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THE ITALY-ALBANIA AGREEMENT ON MIGRATION: PUSHING BOUNDARIES, THREATENING RIGHTS

On 6 November 2023, the Italian and Albanian Prime Ministers announced that they had signed an agreement to set up two centres in Albania to hold people rescued at sea by Italian ships, including people seeking protection. They would be held in these centres while their asylum applications are processed through an accelerated procedure and/or while their repatriation is arranged.

This document places the agreement within a wider international trend towards externalization of border control and asylum processing; summarizes its fundamental elements; describes the ways in which its implementation would likely breach Italy's existing obligations under international and European Union (EU) law; and highlights areas of uncertainty and open questions that might result in an additional detrimental impact on the human rights of refugees and migrants.

Amnesty International's overall conclusion is that, while the agreement is highly unlikely to reach its stated aim in terms of migration management, its implementation would have a negative impact on a range of human rights, including the rights to life and physical integrity of people in distress at sea, and the rights to liberty, to asylum, and to adequate remedy, of people transferred to Albania.

1. BACKGROUND: EXTERNALIZATION AND ITS DISCONTENTS

For at least 20 years, governments from the richest countries – in particular from Europe, North America and Oceania – have conceived and developed policies focused on the externalization of border control and asylum processing, i.e. their placement outside national borders.¹ These policies aim at deterring irregular border crossings – and, in particular, maritime crossings – through the containment of people in the territory of third countries. Externalization policies usually focus on enhanced cooperation with foreign authorities responsible for controlling borders and managing migration, or on the establishment of ad hoc centres in those countries to process asylum applications.

Amnesty International has consistently criticized this approach, and highlighted the unworkable, if not plainly unlawful, nature of several externalization proposals,² and the severe human rights risks entrenched in relevant measures.³ Where such measures have been implemented, Amnesty International has documented their concrete human rights impact on the lives and rights of people. For example, in relation to Australia, the organization has found that the policy of offshore 'processing' of people seeking protection on the remote island state of Nauru or in detention centres on Manus Island (Papua New Guinea) resulted in the disintegration of their mental health, shocking levels of self-harm, and exposure to physical attacks,

¹ Amnesty International, UK/EU/UNHCR: Unlawful and unworkable – extra-territorial processing of asylum claims, 17 June 2003 (Index Number: IOR 61/004/2003). See also, Christina Boswell, «The 'External Dimension' of EU Immigration and Asylum Policy», International Affairs (Oxford University Press), vol. 79, n. 3, May 2003, pp. 619-638.

² Amnesty International, UK/EU/UNHCR: Unlawful and unworkable – extra-territorial processing of asylum claims, 17 June 2003 (Index Number: IOR 61/004/2003).

³ Amnesty International, Human rights risks of external migration policies, 13 June 2017 (Index Number: POL 30/6200/2017).

including sexual assaults, as well as to verbal abuse and daily humiliations.⁴ In cases where people have been contained in third countries where they would be at risk of serious human rights violations, such as Libya for example, Amnesty International has documented how relevant states have breached the principle of non-refoulement.⁵ More generally, the organisation has highlighted how externalization policies widely result in shifting the responsibility for receiving and assisting people in need of international protection to countries with fewer means to support them – often, countries already hosting a higher number of displaced people – rather than ensuring that countries share the responsibility equitably among themselves.

2. ITALY'S EXTERNALIZATION TRAJECTORY: FROM LIBYA TO ALBANIA

Unmoved by these concerns, Italy has been a trailblazer for the externalization of border control. For about two decades, Italy has cooperated with Libya, a major departing point for Sub-Saharan and other refugees and migrants looking for protection and a better life in Europe. First, in the 2000s, it promoted the creation of detention centres in Libya and carried out maritime pushbacks towards Libya.⁶ Then, after the European Court of Human Rights confirmed that maritime pushbacks breached international law,⁷ it provided Libyan coastguards with speedboats, training, and various forms of assistance, to encourage and support pull-back operations.⁸ To date, assistance from Italy and the EU continues to enable Libyan coastguards to intercept thousands of people at sea every year, and take them back to detention centres in Libya, where they are subjected to prolonged arbitrary detention; enforced disappearances; torture and other ill-treatment, including in the form of rape; unlawful killings; and various forms of exploitation.⁹ The horrific consequences of EU's cooperation with Libya on border control have been documented extensively, to the extent that the United Nations (UN) Independent Fact-Finding Mission in Libya has called on relevant states to “cease all direct and indirect support to Libyan actors involved in crimes against humanity and gross human rights violations against migrants, such as the Directorate for Combating Illegal Migration, the Stability Support Apparatus and the Libyan Coast Guard”.¹⁰ Yet, the Italian government has not only continued this cooperation, but also looked at ways to extend it to other countries.

