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Forced Returns and the Importance of Human Rights Monitoring in the
Context of Externalisation of Migration Management

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List of abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CPR	Centri di Permanenza per il Rimpatrio (Repatriation Detention Centers)
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
OPCAT	Optional Protocol to the Committee on Prevention of Torture
ECHR	Charter of Fundamental Rights of the European Union Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
FRA	Fundamental Rights Agency
FRO	Fundamental Rights Officer
FReM	Forced Return Monitoring
FRONTEX	European Border and Coast Guard Agency (also EBCG)
GA	UN General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICERD	UN International Convention on the Elimination of All Forms of Racial Discrimination
ICMPD	International Centre for Migration Policy Development
IOM	International Organization for Migration
JRO	Joint Return Operation
MoU	Memorandum of Understanding
NGO	Non-governmental Organization
NPM	National Preventive Mechanism
OHCHR	Office of the High Commissioner of Human Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNHCR	United Nations High for Refugees
RO	Return Operation
ICESCR	International Covenant on Economic, Social, and Cultural Rights

To my family, Halina and Slawek.

To old and new friends.

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1. Introduction

Return policies are an inevitable part of migration management as they aim to ensure that individuals who do not have a legal right to stay in the host country return to their country of origin. Effective return policies are essential to maintain the integrity of the asylum system and uphold the rule of law. However, these policies must be balanced with the obligation to protect the rights of individuals being returned and fully comply with international standards, focusing on the principle of non-refoulement¹.

The European Union (EU) has increasingly used externalisation strategies, such as agreements with non-EU countries, to manage migration and return processes. As an example, the Memorandum of Understanding between Italy and Albania² has at its core the establishment of asylum processing centres in Albania, where asylum claims of migrants can be processed outside the EU territory, which means that migrants applying for asylum in Italy will be transferred to Albania whilst awaiting their decision. This procedure is perceived among some EU Member States as a potential solution and possible way forward of a broader EU strategy to externalise migration control by processing asylum claims in countries outside the EU.

Additionally, possible place of safety arrangements and transit mechanisms inspired by the existing Emergency Transit Mechanisms could be explored, which would be aimed at detecting, intercepting, or, in cases of distress, rescuing migrants on the high seas and bringing them to a predetermined place of safety in a partner country outside the EU, where durable solutions for those migrants could be found, also building on models like the Italy-Albania Protocol.

Extract from joint letter from Ministers to EU Commissioner for Home Affairs³

In addition, the new EU Pact on Migration and Asylum⁴ seeks to create a balanced approach to migration management, combining enhanced border controls with fair asylum procedures.

¹ The principle of non-refoulement is fundamental for refugee protection and is included in UN General Assembly (GA), Convention Relating to the Status of Refugees, 28 July 1951; Article 7 of the International Covenant on Civil and Political Rights (ICCPR); Article 3 of the UN GA, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) 10 December 1984; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011; Asylum Procedures Directive (2013/32/EU); Return Directive (2008/115/EC);

² 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 return.

³ Joint Letter to Ms Ylva Johansson, Commissioner for Home Affairs, from the Ministers on new solutions to address irregular migration to Europe, signed by Denmark, Estonia, Greece, Italy, Cyprus, Latvia, Lithuania, Malta, the Netherlands, Austria, Poland, Romania, Finland on 15 May 2024.

However, the externalisation of migration control, exemplified by the UK-Rwanda deal, Australia's offshore asylum proceedings and the Italy-Albania MoU, raise significant human rights concerns. Key issues include the risk of arbitrary detention, lack of access to fair asylum procedures, and potential violations of the non-refoulement principle. International and EU legal frameworks, including the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, mandate the protection of fundamental rights. Despite International and EU legal frameworks, including the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, which mandate the protection of fundamental rights, risk of actual violations on an operational level does exist. It is only through thorough training, independent monitoring and accountability mechanisms, the risk of human rights violations can be significantly minimised. This approach can help address the challenges and uphold the EU's commitment to protection of fundamental rights.

The complex process of externalisation and the final phase of return to the country of origin needs well-trained persons, especially escort officers, and the practice of raising awareness among persons involved in the whole return process is essential to safeguarding migrants' dignity and rights. Proper training can help prevent abuses and ensure compliance with international and EU legal standards.

Furthermore, this thesis aims to provide a comprehensive analysis of the existing Italy-Albania MoU as one example of externalisation of migration management, spotlighting possible human rights violations and, at the same time, stressing the importance of human rights training for ensuring compliance with international human rights standards during the transfer, accommodation in the centres. However, particular focus is placed on force returns of migrants that are ordered to leave the country upon rejection of their application for asylum as per the new Pact on Asylum and Migration. This thesis also addresses the central question of how to ensure the protection of human and fundamental rights during the externalisation of migration processes, focusing on the role of return policies and the necessity of human rights training for escort officers involved in forced returns.

2. Methodology

Considering the soon-implemented Italy-Albania Memorandum of Understanding, a multi-faceted research methodology will comprehensively explore adhering to human rights standards on forced return from Albania to the country of origin. This methodology

⁴ Formal adoption by the Council of the EU on 14 May 2024;

encompasses a detailed analysis of relevant existing legislative texts, especially the Memorandum of Understanding between Italy and Albania, the Regulations and Directives of the EU Commission and Italian law, ensuring a thorough and nuanced analysis for a contextual understanding. In order to provide a comprehensive overview, this thesis examines and compares the most prevalent and widely discussed agreements between the United Kingdom and Rwanda, as well as Australia's approach to the externalisation of migration.

While the examples provided above are not within the European Union, this thesis focuses on Europe, particularly in the context of the recently proposed EU Asylum and Migration Pact, which will become legally binding for all EU Member States from 2026 onwards. Therefore, addressing this matter at the present stage is vital to raise awareness among relevant stakeholders, decision-makers, and non-governmental organisations and to identify potential shortcomings.

This thesis does not aim to address the question of the effectiveness of this approach but rather to show, through comparative analysis, the different approaches towards achieving a common objective—the management of irregular migration and addressing the subject, which each political party is obliged to adhere to. In this context, national and international legislation should be applied to eliminate potential human rights violations risks.

In Chapter 4., which focuses on the return process and practices among EU Member States, a review of national policies and procedures related to forced returns and monitoring in selected countries will support the objective to assess the alignment of current monitoring practices with international guidelines and standards. This methodology combines theoretical research with data collection to provide a holistic understanding of the whole process of externalisation of migration and the related actions, i.e. return, with a particular focus on the role of monitors in forced returns. By integrating diverse perspectives and data sources, the thesis aims to offer actionable insights that can inform policymakers and practitioners, contributing to enhancing human rights protections in the context of externalising migration management, especially forced returns.

3. The Phenomenon of Externalization of Migration Control

When speaking about externalisation of migration controls, the term mainly refers to actions taken by states outside their own borders preventing migrants from entering the countries' jurisdictions or making them legally inadmissible without individually assessing their need for protection. Measures can range from direct interdiction and preventive policies to indirect

support for security or migration management practices in third countries.⁵ As migration policy becomes more politicised, the externalisation of migration is often portrayed as a security necessity or a humanitarian effort rather than a strategy for containing and controlling migration. This narrative is often framed as an effort to prevent irregular migration and migrant smuggling with the aim of protecting migrants from risking their lives.⁶ The concept of shifting migrants from one country to another⁷ aims to stop migrants and asylum seekers from entering the states' territories, transfers the responsibility for protection and obliges the temporary receiving country to deal with the new challenging situation. International organisations, non-governmental organisations, media, and academics have noted and challenged this trend, citing its serious negative consequences for asylum seekers and persons in need for international protection. To understand how the concept of safe third country⁸ in the context of externalisation of migration may be alienated, the United Kingdom - Rwanda deal⁹ shall serve as the first example.

3.1. The UK-Rwanda Migration Agreement

The UK-Rwanda migration deal, formally designated as the "Migration and Economic Development Partnership," was proclaimed in April 2022 as an initiative by the UK government to improve the escalating issue of irregular migration. It included a five-year asylum partnership arrangement and a non-binding memorandum of understanding that was upgraded to a formal treaty in December 2023.¹⁰

The British government's intention and reason for concluding this deal was to reduce the number of boats carrying irregular migrants across the English Channel by announcing immediate transfers to Rwanda, where the migrants should await their decision on the asylum procedure. Those granted asylum would then be permitted to remain in Rwanda. In contrast, those whose applications were unsuccessful would be returned to their countries of origin or

⁵ Stock, I., Üstübici, A. & Schultz, S.U., Externalization at work: responses to migration policies from the Global South. CMS 7, 48 (2019).

⁶ Frelick, B. The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants, 2016.

⁷ UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, <https://www.refworld.org/policy/legalguidance/unhcr/2018/en/120729>

⁸ The designation of a country as a "safe third country" in the context of externalization is used by authorities to facilitate the implementation of the externalisation policy and is not connected with the return to the country of origin or the first safe country, where the asylum claim should have been processed.

⁹ Although the deal was put on hold after the UK general election in 2024, it cannot be ruled out that this issue will be revitalised if there is a change of government.

¹⁰ UK-Rwanda treaty: provision of an asylum partnership; treaty between the governments of the UK and Rwanda for the provision of an asylum partnership to strengthen shared commitments on the protection of refugees and migrants, published on 5 December 2023.

relocated to another country willing to accept them. The agreement was initially presented as a deterrent strategy, with the UK government arguing that it would act as a disincentive to others contemplating making the dangerous journey across the Channel. By outsourcing the processing of asylum claims to Rwanda, the government wanted to send a clear message that those who undertook the dangerous journey irregularly across the Channel in search of a better life would not be permitted to settle in the UK.

According to media reports, the financial terms of the agreement included an initial payment of £120 million from the UK to Rwanda¹¹, to cover the costs of processing and integrating the migrants, as well as contributing to Rwanda's broader economic development, including job creation and skills training for the relocated asylum seekers. The UK government emphasised the economic aspect of the agreement, presenting it not only as a migration control measure but more as a partnership with the aim of fostering development in Rwanda. Nevertheless, the deal was perceived with considerable criticism and legal challenges from the outset. Several human rights organisations and legal experts raised significant concerns regarding the agreement's potential implications.¹²

The first planned return operation flight scheduled for June 2022 was abruptly halted by an intervention from the European Court of Human Rights (ECtHR), which issued a Rule 39 measure. This measure allows the court in exceptional situations at the request of a party, the person concerned, or at its own to set measures immediately; in this case, it temporarily prohibited the deportation of individuals until their cases had been thoroughly examined, citing concerns about the risk of irreparable harm.¹³ The ECtHR's intervention, in addition to the ongoing legal challenges in UK courts, has since resulted in the prevention of the agreement's implementation. Although the newly elected government has halted the implementation of the agreement, the future of the policy remains uncertain.¹⁴ It is imperative to underscore the critical significance of the court's methodology. The deployment of Rule 39 represents a pivotal strategy in the domain of non-refoulement in the context of charter return operations functioning as a final safeguard.

¹¹ Estimated annual cost was calculated with £6.2 billion per year for around relocated 2000 people

¹² F.eg. the Commissioner on Human Rights Michael O'Flaherty criticized the removal of people to Rwanda without the UK authorities conducting any prior assessment of their asylum claims in most cases, that would restrict individuals from seeking remedies for possible breaches of the absolute ban on refoulement and significantly limit the ability of UK courts to thoroughly and independently review the matters presented. see also: ECRE, News; UK: Rwanda Bill Finally Adopted Amid High-level Criticism — Rwanda Scheme: Doubts About Civil Service Compliance And Concerns About Airline 'Complicity' in Human Rights Violations — More Migrant Deaths in Channel — NGO Predicts 'Meltdown' of Asylum System; 26 April 2024.

¹³ ECtHR, Rules of the Court, 28 March 2024. p. 21.

¹⁴ As of mid-2024, no asylum seekers have been relocated to Rwanda under the agreement.

The following paragraphs will present the second example of existing practices of externalisation of migration management based on the cases of Nauru and Manus Island, which depict the Australian government's policy of offshore processing of asylum seekers who arrive to Australia by boat.

3.2. Australia's Offshore Migration Management Control

Australia has a well-documented policy of transferring asylum seekers who arrive by sea to offshore processing centres on Nauru and Manus Island in Papua New Guinea. The relevant migration law is found in the Migration Act 1958, Section 198AD, which includes the provision on mandatory transfer of so-called unauthorised maritime arrivals to a regional processing country and offshore processing centres. The legal basis for regional processing arrangements is included in Section 198AHA, which allows the Australian government to make arrangements with other countries to process claims for protection and related activities and authorises funds for these purposes. According to Section 198AB, the Minister may designate a country as a so-called regional processing country if it is in the national interest.¹⁵ The return of asylum seekers to Australia from offshore processing centres is legally permissible under specific, exceptional circumstances, but is defacto not intended. Section 198B of the Migration Act sets rules for the temporary return of those transferred to offshore processing centres to Australia just in specific cases and for individual reasons, such as medical treatment.¹⁶ It is stressed that this return is intended to be temporary, and the person is legally still considered a transitory person and subject to being returned offshore.

As in the previously discussed UK-Rwanda deal, Australia's policy aims to prevent individuals from undertaking dangerous sea routes by precluding them from obtaining a settlement in Australia, even if they are determined to be granted refugee status. Generally speaking, the externalisation process, primarily as it affects access to territorial asylum, raises numerous complex legal, moral, and policy concerns¹⁷ which are often politically justified under the umbrella of preventing individuals from undertaking dangerous sea routes, combating cross-border organised crime, especially human trafficking, and migrant

¹⁵ In addition to the main Migration Act 1958, the Migration Regulations 1994, the Judiciary Act 1903 and the Australian Citizenship Act 2007 form the legal framework for offshore processing. Federal Register of Legislation.

