The Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court Related to the Italian-Albanian Protocol Regarding Illegal Migration: An Agreement Having a Political Nature?

La Decisión núm. 2, del 29 de enero de 2024, del Tribunal Constitucional de Albania relativa al Protocolo italo-albanés sobre migración ilegal: ¿un acuerdo de naturaleza política?

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Publicación: 1st. december, 2025

DOI: https://doi.org/10.22201/iij/24484881e.2026.54.19619

Abstract: In recent years, the flow of asylum-seekers has become a political argument. Since 2020, the EU, as an institution, and some EU Member States have tried to develop asylum policies that aim to externalize the pre-screening process of asylum seekers in third non-EU Member States. Based on this approach, in November 2023, the Italian Government signed an agreement with the Albanian party that aims to review not more than 3.000 asylum applications in the Albanian territory. After uncovering the main parts of this Protocol, this paper argues if this agreement is an international agreement having a political nature. This argument is based on two main reasons. First, four out of nine Albanian Constitutional judges considered this agreement as a political agreement rather than an international treaty. Second, although Albania is part of Protocol no. 16 ECHR, the Constitutional Court did not require an advisory opinion to the ECtHR. In conclusion, the Italian-Albanian Protocol regarding illegal migra-

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tion might have opened the door to legitimizing the pre-screening process of asylum seekers in third non-EU Member States.
Keywords: constitutional rights; migration; political arguments; Protocol on illegal migration an refugee rights.

Resumen: En los últimos años, el flujo de solicitantes de asilo se ha convertido en un argumento político. Desde 2020, la Unión Europea, como institución, y algunos Estados miembros han intentado desarrollar políticas de asilo que tengan como objetivo exteriorizar el proceso de preselección de los solicitantes de asilo en terceros países no miembros de la Unión Europea. Basándose en este enfoque, en noviembre de 2023, el Gobierno italiano firmó un acuerdo con la parte albanesa que tiene como objetivo revisar un máximo de 3000 solicitudes de asilo en el territorio albanés. Tras revelar las partes principales de este Protocolo, este documento analiza si este acuerdo es un acuerdo internacional de naturaleza política. Este argumento se basa en dos razones principales. En primer lugar, cuatro de los nueve jueces constitucionales albaneses consideraron que este acuerdo era un acuerdo político y no un tratado internacional. En segundo lugar, aunque Albania forma parte del Protocolo núm. 16 del CEDH, el Tribunal Constitucional no solicitó un dictamen consultivo al TEDH. En conclusión, el Protocolo italo-albanés sobre la migración ilegal podría haber abierto la puerta a la legitimación del proceso de preselección de los solicitantes de asilo en terceros Estados no miembros de la Unión Europea.
Palabras clave: derechos constitucionales; migración; argumentos políticos; Protocolo sobre migración ilegal y derechos de los refugiados.

Summary: I. *Introduction*. II. *The Italian-Albanian Protocol Regarding Illegal Migration: A Brief Overview from an Albanian Perspective*. III. *The Italian-Albanian Protocol Regarding Illegal Migration: An Agreement having a Political Nature?*. IV. *Conclusions*. V. *References*.

I. Introduction

In recent decades, the flow of asylum-seekers has become one of the leading hot topics. For instance, in 2023, more than 1 million first-time asylum seekers applied for international protection in the EU, up 20% compared with 2022. (Eurostat, 2024) Among others, Italy was one of the leading countries of destination for first-time asylum applicants in the EU in 2023. (Eurostat, Asylum applications - annual statistics, 2024)

National governments, who are skeptical about migration, have traditionally linked migration and asylum policies with issues of national security. (Mogire, 2009; Adamson, 2006; Bigo, 2002) Indeed, the impact that migration might have on national security depends on the efficacy of a State's policy to shape migration flows according to its national interests. (Adamson,

e-ISSN: 2448-4881 | DOI: https://doi.org/10.22201/iij.24484881e.2025.54.19619
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2006) This paper studies the Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court related to the Italian-Albanian Protocol regarding Illegal Migration through an innovative approach. In other words, this research raises doubts regarding the classification of this agreement as an agreement having a political nature. This contribution does not aim to give a detailed analysis of the Italo-Albanian Protocol on Illegal Migration as part of the externalization of the asylum pre-screening process, nor to expose a comprehensive doctrinal approach to it. It simply aims to uncover several arguments that might have been used to justify the violation of (Albanian) constitutional rights, once the Albanian Constitutional Court was asked about its constitutionality. It might seem that political arguments are used to violate Albanian constitutional norms.

This contribution has the following research questions: is this Protocol an agreement having a political nature or an implementation of the Treaty of Friendship and Cooperation between the Italian Republic and the Republic of Albania of 1995 (Treaty of Friendship)? In other words, it is fundamental to correctly qualify this Protocol because if this Protocol is a agreement having a political nature, based on Article 92(1)(ë) and 121(1)(a) and (b) Albanian Constitution, (Albanian Constitutional Court, 2024) as well as the Albanian Constitutional case law, (Albanian Constitutional Court, 2010) for international agreements with a political nature, the competence is of the President, who did not sign this Protocol. While the current scholars have focused on extraterritorial issues, (Nicolosi, 2024; Fontana & Rosina, 2024; Rosina & Fontana, 2024; Punzo, 2024; Campesi, 2023) this research underlines the Albanian approach to this protocol by raising doubts about its constitutionality.

