



ARTICLES

THE EXTERNALISATION OF EU MIGRATION POLICIES IN LIGHT OF EU CONSTITUTIONAL PRINCIPLES AND VALUES

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EU EXTERNAL COOPERATION ON MIGRATION: IN SEARCH OF THE TREATY PRINCIPLES

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ABSTRACT: This *Article* analyses to what extent the EU values and principles are guiding the external dimension of EU migration policies, especially the principle of democracy and fundamental rights. To illustrate this, it elaborates on the consequences of the informalization of this cooperation, and of the lack of safeguards for fundamental rights compliance. In the second part, the *Article* analyses the consequences of the increasing tendency to apply conditionality in the external migration cooperation, illustrated with three recent examples (Union Visa Code, post-Cotonou Agreement and trade tariff preferences). While referencing to political science research from the perspective of third countries, the *Article* concludes that the conditionality approach also risks undermining the principles of equality and sincere cooperation, which eventually impede the effectiveness of the external dimension on migration policies. By drawing lessons from the internal rule of law mechanisms, the EU could bring the external cooperation on migration more in line with its own values and principles enshrined in the Treaties. By doing so, it would offer the necessary safeguards for more coherence in the EU's policies.

KEYWORDS: external dimension – rule of law – conditionality – institutional balance – fundamental rights – equal partnerships.

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I. INTRODUCTION

The principles of rule of law, democracy and fundamental rights constitute a vital reference at all levels of the EU: the legal order of the Member States, the inter-institutional relations and decision making by the EU, including its actions on the external dimension. Migration has increasingly become a priority in the EU's external cooperation, and according to the Commission, it will be "systematically factored in as a priority in the programming" of external policy instruments.¹ This *Article* reflects on the way the Union values and principles are guiding the external dimension of the EU's asylum and migration policy. The *Article* focusses on two values prone to be affected in the external cooperation on asylum and migration, namely democracy and fundamental rights. Subsequently, the author elaborates on the way the EU imposes migration-related conditionality in its external cooperation, and how this may affect respect for EU values and principles. This is illustrated with three recent (draft) legal instruments in which visa (the EU Visa Code), development aid (the Post-Cotonou Treaty) and trade benefits (the revised GSP+ Regulation) are made dependent on the third country's cooperation on border controls and re-admission. The *Article* analyses the types of policy it can trigger in the partner countries, and how these may affect the fundamental rights of migrants as well as the relationship with the EU. In addition, it will be assessed how the conditionality in migration cooperation impacts the EU objective to promote fundamental rights, as well as the principles of coherence, equality and sincere cooperation.

II. THE EU TREATY AS GUIDANCE FOR RULE OF LAW, DEMOCRACY AND FUNDAMENTAL RIGHTS

Since the EU had developed into a political Union which has granted its citizens fundamental rights, Union's responsibility for the protection of its values and rights has been anchored in the Treaties. The 1997 Amsterdam Treaty inserted a new provision into the EU Treaty (TEU) which provided that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".² In the current art. 2 TEU, the Treaty of Lisbon constitutionalized the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, as intrinsically linked and interdependent.³ According to art. 4(3) TEU, Member States must cooperate sincerely and loyally in achieving the EU's objectives. And one of these objectives, laid down in art. 3(1) TEU, is to promote its values.

¹ See Communication COM(2016) final 385 from the Commission of 7 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 20.

² Ex art. 6(1) TEU.

³ These values are reflected in different policy areas covered by the EU Treaties, such as the objectives to promote the equality between men and women and to eliminate all forms of discrimination, see arts 8 and 10 TFEU.

Most treaty provisions to safeguard these principles are related to the national systems, and due to serious rule of law backsliding in Poland and Hungary, these have been the most debated ones. This attention is also reflected in the development and use of instruments aimed at safeguarding rule of law standards in the Member States. Apart from the art. 7 TEU procedure, the Commission has used art. 258 TFEU to conduct several infringement procedures in case of breaches of specific rule of law related provisions in the Treaties or secondary legislation.⁴ In order to prevent deficiencies, a monitoring mechanism has been developed with an annual report on the state of the rule of law in all EU Member States.⁵ The latest legal instrument is the so-called conditionality mechanism, adopted in December 2020, which has made EU funding conditional upon rule of law compliance, in particular independent judiciary and anti-corruption policies.⁶

The design and legal order of the EU itself are based on the same democratic principles.⁷ The principle of institutional balance in the EU implies that each of its institutions (Commission, Council, Parliament and the Court of Justice) has to act in accordance with the powers conferred on it by the Treaties.⁸ This safeguards the separation of powers, which is especially important for democratic and judicial control, and thus the legitimacy of EU's policies. The increased application of co-decision has further cemented the institutional balance in the legislative process.

When negotiating the Lisbon Treaty, the Member States were keen to improve the coherence of the EU's external action.⁹ A new set of general provisions was dedicated to this area, among which art. 21 TEU is the most important as far as the rule of law is concerned.¹⁰ Rule of law but also fundamental rights and democratisation objectives have been progressively integrated into all aspects of the EU's external policies and actions, promoting these values in different ways.¹¹ Coherence of external actions implies

⁴ See *inter alia* CJEU 15 July 2021, C-791/19, ECLI:EU:C:2021:596; CJEU 8 April 2014, C-288/12, ECLI:EU:C:2014:237; CJEU 6 November 2012, C-286/12, ECLI:EU:C:2012:687; CJEU 24 June 2019, C-619/18, ECLI:EU:C:2019:531; CJEU 18 June 2020, C-78/18, ECLI:EU:C:2020:476; CJEU 6 October 2020, C-66/18, ECLI:EU:C:2020:792; CJEU 14 July 2021, C-204/21; CJEU 15 July 2021, C-791/19, ECLI:EU:C:2021:596; pending case C-769/22.

⁵ See the Communication COM(2019) 343 final from the Commission of 17 July 2019 on Strengthening the rule of law within the EU. A blueprint for action.

⁶ Regulation (EU) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, LI 433/1.

⁷ See *inter alia* arts 9 to 12 TEU, but also arts 15 to 22 TFEU on the democratic principles and individual rights of Union citizens.

⁸ See specifically art. 13 TEU.

⁹ See P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure. In Search of a New Balance between Delimitation and Consistency' (2010) CMLRev 987.

¹⁰ L Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' (CLEER working papers 3-2012).

¹¹ M Cremona, 'Values in EU Foreign Policy' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Hart 2011) 292.

coherence with internal policies as well, as the Union principle of consistency requires that external policies are consistent with all other Union policies.¹² Consistency between EU's internal and external asylum and migration policies is of special importance, as external cooperation on migration, including on border control, may affect the core rights of the EU asylum acquis, in particular access to an asylum procedure and the right to *non-refoulement*.

III. EXTERNAL DIMENSION OF EU ASYLUM AND MIGRATION POLICY

III.1. DEMOCRACY AND INSTITUTIONAL BALANCE

The legal basis for internal and external asylum and migration policies can be found in arts 78 and 79 TFEU, which list the topics for asylum and migration law and policies and provide for co-legislation.¹³ The external elements are covered by the legal basis for partnership and cooperation with third countries and the legal ground for formal readmission agreements. However, the extremely limited use of these legal grounds is in stark contrast to the rapidly increasing externalisation of migration policy.¹⁴ The policy choice by the Commission and Council to develop these policies beyond these legal bases, renders the safeguards for an institutional balance much less effective. The next subparagraphs elaborate on the potential use of this legal framework for shaping external policies and the actual use of it.

a) Partnership and cooperation

Art. 78(2) TFEU includes all asylum-related areas on which the EU takes measures according to the ordinary legislative procedure. Subparagraph (g) is the only area covering the external dimension, namely “partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection”. This provision reaffirms that the EU can cooperate with third states in situations where the adoption of secondary legislation does not result in an exclusive external treaty making competence, including through financial and operative support.¹⁵ The Court of Justice has made clear that the content and objective of the instrument in question determines which legal basis applies; in case of multiple aims and components, the

¹² Art. 21(3) TEU.

