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The Extraterritorial Protection of Migrants' Human Rights: An Integrated Reading of the Italy-Albanian Protocol and Article 25 of the Visa Code[1]

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Abstract

This article stems from the approval of the law ratifying the Protocol between the Government of the Italian Republic and the Council of Ministers of the Republic of Albania, which took place on February 21, 2024. The contribution aims to analyse the delicate issue of the extraterritorial application of rights enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights in the implementation of the Protocol. This presents multiple challenges. Foremost among them is the absence of a clear and defined regulatory framework, which raises concerns about potential derogations from fundamental rights and guarantees. The extension of Italian jurisdiction ensures that the activities envisaged by the Protocol are subject to compliance with international humanitarian and human rights law. The analysis of the Protocol is carried out through an integrated reading with Art. 25 of the Visa Code, which provides for the issuance of humanitarian visas. Unlike the Protocol, the issuance of humanitarian visas by EU Countries is limited by jurisdictional issues, although it is capable of ensuring effective protection of the fundamental rights of migrants. Thus, the article aims to critically explore possible perspectives for migration policies that ensure safe and regular access to the EU and to examine requests for international protection on the territory of a third State.

Key Words:

extraterritorial, human rights, Protocol, Italy, Albania, humanitarian visa

1. The Italy-Albania Protocol: Origins, Purpose, and Key Aspects

1.1 Legislative Context and Motivations for the Adoption of the Protocol

On April 29, 2024, a communiqué of the Ministry of Foreign Affairs and International Cooperation (MAECI) published in the Italian Official Gazette reported the entry into force of the Memorandum of Understanding (or and hereinafter Protocol) between the

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Government of the Italian Republic and the Council of Ministers of the Albanian Republic for the strengthening of cooperation in migration matters. The communiqué reads: "ratification was authorised by Law No. 14 of 21 February 2024 (…). In accordance with its Art. 13(1), the Protocol entered into force on 25 March 2024". Therefore, from that date onwards, the bilateral treaty assumed full legal existence in the international regulatory system and in the legal systems of the States Parties. The Protocol was signed in Rome on November 6, 2023, with the aim of strengthening bilateral cooperation between Italy and Albania on the management of migration flows from third countries (Art. 2 of the Protocol).

As is well known, the Protocol is not the first attempt to combat irregular immigration stipulated between the two countries. Over the years, there have been numerous bilateral agreements signed between Italy and Albania for this purpose (see for this purpose Chaloff 2008). In fact, Italian Prime Minister Giorgia Meloni in her statements to the press recalled the historical cooperation that underpins the relationship between the two countries:

> "This agreement enriches the historical friendship, as you know, the deep cooperation between our two nations. Ours is a strategic partnership developed through not only excellent trade relations (Italy is Albania's largest trading partner and our trade exchanges are worth around 20% of Albania's GDP), but also exchanges between our communities in Italy and Albania, intense cultural and social relations and the very close cooperation that already exists in the fight against all forms of illegality, with a significant presence of Italian public security forces and judicial officers in Albania" (Presidency of the Council of Ministers, 2023).

It is evident that the two countries share a profound historical and cultural understanding. The Protocol aligns with the prevailing trend of outsourcing migration policy, with its genesis rooted in the imperative to counter irregular immigration: Italy has been contending with a protracted asylum crisis for years. However, the latest bilateral Protocol introduces novel and contentious legal considerations. Indeed, the most recent Italian-Albanian *entente* is characterized by multifaceted critical dimensions, not only pertaining to the constitutionality of each country's legislation but also concerning adherence to standards delineated by EU law and international human rights conventions.

It appears noteworthy to underscore that initially, the Protocol originated as an informal agreement between Italy and Albania. This would have implied that it could have come into effect simply through an exchange of notes between the two countries. However, numerous jurists, human rights activists, and a significant portion of the academic community had emphasized the unconstitutional nature of not subjecting the Protocol to parliamentary scrutiny. In particular, the Italian Association for Legal Studies on Immigration (ASGI), in a press release dated November 2023, recalled the Italian constitutional framework governing the ratification of international treaties and the importance of democratic oversight over foreign policy by both chambers of Parliament (ASGI, 2023).

Indeed, Art. 80 of the Italian Constitution declares that

> "The Chambers authorize, by law, the ratification of international treaties that are of a political nature, or provide for arbitration or judicial regulations, or entail changes to the territory or burdens on finances or modifications of laws."

The Italy-Albania Protocol on cooperation in migration matters falls within the cases foreseen by Art. 80 of the Constitution and making it imperative to subject it to a

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ratification law. If this had not been done, the agreement could never have been implemented or considered binding in the Italian legal system. In fact, according to Art. 117 para. 1 of the Constitution, it would not have represented an international obligation. Furthermore, Art. 72, para. 4 of the Constitution prescribes that ratification projects must be examined through the ordinary legislative procedure.

It is therefore clear, that a serious constitutional issue would have arisen if the Protocol had bypassed parliamentary scrutiny. The intention to implement such a significant border externalization migration policy without genuine parliamentary scrutiny would have undermined the democratic framework and the rule of law of the Italian Republic.

1.2 Stated Objectives and Key Aspects of the Protocol

The Protocol comprises 14 articles and two appendices. As previously mentioned, Art. 2 outlines the purpose of the Protocol: "to enhance bilateral cooperation between the Parties in managing migratory flows from third countries, in accordance with international and European law". According to Art. 4 of the Protocol, this objective will be pursued through the construction of two centres in Albanian territory under Italian jurisdiction, designated for "migrants" who have undergone border or repatriation procedures (Art. 4. para. 3). Appendix 1 identifies the two areas granted by Albania to Italy: one area located near the port of Shëngjin and the other near Gjadër. In these areas, Italy will construct two facilities entirely at its own expense. At the port of Shëngjin, the entry facility will be built where disembarkation and identification procedures will take place. In Gjadër, the second facility will be used as an accommodation centre.

Art. 4. para. 2 of the Protocol stipulates that these facilities

> "are managed by the competent authorities of the Italian Party, in accordance with relevant Italian and European legislation. Disputes that may arise between the aforementioned authorities and migrants hosted in the said facilities are subject exclusively to Italian jurisdiction".

Furthermore, the same Article establishes that the total number of migrants present simultaneously in Albanian territory cannot exceed three thousand.