This paper studies Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court related to the Italian-Albanian Protocol regarding Illegal Migration through an interdisciplinary approach. More concretely, Section II reviews decision no. 2 of 29.01.2024 of the Albanian Constitutional Court, by also comparing it with the constitutionality requests in the period from January 2022 to June 2024. It briefly reviews the decision and the dissenting opinion since, according to Article 132(3) of the Constitution, *the minority's opinion shall be published along with the final decision.* Section III raises doubts about whether this Protocol is an agreement having a political nature rather than an executive protocol of the Treaty of Friendship and Cooperation between the Italian Republic and the Republic of Albania of 1995 (Treaty of Friendship)(Article 19(1), n.d.) as underlined by the Al-

e-ISSN: 2448-4881 | DOI: https://doi.org/10.22201/iij.24484881e.2025.54.19619
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banian Constitutional Court. In conclusion, the contribution discusses these findings.

II. The Italian-Albanian Protocol Regarding Illegal Migration: A Brief Overview from an Albanian Perspective

This Section introduces the Italian-Albanian Protocol regarding illegal migration. In other words, it uncovers the main arguments used by the Albanian majority opinion to justify the constitutionality of this Protocol. In addition, it compares it with the constitutionality requests in the period from January 2022 to June 2024.

For clarity purposes, it shall be mentioned that the transfer of refugees is a topic discussed previously. Examples are the so-called Pacific Solution or the recent decision of the UK-Rwanda Agreement on an Asylum Partnership. From an economic global perspective, the two main transfer systems are north-to-south and south-to-south transfers. (Bubb, Kremer, & Levine, 2011) In the case of north-to-south transfers, refugees are moved from wealthy countries to poorer host countries, whereas the case of south-to-south transfers, where refugees are moved between poorer countries, requires cooperation between poorer countries. The south-to-south transfer system expands migration options for refugees. (Case of compensation of Kenya in 1994: Agreement to accept financial compensation in exchange for receiving Rwandan refugees from Congo, 1994) This approach generates positive externalities for third countries since it eliminates the burden of directly hosting refugees. A complete and detailed investigation has recommended that if the costs of hosting refugees are convex, it will be more efficient not to host large concentrations of refugees in neighbouring countries. As a result, economic scholars have advocated a south-to-south transfer system since it reduces the total social costs of hosting refugees. (Bubb, Kremer, & Levine, 2011) The Italian-Albanian Protocol regarding illegal migration is something between these systems. It shares with the north-to-south that asylum seekers are transferred from Italy, a member of G7, to Albania, which in 2022 was ranked number 123 in the world economy. Nevertheless, both these countries are part of the world's northern hemisphere.

The process that was finalized with the signature of the Italian-Albanian Protocol regarding illegal migration started on 23.05.2023 when the am-

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bassador of the Republic of Italy in Albania wrote a verbal note informing the general secretary of the Council of Ministers of initiating actions for a possible agreement between Italy and Albania to manage illegal migration. Later, in less than three months, on 21.08.2023, the Italian ambassador forwarded the draft-agreement, while on 06.10.2023, it forwarded a modified version. The reaction from the Albanian side was immediate; in less than 48h, on Friday, 25.08.2023, with the order of the Prime Minister, Order no. 99, an inter-institutional working group was set up with representatives of Albanian institutions to negotiate this agreement.

On 13.09.2023 and 13.10.2023, the Ministry of Foreign Affairs requested to delegate powers to the negotiating group, which was given on 25.09.2023 and 13.10.2023. On 17 and 18.10.2023, talks were held at the technical level on the content of the draft agreement. On 03.11.2023, several steps were concluded on the same day: 1. The Albanian party identified the two areas of use in Lezhë; 2. The Italian party sent the protocol's final version; 3. The Albanian Ministry of Defense requested an opinion from different Albanian institutions on the draft decision for the approval in principle of the Migration Protocol; and, 4. Different Albanian institutions approved, in principle, the Protocol. Later, on 06.11.2023, other two final steps were concluded: 1. The Albanian Council of Ministers approved in principle the Protocol on Migration; and 2. The two countries' prime ministers signed the Protocol.

Without going into the details of the protocol, (aw of Ratification for the Protocol between Italy and Albania (Albanian version), 2024; Protocol between Italy and Albania (Italian version), 2023) two areas in Albania – one area is located in the port of Shëngjin, while the second area is in Gjadër, Lezhë – with a total area of 77,700 m2 is given to the Italian authorities for use without compensation for 5 years (article 3), with the possibility of silent renewal for another 5 years (article 13(2)), to host not more than 3.000 illegal migrants, who do not have the right to enter and stay in Italy.

According to Article 121(1) of the Albanian Constitution, treaties dealing with specific topics—such as international agreements involving territory, peace, alliances, political and military issues, human rights and freedoms, and obligations of citizens as provided in the Albanian Constitution—are ratified by a law approved by a majority of all the members of the Assembly. In these cases, the President shall be involved (Article 92(1)(ë) Constitution). However, *the Prime Minister notifies the Assembly whenever the Council of Ministers signs an international agreement that is not ratified by law* (Ar-

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ticle 121(1) Albanian Constitution). Italy and Albania have had strong relations for decades. Among others, in 1995, these countries signed the Treaty of Friendship and Cooperation between the Italian Republic and the Republic of Albania (Treaty of Friendship). Article 19 of the Treaty of Friendship deals with migration flows. (Article 19 (1) of the International Agreement, n.d.) Thus, it is fundamental to understand if the Italian-Albanian Protocol regarding Illegal Migration of November 2023 is an execution of the Treaty of Friendship of 1995 – as the Council of Ministers underlines – or this is a "new" agreement falling within the areas of Article 121(1) of the Albanian Constitution. In this case, the President shall be involved. As a result, the procedure for ratification of this protocol is unconstitutional.

