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Safe Countries of Origin And External Migration Policy: EU Law, Italy and The Way Ahead

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INTRODUCTION

In the current European scenario, the phenomenon of migration constitutes one of the most complex and controversial issues. In recent decades, the European Union (EU) and its Member States have had to deal with unprecedented challenges arising from humanitarian crises, geopolitical instability and socio-economic dynamics that have led to a significant increase in asylum applications. It is important to underline that the legal basis for asylum policies stems from international law, particularly the 1951 Geneva Convention, which set the fundamental principles of refugee protection and *non-refoulement*. In this context, the concept of "Safe Country of Origin" (SCO) has emerged as one of the key tools for speeding up the examination of applications for international protection and reducing the administrative burden on national asylum systems.

The SCO mechanism, introduced at European level by Directive 2013/32/EU (the Procedures Directive), is based on the assumption that certain countries of origin offer an adequate level of protection of human rights and fundamental freedoms, such that the risk of persecution for their citizens can generally be excluded.[1] However, the practical application of this instrument has raised significant concerns in doctrine, jurisprudence and politics. Designating a country as "safe" implies an accelerated procedure for assessing asylum applications, with potential violations of the principle of non-refoulement, procedural guarantees and the right to an effective remedy. Furthermore, the criteria used to define a country as "safe" are often the subject of debate.

In recent years, tensions between the objective of accelerating asylum procedures, making them more efficient, and the need to ensure an adequate level of protection for applicants have further intensified. The harmonization of asylum law in the EU has always faced significant challenges, with continuous debates over sovereignty, shared responsibility, and the balance between security and fundamental rights. In particular, the Italian legislature has intervened with significant amendments to Legislative Decree 25/2008, most recently with Decree-Law No. 158/2024,

[1] Directive 2013/32/EU *of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).*

incorporated into Law No. 187/2024, redefining the criteria for designating Safe Countries of Origin and the applicable procedures.[2] These measures, designed to simplify the examination of applications, have raised concerns about their compatibility with EU law, international law, and Italian constitutional principles.

In parallel with the strengthening of the SCO mechanism, Italy and the EU have incremented their policies of externalization of migration control, with the aim of shifting responsibilities for managing flows and examining asylum applications to third countries. Although the SCO concept specifically concerns the countries of origin of applicants, it is part of a broader framework in which externalization strategies are a central element of European migration policies. The stated objective is to reduce irregular arrivals, strengthen external border controls, and delegate part of the responsibility for reception and protection to third countries. However, these strategies raise numerous questions about their legitimacy and compatibility with European obligations and fundamental rights.

An example of these dynamics, albeit unprecedented and distinct, is the 2023 Italy-Albania Protocol, which allows Italy to assess applications for international protection on Albanian territory, under Italian jurisdiction.[3] Presented as a pragmatic solution to ease pressure on the national reception system, the Protocol has sparked intense debate both from a legal and political point of view. In particular, concerns have been raised about possible violations of the fundamental rights of asylum seekers, the lack of effective procedural guarantees and the risk of collective refoulement. Most recently, on 29 May 2025, the Italian Court of Cassation has raised concerns and doubts on whether the Italy-Albania Protocol is compatible with EU law. It has referred two preliminary questions to the Court of Justice of the European Union, asking for clarification of these juridical doubts.[4] Furthermore, the Protocol is

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[2] Legislative Decree No. 25/2008, *Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato*; Decree-Law No. 158/2024, *Disposizioni urgenti in materia di procedure per il riconoscimento della protezione internazionale*;
Law No. 187/2024, *Conversione in legge, con modificazioni, del decreto-legge 11 ottobre 2024, n. 145, recante disposizioni urgenti in materia di ingresso in Italia di lavoratori stranieri, di tutela e assistenza alle vittime di caporalato, di gestione dei flussi migratori e di protezione internazionale, nonchè dei relativi procedimenti giurisdizionali.*

[3] *Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il Rafforzamento della Collaborazione in Materia Migratoria,* 6 November 2023.

[4] At the time of writing, the orders have not yet been published.

part of a recently amended Italian regulatory framework, through Decree-Law 145/2024 and Decree-Law 37/2025, aimed at strengthening the powers of the executive authority and reducing judicial review on transfer and detention decisions, raising further doubts about its compatibility with European and constitutional principles.[5]

The issues addressed in the thesis are therefore manifold and interrelated: from the definition and application of the SCO concept to its compatibility with European law principles; from the analysis of EU externalization policies to the Italy-Albania Protocol. Particular attention is paid to the role of European and national institutions in managing these issues and to the comparison between different jurisprudential and doctrinal interpretations.

The main objective is to offer a critical and systematic analysis of these elements in order to assess whether and to what extent Italian legislation and externalization practices are compatible with European obligations and with the effective protection of the rights of asylum seekers.

The first chapter is dedicated to the definition and evolution of the concept of Safe Country of Origin in European and Italian law. The main regulatory sources will be examined, such as Directive 2013/32/EU and Legislative Decree 25/2008, the amendments introduced by Decree Law 158/2024 and the most relevant doctrinal and jurisprudential interpretations.[6] Particular attention will be paid to the criteria for designating countries as "safe" and the critical issues that have emerged in their practical application.

The second chapter will examine the political and legal context in which the SCO is set, with a look at the externalization policies adopted by the EU and Italy. Key cases such as the EU-Turkey agreement and the Italy-Albania Protocol will be analyzed, highlighting the tensions between the need for control and the protection of fundamental rights. This chapter will provide a framework for understanding the

[5] Decree-Law No. 145/2024, *Disposizioni urgenti in materia di ingresso in Italia di lavoratori stranieri, di tutela e assistenza alle vittime di caporalato, di gestione dei flussi migratori e di protezione internazionale, nonchè dei relativi procedimenti giurisdizionali*;
Decree-Law No. 37/2025, *Disposizioni urgenti per il contrasto dell'immigrazione irregolare.*
[6] Directive 2013/32/EU;
Legislative Decree 25/2008;
Decree-Law 158/2024.

political and legal reasons behind recent Italian legislative reforms and externalization strategies.

Finally, the third chapter will address the critical issues of the SCO concept and the Italy-Albania Protocol in light of the broader regulatory framework of the Common European Asylum System (CEAS) and the New Pact on Migration and Asylum. An analysis of European asylum policies will be carried out, and an in-depth comparison between these and Italian policies will be made, highlighting the differences from both a theoretical and practical point of view. This part will conclude with a reflection on the future challenges for Italy and the EU in defining migration and asylum policies that are more respectful of human rights and sustainable from a legal and social point of view.

CHAPTER I
THE NOTION OF SAFE COUNTRY OF ORIGIN

1. The Legal and Normative Foundations of International Protection

A Safe Country of Origin (SCO) is a non-EU country that can be designated as generally respecting human rights, democracy, and the rule of law, such that applicants from that country are presumed not to require international protection unless proven otherwise. The concept of SCO has both European and international normative foundations. At the European level, the Asylum Procedures Directive (Directive 2013/32/EU) provides a detailed framework for the definition, designation and application of SCOs.[7] Internationally, although the 1951 Geneva Convention relating to the Status of Refugees does not expressly mention SCOs, it lays the normative groundwork by defining who qualifies as a refugee and establishing core protection principles, particularly the principle of *non-refoulment*.[8] The application of the SCO concept must respect these obligations, and UNHCR guidelines further stress the need for individualized assessment to avoid undermining the right to seek asylum.[9] In order to fully comprehend the concept of a Safe Country of Origin, it is essential to first examine the fundamental definitions given by international and European law that underpin the system of international protection. This includes an analysis of international protection itself, as well as the specific legal statuses associated with it, namely refugee status and subsidiary protection status. These definitions serve as the legal foundation for assessing whether an individual qualifies for protection under both international and EU law. A clear understanding of these categories is crucial, as they delineate the rights and safeguards afforded to asylum seekers and the corresponding obligations of states.

[7] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, art 36.
[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[9] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (December 2011) HCR/1P/4/ENG/REV.3.

However, while the European and International legal frameworks offer a clear structure for implementing the concept of a Safe Country of Origin, its incorporation into national systems, particularly in Italy, has proven legally and practically complex. Italian legislation has undergone several amendments in recent years, culminating in a binding national list of safe countries with direct procedural implications for asylum seekers. This evolution has raised significant concerns about compliance with EU law, especially regarding the individual assessment of claims and the protection of fundamental rights. The main issues, including the nature of the legal presumption, the burden of proof, and the role of national courts, will be explored in detail in the later sections of this chapter.[10]

1.1. Key Definitions: International Protection, Refugee Status and Subsidiary Protection Status

International protection is defined by the UNHCR as the protection that is accorded by the international community to individuals or groups who are outside their own country, who are unable to return because they would likely be at risk there, and whose own country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution or other threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or different situations of violence.[11]

At EU level, the beneficiary of international protection is a person who has been granted refugee status or subsidiary protection status, as defined by Directive 2011/95/EU, also known as the Recast Qualification Directive, which harmonizes the criteria for granting international protection across Member States.[12] According to Article 2 of said directive, "*"refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country*

[10] See *infra*, para 4.
[11] UNHCR, *Master Glossary of Terms* (UNHCR, 2006).
[12] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art 2(b).

of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it".[13]

On the other hand, a "person eligible for subsidiary protection" is defined as "*a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*".[14] This recognition requires a cumulative assessment of both the general situation in the country of origin and the individual circumstances of the applicant, supported by substantial grounds for believing that serious harm would occur.[15]

Based on Article 15 of the same Directive, serious harm consists of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. It is also explicitly recognized that persecution or serious harm can be inflicted by non-state actors, provided that the authorities of the country of origin are unable or unwilling to provide effective protection.[16]

The refugee status is usually permanent, while subsidiary protection status has a duration of five years, eventually renewable. While both statuses grant protection, there are differences in the scope of rights. Refugees typically enjoy a broader set of entitlements, including access to long-term residence, travel documents, and family reunification, whereas subsidiary protection beneficiaries may encounter limitations, although EU case law has progressively encouraged convergence between the two.[17] Both forms of protection can be revoked in particular cases, such as the commission

[13] Ibid, art 2 (d).
[14] Ibid, art 2 (f).
[15] Ibid, arts 2(f) and 4.
[16] Ibid, art 6.
[17] Case C-373/13 *H. T. v Land Baden-Württemberg* ECLI:EU:C:2015:413; see also Daniel Thym, *European Migration Law* (OUP 2023) ch 6.

of serious crimes by the beneficiary of protection, or a radical improvement in the living conditions of their country of origin.

1.2. The 1951 Geneva Convention and the principle of *Non-Refoulment*

The concept of "International Protection" includes the definition of refugee status, as previously mentioned. The definition of a refugee is outlined in Article 1A, no. 2, para. 1 of the 1951 Geneva Convention.[18] Originally codified in international law through the 1951 Geneva Convention, the definition was subsequently adopted and adapted within the legal frameworks of both the European Union and its Member States. This incorporation ensured that international refugee norms would have binding legal effects not only in cross-border contexts but also within national asylum procedures.

Under the Geneva Convention, a refugee is defined as a person who has a well-founded fear of persecution due to race, religion, nationality, membership of a particular social group, or political opinions. Such a person must be outside their country of nationality and unable or unwilling to seek protection from that country because of this fear. Similarly, a stateless person who is outside their previous country of habitual residence due to comparable circumstances and is unable or unwilling to return because of a fear of persecution also qualifies as a refugee.[19]

To facilitate the proper application of the criteria for refugee status, the UNHCR, though not explicitly mandated in the Convention's operative provisions, has developed guidelines detailed in the *Handbook on Procedures and Criteria for Determining Refugee Status* (UNCHR *Handbook*).[20] The existence of a well-founded fear of persecution is therefore a central requirement for the recognition of refugee status.

Although the Geneva Convention does not explicitly define persecution, it can be inferred from Articles 31 and 33 that persecution includes threats to life or liberty.

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[18] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1(A)(2) para 1.

[19] Ibid.

[20] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (reissued February 2019) https://www.refworld.org/docid/5cb474b27.html accessed 4 April 2025.

Article 31 prohibits penal sanctions for the illegal entry or stay of refugees, while Article 33 establishes the principle of *non-refoulement*, which prevents the return of refugees to countries where their life or freedom would be at risk due to race, religion, nationality, membership of a particular social group, or political opinion.[21]

Articles 31 and 33 impose specific obligations on contracting states once a refugee enters their territory. States are required to protect refugees even if they enter the country illegally, as irregular entry cannot be used as grounds to deny a refugee status application. However, the applicant is still expected to present themselves to the relevant authorities and explain their presence and irregular entry.

Article 33(1) explicitly states that "No Contracting State shall expel or return 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."[22] The article then specifies that the only exception to this rule is when the individual poses a serious threat to the security of the state where they have applied for protection.[23]

Within the framework of international refugee law, the principle of *non-refoulment* constitutes one of the most fundamental guarantees. Art. 42 of the Geneva Convention clarifies that no country can make exceptions or reservations to this rule, reinforcing its absolute nature.[24] Even if a state's political or security interests are at stake, the obligation to uphold *non-refoulment* remains binding. This principle reflects the idea that human rights protections should take precedence over political considerations when it comes to protecting individuals from harm. Moreover, the norm prohibiting *refoulment* is considered as a part of customary international law, thus binding on all States whether or not they are a party to the 1951 Convention.[25]

At the same time, *non-refoulment* does not mean that a refugee automatically has the right to settle or receive protection in the country where they first seek asylum. States still have some flexibility in how they handle refugee claims. For example, they can choose to transfer refugees to a designated safe third country where the person's

[21] Refugee Convention, arts 31 and 33.
[22] Ibid, art 33(1).
[23] Ibid, art 33(2).
[24] Ibid, art 42.
[25] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2002) 13(4) *International Journal of Refugee Law* 538.

rights and safety would still be protected. Alternatively, they can offer temporary protection until a more permanent solution is found.[26] However, these options must still comply with the overall framework of international protection and cannot undermine the core principle of *non-refoulment*. The UNHCR has made it clear that the obligation to protect refugee from refoulment applies not only within a state's land borders but also to its territorial waters, airspace, and any other areas under jurisdiction or control, including offshore processing centers or international zones.[27]

The idea of *non-refoulment* is not limited to the Geneva Convention. It also appears in other major international agreements. Art. 3 of the 1950 European Convention on Human Rights prohibits any form of inhuman or degrading treatment.[28] Similarly, Art. 3 of the 1984 Convention Against Torture states that no country can send someone to a state where they might face torture. It also directs authorities to consider all relevant facts, including any evidence that the receiving country has a record of serious or widespread human rights violations, when assessing whether a person could be at risk.[29]

2. The concept of Safe Country of Origin (SCO): Definition and Application in EU Law

The European Union possesses competence to regulate the concept of "safe country of origin" as part of its broader authority over asylum and migration policy. Under Article 78(2) of the Treaty on the Functioning of the European Union (TFEU), the EU is empowered to establish a Common European Asylum System (CEAS) through the adoption of measures concerning the uniform status and procedures for international protection. The notion of a "safe country of origin" is incorporated into EU secondary legislation, notably the Asylum Procedures Directive (Directive 2013/32/EU), which sets minimum standards for determining whether an applicant's

[26] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention and its 1967 Protocol* (Geneva, 2007) 3 https://www.refworld.org/docid/45f17a1a4.html accessed 4 April 2025.
[27] Ibid, 11.
[28] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 3.
[29] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3.

country of origin can be presumed as safe. Through these harmonized rules, the EU seeks to ensure fair, efficient, and consistent treatment of asylum claims across Member States.

The concept of "safe country" has become a pivotal element in the European Union's asylum policy, aiming to manage and regulate the flow of asylum seekers. There are four different concepts contained within European law that employ the use of safe country practices. This study primarily focuses on the Safe Country of Origin (SCO) concept, but the notions of Safe Third Countries (STC), first country of asylum, and super safe European countries all have closely related purposes and applications in the asylum framework, each intended to restrict access to substantive asylum procedures within EU territory.[30]

"Safe country" refers to "countries which are determined either as being non-refugee-producing countries or as being countries in which refugees can enojoy asylum without any danger."[31] Notions subsumed under this concept are generally delt with through an accelerated asylum procedure, and declared manifestly unfounded or inadmissible (depending on the legal basis).

The SCO concept enables member states of the European Union to designate a country as "safe" for the purposes of asylum, on the basis of only a general presumption of safety: where there is "generally and consistently no persecution … no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict."[32] Following this broad definition, 22 Member States, including Italy, have currently adopted their own lists of Safe Countries of Origin. If a state is designated as safe according to the list, applications for international protection from its citizens will be processed through an accelerated procedure and are likely to be rejected. Besides the lists, Member States can adopt the SCO policy in other ways, for example, Finland, which applies the concept case by case.

[30] Matthew Hunt, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future' (2014) 26(4) *International Journal of Refugee Law* 500, 503.
[31] UNHCR, *Background Note on the Safe Country Concept and Refugee Status* (1991) http://www.unhcr.org/refworld/docid/3ae68ccec.html accessed 4 April 2025.
[32] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 [2013] OJ L180/60, annex II.

The core idea is that the situation in the country of origin in general is safe enough to presume that an asylum seeker is not entitled to international protection in another country. Normally, national authorities assess an asylum request by considering both the general situation in the applicant's country of origin and the individual circumstances presented by the claimant. However, when the safe country of origin principle is applied, the evaluation of individual circumstances is minimized, and procedural safeguards (for example, the right to appeal) are often restricted. The core of the safe country concept involves shifting the burden of proof. While evidence collection is usually a shared responsibility between the assessing authority and the asylum seeker, under the safe country principle, the burden of proof falls entirely on the applicant, who is presumed to have come from a safe country and must prove otherwise.[33]

The definition and the legal framework of the concept of SCO are contained in the Asylum Procedures Directive (Directive 2013/32/EU). Art. 36 of said Directive states that the SCO policy can be applied to the applicant who holds the nationality of the country in question or is a stateless person who formerly resided habitually in that country, and has not submitted serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances.[34] Subsequently, Art. 37 states that the decision to designate a country as safe falls within the competence of the Member States. The criteria that must be met to designate a country as safe are provided by annex I of the Procedures Directive.[35] Member States shall comply with these and incorporate them with ulterior legal frameworks and forms of application. It follows, therefore, that the definition of a Safe Country of Origin may vary depending on the legislation of individual countries and the assessment of individual cases by the competent authorities. It is therefore possible that the definition may change based on the political and social conditions of the countries concerned. Member States are required to regularly review the situation of each country on their list and their assessments. Furthermore, they are obliged to use information from

[33] Claudia Engelmann, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)' (2014) 16(2) *European Journal of Migration and Law* 277, 281–82.
[34] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, art 36(1).
[35] Ibid, art 37(1).

reliable sources, such as particular information from other Member States, the UNHCR, EASO, the European Council, and other competent international organizations.[36] Once the countries to be designated as safe have been identified, the States must notify them to the Commission.[37] To assess whether individuals are genuinely protected from serious human rights violations, several factors are considered. These include the country's legislative and regulatory framework, compliance with human rights and freedoms established by international conventions, adherence to the principle of non-refoulement, and the availability of an effective appeal system to challenge human rights violations.[38]

2.1. Historical Origins and Legal Foundations of the SCO Concept

The first example of safe country practices in Europe is found in the *Danish Clause* of 1986, included in the Danish Aliens Act, a national statutory law.[39] Aimed at reducing the number of refugees entering Denmark from Germany, the clause allowed the designation of "safe third countries" and for applications from such states to be deemed manifestly unfounded. Since it was introduced, the UNHCR has been skeptical about the SCO concept. In a 1991 Background Note, it analyzed the idea and argued that applying the SCO principle could lead to entire groups of people being excluded from refugee status automatically. According to the UNHCR, this goes against both the spirit and the terms of the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.[40] The UNHCR also pushed back against the idea that the SCO policy might motivate countries of origin to invest in democratization. It argued that the asylum process isn't the right tool for driving political change.[41] Nonetheless, the UNHCR recognizes that the SCO concept can be helpful when it comes to identifying asylum seekers who might not have valid

[36] Ibid, art 37(2)-(3).
[37] Ibid, art 37 (4).
[38] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 [2013] OJ L180/60, annex I.
[39] Danish Aliens Act 1986 (Udlændingeloven).
[40] UNHCR, *Background Note on the Safe Country Concept and Refugee Status* (26 July 1991) EC/SCP/76, para 5.
[41] Ibid, para 6.

protection claims.[42] In the Background Note, it stated that countries can make certain assumptions about applicants based on the country of origin, but only if those assumptions are based on reliable, up-to-date facts, remain open to challenge, and allow for consideration of individual, exceptional cases.[43]

A few years later, it appeared for the first time in EU law within the framework of the *London Resolutions*.[44] Given the intergovernmental and not binding nature of the document, and in the absence of an act able to harmonize the domestic legislations on the subject, in the following years, Member States developed very different rules to designate a safe country.

Following the Treaty of Amsterdam, France, Germany, Italy, Spain, and the United Kingdom, which were more cautious about harmonization processes, insisted on including safe country practices in the initial directive concerning asylum procedures.[45]

In December 2005, the Commission adopted the first Asylum Procedures Directive (AP Directive 2005/85/EC), seeking to harmonize the different legislations.[46] This directive was then replaced by the new AP Directive 2013/32/EU, which further proceeds to unify and develop the legal frameworks, with the aim of establishing a common asylum procedure in the EU.[47]

2.2. Safe Third Country (STC) Concept: A Comparative Note

Since the late 1970s, there has been a growing trend of "protection elsewhere" practices, predominantly in the developed States.[48] These practices serve to filter asylum applications and prioritize those in genuine need of protection, similarly to the concepts of Safe Countries of Origin and Safe Third Countries. Fearing to attract

[42] Ibid.
[43] Ibid, para 9.
[44] Council of the European Union, *Council Resolution on Manifestly Unfounded Applications for Asylum ("London Resolution")* (30 November 1992).
[45] Matthew Hunt, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future' (2014) 26(4) *International Journal of Refugee Law* 500, 506.
[46] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.
[47] Directive 2013/32/EU.
[48] Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 223–24.

a disproportionate amount of unfounded claimants, many developed countries have introduced unilateral measures restricting access to both their territories and asylum systems, disclaiming responsibility for the protection requests they received in certain circumstances.[49] As explained above, there are different concepts in the European Union that employ the use of safe country practices, including the Safe Country of Origin concept (SCO) and the Safe Third Country one (STC).[50] These two notions are very closely related but not to be confused. For clarity purposes, this paragraph will briefly grant a definition of Safe Third Country.

The mechanism of Safe Third Country allows EU Member States to declare asylum applications inadmissible if the applicant has already transited through or could reasonably seek protection in a third country considered "safe." In particular, the applicant must not be at risk of persecution, refoulment or ill treatment in violation of the ECHR, Article 3 in the third country.[51] In addition, the recast Asylum Procedures Directive, Article 39 defines the concept of a European safe third country. A third country may only be considered as safe if it has an asylum procedure in place prescribed by law and has ratified and observes the provisions of the Geneva Convention without any geographical limitation and the ECHR, particularly on effective remedies.[52] The evolution of the STC concept, as the SCO one, reflects the EU's efforts to balance the principles of refugee protection with the practical challenges of migration management.[53]

Unlike the SCO concept, which triggers an accelerated examination of the claim, the STC mechanism results in the application being declared inadmissible. According to Article 33(2)(c) of Directive 2013/32/EU, an application shall be considered inadmissible if a country other than the Member State concerned is regarded as a safe third country for the applicant.[54] In such cases, the merits of the protection claim are

[49] Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) ch 1.
[50] Directive 2013/32/EU, arts 36-38; See *supra*, para 2.
[51] European Union Agency for Asylum (EUAA), *Annual Report on the Situation of Asylum in the European Union 2022* (2023) https://euaa.europa.eu/asylum-report-2022/432-safe-country-origin-and-safe-third-country-concept accessed 4 April 2025.
[52] Directive 2013/32/EU, art 39.
[53] European Parliamentary Research Service, *Safe Third Countries and the EU's Asylum Policy* (EPRS Briefing PE 767.148, February 2024) 1 https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/767148/EPRS_BRI(2024)767148_EN.pdf accessed 4 April 2025.
[54] Directive 2013/32/EU, art 33(2)(c).

not examined by the Member State, as the responsibility for offering protection is presumed to lie with the third country in question.

The Safe Third Country mechanism is closely connected to the broader strategy of externalization in EU asylum and migration policy. The use of this concept enables Member States to transfer responsibility for examining asylum claims to non-EU countries considered "safe," thereby relocating key phases of the asylum process outside EU territory. This practice forms part of a wider policy framework in which migration control functions, including screening, reception, and procedural management, are increasingly delegated to third countries through legal instruments such as bilateral agreements, readmission arrangements, and operational cooperation. The STC mechanism can be classified as one of the legal tools through which the EU shifts asylum processing beyond its borders, aligning with other measures designed to prevent the arrival of asylum seekers within the EU's jurisdiction.[55]

3. Safe Country of Origin Lists Across the EU

EU+ countries which are bound by the recast Asylum Procedures Directive are allowed, but not obliged, to create a national list of safe countries of origin based on national regulations and procedures.[56] As of 2022, 22 EU+ countries have adopted lists of safe countries of origin, namely Austria, Belgium, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxemburg, Malta, Netherlands, Norway, Slovakia, Slovenia, Sweden, and Switzerland. In contrast, despite national legislation including relevant provisions, the concept of a safe country of origin is not applied, in the absence of an adopted list, in Bulgaria, Lithuania, Portugal, and Romania. Norway, which does not have a fixed list, applies the safe country of origin concept on a case-by-case basis. In Latvia and Spain,

[55] Mariagiulia Giuffré, Chiara Denaro and Fatma Raach, 'On "Safety" and EU Externalization of Borders' (2022) 24(4) *European Journal of Migration and Law* 570.

[56] EU+ refers to a collective group of states that includes the European Union (EU) member states along with certain non-EU countries that participate in specific EU policies, particularly those related to asylum, immigration, and border control. The EU+ typically comprises all 27 EU member states and additional countries that are part of the Schengen Area, such as Iceland, Norway, Switzerland, and Liechtenstein. These countries cooperate in frameworks like the Dublin System and other EU asylum and migration regulations, facilitating coordinated approaches to refugee protection and border management within the region.

there is no legal provision for the designation of a national list of safe countries of origin, and in Poland, the concept of safe country of origin is not defined by law.[57] With the exception of Turkey, all EU candidate and potential candidate countries are in the Top 5 national SCO lists.[58]

Member States frequently define exceptions for certain categories of asylum-seekers in a country of origin. In these cases, Member States apply the standard asylum procedure in line with the Asylum Procedure Regulation, and not the SCO concept. Exceptions for certain profiles of asylum-seekers are usually applied to specific groups of vulnerable people, including LGBTIQ+ applicants, minorities, political activists, journalists, human rights defenders, women and girls.[59]

The adoption of a list of safe countries of origin requires extensive consultations and the active involvement of various competent authorities. The list is prepared by the authority responsible for asylum or by the authority in charge of policy-making, usually the Ministry of the Interior or the Ministry of Migration. Following the proposal, the list may be adopted by a supervisory body or by the same authority. In some cases, the Ministry of Foreign Affairs is also actively involved in the preparatory phase and in the subsequent adoption of the list.[60]

A key factor in drafting a list of safe countries is the assessment by Member States of the human rights situation in the country designated as safe. As mentioned above, according to the Asylum Procedures Directive, Member States should conduct regular reviews of the situation in safe countries based on a range of sources of information. During periodic reviews, new countries may be determined as safe and others may be withdrawn from a national list. When there is a significant change in the human rights situation in one of these countries, Member States must assess the situation as soon as possible to decide whether to add or remove that country from the list. An example

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[57] European Union Agency for Asylum (EUAA), *The Safe Country Concept in Asylum Procedures* (December 2022) https://euaa.europa.eu/sites/default/files/publications/2022-12/2022_safe_country_concept_asylum_procedure_EN.pdf accessed 4 April 2025.

[58] European Asylum Support Office (EASO), *Situational Update: Safe Country of Origin* (June 2021) https://euaa.europa.eu/sites/default/files/publications/EASO-situational_update-safe_country_of_origin-2021.pdf accessed 4 April 2025.

[59] European Parliamentary Research Service, *Reform of the EU Asylum System: Safe Third Country Concept* (EPRS Briefing PE 762.315, February 2024) https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762315/EPRS_BRI(2024)762315_EN.pdf accessed 4 April 2025.

[60] European Union Agency for Asylum, 'Safe Country Concept' (EUAA Who is Who, 2024) https://whoiswho.euaa.europa.eu/safe-country-concept accessed 4 April 2025.

is Ukraine. Following the Russian invasion in February 2022, Ukraine was removed from the list of safe countries of origin in four countries (Austria, Cyprus, Estonia, and Iceland) and later removed from the Italian list by decree on March 17, 2023. The implementation of the safe country of origin concept was *de facto* suspended in all EU Member States that had previously designated Ukraine as a safe country of origin, namely in Czechia, Greece, Italy, Luxembourg, and the Netherlands.[61]

The Court of Justice of the European Union emphasized that while Member States may designate certain countries as safe countries of origin, they cannot rely solely on this presumption to dismiss an applicant's claims as insufficient.[62] Instead, authorities are required to conduct an individual assessment of each application, allowing applicants the opportunity to present serious grounds indicating that their country of origin may not be safe in their particular circumstances. This interpretation aligns with the obligations set out in Directive 2013/32/EU, ensuring that the presumption of safety does not override the need for a thorough and individualized examination of asylum claims.[63] Regularly updated information on countries of origin enables courts to properly assess whether a country or a region within a designated country can indeed be considered safe.

3.1. Towards convergence? The Debate on a Common EU SCO List

One of the long-standing goals of the European Union's asylum policy has been to establish a common list of safe countries of origin. This measure is seen as a key step toward harmonizing procedures under the Common European Asylum System (CEAS), with the aim of reducing disparities between Member States and speeding up decisions for applicants from countries generally considered safe. The idea was formally put forward by the European Commission in 2015, with a proposed list that included Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia,

[61] EUAA, *Safe Country Concept in Asylum Procedures*.
[62] Case C-69/10 *Aboubacar Cheikh Mbaye v Ministre de l'Intérieur* [2011];
Case C-18/16 *K v Staatssecretaris van Veiligheid en Justitie* [2018].
[63] Case C-406/22 *Ministerstvo vnitra České republiky v CV* ECLI:EU:C:2024:841.

Serbia, and Turkey.[64] The aim was to fast-track asylum applications from citizens of these countries, considered "safe" in full compliance with the criteria set out in Directive 2013/32/EU and the principle of *non-refoulment*. While the co-legislators have agreed on the common list approach, no decision was taken as to which countries should be on the list. On 12 April 2017, the Council announced the suspension of negotiations on the file. On 21 June 202, the Commission withdrew its proposal, including the provisions for an EU SCO list in the revised proposal for an asylum procedure legislation.[65]

As of 2025, this common list still hasn't been adopted. Instead, Member States continue to rely on their own national lists, or in some cases, don't apply the concept at all. The persistence of national lists rather than a single EU-wide list is primarily due to a combination of legal ambiguity surrounding the criteria for designating a country as "safe," and political resistance among Member States to give up control over their own asylum policies. As Gierowska explains, Member States remain deeply divided over what should count as "safe" and are hesitant to hand over this sensitive decision-making power to the EU level.[66] There are also concerns about returning asylum seekers to countries whose human rights records are disputed, even if they appear stable on paper. On top of that, Member States apply the safe country concept in very different ways: some, like France and Germany, maintain detailed and regularly updated lists, while others such as Spain, Latvia, and Poland, either lack a legal framework for it or choose not to implement it in practice.[67]

The New Pact on Migration and Asylum, introduced by the Commission in 2020, reopens the door to a common list.[68] It proposes stronger coordination among Member

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[64] European Commission, *Proposal for a Regulation Establishing a Common EU List of Safe Countries of Origin* COM(2015) 452 final, 9 September 2015 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015PC0452 accessed 4 April 2025.

[65]EPRS, *Safe Third Country Concept* (n 40).