In early 2023, after Tunisia surpassed Libya as the main departure point towards Italy,¹¹ the Italian government focused its diplomatic efforts on enhancing cooperation with the Tunisian government. This resulted in the signing of a Memorandum of Understanding between the EU and Tunisia, aiming to curb migration to Europe in exchange for substantial financial support.¹² Sub-Saharan refugees and migrants had been subjected to serious human rights violations in Tunisia in the months and weeks before the agreement, and the wider population had suffered President Saied's assault on the rule of law and his ever-increasing repression of dissent.¹³ Yet, the agreement was signed without any conditions requiring respect of human rights obligations during its implementation and without any mechanism to monitor and assess its impact on human rights and to suspend the cooperation in case of violations. After the agreement was reached, Tunisian authorities continued to force migrants to the Libyan border and abandon

⁴ Amnesty International, *Island of Despair: Australia's "processing" of refugees on Nauru*, 17 October 2016 (Index Number: ASA 12/4934/2016); and *Punishment not protection: Australia's treatment of refugees and asylum seekers in Papua New Guinea*, 1 February 2018 (Index Number: ASA 34/7781/2018).

⁵ Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, 11 December 2017 (Index Number: MDE 19/7561/2017); and Amnesty International and Human Rights Watch, *Submission to the European Court of Human Rights in the case S.S. v Italy* (Application no. 21660/18), 13 November 2019 (Index Number: EUR 30/1398/2019).

⁶ European Commission, *Technical Mission to Libya on Illegal Immigration*, 27 nov. – 6 dec. 2004, Report, pp.14-15; Ministero dell'Interno, *Rapporto sullo stato della sicurezza in Italia anno 2005*, p.43; Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009.

⁷ European Court of Human Rights, *Case of Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), Judgement (Grand Chamber), 23 February 2012.

⁸ Amnesty International, *Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants*, 11 December 2017 (Index Number: MDE 19/7561/2017);

⁹ Amnesty International, *'No one will look for you': Forcibly returned from sea to abusive detention in Libya*, 15 July 2021 (Index Number: MDE 19/4439/2021).

¹⁰ United Nations, *Report of the Independent Fact-Finding Mission on Libya*, 3 March 2023 (A/HRC/52/83), Para.103(g)

¹¹ UNHCR, *Italy Sea arrivals dashboard March 2023*, 11 May 2023.

¹² Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia, Tunis, 16 July 2023. See also: Eve Geddie, *In Tunisia, the EU is repeating an old and dangerous mistake*, Politico, 21 September 2023.

¹³ Amnesty International, *Tunisia: President's racist speech incites a wave of violence against Black Africans*, 10 March 2023; and *Tunisia: Human rights at risk two years after President Saied's power grab*, 24 July 2023.

them in desert areas, where many languished in urgent need of humanitarian assistance, with international media reporting numerous deaths, that were not publicly condemned by EU leaders.¹⁴

Apart from drawing criticism for its human rights consequences, the agreement with Tunisia also did not achieve its intended aim, i.e. a significant and sustained reduction in the number of sea crossings towards Italy, beyond the usual downturn as weather conditions worsen after the summer passes, nor in the number of people losing lives at sea. Indeed, arrivals in Italy increased from 105,131 in 2022 to 157,314 in 2023,¹⁵ and the risk to people increased substantially in the central Mediterranean, with the number of people dying or going missing at sea rising from 1,417 in 2022 to 2,498 in 2023.¹⁶

Confronted with this reality, in 2023 the Italian government introduced a number of new legislative measures, mostly focusing on further restricting the exercise of human rights by refugees and migrants arriving by sea, including by increasing the use of detention for newly arrived individuals as well as for people found to be undocumented.¹⁷ Notably, such legislative amendments extended the use of detention facilities to hold asylum seekers undergoing ‘border procedures’ to assess their asylum claims.

In this context, in November 2023 the Italian government also signed an agreement with its Albanian counterpart, aiming at the construction of two centres in Albania to hold people rescued or intercepted at sea by Italian state ships.¹⁸ Unlike previous agreements with Libya and Tunisia, which focus on border control cooperation and seek to indefinitely contain refugees and migrants in those countries, preventing them from reaching Italian jurisdiction, the agreement with Albania pursues the extraterritorial processing of asylum claims, with the intent of creating a deterrent to sea crossings. However – unlike other arrangements such as the UK-Rwanda agreement –¹⁹ the Italy-Albania agreement does not outsource responsibility for processing asylum applications to Albania. Instead, it envisages that Italian jurisdiction, laws and procedures will continue to apply to any people taken to the centres specifically established in Albania for the implementation of screening, asylum and return procedures.²⁰ Yet, the Italy-Albania agreement does fall within the wider externalization approach, not least because it enlists the support of a poorer country – and, like Libya, a former colony of Italy – to introduce deterrent measures aimed at reducing the number of people arriving in Italy, in exchange for the commitment to support Albania’s accession to the EU.²¹ Externalization agreements often take advantage of power imbalances between countries, and risk contributing to perpetuating them.

