. The agreement would therefore create a de facto Italian jurisdictional enclave on Albanian territory, with diplomatic immunity for those operating in the centres: a very complex process in reality, whose constitutionality with respect to the law of Albania and Italy will have to be verified very carefully. [86]

In fact, it has been noted that there are legal elements that would already highlight the inadmissibility of the Italian-Albanian agreement under European law. In a 2018 study by which the European Commission tested the legal and practical feasibility of different migrant disembarkation scenarios, it was pointed out that "allowing individuals to apply for asylum outside the EU would require an extraterritorial application of EU law that is currently neither possible nor desirable", and that "the only way in which [such a procedure] could work would be the establishment of an EU asylum system and EU courts to process asylum claims accompanied by an EU-wide appeal structure". There would then have to be a system to distribute asylum seekers among Member States. In addition to requiring a thorough institutional reform, it would be necessary to allocate substantial resources for these new

[84] UNHCR: Transfer arrangements of asylum seekers and refugees must respect international refugee law, press release, 7.11.2023.
[85] The 1951 Refugee Convention.
[86] Lorenzo Piccoli, Offshoring Asylum the Italian Way, Verfassungsblog.de, 14.11.2023.

EU asylum bodies and tribunals.[87] In any case, therefore, this could not be an initiative by a single Member State, entrusted to its national authorities alone.

Meanwhile, on 13 December 2023 it was announced that the Constitutional Court in Tirana had upheld two appeals by Sali Berisha's Democratic Party, which is in opposition to the government, and suspended the ratification process of the agreement in parliament. The appeals claim that the agreement violates the Constitution and international conventions to which Albania is a party. This means that the parliamentary ratification of the agreement is suspended until the Court issues a ruling, which it has three months to do. The protocol was due to be ratified by the Parliament in Tirana on 14 December, but the Albanian Constitutional Court will not start examining the appeals received until 18 January 2024.[88]

2.2.3. The severe legal and practical problems of the Agreement

The agreement raises serious issues of compliance with the legal standards for migration, as the treatment to which asylum seekers would be subjected would seriously aggravate their already vulnerable condition at the time of rescue at sea.

The first problematic issue concerns the journey from the place of rescue at sea to Albania, which could last up to three days: for individuals already traumatised and in an extremely precarious condition, this could amount to inhuman and degrading treatment, prohibited by Art. 3 of the European Convention on Human Rights (ECHR),[89] to which both Albania and Italy are parties. It should be noted that the rule has recently found application in the case law of the ECHR on migration in the judgment J.A. and others v. Italy, in which it was established that the "poor material conditions" to which asylum seekers from Tunisia were subjected in a hotspot on the island of Lampedusa for a period of 10 days violated Art. 3 of the Convention.[90]

A second element of difficulty relates to asylum seekers' ability to access the legal protection that should be granted to them. Lawyers are usually put in a position to talk to the asylum seekers they assist, listen to their stories and thus gather information crucial to their asylum claims. According to Art. 13 IV of Legislative Decree 25/2008, "if the foreign national is assisted by a lawyer ... [he or she] is admitted to attend the asylum interview and may ask to see the report and obtain a copy of it".[91] It is not at all clear how a lawyer can adequately provide legal assistance to a migrant asylum seeker, when he is detained on Albanian territory and thus prevented from meeting those who are in charge of assisting him in his asylum application.

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87 The Legal and Practical Feasibility of Disembarkation Options Follow-up to the Informal Working Meeting of 24 June 2018.

88 Federica Pascale, Albanian court suspends controversial Italian migrant deal, Euractiv.com, 14.12.2023.

89 Art. 3 ECHR: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." In one of its publications on the interpretation of the ECHR, the EDU Court specifies how Article 3 enshrines one of the fundamental values of democratic societies, and how the prohibition of torture and inhuman or degrading treatment or punishment represents a value of civilisation closely linked to respect for human dignity (Bouyid v. Belgium [GC], 2015, p. 7). The prohibition in question must be understood as absolute, no derogation from it being allowed under Article 15 II of the Convention itself (Derogations in cases of emergency), even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime or the influx of migrants and asylum seekers, regardless of the conduct of the person concerned, cfr. European Court of Human Rights, Guide on Article 3 of the European Convention on Human Rights, 31.8.2022, 6.

