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The "Externalization" of the European Union Migration and Asylum Policy: A Case Study of the Italy – Albania Agreement[1]

E. Muharremaj, G. Cami

Erjon Muharremaj – PhD, Vice Dean, Lecturer, Faculty of Law, University of Tirana; Sheshi Nënë Tereza 4, Tiranë 1010, Albania; erjon.muharremaj@fdut.edu.al

Giola Cami – PhD Candidate, Faculty of Law and Political Science, University of Szeged; Tisza Lajos krt. 54, 6720, Szeged, Hungary; cami.giola@stud.u-szeged.hu

Abstract

Migration and its derivates – refugee and asylum policy – are rising up the policy agenda at national and international levels. This paper provides a comprehensive legal and policy analysis of the externalization policy, and migration and asylum frameworks at the European Union (EU), and national levels. Using an integrated approach in methodology, the paper theoretically examines the insights from contemporary debates in the field and briefly analyzes the most recent developments in Europe, where the new Pact on Migration was approved in May 2024. Conducting a comparative legal analysis, we analyse the Protocol on Strengthening Cooperation in the Field of Migration, signed between the Albanian and Italian governments, juxtaposing its provisions with international and EU asylum and immigration law. Furthermore, analysis will be contemplated with the critique of the judgment of the Albanian Constitutional Court on the compatibility of the protocol with Albanian Constitution and legal standards pertaining to international human rights law.

We argue that, the agreement is presented as a legal framework to, de jure, strengthen cooperation in the field of migration, However, from the text of the Protocol, de facto, the agreement is about placing a certain part of the territory of the Republic of Albania under the exclusive jurisdiction of the Italian Republic, where it can 'externalize' its asylum seekers, thus deter potential immigrants from travelling towards Italy. It is the latest in the efforts of the EU members to "discharge" asylum seekers onto other poorer countries, more as a tool of domestic politics, rather than solving the thorny issue of migration. Conclusions will be reached on the developments in EU law and policy on migration and asylum, and their impact on relations between EU members and other countries. Finally, we provide recommendations to ensure compliance with human rights standards.

Keywords: migration, asylum, externalization, human rights, Italy, Albania

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Introduction

International migration has emerged in the last decade as one of the world's most controversial and pressing issues. The massive increase in international travel, and with it, the increase of unauthorized migration, the strengthening of refugee movements, have led to changes of policies on migration. Migration occurs in wealthy nations, as well as in poorer ones. It involves individuals who try to escape persecution in their home countries because of their political, religious or any other belief, their ethnic or racial origin, people who try to escape economic hardship, or even environmental degradation back home. It also involves people who bring with them human capital and professional capacities (sometimes with life-saving qualities for the humanity),[1] as well as people without any such credentials, or even people with criminal backgrounds. When it reaches considerable proportions, it may have serious implications for the receiving country's economy, security, health services, public policies and social cohesion.

Because of the current situation in the world, amid wars and social tensions exacerbated by the economic and environmental crises, advancement of multiculturalism migration has increased to unprecedented numbers [Hysmans, 2002, p.752]. Statistics show that there are 281 million migrants worldwide [IOM, 2024], as a result of persecution, conflict, violence, climate catastrophes, human rights violations or events seriously disturbing public order, out of which 117 million people were forcibly displaced [UNHCR, 2023a]. Due to its' numbers and implications, migration and its derivates - refugee and asylum policy - are rising up the policy agenda at national and international level. Although the receiving countries are mainly low and middle-income countries, which host 75% of the world's refugees and other people in need of international protection [UNHCR, 2023a], it is in the developed countries where the societies are engaged in serious debates about immigration.

In the European Union (EU), a study conducted on democracy perception shows that mitigating immigration is perceived among Europeans as a higher priority than tackling climate change; additionally, there is strong demand for governments to prioritize immigration concerns above other issues [Latana, Alliance of Democracies, 2024]. The public debate on immigration has been focused more on the "illegality" of the immigrants. In due course, the term 'crimmigrant' has been coined, to show that immigration equals increased criminality. The figure of the 'crimmigrant other' has taken a central place in the media and the political discourse, fueling public perception that immigration breeds insecurity, thus influencing the lives of large groups within a society [Franko, 2020].

The 2015 European immigrant crisis, especially, has sparked new debates on how to tackle the EU migration policies[2], and provide solutions that address the national priorities of the member states, while adhering to EU laws and fulfilling commitments under multilateral agreements [Zagharov, Agafoshin, 2023]. Hence, a two-pillar approach policy has been focused on the securitization and externalization policies, resulting in several deals with non-EU countries [Martini, Megerisi, 2023].

Subject to this study, externalization policy was underpinned in the New Pact on Migration and Asylum (2020) presented by the European Commission, reforming the

[1] Founders of both producers of Covid-19 vaccines, Moderna and BioNTech, were immigrants.

[2] European Union has experienced irregular immigration escalation in its southern borders, with Italy and Greece being faced with overwhelming irregular refugee and immigrant crossings.