In December 2023, the Italian government submitted the agreement to the Italian Parliament for discussion and ratification.²² Meanwhile, the Albanian Constitutional Court temporarily suspended the ratification of the agreement by the Albanian Parliament, pending a case regarding the constitutionality of the agreement itself, given alleged shortcomings in the procedure leading to its conclusion.²³

3. THE ITALY-ALBANIA AGREEMENT

The bilateral agreement, signed by the Italian and Albanian heads of government on 6 November 2023, provides for the construction of two centres in the Albanian towns of Shengjin and Gjader. Under the

¹⁴ Vivian Yee, *Europe Pushed Tunisia to Keep Migrants Away. The Result Is Harsh*, The New York Times, 20 July 2023.

¹⁵ UNHCR, Operational Data Portal, Mediterranean Situation / Italy, <https://data2.unhcr.org/en/situations/mediterranean> (accessed on 15 January 2024).

¹⁶ IOM, Missing Migrants Project, Dead and Missing by year (2023) and route (central Mediterranean), <https://missingmigrants.iom.int/> (accessed on 15 January 2024).

¹⁷ Law 5 May 2023, n. 50; Decree 14 September 2023 of the Ministry of Interior; Decree-Law 19 September 2023, n. 124.

¹⁸ Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, Rome, 6 November 2023.

¹⁹ 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, Kigali, 13 April 2022.

²⁰ Art. 4.2 of the agreement.

²¹ Presidenza del Consiglio dei Ministri, Dichiarazioni alla stampa con il Primo Ministro d’Albania, l’intervento del Presidente Meloni, 6 November 2023.

²² Draft Law 18 December 2023, n.1620.

²³ ANSA, L’Albania sospende la ratifica dell’accordo Meloni-Rama, 13 December 2023.

agreement, the two centres would be able to accommodate jointly up to 3,000 people at any given time.²⁴ The people held there would be subjected to border asylum procedures, involving an assessment of their claims to international protection in an accelerated manner, and potentially to return procedures, as provided for by Italian and EU legislation.²⁵

Under the agreement, not all people rescued or intercepted at sea by Italian boats would be transferred to Albania, but only those who have been taken onboard vessels of Italian authorities outside the territorial waters of Italy or other EU States.²⁶ While Italian authorities emphasised from the outset that the agreement “does not concern minors, does not concern pregnant women and does not concern other vulnerable people”,²⁷ the text of the agreement is silent on this point. However, the Italian government has subsequently stated that, since people transferred to Albania are to be detained, only people who can be subjected to administrative detention under Italian legislation would be transferred to Albania, and in particular “non-vulnerable” asylum seekers subjected to accelerated border procedure (e.g. because they arrive from countries of origin deemed “safe”) and people awaiting removal after being found not to have a title to stay in Italy.²⁸

The agreement is set to remain in force for five years, after which time it would be automatically renewed. Italian authorities indicated that its implementation is expected to start in the second quarter of 2024.²⁹

The draft law for the ratification and execution of the agreement, presented by the Italian government in December 2023, includes additional legal provisions aimed at ensuring coordination with the Italian legal, jurisdictional and administrative systems. These provisions indicate, inter alia, that Rome administrative authorities (such as the prefect and police commissioner) will be competent for adopting relevant administrative measures concerning people held in Albania,³⁰ that their asylum applications will be considered by the Rome Asylum Commission,³¹ and that Rome judicial authorities will be competent for any related appeals.³²

The draft law indicates that the two centres in Albania are devoted to the identification and fingerprinting of people accommodated there – similarly to “hotspots” and other similar structures located in Italy – and that they are equated to border and transit zones.³³ This triggers the application of accelerated border procedures for the assessment of asylum applications submitted by people who are considered to have arrived from countries deemed as ‘safe’ or to have eluded border controls or attempted to do so.³⁴ The draft law clarifies that the centre of Gjader would also function as a detention and expulsion centre (*centro di permanenza e rimpatrio*) for individuals for whom authorities seek removal.³⁵

²⁴ Art 4.1 of the agreement.

²⁵ Art. 4.3 of the agreement.

²⁶ Art.3.2 of Draft Law 18 December 2023, n.1620.

²⁷ Presidenza del Consiglio dei Ministri, Dichiarazioni alla stampa con il Primo Ministro d’Albania, l’intervento del Presidente Meloni, 6 November 2023.

²⁸ Camera dei Deputati, Comunicazioni del Governo sul Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, 21 November 2023.