90 J.A. and others v. Italy, 30.3.2023.

91 Decreto Legislativo 25/2008, Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato.

A third issue, related to the previous one, concerns the lack of an individual assessment when sending asylum seekers to Albanian territory, as it is not clear how and where it should take place, since the migrants - according to the text of the Protocol - would be immediately transferred to Albania as soon as they are rescued at sea by the Italian naval forces. On 29 September 2023, the Italian court in Catania assessed the government's decision to place asylum seekers, from countries considered safe, in detention centres, stating that the detention measure must be adequately justified in relation to the personal and concrete situation of the individual applicant.[92] It is therefore unclear how it is possible to send migrants en bloc to Albania without a prior assessment of each individual situation: An assessment, moreover, which is very difficult to carry out on board a ship, given the lack of competent personnel, the unavailability of appropriate technical instruments and the time needed to carry out all the necessary checks to establish, for example, the real age of adolescent migrants, the truthfulness of the family relationships claimed by asylum seekers, or the presence of migrants in a state of physical and, above all, psychological fragility, which is difficult to assess in subjects who are often traumatised and unable to verbalise the violence they have suffered during the journey to the countries where they intend to seek asylum.[93] These elements are fundamental to establishing a reliable picture of the personal situation of each individual migrant but are extremely difficult to define, especially in precarious conditions such as those found on a boat involved in rescue operations. The danger of not diagnosing in time conditions of mental distress would therefore be extremely high, with the consistent risk of transferring to Albanian territory subjects who would need adequate health and psychological treatment that would be difficult to access in the centres located in Albania: a fundamental aspect, that is given no consideration in the Protocol.

The fourth problematic issue concerns the possibility of carrying out selective landings. In February 2023, the Catania court again declared as unlawful a landing order issued by the Italian government in November 2022,[94] whereby women and people in precarious health were allowed to disembark, while the other migrants on the ship that rescued them had to remain on board for another four days.[95] The ruling is based on Chapter V, Regulation 33 of the International Convention for the Safety of Life at Sea, which states that persons in distress at sea should be rescued and brought to a safe port regardless of their nationality or status or the circumstances in which they find themselves.[96] The Agreement between Italy and Albania appears to be a failure to comply with this provision, since it provides that only persons in a more fragile condition, such as minors, pregnant women and persons in a precarious state of health, are not to be transferred to Albanian territory. Moreover, if the minors were to

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92 Silvia Albano, Il giudice non convalida i trattenimenti di tre migranti tunisini disposti in base alla nuova disciplina delle procedure di frontiera, Questione Giustizia, 2.10.2023.

93 Shabnam Pouraghajan, Johannes Ullrich, Naser Morina, Mental health of asylum seekers and refugees: The role of trauma and postmigration living difficulties and the moderating effect of intergroup contact, Current Research in Ecological and Social Psychology, 4/2023.

94 Tribunale di Catania, Ordinanza del 6 febbraio 2023. Moreover, in his order, the judge in Catania refers to a previous ruling by the Italian Court of Cassation, which states that "a ship at sea cannot therefore be qualified as a 'safe place', due to the obvious lack of such a prerequisite, when it is not only at the mercy of adverse weather events, but also does not allow the fundamental rights of the persons rescued to be respected". Nor can the duty to rescue be considered fulfilled by rescuing the shipwrecked persons on the ship and keeping them on it, since these persons have the right to apply for international protection under the 1951 Geneva Convention, which certainly cannot be done on the ship. In further confirmation of this interpretation, it is useful to recall Resolution No 1821 of 21 June 2011 of the Council of Europe (The interception and rescue at sea of asylum seekers, refugees and migrants in an irregular situation), according to which "the notion of 'safe place' cannot be limited to the physical protection of persons but necessarily includes respect for their fundamental rights' (point 5.2.) which, although not a direct source of law, constitutes an indispensable interpretative criterion of the concept of "safe place" in international law", Cassazione Penale, sezione III, 16 gennaio 2020, nr. 6626, 12.

95 Migranti, il Tribunale di Catania: "Illegittimo decreto del governo su sbarco selettivo", Rainews24, 13.2.2023.

96 International Convention for the Safety of Life at Sea (SOLAS), 1974; SOLAS Chapter V – 1/7/02, Safety of Navigation.

disembark in Italy and the parents in Albania, there would be a strong risk that the families would be separated: a practice that, according to UN spokeswoman Ravina Shamdasani, would amount to "arbitrary and illegal interference in family life, and a serious violation of the rights of the child".[97]

The fifth problematic profile - already mentioned above but deserving of specific attention - concerns the fact that the agreement should not apply to minor migrants. However, it is not at all clear who would be competent to assess the distinction between minors and adults in the case of adolescent migrants, and with what instruments and where such an examination should be carried out: on the rescue ship (a rather unlikely hypothesis, for the reasons mentioned above) or on Albanian territory? The second hypothesis, however, would involve an indiscriminate transfer of all migrants apparently of full age to Albania, which would contradict what President Meloni herself explained at the press conference.