¹³ The only exception are emergency measures based on art. 78(3) TFEU. This has been used for emergency relocation decisions for the benefit of Greece and Italy, Decision 2015/1523, adopted 14 September 2015 and Decision 2015/16, adopted 22 September 2015. See Proposal COM(2021) 752 final for a Council Decision of 1 December 2021 on provisional emergency measures for the benefit of Latvia, Lithuania and Poland.

¹⁴ See art. 78(2)(g) and art. 79(3) TFEU.

¹⁵ K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law: A Commentary* (II edition C.H. Beck/Hart/Nomos 2016) 1040.

central elements prevail over incidental aspects if the measure has an identifiable focus.¹⁶ If an instrument is specifically related to another policy, such as financial support as part of the development and neighbourhood policies, or if corollary rules on asylum are laid down in association and neighbourhood agreements, the asylum-related provisions are covered by the legal basis of those policies and agreements.¹⁷ So far, art. 78(2) sub (g) TFEU has only been used for the financial consequences of partnerships aiming at “managing inflows” of asylum seekers, such as the Asylum Migration and Integration Fund (AMIF) Regulation, and for the proposed Resettlement Framework.¹⁸ Regarding the content of the partnerships however, the Parliament is sidelined through the use of informal cooperation.

b) Readmission agreements

The external dimension of return policies, provided for in art. 79(3) TFEU, is subject to the procedure for external agreements in art. 218 TFEU. This implies that Parliament has the right to consent for the conclusion of readmission agreements and the right to be “immediately and fully” informed at all stages of the negotiations on those agreements.¹⁹ Parliament and Council can both obtain an opinion from the Court of Justice on the compatibility of the agreement with the Treaties.²⁰ If incompatible, the agreement cannot enter into force without amendment or revision of the Treaties.

Although return is often at the heart of external migration cooperation, we observe a limited use of art. 79(3) TFEU in the last decade.²¹ Formally, the legal framework does not prevent the EU or Member States from applying informal types of cooperation. Since the Lisbon Treaty, the EU has entered into migration “arrangements”, shaped in different ways such as regional dialogues, joint declarations, Memoranda of Understanding. EU Arrangements have been made with Afghanistan, Bangladesh, Ethiopia, the Gambia, Guinea and Ivory Coast.²² Unlike formal readmission agreements, most of them are not made public, they do not include references to human rights, they are not reciprocal and they do include commitments from the EU on other areas, for instance on financial

¹⁶ See, for instance, case C-91/05 *Commission v Council (ECOWAS)* ECLI:EU:C:2008:288 para. 73.

¹⁷ D Thym, ‘Legal Framework for Entry and Border Controls’ in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* cit. 39-40.

¹⁸ See the AMIF Regulations 516/2014 and 2021/1147 and the Communication COM(2016) final 468 from the Commission of 13 July 2016 where are mentioned both art. 78(2)(d) (common procedures) and (g) (partnerships) TFEU as legal grounds for the proposed Union Resettlement Framework Regulation.

¹⁹ Art. 218(6)(a) and art. 218(10) TFEU.

²⁰ Art. 218(11) TFEU.

²¹ Since 2015, only one EU Readmission Agreement has been concluded, with Belarus in 2020, Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation, 9 June 2020.

²² European Commission, *Return and readmission* ec.europa.eu. See also T Molnár, ‘EU Readmission Policy: A (Shapeshifter) Technical Toolkit or Challenge to Rights Compliance?’ in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022) 486-504.

assistance.²³ Also the negotiation process is more flexible, due to the lack of strict negotiating directives and formal negotiation rounds. Even if a formal instrument has been concluded, it can be easily circumvented and left aside, as this process does not exclude the option of informal cooperation.²⁴ While, according to art. 218(2) TFEU, the Council mandates the Commission to negotiate and conclude formal agreements, it is in practice often the European Council that gives political guidance regarding informal arrangements. For instance, in its December 2021 conclusions, the European Council urged the Commission to make funding available and to use all the leverage possible to ensure effective returns to third countries.²⁵ Accordingly, we must conclude that, despite the actual role of the European Council, the negotiating role of the Commission, the involvement of all three EU institutions for the approval of the budget and the fact that the subject matter of cooperation belongs to the competences of the EU, the actual informal cooperation on migration takes place outside the protective realm of the Treaties.

The informalisation of migration cooperation not only undermines democratic but also judicial control and thus access to justice, as illustrated by the General Court's judgement in 2018 on the EU-Turkey Statement, which was concluded two years prior.²⁶ According to this Statement, Turkey would receive EU funding to host the 3,5 million Syrian refugees, in exchange for preventing their departure to the EU and for readmitting irregular migrants and refugees. In this package, Turkey was promised to get visa-free travel soon and have the EU-accession talks accelerated. The General Court ruled, to the surprise of many, that it lacked competence as the Statement concerned an agreement between the heads of the Member States and Turkey, not between the EU and Turkey. It made several scholars question the legal basis for Member States, acting in their autonomous international law capacity, to negotiate on topics belonging to the exclusive competence of the Union like EU accession, visa policy and EU funds.²⁷ The decision of the General Court has made Dutch NGOs in March 2023 to issue a statement in which they hold the Dutch government accountable for the fundamental rights impact on the refugees stuck on the Greek islands, as the Netherlands negotiated the deal during its EU Presidency.²⁸ Despite referring to criticism of civil society organisations and the European Parliament on the lack of transparency and the potential impact on returnees' human rights, in 2021, the EU Court of Auditors

²³ European Court of Auditors Special Report 17/2021, 'EU Readmission Cooperation with Third Countries: Relevant Actions Yielded Limited Results' para. 37.

²⁴ See for instance the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing cit., art. 18(2).

²⁵ European Council Conclusions EUCO 22/21 of 16 December 2021 www.consilium.europa.eu para. IV.

²⁶ See for the Statement EU Council press release of 18 March 2016, consilium.europa.eu; for the judgement CJEU Joined cases T-192/16, T-193/16 and T-257/16 *NF, NG and NM v Council* ECLI:EU:T:2017:128.

²⁷ See M Giuffrè, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020) 168; P García Andrade, 'External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum' (17 January 2018) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

²⁸ Statewatch, *Netherlands liable for human rights violations in Greek refugee camps* statewatch.org.

recommended stepping up informal cooperation on migration, as it made the content of arrangements more flexible and more likely to be successful.²⁹

The General Court's decision on the EU-Turkey Statement does not, however, mean the Court is at ease with the institutional imbalance that informal arrangements might cause. In 2012, the CJEU annulled guidelines that the Council had adopted as an annex to the Schengen Borders Code, to which the Parliament is co-legislator.³⁰ The Court judged that, despite the title "guidelines", these rules intend to have a binding effect, and therefore have to be established in the legislation itself. It gave three additional reasons: first, the rules concern a major development of the Schengen rules; second, the rules may interfere with the fundamental rights of the persons concerned; third, they require political choices to be made by the EU legislature.

So, the reasons for the Parliament and the Court of Justice being sidelined in the area of external cooperation on migration are the result of political decisions by the Council and the Commission. It is not unlikely that external arrangements between the EU and third countries, in which EU instruments are interlinked, can be qualified as an unlawful circumvention of the legislature. That may well be the case if the Treaties confer a competence to the Parliament for the matters at issue. For example, think of visas or financial assistance, where the Parliament is co-legislator, or readmission or trade where the Parliament has a right to consent.³¹ Such circumvention might be regarded as unconstitutional, especially if fundamental rights are at stake. A recent example is the Memorandum of Understanding on a strategic and global partnership between the EU and Tunisia of July 2023, which (despite references to a number of economic investments) centers around cooperation on border control and combatting irregular migration (including human smuggling and trafficking), return and readmission, as well as policies on visa and labour migration.³² These areas all mirror the topics on which the Parliament has the role of co-legislator regarding EU internal policies.³³ But the MOU might be legally challenged for its arrangements regarding readmission between the EU and Tunisia.³⁴

III.2. FUNDAMENTAL RIGHTS

Notwithstanding the Treaty provisions emphasizing fundamental rights, so far, the EU has failed to set clear, public benchmarks in its external policies, necessary to assess and monitor compliance with fundamental rights. For this reason, the EU is criticized for the

²⁹ European Court of Auditors Special Report, 'EU readmission cooperation with third countries' cit. paras 38 and 124.

