II.2.2 *An Italian jurisdictional enclave: effects on asylum seekers' fundamental rights*

The central objective of the protocol is to establish an Italian sphere of jurisdiction outside its territory, which we could refer to as an extraterritorial jurisdiction regime[357]. In fact, the Memorandum, stipulating that «the facilities are managed by the competent Italian authorities in accordance with the relevant Italian and European legislation», and that «any disputes arising between the Italian authorities and migrants accommodated in these facilities are subject exclusively to Italian jurisdiction» (Article 4 para 2), effectively creates an «Italian enclave on Albanian territory where Italian law is fully applicable»[358], while Albanian authorities remain competent solely to ensure the security of the perimeter outside the area[359].

Therefore, it can be argued with some assertiveness that this measure aims to invoke a fiction of entry into Italian territory for those within the areas of Shengjin and Gjader, since Italian and European law apply "as" third country nationals were on the Italian territory.

Extending its jurisdiction to the Albanian centres entails Italy taking complete responsibility for processing the requests and, if approved, providing protection, implementing thus a «fiction of territoriality»[360].

Having clarified the anticipated effects of the agreement, it can be confirmed that a complete shift of responsibility is absent in this case, as Italy would, as we have seen, retain its jurisdiction over the two Albanian territories. Therefore, this represents a different strategy compared to the typical cases of externalization where asylum procedures are transferred to a third country which then handles the examination of the applications[361].

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[357] M. Savino, F. V. Virzì, *Il protocollo tra Italia e Albania in materia migratoria: prime riflessioni sui profili dell'extraterritorialità,* in *ADiM Blog*, Editoriale, 2023, page 1.
[358] Masera, 2023.
[359] E. Celoria, A. De Leo, *Il Protocollo Italia-Albania e il diritto dell'Unione Europea: una relazione complicata*, in *Diritto, Immigrazione e Cittadinanza*, No. 1, 2024, page 9.
[360] Savino, Virzì, 2023, page 5 (my translation).
[361] An example is constituted by the UK-Rwanda agreement, which will be analysed in Ch. II.3.

If the risks in terms of safeguarding fundamental rights and the right to asylum are quite clear in cases of outsourcing practices *per se*, the Italy-Albania model, representing a «strategy of extraterritorialisation»[362], constitutes a new challenge that deserves to be analysed in order to better understand its effects and possible implications.

Beginning with an analysis aimed at identifying the initial doubts arising in the context of the protection of foreigners, it is firstly necessary to address two issues arising from the reading of the Law No. 14/24 related to the Protocol. These concern detention and the right to defence.

To begin, it should be noted that Italian legislation provides for the application of two distinct frameworks to irregular migrants and asylum seekers, respectively Article 14 para 2 of the Consolidated Immigration Act (TUI), which reflects the provisions of Article 16 para 1 of the Return Directive[363], and Directive 2013/33/EU. In both cases, however, it is stipulated that detention may be implemented «unless less coercive alternative measures are applicable».

Nevertheless, what is observed in the aforementioned decree is the provision of detention as the only possible scenario, given that, pursuant to the Protocol, foreigners for whom detention is not possible must be transferred to Italy as soon as possible. The issue of illegitimacy therefore concerns detention no longer being considered as *extrema ratio*, as envisaged by European legislation and Italian law, but rather as the only practically applicable measure[364].

In this regard it is worth mentioning the Judgment of the Tribunal of Catania[365] of September 2023 where the Court delved, for the first time, into the new regulations regarding detention under the accelerated border procedure for asylum seekers. It reiterated here the foundational principles of this domain, governed by overarching

[362] Savino, Virzì, 2023, page 4.
[363] Directive 2008/115/EC.
[364] Masera, 2023.
[365] Tribunal of Catania 10460/2023, available at: https://www.questionegiustizia.it/data/doc/3639/trib-catania-29-9-2023-rg-10460-23.pdf

sources like EU directives and the Italian Constitution, which are beyond the reach of ordinary domestic legislation[366]. In particular, the court initially affirmed two fundamental principles governing the detention of asylum seekers in its entirety, as outlined in Directive 2013/33/EU, commonly known as the Reception Directive, and Legislative Decree No. 142/2015. These principles dictate that detention cannot be solely for the purpose of processing the asylum application and must be deemed an exceptional measure, to be employed only when no other suitable alternatives exist, while also respecting personal freedom as per Article 13 of the Constitution. Furthermore, the Court reiterated the requirements set forth in both domestic and EU regulations, emphasizing that any decision to detain must be adequately justified based on the individual's specific circumstances. A detention order lacking substantial justification, thus, cannot be upheld, as it precludes any form of automatism.

