VU Migration Law Series No 26

The Italy-Albania Agreement: externalising asylum procedures in violation of human rights

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Migration Law Series

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Working Paper Series

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Abstract

On 6 November 2023, the Italian prime minister Giorgia Meloni and the Albanian prime minister Edi Rama concluded an agreement to transfer asylum seekers rescued at sea to Albania. There, asylum seekers rescued or interdicted at sea by the Italian authorities would be able to await their asylum procedure, in line with Italian and EU legislation. While Albania is not part of the European Union (EU) and is therefore not bound to respect EU human rights criteria, this thesis aims to address the increasing externalisation of responsibility by EU Member States for processing asylum applications and its consequences. The agreement raises various questions about non-compliance with European and international migration and asylum law, ranging from procedural rights of asylum seekers to the principle of *non-refoulement.* Therefore, the main research question of this thesis is what consequences the agreement between Italy and Albania to externally process asylum applications have for human rights. While the Italy-Albania agreement is the first tangible agreement on external processing of asylum applications on (non-) European soil, this thesis analyses a new dimension of externalisation of responsibility in the EU context – in comparison to international examples. The prevalence of various legal uncertainties around this agreement will become clear, on the national, European and international level. Yet this thesis concludes that the Italy-Albania agreement has various consequences for human rights.

Table of Contents

List of Abbreviations 4

Introduction 5

1. The Legal Position of Asylum Seekers in the EU 7
   1.1. Regular asylum procedure 8

2. External processing 10
   2.1. Applicable legal framework 11

3. The Italy-Albania agreement 17
   3.1. The Italy-Albania agreement in light of human rights 18

4. The Italy-Albania agreement compared internationally 24
   4.1. USA/Guantánamo & Australia/Nauru 25
   4.2. UK/Rwanda 29

5. Deterritorialisation of the European Territory 31

Conclusion 35

Bibliography 37

List of Abbreviations

CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
MSs	Member States (plural)
MS	Member State (singular)
NGOs	Non-governmental organisations
Pact	Pact on Migration and Asylum
PD	Procedures Directive
PNG	Papua New Guinea
QD	Qualification Directive
RCD	Reception Conditions Directive
TCNs	Third-country nationals
TC	Territorial Commission
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom of Great Britain and Northern Ireland
UNHCR	(The Office of the) United Nations High Commissioner for Refugees
US	United States of America

Introduction

On 6 November 2023, the Italian prime minister Giorgia Meloni and the Albanian prime minister Edi Rama concluded an agreement to transfer asylum seekers rescued at sea to Albania. This transfer will be conducted by the Italian Coast Guard or Guardia di Finanza (Financial Police) ships - or in any case under the jurisdiction of the Italian authorities.[1] Italy will build two reception centres there, which most likely will be detention centres, deduced from the legal wording of the agreement.[2] It is the intention of both countries to be operational in June 2024. While Albania is not part of the European Union (EU) and is therefore not bound to respect EU human rights criteria, this thesis aims to address the increasing externalisation of responsibility by EU Member States (MSs) for processing asylum applications and its consequences. The agreement raises various questions about non-compliance with European and international migration and asylum law, ranging from procedural rights of asylum seekers to the principle of *non-refoulement*. Therefore, the main research question of this thesis is what consequences the agreement between Italy and Albania to externally process asylum applications have for human rights.

While the Italy-Albania agreement is the first tangible agreement on external processing of asylum applications on (non-) European soil, this thesis analyses a new dimension of externalisation of responsibility in the EU context – in comparison to international examples. The prevalence of various legal uncertainties around this agreement will become clear, on the national, European and international level. This thesis will provide further understanding on which human rights may be infringed by the Italy-Albania agreement and what its consequences are. Hence, the sub-questions of this thesis are what are the implications of external processing; to what extent does the Italy-Albania agreement differ from other international examples of external processing; and how does the Italy-Albania agreement violate human rights. It is important to formulate answers to these questions, while the Italy-Albania agreement is being considered as an example for other MSs to establish increased cooperation with third countries to outsource asylum procedures. Among other MSs, the Czech Republic, Denmark, Austria and the Netherlands insist on further agreements

[1] OCHA, 'The Italy-Albania agreement: Yet another attack on the right to seek asylum' (*Reliefweb*, 9 November 2023) <https://reliefweb.int/report/italy/italy-albania-agreement-yet-another-attack-right-seek-asylum> accessed 24 November 2023.
[2] Odysseus Network, 'Translation of the Protocol between the Government of the Italian Republic and the Council of Ministers of the Albanian Republic' (*Odysseus Network*, --) <https://odysseus-network.eu/wp-content/uploads/2023/11/Protocol-between-the-Government-of-the-Italian-Republic-and-the-Council-of-Minister-of-the-Albanian-Republic-1-1.pdf> accessed 11 January 2024.

to be made similar to the Italy-Albania agreement.[3] This thesis argues that it is important to first gather legal clarity on the feasibility of external processing under EU law, before undertaking further arrangements.

In order to analyse the research questions, the first chapter of this thesis will describe the legal position of asylum seekers in the EU, followed by explaining how a regular asylum procedure works in a Member State.

This will reveal the problem of extraterritorial asylum and external processing, which will be explained in the second chapter. Furthermore, this chapter will provide for an overview of the applicable legal framework. In this section, there will be a focus on four aspects of external processing which may infringe human rights under EU and international law; automatic detention, the principle of *non-refoulement*, the right to asylum, and procedural rights.

In the third chapter of this thesis, the Italy-Albania agreement is described and explained. It stipulates that legal experts have claimed that the Italy-Albania agreement is not in compliance with EU law, while the European Commissioner for Home Affairs Ylva Johansson said it did not breach EU law, as it is "outside of it". In the second part of the chapter, the risk of violation of EU law by the Italy-Albania agreement is ascertained through analysing the agreement in light of human rights.

In chapter 4, the Italy-Albania agreement is compared internationally to examples of external processing policies of the US, Australia and the UK. In the last chapter, the tendency towards external processing in the EU is positioned in a broader political context.

Hence, this thesis adopts comparative legal research as its methodology to ultimately understand the tendency to external processing better. Both EU and international law are considered when analysing human rights infringements. Comparing legislation and practice between legal doctrines and countries will require some knowledge of the historical and socio-economic context of the countries, which may be a limitation. Fortunately, there is a great volume of sources on external processing in other countries (e.g. Australia, US, UK). To understand the arrangement between Italy and Albania better and position it between international examples, the relationship between EU law and ECHR law will be discussed throughout the chapters of this thesis. Examining case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) will likewise

[3] NOS, 'Nederland dringt samen met andere lidstaten aan op asielprocedure in niet-EU-landen' (*NOS*, 6 May 2024) <https://nos.nl/artikel/2519520-nederland-dringt-samen-met-andere-lidstaten-aan-op-asielprocedure-in-niet-eu-landen> accessed 6 May 2024.

give clarity on the feasibility and possibility of external processing in the European context. Here, it is important to mention that Albania is party to the ECHR. It is the question whether this plays a role with regard to the feasibility of external processing as proposed by the Italy-Albania agreement.

Chapter 1. The Legal Position of Asylum Seekers in the EU

Before exploring the possibility of external processing in the European context, it is important to understand the legal position of asylum seekers in the EU. Since the Treaty of Amsterdam entered into force in 1999 the EU legal framework on migration and asylum law has changed from its more intergovernmental character towards an enhanced EU competence on a more supranational level.[4] With the Treaty of Lisbon (2009), the necessary steps were taken to make action in this legal area effective. The Treaty extended the EU's competence on migration and asylum issues. As a result, the CJEU obtained full jurisdiction in this area, which led to an increase in the number of migration and asylum cases before the Court.[5]

The rights of asylum seekers in the EU, third-country nationals (TCNs), stem both from EU law and the ECHR, which both refer to international human rights law under the Geneva Convention. The definition and status of a refugee is set out in the Geneva Convention (the 1951 UN Convention on the Status of Refugees), in conjunction with the 1967 Protocol to that Convention.[6] All MSs have ratified the Geneva Convention and Protocol, and the wording of the definition of a refugee is adopted as well in the EU legal framework. Between 2003 and 2005, the Common European Asylum System (CEAS) was adopted to establish 'a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.'[7] The CEAS aims to set common standards and create forms of cooperation in order to ensure that TCNs are treated equally within the EU.[8] This is governed by five legislative instruments and one agency.[9] While the rights of TCNs stem from various legal dimensions, it is most adequate to adopt an interpretative unity

