Union des Avocats Européens
European Lawyers' Union

United Nations Office of the High Commissioner for Human Rights

Call for inputs "Externalization of Migration and the Impact on the Human Rights of Migrants" issued by the Special Rapporteur on the human rights of migrants

Introduction

The present work will focus on key questions and areas of inquiry no.1 (Example of externalization measures in Italy) and no.6 (Human rights implications) of the call for inputs. Therefore, as an input delivered by the Immigration Law Commission of the Union des Avocats Européens, it will address mainly the impacts of extraterritorial administrative detention on the asylum seekers' rights to defense and to access to a lawyer.

1. Example of externalization measures in Italy.

Extraterritorial administrative detention is an externalization measure recently carried out by Italy. The legal basis for such measure is the Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il Rafforzamento della Collaborazione in Materia Migratoria (the Protocol).[1] The Protocol is a bilateral treaty according to which Italy is entitled to build detention and reception centres on the Albanian territory, in order to detain migrants[2] saved or intercepted by the Italian authorities.[3] In this regard, Law no.14/2024 establishes that the Italian Immigration Law is applicable, in particular the Legislative Decrees no. 286/1998,[4] no. 251/2007,[5] no. 25/2008 (D.lgs. 25/08),[6] and no.142/2015 (D.lgs. 142/15).[7]

[1] https://www.esteri.it/wp-content/uploads/2023/12/PROTOCOLLO-ITALIA-ALBANIA-in-materia-migratoria.pdf [last accessed: 4 June 2025]

[2] Pursuant to Art. 1, par. 1 (d) of the Protocol, migrants shall be intended as third-country nationals or stateless individuals for whom the conditions for entry, stay, or residency in Italy must be ascertained, or have been found not to exist.

[3] The Protocol, art. 3.

[4] Decreto Legislativo 25 luglio 1998, n.286 (in Suppl. ordinario n. 139 alla Gazz. Uff., 18 agosto, n. 191) "*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*".

[5] Decreto Legislativo 19 novembre 2007 n.251 (in Gazz. Uff., 4 gennaio, n. 3) "*Attuazione della direttiva 2004/83/CE recante norme minime sull'attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta*".

[6] Decreto Legislativo 28 gennaio 2008, n.25 (in Gazz. Uff., 16 febbraio, n. 40) "*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*".

[7] Decreto Legislativo 18 agosto 2015 n.142 (in Gazz. Uff., 15 settembre 2015, n. 214) "*Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonché della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale*".

Although being built in Albania, the detention centres, including expenses, are managed by Italian authorities and are under Italian jurisdiction and responsibility.[8] According to the Italian Constitution, the President of the Republic ratifies international treaties.[9] But it is the Government that has the power to, and is responsible for, negotiating, concluding as well as implementing the arrangements.[10] Currently, two functional detention centers have been built in Albania, specifically in Shengjin and in Gjader.[11]

The Shengjin center is a hot spot in which migrants saved or intercepted by Italian authorities are identified. Whereas the Gjader complex consists of three buildings: one is a detention center for asylum seekers waiting for their application to be examined, the second one is a repatriation center, and the third one is a penitentiary.[12] The overall capacity is about 1000 people.[13]

6. Human rights implications.

Extraterritorial administrative detention carried out pursuant to the Protocol has several human rights implications that apparently have never been addressed by the contracting States. Preliminary, it must be highlighted that pursuant to D.lgs. 142/15 asylum seekers cannot be detained for the sole purpose of examining their asylum applications.[14] Moreover, the Directive 2008/115/EC 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[15] includes in Whereas (9):

> *"In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force."*

In the same direction, the directive 2013/32/UE[16] that modifies the Directive 2005/85/EC.