Under Art. 3 of Law 14/2024, exclusively individuals embarked on vessels operated by Italian authorities outside the territorial sea of the Republic or other Member States of the European Union may be processed in the areas provided for by the Protocol, including as a result of rescue operations. Furthermore, the law defines the statuses of the areas and Albanian centres subject to Italian jurisdiction. The port area of Shëngjin and the internal area of Gjadër "are equated to Italian border or transit zones" (Art. 3, para. 3). According to Art. 3 para. 4 of Law 14/2024, the centre of Shëngjin is equated to a "crisis point", thus operating as a hotspot centre (Art. 10-ter para.1, Legislative Decree of July 25, 1998, No. 286 on Consolidated Act of Provisions concerning immigration and the condition of third country nationals). Conversely, the centre of Gjadër will function as a detention centre for repatriation (CPR) (Art. 14 para. 1, Legislative Decree of July 25, 1998, No. 286).

The interpretation of these provisions must be complemented by Art. 4 para. 3 of the Protocol, which stipulates that the conveyance of migrants to Albania may occur "solely for the purpose of carrying out border and repatriation procedures […] and for the time strictly necessary for the such procedures".

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Since the Albanian areas are legally considered as Italian border zones, border procedures are applied. It is important to highlight that border procedures are accelerated when an application for international protection is likely to be unfounded, or when there are specific grounds, such as the applicant being from a safe country of origin or presents false information. These procedures do not take into account the vulnerabilities and specific needs of asylum seekers, as they apply shorter procedural time and shift the burden of proof onto the applicant. This concerning circumstance can entail serious migrants' human rights violations.

Art. 6 outlines the collaboration modalities for maintaining the security of the two aforementioned areas. Albanian authorities ensure order within and around the perimeter of the areas and during transfers within Albanian territory. On the other hand, Italy guarantees security within the areas. Italian authorities ensure the detention of migrants in the designated facilities and prevent them from leaving Albania without authorization before and after administrative procedures. This provision, contained in Art. 6. para. 5 of the Protocol, seems to raise numerous critical issues. In fact, the lack of legal guarantees and procedural standards regarding the detention of migrants could result in the violation of their human dignity and fundamental rights. There is a risk that migrants may be subjected to inhuman and degrading treatment.

Art. 9 presents an eloquent passage of the Protocol. It states that "the period of stay of migrants in the territory of the Republic of Albania cannot exceed the maximum detention period allowed by current Italian legislation". It is necessary to highlight that the current legislation in question has been recently amended. On September 18, 2023, the Council of Ministers approved a Decree-Law (D.L.) 124/2023 containing new provisions to combat irregular migration. The Decree intervenes, in particular, regarding administrative detention (Art. 14 Legislative Decree of July 25, 1998, No. 286), extending the maximum detention time in Repatriation Centres (CPR) for foreign citizens awaiting deportation to a maximum of 18 months - compared to the previously prescribed 3 months. The new regulations do not apply to foreign citizens seeking asylum, for whom the law currently (Art. 6 Legislative Decree 142/2015) provides for a maximum detention period of 12 months. It is evident, therefore, that D.L. 124/2023 and the Protocol with Albania complement each other. To this combination, we add Law No. 50 of May 5, 2023, containing "urgent provisions regarding legal entry flows of foreign workers and prevention and combating of irregular immigration". In this context, there is no opportunity to undertake a normative analysis of these two sources, however, it is clear how this triad is animated by the same guiding principle of combating irregular immigration. Therefore, the two areas granted by Albania constitute an extension of the same national migration policy, now implemented externally.

In accordance with Art. 9. para. 2 of the Protocol, the Parties allow access to the facilities to lawyers, as well as to international organizations and European Union agencies providing assistance to applicants for international protection, within the limits provided by the applicable Italian, European, and Albanian legislation to ensure the right to defence. According to Art. 13 of the Protocol, it will remain in force for five years and is tacitly renewed for a further period of five years, unless one of the Parties communicates, with at least six months' notice before the expiration, its intention not to renew the Protocol.

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2 Analysis of the Italy-Albania Protocol and Extraterritorial Application of Fundamental Rights

2.1 Normative Ambiguities and Legal Gaps in the Protocol's Text

Having briefly examined the essential aspects of the Protocol, it now seems appropriate to offer some critical reflections. It falls within the realm of collaboration between EU countries and non-EU countries regarding the management of migratory flows. However, it appears to propose novel schemes of asylum border externalization compared to previous agreements, raising concerns about systematic violations of fundamental human rights. Border externalization in migration policies is a strategy adopted by some countries to manage migratory flows. It entails shifting border control and responsibility for migrant management to third countries, often located outside the geographical area of competence of the countries adopting this policy.

More precisely, within the EU framework,

> "the externalisation of borders consists of a set of policy and cooperation instruments that seek to impact migration and asylum flows extraterritorially, (far) beyond EU borders, within territories in which the EU and its Member States effectively offshore migration and asylum management. These policies emerged in the late 1980s and early 1990s, have grown substantially and most notably following the 2015 "migration crisis" (Jaulin, 2022: 9).

Therefore, international agreements on extraterritorial immigration management typically or generally

> "are based on the logic of burden-shifting, namely the transfer of responsibility for reception and repatriation to other countries, where, however, asylum systems and migrant protection are often lacking" (Savino, 2024: 1).

In the case of the Italy-Albania Protocol, a new paradigm of border externalization is configured, foreseeing an "extension" of Italian jurisdiction into Albanian territory. Therefore, the usual dichotomy that linked the relocation of migrants to a third country with the state's shift of responsibility is no longer present.

> "In comparison, the model of extraterritoriality outlined by the Italy-Albania Protocol innovates. However, the means employed are different: not the outsourcing of responsibilities to a third country (burden-shifting), but the creation of an extraterritorial management area for migrants, which is subject to Italian jurisdiction and presupposes the application of the same rules applied in Italian territory. It is, therefore, a formula in which extraterritoriality does not inherently imply an evasion from legality and the responsibilities falling on Italy." (Savino, 2024: 2)

The Protocol, which represents a unique case within the framework of European migration policies, opens up new possible paths for extraterritorial management of migration flows: "The idea has the characteristic of extrema ratio: the purpose of building a new model of migratory flow management" (Faggiani, 2024: 1). For example, compared to the bilateral agreements between Italy and Libya, the new Protocol presents significant differences. The novel aspect of the Italian-Albanian Protocol lies not only in the fact that Italy does not delegate the responsibility for managing migration flows to another country, as it did in the case of Libya. The political and normative framework of Albania seems to offer greater guarantees. Libya was not, and currently still is not, a party to the Convention relating to the Status of Refugees (adopted 28/07/1951, entered into force 22/04/1954, UNTS, vol. 189, p. 137, 1951 CG51). Albania, on the other hand, ratified the Convention in 1995

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and, therefore, has an obligation to apply the provisions therein: this may represent a greater assurance of human rights protection for migrants. Additionally, it is interesting to note that the Protocol between Rome and Tirana is the first bilateral agreement on border externalization involving a candidate country for European Union membership.

