PAPERS ON LIBERTY AND SECURITY IN EUROPE

THE 2023 ITALY-ALBANIA PROTOCOL ON EXTRATERRITORIAL MIGRATION MANAGEMENT

A worst practice in migration and asylum policies

Sergio Carrera
Giuseppe Campesi
Davide Colombi

ASILE
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SUMMARY

In November 2023, the Italian government concluded a Memorandum of Understanding (MoU), or Protocol, with the Albanian authorities envisaging extraterritorial migration and asylum management, including detention and asylum processing, in Albania. This Report examines the Protocol in light of EU, regional and international legal standards, and the main responses that it has attracted so far. It concludes that the MoU can be understood as a nationalistic and unilateral arrangement that, while not involving the EU, covers policy areas falling within the scope of European law. The MoU runs contrary to EU constitutive principles enshrined in the Treaties, including the EU Charter of Fundamental Rights, as well as international law. It should be regarded as a non-model in migration and asylum policies as it is affected by far-reaching illegality and unfeasibility grounds undermining both its rationale and implementation.

Sergio Carrera is a Senior Research Fellow and Head of Unit at CEPS; Giuseppe Campesi is a Senior Lecturer and Associate Professor at the University of Bari (Italy); Davide Colombi is a Research Assistant at CEPS. The authors would like to thank Professors Andrew Geddes (EUI, Italy) and Jens Vedsted-Hansen (Aarhus University, Denmark) for their valuable comments on a previous draft of this Paper. This report covers all relevant developments up until 1 December 2023.

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CEPS • Place du Congrès 1 • B-1000 Brussels • Tel: (32.2) 229.39.11

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1. INTRODUCTION

On 6 November 2023, Italian Prime Minister Giorgia Meloni and her Albanian counterpart, Edi Rama, presented at a Joint Press Conference the conclusion of a bilateral Protocol or Memorandum of Understanding (MoU) on migration management. The MoU entails the setting up of two detention centres on Albanian territory where some third country nationals rescued in the Mediterranean Sea, and those already present on Italian territory, would be taken and disembarked for extraterritorial processing of their asylum applications and/or for their eventual expulsions.

Meloni introduced the MoU as a 'truly European agreement[1]' and as a 'historic agreement for the EU'[2]. She even framed it as a model for EU cooperation with third countries on migration management, adding that despite the fact that Albania is not yet an EU member state, this MoU was an example that it is already behaving like one and expressed her support for it to enter the EU[3]. A preliminary legal assessment by the European Commission surprisingly concluded that the deal is 'outside EU law' and thus not in breach of EU law[4].

This Report examines the Italy-Albania Protocol as an example of the extraterritorialisation of migration and asylum management[5]. The analysis concludes that 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. Italian law dealing with asylum, border, and expulsion procedures and detention, implements and follows EU legislation in all these areas, and falls now

[1] Politico (2023), 'Italy announces deal to build migrant centres in Albania', 7 November.

[2] The Guardian (2023), 'Italy to create asylum seeker centres in Albania, Giorgia Meloni says', 6 November.

[3] BBC (2023), 'Europe migrant crisis: Italy to build migrant centres in Albania', 7 November.

[4] Euronews (2023), 'Italy-Albania migration deal falls "outside" EU law, says Commissioner Ylva Johansson', 15 November.

[5] Solveig, A., Carrera, S., Faith Tan, N. and Vedsted-Hansen, J. (2022), *Externalization and the UN global compact on refugees: unsafety as ripple effect*, EUI RSC PP, 2022/12, Migration Policy Centre: Florence. According to the 2022 Refugee Law Initiative (RLI) Declaration on Externalization and Asylum, 'externalisation' is understood as 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory'. As analysed in Section 2 of this Report, the Italian-Albanian Protocol constitutes an initiative focused on extraterritorialisation, which is here understood as a sub-component of the borader notion of externalisation, since the Italian government is not entrusting Albanian authorities with the task of carrying out border/migration control functions or processing asylum applications. See also Refugee Law Initiative (2022), 'Declaration on Externalisation and Asylum', *International Journal of Refugee Law*, Vol. 34, No 1, pp. 114-119. UNHCR has defined 'externalisation' as 'measures preventing asylum-seekers from entering safe territory and claiming international protection, or transfers of asylum-seekers and refugees to other countries without sufficient safeguards'. UNHCR (2021), 'Note on the "Externalization" of International Protection'.

within exclusive EU legal competence. EU Member States are no longer free to unilaterally strike bilateral deals with third countries that cover and put at high risk EU legal standards applicable to these domains, as this directly violates their Treaty obligations. EU Member States responsibilities falling within the scope of Union law do not end within their geographical territories.

A portable justice paradigm applies, and responsibility follows. Otherwise, Member States' extraterritorial actions or inactions would, firstly, undermine the overall effectiveness and goals of EU legislation, and secondly, flagrantly deny justice for individuals subject to their jurisdiction and effective control. The MoU does not constitute an international or European agreement either. It is instead a non-legally binding bilateral arrangement characterized by deep democratic deficit and enforceability challenges, and featuring far-reaching illegality and unfeasibility grounds which can be expected to undermine its rationale, design, and practical implementation.

2. WHAT IS THE MOU ABOUT?

The MoU[6], made public on 7 November 2023 by the Italian Prime Minister's Office, foresees that the Albanian authorities grant two areas within their territory to construct two detention centres during the Spring of 2024, which will run for an initial period of 5 years. The Protocol envisages that the centres will have the capacity to accommodate a maximum of 3 000 individuals at one time. According to initial projections[7], the centres could process approximately 36 000 individuals annually.

One centre is envisaged to be built close to the port of Shengjin, where the disembarkation, identification and border procedures – including those related to asylum – are planned to take place; and the other centre in Gjader, which aims at hosting people who are considered as ineligible for asylum. The two centres will be managed by the Italian authorities 'in accordance with relevant Italian and *European* legislation' (Emphasis added). They will fall under exclusive Italian jurisdiction and should serve the only goal of carrying out border, asylum and return procedures under Italian and EU law.