Alongside the difficulties of implementing the agreement on a legal level, there are practical ones too. The first aspect is the management of the transfer procedures in Albania in terms of time: it is unclear how Italian ships would be able to disembark pregnant women, minors and vulnerable people in Italy and then transfer the rest of the rescued shipwreck survivors to Shengjin, which is about two days' sail from the Sicilian coast. If the ships went back and forth, it would diminish the effectiveness of patrols of Italian territorial waters for the time needed for the transfer operations. If, on the other hand, a first 'disembarkation' from one vessel to another were to take place in a Sicilian port, this would involve a second ship, which would then head for Albania, at a considerable expenditure of resources and manpower that would once again be diverted from patrolling Italian waters.

A second practical aspect would concern the repatriation of those who are denied international protection at the end of the proceedings. According to the agreement, when a person loses the right to remain in the centre, e.g. because his application for asylum is rejected, Italy transfers him "immediately [...] out of Albanian territory". It is not clear where the person will be transferred to, nor whether he/she will be taken to Italy. In the second quarter of 2023, out of 105,865 non-EU citizens ordered to leave EU territory, only 26,600 were actually repatriated.[98] At the beginning of October 2023, the return rate of those ordered to leave Italy was 12%: 1,620 out of the 13,200 ordered to leave the country.[99] In this regard, moreover, the Italian Constitutional Court had clarified with sentence no. 105/2001 that any forced removal procedure implemented by the Italian authorities must be validated by a judge's decision:[100] the problem then arises of how this requirement can be respected when the migrants to be repatriated are detained in Albanian territory and the judges competent to validate the expulsion are in Italy. Eventually, Italian judicial offices would have to be transferred to the same structure hosting the migrants, but with considerable difficulties from a logistical and economic point of view, great cost burdens for Italy, and strong doubts as to whether such a measure is actually feasible. Added to this is the circumstance that in order to carry out a return, a readmission agreement must exist between each third country to which irregular migrants are to be transferred and the EU Member States intending to return them. Such a readmission agreement must clearly define the obligations and procedures on when and how to readmit irregular residents. They aim to improve cooperation between administrations, and can only be used after a return decision has been taken in

97 UN says US must stop separating migrant children from parents, theguardian.com, 5.6.2018.
98 Returns of irregular migrants - quarterly statistics, Eurostat, October 2023.
99 Simone De La Feld, L'Italia è riuscita a rimpatriare solo il 12 per cento dei migranti irregolari, eunews.it, 6.10.2023.
100 Corte costituzionale, Sentenza 105 del 22 marzo 2001.

accordance with the procedural guarantees laid down in the Return Directive and EU asylum rules.[101] At the moment, the EU has binding readmission agreements with 18 non-EU countries, none of which are in Africa.[102] This figure alone already explains the reasons for the paucity and length of implementation of procedures to return irregular migrants from EU territory.

According to the Italian government's intentions, the centres in Albania will be able to accommodate up to 3,000 migrants at the same time, each of whom should see their asylum applications defined within 28 days. This, when fully operational, will allow a complete rotation of migrants every month, with an estimated annual reception capacity of the system transferred to Albania of 38,000/39,000 asylum seekers per year. Assuming, however, that, as we have seen, the percentage of return orders actually realised is very low, and the time required to carry them out very long, it is likely that the stay of migrants awaiting repatriation in Albania will be much longer than four weeks, and therefore the actual reception capacity of the repatriation centre will be much lower than the Italian government's expectations.

Another aspect, both practical and legal, concerns the situation outside the reception centres. According to the Agreement, it would be the task of the Albanian authorities to ensure public order and safety outside the reception areas and during transfers. In case of the unauthorised exit of migrants from the reception areas, it would be the task of the Albanian authorities to bring them back to the centres themselves. This would imply a transfer of responsibilities from the Italian to the Albanian authorities regarding the condition of migrants when they leave the centres, for example in the case of escape. However, the agreement only minimally regulates this issue and would require much more detailed regulation in the interests of all parties involved.

Furthermore, the agreement stipulates that migrants hosted in the Italian enclaves should turn to Albanian health facilities for "urgent care", but according to the information available, the Albanian health system does not provide adequate standards of care and is facing a mass exodus of its health personnel in search of better working conditions and salaries than those guaranteed at home.[103] However, the Agreement between Tirana and Rome does not take the slightest account of how these conditions might affect the quality of medical assistance given to migrants detained on Albanian territory, and consequently the quality of their existence during the period of their detention in Albania, for which, however, the Italian State remains responsible by virtue of the aforementioned international obligations in force. Furthermore, in an analysis of the protocol published on 22 November, ASGI (Associazione per gli Studi Giuridici sull'Immigrazione) denounced serious violations of international, EU and national law by the agreement.[104]

One of the main criticisms of the text is the fact that individuals, already subject to Italian jurisdiction as a result of being rescued and/or transported by Italian state vessels - which, as recalled, constitute Italian territory on the high seas under Italian and international law, even in the case of military vessels[105] - are immediately transported to Albania, a non-EU country. They are thus prevented from

[101] Directive 2013/32/UE of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[102] European Commission, A humane and effective return and readmission policy.