If we posit the greater assurance of human rights protection in Albanian territory, it now seems appropriate to question whether the framework outlined by the Protocol truly provides the necessary legal premises to ensure migrants conducted and detained in Albania receive the same guarantees as those afforded to migrants in Italy. In the opinion of the authors, it is difficult to answer this question affirmatively, considering that the regulatory framework of the Protocol appears blurred and vague. The lack of detailed legislative provisions is already a deeply problematic aspect of the Protocol. A border externalization migration policy should be rich in provisions aimed at ensuring adequate standards of human rights protection for migrants.

The only reference present in the Protocol can be found in Art. 4, which amounts to a general referral to the main legislative acts regarding immigration and asylum and to the "Italian and European regulations concerning the requirements and procedures relating to the admission and stay of foreigners in the national territory" (Art. 4 para. 1). From the reading of such a minimalist provision, the numerous legislative and procedural gaps inherent in the Protocol become evident. As noted,

> "[t]his minimalist choice determines legislative gaps that concern three main profiles: the administrative procedures applicable to migrants in Albanian sites; the right to defense; the transfer to Italy of migrants not detainable in Albania" (Savino, 2024: p. 3).

Law No. 14 of 2024 ratifying the Protocol, in Art. 4, entitled "Jurisdiction and Applicable Law", establishes that

> "The migrants referred to in Article 1, paragraph 1, letter d), of the Protocol are subject, to the extent compatible, to the consolidated text referred to in Legislative Decree No. 286 of July 25, 1998, Legislative Decree no. 251 of 19 November 2007, Legislative Decree no. 25 of 28 January 2008, Legislative Decree no. 142 of 18 August 2015, and the Italian and European regulations concerning the requirements and procedures relating to the admission and stay of foreigners in the national territory. For the procedures provided for in the provisions indicated in the first period, Italian jurisdiction applies, and the specialized section on immigration, international protection, and free movement of EU citizens of the Rome Tribunal has exclusive territorial competence. Italian law applies in cases covered by this paragraph."

It is evident that the phrase "to the extent compatible" represents a problematic passage. In fact, neither the Protocol nor the ratification law clarify what will happen if the legislation indicated as applicable is not "compatible" with the concrete situations that may arise in the application of the Protocol itself. This could leave the individuals concerned in limbo, with the risk of derogation from fundamental rights and guarantees.

2.2 A Reading of the Protocol in Light of Italian Constitutional Principles

A pivotal question that must animate the examination of the Italy-Albania Protocol is whether it complies with the constitutional precepts of the two countries. As anticipated, with reference to jurisdiction, Law 14/2024 specifies that "for the procedures provided for in the provisions indicated in the first period, Italian jurisdiction applies" and that "the specialized section on immigration (…) of the Rome tribunal and the office of the justice of the peace of Rome" have exclusive territorial competence.

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> "Given the extension, to the individual conducted in Albania and the procedures carried out there, of Italian law and jurisdiction, it is therefore a priority to question the extraterritorial effectiveness of constitutional rights and guarantees accorded by the Italian Constitution to 'non-citizens' conducted in Albanian areas" (Siccardi, 2024: 117).

Much of the doctrine finds the rationale for the extraterritorial protection of individual rights beyond the border of the State in the constitutional provisions on inviolable rights. In fact, the protection and enjoyment of fundamental rights, being coessential to human dignity, would not find limitations beyond the borders of the Republic.

> The extraterritorial extension of constitutional guarantees is consistent with the 'universalist' spirit of the Italian Constitution. In fact, the Charter embraces one of the main challenges of modern constitutionalism, that of the universalism of human rights, opening up to the international community and international conventions on human rights by recognizing to all 'individuals' (and no longer just citizens) the protection of inviolable rights (Art. 2, Art. 10 Const.)" (Siccardi, 2024: 118).

So, in accordance with the spirit that has informed the Italian Constitution and has animated numerous judgments of the Constitutional Court, fundamental rights, by virtue of their inalienable nature, belong to the individual as a human being. For this reason, these rights "must be guaranteed in the Albanian areas to all – citizens, foreign protection seekers, and irregular foreigners, regardless of status and residence permit" (Siccardi, 2024: 119).

As highlighted earlier, there are numerous doubts about the real guarantee of equal treatment of migrants within the two countries. This could imply the Protocol's failure to respect the principle of equality codified in Art. 3 of the Constitution. As is known, Art. 3 is one of the fundamental principles upon which the Italian constitutional design is built. These principles have been conceived as indivisible, and among them also lies the right to asylum, codified Art. 10 para. 3 of the Constitution. The reading of Art. 3 in conjunction with Art. 10 para. 3, therefore appears to be one of the possible hermeneutical keys to critically scrutinize the Protocol regarding the protection of human rights that the Italian constitutional charter assumes as its foundation.

Even on the Albanian front, there have been concerns about the compatibility of the Protocol with the constitutional charter. With the ratification of the Protocol, Albania granted Italy the right to use certain areas free of charge. For this reason, the bilateral Protocol was subject to a preventative constitutional review that had suspended the ratification process. On January 29, 2024, the Constitutional Court of Tirana, with five judges in favour and four against, granted approval for the ratification of the Protocol with Italy. The judges did not find any illegitimacy profiles and declared the constitutional nature of the Protocol.

As stated in the press release of the Albanian body,

> "the act would not compromise the territorial integrity of Albania, nor would it deprive Albania of jurisdiction over its own territory, but rather it would operate a 'dual jurisdiction' in human rights matters, binding both the Albanian and Italian states to respect the fundamental rights and freedoms provided for by international conventions. In this perspective, it also deemed it unnecessary to request an advisory opinion from the European Court of Human Rights (ECtHR)" (Celoria, 2024, p. 2).

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2.3 Risks of Fundamental Rights Violations and International Law Implications, Considering the EU Charter of Fundamental Rights and the ECHR

Alongside the provision for extending Italian jurisdiction into Albanian territory, the Protocol fails to clearly define the applicable legal framework. This legislative and procedural gap portends the risk of derogation from fundamental rights and guarantees. Furthermore, neither the Protocol nor the ratification law make any mention of international human rights obligations. Nevertheless, the imperative of human rights protection cannot be overlooked.

> "States shall ensure that measures aimed at addressing irregular migration and combating transnational organized crime (including but not limited to smuggling of migrants and trafficking in persons) at international borders, shall not adversely affect the enjoyment of the human rights and dignity of migrants" (OHCHR, 2014: 8)

> "The activities envisaged by the Protocol will, in any case, be subject to compliance with the 1951 Convention, the European Convention on Human Rights, and the UN treaties and agreements to which both States are parties, as well as the general principles of customary international law (e.g., the principle of non-refoulement, the prohibition of torture, etc.). The EU Charter of Fundamental Rights – which includes the prohibition of refoulement and the guarantee of the right to asylum – is also relevant to the implementation of the Protocol and the proposed ratification law" (UNHCR, 2023: 4).