It is therefore unclear how the situation may differ in Albania, where it also becomes challenging to enforce the right to defence, thus ensuring that the applicant can speak with a lawyer and lodge an appeal.

Regarding indeed the right to defence, enshrined in Article 24 of the Italian Constitution[367] and reiterated in the Italian case-law[368] which recognized that «the foreigner (even irregularly staying) enjoys all fundamental rights of the human person, including the right to defence»[369], some doubts emerge as to the actual safeguard and application of this right. Indeed, Law 14/2024 only provides that the centre manager «adopts the necessary measures to ensure the timely and full exercise of the foreigner's right to defence» (Article 4 para 3), with the further specification that "when remote attendance at the hearing is not possible", the defence lawyer who has travelled to

[366] S. Albano, *Il giudice non convalida i trattenimenti di tre migranti tunisini disposti in base alla nuova disciplina delle procedure di frontiera*, in *Questione Giustizia*, No. 4, 2023, available at: https://www.questionegiustizia.it/articolo/nota-trib-catania

[367] Article 24: «Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defence is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defence in all courts. The law shall define the conditions and forms of reparation in case of judicial errors».

[368] See, for instance, Judgment No. 10/1993 and Judgment No. 98/2000.

[369] Judgment No. 98/2000.

Albania will be reimbursed for travel and accommodation expenses up to a maximum of 500 euros (Article 4 para 5).

Hence, the decree fails to specify the requisite measures to safeguard the right to defence and does not delineate the conditions under which remote hearings are considered impracticable, leaving numerous matters unresolved[370].

Proceeding with the analysis of the decree text, it can be observed that it would inevitably entail an expedited and superficial evaluation of vulnerabilities, which would consequently be unfair[371]. In fact, notwithstanding the prevision of taking a preliminary screening aboard the ship, while this initial assessment could detect certain obvious vulnerabilities, it may not capture all significant ones, particularly those that are less visible, such as victims of psychological, physical, or sexual violence, as well as unaccompanied minors. Therefore, the concern is that individuals may be transported to Albania without proper consideration of their specific situation, with the possibility of returning to Italy contingent upon proving their vulnerable status. Additionally, even if vulnerabilities are identified later, individuals would endure significant stress from the lack of recognition of their situation on board, the journey to Albania, the subsequent screening process, and the potential return to Italy[372].

Therefore, it can be concluded that this approach falls short of adequately safeguarding vulnerable migrants, who require tailored protections as mandated by law and by the Ministry of the Interior's practices[373].

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[370] Masera, 2023.

[371] S. Carrera *et al.*, *The 2023 Italy-Albania Protocol on extraterritorial migration management. A worst practice in migration and asylum policies*, CEPS, 2023, available at: https://cdn.ceps.eu/wp-content/uploads/2023/12/ASILE_Italy-Albania-MoU-Extraterritorial-Migration-Management.pdf

[372] CIR, *Protocollo Italia-Albania: cos'è lo screening preventivo dei richiedenti asilo vulnerabili*, 2023, available at: https://www.cir-onlus.org/2024/01/26/protocollo-italia-albania-cose-lo-screening-preventivo-dei-richiedenti-asilo-vulnerabili/#:~:text=L'introduzione%20di%20uno%20screening,vittime%20di%20violenza%20psicologica%2C%20fisica%2C