The Italian authorities will be responsible for the transfer to and from said centres, as well as the 'maintenance of security and order' within them. The Albanian authorities will be tasked with guaranteeing the 'security and public order' of the external perimeter and during the transfers to and from the detention centres. Therefore, it is not clear whether the responsibility over the transfers is shared. Crucially, the MoU allocates the responsibility to secure the detention and 'unauthorized exit' of individuals into Albanian territory (both during and after completion of the procedures, and irrespective of final outcomes) to Italian authorities. In light of the above, the MoU constitutes a deliberate and conscious strategy to '*extraterritorialise*' migration and asylum management and law enforcement in these offshore locations.

The legal nature of the facilities to be created in Albanian territory is not entirely clear. The Protocol suggests that they are established and managed in accordance with relevant Italian and EU legislation, and that the maximum period of detention of individuals in these centres should not exceed those envisaged under Italian law. Given that these will be detention facilities, the reference seems to be to so-called pre-removal immigration detention centres (*Centri di Permanenza per il Rimpatrio* in Italian) provided for in Article 14 of Legislative Decree 286/1998, where even asylum seekers subject to border

[6] Protocol between the Government of the Republic of Italy and the Council of Ministers of the Republic of Albania for the Strengthening of Cooperation in Migration Matters, 2023.

[7] Politico (2023).

procedures can be held in detention as per Article 6(bis) of the Legislative Decree 142/2015 (as amended by Decree 20/2023).

Furthermore, Article 1 of the MoU states that it applies to 'third-country nationals and stateless persons for whom the existence or non-existence of requirements for entry, stay, or residence in the territory of the Italian Republic must be ascertained or has already been ascertained'. This seems to suggest that also Third Country Nationals (TCNs) already present in Italy who are to be repatriated could be sent to the centres in Albania, not only those detected or rescued while attempting to cross the external borders, as suggested by the above-mentioned official statements.

In any case, the MoU stipulates that following the completion of the procedures, or upon the expiry of the maximum term for detention set by Italian law, or in any case where, for any reason, the legal basis for detention ceases, the Italian authorities will have to ensure the removal of the individuals concerned from Albanian territory. It is not clear whether these transfers must always and in any case be towards Italian territory, or whether TCNs could be transferred by Italian authorities to other third countries of transit and/or origin.

The budgetary costs incurred in the setting up and running of these centres will be, in principle, exclusively covered by the Italian authorities. It has been reported that, according to one Annex of the Protocol,[8] the envisaged financial costs include a first fund of 16.5 million EUR to be paid by the Italian government to the Albanian authorities three months after its formal adoption, which will be coupled with a 100 million EUR bank guarantee.

[8] Gogo.al (2023), 'Exclusive – The Agreement with Italy for the Immigrant Camp in Gjader is revealed', 7 November.

3. EU AND INTERNATIONAL RESPONSES

The European Commission response to the Protocol has been ambivalent and legally flawed. When asked about the legality of the MoU on 7 November 2023, the Commission first told reporters that it had asked Italian authorities for more detailed information regarding the exact scope and expected impacts of the arrangement, and that 'this must be done without prejudice to the asylum acquis'[9]. It argued that 'the deal could prove problematic if Italy sends migrants found in the EU's territorial waters to a non-EU nation' and stated that any person rescued in Italian waters should be able to apply for asylum there and not be transferred to a third, non-EU country. The Commission seemed to leave the door open in cases where the persons involved would be rescued by EU Member States boats in international waters[10]. This understanding of territory appears to closely follow that pursued in 2018's unsuccessful proposal to set up 'regional disembarkation platforms' in North Africa for processing asylum applications[11].

Soon after, on 15 November 2023, Commissioner Ylva Johansson stated that 'the preliminary assessment by our legal service is that this is not violating the EU law, it's outside the EU law'. Johansson declared that 'EU law is not applicable outside EU territory', and went on to say that 'Italian law – which will be applicable in the Albanian centres – follows EU law but, while the rules are the same, they remain two distinct bodies of law'.[12] The analysis provided in *Section 4* of this Report, however, shows how the Commission's assessment is legally unsound, political-driven in nature, and therefore running contrary to the Commission's duty to enforce EU law and act as guarantor of the Treaties.

At the European Parliament, eleven Italian MEPs from the S&D group submitted a question for written answer to the Commission on 7 November 2023[13]. The question sought clarification on several points, including; the extent to which the envisaged transfer of people rescued at sea may constitute collective expulsions and a violation of

[9] EUobserver (2023), 'EU unclear on legality of Italy-Albania deal to offshore asylum', 7 November.

[10] Agence Europe (2023), 'European Commission wants more information on agreement between Italy and Albania to transfer asylum seekers rescued at sea to Albanian centres', 7 November.

[11] Following the call by the European Council Conclusions of 28 June 2018, the Commission published two 'Non-Papers' dealing with 'regional disembarkation platforms' and 'controlled centres', in close cooperation with UNHCR and IOM. One of the Options outlined by the Commission regarding regional disembarkation platforms included the possibility for disembarkation to take place in third countries. According to the Commission, 'If the search and rescue occurs in international waters and involves an EU State's flag vessel, disembarkation can still take place in a non-EU country, provided that the principle of non-refoulement is respected.' European Commission (2018), 'Managing Migration: Possible Areas for Advancement at the June European Council', Brussels.

[12] Euronews (2023).

[13] European Parliament (2023), 'Compliance of the Italy-Albania memorandum of understanding with international law and EU asylum rules', Question for written answer E-003289/2023, 7 November.

the non-refoulement principle similar to that found in the 2012 Hirsi Jamaa and Others v. Italy case by the Strasbourg Court[14]; the risk of unequal treatment between persons rescued in the Mediterranean by civilian vessels and by military vessels, who for that reason alone would be subject to accelerated procedures in non-EU territory; and the potential undermining of the rights of defence and the guarantees of personal freedom enshrined in the Italian constitution and EU and international rules on returns and procedures for the recognition of international protection. MEP Juan Fernando Lopez Aguilar, Chair of the EP's Civil Liberties, Justice and Home Affairs (LIBE) Committee, declared that the current MoU is 'absolutely incompatible not only with the legislation which is now in effect, but with the legislation we are intending to put in place', i.e. the Pact on Migration and Asylum[15].