[66] Natalia Gierowska, 'Why Does No Common European List on Safe Country of Origin Exist Despite Numerous Efforts Aimed at the Harmonisation of European Asylum Policy?' (2022) 23 *Journal of International Migration and Integration* 2035 https://doi.org/10.1007/s12134-021-00922-1 accessed 4 April 2025.

[67] Ibid, 2038–41.

[68] The *New Pact on Migration and Asylum*, introduced by the European Commission in September 2020, is a comprehensive policy package aimed at reforming the EU's migration and asylum system. It seeks to establish a more balanced and integrated approach to migration management by combining stronger border controls, faster asylum procedures, increased solidarity among Member States, and enhanced cooperation with third countries. A key feature of the Pact is its proposed "flexible solidarity" mechanism, allowing

States, supported by the European Union Agency for Asylum (EUAA), which provides country-of-origin information to help ensure consistent decisions.[69] Most recently, the Commission has proposed to establish the first EU list of SCOs as part of the New Pact on Migration and Asylum, which will be discussed in the latter.[70] Even so, the authority to adopt and update these lists remains with national governments, and political resistance to a centralized list continues to be strong.

Nevertheless, the idea of a common list continues to resurface in political discussions. In early 2025, Italian Prime Minister Giorgia Meloni publicly advocated for accelerating the adoption of an EU-wide list, presenting it as a necessary step to enforce returns and reduce irregular migration flows.[71] Similar calls have come from other leaders, especially in countries facing higher numbers of arrivals.

4. The Implementation of the SCO Concept in Italian Law

In Italian law, the concept of a safe country of origin has gained normative importance only recently, through a gradual alignment with European Union law. The primary reference is Legislative Decree No. 25 of January 28, 2008, which provides the legal framework for procedures regarding the granting and revocation of international protection, implementing Directive 2005/85/EC, subsequently replaced by Directive 2013/32/EU on common procedures for international protection.[72] In its original version, however, the decree did not explicitly refer to the concept of a safe country of origin.

The formal introduction of this concept occurred with Decree-Law No. 113 of October 4, 2018, known as the "Salvini Decree," converted with amendments by Law

Member States to contribute through either relocation, return sponsorship, or capacity-building support; see *infra* chapter III, para 1.

[69] European Commission, *Proposal for a Regulation on Asylum and Migration Management* COM(2020) 610 final, 23 September 2020 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0610 accessed 4 April 2025.

[70] See *infra*, Chapter III, para 3.

[71] InfoMigrants, 'Meloni and Brunner Promise to Expedite EU Migration Pact and List of Safe Countries' (23 January 2025) https://www.infomigrants.net/en/post/62957/melonibrunner-promise-to-expedite-eu-migration-pact-and-list-of-safe-countries accessed 4 April 2025.

[72] Legislative Decree No 25 of 28 January 2008, implementing Directive 2005/85/EC and Directive 2013/32/EU.

No. 132 of December 1, 2018.[73] This legislative act inserted Article 2-bis into Legislative Decree No. 25/2008, establishing the procedures for identifying safe countries of origin through an inter-ministerial decree issued by the Minister of Foreign Affairs, in agreement with the Ministers of the Interior and Justice.[74] According to this provision, designated countries must meet criteria relating to democratic stability, respect for human rights, and the rule of law.[75] The main effect of such designation was to allow competent authorities to presume that asylum seekers from these countries generally did not require protection, except in cases presenting individual contrary elements.[76] The first list of safe countries was adopted by the inter-ministerial decree of October 4, 2019, including countries such as Albania, Morocco, Nigeria, Senegal, and Tunisia.[77]

Subsequently, in response to shifting geopolitical contexts and the increasing use of the "safe country" mechanism, Italian legislators intervened again with Decree-Law No. 158 of December 5, 2024, later incorporated in Decree-Law No. 145/2024, converted into Law No. 187 of December 9, 2024.[78] This provision significantly modified and strengthened Article 2-bis, introducing a stricter and legally binding regime. Specifically, the decree established that the updated list of safe countries of origin would have normative value and binding effect for Territorial Commissions.[79] Additionally, the list is required to be periodically updated and notified to the European Commission, in accordance with Article 37 of Directive 2013/32/EU.[80]

The effect of this amendment is the reinforcement of the presumption of safety, effectively becoming a legal presumption, rebuttable only through serious, specific, and documented individual circumstances.[81] Furthermore, asylum seekers from

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[73] Decree-Law No 113 of 4 October 2018 "*Disposizioni urgenti in materia di protezione internazionale e immigrazione, sicurezza pubblica, nonché misure per la funzionalità del Ministero dell'interno e l'organizzazione e il funzionamento dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata"*, converted with amendments by Law No 132 of 1 December 2018.
[74] Legislative Decree No 25/2008, art 2-bis (as inserted by Law No 132/2018).
[75] ibid, art 2-bis(2).
[76] ibid, art 2-bis(5).
[77] Ministerial Decree of 4 October 2019 on safe countries of origin.
[78] Decree-Law No 158 of 23 October 2024 *"Disposizioni urgenti in materia di procedure per il riconoscimento della protezione internazionale"* also known as *"Decreto Paesi Sicuri",* incorporated in Decree-Law No 145/2024 also known as *"Decreto Flussi",* converted by Law No 187 of 9 December 2024.
[79] Legislative Decree No 25/2008, art 2-bis(1) (as amended by Law No 187/2024).
[80] ibid, art 2-bis(1-bis); Directive 2013/32/EU, art 37.
[81] Legislative Decree No 25/2008, art 2-bis(5-bis) (as amended).

countries on the list are generally subjected to the accelerated procedure under Article 28-bis, para. 1(c), of Legislative Decree No. 25/2008, except in rare cases.[82]

4.1. Key Provisions of Legislative Decree No. 25/2008 on Safe Countries of Origin

In Italian law, Legislative Decree no. 25 of January 28, 2008, most recently amended by Law no. 187 of December 9, 2024, represents the reference framework for procedures relating to international protection.[83] Specifically, four articles clearly outline the applicable framework regarding the management of asylum applications submitted by applicants from countries designated as safe.

Article 2-bis, introduced by Decree-Law 113/2018 and significantly amended in 2024, regulates the identification of so-called Safe Countries of Origin (SCO).[84] This identification is carried out through a decree of the Minister of Foreign Affairs, in agreement with the Ministers of the Interior and Justice. The list of safe countries of origin must be periodically updated through a legislative act and notified to the European Commission. The assessment to determine whether a country can be designated as safe is based on its legal framework, democratic stability, and respect for human rights, and mandatorily includes information provided by other Member States or qualified international organizations, such as UNHCR and the European Union Agency for Asylum. By January 15 of each year, the Council of Ministers deliberates on a report providing information about the countries already listed and those proposed for inclusion. The inclusion of a country on this list creates a presumption of safety, rebuttable only by demonstrating explicit "serious personal reasons." Otherwise, the application will automatically be considered manifestly unfounded (Art. 28-ter).[85] This provision implies that the burden of proof relies on the applicant, differentiating the criteria from the ordinary procedure, where the applicant is required to demonstrate the existence of just reasonable grounds. Before the entry into force of Decree-Law 158/2024, this same article provided two possible exceptions to the definition of a safe country of origin: for parts of the territory and

[82] ibid, art 28-bis(1)(c).
[83] Legislative Decree No 25/2008 (as amended).
[84] Ibid, art 2-bis.
[85] Ibid, art 28-ter.

categories of persons. Subsequently, and in conformity with the CJEU ruling of October 4, 2024, the provision allowing exceptions for parts of the territory was removed, leaving only the category-based exceptions. This legislative choice currently raises interpretative doubts among several Italian judges, who have referred preliminary questions to the CJEU seeking clarification.

Article 9 governs how Territorial Commissions decide on international protection applications.[86] With the introduction of paragraph 2-bis, it is specified that in cases of applications from citizens of countries designated as safe, the Commission must justify any rejection exclusively by stating that the applicant did not meet the evidentiary burden necessary to overcome the presumption of safety.[87] This wording simplifies the adverse decision's rationale, making judicial challenges against protection denials more difficult.

Article 27 governs the procedure applicable to international protection applications submitted directly at the border or in transit areas.[88] It stipulates that if an applicant originates from a safe country, the procedure must be conducted at the border with very rapid timeframes, including, following the 2024 reform, the possibility of detaining the applicant until the procedure's conclusion.[89] This provision has also been criticized, as it significantly increases the risk of summary returns and reduces procedural protections, particularly for vulnerable groups.

Lastly, Article 28-bis outlines the accelerated procedure applicable to applications submitted by individuals from designated safe countries.[90] Following amendments made by Decree-Law 158/2024, the accelerated procedure has become mandatory for these applications. It provides notably shortened timeframes: the *Questura* (Police Headquarters) must forward the documentation to the Territorial Commission within five days from the application submission, while the Territorial Commission must conduct the applicant's interview within seven days of receiving the documentation, with a decision issued within the subsequent two days.[91] The timeframes for this procedure are significantly shorter than those for an ordinary international protection

[86] Ibid, art 9.
[87] Ibid, para 2-bis.
[88] Ibid, art 27.
[89] Ibid.
[90] Ibid, art 28-bis.
[91] Ibid.

application. For individuals not from a country considered "safe," the standard procedure lasts 33 days but can extend up to six months, with further possible extensions of 9 to 12 months in particular situations.[92] This drastic reduction in processing time risks compromising the quality of individual assessment and the applicant's defensive guarantees.

Recent amendments to Legislative Decree no. 25/2008 clearly reflect the Italian legislator's aim toward procedural simplification and system efficiency yet have raised substantial concerns regarding the effectiveness of procedural safeguards and the protection of the right to asylum.

4.2. The Italian SCO List

With Decree-Law 158/2024, changes were made to the list of safe countries of origin. Specifically, three countries were removed: Cameroon, Colombia, and Nigeria. This was done to comply with the criteria established by the Court of Justice of the European Union, which, in its ruling of 4 October 2024, stated that countries cannot be considered safe solely for parts of their territory.

The revised list designates the following countries as safe countries of origin: Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Cape Verde, Côte d'Ivoire, Egypt, The Gambia, Georgia, Ghana, Kosovo, North Macedonia, Morocco, Montenegro, Peru, Senegal, Serbia, Sri Lanka, and Tunisia.[93]

4.3. The Côte d'Ivoire case: A Case Study in Contested Safety Designations

The inclusion of Côte d'Ivoire in Italy's list of safe countries of origin has raised significant concerns by international organizations, NGO's and legal scholars, particularly from a human rights and legal perspective. In the first place, it is important to highlight that Italy is the only Member State to include said country in

[92] Ibid, art 27.
[93] Ministero del Lavoro e delle Politiche Sociali, 'Protezione internazionale: in vigore il DL 158/2024 con il nuovo elenco dei Paesi sicuri' (Integrazione Migranti, 23 January 2024) https://integrazionemigranti.gov.it/it-it/Ricerca-news/Dettaglio-news/id/4019/Protezione-internazionale-in-vigore-il-DL-1582024-con-il-nuovo-elenco-dei-Paesi-sicuri accessed 5 April 2025.

its list. Secondly, although Côte d'Ivoire has seen some institutional improvements and relative political stability since recovering from the crisis following the 2010–2011 elections, doubts remain about whether the state can genuinely ensure the safety and fundamental rights of its citizens.[94]

Several reports from international organizations continue to document human rights abuses, including arbitrary detentions, limited press freedom, and instances of torture and mistreatment, especially involving state security forces.[95] Moreover, the political and ethnic tensions, while less visible than in the past, still persist and occasionally escalate into violent incidents, calling into question the government's ability to protect citizens from persecution.[96]

Such concerns have also been expressed by scholars and NGOs; for instance, the Italian Association for Juridical Studies on Immigration (ASGI) has explicitly criticized the government's lack of transparency and rigor in assessing the actual security conditions in Côte d'Ivoire, questioning the appropriateness of labeling it as "safe."[97]

Likewise, media commentary highlights that merely having no open armed conflict does not automatically mean the situation is sufficiently stable or secure for citizens needing protection.[98] Given these points, Italy's decision might conflict with its international obligations under the non-refoulement principle enshrined in the 1951 Geneva Convention[99] and the rigorous assessment required by the EU Procedures Directive for designating safe countries of origin.[100]

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[94] Amnesty International, *Annual Report 2024 – Côte d'Ivoire* (London 2024) 154.
[95] Human Rights Watch, *World Report 2024: Ivory Coast* (New York 2024) 305-306.
[96] International Crisis Group, *Ivory Coast: Defusing Electoral Tensions* (Report No 321, 2023) 12.
[97] Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), *Accesso civico ASGI: le schede dei paesi di origine sicuri* (2023) https://www.asgi.it/asilo-e-protezione-internazionale/accesso-civico-asgi-le-schede-dei-paesi-di-origine-sicuri-2/ accessed 5 April 2025.
[98] Linkiesta, *Paesi di origine "sicuri": così l'Italia respinge chi cerca protezione* (October 2023) https://www.linkiesta.it/2023/10/paesi-di-origine-sicuri-migranti-procedure-alla-frontiera-irregolari/ accessed 5 April 2025.
[99] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.
[100] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60, art 37 and recital 46.

5. Judicial Interpretations and Legal Challenges

The SCO concept and the criteria used to designate a country as “safe” have been the source of many interpretative doubts. The European Court of Justice has cleared some of them, while others are still under scrutiny. These doubts raise legal challenges for national judges when applying the concept to specific cases.

5.1. The CJEU Judgment of 4 October 2024 (Czech Republic Case)

Under the Asylum Procedures Directive (Directive 2013/32/EU), the concept of a safe country of origin has historically allowed for nuanced application.[101] Article 36 of the Directive defines a "safe country of origin" as a country where, on the basis of the legal situation, the application of the law, and the general political circumstances, it can be shown that there is generally and consistently no persecution, torture, inhuman or degrading treatment or punishment, or threat of indiscriminate violence in situations of armed conflict.[102] Article 37 further outlines the procedures that Member States must follow to designate a third country as a safe country of origin at the national level, including the obligation to base such decisions on reliable sources of information, including reports from international organizations.[103] Importantly, Annex I of the Directive establishes the specific criteria that must be satisfied for a country to be deemed safe, including respect for the right to life and freedom from torture or inhuman treatment, respect for the principle of non-refoulement, and the availability of effective legal remedies.[104]

Although the Directive provides detailed definitions, their practical application often raises interpretative doubts. A very controversial aspect is whether Member States can designate a country as a safe country of origin while recognizing that certain parts of the territory or identifiable categories of persons within that country might still face persecution or harm. This approach causes a differential treatment among citizens of the same country, potentially causing discrepancies. The flexibility

[101] Ibid.
[102] Ibid, art 36.
[103] Ibid, art 37.
[104] Annex I, Directive 2013/32/EU.

of this system allows Member States to exclude specific regions or vulnerable groups of persons from the "safe" classification. For example, there has been a ruling by Germany's Supreme Administrative Court that rejected a claim for refugee status by a Syrian man, stating that certain regions of Syria could not be considered as dangerous.[105]

This approach implemented by Member States was overturned by the Court of Justice of the European Union (CJEU) in a landmark judgment on 4 October 2024 (Case C-406/22).[106] This case had as protagonist a citizen of Moldova who fled to Czech Republic requesting international protection, claiming that in his country he faced serious harm from private individuals who had already caused him harm in the past. By decision of 8 March 2022, the Ministry rejected the applicant's international protection application as manifestly unfounded under domestic asylum law. In fact, the Czech Republic considered Moldova to be a safe country of origin by decree, with exception of Transistria.

During the appeal proceedings, on 9 May 2022, the Brno Regional Court granted the suspensive effect on the asylum rejection and referred three questions to the Court of Justice for a preliminary ruling. For the purpose of this thesis, only the second one will be analyzed.

By its second question, the national court asks, in essence, whether Art. 37 of the Procedures Directive (Directive 2013/32/EU) must be interpreted as precluding a third country from being designated as a safe country of origin except certain parts of its territory.

First of all, the Court underlines that the interpretation of a provision of EU law requires to take into consideration not only its wording but also its context, the objectives pursued by the rule and its genesis. It then follows with its argumentation, stating that *"In the first place, as regards the wording of Article 37 of Directive 2013/32, which, in accordance with its title, relates to the designation by a Member State of third countries as safe countries of origin, reference is made, on a number of occasions, to the terms 'country/ies' and 'third country/ies' without any indication*

[105] AP News, 'German Court Rejects Syrian's Asylum Claim, Says No General Danger to Civilians' (26 October 2023) https://apnews.com/article/germany-syria-migration-court-civil-war-d2746da0a7f302c7e256a6af162accee accessed 5 April 2025.
[106] Case C-406/22 *CV v Czech Republic* (4 October 2024).

that, for the purposes of such designation, those terms may be understood as referring only to part of the territory of the third country concerned."[107]

It then follows by affirming *"In the second place, as regards the context of Article 37 of that directive, it is apparent, first, from Article 37 that Member States may designate safe countries of origin in accordance with Annex I to that directive. Like the wording of Article 37, the criteria set out in that annex do not provide any indication that it is open to the Member States to designate as a safe country of origin only the part of the territory of the third country concerned in which those criteria are met."*[108] The Court clarifies that under Annex I, the designation of a country as a safe country of origin is dependent on the possibility of demonstrating that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. The use of the words "generally and consistently" tends to indicate that, in absence of any reference to a part of the territory of the third country concerned in Annex I to Directive 2013/32/EU or in Art. 37 of that directive, the conditions set out in that annex must be met throughout the territory of the third country concerned in order for that country to be designated as a safe country of origin.[109]

In the third place, the Court states that the interpretation according to which Art.37 does not allow Member States to designate a third country as a safe country of origin, with exception of certain parts of the territory, is confirmed by the legislative history of that provision.[110] While Art. 30 of the former Procedures Directive 2005/85 expressly provided for the possibility for a Member State to designate as safe even only a portion of the territory, this possibility was explicitly repealed, in 2013, in the recast Directive.[111] Nevertheless, this possibility reappears in Art. 61 of the new Regulation 2024/1348. This Regulation was formally adopted in May 2024, together with the other instruments of the Pact on Migration and Asylum, but will only apply as of 12 June 2026.

[107] Ibid, para 66.
[108] Ibid, para 67.
[109] Ibid, paras 68-71.
[110] Ibid, para 72.
[111] Ibid, para 73.

In the light of the foregoing considerations, the answer to the second question is that Article 37 of Directive 2013/32 must be interpreted as precluding a third country from being designated as a safe country of origin where certain parts of its territory do not satisfy the material conditions for such designation, set out in Annex I to that directive.

In the same ruling, the Court emphasizes the legitimate discretion of the Union's legislator to conduct a balancing exercise, in compliance with the principle of proportionality, between the need to rapidly examine applications from safe countries and the right of asylum seekers to have access to an adequate assessment of their claim. But because the safety designation has significant consequences on the procedure, allowing applications from such countries to be subjected to a special regime of a derogatory nature (e.g. accelerated procedures, rejection in the form of manifest inadmissibility, limitation of the suspensive effect of the appeal), the interpretation of these derogation rules must be strict and rigorous.[112]

The Court has thus provided clarification regarding the interpretation of Article 37 in relation to the designation of a safe country concerning only parts of a territory. However, it has not ruled on the issue of defining whether Member States can designate a country as a safe country of origin while recognizing that identifiable categories of persons within that country might still face persecution or harm. The debate on how to interpret this aspect of the provision is still ongoing, and in fact, several Italian judges have referred the matter for a preliminary ruling to the Court of Justice of the European Union, which has yet to provide an explicit answer. This issue will be discussed in more detail in the following paragraphs.

[112] Sara Morlotti, 'Safe or Not? Some Much-Awaited Clarification on the Designation of Third Safe Countries of Origin by the CJEU' (October 2024) *Rivista Eurojus* https://www.uclouvain.be/fr/instituts-recherche/juri/cedie/news/morlotti-octobre2024 accessed 5 April 2025.

5.2. Preliminary References by Italian Courts: Legal Challenges and the EU Dimension

The recent preliminary references submitted by Italian courts to the Court of Justice of the European Union represent a significant moment in the European legal debate on the topic of safe countries of origin, with particular reference to the so-called "personal exceptions". This situation arose following the judgment of 4 October 2024 of the Court of Justice in the case *Ministerstvo vnitra České republiky* (C-406/22), in which it was established that the designation of a third country as "safe" cannot take place if some of its territorial portions do not fully comply with the criteria established by Annex I of Directive 2013/32/EU.[113] This ruling had a strong resonance especially in Italy, where national legislation provided for the possibility of designating safe countries of origin with both territorial and personal exceptions.[114]

The Italian legislative response was timely, resulting in Legislative Decree no. 158/2024 which, by amending art. 2 bis of Legislative Decree no. 25/2008, eliminated the territorial exception, while maintaining the personal one.[115] The latter allows a country to be classified as safe despite the presence of specific categories of people who are not adequately protected. This regulatory decision has led several Italian courts, including those of Rome, Florence, Bologna and Palermo, to submit preliminary references to the European Court of Justice to clarify whether the logic of the ruling of 4 October 2024, originally referring to territorial exceptions, can also be extended to personal exceptions.[116]

In particular, the Court of Florence raised questions already in June 2024, requesting clarification on the possibility for a Member State to designate a safe country by providing for personal exclusions for certain categories at risk and on the difficulty of identifying such categories.[117] Similar questions were posed by the Court of Bologna, with an additional question regarding the principle of the primacy of

[113] Case C-406/22 *Ministerstvo vnitra České republiky v CV* ECLI:EU:C:2024:841.
[114] Paolo Iannuccelli, '"Paesi d'origine sicuri": la situazione processuale delle cause pendenti davanti alla Corte di giustizia' (European Litigation, 11 December 2024) 1-2.
[115] Legislative Decree no. 25/2008, as amended by Legislative Decree no. 158/2024.
[116] Mario Savino, 'I Paesi di origine sicuri davanti alla Corte di giustizia: l'udienza del 25 febbraio 2025 e il nodo del controllo giurisdizionale' (ADiM Blog, February 2025) https://www.adimblog.com accessed 5 April 2025.
[117] Iannuccelli, 'Paesi d'origine sicuri'.

Union law over national legislation, especially in relation to the replacement of the interministerial decree with the decree-law.[118] The principle of primacy of the European Union law establishes that in cases of conflict between EU law and national law, EU law prevails. National courts are therefore required to set aside any conflicting provisions of national law, regardless of whether they were adopted before or after the relevant EU rule.[119]

The most relevant cases, however, concern the referrals from the Court of Rome (cases C-758/24 and C-759/24, *Alace* and *Canpelli*), which, having obtained the accelerated procedure, address central issues such as legislative competence in the designation of safe countries of origin, the obligation to make sources accessible and verifiable and the power of judges to use updated information independently to verify the validity of the designation itself.[120] These cases are particularly important because they also concern the relationship between internal legal systems and European Union law, in particular regarding the power of ordinary judges to disapply internal rules that conflict with European law.[121]

On 25 February 2025, during an oral hearing, the European Commission issued its opinion on the questions submitted by the Court of Rome. Since Directive 2013/32/EU is silent on personal exceptions, according to the Commission, "Member States have a margin of discretion" regarding the admissibility of such exceptions. The Commission confirmed that it had carefully considered the issue, declaring itself in favor of allowing Member States to designate a country of origin as safe even in the presence of personal exceptions.[122] The defense of *Alace* and *Canpelli*, on the other hand, expressed itself in the opposite direction, underlining the drastic compression of the guarantees of due process that derives from the subjection to the accelerated procedure. A more solid position on this issue was presented by Germany, the only Member State to have expressed a divergent point of view. According to the German legal representation, given that the Directive does not contain specific indications on the admissibility of personal exceptions, it would be necessary to apply

[118] Ibid, 4-5
[119] Case 6/64 *Flaminio Costa v ENEL* ECLI:EU:C:1964:66, para 3.
[120] Iannuccelli, 'Paesi d'origine sicuri' 6-8.
[121] Savino, 'I Paesi di origine sicuri' 6-7.
[122] Ibid, 4-5.

the interpretative principle based on the distinction between general rule and exception. Since the accelerated procedure constitutes a special and derogatory form compared to the ordinary procedure, a systematic interpretation more oriented towards the protection of individual rights suggests adopting a restrictive reading of the concept of "safe country of origin", thus excluding from the designation those countries in which there are categories of persons who are not sufficiently protected.[123] Also during its ruling of 25 February, the Commission questioned the previous literal interpretation given by the Court of Justice (C-406/22), which had excluded territorial exceptions based on the expression “generally and constantly” provided for by Directive 32/2013/EU. The Commission argued that the use of this language does not necessarily prevent a country from being designated as safe even when there are specific categories of people who do not fully enjoy safety. On the contrary, the word “generally” explicitly allows for the existence of exceptions.[124] The Commission also adopted a systematic argument, referring to Recital 42 of Directive 32/2013. This recital clearly states that the designation of a country as safe cannot constitute an absolute guarantee of safety for all its citizens, but rather takes into account the general civil, legal and political situation. Furthermore, precisely because of the lack of an absolute guarantee, the European legislator has provided, with art. 36 of the directive itself, a specific mechanism to individually assess the requests of subjects belonging to vulnerable categories. This argument aims to demonstrate that the directive already implicitly provides for the possibility of personal exceptions, consistently with its very purpose.[125]

Advocate General Richard De la Tour delivered his conclusions on 10 April 2025, and the Court’s final judgment is expected before summer 2025. Further complicating the picture is the agreement between Italy and Albania that provides for accelerated border procedures and the detention of asylum seekers from countries designated as safe, generating a significant amount of domestic litigation.[126] The decision that the Court of Justice will have to take by mid-2025 will therefore have a decisive impact both on the application of the border procedure provided for by the New European

[123] Savino, ‘I Paesi di origine sicuri’ 5.
[124] Ibid.
[125] Ibid.
[126] Iannuccelli, ‘Paesi d’origine sicuri’ 10-11.

Pact on Migration and Asylum and on the coherence and uniformity of European law in the field of international protection.

The main issue concerns the margin of discretion that Member States have in defining safe countries of origin and the implications for the individual rights of asylum seekers. In particular, the possibility for Italian judges to directly disapply national rules in favor of EU law risks creating jurisdictional and institutional tensions, calling into question the certainty of the law and the coherence in the European management of migration.[127]

5.2.1. The Advocate General's Conclusions on *Alace* and *Canpelli*

With regard to the questions referred for a preliminary ruling in the *Alace* and *Canpelli* cases, Advocate General Richard de la Tour delivered extremely detailed conclusions on four main questions of interpretation relating to Directive 2013/32/EU, providing a systematic and detailed analysis that takes into account not only the wording of the legislation but also its structure and the teleological objective pursued by the EU legislature.[128]

First, with regard to the first question referred for a preliminary ruling, the Advocate General focused on the possibility for a Member State to designate safe countries of origin by means of a legislative act. He noted that neither Article 36 nor Article 37 of the Directive precludes such a practice, since the Directive merely recognizes the Member States' power to introduce national legislation allowing such designation, without specifying the nature of the act to be adopted. Member States therefore enjoy a wide margin of procedural and institutional discretion, being free to choose between legislative, regulatory or administrative acts. However, that autonomy must be exercised in compliance with the fundamental principles of EU law, including the primacy of EU law, the effectiveness of the rights conferred on applicants for international protection and the need to ensure the right to an effective remedy before an independent and impartial tribunal, as enshrined in Article 46 of the

[127] Savino, 'I Paesi di origine sicuri' 11-12.
[128] Richard de la Tour, Opinion of Advocate General in Cases C-758/24 and C-759/24 *Alace* and *Canpelli* ECLI:EU:C:2025:376, delivered on 10 April 2025.

Directive and Article 47 of the Charter of Fundamental Rights of the European Union.[129]

In this regard, the Advocate General emphasized that, even if the designation is made by means of a legislative act, it must be reviewable in the light of the substantive criteria laid down in Annex I to the Directive. The mere legislative form of the act cannot exempt the designation from judicial review, which must be full and effective, otherwise, the practical effectiveness of the right to a remedy enshrined in EU law would be compromised. In short, legislative designation is permissible only insofar as it does not interfere with the applicant's right to full and up-to-date judicial protection based on the actual situation in the country designated as safe.[130]

Turning to the second and third questions referred for a preliminary ruling, concerning the transparency of the sources of information used for the designation of safe countries of origin, the Advocate General emphasized the crucial importance of the disclosure of sources, while acknowledging that Directive 2013/32 does not expressly impose an obligation to disclose them. However, he argued that compliance with Article 46(3) of the Directive, in conjunction with Article 47 of the Charter, requires that applicants have access to an effective judicial remedy, which implies the real possibility of challenging the presumption of safety attributed to the country of origin. That possibility is conditional on knowledge of the sources of information on which the designation is based.[131]

Failure to disclose the sources would seriously undermine the effectiveness of the right of defence and render the judicial review provided for by the Directive devoid of practical effect. Consequently, in the absence of disclosure, it is for the national court to carry out an independent review, using reliable sources among those provided for in Article 37(3) of the Directive, which includes reports from United Nations agencies, international organizations and reliable NGOs. The Advocate General thus emphasized the active role of the court, which is called upon to fill any gaps in information in order to ensure a complete and *ex nunc* examination of the situation in the country of origin, as already stated in the Czech Republic judgment (C-406/22).[132]

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[129] Ibid, paras 32-39.
[130] Ibid.
[131] Ibid, paras 41-65.
[132] Ibid; see *supra,* 5.1.

As regards the fourth question referred for a preliminary ruling, concerning the possibility of designating a country as safe even in the presence of vulnerable categories, the Advocate General proposed a pragmatic and flexible solution that takes into account both the literal wording of Annex I to the Directive and the practical requirements of national asylum systems. He recognized that the concept of 'safety' must be understood in a general and not an absolute sense: the adverb 'generally' used in Annex I allows a country to be considered safe even if there are individual categories of persons for whom protection is not guaranteed.[133]

However, the Advocate General laid down strict conditions: vulnerable categories must be clearly and formally identified, they must be limited in number, and their exclusion from the presumption of safety must be expressly provided for in the act of designation. Furthermore, the competent authority must be able to identify promptly applicants falling within such categories so that they can be subject to the ordinary examination procedure provided for in Article 31 of the Directive. If, on the other hand, the excluded categories were numerous or difficult to identify, the presumption of safety would be rendered meaningless, and the designation would be incompatible with the substantive requirements of the directive.[134]

The Advocate General also emphasized that this interpretation is fully in line with Regulation 2024/1348, which, although it will only apply from 2026, confirms the possibility for Member States to provide for personal exceptions in the designation of safe countries, provided that the categories are clearly identified and limited.[135]

In conclusion, the Advocate General invited the Court to declare that: (i) the designation of safe countries by legislative act is compatible with EU law, provided that effective and complete judicial review is guaranteed; (ii) the disclosure or at least the availability of the sources of information is essential for the effectiveness of the right of defence and judicial review; (iii) Member States may designate a country of origin as safe while providing for exceptions for limited categories of vulnerable persons, provided that those exceptions are formally identified and do not undermine the coherence and stability of the presumption of safety.[136]

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[133] Ibid, paras 66-95.
[134] Ibid.
[135] Ibid, paras 94-95.
[136] Ibid, para 96.

6. Critiques of the Safe Country of Origin Concept

The Safe Country of Origin mechanism has increasingly come under scrutiny for its potential to undermine core principles of international and European asylum law. While intended to streamline procedures and manage asylum flows more efficiently, its implementation has raised serious concerns about the erosion of fundamental rights, the weakening of procedural safeguards, and the risk of refoulement. Critics argue that the presumption of safety attached to certain countries often leads to a reversal of the burden of proof, limiting asylum seekers' ability to obtain fair and individualized assessments. These concerns are particularly acute in contexts where political considerations influence the designation of "safe" countries and where procedural shortcuts compromise access to effective remedies. As a result, a growing body of legal, institutional, and civil society commentary has emerged, challenging both the normative assumptions and the practical consequences of the SCO framework across the European Union.