¹⁶ Plaintiff S99/2016 v. Minister for Immigration and Border Protection.

¹⁷ David Cantor, Nikolas Feith Tan, Mariana Gkliati, Elizabeth Mavropoulou, Kathryn Allinson, Sreetapa Chakrabarty, Maja Grundler, Lynn Hillary, Emilie McDonnell, Riona Moodley, Stephen Phillips, Annick Pijnenburg, Adel-Naim Reyhani, Sophia Soares, Natasha Yacoub, Externalisation, Access to Territorial Asylum, and International Law, *International Journal of Refugee Law*, Volume 34, Issue 1, March 2022, p. pages 120–156.

smuggling.¹⁸ Despite substantial criticism regarding the existence of such agreements and their implementation, it appears that countries confronted with a high number of new migrants are attempting to streamline the method as outlined in past bilateral agreements, which appears to be the case with the recent MoU. While there are significant discrepancies between these agreements, namely in contrast to the UK-Rwanda deal and Australia's offshore proceeding practice, which provide for asylum seekers to be integrated into their host communities following a positive decision, the persons who will be transferred to Albania are likely not to get a positive decision upon their asylum claim and will be ordered to leave the country and return to their country of origin, without any aim of integrating them in the host community.¹⁹

As it will be discussed in greater detail later in this paper, a parallel can be drawn between the Italy - Albania Memorandum of Understanding, in which people rescued at sea are transported to a third country pending the outcome of the asylum application. The primary distinction is that, in contrast to the transfer to Rwanda, individuals relocated to Albania have minimal prospects of a favourable outcome to their asylum procedure and are consequently compelled to depart from the host country. In both instances, a transfer to the country for which the application was submitted is not anticipated. Another similarity lies in political narrative, which strives to protect human lives and emphasizes that this perilous route is not worth taking.

The following chapter will critically analyse the latest agreement, identifying its shortcomings and examining the gaps in its provisions. The rationale behind the decision to prioritise the case of Italy-Albania is twofold. Firstly, it represents a paradigm shift, being the first instance of such a process being implemented by one EU Member State. The second significant aspect is that the individuals in question await a decision regarding their asylum application. However, the probability of a positive outcome is relatively low, which subsequently results in a return order and the repatriation to their country of origin. Consequently, the emphasis in this thesis has been placed on guaranteeing the respect of human rights throughout the return process.

¹⁸ Ibid.

¹⁹ With regards to the impact on host communities, it has been observed that the integration of asylum seekers and refugees presents certain economic, social and political challenges. See feature from J. Morris, *As Nauru Shows, Asylum Outsourcing Has Unexpected Impacts on Host Communities*, August 2023.

3.3. Background and Critical Discussion of the Italy-Albania MoU

The Memorandum of Understanding between Italy and Albania, signed on November 6, 2023²⁰, represents a new approach and development in migration management to address the increasing influx of migrants to Italy. Although there is a downward trend in arrivals, which is also statistically verifiable, increasing migration pressure is politically cited as a reason for the transfer of migrants.²¹ The grounds for concluding the MoU between the two states are based on the friendship treaty signed in 1995²² and a protocol signed in 2017²³ to strengthen bilateral cooperation, which means that the here discussed MoU signed in 2023 between the Government of the Italian Republic and the Albanian Council of Ministers for strengthening cooperation in migration questions represents a further agreement to intensifying bilateral relations.²⁴ The MoU is designed to be operational for five years and will be prolonged for another five automatically. Both sides may resign from the contract after one year, adhering to the clause of a cancellation period of six months before the end of the protocol.

The document includes reasons for concluding the MoU, namely Albania's future accession to the EU²⁵, the geographical closeness between those two countries, and the awareness of the problems arising from irregular migration, which is presented as a need for this bilateral agreement. Furthermore, it is pointed out that compliance with all international agreements is a precondition and that measures must ensure the protection of human rights with the general objective of strengthening cooperation on managing migration flows from third countries in accordance with international and EU law.²⁶

The Albanian party grants the Italian party the right to use the territories at no cost for the duration of the implementation of the MoU, which means that Italian law applies to this

²⁰ 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, ratified with law 21, February 2024, No.14.

²¹ From 1 January 2024 to the accessible reporting date of 22 July 2024, 31,466 irregular migrants arrived in Italy, representing a 62.8% decrease compared to the previous year 2023. In comparison to the corresponding period in the previous year, which saw 84,666 arrivals, the current period has witnessed a reduction of approximately 10%, with 31,466 arrivals recorded. This figure is also approximately 35% lower than the number of arrivals observed in the same period of 2022, which was 47,474. numbers from AT embassy Rome. UNHCR is also reporting a downward trend: compare data from UNHCR Italy sea arrivals dashboard: In the first five months of 2024, 21,113 refugees and migrants arrived in Italy by sea, compared to 50,355 in the same period last year (-58%).

²² Treaty of Friendship and Cooperation of 13 October 1995, ratified by Law no. 170/1998.

²³ Finalization of the Protocol to strengthen bilateral cooperation in the fight against terrorism and human trafficking on 3 November 2017.

²⁴ compare preamble of the MoU.

²⁵ Albania has the status of a candidate country since 19 July 2022 (date of opening of formal negotiations).

²⁶ Article 2 of the MoU.

particular designated territory.²⁷ Two centres will be operational in 2024²⁸, one registration centre in the port of Shengjin, which is intended to be responsible for identification, and a second, so-called procedural centre in Gjader in the country's interior, where the border procedures, return preparations and returns²⁹ are to take place.

Under the terms of the MoU, Albania agrees to host up to 3,000 migrants at once, with Italian authorities managing the facilities and having exclusive jurisdiction over any disputes³⁰ and transfers to and from Albania, Italian authorities have sole jurisdiction. Following the MoU, only individuals rescued in the Mediterranean Sea and that do not belong to a vulnerable group will be transferred to Albania. Furthermore, only those originating from a "safe third country"³¹ will be relocated to Albania. In particular, the procedure for persons coming from a safe third country identified by the EU Member State can also be decided without a personal interview.³² Italy has classified 22 countries as safe countries of origin.³³ The associated fast-track procedure deprives individuals of the right to have their case heard individually, which may potentially lead to a breach of non-refoulement, as outlined in Article 3 of the ECHR and Article 4 of the EU Charter of Human Rights.

The Italian authorities are obliged to ensure that the persons transferred to Albania do not enter Albanian territory, whereas, outside the centres, the responsibility falls to the Albanian authorities. If migrants are encountered outside the centres, Albanian authorities are entitled to bring them back to the centres.³⁴ A special unit will be responsible for safeguarding against potential dangers, ensure a coordinated approach and clarify any safety issues.³⁵

²⁷ Article 3 and 13 of the MoU.

²⁸ Initially the two centres should host migrants from 1. August 2024, but the construction is still underway but the operationalisation of the centres is still expected in 2024.

²⁹ As previously stated in the preceding chapter, this represents the primary distinction between the existing legal provisions in the UK and Australia. On the challenges with regards to the actual return see 7.2.1 of this thesis.

³⁰ Article 4 (2) of the MoU

³¹ The concept of "safe third country" is defined with reference to Article 27 of the Asylum Procedures Directive and where appropriate with an EU list of safe third countries, as a country where the applicant does not face persecution or serious harm, has the possibility to seek recognition as a refugee and, if recognised, enjoy protection in accordance with the Refugee Convention. The applicability of the "safe third country" concept is a ground for inadmissibility, which has been critically discussed by academia. see R. Hoffmann, A. Schmidt, L. Estifanos, *Requirements for Refugee Determination Procedures*, In A. Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2nd Edition. 2024. p. 915 – 958. (5).

³² R. Hoffmann, A. Schmidt, L. Estifanos, *Requirements for Refugee Determination Procedures*, In A. Zimmermann (ed.) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2nd Edition. 2024. p. 915 – 958. (26)

³³ Italy lists Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Cameroon, Cape Verde, Colombia, Gambia, Georgia, Ghana, Egypt, Ivory Coast, Kosovo, Nigeria, North Macedonia, Montenegro, Morocco, Peru, Senegal, Serbia, Sri Lanka, Tunisia as safe third countries. *Gazzetta ufficiale della Repubblica Italiana*, numero 105, p. 23, 7 March 2024.

³⁴ Article 4 and Article 6 of the MoU.

³⁵ Article 6 (4) of the MoU.

In the MoU, personnel from Italy is foreseen to be deployed, although it is also possible for non-Italian nationals to work in the centres; Italian citizens enjoy partial immunity, and salaries are exempt from income tax and social security contributions.³⁶

In financial terms, the competent Italian authorities are fully obliged to bear all costs associated with the construction of the centres, the transfer into the centres, medical treatment, and food, and in return, they are also exempt from indirect taxes and customs duties. In addition, they are exempt from foreign exchange restrictions and controls and can also transfer foreign currency freely, which should guarantee the rapid construction of the centres, for which no formal construction permit is needed.³⁷

Italy will return the land to Albania when the MoU is no longer valid without the obligation for possible damage compensation. A separate account is to be set up to manage the money, and 90 days after the MoU entered into force, Albania received 16.5 million Euros as an advance payment for the costs incurred at the beginning and for the first year. As the procedure for reimbursing costs is executed, the Albanian authorities must inform the Italian authorities of the documented expenses through diplomatic channels by 15 March or 15 September of the documented expenses incurred. The sum is to be transferred within 46 days, to the account, which may not have a balance of less than 16.5 million, ensuring the availability of money.³⁸ Italian authorities assessed the outsourcing of migrants as beneficial, citing the financial advantages. During an official visit to Albania by Italian Prime Minister Giorgia Meloni on 5 June 2024, it was announced at a press conference that the total cost of operating the centres would be around 134 million per year, which corresponds to 7.5% of the cost of supporting migrants in Italy.³⁹

While the overall proactive cooperation is perceived as a positive step towards Albania's EU accession goals, demonstrating its commitment to upholding European human rights and humanitarian aid standards, the deal with Albania must be viewed critically concerning the operational implementation of the MoU. The following subchapter highlights the most critical parts of the MoU, which could lead to human rights violations, as evident from the jurisprudence of the ECtHR and the CJEU.

³⁶ Article 7 of the MoU.

³⁷ Article 5 of the MoU.

³⁸ All possible costs covered by the Italian authorities are listed in Annex II of the MoU.

³⁹ Ore, I.S., Migranti, Meloni: «I due centri in Albania operativi dal primo agosto. Si parte da mille posti, poi 3 mila» 5 June 2024.

3.3.1. Identified Challenges of the Italy – Albania Agreement

The detailed analysis of the Memorandum of Understanding content revealed that, while the externalisation of migration and the transfer of migrants to Albanian territory appear to be mutually beneficial, some aspects warrant further investigation.

Regarding the differing employment conditions between Albanian and Italian nationals, the model seems to follow the principles of an embassy. However, the practical application may reveal whether non-Italian nationals, who are subject to the terms of their employment contracts, face significant disadvantages.⁴⁰

The MoU does not provide any information to whom migrants can turn for assistance in case of difficulties within the centres. Furthermore, there needs to be more information regarding the necessary infrastructure to ensure a dignified and safe living space, including the availability of prayer rooms, mother-child rooms, child-friendly spaces, and adequate accommodation for individuals in vulnerable situations. The MoU does not specify providing basic medical care and psychological support. Moreover, the MoU is deficient in providing information regarding the accessibility of legal assistance⁴¹ and translators⁴². Even though the MoU does not stipulate a human rights monitoring role and no international or non-governmental organisations or human rights legal experts were involved in the drafting of the agreement, the Italian government has now commissioned the United Nations High Commissioner for Refugees (UNHCR) to monitor the centres for an initial period of three months. The UNHCR will oversee the implementation of the Italy-Albania Protocol, ensuring that it is consistent with international refugee law and protects the rights of asylum seekers. The agency will report on any instances of non-compliance with human rights standards and advocate against the externalisation of asylum responsibilities. The UNHCR's monitoring will be conducted independently of any involvement in the protocol, with funding provided by external parties not involved in its development. After the monitoring period, recommendations will be issued.⁴³

The facilities, which are now located in Albania, are responsible for conducting various legal examinations. As stated at the beginning of this chapter, one facility is responsible for the entry procedures. At the same time, the other is tasked with determining

⁴⁰ Employees who are hired locally will likely receive contracts governed by the labour laws of the host country, i.e. Albania; whereas employees who are sent from the home country to work in a different host country will typically governed by the employment laws of the home country and usually receive privileges and immunities.

⁴¹ Directive 2013/32/EU on common procedures for granting and withdrawing international protection, Art. 20-24.

⁴² Ibid., Art. 8, information on counselling in detention facilities and at border crossing points.

⁴³ UNHCR, Italy Albania Protocol, UNHCR to undertake monitoring activities to safeguard and promote fundamental human rights, press release, 14 August 2024.

the conditions for recognising international protection and for returning migrants who are not entitled to enter Italian territory. The model's legal conformity remains to be determined regarding the proposed right of residence in the Member State responsible for the proceedings, the right to remain on the territory, and the deprivation of liberty in the centres. The initial assumption that the transferred individuals are being detained is considered a critical issue, given that they are not authorised to enter Albanian territory for the reasons previously outlined. According to Italian Law Article 6(3-bis) of the Reception Decree introduced by Decree Law 113/2018, the possibility of detaining asylum seekers in hotspots to determine their identity or nationality was introduced. After the amendment introduced by Decree Law 130/2020 as converted by L. 173/2020, the law states that this should happen in the shortest possible time and for a period not exceeding 30 days and, if identification has not been possible within that time frame, they could be sent to a pre-removal facility for detention up to 90 days plus an additional 30 days when the migrant belongs to a country with which Italy has signed repatriation agreements with.⁴⁴ This procedure follows the recently introduced EU Pact on Migration and Asylum, which outlines the implementation of so-called fast-track border procedures. These procedures have the potential to be extended up to six months; however, under Italian law, individuals for whom the authorities seek return may remain in detention for up to 18 months.