UNHCR expressed in a Communication published on 7 November that it was not involved or informed/consulted in any way or form on the Protocol and its details[16]. It underlined that inter-state agreements may be appropriate only where certain protection standards are met and when they contribute to 'equitable sharing of responsibility for refugees, instead of transferring it'. It reiterated that the Italian government has 'the primary responsibility for assessing asylum claims and granting international protection lies with the State where the asylum seeker arrives'.

Similarly critical remarks have been made by the Council of Europe Human Rights Commissioner, Dunja Mijatović[17], who commented that the MoU 'raises several human rights concerns and adds to a worrying European trend towards the externalisation of asylum responsibilities'. She emphasized that 'the lack of legal certainty [inherent to the Protocol] 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'.

Moreover, civil society actors such as Amnesty International and other NGOs have been highly sceptical and critical about the legality of the arrangement, and have underlined the inhumane and populistic nature characterising the deal[18].

[14] European Court of Human Rights (2012), 'Case Hirsi Jamaa and Others v. Italy, Application No. 27765/09', 23 February.

[15] Euractiv (2023), 'Italy-Albania migration deal is unacceptable says leading socialist MEP', 13 November.

[16] UNHCR (2023), 'UNHCR: le modalità di trasferimento di richiedenti asilo e rifugiati devono rispettare il diritto internazionale sui rifugiati', 7 November.

[17] Commissioner for Human Rights (2023), 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures', 13 November.

[18] Amnesty International (2023), 'Italy: Deal to detain refugees and migrants offshore in Albania 'illegal and unworkable'', 7 November; Infomigrants (2023), '"Inhumain", "illegal"… Vives critiques contre l'accord entre l'Italie et l'Albanie sur l'externalisation des demandes d'asile', 8 November.

4. ILLEGALITY AND UNFEASIBILITY GROUNDS

4.1 Ground #1: A bilateral deal affected by democratic, nationalistic, and enforceability deficits

The MoU constitutes a bilateral and *ad hoc* policy arrangement or deal and does not formally qualify as an international agreement. It is therefore exempted from the checks and balances and legal certainty which typically accompany proper international agreements. By qualifying as a political arrangement, instead of an agreement, it has prevented – by design and by choice – any public scrutiny and effective democratic accountability by the relevant national parliaments before its formal conclusion and publication.

The Italian Association of Jurists Specializing in Immigration Matters (ASGI) has emphasized that the MoU should still be approved by the Parliament to comply with the principles of the Italian Constitution[19]. Among the reasons given in support of this position, ASGI highlights that the implementation of the MoU would require several changes to Italian immigration and asylum legislation. Additionally, the facilities to be created in Albanian territory were included among the facilities relevant to national defence and security after the approval of Decree 124/2023. According to Law 25/1997, any international agreement, regardless of its designation, that is relevant to national security must be ratified by the national parliament.

Thus, the Protocol raises serious incompatibility issues in light of Italian constitutional law. This may be the reason why the Italian government made a U-turn on the 21 November 2023 by declaring that the national parliament would be given the opportunity to ratify the Protocol. Italy's Foreign Minister, Antonio Tajani, promised in an intervention in the Italian parliament's lower house that the deal would be converted in a proposal of law subject to the parliament's scrutiny, where the government counts with the majority[20]. This *ad hoc* parliamentary involvement calls into question the sincere cooperation and good faith of the Italian government in this whole endeavour. In the same intervention before the Italian Parliament, Tajani declared that the European Commission had already confirmed that the MoU did not violate EU law, since 'processing will follow Italian law which is fully in line with European law'.

The Protocol is not, however, 'European' in nature and fundamentals. It has been negotiated and concluded outside the EU framework, unilaterally and behind closed doors by the Italian government alone. The European Commission and EU co-legislators

[19] ASGI (2023), 'Accordo Italia-Albania, ASGI: è incostituzionale non sottoporlo al Parlamento', 14 November.

[20] Infomigrants (2023), 'Italy: Parliament to ratify Albania deal to process asylum seekers', 22 November.

(i.e., the Council or the European Parliament, and relevant EU agencies – such as Frontex and the European Union Asylum Agency (EUAA)) have not been directly involved. This further nurtures the democratic deficit intrinsic to the MoU and its overriding nationalistic nature. The Protocol is an exclusively Italian government-owned policy product.

The nature of the MoU, as an arrangement, additionally means that it is legally binding for the two parties involved. The Protocol comes along with weak enforceability, which could prove to be decisive in situations of non-compliance or cases of disagreements or misunderstandings between the parties during its various implementation phases. This also raises profound questions regarding its medium and long-term sustainability.

4.2 Ground #2: Search and Rescue (SAR) and disembarkation

Priority is given within the MoU to transferring and disembarking rescued individuals 'who are considered as not vulnerable' in a coastal port located in Albanian territory, instead of the nearest Italian ports. This is fraught by large legal ambiguities and poses serious challenges to the Italian government's compliance with its SAR obligations under international maritime law, and human rights legal standards more generally.

Generally speaking, the European Commission's political position – according to which disembarkation in Albania could be lawful if the rescue has taken place in international waters – fundamentally disregards key principles of international maritime law and human rights standards. In the case of ships operated by national authorities, there is no doubt that the relevant State exercises jurisdiction (*de jure* or *de facto*) and effective control extraterritorially under international law[21].

This has been confirmed by the Strasbourg Court in the above-mentioned 2012 Hirsi Jamaa and Others case. The Court held that the Italian authorities had exercised jurisdiction by intersecting boats on the high seas in order to prevent non-EU nationals from reaching the Italian territory and to forcibly transfer them to Libyan authorities. The Court declared the Italian authorities' extraterritorial responsibility under Article 1 ECHR and held that push backs constituted unlawful collective expulsions under Article 4 Protocol 4. The ECtHR concluded that not accepting the extraterritorial responsibility would mean that a significant component of contemporary migration policies would fall outside the scope of the Protocol 4, which would be rendered completely ineffective in practice.[22] In the same vein, the United Nations Human Rights Committee 2021

[21] Cantor, D. et al. (2022), 'Externalisation, Access to Territorial Asylum and International Law', *International Journal of Refugee Law*, Vol. 34, N. 1, pp. 120-156.

