

Offshoring Asylum the Italian Way

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2023-11-14T14:29:32

On 6 November 2023, the Italian Prime Minister Giorgia Meloni and the Prime Minister of Albania Edi Rama announced the signing of the [Agreement for Strengthening of Collaboration in the Field of Migration](#). The agreement proposes a relocation of asylum seekers who are rescued at sea by Italian vessels to two centres that would be built in Albania and could host up to 3'000 people. This is part of a broader trend whereby European governments seek to move asylum procedures outside of their territory. At the same time, the agreement contains some innovations compared to previous proposals. Indeed, this move [has been hailed as a “model and example for other collaboration agreements of this kind”](#) by the Italian Prime Minister. This article contends that this may not be the case: the legality and feasibility of offshoring asylum procedures remain dubious at very best.

Context

Giorgia Meloni, who heads the right-wing party Brothers of Italy, won elections in Italy in October 2022. For her party and partners, migration has been a powerful political issue. During the election campaign, Meloni promised to curb immigration once in power, including threats to impose naval blockades against migrant boats. However, in 2023 arrivals have grown compared to the previous year: the [latest statistics published by the Italian Minister of Interior](#) indicate 145'000 arrivals via the sea in 2023, significantly higher than the 80'000 recorded last year in the same period and almost as high as the record 160'000 arrivals of 2016 during the “[long summer of migration](#)”.

These figures, together with the extensive media coverage of overcrowded and poorly equipped reception centres on Lampedusa, have been a source of concern for Ms. Meloni. Earlier this year, the Italian government [renewed agreements with Libya to help patrolling its coast and prevent migrant departures](#). It has also spearheaded efforts to work together with Tunisia to contain the number of people traveling to Italy to seek asylum. The Tunisian government and the European Union [signed an agreement in July](#) with a €105 million package offered from European institutions to support Tunisia's border control operations. In October, [the government of Tunisia returned the offer](#), creating increased pressure on the Italian government to find a solution to what the government framed as “[the problem of migration](#)”.

On 6 November 2023, the Prime Minister of Italy and the Prime Minister of Albania announced the signing of the [Agreement for Strengthening of Collaboration in the Field of Migration](#). Like other agreements, including the agreement between the European Union and Tunisia, this Memorandum of Understanding was presented to the press with no prior parliamentary scrutiny and not even a text to comment upon: the version of the text we are discussing here is available because [it was leaked](#)

[by the Albanian media](#). European institutions and UNHCR were not involved in the negotiations and were informed shortly before the public announcement.

Details of the Agreement

The agreement is composed of 14 articles, has a duration of five years and will be automatically renewed unless one of the parts decides to withdraw [Art. 13]. It stipulates the creation of two structures operated by Italian authorities in Albanian territory [Art. 4]. These structures, likely to be operative from the Spring 2024, will accommodate up to a maximum of 3'000 people at the time [Art. 4]. [Ms. Meloni clarified that minors, pregnant women and other people considered vulnerable are excluded from this measure.](#)

The structures would operate under Italian jurisdiction [Art. 5-8]. [During the press conference](#), it was explained that one of the two structures will be built near the port of Shengjin, about 70 kilometers north of Tirana, the Albanian capital. The disembarkation and identification procedures are meant to take place there: the same area is also meant to host a centre for asylum seekers. In Gjader, twenty kilometers further north and inland, a structure will be set up to carry out functions similar to those of the Centres for Repatriation. Only people who do not appear to have the requirements to obtain a form of asylum will be placed in this second centre.

The agreement stipulates that people rescued by the Italian sea rescue authorities- the Coast Guard, the Financial Police, and the Navy [Art. 4]- may be sent to these structures. It is currently unclear why those rescued by NGOs at sea are not part of the agreement and why pregnant women, minors, and vulnerable subjects are excluded.

The Illegality of Extra-Territorial Asylum Processing

The general question behind this agreement is whether extra-territorial processing of asylum claims is legally permissible. Commenting on this proposal, [UNHCR clarified](#) that “under international refugee law, the primary responsibility for assessing asylum claims and affording international protection rests with the State in which an asylum-seeker arrives, whether at land borders or at sea, and seeks that protection. This obligation remains unaltered by the transfer of asylum-seekers or extraterritorial processing”. Under Art 33 of the [Geneva Convention Relating to the Status of Refugee of 1951](#), states are bound by the principle of non-refoulement. UNHCR construes Article 33 broadly such that if states did not grant temporary admission to those claiming to be refugees, they would be in effect unable to perform their treaty obligation. Accordingly, individuals effectively enter Italian territory upon setting foot on Italian vessels and their asylum application should be processed by Italy, with all corresponding rights and duties. By permitting the forced transfer of asylum seekers to another country, the agreement between Italy and Albania breaks with this fundamental principle of international asylum law.