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[4] Steve Peers, 'Immigration and Asylum' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 791.
[5] ibid 794.
[6] ibid 807.
[7] ibid.
[8] European Commission, 'Common European Asylum System' (*European Commission*, --) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en> accessed 4 April 2024.
[9] The Asylum Procedures Directive; the Reception Conditions Directive; the Qualification Directive; the Dublin Regulation; the EURODAC Regulation and the European Union Agency for Asylum.

between the ECHR, EU law and Geneva Convention in order to examine the legal position of asylum seekers in the EU. This is also reflected in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU):

> 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

1.1. Regular asylum procedure

Moreover, it is valuable to describe how the regular asylum procedure works on the territory of a Member State (MS) in order to determine the implications of external processing. The regular asylum procedure in a MS is based on the Procedures Directive (PD), which regulates time limits and administrative practice to some extent.[10] Despite the ambition of the CEAS to treat TCNs equally within the EU, the standards for procedural rights remain flexible to take account of the specificities of national legal systems.[11] Therefore, the regular asylum procedure differs from MS to MS in administrative conduct. However, all MSs are bound by the principle of *non-refoulement*, which implies that an applicant for international protection must be given the opportunity to state his case and that relevant evidence must be seriously examined by the determining authorities. To this end, the UNHCR has issued more specific requirements to standardise the conducting of asylum procedures and examinations among MSs, including on for instance the availability of interpreters and legal assistance, and the right to remain in the territory pending the procedure.[12]

The regular asylum procedure consists of various steps and guarantees which must be respected during the examination of an asylum application. Initially, the procedure is preceded by the application, identification and registration phase. The PD applies to all applications for international protection made in the territory of the MS.[13] According to Article 9(1) PD applicants 'shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedure (…)'. When examining the asylum application, the competent authority

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[10] Council Directive (EU) 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180 (Procedures Directive).
[11] Pieter Boeles and others, *European Migration Law* (2nd edition, Intersentia 2014) 276.
[12] ibid 277.
[13] Procedures Directive, art 3(1).

shall first determine whether the applicant qualifies as a refugee or as eligible for subsidiary protection, in line with the Qualification Directive (QD).[14]

Central to the regular asylum procedure of the MSs, is the personal interview on the substance of the application between the determining authority of the MS and the applicant.[15] This is granted alongside with the right to legal assistance and representation at all stages of the procedure.[16] This is at the own cost of the applicant. Yet when an applicant wishes to appeal against decisions made with regard to his/her application, it is provided that legal assistance is free.[17] Furthermore, the PD provides that MSs shall not hold a person in detention for the sole reason that he/she is an applicant for international protection.[18]

To illustrate, in Italy the competent authority to examine the application of international protection is the Territorial Commission (TC). According to the national Procedure Decree, the TC interviews the applicant within 30 days after having received the application, and decides in the three following working days.[19] When the TC is unable to decide upon the application within this time limit, the procedure can be prolonged, in which case the decision on the application shall be taken within six months after lodging the application. By way of exception, the TC may extend this period not exceeding a further nine months.[20] Moreover, the Procedures Decree, in light of the PD, provides for the possibility of appeal against a decision issued by the TC before the Civil Court (*Tribunale Civile*) as well as legal assistance during both the first instance of the regular asylum procedure as well as in the appeal phase, in the latter provided for with state-funded legal aid.[21]

After having considered how the regular asylum procedure works, it becomes clear that its scope is primarily territorial. How an asylum application is to be examined is subject to specific requirements which can be best accommodated for within the territory of a MS.

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[14] ibid art 10(2); Council Directive (EU) 2011/95 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 L 337 (Qualification Directive).
[15] Procedures Directive, art 14(1).
[16] ibid art 22(1).
[17] ibid art 20(1).
[18] ibid art 26(1).
[19] ASGI, ‘Country Report: Regular procedure Italy’ (*AIDA*, 31 May 2023) <https://asylumineurope.org/reports/country/italy/asylum-procedure/procedures/regular-procedure/> accessed 29 May 2024.
[20] ibid.
[21] ibid.

This brings to light the problem of extraterritorial asylum and external processing of asylum applications as proposed by the Italy-Albania agreement. In the subsequent chapter, the concept of external processing and the further applicable framework will be described.

Chapter 2. External processing

Since the early 2000s, there have been discussions in the EU on the idea of external processing of asylum applications. However, in contrast to now, these ideas were not supported by the majority of the MSs or EU institutions and did not include any proposals to address the abundant legal and practical constraints that stand in their way.[22] The aim of this chapter is to describe the concept of external processing and to position its components within the EU legal framework.

Initially, the external dimension of asylum policy was built upon two pillars: the managed entry of refugees into the EU and the consolidation of protection for refugees in their country of origin.[23] This has created a tension between securitisation and a humanitarian consideration, which is rather ambivalent in its character.[24] On the one hand, it is clear that the aid for protection assisted by the EU in third countries may benefit many persons who are in need of it. On the other hand, the EU's external asylum policy is premised on a theory of 'containment', the idea that improved protection in regions of transit and origin reduces incentives for people to attempt to receive protection elsewhere.[25]

The relocation of asylum seekers to external processing facilities in another (non-EU) state in order to determine their status there, may be regarded as the culminating idea of external migration control.[26] Hence, external processing consists of the relocation of protection and asylum processing to outside the state of refuge. Therefore, policies of external processing represent a fundamental shift from the traditional paradigm that asylum is granted *within* the territory of a state.[27] It is the idea of external processing that, when asylum is granted, the refugee will be resettled into the state where he or she intended to seek refuge. In the case asylum is rejected, this person will be repatriated to their country of origin or another

[22] Madeline Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?' (2006) 18 IJRL 601.
[23] Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 185.
[24] Claire Loughnan, 'Active neglect and the externalisation of responsibility for refugee protection' in Azadeh Dastyari, Asher Hirsch and Amy Nethery (eds), *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability* (Routledge 2022) 108.
[25] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 187.
[26] ibid 260.
[27] ibid.

safe third country. There are different reasons why states would want to adopt external processing policy. Maarten den Heijer sets them out in his dissertation:

> 'The rationales for external processing may consist of discouraging abuse of territorial protection regimes, of avoiding legal obligations pertaining to those who present themselves at the state's border, of the provision of a temporary safe haven until the circumstances in the country of origin have changed, or to reduce costs incurred in the reception of asylum seekers.'[28]

Increasingly, MSs are considering external processing as a means to maintain sovereignty in the area of migration and asylum.

Yet, external processing has raised numerous legal concerns, especially with regard to automatic detention and the lack of safeguards against removal to possibly unsafe third countries in the case an asylum application gets rejected.[29] More structural, external processing may 'render refugees beyond the domain of justice' and create 'rights-free zones' outside the territory of the state of refuge.[30] The creation of such an area raises questions about transparency. At the same time, scholars have pointed out that states are as such not prohibited to explore alternative arrangements like external processing to provide protection to asylum seekers.[31] Despite of this, Den Heijer argues that external processing raises valid concerns about the both physical and procedural 'containment' of asylum seekers, which were visible in the case of the external processing model of Australia and the US.[32] Several components of external processing result in this physical and procedural 'containment', which will be set out in relation to the EU legal framework in the following section.

2.1. Applicable legal framework

Hence, the legal and practical constraints of external processing shed light on human rights problems within the CEAS. The CEAS was expressly established as a body of law applying only to asylum applications made *within* the territory of a MS or at its border, and not to claims lodged outside a MSs' territory.[33] This section will describe the applicable legal framework in relation to the components of external processing which raise human rights concerns. This thesis will focus on four main components of external processing: the

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[28] ibid.
[29] ibid.
[30] ibid 261.
[31] ibid.
[32] ibid 263.
[33] ibid 203.

prohibition of automatic detention, the principle of *non-refoulement*, the right to seek asylum, and procedural rights. After describing the legal framework in this chapter, the analysis of possible human rights infringements will be outlined in chapter 3.

As mentioned before, while the rights of TCNs stem from various legal dimensions, it is most adequate to adopt an interpretative unity between the ECHR, EU law and Geneva Convention in order to examine the human rights of asylum seekers in the EU.