[22] ECtHR, Application No. 27765/09, 23 February 2012. Refer to paragraphs 177 and 178 of the ruling. The Court added that, an exclusive territorial understanding of jurisdiction would mean that 'migrants having taken to sea, often risking their lives, and not having managed to reach the borders of a state, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling

Communication on A.S., D.I., O.I., and G.D. against Italy[23] concluded that the decisive factor determining Italian state responsibility was not whether an individual is physically within its SAR region, but rather the extent to which they are under its effective control.

Accordingly, the *where* question is legally irrelevant in determining who holds responsibility and liability for the persons concerned. If Italian authorities enter into contact (and hence establish a 'special relationship of dependency') with people in distress at sea, and exercise effective control over them, then this responsibility inevitably lies with them. It also must be pointed out that, in recent years, the Italian navy, coast guard and *Guardia di Finanza* have very rarely actively intervened in SAR operations outside of the country's territorial waters. It is thus striking that the European Commission seems to assume that the Protocol would mostly cover their SAR activities in international waters.

The Italian government appears to be instrumentally and disingenuously misusing international maritime law towards its own political goals. In the midst of a series of incidents between the Italian government and humanitarian NGOs in late 2022-early 2023[24], UNHCR released some 'Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum' to remind Italy of its obligations as a coastal state: 'primary responsibility for ensuring access to international protection falls to the State under whose territorial jurisdiction and effective control an asylum-seeker finds herself. In most instances, this will be the State of disembarkation'[25].

In fact, the Italian government is not denying its jurisdiction over asylum-seekers, as it did with the NGOs in late 2022-early 2023. In the foreseen scenario, there is no real uncertainty over *jurisdiction* in cases of international maritime law and human rights violations, given that the SAR missions are carried out by Italian authorities, and, in Albania, the border procedures (on asylum and expulsions) would be carried out by Italian authorities according to Italian and EU law.

An Achilles' heel of the system designed in the MoU lies in the notion of the nearest place of safety and vulnerability screening. Most of the SAR operations in the Central Mediterranean take place between Sicily and North Africa. Despite the recent attempts by the Italian government to complicate and police NGOs' operations by assigning ports of disembarkation in central and northern Italy, the people rescued in this area should be

by land'. The Court added that 'problems with managing migration flows cannot justify having recourse to practices which are not compatible with the States' obligations under the Convention', paragraph 179.

[23] Human Rights Committee (2021), 'Communication No. 3042/2017, CCPR/C/130/D/3042/2017', 28 April.

[24] Carrera, S., Colombi, D. and Cortinovis, R. (2022), 'Policing Search and Rescue NGOs in the Mediterranean: Does Justice end at Sea?', CEPS In-Depth Analysis, Brussels.

[25] UNHCR (2022), 'Legal considerations on the roles and responsibilities of States in relation to rescue at sea, non-refoulement, and access to asylum', 1 December.

disembarked in the nearest ports on the islands of Lampedusa or Sicily and should only be transferred elsewhere (*within the country*) in a second movement.

By contrast, the MoU raises severe logistical barriers to a swift and effective disembarkation in a safe port[26]. It will require Italian authorities to engage in comparatively long journeys from Italy's Southern external borders to a distant port somewhere in Albania, geographically located more than 700 km away. This would entail several extra days at sea for those who have been rescued and their unnecessary exposure to further danger and possible fundamental rights violations.

The MoU seems to exclusively apply to individuals rescued at sea by the Italian authorities (i.e., the Navy, Coast Guard or Guardia di Finanza). Article 4(4) explicitly says that 'the entry of migrants into the territorial waters and territory of the Republic of Albania shall take place exclusively by the means of the competent Italian authorities'. SAR NGOs are not mentioned here, which has represented one of the most controversial and still unresolved aspects of the SAR debate in Italy[27]. It therefore remains unclear whether people rescued by civil society or NGOs will be covered during the implementation of the arrangement[28], likely leading to a discriminatory treatment between people rescued by Italian authorities vs NGOs.

Furthermore, according to declarations by Prime Minister Meloni, the arrangement would follow a selective disembarkation model whereby some individuals considered to be 'vulnerable' (e.g. minors, pregnant women, etc.), would disembark on Italian territory, while those not deemed to be 'vulnerable' would be taken to Albania. Such a selective logic based on 'vulnerability' has been found to be unconstitutional by a regional administrative court in Catania[29], which held on the 6 February 2023 that the 4 November 2022 Interministerial Decree permitting only the disembarkation of *some* – not all – individuals from the NGO ship Humanity 1 was unlawful and incompatible with Italy's obligations under international maritime law.

As the MoU stands now, it would necessarily imply an accelerated and superficial – and henceforth unfair - assessment of vulnerabilities, with the real priority being the transfer of people to Albania and not the identification of their specific needs. It is unclear how

[26] IlPOST (2023), 'Nell'accordo fra Italia e Albania sui migranti ci sono molte cose che non tornano', 7 November.

[27] Carrera, S., Colombi, D. and Cortinovis, R. (2022).

[28] The MoU states that the entry of migrants into territorial waters and the territory of the Republic of Albania occurs exclusively through the means of the competent Italian authorities. Private ships or NGOs cannot enter Albania. However, if the procedure involves screening to be conducted in Italy and then transfer to Albania for asylum/return procedures, then individuals rescued by NGO ships could also go to Albania.

[29] Melting Pot Europa (2023), 'Sbarco "selettivo" dalla nave Humanity 1: il decreto interministeriale del 4 novembre fu illegittimo', 14 February.

the Italian authorities will assess the prioritisation and 'vulnerability' of some – but not all – rescued individuals in a non-arbitrary and non-discriminatory manner, in particular towards certain groups such as young male and LGBTQIA+ applicants, as well as the impact of these decisions on the separation of families[30]. The Protocol can therefore be expected to lead to significant disregard of the structural vulnerabilities of people rescued at sea, and further enhance their traumatization.

