

How the EU Pact on Migration and Asylum Fails

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The new EU Pact on Migration and Asylum makes it harder for migrants to access safety in different ways. Among these, it will ultimately reinforce the EU's dependence on States beyond its borders to manage migration. The recent Italy-Albania Protocol represents a notable example of this approach, bringing along several practical, ethical and legal problems.

(A) Introduction

1. The rich world is in the middle of an unprecedented migration boom. Its foreign population is rising faster than at any time in its history. Last year 1.2 million people moved to Britain. Australia had twice the rate of migrants before the COVID-19 pandemic. The figure in Spain is at an all-time high. In America 1.4 million people moved, and this was a third more than before the pandemic. Canada had more than double their number in 2022. Germany had an even higher rate than during the migration crisis of 2015!

2. Yet, the reforms agreed by the EU on the Pact on Migration and Asylum on 21st December 2022 will set European asylum law back for decades. The legislative proposals will reform EU migration and asylum law. This will be done through a set of regulations governing how states respond to people arriving in Europe. The European Commission, Council of the EU, and the European Parliament, has reached a deal, but it is a deal which will diminish the rights of people on the move. It will increase suffering on every step of a person's journey to Europe when seeking asylum. From their treatment by countries outside the EU, to their access to asylum and legal support at Europe's border, and then to their reception within the EU – all will be jeopardised.

3. The Pact makes it harder for people to access safety in the following six ways:

(i) First, there will be an increase in *de facto* detention of asylum seekers at EU borders, including their families with children and people in vulnerable situations. More people will be channelled through substandard border asylum procedures only to be detained.

(ii) Second, the Migration Pact will not support the State where people first arrive in Europe. These countries will be countries on the border of the EU, namely, Italy, Spain, and Greece. What the EU should have done was to have prioritised solidarity with these countries by helping with relocations and strengthening protection systems across Europe so that the burdens are shared. Given that this has not happened, these States will simply pay others to strengthen external borders. Italy is now doing that with Albania (see below) but in a way which is questionable. These States will just fund other countries outside the EU and this will prevent people from reaching Europe who are in need of asylum.

(iii) Third, the migration pact will allow countries to opt out of a broad range of EU asylum rules. This is troubling at a time of increased arrivals. These exemptions will breach international obligations on refugee and international human rights law.

(iv) Fourth, the result will lead to an undermining of a common, humane, and practicable response to people in need of protection because it will risk normalising disproportionate emergency measures within European borders.

(v) Fifth, the Migration Pact will thereby ultimately reinforce the EU's dependence on States beyond its borders to manage migration. One only has to look at the recent deals with Albania, Libya, Tunisia, and Turkey, to see what the future holds because these deals will now be further extended. What the EU should have done was to have invested in dignified reception of asylum-seekers within the EU. They should have expanded safe and regular pathways to allow people to reach protection in Europe without relying on dangerous journeys. Instead, what the EU has done is to have taken a further step towards externalising border controls. This has the effect ultimately of evading Europe's refugee protection responsibilities. The opportunity for the EU to put human rights at the centre of negotiations on EU asylum reforms has thereby been lost in this Migration Pact.

(vi) Sixth, the Migration Pact fails ultimately in not dealing with the under-investment in asylum and reception systems where migrants first arrive and it fails in not dealing with the unlawful practise of violent push backs. It fails in the policies that deny people the right to asylum. And yet, all along, there is no consensus on what some of the core elements of the Pact will look like. The Migration Pact has come at a cost of failing to manage migration and asylum with fairness and humanity in a way which would work both for the new arrivals and for local communities.

4. This why the Italian Protocol has become necessary for Italy. Its aim to build migrant camps in Albania is the first ever deal which will involve a non-EU country with the responsibility of dealing with migrants on behalf of an EU member nation. As such, it represents a significant change in Balkan refugee policy.

5. The idea is to offer migrants the option of having their asylum-claims determined while staying in an allegedly safe third country outside Europe, and in so doing deter them from coming to Europe illegally, particularly on boats. A record 150,000 migrants came by sea to Italy in 2023, higher than the 94,000 who arrived in 2022.

6. Under the Italian Protocol, signed in November 2023, its navy and coast guard vessels are to intercept migrants in international waters, take them straight to Albania, where they are to be placed in one of two facilities which the Italian government will build in Albania. Thus, (i) migrants will first be assessed at the popular seaside resort port of *Shëngjin*, and then (ii) migrants will be taken to *Gjadër*, some 15 miles inland, where they will await their decisions, at much larger facility, that will be constructed on a disused Cold War military airfield. If a migrant is successful in an asylum claim they will be brought to Italy. Those unsuccessful are expected to be returned back to their own countries.

7. If the project works, it will have wide-ranging implications. Rome's model could be adapted by other European Union countries who are also keen to stamp out illegal migration. There are, however, a number of legal, ethical, and practical difficulties, with this plan. I will set them out.