[103] Alice Taylor, Albanian healthcare workers flee en masse, government unfazed, euractiv.com, 5 .5.2022.

[104] ASGI, L'analisi giuridica del Protocollo Italia – Albania, 22.11.2023.

[105] Art. 4 Codice della Navigazione: "Italian ships on the high seas and Italian aircraft in a place or space not subject to the sovereignty of any State are considered to be Italian territory."

entering Italian and EU territory and made subject to procedural and reception guarantees that are actually lower than those provided in Italy, for the examination of their possible asylum applications. In spite of the Agreement, however, the entry of the migrants into Italy and the EU would in fact have already taken place the moment they set foot on the Italian vessel or aircraft. Therefore, a migrant who is rescued by an Italian vessel, and expresses the intention to apply for international protection while on the vessel, cannot be transported to Albania during the period of presentation and examination of his application, since European rules (which apply to the Italian territory with which, as mentioned, the Italian ship is equated) almost always provide for the right of the applicant to remain in the territory of the Member State for the duration of the examination of his or her application - except in the case of a repeated application or extradition or European arrest warrant or surrender to the International Criminal Court.[106] This point was further clarified by the European Court of Human Rights, which in a 2012 judgment clarified that "according to international law on the protection of refugees, the decisive criterion to be taken into account in order to establish the responsibility of a State would not be whether the person concerned by the refoulement is in the territory of the State, or on board a vessel flying its flag, but whether he is subject to its effective control and authority". According to the Strasbourg judges, this interpretation constitutes a general prohibition on the refoulement of migrants to a territory other than that of the competent State. This is a prohibition which "constitutes a principle of customary international law binding on all States, including those which are not parties to the United Nations Convention relating to the Status of Refugees or any other refugee protection treaty. It is also a rule of jus cogens: i.e. it is not subject to any derogation and is imperative, in that it cannot be subject to any reservation", as is clear from Articles 53 of the Vienna Convention on the Law of Treaties, 42 § 1 of the Convention relating to the Status of Refugees and VII§1 of the 1967 Protocol relating to the Status of Refugees.[107]

Neither can an asylum-seeker from a safe country of origin be detained in Albania under the above-mentioned accelerated border procedure because only those rescued in international waters are to be transferred to Albania and international waters are not a border zone; the same is true if a citizen of a safe country applies for international protection after having been transferred and identified in the Albanian centre provided for in the Agreement because it is clear that Albania is not part of the Italian border zone.[108]

ASGI's analysis also refers to the fact that EU law on international protection applies indiscriminately in the territory of Member States, at borders, transit zones and territorial waters,[109] while the European Commission itself, in the aforementioned document "The legal and practical feasibility of disembarkation options follow-up to the informal working meeting of 24 June 2018"[110] excludes extraterritorial application of EU law on asylum. EU Commissioner Johansson's words that "if Italian laws are applied, people should be examined according to Italian laws by the Italian authorities and, after a (positive) asylum decision, be taken to Italy or, if not, to their country of origin and, if this is not

[106] Art. 9 Directive 2013/32/UE: "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III [of the Directive]".

[107] Corte EDU, Hirsi Jamaa and others v. Italy, 23.2.2012.

[108] ASGI, Il Protocollo italo-albanese in materia migratoria prevede norme incerte ed illegittime, 21.11.2023, 3.

[109] So also according to the European Council on Refugees and Exiles, which in an assessment of the Italy-Albania Protocol recalls how, regardless of the material location of the centres to which migrants are directed, in them "EU primary law, including the Charter of Fundamental Rights applies", s. ECRE, Preliminary Comments on the Italy-Albania Deal, 9.11.2023.

[110] European Commission, The legal and practical feasibility of disembarkation options follow-up to the informal working meeting of 24 june 2018.

possible, to Italy" do nothing to change this. Therefore, the argument that "Italy is complying with EU law, which means that the rules are the same. But legally speaking, it is not the EU law but Italian law (that applies) and Italian law follows the EU law"[111] appears to be self-evidently invalidated , since it does not clarify how compliance with the Italian law would be guaranteed a priori in the Albanian centres, or how this could be considered a priori compliant with the European law in the absence of an assessment by a competent jurisdictional authority.