Automatic detention

The right to liberty as enshrined in Article 5 ECHR and Article 6 CFREU protects all individuals from arbitrary arrest and detention. The deprivation of liberty requires the strongest possible justification.[34] Nevertheless, the use of immigration detention is increasing as a common practice, even automatic, across Europe and as part of the new Pact on Migration and Asylum.[35] The following provisions are applicable to the deprivation of liberty by (automatic) detention of asylum seekers.

Foremost, Article 26 of the Geneva Convention grants the right to freedom of movement within the territory of the state of refuge. Furthermore, Article 31(1) of the Geneva Convention provides:

> 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'

By contrast, Article 5(1)(f) ECHR permits detention to prevent unauthorised entry. Yet, this permission is only lawful in the case of due justification of a 'reasonable necessity' of detention. Article 5 ECHR must be read in light of the general principles of ECHR law, such as the principle of the rule of law, of legal certainty, proportionality and protection against arbitrariness. It should be noted that the latter principle is the very aim of Article 5 ECHR.[36]

Within EU law, detailed reception conditions requirements are included in the Reception Conditions Directive (RCD). Article 7(1) of the RCD states that 'asylum seekers may move freely within the territory of the host Member State or within an area assigned to

[34] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 279.
[35] ibid.
[36] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights' (*ECHR*, 31 August 2022) <https://www.echr.coe.int/documents/d/echr/guide_art_5_eng.> accessed 16 April 2024.

them by that Member State (…)'. However, the second paragraph of this Article suggests that MSs may decide to detain an asylum seeker in for 'reasons of public interest, public order, or, when necessary, the swift processing and effective monitoring of his or her application.' In relation to this paragraph, Article 7(4) RCD states:

> '4. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence (…). Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.
> The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.'

While the aim of the provision seems noble, Article 7(2) stands in stark contrast to Article 26 of the Geneva Convention, and moreover, to Article 26 of the PD[37], which specifies:

> '1. Member States shall not hold a person in detention for *the sole reason that he or she is an applicant.* The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.
> 2. Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU.'

Additionally, the Return Directive does entail provisions on the detention conditions of asylum seekers who have received a negative decision on their asylum application. In this thesis, there will be a focus on the permissibility of detention *per se*, instead of the detention conditions themselves.[38] The latter are, however, of equal importance and should be closely monitored to avoid inhuman and degrading treatment.

Non-refoulement

The principle of *non-refoulement* in Article 33 of the Geneva Convention constitutes the keystone of the international system of refugee protection.[39] It 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.' The duty of MSs to comply with this principle has been ensured by the Treaties. Article 78(1) TFEU provides:

> 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and *ensuring compliance with the principle of non-refoulement.* This

[37] Same wording mentioned in Article 8(1) of the RCD.
[38] Costello (n 34) 280.
[39] Violeta Moreno-Lax, *Accessing Asylum in Europe; Extraterritorial Border Controls and Refugee Rights under EU law* (Oxford University Press 2017) 249.

> policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

However, Article 78(2)(g) TFEU leaves room for the arrangement of external processing:

> '(…) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
>
> g. *partnership and cooperation with third countries* for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.'

Moreover, Article 3 ECHR provides for protection against *refoulement*:

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

The ECtHR has interpreted this provision as implicitly prohibiting acts that may give rise to a prospective breach of the principle of *non-refoulement* upon removal to another country.[40] The personal scope of application of Article 3 ECHR is not only asylum seekers, but everyone is covered by the principle, regardless of the physical and geographical location of the person.

Under EU law, the principle of *non-refoulement* has its reflections not only in Article 78 TFEU, but also in the CFREU and instruments of secondary legislation. After analysing these sources, Violeta Moreno-Lax argued that EU law encompasses the widest protection, as it combines refugee law and international human rights law.[41] The following sources of EU law reflect the principle of *non-refoulement*: Article 18 CFREU (the right to asylum), Article 4 and 19(2) CFREU (protection from exposure and ill-treatment), the QD (Article 9 and 15) and more general, Article 51 CFREU.

Right to asylum

Where the principle of *non-refoulement* is a rather passive right to obtain international protection, the right for an individual to seek and obtain asylum under EU law is more active in its nature.[42] The CFREU has consolidated the right of the individual to international protection with Article 18:

> 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention (…) and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'

[40] ibid 267.
[41] ibid 281.
[42] ibid 337.

Since its inclusion in EU law, asylum can no longer be dissociated from general human rights standards.[43] Moreover, the Dublin Regulation, the PD and the RCD clarify its scope: asylum applications are to be made 'within the territory, including at the border, in the territorial waters or in the transit zones of the Member States'.[44]

Procedural rights

The Geneva Convention provides for Article 16 regarding access to courts:

> '1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.'

Within the realm of the ECHR, two key provisions accommodate the procedural safeguards of asylum seekers. In the first place by Article 6 ECHR on the right to a fair trial: '(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by *an independent and impartial tribunal established by law*.' In the second place Article 13 ECHR recognises the right of *everyone* to an effective remedy.[45]

Within the EU legal order, judicial protection of Union rights and the rule of law are considered to be inherently linked. This is governed by various general principles of EU law. Following the principle of effectiveness, 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU rights', must be set aside.[46] Furthermore, the principle of effective judicial protection is reflected in Article 47 CFREU:

> 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

[43] Maarten den Heijer, 'Article 18 – Right to Asylum', in Steve Peers and others (eds), *Commentary on the EU Charter of Fundamental Rights* (Hart Publishing, 2014) 533.
[44] Moreno-Lax (n 39) 380.
[45] ibid 409.
[46] ibid 431.

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

The right to an effective remedy under Article 47 CFREU is intertwined with the procedural obligations deriving from the principle of good administration, in the case MSs act within the scope of EU law. Evident from case law, 'the requirements of good administration and legal certainty and the principle of legal protection are connected.'[47] This relationship is depicted in Article 41(2) CFREU:

> '(…) a. *the right of every person to be heard*, before any individual measure which would affect him or her adversely is taken; b. the right of every person *to have access to his or her file,* while respecting the legitimate interests of confidentiality and of professional and business secrecy; c. *the obligation of the administration to give reasons* for its decisions.'

Subsequently, these rights are reflected in the PD, as discussed in detail before. The PD sets the common procedures for granting and withdrawing international protection. For instance, Article 20 of the PD provides for the obligation of MSs to grant free legal assistance and representation in appeals procedures to TCNs in an asylum procedure. Moreover, with regard to external processing, notably Article 9(1) is interesting to consider:

> 'Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance (…)'

In summary, implementing measures taken under EU law must comply with fundamental rights. This follows not only from MSs' international obligations, but also from the duty under EU law to implement EU rules in a manner consistent with requirements flowing from fundamental rights (Article 51 CFREU).[48] This may impose limits on MSs activities which fall within the scope of the relevant EU instruments. [49]

[47] Case C-362/09 P *Athinaïki Techniki AE v European Commission* [2010] ECR I-13275, para 70.
[48] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 207.
[49] ibid 205.

Chapter 3. The Italy-Albania Agreement

The bilateral agreement between Italy and Albania, signed on 6 November 2023, provides for the construction of two centres in Albania, in Shengjin and Gjader.[50] Together, these centres would be able to accommodate 3000 people. There, asylum seekers rescued or interdicted at sea by the Italian authorities would be able to await their border asylum procedure, in line with Italian and EU legislation.[51] According to the agreement, this interdiction at sea would not occur within Italian waters or those of other MSs.[52] Moreover, the Italian authorities have emphasised that vulnerable people will not be transferred to the centres in Albania.[53] However, this decision is not included in the agreement. It is the intention of both countries to be operational in June 2024. Yet a recent tender document of the Italian government reveals that as of 20 May 2024, the centres in Albania already aim to be up and running.[54] Of this, there is still no sign. In Gjader, there is a patch of land, fenced off, which looks like the 'car park of a medium-sized supermarket'.[55] The site is filled with a row of unemployed orange bulldozers. Some old buildings have been demolished and the ground has been levelled.

As per the tender specifications valued at €34 million, the project will encompass three sites. The first site will be realised at the port of Shengjin, where landing and identification procedures will be carried out. The remaining two sites will be built in Gjader, where one will be dedicated to 'to ascertaining the prerequisites for the recognition of international protection', and the other as a repatriation detention centre.[56] In both locations, there will be medical clinics for patient visits and operations, equipped with rooms for laboratory research, radiology and ultrasounds.[57] Furthermore, psychological care will be provided.