³⁰ Case C-355/10 *Parliament v Council* ECLI:EU:C:2012:516.

³¹ See art. 77(2)(a), art. 79(2)(c), art. 79(3) and art. 218(6)(a) TFEU.

³² Memorandum of Understanding on a strategic and global partnership between the EU and Tunisia, July 2023, ec.europa.eu.

³³ See art. 77(2) and art. 79(1) and (2) TFEU.

³⁴ Art. 79(3) TFEU.

lack of political will to take fundamental rights seriously, and for arguing “that publicly articulated benchmarks would introduce tension into a dialogue and undermine its role as a ‘confidence building exercise’, as if the purpose of the dialogue were to promote warm and fuzzy feelings rather than to improve respect for human rights”.³⁵ These concrete benchmarks are also absent in the external instruments on asylum and migration.

The lack of clear criteria for the implementation of human rights provisions also hampers any other type of accountability within the EU framework, such as the obligation to conduct *ex-ante* impact assessments, which follows from the rules on better regulation.³⁶ This implies that monitoring and evaluation exercises are not embedded in the policy framework either. The European Parliament therefore called upon the Commission to conduct human rights *ex-ante* impact assessments prior to entering into forms of migration cooperation and to monitor the results, in order to ensure that the formal or informal cooperation will not affect fundamental rights of migrants and refugees.³⁷ Another complicating element is that the relevant EU institutions that could contribute to transparent and independent monitoring, like the EU Ombudsman and the Fundamental Rights Agency (FRA), lack the competence to operate outside the EU territory.³⁸ This sharply contrasts with the extraterritorial scope granted to operational agencies like Frontex and Europol.³⁹

The protection level for migrants and refugees in a third country does not constitute a criterion for the selection of a partner country, nor a condition for entering or continuing the cooperation, although at least in the area of border management this should be the case.⁴⁰ Yet, extensive research points at heightened human rights risks of migration cooperation with third countries where human rights of migrants are not protected.⁴¹

³⁵ See K Roth, ‘A Facade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers’ in *Human Rights Watch, World Report 2011. Events of 2010* (Seven Stories Press 2011) 8-9.

³⁶ See the Interinstitutional Agreement on Better Regulation, 12 May 2016, and the Better Regulation Guidelines, Chapter IV, SWD(2021) 305 final of 3 November 2021.

³⁷ European Parliament, Report A9-0060/2021 of 25 March 2021 on Human Rights Protection and the EU External Migration Policy, (2116/2020 (INI)), . . .

³⁸ See art. 3(3) of Council Regulation 555/2022 of 5 April 2022 amending Regulation (EC) No. 168/2007 establishing the FRA, and Regulation 1163/2021 laying down the regulations and general conditions governing the performance of the EU Ombudsman’s duties.

³⁹ See art. 10(1)(u) and arts 71-77 of the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 and arts 17(1) (b), 23(1) and 25 of the Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

⁴⁰ Art. 72 of Regulation 1896/2019 cit.

⁴¹ See M Giuffré, *The Readmission of Asylum Seekers under International Law* cit.; V Moreno-Lax, ‘EU External Migration Policy and the Protection of Human Rights’ (September 2020) Policy Department for External Relations, European Parliament; T Strik, ‘Human Rights Impact on the “External Dimension” of European Union Asylum and Migration Policy. Out of Sight, out of Rights?’ (2018) PACE, Council of Europe, doc. no. 14575 assembly.coe.int.

Arrangements on strengthened border control leads to more difficulties for migrants to leave a transit country, which is especially problematic if that country fails to protect or even maltreats migrants. Several studies even reveal that the cooperation leads to more restrictive migration policies by third country governments, on the request of the EU or as a way to avoid responsibility for migrants transiting their territory.⁴² Although part of the EU funding aims to strengthen protection regimes in third countries, these reports indicate that the overall impact on fundamental rights may be negative. This should be a reason for more thorough scrutiny and monitoring. Yet, European policy documents are often limited to generally formulated human rights notions, while refraining from conducting *ex-ante* impact assessments or setting up monitoring systems to gain insight into how the cooperation affects the human rights of migrants and refugees. The few known evaluations are mainly quantitative, focusing on return rates and the number of irregular crossings into the EU. The information about the situation of migrants and refugees in a third country is not based on a variety of independent sources, but merely on information from the authorities of the countries concerned.⁴³

Where policy documents include the objective of improving human rights, the implications of this objective are not clearly defined. The Action Plan on Libya of December 2021 is a painful example of this, bearing in mind the horrendous situation of migrants and refugees in Libya in general, and specifically of those detained after being intercepted by the EU-funded Libyan coastguard.⁴⁴ It defines abolishing unlawful detention of migrants as a key priority, but this objective is not linked to any condition for funding or other types of support. The EU actions to achieve the end of the detention practices is limited to advocacy and encouragement.⁴⁵ Despite the lack of progress in this field, the funding of the Libyan authorities has only increased. In March 2023, the UN Fact-Finding Mission on Libya found that crimes against humanity were committed against migrants in places of detention under the actual or nominal control of Libya's Directorate for Combating illegal Migration, the Libyan Coast Guard and the Stability Support Apparatus, state institutions which also received significant revenue from "trafficking, enslavement, forced

⁴² B Frellick, IM Kysel and J Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) *Journal on Migration and Human Security* 190-220.

⁴³ See the Commission progress reports-based on information from the Turkish and Greek authorities, for instance the Communication COM(2017) 470 final from the Commission of 6 September 2017 on the implementation of the EU-Turkey statement.

⁴⁴ See OHCHR, "*Lethal Disregard: Search and Rescue and the Protection of Migrants in the Central Mediterranean Sea*" ohchr.org; OHCHR, *Fact-finding Mission on Libya: Human Rights Violations are Impeding Transition to Peace, Democracy and the Rule of Law* ohchr.org.

⁴⁵ Operationalization of the Action Plan for strengthening comprehensive migration partnerships with priority countries of origin and transit. Draft Migration Action Plan: Libya, Council document 11946/1/21 REV 1, JAI 993, ASIM 64, RELEX 777 MIGR 207, COAFR 273, 2 December 2021.

labour, imprisonment, extortion and smuggling".⁴⁶ It also observed that these entities "receive technical, logistical and monetary support from the EU and its member States for inter alia the interception and return of migrants".⁴⁷ The Mission therefore recommended to cease all direct and indirect support to these actors "involved in crimes against humanity and gross human rights violations against migrants".⁴⁸

The funding, like any other type of migration cooperation, is not preceded by impact assessments either. Yet, in 2015, in a case on a EU trade agreement with Morocco encompassing products from Western Sahara, the Court of Justice ruled that the EU must avoid situations where an agreement "indirectly encourages" violations of fundamental rights.⁴⁹ This obligation to take precautionary measures not only implies *ex ante* impact assessments and fundamental rights criteria to be met beforehand, but also the need for an independent monitoring and the possibility to suspend the cooperation in case of fundamental rights violations. None of these safeguards are foreseen in the current external cooperation on migration. In the case of Libya, the report of the UN Fact-Finding Mission on Libya of March 2023 will not be followed by updated reports, despite its urgent call to the Human Rights Council for a sufficiently resourced, independent international investigation mechanism as the gross human rights violations continue unabated.⁵⁰ The linkage between these violations and the EU funding did not lead the EU to support such an investigation or monitoring mechanism. The resolution adopted by the Human Rights Council in response to this fact-finding mission report only includes recommendations on technical support for implementing measures. It is quite remarkable that the resolution, despite the UN conclusion about state involvement in crimes against humanity, calls upon the Libyan authorities to monitor, investigate and collect evidence on human rights violations.⁵¹ The resolution was submitted by a group of states, including Italy and Malta, which indicates that they prioritise to continue their cooperation with the Libyan Coastguard to prevent arrivals at their shores. The silence and non-action by the other EU Member States and the EU delegation in Geneva suggest that there is little preparedness to acknowledge the EU's role and responsibility and to end its contribution to the crimes against humanity in Libya or, at least, to impose very strict conditions to the funding. A joint press release of the Tripartite Taskforce on the Situation of Migrants and Refugees in Libya, consisting of the EU, the African Union (AU) and

⁴⁶ Report of the UN Independent Fact-Finding Mission on Libya (A/HRC/52/83) of 3 March 2023, Human Rights Council, 52nd session, 27 February-31 March 2023, Agenda item 10, paras 4 and 41-45.