The ECtHR has developed substantial jurisprudence on the concept of detention under Article 5 of the European Convention on Human Rights (ECHR), particularly in the context of pre-return detention in immigration cases, which will be discussed hereinafter.

In the case *Guzzardi v. Italy*⁴⁵, the Court held that the applicant's confinement to a small area on an island under strict supervision amounted to a deprivation of liberty under Article 5 ECHR. The key considerations were the cumulative restrictions on movement and the overall impact on personal freedom, as the applicant was confined to a very small area, approximately 2.5 square kilometres on an island for an indefinite period. The decision in *Guzzardi v. Italy* set a precedent for interpreting detention in a broad, substantive manner. It showed that the concept of detention is not limited to imprisonment but can include any situation where an individual's freedom is severely restricted, even in open or semi-open conditions. This case has been frequently cited in subsequent ECtHR concerning deprivation

⁴⁴ Article 6(3-bis) Reception Decree, inserted by Article 3 Decree Law 113/2018 and L 132/2018 and amended by Article 3 (2, b) DL 130/2020 and L 173/2020; with regards to the cited law it is questionable if the same detention timeframes will be applied in Albania, as no such adaptation of the law seems to exist by 25.7.2024.

⁴⁵ ECtHR, Application No. 7367/76. November 6, 1980.

of liberty in various contexts, including immigration detention.⁴⁶ The second facility to be constructed in Albania has a total area of 77,700 square metres, and it is yet to be determined how many square metres will be allocated to each migrant, considering the extent of their freedom of movement and the detention time.

In the case *Khlaifia and Others v. Italy*⁴⁷, which concerned the detention of three Tunisian migrants in reception centres, the ECtHR ruled that the applicants had been unlawfully deprived of their liberty in a reception centre and subsequently on ships because the authorities had failed to provide a legal basis for the detention and had not informed the applicants of the reasons for their deprivation of liberty. Furthermore, no opportunity was given to challenge their detention. The court also ruled that despite being identified individually and being issued with separate return decrees, their individual circumstances had not been genuinely considered prior to their return to Tunisia.

In the jurisprudence of the Court of Justice of the European Union (CJEU), several cases addressed the concept of pre-return detention, especially within the context of EU law, such as the Return Directive, which governs the conditions under which third-country nationals may be detained. In the case of *Said Shamilovich Kadzoev*⁴⁸, the CJEU clarified that detention for the purpose of return must comply with the principles of necessity and proportionality and should not exceed the maximum period of detention set out in the Return Directive, which is six months.⁴⁹ Detention should only be used when less coercive measures are inadequate and must not exceed the time necessary to carry out the removal. Another example case is the *Bashir Mohamed Ali Mahdi*⁵⁰ case, which concerned the extension of pre-return detention. The CJEU emphasised the need for judicial review to ensure that detention remains justified throughout its duration and reiterated that detention must be regularly reviewed and can only be extended if removal arrangements are being actively pursued.

Both courts based their decisions on necessity and proportionality, as detention should only be used as a last resort when other measures are insufficient, and authorities should consider less coercive measures, such as reporting obligations or residence restrictions. A particular legitimate aim must be given, and detention must serve a specific purpose, such as

⁴⁶ Cases decided by the ECtHR with reference to *Guzzardii v. Italy* are f.eg.: *Amuur v. France* (1996) Application No. 19776/92; *Saadi v. United Kingdom* (2008) Application No. 13229/03; *M.S.S. v. Belgium and Greece* (2011) Application No. 30696/09; *Khlaifia and Others v. Italy* (2016) Application No. 16483/12.

⁴⁷ *Khlaifia and Others v. Italy* (2016) Application No. 16483/12.

⁴⁸ C- 357/09, paragraph 56; 30.11.2009.

⁴⁹ Article 15, Return Directive specifies that detention is justified only as long as there is a realistic execution of the return. The detention should not exceed six months, but may be extended for a maximum of a further twelve months if the person is non-cooperative or there are difficulties in obtaining travel documents. Cf. Art. 2 and 4 of the Italian Decree-law 4 October 2018, n. 113.

⁵⁰ C -146/14 PPU.

preventing unauthorised entry or ensuring return based on a high risk of absconding. Furthermore, regular and effective judicial review is crucial to ensure the lawfulness of detention. Detention must be for the shortest time possible, and the conditions must respect human dignity.⁵¹ Whether this will be the *modus operandi* under the Italy-Albania MoU is yet to be clarified.

Once the asylum procedure has concluded with the determination that an individual is not entitled to remain on state territory, a return order is issued. The individual is then given the option of returning voluntarily to their country of origin, with the possibility of accessing an offered reintegration programme that provides limited financial assistance.⁵² It is unclear whether individuals detained in the centres who have been ordered to leave the country will have the opportunity to challenge this decision if they are provided with the option of return counselling in a language they understand.⁵³ Furthermore, it is also unclear what happens if migrants opt to leave the centres voluntarily and unassisted, due to the risk of secondary movements and the significant risk of being trafficked and exploited by smugglers. Generally, a forced return is initiated if an individual is unwilling to leave the country voluntarily. However, under the MoU, it is yet to be determined who has the responsibility and competence to return persons to their country of origin. According to EU law, the state that initiates the forced return operation oversees the process and assures adherence to all international standards.

In light of the MoU, a return from Albanian territory would appear to be the most straightforward and practical option; however, it is essential to ascertain the legal responsibilities and parties involved in the return process, as Albania's lack of return practice poses a significant risk of potential human rights violations. Furthermore, the question of practicality arises namely, who will perform forced return operations, given that the European Border and Coast Guard Agency (Frontex) has no mandate to return migrants to third countries from the territory of other third countries.⁵⁴ It thus appears reasonable to assume that the migrants will be transported from Albania back to Italy for the purpose of returning

⁵¹ Article 5.3. of the ECHR.

⁵² voluntary return is always the preferred option, and the UN International Organization for Migration offers return counselling as well as some reintegration programmes connected to a small financial support, for example IOM Assisted Voluntary Return (AVR) Programmes.

⁵³ Currently, there is no established framework governing the qualifications, training, or guidelines for delivering return counselling services. In Europe, this type of counselling is primarily provided by international organizations like the IOM; cf. Communication from the Commission to the European Parliament and Council, The EU strategy on voluntary return and reintegration; 27.4.2021.

⁵⁴ Although there exists a working arrangement between Frontex and the Albanian Ministry of Interior to cooperate in the field of return, it does not enable the Agency to perform return operation from Albania to other third countries. signed in Tirana, 17. March 2021.

them to their country of origin by force. Such an approach is not only costly and resource-intensive but also entails the risk of deepening the trauma of individuals who have already experienced life-threatening situations at sea.⁵⁵

In general, the MoU could establish a precedent for similar agreements between the EU and non-EU countries, potentially significantly altering the landscape of migration management in Europe. Although the agreement was designed to alleviate the migration burden on Italy, it has nevertheless attracted considerable controversy and criticism on the grounds that it could set a precedent, leaving the migrants in a state of rightslessness⁵⁶. The Council of Europe's Commissioner for Human Rights, Michael O'Flaherty, has cautioned that a chain effect could potentially erode the integrity of the European asylum system if other states were to emulate Italy's approach of externalising asylum processing.⁵⁷ This approach raises questions concerning the application of EU law in non-EU territories and the potential for discrepancies in the standards of human rights protection. On top of that, it is possible that the proposed transfer and detention model may present significant challenges to Albania's ability to align with EU standards and its prospects for future Union membership. Several concerns have been expressed regarding the extraterritorial application of EU law, given that the claims submitted in the Albania centres are being made to receive international protection in Italy. In response to whether EU law is applicable outside the EU, EU Commissioner Ylva Johansson provided a definitive negative answer.

Furthermore, EU Commission President Ursula von der Leyen assessed this deal as positive.⁵⁸ It may appear that outsourcing asylum procedures, as exemplified by the Italy-Albania MoU, does not give rise to any legal challenges regarding jurisdiction. However, it is essential to be aware that this is a non-binding instrument, and even if there is consent between the two states, it is still questionable whether the implementation is legally valid. Although the EU has not expressed any concerns about legal issues, a concrete review of the practices in light of the implementation is advisable and necessary.

4. The States Obligation as Protector of Human Rights

States have a fundamental obligation to protect human rights, an imperative enshrined in international human rights law and various regional human rights instruments. This duty

⁵⁵ Under the MoU only persons rescued at sea will be transferred to the Albanian Centres.

⁵⁶ Reyhani, A.-N., Externalization and the Rightlessness of Refugees: An Analytical Framework.

⁵⁷ Sunderland, J., Italy's Dodgy Detention Deal with Albania, Risks for Asylum Seekers and Rescue Operations Should Prompt EU Action, 2024. In addition, the letter of Ministers to Commissioner Johansson clearly shows that several Member States opt for this new approach of externalization of asylum proceedings.

⁵⁸ De Billis M., Italy's arbitrary Albania detention deal will harm EU, February 2024.

extends unequivocally to all individuals within their jurisdiction, including asylum seekers and refugees and the principle of non-refoulement, a cornerstone of international refugee law articulated in the 1951 Refugee Convention⁵⁹ and its 1967 Protocol⁶⁰, prohibits states from returning individuals to countries where they may face persecution, torture, or inhumane treatment. This principle is also embedded in international treaties such as the Convention Against Torture (CAT)⁶¹, as well as Article 3 of the ECHR and Article 4 of the EU Charter on Human Rights. Both the ECHR and the EU Charter of Fundamental Rights impose strict obligations on states to ensure that individuals within their jurisdiction are not subjected to torture or inhuman treatment, either directly or indirectly, through refoulement. These protections are absolute and non-derogable and apply in all circumstances, including national security or public order issues. States are required to conduct thorough assessments of the risks involved in any deportation or transfer of individuals and must refrain from such actions if there is a substantial risk of inhuman or degrading treatment in the receiving country. Failure to do so can result in violating their obligations under Article 3 of the ECHR and Article 4 of the EU Charter of Fundamental Rights.

A review of pertinent jurisprudence reveals cases of migrants whose individual circumstances in their country of origin were not adequately assessed and were subjected to deportation proceedings. These accelerated procedures, which are also to be made after the interception of migrants at sea and transfer to the centres in Albania, carry a high risk of violating the aforementioned articles of the legislation. In the case *Chahal v. United Kingdom*⁶², the ECtHR ruled that the deportation of a Sikh activist to India, where he risked torture or ill-treatment, would violate Article 3. The court emphasised that the protection against torture is absolute, regardless of the individual's conduct or national security concerns. Once again, the *Saadi v. Italy* case serves as an example of individuals' rights being violated if the return operation had been carried out. The ECtHR reiterated that Italy was found to have

⁵⁹ Article 33(1) of the 1951 Refugee Convention: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Recently, more and more statements have been made about the adaptation of the Geneva Refugee Convention. see Minister Edtstadtler interview from 31.7.2024

⁶⁰ Article I of the 1967 Protocol, General Provision: "The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined." This means that the substantive provisions of the 1951 Convention, including Article 33 on non-refoulement, apply to all refugees covered under the Protocol.

⁶¹ Article 3(1) of the CAT: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

⁶² Application no. 22414/93.

violated Article 3, which is an absolute right, by attempting to deport Tunisian citizens to Tunisia due to the risk of torture.⁶³

In the case *M.M. v. Minister for Justice, Equality and Law Reform*⁶⁴, it was emphasised by the court that Article 4 of the EU Charter of Fundamental Rights imposes an obligation on EU Member States to assess the risks of inhuman or degrading treatment in the destination country before carrying out a deportation. The court stated that the Minister had failed to properly consider M.M.'s circumstances and the potential impact of deportation on his rights under Article 8 of the ECHR. The ruling reinforced the importance of fair procedures and thorough consideration of personal circumstances in cases involving deportation orders. The relevant jurisprudence underscores the state's obligation to ensure that asylum seekers have access to fair and effective asylum procedures and that their individual circumstances are assessed thoroughly.

In addition, states must provide adequate reception conditions for asylum seekers, including access to essential services such as healthcare, education, and housing, respecting their human dignity. This requirement aims to prevent situations where asylum seekers are left behind, finding themselves in vulnerable situations subjected to exploitation and abuse. For example, the European Union's Reception Conditions Directive⁶⁵ sets out minimum standards for the reception of asylum seekers to ensure their fundamental rights are respected. In general, detention of asylum seekers should be a measure of last resort, used only when necessary and for the shortest possible period, adhering to standards safeguarding human dignity and rights. International human rights law, including Art. 5 of the ECHR and Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), mandates member states to ensure that any detention is lawful, necessary, and proportionate. The United Nations High Commissioner for Refugees (UNHCR) guidelines on the detention of asylum seekers provide that alternatives to detention should always be considered, and the conditions of detention must meet international standards.⁶⁶ It is needless to say, that states bear the responsibility to protect asylum seekers from discrimination, ensuring that their rights are respected regardless of their legal status. This encompasses protection from arbitrary

⁶³ Application no. 37201/06

⁶⁴ CJEU - C-277/11 *M.M. v Minister for Justice, Equality and Law Reform*, Ireland, Attorney General

⁶⁵ Directive 2013/33/EU laying down standards for the reception of applicants for international protection, 26 June 2013.