Common European Asylum System. Experience with externalization policies may have provided, temporarily, EU member states with public support for cross-border cooperation to address irregular migration [Vranceanu, Dinas, Heidland, Ruhs, 2023, p.1161-1163]; however, the opt-out policies have been subject to criticism regarding their legality and international protection standards under the lens of the international law [Xanthopoulou, 2024, p.109], while serving de-facto as a preventive migratory mobility [Mitsilegas, 2022, p.263-280]. In addition, critics claim that externalization policies have infringed human rights, while enabling EU to prevent the 'triggering' of the international obligations while securing its borders [Frelick, Kysel, Podkul, 2016, p.196-199].

Despite critics, the externalization policies seem to be favored by many member states, which, in part, are signing bilateral agreements with third countries to outsource their asylum policy management, such as the recently singed Italy-Albania Agreement (2023). Current controversies underline the need for rational and informed debate of this widely misrepresented and little understood area. This paper seeks to contribute to this debate by engaging in the discussion and help to understand the developments in the topic of migration.

The study will be conducted using an integrated approach in methodology, allowing for an in-depth acquisition of insights from contemporary debates in the field. Initially, this study will provide a theoretical examination of the EU m*igration and* a*sylum* legal policies; it will be continued by further critically assess the externalization policies conducting a conceptual literature review of existing research studies. The second part of the study, will follow the examination of the case study pertaining to the Italy-Albania Agreement (2023). The case study will be assessed through a comparative legal analysis of the agreement's conformity with human rights enshrined in international, EU and national law.

Aiming at contributing to the critical assessment of externalization, the study will assess the impact of externalization policies on migration and asylum policies. Also, it will briefly cover the potential political gains for the signatory countries, and how these agreements impact on relations between EU members and signatory non-EU countries. Finally, the study will provide recommendations aimed at strengthening and revising existing migration policies to ensure with the protection of human rights, as well as addressing the tackling of any ambiguities in the grey zone that may lead to potential violations.

Literature Review on Externalization Policy

The migration policies established by the Dublin Convention (1990) and the Dublin Regulation (2003), created asymmetric distribution of responsibility for managing migration flows among EU member states. As a result, first-entry point states like Italy, Greece, and Spain have been disproportionately burdened with asylum cases. This system further contributed to fragmented policy responses between the EU and its member states, affected by the unbalanced share of responsibilities at national levels, and resulting in EU policy framework nuanced by a grey zone of ambiguity [Zaun, 2017, p.85-95]. Furthermore, it has been argued that the Dublin system not only contributed to, but also, to some extent, encouraged the emergence of externalization proposals [Moreno-Lax, Lemberg-Petersen, 2019, p.7].

Since the 2015-2016 migration crisis, both in EU level and national levels, the externalization of migration control has become central to the architecture of the EU asylum and migration framework. In essence, it involves the outsourcing of migration control duties to non-EU

countries, through the means of supranational cooperation.
Authors researching the subject matter have provided a definition mapping the term, though essentially, the externalization is referred to ‘as the practice of managing migration flows through the transborder enforcement of immigration policies vis-à-vis the cooperation with other countries’ [Nicolosi, 2024, p.2-3]. Some authors regard externalization as a legal practice shifting the migration and asylum policy from what traditionally has been regarded as internal domain, to an external relations component [Lavenex, 2006, p.330-338; Dimitriadi, 2016, p.2].
However, it has been noted that the externalization of the migration policies to other countries does not equal to the disappearance of territorial border controls of the externalizing state, rather as integral and contemplative [Lemberg-Petersen, 2023, p.87]. The term "controlling element" in this definition refers to the extraterritorial management of refugee and asylum cases, which is carried out either by public, or private agencies, operating in the host country [Lemberg-Petersen, 2017, p.41]. In contrast to this interpretation, a more comprehensive approach views externalization as an 'umbrella' concept that, in a broader sense, includes any migration control on refugees, while relativizing the externalization policy with other concepts, such as remote control, non-entrée, deterrence, or offshoring [Tan, 2021, p.8].
Exercised predominately by the Global North, externalization policies seek to manage migration flows from the Global South through the adoption of several strategies, including offshore interception and detention of asylum seekers, border pre-clearance, and externalized asylum processing agreements, among others [Amuhaya, Ochola, 2023, p.94]. Literature often makes referral to the “Mediterranean migration”, highlighting the geographical context, where countries like Italy, Greece, Malta, and Spain have been subjected to hosting the biggest volume of migration flows [Martini, Megerisi, 2023].
The main interest in the policy of deterrence is the shifting of the responsibility for the refugee protection from developed countries, to neighboring or transit countries [Hansen, Tan, 2017, p.40]. The shift of the migration management to other countries will also limit the responsibilities based on the assumption that human rights obligations only apply territorially [Nicolosi, 2024, p.11]. This approach allows for unregulated migration to be discouraged, as asylum requests will be processed outside of the EU borders, and rejected asylum seekers will be repatriated by the host country [Angenendt et al., 2024; Cantor et al., 2022]. In addition, it is expected that this new approach, by controlling irregular migration, also contributes to the promotion of legal migration pathways [Rosina, Fontana, 2024].
It is important to note that neither the concept, nor the mechanisms, are new, or innovative; they have been present in simpler forms since the beginning of the twentieth century, but, with the increase of the refugee flows, the concept has been further elaborated and measures were refined [Nicolosi, 2024, p.4]. Some of the earlier applications of the externalization policies can be found in the timeframe from 1980s to the mid-2000s, when the governments of the United Kingdom, Denmark, the Netherlands, Germany, and the European Commission, proposed various externalization initiatives. The proposals were commonly understood as a policy to establish facilities outside the EU, where asylum seekers could be relocated [Lemberg-Pedersen, 2019, p.20].
The current approach to migration externalization introduces a significant shift compared to earlier practices, where asylum applicants were processed in another country, and upon approval, moved to the Global North. In contrast, the new framework involves a reverse process, where applicants already in the Global North are transferred to third countries, for further processing [Amuhaya, Ochola, 2023, p.95; Angenendt et al., 2024].
Characteristically, the current migration governance policies and instruments related to the EU's externalization efforts after the 2015 crisis are primarily focused on security and containment, with the goal of controlling the Union's external borders [Raach, 2024, p.7]. While regional cooperation remains crucial for the EU’s implementation of the Common European Asylum System, externalization goes beyond merely managing migration; it also involves the delegation