While only one of the three sites is conceived of as a detention centre, asylum seekers may not leave any of the sites during their asylum procedure. This will be seen to by both the Italian and Albanian authorities. If an individual leaves one of the centres, their asylum

[50] Amnesty International, 'The Italy-Albania Agreement on migration: pushing boundaries, threatening rights' (*Amnesty International,* 19 January 2024) <https://www.amnesty.org/en/documents/eur30/7587/2024/en/> accessed 12 March 2024, 3.
[51] ibid 4.
[52] ibid.
[53] Alice Taylor, 'Albania-Italy migrant deal moves ahead as Rome publishes tender for processing centre' (*Euractiv*, 26 March 2024) <https://www.euractiv.com/section/politics/news/albania-italy-migrant-deal-moves-ahead-as-rome-publishes-tender-for-processing-centre/> accessed 17 April 2024.
[54] ibid.
[55] Ine Roox, 'Wat vinden Albanezen van de migratiedeal met Italië? 'Dit mag niet de plek worden waar Europa bootvluchtelingen dumpt'' (*NRC*, 3 May 2024) <https://www.nrc.nl/nieuws/2024/05/03/wat-vinden-albanezen-van-de-migratiedeal-met-italie-dit-mag-niet-de-plek-worden-waar-europa-bootvluchtelingen-dumpt-a4197744> accessed 13 May 2024.
[56] Taylor (n 53)
[57] ibid.

application will be rejected. The tender document specifies that in this case the Albanian police imposes individuals to return to their country of origin.[58] This practice seems in tension with the provision in Article 4 of the Italy-Albania agreement that the 'competent Italian authorities' will carry out transfers to and from the facilities.[59] Withal, the period of permanent stay of asylum seekers on the territory of Albania cannot exceed the maximum period of detention allowed by Italian legislation. Yet, it does not become clear from the wording of the agreement how this is guaranteed or carried out.

With regard to procedural rights of asylum seekers, Article 9 of the Italy-Albania agreement notes that, to ensure the right to defence, Italy and Albania 'allow the access to the facilities of lawyers, their assistants, as well as to international organisations and European agencies, within the limits of applicable Italian, Albanian and European law.'[60]

All in all, the Italy-Albania agreement raises significant questions on the impact that its implementation will have on human rights of asylum seekers. These questions range from the fairness of asylum procedures, to automatic detention and under which conditions, as well as access to legal aid and effective remedies as understood under EU law. While legal experts have claimed that the Italy-Albania agreement is not in compliance with EU law, European Commissioner for Home Affairs Ylva Johansson said it did not breach EU law as it is "outside of it".[61] In the following section, this thesis will ascertain the risk of violations of EU law by the Italy-Albania agreement.

3.1. The Italy-Albania Agreement in light of human rights

In light of the applicable legal framework described in the previous chapter, this section will focus on the four main components of external processing: the prohibition of automatic detention, the principle of *non-refoulement,* the right to seek asylum, and procedural rights. These will be analysed sequentially one after the other.

Asylum seekers who come to Europe in an irregular manner are vulnerable to detention.[62] While detention of asylum seekers on the ground of unauthorised entry is controversial, it is not necessarily prohibited.[63] Detention which is necessary within a process to determine entry

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[58] ibid.
[59] Odysseus Network (n 2).
[60] ibid.
[61] Taylor (n 53).
[62] Costello (n 34).
[63] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 275.

clearance or eligibility for asylum is not prohibited by Article 5 ECHR, which protects the right to liberty.[64]

The *Saadi v UK* case before the ECtHR sheds more light on the permissibility of detention. In this case, the ECtHR ruled that states are permitted to detain asylum seekers after irregularly entering the territory of that state. However, this may not be subject to arbitrariness. To avoid this, detention must be carried out in good faith; closely connected to the purpose of preventing unauthorised entry; ensuring appropriate conditions and location; and the length of detention should not exceed that what is necessary for the purpose pursued.[65] The ECtHR did not consider it necessary to impose a more stringent proportionality test, but stipulated that immigration detention must only be enforced as a last resort after an individual assessment of the necessity of detention.[66]

The Italy-Albania agreement establishes automatic detention of people rescued at sea by the Italian authorities. The Italian authorities will transfer them to Albania, where they will not be allowed to leave the premises of the centres. Additionally, the Italy-Albania agreement, in conjunction with the Draft Law for its ratification and pre-existing domestic Italian legislation on immigration detention might allow for the detention of a person disembarked in Albania for a continuous period of over 18 months.[67] It is namely the risk that different forms of detention will coincide with each other. The maximum length of detention of 28 days for individuals in the asylum border procedure may be applied in sequence, or at different times to the same person, in combination with detention of asylum seekers who are irregularly present on the territory and subject to removal (18 months maximum length of detention). This means that a person disembarked in Albania may be detained for a continuous period of time: first for identification, then as part of the asylum border procedure, and subsequently for removal.[68]

Yet both automatic and prolonged detention run the risk of being arbitrary and are therefore in violation with Article 5 ECHR. Continuing detention until the asylum seeker concerned can be repatriated to a safe third country is in tension with the safeguards against an unreasonable lengthy detention.[69] Stemming from case law, these safeguards imply, amongst other aspects, that the identification and verification of claims of entry must be

[64] ibid.
[65] *Saadi v United Kingdom* App no 13229/03 (ECtHR, 29 January 2008), paras 70 – 74.
[66] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 275.
[67] Amnesty International (n 50) 7.
[68] ibid 8.
[69] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 277.

prosecuted without undue delay and that, as regards rejected applicants for asylum, prolonged detention may only be effected if there is a 'reasonable prospect of removal' or so long as 'action is being taken with a view to deportation.'[70] Furthermore, when detention is no longer connected to the administrative identification phase, the asylum border procedure or removal, the detention is not only arbitrary but also a contravention of Article 31(1) of the Geneva Convention.[71]

The Geneva Convention presupposes that asylum seekers should not be isolated from the host community where they seek international protection.[72] In Italy, asylum seekers already face many barriers (financial, linguistic and bureaucratic) to appeal the rejection of asylum applications and detention decisions.[73] As Den Heijer argues, 'a system which neither guarantees a right of lawful entry for refugees nor ensures that lawful entry into another state can be obtained, leaves refugees in a legal vacuum, in which the enjoyment of substantive rights set out in the Geneva Convention is potentially subject to indefinite postponement.'[74] Thus, the risk of arbitrary detention is accompanied by unsurmountable barriers for people detained by the Italian authorities in Albania, where they will have diminished access to procedural rights. This will be further discussed in the last part of this section.

Connected to legal issues around detention with the purpose of removal, is the principle of *non-refoulement*. The Italy-Albania agreement raises questions regarding the accountability and responsibility for ensuring that no asylum seeker is returned to an unsafe country. The agreement indicates that the 'competent Italian authorities' will carry out transfers to and from the facilities. However, the tender document of the Italian government indicates that Albanian police will be responsible for return procedures, for instance in the case an individual leaves one of the centres and thence loses their asylum application. If the return procedure will take place outside the territory of Italy, it raises concerns not only of accountability and responsibility, but also of jurisdiction. In the case an individual wants to contest its removal order, it remains unclear on which jurisdiction individuals are considered to fall back onto.

On the one hand, it is hence the question whether Italy would be able to oversee the situation in Albania to ensure that no individual is returned to an unsafe country. On the other hand, it is a question of liability for internationally wrongful acts. The cooperation between

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[70] ibid.
[71] ibid.
[72] ibid 279.
[73] Amnesty International (n 50) 9.
[74] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 279.