6.1. Observations Raised by NGOs and International Bodies

Organizations and NGOs have consistently provided critical input on the EU's use of the Safe Country of Origin (SCO) concept, highlighting the areas of concern under EU fundamental rights and procedural guarantees. The United Nations High Commissioner for Refugees (UNHCR) has invariably urged that any presumption of safety can be overcome through rigorous and individualized testing of asylum claims.[137] Through its numerous declarations and court briefs, UNHCR insists that faster procedures that are part of SCO designation must not jeopardize diligence or fairness as demanded by the EU Charter of Fundamental Rights, in particular Articles 18 (right to asylum) and 47 (effective remedy).[138] Moreover, UNHCR warns that overly exclusive interpretations or shortcuts in applying the SCO principle could risk leading to violations of international protection obligations, in particular non-

[137] UNHCR, *Comments on the European Commission's Proposal for an Asylum Procedure Regulation COM(2016)467* (April 2019) 45.
[138] Charter of Fundamental Rights of the European Union [2012] OJ C364/1, arts 18 and 47.

refoulement.[139] The UNHCR specifically opposes designating only certain areas within a country as safe, as these partial designations fail to provide sufficient protection and complicate practical application. It also highlights persistent divergences among member states in designating countries and procedural applications, raising concerns about potential fundamental rights violations.[140]

Similarly, the European Council on Refugees and Exiles (ECRE) continued to consider Member States' SCO lists as tending to reflect political rather than purely legal and humanitarian grounds, which risks undermining international protection standards. According to ECRE, the designation of states as "safe" has a tendency to be unclear and lacking in objective grounds, which can result in arbitrary or unjustified inclusion of certain states. This approach, contended by ECRE, erodes the procedural rights of asylum seekers and imposes an unreasonably heavy burden on applicants to prove the fact of persecution or risk to life.[141] ECRE also highlights that criteria for designating countries as safe, as outlined in the Procedures Directive, have not been uniformly transposed into national legislations, resulting in inconsistencies across member states. It further critiques using human rights violation metrics by the European Commission, such as judgments by the European Court of Human Rights, arguing these numerical criteria alone inadequately reflect deeper qualitative human rights concerns. Additionally, ECRE challenges the relevance of recognition rates of international protection claims as indicators of a country's safety, pointing out notable discrepancies such as high recognition rates for applicants from Albania and Turkey in certain member states despite their official designation as safe by the EU.[142]

Amnesty International and Human Rights Watch have extensively documented cases in which SCO practices in EU Member States, like Italy and Greece, have led to inadequate individual examinations, insufficient procedural safeguards, and premature rejections of asylum claims. Both organizations cite specific instances in which nationals of countries deemed safe were subjected to serious human rights

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[139] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice – Key Findings and Recommendations* (March 2010).
[140] Ibid.
[141] European Council on Refugees and Exiles, '"Safe Countries of Origin": A Safe Concept?' *AIDA Legal Briefing* No 3 (September 2015) https://www.refworld.org/reference/research/ecre/2015/en/107279 accessed 5 April 2025.
[142] Ibid.

violations upon return, thereby exposing inherent weaknesses in SCO practices. Amnesty International's reports, for instance, highlight the inadequate legal representation and limited appeal rights given to asylum seekers through expedited procedures, which greatly cut down their chances of successfully appealing SCO-based refusals.[143] In the same vein, Human Rights Watch has pointed out that relying on broad assumptions about safety, without full and individual assessments, is contrary to the EU and international law requirements, including the right to seek asylum and protection against refoulement.[144]

Furthermore, the European Union Agency for Fundamental Rights (FRA) has cautiously accepted the SCO mechanism when appropriately implemented to streamline clear-cut cases but maintains concerns about procedural safeguards, stressing the importance of robust legal standards and adequate remedies for affected individuals.[145]

Such associations collectively call for greater transparency and accountability in listing and reviewing SCO lists. They consistently call for these lists to be routinely and systematically updated on the basis of comprehensive human rights reviews by reliable and independent sources. Furthermore, they urge enhanced procedural safeguards, including proper legal representation, effective and easily accessible appeals, and judicial review, to ensure full compliance with EU fundamental rights standards and norms. Their detailed reports and rigorous advocacy significantly influence public discourse and policy debates, providing essential external scrutiny and highlighting critical tensions between the efficiency-driven goals of migration management and the EU's fundamental legal and ethical commitments to protect asylum seekers and uphold human rights.

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[143] Amnesty International, *Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights* (November 2016) https://www.amnesty.org/en/documents/eur30/5004/2016/en/ and *Greece: Lives on Hold – Update on Situation of Refugees and Migrants on the Greek Islands* (July 2017) https://www.amnesty.org/en/documents/eur25/6745/2017/en/ accessed 5 April 2025.

[144] Human Rights Watch, *EU Policies Put Refugees at Risk* (23 November 2016) https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk accessed 5 April 2025.

[145] European Union Agency for Fundamental Rights (FRA), *Opinion No 1/2016 Concerning an EU Common List of Safe Countries of Origin* https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-safe-country-of-origin-01-2016_en.pdf accessed 5 April 2025.

6.2. Critical Perspectives on the Italian Implementation of the SCO Concept

A growing debate has raised serious concerns about the Italian implementation of the Safe Country of Origin (SCO) mechanism, particularly in light of its compatibility with European Union law and the fundamental rights of asylum seekers.

The concerns raised anticipate and reflect the same core legal tensions addressed in both the CJEU's judgment of 4 October 2024 and the preliminary references submitted by Italian courts in the *Alace* and *Canpelli* cases. Specifically, the critiques focus on the risks of turning the presumption of safety into an absolute rule, the erosion of individual assessment, and the insufficient transparency in the designation process, all issues that lie at the heart of the legal questions now under scrutiny at the EU level. In this sense, these doctrinal positions both informed and foreshadowed the challenges currently being examined by the CJEU, particularly regarding the permissibility of personal exceptions and the procedural guarantees required under Directive 2013/32/EU.

Giovanni Armone, in his contribution to Questione Giustizia, outlines a wide range of legal and practical issues stemming from the use of interministerial decrees to designate SCOs. He warns that the inclusion of a country on the Italian SCO list can, in practice, erode the applicant's right to an individual assessment of their asylum claim. The author argues this opens the door to automatic decision-making that runs counter to the guarantees enshrined in Directive 2013/32/EU and the jurisprudence of the Court of Justice of the European Union. Armone stresses that the implementation of the interministerial decree risks turning the presumption of safety into an absolute one, shifting the burden of proof onto the applicant and increasing the likelihood of erroneous decisions. He also criticizes the lack of a proper mechanism for periodic review of the SCO list, which may result in assessments that do not reflect the actual human rights situation in the listed countries. Another issue is the erosion of procedural safeguards, including shorter appeal deadlines, removal from the regular reception system, and immediate enforcement of rejections. These measures, according to the author, undermine the effectiveness of the right to asylum, which is

protected by Article 10, paragraph 3, of the Italian Constitution, and may raise questions of constitutional legitimacy.[146]

These concerns are reaffirmed and elaborated on by Filippo Venturi, who also laments the formalistic and schematic application of the SCO concept through Law No. 132/2018. Venturi, as Armone, argues that the law translates the presumption of safety into an almost absolute principle, thereby denying the right to a real and individualized consideration of protection needs. He highlights how this inversion of the burden of proof obliges the applicant to demonstrate serious and personal reasons to fear persecution, despite the official classification of their country of origin as "safe". In addition, he draws attention to the adoption of accelerated and simplified procedures for applicants from SCOs, which may fall short of the minimum procedural guarantees required by EU law, particularly those relating to the fairness, thoroughness, and individualization of the asylum procedure as required by Directive 2013/32/EU. Additionally, he expresses concern for the lack of transparent, up-to-date and objective criteria in the selection of the States included in the list of SCOs, a practice that, according to the author, lends itself to political or diplomatic influences rather than to evaluations based on documentary evidence relating to the effective respect of human rights. Furthermore, the author draws attention to the risk that the Italian approach may be incompatible with art. 3 of the European Convention on Human Rights, if it leads to pushbacks towards countries where, in concrete terms, inhuman or degrading treatments exist.[147]

Similarly, Cesare Pitea reinforces these concerns, especially regarding the procedural consequences of applying the SCO presumption. He argues that the presumption of safety severely restricts access to international protection by burdening applicants with the responsibility to rebut the assumption and prove their individual risk. In line with both Armone and Venturi, Pitea highlights the lack of a dynamic and transparent review process for the list of designated countries, stressing

[146] Giovanni Armone, 'Il decreto interministeriale sui Paesi di origine sicuri e le sue ricadute applicative' (2020) *Questione Giustizia* https://www.questionegiustizia.it/speciale/articolo/il-decreto-interministeriale-sui-paesi-di-origine-sicuri-e-le-sue-ricadute-applicative-10740 accessed 5 April 2025.

[147] Filippo Venturi, 'Il diritto di asilo: un diritto "sofferente". L'introduzione nell'ordinamento italiano del concetto di «Paesi di origine sicuri» ad opera della l. 132/2018 di conversione del c.d. «Decreto sicurezza» (d.l. 113/2018)' (2019) 2 *Diritto, Immigrazione e Cittadinanza* 30 https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2019-1/399-il-diritto-di-asilo-un-diritto-sofferente accessed 5 April 2025.

that Italian authorities do not ensure regular reassessment based on reliable and updated sources, as required by EU norms. He also identifies a potential violation of Article 46 of Directive 2013/32/EU, particularly in relation to the right to an effective remedy and judicial protection for asylum seekers. Importantly, the scholar introduces an additional dimension to the debate by criticizing the marginalization of the UNHCR's role in the designation process. He argues that the UNHCR, whose expertise and independence are fundamental to ensuring objective evaluations of third-country safety, is often sidelined in Italian practice, a deficiency not directly addressed by the other authors, but one that compounds the broader concern of institutional opacity and lack of accountability.[148]

Further criticism comes from Erika Colombo, who frames the Italian approach within the broader principle of the primacy of EU law. She emphasizes that Italian legislation concerning SCOs not only contradicts specific EU directives but also illustrates a broader reluctance among Italian judicial authorities to disapply domestic norms that are incompatible with EU law. Reflecting on the hearing of 25 February 2025 in joined cases C-758/24 and C-759/24, Colombo stresses that national judges have a legal obligation, not merely a discretion, to set aside conflicting national provisions in favor of directly applicable EU norms. Her intervention adds a constitutional layer to the procedural and administrative critiques raised by Armone, Venturi, and Pitea, suggesting that the Italian judiciary's hesitation to enforce EU primacy exacerbates the systemic erosion of asylum protections.[149]

Lastly, Chiara Favilli contributes a perspective focused on legal coherence and the integrity of EU asylum standards. While recognizing that Italy has formally transposed the SCO mechanism provided by Directive 2013/32/EU, Favilli argues that its domestic application deviates substantially from the European legal framework. Echoing Colombo, she insists that Italy cannot assign a discretionary or politically expedient meaning to the notion of a "safe country" but must adhere to the substantive and procedural requirements laid out by Union law. These include the obligation to ensure a genuine individual assessment of the claim and effective access

[148] Cesare Pitea, 'La nozione di «Paese di origine sicuro» e il suo impatto sulle garanzie per i richiedenti protezione internazionale in Italia' (2019) 102(3) *Rivista di diritto internazionale* 649.
[149] Erika Colombo, 'I grandi assenti: il principio del primato e la disapplicazione della normativa nazionale in contrasto con il diritto UE' (2025) *Eurojus*.

to judicial remedies.[150] During an academic event at the University of Ferrara, Favilli underscored the vital role of judicial authorities in exercising full and substantive scrutiny over the designation of SCOs. In the absence of such scrutiny, she warned, the system risks producing structural violations of asylum seekers' fundamental rights, a conclusion that strongly resonates with the systemic risks identified by all the aforementioned authors.[151]

[150] Chiara Favilli, cited in 'Accordo Italia-Albania: Chi decide qual è un paese sicuro?' (VoxEurop, 9 November 2023) https://voxeurop.eu/it/accordo-italia-albania-fact-checking accessed 5 April 2025.
[151] Università di Ferrara, *Politiche migratorie e conflitti tra ordinamenti: una riflessione multidisciplinare a partire dal caso dei "Paesi sicuri"* (Conference, 24 January 2025) https://giuri.unife.it/it/eventi/politiche-migratorie-e-conflitti-tra-ordinamenti-una-riflessione-multidisciplinare-a-partire-dal-caso-dei-201cpaesi-sicuri201d accessed 5 April 2025.

CHAPTER II
THE EXTERNAL DIMENSION OF EU'S MIGRATION POLICY AND THE ITALY-ALBANIA PROTOCOL

1. The External Dimension of the EU's Migration and Asylum Policy

The European Union's externalization policy in migration management is characterized by strategies aimed at shifting migration controls outside the territorial boundaries of Member States. This approach, which has often been referred to as the "external dimension" of the European Union's migration and asylum policy, emerged in the EU's political debate in the late 1990s and early 2000s, as Member States recognized the limitations and ineffectiveness of traditional domestic border management in dealing with the increasing migration issues from non-EU states. [152] The externalization process involves two closely interrelated practices: externalization of borders and externalization of migration control.

The externalization of borders practice essentially involves the extension of physical and administrative border activities to third countries or international waters, effectively establishing buffer zones or pre-frontier controls that actively intercept and regulate migrant flows before their arrival within European Union jurisdiction.[153] Some examples of these practices are maritime interdictions, visa policies aimed at pre-screening potential migrants, and third-country offshore detention or processing centres that are usually arranged by bilateral or multilateral agreements with transit states. [154]

In parallel, externalization of migration control comprises broader measures designed to engage third countries actively in efforts to regulate irregular migration. Some of these initiatives include enhancing third countries' capacities in border management, anti-trafficking and anti-smuggling activities, and implementing

[152] Christina Boswell, 'The External Dimension of EU Immigration and Asylum Policy' (2003) 79 *International Affairs* 619.
[153] Cecilia Menjívar, 'Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization' (2014) 10 *Annual Review of Law and Social Science* 353.
[154] Salvatore Fabio Nicolosi, 'Externalization of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law' in *Netherlands international Law Review* (May 2024) 2–6; Menjívar, 'Immigration Law Beyond Borders' 357–359.

readmission arrangements, safe third country policies, and asylum cooperation agreements for returning or deterring migrants and refugees outside the EU borders.[155]

Both practices have their roots in a securitized understanding of migration in which migratory flows are mostly constructed as a potential security risk rather than a humanitarian or economic one. [156] This securitization has resulted in increasingly restrictive measures justified through public and political initiatives associating irregular migration with organized crime, terrorism, and socioeconomic threats for receiving societies. [157] However, such externalization practices have sparked intense academic and legal debate, particularly concerning their compliance with international human rights law.

Critics argue that these measures raise serious risks of violating fundamental principles, in particular the principle of non-refoulement, whereby migrants and asylum seekers cannot be repatriated to places where they are threatened with persecution or serious harm. [158] Additionally, externalization efforts have created significant accountability gaps since responsibilities are dispersed between EU member states and third-country partners, making it challenging to enforce legal oversight and migrants' rights.[159] Therefore, the EU externalization policy, while seeking to promote better management of migration, can lead to migrants using increasingly risky migration routes, increased exposure to human trafficking, and institutional failures in protection levels. [160]

A unique arrangement that reflects the broader European trends towards outsourcing migration control is the Italy-Albania protocol, signed on November 6 2023. Under the agreement, Italy will finance, build, and manage under its jurisdiction two migrant processing centres in Albania to handle asylum requests from individuals rescued by Italian vessels outside Italian territorial waters. In the latter, it will be

[155] Boswell, 'External Dimension of EU Immigration' 622–623; Nicolosi, 'Externalization of Migration Controls' 4–8.
[156] Godwin E Morka, 'The Risks of Refoulement of Trafficked Persons, Member States' Responsibilities and Law Enforcement Actions' (Introductory speech, Lagos, Nigeria, 25–26 February 2020).
[157] Menjívar, 'Immigration Law Beyond Borders' 355–356; Boswell, 'External Dimension of EU Immigration' 623–624.
[158] Nicolosi, 'Externalization of Migration Controls' 2–4; Morka, 'Risks of Refoulement'.
[159] Nicolosi, 'Externalization of Migration Controls' 4–8; Menjívar, 'Immigration Law Beyond Borders' 359.
[160] Boswell, 'External Dimension of EU Immigration' 619; Menjívar, 'Immigration Law Beyond Borders' 359; Morka, 'Risks of Refoulement'.

explained how this agreement differentiates itself from other systems of externalization used by the European Union and Member States.

1.1. The Legal Foundations and Policy Mechanisms of EU Migration Externalization

In the last two decades, the European Union and its Member States have increasingly used externalization as a legal and policy instrument to control migration, for example, through bilateral agreements such as the EU-Turkey Statement or the Italy-Libya Cooperation, among others. Instead of keeping migration regulation internal, the EU has developed a network of partnerships and legal tools that extend migration control outward, into the territory of third countries. At the center of this policy is the idea that cooperation with non-EU countries can deter irregular entries, facilitate returns, and share responsibility for asylum processing. This is the line of reasoning found in key EU legislative texts such as Article 78(2)(g) of the Treaty on the Functioning of the European Union (TFEU), which authorizes partnerships with third countries to manage migration flows.[161] It also underpins provisions such as Article 38 of the Asylum Procedures Directive (Directive 2013/32/EU), under which asylum seekers may be returned to "Safe Third Countries" by Member States, if they offer effective protection.[162]

The EU has engaged in formal agreements and informal arrangements with third countries to manage migration flows. These include readmission agreements, for example, the Joint Way Forward on migration issues between Afghanistan and the EU, which bind third countries to accepting back their nationals or other individuals who have transited through their territory. These are typically paired with development aid or financial incentives, which raises questions about the voluntariness and equality of these partnerships.

[161] Art 78(2)(g) TFEU provides that the Union shall adopt measures for the establishment of "partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection." *Treaty on the Functioning of the European Union* [2012] OJ C326/47, art 78(2)(g).
[162] Directive 2013/32/EU art 38; see *supra,* para 2.2.

Moreover, the EU's externalization policy involves transferring border control actions to third countries, i.e., establishing processing centers and providing training and equipment to local authorities. While these policies aim to enhance the capacity of third countries to manage migration, they also risk outsourcing the EU's responsibility for asylum processing and protection to third countries that may lack the necessary infrastructure or legal framework to guarantee migrants' rights.

The institutional setup underpinning externalization extends well beyond formal competences. It has been shaped by political pressures, institutional constraints, and wider normative dilemmas. As Moreno-Lax contends, a significant portion of the European Union's external migration policy falls within “gray legal areas”, in which soft law tools and informal agreements enable the EU and its member states to outsource tasks and transfer responsibilities triggering the full scope of their human rights obligations.[163] Readmission agreements, to take one case, often come with financial incentives but lack enforceable human rights safeguards.[164] These deals, formal or informal, serve to externalize not only border controls but also the risks associated with asylum processing, often placing them in the hands of countries with limited capacity or questionable rights records.

The institutional drivers for externalization are also important. Organizations like Frontex now take action beyond EU borders under the umbrella of status agreements with countries like Albania and Serbia.[165] These arrangements allow EU border officials to take action immediately within the third-country management of migration, extending EU law in practice, if not necessarily principle. As Berfin Nur Osso has argued, this creates a "borderzone" of legal ambiguity, in which guarantees of fundamental rights are diluted and in which access to asylum can be practically denied without formal rejection.[166] Essentially, externalization is a legal and

[163] Violeta Moreno-Lax, ‘Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law’ (2017) *Oxford University Press.*
[164] Jean-Pierre Cassarino, ‘Informalizing EU Readmission Policy’ in Ariadna Ripoll Servent and Florian Trauner (eds.), The Routledge Handbook of Justice and Home Affairs Research, London, Routledge, 83-98.
[165] Juan Santos Vara, ‘The Activities of Frontex on the Territory of Third Countries: Outsourcing Border Controls Without Human Rights Limits?’ (2023) 8 (2) *European Papers* .
[166] Berfin Nur Osso, ‘Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization’ (2023) 35(3) *International Journal of Refugee Law* 272.

institutional response to the intra-EU conflicts, an effort to strike a balance between political demands for control and legal obligations to protection.

The critics point out that such policies risk undermining the very principles the EU claims to uphold, namely, the right of asylum and the principle of non-refoulement.[167] The more the EU relies on third countries to carry out core functions of migration control, the greater the need to clarify who is accountable when things go wrong. As externalization becomes a defining feature of EU migration governance, the challenge lies in ensuring that legal responsibility follows legal authority even when that authority is exercised beyond EU borders.

1.2. Cooperation with Third Countries and Bilateral Agreements

Cooperation with third countries to manage migration flows can take different forms, for example, bilateral agreements. These instruments are designed to control migratory flows, prevent irregular crossings, and facilitate the return and readmission of third-country nationals by fostering strategic partnerships with countries of origin and transit.[168] Through these arrangements, the EU and its Member States engage in operational and political collaboration that often includes provisions on border control, technical support, capacity building, and financial assistance.

Bilateral agreements may take diverse legal forms, ranging from formal readmission agreements to informal arrangements or broader mobility partnerships, all contributing to what has been termed the "external dimension" of EU migration governance. Since the 2015 migration crisis, the EU has increasingly resorted to informal, non-legally binding arrangements with third countries, a process described in the literature as the “informalisation” of external migration action. This shift reflects a preference for flexible, tailor-made instruments such as joint declarations,

[167] Cathryn Costello and Itamar Mann, ‘Border Externalization and the EU’s Duty to Respect Human Rights’ (2022) 56(1*) Israel Law Review* 1.
[168] Paul James Cardwell and Rachel Dickson, ‘“Formal Informality” in EU External Migration Governance: The Case of Mobility Partnerships’ (2023) 49(12) *Journal of Ethnic and Migration Studies* 3121, 3126.

memoranda of understanding, and standard operating procedures, particularly in the field of return and readmission.[169]

A particular tool of cooperation between the EU, interested Member States and third countries are Mobility Partnerships. According to the Commission, these are "The most complete framework for bilateral cooperation between the EU and its partners, based on mutual offers of commitments and project initiatives covering mobility, migration and asylum issues."[170]

These bilateral tools operate within the broader architecture of the EU's external migration policy, including frameworks such as the Global Approach to Migration and Mobility (GAMM), the Migration Partnership Framework (MPF), and the New Pact on Migration and Asylum.[171] Informal cooperation has emerged as a crucial working strategy, making deals with third countries possible even when formal agreements encounter political or legal obstacles.[172]

This dependence on bilateral collaboration is also shaped by internal challenges within the European Union, including the complexities in achieving consensus on changes to the Common European Asylum System. According to Kassoti and Idriz, the external dimension has been used increasingly to overcome such domestic constraints through more efficient ways of working.[173]

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[169] Eva Kassoti and Narin Idriz, 'The Informalisation of the EU's External Action in the Field of Migration and Asylum' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum: Global Europe: Legal and Policy Issues of the EU's External Action* (T.M.C. Asser Press 2022) 2-4.

[170] European Commission, The Global Approach to Migration and Mobility COM(2011) 743 final, 18 November 2011 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0743.

[171] The *Global Approach to Migration and Mobility* (GAMM) is the overarching framework of the EU's external migration policy, built around four pillars: (1) legal migration and mobility; (2) irregular migration and trafficking; (3) international protection and asylum; and (4) the migration–development nexus. It promotes comprehensive cooperation with third countries through balanced, partnership-based strategies;
The *Migration Partnership Framework* (MPF), launched in 2016, aims to manage migration more effectively along key routes by enhancing cooperation with countries of origin and transit, using tailored incentives to increase returns, prevent irregular flows, and address root causes;
The *New Pact on Migration and Asylum* proposes a comprehensive reform of the EU's asylum and migration framework, reinforcing border procedures, return mechanisms, and third-country cooperation, while promoting a balanced approach to solidarity and responsibility-sharing among Member States.

[172] Kassoti and Idriz, 'The Informalisation of the EU's External Action' 4-5.

[173] Ibid.

2. Key Case Studies of Externalization Policies

The phenomenon of migration control externalization has become increasingly central to the strategies adopted by states to manage migratory flows, particularly in Europe. Many different legal mechanisms have been used for this purpose, and they are increasing. Through the analysis of key case studies, it will be possible to highlight the evolving patterns of externalization, the tensions they generate within international and European legal frameworks, and the emerging trends in state practice. The comparative perspective will also provide a foundation for a critical evaluation of the Italy-Albania Protocol of 2023, positioning it within the broader context of migration externalization policies.

2.1. The EU-Turkey Statement

On 18 March 2016, the EU-Turkey Statement was published on the website of the European Council.[174] The agreement represents a landmark in the EU's externalization of migration control, aiming to curb irregular flows through the Eastern Mediterranean route. In particular, it laid down the basic elements of an arrangement to tackle the influx of irregular migrants from Turkey to Greece following the war in Syria.

According to the Statement, new irregular migrants arriving in Greece from Turkey as of 20 March 2016 would be resent to and readmitted by Turkey. For every irregular sent back to Turkey, a Syrian selected on the basis of the UN Vulnerability Criteria would be resettled in the EU. Moreover, the EU would accelerate the liberalization of the visa requirements for Turkish citizens wanting to enter the EU and speed up the process of disbursement of Euro 3 billion already allocated to the EU Facility for Refugees in Turkey, with an additional allocation of 3 billion for humanitarian, education and health care projects in Turkey.[175]

[174] European Council (2016) EU-Turkey statement 18 March 2016. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/

[175] Bas Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in Evangelia (Lilian) Tsourdi and Natasja Idriz (eds), The Informalisation of the EU's External Action in the Field of Migration and Asylum: Global Europe: Legal and Policy Issues of the EU's External Action (T.M.C. Asser Press 2022) 75.

The EU-Turkey Statement has been the subject of much controversy since its inception. Among the main issues of discussion, two key questions have attracted most attention, the first being its actual legal nature from the perspective of European Law, and secondly its compliance with the EU Charter of Fundamental Rights in light of the unsafe conditions asylum seekers and refugees encounter in Turkey.[176]

These issues have been widely debated in civil society and in academic and political contexts. In April 2016, they also led three individuals (two from Pakistan and one from Afghanistan residing in Greece), to challenge the legality of the EU-Turkey Statement before the Court of Justice of the European Union.[177]

The Court unexpectedly declined its jurisdiction to assess the pleas. It affirmed that the EU-Turkey Statement did not constitute an act or international agreement attributable to the European Council. Instead, it held that the Statement was issued by the heads of state or government of the EU Member States and their Turkish counterparts. Moreover, it clarified that the use of the term "EU" and the Council website to publish the Statement served only for communication purposes.[178]

Legal experts have extensively criticized the EU-Turkey Statement and the decisions made by the ECJ declining jurisdiction.[179] According to different authors, by rejecting ownership of and responsibility for the Statement before the Court, the European Council, the Council, and the Commission failed to play the roles attributed to them by the Lisbon Treaty. They argue that this strategy effectively and

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[176] Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (CEPS Policy Insights, No 2017-15, March 2017) 1 https://cdn.ceps.eu/wp-content/uploads/2017/04/EU-Turkey%20Deal.pdf accessed 17 April 2025.

[177] CJEU (General Court), *NF v European Council* (Order) Case T-192/16, *NG v European Council* (Order) Case T-193/16, *NM v European Council* (Order) Case T-257/16, 28 February 2017, ECLI:EU:T:2017:128, ECLI:EU:T:2017:129, ECLI:EU:T:2017:130.

[178] Ibid., *NF v European Council*, paras 57–71.

[179] See, for example, James C Hathaway, 'Taking Refugee Rights Seriously: A Reply to Professor Hailbronner' (Verfassungsblog, 5 May 2016) https://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/ accessed 17 April 2025;
Enzo Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on NF v European Council' (2017) 2 European Papers 251;
Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'It Wasn't Me! The Luxembourg Court Orders on the EU–Turkey Refugee Deal' (CEPS Policy Insights, 2017);
Carmelo Danisi, 'Taking the "Union" out of "EU": The EU–Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law' (EJIL: Talk!, 17 May 2017) https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/ accessed 17 April 2025;
Mauro Gatti, 'The EU–Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)' (EJIL: Talk!, 18 April 2016) https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/ accessed 17 April 2025.

transparently aims at evading any EU legal responsibility for the Statement's authorship and legal effects.

The legal critiques on the Statement and the ECJ declining jurisdiction translate into two main problems: a democratic deficit and a rule of law deficit.[180]

The democratic deficit manifests itself in the absence of formal oversight mechanisms. If the Statement is not considered a legally binding document, there is no obligation on the European Parliament to approve it. Conversely, if it is viewed as an act of the EU that lacks legal binding force, individual Member States are similarly exempt from seeking national parliamentary approval. This dual gap in accountability allows politically significant actions to bypass both EU and national democratic scrutiny.[181]

Moreover, the Statement contributes to a rule of law deficit by escaping judicial review. The lack of a clear legal status makes it difficult to attribute the Statement to EU institutions, which in turn limits the availability of legal remedies. Even though actions based on non-legal instruments can, in theory, be challenged through claims for damages, the high threshold for establishing non-contractual liability in EU external policy severely restricts this path. Thus, while the Statement may not formally qualify as an instance of informalization, it exhibits the structural problems associated with that practice.[182]

2.2. The EU-Afghanistan Joint Way Forward

The Joint Way Forward (JWF) on migration issues between the European Union (EU) and Afghanistan, signed in October 2016, represents a pivotal instrument in the EU's strategy to manage migration through externalization.[183] This non-binding political declaration was negotiated by the European External Action Service (EEAS) without the participation of the European Parliament, raising concerns about

[180] Bas Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in Evangelia (Lilian) Tsourdi and Natasja Idriz (eds), The Informalisation of the EU's External Action in the Field of Migration and Asylum: Global Europe: Legal and Policy Issues of the EU's External Action (T.M.C. Asser Press 2022) 76.
[181] Ibid, 76-77.
[182] Ibid.
[183] Joint Way Forward on migration issues between Afghanistan and the EU, 2 October 2016.

democratic oversight and transparency. Unlike formal readmission agreements, the JWF functions as a standalone arrangement aimed at facilitating the return of Afghan nationals who do not meet the conditions for entry, presence, or residence in the EU.[184] Its primary objective is to establish a rapid, effective, and manageable process for the smooth, dignified, and orderly return of such individuals, while also preventing irregular migration more broadly.

Juridically, the JWF is regulated by a multilevel legal framework that combines EU law, international obligations, and domestic law of Member States. Although the declaration is not binding, its implementation involves several legal instruments, including the EU Charter of Fundamental Rights, the Return Directive (Directive 2008/115/EC), and the European Border and Coast Guard (EBCG) Regulation.[185] The involvement of Frontex, the EU agency responsible for coordinating return operations, also implicates EU law, in particular the obligation of the agency to guarantee respect for fundamental rights in return operations. The EBCG Regulation expressly obliges, in Article 50, Frontex to ensure respect for fundamental rights, the principle of *non-refoulement*, and the dignity of the returnees throughout the return operation. Furthermore, the agency is required to send forced-return monitors and report in detail on return operations to the European Parliament, the Council, the Commission, and its management board.[186]

The JWF sets out step-by-step return procedures, allowing for voluntary returns and enforced returns. It requires the use of travel documents, nationality checks, and removal coordination using scheduled and charter flights, with a coordinating role for Frontex. The declaration does not refer to the Return Directive or EBCG Regulation explicitly, which leaves it uncertain whether EU legal safeguards will be applicable.[187] For example, whereas the JWF refers to the sharing of returnees' personal data, it does not contain express data protection assurances, which may be

[184] Policy Department for External Relations, EU External Migration Policy and the Protection of Human Rights (European Parliament, Directorate General for External Policies of the Union PE 603.512 September 2020) 49.
[185] Charter of Fundamental Rights of the European Union; Directive 2008/115/EC; Regulation (EU) 2019/1896.
[186] Regulation (EU) 2019/1896, art 50.
[187] Policy Department for External Relations, EU External Migration Policy and the Protection of Human Rights (European Parliament, Directorate General for External Policies of the Union PE 603.512 September 2020) 51.

inconsistent with Article 89(5) of the EBCG Regulation, exempting the sharing of personal data that may create serious risks of fundamental rights infringement.[188]

The treatment of vulnerable groups under the JWF raises significant legal concerns. Although the declaration includes commitments to consider humanitarian aspects and to ensure adequate protection for vulnerable individuals, such as unaccompanied minors, single women, and the seriously ill, it lacks specificity regarding the standards and mechanisms for assessing and implementing these protections. For example, while unaccompanied minors are not to be returned without successful tracing of family members or adequate reception arrangements, the declaration does not define what constitutes "adequate," leaving room for inconsistent application and potential rights violations.[189]

The JWF also creates a Joint Working Group (JWG) that is tasked with following up on the declaration's implementation, promoting cooperation, and suggesting amendments. Although the JWG's mandate does not explicitly cover monitoring the rights of returnees or mechanisms to guarantee removals and reintegration are carried out in line with human rights obligations, the absence of transparency and accountability for how the JWG operates raises protection concerns regarding the rights of returnees.