²⁹ Presidenza del Consiglio dei Ministri, Dichiarazioni alla stampa con il Primo Ministro d’Albania, l’intervento del Presidente Meloni, 6 November 2023.

³⁰ Art.3.1 of Draft Law 18 December 2023, n.1620.

³¹ Ibidem.

³² Art.4.1 of Draft Law 18 December 2023, n.1620.

³³ Art.3.3 of Draft Law 18 December 2023, n.1620.

³⁴ Art.28bis, Legislative Decree 28 January 2008, n.25, transposing Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

³⁵ Art.3.4 of Draft Law 18 December 2023, n.1620.

4. KEY CONCERNS IN RELATION TO THE ITALY-ALBANIA AGREEMENT

The Italian government has presented the Italy-Albania agreement as an important measure aimed at deterring and reducing irregular sea crossings.³⁶ Noticeably, the agreement is designed to apply to a limited number of people, compared to the total number of arrivals being registered in Italy. Despite this, it carries considerable financial costs, currently estimated in around 100 million euros per year.³⁷

Crucially, the agreement raises very significant concerns as per its negative human rights impacts on thousands of people. As highlighted by the Council of Europe Commissioner for Human Rights, Dunja Mijatović:

“The MoU raises a range of important questions on the impact that its implementation would have for the human rights of refugees, asylum seekers and migrants. These relate, among others, to timely disembarkation, impact on search and rescue operations, fairness of asylum procedures, identification of vulnerable persons, the possibility of automatic detention without an adequate judicial review, detention conditions, access to legal aid, and effective remedies.”³⁸

While not providing an exhaustive analysis of the agreement and of all its potential impacts, the present section aims at unpacking some of the key human rights concerns emerging from it.

4.1. RISK OF VIOLATIONS OF THE RIGHTS TO LIFE AND PHYSICAL INTEGRITY OF PEOPLE IN DISTRESS AT SEA

Like any other country, Italy has an obligation to protect the rights to life and physical integrity of people on its territory or under its jurisdiction.³⁹ This also applies to people who find themselves in distress at sea, and a body of international law and standards has been developed over decades to protect life at sea and regulate search and rescue activities.⁴⁰ Within this framework, Italy has a legal obligation to save persons in distress at sea without the slightest delay, to guarantee for all persons humane treatment and systematic respect for their human rights, and to ensure the swift disembarkation of rescued persons in a ‘place of safety’.⁴¹

Focusing in particular on the latter point, Amnesty International emphasises that, under international law, Italy and other states have an obligation to coordinate and cooperate to ensure that people rescued at sea can disembark in a place of safety that can be reached “as soon as reasonably practicable” following the rescue,⁴² to “make every effort to minimise the time survivors remain aboard the assisting ship”,⁴³ and to “make every effort to expedite arrangements to disembark survivors from the ship”.⁴⁴

The vast majority of rescues in the central Mediterranean take place between Libya, Tunisia, Sicily and Malta. From there, the places of safety that can be reached most promptly are often Lampedusa, Sicily and

³⁶ Presidenza del Consiglio dei Ministri, Dichiarazioni alla stampa con il Primo Ministro d’Albania, l’intervento del Presidente Meloni, 6 November 2023.

³⁷ See Art.6 of Draft Law 18 December 2023, n.1620; and Giansandro Merli, *Un anno, cento milioni. Ecco il vero prezzo dei campi in Albania*, Il Manifesto, 2 December 2023.

³⁸ Council of Europe Commissioner for Human Rights, Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures, 13 November 2023.

³⁹ See, inter alia, International Covenant of Civil and Political Rights, Articles 6 and 7; United Nations Human Rights Committee, General Comment No. 36 (2018), Article 6: right to life, CCPR/C/GC/36, 3 September 2019, and Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3042/2017 (Italy), CCPR/C/130/D/3042/2017, 28 April 2021; European Convention on Human Rights, Articles 2 and 3; European Court of Human Rights, *Safi and Others v. Greece*, Judgement, 5418/15, 7 July 2022; Charter of Fundamental Rights of the European Union, Articles 1, 2, 3, and 4.

⁴⁰ United Nations Convention on the Law of the Sea, art. 98; International Convention for the Safety of Life at Sea, 1974, Chapter V; International Convention on Maritime Search and Rescue, 1979.

⁴¹ Parliamentary Assembly of the Council of Europe, Resolution on the interception and rescue at sea of asylum-seekers, refugees and irregular migrants, 21 June 2011, Paras. 8, 9.3 and 9.5.

⁴² International Convention on Maritime Search and Rescue, 1979, Art 3.1.9; International Convention for the Safety of Life at Sea, 1974, Regulation 33, Para 1-1; and International Maritime Organization, Res. MSC. 167(78), Guidelines on the treatment of persons rescued at sea, adopted on 20 May 2004, para. 6.3.