⁴⁷ *Ibid.* paras 4 and 46.

⁴⁸ *Ibid.* Chapter IV para. 103 (g).

⁴⁹ Case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 231. See V Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of art. 21 TEU?' (EUI LAW Working Paper 10-2016) 25.

⁵⁰ Report of the Fact-Finding Mission cit. para. 7.

⁵¹ Resolution on Technical assistance and capacity-building to improve human rights in Libya, proposed by Côte d'Ivoire, Iceland, Italy, Malta, Türkiye and Yemen, Human Rights Council 52nd session, 27 February-4 April 2023, Agenda item 10, A/HRC/52/L33.

the United Nations (UN), only “reaffirmed its commitment to supporting the Libyan authorities’ efforts for tackling the urgent needs on the ground”, and repeated its call upon the Libyan authorities to end arbitrary detention of migrants and refugees.⁵²

III.3. CONDITIONALITY AND TREATY CONCERNS

EU cooperation with third countries is historically made conditional upon compliance with the EU’s values by these countries. Especially if the cooperation includes benefits to third countries, the EU tends to impose conditions on good governance, human rights and democracy. The last decade, these value-based conditions are increasingly being replaced or complemented by performances on border control and readmission. Initially a policy was developed in which the EU sought to make migration cooperation mutually beneficial, seeking to create a common agenda with third countries.⁵³ This was followed by attempts to offer benefits like trade, development aid or visa facilitations in exchange for cooperation on migration (the so-called more-for-more approach).⁵⁴ The EU then turned toward a negative conditionality, where third countries receive fewer of these benefits if they did not sufficiently cooperate (the “less-for-less approach”).⁵⁵ While the Commission seems to become aware of the limits of this approach,⁵⁶ the European Council continues to increase pressure on third countries. In mid-December 2021, it took more control with a new Mechanism for the Operational Coordination for the External dimension of Migration: MOCADDEM.⁵⁷ The mechanism, based on the system underlying the EU Integrated Political Crisis Response Arrangements⁵⁸, established a group of national and Commission experts who intended to propose concrete actions with third countries. These actions can include diplomatic steps, capacity building, financial support and visa measures. All policy tools can be used to achieve cooperation on migration, with the exception of humanitarian aid, as this would infringe upon the humanitarian principles.⁵⁹

⁵² EEAS Press Team, Joint Press Release: EU, AU and UN Push for Urgent Action to Address the Pressing Needs of Migrants and Refugees in Libya, EU External Action Service, 21 March 2023, eeas.europa.eu.

⁵³ European Council Conclusions of 17 December 2005, Global Approach to Migration: Priority Actions focusing on Africa and the Mediterranean, 15914/05.

⁵⁴ Communication COM(2011) 743 final from the Commission of 18 November 2021 on the Global Approach to Migration and Mobility.

⁵⁵ Communication COM(2016) 385 final from the Commission of 7 June 2016 on establishing a new Partnership Framework with Third Countries under the European Agenda on Migration.

⁵⁶ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum, chapter 6: ‘Working with our International Partners’.

⁵⁷ Council Implementing Decision 2022/60/EU of 12 January 2022 on the Operational Coordination Mechanism for the External Dimension of Migration.

⁵⁸ Council Implementing Decision 2018/1993/EU of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements.

⁵⁹ Communication COM(2016) 385 final from the Commission to the European Parliament, the European Council the Council and the European Investment Bank of 7 June 2016 on establishing a new Partnership Framework with third countries under the European Agenda on Migration, footnote 26.

In its proposal for the new Pact on Migration and Asylum in September 2020, the Commission exposed its ambiguity concerning third country cooperation, by stressing the importance of both equal partnerships and negative conditionality.⁶⁰ To illustrate that migration-related conditionality has become a structural part of EU's external cooperation, I will highlight three recent examples of it enshrined in (draft) legal instruments: the visa conditionality, the post-Cotonou agreement, and the general trade preferences. For each instrument, I will mention its risks for fundamental rights and the principles of coherence and equality.

a) Suspension mechanisms in the Visa rules

The conditionality between visa and readmission started to develop in the relations with Eastern European and Western Balkan states, where the EU offered visa-free travel in exchange for close cooperation on readmission. This not only led to a long list of migration-related requirements (many on border control and readmission) to gain visa-free travel, but also to a visa suspension mechanism in case those requirements were no longer met.⁶¹ With the introduction in 2019 of a suspension mechanism in the Common Visa Code, the conditionality has expanded to third countries with a less advantageous relationship with the EU: no visa-free travel, and no perspective of accession either. This not only means that the incentives for complying with the visa-related obligations are less strong, but also the level of human rights safeguards is far from secured. The readmission obligations derive from either an EU readmission agreement, concluded with 18 third countries, or as part of a multilateral treaty such as the Cotonou Agreement, concluded with 79 African, Caribbean and Pacific countries. In addition, the EU has concluded a readmission *arrangement* with six countries, which due to its informal nature, fall outside the obligation to disclose the content.⁶² The current EU visa regime includes two different types of suspension mechanisms: one for visa waivers and one for visa facilitation rules.

i) Visa waivers. The conditionality regarding visa-free travel is laid down in the Regulation listing the third countries whose nationals have to possess a visa for crossing the EU's external borders, and the third countries whose nationals are exempt from this requirement. In 2018, after a series of amendments since 2001, this regulation has been codified again.⁶³ The regulation provides for the temporary suspension of the visa exemption in case of non-compliance with the obligation of readmission, including readmission of third

⁶⁰ Communication COM(2020) 609 final cit. para. 6(5).

⁶¹ F Trauner and E Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues After the EU's Experience with the Western Balkans' (2014) *European Journal of Migration and Law* 125-145.

⁶² These countries are (apart from the EU-Turkey Statement) Afghanistan, Bangladesh, Ethiopia, The Gambia, Guinea, Ivory Coast.

⁶³ Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification), 39.

country nationals who have transited through that third country. Non-compliance with a readmission obligation agreed between a Member State and the third country can also trigger the suspension of the visa exemption at the Union level.⁶⁴ The regulation prescribes that the consequences of suspension for the external relations between the Union and its Member States have to be taken into account.⁶⁵ According to the recitals, the human rights situation has to be considered, but the consequences of a deterioration are not defined.⁶⁶ The only reference to refugees concerns a substantial increase of the number of asylum requests with a low recognition rate (around 3 or 4 percent) as an indicator for the suspension.⁶⁷

ii) Visa facilitations. The EU developed a similar linkage between negotiations of visa facilitation agreements and negotiations on readmission agreements, which ultimately linked the entry into force of a Visa Facilitation Agreement (VFA) to the entry into force of a readmission agreement with that same country. The migration-related suspension mechanism for visa facilitation is introduced in the revised Common Visa Code, adopted in 2019.⁶⁸ Since then, the Regulation includes art. 25a, which provides that in case of insufficient cooperation with readmission, the EU will suspend visa facilitations provided in the Visa Code. This can imply more conditions to be met for travelling into the EU, longer procedures or higher fees. This sanction obviously has a negative impact on nationals who are in need of protection as well. In its annual assessment of the third countries' cooperation with regard to readmission and return, the Commission takes into account the overall cooperation in the field of migration, in particular regarding border management, combatting migrant smuggling and preventing transit of irregular migrants through its territory.⁶⁹ The EU is thus not only using its visa leverage for furthering returns, but also for preventing irregular arrivals from transit countries. If the Commission concludes that the country is insufficiently cooperating, or if a simple majority of Member States has notified the Commission accordingly, the Commission is obliged to propose an implementing decision to the Council. This decision implies a temporary suspension of more favourable provisions such as exemptions of requirements for certain documents, a short duration of the procedure, exemptions of the visa fee for holders of a diplomatic or service passport and/or the issuance of multiple-entry visas. If the suspension does not lead to an improved cooperation, the visa fees will be doubled or tripled

⁶⁴ *Ibid.* art. 8 and recital 22.