Based on Article 134(1)(c) of the Albanian Constitution,[1] thirty Albanian deputies requested the Constitutional Court's decision on the constitutionality of this Protocol. From the review of the decisions of the Constitutional Court of 2022, 2023, and the first semester of 2024, the request for constitutionality was found only in 22 decisions. Regarding International Treaties there is only the case of this Protocol. (Albanian Constitutional Court, Decision no. 2 of 29.01.2024, 2024) Focusing on the case of Codes (Albanian Constitutional Court, Decision no. 7 of 29.01.2022; Decision no. 30 of 02.11.2022; Decision no. 39 of 15.12.2022, 2022, Decision no. 69 of 27.12.2023, 2023) Regarding the constitutionality of laws (Albanian Constitutional Court, Decision no. 15 of 22.06.2022; Decision no. 16 of 27.06.2022; Decision no. 18 of 07.07.2022; Decision no. 35 of 22.11.2022, 2022; Decision no. 8 of 22.02.2023; Decision no. 21 of 18.04.2023; Decision no. 32 of 30.05.2023; Decision no. 36 of 16.06.2023, 2023;Decision no. 1 of 25.01.2024; Decision no. 34 of 24.04.2024, 2024) Regarding Parliamentary Decisions (Albanian Constitutional Court, Decision no. 4 of 21.02.2022., 2022; Decision no. 35 of 15.06.2023; Decision no. 70 of 27.12.2023., 2023) From these, the request for the constitutionality of a law or bylaw coming from twenty-thirty Albanian deputies was found only in 9 decisions. (Decision no. 9 of 28.03.2022, no. 18 of 07.07.2022; no. 42 of 27.12.2022, 2022) (Decision no. 21 of 18.04.2023; no. 35 of 15.06.2023; no. 36 of 16.06.2023, 2023; Decision no. 1 of 25.01.2024; no. 2 of 29.01.2024; no. 34 of 24.04.2024. , 2024) This might be a small number compared to the yearly legal decisions. However, it should be mentioned that in Albania, an individual con-

[1] 1. The Constitutional Court initiates a proceeding only on the request of: c. not less than one-fifth of the deputies.

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stitutional complaint has been established. This means that after the decision of the Supreme Court, citizens have direct access to the Constitutional jurisdiction if their constitutional rights have been breached. This approach is similar to the case of Spanish and German constitutions. (Pupe, 2023) In concrete, in the first semester of 2024, in 2023, and in 2022, respectively, 47 (85.5%) out of 55 (2024), (Albanian Constitutional Court, Decisions no. 9 of 27.02.2024; no. 15 of 08.03.2024; no. 33 of 23.04.2024; no. 34 of 24.04.2024, no. 36 of 30.04.02024; no. 41 of 29.05.2024; no. 43 of 04.06.2024; no. 44 of 04.06.2024; no. 45 of 11.06.2024; no. 50 of 20.06.2024; no. 51 of 20.06.2024; no., 2024)61 (87%) out of 70 decisions (2023), (Albanian Constitutional Court, Decisions no. 3 of 07.02.2023; no. 6 of 16.02.2023; no. 9 of 23.02.2023; no. 14 of 21.03.2023; no. 16 of 23.03.2023; no. 20 of 05.04.2023; no. 22 of 25.04.2023; no. 23 of 25.04.2023; no. 25 of 11.05.2023; no. 28 of 18.05.2023; no. 31 of 29.05.2023, 2023; Decision no. 33 of 30.05.2023; no. 37 of 07.07.2023; no. 40 of 14.09.2023; no. 42 of 19.09.2023; no. 43 of 19.09.2023; no. 44 of 26.09.2023; no. 46 of 03.10.2023; no. 50 of 18.10.2023; no. 53 of 31.10.2023; no. 57 of 09.11.2023., 2023) 32 (72%) out of 43 decisions (2022), (Albanian Constitutional Court, Decisions no. 1 of 16.02.2022; no. 2 of 17.02.2022; no. 3 of 17.02.2022; no. 11 of 21.04.2022; no. 22 of 29.09.2022; no. 24 of 11.10.2022; no. 29 of 01.11.2022; no. 31 of 03.11.2022; no. 33 of 14.11.2022; no. 40 of 22.12.2022; no. 41 of 22.12.2022, 2022; Decision no. 43 of 27.12.2022., 2022) dealt with individual constitutional complaints. (Veshi, Koka, & Sheme, 2024)

Moreover, on 11 and 13 December 2023, the Parliament was asked to suspend its approval. After the first filter, on 13.12.2023, the Constitutional Court decided to transfer the case to a plenary session. As a result, the ratification process was suspended. From the review of the decisions of the Constitutional Court from January 2022 to June 2024, from 22 decisions (Albanian Constitutional Court, Decision no. 4 of 21.02.2022; no. 7 of 01.03.2022; no. 9 of 28.03.2022; no. 15 of 22.06.2022; no. 16 of 27.06.2022; no. 18 of 07.07.2022; no. 30 of 02.11.2022; no. 35 of 22.11.2022; no. 39 of 15.12.2022; no. 42 of 27.12.2022, 2022; Decision no. 1 of 23.01.2023; no. 8 of 22.02.2023; no. 21 of 18.04.2023; no. 32 of 30.05.2023; no. 35 of 15.06.2023; no. 36 of 16.06.2023; no. 69 of 27.12.2023; no. 70 of 27.12.2023, 2023; Decision no. 1 of 25.01.2024; no. 2 of 29.01.2024; no. 20 of 03.04.2024; and no. 34 of 24.04.2024, 2024) for a request for consti-

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tutionality related, in none, the Constitutional Court has decided to transfer the case to a plenary session by suspending the execution.