⁶⁶ Non-refoulement is also considered a principle of customary international law, which means it is binding on all states, regardless of whether they are parties to the aforementioned treaties. This status was reaffirmed by various international legal scholars and bodies, including the United Nations High Commissioner for Refugees (UNHCR) UNHCR Executive Committee Conclusion No. 25 (1982), see also Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. Oxford University Press, 2007.

detention, exploitation, and abuse, as well as access to legal assistance and the ability to challenge decisions affecting their status and rights.

The Committee on the Elimination of Racial Discrimination (CERD) stated in its concluding observations on the combined thirteenth and fourteenth periodic reports of Albania that with regards to the Italy-Albania MoU, the establishment of facilities in Albania for the reception of migrants and asylum-seekers do not result in a breach of the state party's legal obligations under the convention and other instruments of international human rights and refugee law, but raised concerns about possible human rights violations resulting from the MoU, especially in the light of detention.⁶⁷

Non-discrimination is a fundamental principle of international human rights law, enshrined in instruments such as the Universal Declaration of Human Rights (UDHR)⁶⁸ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)⁶⁹. The ECtHR has reinforced these obligations through various rulings, for example, in the landmark case of *M.S.S. v. Belgium and Greece*⁷⁰, where the ECtHR emphasised the necessity for states to uphold human rights standards in the context of asylum procedures, affirming that the transfer of asylum seekers to countries with inadequate reception conditions and asylum processes can constitute a violation of human rights - inside and outside the European Union.

Externalising asylum processing to different regions and third countries must ensure that third countries provide adequate protection, uphold human rights standards, and have effective legal remedies. The obligation to protect human rights does not diminish with geographical outsourcing, and states are required to rigorously assess and monitor the conditions and treatment asylum seekers receive in these external locations.⁷¹ Nevertheless, when it comes to the transfer of migrants, the ECtHR ruled in the case *Tarakhel v.*

⁶⁷ UN International Convention on the Elimination of All Forms of Racial Discrimination, 23 May 2024 CERD/C/ALB/CO/13-14; paragraphs 34.-35.

⁶⁸ UDHR Article 2: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." and UDHR Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁶⁹ ICESCR Article 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁷⁰ Application no. 30696/09, 21 January 2011. The *M.S.S. v. Belgium and Greece* case had far-reaching implications for the European asylum system, particularly to the adherence of human rights obligations when implementing the Dublin Regulation and highlighted the importance of addressing systemic deficiencies in the asylum and reception systems of EU countries as member states are required to ensure that their practices do not lead to violations of the ECHR. Furthermore the judgment emphasized the necessity of providing effective remedies for asylum seekers to challenge transfers and the conditions they face in receiving states, which can possibly have also an effect on future bilateral agreements on return cooperation.

⁷¹ see chapter on the States obligation of this thesis.

Switzerland that the general situation in Italy was not as dire as in Greece (as found in the *M.S.S. v. Belgium and Greece* case). However, it nonetheless emphasised that authorities needed to obtain specific assurances from Italy to provide facilities suitable for families and children. The Court concluded that without such assurances, transferring the family to Italy would potentially expose them to conditions that could violate Article 3 of the ECHR.

In light of the fact that the state is the primary entity responsible for protecting human rights, it is imperative to underscore this obligation in the context of another case from 2016. The case *Plaintiff S99/2016 v. Minister for Immigration and Border Protection* (High Court in Australia)⁷² involved the challenge by *Plaintiff S99/2016*, a Bangladeshi woman, against the Minister for Immigration and Border Protection. The plaintiff was transferred from Australia to Nauru under the regional processing arrangements between Australia and Nauru. She alleged that the conditions in Nauru amounted to inhumane treatment and challenged the legality of her transfer and the conditions she faced there. The legal issues concerned the duty of care and if failing to provide appropriate medical care and conditions in Nauru breached this duty. The High Court of Australia recognised that the Australian government had a duty of care towards the plaintiff, even though she was in Nauru, and that the Australian government was responsible for ensuring adequate medical care. The court held that failing to provide timely and appropriate medical treatment constituted a breach of the duty of care. The plaintiff was subsequently transferred to Australia to receive the necessary medical treatment, including the termination of her pregnancy. The case highlighted the Australian government's ongoing responsibility for the welfare and human rights obligations of asylum seekers transferred to offshore processing centres. The ruling had significant implications for Australia's offshore processing policy, emphasising the need to ensure that asylum seekers in regional processing centres receive appropriate health care. It prompted further scrutiny of the conditions and treatment of asylum seekers in Nauru and other offshore processing locations. It is noteworthy that the case set a legal precedent for the duty of care owed by states to asylum seekers under its jurisdiction, even when they are transferred to another country, and it established the legal grounds for challenging inadequate conditions and treatment in offshore processing centres.⁷³

⁷² *Plaintiff S99/2016 v. Minister for Immigration and Border Protection*; cf. Case notes, Kaldor Centre - UNSW Sydney. 2016.

⁷³ Jessica Hambly, Neeraja Sanmahanathan, *Plaintiff S99: Rewriting Refugee Law Through a Trauma-Informed Lens*, *Refugee Survey Quarterly*, 2024.

4.1. Reimagining Control: The EU Pact on Asylum and Migration's New Paradigm

Following the preceding chapters of this thesis, it was stressed that the state bears the responsibility of safeguarding the rights of its citizens. It is, therefore, unsurprising that some EU Member States call for a range of potential solutions and alternatives to the current reality, where some Member States find themselves in a challenging situation. The recurrent calls for a just distribution among Member States and among third countries appear to be a desperate attempt to impose some order upon this demanding situation. At the EU level, the new EU Pact on Migration and Asylum was created to provide potential solutions and thus facilitate progress by providing a comprehensive policy that addresses both the immediate challenges of migration and the long-term need for a cohesive European strategy. The intention is to ensure that no individual is left behind and build a common Annual Solidarity Pool among Member States that face the most migratory pressure.⁷⁴

Not only were complex legal documents created so far, but planned are also annual reports that should serve as the foundation for any support services. The annual European Annual Asylum and Migration Report is not only intended to provide an overview of the asylum situation in EU Member States, including statistical data, but also to present decisions on asylum in the first instance and return decisions in line with the Return Directive.⁷⁵ The following subchapters intend to provide the main aspects of the legal framework of the European Union in the field of asylum with a special focus on the relevant legislation with regard to the discussed MoU in order to provide fundamental knowledge before the discussion on the role of human rights monitoring on forced returns.

4.2. The Uneven Landscape of Migration Management in Europe

The Common European Asylum System (CEAS) sets rules for determining which EU Member State is responsible for handling asylum applications and establishes common standards for asylum procedures, reception conditions, and rights for those granted protection. The different existing systems in the EU Member States contribute to migrants putting themselves in a vulnerable situation through secondary movements and hinder the goal of

⁷⁴ Communication on the New Pact on Migration and Asylum; Regulation (EU) 2024/1351 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013.

⁷⁵ Given the extensive nature of the new legislation, a comprehensive analysis is beyond the scope of this thesis, therefore the following section focuses on the most significant aspects to be considered in the context of externalization of migration and the protection of human and fundamental rights with a special focus on return.

equal treatment for all applicants across the EU.⁷⁶ The reasons for migration are multifaceted and interrelated. Individuals who lack access to legal migration channels may opt for irregular migration paths driven by different push factors, such as wars and conflicts, political and economic instability, natural disasters, and climate change that deprive people of their livelihoods. Conversely, pull factors, including support measures and treatment of migrants, better future employment opportunities and educational institutions, a more favourable climate, and an existing strong diaspora, may influence the decision of which destination country is chosen. Given the considerable discrepancies at the European level, the objective of the revised legislation is to establish a uniform standard across all Member States. The new Directive 2024/1346 serves as a recast of the previous Directive 2013/33/EU, with the primary goal of enhancing clarity and improving the implementation process across EU Member States. By streamlining the language and structure, making it more straightforward for Member States to adopt and comply with its rules.

One of the main points of the new directive is the enhancement of reception conditions for applicants seeking international protection. Member States are encouraged to introduce more favourable provisions, particularly for applicants and their dependent family members, aiming to reflect the EU's commitment to treating individuals with dignity and care throughout the asylum process. The directive also aims to streamline procedures, ensuring that international protection applications are processed more timely and efficiently. This is crucial for the well-being of applicants, who often face long waiting periods, uncertain conditions and unjustified detention during the application process.⁷⁷

The rights of applicants are further reinforced in the new directive, guaranteeing access to essential services such as healthcare, education, and legal assistance throughout the application process. This ensures that applicants are treated fairly and given the necessary support to navigate the complexities of the asylum system. In light of the Italy-Albania deal, the modalities of providing legal advice and handling appeals against decisions remain uncertain, and the Member State may not grant legal assistance under certain conditions. The

⁷⁶ Article 7 of the Directive (EU) 2024/1346 laying down standards for the reception of applicants for international protection of, 14 May 2024, still leaves room for the independent decision of each Member State with regards to the design of its reception system.

⁷⁷ see Article 10.4.a. where it is stated that a detention is possible for the identification and verification process. 10.4.d. in the context of a border procedure in accordance with Article 43 of Regulation (EU) 2024/1348, on the applicant's right to enter the territory; 10.4.e. detention before return procedure under Directive 2008/115/EC; Article 9 of the MoU highlights that the period of stay of third country nationals in Albanian territory should not exceed the maximum period of detention allowed in Italian legislation, that is between 28 days and 18 months; Decree-Law No. 130/2020 amended in 2023 Initial detention of migrants for up to 28 days in facilities known as "CPRs" (Centri di Permanenza per il Rimpatrio, or "Repatriation Detention Centers") is allowed during the identification procedure.

text from Article 29 of Directive 2024/1346 outlines several potential challenges regarding human rights, mainly related to providing legal assistance in asylum cases. While the directive mandates that Member States provide free legal assistance and representation in appeals, there are conditions under which this can be denied, such as when an appeal is deemed to have "no tangible prospect of success."⁷⁸ This could lead to situations where asylum seekers, particularly those with complex cases, are denied the necessary legal support, potentially undermining their right to a fair hearing.

Furthermore, the precondition that legal advisers or other suitably qualified persons must not have conflicting interests must be crucial. If not adequately enforced, this could lead to conflicts of interest where legal representatives might not fully advocate for the applicant's best interests, thereby violating their right to an impartial defence. The directive allows Member States to impose limits on the duration or cost of legal assistance as long as they do not "arbitrarily restrict access." However, these limits could still make it difficult for applicants to receive adequate representation, especially in cases requiring extensive legal work, thus potentially infringing on their right to effective legal aid. The provision that allows Member States to request reimbursement if the applicant's financial situation improves could deter asylum seekers from seeking legal assistance, fearing future financial burdens. This could result in a violation of their right to free legal aid, especially if they initially sought assistance in good faith. With regards to the establishment of specific procedural rules for requesting legal assistance, for some persons seeking protection, it can pose an unmanageable hurdle if the procedures are overly complex or difficult to understand, particularly in cases where it is not possible to leave the facility and legal advice and assistance may be offered just online.

Furthermore, compliance with fundamental rights, as outlined in the Charter of Fundamental Rights of the European Union, stands at the new directives' core, as it aims at ensuring that human dignity and rights are at the core of the reception process. However, in light of the freedom of movement and residence⁷⁹ bridging to Article 10 - detention - of the new Directive poses a possible violation of the Charter as the Directive states that

"for reasons of public order or in order to effectively prevent the applicant from absconding, Member States should be able to decide that the applicant is allowed to reside only in a specific place, such as

⁷⁸ 3.b. of the Directive (EU) 2024/1346.

⁷⁹ Article 45 of the EU Charter of Fundamental Rights.

an accommodation centre, a private house, flat, hotel or other premises adapted for housing applicants. Such decision should not result in the detention of the applicant.”⁸⁰

Although Article 10 of the directive stipulates that detention cannot be based solely on an applicant's status or nationality, the broad grounds for detention, such as verifying identity or preventing absconding, could lead to arbitrary detention, which could violate Article 5 of the ECHR. Furthermore, the requirement that detention must be necessary and only applied when less coercive measures are ineffective. This cannot be applied in the case of the Italy—Albania MoU, as the migrants will not be allowed to leave the centres, finding themselves in detention, and leaving the centres would mean irregularly entering Albanian territory.

The Article requires that Member States consider any special reception needs of applicants when deciding on detention. However, if assessments of these needs are not conducted thoroughly or promptly, vulnerable individuals, such as those with mental health issues or survivors of trauma, might be detained inappropriately, leading to potential violations of their rights to humane treatment under Article 3 of the ECHR and Article 4 of the EU Charter of Fundamental Rights. Concerning the grounds on detention, such as national security concerns or border procedures, could be interpreted broadly, potentially leading to extended detention periods that might not be justified, potentially resulting in violations of the right to liberty and security.

4.3. The Politics of Asylum at EU Borders - a Frontline Exclusion?

One of the most frequently discussed topics in contemporary political public discourse is the question of how to safeguard the external borders of the European Union. The latest development in this context is the introduction of a new border procedure, which also requires Member States to establish adequate facilities and resources to manage these procedures effectively. The new EU Pact on Asylum and Migration framework provides Member States with the discretion to determine specific locations for these procedures, ensuring that the process is aligned with national security and public order concerns.⁸¹ This procedure is not only part of the broader Common European Asylum System (CEAS), which aims to harmonise asylum policies across the EU, ensuring that all Member States apply consistent standards while respecting the fundamental rights of asylum seekers, but it is also of utmost relevance for the topic of this thesis, as all externalised asylum processes fall under the border

⁸⁰ Directive 2024/1346, (19), p. 3/35.