⁶⁵ *Ibid.* see art. 8(6) and recital 17.

⁶⁶ *Ibid.* recitals 26 and 28.

⁶⁷ *Ibid.* art. 8(2)(b) and recital 24.

⁶⁸ Regulation (EU) 1155/2019 of the European Parliament and of the Council of 20 June 2019, amending Regulation 810/2009 establishing a Community Code on Visas, art. 25. The indicators to be assessed by the Commission are listed in para. 2 of the new art. 25(a).

⁶⁹ Recital 13 of the Common Visa Code cit.

for all nationals of that specific country.⁷⁰ If the Commission concludes that a third country cooperates sufficiently on readmission, it can propose to the Council the adoption of positive visa measures, such as the reduction of the visa fee or the processing time, or an increased period of validity of multiple entry visas.⁷¹ This however has not occurred yet.

Based on its first assessment of the level of compliance by the third countries with readmission, the Commission concluded in 2021 that with more than one third of the partner countries, the cooperation is not sufficient.⁷² Regarding The Gambia, the Council adopted the implementing decision proposed by the Commission, to suspend certain facilitating provisions for nationals of The Gambia, due to the country's reluctance to cooperate with forced returns.⁷³ Although the detailed progress report and the proposal to the Council for an implementing decision are confidential, there is some external reporting that the Commission also considered proposing suspensions regarding the Democratic Republic of Congo, Egypt, Eritrea and Ethiopia, Iraq, Iran, Libya, Mali and Somalia.⁷⁴ This means that in many countries potentially subject to visa restrictions, human rights violations are taking place at a large and structural scale, which may force citizens to flee their country. This is reflected in the number of asylum applications from these countries, and the high recognition rate of some of them.⁷⁵ Suspension measures for all nationals of those countries would affect human rights defenders or other victims of persecution who need a low threshold for swiftly obtaining a visa to be protected by the international community. Furthermore, the obligation to readmit migrants who transited a third country may trigger a more restricted border control and the preventing of departures, without any guarantee that this transit country secures access to protection for refugees. These real risks raise the pertinent question to what extent the human rights level in the partner countries are actually taken into account in applying this suspension mechanism.

Due to their national specific situation and interests, Member States have difficulties to achieve a united position.⁷⁶ Some Member States want to protect and foster their privileged bilateral relation with a third country against interference by the Union, others suffer from a bad relation and need the Union to protect their interests. The discussions in the Council fail to address the reasons of the limited number of readmissions or a

⁷⁰ See art. 25(a)(5) Common Visa Code cit.

⁷¹ *Ibid.* art. 25(a)(8).

⁷² Communication COM(2021) 56 final from the Commission of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, para. 4.3.

⁷³ Implementing Decision 11748/2021/EU of the Council of 28 September 2021 on the suspension of certain provisions of Regulation 810/2009 with respect to The Gambia. The suspension concerns provisions set out in art. 25(a)(5)(a) of the Visa Code.

⁷⁴ ECRE, 'Playing the Visa Card?' (2021) ECRE Weekly Bulletin [ecre.org](https://www.ecre.org).

⁷⁵ See UNHCR's Global Trends report over 2019, which reports that the protection rate for asylum seekers from DRC, Eritrea and Somalia was around or higher than 80 percent. [unhcr.org](https://www.unhcr.org) 42.

⁷⁶ See Communication COM(2021) 6583 final from the Council of 5 March 2021 on enhancing cooperation on return and readmission, available at [Statewatch](https://www.statewatch.org), [statewatch.org](https://www.statewatch.org).

problematic cooperation.⁷⁷ A one-sided focus on the suggested unwillingness of a third country and the lack of self-reflection, overlooks the role that Member States themselves have in improving their return and readmission procedures.⁷⁸

iii) Little result, more sanctions? In its impact assessment to its proposal for the revised Visa Code, the Commission concluded that there was no hard evidence that visa leverage leads to better cooperation of third countries on readmission.⁷⁹ The question can be raised if the incentive of procedural obstacles for obtaining a visa is sufficiently strong for third countries. They have to weigh procedural disadvantages against their economic interest in irregular migration and their internal political interest in resisting the EU.⁸⁰ Their situation is incomparable to countries for which the significantly more beneficial visa-free travel or the perspective of accession is at stake.

As EU Member States appear reluctant to offer positive incentives in the field of migration, such as labour migration pathways, Member States and the Commission consider additional negative conditionalities to improve cooperation.⁸¹ Art. 7 of the proposed Asylum and Migration Management Regulation, launched as part of the Asylum and Migration Pact, permits the annual Visa Code report to be used as a basis for “the identification of any measures which could be taken to improve the cooperation of that third country as regards readmission”, rather than just restrictions on visa issuance.⁸² Member States are currently discussing the option to require alignment of the partner country's visa policy with the EU visa regime, as more liberal rules in a transit country would create an avenue for irregular migration into the Union. For that reason, the Commission

⁷⁷ For instance, according to the assessment by the Commission, Member States experience an overall positive cooperation with Morocco, except a few Member States. Instead of blaming Morocco, the Commission could first dig deeper into the reasons for these specific troublesome bilateral relations, see Communication COM(2021) 55 from the European Commission of 10 February 2021, report to the Council on Assessment of third countries' level of cooperation on readmission in 2019, available at Statewatch, statewatch.org.

⁷⁸ For insight into gaps and failures by the Member States in implementing return procedures, see Policy document COM(2023) 45 final from the European Commission of 24 January 2023 towards an operational strategy for more effective returns, para. 2, in which is mentioned that only 16 percent of the return decisions are followed by a request for readmission.

⁷⁹ European Commission, Commission Staff Working Document Impact Assessment SWD(2018) 77 of 14 March 2018 accompanying the Proposal for the revised Visa Code, 31; O Sundberg Diez, F Trauner and M De Somer, ‘Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains’ (2021) EJML 238.

⁸⁰ See also O Sundberg Diez, F Trauner and M De Somer, ‘Return Sponsorships in the EU's New Pact on Migration and Asylum’ cit. 239-240. See the case of Morocco: L Laube, ‘The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy’ (2019) Comparative Migration Studies; and T Abderrahim, ‘A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia’ (2019) EuroMeSCo Series euromesco.net.

⁸¹ F Trauner and E Manigrassi, ‘When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose’ cit.

⁸² Communication COM(2020) 610 final from the Commission of 23 September 2020, Proposal for a regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU).

monitors the visa-regime in the countries with visa waivers and raises divergences with the Union's visa regime. After a sharp increase in irregular migration via the Western Balkan route, partly relating to Serbia's non-alignment to EU visa policy in 2022, the Swedish Presidency initiated a broader debate in the Schengen Council in 2023 to reflect on EU's visa policy, including on a possible revision of the visa suspension mechanism.⁸³ It proposed to extend the grounds for suspension by including alignment to EU visa policy, irregular migration including transit-hubs and citizenship by investment schemes.

In April 2020, the Croatian Presidency presented the option to introduce a conditionality clause in a Union instrument or international agreement - not related to migration - which is being amended or under negotiation.⁸⁴ In case of reluctance to agree with such clause, the EU could suspend the negotiations or withhold approval on provisions favorable to the third country to be included in the agreement. In addition, the Commission proposed to consider other measures in relevant sectorial instruments (for instance on trade or development) as leverage for non-cooperation on readmission, including financial ones. Both options have been realized, as the next two examples will show.

b) Post-Cotonou Partnership Agreement

In 1999, the Council decided to include standard readmission clauses in all European association and cooperation agreements with third countries.⁸⁵ Such clauses were introduced in the Cotonou Agreement, signed in June 2000 between the EU and the African, Caribbean and Pacific countries, aiming to promote the sustainable development goals.⁸⁶ The Cotonou Agreement serves as the model to emulate for all substantive human rights clauses, since the refinement in 2005 of the procedure whereby either party may withdraw from the agreement or take "appropriate measures" when the other party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law or when a party seriously violates one of these "essential elements". Until now, in all cases that "appropriate measures" have been adopted, this was done by the EU against Organization of African, Caribbean and Pacific States (ACP) countries.⁸⁷ The Agreement obliges ACP states to accept the return and readmission of its nationals who are illegally present on the territory of a Member State of the European Union, at a

⁸³ Note from the Presidency to the Visa Working Party on the future of EU visa policy, 17 February 2023, 6268/23, found on www.statewatch.org.