In any case, according to Johansson's interpretation, the Protocol between Italy and Albania would not violate EU law. In turn, Foreign Minister Tajani deduces from Johansson's arguments that "EU law does not apply outside the territory of the European Union, but there is no violation of law. This does not apply, but there is no violation either".[112] However, as already mentioned with ample references, under Italian law Italian ships constitute Italian territory; therefore, the same procedures and guarantees under EU law should apply to all migrants transported by Italian ships. Circumstances that make Johansson's remarks actually quite ambiguous and contradictory. Alternatively, even if EU law did not apply, the "only" Italian law will certainly be applicable, i.e. Article 10 III of the Constitution, which guarantees all foreigners constitutional asylum, and also requires, among other things, the right to enter Italian territory and not third countries that are not national territory,[113] which provides a much more favourable form of protection than European law and excludes the possibility of recourse to accelerated procedures for examining asylum applications provided for by European law.[114] A similar conclusion should be drawn with regard to the detention of migrants subject to deportation procedures, to which Directive 115/2008/EC[115] should be applied. These could not however be enforced in return centres located outside the territory of the Union. In any case, no asylum or deportation procedure can be carried out outside Italian territory.

Others drew attention to the guarantees that must be given to all asylum seekers under European rules during the period of detention which they have to undergo pending the outcome of their asylum application.[116] Even for migrants detained in centres in Albania, the exercise of fundamental rights must therefore be guaranteed without exception, including the right to receive "information on the procedure with regard to the particular situation of the applicant" as well as to communicate with "organisations providing legal assistance or other advice to applicants".[117] These are clear and inescapable obligations but the Protocol nevertheless fails to provide any concrete indications as to how their observance will be ensured in the detention facilities to be established on Albanian territory.

As a matter of fact, two options would be available to enable asylum seekers to access the envisaged legal assistance: the construction of facilities adjacent to detention centres on Albanian territory, or the provision of telematic tools to ensure remote connections between migrants and their legal

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[111] Jorge Liboreiro, Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson, euronews.com, 15.11.2023.

[112] Camera dei Deputati, Seduta del 21 novembre 2023, 26.

[113] Art. 10 III Cost.: "A foreigner who is prevented in his own country from effectively exercising the democratic freedoms guaranteed by the Italian Constitution has the right to asylum in the territory of the Republic in accordance with the conditions laid down by law."

[114] Gianfranco Schiavone, Accordo tra Italia e Albania, così il governo si è smentito da solo…, unita.it, 23.11.2023.

[115] Directive 2008/115/CE of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

[116] Gianfranco Schiavone, Ecco perché l'accordo tra Italia e Albania è illegale: tutte le procedure che violano il diritto europeo, unita.it, 10.11.2023.

[117] Art. 19 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

representatives. In the first case, there would obviously be practical problems for the legal representatives to reach their clients in Albania on a regular basis; in the second case, the confidentiality of the interviews between asylum seekers and lawyers would be jeopardised, as the management of the telematic links would not be at the exclusive disposal of the migrants and their legal guardians. Obviously, these are not only procedural aspects, but also, and above all, substantive aspects with regard to the legality of the agreement between Italy and Albania, on which the Italian authorities will have to provide adequate information to demonstrate that the agreement complies with the legal constraints in force.[118]

3. Practicability and risks of transferring asylum seekers to third countries and externalisation of asylum procedures

For several years now, there has been a widespread conviction among the European public that the increase of migrants in their respective jurisdictions corresponds to a worsening of the general living conditions of national communities. This is considered to involve threats to public safety and fewer job opportunities for citizens, who are forced to compete with migrant workers willing to perform the same tasks for lower wages and without the economic and legal protections provided by law.[119] According to a Eurobarometer survey conducted in the winter of 2021-22, the issue of migration was the main concern for 22 per cent of respondents, ahead only of climate change (26 per cent) and rising inflation and the cost of living (24 per cent).[120] This also has consequences on a political level, given the widespread success of extreme right-wing parties across Europe, which are increasingly able to leverage fears about migrants to increase their electoral support.[121] Thus, irrespective of whether fears about "waves of refugees" are justified, if public discourse evolves in a certain direction, and right-wing populism succeeds in riding on these sentiments, the result is a loss of support for traditional parties (both right-wing and left-wing) and the increasing presence of radical right-wing representatives and often Eurosceptic political forces in European parliaments and governments.[122]

3.1. Easy solutions to a complex problem

It is therefore understandable that political actors are looking for solutions that respond to the negative perceptions of their electorates about the presence of migrants in their territories. Among the options considered viable, both the EU institutions and various European governments have, as shown above, begun to consider more seriously the possibility of transferring asylum seekers to third countries or outsourcing the procedures for examining applications for international protection of migrants bound for Europe. This is now a widespread trend, with an increasing number of countries in the so-called Global North[123] (from the United States to Israel and Australia, as well as Europe) tempted

[118] Mario Savino, Flavio Valerio Virzì, Il protocollo tra Italia e Albania in materia migratoria: prime riflessioni sui profili dell'extraterritorialità, Blog ADiM, November 2023, 6-7.

[119] Richard Wike, Bruce Stokes, Katie Simmon, Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs, Pew Research Center, 11.7.2016.

[120] Eurobarometer, Standard Eurobarometer 96 - Winter 2021-2022, April 2022.