⁸¹ Regulation (EU) 2024/1349 establishes border procedure for asylum and return, providing detailed guidelines on how Member States should conduct these procedures at the external borders. It sets the criteria for assessing applications, including the treatment of vulnerable individuals and the conditions under which detention may be applied.

procedure. Furthermore, it is crucial to comprehend the specifics of border procedures and their correlation with the potential decision to return persons not eligible to stay on a state's territory to their country of origin. This chapter will address the intricacies of the procedure itself and the challenges that may arise during its execution.

As previously addressed, detention of persons is a significant and multifaceted issue that warrants further investigation, as it is stressed that detention of asylum seekers should not be punitive⁸². Indeed, the new legislation rules out the use of detention as a punishment, with the focus instead shifting to detention during the identification and screening process. Furthermore, the question of the sovereignty of the EU Member States arises, given that migration is an inherently politicised area, and the apparatus behind it is shaped by a multitude of approaches and implementation strategies contingent on the prevailing political context. In this context, the border procedures could lead to extended periods of confinement, creating a risk of prolonged detention without adequate legal safeguards, which could infringe the right to liberty under Article 5 of the ECHR and Article 6 of the EU Charter of Fundamental Rights. Detention should always be handled as a means of last resort and based on necessity and should be for the shortest period possible, which is why an individualised assessment before detention⁸³ is crucial, but the fast-tracked nature of border procedures may lead to rushed or superficial evaluations, potentially further violating fundamental rights, in particular the right to an effective remedy, Article 47 of the EU Charter on Fundamental Rights.

As indicated in the previous paragraph, another area for improvement related to the desired speed of the process is that the fast assessment of applications at borders⁸⁴ raises concerns about the thoroughness of evaluations, particularly in identifying well-founded claims. If these processes are not handled with utmost accuracy, which can be very difficult to do under time pressure, possible violations of the principle of non-refoulement, as protected under international law, including Article 33 of the 1951 Refugee Convention, could occur. In addition to that, special needs of vulnerable persons, mental health issues or other needs may be overlooked. Such seemingly minor inconsistencies can, nevertheless, have significant effects and consequences not only for the individual in terms of their future prospects and state of health but also in upholding and respecting fundamental and human rights.

⁸² compare Article 10(1)

⁸³ compare Article 10(2)

⁸⁴ Article 4, 2024/1349.

Member States are allowed to determine specific locations for processing their applications⁸⁵, which might lead to inconsistent application of standards across different locations. This could result in unequal treatment of asylum seekers, undermining the principle of non-discrimination enshrined in Article 21 of the EU Charter of Fundamental Rights. While free legal assistance is mandated in the before-discussed Directive 2024/1346⁸⁶, the accelerated nature of border procedures may limit adequate access to legal representation, hindering the ability of applicants to appeal negative decisions properly. This could violate the right to a fair trial and an effective remedy as enshrined in Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. With regard to the Italy-Albania agreement, there is a lack of clarity regarding the extent to which access to legal counselling can be guaranteed. The question of who will provide the free legal advice and in what form has yet to be resolved at this stage of the agreement's implementation. It is therefore strongly recommended that non-governmental organisations, civil society organisations and independent legal advisors be granted access to these centres.

The recently introduced EU-level regulations have also prompted some Member States to leverage these innovations as a means of expediting case processing, with the objective of promptly returning individuals who have received a return decision. There is a significant risk that individuals in genuine need of protection will not be identified and assisted. Therefore, recognising that the deciding person assesses each case individually is also essential which is closely connected to the importance of ensuring that all personnel involved in initial contact receive appropriate training and re-training if necessary.

4.4. Streamlining Returns or Compromising Rights - A Critical Discussion

This sub-section is dedicated to a particularly challenging innovation related to the border procedure and constitutes the second part of the new procedure at EU external borders. The so-called return border procedure complements the previously discussed asylum border procedure and will be bindingly applicable from 12 June 2026.⁸⁷

The regulation outlines a structured return procedure that must be followed by Member States, which means that once a third-country national has been issued a return decision, the individual is generally given a period for voluntary departure to the country of origin, which can vary depending on the circumstances. If voluntary return is not the chosen

⁸⁵ Article 4(2).

⁸⁶ Article 29 of the Directive 2024/1346, and art. 17 - 19 of the Regulation 2024/1348.

⁸⁷ Article 14 of the Regulation EU 2024/1349; By 12 September 2024, the Commission, in collaboration with Member States, must present a common implementation plan to ensure readiness for Chapter II of this Regulation by 1 July 2026. This plan is intended to assess gaps and necessary operational steps.

option or if the person does not comply with the granted period, Member States are obliged to enforce the return decision with a maximum detention period of 12 weeks before the return operation.⁸⁸ The Return Directive EU 2008/115 stipulated that the pre-return detention should not exceed six months. In some cases, the Member States may prolong the detention time for another twelve months if the grounds for detention are lawful and reasonable.⁸⁹ Although this represents a significant reduction compared to earlier regulations, evaluating and streamlining the pre-detention in return processes with a particular focus on adhering to all fundamental and human rights is necessary.

The deprivation of liberty under Regulation (EU) 2024/1349 remains a measure of last resort, following an individual assessment and if it is the only way to ensure the individual's return.⁹⁰ Persons detained during the asylum border procedure who no longer have the right to stay may be further detained to prevent entry into the Member State, prepare the return or execute the removal. It is important to note that the period of detention preceding the actual return can be extended for various reasons, as already mentioned previously in footnote 77. However, in addition to that, the level of cooperation with the country of origin is crucial in the field of forced return. Whether the cooperation with the responsible authorities is good impacts not only the identification process of the migrant, which is linked to the procurement of return travel documents, but also the reintegration of the returnee in the country of origin. In the absence of return travel documents, or in the event that they are issued after the relevant deadlines for the return operation, the individual in question cannot be returned, which again could result in prolonged detention and leave the individual in a state of vacuum and uncertainty.

At the EU level, returns are frequently regarded as a crucial component of an effective migration management system. Without entitlement to international protection, individuals must leave the country; otherwise, the system is undermined in its credibility. The potential challenges of this decision under the new Pact have been previously discussed. In the event that a lawful return decision is made, assuming that the asylum procedure has been properly and lawfully completed and that the right to appeal has been exhausted, it is always preferable for the individual to return to their country of origin on a voluntary basis. In the event that a forced return is nevertheless necessary for various reasons, it is of the utmost importance to ensure that all applicable rights are respected in order to guarantee the absolute right of

⁸⁸ cf. Chapter II, Article 4 of the Regulation EU 2024/1349. the limits set out in Article 4(2) of the Regulation, must also comply with the maximum periods of detention established in Directive 2008/115/EC.

⁸⁹ cf. Article 15.5. and 15.6. of the Directive EU 2008/115

⁹⁰ cf. Article 5 of the Regulation EU 2024/1349; reasons for detention may be high risk of absconding, manipulation of the return process, threat to public order or/and security.

human dignity. The following chapters are intended to address the question of how human rights can be guaranteed in the case of forced returns, to examine the role of the main actors in the field of human rights monitoring, to identify the difficulties that arise and to propose solutions that can be implemented to prevent further harm.

5. Human Rights Monitoring on Forced Return Operations

The EU has established a comprehensive framework for monitoring the human rights aspects of forced return operations, with Frontex, the European Border and Coast Guard Agency, playing an essential role. In addition to that, each EU member state is required to establish a national monitoring mechanism as mandated by the Return Directive (2008/115/EC)⁹¹. Article 8 mandates the removal of persons not eligible to stay on the territory of a specific member state and their obligation to establish an independent mechanism to monitor forced return operations, ensuring that these operations are conducted in compliance with human rights standards. The monitoring body is tasked with overseeing the entire process of forced returns, from the pre-departure phase through to the arrival in the country of return. Alongside Frontex, the Fundamental Rights Agency (FRA) acts as an essential protector of human and fundamental rights in the European Union.

To ensure transparency FRA publishes an annual update of the forced return monitoring systems of EU Member States under Article 8 (6) of the EU's Return Directive (2008/115/EC).⁹² These reports aim to provide an overview of potential indicators for an effective forced return monitoring system and details of the organisation responsible for monitoring forced returns, the number of operations observed within a specific year, the different phases of the return operations that were monitored, the number of staff trained and employed as monitors, and whether the monitoring body released public reports on their findings.⁹³ The findings show that significant differences in human rights monitoring mechanisms exist throughout the European Union with regard to organisational structure, scope and coverage of monitoring, staffing and training, reporting and transparency, as well as the legal mandate. Referring to the legal mandate, some Member States have established independent bodies, such as national human rights institutions or ombudsman offices, tasked with monitoring.

⁹¹ Article 8(6) states that Member States shall provide for an effective forced-return monitoring system.

⁹² Fundamental Rights Agency (FRA), Forced return monitoring systems – 2023 update; the report covers the period until end of 2022.

⁹³ The annual reports do not include information on monitoring conducted by the European Border and Coast Guard Agency (Frontex) pool of forced return monitors, p. 3.

It should be noted that the objective of this paper is not to provide an exhaustive overview of the diverse systems and practices of EU Member States. However, for the sake of completeness, it is essential to acknowledge that, while the existence of an independent monitoring mechanism is recommended, some EU Member States use personnel from governmental agencies or departments within Ministries of the Interior or Justice to monitor their forced return operations.⁹⁴ Findings also show that there is no uniform standardisation across Member States regarding which phases of the return process⁹⁵ are observed, and significant discrepancies have been identified. Some bodies monitor all stages, from pre-departure to post-arrival, while others focus only on specific phases such as departure or transit. As an example, the Austrian model is used to monitor the whole return process. The Federal Agency for Reception and Support Services (BBU)⁹⁶ monitors all phases, from contact talks to the disembarkation of the returnee in his or her country of origin.

6. Responsibilities of Human Rights Monitors during Forced Returns

Monitors for forced-return operations must fulfil several essential duties in order to guarantee that the process is conducted fairly and transparently. To fulfil their obligation, it is of the utmost importance to have access to all relevant information concerning the return operation (RO). Such details as the date and time of the operation, the countries to which individuals are being returned, and all necessary travel documents must be made available. Furthermore, it is fundamental that monitors are aware know the number of returnees, paying particular attention to those who may find themselves in exceptionally vulnerable situations. It is similarly crucial to ensure that monitors have access to the returnees, as they are allowed to interact with the returnees unless a specific risk assessment indicates otherwise. This guarantees that monitors can observe and document the conditions and treatment of returnees directly. The following subchapters are designed to outline the activities of the pivotal actors involved in forced return and human rights monitoring. This appears to be relevant in terms of a deeper understanding of the responsibilities inherent to the situation and should help to identify potential shortcomings and address areas where further action may be required.

⁹⁴ AT, BE, DE, HR (has not yet established an organization for monitoring forced returns), IE (no monitoring system provided in law), NL, PT, RO; see Annex of the Fundamental Rights Agency (FRA), Forced return monitoring systems – 2023 update;

⁹⁵ Forced return operations are split into pre-departure, in-flight and post arrival. It needs to be mentioned at this point that Monitors from the Frontex pool are obliged to monitor the whole return process in accordance to Article 50(3) of EBCG Regulation (EU) 2019/1896.

⁹⁶ The legal framework of the BBU mandate is the BGBl. I Nr. 53/2019 (BBU Establishment Act)

6.1. Spotlight on Frontex

Frontex, the European Border and Coast Guard Agency, has become a central figure in the EU's efforts to manage migration, mainly through coordinating and monitoring forced return operations. The Agency was established in 2004⁹⁷, and its role has grown significantly, now encompassing the important task of ensuring that forced return operations adhere to human rights standards.⁹⁸ This chapter explores the Agency's mandate, the legal frameworks guiding its monitoring operations, and potential challenges in protecting human rights, drawing on evaluation from various stakeholders and relevant case law.

6.1.1. Frontex's Mandate in Monitoring Human and Fundamental Rights on Forced Returns

In addition to the EU's Return Directive (2008/115/EC), which sets out common standards for the return of irregular migrants, prioritising voluntary return, the EBCG Regulation (EU) 2019/1896 reinforces its role in coordinating return operations and monitoring human rights compliance. Since 2017, in line with Regulation (EU) 2016/1624⁹⁹, Frontex has established a pool of forced return monitors¹⁰⁰ who oversee the compliance of return operations with human rights standards. The EBCG Regulation 2019/1896 declares that these monitors are trained to identify and report potential violations, ensuring that operations are conducted within legal and ethical boundaries.¹⁰¹

Additionally, the Fundamental Rights Officer within the Agency's Fundamental Rights Office oversees the adherence to fundamental rights, investigating complaints and recommending corrective actions as necessary. The complaints mechanism¹⁰² allows individuals subject to return operations to file complaints regarding human rights violations, which the Fundamental Rights Office addresses to ensure accountability. The efficiency of

⁹⁷ On the legal foundation Council Regulation (EC) 2007/2004

⁹⁸ Article 110 of the Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 outlines the roles, responsibilities, and operational guidelines for fundamental rights monitors within the context of European integrated border management.

⁹⁹ Regulation on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, 14. September 2016.