Although the request originated from 30 Albanian Deputies, the Albanian Ombudsman also took a similar position, at least regarding the violation of human rights, Article 121(1)(b) Constitution. The Council of Ministers defended its position, while the President and the Parliament did not send any documents. While the President did not reply at all, the Parliament stated that since the draft bill has not been approved, it is waiting for the decision of the Constitutional Court to ratify the protocol. It is interesting to underline that from January 2022 to June 2024, when there is a request for the constitutionality of a law or bylaw, the Albanian Ombudsman has intervened 4 times, (Albanian Constitutional Court, Decisions no. 7 of 01.03.2022; no. 69 of 27.12.2023, no. 2 of 29.01.2024, no. 34 of 24.04.2024., 2022; 2023; 2024) while the Albanian President (Albanian Constitutional Court , Decision no. 9 of 28.03.2022; no. 18 of 07.07.2022; no. 42 of 27.12.2022; Decision no. 21 of 18.04.2023; no. 35 of 15.06.2023; no. 36 of 16.06.2023; Decision no. 1 of 25.01.2024; no. 2 of 29.01.2024; no. 34 of 24.04.2024, 2022; 2023; 2024) has intervened 3 times. This shows the importance of this Protocol, which involves several public actors.

According to the applicants, based on Article 92(1)(ë) and 121(1)(a) and (b) of the Albanian Constitution, the President should have been involved in the drafting process since the Italy-Albanian Protocol deals with human rights. In addition, the applicant highlights the absence of publication of the bylaw of the Council of Ministers of 06.11.2023 that approved in principle the Protocol on Migration in the Official Gazette. Furthermore, the applicants requested that the Albanian Constitutional Court request an advisory opinion from the ECtHR on questions of principle relating to interpreting or applying the rights and freedoms defined in the Convention or the protocols thereto. It shall be clarified that Albania is a party to Protocol No. 16 to the ECHR, which states that *the highest courts and tribunals of a High Contracting Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto* (Article 1(1)).

While the Council of Ministers defended its position, five out of nine judges agreed with their position. For the period from January 2022 to June 2024, in the 22 constitutionality requests, in 13 cases (Albanian Constitutional Court, Decisions: no. 4 of 21.02.2022; no. 7 of 01.03.2022; no. 9 of 28.03.2022; no. 16 of 27.06.2022; no. 18 of 07.07.2022; no. 35 of

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22.11.2022; no. 42 of 27.12.2022, 2022; Decisions no. 32 of 30.05.2023; no. 35 of 15.06.2023; no. 36 of 16.06.2023; no. 70 of 27.12.2023, 2023; Decisions no. 2 of 29.01.2024; no. 34 of 24.04.2024., 2024), the Constitutional Court has declared the law constitutional, while in 9 cases (Albanian Constitutional Court, Decision no. 15 of 22.06.2022; no. 30 of 02.11.2022; no. 39 of 15.12.2022, 2022; Decision no. 1 of 23.01.2023; no. 8 of 22.02.2023; no. 21 of 18.04.2023; no. 69 of 27.12.2023, 2023; Decision no. 1 of 25.01.2024; no. 20 of 03.04.2024, 2024) the Constitutional Court has declared the law partly or fully unconstitutional. For the same period, in the 22 constitutionality requests, there are 13 decisions (Albanian Constitutional Court, Decision no. 4 of 21.02.2022; no. 16 of 27.06.2022; no. 39 of 15.12.2022; no. 42 of 27.12.2022, 2022; Decision no. 8 of 22.02.2023; no. 21 of 18.04.2023; no. 32 of 30.05.2023; no. 36 of 16.06.2023; no. 69 of 27.12.2023; no. 70 of 27.12.2023, 2023; Decision no. no. 2 of 29.01.2024; no. 20 of 03.04.2024; no. 34 of 24.04.2024, 2024) where the Court has published dissenting opinions. Thus, it is common to have dissenting opinions in the case of constitutionality requests.

According to the majority opinion of the constitutional judges, the Protocol does not change the Albanian territory, either the physical territory or the Albanian jurisdiction on them. In other words, the Italian party will use the Albanian parts temporarily and not permanently and has only the right to use it, while the Albanian sovereignty will remain. On the contrary, according to four Constitutional judges,[2] the fact that the Protocol uses civil law terms – the use of property – also includes rights related to public law since it limits the Albanian jurisdiction in this area. Thus, the Protocol deals with Article 121(1)(a) Albanian Constitution, with the concept of territory.

In addition, according to the majority opinion of the constitutional judges, the Protocol does not narrow human rights, since there is a double jurisdiction: Albanian jurisdiction for the protection of fundamental constitutional rights as well as international liabilities for States and an Italian jurisdiction for the administrative issues concerning the use of these areas. (Veshi, Koka, & Haxhia, 2024) On the contrary, according to three Constitutional judges,[3] the Protocol deals with human rights since, in this area, Albanian (ordinary and administrative) jurisdiction will not be applied.