Foremost among these principles is the obligation of non-refoulement, which today represents a norm of customary international law. As is known, for a norm to become part of customary international law, two elements are necessary: consistent practice by States and *opinio juris*, i.e., the belief by States that such practice is obligatory due to the existence of a norm requiring its application. A broad part of doctrine agrees that the prohibition of the refoulement of refugees, as contained in Art. 33 of the 1951 Convention Relating to the Status of Refugees and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a norm of customary international law. As such, it is binding on all States, including those that have not adhered to the 1951 Convention.

The fact that the Protocol only uses the generic term "migrants" and contains no explicit reference to asylum seekers or refugees does not alter the obligations of States under the 1951 Convention and international and regional refugee and human rights law, towards persons seeking or potentially in need of international protection. Furthermore, both Italy and Albania are parties to the 1951 Convention, and therefore the Protocol must necessarily respect its treaty provisions.

In this regard, it is interesting to examine the recommendations that had been proposed by UNHCR on Draft Law 1620 of 18/12/2023 for the ratification and execution of the Protocol. The Agency has highlighted that in the case of agreements involving the transfer of asylum seekers from one country to another for the examination of international protection claims,

> "the State exercising jurisdiction and control over the individuals concerned retains the responsibility to ensure respect for their rights, under international refugee law and human rights law. This includes ensuring adequate reception and treatment conditions, in line with relevant international standards, with particular reference to protection against refoulement and procedural guarantees necessary to ensure a fair and efficient determination of international protection needs, where relevant" (UNHCR, 2023: 2).

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Furthermore, UNHCR has pointed out in the document how the lack of clarity in the legislative framework applicable to individuals subject to the transfer regime established by the Protocol could lead to serious violations of the principle of equal treatment among applicants in the same legal situation. Concerning the Protocol, the UN Refugee Agency has also expressed deep concern about the absence of specific provisions relating to the identification and screening phases of migrants. These phases, constitute a fundamental prerequisite for a true individual assessment of the legitimacy of transfers under the Protocol.

With regard to the obligations to protect fundamental rights arising from regional sources, the Protocol will have to respect the provisions of the European Convention on Human Rights (adopted on November 4, 1950, entered into force September 3, 1953, ETS No. 5, 1950 ECHR). Under Art. 117 para. 1 of the Italian Constitution, the conventional rules are fully applicable to the Protocol. This means that Italy will have the responsibility to ensure the protection of the rights and fundamental freedoms of transferred migrants as guaranteed by the ECHR in Albanian facilities. Furthermore, Art. 1 of the ECHR establishes that the rights and freedoms provided for are ensured to all individuals within the jurisdiction of the contracting States.

Moreover,

> according to the established jurisprudence of the Strasbourg Court, starting from the leading case of 1989 Soering v. United Kingdom, the responsibility arising from the Convention rules lies not with the destination state, but with the contracting Party that exposes the individual to certain risks by delivering him to a state where there are reasonable grounds to believe that he may be subjected to inhuman or degrading treatment" (Zanghì, 2019: 310).

The Strasbourg Court (ECtHR) in its jurisprudence has often interpreted Art. 3 of the ECHR as a complement to the principle of non-refoulement, the beating heart of the 1951 Convention. In fact,

> "in the opinion of the ECtHR, although the Convention does not expressly contemplate the principle of non-refoulement under international law, it must be considered 'already inherent in the general terms of Art. 3'" (Zanghì, 2019: 310).

Despite the fact that the latest Protocol postulating the extension of Italian jurisdiction into Albanian territory, the vague and unclear legal framework of the Italian-Albanian Protocol could lead to the reemergence of violations of the ECHR by Italy, particularly Art. 3 and Art.4 of Protocol No. 4. This concern becomes more pronounced when considering the absence of any form of guarantee for the respect of the fundamental rights of the 'migrants' who will be subject to the Protocol.

Another source of regional nature concerning the respect of human rights to which the Protocol must adhere is the Charter of Fundamental Rights of the European Union (adopted on December 7, 2000, entered into force on December 1, 2009, 2000/C 364/01, 2000 CFR). The obligation of the Member States to respect the rights protected by the Charter is the necessary corollary of the EU's obligations regarding fundamental rights.

2.4 Examination of the Extraterritorial Application of Rights under the Charter and the Convention within the Context of the Protocol, including Challenges, Opportunities, and Implications for Policy Coherence

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Considering the norms of international human rights law and the postulated Italian jurisdiction in Albanian territory, it is necessary to analyse the extraterritorial application of human rights treaties, for which Italy will be responsible. The extraterritorial application of human rights treaties refers to the ability and obligation of states to respect and guarantee human rights outside their own national territory, as well as within. This means that states are required to observe the principles and obligations enshrined in international human rights treaties not only within their national borders but also in relation to their actions and policies involving individuals or territories outside their national jurisdiction.

With reference to the European Convention on Human Rights (ECHR),

> "the existence of Italian jurisdiction for violations of the convention's provisions committed in Albania (a state party to the ECHR) seems to find confirmation in the case law of the European Court of Human Rights (ECtHR), which has determined the extraterritorial application of the convention in two cases: where the state exercises effective control over a territorial area outside its borders (the so-called spatial model); and where the state exercises effective control over individuals (the so-called personal model)" (Siccardi, 2024: 119).

Both profiles are identifiable in the Protocol.

Regarding the EU framework, the European Union is obliged to uphold respect for human dignity, the rule of law, and the principles of freedom, equality, and solidarity in both its internal and external actions (Art. 2 and Art. 21 of the Treaty on European Union). In fact, the EU's primary obligations in the field of human rights are based on the universality and indivisibility of human rights, along with the promotion of democratic principles and values. For this reason, it is essential to remember the crucial role of so-called extraterritorial obligations in the field of human rights. Additionally, the EU's obligation to duly consider human rights in external relations is not limited to the Charter of Fundamental Rights. It extends, in principle, to fundamental rights recognized as general principles of EU law, which the Court of Justice ensures compliance with under Art. 6 para. 3 TEU.

> The Charter of Fundamental Rights provides the primary reference (Art. 6 TEU) for establishing the minimum set of protections with which the EU and its MSs must comply when exercising their powers and when 'implementing Union law' (Art. 51(1) CFR). […] The question of extraterritorial applicability is also dealt with, reaching the conclusion that the fundamental rights acquis applies whenever a situation is governed by EU law, whether the action/omission is undertaken within the territorial boundaries of MSs or not" (Policy Department for External Relations, 2020: VIII).

> There is a series of rights that the Charter recognises as being applicable to all persons, which are of particular relevance in the context of external and extra-territorial EU and MS action in the areas of migration, borders and asylum" (Policy Department for External Relations, 2020: 14).