[373] Vulnerable individuals are outlined in Article 19, para 2bis of the Consolidated Immigration Act as "*persons with disabilities, the elderly, minors, single-parent families with minor children, minors, or victims of serious psychological, physical, or sexual violence.*" This orientation is confirmed by Article 17 of Legislative Decree No. 142/2015, which, in implementing Directive 2013/33/EU, adds victims of trafficking, victims of torture, and victims of violence related to sexual orientation or gender identity to the aforementioned

It is also to be noted that the decree implementing the Protocol provides that, in exceptional cases, the foreigner present in the two Albanian "areas" may be transferred to facilities located on Italian territory[374]. However, there is no clear reference to the possibility of identifying individuals who, according to Article 28-bis para 6 of Legislative Decree No. 25/2008, cannot be subjected to border procedures and, therefore, should be immediately disembarked in Italy.

Another risk that emerges is that of "multiple transfers"[375] which might prolong the journey of vulnerable people and cause the consequent delayed access to essential services, amounting to a possible violation of Article 4 CFR, namely the "Prohibition of torture and inhuman or degrading treatment or punishment".

An important aspect that is not provided neither in the Protocol nor within the Implementing Law, concerns practical guidelines and modalities on the measures to be taken upon the conclusion of asylum procedures. Indeed, they do not contemplate different solutions based on the legal status of the individuals involved (such as recognized refugees, applicants whose protection was denied and who should be repatriated etc.). Furthermore, the procedures for registering asylum applications and conducting interviews during the administrative phase of the international protection recognition procedure lack clarity. While there is an indication that detention validation hearings will likely take place remotely via video conference, it remains uncertain whether the registration of asylum applications and interviews during the

categories. Moreover, A special commission formulated an official Handbook for the Ministry of the Interior on the identification of vulnerability, where paragraph 2 states: "The process of identifying and bringing to light vulnerabilities is to be considered as an activity that accompanies the individual in all phases of the rescue and reception system, from the sea rescue phase to access to the territory, during the international protection procedure, for those who have requested it, and in the subsequent phases of reception".

[374] Article 3 para 1, Law 14/2024.

[375] UNHCR, *Audizione UNHCR alla Camera dei Deputati sul Protocollo tra Italia e Albania*, 2024, available at: https://www.unhcr.org/it/notizie-storie/notizie/audizione-unhcr-alla-camera-dei-deputati-sul-protocollo-tra-italia-e-albania/

initial phase will be carried out in person by competent Italian authorities or remotely[376].

In addition, asylum seekers and migrants' right not to be subjected to differential treatment and therefore to discrimination[377] is highly jeopardized, especially among those transferred to Albanian territory[378] who might be liable to receive different treatments compared to those who are brought to Italy. First of all, this differentiation subsists for the expected «selective disembarkations»[379] where third country nationals would be susceptible to differentiation between those who must disembark in Italy due to vulnerable conditions and those who, instead, must proceed to Albania. In this regard, it is important to mention ruling No. 14232/2022 where the Tribunal of Catania declared the practice of selective disembarkations illegitimate[380] referring to Regulation 33 of the International Convention for the Safety of Life at Sea[381], and mandating the rescue and transport to a safe port of individuals in distress at sea regardless of the nationality or status of such persons or the circumstances in which they are found.

Also, the discriminatory treatment might be caused by the introduction of remote hearings and validation procedures, which could pose an effective differentiation and could raise the question of whether differential treatment impacts the efficacy of the

[376] F. Z. El Harch, *Il protocollo Italia-Albania è legge: tra (nuovi) vuoti normativi e (vecchie) violazioni di diritti*, Melting Pot, 2024, available at: https://www.meltingpot.org/2024/02/il-protocollo-italia-albania-e-legge-tra-nuovi-vuoti-normativi-e-vecchie-violazioni-di-diritti/#easy-footnote-bottom-1-500058

[377] The right to non-discrimination is enshrined in Article 21 of the CFR: «Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited».

[378] Celoria, De Leo, 2024, page 2.