[2] Ms. Marsida Xhaferllari, Ms. Sonila Bejtja, and Mr. Ilir Toska (first dissenting opinion) and Ms. Elsa Toska (second dissenting opinion)

[3] Ms. Marsida Xhaferllari, Ms. Sonila Bejtja, and Mr. Ilir Toska

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In addition, according to the majority opinion of the constitutional judges, the Protocol is based on the Treaty of Friendship of 1995; precisely, Article 19 deals with migration flows. On the contrary, according to four Constitutional judges,[4] the Treaty of Friendship of 1995 cannot be considered as the framework for this Protocol. While three judges[5] argue the Treaty of Friendship of 1995 cannot be considered a framework for the current Protocol since Article 19 aimed at regulating seasonal Albanian migration in Italy as stated in its attendant relation (The need to control the migratory flow through cooperation and the establishment of an agreement regulating seasonal labor admission) rather than irregular migration from third countries in Italy, one judge[6] underlined that the Albanian Constitution prevails over international treaties (Article 116 Albanian Constitution). (Albanian Constitutional Court, Decision no. 55 of 27.07.2016; no. 16 of 10.04.20125; no. 5 of 05.02.2015; no. 5 of 05.02.2014)

To sum up, the asylum pre-screening process has been established also in other cases. In addition, before the Albanian Constitutional Court, there has been a request for the constitutionality of a law or bylaw. According to most constitutional judges, the Protocol does not narrow the Albanian territory or the human rights established in the Albanian Constitution. Thus, according to most constitutional judges, there was no need for the involvement of the President since this Protocol is based on the Treaty of Friendship of 1995, already ratified by the Albanian Parliament. However, quite interestingly, the Constitutional Court needed to give a clear argument for not requesting an opinion from the ECtHR.

III. The Italian-Albanian Protocol Regarding Illegal Migration: An Agreement having a Political Nature?

The Albanian Constitutional Court consists of nine members: three members are appointed by the President of the Republic; three members are elected by the Parliament; and three members are elected by the Supreme Court. Five out of nine judges have considered this Protocol as constitutional. How-

[4] Ms. Marsida Xhaferllari, Ms. Sonila Bejtja, and Mr. Ilir Toska (first dissenting opinion).

[5] Ms. Elsa Toska (second dissenting opinion)

[6] Ms. Marsida Xhaferllari, Ms. Sonila Bejtja, and Mr. Ilir Toska (first dissenting opinion) and Ms. Elsa Toska (second dissenting opinion)

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ever, four of nine judges have considered this Protocol an agreement having a political nature. The Court's decision has two dissenting opinions. Three judges wrote the first dissenting opinion: two were appointed by the President and one, Ilir Toska, by the Supreme Court. The second dissenting opinion was written by one of the judges elected by the Parliament. Based on the dissenting judges' opinions, this section raises doubts about whether this Protocol is an agreement having a political nature, focusing on the following reasons: 1. The fast proceeding that this Protocol was drafted; 2. Structure of the reasoning; 3. The terminology used; 4. Premises of the reasoning; and 5. Absence of reference to other similar Protocols.

First, the fast proceeding from the moment of drafting to the approval leaves some doors open to the interpretation that this Protocol might be an agreement having a political nature. During the proceeding, six different moments show the acceleration of the proceeding. First, the Italian party presented the first draft in less than three months. Second, in less than 48 hours, in August, on Friday, 25.08.2023, with the order of the Prime Minister, Order no. 99, an inter-institutional working group was set up with representatives of Albanian institutions to negotiate this agreement. August, generally, is a month of vacation. Third, the second authorization from the Minister of Foreign Affairs to the negotiating group was requested and issued on the same day, on 13.10.2023. Fourth, the technical talks on the content of the draft agreement were only for two days, on 17 and 18.10.2023. On the same day, i.e., on 03.11.2023 or on 06.11.2023, several steps were fulfilled within 24 hours or 8 working hours. For instance, on 03.11.2023, within the same day: 1. The Albanian party identified the two areas of use in Lezhë; 2. The Italian party sent the protocol's final version; 3. The Albanian Ministry of Defense requested an opinion from different Albanian institutions on the draft decision for the approval in principle of the Migration Protocol; and 4. Different Albanian institutions approved, in principle, the Protocol. Again, on 06.11.2023, the other two final steps were concluded: 1. The Albanian Council of Ministers approved in principle the Protocol on Migration; and 2. The two countries' prime ministers signed the Protocol. Last but not least, regarding the proceeding, the Albanian Parliament ratified this protocol, law no. 20/2024 of 22.2.2024, only one day after the Italian ratification through law no. 14/2024 of 21.02.2024.

