‘Detention, illegalisation and the so-called CEAS reform in southern Italy - monitoring the situation of refugees in the light of the European migration pact’

Palermo, 18.11.2024

In September 2024 our new project began, carried out by the organisations borderline-europe and Maldusa, managed by the *Forschungsgesellschaft Flucht und Migration,* and supported by the Protestant Church in Hessen and Nassau (EKHN), the Protestant Church in the Rhineland (EKIR), LeaveNoOneBehind and Pro Asyl!

In recent years, Europe has been characterised by increasing attacks on human rights in general and the massive dismantling of refugee rights in particular. One example of this is the ‘Common European Asylum System’ (CEAS), which aims to make detention centres at the EU's external borders the standardised norm. Unlawful pushbacks and pullbacks characterise and dominate the daily reality of refugee and migration movements, particularly in the eastern and central Mediterranean. Continued attempts to externalise the border regime can be seen in the EU's billion-euro deals with Turkey, Libya, Tunisia, Mauritania, Egypt and Lebanon.

Sicily, the EU's southern external border and arrival point for migrants by sea, is a testing ground for the implementation of the new European asylum and migration policy. With the Albania-Italy deal, Italy is one of the first EU states to actually attempt to extraterritorialise border procedures, pre-removal detention, access to asylum, and refugee status determination (RSD).

We feel it is vital to keep monitoring this complexity, highlighting the critical role of civil society actors, as well as the critical actions and voices of people on the move.

Palermo, November 2024

Picture: Porto Empedocle: Migrants waiting for transfer to the closed or open centres
Credits: Maldusa

The implementation of new border procedures in Italy after the 'Cutro decree'.
Main challenges and ongoing legal battlegrounds.

Since March 2023, several juridical changes have altered migration policies relating to arrivals in Italy by sea. In continuity with the past, governmental efforts have gone in the direction of further restricting the possibilities of seeking asylum in Italy, through an instrumental use of the safe country of origin concept, and through the introduction of new detention procedures for asylum seekers. The outcome of these new experimental procedures now depends on the possibility of implementing the protocol between Italy and Albania, as a form of extraterritorialisation of border procedures and asylum access. In this short article, we reflect on the major obstacles these policies have encountered at the jurisdictional level, thanks to the challenges raised in the Sicilian and Roman courts, as well as in the European Court of Justice.

1. Border procedures after the Cutro decree/law (April 2023)

Porto Empedocle closed centre, picture: Maldusa

In the months following the notorious Cutro shipwreck in February 2023 – in which 105 people travelling on a boat from Turkey lost their lives just few meters far from Steccato di Cutro beach (Calabria) -- the extreme right wing Italian government issued the so-called Cutro Law Decree (D.L. 20/2023, then converted into Law 50/23). Beyond the cynical attitude of recalling such a tragic, but most probably avoidable, event by introducing heaviest penalties for boat drivers, instead of recalling states' biding duty to rescue, the decree introduced some new measures that further shrink accessible pathways to asylum, and to the right to stay.

Keeping at its core the notion of a 'safe country of origin' (SCO) as the main selection criteria for accessing asylum, the decree introduced the possibility to detain asylum seekers during fast-track Refugee Status Determination (RSD) procedures, if they could not dispose of a financial guarantee (initially fixed at 4.938 Euro, and now re-defined by local authorities on a country of origin-based criterion). The opening of two new dedicated detention facilities – in Modica/Pozzallo (in 2023) and in Porto Empedocle (in 2024) – was functional to the implementation of these new measures.

2. State of the art on implementing the new border procedures

Nevertheless, a precondition for their implementation was the validation by Sicilian courts – Catania and Palermo, respectively – which, with few exceptions, never took place. According to available data up to October 2024, 94% of judges' decision in Palermo and 100% in Catania have not validated the detention measures requested by police authorities in Agrigento and Ragusa, those responsible for the two centres

mentioned above. The judges rejected the detention primarily for the following two reasons:

1) the inapplicability of the "border zone concept" – established with the decree from August 5, 2019 – to those detention measures that are meant to take place in a location extremely far from the first border of entry. E.g. if a migrant arrives in Lampedusa, then this is the border that counts, and not the Sicilian 'mainland' to which they might be transferred in a second stage afterwards.