2.5 The Protection of Asylum Seekers with Specific Needs

The concerns raised about the Protocol become even more profound when considering the vulnerable category of asylum seekers. As known, the concept of vulnerability lies at the heart of the so-called complementary protection. It is defined as such precisely because it should serve as the national complement to international protection. Thus, the two dimensions – the international and the national one – should integrate in order to ensure adequate protection standards for asylum seekers.

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In Italy, Art. 17 of Legislative Decree No. 142/2015, which implements EU Directive 2013/33, the so-called "Reception Directive", provides an open and non-exhaustive list of persons recognized as vulnerable. The provision states

> "Reception measures provided for in this Decree take into account the specific situation of vulnerable persons, such as minors, unaccompanied minors, disabled persons, the elderly, women (, with priority for those) in a state of pregnancy, single parents with minor children, victims of human trafficking, persons suffering from serious illnesses or mental disorders, persons who have been found to have suffered torture, rape, or other serious forms of psychological, physical or sexual violence related to sexual orientation or gender identity, victims of genital mutilation."

For this reason, the Protocol should provide for derogations for the aforementioned categories. However, these are not explicitly stated, and the risk of non-procedural differentiation among asylum seekers becomes increasingly concrete. The fact that the Law No. 14 of February 21, 2024, provides for the generalized detention of persons rescued at sea by Italian military ships and transferred to Albania seems to be a reversal of perspective compared to Art. 13 of the Constitution, which always requires individual and motivated measures, resulting in a restriction of personal freedom. Furthermore, collective detention is prohibited in the Italian legal system by the Legislative Decree of July 25, 1998, No. 286 (Art. 9 et seq.).

The exclusion of minors and other vulnerable individuals from the accelerated procedure is not mentioned in the Draft Law, which has been assumed several times so far, as well as for all those for whom the accelerated border procedure does not apply in any case. These are individuals, albeit residual, who cannot be detained in centres in Albania and, if brought there, should be immediately transferred to facilities located in Italy, suitable for their reception; but the Draft Law does not address this aspect in any way, thus leaving the urgent need to fill this serious gap through a parliamentary process.

Despite the Italian Prime Minister's statement from November 6, 2023, following the signing of the bilateral treaty, "this agreement, this possibility, does not concern children, pregnant women and other vulnerable individuals" (Presidency of the Council of Ministers, 2023), questions arise about how such a statement will be translated into concrete action and guaranteed. Indeed, the Protocol and the ratification law thereof make no mention of migrants with specific needs. The Democratic Party had proposed an amendment aimed at recognizing the exclusion, but it was rejected on the pretext of preferring to maintain a concise text. It is therefore evident that it was a deliberate choice not to establish precise rules for the screening of vulnerable subjects.

For these reasons, in the author's opinion, it is difficult to find any example of complementary protection for asylum seekers in the Protocol.

3 Interconnection with Art. 25 of the EU Visa Code: Potential Precedents for Expanded Application

The extraterritorial respect of human rights, and application of the ECHR and the EU Charter of Fundamental Rights, presents a significance challenge for different migration policy instruments available to Member States of European Union: Art. 25 para. 1 lit. a) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of July 13, 2009 establishing a Community Code on Visas (hereinafter referred to as Visa Code), which provides for the so-called humanitarian visa. It has the potential to allow third-

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country nationals to enter an EU country regularly and safely whether the applicants have a genuine protection need, or are reluctance to return to their own country, and therefore wish to apply for international protection.

The issuance of the so-called humanitarian visa must follow an eligibility assessment to evaluate needs deserving protection, as well as the criteria for the possible recognition of international protection. This assessment, done in the diplomatic and consular representation of an EU Member State in a third country, of which the foreign applicant may or may not be a citizen, raises the issue of the existence of an EU extraterritorial jurisdiction concerning the protection of fundamental rights, and the right of asylum among them.

Therefore, despite having opposite goals, both the Italy-Albania Protocol and the so-called humanitarian visa share the need to assess, within the territory of a third country, the requirements for recognizing international protection. This includes arranging the repatriation of migrants not entitled to entry and stay in Italian territory and issuing humanitarian visas. This is something that poses obstacles and raises potential benefits to fundamental rights protection, as already introduced in the previous paragraph. In other words, the extraterritorial extension of an EU country's jurisdiction in the field of migration and asylum, as the Italy-Albania Protocol unveils, presents both challenges and opportunities in terms of setting precedents for the expanded application of rights and regulations in migration policy such as the implementation of Art. 25 of the Visa Code, which at the time of writing presents a very limited application.

3.1 Analysis of the Provisions Concerning Humanitarian Visas and the Potential Benefits of their Issuance in Upholding Fundamental Rights, Including the Right to Asylum

According to Art. 77 and Art. 79 of the Treaty on the Functioning of the European Union (TFEU), the EU has established a common regulatory framework aimed at "facilitating legitimate travel" and "combating illegal immigration through further harmonization of national legislation and practices for the handling of visa applications at local consular representations". This represents the legal basis of Regulation (EC) 810/2009 establishing the Visa Code, which "sets out the procedures and conditions for issuing transit visas or visas for stays not exceeding three months in any six-month period in the territory of the Member States" (Art. 1).

In the Visa Code, Art. 19 para. 4 introduces the possibility to issue a humanitarian visa, whenever a visa application does not meet the requirements set out in para. 1 of the same Article: a visa application "may be considered admissible on humanitarian grounds or for reasons of national interest". However, the Article does not give a clear definition specifying what can constitute "humanitarian grounds" or "national interest".

Consequently, Art. 25 para. 1 lit a) of the Visa Code directly provides for the issuance of a limited territorial validity visa (VLT), valid for a 90-days stay, to a third-country national for "humanitarian reasons, national interest, or in accordance with international obligations", deviating from the principle of compliance with entry conditions outlined in Art. 5 para. 1 lit. a), c), d), and e) of the Schengen Borders Code. However, once again, the Article does not provide criteria to assess humanitarian reasons and national interest, whereas the reference to the respect of international obligations should be clear. Given the

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humanitarian scope of the visa, there is an evident invocation of international obligations concerning the respect for human rights.

Therefore, the issuance of humanitarian visas should respect and adhere to international obligations, such as those arising from human rights treaties, and thus has a positive impact on fundamental rights. For instance, by offering a mechanism to enter a territory legally to seek refuge or assistance, humanitarian visas can potentially prevent individuals from resorting to dangerous and irregular migration routes, thus reducing the risks of exploitation, trafficking, or abuse, in line with the rights outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Additionally, humanitarian visas uphold the principles of *non-refoulement* and provide access to protection mechanisms, ensuring that individuals fleeing persecution or violence can seek asylum or other forms of international protection in a safe and lawful manner, as stipulated by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Moreover, humanitarian visas can foster international cooperation and solidarity in addressing humanitarian crises by allowing countries to share the responsibility of providing assistance to those in need, as called for in the 2030 Agenda for Sustainable Development and the Global Compact on Refugees.