Italian authorities may argue that this is not in violation of the law because applications will be processed by Italian officials using Italian and EU legislation, and Italian judges will be responsible for handling disputes. This is different from the [agreement between the United Kingdom and Rwanda](#), which has been [declared unlawful by UK courts so far](#): here, it will be Italian operations on Albanian territory and those who are granted refuge will be able to move to Italy. The agreement thereby effectively creates an Italian jurisdictional enclave in Albanian territory, with diplomatic immunity for those operating in the centres. The legality and constitutionality of this decision would have to be carefully examined from the viewpoint of Albanian and Italian law.

Notably, there are already indications that this may not be permissible under European law: a [2018 study of the European Commission](#) on the legal and practical feasibility of different disembarkation scenarios concluded that “to allow individuals to apply for asylum outside the EU would require the extraterritorial application of EU law which is currently neither possible nor desirable”.

An Unlawful Reduction in Rights Protection

The agreement also exposes asylum seekers to situations of heightened vulnerability. Here I raise four key concerns.

The first pertains to the journey from Italian waters to Albania which could last up to three days. For people already traumatised and in extremely precarious conditions, this may amount to inhuman and degrading treatment, which is prohibited by Article 3 of the [European Convention for the Protection of Human Rights](#) (ECHR), to which both Albania and Italy are parties. Thus, in [J.A. and Others v. Italy](#) the ECtHR recently held that the “poor material conditions” to which asylum seekers were subjected to in a hotspot for a period of 10 days violated Article 3.

A second issue concerns the capacity of asylum seekers to access legal representation and guarantees. Lawyers usually speak to asylum seekers and hear their appeals, with Article 13.4 of Italy’s [Legislative Decree 25/2008](#) stipulating that “if the foreign citizen is assisted by a lawyer ... he/she is admitted to attend the asylum interview and can ask to see the minutes and obtain a copy”. It is unclear how Italian lawyers could represent cases of people in Albania, without any personal contact with them.

A third and related issue regards the lack of an individual assessment upon sending asylum seekers to Albanian territory. On 29 September 2023, the [Italian tribunal of Catania ruled against the government’s decision to place asylum seekers arriving from countries that are considered to be safe in detention centres](#). The court argued that the detention measure must be adequately motivated in relation to the personal and concrete situation of the individual applicant. It is therefore dubious that individuals could be sent to Albania lacking a prior individual assessment.

The fourth issue concerns the desirability of selective disembarkations. In February 2023, [the tribunal of Catania declared illegitimate a disembarkation order](#) by

the Italian government in November 2022, when women and individuals with precarious health were allowed to disembark and the others had to remain onboard for four additional days. The decision is based on Regulation 33 of the [International Convention for the Safety of Life at Sea](#), which stipulates that people in distress at sea must be rescued and taken to a safe port “regardless of the nationality or status of such persons or the circumstances in which they are found.” The agreement seems to break with this norm, stating that those in more fragile conditions such as minors, pregnant women and people in precarious health would not be sent to Albania. Moreover, if minors have to disembark in Italy and their parents in Albania, there is a strong risk that families will be separated, a practice that [the spokeswoman of the United Nations Ravina Shamdasani](#) has defined as an “arbitrary and unlawful interference in family life, and a serious violation of the rights of the child”.

Two Practical Obstacles

Aside from legal considerations, there are two practical issues that undermine the agreement’s feasibility.

The first issue concerns the management of time. It is not clear how Italian ships will disembark pregnant women and minors in Italy and then bring the rest of the people to Shengjin, which is about two days’ sailing from Sicily. If the ships were to go back and forth, they would not be able to effectively patrol Italian territorial waters.

The second issue concerns repatriation of those who are denied international protection at the end of the process. The agreement states that when a person loses the right to remain in the centre, for example because his/her asylum application is rejected, Italy will transfer him “immediately [...] out of Albanian territory” [Art. 9]. It is not clear where the person will be transferred, nor whether he will be taken to Italy. The repatriation rate of those with an order to leave in Italy is [lower than 10%](#), because countries in the EU do not have repatriation agreements with third countries so repatriations are, in fact, extremely difficult to execute. Further, [ruling no. 105/2001 of the Italian Constitutional Court](#) demands that any forced removal procedure implemented by Italian authorities must be validated by the decision of a judge. How will it be possible to implement these procedures in Albanian territory?

Ultimately, there is a good chance centres in Albania will be over capacity within a few months.

An Unfeasible Exercise in Deterrence Politics

Many commentators suggest that this agreement is [a political stunt](#), good for propaganda but less so for real solutions. The main goal of the Italian government may be deterrence. By making conditions harder for those who seek asylum in the country, the government hopes that fewer people will take the risk. This year, Ms. Meloni’s government [tightened the criteria to grant asylum seekers a residual form of protection called special protection](#) and [opened new detention facilities](#) to house people from countries that are considered safe as they wait for the results of asylum

applications. Thus far, these measures have not deterred people from taking the journey to Italy.

In practice, this agreement creates a difficult situation for Albania due to the establishment of an Italian jurisdictional enclave within its territory. It also does not help reduce the high number of asylum seekers whose claims need to be processed in Italy. It only succeeds in increasing their vulnerability by transferring them back and forth between the two countries and rendering their asylum process longer and more cumbersome.