2) Another interesting reason for the rejection of detention is the illegitimacy of the Italian Safe countries of Origin list. It should be noted here that the Italian Ministry of Foreign Affairs - in contrast to the 'safe countries of origin' as defined by the Ministry of the Interior - does recognise dangers in its own country reports relating to states that are otherwise listed by the Ministry of the Interior.

With regard to the first point, in a decision issued on 17.09.2024 by the court in Catania, relating to the non-validation of detention measures in the Pozzallo-Modica centre of a Tunisian citizen who had landed in Lampedusa, the judge wrote:

"In other words, it is intended to state that - pursuant to Directive 2013/32 and to Articles 6a and 28a of Legislative Decree 25/2008 cited above - it is certain that detention in the context of border procedures can only be made at the border itself (Article 2 of Regulation 2016/399/EU defines external borders as 'land borders, including river and lake borders, sea borders and airports, river, sea and lake ports of the Member States, which are not internal borders' and 'border crossing point as any crossing point authorised by the competent authorities for the crossing of external borders'), and the BORDER in our case is Lampedusa, the place where the disembarkation took place and where the request for protection was made, and not the province of Ragusa where the detention took place."

With regard to the second point, the same decision highlights:

"This being the case, the irreconcilable contrast between the MAECI (Ministry of Foreign Affairs and International Cooperation) decree 07.05.2024, read in conjunction with the Country Fact Sheet, and the primary legal provision, i.e. the aforementioned Article 2 bis of Legislative Decree no. 25 of 18.01.2008, appears evident, since a country like Tunisia cannot in any way be defined as a country that protects dissidents and minorities from persecution within a democratic framework when, according to the evaluations referred to by the Ministry of Foreign Affairs and International Cooperation itself, it:

1) *Does not respect the ban on arbitrary arrests and detentions;*
2) *Practices arrests with non-existent evidence;*
3) *Applies precautionary measures without judicial scrutiny;*
4) *Closes down television networks opposed to the government;*
5) *Represses freedom of association by arbitrarily detaining protesters;*
6) *Discriminates against LGBT rights by prosecuting homosexuals with the possibility of prison sentences of up to three years;*

7) *Tolerates widespread violence against women, by not adequately combating the act of rape, or widespread and systemic discrimination of women;*
8) *Allows torture in police stations and prisons;*
9) *It does not offer sufficient guarantees that asylum seekers (sub-Saharan migrants) will not be rejected, even if they qualify as refugee applicants.*

Having said this, we agree with the orientation according to which the administrative act" – namely, the ministerial decree of the MAECI updating the list of safe countries of origin – "*must be disapplied […]. This disapplication is compulsory in view of the fact that the decree has an impact both on the right to asylum (by ceding to the accelerated border procedure) and on the fundamental subjective right to personal freedom, by restricting them.*"

Reading the court decisions to not validate the detention orders made by the Police in Agrigento for Tunisian, Bangladeshi and Egyptian citizens (in the Porto Empedocle centre) or in Ragusa (for the Pozzallo-Modica centre), the contrast between the procedures defined in the so-called Cutro Decree and the normative sources of EU asylum law is more than evident. This contrast is also evident in the assessments of the Italian Ministry of Foreign Affairs with its country reports and the definition of the list of safe countries of origin, which serve as a purely functional instrument for limiting the access of persons arriving in Italy by sea to the right of asylum.

Hotspot Porto Empedocle. The border centre for fast-track procedures was built next door to the Hotspot in July 2024, picture: borderline-europe

3. The ECJ's (European Court of Justice) decisions on detention in accelerated border procedure centres

On October 4, 2024, further challenges were made by the European Court of Justice in relation to the already-contested new fast-track border procedures and detention measures introduced by the 'Cutro Decree', and to be ideally implemented under the Italy-Albania protocol.