of asylum responsibilities to the regional external countries [Cantor et al., 2022, p.151].
The implementation of the EU's externalization practices is being conducted through the means of both, bilateral and multilateral agreements, serving as the backbone structure to allow the outsourcing of the responsibility of asylum seekers application processing to non-EU countries. The cooperation framework stipulated in the agreements includes the provision of financial and technical assistance from the EU, or its member state(s) to the non-EU country, while on specific cases, the agreement has included controversial political concessions regarding accession negotiations and visa liberalization. [Hansen, Tan, 2017, p.44].
Since 2015, the EU externalization approaches have led to numerous cooperation agreements between the Union, as a whole, or through individual member states, and regional non-EU countries. Proposed, under-evaluation, or signed main practices include the EU-Turkey Statement (2016), Italy-Libya Memorandum of Understanding (2017), UK-Rwanda Migration Partnership (2022), and the recent Italy-Albania Migration Agreement (2023). While each of these agreements is founded on the principle of outsourcing asylum management beyond EU borders, they also reflect distinct approaches, each with its own characteristics. While in principle, the external migration policy analysis is expected to be led by EU level assessment [Weinar, 2011, p.7], the state-level efforts to outsource migration management have gained more provenience than anticipated [Rosina, Fontana, 2024].
Italy and Spain are classic examples of externalization, having implemented agreements that go beyond the broader EU initiatives, hence reflecting countries' relevance in external migration policies built up vis-à-vis direct partnerships with non-EU countries[3]. Their peculiar geographical positions play a role in both countries' resilience toward outsourcing migration control [Rosina, Fontana, 2024].
Notably, Italy has been deliberate in its efforts to tackle irregular migration, having already signed two externalization agreements, with Libya and, recently, with Albania. However, the geographical position of Italy is not to be treated as a standalone explanatory argument to support the country's position in the matter. Italy's experience with involving third countries in migration management since the late 1990s has significantly shaped its diverse cooperation strategies [Rosina, Fontana, 2024]. Although the relevance of regional cooperation strategies has gained international recognition in the last decade, with less emphasis on Italy's experience, the country's external dimension of its migration policies can significantly contribute to the discussion on the political and legal aspects of externalization. [Rosina, Fontana, 2024].
Externalization policies have been heavily criticized, despite political persistence toward implementation, for not having reached its purpose – preventing irregular migration into Europe. Reversely, externalization policies have contributed to a new surge in irregular immigration on the central Mediterranean route since 2020 [Martini, Megerisi, 2023]. The political pragmatism aimed at reducing the number of migrants crossing the sea has been challenged by calls to ensure that such cooperation respects the rule of law and upholds human rights [Raach, 2024, p.8].
Significant legal and ethical concerns, particularly regarding the principle of non-refoulement, critiquing the EU's externalization policies that often lead to situations where this principle is undermined, thus, circumventing its obligations under the 1951 Refugee Convention [Mitsilegas, 2022, p.264-271].

Furthermore, when addressing concerns on legal implications, collectively, studies have raised red flags in respect to human rights violations [Nethery, Dastyari, 2024]. The externalization experience has been regarded as 'legal black holes', where migrants are left without protection, or access to justice [Wilde, 2005]. The use of non-binding agreements, such as memoranda of understanding, further complicates the enforcement of human rights standards, as these

[3] United Kingdom is not mentioned here, because it is no longer a member state. This paragraph focuses on highlighting similar state-level externalization practices within the EU.

agreements often lack the legal rigor and accountability mechanisms found in formal treaties [Nicolosi, 2024, p.2].

EU Migration and Asylum Law and Policy Framework

The legal framework for asylum and immigration is primarily governed by the Lisbon Treaty (2007), which outlines policies on border checks. It applies on three categories of subjects: EU residents (*i.e., EU citizens who move and reside to another EU country)*, non-EU long-term residents, and asylum seekers.