[121] The Economist, Right-wing anti-immigrant parties continue to receive support in Europe, 10.9.2018.

[122] Jake Moran, Climate, conflict, and migration: Europe's next frontier of populism, European Center for Populism Studies, 7.12.2022.

[123] This expression should include North America and Europe, Israel, Japan and South Korea, as well as Australia and New Zealand, according to the classification of the United Nations Conference on Trade and Development (UNCTAD)

by the idea of solving the problem of mass migrant arrivals by outsourcing the logistics of processing asylum applications to third countries.[124] In return, Western countries agree to offer favourable conditions for legal access to their borders to quotas of nationals from third countries willing to host asylum procedures, thus preventing migrants from the so-called Global South from entering the West.[125]

3.2. Legal constraints matter

As this strategy is increasingly put to the test in Europe,[126] it is appropriate to ask whether such plans are actually feasible in the European context, and whether they can provide truly effective solutions to the massive influx of migrants that the Old Continent has been facing for some time.[127]

It was emphasised that, despite their profound differences, the UK-Rwanda agreement and the Italy-Albania memorandum on the outsourcing of asylum seeker identification procedures contain several critical elements in regard to existing national, European and international legal standards.[128] In the case of the United Kingdom, the Supreme Court's rejection demonstrates the Plan's incompatibility with domestic legislation in the first place, but also illustrates its many critical aspects with respect to European human and fundamental rights legislation: the fact that the ruling of the five British supreme judges did not definitively reject the Plan in no way changes the fact that in order to be judged admissible, it must in any case agree with European regulations and jurisprudence on asylum seekers.

The proposal by the most extreme fringe of the British Conservative Party to withdraw the UK from the ECHR, which was initially rejected but has recently come back into vogue, [129] shows that even the staunchest supporters of the plan realise that the UK will never be able to implement such a strategy as long as the European constraints apply, that remain in place after Brexit. And even if London were to leave the ECHR, the British government would still be forced to comply with its international obligations under the asylum conventions to which Britain is a party.[130]

The question arises all the more for Italy and the other EU Member States, which, in addition to the constraints of the ECHR, are also called upon to comply with those laid down by EU regulations, as well as the general international obligations by which, as we have seen, the United Kingdom also remains bound. The feeling is that the proposals, first London's, and then Rome's, represent a sort of "pilot project" whose final outcome is also being watched closely by other European governments, such as Germany's,[131] to see if such solutions can be subsequently adopted by them as well.

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[124] Lena Riemer, Carrot and Stick: How Western States Lure and Pressure Third States into Cooperating in Migration Control and What This Means for Migrants' Rights, opiniojuris.org, 22.7.2019.

[125] A term that broadly comprises countries in the regions of Africa, Latin America and the Caribbean, Asia (without Israel, Japan, and South Korea), and Oceania (without Australia and New Zealand), according to the UNCTAD classification.

[126] Marion MacGregor, Europe considers offshore screening of asylum seekers after UK ruling, infomigrants.net, 16.11.2023.

[127] Benjamin Ward, Think Fortress Europe is the answer to migration? Get real, euronews.com, 9.1.2018, updated 9.5.2019.

[128] It has also been pointed out that the European Asylum Pact has internalised strategies on the externalisation of asylum procedures that appear to be inspired precisely by the UK-Rwanda Pact, cfr. Francesca Romana Partipilo, The UK – Rwanda Migration Partnership under the scrutiny of the trasbourg Court: Externalising asylum while bypassing refugee law?, August 2022.

[129] UK condemns court decision to block Rwanda deportation, will not leave convention, reuters.com, 16.6.2022.

[130] Maja Grundler, Elspeth Guild, The UK-Rwanda deal and its Incompatibility with International Law, eumigrationlaw.eu, 29.4.2022.

[131] Germany's Scholz looking 'closely' at Italy's migrant deal with Albania, reuters.com, 11.11.2023. Even the CDU, Germany's main opposition party, has recently come out in favour of the possibility of adopting strategies similar to those currently

Yet, the Council of Europe's Commissioner for Human Rights, Dunja Mijatović, recently commented on the Italy-Albania Memorandum of Understanding, saying that the pact "is indicative of a wider drive by Council of Europe member states to pursue various models of externalising asylum as a potential 'quick fix' to the complex challenges posed by the arrival of refugees, asylum seekers and migrants. However, externalisation measures significantly increase the risk of exposing refugees, asylum seekers and migrants to human rights violations. The shifting of responsibility across borders by some states also incentivises others to do the same, which risks creating a domino effect that could undermine the European and global system of international protection".[132]