The presence of so-called 'vulnerable individuals' (or, rather, persons with specific reception and procedural needs) would require vessels to head to an Italian port for disembarkation. In such circumstances, if ships were to dock in Italy to disembark 'vulnerable' people, keeping all 'non-vulnerable' people onboard for eventual transfer to the Albanian centres, it is highly likely that judicial authorities would intervene, as they have done in the recent past. All people rescued at sea are inherently vulnerable and must have access to fast and effective asylum procedures as soon as they express their intention to present an asylum application, including at sea.

Additionally, in this scenario, and once more contrary to Commissioner Johansson's claims, EU law will undoubtedly apply. The 2013/32 Asylum Procedures Directive (APD), and the fundamental right to asylum, would give all the asylum-seekers onboard the right to remain on Italian territory for the whole duration of the asylum procedure and would therefore prevent their transfer to another non-EU country. Furthermore, as confirmed by the Luxembourg Court in cases C-14/21 and C-15/21 *Sea Watch eV*, issued on August 2022[31], SAR is not a policy area falling completely outside EU law. Compliance with the EU Directive 2009/16 on port state control, which must be read in light of existing international maritime standards, constitutes a crucial issue here, irrespective of *where* the people have been rescued.

4.3 Ground #3: Asylum and injustice

The MoU directly affects provisions, envisaged in EU primary law, of a constitutional nature in the EU legal system. Firstly, it interferes with the essence of the EU fundamental right to asylum enshrined in Article 18 of the EU Charter of Fundamental Rights (EUCFR). The right to asylum includes, for instance, the right to be allowed entry in EU Member States' territory and having access to status determination procedures. It covers everyone applying for asylum, regardless of the outcome of the procedures and whether or not they are found to qualify as refugees or subsidiary protection beneficiaries. The

[30] The options would be: first, either screening takes place on board the ship, which first disembarks the vulnerable individuals in Italy and then transfers the others to Albania; or all persons rescued at sea are first disembarked on Italian territory for screening and then transferred to Albania. In both cases, the procedure would be illegitimate under international and EU law, but in the first case, it would also be contrary to the provisions of the judgment of the Catania Court.

[31] CJEU, *Sea Watch*, Joined Cases C-14/21, C-15/21, 1 August 2022.

Luxembourg Court has underlined in several judgments how this EU right takes hierarchical preference over EU secondary legislation on borders and asylum. The Court has insisted on the obligation of EU Member States to ensure effective, timely, and genuine access to asylum procedures, irrespective of the unauthorised means of entry into EU territory[32].

As analysed in *Section 4.2.* above, the transfer of some rescued individuals to a distant port in a neighbouring country would unnecessarily and disproportionality entail delaying access to asylum for the persons involved. This undermines the effectiveness of the right to asylum under Article 18 EUCFR and the above-mentioned Asylum Procedures Directive (APD). Crucially, the Luxembourg Court reconfirmed that as soon as an asylum application is made, the TCN automatically becomes 'a person seeking international protection' within the scope of the APD, and 'must be allowed to remain in the territory of that Member State' following Article 9 of the APD.

The above-mentioned Commission's statement according to which 'Italy is complying with EU law, so that means that this is the same rules. But legally speaking, it's not the EU law but it's the Italian law (that) follows the EU law', is a contradiction in terms and is legally flawed. The procedures envisaged by the MoU are now regulated by EU primary and secondary law. Thus, in contrast to the preliminary political assessment made by the Commission, the most relevant threshold to review the legality of EU Member States actions – and in this case that of the Italian government – is the extent to which their activities fall within the scope of EU law[33].

Secondly, the fundamental right to an effective remedy, included in Article 47 EUCFR, is also at stake in the Italy-Albania MoU. This right is particularly crucial as regards asylum processing and detention. Effective judicial protection is a constitutive component of the concept of the rule of law enshrined in Article 2 TEU, which applies to every person irrespective of administrative migration status. Article 9.2 of the MoU exclusively declares that the Italian and Albanian authorities shall allow access to the centres to 'lawyers, their auxiliaries, as well as to international organizations and agencies of the European Union providing advice and assistance to applicants for international protection', subject to the time-limits envisaged under Albanian, Italian, and EU legislation. The MoU does not clarify, however, which specific courts will be competent to handle procedures for migrants and asylum seekers detained in Albania. This will, in our view, necessitate an amendment to the existing Italian legislation.

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[32] See for instance CJEU, *European Commission v Hungary*, Case C-823/21, 22 June 2023.

[33] Moreno Lax, V. and Costello, C. (2014), 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart/Beck, pp. 1657-1683. According to Moreno Lax and Costello, 'Whenever EU law applies,…, it must respect, protect and promote fundamental rights within the scope of its competences as a matter of EU law', p. 1682.

It remains equally uncertain the extent to which the right to an effective remedy will be delivered in practice so as to ensure a truly *effective* access to judicial protection for the relevant individual. It is unlikely that TCNs transferred to an offshore detention facility in Albania could have prompt access to trusted legal representation and a competent interpreter so as to ensure the overall fairness and equality of procedures. The issue arises, in particular, for the validation procedure of the detention measure, which, according to the Italian Constitution, must occur within a few hours. One of the likely consequences of the MoU will be a huge reduction in the actual scope and specific features of the right to an effective remedy under EU law, including in cases covering detention (see *Section 4.5.* below).

The MoU does however foresee the likelihood of judicial proceedings and appeals during its implementation, which can be indeed expected to increase in number once it is put into effect. Article 12.2 of the Protocol clarifies that the Italian authorities will bear the costs of legal representation and/or court proceedings and compensations for damages brought against Albanian authorities by any third parties, including 'actions or omissions of the Italian Party with respect to migrants, or as a result of the activities of the Italian authorities'.