Up to now humanitarian visas have been a useful instrument – although to a limited extent – for the implementation of legal pathways towards the EU for people in need of protection, including resettlement programmes, humanitarian admission programmes, protected entry procedures, facilitated entry schemes for certain nationalities or certain groups, for family reunification purposes, and for labour and study purposes[4]. Unfortunately, these mechanisms are not uniformly adopted in every EU Member State as there is no obligation for their activation, and they only constitute a minority of the entries registered in EU Member States.

On the other hand, a humanitarian visa presents several problematic aspects in its role as for the protection of human rights. First, the vagueness of the grounds for issuing humanitarian visas and the inexistence of a dedicated EU regulation creates uncertainty. This vagueness allows Member States the discretion to both decide whether to issue such a visa and to classify the reason for the request as "humanitarian", given the absence of criteria indicating the situations that can justify granting this type of visa. In relation to this, the evaluation method for visa issuance raises questions about the entity or entities responsible for examining the request, how it should be conducted, on which legal basis and following which procedure.

Second, the territorial validity and short duration of the visa (90 days) raise concerns. This, combined with the visa's limited territorial validity (LTV) to the Schengen State whose representation issued the visa has sparked debate about Member States' obligations under Art. 25, especially where the refusal to issue such a visa would expose individuals to the risk of inhuman and degrading treatment. The Court of Justice of the European Union (CJEU) in the case X and X v. Belgium (C-638/16 PPU), decided on March 7, 2017, ruled in a restrictive sense. The CJEU in its decision considered that the request for a visa to enter the territory of a Member State for the purpose of seeking asylum may be denied

[4] For further reading, see Commission Recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the European Union: promoting resettlement, humanitarian admission, and other complementary pathways.

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since more than a 90 days' stay in the Member State is required to complete the asylum application procedure, which is a longer duration than that provided for in Art. 25 of the Visa Code. Furthermore, since the EU does not provide rules governing visas allowing stays longer than 90 days, the Court considered that it is not possible to apply Union law, or the obligations enshrined in the EU Charter of Fundamental Rights. One could argue whether the limited duration truly constitutes an obstacle to the issuance of such a visa, in light of the fact that, according to Art. 33 para. 1, of the Visa Code,

> "The period of validity and/or the duration of stay of an issued visa shall be extended where the competent authority of a Member State considers that a visa holder has provided proof of force majeure or humanitarian reasons preventing him from leaving the territory of the Member States before the expiry of the period of validity of or the duration of stay authorised by the visa."

Furthermore, when the holder of the humanitarian visa applies for asylum, his/her legal status changes, no longer falling under the visa regime but rather under that of international protection (Del Guercio, 2017: 284).

The third problematic element is precisely the non-obligatory nature of visa issuance, as derived from the mentioned CJEU's judgment. According to the Court, there is no obligation for Member States under Union law to issue a humanitarian visa to persons intending to enter their territory with the intention of seeking asylum (para. 49), but they remain free to do so on the basis of their respective national law. The inexistence of an obligation to issue humanitarian visas is also strongly linked to a practical, and somehow political, risk: If an obligation to admit the entry of all people living in catastrophic situations existed, the risk would be that of "requiring the developed countries to accept entire populations from the developing world, countries at war or those ravaged by natural disasters" (ECHR, Judgment of 5/3/2020, M.N. and Others v. Belgium, No. 3599/18, para. 19).

Finally, since the issuance of the humanitarian visa requires an eligibility assessment, it is not clear to what extent a Member State can extend its jurisdiction extraterritorially for this purpose. The lack of clear and complete standards on admission for humanitarian and asylum-seeking purposes worsens the scenario. On the one hand, EU law does not regulate the extraterritorial application of asylum rules, leaving it within the residual competence of Member States. They may examine asylum applications outside their territory, applying their own laws – as the Italy-Albania Protocol aims to do – provided it does not hinder internal application and is in accordance with EU law. On the other hand, should human rights as provided for by international human rights treaties be guaranteed extraterritorially?

3.2 Examination of the Extraterritorial Application of Rights under the Charter and the Convention in light of the "M.N. and Others v. Belgium"

The extraterritorial extension of a state jurisdiction in the matter of compliance with international treaties on human rights is particularly controversial when concerning immigration matters. Moreover, "whether asylum-seekers applying for a visa at an embassy or consulate trigger the non-refoulement principle – is [...] a long-standing and contested issue in refugee law scholarship" (Gammeltoft-Hansen, 2020: 1).

Indeed, the extraterritorial application of fundamental rights during the assessment for the issuance of the humanitarian visa has been subject to a legal debate, exemplified by the case M.N. and Others v. Belgium (No. 3599/18), adjudicated by the ECtHR on March

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5, 2020. While the ECHR obliges states to respect human rights within their jurisdiction, the application of this principle to extraterritorial actions remains contentious. This raises questions about the feasibility of extraterritorial examination of asylum claims and imposes limitations on the application of Art. 25 of the Visa Code, hindering the possibilities of providing regular, safe, and orderly entry for those in need of protection.

In the case M.N. and Others v. Belgium, the ECtHR examined whether the failure to issue a humanitarian visa by Belgian authorities to Syrian citizens at the Belgian diplomatic representation in Beirut constitutes a violation of Art. 3 (Prohibition of Torture) and Art. 13 (Right to an effective remedy) of the ECHR. The applicants were a married couple with their two children, who

> "stated that in terms of both security and living conditions they were in a situation of absolute emergency on account of the armed conflict in Syria and, more specifically, the intensive bombardment of Aleppo" (para. 10 of the Decision).

First, the court had to assess whether the application could be considered admissible evaluating the question of jurisdiction within the meaning of Art. 1 of the Convention. According to Art. 1 (Obligation to Respect Human Rights), "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". As a consequence, extraterritorial application of the ECHR "refers to the recognition (French for 'securing' in Art. 1 ECHR) of ECHR rights by states parties and the identification of the corresponding duties on their part to individuals or groups of individuals situated outside their territory" (Besson, 2012: 862).

According to a restrictive interpretation of the Strasbourg Court (Gondek, 2005) in the case Banković and others v. Belgium and others (No. 52207/99), decided on December 12, 2001, jurisdiction of a state primarily coincides with its own territory because it is where the state is presumed to exercise full powers and control (see para. 61). Moreover, in the Banković case, the Court ruled out the possibility of determining jurisdiction based on a cause-and-effect link, otherwise

> "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Art. 1 of the Convention" (para. 75).