The main objectives of the EU include the free movement of persons, which is ensured in conjunction with appropriate measures regarding the external border controls, asylum, immigration and the prevention and combating of crime, in order to offer its citizens an area of freedom, security and justice without internal frontiers [Treaty of Lisbon, 2007]. As such, asylum and immigration now constitute a self-sufficient policy field, within the area of freedom, security and justice, and not a replication the mobility regime for EU citizens [Thym, Hailbronner, 2022].

The treaty sets out the development of a common policy on asylum and international protection, ensuring compliance with the principle of '*non-refoulement'*, in accordance with the Refugee Convention (1951) and its New York Protocol (1967), and other relevant treaties. The asylum and immigration policies have to be implemented based on the principle of solidarity and fair sharing among the Member States of the responsibility and the financial burden.

In practice, the EU migration governance is a complex system of vertical and horizontal, legal and institutional relations, including human-rights legislation and case-law, that go beyond the EU's legal and political institutions [Bátora, Fossum, 2020]. While dealing with serious challenges, it has proved itself insufficient to deal with the massive influx of migrants, especially after 2015. It was not efficient in providing solidarity and allocating responsibility among the Member States, in order to deal effectively with the increasing number of the migrants reaching Europe.

The New Pact on Migration and Asylum adopted by the European Parliament in April 2024 and by the Council in May 2024 is comprised of rules managing migration and a common asylum system. It is based on four pillars: 1. Secure external borders; 2. Eurodac asylum and migration database; 3. Border procedure and returns; 4. Crisis protocols and action against instrumentalization [European Commission, 2024].

The pact includes the acts on asylum and migration management [EU Regulation 1351, 2024], on laying down standards for the reception of applicants for international protection [EU Directive 1346, 2024], on establishing a Union Resettlement and Humanitarian Admission Framework [EU Regulation 1350, 2024], on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted [EU Regulation 1347, 2024], on the establishment of 'Eurodac' for the comparison of biometric data and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and

Europol for law enforcement purposes [4] [EU Regulation 1358, 2024], on establishing a return border procedure [EU Regulation 1349, 2024], on establishing a common procedure for international protection in the Union[5] [EU Regulation 1348, 2024], on introducing the screening of third-country nationals at the external borders [EU Regulation 1352, 2024], and on addressing situations of crisis and force majeure in the field of migration and asylum [EU Regulation 1359, 2024]. In essence, through the new legal pact on migration and asylum, EU members have decided to contribute in the migration system either by accepting asylum seekers, or by providing financial means to those countries hosting the asylum seekers.

Being wary of the "mandatory solidarity" and the effectiveness of the pact, EU and its members rushed to find new ways for migration management, looking to 'externalize' asylum procedures to third countries, instead of focusing on swift implementation of the freshly passed laws [Griera, 2024]. The agreement between Italy and Albania is the result of such rushed decisions, deriving from the need of European governments to be seen that they are serious on tackling immigration and that they are acting upon it.

Italy-Albania Agreement on 'Externalizing' Asylum-Seekers

Albanian and Italian governments signed in Rome the Protocol on Strengthening Cooperation in the Field of Migration, on 6 November 2023 (hereinafter 'the Protocol'). It was an agreement that was apparently negotiated under the guise of private meetings between the Prime Ministers of Italy and Albania [Si, 2023], but which was made public only after it was signed and it was presented as *fait accompli*. It was neither consulted with the public, nor with the UNHCR [UNHCR, 2023b], or other relevant international agencies for the protection of refugees. This lack of public transparency on 'externalizing' policies is concerning, because it can undermine the effective implementation of the law on refugee protection.

The Italian authorities will build two reception centers in the towns of Shëngjin and Gjadër in Albania, designated for hosting the migrants that have been rescued at sea, in international waters ["Protocol", 2023]. Italy has undertaken to build the centers in Albanian territory, called "Areas", where the total number of migrants present simultaneously in Albanian territory will not exceed 3,000 people, whereas the total number of migrants accommodated in the two Areas will not exceed 36,000 people in a year. The Areas will be used to host the migrants who are rescued at sea by Italian authorities, who will initially be disembarked at the 'Reception Area' in Shëngjin, where they will undergo the registration and medical examination. Subsequently, they will be transferred to the 'Accommodation Area' in Gjadër, where they will await the processing of their asylum application by the Italian authorities. They will not be allowed to leave the premises while they wait for their claims to be examined. Pregnant women, children and vulnerable people are excluded from being sent to Albania.

The Albanian authorities will allow the entry and stay in the Areas, solely for the purpose of accommodating the migrants while their claims are processed. Disembarkation in the Port of Shëngjin, the registration procedure, the transfer of the migrants between the reception and accommodation Areas, the examination of the claim, and the repatriation procedures will be conducted exclusively by the Italian authorities, in accordance with the Italian and European legislation.

If, for any reason, the right to stay in the Areas is not applicable, the Italian authorities undertake to immediately remove the migrants from the Albanian territory. Transfers to and from the Areas

[4] Controversially provides for taking and transmitting the biometric data of every applicant for international protection, including children six years of age.