Italy and Albania may violate basic human rights of asylum seekers who embark on their journey to Europe, and specifically the EU. With regard to the cooperation with a third country, the ECtHR has held that:

> 'where States establish (…) international agreements to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the [ECHR] if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such [agreements]'[75]

In light of this the ECtHR proceeded in *Xhavara*, attributing exclusive responsibility to Italy for the acts carried out in international waters, as a result of a convention it concluded with Albania, authorising the country to patrol both international and Albanian waters for the purpose of migration control.[76] This reasoning was applied similarly in various case law on allocation of responsibility regarding cooperation with third countries. In *Sharifi*, the ECtHR concluded that implementation of a bilateral agreement, including those under EU law, must be compatible with the ECHR, even if that entails difficulties in managing migration or exposes the state concerned to an influx of migration.[77]

The principle of *non-refoulement* is part of the right to asylum, as enshrined in Article 18 CFREU. The logic behind this becomes clear in case law of the CJEU, which interpreted Article 18 CFREU in conjunction with the requirements stemming from Article 78 TFEU.[78] As a result, the minimum level of protection must be the prevention of *refoulement*, to ensure the right of asylum.[79]

However, the precise meaning of the right to asylum (Article 18 CFREU) is yet open to interpretation. Some scholars see Article 18 as a full-fledged right to be granted asylum, others reduce its wording to the right to be recognised as a refugee as established in the Geneva Convention, without Article 18 adding more substance. This latter interpretation then follows the Preambular statement that the CFREU 'reaffirms' existing rights.[80] Yet, with the Treaty of Lisbon, the CFREU has become legally binding. Among other implications, this has

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[75] *K.R.S. v UK* App no 32733/08 (ECtHR, 2 December 2008); *T.I. v UK* App no 43844/98 (ECtHR, 7 March 2000).
[76] Moreno-Lax (n 39) 331.
[77] *Sharifi v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014), paras 222 – 224.
[78] Moreno-Lax (n 39) 282.
[79] ibid.
[80] ibid 371.

consolidated the meaning of the Area of Freedom and Security and Justice as a legal space, implying that the access to the territory of the EU ensures legal protection, also for TCNs.[81]

To resolve the interpretative controversies around Article 18 and the CFREU, the CJEU was asked to clarify the scope of Article 18 in relation to Dublin transfers in the case of *N.S. and M.E.*[82]*,* and subsequently in *Halaf*.[83] Nevertheless, as of yet, the CJEU did not draw on the implications of the right to asylum. Rather, as for instance in *N.S. and M.E.*, there was a focus on the obligations stemming from the principle of *non-refoulement* and the prohibition of inhuman and degrading treatment, as enshrined in Article 4 CFREU and Article 3 ECHR.[84] Interestingly, in his Opinion in *Elgafaji,* AG Maduro did suggest that the aim of the QD is to justify the 'fundamental right of asylum'.[85] To what extent Article 18 CFREU hence entails a strong access to asylum, depends on further doctrinal and institutional questions.[86]

This is likewise the case with regard to the territorial scope of application of Article 18 CFREU. On the one hand, the Dublin Regulation, the PD and the RCD clarify its scope: asylum applications are to be made 'within the territory, including at the border, in the territorial waters or in the transit zones of the Member States'.[87] On the other hand, Article 78(2)(g) TFEU creates a new legal basis, conferring the EU to establish 'partnership[s] and cooperation with third countries for the purpose of managing inflows of people applying for asylum or temporal protection'. This provision reveals that there is indeed an external – i.e. extraterritorial – dimension of the CEAS.[88] Article 78(2)(g) must however be read in conjunction with Article 78(1) TFEU and Article 18 CFREU, which stipulates the obligation to comply with the Geneva Convention and other relevant treaties.

The QD likewise leaves this question of territorial scope open. Hemme Battjes asserts that '[t]here is no reason to assume that the [QD] serves to harmonise the disparate domestic legislation on [extra-territorial processing]'.[89] According to Battjes, the scope of the QD is determined by the PD.[90] If this would be the case, external processing such as proposed in the Italy-Albania agreement would be in non-compliance with the territorial scope of the right to

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[81] Jean-Pierre Cassarino and Luisa Marin, 'The Pact on Migration and Asylum: Turning the European Territory into a Non-territory?' (2022) 2(1) European journal of migration and law 1, 8.
[82] Case C-411/10 and C-493/10 *N.S. and M.E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR 00000.
[83] Case C-528/11 *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2013] GC --.
[84] Costello (n 34) 250.
[85] Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, Opinion of AG Maduro, para 21.
[86] Costello (n 34) 250.
[87] Moreno-Lax (n 39) 380.
[88] ibid 381.
[89] Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) 210.
[90] ibid 211.

asylum as enshrined in in the Dublin Regulation, the PD and the RCD. All in all, a future clarification of the territorial scope of Article 18 CFREU may render external processing unlawful altogether, if the CJEU adopts a strict and territorial approach.

In contrast to the right to asylum, the procedural rights of asylum seekers are more straightforward. Moreover, they are interlinked with the principle of effectiveness. For MSs, this means they have the negative obligation within the EU legal order to 'refrain from any measure which could jeopardise the attainment of the Union's objectives' as well as the positive obligation to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.'[91]

Moreno-Lax therefore argues that MSs' acts abroad, such as external processing, may have serious repercussions.[92] If the effectiveness of rights is not recognised in this realm, their fundamental essence risks being nullified.[93] With regard to the applicable legal framework on procedural rights of asylum seekers, this risk is considerable in the case of the Italy-Albania agreement. This will become clear by assessing to what extent access to justice as understood under EU law is foreseen to be effective in Albania.

The Italy-Albania agreement provides in Article 9 for the 'right to defence', in the form of 'allow[ing] the access to the facilities of lawyers, their assistants, as well as to international organisations and European agencies, within the limits of Italian, *Albanian* and European law.'[94] This implies that lawyers and organisations may enter the facilities in Albania, but that the asylum applicants in the facilities may not actively seek judicial aid outside of the facilities. If this would be the case, this would be in non-compliance with the remedy of judicial review of administrative action under EU law, as clarified in *Heylens*:

> "the latter [individual] must also be able to defend that right [to judicial protection] under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts.''[95]

Barring seeking judicial aid or access to the courts in Italy would contravene this right to judicial protection under the best possible conditions. In practice, the right to a fair and

[91] Moreno-Lax (n 39) 395. See art. 4(3) TEU.
[92] Moreno-Lax (n 39) 395.
[93] ibid.
[94] Odysseus Network (n 2) (emphasis added).
[95] Case 222/86 *Unectef v Heylens* [1987] ECR 4097.

effective asylum procedure, as protected by the right to a fair trial, the right to effective remedy and good administration seems to be curtailed by the location of the two centres in Albania. Moreover, it is unclear which consequences the application of Albanian legislation has in this case, as specified in Article 9 of the Italy-Albania agreement. This seems in tension with the proposal by Meloni and Rama in November 2023, stating that asylum seekers in Albania would remain under the Italian jurisdiction. Furthermore, Amnesty International also has concerns about suggested remote legal interviews and legal assistance, which increase the risk of misunderstandings and poor interpretation.[96] The ability to express yourself and your case fully before a lawyer must be maintained to secure access to justice as enshrined in EU law. With regard to the Italy-Albania agreement, it should also be considered that the agreement results in differential treatment, between those whose asylum applications are examined in Albania and for whom this will happen in Italy.[97]

All in all, the rights of asylum seekers under EU law, in conjunction with the rights stemming from the ECHR and the Geneva Convention, must be implemented in good faith, in procedures which are effective in light of the principles of the Union.[98] Following the understanding of Article 9(1) of the PD which provides that that applicants shall be allowed to remain in the MS for the duration of the procedure, it may be concluded that asylum seekers must be allowed access to the competent authorities within the territory of the MSs, where their asylum applications can be assessed under the best possible circumstances.

Chapter 4. The Italy-Albania Agreement compared internationally

In this chapter, the Italy-Albania agreement will be compared to other international examples of extraterritorial asylum. In the first section, external processing by the US and Australia will be described and compared to the Italy-Albania agreement, focusing on the procedural and physical containment of asylum seekers. In the second section, this will be the case for the external processing initiative of the UK. This analysis is conducted to ascertain to which extent the Italy-Albania agreement differs from other examples of international protection.

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[96] Amnesty International (n 50) 9.

[97] Council of Europe, 'Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures' (*Council of Europe,* 13 November 2023) <https://www.coe.int/et/web/commissioner/-/italy-albania-agreement-adds-to-worrying-european-trend-towards-externalising-asylum-procedures> accessed 26 April 2024.

[98] Moreno-Lax (n 39) 459.