In 2011, the Court also ruled in the case Al-Skeini and others v. the United Kingdom (No. 55721/07) that the Convention may apply extraterritorially where the State exercises effective control over a part of territory beyond its borders or, through its agents, over an individual (see para. 136).

In a previous judgment, the Court applied a different, more functional criterion to determine the existence of jurisdiction, this time giving importance to the cause-effect element. In the case of PAD and others v. Turkey (No. 60167/00), decided on June 28, 2007, concerning the killing of Iranian citizens by a Turkish helicopter, the Court affirmed Turkey jurisdiction considering it unnecessary "to determine the exact location of the impugned events" since "the fire discharged from the helicopters had caused the killing of the applicants' relatives" (para. 54).

In the case of our interest, M.N. and Others v. Belgium, decided on May 5, 2020, the Strasbourg Court followed the more restrictive trend, holding that the failure to issue a humanitarian visa cannot constitute a violation of rights under the ECHR given the

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inexistence of circumstances justifying the extraterritorial exercise of a Member State's jurisdiction. The Court considered that protection requests at diplomatic representations abroad are outside the scope of the Convention and, therefore, issuing a visa under Art. 25 of the Visa Code is not mandatory for protecting foreign nationals from the risk of inhuman and degrading treatment. In addition, the Court cleared that there is no general obligation for States to admit foreign citizens in their territory, as the existence of such obligation

> "would give way to an unlimited obligation on the States Parties to authorise entry to their territory to individuals who were at risk of treatment in breach of Art. 3 anywhere in the world" (para. 89).

At the same time,

> "the Court notes that this conclusion does not prejudice the endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations" (para. 126).

This judgment, together with the 2017 CJEU's, confirms that there is currently no EU obligation regarding the issuance of humanitarian visas, and such obligation does not derive from human rights protection. However, they leave open the possibility for individual Member States to use this instrument and for the EU to intervene with a legislative act to better specify the conditions for applying Art. 25 of the Visa Code. In other words, while there is no absolute obligation to respect and guarantee the rights provided for by the ECHR outside the territory and jurisdiction of a state, one could argue that there remains the possibility of issuing a humanitarian visa and thus, consequently, effectively safeguarding the rights guaranteed by the ECHR, meaning that the absence of obligation does not imply a prohibition.

The provisions of the Italy-Albania Protocol demonstrate an openness towards a concrete scenario in which Italy extends its jurisdiction beyond its national territory and will undoubtedly be called upon to respect and guarantee the rights provided for by the ECHR.

3.3 Interplay between the Italy-Albania Protocol and the Art. 25 of the Visa Code

The analysis of Art. 25 of the Visa Code and of the Italy-Albania Protocol has been conducted because both instruments carry significant implications for fundamental rights protection and asylum policies on the territory of a third country. They include ensuring compliance with international human rights standards, addressing jurisdictional issues, and balancing national security concerns with humanitarian considerations. Therefore, the integrated reading of these instruments aims at highlighting the challenges and opportunities that exist to enhance cooperation between states, strengthen asylum systems, and uphold the rights of individuals in need of protection.

However, while both the Italy-Albania Protocol and Art. 25 of the Visa Code aim to address migration-related challenges, they represent two different approaches to migration policy. Firstly, they differ in objectives, given that, albeit operating within the same framework of immigration management, they are instruments of migration policy that move in opposite directions: the strengthening of the non-entry policy to reduce immigration flows represented by the Italy-Albania Protocol vs. the implementation of regular channels for protection seekers towards EU Member States represented by the humanitarian visa.

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Secondly, they differ in nature: the Italy-Albania Protocol is a bilateral agreement that explicitly extends jurisdiction extraterritorially, whereas Art. 25 of the Visa Code operates within the framework of European immigration law and follows the traditional determination of jurisdiction which, as explored in the previous paragraph, excludes the application of the ECHR. As already introduced, the Protocol stipulates that "border or return procedures provided for by Italian and European legislation" (Art. 4, para. 3) shall be carried out on Albanian territory, and Art. 7 states that

> "the competent Italian authorities shall bear all costs necessary for the accommodation and treatment of the persons received […], including food, medical care […], committing to ensuring that such treatment respects the fundamental rights and freedoms of man, in accordance with international law."

This also implies the extraterritorial extension of constitutional guarantees and, therefore, the adherence to international human rights law. This means the extraterritorial application of the ECHR is undeniable, given the two circumstances already mentioned: the exercise by the Italian State of effective control over a territorial area outside its borders, and the exercise of control over individuals.

In conclusion, the analysis of Art. 25 of the Visa Code in interaction with the recent Italy-Albania Protocol offers insights to reflect on the prospects for European migration policy, ensuring fundamental rights and envisaging new procedures for the extraterritorial examination of protection needs.

4. Implications for Fundamental Rights Protection and Asylum Policies

The decision to analyse the Protocol in conjunction with Art. 25 of the Visa Code is intended to critically examine potential perspectives for evaluating requests for international protection by one state on the territory of another. On the one hand, the Italy-Albania Protocol extends national jurisdiction and thus theoretically ensures the application of the ECHR, but also brings forth numerous challenges in terms of practical protection of the rights of foreign citizens entering Albania under Italian jurisdiction. On the other hand, Art. 25 of the Visa Code represents a traditional migration policy instrument, the visa, which in this case is issued for humanitarian reasons. It has the potential to facilitate safe and regular migration to the EU, protect the rights of foreign citizens with protection needs, but simultaneously encounters limitations in terms of the limited responsibilities and obligations of states that can issue it.

The primary issue under consideration is the implications of the Protocol's application for the respect of fundamental rights, although it is challenging to foresee the actual impact of the policy on individuals and their rights.

As for the implications regarding the practical protection of the rights of foreign citizens entering Albania, it is useful to refer to a recent judgment of the European Court of Human Rights: J.A. and Others v. Italy (No. 21329/18). On March 30, 2023, the court condemned Italy for violations of Art. 3 (prohibition of inhuman or degrading treatment), Art. 5 paras. 1, 2, and 4 (right to liberty and security), and Art. 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) of the ECHR. The Court found that the detention of the applicants, or deprivation of personal liberty, for 10 days at the Lampedusa hotspot occurred in the absence of a clear and accessible legal basis; that this constituted inhuman and degrading treatment due to the poor material conditions of the hotspot; and

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that the expulsion orders issued against the applicants lacked individualized and adequate assessment, thereby amounting to collective expulsion. Similar conclusions were reached by the Court in October 2023, in the cases ECtHR, Judgment of 19/10/2023, A.B. v. Italy, No. 13755/18, ECtHR, Judgment of 31/08/2023, M.A. v. Italy, No. 70583/17 and ECtHR, Judgment of 19/10/2023, A.S. v. Italy, No. 20860/20.