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[8] The Protocol, arts. 3, 4, 5, 6 para. 3, 5-8.
[9] Costituzione della Repubblica Italiana, art. 87, para. 8.
[10] The Protocol, art. 1 (b); Legislative decree no.300/1999, art. 12.
[11] https://www.amnesty.it/accordo-italia-albania-operativi-i-due-centri-per-persone-migranti/#:~:text=Il%20governo%20italiano%20ha%20annunciato,Albania%20firmato%20nel%20novembre%202023 [last accessed: 4 June 2025].
[12] https://www.cittadinanzattiva.it/notizie/16697-pronti-i-centri-per-migranti-in-albania-a-rischio-i-diritti-delle-persone-migranti.html#:~:text=I%20centri%20in%20Albani%20sono,un%20penitenziario%20(20%20posti) [last accessed 4 June 2025].
[13] Ibid.
[14] D.lgs.142/15, art. 6, para. 1. See also Dir. 2013/33/UE, art. 8, para 1.
[15] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115 [last accessed 10 June 2025].
[16] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032 [last accessed 10 June 2025].

This provision extends protection beyond a administrative processing of the asylum application, guaranteeing the right to remain in the territory. Although it does not constitute the granting of a residence permit, it provides additional protection against detention and expulsion throughout the entire asylum process, including the appeal stage, which should imply a limitation on detention during the processing of the application.

The analyzed externalization measure highlights a potentially discriminatory approach to the asylum procedures adopted by the Italian Government. As a matter of fact, it does not consider the specific vulnerabilities of migrants coming from Safe Countries of origin. In this regard, questions arose concerning both the concept of Safe Country of origin and the criteria adopted in order to determine whether a Country of origin can be considered safe or not.

In October 2024, the Court of Bologna has referred the case of a Bangladeshi asylum seeker to the Court of Justice of the European Union (CJEU) to determine whether the recent Decree-Law no. 158/24, by which the Meloni Government reformulated the list of countries it considers "safe" for the adoption of accelerated asylum procedures at the border and also on Albanian territory, in order to implement the Protocol, should be disregarded.[17]

According to the Protocol, asylum seekers coming from Safe Countries of Origin shall be detained in Albania until the asylum application has been examined. In this regard, the Legislative Decree no.25/2008 (D.lgs. no.25/08) establishes an accelerated procedure for those asylum seekers coming from Safe Countries of Origin, as the asylum application is highly likely to be found manifestly infounded. This entails that asylum seekers enjoy a restricted number of guarantees, for instance they can be immediately refouled.[18] Moreover, asylum seekers have a shorter term for filing an appeal, as it must be filed in 7 days from the notification of the decision issued by the Territorial Commission for the Recognition of International Protection (T.C.).[19]

The accelerated procedure applied to asylum seekers coming from Safe Countries of Origin is strict. The Police Headquarters shall promptly transmit the necessary documentation to the T.C.

[17] https://www.meltingpot.org/2024/10/dal-tribunale-di-bologna-un-rinvio-alla-corte-di-giustizia-ue-sul-nuovo-decreto-legge-sui-paesi-di-origine-sicuri/.
[18] D.lgs. 25/08, Art. 35-bis, paras. 3 and 4.
[19] D.lgs. 25/08, Art. 35-bis, paras. 2-bis and 2-ter. However, these provisions have been recently amended by the Law no.75/2025 and apparently the ordinary term of 30 days has been restored.

which, within seven days of receiving the documentation, shall schedule the interview and issue the decision within the following two days.[20] Several critical issues arise from this provision.

First, the huge number of asylum applications makes it hard both for the Police Headquarters and for the T.C. to comply with the above-mentioned mandated procedural timeframes.[21] Moreover, such procedure does not enable the competent authorities to carry out a careful case-by-case examination.[22] This results in asylum seekers waiting even for several months for their application to be examined and decided. Therefore, those sent to the detention centers in Albania can be detained far beyond the time imposed by law. In addition, if after such large amount of time the application is considered manifestly unfounded, the asylum seekers still have only 7 days to file an appeal, and they shall be immediately refouled.