(B) Practical Problems

8. There is a history of such arrangements not being successful. A similar agreement between the EU and Tunisia failed in April 2023. It was just two months later that in June 2023, a British court halted the refugee agreement between that country and Rwanda because the small Central African country was not considered a 'safe third country'.

9. The untested and unproven assumption here is that established international rules will be adhered to. What is suggested is that (i) requests for admission are to be speedily processed within 28 days; (ii) asylum-seekers, when refused, are to be promptly despatched to their countries of origin; (iii) the two Reception Centres are to be up-and-running by early 2024 and operating under Italian jurisdiction; (iv) refugees to be accommodated are to be as many as 40,000 per annum; and (v) Italy will pay €16.5 million to Albania in a five-year plan as well as cover all running costs of operating the centres during this time – although the figure is likely now to be anything between €300 million and €900 million (in much the same way as costs of Britain's Rwanda deal also mushroomed far beyond initial estimations).

10. On this basis, what is proposed by Foreign Minister Antonio Tajani is (i) that once the Italian coastguard or navy has intercepted migrants in international waters, then Albania will have sent to them only those who have no right to stay in Italy; (ii) that Albania would have no children or pregnant women sent to it; and (iii) that those detained pending repatriation will be cleared within 18 months.

11. Of the potential practical problems, the following would merit immediate consideration:

(i) What will happen to a failed asylum-seeker, rejected in Albania, whose country decides not to re-admit them? Will Italy take them? Italy has repatriation deals with only a few countries, so how will it return failed asylum-seekers to their countries? It is noteworthy that only 4,000 of the 150,000 migrants entering Italy in 2023 were returned home. In case of transfer to Italy there would be then no difference between a successful applicant (who does have a right to come to Italy after processing) and an unsuccessful one (who does not after processing), given that both end up becoming the responsibility of Italy anyway and not of Albania (which is tasked to avoid Italy having to bear the burden of dealing with irregular arrivals)?

(ii) What if Italy refuses to have unsuccessful migrants repatriated to them from Albania? Are such migrants to be subjected to indefinite detention at the camps in Albania in such an eventuality? And if so, does Italy end up breaching its human rights obligations under the European Convention on Human Rights ('ECHR') and the Geneva Convention on Refugees, as well as the Torture Convention?

(iii) And if they are not to be locked up as unsuccessful asylum-seekers with no right to remain, and they proceed from Albania to enter into another EU country (such as Croatia in the north)? How will that be viewed by other EU countries?

(iv) If that is the scenario that is likely to unfold in this situation, is there a risk that such migrants will then fall prey to human trafficking, which is already a scourge in movement of migrants to Europe?

(C) Ethical Problems

12. Of the potential ethical problems, the following would merit immediate consideration:

(a) The accord between Italy and Albania has been criticised by the EU's leading human rights organisation, namely, the Council of Europe, on grounds that it is another example of "a worrying European trend towards the externalization of asylum responsibilities".

(b) Albania itself is a major refugee-producing country of a three million predominantly Muslim nation. During Europe's 'migration crisis' of 2015, refugees from Albania

were second only to Syrians, so that no less than 54,762 lodged claims in Germany alone. The main risks to people arise on account of (i) human trafficking, (ii) blood feuds, (iii) expressions of sexual orientation and gender identity, (iv) domestic violence against women, and (v) actions of non-state actors. Even now it is the source of some of the most vulnerable claimants coming to Europe – in 2022 unaccompanied children from Albania comprised the highest number in the United Kingdom (amounting to 34%).

(c) Albania's Prime Minister, Edi Rama, had earlier denounced the accord on grounds that his country was not a place for the EU to dump its desperate people, as if they were toxic waste. He had initially said that refugee camps would never be built in Albania for use by the European Union. Such condemnation from their PM means that it cannot be assumed that they will even now actually be built. This is despite €16.5 million being paid to Albania and despite the fact that Albania is being offered the prospect in return of EU membership. But if Albania has shown unwillingness, this may be unsurprising given the view of the German Government that, "it is difficult to find countries willing to establish reception centres".

(d) The Protocol is arguably akin to the Rwanda agreement that Britain signed in October 2022 with Rwanda. Ylva Johansson, the EU Commissioner for migration, has already remarked that such a model, which had been attempted not just by Great Britain but also by Denmark, is "completely unrealistic" amounting to a "violation of human rights". In her opinion it would violate both EU law and the Geneva Convention on refugees, in its plan to send asylum seekers arriving in Europe to a country outside Europe for processing processes. It is to be noted, however, that the plan by Foreign Minister Antonio Tajani is to intercept the refugees in international waters. Italy, nevertheless, will need to be careful that it does not attract litigation as it has done previously before the European Court (see below) as that will scupper the plan.