The choice to extend Italian jurisdiction to Albanian territory thus raises and will continue to raise questions and issues from the perspective of the extraterritorial effectiveness of guarantees protecting fundamental rights, similar to those examined in the cases just mentioned, due to the similarity of the practices in question: detention, undefined living standards and services, problematic access to legal assistance, undifferentiated standards for vulnerable people, and others. As Savino argues,

> "International agreements on extraterritorial immigration management typically postulate (already ex ante, in their conception) and fatally determine (ex post, in the implementation phase) a drastic reduction in the standards of protection of migrants' rights." (Savino, 2024: 1)

In light of the provisions of the Protocol and its implementing legislation, many scholars, academics, and jurists fear "that areas far from our eyes may become, in practice, places of deviation from constitutional guarantees" and thus deviation from associated international obligations; this fear arises from the fact that the exercise of rights will occur "in ways different from those in Italian territory" (Siccardi, 2024: 120-121)

Specifically, there is a fear and therefore a risk of violating the right to asylum and the prohibition of collective expulsions (Art. 4 Protocol 4 ECHR), the prohibition of inhuman and degrading treatment in centres (Art. 3 ECHR), the violation of guarantees protecting personal liberties (Art. 5 ECHR), and the right to defence (Art. 6 ECHR). It thus appears that the response to immigration management and border control provided by the Protocol may constitute a threat to internationally recognized fundamental human rights.

Secondly, implications for fundamental rights protection and asylum policies unveiled by the issuance of humanitarian visas are considered to be superior to those that the Italy-Albania Protocol may theoretically bring about. Effectively carrying out extraterritorial procedures to safeguard fundamental rights, and issue humanitarian visas – while the examined judgments of the CJEU and the ECtHR do not prohibit such actions but leave the option open – can lead to greater overall protection of the fundamental rights of those who are forced to migrate. This would eliminate the need to rely on traffickers to undertake the journey, reducing the risk of incidents during travel, decreasing the likelihood of exposure to violence and inhuman and degrading treatment, and increasing the possibility of protecting specific vulnerabilities, as well as reducing irregular migration – the latter being at the core of the Italian immigration policy.

The limitation of the non-mandatory issuance of humanitarian visas echoed by the judgment M. N. v. Belgium, which uses the argument of the non-extraterritorial extension of the ECHR, could be met with a change if new perspectives regarding extraterritoriality are considered by the CJEU and the Strasbourg Court. A new perspective is offered by the two communications of January 27, 2021, the UN Human Rights Committee (UNHRC) addressed to Italy and Malta: A.S. and others v. Malta (n. 3043/20179) and A.S. and others v. Italy (n. 3042/2017). The UNHRC assessed the responsibility of the Maltese and Italian states for violations of obligations arising from the right to life (Art. 6 International Covenant on Civil and Political Rights - ICCPR), in relation to the failure to carry out rescue

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operations in a shipwreck in the Mediterranean in 2013, when more than 200 migrants lost their lives at sea. In both decisions, the UNHRC adopted an innovative approach due to an extensive notion of extraterritorial jurisdiction under Art. 2 para. 1, of the ICCPR. The notion itself follows the "functional" approach introduced in General Comment No. 36 of the UNHRC on the right to life, published in September 2019. Para. 63 of the General Comment indicates that a State must apply Art. 6 of the ICCPR to

> "all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner."

The innovative scope of the notion lies in overcoming the traditional exercise of effective control over territory or individuals, and in considering it sufficient in affecting the enjoyment of human rights (Fazzini, 2021). Certainly, this functional approach poses difficulties in determining the existence of extraterritorial jurisdiction as the assessment is less rigorous and based on both factual and legal elements. However, this interpretive novelty introduced by the Committee in 2019 and recalled in 2021 represents a precedent, albeit non-binding, capable of influencing international courts such as the European Court of Human Rights, which adopted a similar approach in the mentioned PAD and others v. Turkey in 2007, in all those situations where there is no precise territorial boundary or clear relationship between the State entitled to the application of human rights provisions and the individuals with whom it interacts outside the national territory.

In conclusion, the Protocol and its implementation demonstrate that extending jurisdiction to carry out immigration and asylum procedures is achievable with political will and despite all inherent limitations. While the application of a tool such as the humanitarian visa remains inadequate, again due to the role of political will, and given existing regulatory and jurisdictional limitations.

5 Conclusions

In light of the findings of the normative analysis of the Protocol, it seems appropriate to present some concluding remarks.

The Italy-Albania Protocol, part of the broader category of border externalization policies, represents one of the latest and most innovative attempts by European States to effectively manage migration flows towards the Union. The initiative highlights the complex interplay between migration management objectives, geopolitical interests, and ethical considerations, underscoring the need for comprehensive and rights-based approaches to migration governance both within and beyond the EU.

In the author's opinion, confronted with new political paradigms, old human rights violations will resurface. What is concerning is that the Protocol has opened an unprecedented scenario, and many EU Countries are looking at this model with interest and considering its adoption. On May 15, 2024, a group of 15 European Union Member States issued a joint letter to senior officials of the EU Executive Commission to find "new solutions" in the fight against irregular immigration. The letter mentions the Italy-Albania Protocol as a potential model for migration management to be adopted:

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> "Additionally, possible place of safety arrangements and transit mechanisms inspired by the existing Emergency Transit Mechanisms could be explored, which would be aimed at detecting, intercepting, or in cases of distress, rescuing migrants on the high seas and bringing them to a predetermined place of safety in a partner country outside the EU, where durable solutions for those migrants could be found, also building on models like the Italy-Albania Protocol (Ministers, 2024).

On the horizon, we see the dawn of a new system of agreements between the EU and non-EU countries characterized by undefined regulatory boundaries that can undermine the imperative of human rights protection. Indeed, the Protocol appears to be in open violation of inviolable rights. These rights, being coessential to human dignity, are inalienable for each individual, regardless of the territory in which they are located. The risk that this type of policy could be systematized and codified at the EU level would represent an open repudiation of the core human rights that the EU commits to uphold (Art. 2 TEU).

Conversely, a traditional migration policy instrument already available to EU Member States, such as the visa issued for humanitarian reasons (Art. 25 Visa Code), would be capable of facilitating safe and regular migration to the EU, and of protecting the rights of foreign citizens in need. However, its current regulatory and jurisdictional context, combined with a lack of political will, imposes significant limitations on the responsibilities and obligations of the states that can issue it.

By way of conclusion, the integrated analysis of these two instruments underscores the potential of extending jurisdiction beyond national borders to ensure the protection of fundamental human rights. This potential can be realized only if such extensions are embedded within a precise regulatory framework that clearly defines specific obligations and responsibilities.

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