⁴³ International Maritime Organization, Res. MSC. 167(78), Guidelines on the treatment of persons rescued at sea, adopted on 20 May 2004, para. 6.8.

⁴⁴ *Ibidem*, para. 6.9.

Malta. While Libya and Tunisia are geographically close, neither of them currently offers any places of safety to refugees and migrants rescued at sea, due to the human rights violations and abuses routinely imposed to people disembarked there by authorities, militias and armed groups.⁴⁵ The Albanian port of Shengjin, indicated as port of disembarkation for the people to be taken to Albania under the Italy-Albania agreement, is located over 500 nautical miles (or 926 km) from the area where rescues are most frequently carried out. It would take about two additional days at sea – or even three, in rough sea conditions – to take shipwreck survivors there, as opposed to closer ports such as Lampedusa or Malta.

By pre-determining that relevant maritime operations will conclude with the disembarkation of survivors in Albania, the agreement distorts the search and rescue system and imposes additional suffering on people rescued at sea. Shipwreck survivors are often traumatized by having just witnessed the drowning of other people, including relatives or friends, and are often in need of urgent medical assistance. They may have spent days at sea, sometimes without food or water, and before taking to the sea they have often spent weeks or months in captivity, subjected to torture and other cruel abuses. In such situations, unnecessarily forcing them to spend days onboard rescue ships, where crews cannot fully cater to their needs, constitutes a violation of international standards on search and rescue, and may in itself amount to ill-treatment.⁴⁶

On top of this, the agreement may have additional negative impacts on the wider search and rescue system, particularly as the Italian Maritime Rescue Coordination Centre may be subjected to undue pressures to ensure that certain groups of people are rescued or intercepted by state vessels – as opposed to other boats present at sea – in view of their potential transfer to Albania. This distortion of search and rescue practices would likely jeopardize the safety of relevant people, who may be left at sea in a situation of distress for longer than strictly necessary. Longer return journeys for rescue ships would also entail shorter periods when these ships are effectively available for rescues in the central Mediterranean, as already seen with the imposition of Italy's 'distant ports' policy on rescue NGO ships.⁴⁷ It is foreseeable that the agreement would further reduce the presence of rescue ships in the areas of the central Mediterranean where most shipwrecks are reported, and therefore lead to a slower response to situations of distress, with potentially lethal consequences.

4.2. RISK OF VIOLATIONS OF THE RIGHTS OF CHILDREN, PREGNANT WOMEN, SURVIVORS OF TRAFFICKING AND TORTURE, AND OTHER INDIVIDUALS IN NEED OF SPECIFIC CARE

The agreement and the draft law are silent about the procedures to be applied by the authorities to identify and separate the individuals to be taken to Italy (children, pregnant women, other "vulnerable" individuals) and those to be transferred to Albania. There is no clarity on whether such procedures would take place on board the rescue vessels or after disembarkation in Albania.

Procedures for the identification of children, pregnant women, survivors of trafficking and torture, and other "vulnerable" individuals, such as people with serious illnesses, often require specialised medical or psychosocial personnel and/or equipment and the time necessary to conduct detailed examinations and interviews. Amnesty International is concerned that the necessary personnel and equipment may not be available, should these procedures be conducted on board the rescue vessels, and that attempts at conducting them there may delay disembarkation for the entirety of the people rescued at sea, in breach of international law requiring – as previously pointed out – that people rescued at sea are disembarked in a

⁴⁵ Amnesty International, Libya: Hold Stability Support Authority militia leaders to account, 4 May 2022; 'No one will look for you': Forcibly returned from sea to abusive detention in Libya, 15 July 2021 (Index Number: MDE 19/4439/2021); and 'Between life and death': Refugees and Migrants trapped in Libya's cycle of abuse, 24 September 2020 (Index Number: MDE 19/3084/2020).

⁴⁶ Garante Nazionale dei diritti delle persone detenute o private della libertà personale, Informativa alle Procure della Repubblica di Agrigento e di Catania, 24 August 2018.

⁴⁷ Amnesty International, Italy: Withdraw measures that hinder the work of search and rescue NGOs and increase the risk of drownings, 1 February 2023 (Index Number: EUR 30/6407/2023).

place of safety as promptly as possible. Conversely, conducting these procedures after disembarkation in Albania would imply imposing on these “vulnerable” categories the same automatic detention regime imposed on all other individuals transferred to Albania – in violation of Italian, European and international law (see below).

All in all, the Italy-Albania agreement risks compromising the whole system for the identification and protection of children, pregnant women, survivors of trafficking and torture and other groups of individuals in need of specific care.