⁸⁴ Communication COM(2020) 7256 final from the Commission to the European Parliament and the Council of 20 April 2020 on Proposal for a coordination mechanism to activate different policies to improve the cooperation of third countries on the return/readmission of their nationals.

⁸⁵ European Council Note 13409/99 of 25 November 1999, Consequences of the Treaty of Amsterdam on readmission clauses in Community agreements and in agreements between the European Community, its Member States and third countries.

⁸⁶ See Decision 2000/483/EC of the Council of 15 December 2000, Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000.

⁸⁷ L Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' cit. 21.

Member State's request and without further formalities.⁸⁸ In addition, ACP states must conclude a bilateral agreement at the request of an EU Member State, not only on the return and readmission of own nationals but also regarding third country nationals and stateless persons.⁸⁹ The negotiations on the renewed Partnership Agreement were concluded in April 2021, but has not yet been approved and entered into force.⁹⁰ Migration and readmission was one of the most controversial issues during the negotiations, and a key priority for the EU. The EU insisted on the legal obligation to readmit own nationals, and on the possibility to take "appropriate measures" in case the ACP-country does not comply. While the EU side was seeking firm ACP commitments to assist in the repatriation and readmission of ACP nationals, the ACP countries urged for the facilitation of legal migration.⁹¹ These negotiations however resulted in a focus on managing migration flows and fighting irregular migration and trafficking.

Where the Cotonou Agreement only included one provision on migration (art. 13), it is now given its own title (14 articles) and a specific annex in the foundation, and another distinct title in the Africa protocol (seven articles). They enshrine the obligation to conclude a bilateral readmission agreement or arrangement with simplified procedures, which are laid down at a very detailed level in the annex.⁹² These specific obligations (*de facto* addressed to the ACP-countries) contrast with the provisions on promoting mobility (including labour migration) and lowering the transaction costs of remittances, which are limited to expressing good intentions.⁹³ Also the root causes of migration and the relationship between migration and development are not really built upon. These different formulations imply that only in case of non-compliance with the return and readmission provisions, the "other Party" can take appropriate and proportionate measures, including the partial or full suspension of the Agreement.⁹⁴ If the EU Member States fail to perform on mobility, remittances or other commitments, the ACP-countries are left with empty hands.

c) Tariff preferences for developing countries

The most recent example of anchoring a readmission obligation in an international agreement is the Commission proposal for a revision of the Regulation for generalized

⁸⁸ Art. 13(5)(c)(i) of the Cotonou Agreement.

⁸⁹ *Ibid.* art. 13(5)(c)(ii).

⁹⁰ See the text of the Negotiated Post-Cotonou Agreement initialled by the EU and OACPS chief negotiators and concluded on 15 April 2021, ec.europa.eu.

⁹¹ See J-C Boidin, 'ECP-EU Relations: The End of Preferences? A Personal Assessment of the Post-Cotonou agreement' (2020) ECDPM ecdpm.org.

⁹² See art. 74 and Annex I: Return and Readmission Processes.

⁹³ See arts 63 and 67 of the Agreement, and also arts 74 and 76(2) of the Africa Protocol.

⁹⁴ See arts 74(4) and 101 paras 5-8 post Cotonou Agreement. This suspension can include development aid assistance as well.

scheme of tariff preferences for developing countries.⁹⁵ Since 1971, the EU has granted trade preferences to developing countries in the framework of the so-called generalised system of (tariff) preferences (GSP). One of the characteristics of this trade arrangement is that it includes a special incentive arrangement known as GSP+, which offers additional trade preferences to the most vulnerable developing countries on the condition that they ratify and effectively implement a set of core international conventions on human and labour rights, environmental protection and good governance. On these grounds, the Commission can temporarily withdraw trade preferences if the beneficiary country has seriously and systematically violated the principles laid down in these international conventions concerning core human rights and labour rights or related to the environment or good governance.⁹⁶ In order to enforce compliance, beneficiary countries have to accept regular monitoring of its implementation of these conventions. The temporary withdrawal option has been used in the past in response to the political situation in Myanmar and in Belarus.⁹⁷ The current GSP regime provides non-reciprocal preferential access to the EU market to developing countries.⁹⁸ In its proposal for revision presented in September 2021, the Commission added the possibility to withdraw preferences in case of violations of the obligation of readmission.⁹⁹ Apparently, the idea to insert this negative condition emerged at a late stage of the legislative process, as it was not included in the scope of the *ex-ante* impact assessment. However, that did not keep the Commission from arguing that the impact of this condition can only be positive, as it would prevent “a constant drain in active population in the countries of origin, with the ensuing long-term consequences on development”, and it would ensure that migrants are treated with dignity.¹⁰⁰ This justification is an attempt to hide the EU interest of the readmission obligation, which fundamentally differs from all current conditions that serve the wellbeing and rights of the people in the least developed countries. The proposal to insert this migration-related condition is also criticized as not being compatible with the WTO-rules. In a

⁹⁵ Communication COM(2021) 579 from the European Commission of 22 September 2021 on Commission proposal for a Regulation on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012,.

⁹⁶ See also L Pech, ‘Rule of Law as a Guiding Principle of the European Union’s External Action’ cit. 16-17.

⁹⁷ Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, recital 23; Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, recital 25.

⁹⁸ See art. 9(1) and Annex VIII (conditions), and art. 15 (grounds for temporary withdrawal) of Regulation 978/2012 cit.

⁹⁹ Communication COM(2021) 579 final cit. art. 19(1)(c).

¹⁰⁰ Commission Staff Working Document SWD(2021) 266 of 22 September 2021, Impact assessment report accompanying Commission proposal for a Regulation of the European Parliament and of the Council on applying a generalized scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, 24 and 43; see also recital 26 of COM(2021) 579 final cit.

legal opinion, Vidigal argues that, as GSP-schemes aim to facilitate and promote the trade of developing countries, the conditions imposed must respond positively to the development, financial and trade needs of these countries.¹⁰¹ Since the conditionality regarding return and readmission of migrants does not meet this criterion but demands action that is in the domestic interest of the WTO-Member, the proposed conditionality should be withdrawn “if the EU is to comply with its international commitments and avoid further straining the multilateral trading system”.¹⁰²

Furthermore, the Treaty provides for the definition of development cooperation objective to reduce and eradicate poverty.¹⁰³ This does not only bind the EU and Member States while making development cooperation policies, but also when implementing other external policies which are likely to affect developing countries. Adding a (negative) condition accommodating EU’s own interest to return undocumented migrants to a regime meant to support the least developing countries, does not only risk to affect development aid goals, but it also takes away the possibility to promote other external policy objectives. Incentives lose their functionality if they are linked to such broad range of performances, as it makes prioritization inevitable. The risk of undermining external policy objectives is especially real if compliance with the readmission obligation gets priority over fundamental rights, good governance, labour rights or environmental policies. This priority was actually the reason behind creating a partnership framework on migration, as the Commission unambiguously underlined: “[t]his means, for each partner country, the development of a mix of positive and negative incentives, the use of which should be governed by a clear understanding that the overall relationship between the EU and that country will be guided in particular by the ability and willingness of the country to cooperate on migration management”.¹⁰⁴

Where the Council fully supported the Commission’s proposal to insert this new conditionality, the Parliament proposed to delete it.¹⁰⁵ This resulted in a deadlock after seven rounds of trilogues, with the risk that no new Regulation would be adopted before the

¹⁰¹ S Vidigal, ‘Legal Opinion on the Lawfulness of Proposals to Include Migration-related Conditionalities in the EU GSP (2023) CSW csw.org.uk.