4.4 Ground #4: Border procedures

The adoption of this MoU represents the final piece of a series of EU and national legislative reforms that, in many aspects, seems to anticipate some of the measures that are being currently renegotiated at EU level under the so-called EU Pact on Migration and Asylum[34], and which are currently regulated under the Schengen Borders Code (SBC) and the APD.

In particular, Italian Legislative Decree 20/2023 established that all asylum seekers from third countries considered to be 'safe' and subjected to border procedures would be detained for a maximum of four weeks in designated premises within Hotspots or in detention centres located near disembarkation points. However, the Italian authorities immediately faced the impracticality of a policy of mass detention upon arrival[35]. The high number of arrivals recorded in the summer of 2023 led to the immediate overcrowding of the Hotspots and detention facilities located near the main disembarkation points.

In response to the critical situation that unfolded at the Lampedusa Hotspot in the early weeks of September 2023, the Italian government decided to accelerate the construction

[34] Brouwer, E. et al. (2022), 'The European Commission's legislative proposals in the New Pact on Migration and Asylum', European Parliament, Brussels.

[35] Cornelisse, G. and Campesi, G. (2021) 'The European Commission's New Pact on Migration and Asylum', Horizontal substitute impact assessment, Brussels.

of new dedicated detention facilities for asylum seekers subject to border procedures, entrusting this responsibility to the military engineering corps. After a few weeks, the first of the new detention facilities opened its doors, near the Pozzallo Hotspot in Ragusa (Sicily)[36].

The MoU with Albania aligns with policies aimed at strengthening the capacity of the Italian detention system implemented in recent months, creating facilities specifically dedicated to the detention of newly arrived migrants and asylum seekers. However, it represents a major qualitative leap, in the sense that it moves towards a direct and explicit extraterritorialisation of detention, going well beyond proposals included in the Commission's Pact on Migration and Asylum. Therefore, as rightly underlined by the European Parliament (See *Section 2* above), the MoU directly affects and jeopardizes EU secondary legislation currently in force and under inter-institutional negotiation. In this manner, the Protocol is inconsistent with EU Member States' duty to ensure sincere and loyal cooperation under Article 4 Treaty on the European Union (TEU).

4.5 Ground #5: Detention and reception conditions

Research examining previous international experiences in extraterritoriality or outsourcing of asylum and migration management has showed their profound structural pitfalls and incompatibility with international and EU human rights and rule of law standards[37]. This same research has questioned the effectiveness of extraterritorialisation arrangements in deterring unauthorised arrivals.

An illustrative case in point is the so-called 'Pacific Plans' or MoU in Australia[38]. This MoU envisaged interdictions and regional detention centres in Naura, Papua New Guinea, and Christmas Island where asylum seekers claims have been processed. These have led to widespread inhuman and degrading conditions and treatment, severe physical and mental health impacts and have been found contrary to the prohibition of arbitrary detention (Article 9 ICCPR), the non-penalization of refugees (Article 31 1951 Geneva Convention), and the non-refoulement principle (Article 33 1951 Geneva Convention).[39] Australian offshoring policy has been regularly denounced by the UN Universal Periodic

[36] ASGI (2023), 'Monitoraggio ASGI e SC a Pozzallo: hotspot, Contrada Cifali e il nuovo centro di trattenimento', 9 October.

[37] Carrera, S. et al. (2018), 'Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU', Open Society European Policy Institute, Brussels.

[38] Foster. M. and Hood, A. (2021), 'Regional Refugee Regimes: Oceania', in Costello, C. et al. (eds), *The Oxford Handbook of International Refugee Law*, Oxford University Press, pp. 441-460.

[39] Furthermore, the Papua New Guinea Supreme Court of Justice found in the 2016 Namah case (no. 84, SC1497) that the arrangement was illegal because the detention of asylum seekers against their will ran against their personal liberty guaranteed by the Constitution. Available at https://www.lawsociety.org.nz/assets/news-files/0020-100568-Namah-v-Pato-2016-PGSC-13.pdf

Review (UPR), which has recommended on several occasions that the Australian government withdraws or suspends its application.

The systematic detention camps regime foreseen by the MoU runs the real risk of constituting arbitrary detention under international law, increasing the probability of inhuman and degrading treatment, which is of absolute nature and prohibited by international human rights law and the EUCFR. Further, the detention of TCNs subject to expulsion and asylum procedures falls under EU law and it must be a measure of 'last resort'[40], i.e. only if other alternatives have been duly exhausted, and subject to independent judicial review by European and national Courts. Additionally, 'detention' is now an autonomous concept of EU law[41], and the common standards envisaged by the EU 2001 Returns Directive and the 2013 Reception Conditions Directive apply.

Article 9 of the MoU highlights that the period of stay of TCNs in Albanian territory should not exceed the maximum period of detention allowed in Italian legislation.[42] However, the practical implementation of the MoU raises an enormous risk of situations where individuals transferred to Albania are detained illegitimately. Italian authorities are obligated to transfer to Italy all individuals whose detention is no longer justified. If the person were hosted in a detention centre on Italian territory, they would be immediately released. However, in this case, that cannot happen because, according to the MoU, TCNs and asylum seekers are not allowed to move within Albanian territory. This also implies that throughout the entire transfer procedure, the individual will remain under the complete control of both Italian and Albanian authorities, as the latter are tasked with ensuring security during the transfer phases occurring on Albanian territory. In essence, persons detained in Albania will see their personal freedom restricted beyond the terms established by Italian law and in the absence of any legal basis regulating this additional period of detention. Moreover, there is no guarantee that transfers to Italian territory will be carried out promptly. This means that individuals could remain in a condition of unlawful or arbitrary detention for days while awaiting to be transferred to Italy.

In light of the above, there is a potential risk of conflicting competences and deflection of responsibilities between the Italian and Albanian authorities in the practical implementation of this arrangement. The Protocol can be expected to enable situations in which both the Italian and Albanian authorities will bear *joint responsibility* for human

[40] FRA and Council of Europe (2020), *Handbook on European Law relating to Asylum, Borders and Immigration*, Vienna, p. 198.