Second, the structure of the decision of the Constitutional Court raises some suspicions. The applicants claimed that the Albanian Constitutional Court should request an opinion from the European Court of Human

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Rights (ECtHR). It shall be mentioned that Albania has ratified Protocol no. 16 ECHR. Thus, in other words, the Albanian Constitutional Court, as the highest Court in Albania, *may seek an advisory opinion only in the context of a case pending before it* (Article 1(2) Protocol no. 16 ECHR). However, the Albanian Constitutional Court, with only a paragraph, par. 64,[7] considered *unnecessary to obtain an advisory opinion from the ECHR* since *the Protocol on Migration, in essence, does not create new fundamental constitutional rights and freedoms, nor does it introduce additional restrictions on existing human rights and freedoms, beyond those provided by the order Albanian legal.* This approach is interesting for three reasons. First, while all the other claims have been organized in sections or sub-sections, the claim for advisory opinion is not part of a separate section or subsection. Second, the Albanian Constitutional Court does not mention Protocol No. 16 ECHR, which Albania has signed. Third, in the future, the ECtHR will be involved. In several cases, the ECtHR has punished Italy for violating asylum seekers' rights[8] or the right to trial within a reasonable time. (Mirate, 2009) Indeed, Article 9 Protocol states that the period of stay of migrants in the territory of the Republic of Albania, in implementation of the Proto-

[7] 64. Consequently, the Court, considering that the Protocol on Migration, in essence, does not create new fundamental constitutional rights and freedoms, nor does it introduce additional restrictions on existing human rights and freedoms, beyond those provided by the order Albanian legal, assesses that it is not included in the category of international agreements in the sense of Article 121, point 1, letter "b", of the Constitution. In conditions where the fundamental rights and freedoms of foreigners enjoy dual jurisdictional protection and the Migration Protocol does not limit them, the Court considers it unnecessary to obtain an advisory opinion from the ECHR, so the applicant's procedural request for this purpose is not accepted.

[8] Among others, ECtHR, Application no. 27765/09, pushed-back at sea, held: violations under Article 3 ECHR, Article 4 of Protocol No 4 (prohibition of collective expulsions) and Article 13 ECHR for being exposed to risk of ill-treatment in Libya and repatriation to Somalia and Eritrea; ECtHR, Application no. 16483/12, concerning the holding in the reception center on the island of Lampedusa and on ships in Palermo harbor in Sicily, violations of Article 5(1), (2) and (4) ECHR and Article 13 ECHR, but no violation of Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR; ECtHR, Application no. 27725/10, concerned Dublin transfer to Italy of a Somali asylum seeker, Application was found manifestly ill-founded and declared inadmissible; ECtHR, Application no. 16643/09, concerned immediate returns to Greece from Italy, Held: Greece violated Article 13 ECHR combined with Article 3 ECHR, for lack of access to asylum procedure and risk of deportation to Afghanistan. A violation by Italy of Article 4 of Protocol No 4 and Article 3 ECHR by returning these applicants to Greece exposed them to the shortcomings of the Greek asylum procedure, and a violation of Article 13 ECHR combined with Article 3 ECHR and Article 4 of Protocol No 4 to the ECHR of the lack of access to asylum procedure in the port of Ancona.

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col, cannot exceed the maximum detention period allowed by current Italian legislation. However, in practice, in several cases, the time is not respected. For instance, a study showed that 23% of the requests for international protection are verbalized between three and twelve months. (Rifugiati), 2010) Thus, it is not comprehensible the reasons that the Albanian Constitutional Court did not raise a question of interpretation of this Protocol to the ECtHR.

Third, the terminology used by the Constitutional Court raises several doubts. For instance, except in one case of the first dissenting opinion of three judges, the Constitutional Court uses the term illegal migration or migrants rather than irregular migration or migrant. The EU Commission underlines that the term 'irregular' is preferable to 'illegal' migrants because the latter carries a criminal connotation. In other words, the term "irregular" is part of administrative law since it indicates an infraction of administrative regulations rather than illegal, which refers to a criminal offense. (Commission, n.d.) So, an act can be legal or illegal, but a person cannot. However, it shall be mentioned that several right-wing parties have used the term "illegal" to link migration with issues of national security by increasing populism. (Greven, 2016; Kurecic & Kuhar, 2019; Toscano, 2015; D'Amato & Skenderovic, 2009)

Fourth, the premises that the five judges who considered this Protocol constitutional should be underlined. According to the majority of the Constitutional judges, this Protocol does not violate Albanian constitutional norms. Their premises are three: first, the Protocol does not violate the Albanian territory, Article 121(1)(a) Constitution, since the Protocol used terminology deriving from private law. Second, the Protocol does not violate human rights, Article 121(1)(b) Constitution, since the term human rights shall be interpreted in *a narrow and purposive interpretation* (par. 55 Decision No. 2 of 29.01.2024). Third, the Protocol is an implementation of the Treaty of Friendship and Cooperation of 1995 (par. 67 Decision No. 2 of 29.01.2024).

The structure of the first premise could be clearer: according to the Court, there is no violation of Article 121(1)(a) of the Constitution, either physical territory or the judiciary. First, there is no violation of the Albanian physical territory because this Protocol includes only *the transfer from the Albanian state to the Italian state authorities of the two areas* (par. 36 Decision No. 2 of 29.01.2024) for *temporary administration* (par. 37). Second, there is no violation of the Albanian jurisdiction because there the provisions of the Protocol *do not exclude the jurisdiction of the Albanian state at the*

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constitutional and convention level for the protection of fundamental human rights and freedoms (par. 44 Decision No. 2 of 29.01.2024). So, in these areas there is an Albanian constitutional jurisdiction, which also includes the application of international law, and the Italian administrative and ordinary jurisdictions as well as the EU law since Italy is part of the EU.