From a legal perspective, the implementation of the JWF by EU Member States implies the application of EU law, thereby activating the obligations under the Charter of Fundamental Rights, as provided by Article 51 of the Charter, including the right to an effective remedy and the principle of *non-refoulment*.[190] These are reiterated by the Return Directive, which obliges return decisions to have due regard to the best interests of the child, family life, and the health status of the third-country national.[191] Additionally, the persons affected by return should have access to an effective remedy to appeal or request review of return decisions, in line with Article 13 of the Return Directive and Articles 41 and 47 of the Charter. [192]The focus of the JWF on

[188] Regulation (EU) 2019/1896, art 89.
[189] Policy Department for External Relations, EU External Migration Policy and the Protection of Human Rights (European Parliament, Directorate General for External Policies of the Union PE 603.512 September 2020) 51-52.
[190] Charter of Fundamental Rights of the European Union, art 51.
[191] Directive 2008/115/EC.
[192] Directive 2008/115/EC art 13; Charter of Fundamental Rights of the European Union arts 41 and 47.

readmission and return, and the absence of binding legal guarantees within it, are reflective of a general tendency in EU migration policy to act through informal agreements to manage migration flows.[193] It enables the EU to exert influence in third states without incurring binding treaty obligations, but at the same time, it presents some serious legal and ethical concerns. The use of non-binding tools such as the JWF has the potential to undermine the EU's support for human rights and the rule of law, especially where such deals are not accompanied by effective oversight mechanisms and do not provide protection for vulnerable persons.[194]

2.3. Spain's Agreements with West African Countries

Spain has developed a legally complex and diplomatically layered framework to manage irregular migration through the externalization of border controls, particularly via bilateral agreements with African states. The 1992 readmission agreement with Morocco allows the return of both Moroccan nationals and third-country nationals who transited through Moroccan territory, yet its implementation has faced systemic difficulties due to evidentiary burdens and Morocco's recurring reluctance to cooperate.[195] Similarly, the 2003 agreement with Mauritania enables the return of non-Mauritanian nationals presumed to have departed from Mauritania, but its enforcement remains inconsistent owing to both logistical and political limitations.[196] These agreements are complemented by informal mechanisms such as Memoranda of Understanding with countries like Senegal and The Gambia, which are often negotiated without parliamentary approval or judicial oversight, raising critical concerns regarding legal accountability and compliance with constitutional

[193] Policy Department for External Relations, EU External Migration Policy and the Protection of Human Rights (European Parliament, Directorate General for External Policies of the Union PE 603.512 September 2020) 49-52;
See also Eva Kassoti and Narin Idriz, 'The Informalisation of the EU's External Action in the Field of Migration and Asylum' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum: Global Europe: Legal and Policy Issues of the EU's External Action* (T.M.C. Asser Press 2022).
[194] Ibid.
[195] Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42 *The International Spectator* 179.
[196] Amnesty International, *Spain and Morocco: Failure to Protect the Rights of Migrants* (2006) https://www.amnesty.org/en/documents/eur41/009/2006/en/ accessed 23 April 2025.

guarantees.[197] Both MoUs align with Spain's broader strategy of externalizing migration control by engaging with countries of origin and transit to manage migration flows collaboratively. Spain reaffirmed these MoUs with Senegal and The Gambia in August 2024, expanding legal labour channels through circular migration schemes and reinforcing joint border efforts.

This externalization process was further shaped by the 2002 Seville European Council Summit, where the Spanish government formally proposed a legal mechanism to make development aid to third countries conditional on their cooperation with EU migration controls.[198] The proposal sought to introduce a clause, often referred to as "negative conditionality", that would allow the EU to suspend development funds to countries that refused to accept the return of their nationals or failed to prevent irregular departures. Although other EU Member States ultimately rejected the measure on humanitarian and legal grounds, it reflected a growing effort within Spain's foreign policy to link migration control with development cooperation, a strategy that would later influence bilateral agreements. This approach was formalized in 2006 through the Africa Plan (Plan África), a strategic document that redefined Spain's engagement with West African countries.[199] The plan integrated migration policy with development, security, and diplomatic cooperation, offering investment and legal migration schemes to incentivize countries like Senegal and Mali to prevent departures and accept returns. Beyond border security, the Africa Plan sought to address the root causes of irregular migration by integrating development, diplomatic, and human rights dimensions. It sought to strengthen institutional capacities, accelerate economic development, and provide incentives for local employment in order to reduce push factors for migration. The plan also encouraged bilateral legal migration flows and regional stability and framed Spain's migration agreements not only as deterrent mechanisms but as long-term cooperation agreements with legal, developmental, and humanitarian aims.

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[197] Gabriel Echeverría, Gabriele Abbondanza and Claudia Finotelli, 'The Externalisation Gamble: Italy and Spain at the Forefront of Maritime Irregular Migration Governance' (2024) 13 *Social Sciences* 517.
[198] European Council, Presidency Conclusions: *Seville European Council, 21 and 22 June 2002* (2002) para 33 https://www.consilium.europa.eu/media/20928/72638.pdf accessed 23 April 2025.
[199] Ministerio de Asuntos Exteriores y de Cooperación, *África: Plan de Acción 2006–2008* (Gobierno de España 2006).

A pivotal legal controversy surrounding Spain's migration control relates to its use of *devoluciones en caliente* (hot returns) at its borders with Morocco, notably in Ceuta and Melilla. These summary expulsions were scrutinized in the landmark case of *N.D. and N.T. v. Spain*, in which the European Court of Human Rights initially condemned Spain for failing to provide individualized assessments but later reversed its position in the Grand Chamber, holding that the migrants had placed themselves in an unlawful situation by storming the fence.[200] While the ruling legitimized Spain's practices under Article 4 of Protocol No. 4 ECHR, it sparked intense debate regarding the weakening of procedural protections under EU asylum law, particularly Articles 6 and 14 of Directive 2013/32/EU.[201] The practice also sits uneasily with the principle of non-refoulement under Article 33 of the 1951 Refugee Convention, especially in contexts where returnees face potential ill-treatment.[202]

Spain's role as a "model student" of EU migration policy is further entrenched by its leadership in joint operations such as Operation HERA, coordinated by Frontex under the legal framework of Regulation (EU) 2019/1896 on the European Border and Coast Guard, to interdict migrant vessels before reaching the Canary Islands.[203] Funded through mechanisms like the EU Trust Fund for Africa, these operations form part of a broader European strategy to externalize migration controls by reinforcing the capacities of African states in border management.[204] While framed as cooperative initiatives, these arrangements have drawn criticism from scholars and human rights organizations for enabling practices that may effectively bypass legal obligations to protect asylum seekers.[205] The opacity of informal agreements and the instrumental

[200] *N.D. and N.T. v. Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).
[201] Directive 2013/32/EU, arts 6, 14.
[202] 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' (2018).
[203]Frontex, 'Longest Frontex-Coordinated Operation: HERA in the Canary Islands' (Frontex, 15 December 2023) https://www.frontex.europa.eu/media-centre/news/news-release/longest-frontex-coordinated-operation-hera-the-canary-islands-WpQlsc accessed 23 April 2025; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L295/1.
[204] European Commission, *EU Emergency Trust Fund for Africa: Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa* (Publications Office of the European Union 2023).
[205] Human Rights Watch, 'Spain/Morocco: Protect Migrants, Asylum Seekers' (24 March 2014) https://www.hrw.org/news/2014/03/24/spain/morocco-protect-migrants-asylum-seekers accessed 23 April 2025.

use of development aid to secure readmission cooperation challenge the foundational principles of international refugee law and the rule of law itself.[206]

2.4. The Italy-Libya Cooperation

Italy's partnership with Libya for the governance of migration has taken shape over several decades in a series of bilateral agreements and diplomatic exchanges. The political, economic, and historical circumstances have long influenced the bilateral relationship, such as Italy's colonial history and Libya as a transit country for immigrants.[207] Libya started coming back to the international community in the 1980s and 1990s, following ten years of estrangement, thanks to Italy's policy of rapprochement and economic involvement, especially through the energy sector.[208]

The initial major step towards institutionalizing the cooperation was the 1998 Joint Communiqué that opened the formalized structured dialogue between the two nations. The Communiqué covered topics like the fight against visa fraud, increasing economic collaboration, and the necessity to resolve historical disputes, along with launching initiatives on migration issues.[209]

This was succeeded by the more detailed 2008 Treaty of Friendship, Partnership, and Cooperation, signed in Benghazi, which contained provisions regarding historical reconciliation, economic growth, and Article 19, which encompassed joint initiatives for migration control, such as Libyan coast patrols and satellite monitoring of land borders.[210] These joint patrols led to the practice of intercepting migrants at sea and returning them to Libya without assessing their individual circumstances, a policy that was later condemned by the European Court of Human Rights in its 2012 Grand

[206] Sílvia Morgades Gil, 'El Pacto Mundial sobre los Refugiados y el Nuevo Pacto de la Unión Europea sobre Migración y Asilo: Derecho Informal y Jurisprudencia Europea en Materia de Acceso a la Protección' (2022) 74 *Revista Española de Derecho Internacional* 25.
[207] Mathias Hatleskog Tjønn and Maria Gabrielsen Jumbert, 'Migration Across the Mediterranean: Shaping Italy–Libya Relations Over Time' in Ricard Zapata-Barrero and Ibrahim Awad (eds), *Migrations in the Mediterranean* (IMISCOE Research Series, Springer 2024).
[208] Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?' (2009) *Bulletin of Italian Politics*.
[209] Tjønn and Jumbert 'Migration Across the Mediterranean: Shaping Italy-Libya Relations Over Time' in Richard Zapata-Barrero and Ibrahim Awad 'Migrations in the Mediterranean', 57–59.
[210] Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (signed 30 August 2008, entered into force 2 March 2009), art 19.

Chamber judgment *Hirsi Jamaa and Others v. Italy*.[211] The Court held that Italy had violated Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment; Article 13, which guarantees the right to an effective remedy; and Article 4 of Protocol No. 4, which prohibits the collective expulsion of non-citizens. The judgment emphasized that Italy's actions exposed the applicants to the risk of ill-treatment in Libya and lacked procedural safeguards.[212]

Following this ruling and due to the outbreak of the Libyan civil war, the application of the Treaty was considerably reduced. However, with the escalation of the 2015 migration crisis, a new agreement was considered necessary, a position also supported by EU institutions.[213]

In 2017, the Italian government and the UN-backed Libyan Government of National Accord signed the "Memorandum of Understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking, fuel smuggling, and on reinforcing the security of borders."[214] The agreement includes Italian commitments to provide funding, equipment, and training to Libyan authorities, particularly the coastguard, and to support the refurbishment of reception centres in Libya.[215] These centres, under Libyan jurisdiction, are described in the MoU as temporary structures aimed at hosting migrants prior to return or repatriation. The MoU also established a mixed committee to oversee its implementation and is automatically renewable unless terminated by either party.[216]

The legal framework underpinning this cooperation clashes with several sources of international and regional law. The principle of non-refoulement, codified in Article 33 of the 1951 Refugee Convention, prohibits the return of individuals to territories where they may face threats to life or freedom.[217] Although Libya is not

[211] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[212] Ibid.
[213] Chiara Di Stasio, 'Esternalizzazione delle frontiere: violazione dei diritti umani dei migranti e responsabilità dello stato' (2021) *Dirittifondamentali.it,* 124.
[214] Memorandum of Understanding between Italy and Libya on Development Cooperation, Illegal Immigration, Human Trafficking, Fuel Smuggling and Reinforcement of Border Security (2 February 2017).
[215] Ibid, arts 1-2.
[216] Ibid, arts 3-8.
[217] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33; see *supra,* para 1.2.

party to the 1951 Convention, the state is nonetheless obligated under other international treaties, including the 1984 Convention Against Torture and the African Charter on Human and Peoples' Rights, both of which contain clauses pertinent to protecting migrants and asylum seekers.[218] Italy, as a contracting party to the Refugee Convention and the European Convention on Human Rights (ECHR), remains bound by its obligations irrespective of territorial location. The European Court of Human Rights has clarified that responsibility may arise in cases of extraterritorial actions if a state exercises effective control, as affirmed in *Hirsi Jamaa and Others v Italy*.[219]

The potential for indirect state responsibility has been discussed in relation to support provided to Libyan actors by EU Member States. Under Article 16 of the International Law Commission's Draft Articles on State Responsibility, a state may bear responsibility if it knowingly aids or assists another state in committing an internationally wrongful act.[220] While the MoU includes a general commitment to comply with international obligations, it does not establish an operational mechanism to monitor compliance with human rights standards.[221] The European Union has also contributed to capacity building in this area, notably through initiatives such as EUBAM Libya and the use of the EU Emergency Trust Fund for Africa to fund migration-related cooperation.[222]

Domestically, the MoU was concluded as a technical agreement and did not undergo parliamentary ratification. In this regard, Article 80 of the Italian Constitution provides that treaties involving financial obligations or affecting fundamental rights require parliamentary approval.[223] Some legal commentators have raised questions about the compatibility of this procedural pathway with

[218] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, art 12(3); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3.
[219] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[220] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), art 16.
[221] Anja Palm, 'The Italy–Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (2017) *Istituto Affari Internazionali*.
[222] European Union External Action, 'EUBAM Libya' (2024).
[223] Constitution of the Italian Republic 1947, art 80 *On the ratification of international treaties requiring parliamentary authorization.*

constitutional requirements, especially in light of the MoU's operational consequences.[224]

The implementation of the 2017 MoU builds upon the framework first established in 2008 and reflects a broader trend of externalizing border controls through bilateral and regional cooperation. However, international organizations and NGOs have highlighted legal and practical challenges in ensuring access to protection and legal safeguards in Libya, particularly in detention centres.[225] These findings have contributed to ongoing legal discussions regarding the attribution of responsibility and the application of human rights norms to externalized migration governance frameworks.[226]

2.5. The UK-Rwanda Agreement

Although regarding the international legal system and not the European Union framework, the UK-Rwanda Asylum Partnership Agreement (APA) represents a paradigmatic example of contemporary externalization policy, seeking to shift core state responsibilities in asylum processing to a third country through a bilateral memorandum of understanding (MoU), making it an important example to analyze for a complete comparison. Signed in April 2022, the non-binding MoU provided for the forcible transfer of certain asylum seekers arriving irregularly in the UK to Rwanda, where their claims would be assessed and, if successful, protection granted under Rwandan law.[227]

The UK government justified the policy by invoking the "safe third country" concept, which allows asylum claims to be declared inadmissible if the applicant had or could have sought protection elsewhere.[228] The legal basis cited included paras

[224] See, for example, Elisa Olivito, 'The Constitutional Fallouts of Border Management Through Informal and Deformalised External Action: The Case of Italy and the EU' (2020) 2 *Diritto, Immigrazione e Cittadinanza* 115-126.
[225] UN Human Rights Council, *Report of the Independent Fact-Finding Mission on Libya* (1 October 2021) UN Doc A/HRC/48/83.
[226] European Union Agency for Fundamental Rights, *Scope of the Principle of Non-Refoulement in Contemporary Border Management: Evolving Areas of Law* (FRA 2020) 34–38.
[227] Guy S Goodwin-Gill, 'Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda' (2023) 62(1) *International Legal Materials* 166.
[228] Immigration Rules paras 345A–D; Immigration Act 1971, s 3.

345A–D of the Immigration Rules and section 3 of the Immigration Act 1971, as well as Clause 30 of the Nationality and Borders Act 2022, which explicitly aimed to facilitate extra-territorial processing.[229]

Central to the legality of the APA was therefore the classification of Rwanda as a "safe third country" under domestic and international standards, including respect for the principle of non-refoulement, effective access to fair and efficient asylum procedures, and basic human rights safeguards.[230]

However, this classification was fiercely contested. In *AAA v Secretary of State for the Home Department*, the Supreme Court found substantial grounds to believe that removal to Rwanda would expose asylum seekers to a real risk of refoulement, thereby rendering the policy unlawful.[231]

The Court held that the Divisional Court had erred by deferring excessively to the executive's assessment, failing to accord sufficient weight to the unchallenged evidence of the UNHCR, and neglecting to assess Rwanda's prior breaches of similar assurances given to Israel.[232] In particular, it emphasized that Rwanda's asylum system lacked basic procedural safeguards, such as access to legal representation, impartial decision-making, and appeal mechanisms, and displayed a poor human rights record including previous political violence, repression, and rejection of refugee claims from conflict zones. Consequently, the Court ruled that "significant changes" would be required to Rwanda's asylum procedures before the policy could comply with the UK's international obligations.

In response, the government signed a revised treaty with Rwanda in December 2023 and passed the *Safety of Rwanda (Asylum and Immigration) Act 2024*, which declares Rwanda legally "safe" and limits courts' ability to scrutinize that designation.[233] The Act triggered significant constitutional concerns, with the House of Lords attempting (unsuccessfully) to introduce a requirement that safety be demonstrated in practice and validated by an independent monitoring body.[234]

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[229] Nationality and Borders Act 2022, cl 30.
[230] Kirsty Hughes, 'The Meaning of "Safe" and the UK and Rwanda Asylum Partnership Arrangement' (2024) 83(2) *Cambridge Law Journal* 206-209.
[231] *AAA v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433.
[232] Ibid [64]–[70].
[233] *Safety of Rwanda (Asylum and Immigration) Act 2024*, ss 2–3.
[234] Hughes, 'The Meaning of "Safe" and the UK and Rwanda Asylum Partnership Arrangement' 208-209.

Beyond domestic law, the APA has been widely criticized by legal scholars and international bodies for undermining the territorial right to asylum, contravening the non-penalization clause in Article 31(1) of the Refugee Convention, and ignoring the lack of connection between transferred individuals and Rwanda.[235] The MoU itself expressly states that it is not legally binding and confers no rights enforceable in any court, thereby evading international accountability mechanisms.[236]

While the UK government asserts that it will uphold international standards through bilateral assurances, the UNHCR has concluded that the arrangement cannot meet the UK's non-refoulement obligations and fails to guarantee effective protection, especially for vulnerable groups such as LGBT asylum seekers and unaccompanied minors.[237]

Scholars have located the APA within a broader trend of Global North countries exporting asylum responsibilities to lower-capacity states, comparable to the EU-Turkey Statement, Australia's offshore processing in Nauru, and Israel's prior transfers to Rwanda.[238] Yet the APA is legally distinct in that it provides no requirement for a prior connection with Rwanda, imposes positive obligations on Rwanda to carry out refugee status determinations, and involves transfers to a jurisdiction with demonstrably lower procedural and protection standards.[239]

Despite legislative attempts to shield the policy from judicial review, its legal and normative foundations remain contested, and as of April 2025, no transfers have occurred, with the incoming government having formally abandoned the scheme.

The case highlights the tension between sovereign control over borders and enduring obligations under international refugee and human rights law, reaffirming that designating a country as "safe" cannot override the substantive safeguards enshrined in UK and international legal frameworks.

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[235] Nikolas Feith Tan, 'Externalization of Asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement' (*EU Migration Law Blog*, 20 April 2022).
[236] Home Office, *Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the Provision of an Asylum Partnership Arrangement* (14 April 2022), para 2.2.
[237] UNHCR, *Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda Arrangement* (8 June 2022).
[238] Tan, 'Externalization of Asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement'.
[239] Ibid.

3. Focus: The Italy-Albania Protocol

The Protocol signed on 6 November 2023 and ratified with Law No. 14 of 21 February 2024, between the Italian and Albanian governments, represents a significant development in the policies of externalizing migration control.[240] The agreement provides for the construction and management, on Albanian territory, of two centers for the reception and examination of applications for international protection submitted by migrants intercepted in international waters by Italian authorities. The centers remain under Italian jurisdiction and are entirely financed by Italy.

Presented by the Meloni government as an innovative and supportive solution to address migratory pressure, the Protocol has raised various doubts from a legal, political, and humanitarian perspective. In particular, the involvement of a non-EU member state in procedures normally regulated by European law has reopened the debate on the use of extraterritorial mechanisms to evade protection obligations established at a supranational level.

The Italy-Albania case is therefore an emblematic example of the new strategies adopted by Member States to circumvent or reinterpret the common European asylum system, while formally remaining within the perimeter of legality.

3.1. The Main Provisions of The Agreement

The Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania for the strengthening of cooperation on migration matters, signed on 6 November 2023, establishes a detailed operational and legal framework for the creation of two Italian migration facilities on Albanian territory.[241] The provisions of the agreement are structured on multiple levels, precisely outlining the distribution of competences, the operating methods, and the jurisdictional limits of the initiative.

[240] Protocollo tra il Governo della Repubblica Italiana e il Consiglio dei Ministri della Repubblica di Albania per il Rafforzamento della Collaborazione in Materia Migratoria (signed 6 November 2023).
[241] Italy-Albania Migration Protocol.

First, Article 1 gives the main definitions, and Article 2 sets out the scope of the agreement, which is to reinforce the cooperation between the two parties regarding migration flows from Third Countries, in accordance with European Union and international law.[242]

Articles 3 and 4 define the object of the agreement: Italy will be able to install and manage, in full autonomy and under its own jurisdiction, two facilities located on Albanian territory, one in Shengjin (for landing and initial reception) and one in Gjader (for the examination of applications for international protection, detention and possible repatriation). The facilities will be able to accommodate a maximum of 3,000 people at a time. Albania undertakes to grant the use of the areas free of charge. Article 4 also clarifies that any dispute between the migrants and the authorities will be subject exclusively to Italian jurisdiction. This provision is reinforced by a clause that provides for the non-applicability of Albanian jurisdiction to the activities carried out in Italian facilities. Entry into the centers may only take place via Italian means, and the stay in Albanian territory will be limited to the duration necessary to carry out the procedures required by Italian and European law. The possibility of temporarily detaining migrants is foreseen, in accordance with Italian law, for the time necessary to evaluate asylum applications and carry out any repatriations. The agreement specifies that only migrants intercepted in international waters by Italian naval units as part of rescue operations or border control may be transferred there. From a logistical and healthcare perspective, Italy undertakes, as per Article 4, to ensure the presence of healthcare facilities and adequate medical personnel within the centers. Should access to Albanian healthcare facilities be necessary for needs that cannot be managed locally, Albania undertakes to provide collaboration, it being understood that the costs of treatment will be entirely borne by Italy. The same applies to essential services, such as water, electricity, waste disposal, and telecommunications, which Italy will provide directly or through local suppliers.[243]

According to Article 5, the mentioned areas will be exempt from any restrictions or authorizations provided by Albanian building law, and construction can be carried out directly by Italian authorities. The same Article regulates the applicable fiscal

[242] Ibid, arts 1-2.
[243] Ibid, arts 3-4.

regime: Italy will enjoy exemptions on VAT, excise duties, and customs duties for the import of materials and services intended for the facilities. Furthermore, the Italian authorities will have full freedom in the transfers of capital and goods necessary for the operation of the centers.[244]

In terms of security competences, Article 6 gives Italy full responsibility for the management of the facilities, the administration of migration procedures and the exercise of jurisdiction over migrants. Italian authorities will be responsible for identification, questioning, processing of applications for international protection, and for all decisions on detention or repatriation. Albania, for its part, will ensure the external security of the centers, employing dedicated law enforcement agencies, whose presence will be coordinated with Italy but who will not intervene in the activities carried out within the centers.[245]

Moreover, Article 7 establishes that the working conditions of the Italian authorities are under Italian jurisdiction. The only case where Albanian jurisdiction will be applied is if Italian authorities commit crimes outside their service.[246]

Article 8 states that the access of means of the Italian Party to Albanian territory is regulated by subsequent agreements between the competent Italian and Albanian authorities, which enter into force on the date of the signature.[247]

In addition, according to Article 9, the period of stay of migrants in the territory of the Republic of Albania under the implementation of this Protocol shall not exceed the maximum detention period permitted by current Italian legislation. Upon completion of the procedures, Italian authorities shall arrange for the removal of the migrants from Albanian territory. To ensure the right to defense, the parties shall allow access to the facilities to lawyers, their assistants, as well as international organizations and European Union agencies that provide legal advice and assistance.[248]

Article 10 states that any additional cost will be sustained by the Italian Authorities.[249]

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[244] Ibid, art 5.
[245] Ibid, art 6.
[246] Ibid, art 7.
[247] Ibid, art 8.
[248] Ibid, art 9.
[249] Ibid, art 10.

Furthermore, Article 11 establishes that, at the end of the agreement, all the infrastructures built in the two sites will return to the full availability of the Albanian State without the latter having to pay any compensation for the improvements made. Any modification or extension of the agreement must be agreed between the parties through a formal exchange of diplomatic notes.[250]

Article 12 sets the rules for compensation in case of misconduct or negligence by one of the two parties, and finally, Article 13 establishes a duration of 5 years for the protocol, which is automatically renewed unless otherwise agreed.[251]

Overall, the Protocol establishes an innovative model of bilateral cooperation on migration matters, which aims to transfer part of the reception and identification operations outside the national borders, while maintaining the entire legal and procedural framework under the sovereignty of the Italian State. Precisely for this reason, its application raises significant questions of compatibility with European Union law and international obligations in the field of human rights.[252]

3.2. The Ratification Law and Its Legal Effects

Law No. 14 of 21 February 2024, ratifying and implementing the Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on strengthening cooperation on migration, is the act by which Italy incorporated the content of the international agreement into its domestic legal system.[253]

Pursuant to Article 80 of the Italian Constitution, the ratification of international treaties involving economic burdens or legislative changes must be authorized by formal law.[254] The ratification law therefore has a dual function: on the one hand, it

[250] Ibid, art 11.
[251] Ibid, arts 12-13.
[252] See *infra*, para 3.4.
[253] Law No 14 of 21 February 2024, *Ratification and implementation of the Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania for the strengthening of cooperation on migration matters*, Official Gazette (Gazzetta Ufficiale) General Series No 44 of 22 February 2024.
[254] Constitution of the Italian Republic 1947, art 80 *On the ratification of international treaties requiring parliamentary authorization.*

confers internal legal force on the Protocol and, on the other, it authorizes the organs of the State to implement its provisions.

In substantive terms, the law has significant effects. Firstly, it makes the Protocol legally binding not only in international relations between Italy and Albania, but also within the Italian legal system, where it acquires the status of ordinary law. The provisions of the Protocol, as transposed, are directly binding on the Italian administrative authorities responsible for its implementation and are potentially enforceable in court.

A further effect of the law is to provide financial coverage for the costs arising from the implementation of the agreement. The ratification law, as required by public accounting rules, authorizes the expenditure necessary for the construction and management of facilities on Albanian territory, charging it to the Italian State budget.

Furthermore, parliamentary approval of the law also implies a form of political legitimization of the agreement, strengthening its position in the system of sources and making it more difficult to challenge it at the domestic level, although it remains fully subject to constitutional or supranational review.

The ratification law introduces for the first time an explicit legal classification of the migration structures planned on Albanian territory, likening them to two institutions already existing in the Italian legal system: *hotspots* and Repatriation Centres.[255] In particular, paragraphs 1 to 6 of Article 3 of the law outline the operational guidelines for the implementation of the Protocol, clarifying the nature and regime applicable to these structures. Paragraph 1 identifies the authorities responsible for implementing the Protocol in the facilities located in Rome.[256] Paragraph 2 establishes that only persons intercepted in international waters and taken on board Italian vessels, including those involved in rescue operations, may be taken to the centres located in Albania, provided that they are outside the territorial waters of Italy or other EU Member States.[257] Paragraph 3 provides that the areas made available by Albania are to be treated as border or transit zones, thus making the

[255] Law No 14 of 21 February 2024;
Repatriation Centres in Italian law are called *Centri di Permanenza per I Rimpatri (CPR).*
[256] Ibid, art 3(1).
[257] Ibid, art 3(2).

accelerated procedure for examining applications for international protection applicable in accordance with the legislation in force.[258]

However, it is paragraph 4 that introduces an element of particular systemic importance: the two facilities identified in Annex 1 of the Protocol are expressly equated, respectively, with *hotspots* and Repatriation Centres. The facilities designated 'for entry procedures' (Shëngjin) and 'for the assessment of the conditions for international protection' (Gjadër) are treated as *hotspots*, while only the facilities intended for return, among those in Gjadër, are considered equivalent to Repatriation Centres.[259]

This regulatory equivalence clarifies the legal and functional framework within which the centres provided for in the Protocol are to be placed. *Hotspots*, introduced in Italy in 2015 in implementation of the so-called 'hotspot approach' promoted by the European Union, are non-detention facilities for the identification, registration and orientation of newly arrived migrants.[260] They carry out preliminary operations prior to entry into the reception system or return. The Repatriation Centres, on the other hand, are detention facilities governed by the Consolidated Law on Immigration Legislative Decree No. 286 of 25 July 1998, as amended, intended for the temporary detention of foreign nationals pending the execution of an expulsion or return order, in accordance with judicial guarantees.[261]

Moreover, Article 4 states that European and Italian law will be applied 'insofar as it is compatible', a provision that has been widely criticized.[262] According to Siccardi "it is problematic to leave such broad discretion to the administrative

[258] Ibid, art 3(3).
[259] Ibid, art 3(4).
[260] European Commission, *Communication on a European Agenda on Migration* COM(2015) 240 final, 13 May 2015; see also Ministry of the Interior (Italy), *Standard Operating Procedures (SOPs) Applicable to Italian Hotspots* (February 2016) http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_versione_italiana.pdf accessed 24 April 2025.
[261] Legislative Decree No 286 of 25 July 1998, *Consolidated Act on Immigration and the Legal Status of Foreign Nationals*, Article 14;
Italian Constitutional Court, Judgment No 105/2001;
European Court of Human Rights, *Khlaifia and Others v Italy* App no. 16483/12 (ECtHR, 15 December 2016).
[262] Law No 14 of 21 February 2024, art 4.

authority, which may act beyond the scope of the legal provisions."[263] This situation threatens the predictability and transparency of the actions undertaken to implement the Protocol, calling into question the foundational principles of legality and legal certainty.[264]

The explicit assimilation of Albanian facilities to these models, even though they are located abroad, suggests the Italian legislator's desire to integrate the Protocol mechanism into an already established regulatory framework, while placing it in an extraterritorial context and under full Italian jurisdiction. However, this assimilation inevitably raises questions about compatibility with the principles of legality, jurisdiction, and the protection of fundamental rights, issues that will be analyzed in the following paragraphs.

3.3. Differences from Other Models of Externalization

The Protocol between Italy and Albania of 6 November 2023 represents a significant development in the European landscape of migration control externalization policies, introducing an atypical model based not on the delegation of responsibility to a third country, but on the extension of Italian jurisdiction beyond national borders. The text, signed in Rome and subsequently ratified by Law No. 14 of 21 February 2024, authorizes the establishment and management by the Italian authorities of two migrant centres on Albanian territory, formally under full Italian jurisdiction. Initially, the government had envisaged direct implementation of the Protocol without the involvement of Parliament, describing it as an executive agreement within a pre-existing agreement between the two countries. Only after criticism from legal scholars and civil society was draft law A.C. 1620 presented, which was then approved by both houses of Parliament in January-February 2024.[265]

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[263] Cecilia Siccardi, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania per il rafforzamento della collaborazione in materia migratoria: problematiche costituzionali' (2024) 2 Osservatorio Costituzionale, 120.
[264] Ibid.
[265] Andrea Spagnolo, 'Sull'illegittimità del Protocollo Italia-Albania in materia migratoria' (SIDIBlog, 9 novembre 2023) http://www.sidiblog.org/2023/11/09/sullillegittimita-del-protocollo-italia-albania-in-materia-migratoria/ accessed 25 April 2025;
Alessia Fusco, '«Aiutiamoli a casa d'altri»: note critiche sul Protocollo italoalbanese per la collaborazione rafforzata in materia migratoria' (2024) 1 *Quaderni costituzionali,* 166 https://www.rivisteweb.it/doi/10.1439/112930 accessed 25 April 2025.