[5] It controversially included the concept of 'safe third country' as a ground for inadmissibility simply because members of the applicant's family are present in that country.

are the responsibility of the Italian authorities. The entry of the migrants into the territorial waters and the territory of the Republic of Albania will be carried out exclusively by means of the Italian authorities. The expenses for the construction and the operation of the Areas and for the reception, accommodation, food and medical care, for the entry of the migrants into the territory of the Republic of Albania will be fully covered by the Italian side.
The Protocol will remain in force for 5 years, with the possibility to be renewed for another period of 5 years. It can be denounced by any of the two parties, subject to a six months' notice ["Protocol", 2023, Art. 13].

Italy-Albania Agreement and International Law

In the agreement, the parties have consented to cooperate to maintain the security of the Areas, but while the hosts - the Albanian authorities - will ensure the maintenance of order and public safety *outside* the Areas and during land transport which is carried out in the Albanian territory, the Italian authorities will maintain the order and security *inside* the Areas. The Albanian authorities can enter the Areas only with the express consent of the head of the administration present in the Areas, or in cases of *force majeure* - in case of fire, other serious and imminent danger that requires immediate intervention - subject to notifying the Italian head of the administration present in the Area. The Italian authorities will take the necessary measures to ensure that the migrants will not be allowed to exit the Areas and into the other parts of the territory of the Republic of Albania, both, while their cases are under review, as well as after their termination, whatever the final result. In case of unauthorized exit of migrants from the Areas, the Albanian authorities will accompany them to these structures.
Taking into account these provisions of the Protocol, clearly, in the Areas subject to the Protocol, the principle of extraterritoriality will be applied, the impossibility of exercising jurisdiction by the Albanian authorities in their territory. Through this agreement, Albania effectively cedes sovereignty and agrees to let the two Areas to be administered according to the relevant Italian legislation, not by its national legislation. The Albanian authorities have relinquished their sovereign right to act within the Areas, where exclusive Italian legislation will be enforceable, giving them *de facto* an equal status with that of a diplomatic mission, within the meaning of Article 22 of the Vienna Convention on Diplomatic Relations (VCDR) [Vienna Convention, 1961].[6]
The Italian personnel are exempted from visas, residence permits and other formalities required by the Albanian migration legislation. Their working conditions are regulated exclusively by Italian legislation and their salaries are exempt from Albanian income tax and from social assistance contributions. They are not responsible for their words and acts performed in the exercise of their functions, and will not be subject to the Albanian jurisdiction, even after the end of their functions in the Albanian territory. Their communications are not subject to restrictions by the Albanian authorities ["Protocol", 2023, Art. 7].

[6] See Art. 22: "1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. 2.The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. 3.The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

Obviously, the Italian personnel are granted immunity similar to that granted to foreign diplomats (while the Italian personnel do not have such a status, they are military or administrative staff), within the meaning of Article 29 of VCDR.[7] They will be responsible, according to Albanian legislation, only if they commit a criminal offence during their stay, outside their duty, which violates the rights of the Albanian citizens or the Albanian state.

So, the 'passive personality' jurisdiction applies only if the 'victim' of the criminal offence is an Albanian subject. Otherwise, the Italian jurisdiction applies. Thus, as a corollary, the EU legislation on the protection of human rights should apply, despite the declarations of the EU officials for the contrary.

In fact, as stipulated in the Protocol (2023), the period of stay of migrants in the Albanian territory cannot be longer than the maximum period allowed by the relevant Italian legislation. At the end of the procedures carried out in accordance with the Italian legislation, the Italian authorities will carry out the removal of the migrants from the Albanian territory. In order to guarantee the right to be protected, the parties have undertaken to allow access to lawyers, international organizations and European Union agencies that provide advice and assistance to asylum seekers ["Protocol", 2023, Art. 9].

From the viewpoint of international law, the Protocol represents clearly the implementation of a strategy of 'externalization' of the migration and asylum management [Carrera, Campesi, Colombi, 2023]. It is an agreement that leads indirectly to *refoulement*, which is contrary to international refugee law and customary law. Several international human rights agencies have labelled the protocol as 'illegal' and 'unworkable', with potential negative consequences for asylum-seekers, whose rights could be violated, away from the guarantees that the Italian judiciary offers, and as such, it should be abolished [Amnesty International, 2023].

The Protocol with Albania comes as a continuance of Italy's efforts to keep asylum seekers as further as possible form its borders. It has signed agreements with Libya in this regard in 2007 and 2008, and its actions within such agreements have been found in breach of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR), for the treatment of Somali and Eritrean asylum seekers [*Hirsi Jamaa and others v. Italy]*.

Taking into consideration this case, in order to protect itself from any similar lawsuits in the future, Albania has secured the undertaking from Italy to cover the costs for legal representation and the procedural and compensation costs in the event of a lawsuit that may be brought against Albania, including the acts towards the migrants ["Protocol", 2023, Art. 12§2].

These 'legal maneuvers' are futile, because despite the formulation of the Protocol, taken together with the principle of extraterritoriality, Albania cannot rely on the principle of extraterritoriality granted to the Areas, in order to discharge itself from its obligations under international law. Article 1 of the ECHR stipulates that the parties "…shall secure to *everyone within their jurisdiction* the rights and freedoms" defined in the Convention.