In this regard, the Joint Sections of the Supreme Court of Cassation issued a milestone judgement establishing that when the accelerated procedure has not been respected in its procedural timeframes, the ordinary procedure is automatically reinstated.[23] Accordingly, guarantees such as the 30-days deadline for filing an appeal, as well as the automatic non-refoulement of asylum seekers come back into effect.[24]

In any case, the extraterritorial administrative detention in Albania hinders asylum seekers right to defense, in particular their right to access to a lawyer, especially when the accelerated procedure's timeframes are respected. Albania not being a Member State of European Union renders things harder in this sense, as in asylum cases the activity of lawyers turns out to be extremely complex. Personal meetings with asylum seekers are crucial for a lawyer to provide tailored legal assistance, especially when fundamental and human rights, such as the right to life, the right to respect for private and family life, the right to not be subjected to torture and inhuman treatments, are at stake. Lawyers must collect all the necessary documentation, which in most cases is no longer in the possession of the asylum seekers and needs to be requested to the Italian Public Authorities, that are not able to fulfill the requests in short time. Moreover, lawyers need personal meetings with asylum seekers especially to find out and report specific vulnerability indices, such as

[20] D.lgs. 25/08, art. 28-bis, para. 2.
[21] https://cir-rifugiati.org/2025/04/30/asilo-e-migrazioni-il-cir-presenta-il-rapporto-attivita-2024/#:~:text=Le%20richieste%20di%20asilo%20in,diminuite%20a%20996.805%20nel%202024 [last accessed 8 June 2025].
[22] D.lgs. 25/08, art. 8, para 2.
[23] Italian Supreme Court of Cassation, Joint Civil Sections, 29 April 2024, Judgement no. 11399/2024, pp. 19-20.
[24] Ibid.

being trafficked, or smuggled, or having suffered from violence during the journey. Such activities request time and, in compliance with a human rights-based approach, they cannot be carried out in a detention center but need to take place in safe and protected environments.

In conclusion, it must be noted that similar concerns have been recently raised also by the Rome Court of Appeal. In particular, the Court did not uphold the detention of a Ghanian asylum seeker in the Gjader center, highlighting - among others - critical issues related to asylum seekers right to defense, and the non-compliance of the Protocol and of Law no.14/2024 with European Law, CJEU jurisprudence, Italian Constitution, and Italian Immigration Law.[25] Recently, the Lecce Court of Appeal referred to the Italian Constitutional Court a question concerning the legitimacy of the detention of asylum seekers in repatriation centers and the criteria for the identification of the competent judicial authority[26]. However, the matter is far from being settled, as the above-mentioned decision is in open contrast with a former decision issued by the Supreme Court of Cassation.[27] Contrasts, even among judges and courts, are still ongoing and the matter has been referred to the CJEU.[28]

At the EU level, the CJEU, in case C-406/22, shed light on the conditions under which a third country can be considered safe.[29] Linked to the above-mentioned case, case C-389/24 is still pendent before the CJEU and it specifically addresses the issue of vulnerable asylum seekers coming from Safe Countries of origin.[30] These cases are relevant also in light of the circumstance that European Commission has recently proposed to frontload elements of the Pact on Migration and Asylum, including a firs list of Safe Countries of origin.[31]

Written by: Mr. Luigi Migliaccio (President of the Immigration Law Commission), Ms. Anna Estella Monteys, Prof. David Zammit, Ms. Laura Barberio, Mr. Andrea Di Maio, Mr. Bernd Strieder (Secretary).

The President of the Union des Avocats Européens: Ms. Rosanna Marzocca.
The Secretary General: Mr. Simon De Zordo.

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[25] Rome Court of Appeal, International Protection Section, 19.05.2025, judgement no.1188/2025, pp. 3, 10, 11, 12.
[26] Lecce Court of Appeal, 07.05.2025, case no.460/2025.
[27] Ibid., pp. 8-12;
https://www.repubblica.it/cronaca/2025/05/20/news/dl_albania_scontro_tra_giudici_trattenimento_migranti-424426504/ [last accessed 9 June 2025].
[28] https://www.ilsole24ore.com/art/migranti-centri-albania-cassazione-rinvia-corte-ue-AHnfdE1 [last accessed 9 June 2025].
[29] CJEU (GC), 4 Oct. 2024, Ministerstvo vnitra České republiky, odbor azylové a migrační politiky, C-406/22, EU:C:2024:841, para. 99.
[30] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202405214 [last accessed 9 June 2025].
[31] https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en [last accessed 9 June 2025].