[41] CJEU, European Commission v Hungary, Case C-808/18, 17 December 2020; refer also to CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others, 14 May 2020.

[42] According to Italian legislation the maximum period of detention is: First, 28 days for asylum seekers subject to border procedures; Second, 12 months for certain categories of asylum seekers that can be placed in detention; and third, 18 months for all other TCNs (irregular staying to be returned).

rights violations. As ECRE has rightly pointed out, despite the claims in the Protocol, Albanian law will still apply in these situations and TCNs will remain also under Albanian jurisdiction.[43]

The Protocol underlines that the Italian government will also ensure 'the necessary health services' at the facilities. Yet, in cases where the Italian authorities may not be capable of meeting all medical needs, the Albanian authorities shall cooperate 'to ensure essential and unavoidable medical care for the migrants detained.' The Italian government will cover all costs related to reception conditions inside the detention centres as well. These, according to the MoU, will include food, medical treatment and 'any other service deemed necessary…[while respecting] fundamental human rights and freedoms in accordance with international law'. Here too the MoU completely disregards the fact that EU Member States are bound to comply with the EU asylum *acquis*, which includes the above-mentioned Reception Conditions Directive. This Directive envisages a notion and scope of 'reception conditions' which go above and beyond those foreseen by the MoU.

4.6 Ground #6: Expulsions

The allocation of responsibility to the Italian authorities for the expulsion of TCNs transferred to Albanian territory to their countries of origin or other transit countries raises equally alarming legality and feasibility concerns. This is even more so in light of the uncertainty characterising the Protocol as regards the precise ways in which the Italian authorities will actually ensure that expulsions take place under envisaged timetables and required safety conditions. The MoU already necessitates that individuals in question be first expelled to a third country different from the one they are attempting to enter, i.e., Albania, in order to have their identification, registration and procedures sorted and determined, whilst in the meantime being under systematic and arbitrary detention.

Obstacles to expulsions can be expected to remain high in practical terms, and the expected returns rate is unlikely to function as expected and increase dramatically. Previous research has underlined the many legal, practical, and operational reasons which preventing or rendering unfeasible the enforcement of return orders by EU Member States authorities[44]. These include questions related to identification, travel documents, and third country authorities cooperation, but also well-founded human rights considerations which legitimately prevent expulsions. Indeed, the accelerated

[43] ECRE (2023), Preliminary Comments on the Italy-Albania Deal, Brussels, 9 November.

[44] Carrera, S. (2016), *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*, Springer Nature; Carrera, S., den Hertog, L. , Kostakopoulou D. and Panizzon, M. (2019), *The External Faces of EU Migration, Borders and Asylum Policies: Intersecting Policy Universes*, Brill Nijhoff: Leiden.

procedures to which some of the individuals covered by the Protocol will be subject to, are at high risk of unfairness and unlawfulness in light of the overriding policy priority of expulsions at the expense of fully ensuring evidence-based safety and asylum.

This exponentially increases the risk that expulsions by Italian authorities to third countries will run contrary to the principle of *non-refoulment* envisaged in Articles 4 and 19 EUCFR. Consequently, if the Italian authorities were to faithfully comply with their international and regional human rights obligations, this would effectively mean that the TCNs involved would need to be transferred back to the Italian territory after the expiration of the envisaged deadlines, including those related to the maximum period of detention in Albanian territory. This raises, once again, key questions regarding the overall effectiveness of the deal.

5. CONCLUSIONS

The Italy-Albania MoU on extraterritorial migration management constitutes a bilateral and *ad hoc* deal on the part of one EU Member State. The MoU, however, covers areas falling squarely within the scope of EU law that nonetheless fails to meet existing EU Treaties and secondary legislation, as well as international maritime and human rights standards.

The Protocol's goal to extraterritorialise immigration and asylum detention pursues nationalistic and unilateral interests, aimed at bypassing the numerous obstacles that the Italian government is currently facing in identifying locations to establish new detention facilities within Italian territory. Italian local administrations of all political affiliations have opposed the creation of new facilities for TCNs on their territory. The areas closest to present disembarkation points (especially Puglia and Sicily) already host numerous first reception facilities (Hotspots) and detention centres. In such a divisive national and local context, Albania seems to offer a 'practical solution' to bypass these issues, in which the creation of detention facilities that are less accessible, accountable and transparent is envisioned. With the September 2023 Legislative Decree, all migration reception and detention facilities were declared as 'strategic infrastructure' for national defence and security, becoming potentially subject to state secrecy. Through this MoU, a further step is taken in reducing the transparency and accountability of immigration and asylum detention practices by placing detention facilities outside Italian territory.

This Report has shown however, that the Protocol does not represent a real 'solution' to current dilemmas. In fact, it will only entrench and deepen current policy challenges related to SAR and asylum in Italy and the entire EU. The MoU is evidently affected by serious illegality, feasibility, and constitutionality issues in the scope of both Italian, EU and international law. Domestically, the MoU has attempted to bypass all relevant national checks and balances and constitutional guarantees during its inception, negotiations and conclusion. It has short-circuited the application of effective democratic scrutiny by the Italian and EU parliaments and public accountability prior to its adoption. Furthermore, the serious human rights challenges characterising the MoU's design, such as those in relation to the envisaged transfers and detention model, may become key obstacles for Albania's alignment and compliance with EU benchmarks for potential future Union membership.

Our analysis shows that the Protocol covers and negatively impacts several fields falling under exclusive EU legal competence, which are regulated by both EU primary and secondary legislation. The MoU concerns aspects currently regulated by various EU legal instruments offering common standards regarding asylum procedures, reception conditions, expulsions, and detentions. It poses significant risk to lowering and systematic violations of their envisaged standards. The MoU also seriously interferes with EU Treaties' provisions, including the EU fundamental rights to asylum, liberty and security

and effective remedies, which are hierarchically above current and future EU secondary legislation, including those currently under negotiations in the Pact on Migration and Asylum. By forcibly transferring people without their own consent to a detention centre in a third country, where they did not intend to travel, the MoU treats people as cargo, ignores the human dignity inherent to every person and completely disregards their agency.