However, as underlined by three dissenting judges, *the relationship that has been created through the Protocol on Migration between the Council of Ministers and the Italian government is not a relationship of private law, but a relationship of public law* (par. 9 Decision No. 2 of 29.01.2024, first dissenting opinion). In other words, the use of private law terminology also includes effects on jurisdiction. Furthermore, jurisdiction is not limited to constitutional jurisdiction but also ordinary, administrative, and criminal jurisdiction, which is given to the Italian party in these territories. Indeed, the Court's reasoning is also incoherent: par. 3 of the Protocol states *these structures will be managed by the Italian authorities, according to Italian and European legislation, and disputes that may arise between the Italian authorities and the migrants who will be accommodated in them, will be subject* exclusively *to Italian jurisdiction* [bold by the authors].

Focusing now on the second premises, par. 55 Decision No. 2 of 29.01.2024, it needs to be more comprehensible to the reasons for *a narrow and purposive interpretation* of human rights. The justification given by the Court is that *a broad interpretation would bring as a long-term and unwanted consequence the hardening of international relations at the executive level* (par. 55 Decision No. 2 of 29.01.2024). However, it should be noted that in recent decades, there has been a broad interpretation of human rights in general as well as of the application of the Ginevra Convention on Refugees. For instance, from the ECHR to the Charter of Fundamental Rights of the European Union of 2000, which become legally binding with the Lisbon Treaty. In addition, the evolutionary interpretation of the 1951 Convention has been underlined by both jurisprudence and doctrine. (Veshi D. , 2024; Veshi D. , Refugee Flow: A Law and Economics Approach, 2020)

Again, the Constitutional Court has considered the Protocol of 2023 as an implementation of the Treaty of Friendship and Cooperation of 1995. The authors disagree with this position since attendant relation of the Treaty of Friendship and Cooperation of 1995 underlines that the *Contracting Parties recognize the need to control the migratory flow through the development of cooperation between the competent bodies and the conclusion of an organic agreement that also regulates the admission of citizens of* both coun-

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tries *to the seasonal labor market, in accordance with the legislation in force* [Page 1 of the attendant relation; bold by the authors].

This reason has also been used by the first dissenting opinion (par. 17 Decision No. 2 of 29.01.2024, first dissenting opinion)

Fifth, the Albanian Constitutional Court has mentioned the national Constitutional jurisprudence of other countries – such as Germany, (Albanian Constitutional Court, Decision no. 69, of 27.12.2023; no. 42 of 27.12.2022; no. 27 of 29.06.2021; no. 20 of 20.04.2021; no. 11 of 09.03.2021; no. 60, of 16.09.2016; no. 19 of 01.04.2016; no. 9 of 26.02.2016; no. 30 of 16.05.2014; no. 2 of 18.02.2013; no. 14, of 03.06.2009) (no. 14, of 03.06.2009; no. 10, of 19.03.2008; no. 40, of 16.11.2007; no. 34, of 20.12.2005; no. 32, of 02.12.2005; no. 30, of 01.12.2005; no. 31, of 19.11.2003; no. 186, of 23.09.2002.) Italy (Decision no. 8 of 22.02.2023; no. 18 of 07.07.2022; no. 29 of 02.07.2021; no. 9 of 01.03.2021; no. 5 of 05.02.2014; no. 4, of 25.02.2009; no. 31, of 19.11.2003.) or France (Decision no. 186 of 23.09.2002) – on several occasions; sometimes, also in the dissenting opinions (Decision no. 23 of 20.04.2016; no. 10 of 18.03.2013; no. 8 of 08.03.2013; no. 7 of 27.02.2013) and sometimes, also by using on the case, legal decisions coming from two different national constitutional courts. (Decision no. 186 of 23.09.2002; no. 31 of 19.11.2003) Nevertheless, in this case, the Albanian Constitutional Court did not mention either the so-called Pacific Solution or the recent decision of the UK-Rwanda Agreement on an Asylum Partnership. In other words, the externalization of the asylum screening is not new. According to the so-called Pacific Solution, boats with passengers heading towards Australia are transferred to other countries. Since 2013, this process also includes offshore processing. Australia has signed various international treaties with different countries, while several attempts with other countries – East Timor, Fiji, France, Kiribati, Palau, Tonga, and Tuvalu – have failed. (Incident, 2002) However, on several occasions, these treaties were considered unconstitutional. For instance, an agreement with Malaysia was considered invalid by the High Court of Australia (Challenge to Migration Policies on Offshore Processing, 2011) since the domestic law of Malaysia does not *contain provisions recognising or affording rights to asylum seekers* (par. 6). Again, while the High Court of Australia upheld the legality of this process with Papua New Guinea, (Constitutionality of Offshore Detention, 2016) in a unanimous decision, the Supreme Court of Papua New Guinea decided that the detention of refugees and asylum seekers in Manus center is unconstitutional (Section 42 Constitution of Pap-

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ua New Guinea: liberty of the person). (Legality of Detention of Asylum Seekers on Manus Island, 2016) Recently, on 15 November 2023, the UK's Supreme Court declared the policy unlawful because Rwanda was not a safe country to remove asylum seekers from. (AAA v Secretary of State for the Home Department, 2023) (NSK v. United Kingdom, 2022; 2023) While on several occasions, the Albanian Constitutional Court has referred to other Constitutional Courts, in this case, it is not understood why the Court did not consider similar situations.

To sum up, this Section investigated the Italian-Albanian protocol regarding illegal migration through critical reasoning, highlighting doubts about its constitutionality since—as stated in the introduction—for international agreements with a political nature, the competence is of the President, who was not involved in drafting this Protocol.

IV. Conclusions

This paper studied Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court regarding the Italian-Albanian Protocol regarding Illegal Migration. After examining the decision, doubts were raised that this is an agreement with a political nature where the President should have been involved.