[379] Piccoli, *Offshoring Asylum the Italian Way: No Model for Others to Follow*, in *VerfBlog*, 2023, available at: https://verfassungsblog.de/offshoring-asylum-the- italian-way/, DOI: 10.59704/06a96c55e6fe8b79

[380] The judgment is available at: https://www.asgi.it/wp-content/uploads/2023/02/Ordinanza-Humanity1-.pdf

[381] Available at: https://imorules.com/GUID-84303B70-61E5-43BB-BD5E-A8E96139D972.html

right to defence and if such discrepancy can be deemed reasonable within the context of a potential constitutional assessment[382].

Based on the previous reasoning, considering thus, among others, the precariousness of the right to defence and the compulsoriness of detention, being the sole and only option for all third country nationals, it is therefore possible to assume that the right to asylum guaranteed by the Italian Constitution is at least endangered, recalling as well that the nature assigned to the two Albanian areas, namely that of border and transit zones, is aimed at implementing an accelerated assessment of protection applications, diminishing thus the guarantees of asylum seekers.

It must be added, with regard to the analysis conducted, the importance of the right to personal liberty[383] that, by virtue of its "inviolable" nature, should represent a necessary condition for those seeking asylum. In this respect, judgment No. 105/2001 of the Italian Constitutional Court deserves our attention. In particular, concerning the regulation of the detention of foreigners in temporary stay and assistance centres, the Court emphasized how, in the case of detention, «even when this is not separate from a purpose of assistance», there arise «the humiliation of human dignity that occurs in any instance of physical subjection to the power of others, which is a sure sign of the measure's relevance to the sphere of personal freedom»[384]. The Court, thus, established a connection between the deprivation of personal liberty through detention and human dignity and dwelled on the concept of "person", underscoring the aspect that most characterizes and identifies it, namely human dignity, which belongs to the individual as such[385].

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[382] Savino, Virzì, 2023, page 7.

[383] Article 13 Italian Constitution: «Personal liberty is inviolable. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law. […]»; Article 6 CFR: «Everyone has the right to liberty and security of person.».

[384] Available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2001&numero=105

[385] I diritti fondamentali nella giurisprudenza della Corte Costituzionale. Relazione predisposta in occasione dell'incontro della delegazione della Corte costituzionale con il Tribunale costituzionale della Repubblica di Polonia, 2006, available at: https://www.cortecostituzionale.it/documenti/convegni_seminari/STU185_principi.pdf

In this regard, a reference to Article 2 of the Italian Constitution[386] must be made since it represents a fundamental anchor for the evolution and protection of what we define as "the inviolable rights of the person" and because inviolable rights represent a true manifestation of the personalist principle, geared towards safeguarding and preserving human dignity[387].

Furthermore, it is apparent that fundamental rights not only serve as the paramount tenets of the constitutional framework but also define the democratic framework of the State. Any diminishment, restriction, or violation of these rights would undercut the essence of democracy within the State[388].

Therefore, according to another judgment of the Constitutional Court[389], Article 2 must be understood as assigning inviolable rights to individuals rather than exclusively to citizens.

Drawing from the highlighted textual evidence, the Court concluded that, irrespective of the literal wording of the provisions that individual rights entail, such as Article 3 of the Constitution which provides for the principle of equality for *citizens*[390], both citizens and foreigners should be regarded as beneficiaries of inviolable rights, ensuring equality of treatment, guaranteed to foreigners also in accordance with international law[391].

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[386] Article 2: «The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

[387] I diritti fondamentali nella giurisprudenza della Corte Costituzionale. Relazione predisposta in occasione dell'incontro della delegazione della Corte costituzionale con il Tribunale costituzionale della Repubblica di Polonia, 2006, available at: https://www.cortecostituzionale.it/documenti/convegni_seminari/STU185_principi.pdf

[388] I diritti fondamentali nella giurisprudenza della Corte Costituzionale. Relazione predisposta in occasione dell'incontro della delegazione della Corte costituzionale con il Tribunale costituzionale della Repubblica di Polonia, 2006, available at: https://www.cortecostituzionale.it/documenti/convegni_seminari/STU185_principi.pdf

[389] Judgment No. 104/1969, available at: https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1969&numero=104

[390] Emphasis added.

[391] Article 10 para 1 and 2 of the Italian Constitution.