¹⁰⁰ It was anticipated that 40 officers would have undergone training by 5 December 2020. However, a letter from Monique Pariat (DG Home) indicates that, as of 18 December 2020, not a single fundamental rights officer had been recruited. The aforementioned letter is available for public access here: accessed on 2.8.2024; As of October 2022 the pool of Frontex monitors counted 60 persons from 24 EU Member States.

¹⁰¹ compare Article 110 of the Regulation on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, 13 November 2019.

¹⁰² Article 111 of the Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

this complaint's mechanism has been the subject of considerable criticism in the past. A systematic examination of the obstacles that impede optimal functionality should facilitate the identification of measures for enhancing the mechanism's performance.

6.1.2. The Challenges of Frontex's Complaint Mechanism

In the context of European border management, the complaints mechanism¹⁰³ is an indispensable instrument for protecting fundamental rights. However, it is essential to identify and address potential risks that could undermine its credibility and provide room for improvement.

The extensive scope of the complaints mechanism, which permits any individual adversely affected by the Agency's actions or omissions to submit a complaint¹⁰⁴, may potentially pose a risk. While this inclusivity is essential for comprehensive oversight, it also means that the mechanism may face a high volume of complaints, which could impact the management of the complaints in a timely manner and minimise the risk of backlogs, but reports from the Frontex Fundamental Rights Office from 2023 show that this is not the case, as just four complaints have been filed and all have been declared inadmissible.¹⁰⁵

Regarding admissibility, the selection of substantiated complaints involving concrete violations of fundamental rights can be a challenging process. This is particularly true when the criteria for substantiation are unclear or inconsistently applied. There is a risk of legitimate complaints being dismissed or frivolous ones being accepted, which could undermine the credibility and effectiveness of the mechanism. The bi-annual report from Frontex Fundamental Rights Office *Observations to Return Operations conducted in the 2nd half of 2023* reported that in several cases, the returnees had not been provided with sufficient information on the complaint mechanism, and due to procedural issues, one case was declared inadmissible, as it was not filed by the person directly involved in the incident.¹⁰⁶ It would be beneficial to gain further insight into the extent to which these formalities are enforced and to ascertain whether there are exceptions for individuals with disabilities or migrants who, for instance, lack the ability to read or write.

¹⁰³ The legal base for the establishment and operation of the fundamental rights complaint mechanism is to be found in Article 111 of the EBCG, which also includes the right to submit complaints, the admissibility, the handling, procedures, the follow-up, the Member States responsibility, and data protection in accordance with Regulation (EU) 2018/1725 by the Agency and Regulation (EU) 2016/679 and Directive (EU) 2016/680

¹⁰⁴ EBCG, Article 111 (2).

¹⁰⁵ cf. Frontex Fundamental Rights Office *Observations to Return Operations conducted in the 2nd half of 2023*, page 19.

¹⁰⁶ Ibid.

The mechanism's effectiveness may be compromised if the role of the fundamental rights officer in handling, reviewing, registering, and forwarding complaints and ensuring concrete follow-up actions is not adequately supported. Furthermore, the professional handling of complaints entails communication with the complainant. Insufficient information regarding the complaint procedure and the status of the complaint can create mistrust and dissatisfaction, which can, in turn, affect the effectiveness of the mechanism, the entire system, and the reputation of the Fundamental Rights Office. It is similarly evident that the handling of incidents reported by the Fundamental Rights Officer to the Fundamental Rights Office is open to question, particularly regarding the degree of objectivity applied. The Committee on Prevention of Torture (CPT) considered in its report, after ad-hoc participation in a forced-return operation from Germany to Pakistan, that the complaint mechanism procedure should be more accessible to the returnees.¹⁰⁷ The question of whether it would not be preferable to set up a fully independent, separate monitoring body¹⁰⁸ is still to be determined.

In conclusion, while the complaints mechanism represents a crucial element of European border management, its efficacy hinges on mitigating the risks, as mentioned above. Ensuring independence, managing a substantial volume of complaints, applying admissibility criteria consistently, supporting the fundamental rights officer, maintaining efficient communication, enforcing follow-up actions, protecting personal data, providing comprehensive reporting, ensuring accessibility, securing cooperation from Member States, and allocating sufficient resources are all vital to ensuring effectiveness and credibility.

6.1.3. Frontex Code of Conduct

Frontex's responsibilities include coordinating joint return operations (JROs)¹⁰⁹ among Member States, following the Code of Conduct, and ensuring that the processes respect

¹⁰⁷ Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 4-7 September 2023, page 3. On 5 September 2023, the CPT delegation observed a joint return operation (JRO) by air from Germany to Pakistan, via Cyprus. The JRO was conducted with the support of the European Border and Coast Guard Agency (Frontex). The delegation observed all phases of the removal operation, including the preparations and the flight phase to Pakistan. During this JRO, 51 returnees (including 38 from Germany) were handed over to the Pakistani authorities in Islamabad. <https://rm.coe.int/1680af2743>

¹⁰⁸ The European Ombudsman has also taken up the matter and launched an investigation. For the decision, see Decision in OI/5/2020/MHZ on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, 15 June 2021.

¹⁰⁹ An operation aimed at the removal of illegally present third-country nationals by air. The initiative for such an operation is to be taken by one Member State, which will invite the participation of other Member States.

“human dignity, the rights to life, the principles of non-refoulement, the right to asylum, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the rights of the child, the rights of the protection of personal data and non-discrimination, and the right to respect for private and family life” Article 4., Code of Conduct

The Code of Conduct has been developed based on the Common guidelines on security provisions by air (Annex to Decision 2004/573/EC), fully respecting Article 8(5) and Article 8(6) of the Return Directive.¹¹⁰ Chapter 8 deals with the monitoring system of JRO and covers not only the scope of nature but also the responsibilities of the monitors¹¹¹.

As of October 2022, the pool of forced-return monitors comprised 60 monitors from 24 EU Member States and Schengen Associated Countries.¹¹² Additionally, five of the 46 fundamental rights monitors recruited by the Frontex Fundamental Rights Office were also nominated to the pool as forced-return monitors.¹¹³ The day-to-day management and deployment of these monitors to specific forced-return operations are primarily overseen by Frontex's Capability Programming Office (CAP), the European Centre for Returns (ECRET), and the Fundamental Rights Office (FRO), and the Training Unit handles all training related activities for the pool of forced-return monitors.

Moreover, the Fundamental Rights Officer prepares bi-annual reports on return operations¹¹⁴, based on the analysis of monitoring reports and presents these observations to the Frontex Management Board. The report includes data on return monitoring, observations and findings observations regarding the treatment of vulnerable groups, logistical arrangements, and the conduct of escort personnel. Furthermore, processes for documenting serious incidents and complaints arising during return operations, emphasising the importance of transparency and accountability, are included, as well as good practices and recommendations for improvement.

¹¹⁰ cf. Article 2, Code of Conduct for Joint Return Operations coordinated by Frontex, p. 5.

¹¹¹ cf. idem. p.18-19.

¹¹² Between 2016 and 2021, the Forced-Return Monitoring (FReM) II and III projects helped Frontex establish its pool of forced-return monitors. These projects were implemented in collaboration with the International Centre for Migration Policy Development (ICMPD), the European Union Agency for Fundamental Rights (FRA), and several EU Member States. Co-funded by the Asylum, Migration and Integration Fund of the European Union (AMIF), the FReM III project's goal was to ensure and protect the fundamental rights of returnees while enhancing the independence and transparency of forced-return monitoring based on a common European framework. Additionally, the FReM projects supported EU Member States in increasing the implementation of the EU Return Directive (2008/115/EC) and improving their monitoring capacity.

¹¹³ These fundamental rights monitors operate independently on behalf of the Fundamental Rights Officer and contribute to monitoring return activities in Member States.

¹¹⁴ Observations to Return Operations conducted in the 2nd half of 2023, Frontex Fundamental Rights Officer.

6.1.4. Criticism and Controversy Surrounding Frontex Role in Human Rights Monitoring

Frontex has faced considerable criticism over the years, particularly in relation to its adherence to its own code of conduct. Allegations and media reports have repeatedly called into question the agency's commitment to human rights and the fair treatment of migrants.

It is widely acknowledged that one of the most significant allegations levelled at Frontex pertains to the illicit interception of asylum seekers, notably in the Aegean Sea. A number of investigations have indicated that Frontex vessels were either complicit in, or failed to prevent the Greek authorities from forcibly returning migrants to Turkey without giving them the opportunity to apply for asylum.¹¹⁵ In 2020, an investigation by the media revealed evidence indicating that Frontex had been involved in pushbacks in the Aegean Sea.¹¹⁶ Video footage and internal documents demonstrated that Frontex units were present during pushbacks conducted by Greek forces, prompting significant inquiries into the agency's role and obligations. Questions of transparency and accountability have also plagued Frontex, as numerous NGOs and human rights organisations have criticised the Agency for failing to provide sufficient information about its operations and the treatment of migrants. This lack of transparency has fuelled suspicion and made it difficult for external bodies to hold Frontex to account. In 2021, pressure on Frontex intensified following leaked internal reports and whistleblowing testimonies, which revealed that the Agency's management had either ignored or failed to act on reports of human rights abuses. This ultimately led to the resignation of Frontex's Executive Director, Fabrice Leggeri, who left his post in the face of mounting criticism from the European Parliament and other key stakeholders.¹¹⁷

To restore its reputation and ensure the fair and humane treatment of migrants, as well as a potential future role in connection with the Italy-Albania MoU or similar externalisation agreements, Frontex must take decisive steps. First and foremost, the agency must increase transparency. The introduction of more rigorous reporting and documentation procedures for all operations is essential, as ensuring that information on return operations, including the treatment of migrants, is made publicly available in a timely and accessible manner will help to rebuild trust. In addition, establishing an independent oversight body to review and report on Frontex's activities regularly will provide much-needed accountability. Frontex should

¹¹⁵ ECRE, Greece: Ongoing Pushbacks and Tragedies – More Reports Highlight the Country's Inhumane and 'Failing' Asylum System – ECtHR Rules Against the Authorities, 24 January 2024; S. van Brunnersum, Frontex investigates migrant pushback allegations following German media reports, 24 May 2024.

¹¹⁶ The pushback allegations against Frontex are mentioned here only for the sake of completeness, and as they are not subject of this thesis, they will not be discussed further.

¹¹⁷ see Statement of Frontex Executive Management following publication of OLAF report, 14 October 2022.

further develop the system for reporting and addressing human rights violations, ensuring that all misconduct allegations are properly and impartially investigated. This should include appropriate consequences for those found responsible. Fostering a culture of accountability within the Agency through regular training on human rights and ethical conduct for all staff will further strengthen these efforts. Through stakeholder engagement consultations with NGOs on a regular basis, human rights organisations can provide valuable feedback and help improve practices. Establishing a formal advisory committee with representatives from civil society and human rights groups will provide ongoing input and oversight.

Finally, improved training and resources for Frontex staff are essential. Comprehensive training on human rights law, ethical behaviour and the proper treatment of migrants will enable staff to carry out their duties in accordance with the Agency's Code of Conduct. Ensuring that staff has access to the necessary resources and support will enable them to carry out their tasks effectively and ethically. By taking these steps, Frontex can work towards building trust, ensuring the fair and humane treatment of migrants and upholding its commitment to human rights. While the mandate of Frontex, in alignment with the EU Regulation (EU) 656/2014¹¹⁸, extends beyond the mere safeguarding of borders and providing assistance to EU Member States in this regard, it also encompasses the responsibility for search and rescue operations at sea.

Nevertheless, the primary accountability for these operations lies with the respective national authorities. In light of the Italy-Albania agreement, a crucial point for consideration is whether and to what extent Frontex will be involved in the transfer of migrants rescued at the Mediterranean Sea during search and rescue operations, as well as the involvement in returns of persons non-eligible to stay in Italy. The role of the Agency in this matter still needs to be addressed.

6.2. Spotlight on Italy

The objective of the following is not to identify a single perpetrator but to utilise the identified difficulties and challenges to improve the prevailing situation as much as possible through concrete measures. Furthermore, it should serve as an illustrative example for other Member States to reflect on their systems in place and the current reality in order to achieve the

¹¹⁸ See Article (4) of the Regulation (EU) No. 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 15 May 2014. This Regulation was fully integrated and referred to in Regulation (EU) 2016/1624 and now in Regulation (EU) 2019/1896.

overarching goal of protecting the human rights of those who find themselves in a particularly vulnerable situation after deciding to leave their country of origin irregularly.

6.2.1. The Necessity of Balancing Humanitarian Obligations and National Interests

Italy is bound by several international and regional human rights obligations, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture (CAT). These treaties impose strict limitations on forced returns, especially where there is a risk of torture, inhuman or degrading treatment, or punishment in the destination country. Due to its geographical location, Italy has historically been a primary destination for individuals seeking asylum and refuge in Europe. The country has been particularly affected by the influx of people fleeing conflict and persecution and opting for an economic improvement in their living conditions. Over the past decade, Italy has been subjected to fluctuating waves of asylum seekers, each of which has tested the resilience and capacity of its asylum system. The situation is characterised by a complex interplay of national policies, EU regulations and the realities of managing large-scale arrivals. Notwithstanding ongoing endeavours to optimise procedures and enhance reception conditions, Italy's asylum system persists in confronting considerable challenges, including overcrowded reception centres, protracted processing times and prolonged detention times. It is, therefore, unsurprising that alternative approaches and possibilities to improve the overall migration management are being considered. However, it is uncertain whether externalisation will lead to the expected improvements if the system itself is not fundamentally reformed.