4.3. RISK OF VIOLATIONS OF THE RIGHT TO LIBERTY

The agreement provides for the automatic detention of all people taken to Albania, including asylum-seekers, who would not ever be able to leave the centres during their stay in Albania.⁴⁸ Additionally, the combined application of the Italy-Albania agreement, the Draft Law for its ratification and pre-existing domestic legislation on migration-related detention might allow for the detention of a person disembarked in Albania for a continuous period of over 18 months. Automatic and prolonged detention are both inherently arbitrary and therefore unlawful.

The right to liberty and the related prohibition of arbitrary detention are enshrined in numerous human rights treaties.⁴⁹ International law sets out that “freedom must be the default position and detention the exception.”⁵⁰

4.3.1. RISKS OF PROLONGED DETENTION

Under international human rights law and standards, migration-related detention should always be for the shortest possible time and must not be prolonged or indefinite.⁵¹

The Draft Law for the ratification of the Italy-Albania agreement extends the application of Italian legislation on migration-related administrative detention to the two centres to be set up in Albania, where people would be subjected to the ‘border procedure’ as per Italian and EU laws.⁵² Upon arrival in the Albanian port of Shengjin, people selected for disembarkation in Albania would be initially detained for a short period for identification, as they would be in hotspots on Italian territory, after which they should not be detained, unless there is a legal cause for depriving them of liberty. However, a legislative change introduced by Law 50/2023 in May 2023 allows Italian authorities to detain for up to 28 days individuals who have applied for asylum at the borders or in a transit zone and have arrived from countries of origin identified as ‘safe’ by the government.⁵³ Based on a fiction of non-entry, the provision enables authorities

⁴⁸ Art. 6.5 of the agreement.

⁴⁹ International Covenant on Civil and Political Rights, Art. 9(1); UN Human Rights Committee, General Comment 35 on Article 9: Liberty and security of person, CCPR/C/GC/35, 31 October 2014; UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Resolution 43/173, 9 December 1988, Principle 2; and Declaration on the Human Rights of Individuals who are not nationals of the country in which they live, Resolution 40/144, 13 December 1985, Art. 5(1)(a); European Convention on Human Rights, Art. 5(1); Refugee Convention, Art. 31; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 16(1); African (Banjul) Charter on Human and Peoples’ Rights, Art. 6; American Convention on Human Rights, Art. 7(1); American Declaration on the Rights and Duties of Man, Art. 1; Arab Charter on Human Rights, Art. 14; UNHCR Detention Guidelines, Introduction.

⁵⁰ UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, A/HRC/35/25, 28 April 2017, paras 58 and 62.

⁵¹ UN General Assembly, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012, para. 22; UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2000/4, 28 December 1999, Annex II, Principle 7; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/MEX/CO/2, 3 May 2011, para. 36; and Concluding observations of the Committee on the second periodic report of Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 September 2012, para. 26(a); UN Human Rights Committee, Concluding observations on the sixth periodic report of Canada, CCPR/C/CAN/CO/6, 13 August 2015, para. 12; UN Committee against Torture, Concluding observations of the Committee against Torture: Australia, CAT/C/AUS/CO/3, 22 May 2008, para. 11; UNHCR Detention Guidelines, Guideline 6.

⁵² Art.4 of Draft Law 18 December 2023, n.1620.

⁵³ Art.6-bis of Legislative Decree 28 January 2008, n. 25, introduced by Law 5 May 2023, n.50.

to detain relevant individuals with the aim of ascertaining whether they should be granted formal access to Italy. The maximum length of detention of 28 days corresponds to the period during which, under applicable EU law, Member States can limit access to territory to individuals undergoing asylum border procedures.⁵⁴ While the Asylum Procedures Directive does not explicitly provide for the use of detention, this latest development confirms that the use of detention is often assumed by Member States introducing border procedures. Importantly, the total length of relevant procedures could extend up to six months, following the entry into force of the new Asylum Procedures Regulation, part of the Pact on Migration and Asylum reforms being approved by the EU in early 2024. In line with this, there is a risk that Italy may extend the detention of asylum seekers in the detention centres in Albania well beyond the 28 days currently proposed. The Italy-Albania agreement does not indicate a maximum length of detention, but only refers to that applicable under Italian law.⁵⁵

This form of detention is separate from the detention of migrants who are irregularly present on the territory and subject to removal, which in September 2023 the government extended to a maximum of 18 months.⁵⁶ The two measures, however, can be applied, in sequence or at different times, to the same person, in particular following the rejection of an asylum claim and any relevant appeal. This means that a person disembarked in Albania might be detained in Italian centres there for a continuous period of over 18 months: first for identification, then to go through a border procedure, and later for removal.

4.3.2 AUTOMATIC DETENTION

Amnesty International considers that the agreement and its proposed implementing legislation introduce a form of routine or automatic detention, which is by definition arbitrary and therefore in breach of international law.