This Protocol has raised doubts regarding its constitutionality by involving several actors. For instance, a group of Albanian deputies asked the Albanian Constitutional Court for a constitutionality request. In addition to the Council of Ministers defending its decision, the Albanian Ombudsman and the Albanian President were interested parties. From a historical approach, from January 2022 to June 2024, there have been only 22 requests for constitutionality, while only 9 were by a group of Albanian deputies. Except for the decision of this Protocol, while the President intervened only 3 times, the Ombudsman intervened only 4 times.

This Protocol is part of limiting the restrictive asylum procedures; in particular, access restrictions. However, the economic literature is divided over the effects of restrictive asylum procedures. Some scholars argue that restrictive asylum laws directly influence the number of applications and the rate of asylum grants. (Jennissen & Wissen, 2015; Des Places, 2003) This was particularly true before the introduction of the European asylum policy

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expressed in the Amsterdam Treaty of 1999. (Rotte, Vögler,, & Zimmermann F., 1996) On the contrary, other studies argue that restrictive asylum policies do not reduce the inflow of refugees or a better selection of asylum seekers. (Hatton, 2009; Monheim, 2008) These studies explain the peaks of refugees as consequences of broader historical events rather than as the results of specific asylum policies. For example, the peak of (Eastern European) refugees in 1992 came after the fall of the Berlin Wall and the collapse of the Soviet Union; the peak in 2001 followed the wars in Rwanda, Kosovo, and Darfur; the peak of 2015-2016 was the result of Arab Spring; and the peak of 2022 is the result of the Russian war in Ukraine.

This Protocol has two parties. From the Albanian side, it shall be underlined that the use of the Albanian territory is free of charge (Article 3 Protocol), and the constructions within these areas will not pay any Albanian taxes (Article 5(1) Protocol), and there is an exception from indirect taxes and customs duties (Article 5(4) Protocol). Moreover, while the Albanian side facilitates the prompt processing of customs operations (Article 5(6) Protocol), medical care by the Albanian authorities is only reimbursed after they have been spent (Article 4(8) and Article 10 Protocol). In other words, from the Albanian side, there are no financial advantages to accepting asylum seekers in its territory. Or better stated, from the Albanian side, there are no economic advantages to transferring the use of two areas (for temporary administration to the Italian authorities).

From the Italian side, this protocol might help the self-selection of refugees. However, in Italy, in 2022, there were more than 75.000 first-time asylum applicants, (Eurostat, Five main citizenships of first-time asylum applicants (non-EU citizens), 2022 (number), 2022) while the Protocol focuses on a maximum of 3.000 asylum applicants. In Italy, on 1 January 2023, there were approximately 5 million and 775 thousand foreigners present, (ISMU, 2024) and only in 2022, the last available data, 449.118 residence permits, were issued. (ISTAT) Based on these data, several foreigners also come from African countries.

Focusing on Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court related to the Italian-Albanian Protocol regarding Illegal Migration, the majority of judges agreed that this Protocol is constitutional by agreeing with the position of the Council of Ministers. However, four out of nine judges disagreed with them. The fast proceeding for its drafting, the structure and the terminology used as well as the decision to not review the decision of other Constitutional Courts dealing with similar situations or to an advi-

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sory opinion of the ECtHR raise doubts that this Protocol aimed to fulfill political goals rather than protecting asylum seekers' human rights. Indeed, also Amnesty International (International, 2024) has announced that this Protocol violates asylum seekers' human rights. In addition, the EU reaction shows that it is more about political aspects than human rights since the European Commissioner for Home Affairs protects it rather than the European Commissioner for Human Rights does not.

The externalization of the pre-screening process outside the EU is not a novelty in EU politics. Indeed, as part of it, in September 2020, the EU proposed a pre-screening process in third non-EU safe countries (Pact on Migration and Asylum), which was part of the Dublin IV proposal. However, in April 2021, the European Commission withdrew the Dublin IV proposal. Nevertheless, on 10 April 2024, the European Parliament voted in favor of the new rules on migration, followed by their formal adoption by the Council of the EU on 14 May 2024, which also includes an externalization of the pre-screening process outside the EU. This new EU approach towards asylum seekers has been criticized by Amnesty International. (Euronews, 2024)

To sum up, only five out of nine Albanian constitutional judges agreed that the Italian-Albanian Protocol regarding Illegal Migration does not violate Albanian constitutional rights. However, this paper raised doubts that Albanian judges might have used political arguments to justify their decision. This Protocol might have opened the door to the new Pact on Migration and Asylum of April 2024.

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e-ISSN: 2448-4881 | DOI: https://doi.org/10.22201/iij.24484881e.2025.54.19619

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Cómo citar

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Veshi, Denard y Koka, Enkelejda (2026). "The Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court Related to the Italian-Albanian Protocol Regarding Illegal Migration: An Agreement Having a Political Nature?", *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, México, vol. 27, núm. 54, enero-junio de 2026, e19619. https://doi.org/10.22201/iij/24484881e.2026.54.19619

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Veshi, D. y Koka, E. (2026). The Decision No. 2 of 29.01.2024 of the Albanian Constitutional Court Related to the Italian-Albanian Protocol Regarding Illegal Migration: An Agreement Having a Political Nature?. *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, *27*(54), e19619. https://doi.org/10.22201/iij/24484881e.2026.54.19619

e-ISSN: 2448-4881 | DOI: https://doi.org/10.22201/iij.24484881e.2025.54.19619
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