The existing discourse on the subject of asylum and return has already demonstrated that the primary challenges arise from the fact that individuals are typically held for an unduly lengthy period prior to their return. The practice of detention has been the subject of criticism from numerous non-governmental organisations (NGOs) international and national human rights protection mechanisms. This chapter aims to provide a concise overview of the primary challenges during forced return operations based on findings from reports from the National Preventive Mechanism, Frontex Fundamental Rights Officer and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

In Italy, the National Guarantor for the Rights of Persons Deprived of Liberty acts as the main National Preventive Mechanism (NPM) under OPCAT¹¹⁹, which, according to its mandate, also monitors forced returns.¹²⁰ The following constitutes a comprehensive overview of the observations recorded by the NPM, accompanied by a concise explanation in order to provide a deeper understanding of the current situation in Italy, which seems to be of particular relevance in light of the MoU discussed in part one of this thesis with a special focus on the detention situation before a return operation.

The detention of migrants is governed by the Italian Legislative Decree No. 286/1998 (Consolidated Immigration Act), Article 13, which addresses detention for the purpose of expulsion, allowing for initial detention for up to 30 days, which can be extended by another 30 days. Article 14 allows for the extension of detention up to a maximum of 90 days. Under exceptional circumstances (e.g., delays in obtaining travel documents), detention can be extended for an additional 60 days, reaching 180 days in total.

In its annual report to the Parliament, the Italian NPM examines the deprivation of liberty of migrants in Italy, and its findings criticise the frequently futile and unjustified duration of migrants' detention in centres for the return of persons (Centri di Permanenza per il Rimpatrio CPRs) while awaiting deportation.¹²¹ Amnesty International has also articulated profound concerns with regard to the administrative detention of migrants and asylum seekers in Italy.¹²² The organisation draws attention to the rights of asylum seekers' access to justice and cautions that the Italy-Albania agreement may result in further human rights violations and an increased prevalence of arbitrary detention, assuming a similar treatment of migrants as in detention facilities in Italy, such as the CPR's, which have been reported to fail to meet international standards. Concerns include sub-standard living conditions, inadequate access to legal assistance, and lack of proper health care for detainees.

In the case *J.A. and Others v. Italy*¹²³, the ECtHR ruled that Italy violated the rights of Tunisian sea migrants, who were, after being rescued at sea, detained for ten days in poor conditions on the island of Lampedusa, without clear and accessible legal basis and without

¹¹⁹ Mandate is covered under Article 7 of Decree-Law 146 (2013) updated into Law 10 (2014) and according to provisions of Articles 17-23 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, signed by Italy 2003, ratified 2013.

¹²⁰ The Optional Protocol to the United Nations Convention against Torture (OPCAT) is the international instrument establishing the Subcommittee on Prevention of Torture and entrusting national bodies – the National Preventive Mechanisms (NPMs) – with a role in the implementation of the Convention, as monitoring bodies.

¹²¹ cf. p. 45. Report to Parliament of the National Guarantor for the rights of persons deprived of personal liberty 2023.

¹²² Amnesty International Public Statement, Liberty and Dignity: Amnesty International's Observations on the Administrative Detention of Migrant and Asylum-seeking People in Italy, 4 July 2024.

¹²³ Application no. 21329/18

the possibility to challenge their defacto detention before court, constituting a violation of Article 3, Article 13 in connection with Article 3, as the applicants did not have an effective remedy to challenge the conditions of their detention, Article 4 of Protocol No. 4, as a collective expulsion without an individual assessment of their cases was carried out. Italy was found to have violated Article 5 of the ECHR because the applicants' detention was unlawful and arbitrary, and they were not adequately informed of the reasons for their detention. Further, the court noted that Italy had failed to comply with its interim measures under Article 34, as the authorities had not taken steps to protect the applicants from being sent back to Tunisia pending the Court's decision. The case of *J.A. and Others v. Italy* illustrates the systemic challenges in Italian practice. It must be added that despite the expectation that the new centres in Albania will not fall below the appropriate standard, recent media reports have indicated that the accommodation provided for migrants does not meet the required international standards in terms of size and fragmentation.¹²⁴ Under the new MoU, and given that the case involved Tunisian nationals and that Tunisia is listed as one of 22 safe third countries, the migrants could be transported to Albania, then be subjected to an accelerated procedure, and most likely ordered to leave the country.

These circumstances pose a major systemic challenge with an immediate effect on the condition of migrants, who find themselves in a situation lacking activity and uncertainty, which exacerbates feelings of failure and internal emptiness. Italy's current approach, which is primarily focused on forced returns and restrictive measures, is perceived as lacking a long-term perspective. However, a considerable number of migrants in Italian detention centres are held without realistic prospects of return. Figures show that in the year 2022, of the 6,383 migrants detained in centres, only 3,154 were actually returned.¹²⁵ This illustrates the systems inefficiency and the disconnection between the practice of detention and its intended legal purpose. The operationalisation of the MoU will show if the efficiency of the procedures will occur.

It needs to be mentioned that the report to Parliament of the National Guarantor for the rights of persons deprived of personal liberty highlights that a significant number of migrants are detained in contravention of the legal standards set forth by the European Convention on Human Rights and the Return Directive. Approximately half of the migrants who are detained

¹²⁴ According to media reports 4 persons will be hosted on 15 square meters. cf. Italy's 'Guantanamo': Inside the centres for migrants rescued from boats set to open in Albania. 1. August 2024.

¹²⁵ Report to Parliament of the National Guarantor for the rights of persons deprived of personal liberty 2023 cf. p. 46.

are held without a clear legal purpose, which renders their detention an unjustified deprivation of time and liberty.¹²⁶

Notwithstanding these challenges, the report acknowledges the notable degree of cooperation between the National Guarantor and the Department for Civil Liberties and Immigration authorities. This collaboration has entailed the sharing of data and the coordination of forced return operations. However, public discourse and the language used to address migration issues have not effectively increased awareness of the structural nature of migration, nor have they adequately considered both the positive and negative aspects of the phenomenon.¹²⁷ At the time of the writing, the Italian government has yet to comment on the aforementioned report.

The discussed findings could indicate that migrants who face deprivation of liberty under the Memorandum of Understanding between Italy and Albania will be confronted with similar realities. It is, therefore, of great importance to ensure that all necessary measures have been taken to ensure the best possible preparation before receiving migrants in the centres in Albania.

As previously stated, two additional sources that have documented forced returns from Italy, in particular, should be utilised to support the observations of the Italian NPM. The recommendations and findings from the Fundamental Rights Officer (Frontex) propose that Member States, in general, should refrain from the use of restraints as a preventive measure during return operations. A number of incidents have been reported involving Spain, Germany, France and Greece, which have primarily involved violations of the rights of returnees to dignity and privacy. Such incidents occurred primarily due to the utilisation of unauthorised restraining techniques that did not respect privacy and physical security checks. The returnees were held in restraint in the same waiting area as families with children, which could give rise to psychological distress and safety concerns for vulnerable groups.¹²⁸

The report indicates that Italy was one of four principal Member States responsible for the organisation of return operations, with forty-five return operations in the second half of the year 2023. It is noteworthy, that monitors were present at only four repatriations.¹²⁹ In light of this, it is pertinent to inquire as to how Italy, as an EU Member State bound by the

¹²⁶ Ibid. cf. p. 75.

¹²⁷ Ibid. cf. p. 75-79.

¹²⁸ Observations to Return Operations conducted in the 2nd half of 2023, Frontex Fundamental Rights Officer; pages 8-18.

¹²⁹ Ibid. figure 3 and footnote 10, page 5.

tenets of EU law, can ensure the prevention of human rights violations, both during the transfer to and from Albania and in the event of a return to the country of origin.

Discussions with Italy's national return services revealed the necessity for individual risk assessments prior to return operations. As this seems to be a known challenge, the Italian authorities should ensure that the risk assessment is done correctly before sending migrants to their country of origin. Furthermore, the report from the fundamental rights officer emphasised that the use of restraints should not be used as a preventive measure, but rather as a means of last resort. Consequently, it was recommended that additional training be provided for escort officers, with a particular focus on de-escalation and effective communication. It is of paramount importance to address the issues of restraint usage and ensure compliance with fundamental rights to enhance the integrity of return processes in Italy, especially within Italy's jurisdiction in externalised centres.¹³⁰

The CPT, part of the Council of Europe, monitors the treatment of individuals deprived of their liberty, including those in immigration detention and during forced return operations and conducts regular visits to detention facilities and monitors deportation processes to ensure compliance with the European Convention on Human Rights, particularly Article 3. The findings of the delegation who monitored a forced return flight will be presented and analysed and are intended to highlight areas of past ineffectiveness and offer potential for future improvement. This will facilitate the formulation of conclusions applicable to the present and future contexts, and should the planned collaboration between Italy and Albania materialise, it is imperative to devote particular attention to this aspect. However, it should be noted at the outset that even though the CPT's ad-hoc participation in a return flight was some time ago, namely in 2015, it has not been possible to ascertain whether the recommendations made have been fully implemented by the Italian authorities.¹³¹

The CPT conducted an ad hoc visit to Italy from December 16 to 18, 2015, to observe the treatment of foreign nationals during a Joint Return Operation (JRO) from Rome to Lagos, Nigeria. This operation was coordinated by Frontex, with Italy as the organising Member State, alongside Belgium and Switzerland. The delegation observed the entire process from the Identification and Expulsion Centre (CIE) Ponte Galeria to the handover of detainees to Nigerian authorities in Lagos. The CPT's findings indicated that the treatment of detainees during the JRO was professional and respectful, with no ill-treatment observed.

¹³⁰ cf. Observations to Return Operations conducted in the 2nd half of 2023, Frontex Fundamental Rights Officer; pages 8,9,22.

¹³¹ Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 16 - 18 December 2015.

Initially, 46 Nigerian detainees were planned for return, but only 28 were eventually returned due to various issues, including appeals against their asylum applications.¹³² Among those removed were 13 women, all of whom had their asylum applications rejected and were appealing the decisions in court. The decision of the Italian authorities not to remove seven of the women was taken after the CPT's delegation had visited CIE Ponte Galéria, where it held interviews with the 13 Nigerian women listed to be removed. In light of these circumstances, the CPT has expressed reservations regarding the legislation and recommended that the entirety of the asylum procedure, including the appeal process, be concluded prior to the implementation of the return, as the return of individuals in the absence of concluded procedures contravenes the right to respect for private and family life.¹³³

The return of an individual by force, while the appeal decision is still pending, may potentially violate their right to an effective remedy. This right is enshrined in several international human rights instruments, including Article 13 of the ECHR, which guarantees the right to an effective remedy before a national authority for violations of rights and freedoms set forth in the Convention, and Article 47 of the Charter of Fundamental Rights of the European Union, which provides for the right to an effective remedy and to a fair trial, thereby ensuring that individuals have access to legal recourse to challenge actions that affect their rights. The forcible return of an individual while their appeal is pending deprives them of the opportunity to have their appeal heard and decided upon, thereby undermining the effectiveness of the legal remedy available to them. Furthermore, this action may contravene the principle of non-refoulement¹³⁴, which prohibits the return of individuals to a country where they may face persecution, torture, or inhumane treatment.

In order to mitigate the risk of a breach of the principle of non-refoulement, the CPT recommends that the Italian authorities guarantee that a foreign national is not returned when a court has suspended the removal of an individual or if a request for suspension of removal is pending before a court, or if such a request for suspension is legally possible. The Italian authorities should ensure that the aforementioned conditions are met prior to the removal of the individual in question. It is, therefore incumbent upon the Italian authorities to ensure that all relevant actors, in particular the escort leader, are kept fully informed of the status of the

¹³² Ibid. cf. page 9.

¹³³ The delegation found that the first instance Territorial Commission for Rome and its appeal body, the Rome City Court, have differing views on the safety of Nigeria for returning irregular migrants. While the Territorial Commission deems Nigeria generally safe, except for areas impacted by Boko Haram's activities, the Rome City Court has, in several cases, granted international protection to individuals from the southern part of Nigeria. This is based on the court's assessment of a "generalized climate of conflict with uncertain boundaries" in that region. see page 9 (16); reference to relevant decisions to be found in footnote 15 of the CPT report.

¹³⁴ see footnote 1 of this document.

legal proceedings of the detainees up until the moment of handover. Firstly, it is a precondition that the detainees are subject to a return operation and their legal counsel is aware of the removal operation; secondly, a "last call procedure"¹³⁵ must be implemented for return operations conducted by air.¹³⁶

The European Court of Human Rights case law shows that in asylum cases an appeal against a negative initial decision should lead to an automatic suspension of deportation¹³⁷, especially if the return will lead to a potential violation of a fundamental right. This applies to assessing the risk of non-refoulement, as the previously discussed situation with Nigerian returnees clearly demonstrated. According to data provided by the European Union Asylum Agency (EUAA), 27% of all asylum applications in Italy in May 2024 were made by Nigerian nationals, and Nigeria is one of 22 countries identified as safe third country.¹³⁸ It is crucial to note the high overall application numbers in Italy, as based on the available data from EUAA, over 15,000 asylum applications were filed in May 2024. Additionally, over 195,000 asylum procedures are currently pending, with no concluded cases in the period, consequently resulting in no positive asylum decisions for the month of May 2024.¹³⁹ It is evident that the high migration pressure cannot be ignored, and it is therefore comprehensible that possible new solutions are being considered. However, at the same time, it is regrettable that, at this juncture, the modalities of implementing national and EU-level rights remain uncertain, particularly given that the feasibility of these measures often bears little correspondence to the prevailing reality.