The agreement allows for the transfer to Albania of a maximum of 3,000 migrants at a time, provided they are intercepted in international waters by Italian vessels, for the examination of asylum applications and possible repatriation. However, unlike other models of externalization, Albania is not required to carry out border procedures or repatriation activities itself. Its role is limited to making the areas where the centres are located available to the Italian government free of charge, leaving Italy with full responsibility for managing the operations and bearing the financial burden of the intervention. This approach has led some legal scholars to emphasize that the Protocol pursues a 'de-territorialisation of the right to asylum', i.e. a strategy of spatial displacement of access to protection, while maintaining the Italian legal system as the reference regulatory framework.[266]

It is precisely this configuration that distinguishes the Protocol from the better-known agreement between the United Kingdom and Rwanda, which, like most externalization policies, is based on the logic of burden-shifting, i.e. the complete transfer of responsibility for international protection to a third country.[267] In that case, Rwanda was designated a 'safe country' by the British government, but the Supreme Court ruled that the agreement was contrary to the principle of *non-refoulement*.[268] The plan was subsequently reformulated and reapproved, only to be definitively abandoned. In the case of the Italy-Albania Protocol, however, there is no transfer of procedural sovereignty: the Italian authorities remain responsible for the entire administrative process, from reception to return, applying national and European law 'insofar as it is compatible'.[269]

The uniqueness of the approach is also reinforced by the legal configuration of the planned facilities, which are assimilated, by express provision of ratification law no. 14/2024, to *hotspots* and Repatriation Centres.[270] In particular, the centre located in Shëngjin performs initial reception and identification functions similar to those of

[266] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge' (ADiM Blog, dicembre 2023) https://www.adimblog.com/lultimo-atto-il-nuovo-patto-sulla-migrazione-e-lasilo-e-quasi-legge/ accessed 25 April 2025.
[267] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa' (ADiM Blog, 1 febbraio 2024) https://www.adimblog.com/2024/02/01/la-legge-di-ratifica-ed-esecuzione-del-protocollo-italia-albania-tre-problemi-di-sostenibilita-giuridica-e-amministrativa/ accessed 25 April 2025.
[268] See *supra,* para 2.2.
[269] Italy-Albania Protocol, art 4.
[270] Law No 14 of 21 February 2024.

hotspots, while the centre in Gjadër is intended for the examination of protection applications and return operations, with functions similar to those of Repatriation Centres. However, unlike the centres operating on Italian territory, these facilities are located in Albanian areas formally equated to Italian border areas, according to a *fictio iuris* that allows Italian and European rules to be applied there, even though they are located in a third country.[271]

Finally, the Protocol also differs from the previous Memorandum of Understanding between Italy and Libya of 2017, which operated through a material and informal delegation of powers to the Libyan authorities. In Albania, on the other hand, Italy does not delegate, but operationally transfers its administrative apparatus to foreign soil, exercising its jurisdiction in that context, in a form permitted by international law where there is the consent of the host State.[272]

Ultimately, what makes the Italy-Albania Protocol a completely new legal experience in the European landscape is its ability to combine, for the first time, geographical relocation and full continuity of the national legal system. This is not a simple transfer of functions to a third State, but an exercise of extraterritorial sovereignty that allows the Italian State to export its asylum system while retaining legal, administrative, and operational control over it. It is precisely this architecture that makes it a paradigmatic model of externalization 'under the jurisdiction' of the sending State.

3.4. Critical issues and ambiguities of the Italy-Albania Protocol: an in-depth analysis

The Italy-Albania Protocol is one of the most ambitious experiences of extraterritorial management of migration flows in Europe. However, its implementation has raised numerous constitutional, European, international and administrative issues, as systematically highlighted by extensive legal scholarship, parliamentary hearings and the opinions of civil society organizations.

[271] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata' (2024) 1 *Diritto, Immigrazione e Cittadinanza*, 7.
[272] Ibid; see *supra*, para 2.4.

From a constitutional point of view, one of the main issues concerns the compatibility of the Protocol with Article 80 of the Italian Constitution.[273] The Italian Government's initial attempt to proceed with the conclusion and application of the Protocol without prior parliamentary authorization raised strong criticism, highlighting the need to respect the legal reservation on international treaties affecting fundamental rights or involving legislative changes.[274] Andrea Spagnolo pointed out that the nature of the Protocol, which provides for restrictions on the personal freedom of migrants, the creation of detention facilities and the transfer of judicial proceedings abroad, inevitably required formal parliamentary ratification.[275] It was only thanks to pressure from part of the legal profession and civil society that draft law A.C. 1620 was submitted to Parliament for consideration.

From a substantive point of view, according to Siccardi, the procedures concerning Safe Countries, especially when applied under the Italy-Albania Protocol, undermine constitutional rights such as the right to a defense, personal liberty, and the right to asylum.[276]

The violation of Article 13 of the Constitution has been widely denounced.[277] The Protocol introduces a form of automatic detention for all migrants transferred to Albania, without prior individual assessment and without the possibility of alternative measures.[278] This generalization of detention, envisaged as a rule rather than an exception, conflicts with established constitutional case law and European directives, which allow the detention of applicants for international protection only under strict specific conditions.[279]

Added to this is the issue of the right to defence. As highlighted by numerous experts during parliamentary hearings, the system of remote participation in hearings, without guarantees of effective communication with the defence lawyer, and the

[273] Constitution of the Italian Republic 1947, art 80.
[274] Andrea Spagnolo, 'Sull'illegittimità del Protocollo Italia-Albania in materia migratoria'.
[275] Ibid.
[276] Cecilia Siccardi, 'Le procedure Paesi sicuri e il protocollo Italia-Albania: tra politica, giudici e Corti', *Quaderni Costituzionali* (2024) 4, p 907.
[277] Constitution of the Italian Republic 1947, art 13 *On personal liberty and its inviolability.*
[278] Tavolo Asilo e Immigrazione, 'Protocollo Italia-Albania: documento critico' (TAI, novembre 2023) https://www.arci.it/app/uploads/2023/11/Protocollo-Italia_Albania_documento_TAI_21_novembre_2023.pdf accessed 26 April 2025.
[279] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

absence of adequate means to appoint independent lawyers in Albanian centres, constitute a substantial violation of Article 24 of the Constitution.[280]

From the point of view of compatibility with EU law, the Protocol presents further serious shortcomings. As pointed out by Celoria and De Leo, the creation of fictitious 'frontier zones' in Albania has no basis in EU directives, which require the strictly territorial application of border procedures.[281] The forced deterritorialisation of the right to asylum compromises the principle of effectiveness of protection enshrined in Articles 18 and 47 of the Charter of Fundamental Rights of the European Union.[282] The accelerated procedure applied in Albanian centres, in particular, risks undermining the right to a swift and effective remedy against decisions of refusal or return.[283]

Furthermore, invoking the 'insofar as compatible' clause for the application of EU law in Albanian centres introduces dangerous regulatory flexibility, which could allow unjustified derogations from standard procedural guarantees.[284] This ambiguity undermines the principle of legal certainty, which is fundamental to the Common European Asylum System (CEAS).

From the perspective of international human rights law, the Protocol also appears highly problematic. The lack of effective screening to identify vulnerable persons, systematic transfer to detention centres and the curtailment of the rights of defence and access to protection constitute potential violations of the principle of non-refoulement enshrined in the 1951 Geneva Convention and Article 3 of the ECHR.[285] The Council of Europe Commissioner for Human Rights, Dunja Mijatović, has

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[280] Audizioni informali presso le Commissioni Affari Costituzionali e Affari Esteri, Camera dei Deputati, 8–10 gennaio 2024 https://www.camera.it/leg19/126?leg=19&idDocumento=1620 accessed 26 April 2025; Constitution of the Italian Republic 1947, art 24 *On the right to legal defense*.

[281] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata' 7.

[282] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 arts 18, 47.

[283] Directive 2013/32/EU.

[284] Ibid, art 43.

[285] CIR - Consiglio Italiano per i Rifugiati, 'Protocollo Italia-Albania: cosa sta succedendo?' (CIR, novembre 2024) https://cir-rifugiati.org/2024/11/27/protocollo-italia-albania-cosa-sta-succedendo/ accessed 26 April 2025;
Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art. 3.

expressed concern about the lack of legal certainty and the risks of discrimination and inhuman treatment linked to the implementation of the Protocol.[286]

Another serious criticism concerns the administrative sustainability of the project. As pointed out by Mario Savino, the lack of logistical and operational resources, the difficulty of carrying out effective screening on board ships, the absence of clear plans for the rapid transfer of vulnerable migrants and problems relating to the length of detention are likely to lead to chronic overcrowding in Albanian centres.[287] Such congestion could undermine the deterrent effect sought by the Italian government and turn the centres into places of prolonged detention, with serious human, political and economic costs.

From an EU law perspective, the selective extraterritorial application of European rules also raises doubts about the functioning of the CEAS solidarity mechanisms. The lack of immediate registration of migrants in the EURODAC system, the non-applicability of the Dublin Regulation and the exclusion of migrants detained in Albania from the calculations of 'detention capacity' required by the new European Pact risk isolating Italy from its obligations and opportunities under the European framework.[288]

Furthermore, as noted by the Asylum and Immigration Roundtable, the Protocol creates structural inequality between migrants managed on the national territory and migrants detained in Albania, compromising the principle of equality and non-discrimination.[289] The material reception conditions in Albanian centres are not clearly regulated, leaving room for differential treatment that cannot be justified by either domestic or supranational law.

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[286] Commissioner for Human Rights, Council of Europe, 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures' (13 November 2023) https://www.coe.int/en/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures accessed 26 April 2025.

[287] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa' (ADiM Blog, gennaio 2024) https://www.adimblog.com/2024/02/01/la-legge-di-ratifica-ed-esecuzione-del-protocollo-italia-albania-tre-problemi-di-sostenibilita-giuridica-e-amministrativa/ accessed 26 April 2025.

[288] Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of return of illegally staying third-country nationals [2018] OJ L312/1.

[289] Tavolo Asilo e Immigrazione (TAI), 'Audizione presso le Commissioni Affari Costituzionali e Affari Esteri, Camera dei Deputati, gennaio 2024' https://www.camera.it/leg19/126?leg=19&idDocumento=1620 accessed 26 April 2025.

The profile of effective judicial protection is also severely tested: the right to an effective remedy against decisions taken in Albanian centres could be purely theoretical, due to the physical distance from Italian courts, logistical difficulties in appointing and consulting lawyers, and restrictions on remote participation in hearings.[290]

Aditionally, in terms of political legitimacy, several scholars point out that the Protocol, while masquerading as an innovative model of neutral extraterritorial management, actually risks consolidating practices that remove state responsibility for the protection of fundamental rights.[291] In this sense, the agreement with Albania is part of a broader trend towards the externalization of borders, which has already been criticized internationally for its detrimental effects on the protection of migrants and respect for international standards.

Finally, it should be noted that on the Albanian side, thirty parliamentarians requested the Constitutional Court to review the constitutionality of the Protocol, arguing that it violated the Albanian Constitution as it was adopted without the involvement of the President of the Republic, required for agreements affecting human rights and territorial jurisdiction, and that it potentially endangered the fundamental rights of those affected, asking for an advisory opinion from the European Court of Human Rights.[292] Nonetheless, the Constitutional Court, by a narrow majority of five to four, ruled that the Protocol represented an implementation of the 1995 Treaty of Friendship between Italy and Albania, and did not require additional procedures or involve violations of human rights or national sovereignty.[293]

Overall, therefore, a combined analysis of doctrinal and institutional sources highlights that the Italy-Albania Protocol, while presenting itself as a strategic solution for containing migration flows, presents serious legal and practical problems: it risks violating the constitutional principles of personal freedom, equality and the right to asylum, conflicting with EU law on international protection, and

[290] ASGI, 'Trattenimento arbitrario e diritto di difesa compromesso: gravi violazioni UE nel Protocollo Italia-Albania' (ASGI, 2024) https://www.asgi.it/antidiscriminazione/trattenimento-arbitrario-e-diritto-di-difesa-compromesso-gravi-violazioni-ue-nel-protocollo-italia-albania/ accessed 26 April 2025.
[291] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge'.
[292] Enkelejda Koka and Denard Veshi, 'Il Protocollo Italia-Albania in materia migratoria salvato (per un voto) dalla Corte costituzionale albanese', *Quaderni* Costituzionali (2024) 4, pp 918-921.
[293] Ibid.

compromising the effectiveness of the Common European Asylum System. Furthermore, at the operational level, the administrative and financial sustainability of the project appears highly uncertain, thus undermining the very effectiveness of its stated objectives. Ultimately, without a thorough rethinking of its implementation modalities and a firmer anchoring in constitutional and European law principles, the Protocol risks turning from a strategic innovation into a structural source of legal disputes and institutional tensions.

3.5. Italian Case-Law Regarding the Protocol

In confirmation of its problematic and peculiar nature, the agreement has been the subject of litigation since its inception, and the issues raised by the case law are duly taken into consideration in the analysis conducted throughout this thesis. The legal issues raised in Italy in relation to the Italy-Albania Protocol have highlighted a series of highly complex problems, mainly centred on judicial review of the designation of safe countries of origin and on the limitations of the right of defence of applicants for international protection.[294] In particular, two decisions of the Court of Cassation, dated 19 and 30 December 2024, clarified the limits and modalities of intervention of the ordinary courts with regard to the qualification of a country as safe, in a regulatory context prior to Decree Law No. 158/2024 and Law No. 187/2024.[295] The judgment of 19 December 2024 responded to a preliminary ruling from the Court of Rome, reaffirming the power of the court to review the legitimacy of the designation of the country of origin as safe, including through the incidental disapplication of the ministerial decree, when such designation is manifestly contrary to the criteria established by European and national legislation.[296] The Court based this conclusion on a thorough reconstruction of the constitutional framework, referring to Articles 10, 11 and 117 of the Italian Constitution and the principle of protection of fundamental

[294] See also *supra* para 5.2.
[295] Cass., sez. I, 19.12.2024, n. 14533; Cass, sez. I, 30.12.2024, n. 22146;
Cecilia Siccardi, 'Le procedure Paesi sicuri e il Protocollo Italia-Albania alla luce della più recente giurisprudenza: profili di diritto costituzionale' (2025) 1 *Diritto, Immigrazione e Cittadinanza,* 19-22.
[296] Cass., sez. I, 19.12.2024, n. 14533.

rights of the individual, also with reference to international sources.[297] In this context, the judge is qualified as the guarantor of the effectiveness of the applicant's rights, while the political institutions are responsible for the overall management of migration, including assessments of the security of countries. However, the Court of Cassation specified that the political aspect of the designation does not exclude judicial review, as the ministerial decree is not a purely political act but a legal act subject to review, especially in the presence of serious violations of rights.

The interim order of 30 December 2024, on the other hand, postponed the decision on the validity of the detention of applicants sent to Albania, pending the rulings of the EU Court of Justice on preliminary rulings requested by various Italian courts.[298] However, the Court of Cassation offered relevant interpretative guidance, distinguishing between personal and territorial exceptions in the designation of safe countries. The Court stated that personal exceptions are not in themselves incompatible with the concept of a safe country, unless they involve generalised, endemic or systematic persecution affecting the effective protection of fundamental rights. This approach emphasises the need to balance compliance with European standards with the protection of human dignity, an essential foundation of the international protection system.

Following the rulings of the Court of Cassation, various Italian courts have continued to rule on cases concerning the Italy-Albania Protocol. Some courts, such as that of Catania, have chosen to disapply the ministerial decree, even in the absence of preliminary rulings or in-depth assessments of the applicant's allegations, a choice that has been criticised in legal scholarship.[299] Others, such as the Court of Appeal of Rome and that of Palermo, have instead opted for a preliminary ruling from the EU Court of Justice, raising questions of interpretation of EU law regarding the compatibility of the designation of safe countries with personal exceptions and the protection of non-derogable rights enshrined in the European Convention on Human

[297] Constitution of the Italian Republic 1947, Art 10 *On the conformity of Italian law with international law and the right to asylum*, Art 11 *On repudiation of war and acceptance of international cooperation for peace and justice*, Art 117 *On division of legislative powers between State and Regions, respecting EU and international obligations.*
[298] Cass, sez. I, 30.12.2024, n. 22146.
[299] Trib. di Catania, sez. immigrazione, 4 gennaio 2025, n. 60.

Rights.[300] These referrals have made it possible to suspend the procedures for validating the detention of applicants sent to Albania and to raise doubts about compliance with the principle of adversarial proceedings and the right to an effective remedy.

A particularly significant case following these rulings is judgment no. 17510/2025 of the First Criminal Section of the Court of Cassation, which has sparked widespread debate.[301] With this decision, the Court overturned the order of the Court of Appeal of Rome, which had refused to validate the administrative detention of a foreign national transferred to the centre of Gjader, Albania, after applying for international protection. The Court of Cassation affirmed the legitimacy of continuing detention even after the application had been submitted, arguing that the Gjader centre was equivalent to Italian repatriation centres pursuant to Article 14 of Legislative Decree 286/1998.[302] However, this equivalence is based on a controversial *fictio iuris*, which ignores the substantial difference between the guarantees offered in Italian centres and those actually available in Albania, and is based mainly on the explanatory report accompanying Decree-Law 37/2025, which has no normative value.[303] The decision raised concerns about compatibility with constitutional principles on personal freedom (Article 13 of the Italian Constitution), the right to defence (Article 24 of the Constitution), and European Union law, as Directive 2008/115/EC does not allow pre-expulsion detention outside the territory of Member States.[304] The ruling also triggered a debate with the courts of first instance, including the Court of Appeal of Rome, which subsequently rejected the Supreme Court's position in other rulings, noting the lack of an explicit legal basis for detention outside the national territory and the impairment of the right to defence.[305]

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[300] Corte d'appello di Roma, sez. famiglia, persone e protezione internazionale, 31.01.2025, n. 478; Corte d'appello di Palermo, I sez. civile, ord. 6.02.2025.
[301] Cass Pen, sez. I, 08.05.2025, n. 17510.
[302] Legislative Decree No 286/1998, art 17.
[303] Decree-Law No 37/2025.
[304] Constitution of the Italian Republic 1947, arts 13 *On personal liberty and its inviolability* and 24 *On the right to legal defense*;
Directive 2008/115/EC.
[305] Fulvio Vassallo Paleologo, 'Partenza falsa per il CPR di Gjader in Albania: ancora un trattenimento illegittimo' (ADIF, 20 April 2025) https://a-dif.org/2025/04/20/partenza-falsa-per-il-cpr-di-gjader-in-albania-ancora-un-trattenimento-illegittimo/

The central issue also concerns the choice of the most appropriate legal remedy to challenge the legality of domestic laws and ministerial decrees. In addition to non-application and preliminary rulings, recent doctrine and case law have highlighted the possibility of raising constitutional issues, particularly in relation to the amendments introduced by Decree-Law No 145/2024 and Law No 187/2024. These amendments, which also apply to applicants detained in Albania, impose very strict time limits for lodging appeals, significantly reducing the guarantees of defence and the right to a fair hearing. Despite this, few judges have chosen this route, preferring immediate and less demanding remedies, which do not, however, guarantee the *erga omnes* effectiveness typical of a declaration of unconstitutionality.[306] The Court of Cassation itself, in Order No. 1959/2025, showed openness to this remedy, doubting the constitutional legitimacy of the rules on appeals in validation proceedings, but without yet reaching a final ruling.[307]

Most recently, the Court of Cassation, in two orders of 29 May 2025, has raised significant doubts about the compatibility of the migrant centres in Albania with European Union law, referring two questions to the Court of Justice of the EU for a preliminary ruling.[308] With this initiative, the Supreme Court has revised its position expressed in its order of 8 May 2025, in which it had equated the repatriation centre in Gjader, located in Albania, with the repatriation centers on Italian territory.[309] The preliminary questions arise relating to two decisions of the Court of Appeal of Rome, which had refused to validate the detention of a migrant in an irregular administrative situation and an asylum seeker who had applied for international protection at the Gjader centre in Albania.

The first question concerns the possible incompatibility of the transfer of irregular migrants from Italy to Albania with Directive 2008/115/EC on the return of third-country nationals. The Court of Cassation asked the Court of Justice to rule on the possible violation of Article 3 of said directive, which regulates forced return, in

[306] Ibid.
[307] Ibid.
[308] Chiara Acampora, 'I Dubbi della Corte di Cassazione sul piano Albania, due rinvii alla Corte Ue', ANSA, https://www.ansa.it/sito/notizie/politica/2025/05/30/i-dubbi-della-corte-di-cassazione-sul-piano-albania-due-rinvii-alla_7b151dfa-d7c3-4972-a198-13e90cc4c506.html;
At the time of writing, the orders have not yet been published.
[309] Cass Pen, sez. I, 08.05.2025, n. 17510.

relation to Italian Law No 14/2024 ratifying the Italy-Albania protocol on the transfer of irregular migrants.[310]

The second question referred for a preliminary ruling concerns the compatibility of the domestic legislation, which allows for detention in centres located outside the national territory, with the provisions of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection.[311] In particular, the Court asked whether this legislation is contrary to EU law, especially when detention is ordered on the basis of the alleged instrumental nature of the application for protection.[312]

The Court of Cassation also requested the Court of Justice of the EU to give a ruling under the urgent procedure, suspending the pending domestic proceedings in the meantime.[313]

These case law developments highlight how the Italy-Albania Protocol and the accelerated procedures for designating safe countries raise issues of compatibility not only with EU law but also with Italian constitutional principles, requiring careful consideration of the balance between the need to control migration flows and the protection of fundamental rights.

3.6. Compatibility of the Protocol with EU law

The Protocol signed between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on 6 November 2023 is part of recent European policies aimed at the externalized management of migration flows. However, despite its stated aims of strengthening cooperation, its compatibility with EU law raises numerous legal questions. In particular, serious concerns arise in relation to the territoriality of EU asylum rules, the effective protection of the

[310] Chiara Acampora, 'I Dubbi della Corte di Cassazione sul piano Albania, due rinvii alla Corte Ue', ANSA, https://www.ansa.it/sito/notizie/politica/2025/05/30/i-dubbi-della-corte-di-cassazione-sul-piano-albania-due-rinvii-alla_7b151dfa-d7c3-4972-a198-13e90cc4c506.html;
Directive 2008/115/EC.
[311] Ibid; Directive 2013/32/EU.
[312] Ibid.
[313] Ibid.

fundamental rights of applicants for international protection, and the division of external competences between Member States and the Union.

Firstly, the Protocol raises significant doubts as to compliance with the principle of territoriality of the Common European Asylum System (CEAS). Under EU law, the procedural and substantive rights granted to asylum seekers must be fully guaranteed within the territory of the Member States. Directive 2013/32/EU establishes that border procedures for examining applications for protection may only take place 'at border crossing points or in transit zones' within the territory of the Member States.[314] The *fictio iuris* introduced by the Protocol, which assimilates the areas of Shëngjin and Gjadër to Italian border areas, has no basis in European law and risks violating Article 18 of the Charter of Fundamental Rights of the European Union, which recognizes the right to asylum in accordance with the Geneva Convention and the Treaty on the Functioning of the European Union (TFEU). [315]

Although the Italian authorities have claimed full jurisdiction over the centres located in Albania, this extraterritorial extension does not automatically guarantee the effectiveness of fundamental rights. The Court of Justice of the European Union has repeatedly stated that the provisions of directives must be interpreted in such a way as to safeguard the effectiveness of the rights recognized.[316] In particular, the CJEU has clarified that the effectiveness of asylum procedures cannot be compromised by practices that make access to protection more difficult or reduce the guarantees provided by European law.[317]

The idea of physically transferring applicants for protection to a third country, even if under the jurisdiction of a Member State, therefore undermines the very logic of the CEAS, which is based on the uniformity and territoriality of procedures. As noted by Celoria and De Leo, the location of centres outside the European territory risks undermining the principle of uniform treatment of applicants, with potential disruptive effects on the entire common regulatory framework.[318]

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[314] Directive 2013/32/EU, art 43.
[315] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 art 18.
[316] Case C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner* [2011] ECLI:EU:C:2011:865, para 93.
[317] Ibid, paras 100–101.
[318] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'20-22.

A further aspect of incompatibility concerns the accelerated procedure for examining asylum applications in Albanian centres. Directive 2013/32/EU, in Article 43, allows for the adoption of accelerated procedures only in strictly defined circumstances, and requires that even during such procedures the fundamental rights of applicants be respected, including the right to an effective remedy and to decent material conditions.[319] In the Protocol, however, the accelerated procedure is systematically applied as the standard procedure rather than as an exception, which results in a structural reduction of the guarantees provided.

In particular, applicants detained in Albania participate in court hearings via remote connection, without the physical presence of a lawyer, a practice that raises doubts regarding the right to defence and the principle of effective adversarial proceedings, protected by Articles 47 and 48 of the Charter of Fundamental Rights.[320] Furthermore, the deprivation of mobile phones in the centres makes it particularly difficult for migrants to freely contact a lawyer or obtain information about their situation, in breach of the obligations of Directive 2013/33/EU.[321]

The automatic deprivation of personal liberty is also incompatible with EU law. Article 8 of Directive 2013/33/EU stipulates that the detention of applicants for international protection must be taken only on a case-by-case basis, after an individual examination, and must be justified by necessity, proportionality and the absence of alternative measures.[322] The model provided for in the Protocol, on the other hand, introduces a form of generalized detention without adequate individual justification, constituting a substantial violation of European law.

The issue of the exclusive external competence of the European Union is also particularly sensitive. Article 3(2) TFEU establishes that the Union has exclusive competence to conclude international agreements which may affect common rules or alter their scope.[323] Since European law extensively regulates international protection

[319] Directive 2013/32/EU, art 43.
[320] ASGI, 'Trattenimento arbitrario e diritto di difesa compromesso: gravi violazioni UE nel Protocollo Italia-Albania' (ASGI, 2024) https://www.asgi.it/antidiscriminazione/trattenimento-arbitrario-e-diritto-di-difesa-compromesso-gravi-violazioni-ue-nel-protocollo-italia-albania/ accessed 26 April 2025;
Charter of Fundamental Rights of the European Union [2012] OJ C326/391 arts 47 and 48.
[321] Ibid;
Directive 2013/33/EU, arts 5 and 8.
[322] Ibid, art 8.
[323] Treaty on the Functioning of the European Union [2012] OJ C326/47 art 3(2).

procedures, the conclusion of bilateral agreements by Member States must be carefully coordinated with EU law to avoid conflicts or overlaps.

In the case of the Italy-Albania Protocol, there is a clear risk that the agreement could interfere with common European asylum rules, in particular with regard to material reception conditions, procedural guarantees and the criteria for determining the State responsible. The European Commission itself, as highlighted in its 2023 statements on external disembarkation centres, has expressed concern about the possibility of exporting Member States' responsibilities extraterritorially without ensuring full compliance with common standards.[324]

The management in Albania, although formally under Italian jurisdiction, therefore risks constituting an escape from the CEAS, reducing the effectiveness of common European policies and encouraging unilateral solutions contrary to the principle of solidarity between Member States.[325] Furthermore, as noted by legal scholars, the fact that migrants transferred to Albania are not covered by the solidarity mechanisms provided for in the New Pact on Migration and Asylum could undermine the objective of fair burden-sharing between Member States.[326]

In conclusion, the legal analysis shows that the Italy-Albania Protocol presents serious issues of incompatibility with EU law. The violations concern both respect for the territoriality of asylum procedures and the protection of the fundamental rights of applicants for protection, as well as the correct delimitation of competences between Member States and the Union. Without corrective action to ensure full compliance with European directives and the Charter of Fundamental Rights, the Protocol risks compromising not only the individual rights of migrants, but also the coherence and integrity of the European common asylum system.

[324] Ylva Johansson, European Commissioner for Home Affairs, Statement on Externalisation Policies (Brussels, 2023).
[325] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa'.
[326] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge'.

CHAPTER III

FUTURE PERSPECTIVES, CRITICAL ISSUES AND COMPARATIVE ANALYSIS

1. The Common European Asylum System and the New Pact on Migration and Asylum

This chapter analyzes the new reforms within the Common European Asylum System (CEAS) and the recent developments of the Italian migration policies in light of such reforms, comparing the different aims and practical application of general principles. The CEAS constitutes the legal and policy architecture through which the European Union (EU) seeks to implement a harmonized and coherent framework for the reception, assessment, and protection of individuals seeking asylum. Developed in line with the obligations of EU Member States under the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, the CEAS reflects the European integration project's aspiration to create a unified area of freedom, security and justice. The initial political commitment to develop a common asylum system dates back to the 1999 Tampere European Council conclusions, which called for the establishment of a common European asylum procedure and a uniform status for those granted asylum. Over the next two decades, a series of legislative instruments were adopted with the dual aims of standardizing the treatment of asylum seekers and ensuring the efficient functioning of the Schengen Area by reducing incentives for secondary movements.

The legal basis of the CEAS is Article 78 of the TFEU, which in particular mandates the creation of a common asylum policy, including the rules on criteria for the grant of asylum and subsidiary protection and on the rights of holders of international protection.[327] This legislative obligation gave rise to the adoption of some key directives and regulations. The first phase of the CEAS, which lasted from 1999 until 2005, established a minimum set of standards in the Member States. It was succeeded by a second phase from 2008 until 2013, in which the initial instruments

[327] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 78.

were recast with the aim of increasing harmonization and addressing the deficiencies highlighted.

The core components of the CEAS include: the Qualification Directive (Directive 2011/95/EU), which defines the criteria for granting refugee and subsidiary protection status and lays down the rights attached to each; the Asylum Procedures Directive (Directive 2013/32/EU), which sets out common procedures for the examination of asylum claims; the Reception Conditions Directive (Directive 2013/33/EU), which establishes standards for the living conditions of asylum seekers; the Dublin III Regulation (Regulation (EU) No 604/2013), which determines the Member State responsible for examining an asylum application; and the Eurodac Regulation (Regulation (EU) No 603/2013), which creates a fingerprint database for identifying asylum applicants and aiding the implementation of the Dublin system.[328] Each of these instruments has been the subject of extensive academic and policy critique, particularly in relation to their effectiveness in ensuring fairness, consistency, and respect for human rights across divergent national systems.

One of the most contentious elements of the CEAS is the Dublin III Regulation, which establishes the first Member State of entry as being responsible in the first instance for handling an asylum application.[329] This policy has disproportionately affected border countries like Greece, Italy, and Spain, which have seen the majority of arrivals by sea or land. The Regulation's strict application has resulted in the overloading of frontier states, the multiplication of informal practices to circumvent its conditions, and a succession of legal disputes. In cases such as *NS v Secretary of State for the Home Department* and *ME v Refugee Applications Commissioner*, the Court of Justice of the European Union (CJEU) clarified that Member States must not transfer asylum seekers to other states where systemic deficiencies could result in inhumane or degrading treatment, thereby introducing an important human rights safeguard into the application of Dublin rules.[330] Criticisms nonetheless remain

[328] Directive 2011/95/EU of the European Parliament and of the Council [2011] OJ L337/9; Directive 2013/32/EU of the European Parliament and of the Council [2013] OJ L180/60; Directive 2013/33/EU of the European Parliament and of the Council [2013] OJ L180/96; Regulation (EU) No 604/2013 [2013] OJ L180/31; Regulation (EU) No 603/2013 [2013] OJ L180/1.
[329] Regulation (EU) No 604/2013, art 3.
[330] Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner* [2011] ECR I-13905.

regarding the Regulation's equity and effectiveness, especially in light of its inability to provide actual solidarity and burden-sharing among Member States.

The institutional frailties of the CEAS were on full display during the migration crisis of 2015, when around 1 million individuals sought asylum within the EU, many of whom were escaping conflict in Syria, Afghanistan, and Iraq.[331] The crisis exposed fundamental fault lines within the EU's asylum regime, with some member states reneging on commitments to establish relocation mechanisms and others turning to national or exclusionary agendas. The emergency relocation schemes of the European Commission within Council Decisions 2015/1523 and 2015/1601, albeit binding in law, were only partially implemented and ultimately failed to provide the projected reallocation of asylum seekers.[332] The crisis made evident the inadequacy of voluntary solidarity and the requirement for a more effective and binding system. Moreover, extensive disparities in recognition rates, reception conditions, and procedural rights resulted in substantial divergences in asylum decisions and experiences within Member States.