To understand what happened, it is necessary to take a step back and look at the events surrounding the first attempt at applying the border procedures under the Cutro Decree in Autumn 2023.

In October, several judges of the specialised immigration section of the court in Catania had, as described above, chosen to not validate the detention of Tunisian citizens ordered by the Ragusa police headquarters at the newly established Pozzallo-Modica centre. This had caused a huge media uproar, as well as the start of a defamatory campaign against the judge, Iolanda Apostolico, as well as against others

who had issued the non-validation orders. The methods of criticism adopted by the government - which included the illegitimate use of audio-visual material in the possession of the secret services, showing the presence of the judge in demonstrations against Minister Salvini at the time of the 'closed ports' policy - implied a clear threat to the autonomy of the judiciary. According to the executive, the courts should have submitted to their decision, even while this would represent a failure in the judiciary's mandate and the principle of separation of powers on which democracy is based.

In parallel to this smear campaign against the judges, the State Attorney's Office had lodged appeals in the Cassation Court against the first round of 17 non-validation decisions issued by the judges in Catania. The Cassation Court suspended the decision and asked an opinion from the European Court of Justice concerning the legitimacy of the requirement of a financial guarantee, as fixed by the 'Cutro Decree'. In response, the Italian government reformulated the law on the topic, leaving local authorities with the autonomy to fix the guarantee between 2.500 and 5.000 Euros on a country-by-country basis. In September 2024, i.e. after the second round of "negative" decisions by the courts in Catania and Palermo, the State Attorney's Office withdrew the appeals, perhaps fearing a "bad decision" by Italy's highest court.

Nevertheless, going beyond the quite narrow topic on which the Cassation court had requested the ECJ pronunciation – namely the legitimacy of requiring the above-mentioned economic guarantee from asylum seekers – on October 4 the ECJ called into question the whole application of the SCO criteria. According to the court, an SCO should be safe for everyone, without exception. This means that if just one group - e.g. the LGBTQIA+ community in Tunisia - is not safe, then the country as a whole cannot be considered safe. Therefore, all those countries included in the Italian SCO list – such as Tunisia, Egypt, Bangladesh ('coincidentally' also the main countries of origin of refugees arriving in Italy by sea) cannot be considered safe.

This decision was immediately taken up by the Italian courts in the non-validation decrees, showing its innovative scope.

4. The extraterritorialization policy of the Albania-Italy deal

We can't go into detail about the Albania-Italy deal here, but we do want to address some important points. In addition to the border centres opened in Italy in Pozzallo-Modica and Porto Empedocle (there are plans to open further centres in Sicily), the centres in Shengjin and Gjader in Albania have also been opened to fulfil the function of carrying out fast-track procedures. This is the first agreement between an EU-member State and a non-EU one to selectively extraterritorialise border procedures, pre-removal detention and access asylum procedures. Signed in November 2023, it states that people from SCOs without "special needs" (art. 21, EU reception directive) will be transferred to Albania to undergo an accelerated asylum procedure while in detention. The opening of the three centres - a screening centre (Shengjin), a fast-track centre (Gjader) and a detention centre with 20 places for deportation (Gjader) - raises many questions about the rule of law. The centres are located on Albanian territory but under Italian jurisdiction. In particular, there are serious concerns about the effectiveness of the right to legal defence, which is supposed to be 'guaranteed' by

online hearings. The agreement stipulates that lawyers can visit their clients on site. However, they will only be reimbursed 500 euros for their expenses. Obviously, this will happen rarely.