Under international law, the enjoyment of personal liberty must remain any individual's default condition. Any restriction on the right to liberty must be exceptional and based on a case-by-case, individualized assessment of the personal situation of the migrants and asylum-seekers concerned.⁵⁷ The individualized assessment must take into consideration the effect of detention on irregular migrants' or asylum-seekers' physical and mental health,⁵⁸ as well as factors such as their personal history, age, health condition, family situation and any specific needs. Blanket or automatic detention policies are arbitrary because they are not based on an individualized assessment of the necessity and proportionality of the detention measure.⁵⁹

Shortly after the approval of Law 50/2023, the Italian government started detaining individual asylum-seekers for up to 28 days, in ad hoc areas or specific detention centres, such as the centre of Modica in Sicily. However, several courts ruled these detention orders to be unlawful, since the domestic provisions conflict with the Italian Constitution and with EU law, which forbids the automatic detention of asylum seekers and requires authorities to provide adequate motivation based on individual circumstances in relevant detention orders.⁶⁰ The Italian government appealed against such decisions before the Italian Court of Cassation, which is expected to rule in 2024.

⁵⁴ Directive on common procedures for granting and withdrawing international protection (recast), 2013/32/EU, 26 June 2013, Art.43.

⁵⁵ Art. 9.1 of the agreement.

⁵⁶ Decree-Law 19 September 2023, n.124, Art.20.

⁵⁷ See, for example, UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Concluding observations of the Committee on the second periodic report of Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 September 2012, para. 26(c); Concluding observations of the Committee on the initial periodic report of Rwanda, CMW/C/RWA/CO/1, 10 October 2012, para. 24(a); and UNHCR Detention Guidelines, para.2, and Guideline 4.

⁵⁸ UN Human Rights Committee, General Comment 35 on Article 9: Liberty and security of person, CCPR/C/GC/35, 31 October 2014, para. 18.

⁵⁹ UNHCR Detention Guidelines, para. 3; UN Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Bahamas, CERD/C/64/CO/1, 28 April 2004, para. 17.

⁶⁰ 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 October 2023.

4.3.3. OTHER RISKS OF ARBITRARY DETENTION

Refugees, asylum-seekers and migrants currently in Italy already face barriers to appeal against the rejection of asylum claims and detention rulings, especially when they are already confined in hotspots or detained in repatriation centres, which include financial, linguistic and bureaucratic obstacles. It is therefore a major concern that such barriers would become even more unsurmountable for people detained by Italian authorities in Albania. This would increase considerably the risk of arbitrary detention.⁶¹

Furthermore, the fact that the Italy-Albania agreement does not foresee the possibility for people to be released from the centres other than through a transfer to Italy, poses a risk that those who succeed in challenging their detention may in fact remain detained until after their transfer is arranged, which might take a considerable period of time.

4.4. RISK OF VIOLATIONS OF THE RIGHT TO ASYLUM AND RELEVANT PROCEDURAL GUARANTEES

When presenting the agreement, Italian authorities emphasized that people rescued at sea and taken to the centres in Albania would remain subject to Italian jurisdiction. This is stated in the agreement itself, specifying that Italian authorities will manage the centres and conduct relevant procedures applying Italian and EU law.⁶²

The fact that Italian jurisdiction would be maintained over the rescued people should translate into ensuring that they have access to the substantive and procedural guarantees established under Italian and EU law, protecting the right to seek asylum, among other human rights.

However, in practice, the right to seek asylum, including access to fair and effective asylum procedures, is likely to be significantly curtailed, in view of the location of the two centres to be set up in Albania and the physical distance between asylum seekers and authorities and others playing a key role in decisions affecting them – asylum commissions, lawyers and judges, among others. Serious questions emerge, for example, in relation to the possibility to receive adequate legal assistance from a lawyer of one's choice and to effectively participate in relevant proceedings, also considering the planned use of remote legal assistance and interviews,⁶³ which increases the risk of misunderstandings and poor interpretation or legal assistance, and limits people's ability to express their case and situation fully.⁶⁴ This compounds the already restrictive conditions imposed by the use of the “border procedure”, entailing accelerated processing while in de facto detention or containment.

Questions also arise as to the effective possibility for relevant authorities, such as Members of Parliament and the Ombuds for people in detention, to fully exercise their prerogatives in defence of detainees' rights. These authorities will likely face logistical challenges to travel to the centres in Albania – making unannounced visits virtually impossible – and their capacity to deliver on their functions may become dependent on the cooperation of Albanian authorities. Similarly, under the agreement, relevant international organizations and EU agencies would be granted access to the detention centres only within the limits provided for by the applicable Italian, European and Albanian legislation, whereas no provision clarifies the possibility and limits of access for civil society organizations.⁶⁵

⁶¹ See ECRE-AIDA, Country Report: Italy, 2022 and 2021 updates.

⁶² Art.4.2 of the agreement and Art.4 of Draft Law 18 December 2023, n.1620.