The urgency of stemming migrant arrivals in Europe is leading many European rulers to seek practical shortcuts, forgetting, however, that in a community of law, respect for legal values and principles is a prerequisite for regulatory measures to be effectively admissible and capable of producing effects.[133] The example of the United Kingdom illustrates the problem well: setting up procedures without regard to the constraints of one's own legal system is likely to result in a waste of time that will be useless in solving the problem one intends to address, because unlike governments, the courts, especially those of last resort, are much more concerned with the obligations to which legislation must be subject than with political polls. Rishi Sunak's government has chosen to disregard these obligations, and one year after entering into the pact with Rwanda, it seems to find itself back to square one with the problem of stemming migrant landings on British shores. The Italy-Albania MoU risks following the same fate, while the European Pact on Asylum itself presents criticalities that could lead to its rejection by the European Court of Justice or the European Court of Human Rights, as well as by individual national supreme courts, which do not fail to emphasise - and rightly so - their independence from political power, as seen for example in the case of the recent ruling of the German Federal Constitutional Court on the public budget, declaring as unlawful transfers of financial resources amounting to 60 billion Euros from one expenditure item to another, creating considerable problems for the budgetary policies of the Berlin government for the coming years.[134]

3.3. Moral consistency cannot be a luxury - at least in Europe

One should also always be aware of the need to verify the morality of a measure such as the outsourcing of the assessment of asylum applications: any neglect of the ethical profiles of such a rule, in fact, would complicate the credibility of its authors to no small degree, when they demand respect for human rights from governments in the Global South, or demand compliance with the principle of legality from EU Member States that violate, for example, the independence of the judiciary. One would have to recognise that if one is willing, for internal political needs, to compromise on principles (legal but also moral) that are actually proclaimed inviolable by one's own legal system or by the European Treaties, one then loses the authority needed to be able to ask others to do the same when it would be proper to do so.

being tried by the UK in Rwanda, s. Ben Knight, , Migration: CDU debattiert Ruanda-Plan für Asylbewerber, Deutsche Welle, 28.12.2023.

[132] Agreement between Italy and Albania: Council of Europe about disembarkation and refugees, "no legal certainties, protection of human rights at risk", agensir.it, 13.11.2023.

[133] Emblematic in this respect was the light-heartedness with which the issue of respect for the rule of law by Frontex, Frontex, the European Border and Coast Guard Agency that helps EU and Schengen countries manage the EU's external borders and fight cross-border crime, on which s. Luisa Marin, Frontex and the Rule of Law Crisis at EU External Borders, verfassungsblog.de, 5.9.2022.

[134] Nicolas Camut, Peter Wilke, Top court blows €60B hole in Germany's climate financing plans, politico.com, 15.11.2023.

Nor would it be appropriate to present European constraints as a limitation on the freedom of action of the respective national government. This is what happened in the British campaign on Brexit with respect to the obligations required of Member States on immigration,[135] and the result was the exit of an authoritative state like Great Britain from the European Union. In other words, enacting measures contrary to European law or jurisprudence risks, among other things, stimulating Eurosceptic sentiments in national electorates, increasing public disaffection with the EU and endangering the continuation of the European integration process.

The issue of legal constraints, however, does not seem to be the sole concern of European judges. On 8 November 2023, the Australian High Court issued a landmark decision in the NZYQ case[136], declaring the policy of indefinite detention of genuine asylum seekers or stateless persons with no prospect of resettlement to be unconstitutional. As a result of the decision, the Minister responsible had to order the release of more than 140 people detained on immigration grounds. The decision overturned 20 years of legal precedent. Although the High Court decision refers specifically to the Australian legal context, it is well known that many politicians in Europe have often referred to Australia's strict detention policy as a model for an orderly refugee reception process.[137] The High Court's decision therefore not only forces a rethink of Australia's current system of migrant management, but also raises important questions about the possibility of replicating this model in the European context.[138]

3.4. Controversial and ineffective measures, after all

Moreover, according to a study of such measures taken in various parts of the world, these procedures would produce little deterrent to the objectives for which they were conceived: the number of migrant arrivals would fall only marginally, traffickers would continue their business by putting the lives of asylum seekers at even greater risk, and asylum seekers would be pushed along even more dangerous routes to the West.[139] Even if they were implemented, in fact, both the UK pact with Rwanda and the Italo-Albanian MoU would concern at best a few thousand migrants, insignificant compared to the overall size of the migratory phenomenon affecting Britain and Italy: the real practical benefits would therefore be very limited, compared to the high economic costs that the governments in London and Rome would have to bear.[140] Instead, experts in the field have long been recommending the construction of an effective system of legal entry of migrants into Europe, which is considered to be much more effective than simply securing the external borders for efficient migration management.[141] However, the procedures for controlling the EU's external borders pose concrete problems with regard to the legal status of the refugees concerned, particularly with regard to the pre-entry screening and the new border procedures provided for by the new European Pact on Migration and Asylum, which