¹⁰² Similar criticism in the in-depth study requested by the DROI committee, authored by G van der Loo, ‘The Commission Proposal on Reforming the Generalised Scheme of Tariff Preferences: Analysis of Human Rights Incentives and Conditionalities’ (January 2022) www.europarl.europa.eu.

¹⁰³ Art. 208(1) TFEU.

¹⁰⁴ Communication COM(2016) 385 cit. 17. See also 3: “It is essential that in close cooperation with all Member States it is made clear to our partners that a solution to the irregular and uncontrolled movement of people is a priority for the Union as a whole”.

¹⁰⁵ See for the Council Mandate Council document no. 16270/22, adopted on 22 December 2022, and the European Parliament position report n. A9-0147/2022, adopted on 17 May 2022 in the INTA committee. See I Zamfir, ‘New EU Scheme of Generalised Preferences’ (July 2022) EPRS Briefing, European Parliament.

current one would expire on 31 December 2023.¹⁰⁶ The Commission therefore proposed to extend the duration of Regulation 978/2012 with four years to allow Council and Parliament to find an agreement in the meantime, to which both institutions agreed.¹⁰⁷

The prioritization of own migration interests in external relations poses three challenges to key principles of the EU. First, it impedes the EU's effectiveness related to its external policy objectives, especially those where EU Member States' own interests are not immediately at stake. Member States will not endanger their cooperation on security, trade or other beneficial policies, just because of a lack of cooperation on readmission. The areas which are prone to be sacrificed are those related to the interests and rights of people in those countries, non-citizens and citizens alike. Second, it may affect the EU's coherence as its leverage to pursue a strong agenda on human rights has become dependent on the strategic importance of the third country for EU's border and migration policy. Finally, it endangers the Union principle of sincere cooperation, if prioritizing EU interests affects the equality of the partnerships. Research on externalization conducted from the perspective of third countries points at their perception of inequality, sometimes resulting in reluctance or strategic responses to the pressure from the EU. Below, I will highlight some examples.

III.4. PRINCIPLES OF EQUALITY AND SINCERE COOPERATION

EU Member States (and the EU agencies) have to cooperate sincerely and loyally in achieving the EU's objectives, in mutual respect, based on the principles of solidarity and fair sharing of responsibility.¹⁰⁸ It requires that the content and results of Member States' external cooperation on migration is in line with democracy, the rule of law, human rights, and that Member States refrain from taking international action capable of affecting the Union's position.¹⁰⁹ The way Member States exercise their competences in their external cooperation on migration to circumvent or counterbalance EU action, not seldomly impeding EU's objectives, is subject to critical analyses.¹¹⁰ Although the principle of sincere cooperation applies to internal EU relations, the principles of equality and solidarity in external actions make it plausible that Member States are to respect this

¹⁰⁶ See the urgent call of Human Rights Watch, C Francavilla, 'Migration Paranoia Jeopardizes EU Trade and Development Scheme. EU Council, Commission Should Listen to Parliament, Drop Migration-Trade Benefits' (6 June 2023) hrw.org.

¹⁰⁷ Communication COM(2023) 426 final from the European Parliament and the Council of 25 October 2023, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008.

¹⁰⁸ Art. 4(3) TEU and art. 80 TFEU.

¹⁰⁹ C Molinari, 'Sincere Cooperation between EU and Member States in the Field of Readmission: The More the Merrier?' (2021) CYELS 269–289.

¹¹⁰ See *i.a.* P García Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) CMLRev 157, 175.

principle toward partner countries as well. Furthermore, art. 21 TEU explicitly defines the principles of equality and solidarity as belonging to the basis of EU external action.¹¹¹ In its 2020 Communication, the Commission showed an increasing awareness of the need to achieve “real” mutually beneficial partnerships with key countries of origin and transit.¹¹² However, after expressing a “warning” that migration issues such as border management or return and readmission can be politically sensitive for partners, it failed to elaborate on the implications of this reality.

a) Counterproductive effects

Interdisciplinary research offers useful insights into third countries' perceptions and the way they respond to pressure from the EU. Stutz and Trauner found that intensifying cooperation on readmission does not lead to a higher return rate.¹¹³ They observe that developments in return rates are regionally defined, regardless of the fact that a specific country in that region has concluded a readmission agreement. They illustrate this with the significant drop of the return rate in African countries during the last decade, partly because of the worsening human rights situation (like in Yemen and Libya), but also due to pressure from the electorate and diaspora in democratised African countries like Senegal, The Gambia and, until 2021, Tunisia. In addition, the lack of a real perspective to more mobility into the EU impedes cooperation on return, which mirrors the increasing return rates in Eastern Europe and the Western Balkans, where visa free travel and the prospect of accession trigger an improved cooperation. Cassarino and Marin conclude that cooperation on readmission is inextricably based on unbalanced reciprocities, because of the asymmetric costs and benefits having economic social and political implications for countries of origin, especially in Southern countries.¹¹⁴ Accordingly, both the polarisation on migration with EU and the lack of real gains predict ineffective readmission cooperation. Although the effectiveness of the conditionality seems to be limited, it may lead to soured and strained relationships, impeding cooperation on other policy areas.

b) From reversed conditionality to instrumentalisation

On the other hand, the eagerness of the EU to achieve cooperation on border control and returns also empowers third countries, especially if they are important to the EU, geographically or otherwise. Cassarino observed that the EU's dependency has created

¹¹¹ Art. 21(1) TEU.

¹¹² Communication COM(2020) 609 cit. 2 and 17. It also mentions that responsibility-sharing would serve the interests of all countries involved, including the demonstration of solidarity with third countries hosting refugees (see also page 22 of the Communication).

¹¹³ P Stutz and F Trauner, 'The EU's 'Return Rate' with Third Countries: Why EU Readmission Agreements Do Not Make Much Difference' (2021) *International Migration* 1-19.

¹¹⁴ J-P Cassarino and L Marin, 'The New Pact on Migration and Asylum: Turning European Union Territory into a Non-territory. Externalisation Policies in 2020: Where is the European Union Territory?' (2020) EU law analysis eulawanalysis.blogspot.com.

the phenomenon of “reversed conditionality”, in which third countries use the EU’s dependency as a bargaining chip to benefit their interests.¹¹⁵ For instance Morocco was successful with its demand that the EU would conclude EURAs with other African countries and that it would fund certain programs in Morocco.¹¹⁶ This strategy exposes the self-created vulnerability of the EU, especially when it is confronted with demands it is unwilling or unable to meet, like visa liberalisation or progress in accession talks.¹¹⁷ The power conferred upon the partner country by the EU also affects the coherence in EU’s external actions, as the first thing to perish is human rights criticism towards that specific country. The mild attitude of the EU towards the violations of human rights and the principles of democracy and rule of law by its autocratic neighbours like Turkey, Egypt and Morocco is telling. The same effect is visible on the national level, for instance when in May 2022, the Dutch government expressed its intention to “no longer meddle in the legal framework” of Morocco and to involve the Moroccan authorities in decisions on funding of Dutch-Moroccan communities, in order to gain cooperation on readmission of Moroccan nationals.¹¹⁸

This exposed dependency can also make the EU vulnerable to other types of threats, even beyond the scope of migration negotiations. In recent years, four non-democratic states have taken advantage of the EU’s desire to prevent irregular migration and used it as an opportunity to instrumentalise migrants, either as an attempt to blackmail the EU or as a mean to hit back for human rights criticism.¹¹⁹ By framing these actions as a security threat, the EU made a clear link between its eagerness to externalise border control and the securitisation of its migration policy. In response to these threats, the European Commission has proposed to allow Member States to derogate from the EU Schengen and asylum *acquis* in cases of instrumentalisation.¹²⁰ Member States can make border crossing points less accessible and deviate from the safeguards to have an asylum

¹¹⁵ J-P Cassarino, ‘Informalising Readmission Agreements in the EU Neighbourhood’ (2007) *The International Spectator* halshs.archives-ouvertes.fr 179-196; S Carrera and others, ‘EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?’ (CEPS Papers in Liberty and Security in Europe n. 87-2016) 1-18; F Tittel-Mosser, ‘Reversed Conditionality in EU External Migration Policy: The Case of Morocco’ (2018) *Journal of Contemporary European Research* 349-363 doi.org.