[7] See Art. 29: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

ECtHR has repeatedly emphasized that in view of public international law, the words '*within their jurisdiction*' in Article 1 of ECHR should be understood that the jurisdiction of a State is primarily territorial [*Banković and others v. Belgium and others, 2001]*, subject to exceptional cases when it cannot exercise its jurisdiction because of military occupation, acts of war or rebellion, or acts of a foreign state supporting the installation of a separatist state within the territory of that state [*Ilaşcu and others v. Moldova and Russia, 2004]*.

In the case of the implementation of the Protocol, in the event of a lawsuit brought against it, Albania would not be able to justify itself with the impossibility of exercising jurisdiction, because it does not face any of these extraordinary circumstances: a) it is not a state that is prevented from exercising its authority in the areas where the migrants will be settled, because it has acted through its own free will, signing the Protocol; b) the Protocol was not signed as a result of the military occupation by the armed forces of Italy; c) the Protocol was not signed as a result of acts of war or rebellion; d) the Protocol is not a result of the acts of Italy, because it is not supporting the installation of a separatist state within the territory of Albania.

Moreover, ECtHR has decided that the obligations assumed by a State Party under Article 1, include not only the duty not to impede the enjoyment of guaranteed rights and freedoms, but also the positive obligations to take the necessary steps to guarantee the enjoyment of these rights and freedoms within its territory [*Hirsi Jamaa and others v. Italy, 2012]*.

Under these conditions, Albania would bear responsibility for all the violations of the ECHR in the areas of its territory that are placed under the control of the Italian authorities, regardless of the provisions of the Protocol.

When countries agree on the 'externalization' of asylum procedures, as in the case of Italy and Albania, such agreements must respect international obligations, which include the contribution to the enhancement of the protection offered to the asylum-seekers, and that they clearly stipulate the rights and obligations of the parties, as well as the rights and duties of asylum-seekers [UNHCR, 2013]. Unfortunately, there are no such guarantees in the text of the Protocol.

Italy-Albania Agreement and EU Law

The European Union itself has been uncertain and ambiguous on the applicability of EU law in the case of the Italy-Albania Protocol. As stipulated in the Protocol, the two Areas are managed by the competent Italian authorities, according to the *relevant Italian and European legislation*. Disputes arising between the Italian authorities and the migrants, to be accommodated in the Areas, are subject to *exclusive* Italian jurisdiction ["Protocol", 2023, Art. 4§2].

There is confusion and discrepancies regarding the applicable law among the parties themselves. On the one hand, the draft-law approved by the lower chamber of the Italian parliament, stipulates that both Italian and EU law apply [Chamber of Deputies, 2023]. It was contested by the political parties of the left, who would normally be closer to the Albanian Socialist party, which is led by Prime Minister Edi Rama. Also, at the European Parliament, twelve Italian members of the Progressive Alliance of Socialists and

Democrats, submitted questions on the compliance of the Italy-Albania agreement with international law and EU asylum rules [European Parliament, 2023].
Referring to the Protocol, the executive director of Frontex noted that Frontex is not allowed to help Albania repatriate migrants. It could only help Italy if it needed help, but even in this case, that could be done only on Italian territory, with Italian jurisdiction" [Zachová, Alipour, Noyan, Michalopoulos, 2024]. This means that Frontex is excluded from having any competences related to the Protocol. However, Frontex has been operating in Albania since 2019 and it has deployed its officers at the borders between Albania and its neighbors [European Commission, 2023]. It is part of the EU's strategy to deter migration towards its' borders, even though it has been accused itself as overlooking the 'pushback' operations and human rights violations of the host countries [Chereseva Stavinoha, 2024]. Double standards are employed regarding access to information, depending on where the Frontex is operating.
Also, double standards exist in the treatment of asylum seekers, which is conditioned on the "identity" of the rescuer. The situation with the Ocean Viking highlights a broader issue regarding the responsibilities of flag states in relation to rescued migrants at sea. When vessels, particularly those operated by private organizations, rescue individuals in international waters, questions arise about which country is obligated to provide a safe port for disembarkation. While some argue that the flag state of the vessel should assume responsibility, others, like Norway in this case, contend that international law does not mandate such duties for private ships flying their flag. [Busco, 2024]. But when the asylum seekers rescued by these NGOs are successfully disembarked in any of the EU countries, EU law applies. On the other hand, if they are rescued by Italian navy vessels and sent to Albania, as the Protocol states, EU law does not apply. So, for the same category of asylum seekers, different regimes will be applied, depending on who the rescuer is. This is not the kind of protection that the EU *acquis* was supposed to guarantee. The Protocol can lead to "indirect refoulement", the expulsion to a State from where migrants may face farther deportation without a proper assessment of their situation. In a case concerning expulsion from Belgium to Greece, the European Court of Human Rights has held that where the asylum procedure of a particular EU member State is deficient and does not offer effective guarantees against arbitrary removal, other member states must refrain from returning asylum seekers to that country [*M.S.S. v. Belgium and Greece, 2011]*.
The Protocol does in fact fall within the scope of EU primary and secondary law, and is directly incompatible with the latter, as well as existing international maritime and human rights legal standards [Carrera, Campesi, Colombi, 2023]