4.1. USA/Guantánamo & Australia/Nauru

The external processing facilities of Australia and the US are the first examples of states seeking migration control through offshore programmes. In the US, the prior Guantánamo Bay US Naval Station, hereafter Guantánamo, was opened in 1991 as an external processing facility when the US Coast Guard was faced with intercepted Haitians who had fled their country after the ejection of President Aristide.[99] In the following 18 months, more than 36 000 asylum seekers from Haiti were processed in Guantánamo, of which 10 000 were granted entry to the US, others repatriated back to Haiti.[100] Yet in 1993, a federal judge closed the facility after cases of HIV infected refugees. At the same time, the policy of external processing in Guantánamo was already reversed by the Kennebunkport Order of 1992, which issued that intercepted Haitian boat migrants were to be returned to Haiti by the US Coast Guard without conducting asylum interviews (no-screening).[101] However, when violence broke out in Haiti again in 1994, the facility in Guantánamo was reopened again. President Clinton abandoned the "no-screening" return policy. A new component to the policy was to bring Haitian asylum seekers to a region close by where they would not be processed as potential refugees.[102] Hence, after being detained and processed in Guantánamo, it was not possible to obtain asylum in the US. To resettle Haitian asylum seekers to third countries, the US entered into agreements across the Caribbean.[103]

In August 1994, the US government decided to use the facility in Guantánamo for an influx of Cubans trying to migrate to the US by boat, through which the government reversed its long policy of welcoming Cubans fleeing from Fidel Castro's regime.[104] In this period, over 30 000 Cubans left their home country, after Castro announced that he would no longer prevent emigration. The group of Cubans in Guantánamo, was like the Haitian applicants, not granted asylum in the US, but were repatriated to third countries nearby. However, when the costs of the facility in Guantánamo increased, and the living conditions were becoming increasingly severe, the US government did decide to transfer most of the Cubans to the US in May 1995, after signing an agreement with Cuba.[105]

[99] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 264.
[100] ibid.
[101] ibid.
[102] ibid 265.
[103] ibid.
[104] ibid.
[105] Maria E. Sartori, 'The Cuban Migration Dilemma: An Examination of the United States' Policy of Temporary Protection in Offshore Safe Havens' (2001) 15 Georgetown Immigration Law Journal 319, 331.

Since these migration influxes to the US, Guantánamo has remained in permanent use to accommodate smaller groups of migrants who were interdicted at sea. Yet, it has been mainly considered as a contingency facility for future large-scale migration to the US.[106] This is occurring at this moment. The Biden administration is opting to use the facility in Guantánamo to process a possible new influx of migrants from Haiti, where the conditions are worsening and social order is on the brink of collapse.[107]

In August 2001, the government of Australia refused the entry of the Norwegian freighter *MV Tampa*, carrying 433 rescued asylum seekers. This is referred to as the Tampa incident. In its aftermath, the Pacific Strategy was introduced, Australia's offshore programme for intercepted asylum seekers on the islands of Nauru, Manus Island and Papua New Guinea (PNG). For the outsourcing of asylum procedures to these islands, the governments of Nauru, Manus Island and PNG received financial reimbursement. Since 19 July 2013, more than 4245 asylum seekers intercepted at sea have been transferred to a regional processing country like Nauru.[108] While the processing centres of Manus Island and PNG have been closed, this thesis will focus mainly on the processing centre of Nauru. The Nauru processing centre was in use from 2001 to 2008, repeatedly from 2012 to 2019, and currently again from September 2021. The policy changed a few times, but since 2013 those found to be refugees, are not allowed to enter Australia. They are to be repatriated to a third country. In the past, there have been resettlements to New Zealand, Canada, Sweden, Denmark and Norway. Nevertheless, there have been possibilities to enter Australia on a temporary visa.[109]

Both the US and Australian offshore processing policies rely on a system in which asylum seekers are detained and barred from invoking domestic immigration laws and from accessing the courts.[110] In the US, exclusion of asylum seekers held at Guantánamo from legal protection, was made possible by a number of executive decisions and the confirmation of their legality by domestic US courts.[111] While domestic US courts had been divided on the question of the applicability of immigration rights to persons held in Guantánamo, it was

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[106] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 266.
[107] Caitlin Stephen Hu and Michael Rios, 'Haiti's leader to resign as gangs run rampant through country engulfed in crisis' (*CNN*, 12 March 2024) <https://edition.cnn.com/2024/03/11/americas/haiti-pm-ariel-henry-resigns-gang-violence-intl-hnk/index.html> accessed 7 May 2024.
[108] Refugee Council of Australia, 'Offshore processing statistics' (*Refugee Council of Australia,* 17 April 2024) <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/.> accessed 7 May 2024.
[109] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 268.
[110] ibid 269.
[111] ibid.

ultimately found that US immigration law was not applicable outside the territory of the US, and therefore persons held in Guantánamo were 'without legal rights that are recognisable in the courts of the United States'.[112] Yet, the Court found the US policy conducted in Guantánamo to be a 'gratuitous humanitarian act'.[113]

Australia likewise chose to establish an offshore programme under a system of 'unreviewable executive control'.[114] The Pacific Strategy was based on a major revision of the Migration Act which mainly concerned the legal status and procedural safeguards afforded to asylum seekers intercepted at sea.

When one situates the inapplicability of the law and the lack of judicial review in the cases of the US and Australia within the European context, it becomes inherently problematic from a human rights perspective.[115] While MSs are allowed to seek alternative methods to arrange entry to the territory, they must be in conformity with international and EU law. Den Heijer argues that states cannot simply excise particular territories from their human rights obligations, nor are they absolved from respecting those obligations when undertaking activities in a third country.[116] Consequently, individuals held in external processing facilities must be able to invoke human rights in order to defend themselves against arbitrary state power.[117]

The ongoing programmes of offshore detention in Guantánamo and Nauru demonstrate a contradictory attitude towards the protection of human rights. External processing in the facilities was justified by a pledge of the US and Australia to guarantee refugee rights and by granting a safe haven for persons intercepted at sea.[118] However, the policy was designed in such a manner that it prevented asylum seekers and recognised refugees to enter the state. Therefore, procedural rights and norms of good administration were discarded.[119]

One of the defining characteristics of the processing schemes established in Nauru and Guantánamo is the mandatory detention of asylum seekers. For governments to gain migration control, this serves two purposes. In the first place, it ensures that they are prevented from effecting unauthorised entry and residence. In the second place, it serves as a policy to deter future arrivals.[120]

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[112] ibid 270.
[113] ibid.
[114] ibid.
[115] ibid 271.
[116] ibid 272.
[117] ibid.
[118] ibid.
[119] ibid 273.
[120] ibid 274.

The automatic detention of asylum seekers in offshore facilities of Guantánamo and Nauru has attracted considerable criticism. The detention is not subject to judicial review, lacks maximum time limits, and offers no guarantees as to resettlement or repatriation.[121] Consequently, it may result in excessive periods of detention without prospect. Furthermore, the aforementioned limitations prevent asylum seekers from engaging in meaningful activities, such as work or education, or from integrating into society.[122] It is evident from the preceding section of this chapter that the use of detention should be an instrument of last resort, and must follow an individual assessment of the necessity of such detention.

With regard to the policy of Australia, cases have been reported of recognised refugees detained for four years in Nauru.[123] Yet the Human Rights Committee (HRC) did not consider the automatic detention system of Australia, to be in violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR). The HRC is an independent body of experts tasked with monitoring the implementation of ICCPR by its State parties.[124] Article 9 ICCPR protects the right to liberty and security of a person, like Article 5 ECHR, and hence protects against arbitrary detention. Still, the HRC did condemn in its considerations the restrictions on judicial review, and prolonged duration of detention.[125] To establish whether automatic detention is arbitrary in itself however seems to require more scrutiny. In *Bakhtiyari v Australia*, the HRC found the automatic detention of an asylum seeker intercepted at sea not to be arbitrary, because the identity of the person was uncertain and while he had already been granted a protection visa and was released seven months after his arrival.[126]

The offshore processing programmes of the US and Australia were established without an additional strategy as to how to release asylum seekers, in the form of entry to the host country, resettlement elsewhere, or repatriation to the country of origin.[127] In such a system, the prolonged detention of asylum seekers without judicial review has serious implications for human rights. While offshore detention in itself is not arbitrary, the circumstances in which it happens may render it in violation of Article 5 ECHR.

[121] ibid.
[122] ibid.
[123] ibid 277.
[124] United Nations of Human Rights Treaty Bodies, 'Human Rights Committee' (*UNHRC*, ---) <https://www.ohchr.org/en/treaty-bodies/ccpr#:~:text=The%20Human%20Rights%20Committee%20is,of%20law%2C%20policy%20and%20practice> accessed 9 May 2024.
[125] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 276.
[126] *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia* App no 1069/2002 (HRC, 6 November 2003), para 9.2.
[127] Den Heijer, *Europe and Extraterritorial Asylum* (n 23) 277.