¹¹⁶ S Carrera and others, ‘EU-Morocco Cooperation on Readmission, Borders and Protection’ cit.

¹¹⁷ See about the case of Turkey, S Smeets and D Beach, ‘When Success is an Orphan: Informal Institutional Governance and the EU-Turkey Deal’ (2020) *West European Politics* 129-158.

¹¹⁸ See the Communiqué in May 2022 by the Dutch and Moroccan government, open.overheid.nl, parliamentary questions and answers in Dutch open.overheid.nl.

¹¹⁹ That was the case with Libya in 2011, Morocco in 2018 and 2021, Turkey in 2020 and Belarus in 2021.

¹²⁰ See the Proposal COM(2021) 891 final for a Regulation of the European Parliament and of the Council of 14 December 2021 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, especially the proposed revision of arts 2 (definition of instrumentalisation), 5 and 13, and the Proposal COM(2021) 890 final from the Commission for a Regulation of the European Parliament and of the Council of 14 December 2021 addressing situations of instrumentalisation in the field of migration and asylum.

request registered and assessed, as well as from the safeguards for detention and return. Accordingly, the EU response to threats from neighbouring countries penalises the migrants who are subjected to this instrumentalisation, including those who are seeking protection. The EU thus tries to preserve its external dimension of migration and asylum policy at the cost of the human rights protection of asylum seekers on the EU territory. This further blurs the lines between external and internal migration policies.¹²¹

c) Human rights responses to the EU's externalisation

Apart from the need to know what determines the level of cooperation from a third country, it is also relevant from a human rights perspective to understand which migration policies third countries develop in response to their cooperation with the EU. Norman found that apart from liberal and repressive policies, specific non-democratic third countries like Egypt, Morocco and Turkey developed a policy of “strategic indifference”.¹²² These rather new host countries tend to defer to international organisations and civil society actors to provide basic services to migrants and refugees, which still may lead to their *de facto* integration, mainly through the informal labour market. Even after Morocco and Turkey formally adopted a more protective approach, their attitude did not significantly change.¹²³ On the other hand, the increased EU funding of the “fight against irregular migration” has led to securitization and criminalization of migration policies in partner countries and regions.¹²⁴ More repression, especially in countries lacking rule of law safeguards, is likely to affect human rights of migrants and refugees, including access to justice and protection. The EU should not only become more aware of the variety of the responses to migration and migration cooperation, but also of the increased risks of human rights violations accompanying migration cooperation, and thus of the importance of independent and in-depth monitoring of its impact on the rights of migrants and refugees.

The studies on third countries’ responses show the warning signs that the prioritisation of migration in the EU’s external actions may undermine other policy aims, including the promotion of fundamental rights. While autocrats seem to be eager to cooperate on migration to silence the EU in its human rights criticism, leaders of democracies are under a sandwich pressure from the EU as well as from their own societies. The EU’s migration priority endangers the effectiveness and coherence of EU’s external policies, and it even leads to counter-conditionalities. These findings feed the presumption that until now, the

¹²¹ See also my analysis of the link between the negotiations on the safe third country concept in the proposed Asylum Procedures Regulation and the aim to outsource the protection of refugees to third countries in T Strik, ‘Migration Deals and Responsibility Sharing: Can the Two go Together?’ in S Carrera, J Santos Vara and T Strik, *Constitutionalising the external dimensions of EU migration policies in times of crisis. Legality, rule of law and fundamental rights reconsidered* (Edward Elgar Publishing 2019) 57-74.

¹²² K P Norman, ‘Inclusion, Exclusion or Indifference? Redefining Migrant and Refugee Host State Engagement Options in Mediterranean “Transit” Countries’ (2019) *Journal of Ethnic and Migration Studies* 42-60.

¹²³ Since the coup, the Egyptian regime developed a repressive policy towards migrants and refugees.

¹²⁴ J-P Cassarino, ‘Beyond the Criminalisation of Migration: A Non-Western Perspective’ (2018) *International Journal of Migration and Border Studies* 397-411.

EU is failing an important test: it has not incorporated and guaranteed the Treaty's principles regarding its external policies in its cooperation with third countries on migration.

IV. LESSONS LEARNT FROM THE EU RULE OF LAW CRISIS?

Despite the applicability of the EU Treaties, the external dimension of asylum and migration policy falls short from respecting key EU principles, in particular democracy, institutional balance, fundamental rights and coherence. They are not structurally embedded in the shaping and implementing of the external cooperation on asylum and migration. There are lessons to be drawn from the way rule of law and fundamental rights are monitored and enforced within the EU, for instance by looking at the annual reports on the rule of law situation in all Member States, based on a wide range of sources. This tool mirrors the EEAS annual reports on human rights and democracy in the world, based on the periodic EU Action Plan on Human Rights and Democracy.¹²⁵ The Action Plan only briefly refers to migration related objectives, and the recent implementation reports merely mention the EU actions based on the New Pact, such as combatting smuggling, trafficking and instrumentalizing migrants, and returns and resettlement.¹²⁶ What is lacking is a periodic evaluation of the human rights impact of the external dimension of asylum and migration policy, to grasp intended or unintended human rights effects of the migration cooperation. For an evidence-based overview, it should include findings from independent humanitarian and human rights organisations. The Fundamental Rights Agency and European Ombudsman should be able to monitor and evaluate the impact of the external action on migration, and thus contribute to coherence between the internal and external migration policies from a human rights perspective. Such an evaluative overview would offer the European Parliament and national parliaments a better way to scrutinise the externalisation and thus ensure a better institutional balance. For an effective democratic and judicial control, the third country partnerships should be brought under the scope of the Treaties, either on the basis of art. 218 TFEU or art. 78(2) TFEU. Adequate monitoring requires clear criteria to be met before the EU enters into or maintains cooperation on border control and return. Those benchmarks should be based on the necessary human rights protection standards, with a special focus on the rights of migrants and refugees.

¹²⁵ EEAS, 'Report of the EU High Representative for Foreign Affairs and Security Policy 2021 Annual Report on Human Rights and Democracy in the World' (2022) eeas.europa.eu. See the Joint Communication JOIN(2020)5 to the European Parliament and the Council of 25 March 2020 EU Action Plan on Human Rights and Democracy 2020-2024 and its Annex.

¹²⁶ The objectives in the Action Plan are mentioned on page 3: "Advocate for the specific protection to which migrants, refugees, and internally displaced and stateless persons are entitled. Support measures to improve integration, social cohesion and access to quality basic services. Support a human rights-based approach to migration governance and strengthen the capacity of states, civil society and UN partners to implement this approach".

The most innovative rule of law instrument in the EU, the conditionality mechanism, could be a source of inspiration as well. Where this mechanism is primarily meant to protect the EU budget against corruption and misuse,¹²⁷ the EU external funding should also be protected against use that would violate key EU values. Instead of applying conditionality in relation to border control, return and readmission, EU funding and other benefits could be conditioned to strengthen the rights of migrants and refugees in third countries. The Refugee Convention could be added to the list of conventions that the least developed countries should adhere to, to enjoy beneficial treatment, provided that the cooperation goes hand in hand with the relevant EU support. Such approach would align the external cooperation on migration with the EU's external action, where conditionality is normally linked to human rights.

Apart from restoring coherence, the principles of solidarity and equality should be safeguarded as well; as a matter of EU principle, but also to make those partnerships more effective. This requires that interests of third countries are taken into consideration, for instance by compensating possible loss of mobility for their citizens with legal pathways. Member States cannot expect successful negotiations by the Commission when they refuse to grant the necessary (national) leverage to make partnerships mutually beneficial. Creating a real positive agenda on migration would make the current conditionality regimes redundant, which are, apart from harmful, ineffective anyway.

¹²⁷ Regulation (EU) 2092/2020 of the European Parliament and of the Council of 16 December 2020 on the general regime of conditionality for the protection of the Union budget, art. 1.