Italy-Albania Agreement and Albanian Constitutional Law

Apart from the issues analyzed above in view of international and EU law, the Protocol raises compatibility issues in light of Albanian constitutional law. While Italy sent the Protocol to be ratified by both houses of its parliament and promulgated by its President [Legge n. 14, 2024], the Albanian Prime Minister decided not to consider the Protocol as an agreement that requires the authorization of the President of the Republic.
The ratification and denunciation of international agreements by the Republic of Albania is done by law if they concern *territory*, peace, alliances, political and military issues, *freedoms, human rights* and obligations of citizens, membership of the Republic of Albania in international organizations, the undertaking of financial obligations, the

approval, amendment, supplementing or repeal of laws [Constitution of the Republic of Albania, 1998].[8] For these agreements, the Constitution stipulates that the President of the Republic signs them, according to the law.[9] So, the Constitution refers to the specific law on international agreements, which stipulates that when an international agreement is negotiated and/or signed in the name of the Republic of Albania - i.e., agreements of a political character, as distinguished from those of an economic or commercial character - the authorization to negotiate and/or sign such an agreement is given by the President of the Republic [Law No.43, 2016].[10]

In practice, such provisions are often not taken into account. As the Albanian Constitutional court has previously found, "…it has become a constant practice that even in other cases of holding negotiations and signing agreements in the name of Albania, the Albanian delegation has not requested full-powers from the President…the practice of not equipping the Albanian delegation with full powers has been established…The court considers that the pursuit of such a practice turns out to have *no constitutional or legal basis* [emphasis added]…This institutional behavior turned into a practice contradicts not only Article 92(ë) of the Constitution…but also Article 4 (Rule of Law) and Article 7 (Separation of Powers) of the Constitution [*Partia Socialiste e Shqipërisë vs. Kuvendi i Republikës së Shqipërisë, 2010*].

Despite the previous caselaw of the Constitutional Court, for the Albanian Prime Minister, the agreement was not an agreement related to the territory or to human rights, therefore, there was no need to be authorized by the President. The Albanian opposition decided to challenge the agreement at the Constitutional Court, in order to assess its compatibility with the Constitution. Contrary to its former judgment, this time, the Constitutional Court agreed with the government, it decided that the Protocol was neither concerning the Albanian territory (because it does not determine or change the territorial integrity of the Republic of Albania…it does not change or defines its borders…*it does not expressly waive the exercise of jurisdiction* over its territory), nor the human rights (because the Albanian state continues to exercise its jurisdiction even during the implementation of the Protocol, and the Protocol does not create new human rights and freedoms beyond those provided for in the internal legal order, and does not bring additional restrictions to existing rights and freedoms), so, the Protocol was compatible with the Constitution [*Thirty Members of the Parliament vs. President of the Republic of Albania,* 2024].

These arguments in the judgment of the Albanian Constitutional Court are legally flawed.

Firstly, the Constitutional Court misinterprets and reads narrowly the Constitution, when it states that only the international agreements that change the territorial integrity of the Republic of Albania, or those that define its borders are related to 'territory'. If that would be true, the Constitution would not expressly require in its article 12(3) that "*No foreign military force may be situated in, or pass through [emphasis added] the Albanian territory, and no Albanian military force may be sent abroad, except by a law approved by a majority of all members of the Assembly"* [Constitution of the Republic of Albania, 1998]. Clearly, the Constitution considers relevant to 'territory' even the transit passage of military personnel of other countries, let alone their presence