(e) The Protocol has arguably paid little attention to the 'capacity' of the Albanian Government to deliver. Although Foreign Minister Antonio Tajani has argued that there is no resemblance between this Protocol and the United Kingdom and Rwanda agreement (now declared unlawful by the UK Supreme Court). Albania is an impoverished country and no evidence has been provided that it has the necessary infrastructure to accommodate arrivals in the numbers envisaged.

(f) Albania will use military barracks on its southern border, which it is hoped will be available for use as accommodation, but where all the evidence is of facilities being understaffed and under-resourced.

(g) The Albanian government itself has not engaged openly to explain publicly how they propose to plan the setting up of the two camps. Their reason is that if they were to be more forthcoming and if they were to announce their plans, this will only

attract refugees to come to their country. However, this is not a plausible reason because refugees will come anyway.

(h) Finally, it is noteworthy that a re-admission agreement already exists between Albania and Greece (in much the same way as one already existed between Rwanda and Israel when the UK government was earnestly in negotiation with Rwanda over Britain's plan), and under this agreement return back to Albania is prescribed within 14-days of a migrant being captured across the 280 kilometre border of jagged mountains, dense forest and sudden abysses. However, this agreement does not appear to be working at all (just as the Rwanda-Israel agreement had ceased to work when the British were negotiating) because evidence shows that the facility that Albania is meant to be using for these purposes actually lies empty.

(D) Legal problems

13. Of the potential legal problems, the following would merit immediate consideration:

(a) The Albanian constitutional had earlier blocked the accord, of sending asylum seekers to Albania for purposes of processing, on grounds that it potentially violates their Constitution. It has now said that it does not. So for now ratification of the Protocol is not automatically suspended. Even so, (and just like the British deal with Rwanda) the Italian Protocol is likely to get mired in a legal disputes when an asylum-seeker is prevented from applying for asylum in Italy. In any event, there is the more immediate question of whether by the summer of 2024 the centres will be operational, as planned by Foreign Minister Antonio Tajani.

(b) The accord with Albania has come to Italy at a cost of €16.5 million being paid to Albania. The British Government paid Rwanda £240 million initially, though costs have since escalated with not a single flight going to Rwanda, and none now feasible given the election on 4th July in the UK. Not a single person has been sent by Britain to this African country and Foreign Minister Antonio Tajani may want to consider whether the same prospect lies ahead for Italy.

(c) The overriding reason, however, for why the legal difficulties that lie ahead must be considered is to do with the ancient principle of *non-refoulement* (and which the British Government also fell foul of in its Rwanda deal before the UK Supreme Court). The *non-refoulement* of refugees (meaning 'non-return' to their country of origin from where they have fled for reasons of alleged persecution) is unlawful under both international and European law.

(d) Italy can ill afford to overlook the principle of *non-refoulement*, because it has already previously been hauled up before the European Court of Human Rights for

having in place a policy which was so illegal and unworkable that it had to be scrapped. This was in 2012 in *Hirsi Jamaa and Others v. Italy* case¹. The proposal by Foreign Minister Antonio Tajani is to apprehend the asylum-seekers while they are still on the high seas. But in that case the European Court held that when 24 people from Somalia and Eritrea were intercepted at sea in 2009 by Italian authorities, in an agreement with Colonel Gaddafi of Libya, and were then forced to return to Libya, which was their point of initial departure, that Italy violated their human rights in so doing. Returning individuals to countries, in breach of international obligations, which results in a risk of human rights abuses, cannot be a lawful State practice.

(e) According to Foreign Minister Antonio Tajani the detainees in Albania would not be at risk of human rights violations because their entire detention and treatment would fall under Italian jurisdiction. However, given that EU asylum law cannot be applied outside the EU (as has been confirmed by the European Commission) in truth the Protocol with Albania will be nothing other than a ruse to circumvent national, international and EU law. Lengthy detentions and other human rights violations could await those seeking asylum in Albania, where their treatment would not fall within the purview of the Italian judicial authorities at all, but would expose an already vulnerable group of migrants to the most severe of consequences at the hands of a foreign country.

14. The Italian government remains bound by its international law obligations on *non-refoulement* and it is bound by its duty to guarantee asylum. The right of asylum seekers and refugees only works if they are protected from *refoulement*, which means that that is their basic right. Indeed, *non-refoulement* is a core principle of international refugee law, which some would say is even a part of customary international law, making it binding on all States. In fact, Article 78(1) of the Treaty on the Functioning of the European Union and Article 18 and 19 of the EU's Charter of Fundamental Rights, enshrine the principle of non-refoulement within EU law. The Italian Government currently runs an unnecessary risk of ignoring these commitments for little reward at the end.

1. *Hirsi Jamaa v. Italy* - 27765/09 - HEJUD [2012] ECHR 1845 (23 February 2012) (available at www.bailii.org/eu/cases/ECHR/2012/1845.html) and cited as: [2012] ECHR 1845, 55 EHRR 21, 33 BHRC 244, (2012) 55 EHRR 21.