As a reaction to these issues, on 23 September 2020, the European Commission presented the New Pact on Migration and Asylum.[333] The policy package has the goal of establishing trust among Member States, enhancing mutual solidarity, and developing a more predictable and integrated asylum system. In effect, the Pact aims to substitute the old ad hoc approach to crisis management with an enduring structure that is effective, flexible, and compliant with fundamental rights. Its key proposals include a new Asylum and Migration Management Regulation, a Screening Regulation, a recast Asylum Procedures Regulation, and a Crisis and Force Majeure Regulation. These legislative instruments were designed to modernize the CEAS and address long-standing concerns over procedural fragmentation, operational inconsistencies, and the absence of enforceable solidarity.

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[331] UNHCR, '2015: The Year of Europe's Refugee Crisis' (UNHCR, 30 December 2015) https://www.unhcr.org/news/stories/2015-year-europes-refugee-crisis accessed 1 May 2025.

[332] Council Decisions (EU) 2015/1523 and 2015/1601;
European Commission, 'Relocation and Resettlement: EU Member States urgently need to deliver' (2016) https://ec.europa.eu/commission/presscorner/detail/en/IP_16_829 accessed 1 May 2025.

[333] European Commission, 'New Pact on Migration and Asylum' (2020) https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en accessed 1 May 2025.

The Asylum and Migration Management Regulation proposes a revised system for determining Member State responsibility, expanding the criteria for responsibility beyond first entry to include family links and meaningful connections such as previous residence or study.[334] It creates a new tool of "obligatory but flexible solidarity," where Member States can either relocate asylum seekers, fund returns of individuals with no right to remain, or offer operational or financial support.[335] It is intended to prevent political deadlock due to obligatory quotas, while still guaranteeing that Member States under strain receive substantial support. Yet, critics note that the voluntary character of the solidarity contribution risks undermining the equal sharing of burden principle and enables wealthier states to buy themselves out of needing to be relocated.[336]

The Screening Regulation establishes a pre-entry screening system that would be obligatory for any third-country nationals entering irregularly or having been disembarked after a search and rescue operation.[337] The screening, which would have to be concluded within five days, encompasses identity checks, security screening, and health checks. It aims to quickly funnel individuals into either asylum processes or return processes and thus minimize the risk of absconding and generally enhance efficiency. But concerns have been raised regarding the legal assurances applicable during screening, including access to legal assistance and judicial review.[338] The lack of formal entry at the screening phase also puts into question the applicability of the Charter of Fundamental Rights of the European Union.

The recast Asylum Procedures Directive creates fast-track border procedures for applicants from countries with low recognition rates, with a maximum 12-week processing deadline.[339] While this can enhance efficiency, there is a risk that accelerated timeframes can bias the thoroughness of the examination and respect for procedural rights. The draft Crisis and Force Majeure Regulation enables temporary

[334] Proposal for a Regulation on Asylum and Migration Management COM (2020) 610 final.
[335] Ibid, art 45–49.
[336] Giuseppe Morgese, 'La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo' (Cacucci Editore 2021).
[337] Proposal for a Screening Regulation COM (2020) 612 final.
[338] European Council on Refugees and Exiles (ECRE), Screening Out Rights? Delays, Detention, Data Concerns and the EU's Proposal for a Pre-Entry Screening Process: A Summary of ECRE's Assessment of the Screening Regulation COM(2020) 612 and Its Proposed Amendments (Policy Note No 30, 2020) https://ecre.org/wp-content/uploads/2020/12/Policy-Note-30.pdf accessed 15 May 2025.
[339] Proposal for a Regulation on Asylum Procedures COM (2020) 611 final.

derogations from the usual rules in cases of mass influx or exceptional pressure.[340] These comprise longer time limits, reduced standards, and temporary exemptions from responsibility criteria under the Dublin system. Critics maintain that such derogations could potentially reduce protection standards as well as to differential treatment based on the conditions of arrival.

In April 2024, following extensive negotiations, the overall legislative foundation of the New Pact was adopted by formal decision by the European Parliament and the Council.[341] It is planned that the implementation of these reforms occurs in 2026, following a transition period. Although the adoption of the agreement represents a significant step forward in EU asylum policy, its reception was extremely varied. Human rights organizations, like the European Council on Refugees and Exiles (ECRE), have feared that the reforms place too much emphasis on deterrence and containment at the expense of access to protection and remedies.[342] Particular issues are the growing resort to detention at the border, the use of complex procedures which can be difficult to navigate in the absence of good legal assistance, and the continued emphasis on preventing entry rather than providing safe and legal channels.

Legal experts have asked if the Pact is completely consistent with EU fundamental rights obligations. The use of pre-entry screening and extended border procedures may contravene Article 5 of the European Convention on Human Rights, which ensures protection from arbitrary detention.[343] In the case of Khlaifia and Others v Italy, the European Court of Human Rights reaffirmed the requirement of sufficient legal bases and effective judicial control in cases of detention.[344] Moreover, the right to an effective remedy under Article 47 of the Charter may be infringed if fast-track procedures deny applicants sufficient time to prepare and submit their cases.[345] The Pact's emphasis on externalization, including cooperation with third countries such as

[340] Proposal for a Crisis and Force Majeure Regulation COM (2020) 613 final.
[341] European Parliament, 'MEPs Approve the New Migration and Asylum Pact' (European Parliament, 10 April 2024) https://www.europarl.europa.eu/news/en/press-room/20240408IPR20290/meps-approve-the-new-migration-and-asylum-pact accessed 1 May 2025.
[342] European Council on Refugees and Exiles (ECRE), Relying on a Fiction: New Amendments to the Asylum Procedures Regulation – A Summary of ECRE's Comments on the New Amendments to the APR in COM(2020) 611 and Recommendations for the Co-legislators (Policy Note No 29, 2020) https://ecre.org/wp-content/uploads/2020/12/Policy-Note-29.pdf accessed 15 May 2025.
[343] European Convention on Human Rights, art 5.
[344] *Khlaifia and Others v Italy* (2016) App no 16483/12 (ECtHR).
[345] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 47.

Libya, Tunisia, and Albania, also presents legal and ethical concerns, particularly in light of reported human rights violations in some of these countries.[346]

One of the more novel features of the Pact is the concept of return sponsorship, whereby a Member State commits to facilitating the return of an individual who has no right to remain in the EU. While designed to improve the number of successful returns, this approach creates legal uncertainty regarding which state has responsibility if the individual is subject to abuse or ill-treatment in the course of, or following, the return operation.[347] Without express legal provision for liability and respect for the principle of non-refoulement, return sponsorship exposes the EU to challenge under both EU and international human rights law. In addition, by promoting returns over integration, the mechanism may push the EU's asylum policy even more towards securitization and even further from protection.

In short, the New Pact on Migration and Asylum is a high-stakes attempt to rebalance the CEAS and break with the tensions that have long plagued EU asylum policy. While it offers innovative approaches to burden-sharing and crisis management, its success will depend on faithful implementation, robust legal safeguards, and genuine political will to solidarity. The Pact is a move in the direction of a more systematized and functionally coordinated system; yet its efficiency focus and containment bias must be carefully balanced with the European Union's binding legal commitment to respect human dignity, ensure procedural fairness, and safeguard the right to asylum. Future reviews must closely watch the Pact's implementation on the ground and examine whether it fulfills its promise to establish an effective common and respect-for-rights European asylum system.

2. The Dublin III Regulation and its Operational Issues

Within the framework of the Common European Asylum System (CEAS), Regulation (EU) No 604/2013, known as the Dublin III Regulation, is the main legal mechanism for determining the Member State responsible for examining an

[346] Anja Palm, 'The Italy–Libya Memorandum of Understanding: A Legal Analysis'.
[347] Olivia Sundberg Diez and Florian Trauner, 'EU Return Sponsorships: High Stakes, Low Gains?' (European Policy Centre, 15 April 2021) https://www.epc.eu/en/publications/EU-return-sponsorships-High-stakes-low-gains~3ac104 accessed 1 May 2025.

application for international protection.[348] The idea behind this instrument is seemingly simple: to avoid multiple or sequential applications by the same individual and to ensure that each application is examined by a single Member State, identified on the basis of objective and hierarchical criteria.[349] However, the experience of the last ten years has shown that the implementation of the Regulation has been marked by numerous operational difficulties, structural imbalances and tensions between Member States.

The first and most significant criticism concerns the persistent centrality of the 'first entry' criterion (Article 13), according to which the Member State responsible is the one that allowed the applicant to enter the EU illegally.[350] Over time, this provision has led to an excessive concentration of responsibilities on border Member States, in particular Italy, Greece and Spain which, for geographical reasons, are the main points of entry for migration flows. In the absence of an effective automatic redistribution mechanism, this approach has led to a significant imbalance in the management of applications, exacerbating the administrative and legal difficulties of peripheral countries.[351]

Added to this is a second critical issue: the weakness of the solidarity instruments provided for in the Regulation. Although Article 33 refers to the possibility of activating corrective measures in the event of exceptional pressure, their implementation is left to the discretion of Member States and does not entail legally binding obligations. As a result, in practice, solidarity mechanisms have proved ineffective or completely unenforceable, especially during the migration crises of 2015 and 2022.[352] As Barletta and Paparusso observe, the flexibility of the system has resulted in a misalignment between the principles of fair sharing of responsibility set out in the Treaties and their practical implementation.[353]

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[348] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.
[349] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People' (2017) 24 *Maastricht Journal of European & Comparative Law* 622, 623.
[350] Dublin III Regulation [2013] OJ L180/31, art 13.
[351] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino' (2021) 1 *Diritti umani e diritto internazionale* 85, 89.
[352] Giulia Barletta and Angela Paparusso, 'On the Reform of the Dublin System and the New Pact on Migration and Asylum' (2021) 88 *Rivista di studi politici internazionali* 63, 67.
[353] Ibid, 68.

A third critical issue is the procedural complexity and fragmented implementation. Cooperation between national authorities, an essential element for the proper functioning of the Dublin system, has often proved inefficient, characterised by delays in requests to take charge, failure to respond and difficulties in carrying out transfers.[354] This dysfunction has been confirmed by numerous rulings of national courts and the Court of Justice of the European Union, which have recognised the ineffectiveness of many Dublin transfers, often hampered by logistical problems, legal opposition or inadequate material conditions in the countries of destination.[355]

A further critical aspect is the impact that the Regulation has had on the effective protection of the fundamental rights of asylum seekers. On several occasions, higher courts, both at national and European level, have found that the transfer of an applicant to the Member State responsible under the Dublin Regulation may entail a violation of the prohibition of inhuman or degrading treatment, in particular when the reception system in the country of destination is inadequate or overburdened.[356] In this regard, the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has clarified that Member States must assess the risk of fundamental rights being compromised in concrete terms before carrying out a transfer, even when this is done in automatic application of the Dublin criteria.[357]

Particularly significant in this context is the judgment in *NS v Secretary of State for the Home Department* (C-411/10), in which the CJEU ruled that a Member State is obliged to suspend the transfer of an asylum seeker where there are 'serious and proven grounds' for believing that he or she would be subjected to treatment incompatible with the Charter of Fundamental Rights of the European Union.[358] This case law has had the effect of tempering the automatic nature of the Dublin mechanism, opening up scope for more effective judicial review and for the

[354] European Commission, 'Country responsible for asylum application (Dublin Regulation)' https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu/country-responsible-asylum-application-dublin-regulation_en accessed 29 April 2025.
[355] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 627.
[356] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 321–322.
[357] *C.K. and Others v Republika Slovenija (*Case C-578/16 PPU, CJEU, 16 February 2017) EU:C:2017:127, para 59.
[358] *N.S. v Secretary of State for the Home Department* (Case C-411/10, CJEU, 21 December 2011) EU:C:2011:865, para 94.

individualised application of the criteria for determining responsibility. However, it has also revealed the structural tension between the requirements of administrative efficiency and the duties of substantive protection, undermining the systemic coherence of the Regulation.

The difficulties of interpretation and application have been exacerbated by the absence of an effective system of monitoring and sanctions in the event of Member States failing to fulfil their obligations. In the absence of a central authority with corrective powers, the implementation of the Regulation has relied essentially on the goodwill of the States and on cooperation between the competent national authorities, which often have different practices and resources. This has led to serious shortcomings in the traceability of applications, the protection of unaccompanied minors and the timeliness of transfers, resulting in many Member States becoming disaffected with the entire system.[359]

In view of these critical issues, numerous observers and scholars have denounced the operational failure of the Dublin Regulation, emphasising that it has become a dysfunctional, inefficient mechanism and a source of systemic injustice. Favilli, in particular, spoke of a 'legal infrastructure of inequality' to describe the paradoxical effect of a system designed to ensure fairness but which, in practice, has increased the administrative and political burden on first-entry states, which often lack adequate resources to manage it in a manner consistent with fundamental rights.[360]

Awareness of the shortcomings of the Dublin system has led to multiple attempts at reform by European institutions over the years. However, these efforts have often been hampered by persistent political disagreement among Member States, particularly on the fair distribution of responsibilities. The failure of the 2016 Dublin IV proposal is emblematic: it provided for an automatic relocation mechanism in the event of a crisis, but was blocked by opposition from some Central and Eastern European states, which were reluctant to accept mandatory solidarity obligations.[361]

The Pact on Migration and Asylum proposed in 2020 and approved in 2024 sought to overcome this impasse by introducing a new Asylum and Migration Management Regulation which, while retaining the framework of Dublin III, modifies some of its

[359] Giulia Barletta and Angela Paparusso, 'On the Reform of the Dublin System', 70.
[360] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino', 97.
[361] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 626.

essential aspects. Among the significant innovations is the introduction of a 'mandatory but flexible solidarity mechanism', which allows states to choose whether to accept asylum seekers, contribute financially or offer operational support.[362] However, as Maiani points out, this compromise risks perpetuating the structural inequalities of the original system, as it does not substantially affect the logic of the first country of entry as the primary criterion for determining responsibility.[363]

The new system also provides for greater centralisation of procedures and more effective intervention by the European Union Agency for Asylum (EUAA), which should provide technical support to Member States in managing applications. The interoperability of information systems (Eurodac, VIS, EES) is also strengthened in order to improve the tracking of persons and the sharing of data between national authorities.[364] However, these measures also risk having the opposite effect to the stated objectives if they are not accompanied by a real rebalancing of responsibilities.

One of the most problematic aspects remains the tendency to 'outsource responsibilities' through agreements with third countries and the adoption of measures to contain irregular arrivals. Although the Pact recognises the need to respect fundamental rights and the Geneva Convention, it encourages extraterritorial control practices that risk replicating, on a European scale, models already criticised at national level, such as those of Italy with Libya or Albania.[365]

As highlighted by Barletta and Paparusso, the new Regulation seems more oriented towards the 'efficient management' of flows than towards removing the systemic inequalities generated by the Dublin system. The principle that the State of first entry is, in principle, responsible for the application is not questioned, and solidarity remains subordinate to margins of political choice that undermine the coherence of the overall mechanism.[366]

The intervention of the national court serves to restore balance, especially where the automatic allocation of responsibility conflicts with the principles of effectiveness and the protection of rights. As Favilli observes, the Dublin system has become a

[362] European Commission, 'New Pact on Migration and Asylum' (Migration and Home Affairs, 2024) https://home-affairs.ec.europa.eu/policies/migration-and-asylum_en accessed 26 April 2025.
[363] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 628-629.
[364] Ibid, 630.
[365] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino', 98.
[366] Giulia Barletta and Angela Paparusso, 'On the Reform of the Dublin System', 72.

privileged forum for ‘dialogue between courts’, in which preliminary rulings to the CJEU play a fundamental role in verifying the compatibility of secondary law with the primary guarantees of the Union.[367]

In this context, there is also the problem of consistency between European obligations and national administrative practices. The implementation of the Dublin system is hampered by serious technical and organisational limitations: lack of specialised staff, inconsistency in procedural practices between different police headquarters, and misuse of the criteria of ‘flight’ or ‘unavailability’ of the applicant to justify the failure to examine the application in Italy.[368] These shortcomings further undermine the effectiveness of the guarantees offered by the Regulation and raise serious questions about the system's ability to provide effective protection.

Another critical issue concerns the impact of the Dublin system on unaccompanied minors. According to the case law of the European Court of Human Rights (*Tarakhel v Switzerland,* application no. 29217/12), transfers must be assessed with particular attention to the vulnerability of the individual, and reception guarantees must be specifically verified by the State ordering the transfer. However, in numerous cases, Italian practice has shown shortcomings in the timely identification of minors and the activation of adequate protection measures.[369]

Despite the EU Pact's attempt to introduce corrective elements, the structure of the Dublin Regulation continues to reflect a state-centric and security-oriented approach to the management of asylum applications. The proposed innovations do not affect the basic principle of ‘first territorial responsibility’, but merely mitigate its effects through flexibility clauses or compensatory mechanisms. As Maiani points out, this is a ‘reform without rupture’, in which the principle of territoriality remains intact and systemic dysfunctions are addressed through administrative rather than legislative means.[370]

In conclusion, the Dublin Regulation, in its current version and in its proposed reforms, continues to raise fundamental questions about its legal sustainability, its operational effectiveness and its compatibility with the founding principles of the

[367] Chiara Favilli, ‘La solidarietà flessibile e l’inflessibile centralità del sistema Dublino’, 97.
[368] Giulia Barletta and Angela Paparusso, ‘On the Reform of the Dublin System’, 73.
[369] *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014), paras 119–122.
[370] Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of Sharing People’, 623.

Union. The tensions between objective criteria for distribution and subjective guarantees of protection appear unresolved. The asymmetry between first-entry countries and northern European countries, combined with the absence of binding solidarity, produces fragmentation that jeopardises not only the common asylum system but also the authority of European law as an instrument of equality and justice. A genuine reform of the Dublin system cannot therefore be achieved without a radical rethinking of the principle of territoriality and the adoption of an approach that is finally based on solidarity, legally binding and centred on the rights of the individual.

2.1. The Principle of "First Country of Entry" and its Limitations

Within the European asylum framework, the principle of first country of entry is one of the cornerstones of Regulation (EU) No 604/2013, known as the Dublin III Regulation.[371] According to this principle, the responsibility for examining an application for international protection lies with the first EU Member State in which the applicant entered irregularly or lodged an asylum application, subject to certain specific exceptions based on family, humanitarian or discretionary criteria. The mechanism underlying this rule aims to prevent so-called 'asylum shopping' and secondary movements within the Schengen Area, while ensuring timely access to the asylum procedure and legal certainty for applicants.[372]

However, the strict application of this principle has raised significant concerns, both in terms of the fair distribution of responsibilities between Member States and the effective protection of asylum seekers' rights. In particular, Member States located at the external borders of the Union, such as Italy, Greece and Spain, have found themselves bearing a disproportionate burden in the management of asylum applications, as they are more exposed to migration flows for geographical reasons.

[371] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

[372]Asylum shopping refers to the practice where asylum seekers apply for international protection in a country of their choosing, often after passing through other safe countries, instead of applying in the first EU Member State they enter;
European Commission, 'Country responsible for asylum application (Dublin Regulation)' https://home-affairs.ec.europa.eu/policies/migration-and-asylum/asylum-eu/country-responsible-asylum-application-dublin-regulation_en accessed 29 April 2025.

This asymmetry has led to an erosion of the principle of solidarity and shared responsibility enshrined in Article 80 of the Treaty on the Functioning of the European Union (TFEU).[373]

Legal doctrine has emphasised that the first entry criterion has effectively transformed border states into 'buffer zones' where, with often limited resources, the operational, administrative and jurisdictional responsibilities related to reception and the examination of applications are concentrated. This phenomenon has negative effects both in terms of respect for fundamental rights and the overall functioning of the Common European Asylum System (CEAS), contributing to its structural dysfunction.[374]

Furthermore, numerous judgments of the European Court of Human Rights and the Court of Justice of the European Union have called into question the automatic application of the criterion of the first country of entry, in particular in cases where the competent State does not guarantee adequate material conditions or fair procedures. In such circumstances, the principle must be tempered in the light of the principle of non-refoulement, fundamental human rights and the rules contained in the Charter of Fundamental Rights of the European Union.[375]

A prime example of this issue is the case law of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, in which the Court condemned the Dublin system for leading to the transfer of the applicant to a country (Greece) that did not guarantee decent reception conditions, in violation of Article 3 of the European Convention on Human Rights (ECHR).[376] This ruling marked a turning point, highlighting that the first entry criterion cannot be applied automatically, but requires a concrete assessment of the situation in the competent country.

In light of case law and legal doctrine, the principle of first country of entry has been increasingly criticised for its inability to ensure a fair distribution of burdens between Member States and for its potential incompatibility with the fundamental rights of asylum seekers. As pointed out by Barletta and Paparusso, by continuing to focus on the first entry criterion, the Dublin III Regulation has ended up consolidating

[373] TFEU, art 80.
[374] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino', 89.
[375] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 635.
[376] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

a ‘structural asymmetry’ that systematically penalises border states and hinders the emergence of effectively shared responsibility at European level.[377]

One of the most controversial aspects of the principle concerns its dissuasive effect on cooperation between Member States. Instead of encouraging solidarity and mutual support, the current system has led to defensive behaviour, including the implicit or explicit refusal to take responsibility for applicants by failing to transfer them as required by the Dublin system, or the practice of informal pushbacks at external borders, as reported by numerous NGO and European Parliament reports.[378]

Another structural limitation of the principle of first entry concerns the paradoxical effect it has on secondary movements. In theory, the Dublin system aims to prevent them by establishing clear rules on which state should process the application. In practice, however, many asylum seekers, after being registered in the first state of arrival, seek to move on to other EU countries where they have family ties, social networks or better prospects for integration. This often leads to transfer requests, judicial proceedings and forced returns, resulting in high costs, procedural discontinuity and administrative fragmentation.[379]

In this regard, the reform proposal contained in the 2024 European Pact on Migration and Asylum does not eliminate the principle of first entry, but attempts to mitigate its effects through a system of ‘mandatory and flexible solidarity’, which provides for forms of relocation, financial support and operational cooperation for states under migratory pressure. However, as Favilli notes, the provision for ‘variable geometry’ solidarity risks leaving the core problems of the Dublin system intact, without overcoming its dysfunctional assumptions.[380]

A further critical element is the lack of timeliness and certainty in the procedures for determining the Member State responsible. It is not uncommon for the response time to requests to take charge or resume responsibility to exceed the prescribed time limits, resulting in the transfer of responsibility to the State where the applicant is

[377] Giulia Barletta and Angela Paparusso, ‘On the Reform of the Dublin System’, 68.
[378] European Parliament, ‘The Implementation of the Dublin III Regulation’ (2020) Study for the LIBE Committee https://www.europarl.europa.eu/RegData/etudes/STUD/2020/604972/IPOL_STU(2020)604972_EN.pdf accessed 29 April 2025.
[379] Francesco Maiani, ‘The Reform of the Dublin System and the Dystopia of Sharing People’, 629–630.
[380] Chiara Favilli, ‘La solidarietà flessibile e l’inflessibile centralità del sistema Dublino’, 97.

located. This creates administrative uncertainty and leads to delays that result in prolonged stays in reception centres and increased vulnerability for applicants, especially unaccompanied minors and persons with special needs.[381]

The critical issues of the principle also arise at the constitutional and fundamental rights level. The principle of first entry can, in practice, result in an unjustified limitation of the right to respect for private and family life, as enshrined in Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union. The European Court of Human Rights has repeatedly stated that the transfer of an asylum seeker to the Member State formally responsible cannot be made without a concrete assessment of the individual circumstances and any human rights violations to which the person concerned may be exposed.[382]

The implementation of the principle of first entry, as provided for in the Dublin III Regulation, often conflicts with obligations under EU law and the ECHR, requiring national courts to balance legal certainty with the effective protection of rights. This balance is particularly complex in situations of overburdened reception systems, such as in Italy and Greece, where the automatic assumption of responsibility results in a reduction of rights and administrative capacity, as well as a weakening of European cohesion.[383]

During the European debate on the reform of the Dublin Regulation, the principle of the first country of entry was the subject of numerous proposals for revision, precisely in order to overcome its unfair effects and strengthen the logic of solidarity between Member States. The New Pact on Migration and Asylum, proposed by the European Commission in 2020 and updated in 2023–2024, attempted to mitigate its impact by introducing mandatory relocation mechanisms, calculated on an annual and proportional basis. However, as Favilli notes, these corrective measures risk being inadequate if they do not affect the very principle of automatic competence based on first entry.[384]

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[381] European Commission, 'Country Responsible for Asylum Application (Dublin Regulation)'.
[382] *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014), para 104.
[383] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 635-637.
[384] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino', 98.

The system provided for in the Pact allows Member States, in the event of strong migratory pressure, to access 'flexible solidarity', choosing between different forms of support: relocation, financial contributions or other operational assistance measures. However, this approach formally leaves the primacy of the territorial criterion intact, shifting the burden of solidarity to a voluntary basis without altering the fundamental structure of the Dublin Regulation.[385] The risk is that the emergency logic will be perpetuated, subordinating the rights of applicants to the political willingness of States.

As Barletta and Paparusso point out, the real obstacle to overcoming the principle of first entry is the lack of trust between Member States and the political resistance to accepting forms of shared and binding responsibility. The 2015 refugee crisis highlighted the inadequacy of existing mechanisms and the need for a profound rethinking of the system, starting from the recognition of the mobility of applicants as a structural and not a pathological phenomenon.[386]

A further proposal put forward in academic circles is to replace the principle of first entry with a model based on the preferences expressed by applicants, compatible with the requirements of administrative efficiency and social cohesion. This model, supported by legal scholars, would value family, cultural or linguistic ties as criteria for competence, promoting a more balanced and sustainable distribution of flows, in line with the principles of proportionality and humanity enshrined in the Charter.[387]

In light of the above, it is clear that the principle of the first country of entry, while representing one of the historical pillars of the Dublin Regulation, is now increasingly inadequate in view of the complexity of today's migration challenges. Its structural rigidity and disproportionate impact on some Member States, particularly those on the border, make it difficult to reconcile with the founding values of the European Union and the need for fair distribution of responsibilities. As Maiani has noted, it is a criterion that is 'legally elegant but politically toxic', as it encourages pushback policies, fuels bilateral tensions and undermines mutual trust between states.[388]

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[385] European Commission, *New Pact on Migration and Asylum* (2020) COM(2020) 609 final, 20–21.
[386] Giulia Barletta and Angela Paparusso, 'On the Reform of the Dublin System', 72-73.
[387] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People', 652.
[388] Ibid.

The Court of Justice of the European Union, while never declaring the criterion unlawful, has gradually developed case law limiting its automatic application, requiring Member States to take into account the material conditions and specific situations of applicants.[389] Judgments such as *C.K. and Others v. Slovenia* and *M.A. v. Belgium* have held that, where there are real risks of inhuman or degrading treatment in the competent State, the transfer may be suspended under Article 4 of the Charter of Fundamental Rights.[390]

The evolution of legislation and case law therefore suggests that the logic of the asylum responsibility system needs to be radically rethought. The reform of the EU Pact is a step in this direction, but, as noted in the literature, it risks remaining incomplete if the very core of the Dublin model is not called into question. Only by genuinely overcoming the principle of first entry, replacing it with criteria of proximity, preference and sustainability, will it be possible to ensure a balance between administrative efficiency, respect for rights and cohesion between Member States.[391]

In conclusion, the principle of the first country of entry is now one of the most critical aspects of the European common asylum system. Its continuation, even in a watered-down form, risks perpetuating the dysfunctions already observed in the past decade and undermining the objectives of solidarity and shared responsibility set out in the Treaties. A genuine reform of the CEAS cannot be achieved without a structural review of this principle, otherwise the systemic asymmetry that has already shown all its limitations will be reproduced.

2.2. The Principle of Burden Sharing among States

In the context of the Common European Asylum System (CEAS), the principle of burden sharing represents one of the most complex and controversial challenges, especially in light of the deep geographical, political and economic asymmetries

[389] Directive 2013/32/EU, art 26.
[390] *C.K. and Others v. Republika Slovenija* (Case C-578/16, Judgment of the Grand Chamber, 16 February 2017) EU:C:2017:127; *M.A. v. Belgium* (Case C-648/20, Judgment of the Grand Chamber, 1 August 2022) EU:C:2022:620.
[391] Chiara Favilli, 'La solidarietà flessibile e l'inflessibile centralità del sistema Dublino'.

between Member States. The current regulatory architecture, based primarily on Regulation (EU) No 604/2013 (the so-called Dublin III Regulation), assigns responsibility for asylum applications, as a priority, to the State of first entry, without providing for an effective mechanism of compulsory redistribution of applicants among all EU countries. This approach has resulted in disproportionate pressure on Member States located at the EU's external borders, such as Italy, Greece and Spain, contributing to serious imbalances of responsibility and internal political tensions within the Union.

The principle of solidarity and fair sharing of responsibility is enshrined in Article 80 of the Treaty on the Functioning of the European Union (TFEU), which states that 'Union policies on border control, asylum and immigration shall be governed by the principle of solidarity and fair sharing of responsibility between Member States'.[392] However, this principle has so far had little practical implementation and has been applied mainly through temporary and voluntary instruments, rather than through structural and binding mechanisms. The most emblematic example is the extraordinary relocation programme adopted by Decisions (EU) 2015/1523 and 2015/1601, which provided for the transfer of a limited number of international protection seekers from Italy and Greece to other Member States. Despite the binding nature of the Council's decisions, many states have shirked their obligations, leading the European Commission to launch infringement proceedings and the Court of Justice to rule in 2020 condemning Poland, Hungary and the Czech Republic for non-compliance.[393] As highlighted by Morgese, outside emergency situations, European institutions have shown extreme reluctance to introduce permanent relocation schemes, limiting themselves to ad hoc measures often restricted to beneficiaries of protection and not to applicants.[394]

The lack of a permanent burden-sharing mechanism has had systemic effects on the resilience of the CEAS. In particular, it has fostered the emergence of divergent national practices to limit or circumvent responsibility under the Dublin Regulation,

[392] TFEU, art 80.
[393] Case C-715/17 *Commission v Poland*, Case C-718/17 *Commission v Hungary*, and Case C-719/17 *Commission v Czech Republic* [2020] ECLI:EU:C:2020:257.
[394] Giuseppe Morgese, 'La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo' (Cacucci Editore 2021).

such as reducing reception standards to discourage secondary movements or adopting restrictive measures to prevent access to the territory.[395] Moreover, some states have progressively abandoned the cooperative logic, adopting unilateral containment policies, such as the construction of physical barriers at the eastern borders or informal rejections at border crossings.[396] This phenomenon, often referred to as the 'renationalisation' of asylum policy, reflects the crisis of legitimacy of the principle of solidarity and accentuates the rifts between the countries of central and northern Europe and those of first entry.[397] In light of these critical issues, numerous reform proposals have sought to overcome the current model by introducing stronger forms of solidarity. However, even the attempted changes presented in the framework of the 2020 New Pact on Migration and Asylum have struggled to combine the needs of procedural efficiency with those of fairness in the distribution of applicants. As Maiani notes, many of the Commission's proposals have limited themselves to introducing 'flexible solidarity' mechanisms, which leave wide discretion to Member States in choosing the type of contribution to be made, e.g. through relocation, operational support or financial assistance.[398] This approach, while marking a step forward compared to the total absence of solidarity obligations, risks reinforcing a voluntarist logic and confirming the status quo rather than transforming it.