[8] See Art. 121(1)
[9] Ibid., Art. 92(ë).
[10] See Art. 6(3)(a) of the Law

for five years, or more, as the Protocol stipulates for the Italian military in Albania.
Secondly, the Albanian Constitutional Court seems not to have "read" carefully the text of the Protocol, when it states that Albania "…*it does not expressly waive the exercise of jurisdiction over its territory*", while Article 6(3) of the Protocol clearly states that "The competent authorities of *the Italian party shall ensure the maintenance of law and order and public security* [emphasis added] on the perimeter within the areas. The competent authorities of the Albanian party shall have access to the areas, *subject to the consent of the person responsible for the facility*. *Exceptionally*, the authorities of the Albanian party *may enter* the facilities, informing the Italian responsible for the same, in case of fire or other serious and immediate danger that requires immediate intervention." Further, Article 6(8) of the Protocol states that "Official documents held by the Italian authorities and Italian personnel in any capacity are *exempt from seizure or other similar measures* by the Albanian authorities", while Article 7(4) states that "For any word said or written, for acts performed in the exercise of their duties, *Italian personnel are not subject to Albanian jurisdiction*, even after the end of the exercise of their functions on Albanian territory" [Italy-Albania Migration Agreement, 2023]. If all these provisions are not considered as *express waiver of the exercise of jurisdiction over its territory* by the Albanian authorities, then, the Albanian Constitutional Court must have broken new ground in its interpretation of 'jurisdiction'.
Moreover, the interpretation of the Constitutional Court that the Protocol does not concern human rights, because it does not create new human rights and freedoms beyond those provided for in the internal legal order, and does not bring additional restrictions to existing rights and freedoms, is extremely flawed. It seems that the Constitutional Court misinterprets Article 16 of the Albanian Constitution - that was supposed to protect - which states that "The fundamental rights and freedoms and the duties contemplated in this Constitution for Albanian citizen are also valid for *foreigners and stateless persons in the territory of the Republic of Albania*, except for cases when the Constitution specifically attaches the exercise of particular rights and freedoms with Albanian citizenship" [Constitution of the Republic of Albania, 1998].
Further, the Constitutional Court found that no authorization by the President was needed, because the Protocol was based on the 1995 Treaty of Friendship and Cooperation between the Republic of Albania and the Republic of Italy (hereinafter: Memorandum of 1995), which was referred to in the Preamble of the Protocol. This argument is also flawed, because the Memorandum of 1995 was reached exclusively for the bilateral relations between Italy and Albania, to manage the migrations of Albanian migrants towards Italy, in the context of huge migration waves of the Albanians in the 90's [Treaty of Friendship and Cooperation, 1995]. If the Memorandum of 1995 would be accepted as the basis for the Protocol of 2023, then, the Albanian Constitutional Court must be considered to have erred in its previous decision on the constitutionality of the agreement reached with Greece in 2010, on the delimitation of maritime areas. In that decision, the Constitutional Court found that the agreement was unconstitutional, among others, because it was concluded with no prior authorization from the President of the Republic.

Considering all the above, the Protocol is also incompatible with the Albanian Constitution.

Conclusions

As it has been argued in this paper, the crisis-based response framework constructed by international law treats migration as exceptional rather than ordinary. In so doing, it fails to engage proactively with, or respond to the needs of either migrants, or destination

states. Migration has to be accepted as a natural phenomenon of globalization, and as such, the legal and institutional framework should aim at regulating it. Without regularization, millions of migrants will have only one option: to move outside of the legal channels.

The legal framework on refugee protection increasingly favors keeping migrants away from developed countries unless they possess specific skills that benefit the host economy. The fear of persecution was meant to be a criterion for recognizing the refugee, but it seems the approach has shifted over the years, putting in doubt in the contemporary world [Whittaker, 2006].

The debate has shifted towards the "illegality" of the immigrants, the 'crimmigrants' endangering the well-being of the host country. Populist politicians have used irregular migration to stoke fears in many destination states, a development that threatens to undermine the international legal order [Sloss, 2023]. A framework designed to protect the most vulnerable, can make them feel more vulnerable, to add to the pain of leaving home [Costello, Foster, McAdam, 2021].

In Europe, states argue that asylum is better defended when access to it is restricted, but their concern is really to control migration and to ensure that asylum does not become an open gateway for all [Triandafyllidou, 2016].

The new Pact on Migration and Asylum shows that decision-makers in Brussels are heeding the calls from both the extremes, left and right, to make it harder for people to claim asylum in Europe. With this aim, EU has reached deals with countries outside Europe, mainly in Middle East and Africa, to 'externalize' the migration management, in exchange for billions of Euros as financial aid.

The Protocol between Italy and Albania is the result of such 'externalization' efforts, deriving from the need of the Italian government to be seen that it is serious on tackling immigration and that it is acting upon it. Even though it has been hailed as "ground-breaking", in reality, it is not an isolated act, but the result of ongoing efforts in Europe to tackle migration. It is in line with the approach adopted by the EU to strengthen its 'external dimension', as it is commonly referred its policy of reaching deals with non-EU countries, in order to prevent the arrival of new asylum seekers in Europe's shores.

Such agreements are driven more by domestic political interests and political opportunism, rather than finding real solutions to the problems of asylum and immigration. Politicians seek to gain voters, or pretend to fulfil their electoral promises, by appearing tough on immigration.

The belief in Europe that the new Pact on Migration and deals with non-EU countries will deter migrants is misguided. These measures won't stop those willing to risk their lives for a better future. Instead, they may worsen human rights protections, boost traffickers' profits, and obstruct access to international protection.

Unfortunately, migration remains a necessity, not a choice. While the new Pact on Migration is celebrated as a solution, it is based on the wrongful concept of a 'fortress Europe,' which is an illusion. Migration issues can't be solved with barriers or by "externalizing" migrants. Instead, they require increased international cooperation to address root causes in origin countries and establish lawful migration pathways.

Recommendations for Migration Policies Safeguarding Human Rights

- Considering the shifts in migration policy, it is crucial that the core principles of the 1951 Refugee Convention are respected, prioritizing the protection of human rights, ensuring that fear of persecution remains the primary evaluation basis, for offering protection. It should include access to livelihoods, education, and social integration, while ensuring physical safety and humanitarian assistance.
- The criminalization of migration has to be counteracted by implementing policies that emphasize protection and integration, safeguarding the dignity and rights of all migrants, rather than relying on restrictive and punitive measures, which have proved to be ineffective.
- International cooperation efforts should address the root causes of migration in the countries of origin. Any expanded cooperation needs to include resettlement programs, humanitarian visas, and fair distribution mechanisms.

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