Furthermore, it is questionable whether the right to communicate with organisations providing legal advice or assistance (EU Directive 2013/32/EU Art. 12 para. 1 c) is guaranteed, or the right to meet effectively with a lawyer or other legal counsellor authorised or permitted by national law on matters related to international protection at any stage of the procedure, including in the event of a negative decision (Art. 22 of the same Directive).
How these rights be exercised in practice in the event of a 'negative decision' (Art. 22 of the EU Directive), is just one of the many critical points of the deal.[1]
According to research by the Italian investigative news program *Report*, the entire process in Albania will cost at least one billion Euros over five years.
In mid-October 2024, it was also revealed that a number of construction contracts for the centres, worth at least 60 million Euros, have been awarded without any tendering.
There are serious doubts, therefore, not only in relation to the rule of law for the implementation of extraterritorialise asylum procedures in Albania, but also the correct approach of the Italian government towards the process of constructing the centres. This is now leading to a series of parliamentary questions from the opposition and a complaint to the Court of Auditors. Nevertheless, the Italian government has opened the centres in Shengjin and Gjader, even though local and European court rulings mean that the SCO-based 'classification' cannot be implemented. In addition, given the full continuity between the selection mechanisms introduced by the Hotspot approach (2015), the introduction of fast-track procedures (2020), the new border accelerated procedures and related detention measures (2023) and the Italy-Albania protocol (2023) – all having the SCO notion at their core – these legal battlegrounds may well have an even broader impact.

5. 'Safe countries of origin' and the Albania-Italy deal in the continuity of Italian migration policies

Despite the multiplication of judicial challenges to the applicability of the 'Cutro decree', and the fact that the same (allegedly illegitimate) procedures are to be applied in Albania, the Italian government decided nevertheless to start applying the Italy-Albania protocol.

According to this protocol, those to be transferred by sea to Albania are meant to be anyone from SCOs – with the exception of persons with special needs (PWSN, art. 17, D.Lgs 142/15) – who have been rescued in international waters by Italian state naval assets. Since the signing of the protocol, several civil society organisations as e.g. Amnesty International have highlighted its procedural and legal problems. These

[1] For the critical impact of the Italy-Albania Deal see also:
https://www.asgi.it/asilo-e-protezione-internazionale/leuropa-elogia-il-patto-italia-albania-ma-le-criticita-a-shengjin-e-gjader-sono-molto-chiare/

concern the selection of persons at sea on the basis of nationality and statuses of vulnerability which – as events demonstrated – are far from being legitimately feasible.
In the night between the 10th and 11the of October, the Italian Customs police (Guardia di Finanza) – probably backed up by the Italian Coast Guard – intercepted two migrant boats departed from Libya, just outside Italian territorial waters in the central Mediterranean. After a very rough selection process on the high seas - in which it is unclear whether UNHCR and IOM participated, 16 Egyptian and Bengali nationals were transferred to the *Libra* (patrol vessel P402) - of the Italian navy, anchored south of Lampedusa, outside territorial waters. While the remaining people disembarked in Lampedusa, the *Libra* left for a two-day trip to Shengjin (Albania) with the 16 unlucky people on board. Among them were two unaccompanied minors and two persons with special needs who - once they arrived in Albania - would be transferred back to Italy, on board a Coast Guard patrol boat. Once in Apulia, the two adults were transferred to the CARA (centre for asylum seekers) in Bari Palese, while appropriate accommodation centres were found for the unaccompanied minors.

Navy patrol vessel Libra, picture: Wikimedia

The following day, remaining 12 people's detenion in Albania was examined by the specialised immigration section of the court in Rome. None of the detentions were validated, and the judges issued a press statement to clarify their decisions. All 12 asylum seekers were then transferred by the Italian Coast Guard to Italy – to the Bari reception centre (CARA).

In addition to pointing out the same profiles of illegitimacy raised by the Sicilian judges and referring to the ECJ ruling, the court in Rome underlined the evident incompatibility between the procedures of interception at sea in international waters by Italian assets - provided for by the Italy-Albania Protocol as one of the requirements for the transfer of persons - and the notion of "evading border controls" as one of the conditions for detention.