The new solidarity mechanism envisaged in Regulation (EU) 2024/1351, adopted as part of the pact, aims to make Member States' contributions more stable and predictable, while maintaining a certain degree of flexibility. Each year, the Commission proposes an indicative number of relocations to be implemented on the basis of migratory pressure and the capacities of the different countries. States can choose between relocating applicants from other Member States, contributing financially or offering other forms of support.[399] The aim is to overcome the emergency logic of 2015 and establish a permanent framework of solidarity-based management. However, according to part of the doctrine, this system risks

[395] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People'.
[396] Chiara Favilli, 'Le politiche di immigrazione e asilo: passato, presente e futuro di una sovranità europea incompiuta'*, Annali AISDUE*, 2022.
[397] Francesca Rondine, 'La riforma del sistema Dublino nel Nuovo Patto sulla migrazione e l'asilo, tra continuità e discontinuità col passato', *Diritto, Immigrazione e Cittadinanza*, fasc. n. 1/2025.
[398] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People'.
[399] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 24 April 2024 on asylum and migration management [2024] OJ L, arts 56-57.

maintaining the structural flaw of not providing for an automatic and compulsory distribution of applicants, leaving the problem of excessive burden on border states unresolved.[400]

Another problematic aspect is that the new Regulation maintains, in substance, the initial responsibility of the State of first entry, without introducing a generalised derogation to this criterion. In this way, the Mediterranean States continue to represent the main point of access and management of applications, with the risk of once again finding themselves isolated during the periods of greatest influx. It is true that the system provides for corrective clauses for crisis situations, but these remain subject to political decisions and do not guarantee an automatic response.[401] The result is a systemic asymmetry in the distribution of responsibilities, which has already proven to undermine the overall effectiveness of the CEAS.

Finally, it must be considered that the absence of a binding redistribution mechanism also has effects at the jurisprudential level. The Court of Justice, while affirming the obligation of loyal cooperation between Member States, has emphasised the limits of secondary legislation in imposing concrete obligations on burden sharing, highlighting the need for structural and not merely corrective regulatory intervention.[402] Beyond the legal and institutional level, the issue of burden sharing also has important political and social implications. The resistance shown by some Member States to relocation mechanisms does not stem solely from reasons of administrative capacity, but is often linked to domestic considerations, such as fear of negative public opinion reactions or the political use of the migration issue. Some governments, particularly those of Central and Eastern Europe, have built their political legitimacy on a rhetoric of closure and national sovereignty, making any compromise in the European forum difficult.[403] This has contributed to consolidating a climate of mutual distrust between the member states and hindering the effective functioning of any binding solidarity scheme.

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[400] Chiara Favilli, 'Le politiche di immigrazione e asilo: passato, presente e futuro di una sovranità europea incompiuta', *Annali AISDUE*, 2022.
[401] Giuseppe Morgese, 'La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo' (Cacucci Editore 2021).
[402] Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland and Others* [2020] ECLI:EU:C:2020:257.
[403] Giuseppe Morgese, 'La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo' (Cacucci Editore 2021).

In this context, the principle of solidarity has been progressively emptied of preceptive content, taking on a declaratory rather than normative value. The absence of an effective translation of the principle under Article 80 TFEU into binding rules has led to a 'legal asymmetry' between the responsibilities attributed to border States and the absence of redistributive obligations for the other members.[404] As a result, a kind of variable-geometry solidarity has been created, which risks undermining the cohesion of the entire European asylum system.

The jurisprudence of the European Court of Human Rights (ECHR) has also, indirectly, highlighted the limitations of the current system. In cases such as *M.S.S. v. Belgium and Greece*, the Court recognised that the excessive burden placed on a Member State (in this case Greece) due to the ineffective burden sharing mechanism and the rigidity of the Dublin Regulation can lead to violations of asylum seekers' fundamental rights as enshrined in Articles 3 and 13 of the Convention.[405] This case law confirms the need for reforms that take into account the effective capacity of states and the protection of individual rights in the design of responsibility criteria.

A further critical issue emerges from a comparison with federal mechanisms for apportioning responsibility in other jurisdictions, such as the United States or Canada, where more centralised systems provide for automatic balancing between sub-state entities through objective criteria and equalisation instruments. The European Union, although not a federation, has developed common asylum policies without equipping itself with similar balancing tools, thus leading to a structural imbalance between common obligations and the capacity to implement them.[406]

In light of these findings, the new framework envisaged by the Pact on Migration and Asylum and the related regulations of 2024 represents a crucial opportunity to structurally address the distribution of responsibilities.

It should also be considered that the principle of solidarity must be aimed not only to manage emergencies, but also to build an ordinary and sustainable system capable of operating under normal conditions. To this end, it is essential that solidarity becomes a legally enforceable principle and that its implementation is subject to forms

[404] Francesca Rondine, 'La riforma del sistema Dublino nel Nuovo Patto sulla migrazione e l'asilo, tra continuità e discontinuità col passato', *Diritto, Immigrazione e Cittadinanza*, fasc. n. 1/2025.
[405] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), paras 344–367.
[406] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of Sharing People'.

of objective verification and sanctions in the event of non-compliance. Without such guarantees, the risk is that the 2024 reforms, while marking a step forward in terms of regulatory cooperation, will prove insufficient in terms of effective implementation, fueling new tensions between states and increasing disillusionment with the European project.

2.3. The Impact on Peripheral States of the European Union

The Dublin Regulation, in its regulatory evolution up to the current Regulation (EU) No. 604/2013 (Dublin III), has crystallized an arrangement of responsibilities that, while pursuing the objective of guaranteeing rapid access to asylum procedures and preventing the phenomenon of *asylum shopping*, has produced systemic imbalances in the distribution of burdens among EU Member States.[407] The centrality of the criterion of 'first entry', enshrined in Article 13 of the Regulation, has led to a disproportionate concentration of responsibility on the countries located on the Union's southern and eastern external borders, in particular Italy, Greece and Spain, generating far-reaching repercussions on their respective reception systems, on internal political-institutional dynamics and on the very resilience of the Common European Asylum System.[408]

The application of the first entry criterion has produced, firstly, a structural overload of the national asylum systems of peripheral countries, forcing them to manage migratory flows of varying intensity and composition with often inadequate resources. As highlighted by Morgese, 'migratory pressure on Mediterranean countries is not a cyclical but a structural phenomenon, which requires systemic and not merely emergency responses'.[409] This pressure has led to significant operational criticalities at all stages of the asylum procedure: from initial identification and registration, to reception conditions during the examination of the application, to the

[407] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.
[408] Ibid, art 13.
[409] Giuseppe Morgese, 'La solidarietà tra gli Stati membri dell'Unione europea in materia di immigrazione e asilo' (Cacucci Editore 2021).

integration of beneficiaries of protection or the repatriation of those who do not obtain status.

In Italy, the capacity of the reception system has been repeatedly put to the test, as demonstrated by the evolution of the SPRAR (now SAI) system, initially conceived as an ordinary model of integrated reception but progressively flanked by emergency centres (CAS) which, paradoxically, have become the predominant component of the system.[410] Similarly, in Greece, the reception infrastructures on the Aegean islands have shown structural limitations, leading to the creation of hotspots characterised by overcrowded and precarious conditions. As noted by the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, these conditions have in some cases reached thresholds constituting degrading treatment within the meaning of Article 3 ECHR.[411]

Spain, for its part, has faced significant challenges in managing migration flows through the enclaves of Ceuta and Melilla and, more recently, through the Atlantic route to the Canary Islands, developing a reception system increasingly under pressure and characterised by emergency interventions rather than structural planning.[412] This procedural and logistical overload has had direct repercussions on the quality and efficiency of asylum procedures. Application processing times have lengthened, generating significant backlogs and prolonged periods of legal uncertainty for applicants.

The management of asylum applications and reception entails significant economic burdens for border Member States, which are only partially mitigated by available European funds.

The asymmetry between responsibilities and available resources raises issues of distributive equity between member states and economic sustainability of national systems, accentuated by the different fiscal and administrative capacities of the countries involved. As Tsourdi observed, 'the unequal distribution of the financial

[410] Giuseppe Campesi, 'Between Containment, Confinement and Dispersal: The Evolution of the Italian Reception System Before and After the "Refugee Crisis"' (2018) 23(4) *Journal of Modern Italian Studies* 490.
[411] *MSS v Belgium and Greece* (GC) App no 30696/09 (ECtHR, 21 January 2011).
[412] Peter Gold, 'Immigration into the European Union via the Spanish Enclaves of Ceuta and Melilla: A Reflection of Regional Economic Disparities' (1999) 4(3) *Mediterranean Politics* 23.

burdens associated with the reception of asylum seekers reflects and amplifies pre-existing economic inequalities within the Union'.[413]

A further consequence of the Dublin system on peripheral countries is the intensification of so-called 'secondary movements', i.e. unauthorised movements of asylum seekers from the responsible Member State to other EU countries. Such movements are often motivated by the search for better economic opportunities, the presence of family or community networks, or the perception of more favourable asylum systems in terms of recognition rates and reception standards.

This phenomenon has led to the emergence of adaptation strategies by peripheral countries, oscillating between enhanced control and forms of de facto 'tolerance' of secondary movements. As pointed out by Papagianni, 'some border Member States have developed selective registration or incomplete identification practices, which implicitly facilitate the continuation of the migrants' journey to other European countries'.[414] The CJEU's *Jafari* judgment indirectly acknowledged the complexity of this phenomenon, affirming the responsibility of the state of first entry even in contexts of massive influxes, while highlighting the need for effective solidarity mechanisms.[415]

These dynamics have contributed to generating tensions between Member States, with secondary destination countries accusing border countries of not fully meeting their identification and registration obligations under the Eurodac Regulation and the Schengen Borders Code. On the other hand, peripheral countries contest the lack of effective responsibility-sharing, invoking the principle of solidarity enshrined in Article 80 TFEU.[416]

Pressures on the reception system in peripheral countries have had a significant impact on the protection of asylum seekers' fundamental rights. Numerous court rulings have highlighted systemic deficiencies in reception and the resulting human rights violations. In addition to the aforementioned *M.S.S.* judgment, the ECHR found

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[413] Evangelia Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) *Maastricht Journal of European and Comparative Law* 580.
[414] Georgia Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' (2013) 15(3) *European Journal of Migration and Law* 1.
[415] Case C-646/16 *Jafari* ECLI:EU:C:2017:586, Judgment of 26 July 2017 (CJEU).
[416] TFEU, art 80.

structural deficiencies in the case *Tarakhel v. Switzerland*, suspending the Dublin transfer of an Afghan family to Italy due to the risks of inadequate treatment for the minors involved.[417]

The Court of Justice of the EU, for its part, has developed case law which, while safeguarding the overall framework of the Dublin system, has introduced important limitations on transfers where there is a risk of inhuman or degrading treatment. In Joined Cases *N.S. and M.E.*, the Court ruled that Member States may not transfer asylum seekers to countries with systemic deficiencies in asylum procedures and reception conditions.[418] This guideline was later codified in Article 3(2) of the Dublin III Regulation.[419]

The structural difficulties of reception systems in peripheral countries have also affected the quality of the examination of applications and the application of the procedural guarantees provided by European law. The quantitative pressure has led, in some cases, to a lowering of the quality standards of the examination, with repercussions on the effectiveness of the right to asylum. As Costello observed, 'the excessive workload of the territorial commissions in Italy and the appeal committees in Greece has sometimes compromised the thoroughness of the individual examination and the proper assessment of the personal circumstances of applicants'.[420]

Faced with the challenges posed by the Dublin system, peripheral countries have adopted diversified response strategies, oscillating between calling for greater European solidarity and adopting restrictive national policies. At the European level, Italy, Greece and Spain have consistently argued for a reform of the Dublin system geared towards a fairer distribution of responsibilities. This position has manifested itself in support for reform proposals based on automatic redistribution mechanisms,

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[417] *Tarakhel v Switzerland* (GC) App no 29217/12 (ECtHR, 4 November 2014).
[418] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* and *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865, Judgment of 21 December 2011 (CJEU).
[419] Regulation (EU) 604/2013, art 3(2).
[420] Cathryn Costello, 'The Human Rights of Migrants and Refugees in European Law'(2016) *Oxford University Press*, 251.

such as the one presented by the Commission in 2016, and in opposition to solutions that would keep the first entry criterion unchanged.[421]

At the national level, however, responses have often taken on an emergency and restrictive character. Italy, for example, has adopted policies to contain arrivals through bilateral agreements with countries of origin and transit, such as the 2017 agreement with Libya, raising questions in terms of compatibility with human rights obligations.[422] Greece, similarly, has strengthened maritime border controls and developed fast-track border procedures, also following the 2016 EU-Turkey Declaration.

In some cases, tensions between European responsibility and national policies have led to direct confrontations between European institutions and member states. Emblematic is the case of the infringement procedure initiated by the Commission against Italy in 2015 for the failure to collect fingerprints of all irregular migrants, which was resolved by the adoption of 'hotspot approaches' that intensified identification activities.[423]

The highlighted criticalities fueled the debate on the reform of the Common European Asylum System, culminating in the proposals of the New Pact on Migration and Asylum presented by the Commission in September 2020. While maintaining the general framework of the Dublin system, the new framework introduces elements of flexibility and solidarity that are potentially relevant for peripheral countries.

The solidarity mechanism envisaged by the proposal for a regulation on asylum and migration management provides mandatory contributions by all member states, which can take the form of relocations, operational support or financial contributions (so-called 'sponsorship of returns'). According to Maiani, 'the new mechanism represents a step forward compared to the absence of solidarity obligations, but it

[421] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* COM(2016) 270 final, 4 May 2016.
[422] Anja Palm, 'The Italy–Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (2017) *Odysseus Network*.
[423] Federico Casolari, 'The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?' (2016) 25 *Italian Yearbook of International Law* 109.

maintains a voluntarist approach that risks not guaranteeing an adequate response to the needs of border countries'.[424]

Indeed, the 'flexible solidarity' approach adopted in the pact reflects a political compromise that takes into account the resistance expressed by the Visegrád group countries and other member states against compulsory redistribution mechanisms. This solution, while introducing corrective elements, does not substantially change the underlying logic of the Dublin system and the principle of responsibility of the first country of entry.

For peripheral countries, the new framework might offer some relief in situations of migratory pressure, but it does not address the structural asymmetries of the system. As noted by Carrera, 'the persistence of the first entry criterion, even if mitigated by solidarity mechanisms, continues to represent a fundamental element of imbalance in the European asylum system'.[425]

The analysis of the Dublin system's impact on the peripheral countries of the European Union highlights the need for a rethinking of the balance between responsibility and solidarity in asylum management. The principle of the first country of entry, although justified by requirements of procedural efficiency and prevention of abuse, has produced systemic distortions that undermine distributive equity between member states and, ultimately, the overall effectiveness of the Common European Asylum System.

The reform perspectives outlined in the Pact on Migration and Asylum represent an attempt to redress these imbalances, but their actual impact will depend on the concrete ways in which they are implemented and the degree of political commitment of Member States. As Peers points out, 'the success of the new system will depend on the ability to combine flexibility in contributions with guarantees of predictability and sufficiency of the solidarity offered'.[426]

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[424] Francesco Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact' (2020) *EU Immigration and Asylum Law and Policy*, https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/ accessed 14 May 2025.

[425] Sergio Carrera, 'Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum' (2020) *CEPS Policy Insights* No 2020/22, 15.

[426] Steve Peers, 'First Analysis of the EU's New Asylum Proposals' (2020) *EU Law Analysis*, http://eulawanalysis.blogspot.com/2020/09/first-analysis-of-eus-new-asylum.html accessed 14 May 2025.

In the medium to long term, however, a more ambitious reconfiguration of the system may be necessary, oriented towards a more centralised management of asylum applications at the European level or, at least, towards automatic distribution mechanisms that go beyond the logic of first entry. In this perspective, the experience of the peripheral countries constitutes an emblematic case study of the tensions between the national and supranational dimensions in asylum governance, and of the challenges posed by the search for a sustainable balance between border control, protection of fundamental rights and intra-European solidarity.

3. The role of the Safe Country of Origin within the Reform

With the adoption of Regulation (EU) 2024/1348, which will replace Directive 2013/32/EU as of 12 June 2026, the EU has introduced a new common legal framework for international protection procedures, with the aim of harmonising Member States' practices and reducing discrepancies that fuel secondary movements and slow down asylum procedures.[427] One of the most significant innovations of the new regulation concerns the concept of Safe Country of Origin (SCO), which is formalised not only at national level, but also through a common designation at EU level, based on harmonised criteria and shared sources of information and assessment. This innovation is part of the broader context of the Pact on Migration and Asylum proposed by the Commission in 2020 and concretised in 2024, which aims to strengthen shared responsibility and solidarity between Member States, while reducing manifestly unfounded applications and facilitating the return of foreigners whose request for international protection has no legal basis.

Article 61 of Regulation 2024/1348 states that a third country may only be designated as a SCO where, on the basis of the legal situation, the application of the law in a democratic context and the general political circumstances, it can be demonstrated that there is no persecution within the meaning of Article 9 of Regulation 2024/1347 and no real risk of serious harm within the meaning of Article

[427] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 on common procedures for granting and withdrawing international protection (Asylum Procedures Regulation) [2024] OJ L1348/1.

15 of the same regulation.[428] The assessment has to be based on reliable and up-to-date sources, including information from Member States, the Asylum Agency, the European External Action Service, UNHCR and other international organisations, also taking into account common analyses on country of origin information produced under Regulation (EU) 2021/2303. Essentially, therefore, the definition of SCO and the means to rebut the presumption do not change compared to Directive 2013/32/EU, but the sources from which the information is to be drawn are described more precisely, reinforcing the obligation to update the lists and the principle of clarity in the periodic security assessment.[429]

One of the most significant innovations introduced by Regulation (EU) 2024/1348 compared to Directive 2013/32/EU concerns the possibility, now explicitly provided for, to designate only parts of a given territory as safe country of origin or to exclude specific clearly identifiable categories of persons.[430] The 2013 Directive, while allowing the possibility for the applicant to rebut the presumption of safety by demonstrating that the country of origin is not safe in his or her particular case, did not expressly provide for a partial or differentiated country of origin designation. This restrictive interpretation was also confirmed by the Court of Justice, which stated that the designation had to cover the country as a whole, as it was not possible to exclude individual areas from the presumption of safety regime.[431] The new regulation, however, in Article 61(2), formally authorises member states and the Union to introduce exceptions to the designation for 'specific parts of the territory' or for 'clearly identifiable categories of persons'.[432]

The added value of the new provision lies in its ability to capture the internal complexity of the geopolitical and social contexts of third countries. In many situations, in fact, a country may present substantial stability and respect for human rights in the majority of its territory, but at the same time show high risk conditions in specific areas, for instance regions subject to internal conflicts, targeted repression towards ethnic minorities, or rural areas where state authority is weak or

[428] Ibid, art 61.
[429] Directive 2013/32/EU.
[430] Regulation (EU) 2024/1348, art 61(2).
[431] Case C-406/22 *CV v Czech Republic* (4 October 2024).
[432] Regulation (EU) 2024/1348, art 61(2).

compromised. The possibility of limiting designation to only parts of the territory allows for a more accurate response to such intra-state differences, promoting a more proportionate application in accordance with the principle of *non-refoulement*, as codified in Article 33 of the 1951 Geneva Convention.[433]

In parallel, the provision of exceptions related to specific categories of persons recognises that certain groups may be in a state of systemic vulnerability even in countries generally considered safe. Examples include members of the LGBTIQ+ community, dissident journalists, political activists or religious minorities, who may suffer discrimination or selective persecution despite the state's apparent respect for fundamental rights. Directive 2013/32/EU implicitly left this possibility open through the clause of individual examination of the application, but did not expressly provide for an *ex ante* diversification of the security judgement on the basis of membership of specific groups.[434] The new regulation thus fills a regulatory gap and brings greater clarity and legal soundness to an approach already partly developed by case law and administrative practice.

Moreover, Regulation (EU) 2024/1348 introduced another significant change in the legal regime of safe countries of origin, establishing for the first time a binding designation at EU level, accompanied by a limited option for Member States to maintain or introduce residual national designations. In particular, Article 62 provides for the European Commission, assisted by the European Union Asylum Agency and on the basis of authoritative sources such as the EEAS and UNHCR, to designate specific third countries as safe, according to the criteria set out in Article 61 of the same Regulation.[435] Member States are obliged to apply the presumption of safety in respect of such countries, unless the applicant submits individual grounds to rebut it.[436] Unlike the previous regime, which was based on divergent and uncoordinated national lists, the common binding list imposes a standardisation that aims to ensure consistency and reciprocity in the application of accelerated procedures throughout the Union.

[433] Refugee Convention, art 33.
[434] Directive 2013/32/EU.
[435] Regulation (EU) 2024/1348, art 62.
[436] Ibid.

Alongside this central mechanism, the regulation leaves the Member States a subsidiary option to designate, at national level, other countries as safe, provided these are not already designated or suspended at EU level.[437] However, this option is subject to strict procedural limits: for example, if a country has been suspended or removed from the common list due to a deterioration of the internal situation, a Member State may propose to reinstate it at national level only after having formally notified the Commission, accompanied by a detailed assessment, and provided that the Commission does not object within three months.[438] In this case, the Commission may also propose the re-designation of the country at EU level through the ordinary legislative procedure. In addition, states are obliged to notify the Commission and the EU Asylum Agency annually of the updated list of nationally designated third countries.[439]

The result is a hybrid, hierarchical system in which the common designation takes precedence over national ones and conditions their eligibility. The Regulation's harmonised approach reflects the intention to overcome discrepancies between Member States' practices, while strengthening central control over the qualification of third countries, in line with the objectives of the Pact on Migration and Asylum. However, it leaves room for manoeuvre open to states, which will be able, with the Commission's endorsement, to retain a certain degree of decision-making autonomy on safe countries not covered by the common list.

In the context of the gradual implementation of the new Pact on Migration and Asylum, the European Commission proposed on 16 April 2025 to bring forward the entry into force of some key provisions contained in the Asylum Procedures Regulation, which is formally due to enter into force in June 2026. The initiative aims to enhance efficiency and speed in the processing of applications for international protection, in particular with regard to applicants whose applications are considered most likely to be unfounded. In this perspective, the Commission made two main

[437] Ibid, art 64 (1)(2).
[438] Ibid, art 64(3).
[439] Ibid, art 64(4).

proposals: the early activation of the 20% threshold and the adoption of a first common EU list of safe countries of origin.[440]

Firstly, the proposal allows Member States to apply the border or accelerated procedure to applicants from third countries with an average recognition rate for international protection of 20% or lower. Secondly, it is formally foreseen that the designation of safe countries of origin or safe third countries can be done with exceptions in order to provide flexibility to Member States.[441]

As part of this reform, the Commission presented a proposal for the adoption of a first EU list of safe countries of origin, with the aim of supporting a more uniform and coordinated application of the concept within the Union. The proposed list includes Kosovo, Bangladesh, Colombia, Egypt, India, Morocco and Tunisia.[442] It is important to emphasise that some of these countries are already on the national lists of several Member States, and that the common list is intended to complement these national designations, not replace them entirely. The Commission has also indicated that, in principle, EU candidate countries fulfil the criteria for designation as safe countries of origin, due to the path towards the standards of democracy, rule of law and protection of fundamental rights required for accession. Exclusion from the list can only occur under specific conditions, such as situations of indiscriminate violence in conflict contexts, sanctions by the EU Council, or recognition rates of more than 20% at EU level.[443]

The proposal is based on an analysis conducted by the European Union Asylum Agency (EUAA), complemented by contributions from Member States, the European External Action Service (EEAS), the UNHCR and other relevant actors, including civil society organisations. The methodology adopted by the EUAA for the identification of safe countries of origin considers a number of factors, including the existence of a significant caseload of asylum applications from these countries, the

[440] European Commission, 'Commission proposes to frontload elements of the Pact on Migration and Asylum as well as a first EU list of safe countries of origin' (Press release, 16 April 2025) https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1070 accessed 13 May 2025.
[441] Ibid.
[442] Ibid.
[443] Ibid.

level of the recognition rate (below 5% EU-wide) and the country's presence on existing national lists.[444]

Finally, it is made clear that designation as a safe country of origin does not amount to an absolute guarantee of safety for every national of that country. The obligation for Member States to carry out an individual assessment of each application for international protection, regardless of the applicant's origin, remains unaffected.[445]

4. Comparative Analysis of the Strategies of Italy and the European Union

In the contemporary migration policy landscape, Italy and the European Union have developed approaches that are often complementary but also divergent, marked by different strategic visions in terms of responsibility, operational priorities and the location of migration control. The recent adoption of innovative bilateral instruments by Italy, such as the agreement signed with a third country in 2023, as well as the evolution of the European Pact on Migration and Asylum approved in 2024, represent two emblematic and contrasting models: one bilateral, with strong legal and territorial innovation; the other multilateral, aimed at strengthening internal solidarity between Member States and standardizing procedural guarantees.

Italy, in particular, has consolidated over time a migration strategy strongly focused on containment, deterrence and, above all, the externalization of border control. This trajectory has evolved from informal cooperation models, such as the 2017 Italy-Libya Memorandum of Understanding, to more complex and legally sophisticated formulas involving the extraterritorial transfer of procedures under Italian jurisdiction.[446] In contrast, the European Union has pursued, at least formally, a policy aimed at creating a harmonized system based on the principles of solidarity, fair sharing of responsibility and protection of the fundamental rights of asylum seekers.[447]

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[444] Ibid.
[445] Ibid.
[446] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa'.
[447] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'.

This difference is also evident in the different regulatory structures of the two models. The EU has gradually codified a comprehensive body of law, the so-called Common European Asylum System (CEAS), based on directives and regulations binding on all Member States. These rules, including Directive 2013/32/EU (Procedures), Directive 2013/33/EU (Reception), and the Dublin III Regulation (604/2013), aim to ensure uniform procedures and standards for access to international protection. In this context, the EU strategy favours collective and structural solutions, as demonstrated by the recent Pact on Migration and Asylum, which aims at mandatory solidarity mechanisms and strengthening the effectiveness of returns through new centralized operational capabilities.[448]

In contrast, the Italian approach appears to be more reactive and geared towards emergency management of flows. The bilateral and ad hoc nature of the agreements signed by Rome in recent years, from the Memorandum with Libya to the more recent Protocol with Albania confirms, according to many, a strategic line aimed at circumventing, rather than strengthening, the European legal framework.[449] Although these legal instruments contain elements of innovation, they have had the effect of removing certain stages of the asylum procedure from the scope of EU law through the spatial relocation of administrative functions and the adoption of legal fictions that assimilate areas outside Italian border zones.[450]

Italy, in concluding agreements on asylum, such as the Protocol with Albania, operates within a shared competence with the European Union, as provided for by Article 4(2)(j) TFEU, which includes the area of freedom, security and justice.[451] According to Article 2(2) TFEU, when the Union exercises its competence in a shared area, the competence of the Member States is limited to the areas not covered or where the Union decides not to intervene.[452] This means that Italy can negotiate and conclude agreements in this area, but must do so in compliance with the European legal framework and without compromising the common rules already adopted by the

[448] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge'.
[449] See, for example, Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), 'Arbitrary Detention and Compromised Right of Defense: Serious Violations of EU Law in the Italy-Albania Protocol' (7 March 2025) https://www.asgi.it/en/detention/albania-italy-detention-migration/ accessed 12 May 2025.
[450] CIR - Consiglio Italiano per i Rifugiati, 'Protocollo Italia-Albania: cosa sta succedendo?'.
[451] TFEU, art 4(2)(j).
[452] Ibid, art 2(2).

EU. Article 78 TFEU establishes that the common policy on asylum and international protection must respect the Geneva Convention and guarantee the rights of asylum seekers, while Article 80 TFEU introduces the principle of solidarity and fair sharing of responsibilities between Member States, making it clear that any measure adopted, even at bilateral level, must be consistent with these principles.[453] In essence, Italy's competence exists but must be exercised in compliance with Union law, without prejudice to the effectiveness of European standards.

A particularly telling example of the difference between national and supranational strategy can be found in the use of lists of Safe Countries of Origin (SCOs). Although EU law, in particular Directive 2013/32/EU, allows Member States to designate third countries as safe for the purposes of applying accelerated procedures, this power is subject to precise substantive and procedural constraints.[454] Article 37 of the Directive requires that the designation be based on a thorough examination of the situation in the country concerned, taking into account respect for human rights, effective protection against torture and persecution, and the possibility of accessing effective international protection.[455]

In Italy, however, the designation of safe countries has been used on several occasions as a tool for the preventive curtailment of guarantees, especially in the context of emergency migration management policies. The decree of 4 October 2019, and more recently the interministerial decree of 7 May 2024, already included countries such as Tunisia, Morocco, Ghana, Senegal, Bangladesh, and Egypt, despite documented critical issues regarding the protection of certain vulnerable groups.[456] The European Union, on the other hand, does not have a single binding list valid for all Member States, but has provided in the 2024 Pact on Migration and Asylum for the possibility of establishing a common list only following centralized technical and legal coordination. The Italian tendency to produce lists through interministerial decrees, and more recently also through primary legislation, has raised serious doubts

[453] Ibid, arts 78 and 80.
[454] Directive 2013/32/EU art 37.
[455] Ibid.
[456] Ministero dell'Interno, 'Decreto interministeriale 7 maggio 2024'.

as to its compatibility with the general principles of EU law, as noted by the Court of Justice in its judgment C-406/22.[457]

In that judgment, the CJEU ruled that the designation of a country as safe cannot provide for territorial exceptions, and that national courts have a duty to verify of their own motion whether the material conditions of safety required by the Directive are met. This approach contrasts with the Italian approach, which has included in the SCOs countries where forms of territorial persecution persist and has sought to remove such designations from judicial review by elevating them to primary legislation. This choice was expressly challenged in the most recent order of the Court of Rome, which referred to the CJEU a question for a preliminary ruling on the legitimacy of designating a country as safe by law and on the failure to publish the sources of information supporting the government's decision.[458]

Here too, the strategic distinction is clear: the European Union seeks a balance between procedural simplification and the protection of rights, while Italy adopts formal instruments to speed up proceedings at the cost of reducing guarantees. The EU Pact on Migration and Asylum provides that the accelerated procedure may be applied only when reliable, transparent and public information on the situation in the third country is available. In contrast, Italy has resorted to emergency decrees (Decree Law 158/2024) to shield technical decisions and remove them from full constitutional and supranational scrutiny.[459]

Another significant divergence between the Italian and European strategies concerns the construction and management of ‘flexible’ or formally extra-territorial legal spaces. With the Italy-Albania Protocol, Italy has inaugurated a new model: operational structures physically located abroad but formally subject to Italian jurisdiction. This mechanism allows the Italian government to extend its legislation on entry, stay, reception and return even beyond its national borders, while avoiding the full involvement of the European legal system and its obligations.[460]

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[457] Case C-406/22 *CV v Czech Republic* (4 October 2024).
[458] Tribunale di Roma, Sezione Immigrazione, ordinanza di rinvio pregiudiziale alla CGUE, novembre 2024 (inedita).
[459] Decree-Law 158/2024.
[460] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa'.

As noted by authoritative commentators, this is an example of the deterritorialisation of the right to asylum, which has a twofold effect: on the one hand, it symbolically reduces migratory pressure on the national territory; on the other, it lowers the guarantees offered to applicants, who are exposed to faster, more compressed and less accessible procedural mechanisms.[461] The European Union, while also promoting more effective return mechanisms and external management of flows, has so far maintained a structure linked to the centrality of the territory of the Member States and the effectiveness of judicial protection. This is precisely why the European Commission, while not explicitly condemning the Italian-Albanian Protocol, has placed it outside the EU legal framework, stating that it must not undermine the CEAS.[462]

In the European context, proposals for externalization, such as those put forward by France, Denmark and, more recently, Austria, have so far been rejected or suspended precisely because they do not comply with EU law.[463] Asylum management is considered, including in the case law of the Court of Justice, to be a highly integrated matter, in which procedural and substantive uniformity is essential. Italy, on the other hand, with the Albania Protocol and its unilateral management of maritime zones and screening platforms on board ships, has chosen to act within a bilateral and derogatory framework, constructing a space of administrative sovereignty that is formally compliant but substantially misaligned with European standards.[464]

This difference also translates into political and institutional legitimacy: while the EU binds its choices to decisions shared between the Parliament, the Council and the Commission, with full judicial review by the CJEU, Italy proceeds through decree-

[461] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge'.
[462] European Parliament, 'Parliamentary Question P-002206/2024: Protocol between Italy and Albania on the Establishment of Centres for the Detention of Migrants' (22 October 2024) https://www.europarl.europa.eu/doceo/document/P-10-2024-002206_EN.html accessed 12 May 2025.
[463] See Nikolaj Skydsgaard, 'Denmark Passes Law to Process Asylum Seekers Outside Europe' (Reuters, 3 June 2021) https://www.reuters.com/world/europe/denmark-agrees-law-deport-asylum-seekers-outside-europe-2021-06-03/ accessed 12 May 2025;
Gabija Leclerc, Maria Margarita Mentzelopoulou and Anita Orav, Extraterritorial Processing of Asylum Claims (European Parliamentary Research Service, PE 757.609, January 2024) https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757609/EPRS_BRI(2024)757609_EN.pdf accessed 12 May 2025.
[464] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'.

laws, protocols not ratified in the ordinary way, technical agreements and a broad interpretation of the concept of extraterritorial jurisdiction. The result is a dual legal system, in which migrants subject to procedures in Albania receive less guaranteed treatment than those received on EU territory, even though they are formally subject to the same legislation.