Comparing the Italy-Albania agreement to the cases of external processing by the US and Australia sheds light on the feasibility of it in the European context. When considering the procedural containment of asylum seekers in Guantánamo and Nauru, it becomes clear that after being granted asylum, a refugee is not allowed to enter the state. According to the Italy-Albania agreement, this would not be the case for asylum seekers held in Albania. After being granted asylum in Albania, refugees will be transferred to Italy. Other procedural guarantees remain however disregarded, like in Guantánamo and Nauru, for instance by the shortcoming of judicial review of decisions regarding the asylum procedure.

Moreover, when considering the physical containment of asylum seekers in Guantánamo and Nauru, it becomes clear that the same violations of human rights by automatic detention are to be foreseen with regard to the Italy-Albania agreement. This pertains mainly to the violation of Article 31(1) Geneva Convention which sets forth that states may not impose penalties on asylum seekers, such as detention, on the sole account of their illegal entry or presence of the territory of that state. Furthermore, the risk of prolonged and indeterminate detention in Albania creates a risk of arbitrariness.

4.2. UK/Rwanda

Despite the criticism towards external processing in the European context, the UK has signed an agreement with Rwanda on 14 April 2022 to relocate asylum seekers in the UK to Rwanda. It was presented with the objective to end irregular migration and human trafficking across the English Channel.[128] In Rwanda, asylum seekers will be entitled to international protection under Rwanda's law, with access to work, health care and social services.[129]

Two months after signing the agreement, the UK government was planning to begin its first deportation flight to Rwanda. This flight did however not take off. The ECtHR issued interim urgent measures to stop the flight to Rwanda. Such measures are to be issued in cases of an imminent risk of irreparable harm such as death or torture.[130] They are generally issued in extradition and deportation cases. The ECtHR had granted the measures with regards to an

[128] James Tasamba, 'Rwanda, UK sign major deal on asylum seekers amid criticism' (*Anadolu Ajansi (AA),* 14 April 2022) <https://www.aa.com.tr/en/africa/rwanda-uk-sign-major-deal-on-asylum-seekers-amid-criticism/2564054#> accessed 13 May 2024.
[129] ibid.
[130] International Justice Resource Center, 'European Court of Human Rights' (*IJRC*, --) <https://ijrcenter.org/european-court-of-human-rights/> accessed 13 May 2024.

Iraqi national, preventing his removal to Rwanda until after his judicial review proceedings.[131] As until now, no deportation flight to Rwanda has taken place.

On 15 November 2023, the UK Supreme Court held that there are substantial grounds to believe that the removal of asylum seekers to Rwanda would expose them to a real risk of ill-treatment by reason of *refoulement*.[132] The policy of the Secretary of State was therefore deemed to be unlawful. The Court emphasised that the case did not depend solely on the ECHR or the Human Rights Act 1998, which gives effect to most Convention rights in UK law. Withdrawal from the ECHR - called for by Suella Braverman, among others, when she was Home Secretary - would not remove the obligation to respect the principle of *non-refoulement.*[133]

To circumvent the ruling, the government chose to amend the notion of a safe country in the law so that deportation to Rwanda could take place. This change in the law was passed by the British Parliament on 22 April 2024, called the 'Safety of Rwanda' Bill. This pursuit was immediately met with much new opposition from human rights activists, the Council of Europe and the UNHCR. The latter stipulates that in practice, the protection gaps identified by the Supreme Court will not be overcome.[134] Once enacted, it will restrict the UK domestic courts from properly scrutinising removal decisions, leaving asylum seekers with limited room to appeal.[135] Hence, not only the principle of *non-refoulement* is violated. Likewise, procedural rights of asylum seekers are infringed, such as legal assistance and access to justice.

When comparing the UK-Rwanda agreement to the Italy-Albania agreement, there are many similarities in which way the cooperation is foreseen and which human rights of asylum seekers it may infringe. While the ECtHR is very clear about the illegitimacy of the UK-Rwanda agreement, it is yet the question which stance the Court would take in the case of the Italy-Albania agreement, with Albania being a party to the ECHR. This uncertainty is the same for the CJEU, having to rule for the first time on such an external arrangement with regards to EU law. Yet the right to asylum ought to be of considerable importance for the

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[131] Caroline Davies, 'What is the ECHR and how did it intervene in UK's Rwanda flight plans?' (*The Guardian*, 15 June 2022) <https://www.theguardian.com/law/2022/jun/15/what-is-the-echr-and-how-did-it-intervene-in-uk-rwanda-flight-plans> accessed 13 May 2024.

[132] *R v Secretary of State for the Home Department* [2023] UKSC 42.

[133] Alice Donald and Joelle Grogan, 'Defeat in the Supreme Court' (*Verfassungsblog*, 17 November 2023) <https://verfassungsblog.de/defeat-in-the-supreme-court/> accessed 13 May 2024.

[134] Filippo Grandi and Volker Türk, 'UK-Rwanda asylum law: UN leaders warn of harmful consequences' (*Office of the High Commissioner for Human Rights*, 23 April 2024) <https://www.ohchr.org/en/press-releases/2024/04/uk-rwanda-asylum-law-un-leaders-warn-harmful-consequences> accessed 13 May 2024.

[135] ibid.

CJEU, it being enshrined as an explicit right in the CFREU. This is the same for procedural rights under EU law, which are interpreted as having a territorial scope within the borders of the EU.

Chapter 5. Deterritorialisation of the European Territory

To understand the tendency to external processing of asylum applications by MSs better, it is important to give an insight in the broader political context around asylum in Europe. In doing so, this chapter will take into account the newly adopted Pact and how it subtly develops policies aimed at "deterritorialising" the EU while reinforcing its practices of externalisation of responsibility.[136] Subsequently, the consequences of the lack of solidarity in EU migration and asylum law will be discussed.

Over the past 10 years, the EU has operated from crisis to crisis – among them the Greek sovereign debt, the Russian annexation of Crimea, sudden high influx of migration, the turmoil created by Brexit, the covid-19 pandemic, the war in Ukraine and the ongoing unrest and war in the Middle East. As an organisation being historically economic in nature instead of political, it has been challenging for the EU to surmount these events and its consequences. On the EU political level, questions of identity, sovereignty and solidarity have taken a step forward, especially in the field of migration and asylum.[137] Historian and political theorist Luuk van Middelaar coined the term *events-politics* to describe this development.[138]

An example of events-politics is the closing of agreements with third countries to 'manage' migration.[139] In 2015, the European Commission (EC) presented the European Agenda on Migration, which prioritised action "together with partner countries to put in place concrete measures to prevent hazardous journeys."[140] As a policy outcome, the EU-Turkey Statement was agreed upon in 2016. This agreement has significantly affected the right to asylum, while it has not produced proportionate results on migration management. Between

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[136] Cassarino and Marin (n 81) 1.
[137] Luuk van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing, 2019) book cover.
[138] ibid 92.
[139] ibid.
[140] European Commission, 'A European Agenda on Migration' (*European Commission*, 13 May 2015) < https://home-affairs.ec.europa.eu/system/files/2020-09/communication_on_the_european_agenda_on_migration_en.pdf> accessed 3 June 2024, 5; Alexandra Bousiou, 'Peripheralisation and externalisation of the EU asylum regime: implications for the right to seek asylum on the southeastern EU border islands' (2022) 48(19) Journal of Ethnic and Migration Studies 4586, 4587.

April 2016 and the end of 2020, only around 1.4% of all newly-arrived asylum seekers have been returned to Turkey under the agreement.[141] Moreover, legally, the text of the deal leads to issues of accountability, while it is undetermined who authored this document, it being a press release on the website of the European Council and the Council of the European Union.[142] These facts lead to serious doubts over the legitimacy of the externalisation of EU migration and asylum policy. This, while it leads to severe human rights violations, is expensive, often the result of informal cooperation and very difficult to assess in its effectiveness.[143] Despite these concerns, the EU has more recently sealed various migration deals with Morocco, Tunisia, Mauritania, Libya and Egypt to manage migration flows to Europe.

Furthermore, events-politics is visible through the strengthening of agencies of border control and asylum.[144] To achieve more long-term solutions and prepare for a future 'crisis', the EU has sought to adjust the legal framework for migration and asylum with the advent of the Pact.