In particular, the judges found that "the absence of the necessary prerequisite for the border procedure and detention determines the absence of the asylum seeker's right to stay in the facilities referred to in Article 4 paragraph 1, of the Protocol [between Italy and Albania] and Article 3 paragraph 4, of the Law of ratification."[2]

6. What will come next

The Italian government will not renounce the Albania deal and immediately issued a new decree. Lucia Gennari, a lawyer from the Italian Association for Juridical Migration Studies (ASGI), commented:

[2] See the following rulings: Tribunale di Roma, Sez. XVIII civile, diritti della persona e immigrazione - decreto 18.10.2024 (Bangladesh), Tribunale di Roma, Sez. XVIII civile, diritti della persona e immigrazione - decreto 18.10.2024 (Egitto).

"What they did with this decree was remove countries from the list that had territorial exceptions, arguing that the EU Court of Justice (ECJ) ruling referenced by the Court of Rome Tribunal applied only to these territorial restrictions. This is true, but also the ECJ was very clear that for a country to be considered safe, it has to "uniformly and systematically respect" human and civil rights. (…) The other thing they did, was to include the possibility of appealing at the court of appeal the possibility of administrative detention. Before you could only appeal at the high court, and that takes a long time. So previously, if a judge decided to revalidate the detention of someone, there was no way for the state to restart that detention. The new decree would make that possible."[3]

The question that arises is why Italy attaches so much importance to this expensive, ill-conceived deal. The main reason is surely to show that the government is capable of solving the supposed 'problem' of migration. It wants to set an example. It wants to act as a deterrent. And it wants to make asylum procedures more ineffective and isolate those affected so that rejections become even more possible.
The Italian government also refers to the European Pact on Migration and Asylum adopted in April 2024, which could allow the deportation of people to countries where there are supposedly safe areas within that country. However, the migration pact is not yet in force and the ECJ judgement applies for the time being.

"The EU pact appears to want to formalize this kind of system, giving a superficial appearance of legality. But there will be different legal challenges coming down the line if and when that happens", said Gennari.

So we doubt that the new European Pact on Migration and Asylum will be able to solve all these dilemmas.

In the meantime, in the context of an appeal filed by a Bengali citizen, the court of Bologna made a preliminary reference to the European Court of Justice asking it to rule on the legitimacy of the new decree-law on safe countries of origin (DL 158/2024) issued by the Italian government following the non-validity of the detention measures for the 12 foreign citizens who remained in Albania following the transfer to Italy of the two minors and the two people deemed vulnerable. The sentence reads:

"The court, having to decide on this interlocutory application, considers that the prerequisites for a preliminary reference to the Court of Justice of the European Union are met, since it is necessary to resolve certain contrasts of interpretation that have arisen in the Italian legal system and that pertain to the relevant rules contained in Directive No. 2013/32/EU and, more generally, to the regulation of the relationship between European Union law and national law."

It continues:

[3] The somewhat incomprehensible term 'revalidate' was used in the interview. This refers to cases where judges do not uphold detention.

"Manifest divergences have indeed emerged between the various national authorities called upon to apply the relevant EU rules, both with regard to international protection and in relation to the hierarchy of the funds of law, which have received specific expression in Decree-Law No. 2024 of 24 October 2024, so that there is a general interest in a clarification by the Court of Justice aimed at ensuring the uniform application of EU law, in addition to a direct impact in the case before this court."

The open threat of violence against judges who have ruled on border procedures in Albania is a very worrying turn of events. After the court in Rome did not confirm the detentions in Albania, the chairwoman of the specialised division, Judge Silvia Albano, received dozens of letters of intimidation and several death threats. As ASGI emphasised in a statement of solidarity with her and with Judge Escher from Catania, who was also defamed by the right-wing media, not only the independence of the judiciary but also the Italian constitution and democracy itself are in serious danger.

In light of these developments and the increasingly evident disconnect between the new rules introduced by Italian and EU, and international law, it seems crucial to continue monitoring the legal battles over Italy's policies of managing maritime migration.

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