In terms of its stated objectives, Italy has gradually complemented the humanitarian paradigm with a security paradigm, placing the fight against irregular immigration, the containment of flows and the strengthening of external borders at the centre of its agenda. As illustrated in the previous chapters, the doctrine has highlighted how, starting with the agreements with Libya in the 2000s, later reformulated in the 2017 Memorandum, Italy's strategy has been based on making third countries responsible and transferring control functions, in the absence of any effective anchoring to multilateral mechanisms.[465] The Italy-Albania Protocol marks a qualitative leap: no longer simple external cooperation, but the legal export of the entire procedure for entry, reception, examination of applications and return, in an attempt to 're-territorialise' the law in an extraterritorial area but formally equivalent to the border.[466]

The European Union, on the other hand, despite facing strong internal political pressures and regulatory contradictions, has sought in recent years to combine the needs of control with those of protection through the development of shared legal instruments and common procedures. The EU Pact on Migration and Asylum, adopted in 2024, introduced a 'dual lever' system: on the one hand, it strengthens the mechanism of responsibility between Member States with new criteria and mechanisms for mandatory solidarity; on the other, it institutionalizes forms of cooperation with third countries, provided they respect fundamental rights and non-discrimination.[467]

In this context, there is a difference not only in means but also in legal philosophy. Italy can conclude agreements in the area of migration and asylum, as it is a shared

[465] Anja Palm, 'The Italy-Libya Memorandum of Understanding: A Model of Externalisation'.
[466] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa'.
[467] European Commission, 'Pact on Migration and Asylum' (European Commission, 2024) https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/migration-and-asylum/pact-migration-and-asylum_en accessed 12 May 2025.

competence with the European Union, but must do so in compliance with the European legal framework and without compromising the common rules already adopted by the EU. It is a subject that has sparked not only widespread debate in the context of Italy's politics, but also disorder within national courts, which have repeatedly raised doubts on the legality and the interpretation of the recent migratory policies, also invoking the Court of Justice of the European Union.

Italy uses law as an adaptive and reactive tool, based on emergency and derogation, as demonstrated by the systematic use of emergency decrees and bilateral technical agreements. The European Union, on the contrary, acts through stable regulatory instruments, albeit often slow and subject to compromise. In the European context, law retains a normative and programmatic dimension, aimed at building a coherent system, as can also be seen from the inclusion in the Pact of explicit references to the Charter of Fundamental Rights and the principle of proportionality.[468]

Finally, the two strategies also diverge in terms of their operational, institutional and symbolic implications. The Italian model, based on bilateralism and the extraterritorial projection of sovereignty, tends to depoliticize the phenomenon of migration through spatial and legal externalization, with the aim of reducing internal conflict and direct responsibilities. However, this approach gives rise to serious tensions, not only in terms of constitutional and supranational compatibility, but also with regard to the effectiveness of the right to asylum and the protection of fundamental rights. The recent rulings of the Court of Rome, culminating in a preliminary referral to the CJEU, are an eloquent manifestation of this: regulatory ambiguity and the instrumental use of sources have led to a judicial block on the implementation of the Protocol.[469]

On the contrary, the European Union's approach, although criticized for its slowness and compromises, is based on an integrated framework of rules, cooperation instruments and shared judicial controls, which guarantee greater transparency and accountability. The adoption of the EU Pact on Migration and Asylum aims to move beyond the emergency approach by providing for stable solidarity mechanisms, new

[468] Ibid.
[469] Tribunale di Roma, Sezione Immigrazione, ordinanza di rinvio pregiudiziale alla Corte di giustizia dell'Unione europea, novembre 2024 (inedita).

procedural guarantees and common eligibility criteria. There are certainly problematic elements, including the risk that security considerations and flexible instruments, such as ‘strategic partnerships’ with third countries with conditional return clauses, will prevail at EU level. However, the difference with the Italian model remains marked: the EU seeks to balance protection and control within a shared legal framework, while Italy has often acted in isolation, derogating from common principles in the name of efficiency.

In summary, a comparative analysis of the strategies of Italy and the European Union highlights a growing gap between the EU's multilateral approach and Italy's bilateral and derogatory approach. This divergence concerns both the regulatory instruments used, SCO lists, accelerated procedures, external jurisdiction, and the political and institutional objectives pursued. On the one hand, there is a European system that seeks to harmonize; on the other, there is a Member State that multiplies exceptions. This asymmetry is now one of the main challenges to the coherence of the European asylum system and the rule of law.

4.1. Differences in Legal Interpretation and Application

One of the most profound differences between Italy's and the European Union's migration strategies concerns the different ways in which substantive and procedural law is interpreted and applied. While the European Union is based on a harmonized legal system geared towards effectiveness and the protection of fundamental rights through the action of the Court of Justice of the European Union (CJEU), the Italian approach has been characterized by a more flexible use of the legal framework, aimed at strengthening control over flows rather than guaranteeing individual rights.

This divergence is primarily evident in the management of accelerated border procedures. Under Directive 2013/32/EU, these procedures may only be implemented in specific situations and must, in any case, guarantee the right to an effective remedy and respect for minimum procedural guarantees.[470] However, in the Italian context, and in particular with regard to the implementation of the Italy-Albania Protocol, there has been widespread use of the accelerated procedure, without an individual

[470] Directive 2013/32/EU.

assessment of the conditions of the applicants, and outside what the CJEU has deemed to be the legitimate conditions for its application.[471] The order of the Immigration Section of the Court of Rome of 18 October 2024 highlighted that the use of the accelerated procedure in the case of migrants transferred to Albania was legally unfounded, as neither the conditions of arrival nor the origin from Safe Countries of Origin (SCO) justified such a measure.[472]

This introduces a second interpretative issue: the qualification and use of lists of safe countries of origin. While Directive 2013/32/EU provides for limited use of SCO lists, strictly based on objective and verifiable criteria, in Italy their adoption has been essentially political and functional to the restriction of the right to asylum. Countries such as Bangladesh and Egypt, included in the Italian lists, have serious structural shortcomings in terms of respect for human rights and effective protection for vulnerable groups.[473]

A third area of profound interpretative divergence concerns the concept of jurisdiction. Italy has argued that the centres set up in Albania under the Protocol remain subject to its jurisdiction, thus making Italian rules applicable and, by extension, European rules 'insofar as they are compatible'.[474] However, this approach is strongly contested by much of the doctrine, which points out that the extraterritorial extension of jurisdiction entails a number of problems related to the effective respect of rights, the overlapping of competences with the host State and the impossibility of guaranteeing conditions equivalent to those provided for in the national territory.[475]

At the level of European Union law, the case law of the CJEU has held that the guarantees offered by the CEAS, including the right to an effective remedy and to decent material conditions, must be applied in any situation in which a Member State exercises *de facto* or *de jure* control over the applicant.[476] The Court has also clarified that the legal form adopted by the Member State to exercise its functions cannot

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[471] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'.
[472] Tribunale di Roma, Sezione Immigrazione, ordinanza del 18 ottobre 2024 (inedita).
[473] Directive 2013/32/EU, art 37;
CIR - Consiglio Italiano per i Rifugiati, 'Protocollo Italia-Albania: cosa sta succedendo?'.
[474] Italy-Albania Protocol, art 4(1) and 4(3).
[475] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'.
[476] Case C-411/10 and C-493/10, *N.S. and M.E.* [2011] ECLI:EU:C:2011:865, paras 84-94.

prejudice the application of EU law, in particular if it results in restrictions on fundamental rights.[477] The Italian attempt to justify the restriction of rights through the fictitious assimilation of Albanian structures to 'frontier zones' could be considered therefore in conflict with the established interpretative principles of the CJEU.

This divergence is also evident in the practical application of defence guarantees. In the management of applications in Albania, the Italian authorities require migrants to participate remotely in the detention review hearing, connecting via video with the judge in Italy. The defence lawyer may not be physically present with either the judge or the person concerned, making confidential and timely dialogue impossible. This arrangement has been criticised not only by legal scholars but also by numerous independent organisations and by the Council of Europe's Commissioner for Human Rights, who expressed concerns about the right to an effective remedy and fair procedures.[478]

On the contrary, EU law, as established in Articles 47 and 48 of the Charter of Fundamental Rights, requires that every person subject to restrictive measures has access to an effective remedy, to a real defence and to adequate communication with their lawyer.[479] Italian practice deviates significantly from these standards, resulting in a formal but not effective application of the law.

The differences between Italian interpretations and European standards are particularly evident in the conflict between the legislative and judicial powers. After the first order of the Court of Rome denying the validation of the detention of migrants in Albania, the Government attempted to consolidate the legitimacy of the accelerated procedure through legislative intervention: Decree-Law 158/2024, which was later incorporated into the decree on immigration flows, transformed the list of safe countries of origin into primary legislation. The aim was to prevent judges from disapplying it, as had happened with reference to the CJEU judgment C-406/22.[480]

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[477] Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1991] ECR I-2925, para 43.

[478] Council of Europe Commissioner for Human Rights, 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures' (13 November 2023) https://www.coe.int/en/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures accessed 12 May 2025.

[479] Charter of Fundamental Rights of the European Union, arts 47-48.

[480] Decree-Law 158/2024.

The principle of the primacy of EU law, established since the *Costa v ENEL* judgment (C-6/64), requires that in the event of a conflict between a domestic rule, even of constitutional rank, and a provision of EU law having direct effect, the national court must disapply the domestic rule.[481]

In some cases, such as the order of the Court of Rome of 18 October 2024, and the decree of the Court of Catania of 4 November 2024, national judges ruled that they could not apply national provisions that conflicted with obligations arising from EU law, by virtue of the principle of the primacy of EU law.[482] This primacy is closely linked to the principle of direct effect, first established in the *Van Gend & Loos* judgment, according to which certain provisions of EU law, which are sufficiently clear, precise and unconditional, can have immediate effect in the national legal systems and confer subjective rights on individuals that can be enforced before the national courts.[483] In this context, the decision to disapply national legislation that is not in conformity with EU law is an essential tool for ensuring the effectiveness of EU law and the uniform protection of the rights deriving from it, even in the absence of a preliminary ruling from the Court of Justice. "*Primacy implies that EU law should be effectively, as well as uniformily, enforced. In this sense, primacy and direct effect are two ramifications of the principle of effectiveness of EU law*".[484]

Other Italian Courts, such as Florence, Rome and Bologna, have instead chosen the path of raising preliminary questions to the Court of Justice of the European Union in similar situations where the national provisions appeared to conflict with EU law, in order to clarify the correct interpretation and application of Union rules.[485] This reflects the central role of the preliminary ruling procedure under Article 267 TFEU, which enables national courts to ensure the uniform and effective enforcement of EU law.[486] As established in *Van Gend & Loos*, the doctrine of direct effect allows individuals to invoke certain provisions of EU law directly before national courts.[487]

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[481] Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66.
[482] See *supra,* Chapter I, para 5.2 and Chapter II, para 3.5.
[483] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 26/62, EU:C:1963:1.
[484] Daniele Gallo, 'Direct Effect in EU Law', Oxford EU Law Library, p 26.
[485] See *supra,* Chapter I para 5.2 and Chapter II para 3.5. See *supra,* Chapter I para 5.2 and Chapter II para 3.5.
[486] Daniele Gallo, 'Direct Effect in EU Law', Oxford EU Law Library, pp 35-36.
[487] *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 26/62, EU:C:1963:1.

Over time, the CJEU has expanded this doctrine to cover not only the founding treaties, but also secondary legislation, international agreements, and fundamental principles of EU law.[488] These developments would not have been possible without the preliminary reference mechanism, often described as the "keystone" of the EU judicial system.[489] By referring questions to the CJEU, Italian judges contribute to the coherent interpretation of Union law and help to safeguard the primacy and effectiveness of the European legal order, especially in areas where domestic norms may undermine individual rights or contradict European obligations.

Furthermore, the Charter of Fundamental Rights of the European Union and the asylum directives confer on national courts an active role in ensuring that procedures comply fully with supranational rules. Judgment C-69/21 (*M.A. v Hungary*) reiterated that, in the field of asylum, the domestic court not only may, but must verify of its own motion whether fundamental rights have been respected and disapply any provisions that hinder their effective protection.[490]

This principle clashes with the Italian legislature's attempt to crystallize technical and political choices through legislative sources, thus removing them from judicial review. The recent order for a preliminary ruling from the Court of Rome to the CJEU, in the second series of cases concerning detention in Albania, highlights a rift between the judicial and regulatory approaches, between constitutional and supranational interpretations of rights, which risks undermining the effectiveness of the common European asylum system.[491]

Another crucial aspect concerns the increasingly frequent phenomenon at national level of the selective non-application of EU law, influenced by political considerations or urgent circumstances. The case of the Italy-Albania Protocol, as well as the management of lists of Safe Countries of Origin, are emblematic examples of how the Italian State has attempted to interpret European rules in an instrumental manner, subordinating their application to the objectives of migration control and public opinion management.

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[488] Daniele Gallo, 'Direct Effect in EU Law', Oxford EU Law Library, pp 35-36.
[489] Ibid.
[490] Case C-69/21 *M.A. v Hungary* [2022] ECLI:EU:C:2022:100.
[491] Tribunale di Roma, Sezione Immigrazione, ordinanza di rinvio pregiudiziale alla CGUE, novembre 2024.

This approach, however, contradicts the unifying and protective function of the Court of Justice of the European Union. In interpreting secondary asylum law, the CJEU has consistently reaffirmed the principle that the effectiveness of EU law must be ensured uniformly in all Member States. This means that there can be no margin of discretion for Member States that would render the guarantees provided at supranational level meaningless, either in substance (fundamental rights) or in procedure (access to justice, transparency, reasoning).[492]

The Italian tendency to treat European rules as flexible or derogable, based on emergency choices or internal needs, thus clashes with the teleological and systemic vision of EU law. The CJEU has repeatedly stated that even in the field of asylum, despite the strong political tensions that characterize it, uniformity of interpretation is a necessary condition for the functioning of the common European system.[493] Case law has also clarified that migration pressure cannot justify a reduction in safeguards, but may, if anything, require support instruments between Member States, as provided for in the EU Pact, and not a reduction in the level of protection of individuals.[494]

The dialogue between judges, through preliminary rulings to the CJEU, is a fundamental safeguard of compatibility between national rules and EU values.

In summary, the differences between Italy and the European Union in the interpretation and application of asylum and migration law are not limited to regulatory or procedural choices, but involve divergent conceptions of the role of law itself. On the one hand, the Italian approach appears to be functional and instrumental, in which the law is used to govern emergencies, limit administrative discretion and strengthen control over the territory. This use of law responds to a logic of containment, deterrence and politicization of mobility, and translates into hybrid legal solutions, such as the use of formally jurisdictionalised extraterritorial zones or unilateral and legislative designations of safe countries.

On the other hand, the European model is based on a systemic, binding and multi-level interpretation of law: rules are conceived as instruments of harmonization, whose application is entrusted to constant interaction between European institutions

[492] Case C-18/16 *K v Staatssecretaris van Veiligheid en Justitie* [2017] ECLI:EU:C:2017:680.
[493] Case C-245/11 *K v Bundesasylamt* [2012] ECLI:EU:C:2012:685.
[494] *C.K. and Others v Republika Slovenija* (Case C-578/16 PPU, CJEU, 16 February 2017) EU:C:2017:127.

and national courts, under the ultimate supervision of the Court of Justice. The purpose of the system is not only control but also protection, and the effectiveness of the right to asylum is understood as a prerequisite for the overall legitimacy of migration policies.

The consequences of this interpretative gap are significant not only at the domestic level but also at the European level. The fragmentation in the application of EU law jeopardizes the credibility of the CEAS and its ability to guarantee minimum common standards.

4.2. Effectiveness and Results of the Italian and European Strategies

A comparative analysis of Italian and European migration strategies cannot be considered complete without an assessment of their effective implementation and concrete results, both at the operational and legal levels. The effectiveness of a migration policy cannot be measured solely on the basis of its regulatory consistency or legal compatibility, but must also take into account its ability to produce tangible results in terms of reducing irregular arrivals, speeding up procedures, protecting fundamental rights and ensuring the institutional stability of the system.

From this point of view, the Italy-Albania Protocol is a case in point of a formally ambitious strategy with limited institutional effectiveness. A few months after its approval (November 2023) and ratification by Law No. 14/2024, the mechanism provided for the transfer and management of border procedures in Albania has been blocked twice by the Court of Rome: first with an order refusing to validate the detention of migrants, then with a preliminary referral to the Court of Justice of the European Union.[495] In both cases, the Italian strategy proved ineffective not because of logistical shortcomings, but because of systemic incompatibility with European law, resulting in the freezing of the entire operational project and the demobilisation of personnel in the centres in Albania.[496]

In Italy, the increase in litigation has placed a heavy burden on both the Territorial Commissions and the ordinary courts. The emergency and derogatory approach has

[495] Tribunale di Roma, Sezione Immigrazione, ordinanze del 18 ottobre e 11 novembre 2024 (inedite).
[496] CIR - Consiglio Italiano per i Rifugiati, 'Protocollo Italia-Albania: cosa sta succedendo?'.

proved counterproductive under certain aspects, generating legal uncertainty, administrative overload and institutional tensions, as well as a significant reputational risk at European level.[497]

On the contrary, the European Union's strategy, although hampered by structural slowness and compromises between Member States, has shown greater institutional resilience. The approval of the Pact on Migration and Asylum in 2024, the result of years of negotiation, is an example of multilateral and integrated implementation, with the aim of combining mandatory solidarity, shared responsibility and respect for procedural guarantees. Although its concrete effects are yet to be monitored, the Pact has already introduced redistribution mechanisms, strengthened common governance and re-established a shared regulatory language among European institutions.

Another useful indicator for assessing the effectiveness of strategies is the management of lists of safe countries of origin (SCO). In Italy, the inclusion of countries such as Bangladesh and Egypt, despite serious concerns regarding specific categories of persons, has had the effect of speeding up procedures, but at the cost of an exponential increase in appeals. The Territorial Commissions have often rejected applications very quickly on the basis of a presumption of safety, with the result that many cases have subsequently been annulled in court due to a lack of individual assessment.[498]

The detention mechanisms provided for in the Italy-Albania Protocol also proved ineffective. The automatic detention of all applicants transferred to Albania, without individual assessment and without the possibility of alternatives, violated Article 8 of Directive 2013/33/EU and Article 13 of the Italian Constitution, as noted by the Court of Rome.[499] This not only prevented the implementation of the measures, but also highlighted the risk of overcrowding in detention facilities and the total absence of an alternative plan for migrants who cannot be expelled.

On the contrary, although the results are not yet fully measurable, the new European system aims to strike a balance between detention and guarantees, with

[497] Eleonora Celoria and Andreina De Leo, 'Il Protocollo Italia-Albania e il diritto dell'Unione europea: una relazione complicata'.

[498] UNHCR, 'Audizione alla Camera sul Protocollo Italia-Albania', 9 january 2024 https://www.unhcr.org/it/notizie-storie/notizie/audizione-unhcr-alla-camera-dei-deputati-sul-protocollo-tra-italia-e-albania/ accessed 29 April 2025.

[499] Tribunale di Roma, Sezione Immigrazione, ordinanze del 18 ottobre e 11 novembre 2024 (inedite).

provision for proportionate detention capacities, shared maximum thresholds and harmonised standards. The procedural regulation provided for in the EU Pact requires that all detention be justified, necessary and verifiable. If implemented correctly, this approach offers better long-term sustainability, reducing the risk of litigation and improving the management of requests.

In addition to legal and administrative effectiveness, the political and symbolic dimension of the strategies adopted must also be considered. In the Italian case, effectiveness has often been measured on the basis of the ability to communicate firmness rather than on the actual implementation of measures. The Italy-Albania Protocol, like the security decrees or the Memorandum with Libya, has had a significant media impact, strengthening consensus among sectors of public opinion in favour of a policy of closure and control. However, on a practical level, these instruments have shown little substantive effectiveness, precisely because they are based on exceptional, derogatory solutions that are difficult to sustain over time.[500]

The fact that none of the migrants transferred to Albania were detained in accordance with national and EU law, and that the measures were suspended after only two operations, shows that effective communication does not necessarily translate into effective action. The demobilisation of staff in the centres, the reduction in police units and the return of social workers to Italy also demonstrate the organisational inadequacy of a project announced in decisive tones but lacking a solid legal basis and structural planning.[501]

The European Union's approach, although less symbolic, aims for more lasting and systemic results. The EU Pact is not intended as an emergency response, but as a structural reform aimed at improving the sustainability of the common system, increasing trust between Member States and ensuring the redistribution of migrants according to criteria of balance and cooperation. While the Pact has been criticised for introducing ‘flexible’ solidarity, it has also created a coherent legal framework within which Member States can act predictably and in accordance with shared rules.[502]

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[500] Mario Savino, 'La legge di ratifica ed esecuzione del Protocollo Italia-Albania: tre problemi di sostenibilità giuridica e amministrativa'.
[501] CIR - Consiglio Italiano per i Rifugiati, 'Protocollo Italia-Albania: cosa sta succedendo?'.
[502] Daniela Vitiello, 'L'ultimo atto: il nuovo Patto sulla migrazione e l'asilo è (quasi) legge'.

Finally, it is necessary to consider effectiveness in terms of impact on migrants' rights. In many cases, the Italian model has led to a lowering of protection standards, creating situations of uncertainty, arbitrary detention and limited access to defence. Accelerated procedures, the distorted use of SCOs and the remote management of hearings have compromised fundamental guarantees, as recognised by the UNHCR, ASGI and the Council of Europe.[503] The European approach, although perfectible, maintains a multi-level structure of control – judicial, parliamentary and technical – which allows for greater effectiveness of safeguards and accountability of Member States.

Overall, a comparison between Italian and European strategies in terms of effectiveness reveals an asymmetrical picture. On the one hand, the Italian strategy has favoured flexible regulatory instruments, political visibility and rapid implementation, but has produced fragile results that have been contested and largely deactivated through the courts. Symbolic effectiveness has proved disconnected from legal effectiveness, and regulatory production has often generated more litigation than structural solutions. The case of the Italy-Albania Protocol, which began as an innovative project and was presented as a replicable model, quickly ran aground in the face of resistance from the national and supranational judicial system, demonstrating how risky it is to build migration policies on fragile or circumvented legal bases.

On the other hand, the European Union's approach has focused on slower but structurally stable mechanisms, based on shared principles, multilateral cooperation instruments and a widespread control system. The effectiveness of the Pact on Migration and Asylum cannot yet be fully measured, but its gradual implementation is already producing positive effects: greater harmonisation of procedures, a common language between Member States, and the construction of a system of solidarity-based responsibility, albeit with limitations.

The outcome of the two strategies is therefore profoundly different in terms of institutional and systemic resilience: the Italian strategy shows a high exposure to the risk of contrast with the European Union, judicial paralysis, administrative overload

[503] ASGI, 'Trattenimento arbitrario e diritto di difesa compromesso' (ASGI, 2024) https://www.asgi.it/antidiscriminazione/trattenimento-arbitrario-e-diritto-di-difesa-compromesso-gravi-violazioni-ue-nel-protocollo-italia-albania/ accessed 29 April 2025.

and constitutional tensions; the European strategy, although imperfect, is based on a balance between efficiency, law and legitimacy. In this context, it is clear that regulatory effectiveness cannot be separated from legal effectiveness, and that uniformity in the application of guarantees is a necessary condition for the sustainability of migration policies.

CONCLUSION

This thesis examined the concept of safe country of origin (SCO) within the complex legal, political and procedural framework of the European Union and the Italian asylum system, with particular attention to the interaction between national implementation, European harmonization and migration control externalization strategies. The legal foundations of the SCO mechanism have been explored in depth, both in international and EU law, highlighting how the concept has emerged as a tool to speed up the examination of applications for international protection through the presumption that applicants from certain countries do not, in general, need protection.

Although this presumption can formally be overcome, its practical application often involves a significant shift in the burden of proof, requiring the applicant to demonstrate individual risks in the face of the general 'safety' classification of their country of origin. This reversal has a profound impact on the principle of individual examination enshrined in the 1951 Geneva Convention, on the prohibition of refoulement provided for in Article 33 and on the procedural guarantees codified in Directive 2013/32/EU.[504]

The thesis demonstrated that, although the Convention does not expressly mention the concept of SCO, its fundamental principles, including the right not to be returned to countries where there is a risk of serious danger, are directly compromised if generalised presumptions of safety are applied without solid individual safeguards.

This conflict is particularly evident in the Italian legal system, where domestic legislation, in particular Legislative Decree No. 25/2008, amended first by Decree Law No. 113/2018 and subsequent amendments, most lately converted into Law No. 187/2024, introduced a binding list of SCO for the Territorial Commissions, severely limiting the scope for derogations.[505] The case study on Côte d'Ivoire highlighted the risks arising from arbitrary or outdated designations, as Italy's unilateral inclusion, not followed by other Member States, took place despite documented human rights violations, ethnic tensions and repression by the security forces. This designation raises serious doubts about compliance with Article 37 of Directive 2013/32/EU and

[504] Convention Relating to the Status of Refugees of 1951, art 33;
Directive 2013/32/EU.
[505] Legislative Decree No. 25/2008, as amended by Law No. 187/2024.

the criteria set out in Annex I, which require regular review based on reliable sources.[506]

The analysis of the SCO mechanism can also be placed within the external dimension of EU migration policy, reconstructing the evolution of measures aimed at delegating border control and the management of asylum applications to third countries.

The policy of externalization, legitimized, *inter alia*, by Article 78(2)(g) of the TFEU and Article 38 of Directive 2013/32/EU, translates into a multitude of formal and informal instruments, including readmission agreements, mobility partnerships and operational arrangements, which often escape judicial review.[507]

The Italy-Albania Protocol of 6 November 2023 is a paradigmatic example of this trend: it provides for the construction and management by Italy of centres for the processing of asylum applications on Albanian territory, under Italian jurisdiction, for migrants rescued at sea outside territorial waters.[508] While seeking to maintain the legal fiction of continuity of jurisdiction, this agreement raises new questions about the effective application of the Charter of Fundamental Rights of the European Union, access to effective judicial remedies and the possibility of ensuring respect for the principle of *non-refoulement*.

The combination of territorial externalization, automatic detention and accelerated processing for SCO candidates contributes to their vulnerability, with a very concrete danger of diminishing international protection to a formality. These procedures are reflective of a wider management rationale founded on deterrence and speed, one that sacrifices procedural guarantees for efficiency.

Judicial review in delimiting the margin of discretion of Member States plays a central role. The judgment of the Court of Justice of the European Union of 4 October 2024 (Case C-406/22) clarified that a Member State cannot designate as safe a country of which only some parts meet the criteria set out in Annex I, thus reaffirming the need for territorial consistency and a restrictive interpretation of procedural

[506] Directive 2013/32/EU art 37;
Annex I of Directive 2013/32/EU.
[507] TFEU, art 78;
Directive 2013/32/EU, art 38.
[508] Italy-Albania Protocol of 6 November 2023.

derogations.[509] In response, the Italian legislature removed the territorial exceptions but retained the personal ones. This led to a new series of preliminary rulings to the CJEU, including the *Alace* and *Canpelli* cases, which ask the Court about the compatibility of personal exceptions with EU law and the admissibility of the legislative constraint in the designation of SCO.[510]

The Advocate General's conclusions, presented on 10 April 2025, admit the possibility of such exceptions provided that they are clearly identified, formally provided for and subject to full and effective judicial review.[511] This interpretation represents an attempt to strike a balance between the requirements of administrative efficiency and the protection of individual rights, but it does not resolve the systemic issues linked to the trend towards increasingly simplified and less protective asylum management.

The thesis highlighted how the current European asylum framework, with the proliferation of accelerated procedures and the increasing use of derogatory instruments, is undermining the effectiveness of the protections recognised by primary EU law and international treaties. The SCO mechanism, in particular, crystallises these risks, as it allows for the generalised exclusion of entire categories of applicants from individual assessment of their need for protection.

The absence of a common EU list, combined with the fragmentation of national lists based on inconsistent and often opaque criteria, undermines the very objective of the Common European Asylum System and opens the door to arbitrary abuses. A structural reform of the system is therefore desirable, providing for the mandatory publication of information sources, independent and regular monitoring, and the systematic involvement of the UNHCR and the European Union Agency for Asylum.

Furthermore, any procedural simplification, including the acceleration of decision-making times, must be accompanied by adequate safeguards, legal assistance and effective access to remedy. Externalization mechanisms, such as the Italy-Albania Protocol, must be subject to prior review of their compatibility with fundamental rights, in particular with the prohibition of inhuman or degrading

[509] Case C-406/22 *Ministerstvo vnitra České republiky v CV* ECLI:EU:C:2024:218.
[510] Cases C-758/24 and C-759/24 *Alace* and *Canpelli* ECLI:EU:C:2025:376.
[511] Richard de la Tour, Opinion of Advocate General in Cases C-758/24 and C-759/24 *Alace* and *Canpelli* ECLI:EU:C:2025:376, delivered on 10 April 2025.

treatment and with the principle of *non-refoulement*. Moreover, unilateral initiatives within the framework of a shared competence and concurrent policy may undermine the overall functioning of the system and create substantial and procedural coordination problems.

National and supranational courts have a decisive role to play in this context in ensuring that efficiency does not prevail over the law. Through a strict interpretation of derogations, active monitoring based on up-to-date sources and the strengthening of judicial remedies, courts can rebalance the system against excessive security drift. Most recently, the Italian Court of Cassation has referred two preliminary questions to the Court of Justice of the European Union regarding the Italy-Albania Protocol, raising doubts about its compatibility with the EU. The preliminary ruling mechanism before the Court of Justice of the European Union will help ensure the uniform application of EU law. Moreover, the upcoming decisions of the CJEU in the *Alace* and *Canpelli* cases will be decisive in clarifying the scope of national discretion and redefining the boundaries of legitimacy of the entire SCO mechanism.

In view of the implementation of the New Pact on Migration and Asylum and Regulation (EU) 2024/1348, which will enter into force in 2026, it is essential that reforms strengthen legal coherence and effective protection.

The new regulation, which will replace Directive 2013/32/EU, introduces important innovations, including the obligation for a rapid and integrated examination of applications, more binding common procedures for all Member States and a shared legal basis for the designation of safe countries. However, significant concerns remain, in particular, with regard to the new provisions on border mechanisms and accelerated procedures, which risk leaving too much space to Member States' discretion.

In this context, the strengthening of the Common European Asylum System (CEAS) could include a rethinking of the Dublin system, which has always been contested because of its tendency to concentrate the burden of applications on countries of first entry. The Dublin Regulation still provides the territorial principle as a basic principle, with the risk that existing imbalances between Member States will be perpetuated. Such a principle prejudices peripheral states like Spain, Italy, and Greece, which face a major influx of migrants compared to others. For this reason,

scholars believe the system is insufficient to ensure a fair distribution of responsibilities and genuine protection of the fundamental rights of asylum seekers.

The future therefore requires a joint commitment by the European institutions to overcome the structural dysfunctions that have marked the functioning of the CEAS since its inception. This requires not only the uniform and consistent implementation of the new legislative instruments, but also the development of a shared legal culture in which administrative efficiency does not translate into a curtailment of rights, but rather into their effective and accessible protection. The findings of this thesis therefore support the need for systemic rebalancing, capable of combining management requirements and shared responsibility with unconditional respect for human dignity, procedural guarantees and the rule of law.

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