⁶³ Art. 4.3-5 of Draft Law 18 December 2023, n.1620.

⁶⁴ For example, organisations present on the Greek islands report that infrastructural problems, such as poor connectivity or restricted access to WiFi, have already led to detrimental effects on individuals' access to effective asylum procedures. See e.g. European Ombudsman, Decision in strategic inquiry OI/3/2022/MHZ on how the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ, 7 June 2023.

⁶⁵ Art. 9.2 of the agreement.

Since Italy is a member of the EU, the extraterritorial exercise of jurisdiction also raises the question of the compatibility of relevant measures with EU law, considering that the granting of international protection by EU member states is regulated by EU law and this does not foresee offshore asylum processing.⁶⁶ The European Commission has dismissed this point, suggesting – following a preliminary assessment – that Italy would in fact apply Italian legislation in Albania, rather than EU law, and that since the agreement operates outside of EU law, it does not breach it.⁶⁷ This conclusion seems at odds with the very texts of the Italy-Albania agreement and of the Italian draft law for its ratification, which explicitly state that Italian authorities will apply Italian *and EU law* in the centres in Albania,⁶⁸ “*insofar as compatible*”,⁶⁹ and contain numerous references to Italian legislation transposing EU law. This poses the question of selective application of EU norms, as Italy may disapply EU rules incompatible with the arrangements under the agreement, thus creating legal uncertainty.

Given the level of uncertainty, Amnesty International is concerned that the agreement may be used to circumvent obligations imposed by EU and international law. This could have devastating consequences for people seeking asylum, who could be subjected not only to automatic and therefore unlawful detention – as previously indicated – but also to a sub-standard and unfair asylum procedure, without having access to adequate procedural guarantees and judicial protection.

In addition, the implementation of the agreement would result in the discriminatory treatment of people transferred to Albania, in comparison to other individuals in similar situation having access to Italian territory, in breach of international law and Italy’s own Constitution.⁷⁰ As pointed out by the Council of Europe Commissioner for Human Rights, Dunja Mijatović:

“[i]n practice, the lack of legal certainty will likely undermine crucial human rights safeguards and accountability for violations, resulting in differential treatment between those whose asylum applications will be examined in Albania and those for whom this will happen in Italy.”⁷¹

5. CONCLUSIONS

Amnesty International considers that the Italy-Albania agreement is in breach of Italy’s obligations under international and EU law and Italy’s Constitution. This appears particularly evident with reference to Italy’s obligations to uphold the rights to life and physical integrity of people in distress at sea, and the rights to liberty, to seek asylum and to be treated without discrimination of refugees and migrants transferred to Albania.

Italian authorities have emphasized that Italian laws and jurisdiction will apply. However, neither the text of the agreement nor information shared by the government with the parliament have adequately clarified how in practice the people transferred to the territory of a third country will be able to access their rights without discrimination, and how they will be protected from the risk of human rights violations.⁷² In this sense, the Italy-Albania agreement is not only dangerous in itself, but also as a potential blueprint for potential future similar agreements.

⁶⁶ Andreina De Leo, On the incompatibility of the Italy-Albania protocol with EU asylum law, SIDI Blog, 15 November 2023.

⁶⁷ On 15 November 2023, the European Commissioner for Migration and Home Affairs, Ylva Johansson, stated during a press conference in Brussels that: “The preliminary assessment by our legal service is that this is not violating the EU law, it’s outside the EU law”. A video of the statement is available at <https://www.youtube.com/watch?v=2xIDoNyeICw> (consulted on 16 January 2024)

⁶⁸ Articles 2, 4, and 9 of the agreement.

⁶⁹ Art.4 of Draft Law 18 December 2023, n.1620.

⁷⁰ See, inter alia, International Covenant on Civil and Political Rights, Art.26; European Convention on Human Rights, Art.14; and Italian Constitution, Artt.3 and 10.

⁷¹ Council of Europe Commissioner for Human Rights, Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures, 13 November 2023.

⁷² Camera dei Deputati, Comunicazioni del Governo sul Protocollo tra il Governo della Repubblica italiana e il Consiglio dei ministri della Repubblica di Albania per il rafforzamento della collaborazione in materia migratoria, 21 November 2023.

Amnesty International calls on Italian authorities to refrain from ratifying and implementing the Italy-Albania agreement. Italy should redirect the very considerable resources earmarked for this project to ensure that people seeking international protection have access to effective asylum procedures and dignified reception on its territory, including through increased opportunities to access safe and regular pathways. Furthermore, Amnesty International calls on the EU institutions to conduct a thorough legal analysis of the agreement's compliance with EU law. The EU must refrain from endorsing this approach, and must use the tools at their disposal to ensure EU member states' full application of relevant norms of EU and international law.