6.2.2. The Nexus Between Training, Monitoring and Effective Forced Returns

In its annual reports, the Fundamental Rights Agency identifies the majority of the difficulties encountered relating to the following areas: transparency, independence, phases of the monitored return, the types of the return operation and funding.¹⁴⁰ The recently released statistical data from the EU Commission indicates that only forced returns (no returns on a voluntary base¹⁴¹) were conducted from Italy during the initial three-month period of 2024.¹⁴²

¹³⁵ The last contact between the representatives of the State Police on board the plane and their headquarters for reasons of verification whether a last judicial injunction has been issued by a national Court or the European Court of Human Rights.

¹³⁶ cf. report of the CPT, page 10.

¹³⁷ See f.e.g.: *Jabari v. Turkey* - 40035/98; *M.A. v. Cyprus* - 41872/10; *De Souza Ribeiro v. France* - 22689/07;

¹³⁸ see EUAA, latest trends on asylum; <https://euaa.europa.eu/latest-asylum-trends-asylum>

¹³⁹ Ibid. overview of pending cases for EU+ countries

¹⁴⁰ *Forced return monitoring systems – 2023 update*. (2023, November 28). European Union Agency for Fundamental Rights.

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¹⁴² EU Commission, Eurostat, statistics on forced returns in the first Quarter 2024.

This fact highlights the necessity of training for those acting as escorts, and highlights the important role of human rights observers in forced returns.

Those engaged in the sensitive process of forced returns must possess not only the appropriate personal attributes, including a high level of empathy and understanding,¹⁴³ but furthermore, it is advisable that escort officers must complete specialised training and have the chance to participate in ongoing training courses and supervision. Nevertheless, Italy's NPM's observations revealed that over 40% of Italian personnel escorting individuals on forced returns lack basic escort training required for such a sensitive task.¹⁴⁴ This is of particular significance, as return operations are inherently prone to the potential for human rights violations. In addition to that, and particularly in the light of the use of restraints, adequate training is often recommended.¹⁴⁵

The forced return of individuals, frequently occurring under contentious circumstances, represents one of the most challenging aspects of contemporary migration management. In such circumstances, the potential for human rights violations to occur is considerably heightened, particularly for those returning who may already be in a vulnerable position. The role of monitors in safeguarding the human rights of returnees during the forced return process is of utmost importance, as they act as objective observers, ensuring that the authorities' actions comply with international human rights standards. The necessity of monitors in this context is underscored by the Guidelines on Forced Returns¹⁴⁶, a comprehensive framework designed to guarantee that the process of returning individuals is conducted with due respect for their dignity and rights. In accordance with these guidelines, the involvement of monitors is not merely a procedural formality; rather, it constitutes a substantive safeguard that provides oversight and transparency throughout the return process. The responsibility of the monitor is to oversee the entire forced return process, from the initial decision-making stage to the physical return of the individual to their country of origin.¹⁴⁷ It is their responsibility to guarantee that each stage of the process is conducted in accordance with the principles set forth in the Guidelines on Forced Returns, particularly those pertaining to the prohibition of torture, inhuman or degrading treatment, and the right to life.¹⁴⁸

¹⁴³ See Guideline 18. Use of escorts, in: Council of Europe, twenty guidelines on forced returns, 2005. p.50.

¹⁴⁴ cf. B1. training of the NPM's report.

¹⁴⁵ See guideline 19. Means of restraint, in: Council of Europe, twenty guidelines on forced returns, 2005. P. 52.

¹⁴⁶ Council of Europe, twenty guidelines on forced return, September 2005.

¹⁴⁷ For the differences between Member States in which phases of the return procedure are monitored see footnote no. 76 of this thesis.

¹⁴⁸ Articles 3 and 2 of the ECHR.

The presence of monitors serves to deter potential abuses, while their ability to intervene if they witness actions that could lead to human rights violations provides an additional layer of protection. The reports and observations produced by monitors serve as critical evidence for holding the relevant authorities accountable and ensuring that any breaches of rights are addressed. Such oversight is of particular importance during the physical return phase, when the risk of excessive force, mistreatment, or psychological trauma is particularly high. The deployment of monitors enhances transparency and accountability in the context of forced returns. Their independent and impartial role enables them to provide an objective assessment of the return process. Such transparency contributes to establishing trust in the process, both among those who are returning and within the broader international community. Furthermore, it guarantees that any allegations of mistreatment can be corroborated with verifiable evidence, which is vital for maintaining the rule of law.

The documentation of observations and reporting of violations by monitors facilitate establishing a culture of accountability. Such reports can be employed to facilitate a review and potential enhancement of the forced return procedures, thereby ensuring that they not only align with the requisite legal standards but also reflect the most efficacious practices for protecting human rights. To ensure the effective performance of their duties, the Guidelines on Forced Returns recommend that monitors be granted unrestricted access to all relevant information and phases of the return.

The psychological and physical well-being of returnees is another crucial aspect of the monitor's role. The stress and fear associated with forced returns can be overwhelming, and the presence of an independent monitor can help alleviate some of this anxiety by ensuring that returnees are treated with respect and dignity. Furthermore, monitors can ensure that any specific needs or vulnerabilities of the returnees, such as medical conditions or mental health issues, are appropriately addressed during the return process.¹⁴⁹

The thematic report on monitoring activity of forced-return operations of foreign nationals of the Italian NPM reveals that it is not uncommon for tensions to arise between escort officers and monitoring persons if the former has not received sufficient guidance regarding the latter's role and the importance of monitoring return operations in accordance with national and international law. For the monitor to fulfil his/her mandate, it is vital that

¹⁴⁹ See guideline 20. Monitoring and remedies 3. In Council of Europe, twenty guidelines on forced return, September 2005. p. 56.

they have access to all relevant information, including the state of health of the individual in question, as it was already stressed before.¹⁵⁰

7. Standards and Training for Human Rights Monitors in Forced Return Operations

In addition to the 20 Guidelines on forced returns from the Council of Europe, different actors developed further training material on return operations, which shall be examined here.

The OHCHR Manual on Human Rights Monitoring provides a comprehensive framework for understanding the legal and ethical considerations with respect to the field of migration. Chapter 26 deals with selected human rights issues and provides easy, understandable legal definitions and concrete sample questions for adequately assessing the given situation and identifying challenges and how to overcome these by giving recommendations. The guidance given in the manual includes proof of the legality of the return order, the degree to which adequate information in an understandable form has been received, and whether access to legal representation was provided. Questions, for example, whether there is a right to appeal and whether the procedures and their implementation are adequate, need to be asked before the return procedure is carried out.¹⁵¹

Another important and comprehensive manual for monitoring forced returns is the Forced-Return Monitoring (FReM), which outlines key principles, guidelines, and practical information for monitors involved in the forced-return process within the European Union. The reader emphasises the importance of aligning forced-return operations with European and international human rights standards and provides detailed instructions on responsibilities and processes. The document details the role of forced-return monitors, who are tasked with observing the entire return process, from pre-departure to handover in the receiving country. Their responsibility is to ensure transparency, document any potential rights violations, and provide objective reports on the operations. The reader provides a step-by-step guide on how to monitor forced-return operations effectively and includes instructions on how to prepare for monitoring missions, what to observe during the operation, and how to report findings accurately and impartially. The document addresses common challenges faced by monitors, such as potential conflicts of interest, the psychological impact of monitoring returns, and the need to maintain neutrality and professionalism.¹⁵²

¹⁵⁰ See 7.3, p. 26 of this thesis.

¹⁵¹ OHCHR Manual on Human Rights Monitoring, p. 47. The provided challenges that Italy faces in respect to return operations refer to the report of the CPT, which has been discussed extensively in this thesis.

¹⁵² Frontex, ICMPD, FRA, Forced-Return Monitoring, background reader, version 2021.

8. Conclusion

Migration towards Europe is a long-term global phenomenon rather than a temporary surge. In light of the aforementioned circumstances, it is imperative that European countries, particularly those with the most significant geographical exposure, implement comprehensive and systematic policies aimed at integrating and stabilising migrants. Migration is driven by a number of factors, including the ongoing occurrence of conflicts and the increasingly evident impact of climate crises. Furthermore, European market practices frequently contribute to the impoverishment of resource-rich regions, thereby exacerbating the motivation for people to migrate. Serious human rights violations, breakdown of public order, and widespread corruption in the countries of origin fuel the desire for a life in dignity and often lead to migration in an irregular manner.

The thesis aimed to provide a comprehensive overview of the existing externalisation practices with a special focus on the Italy-Albania Memorandum of Understanding. The new approach of transferring migrants, who are most likely to receive an order to return to their country of origin, to a country outside the European Union must be subject to close monitoring in the field of asylum and return to ensure compliance with all international human and fundamental rights.

The situation of human rights monitoring in Italy with regard to forced returns remains a matter of contention, with considerable challenges pertaining to the safeguarding of migrants' rights. Although Italy is legally obliged to adhere to international human rights standards, the analysis has revealed persistent concerns regarding the sufficiency of the legal and procedural safeguards currently in place. It is of paramount importance to guarantee effective monitoring, judicial oversight and compliance with international obligations in order to prevent the unlawful return of individuals to circumstances where they may be subjected to severe harm. The jurisprudence of the ECHR and the CJEU clearly shows where violations occurred in the past, but the analysis of the violations allows for new ones to be prevented. The role of human rights monitors, be it in reception facilities or on forced returns, is inevitable. To maintain comprehensive oversight, it is essential that monitors be granted unimpeded access to all areas in the reception centres and utilised during the return process.

Research has shown that many NGOs and academia have dealt with the phenomenon of externalisation of migration. However, few have connected forced returns to be one primary outcome of the transfer process. It is crucial that monitors are entitled to participate in all phases of the return process, which means beginning from pre-return briefing and the post-return debriefing. This allows for the communication of their findings and observations, and

such involvement is identified to be of critical importance for the provision of feedback and the assurance of continuous improvement of all involved. However, the role of monitors is of even greater significance, as in the event of any irregularities being observed by monitors during the return operation, they are empowered to report these issues to the head of the return operation or the escort leader. It is imperative that they refrain from interfering with the operational process, ensuring that their supervisory role does not impede the procedure. In circumstances where inter-agency monitoring is viable, monitors are permitted to observe on behalf of other member states participating in the return operation, provided that prior agreement has been reached. This collaborative approach has the potential to enhance the consistency and thoroughness of monitoring across different jurisdictions, which is essential during forced return operations by air. The existing training manuals cover topics such as non-refoulement, the prohibition of inhuman or degrading treatment, and the rights of vulnerable individuals, including children and victims of trafficking. Practical training contributes to more humane and lawful operations, fostering trust and cooperation between migrants and authorities. A substantial corpus of training manuals has been identified that disseminates theoretical knowledge in this domain. However, it is imperative to guarantee that the training incorporates a practical component in which the monitors collaborate closely with the escorts to pursue a unified objective: the safeguarding of all internationally applicable human rights.

A thorough examination of the new Italy-Albania agreement has identified several significant gaps, which pose a substantial risk of human rights violations. To mitigate these risks, the responsible authorities must ensure that migrants, who are often in vulnerable situations, are not subjected to further harm and receive the protection they need. This can be achieved by providing the necessary funding for professional training and retraining of all personnel involved in the process. It is imperative that a lawful asylum procedure be upheld, free from unnecessary detention. Additionally, it is crucial that accommodation facilities for migrants meet all relevant international standards, as repeatedly emphasised in various reports and legislation. Once the asylum procedure is completed, including the right to appeal, any order to leave the country must be communicated in a language the individual can understand. Providing clear information about voluntary departure options, reintegration programs, through independent return counselling is of fundamental importance and forced return should be considered only as a last resort.

Unnecessary detention prior to return should be avoided, and restraint techniques should only be employed when absolutely necessary. The highest level of protection during the return

process can only be guaranteed through ongoing staff training and retraining. EU Member States must also fulfil their responsibility to regularly evaluate the training programs and existing complaint mechanisms, as it is crucial to ensuring that the system—in light of the new Pact on Asylum and Migration—is continually improved for preventing human rights violations and upholding fundamental rights.

9. Abstract

In order to create a comprehensive understanding of potential new ways of migration control of the European Union, existing bilateral agreements in the area of externalisation of migration were analysed and put in context of the new Pact on Migration and Asylum of the European Union, which will be applicable to all EU member states in 2026. In order to identify potential weaknesses, relevant case law from the ECtHR and the CJEU was cited with the overarching aim of avoiding potential human rights violations linking them to the recently signed agreement between Italy and Albania. Furthermore, particular attention was paid to the role of escort officers as well as human rights observers during forced return operations underlining the importance of special and regular training for all persons involved in this process.

Um ein umfassendes Verständnis für mögliche neue Wege der Migrationskontrolle der Europäischen Union zu schaffen, wurden existierende bilaterale Abkommen im Bereich der Externalisierung von Migration analysiert und in den Zusammenhang mit dem neuen Migrations- und Asylpakts der Europäischen Union gestellt, der ab 2026 für alle EU-Mitgliedstaaten bindend gelten wird. Im Hinblick auf das übergeordnete Ziel, die Gefahr möglicher Menschenrechtsverletzungen in diesem Bereich in Zukunft zu vermeiden, wurden potenzielle Unzulänglichkeiten des kürzlich unterzeichneten Albanien - Italien Memorandum of Understanding identifiziert, in dem einschlägige Rechtsprechung des EGMR und des EuGH herangezogen wurde. Darüber hinaus wurde besonderes Augenmerk auf die Rolle von Eskortern und Menschenrechtsbeobachtern bei nicht freiwilligen Außerlandesbringungen gelegt, wobei die Bedeutung spezieller und regelmäßiger Schulungen für alle an diesem Prozess beteiligten Personen in den Vordergrund gerückt wurde.

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