[135] Hélène Grinan-Moutinho, An analysis of the anti-immigration discourse during the official 2016 Brexit referendum campaign, Observatoire de la société britannique, 29/2022, 65-87.
[136] High Court of Australia, NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor, Case S28/2023, 9.11.2023.
[137] Madeleine Geibel, Farida Fozdar, Fiona McGaughey, 'No way. You will not make [insert country here] home': Anti-asylum discursive transfer from Australia to Europe, Current Sociology, Online First, 2023.
[138] Jock Gardiner, Silvia Talavera Lodos, High Court of Australia rules indefinite detention to be unconstitutional – why Europe should pay attention, Blog Diritti Comparati, 13.12.2023.
[139] National Immigrant Justice Center, Pushing Back Protection. How Offshoring And Externalization Policies Imperil The Right To Asylum, 3.8.2021.
[140] Hanne Beirens, Samuel Davidoff-Gore, The UK-Rwanda Agreement Represents Another Blow to Territorial Asylum, Migration Policy Institute, April 2022.
[141] Harlem Desir, Safe migration routes are vital for a functioning EU asylum system, politico.eu, 22.12.2023.

configure a possible "deterritorialization" of the EU territory by reinforcing its practices of externalisation.[142]

Moreover, both the plans to transfer migrants across national borders and the outsourcing of asylum procedures presuppose an inescapable condition: the existence of third countries willing to receive and detain on their territory migrants on their way to the West. However, even if these countries were absolutely willing to play the role assigned to them, such agreements would give them, or rather their governments, a powerful weapon of pressure against their Western counterparts. If a third country were to pursue a policy that jeopardised European interests, it could threaten to unilaterally suspend the pact if the West objected, for example, to strategies forbidden by international law or to demands for more financial resources to keep the agreement in force. This is what happened in February 2020, for example, when Turkish President Erdogan unilaterally suspended the EU-Turkey declaration in force since March 2016 by sending some 20,000 migrants to the border with Greece and demanding additional funding from the EU to continue detaining asylum seekers from the Middle East on Turkish territory.[143] Although the use of migratory flows as a tool to achieve foreign policy objectives is not a new phenomenon,[144] the relocation of migrants or the outsourcing of the procedures for processing their asylum claims therefore risks exposing Europe and its Member States to demands that could undermine objectives that are as strategic, if not more so, than the containment of migratory flows.

Conclusions

The management of migratory flows to Europe remains a complex problem, which requires adequate but also workable, effective and sustainable remedies. Strategies such as those attempted with the UK-Rwanda pact or the MoU between Italy and Albania, as well as some elements of the European Asylum Pact, risk instead being ineffective, costly and unworkable, for both legal and practical reasons. Moreover, these agreements are usually linked to the disbursement of large sums of money in favour of the countries called upon to detain migrants. if these countries are led by populist or undemocratic governments, providing them with economic support could also result in a worsening of democratic conditions in those countries and an increase in migration flows.[145]

In order to avoid venturing down paths that could result in a waste of the precious time needed for the problems they are trying to solve, Member States and the European institutions should entrust pools of technical experts with the task of identifying the best solutions for achieving the established goals. In doing so, they must take account of all the variables involved in implementing such solutions rather than being led by contingent political conditions when choosing the remedies to follow in this field. Currently, however, Europe seems to prefer "non-agreements" based on the simple idea of "protection elsewhere" [146] - a kind of Nimby strategy which the old continent is applying to the migration issue - whose main objective consists of merely attempting to prevent asylum seekers from arriving on European territory. The result is a legal limbo in which fundamental human rights are suspended in the name of saving the lives of migrants; rights which Europe needs to uphold if it is to

[142] Jean-Pierre Cassarino, Luisa Marin, The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?, European Journal of Migration and Law, 1/2022, 1–26.
[143] Ayşe Dicle Ergin, What Happened at the Greece-Turkey Border in early 2020?, verfassungsblog.de, 30.9.2020.
[144] Lucas Rasche, The instrumentalisation of migration. How should the EU respond?, Hertie School, Jacque Delors Center, 16.12.2022.
[145] This is what Nathalie Tocci observes about the possible agreement between the EU and Tunisia, v. Nathalie Tocci, The EU's fear of migration is back – but a squalid deal with Tunisia is no way to tackle it, theguardian.com, 2.8.2023.
[146] Chiara Favilli, Nel mondo dei "non-accordi". Protetti sì, purché altrove, Questione Giustizia, 1/2020.

remain true to itself as a community based on legal and ethical values. Indeed, all political actors involved should be clear that an issue as complex as the management of migration flows cannot be solved solely through restrictive regulatory interventions, aimed primarily at convincing the public that they are taking some kind of action, rather than at creating an effective overall strategy. Otherwise, the risk is to enact useless measures that fail to solve the problems for which they were envisaged thereby further disappointing the electorate and fostering the growth of precisely those populist movements that one would like to oppose.

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