On 10 April 2024, the European Parliament (EP) voted in favour of the new Pact on Migration and Asylum. This was followed by the formal adoption of the new legislation by the Council of the EU on 14 May 2024. It proposes a new common EU system to manage migration, focusing on securing the external borders of the EU, fast and efficient procedures, an effective system of solidarity and responsibility and embedding migration in international partnerships.[145] The package of reforms proposed in the Pact is considerable and comprises of various new procedures. For instance, a mandatory border procedure will apply to asylum seekers who are unlikely to be granted asylum, mislead the authorities or pose a security risk.[146] During this procedure, asylum seekers will be detained, from which children in a family are not excluded. Furthermore, the Crisis Regulation provides for protocols which may be enacted in emergency situations. The Pact also establishes a solidarity mechanism between MSs. However, MSs can choose themselves how they wish to participate within this; in the

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[141] Alexandra Bousiou, 'Peripheralisation and externalisation of the EU asylum regime: implications for the right to seek asylum on the southeastern EU border islands' (2022) 48(19) Journal of Ethnic and Migration Studies 4586, 4587.
[142] Evangelia Tsourdi, Andrea Ott and Zvezda Vankova, 'The EU's Shifting Borders Reconsidered: Externalisation, Constitutionalisation, and Administrative Integration' (2022) 7(1) European Papers 87, 93.
[143] Bousiou (n 141).
[144] Van Middelaar (n 137).
[145] Directorate-General for Migration and Home Affairs, 'Pact on Migration and Asylum' (*European Commission*, 21 May 2024) <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en.> accessed 3 June 2024.
[146] ibid.

form of relocations, financial contributions, operational support, request deductions or 'responsibility offsets'.[147] In practice, this may mean that MSs will not help each other in distributing asylum seekers evenly across the EU, but will buy the relocation of asylum seekers off. This costs €20,000 per asylum seeker.[148] There are also no rules established on what this 'buyout money' can be used for. Thus, it could be used for realising better reception, but equally for implementing stricter border control.

Jean-Pierre Cassarino and Luisa Marin argue that the Pact and many of the measures proposed, read together, aim at the deterritorialising of the territory of the EU while reinforcing its practices of externalisation of responsibility. [149] Cassarino and Marin explain that in the proposal for the new Screening Regulation and Procedure Regulation, as part of the new Pact, a separation is made *within* the EU of 'territory' from 'legal order'.[150] It becomes apparent that the external border of the EU has been allocated a further enhanced function of securitisation. Therefore, non-governmental organisations (NGOs), journalists and scholars have described the Pact a consolidation of 'Fortress Europe'.[151]

With the adoption of the Pact, the Dublin Regulation remains in place. This regulation provides that the MS of first entry is responsible for the application for asylum of a TCN. Since 2015, this system has placed an unfair burden on the southern and south-eastern MSs for the examining of asylum applications.[152]

Nevertheless, the EU's open internal borders permit asylum seekers to travel freely between MSs, which has led to the wish from political parties in northern and western MSs to close their borders on grounds of public order. This would have serious consequences for the project of European integration.[153] In order to prevent this, and to create an effective and fair system for migration and asylum, solidarity is necessary. However, for national governments this is troublesome, as borders and migration touch upon national sovereignty and identity.[154] The implementation of greater solidarity would entail the conferral of additional powers from MSs to the EU. In the majority of MSs, the prospect of increased EU involvement is not a

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[147] ibid.
[148] VluchtelingenWerk Nederland, 'Dit is waarom het Europees migratiepact niks oplost' (*VluchtelingenWerk Nederland*, 10 April 2024) <https://www.vluchtelingenwerk.nl/nl/artikelen/nieuws/dit-waarom-het-europees-migratiepact-niks-oplost/> accessed 3 June 2024.
[149] Cassarino and Marin (n 81) 4.
[150] ibid.
[151] Francesca Spinelli, 'Fortress Europe raises the drawbridge' (*VoxEurop,* 7 October 2020) <https://voxeurop.eu/en/fortress-europe-raises-the-drawbridge/> accessed 8 April 2024.
[152] Van Middelaar (n 137) 97.
[153] ibid 98.
[154] ibid.

popular one, particularly during election periods. This is why the solidarity mechanism in the Pact leaves much room for MSs to choose for themselves what kind of solidarity they want to show: actual shared responsibility, or only in a financial sense. Actual effective and genuine solidarity would not be financial, but would mean that all MSs take responsibility for their fair share of asylum applications, without the option to buy out.

The lack of this genuine solidarity means that MSs on the southern and south-eastern borders of the EU will remain to be overburdened with the number of asylum applications, also with the adoption of the new Pact. Instead of financial help, there is need for material help to realise the sharing of asylum seekers throughout the EU. Relocation of asylum seekers requires intensive preparatory work on the ground by the competent authorities.[155] Compared to other MSs, the facilities and basic services for asylum seekers are less sufficient in the southern and south-eastern MSs, e.g. with regard to the safety of reception centres and the efficiency of registration procedures.[156]

Luisa Marin shows in her article on the solidarity crisis in EU asylum law that, while reforms of legislative instruments are not progressing, MSs and EU institutions are increasingly adopting 'operational and informal arrangements'.[157] Hence, due to the lack of solidarity and structural solutions, MSs seek alternative arrangements such as the proposal of the Italy-Albania agreement. These informal operational arrangements may challenge the rule of law of the EU.[158] Yet, the EU does not condemn this shift to informal arrangements as part of an effort to control migration. On the contrary, it seems to encourage it. This has also become clear in the case of the Italy-Albania agreement, which is endorsed by the president of the EC, Ursula von der Leyen.

All in all, the newly adopted measures of the Pact, and the increase of informal arrangements by MSs might be conducive to the enhanced precarisation of the legal position of asylum seekers in the European legal order.[159] External processing is an indication of this trend.

[155] ibid 101.
[156] ibid.
[157] Luisa Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) 22(1) European journal of migration and law 60.
[158] ibid.
[159] Cassarino and Marin (n 81).

Conclusion

In summary, the prevalence of various legal uncertainties around the Italy-Albania agreement have become clear, on the national, European and international level. Describing the legal position of asylum seekers in the EU, followed by explaining how a regular asylum procedure works in a MS revealed the problem of extraterritorial asylum and external processing. In this thesis, there was a focus on four aspects of external processing which may infringe human rights under EU and international law; automatic detention, the principle of *non-refoulement*, the right to asylum, and procedural rights. Subsequently, the Italy-Albania agreement was described and compared internationally to examples of external processing policies of the USA, Australia and the UK. In the last chapter, the tendency towards external processing in the EU was positioned in a broader political context.

In conclusion, the agreement between Italy and Albania to externally process asylum applications has various consequences for human rights. In the first place, the increase of informal arrangements by Member States might be conducive to the enhanced precarisation of the legal position of asylum seekers in the European legal order. External processing is an indication of this trend and a departure from the norm of the strong legal position asylum seekers have when their application is being processed on European territory.

In the second place, external processing may have serious repercussions. If the effectiveness of human rights is not recognised extraterritorially, their fundamental essence is at risk of being nullified. With regard to procedural rights of asylum seekers, this risk is considerable in the case of the Italy-Albania agreement.

In the third place, Article 9(1) of the Procedures Directive provides that applicants shall be allowed to remain in the MS for the duration of the procedure. Following this understanding, it may be concluded that asylum seekers must be allowed access to the competent authorities within the territory of the MSs, where their asylum applications can be assessed under the best possible circumstances.

In the fourth place, the comparative analysis between international examples of external processing clarifies that its feasibility in the European context is unlikely. This is mainly due to the disregard of procedural guarantees, for instance the shortcoming of judicial review of decisions regarding the asylum procedure. Moreover, when considering the detention of asylum seekers in the United States' and Australian cases, it becomes clear that the same violations of human rights by automatic detention are to be foreseen with regard to the Italy-Albania agreement. When comparing the UK-Rwanda agreement to the Italy-

Albania agreement, there are many similarities in which way the cooperation is foreseen and which human rights of asylum seekers it may infringe. While the ECtHR is very clear about the illegitimacy of the UK-Rwanda agreement, it is yet the question which stance the Court would take in the case of the Italy-Albania agreement, with Albania being a party to the ECHR.

With regard to the Italy-Albania agreement, it should also be considered that the agreement results in differential treatment, between those whose asylum applications are examined in Albania and for whom this will happen in Italy.

As a last statement, this thesis argues that it is important to formulate answers to these questions, while the Italy-Albania agreement is being considered as an example for other Member States to establish increased cooperation with third countries to outsource asylum procedures. Among other Member States, the Czech Republic, Denmark, Austria and the Netherlands insist on further agreements to be made similar to the Italy-Albania agreement. Before undertaking further agreements, legal clarity of the Courts on the feasibility of external processing under EU law is required.

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