The apparent pro-EU framing of the MoU by the Italian Government is not only surprising, taking into account that the idea finds its origins in a far-right leadership otherwise characterized by a transparently Eurosceptic and discriminatory political agenda, but factually misleading. It could indeed be understood as an attempt to mainstream highly problematic far-right policies and fundamentally redefine the EU, and its asylum, borders and migration policies, in way that advocates for a fundamentally different idea of what the EU actually is in light of the principles enshrined in Article 2 TEU,[45] and the EU Charter of Fundamental Rights.

Contrary to the politicised assessment of the Protocol by the European Commission, our analysis shows that its lawfulness is highly contestable from an EU law perspective. Territory is not the decisive 'connecting factor' for determining legal responsibility and liability of EU Member States for actions or inactions falling within the scope of EU law, and those qualifying as violations of SAR and human rights standards.

This report confirms that the key entry point is rather the extent to which Member States activities fall within the scope of EU law or not. It underlines the relevance of the notion of jurisdiction[46] and effective control over territory at times when the responsibility of EU Member States, in cases of SAR and human rights violations, is being determined. A portable justice paradigm is fully applicable in this domain, whereby justice and responsibility should be expected to follow[47]. The Italy-Albania MoU should be regarded as a *non-model* in the EU and as a case of worst practice in migration and asylum policies. The European Commission should give unequivocal priority to fulfilling its role as guarantor of the Treaties, and fully uphold and effectively enforce Article 2 TEU principles in the scope of migration, border and asylum policies.

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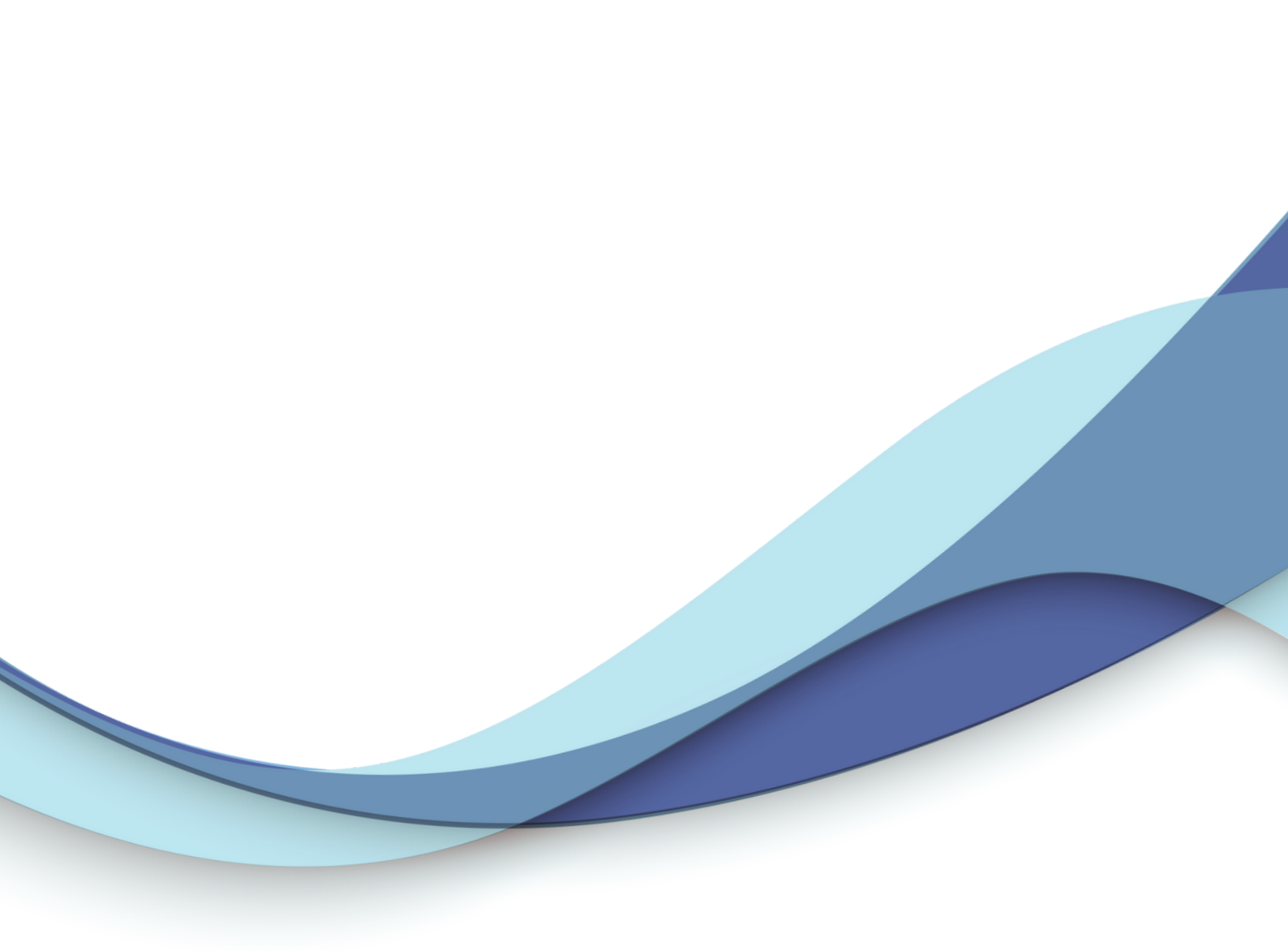
[45] Article 2 TEU states that 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.

[46] Carrera, S. and Guild, E. (2017), 'Offshore processing of asylum applications: Out of sight, out of mind?', CEPS Commentary, Brussels.

[47] According to Carrera and Stefan, '…whenever EU or member states' authorities act under the scope of EU law, they are also subject to the legality test and effective remedies standards provided under the EU Treaties and acquis…Fundamental rights responsibility under EU law is therefore portable because it captures abusive practices regardless of where they take place', p. 9. Carrera, S. and Stefan, M. (2020), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice*, Routledge Studies in Human Rights.



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